State of Uttar Pradesh and ors. Vs. Mukhtar Singh and ors.

LegalCrystal Citation : legalcrystal.com/462382

Court : Allahabad

Decided On : Mar-08-1957

Reported in : AIR1957All505

Judge : Desai and ;N.U. Beg, JJ.

Acts : Constitution of India - Articles 132, 132(1), 133, 133(1), 134, 135, 136, 145(1), 215, 225, 226 and 227; Code of Civil Procedure (CPC) , 1908 - Sections 2(14), 9, 109 and 151 - Order 45, Rules 1, 13 and 13(2); Allahabad Rules of Court, 1952 - Rule 1; Uttar Pradesh Consolidation of Holdings Act, 1954

Appeal No. : Misc. Appln. No. 2247 of 1956 in Supreme Court Appeal No. 100 of 1956

Appellant : State of Uttar Pradesh and ors.

Respondent : Mukhtar Singh and ors.

Advocate for Def. : A.G., ;Standing Counsel and ;K.B. Garg, Adv.

Advocate for Pet/Ap. : G.P. Goyal and ;Sant Prakash, Advs.

Disposition : Application dismissed

Judgement :

Desai, J.

1. This is an application, purporting to be under Order 45, Rule 13, C. P. C., for the issue of an order staying operation of the order passed by this Court on October 8, 1956, in Writ Petition No. 252 of 1956 and maintaining the status quo as regards possession over the land covered by the orders of the consolidation authorities. The facts leading to this application are as follows:

2. Under Section 26 of the U. P. Consolidation of Holdings Act, 1953 (No. 5 of 1954) possession of some land belonging to opposite parties Nos. 1 to 11 was transferred to other tenants of the village, who are opposite parties 12 to 16. After exhausting the remedy as provided in the Act against the transfer they filed a petition for a writ of certiorari, Mukhtar Singh v. State of U. P. : AIR1957All297 . A Bench of this Court quashed the orders of the consolidation authorities regarding transfer of possession of the Opposite parties' land on 8th October, 1956 on the ground that Section 14 (ee) of the Act was unconstitutional. The State of U. P. has filed an application 'for certificate for leave to appeal to the Supreme Court' and the application is pending. Opposite parties Nos. 1 to 11 are trying to get back possession over their land on

which crops have been sown by opposite parties 12 to 16 after possession was transferred by the consolidation authorities. The State apprehends that a grave situation would arise if the status quo were not maintained and if the opposite parties 1 to 11 were allowed to take back possession from opposite parties 12 to 16; therefore, it asks for stay of the operation of the order passed by the Bench on 8-10-1956. The application is contested by opposite parties 1 to 11; who contend that this Court has no jurisdiction to stay the operation of the order either under Order 45, Rule 13, C. P. C., or under any other law.

3. Before deciding whether we have any jurisdiction to stay the operation of the order passed by this Court it is essential to determine what proceeding is pending before us, because our jurisdiction depends upon its nature. The proceeding is undoubtedly one connected with an appeal desired to be preferred by the applicant to the Supreme Court from the Court's order. Under Article 132 an appeal lies to the Supreme Court from any final order of a High Court 'whether in a civil, criminal or other proceeding', if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. Where the High Court has refused to give a certificate, the Supreme Court may grant special leave to appeal. Where such a certificate is given or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that such question has been wrongly decided and, with the leave of the Supreme Court, on any other ground. Three facts emerge from these provisions of Article 132(1) that proceedings are divisible into three classes, ''Civil'', 'Criminal' and 'other' proceedings, (2) that the appeal must be filed after the certificate is given by the High Court and not before; and (3) that it must be filed in the Supreme Court and not in the High Court. The grounds of appeal may, with the leave of the Supreme Court, include grounds other than that the question of law as to the interpretation of the Constitution has been wrongly decided; it follows that they are expected to be prepared after the certificate is given or the leave is granted. If the appellant wants to appeal on any other ground, he must after receiving the certificate from the High Court or the special leave from the Supreme Court obtain the leave of the Supreme Court for the same. Article 133 provides that ''an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court' if the High Court certifies that the case is a fit one for appeal to the Supreme Court; but no appeal shall He from the judgment, decree or final order of one judge of a High Court. Article 134 provides for an appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court. Under Article 135 the Supreme Court has jurisdiction and powers with respect to any matter to which the provisions of Article 133 or 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the Constitution came into force, Article 136 empowers the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal. In civil and criminal proceedings a party has a right of appeal to the Supreme Court if he has obtained a certain certificate; but no party in any other proceedings has a right of appeal to the Supreme Court except when a question of law as to the interpretation of the Constitution is involved.

If a party to a proceeding that is neither civil nor criminal desires to appeal, even though the proceeding does not involve a question of law as to the interpretation of the Constitution he can do so only after obtaining special leave from the Supreme Court. In other words an order in a proceeding that is neither civil nor criminal can be appealed from either if it involves a question of law as to the interpretation of the

Constitution or special leave has been obtained from the Supreme Court.

4. The Supreme Court is authorised by Article 145(1) to make rules 'as to the procedure for hearing appeals and other matters pertaining to appeals'', 'as to the entertainment of appeals under Sub-clause (c) of Clause (1) of Article 134', 'as to stay of proceedings' and as to other matters relating to the practice and procedure of the Court Chapter XII of the Supreme Court Rules, 1950, made by the Supreme Court in exercise of these powers, contain rules regarding 'civil appeals' on certificate by a High Court. Rule 1 applies the provisions of Order 45 of the Civil Procedure Code and any rules made for the purpose by the High Court, in relation to appeals under Articles 132(1) and 133.

Rule 2 permits an appellant, who has obtained a certificate, to withdraw the appeal at any time prior to the making of an order admitting it. Rule 4 authorises the High Court to grant an appellant, whose appeal has been admitted and who desires prior to the despatch of the record to the Supreme Court to withdraw it, a certificate to the effect that it has been withdrawn. Order 21 contains rules regarding, criminal appeals. Rules regarding other appeals are contained in Order 13 'appeals by special leave'.

There are no rules regarding appeals on certificate to proceedings other than civil or criminal under Article 132(1). I am at a loss to know why the Supreme Court has made no rules regarding such appeals. If the appeal that the applicants desire to prefer is neither a civil nor a criminal appeal, then it is not governed by anything contained in the Supreme Court Rules.

