

enquiry or trial of cases are expected to take intelligent interest in the proceedings before them, and not to act merely as automatons. If a party is tempted to resort to unfair tactics, the Court should be vigilant enough to thwart such tactics to ensure a fair trial and to prevent failure of justice.

Chhota Singh
v.
The State
Gurdev Singh, J.

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CIVIL MISCELLANEOUS

Before S. B. Capoor and Prem Chand Pandit, JJ.

SONA RAM AND OTHERS,—*Petitioners*

versus

CENTRAL GOVERNMENT AND OTHERS,—*Respondents.*

Civil Writ No. 39 of 1960

Code of Civil Procedure (Act V of 1908)—S. 411—Provisions of the Code—Whether apply to petitions under Article 226 of the Constitution—High Court Rules and Orders, Volume 5—Chapter 4-F(b)—Whether makes the provisions of the Code inapplicable to writ proceedings.

1963

April, 24th.

Held, that if in a petition under Article 226 of the Constitution civil rights are involved, then the proceedings would be civil proceedings, but, on the other hand, if the proceedings do not involve such rights, then they cannot be termed as such. It follows, therefore, that in writ petitions, where civil rights are involved, the proceedings are in the nature of a suit and by virtue of the provisions of section 141, the procedure provided in the Code in regard to suits shall apply, as far as it can be made applicable. A petition for a writ to the effect that the property in dispute ought to have been transferred to the petitioners by the Rehabilitation Department and the same should not have been put to auction is a civil proceeding in the nature of a suit and by virtue of the provisions of section 141, the procedure provided in the Code of Civil Procedure in regard to suits shall apply, as far as it can be made applicable. The fact that certain rules have been framed by the High Court does not change the position, because they are in addition to, and not in substitution of, the provisions of the Code.

Case referred by Hon'ble Mr. Justice P. C. Pandit to a larger Bench on 14th December, 1962, for decision of the important question of law involved in the case and finally decided by Hon'ble Mr. Justice Kapoor and Hon'ble Mr. Justice P. C. Pandit, on 24th April, 1963.

Application under Sections 151 and 152 of the Civil Procedure Code praying that the orders passed by this Court in C.W. No. 39 of 1960, be suitably amended and clarified to the extent that the auction held by respondent No. 3, in favour of respondents Nos. 4 to 6 be quashed.

H. S. WASU AND B. S. WASU, ADVOCATES, for the Petitioner.

C. D. DEWAN, DEPUTY ADVOCATE-GENERAL, SHAMAIR CHAND, AJIT SINGH SARHADI A.D. P. C. JAIN, ADVOCATES, for the Respondents.

ORDER

Pandit, J.

PANDIT, J.—This is an application under sections 151/152 of the Code of Civil Procedure filed by Sona Ram and others for the clarification of the order dated 7th December, 1960, passed by Bishan Narain, J., in Civil Writ No. 39 of 1960.

The applicants are displaced persons from West Punjab and after the partition of the country, they had settled in Jullundur City, where they had been in actual cultivating possession of the evacuee urban agricultural land measuring about 86 *kanals* within the municipal limits of Jullundur City for the last about 10 years. This land was first given on lease to Shrimati Durga Devi and Chattar Singh, displaced land-holders, and the applicants cultivated the same under them as their sub-lessees. Later on, however, in 1956 both the allottees gave up this land and since then the applicants had been cultivating it in their own right on payment of lease money, etc., to the Government. In

pursuance of the circular letter, dated 27th November, 1957, issued by the Chief Settlement Commissioner, the applicants were not transferred this property. The same was, however, disposed of by public auction in different lots on 9th October, 1959, and it was purchased by Messrs. Rattan Chand Kapur and Company and others, respondents 4 to 6 in this application. Thereupon, the applicants filed a writ petition (Civil Writ No. 39 of 1960) in this Court, praying for a writ of *certiorari* quashing the auction-sale of the land in dispute held under the illegal instructions issued by the Chief Settlement Commissioner. This writ petition was heard by Bishan Narain, J., on 7th December, 1960, and the last paragraph of his order is as follows:—

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“The result is that this petition succeeds. I, therefore, accept this petition and quash the press-notes dated 31st May, 1957, 15th October, 1957, 31st October, 1957, and also the circular letter, dated 27th November, 1957. The petitioners are entitled to get costs for this petition from respondents 4 and 6. Counsel’s fee Rs. 100.”

