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March 26.

STATE OF UTTAR PRADESH

v.

DR. VIJAY ANAND MAHARAJ

(B. P. SINHA, C.J., K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR, and T. L. VENKATARAMA AIYAR, JJ.)

Agricultural Income-tax—Review of proceedings—Proceedings, if include writ proceedings—U.P. Agricultural Income-tax Act, 1949 (U.P. III of 1949) as amended by U.P. Act No. XIV of 1956, s. 11—Rules of Court Ch. VIII, r.5—Letters Patent Allahabad High Court, cl. 10—Constitution of India, Art. 226.

The respondent, who owned agricultural properties in the different districts of Uttar Pradesh, was assessed to agricultural income tax by the Additional Collector of Banaras. On challenge by way of a petition under Art. 226 of the Constitution, assessment was quashed by the Allahabad High Court on the ground that the assessing authority had no jurisdiction to assess. Under s. 6 of the U.P. Act No. XIV of 1956 the assessments by the Additional Collector were validated and a party to the proceedings under Agricultural Income-tax Act was given the right to move the Court or authority within the prescribed period to review the proceedings where in the assessments had been set aside on the ground that the assessing authority had no jurisdiction to make the assessment. By s.11 the authority or court so moved was bound to review the order. The State of Uttar Pradesh applied to the High Court for review of its earlier order quashing the assessment. The single Judge of the High Court held that s.11 of the Act did not apply to writ proceedings under Art. 226 of the Constitution. On appeal the Division Bench held that the order of the single Judge did not amount to a 'judgment' under Ch. VIII r.5 cl.10 of the Letter Patent and the Rules of Allahabad High Court and that s.11 of the Act did not apply to proceedings by way of a writ before the High Court. On appeal by special leave by the State it was contended that the Division Bench was wrong and by an additional statement of case it was sought to be urged that the application for review should be treated as one under order 47 of the Code of Civil Procedure.

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Held (per Sinha, C. J., Subba Rao, Ayyangar and Aiyar, JJ.), that under cl. 10 of the Letters Patent of the Allahabad High Court and the Rules of the Court the expression 'judgment' would even on the narrow view of the expression include the order in the present case whereby the statutory right given to the party was finally negatived and that the Division Bench was in error in holding that it was not a 'judgment'.

Held, further, that the proceeding under Art. 226 of the constitution were neither 'proceedings' under the Act nor proceedings on the basis of the Act.

The proceedings under Art. 226 of the Constitution were independent and original proceeding and not a continuation of the assessment proceedings.

Venkataratnam v. *Secretary of State for India*, (1930) I.L.R.53 Mad. 979, *Ryots of Garabandha* v. *The Zamindar of Parlakimedi* I.L.R. 1938 Mad. 816, *Ramayya* v. *State of Madras*, A.I.R. 1952 Mad. 300, *Moulvi Hamid Hassan Nomani* v. *Banwarilal Coy.* (1947) II M.L.J. 32, *Budge Budge Municipality* v. *Mangru*, (1952) 57 C.W.N.25 and *Satyanarayanamurthi* v. *I.T. Appellate Tribunal*, A.I.R.1957 Andhra 123, referred to.

The Act had to be interpreted consistently with the Constitution and there was no power in the State Legislature to compel the High Court to act in a particular way in exercise of its jurisdiction under Art. 226 of the Constitution. Section 11 could only apply to cases where any court or authority other than the High Court in exercise of its jurisdiction under Art. 226 of the Constitution, had decided the matter.

Held, further, that construing 'shall' in s.11 of the Act as 'may' would defeat the very provisions of the Act.

Held, also, that the contention that the application under s.11 of the Act may be treated as one order 47 of the Code of Civil Procedure, was highly belated and further there were many possible objections to such a course and it cannot be acceded to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 25 of 1961.

Appeal by special leave from the judgment and decree dated November 26, 1957, of the Allahabad High Court in Special Appeal No. 235 of 1957.

C. B. Agarwala and *C. P. Lal*, for the appellants.

H. N. Sanyal, Additional Solicitor General of India, S. K. Kapur, Bishamber Lal and *K. K. Jain*, for the respondent.

1962. March 26. The Judgment of Sinha, C.J., Subba Rao and Ayyangar, JJ., was delivered by Subba Rao, J., Mudholkar, J., delivered a separate Judgment.