5. According to Order 45, C. P. C. whoever desires to appeal to the Supreme Court must apply by petition to the High Court whose decree is complained of. The petition must contain the grounds of appeal; and pray for the required certificate, vide Rule 3. If the certificate is refused, the petition must be dismissed (Rule 6); if it is granted and the applicant furnishes the security and deposits money to defray certain expenses, the Court is required by Rule 8 to

(a) declare the appeal admitted,

(b) give notice thereof to the respondent,

(c) transmit to the Supreme Court.....

a correct copy of the said record..... .....'

Rule 13 reads as follows:--

''1. Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

2. The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,

....

(b) allow the decree ..... to be executed.....

(c) stay the execution of the decree ...., taking such security from the appellant as, the Court thinks fit for the due performance of the decree..... or

(d) place any party seeking the assistance of the Court under such conditions or give such other directions respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.'

6. Under Article 225

'the jurisdiction of, and the law administered' in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court..... .shall be the same as immediately before the commencement of this constitution'.

Rules of Court, 1952, are the rules made by this Court 'in exercise of the powers conferred by Article 225..... and all other powers enabling it in that behalf'. Chapter XXIII deals with appeals to the Supreme Court. Rule 2 requires that a petition for leave to appeal shall contain a brief statement of the case and the grounds of appeal. Rule 3 provides that the period of limitation for a petition for a certificate under Article 132 or 133 is governed by Article 179 of the Limitation Act. After the record has been prepared, it is required by Rule 18 to be transmitted to the Supreme Court.

Rule 28 deals with an application for a certificate under Article 132 or 134 in a criminal proceeding. After the applicant has been given a certificate, he is required by Rule 29 to execute a bond undertaking to lodge an appeal in the Supreme Court within the prescribed time. The Record is to be prepared after an appeal has been lodged in the Supreme Court and a copy of the petition of appeal has been received from there.

7. Since the procedure to be followed by a party desiring to file an appeal from a judgment or order to the Supreme Court depends upon whether it was passed in a civil proceeding or a criminal proceeding or any other proceeding, it becomes necessary for us to determine the nature of the proceeding in a petition for a writ of certiorari. Article 226 confers power upon all High Courts to issue directions, orders or writs for the enforcement of fundamental rights and 'for any other purpose'. Prior to the constitution this Court had no power to issue a writ for any purpose; its jurisdiction was governed by Section 223 of the Government of India Act, 1935.

Under Clause 11 of the Letters Patent this Court was constituted a Court of appeal from the Civil Courts to exercise appellate jurisdiction in such cases as were subject to appeal to the High Court by virtue of any laws in force, under Clause 20 it was constituted a Court of Appeal from the Criminal Courts, under Clause 25 it had testamentary and intestate jurisdictions, under Clause 26 it had matrimonial jurisdiction, under Clause 9 it had extraordinary original jurisdiction in any suit transferred to it and under Clause 15 it had original criminal jurisdiction in respect of certain proceedings; it had no other jurisdiction.

Testamentary, intestate and matrimonial jurisdictions were provided for separately in Clauses 25 and 26, because they were not included in the civil jurisdiction provided for in Clauses 9, 10 and 11. By clause 28 it was empowered to apply the provisions of

the Code of Civil Procedure to all proceedings in its testamentary, intestate and matrimonial jurisdictions. The Letters Patent came to an end when the United Provinces High Courts (Amalgamation) Order, 1948, was published in the Gazette of India, but the jurisdiction that was exercised by this Court under the Letters Patent was preserved by Clause 7 of the Amalgamation Order.

Consequently after the constitution this Court has the same jurisdiction and powers that it had under the Letters Patent. It was vehemently contended on behalf of the applicant that writs are issued by a High Court under Article 226 in exercise of its civil jurisdiction and it was equally vehemently contended by the contesting opposite parties (i.e., opposite parties 1 to 11) that they are not issued in exercise of its 'civil' or 'criminal' jurisdiction but in exercise of 'other' jurisdiction which may be called extraordinary or supervisory or constitutional jurisdiction. We were referred to Bailey on Habeas Corpus, Volume II, p. 774 where the nature of the writ of mandamus is discussed.

He writes that some courts designate the proceeding on a writ of mandamus, as an action at law and governed in regard to trial and review by the rules of practice applicable to such actions, others,. in the, nature of a civil action, and still others as a civil proceeding. In Volume I, page 11, he has discussed the nature of the writ of habeas corpus; there is a divergence of views in regard to its nature also. The views of the Supreme Court are contained in. Davies v. Corbin (1884) 28 Law ED 627: (112 U.S. 36) (B) and in re Tom Tong (1883) 27 Law ED 826: (108 US 556) (C). In the former case Waite C. J. observed at p. 629:--

'While the Writ of mandamus, in cases like, this, partakes of the nature of an execution to enforce the collection of a judgment, it can only be got by instituting an independent suit for that purpose. There must be, first, a showing by the relator in support of his right to the Writ; and second process, to bring in the adverse party, whose action is to be coerced, to show cause, if he can, against it. If he appears and presents a defence, the showings of the parties make up the pleadings in the cause, and any issue of law or fact that may be raised must be judicially determined by the court before the writ can go out. Such a determination is, under the circumstances, a judgment in a civil action brought to secure a right, that is to say, process to enforce ft judgment ..... The writ..... can only issue after a 'judgment of the Court to that effect in an independent adversary proceeding instituted for that special purpose. Such a judgment is, in our opinion, a final judgment in a civil action, within the meaning of that term as used in the statutes regulating write of error to this Court.'

In the other cases the question was whether a proceeding on a writ of habeas corpus was a civil suit or a proceeding within the meaning of Section 650 of the Revised Statutes or a criminal proceeding within the meaning of Section 651, Waite C. J. observed at pp. 827 and 828:--

'The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes; but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus

which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims as against those who are holding him in custody, under the criminal process.''

It is to be noted that the Questions that arose before the Supreme Court of U. S. A. are not the same that arise before us; the Supreme Court had to consider whether a judgment in a proceeding for mandamus was a final judgment in a civil action, and a proceeding on a writ of habeas corpus was a civil proceeding or criminal, within the meaning of certain statutes. It seems that according to the Revised Statutes a proceeding is either civil or criminal; they do not contemplate a third kind of proceeding. Our Constitution, however, contemplates a third kind of proceeding which is neither civil nor criminal. Whereas according to the American law a proceeding that is not criminal must be civil, it is not so according to our Constitution, because it can be not civil also.