According to the applicants, the District Rent and Managing Officer, Jullundur, respondent No. 3, misconstrued the above-mentioned order and directed the Tehsildar, Jullundur,—*vide* his order dated 29th December, 1961 to deliver the possession of the land in dispute to the auction-purchasers. This resulted in the filing of the present application. It was stated therein that by accidental omission, it was not specifically mentioned in the order of Bishan Narain, J., that the auction in favour of respondents Nos. 4 to 6 was also set aside. The writ petition had been accepted, which meant that the applicants’ prayer for

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quashing the sale in question was also being allowed. When the press-notes and the circular letter were quashed, then in view of the decisions of this Court in *Ram Nath and another v. Central Government and others* (1), and *Bishan Singh v. The Central Government and others* (2), any action taken in pursuance of them was also illegal. Thinking that since their writ petition had been allowed, and the auction-sale in favour of respondents 4 to 6 was automatically quashed, the present application was not filed earlier. But now since orders had been issued by respondent No. 3 to the Tehsildar, Jullundur, for the delivery of the possession of the land to the auction-purchasers, this application has been put in.

This application came up before me, in the first instance, and Mr. Shamair Chand, learned counsel for respondent No. 4, raised a preliminary objection that it was not maintainable, because the provisions of the Code of Civil Procedure (hereinafter referred to as the Code) did not apply to petitions under Article 226 of the Constitution. Since there was conflict of judicial opinion on this point, I referred the application for decision to a larger Bench. That is how the matter has come up before us.

The first question for determination in this case is whether the provisions of the Code apply to a petition filed under Article 226 of the Constitution.

The relevant section for our present purpose is section 141 of the Code, which runs thus—

“The procedure provided in this Code in regard to suits shall be followed, as far as

(1) 1960 P.L.R. 53.

(2) I.L.R. (1961) 1 Punj. 415=1961 P.L.R. 73 (D.B.).

it can be made applicable, in all proceedings in any Court of civil jurisdiction."

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Now it is to be seen whether the writ proceedings in this Court are proceedings in a Court of Civil jurisdiction. If that be so, then by virtue of the provisions of section 141 of the Code the procedure provided therein in regard to suits shall be followed, as far as it can be made applicable, for their disposal. When can a Court in any proceedings be called a Court of civil jurisdiction? The language employed in this section shows that when a Court is trying a suit, then that Court can be called a Court of civil jurisdiction. In other words, if any other proceedings are before a Court, which are in the nature of a suit, then that Court can be called a Court of civil jurisdiction. The point then arises whether it can be said that the writ proceedings are in the nature of a suit. Any proceedings in a Court of law brought to vindicate or enforce a civil right would fall within the word 'sue' (see in this connection *Province of Bombay v. Khushal Das S. Advani and others* (3)). It is manifest that in a suit civil rights are involved and, therefore, the proceedings therein are of a civil nature. In other words, they can be termed as 'civil proceedings'. Are the proceedings under Article 226 of the Constitution civil proceedings? In my opinion, if in a petition under Article 226, civil rights are involved, then the proceedings would be civil proceedings, but, on the other hand, if the proceedings do not involve such rights, then they cannot be termed as such. It follows, therefore, that in writ petitions, where civil rights are involved, the proceedings are in the nature of a suit and by virtue of the provisions of section 141, the procedure provided in the Code in regard to suits shall apply, as far as it can

(3) A.I.R. 1950 S.C. 222.