Subba Rao J.

SUBBA RAO, J.—This appeal by special leave is directed against the judgment and order of a division Bench of the Allahabad High Court confirming those of a single Judge of that court dismissing the application filed by the appellant to review the order of the High Court dated November 22, 1958.

The facts leading up to the filing of this appeal may be briefly stated. The respondent held certain zamindari and agricultural properties in different districts of the State of Uttar Pradesh. On December 22, 1952, the Additional Collector, Banaras, in exercise of the powers conferred on him under the provisions of the U. P. Agricultural Income-Tax Act (Act III of 1949), assessed the respondent to an agricultural income-tax of Rs. 99,964-12-0 for the year 1359 fasli. On September 30, 1955, the respondent filed a petition before the High Court under Art. 226 of the Constitution for quashing the said order on the ground that the Additional Collector, Banaras, had no jurisdiction to make the said assessment. On November 22, 1955, Mehrotra J., allowed the writ petition quashing the said assessment. The State of Uttar Pradesh did not prefer an appeal against the said order and allowed it to become final. On February 9, 1956, the State of Uttar Pradesh promulgated an Ordinance, being Ordinance No. II of 1956, which was subsequently replaced by U. P. Act No. XIV of 1956. Under the provisions of the Ordinance, the assessments made

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by the Additional Collector were retrospectively validated and, under s.6 thereof, a right was conferred upon any party to the proceedings under the U.P. Agricultural Income-tax Act, 1948, (hereinafter called the principal Act), wherein any assessment made by an Additional Collector or Additional Assistant Collector was set aside merely on the ground that the assessing authority had no jurisdiction to make the assessment, to apply within 90 days from the date of the commencement of the said Ordinance for a review of the said proceedings in the light of the provisions of the Ordinance, and a statutory injunction was imposed upon a court to review the said order accordingly. Pursuant to the provisions of s.6 of the said Ordinance, on March 14, 1956, the appellants filed an application in the High Court at Allahabad for review of its order dated November 22, 1956. Subsequently as stated earlier, the Ordinance was replaced by the U. P. Act XIV of 1956, hereinafter called the Act. In the course of the judgment we shall refer only to the provision of the Act. The said application was heard, in the first instance, by Mehrotra, J., and he held that s.11 of the Act, which corresponds to s.6 of the Ordinance, did not entitle the appellant to file an application for review of an order made by the High Court under Art. 226 of the Constitution. The appellant's petition was dismissed on that ground. The appellants preferred an appeal against the said order to a division Bench of that court. Nootham, C.J., and Srivastava, J., who heard the appeal, dismissed it on two grounds, namely, (1) under Ch. VIII r.5 of the Rules of Court, a special appeal against an order of a single Judge of the court can be maintained only if that order amounts to a "Judgment," and an order refusing an application for review not being a "Judgment" cannot be the subject of an appeal, (2) on merits, that is on the construction of s.11 of the Act, the view taken by Mehrotra, J. was correct. The present appeal, as already stated, was preferred against the said order.

Mr. C. B. Aggarwala, learned counsel for the appellants, has raised before us the following points: (1) The order of Mehrotra, J., dismissing the application for review of his earlier order is a "Judgment within the meaning of Ch. VIII r. 5 of the Rules of Court and, therefore, an appeal lies against that order to a division Bench of that court. (2) The terms of s.11 of the Act are comprehensive enough to take in an order made by the High Court under Art. 226 of the Constitution quashing the order of assessment and even if there is some lacuna, the provisions shall be so construed as to carry out clear intention of the Legislature. (3) In any view, the application for review filed by the appellants could be treated as one filed under Order 47 of the Code of Civil Procedure, and the earlier order reviewed on the ground that there is an error apparent on the face of the record. We shall take the questions in the order they were argued.