Moreover, it cannot be assumed that the words ''civil proceedings' and 'criminal proceedings' have established meanings and that what is a civil proceeding in one country is a civil proceeding in another. In Davies v. Carbin (B) the question before the Supreme Court was whether the judgment was a final judgment, there being no dispute that it was a judgment in a civil action. In A.K. Gopalan v. State of Madras : 1950CriLJ1383 Kania C. J. saw no justification to adopt the meaning of the word 'law' as interpreted by the Supreme Court of U. S. A. in the expression ''due process of law' merely because the word 'law' is used in our Article 21; see p. 109. In Champakam Dorairajan v. State of Madras : AIR1951Mad120 . Viswanatha Sastri J. repeated the note of caution against placing implicit reliance on American precedents Without due regard to the fact that our Constitution, unlike American, runs into the details and considerably narrows the scope for judicial interpretation. See also the warning uttered by P. N. Mukharji in Mahadeb Jiew v. B.B. Sen : AIR1951Cal563 .

As pointed out earlier, Article 132 recognises a third kind of proceeding that is neither civil nor criminal. It is laid down in Section 112 (2) of the Code that it will not apply to any matter of criminal or admiralty jurisdiction; this provision recognises the existence of admiralty jurisdiction as distinct from criminal and civil jurisdiction. The Letters Patent also recognised testamentary, intestate and matrimonial jurisdictions as distinct from civil and criminal jurisdictions. Much confusion has resulted from the assumption, for which there is no warrant at all, that jurisdiction is either civil or criminal.

There are several kinds of jurisdictions and there is no foundation for the view that civil and criminal jurisdictions exhaust the list of jurisdictions that can be conferred upon a High Court. Article 225 retains the civil, criminal, testamentary, intestate and matrimonial jurisdictions conferred upon the High Courts under the Letters Patent and Article 226 confers additional jurisdiction. Since it is additional jurisdiction, it must be different from the jurisdictions mentioned above. In Election Commission, India v. Saka Venkata Subba Rao : [1953]4SCR1144 Patanjali Sastri C.J. observed at p. 1150 (of SCR): (at p. 212 of AIR):

''The makers of the Constitution..... conferred..... new and wide powers on this High Court of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions, etc., 'for any other purpose' being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England.'

On p. 1151 (of SCR) : (at p. 213 of AIR) he stated that the power to issue prerogative writs formed no part of the original or appellate jurisdiction, of the Court of King's Bench and that the writs had their origin in the exercise of the King's prerogative power of superintendence over the due observance of the law by his officials and tribunals. The control that is exercised over judicial and quasi-judicial proceedings is not in an appellate but in supervisory capacity as pointed out by B.K. Mukerjee J. in Basappa v. Nagappa : [1955]1SCR250 and by Venkatarama Ayyar J. in H.V. Kamath v. Ahmad Ishaque : [1955]1SCR1104 Mukerjee J. stated at pp. 744 and 745 (of SCR) : (at pp. 209, 210 of AIR) in Rashid and Son v. Income-Tax Investigation Commission : [1954]25ITR167(SC) :--

'The Constitution introduced a fundamental change of law in this respect. As has been explained by this Court in the case referred to above, while Article 225 of the Constitution preserves to the existing High Courts the powers and jurisdictions which they had previously, Article 226 confers on all High Courts new and very wide powers in the matter of issuing writs which they never possessed before and referred to the above observation of Patanjali Sastri C. J. in Saka Venkata Subba Rao's case (G), In Ravi Pratap Narain Singh v. State of Uttar Pradesh : AIR1952All99 this Court held that a High, Court exercising powers under Article 226 does not act as a civil court; V. Bhargava, J. observed at p. 104: 'The civil and criminal jurisdiction of the High Court is exercised by virtue of Article 225 of the Constitution. Article 226 gives an additional power which is exercised by virtue of this provision of the Constitution and not by virtue of the High Court being either a criminal or a civil Court.'

In the State of Uttar Pradesh v. Mahendra Pratap : AIR1956All585 there is an observation at p. 354 (of All LJ): (at p. 586 of AIR) to the effect that Article 226 extends 'the ordinary original civil jurisdiction'' so as to include the hearing of writs and that writ proceedings are 'proceedings in the nature of a suit'' within the meaning of Rule 6 of Chapter VII of the Rules of Court, 1952. It is only an assumption not supported by any reasons or authorities that writs etc. are issued by a High Court in exercise of its civil jurisdiction conferred by Article 225. Proceedings under Article 226 may be in the nature of a suit but what Article 133 requires is a civil proceeding and not a proceeding in the nature of a civil proceeding.

8. The nature of a writ of certiorari is discussed by the Privy Council in Ryots of Garabandho v. Zamindar of Parlakimedi Viscount Simon L. C. pointed out that

'the remedy, in point of principle, is derived from the superintending authority which the sovereign's Superior Courts, and in particular the Court of King's Bench, possess and exercise over inferior jurisdictions.'

In : [1955]1SCR250 the purpose behind Article 226 was said to be to place all High Courts in somewhat the same position as the Courts of King's Bench in England, The question whether an appeal lies under the Letters Patent of the Madras High Court from an order passed by a single Judge issuing or refusing to issue a writ of certiorari was discussed in Ramayya v. State of Madras : AIR1952Mad300 and was answered in the affirmative. Govinda Menon and Ramaswami Gounder JJ, had no hesitation in holding that a proceeding under Article 226 is neither a criminal proceeding nor a miscellaneous proceeding, like matrimonial, testamentary or admiralty.

They observed at p. 302 that unless the matter expressly relates to criminal jurisdiction it must be taken that the issuing of a writ of certiorari will ordinarily be

an original civil proceeding. The view of the learned Judges that the nature of a proceeding for a writ of certiorari depends upon the nature of the proceeding in which the impugned order was passed is not supported by any authority. Even though a petition for habeas corpus arises out of the petitioner's being held in custody in order to be punished for an alleged crime, the proceeding on the petition is a civil proceeding (as understood in U.S.A.) and not a criminal proceeding; Bailey on Habeas Corpus, Volume I, p. 10.

According to Ferris on Extraordinary Legal Remedies, at page 28, 'habeas corpus is a civil, separate proceeding to enforce a civil right'. The purpose of a writ of certiorari is to have the entire record of the inferior tribunal brought before the superior Court, to determine whether the former had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law.