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be made applicable. In this view of mine, I am supported by a Bench decision of the Andhra Pradesh High Court, consisting of Suba Rao, C.J., and Srinivasachari, J., in *Annam Adinarayana and another v. State of Andhra Pradesh and another* (4), wherein it was held that an application under Article 226 of the Constitution of India was a proceeding in a Court of civil jurisdiction and section 141 of the Code, was, therefore, directly attracted.

The question whether proceedings under Article 226 of the Constitution are civil proceedings or not has been the subject matter of a number of judicial decisions. In Article 133 of the Constitution, it is provided that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court. The expression "civil proceeding" occurring in this Article has been interpreted by the various Courts as below:—

In a Full Bench decision of this Court in *Sardar Kapur Singh v. Union of India* (5), it was observed—

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What a civil proceeding is may be defined as a judicial process to enforce a right and includes any remedy employed to vindicate that right. It covers every step in an action and is equivalent to an action. It is a prescribed course of action for enforcing a legal action and embraces the requisite steps by which judicial action is invoked.

(4) A.I.R. 1958 Andh. Pra. 16.

(5) I.L.R. 1957 Punjab. 673—A.I.R. 1957 Punj. 173.

To determine question whether a proceeding is a civil proceeding or not within the meaning of Article 133 in every case, one has to see against what wrong is the remedy sought. Where a suit could be brought and the petitioner seeks his remedy by way of a prerogative writ, the proceeding would be civil, but it cannot be said that if the suit could not be brought, the proceeding would not be civil in nature.

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Where the complaint of the petitioner under Article 226 was that the proceedings which were taken against him under the Public Servants' Inquiry Act (37 of 1850) and the order passed as a consequence was vitiated because of certain defects which he pointed out and the High Court has overruled those objections, this amounted to a determination of his civil rights and there is no doubt that had he brought a suit and wanted to go to the Supreme Court, the matter would have been covered by Article 133. There is no reason why the nature of proceedings should become different merely because he has sought a remedy in the High Court by way of an application under Article 226 rather than by way of a suit or appeal as the case may be.

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Even though the proceedings against which the petitioner made an application

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under Article 226 of the Constitution of India were merely executive proceedings, one cannot lose sight of the question that the petitioner was agitating the question of his right to remain in service and under section 9 of the Civil Procedure Code a suit in which the right to property or to office is contested is a suit of a civil nature, then any proceeding brought to establish and vindicate his right to an office must be considered to be a civil proceeding even though the final order of dismissal and, therefore, determining his right to office is made by the President in the exercise of his administrative and executive powers. Merely because an act is purely ministerial does not take it out of the definition of the words 'civil proceedings.'

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Any proceeding in a Court of law brought to vindicate or enforce a civil right would fall within the word 'sue' and if a writ of *certiorari* to quash an order of Government requisitioning a flat can fall within the word 'sue', it would be difficult to contest that a writ directed against proceedings under Act 37 of 1850 or to challenge the order made as a consequence of those proceedings is not within the words 'civil proceeding' ."

In *Kehar Singh v. Custodian General, Evacuee Property, New Delhi* (6), it was held—

"For determining whether proceedings are of a civil or criminal nature or fall in

any special category, it is the subject-matter of the proceedings which should be seen, rather than the particular jurisdiction of the forum, under which the petitioner has invoked his rights. A proceeding which is undoubtedly of a civil nature, does not cease to be so because the petitioner has invoked the extraordinary jurisdiction of the High Court under Article 226 or Article 227 of the Constitution. It is not the manner in which the interference of the High Court is sought, but the nature of the claim canvassed, which should determine the civil character of the proceedings. A proceeding taken for enforcement of civil right is a civil proceeding even if jurisdiction of the Court, which has been invoked, happens to be special or extraordinary.