The first question is whether an appeal lay against the order of Mehrotra, J., rejecting the application for review filed by the appellants to a division Bench of the High Court. Chapter VIII r.5 of the Rules of Court provides for an appeal against an order of a single judge. Under that rule a special appeal against an order of a single judge of the court can be maintained only if that order amounts to a "judgement". That rule gives effect to cl. 10 of the letters Patent for the High Court of Allahabad, which gives a right of appeal against a judgment of a single judge subject to the conditions mentioned therein. The said cl.10 corresponds to cl.15 of the letters Patent for the High Courts of Calcutta, Bombay and Madras. The scope of the expression "judgment" came under the judicial scrutiny of the various High Courts: there is a cleavage of opinion on that question. We shall briefly notice the leading decisions of the various High Courts on the subject. Couch, C.J.,

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in *The Justices of the Peace for Calcutta v. The Oriental Gas Co.* (1) defines the word "judgment" in cl. 15 of the Letters Patent thus:

> "We think 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it, leaving other metters to be determined".

The same High Court in *Hadjee Ismael* v. *Hadjee Mahommed* (2) held that an appeal lay under the said clause from an order refusing to set aside an order granting leave to sue to the plaintiff under cl.12 of the Letters Patent. Therein Couch, C.J., observed:

> "It is not a mere formal order, or an order merely regulating the procedure in the suit, but on that has the effect of giving a jurisdiction to the court it otherwise would not have. And it may fairly be said to determine some right between them, viz., the right to sue in a particular Court, and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or if they do not, to make them liable to have a decree passed against them in their absence."

The Bombay High Court followed the Calcutta view. The leading judgment of the Madras High Court is that in *Tuljaram v. Alagappa* (3), where it was held that an order of a single Judge in the Original Side refusing to frame an issue asked for by one of the parties is not a 'judgment' within

(1) (1872) 8 Beng. L.R. 433, 452. (2) (1874) 13 Beng. L.R. 91, 101.
(3) (1912) I.L.R. 35 Mad, 1, 7, 15.

the meaning of cl.15 of the Letters Patent. White, C.J., laid down the following tests:

> "The test seems to me to be not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a 'judgment' within the meaning of the clause."

Referring to the decisions of the Calcutta High Court the learned Chief Justice proceeded to state:

> "On the other hand I am not prepared to say as was held in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1) and in *Sonbai* v. *Ahamedbhai Habibhai* (2), it must be a decision which affects the merits by determining some right or liability. I think the decision may be a judgment for the purposes of the section though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding.

Krishnaswami Ayyar, J., observed much to the same effect:

> "I would only stop here to remark that a decision which determines the cause or proceeding so far as the particular court is concerned, though it refused to adjudge the merits, must also be deemed to be a judgement: far otherwise the rejection of a plaint for defect of form or insufficiency of Court

(1) (1872) 8 Beng. L.R. 433. (2) (1872) 9 B.H.C.R. 398.

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fee or a return of it for want of jurisdiction would be outside the definition of the learned Chief Justice which could hardly have been his meaning. I may also observe that the "part" which is determined may be a part of the claim separable from the rest or a determination of liability generally though the actual measure of liability may be a matter of account".

The Lahore High Court generally followed the view expressed by the Madras High Court. The Allahabad High Court in *Muhammad Naim-Ullah Khan* v. *Ihsan-Ullah Khan* (1) expressed the view that an order which is not appealable under 0.43 r. 1 of the Code of Civil Procedure is not appealable under cl. 10 of the Letters Patent. This view has been followed by a division Bench of the same High Court in *Tirmal Singh* v. *Kanhayia Singh* (2). But the said decisions do not attempt to lay down a definition of the expression "judgment" in the Letters Patent. The Nagpur High Court in *Manohar* v. *Baliram* (3) by a majority, after considering the case-law on the subject, laid down the following definition. Hidayatullah, J., who delivered the leading judgment, laid down the test at p. 522 thus:

> "A judgment means a decision in an action whether final, preliminary, or interlocutory which decides either wholly or partially, but conclusively in so far as the Court is concerned, the controversy which is the subject of the action. It does not include a decision which is on a matter of procedure, nor one which is ancillary to the action even though it may either imperil the ultimate decision or tend to make it effective. The decision need not be immediately executable *per 88* but if left untouched, must result inevitably without anything further, save the determination of

(1) [1892] I. L. R. 14 All. 226 (2) [1923] I. L. R. 45 All. 535.
(3) I. L. R. 1952 Nag. 471.

consequential details, in a decree or decretal order, that is to say, an executive document directing something to be done or not to be done in relation to the facts of the controversy. The decision may itself order that thing to be done or not to be done or it may leave that over till after the ascertainment of some details but it must not be interlocutory having for its purpose the ascertainment of some matters or details prior to the determination of the whole or any part of the controversy."