The question whether the inferior tribunal had jurisdiction or exceeded it has nothing to do with, and cannot take its colour from, the nature of the proceeding of the inferior tribunal; and inquiry into the jurisdiction of the inferior tribunal does not become a criminal proceeding merely because the inferior tribunal claims to exercise criminal jurisdiction. An order issuing a writ of mandamus is a judgment in a civil action according to Bailey, Volume II, page 775, regardless of the nature of the authority to whom the mandamus is issued.

It is stated in Perils on page 220 that mandamus is a civil remedy for the protection of civil rights regardless of the origin of the dispute. Proceeding in quo warranto was originally a criminal proceeding but by statute is now deemed to be a civil proceeding for all purposes (vide Everett v. Griffiths, 1924-1 KB 941 (O), but that is the result of a statute. The Patna High Court has taken the view that a proceeding under Article 226 may be civil, criminal or other; see Alien Berry & Co. v. Income-tax Officer 0044/1956 : [1955]28ITR70(Patna) .

There the question arose on an application for a certificate for leave to appeal under Article 133 from an order of a Bench of the High Court dismissing a petition for a writ of certiorari against order of assessment by the Income-tax Officer. Das, C. J., upheld the contention that the proceeding was not a civil proceeding within the meaning of Article 133. After referring to authorities he stated at p. 177:

''It is, therefore, clear that there can be a proceeding which is neither civil nor criminals and whether a particular writ application is in the nature of a civil proceeding or criminal proceeding or other proceeding will depend on the facts of each case.'

Since the petition arose out of an income-tax proceeding, he held that it was not a civil proceeding because there was no right of suit. With great respect to the learned Chief Justice I agree that a proceeding under Article 226 is not necessarily a civil proceeding but find it difficult to accept the other view that its nature depends upon the nature of the earlier proceeding before the inferior Court or tribunal. I also find it difficult to see any connection between the nature of the proceeding under Article 226 and the fact whether a civil suit would lie or not. A suit can be filed in a civil Court to enforce any civil right except when its jurisdiction is expressly or impliedly barred, vide Section 9 of the Civil Procedure Code. The Legislature may in an enactment relating to a civil right decide to bar the jurisdiction of a civil Court in respect of a matter provided for in it or may not; whether a proceeding held under it

is a civil proceeding or not cannot depend upon the mere fact whether the jurisdiction of a civil Court is barred by the Legislature or not.

Nilmoni Singh Deo v. Taranath, ILR 9 Cal 295 (PC) (Q), is no longer of any help, because it was decided under Act VII of 1859 whereas we are now governed by the Civil Procedure Code of 1908. In Kyots of Garabandho v. Zamindar of Parlakimedi, AIR 1938 Mad 722 (R), the Madras High Court gave a certificate under Section 109(b), C. P. C., to the petitioners who desired to appeal from an order of the Court refusing to issue a writ of certiorari to quash an order passed by the Board of Revenue under the Madras Estates Land Act. The question there arose under Section 109, C. P. C., which distinguished only between civil and criminal jurisdictions; since the order of the High Court referred to a civil matter as opposed to a criminal matter, namely, decision of a revenue Court in a revenue case, it was held to be an order in an original civil jurisdiction.

In the case of K.S. Rashid and Son (J), the High Court of Punjab gave a certificate under Article 133 in respect of an order refusing to issue writs of prohibition and certiorari, but the Supreme Court did not discuss the question whether the certificate could be issued at all or not. The Supreme Court dismissed the appeal though not on the ground that it could not be filed under Article 133. Same thing happened in Lloyds Bank Ltd. v. Lloyds Bank Indian Staff Association : AIR1956SC746 . In, In re Prahlad Krishna : AIR1951Bom25 , the remedy of a person aggrieved by the High Court's refusal to enforce his fundamental rights was said to be to approach the Supreme Court for special leave to appeal under Article 136.

In Inda Devi v. Board of Revenue, U. P. : AIR1957All116 , a certificate was issued by a Bench of this Court under Article 133 in respect of an order of a Bench dismissing a petition for a writ of certiorari to quash an order of the Board of Revenue; but the meaning of the words 'civil proceeding' was not discussed. I am not at all satisfied that any proceeding under Article 226 can be said to be a civil proceeding. Civil, proceedings are included in those held by a High Court in exercise of the powers conferred by Article 225; Article 226 confers new and different powers, i.e., powers not already included within its civil jurisdiction.

In Rashid Ahmad v. The Income-tax Investigation Commission, AIR 1951 Punj 74 (V), if was stated by Kapur, J., at p. 77 that 'Article 225 defines the jurisdiction of this Court and Article 226 confers authority or power to be exercised within the jurisdiction given in Article 225,'' No reasons are given by the learned Judge for the view and no authorities are cited. It is also not easy to understand the distinction between jurisdiction and authority or power; Article 225 speaks not only of jurisdiction of the High Court but also of its power (to make rules).

9. The jurisdiction that a High Court exercises under the Income-tax Act is extraordinary jurisdiction; see In re Chhaturam Horilram Ltd. : AIR1951Pat174 . In Pritam Singh v. The State : 1950CriLJ1270 , Fazl Ali, J., observed at p. 458 (of SCR): (at p. 171 of AIR), with reference to Article 136:--'By virtue of this article, we can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals arid in a variety of other cases'; evidently income-tax cases were not treated as included in civil cases. Proceedings under Section 23 of the C. P. and Berar Sales Tax Act (No. XXI of 1947) were according to a Full Bench of the Nagpur High Court revenue proceedings and not civil: In Sriram Gulabdas v. Board of Revenue, AIR 1954 Nag 1 (Y), Hidayatullah, J., as

he then was, observed at p. 5:

''The proceedings under Section 23 deal with, matters pertaining to liability and assessment of tax and can properly be regarded as revenue proceedings. They are not civil proceedings. Clause 29 of the Letters Patent and Article 133 of the Constitution have, therefore, no application..... .The words 'other proceedings' are words of wide amplitude and include all proceedings other than civil or criminal proceedings. They thus include revenue proceedings.'

Section 2 of 39 & 40 George 3 c. 79 established a Supreme Court at Madras ''with full power to exercise as civil, criminal, admiralty and ecclesiastical jurisdictions, etc.'; this indicates that admiralty and ecclesiastical jurisdictions are not included in civil jurisdiction. The jurisdiction that a High Court exercises under the Bihar Sales Tax Act, Section 21 (3), was held to be only consultative and neither original nor appellate in Premchand Satrarndas v. State of Bihar : [1951]19ITR108(SC) .