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The word 'civil' when prefixed before 'proceeding', 'action', 'suit' or other cognate expression relates to private rights and remedies given to individuals or corporations as members of the community in contradistinction to those which are public and relate to Government. An action, which has for its object, the recovery of private or civil rights, or compensation for their infraction, is necessarily civil proceeding. A civil action is a proceeding in a Court of justice by one party against another for the enforcement or protection of a private right, or for the redress or prevention of a private wrong. The word 'criminal' is used in contradistinction to civil proceeding or action. The former

The 'civil proceeding' that is contemplated by the Article is a proceeding in which some rights to property or other civil rights, are involved. It is of no consequence whether such a proceeding is taken in a suit or by way of a writ under Article 226 of the Constitution. If a right to property or any other civil right is involved in the proceeding, then the proceeding is a civil proceeding, no matter the jurisdiction of the Court invoked is special or extraordinary."

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A different note was, however, struck in a Full Bench decision of the Patna High Court in *Collector of Monghyr and others v. Maharaja Pratap Singh Bahadur and others* (9), where it was observed—

"The jurisdiction of the High Court under Article 226 is an extraordinary jurisdiction vested in the High Court not for the purpose of declaring the civil rights of the parties but for the purposes of ensuring that the law of the land is implicitly obeyed and that the various tribunals and public authorities are kept within the limits of their jurisdiction. In a proceeding under Article 226 the High Court is not concerned with the determination of the civil rights of the parties; the only object of such a proceeding under article 226 is to ensure that the law of the land is implicitly observed and that various authorities and tribunals act within limits of their respective jurisdiction.

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Hence the proceeding in the High Court for grant of a writ under Article 226 of the Constitution is not a 'civil proceeding' within the meaning of Article 133 of the Constitution and the petitioner against whom a writ has been issued has no right of appeal to the Supreme Court under that Article."

This authority was dissented from in *C. Dhana-lakshmi Ammal's* case and in the case of *Dhana-lakshmi Vilas Cashew Company and others*. Besides, the decision of the Full Bench of our own Court in *Sardar Kapur Singh's* case also runs counter to it. Moreover, the view taken by the Patna Full Bench to the effect that a petitioner against whom a writ had been issued had no right of appeal to the Supreme Court under Article 133 of the Constitution, with great respect, does not appear to be correct, because the Supreme Court itself has been entertaining such appeals (see in this connection *State of Bombay v. K. P. Krishnan and others* (10)). Under these circumstances, we would prefer to follow the Full Bench decision of our own Court, especially when the learned counsel for the respondent has not been able to persuade us that the reasoning given therein is, in any way, erroneous in law.

Another decision relied on by the learned counsel for the respondent is reported as *Shriram Hanumanbux v. State of Madhya Pradesh and another* (11). This authority, however, is not of much assistance, because therein emphasis was laid on the point that an order dismissing a writ petition under Article 226 of the Constitution was not a judgment, decree or final order within

(10) A.I.R. 1960 S.C. 1223.

(11) A.I.R. 1955 Nag. 257.

the meaning of Article 133 of the Constitution and, consequently, the other question, namely, whether such an order was given in a civil proceeding was not considered. It may, however, be mentioned that this decision was also dissented from in *Dhanalakshmi Vilas Cashew Company and others'* case.

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In the instant case, as already mentioned above, the applicants had filed a writ to the effect that the property in dispute ought to have been transferred to them by the Rehabilitation Department and the same should not have been put to auction. Obviously, the present proceedings are civil proceedings. In other words, they are in the nature of a suit, as held above. That being so, by virtue of the provisions of section 141, the procedure provided in the Code in regard to suits shall apply, as far as it can be made applicable.

Learned counsel for the respondent then submitted that the provisions of the Code did not apply to the proceedings under Article 226 of the Constitution, because special rules for the issue of writs under this Article had been framed by this Court and the same were given in Chapter 4-F(b) of the High Court Rules and Orders, Volume 5.

There is no force in this submission, because I have already held above that the provisions of the Code apply to the proceedings under Article 226 of the Constitution. The fact that certain rules have been framed by this Court would not change the position, because they are in addition to, but not in substitution of, the provisions of the Code. It may be mentioned that various rules have been framed by this Court under the provisions of the Code and it cannot be urged that

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where these rules have been framed, the provisions of the Code become inapplicable.