The foregoing brief analysis of judgment shown that the definition given by the Madras High Court is wider than that given by the Calcutta and Nagpur High Courts. It is not necessary in this case to attempt to reconcile the said decision or to give a definition of our own, for on the facts of the present case the order of Mehrotra, J., would be a judgment within the meaning of the narrower definition of that expression.

The appellants filed an application to review the order of the High Court quashing the order of assessment made by the Additional Collector. It was alleged in the affidavit that the impugned assessment had been validated under the Ordinance and that the applicants had the right to have the order of Mehrotra, J., reviewed in the light of the provisions of s. 6 thereof. The assessee denied that the appellants had any such right. The appellants' statutory right to have the order of the High Court reviewed was denied by the other side and was put in issue before the High Court. The relevant provisions of the Act read :

Section 2. "In Section 2 of the U. P. Agricultural Income Tax Act, 1948 (hereinafter called the Principal Act), for clause (4), the following shall be and be deemed always to have been substituted—

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"(4-a) 'Collector' shall have the meaning as in the U, P. Land Revenue Act, 1901, and will include an Additional Collector appointed under the said Act."

Section 10. *Validation*—(1) For the removal of doubts it is hereby declared that—

(a) in rule 18 of the U. P. Agricultural Income Tax Rules, 1949, the expression "Collector" and "Assistant Collector in-charge of a sub-division" shall respectively include and be deemed always to have included an "Additional Collector" and an "Additional Assistant Collector in-charge of a sub-divisional".

(b) all orders, actions or proceedings taken, directions issued or jurisdiction exercised or in accordance with the provisions of the Principal Act or of any rule framed thereunder prior to the amendment of that Act by Section 2 of this Act shall be deemed to be as good and valid in law as if Section 2 aforesaid had been in force at all material dates.

(2) Where any question arises as to the validity or legality of any assessment made by an Additional Collector in-charge of a sub-division or by an Additional Collector in purported exercise of the powers under Section 14 or of the rules framed under clause (c) of sub-section (2) of Section 44 of the Principal Act, the same shall be determined as if the provisions of Section 2 of this Act had been in force at all material dates.

Section 11. *Review of Proceedings* :—Where before the commencement of this Act any court or authority had, in any proceedings under the Principal Act, set aside any assessment made by an Additional Collector or

Additional Assistant Collector in-charge of a sub-division merely on the ground that the assessing authority had no jurisdiction to make an assessment, any party to the proceedings may, at any time within ninety days from the date of commencement of this Act apply to the Court or authority for a view of the proceedings in the light of the provisions of this Act, and the Court or authority to which the application is made shall review the proceedings accordingly and make such order, if any, varying or revising the order previously made as may be necessary to give effect to the provisions of the Principal Act as amended by Sections 2 and 8 of this Act.

Under the aforesaid provisions the assessments made by the Additional Collector were retrospectively validated and a right was conferred on a party to the proceedings under the Principal Act, wherein the assessments were set aside merely on the ground that the assessing authority had no jurisdiction to make an assessment, to apply to the court to have that order reviewed. A statutory injunction was also issued to the court which set aside the assessment on the ground of want of jurisdiction to review its order and to give effect to the provisions of the Principal Act, as amended by ss. 2 and 4 of the Act, that is to say, a fresh right has been conferred upon a party to the earlier proceedings to have the previous order set aside and to have decision from the court on the basis of the amended Act. This is a valuable and substantive right conferred upon a party to the proceeding.

On the rival contentions, the question of the fresh right conferred upon a party to the proceeding and the jurisdiction of the court to enforce the said right would be in issue and any decision thereon could legitimately be said to be a decision determining the rights of parties. But for the

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amending Act, the order of the High Court admittedly would have become final; but, because of the amending Act there was a controversy whether the binding decision could be reopened and the rights of the parties decided in accordance with the amending Act. The decision of Mehrotra, J., dismissing the application was certainly a decision denying the right of the appellants alleged to have been conferred under the amending Act. We therefore, hold that the order of Mehrotra, J., dismissing the application, filed for review of his earlier order, on the ground that s. 11 of the Act did not confer any such right on the appellants was a 'judgment' within the meaning of cl.10 of the Letters Patent as well as Ch.VIII r.5 of the Rules of Court. If so, we must hold that the division Bench of the High Court went wrong in holding that no appeal lay against the order of Mehrotra, J.