10. Under Rule 8 (2) (h) of Ch. XVIII of the Rules of Court, 1952, a petition, for the issue of a writ, direction or order under Article 226 in a criminal matter is to be registered as criminal miscellaneous case. This is only a departmental rule arid cannot affect the nature of the proceeding; it cannot convert it into a criminal proceeding within the meaning of Article 134 if otherwise it was not. I respectfully agree with Das, C. J., in Alien Berry & Company's case (P), that a rule requiring a petition for a Writ to be filed before a criminal Bench or a civil Bench cannot determine the nature of the proceeding for the purposes of Article 133.

11. Occasionally provisions of the Code of Civil Procedure have been applied in proceedings under Article 226. In Chenchanna Naidu v. Praja Seva Transports Ltd. : AIR1953Mad39 , Chandra Reddi, J., observed at p. 40:--

''The petitioner invoked the civil jurisdiction of this Court to issue a writ under Article 226 of the Constitution. If the application for the issue of a writ, is made on the civil side, in dealing with such an application we are governed by the provisions of the Civil Procedure Code. It is indisputable that the procedure applicable to all Courts of civil judicature is that contained in the Civil Procedure Code'',

and relied upon the fact that in the case of Ryots ofGarabandho (R), an order refusing to issue certiorariagainst the Board of Revenue was held to be anorder passed in the exercise of the original civil jurisdiction within the meaning of Section 109(b), C. P. C.The Madras High Court had, even before the Constitution came into force, jurisdiction to issue certiorari and it used to do so in exercise of its originalcivil jurisdiction within the meaning of Section 109, C.P. C.

Consequently certiorari issued under Article 226 also was supposed to be in exercise of its original civil jurisdiction. It has not been explained what is the civil side, and how it is determined. It has also not been explained how it could be said that the Court's civil jurisdiction was invoked through the prayer for certiorari. In Brij Lal Suri v. State of Uttar Pradesh : AIR1954All393 , Mootham, J., suggested at p. 401 that in a petition for mandamus 'witnesses can if necessary be examined and advantage taken of the provisions of Civil Procedure Code for discovery and inspection.' No reference is. made to the rules of procedure and it seems to have been taken for granted that Civil Procedure Code governs proceedings under Article 226.

This Court has framed rules regulating the procedure in petitions under Article 226, vide Chaps. XXI and XXII of the Rules of Court, 1952. They do not make Civil Procedure Code expressly applicable and far from suggesting that it is made applicable, they exclude its applicability by laying down complete procedure. On the other hand in Hajee Suleman v. Custodian, Evacuee Property, (S) AIR 1955 Madh B 108 (Z-3), an order on a petition under Article 226 was held to be not subject to review. If the test of a civil proceeding is that it is governed by the Code of Civil Procedure, a proceeding under Article 226 is not a civil proceeding.

Whether a proceeding is a civil proceeding or criminal or any other kind of proceeding depends upon the procedure to be adopted; the very word 'proceeding' denotes that its nature depends upon how one proceeds in the matter. The Code of Civil Procedure is an Act 'to consolidate and amend the laws relating to the procedure of the Courts of civil judicature'. There are a number of Courts and tribunals created under local and special Acts which are not Courts of civil judicature; their procedure is not as laid down in the Civil Procedure Code unless the Acts concerned contain a special provision making Civil Procedure Code applicable to the proceedings before them. For instance, Sections 286 and 295 of the Succession Act, Section 17 of the Small Cause Courts Act, Section 23 of the Workmen's Compensation Act, Section 23 of the Land Acquisition Act, Section 14 (4) of the U. P, Encumbered Estates Act and Section 5 (1) of the U. P. Provincial Insolvency Act make the Civil Procedure Code applicable to proceedings before the special Courts and tribunals created under those Acts.

Proceedings before these Courts and tribunals may not be civil proceedings merely because they are governed by the Civil Procedure Code but I do not see how a proceeding can be said to be a civil proceeding if it is not governed by the Civil Procedure Code. The matters dealt with by these Courts and tribunals are not criminal and are of a civil nature; if still the proceedings held by them are not civil proceedings, it means that a proceeding is not a civil proceeding merely because it is not a criminal proceeding or deals with civil rights. Section 75 (1) of the Provincial insolvency Act expressly rulers to insolvency jurisdiction as distinct from civil jurisdiction. There are several special and local Acts which expressly bar jurisdiction of civil Courts over matters dealt with in them; for example Section 19(2) of the Workmen's Compensation Act.

It is difficult to say that a proceeding that is excluded from the jurisdiction of civil Courts is still a civil proceeding. Proceedings under Section 49 of the U. P. Consolidation of Holdings Act are excluded from the jurisdiction of a civil Court and cannot be said to be civil proceedings. If it be correct, as said by some of the authorities mentioned above, that the nature of the proceeding under Article 226 depends upon the nature of the proceeding before the inferior Court or tribunal, the proceedings on the petition for writs of certiorari and prohibition of the contesting opposite parties could not be said to be a civil proceeding. It is well established that even when the jurisdiction or a civil Court is barred, the High Court's jurisdiction to issue a writ under Article 226 is not barred; this again points to a proceeding under Article 226 being different from a proceeding in a civil Court.

12. The simplest definition of ''civil proceeding' is a proceeding in a Court of civil jurisdiction, e.g., a civil. Court. 'Jurisdiction'' is not the same thing as 'procedure'; Abhilakhi v. Sada Nand : AIR1931All244 ; but the words 'jurisdiction' and 'proceeding' are interchangeable and have been used as such in the Letters Patent. Clause 30 of

the Letters Patent uses the words 'in any matter not being of criminal jurisdiction' and Clause 31, 'any such proceeding.... . . .not being of criminal jurisdiction.

The Code of Civil Procedure is meant to govern the procedure in civil Courts (see its preamble), but its applicability is not the test of a civil proceeding, because it may be applied to revenue and other proceedings also. While a proceeding not governed by the Code cannot be said to be a civil proceeding, a proceeding governed by it is not necessarily a civil proceeding. There mast be something in the jurisdiction of the tribunal which makes the proceeding a civil proceeding.

13. The words 'civil proceedings' have been used in the Constitution in other Articles also, for example 361 (4) and 374 (2). In Article 361(4) they seem to apply to proceedings in the nature of a suit. It is by no means certain that the word 'civil' governs only the word 'proceedings', or the phrase ''all suits, appeals and proceedings'. In any case there could not be any appeal from an order passed under Article 226 before the Constitution.