Learned counsel for the respondent then urged that even if the provisions of the Code applied, the present application was made virtually for reviewing the order of Bishan Narain, J., and since review was not a matter of procedure, but was a substantive right, which has to be given by the statute itself, the applicants could not succeed.

There is no merit in this contention. The present application has been made under sections 151/152 of the Code for the clarification of the order passed by Bishan Narain, J. No question of review, therefore, arises.

Learned counsel for the applicants submitted that Bishan Narain, J., had quashed the press notes and the circular letter in view of this Court's decision in *Ram Nath and another's case* and the case of *Bishan Singh*. In *Bishan Singh's* case, it has been specifically mentioned that any action taken or intended to be taken on the basis of the press-notes and the circular letter was of no legal effect. It was, therefore, by sheer accidental omission that the learned Judge had forgotten to mention in the order that the auction in favour of respondents 4 to 6 was also set aside or it might be that since the writ was being accepted, it clearly meant that the applicants' prayer for the quashing of the auction-sale in dispute was being allowed and it was not considered necessary to mention this fact specifically in the order. He further submitted that since the District Rent and Managing Officer was misconstruing the order of the learned Judge, the need for filing the present application had arisen and this Court had inherent powers to clarify the said order. Learned counsel for the respondent, on the other hand, argued that

Bishan Narain, J., purposely did not set aside the auction, because the applicants, not being the lessees had no right to the transfer of the land in dispute in their favour. The question as to whether they were entitled to the transfer of this property was left for the Department to decide and it was so mentioned in the order of the learned Judge.

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In my view, the present application falls under the provisions of section 151 of the Code. It is common ground between the parties that the applicants would have a right to purchase the property in dispute only if they were the lessees of the same. Their claim on this score was being opposed by the auction-purchasers in the writ petition itself. Bishan Narain, J., had specifically mentioned in his order that the question whether the applicants were the lessees of the property or not and whether they were entitled to the transfer of this property on that ground was not being decided in the writ petition and was left open to be determined in other proceedings. All that was decided was that the press-notes and the circular letter were void. In other words, if the Department was refusing to transfer the land to the applicants, because of certain restrictions contained in them, then it was not justified in doing so. The idea seems to be that if the Department found that the applicants were the lessees of the property, then they were entitled to its transfer and the auction would be set aside. If, on the other hand, they fail to establish this fact, then naturally they would have no grievance and the auction-sale would remain unaffected. It was perhaps with that very object that since the point whether the applicants were the lessees of the property or not was not being determined in the writ petition that the learned Judge did not quash the auction-sale.

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The Department will now decide the case in accordance with the observations made above. In the circumstances of this case, there will be no order as to costs.

S. B. CAPOOR, J.—I agree.

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FULL BENCH

Before S. B. Capoor, D. K. Mahajan and Prem Chand Pandit,
JJ.

TEJA SINGH,—Appellant.
versus

BIR SINGH AND ANOTHER,—Respondents.

Regular Second Appeal No. 1118 of 1962

1963
May, 6th.

Punjab Pre-emption Act (I of 1913)—Waiver—mortgagee, entitled to pre-empt, accepting mortgage amount from vendee—Whether loses his right to pre-empt.

Held, that the mortgagee in accepting the mortgage money from the vendee does nothing more than to recognise that the latter as transferee from the mortgagor has the right to redeem. The mere recognition of this right cannot by itself amount to waiver of the mortgagee's right to pre-empt unless it is shown that the mortgagee had either made up his mind not to sue to enforce his right of pre-emption or had given expression to his intention not to do so.

Case referred by the Hon'ble Mr. Justice Shamsher Bahadur on 8th January, 1963, to a larger Bench for decision owing to the importance of the question of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice Capoor, Hon'ble Mr. Justice Mahajan and Hon'ble Mr. Justice P. C. Pandit, finally decided the case on 6th May, 1963.

Second Appeal from the decree of the Court of Shri Sant Ram Garg, District Judge, Ambala, dated the 4th day