Even so, the appellants would not be entitled to succeed, unless we hold, differing from the High Court, that s.11 of the Act confers a right on the appellants to have the order of Mehrotra, J., reviewed. We have already extracted the provisions of s. 11. Section 11 is in two parts: the first part of the section confers a right on a party to the proceedings under the Principal Act to apply to the court or authority for a review of the proceeding in the light of the provisions of the Act within 90 days from the commencement of the Act, and the second part issues a statutory injunction on such a court or authority to review the proceedings accordingly and to make an order as may be necessary to give effect to the provisions of the Principal Act, as amended by ss.2 and 4 of the Act. The first question, therefore, is whether the order of Mehrotra, J., in an application under Art. 226 of the Constitution was in any proceeding under the Principal Act. Obviously a petition under Art. 226 of the Constitution cannot be a proceeding under the Act: it is a proceeding

under the Constitution. But it is said, relying upon certain passages in Maxwell on the Interpretation of Statutes, at p, 68, and in Crawford on "Statutory Construction" at p. 492, that it is the duty of the Judge "to make such construction of a statute as shall suppress the mischief and advance the remedy," and for that purpose the more extended meaning could be attributed to the words so as to bring all matters fairly within the scope of such a statute even though outside the letter, if within its spirit or reason. But both Maxwell and Crawford administered a caution in resorting to such a construction. Maxwell says at p.68 of his book:

> "The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words."

Crawford says that a liberal construction does not justify an extension of the statute's scope beyond the contemplation of the Legislature. The fundamental and elementary rule of construction is that the words and phrases used by the Legislature shall be given their ordinary meaning and shall be constructed according to the rules of grammar. When the language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. It is a well recognized rule of construction that the meaning must be collected from the expressed intention of the Legislature. So construed, there cannot be two possible views on the interpretation of the first part of the section. Learned counsel suggested that we should read the relevant portion of the first part thus: "in any proceedings to set aside any assessment made on the basis of the Principal Act". To accept this argument is to rewrite the section. While the section says that the order sought to be reviewed is that made in a proceeding under

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the Principal Act, the argument seeks to remove the qualification attached to the proceeding and add the same to the assessment. The alternative argument, namely, that without changing the position of the words as they stand in the section, the expression "on the basis of" may be substituted for the expression "under" does not also yield the results expected by the learned counsel. It cannot be held with any justification, without doing violence to the language used, that a proceeding under Art. 226 of the Constitution is either one under the Principal Act or on the basis of the Principal Act, for it is a proceeding under Art. 226 of the Constitution to quash the order on the ground that it was made in violation of the Act. An attempt is then made to contend that a proceeding under Art. 226 of the Constitution is a continuation of the proceedings before the Additional Collector and, therefore, the said proceedings are proceedings under the Act. This leads us to the consideration of the question of the scope of the proceedings under Art. 226 of the Constitution.

Article 226 confers a power on a High Court to issue the writs, orders, or directions mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. This is neither an appellate nor a revisional jurisdiction of the High Court. Though the power is not confined to the prerogative writs issued by the English Courts, it is modelled on the said writs mainly to enable the High Courts to keep the subordinate tribunals within bounds. Before the Constitution, the chartered High Court, that is, the High Courts at Bombay, Calcutta and Madras, were issuing prerogative writs similar to those issued by the King's Bench Division, subject to the same limitations imposed on the said writs. In *Venkataratnam* v. *Secretary of State for India* (1),

(1) (1930) I.L.R. 53 Mad. 979.