14. My conclusion is that a proceeding under Article 226 for a writ is not a civil proceeding.

15. We are not considering the applicants' application for leave to appeal to the Supreme Court and, therefore, we are not concerned with the question whether an appeal lies or not. It would be for the Supreme Court, when an appeal is preferred before it, to decide whether it lies under Article 133(1)(c) or not. There is nothing like applying for leave to appeal; what an intending appellant has to apply for is simply a certificate. Leave to appeal is to be sought for only under Article 136 and from the Supreme Court, not from the High Court or under Art 132 or 133 or 134.

A High Court has no power to grant leave to appeal, still applications for leave to appeal are being presented though what they really ask for is one certificate or another. This practice, which is undoubtedly wrong and cannot be justified, has unfortunately received some support from our Rules of Court which erroneously refer to such applications as applications 'for leave to appeal to the Supreme Court', vide Rule 1 of Ch. XXIII. When an application for a certificate is made to a High Court, all that if has to decide is whether the facts to be certified- exist or have been established; it is beyond its jurisdiction to consider whether an appeal lies on the basis of the certificate or not. It cannot refuse to grant a certificate on the ground that no appeal lies from the order even if the certificate is granted; this is a matter within the exclusive jurisdiction of the Supreme Court.

If this Court cannot even decide if an appeal lies, I do not understand how it can give an interim relief during the pendency of an application for a certificate. The grant of a certificate or the entertainment of an application for a certificate does not mean that in the opinion of the High Court an appeal lies. Consequently the mere fact of pendency of the applicant's application for a certificate does not bar us from holding that the order sought to be impugned was not passed by this Court in a civil proceeding.

16. The relief sought from us is an interim relief; if the principal relief itself cannot be granted, it is a matter to be taken into consideration when deciding whether the interim relief should be granted or not. If no appeal lies under Article 133 from the impugned order, it would be futile and most improper, if not wholly illegal, oh our part

of the High Court to give the interim relief in the form of stay.

17. The petitioners seek stay of the operation of the impugned order not only under Order 45, Rule 13, C. P. C., but also under Section 151, C. P. C. and Article 226 of the Constitution.

18. As regards Section 151, C. P. C., a Court cannot in exercise of its inherent powers stay operation of an order passed by itself: and that is why there exist statutory provisions conferring such a power in suitable cases, vide Section 426 (2A) of the' Code of Criminal Procedure and Order 41, Rules 5 and 6, C. P. C. Inherent powers are to be exercised by a Court in the interest of justice or to prevent an abuse of process of Court and not for any other purpose. It is impossible for a Court to say that allowing an order passed by itself to operate is against the interest of justice or is an abuse of process of Court; if that were so, it should not have passed the order at all.

In Sajjan Singh v. State of Rajasthan , a petition for a writ was dismissed by the High Court, the petitioner applied for a certificate of fitness of appeal to the Supreme Court and during its pendency applied for an order restraining the opposite-party from interfering with his rights over land. He invoked the inherent powers but the High Court refused to exercise them in his favour. It was said at p. 301 that giving the interim relief would be directly against the final order passed by the High Court. On p. 303 it was observed:--

This Court having expressed the view that the Act is valid, and having dismissed the writ petition cannot now give any interim relief in aid of the main relief because no relief can be obtained from this Court. It is only the Supreme Court which can now grant any relief to the applicant, and it seems to us that it is only that Court which may, if it so desires, grant interim relief in aid of the final relief.'

Similar observation was made in Jitendra Narayan v. State of Assam, AIR 1953 Assam 159 (Z-6); Sarjoo Prasad, C. J., observed at p. 160:--

'Now that this Court has held that the Act in question is a good and valid legislation, this Court cannot direct that the authorities should refrain from lawfully acting under it.'

In Nanda Kishore Singh v. Ram Golam Sahu, ILR 40 Cal 955 (Z-7), Mookerjee, J., held that a High Court is competent to stay execution of its decree on account of the pendency of an application by the judgment-debtor for special leave to appeal to the Privy Council; Mookerjee, J., gave the following justification at p. 963:--

'It cannot seriously be maintained that the grant of a stay in any way throws doubt on the decree or weakens its effect; the stay is granted on the principle that the parties should, if the circumstances justify the adoption of such a course, be retained in status quo till the validity of the decree has been tested in the Court of ultimate appeal. The exercise of the inherent power of the Court should thus be widened to aid the administration of justice.'

That the parties should be retained in status quo till the validity of the decree has been tested in the Court of ultimate appeal is a statement that goes against the rule laid down by the Legislature itself that the pendency of an appeal from a decree is no ground for staying its execution. The Civil Procedure Code makes ample provisions

for stay of execution of decrees in appropriate cases and it is not open to a Court in the exercise of its supposed inherent powers to stay execution in other cases merely on the ground that appeals are pending from them. I respectfully agree with the following views of Holm-wood, J., in the same case:--

'To my mind the use of the inherent power in this case would be an abuse of process of the Court. .....The decree of this Court..... .is.....res judicata between the parties and we cannot go into the merits of the case and say that this is a case where a stay of execution should be granted' (P. 964) '.....I am strongly averse to staying execution where the law does not expressly authorise it except on very good grounds shown to the satisfaction of the Court.' (p. 965).

In Atma Ram v. Beni Prasad : AIR1934All585 , Sulaiman, C. J., refused to stay proceedings in a suit, pending in a subordinate Court during the pendency of an appeal in the Privy Council. On p. 586 he observed that inherent power would ordinarily be limited to jurisdiction to deal with proceedings pending before it and would not include a wide jurisdiction aver inferior Courts, The same learned Chief Justice speaking for a Full Bench said in Mukand Lal v. Gaya Prasad : AIR1935All599 :--

'The inherent power would not enable Courts to extend the scope of power's specifically conferred upon them by other provisions of the Civil Procedure Code.... ....The inherent powers, which can be exercised by a superior Court, are ordinarily such powers as are necessary to exercise in relation to proceedings pending before it.'

On p. 600 he said;--

''The High Court is not competent in the exercise of this authority to interfere and set right the orders of a subordinate Court on the ground that the order of the subordinate Court has proceeded on an error of law or an error of fact.'

It might be said with some show of reason that an appellate Court has inherent power to stay execution or operation of an order, appealed from during the pendency of the appeal so that the order that it would pass on appeal should not be rendered infructuous, but the same consideration cannot be availed of by the trial Court as there is no question of its taking steps to see that its order is not rendered infructuous. On the contrary it has to see that its order is enforced. No case is made out for our directing under our inherent powers that the impugned order should not be given effect to and that the consolidation authorities should maintain the status quo as regards possession during the pendency of the application for a certificate.

19. Article 226 also cannot justify our issuing the directions sought for. No petition can be made under Article 226 just for staying operation of an order passed by the Court itself. In the State of Orissa v. Madan Gopal Rungta : [1952]1SCR28 , Kania, C. J., observed at p. 33 (of SCR): (at p. 13 of AIR):--

'The concluding words of Article 226 have to be read in the context of what precedes the same. Therefore the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article.'

On p. 35 (of SCR): (at p. 14 of AIR) he observed:--

''Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application..... .An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding.'

The words 'for any other purpose' were interpreted ejusdem generis in Carlsbad Mineral Water Mfg. Co. Ltd. v. H.M. Jagtiani : AIR1952Cal315 , where J.P. Mitter, J., held that the powers given under Article 226 are to be exercised in accordance with the provisions that govern high prerogative writs. In Harendranath v. State of Madhya Bharat, AIR 1950 Madh B 46 (Z-12), ejusdem generis interpretation of the words was rejected but the words were construed to refer to all purposes for which at English common law the high prerogative writs are issued.

A warning against construing the provisions of Article 226 very widely was uttered by Rajamannar, C. J., in In re Nagabhushana Reddi : AIR1951Mad249 . It is generally established that the issue of writs is governed by the principles existing before the Constitution; see Harendranath's case (Z-12) and Dr. Ishwari Prasad v. Registrar, University of Allahabad : AIR1955All131 . A writ can be issued only against statutory bodies invested withStatutory powers; acts of an individual cannot be controlled through a writ. In Rule v. Disputes Committeeof Dental Technicians, 1953-1 All ER 327 (Z-15),Lord Goddard, C. J., observed at pp. 327 and 328:--

''The bodies to which in modern times the remedies of these prerogative writs have been applied areall statutory bodies on whom Parliament has conferred statutory, powers and duties the exercise of whichmay lead to the detriment of subjects as, for instance,where a statute gives a certain body power for thecompulsory acquisition of land and an arbitrator isset up by Parliament to assess the compensation, andit is essential that the Courts should be able to control the exercise of the statutory jurisdiction withinthe limits imposed by Parliament'

and refused to issue certiorari to quash an order made by the Disputes Committee of Dental Technicians, because the Committee was in no sense a public body but was a private tribunal set up as arbitrators by an agreement between the parties.

In Badri Prasad v. President, District Board, Mirzapur : AIR1952All681 , this. Court refused to give relief against a decision of a Committee that had no statutory or legal existence. In the case of Nagabhushana (Z-13), the learned Chief Justice pointed out that no case had been brought to his notice in which a writ of. prohibition might have been issued to a private organisation. It is well known that the relief contemplated by Article 226 is discretionary and is refused if ordinary remedy of approaching the Courts is open to the petitioner.

For authority, reference may be made to Asiatic Engineering Co. v. Achhru Ram : AIR1951All746 and : [1954]25ITR167(SC) . Therefore, neither can we issue any writ, direction or order to the opposite-parties nor can we issue it as an interim relief during the pendency of a mere application for a certificate.

20. Reliance upon Order 45, Rule 13, of the Code of Civil Procedure is equally futile. In the first place there is no decree here, but only an order. We were referred to Rule 1 which includes a final order within the meaning of decree for purposes of Order 45. A final order must be an order as denned in Section 2 (14) of the Code, i.e., it must be a formal expression of a decision of a civil Court. The order under appeal is not an

order of a civil Court, because a High Court is a Court of record created by the Constitution, and not a civil Court. Civil Courts are inferior Courts created by the States through their local Acts as pointed out by me in Rani phul Kumari v. State of U. P., Civil Revn. No. 886 of 1954 D/- 31-1-1957, : AIR1957All495 .

The Letters Patent by which this High Court was established originally themselves distinguished between it and civil Courts; see Clause 11. Under Clause (d) of Rule 13 (2) only a particular party can be placed under conditions, e.g., the party seeking the assistance of the Court. Only the party successful in the High Court could have an occasion for seeking its assistance through either execution (if a decree was passed in his favour) or enforcement (if an. order was passed in his favour). The opposite parties were successful in this Court, but they are not seeking any assistance of this Court. Whatever assistance they need would be sought from the consolidation authorities.

Moreover, the Court has to act only when the party seeks its assistance; so long as it does not do so, it cannot be placed under any condition. The power to give any other direction is exactly similar to that of placing him under conditions, so no direction also can be given if he does not seek its assistance. The direction can be only in respect of the subject-matter of the appeal. The subject-matter contemplated by the Legislature seems to be tangible property; the reference to appointment of a receiver is indicative of this intention.

The subject-matter of the intended appeal is the constitutionality of the U. P. Consolidation of Holdings Act. All that this Court has held under the order sought to be impugned is that certain provisions of the Act are unconstitutional; the quashing of the orders of the consolidation authorities follows as a matter of course from those provisions being found to be unconstitutional. Apart from the constitutionality of the Act there is no other dispute sought to be raised in the appeal.

It is not possible to give any direction respecting this subject-matter of the appeal. Even if it were granted that the subject-matter of the appeal is the opposite parties' land involved in the consolidation proceedings, the direction that can be given should be in the nature of appointment of a receiver and not a wholesale stay of the execution or operation of the order.

If it was intended by the Legislature that the execution or operation of an order appealed from can also be stayed, it would have enacted a provision similar to that in Clause (c) Or Clause (c) would have been made applicable to execution of decrees as well as to execution of orders. The object behind Clause (d) was certainly not to stay execution or operation o an order completely but to allow it under certain conditions or to provide a substitute for it.

21. In Rajahmundry Electric Supply Corporation Ltd. v. State of Madras : AIR1953Mad475 , the Electric Supply Corporation was granted a certificate under Article 133 by the Madras High Court. It applied for stay of the operation of a Government Order during the pendency of the appeal in the Supreme Court and the application was rejected on the ground that Order 45, Rule 13 (2), did not apply. Rajamannar, C. J., observed at pp. 475 and 476;--

'Obviously he is not seeking stay of execution of the Order passed by us. He is really in effect asking for an injunction restraining the State from taking action in

pursuance of an order passed by it directing a vesting of the corporation in the State. This relief cannot fall within the scope of Clause (d) of Rule 13 (2)..... .The provision does not enable this Court to give any direction to the successful party by way of restricting or preventing him from exercising the rights to which he has become entitled under the final order of this Court.'