a division Bench of the Madras High Court, consisting of Venkatasubba Rao and Madhavan Nair, JJ., held that the jurisdiction to issue a writ of certiorari was original jurisdiction. In *Ryots of Garabandha* v. *The Zamindar of Parlakimedi* (1), another division Bench of the same High Court, consisting of Leach, C. J., and Madhavan Nair J., considered the question again incidentally and came to the same conclusion and held that a writ of certiorari is issued only in exercise of the original jurisdiction of the High Court. In *Ramayya* v. *State of Madras* (2), a division Bench, consisting of Govinda Menon and Ramaswami Gounder, JJ., considered the question whether the proceedings under Art. 226 of the Constitution are in exercise of the original jurisdiction or revisional jurisdiction of the High Court, and the learned Judges held that the power to issue writs under Art. 226 of the Constitution is original and the jurisdiction exercised is original jurisdiction. In *Moulvi Hamid Hassan Nomani v. Banwarilal Roy* (3), the Privy Council was considering the question whether the original civil jurisdiction which the Supreme Court of Calcutta possessed over certain classess of persons outside the territorial limits of that jurisdiction has been inherited by the High Court. In that context the Judicial Committee observed.

> "It cannot be disputed that the issue of such writs is a matter of original jurisdiction".

The Calcutta High Court, in *Budge Budge Municipality v. Mangru* (4), came to the same conclusion, namely, that the jurisdiction exercised under Art. 226 of the Constitution is original as distinguished from appellate or revisional jurisdiction; but the High Court pointed out that the jurisdiction, though original, is a special jurisdiction and should not be

(1) I.L.R. 1938 Mad. 816. (2) A.I.R. 1952 Nad. 300.
(3) (1942) II M. L. J. 32, 35. (4) (1952) 57 C. W. N. 25.

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confused with ordinary civil jurisdiction under the Letters Patent. The Andhra High Court in *Satyanarayanamurthi* v. *I. T. Appellate Tribunal* (1) described it as an extraordinary original jurisdiction. It is, therefore, clear from the nature of the power conferred under Art. 226 of the Constitution and the decisions on the subject that the High Court in exercise of its power under Art. 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction. If that be so, it cannot be contended that a petition under Art. 226 of the Constitution is a continuation of the proceedings under the Act.

There is another insurmountable difficulty in accepting the construction suggested by learned counsel. Under the second part of the section a party to the earlier proceedings may within the prescribed time apply to the court or authority for a review of the proceedings in the light of the provisions of the Act, and the court or authority to which the application is made shall review the proceedings accordingly, and make such order, if any, varying or revising the order previously made as may be necessary to give effect to the Principal Act, as amended by s. 2 of the Act. Should it be held that this section applies to an order made by a High Court under Art. 226 of the Constitution, the statutory mandatory injunction issued under the second part of the section to the High Court to make an order in a particular way would be constitutionally void. Under the Constitution the Legislature of a

(1) A. I. R. 1957 Andhra 123.

State derives its authority to make laws under Art. 245 of the Constitution, which reads:

> (1) "Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."

Article 245 is, therefore, subject to Art. 226 of the Constitution. It follows that no law made by the Legislature of a State can be in derogation of the powers of the High Court under Art. 226 of the Constitution. It is well settled that Art. 226 confers a discretionary power on the High Courts to make or issue appropriate orders and writs for the enforcement of any of the rights conferred by Part III of the Constitution or for any other purpose. While Art. 226 confers a discretionary power on the High Court, the second part of s. 11 of the Act enjoins on the High Court to make an order in a particular way. We should not give such a construction to the section as would bring it into conflict with Art. 226 of the Constitution and which would have the effect of invalidating it to that extent. On the other hand, the construction adopted by us would be consistent with the second part of the section, for, if the first part is confined only to an order made by any court or authority, other than the High Court in exercise of its jurisdiction under Art. 226 of the Constitution, both the parts fall in a piece, and we would not only be giving a natural meaning to the express words used in the section but we would also be saving the section from the vice of constitutional invalidity.

Learned counsel for the appellants seeks to get over this obvious difficulty by contending that the word "shall" may be treated as "may" so that the discretion of High Court under Art. 226 may be maintained. Alternatively, he contends that the second part of the section comprises two parts—the

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first empowers an aggrieved party only to file an application, and the second imposes a statutory duty, and that the first may conveniently be served from the second and its validity to that extent sustained. The first argument is contrary to the express words used and the intention of the Legislature. If we read "shall" as "may" the same discretion will have to be given even to authorities and courts other than the High Court, with the result the purpose of the section would be defeated. On the other hand, if the expression "shall" is given its natural meaning, the section carries out the intention of the Legislature, viz., the mandatory injunction imposed on courts and authorities to restore the assessment declared invalid. The decisions cited by the learned counsel in support of his construction are not of any help, for they were based upon the construction of the relevant provisions under consideration in those cases. The second argument, if accepted, would be rewriting the section. While the dominant intention of the Legislature is to issue a mandatory injunction on the courts or authorities to review their orders on a suitable application made to them, we would be deleting it and thus defeating the object of the Legislature. For the foregoing reasons, we have no hesitation in holding that, on a plain reading of the clear words used in the section, it does not apply to an order made by the High Court under Art. 226 of the Constitution.

Lastly it is contended that even if s. 11 does not apply, we should treat the application filed by the appellants before the High Court as one made under Order 47 of the Code of Civil Procedure. There are many objections for allowing the appellants to do so at this very late stage of the proceedings. The application was filed only under s. 11 of the Act and no attempt was made either before Mehrotra, J., or before the division Bench of the High Court to ask for an amendment

or to sustain the petition under Order 47 of the Code of Civil Procedure; nor did the appellants raise this plea in the petition filed for special leave or even in the statement of case as originally filed by them. After the case was argued for sometime on an observation casually made by the Court, time was taken and for the first time this plea was taken in the additional statement of case filed by the appellants. This is, therefore, a highly belated attempt to convert the application filed on one basis into that on another. Further, the plea, if allowed, is not so innocuous or smooth-sailing as it appears to be, but is brimming with many controversial questions. It raises the following questions : (1) Whether the application treated as one made under order 47 of the Code of Civil Procedure was within time ; (2) if it was out of time, could the delay be excused without the appellant filing an application for excusing it and giving valid reasons for the same ; (3) whether an order made by the High Court in exercise of its powers under Art. 226 of the Constitution could be reviewed under Order 47 of the Code of Civil Procedure, and, if not, under s. 151 of the said Code ; (4) whether the amendment of an Act with retrospective effect could be treated as an error on the face of the record or as a sufficient cause within the meaning of Order 47 of the Code of Civil Procedure for reviewing the final orders and decrees made by courts on the basis of the law obtaining at the time the said orders or decrees were made ; and (5) if the order of Mehrotra, J., was one made under Order 47 of the Code of Civil Procedure, would an appeal lie to a division Bench of the High Court under Order 43 of the Code. We do not propose to express any opinion on the aforesaid questions. It would be enough to say that we are not justified to allow the appellants to convert their petition to one made under Order 47 of the Code of Civil Pro-

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State of Uttar Pradesh v. Dr. Vijay Anand Maharaj

Subba Rao J.

cedure at this very late stage, in view of the foregoing reasons.

In the result, we hold that the order of the High Court is correct. The appeal fails and is dismissed with costs.

Mudholkar J.

MUDHOLKAR, J.—I agree with my learned brother that the appeal should be dismissed for the reasons stated in his judgment. I, however, express no opinion on the quetion regarding the maintainability of the appeal under the Letters Patent against the decision of a single Judge in a case of this kind.

Appeal dismissed.

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March 16.

THAKUR MOHD. ISMAIL

v.

THAKUR SABIR ALI

(P. B. GAJENDRAGADKAR, A. K. SARKAR and K. N. WANCHOO, J J.)

Wakf-alal-aulad Executed by Oudh talukdar--If offends rule against perpituity—Oudh Estates Act. 1869 (1 of 1869), ss. 11, 12, 18—Mussalman wakf Validating Act, 1913 (6 of 1913), ss. 3, 4.

A Hanafi Mussalman, owner of a talukdari estate governed by the Oudh Estate, 1869, executed in 1925 a deed of *wakf-alal-aulad*, for the benefit of himself, his family and descendants generation after generation. He was to be the first mutwalli and thereafter his second son and after him his other sons and descendants according to the rule of primogeniture. Certain amounts were also to be paid to charities and for the maintenance of members of his family. The remainder was to go to the mutwalli. After his death the suit, out of which the present appeal arises, was instituted by the eldest son of his predeceased eldest son claiming succession to the estate according to male lineal primogeniture under the Act. His case mainly was that the wakf deed was invalid in view of ss. 11 and 12 of the Act. The trial court found that the deed