In the case of Atma Ram : AIR1934All585 , the learned Chief Justice stated with regard to Sub-rule (2) (d) that it 'Obviously refers to cases where a party is to be put to certain terms or where some order has to be made regarding the custody or disposal of the subject-matter of the appeal.''

In Jitendra Narayan Deb's case (Z-6), the learned Chief Justice observed that after the Court had held that the Act in question was a good and valid legislation it could not direct that the authorities should refrain from lawfully acting under it. Though a certificate under Article 133 had been granted he held that Rule 2 (d) did not support the petitioner's prayer for restraining the opposite party from taking possession. In the cases of Sajjan Singh (Z-5) and Jitendra Narayan (Z-6), it was held that Sub-rule (2) does not apply during the pendency of an application for a certificate. The question was discussed by Bench of this Court in Girja Prasad Sunder Lal v. Divisional Forest Officer, Dudhj : AIR1955All589 .

In circumstances exactly similar to those in the present case our brothers Chowdhry and Upadhya held that under Rule 13 (2) (d) the Court can restrain the opposite party from interfering with the petitioners rights during the pendency of his application for a certificate under Article 133. They observed that the Court can exercise the power conferred by Sub-rule (2) even during the pendency of an application for a certificate and that the provision that a decree appealed from must be executed notwithstanding the grant of a certificate does not mean that the power of Sub-rule (2) cannot be exercised before the grant of a certificate.

With great respect to my learned brothers, I do not think that Sub-rule (2) has no connection with Sub-rule (1). Sub-rule (1) itself empowers a Court to direct otherwise and Sub-rule (2) obviously lays down the circumstances in which it can direct otherwise. Therefore, Sub-rule (2) is in the nature of an exception to Sub-rule (1). Rule 13 deals with execution of a decree notwithstanding the grant of a certificate; it does not deal with execution of a decree before the grant of a certificate.

If even after the grant of a certificate it must be executed, it must all the more be executed during the pendency of an application for a certificate. After the grant of a certificate the Court is empowered in certain circumstances to stay execution on certain conditions, but no power has been conferred to stay execution in any circumstance and to any extent during the pendency of an application for certificate. If it has power to stay execution even during the pendency of an application for a certificate, it must be under some provision other than Rule 13.

That Sub-rule (2) deals with staying execution afterthe grant of a certificate is clear from the use ofthe words 'the decree appealed from' in Clauses (b) and (c).A decree cannot be said to be appealed from unlessa certificate has been granted and the appeal hasbeen admitted. The words 'the decree appealedfrom' occur in Sub-rule (1) and the use of the samewords in Clauses (b) and (c) of Sub-rule (2) connects thelatter sub-rule with the former.

Our learned brothers observed at p. 841 (of All LJ): (at p. 591 of AIR):--'Whatever may be the position otherwise, the filing of an application for leave to appeal to the Supreme Court would seem ,to invest the Court with the jurisdiction to pass such orders as it may become necessary to pass in connection with such an application, including orders in exercise of powers in pending appeals provided by Rule 13.' It does not appear that they definitely held that Rule 13 applies even during the pendency of an application for a certificate.

There is nothing in Rule 13 to indicate that it applies even during the pendency of an application for a certificate and the basis for saying that the mere filing of an application for a certificate invests the Court with jurisdiction to grant interim relief has not been disclosed. Though I respectfully differ from the observations made by our learned brothers, I do not think it necessary to refer the case to a larger Bench, firstly because their decision was not based upon the observations, they having refused on merits to pass any order under Rule 13, and secondly because even if we were to hold that Rule 13 applies, on merits the application deserves to be dismissed.

The word 'decree' in Rule 13 includes a final order, but an order is not a final order if it does not bind parties. In the case of Premchand (Z), Fazl Ali, J., observed at p. 804 (of SCR): (at pp. 15-16 of AIR), that an order rejecting an application for requiring a Board of Revenue to stay a case 'cannot be regarded as a final order, because it does not of its own force bind or affect the rights of the parties.' The order in the present case is of a different nature; it does bind the parties because it holds certain provisions of the Consolidation Act unconstitutional and quashes, finally so far as it was concerned, their orders; see Alien Berry's case (P).

In the case of Madan Gopal Rungta (Z10), the learned Chief Justice observed that if an order completely disposes of the matter and leaves nothing pending or to be done in respect of the petition, it is a final order. But, as pointed out earlier, it is not an order of a civil Court, and is, therefore, not a decree. Moreover, there is no question of its being executed because it is inexecutable. Under it the consolidation authorities' order has been quashed and all that is required to be done is that they should not take any action under the Act. The applicants have only to remain inactive now.

They cannot certainly be permitted to take action under the provisions which have been held to be unconstitutional; that would be going beyond merely staying execution of the decree or staying operation of the order. Under Sub-rule (2) a successful party may be prevented from taking action which he would not be justified in taking except under the impugned order, but the unsuccessful party cannot be permitted to take action which is illegal according to the impugned order.

Permitting a defeated party to act as if the impugned order had not been passed at all does not come within the scope of the words 'give such other direction respecting the subject-matter of the appeal' in Clause (d). The only reason on account of which we should stay operation of the impugned order is said to be that the consolidation proceedings in the whole village would be at a standstill, that the opposite parties insist upon being restored to possession of the lands allotted to other persons and sown by them with crops and that there is likelihood of a serious breach of the peace.

If the Act is unconstitutional the consolidationproceedings must come to a standstill and no substantial loss is likely to result from this. If there isan apprehension of a

breach of the peace, the Statemust take necessary steps to prevent it. I am notsatisfied that any special cause has been shown bythe applicants for any order to be passed underSub-rule (2).

21a. Order 45 deals with 'appeals, to the Supreme Court'. It has been already pointed out that a High Court is not invested with any power under the Constitution to make rules governing procedure in the matter of granting certificates.

Jurisdiction and powers of High Courts are not included in any of the three lists of Schedule 7 of the Constitution. In the concurrent list there is item No. 13 dealing with 'civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution'. It is doubtful if procedure in relation to an application for a certificate under the Constitution is covered by this item.

If it is not, the Central Legislature is without any power to make any rules to govern the procedure in an application for a certificate. It seems that because the Supreme Court has been invested with the power to make rules regarding such matters no power has been conferred upon any Legislature.

Even if the provisions of Order 45 were ultra vires the Parliament, they could be made applicable by the Supreme Court to proceedings before High Courts in matters relating to certificates. The only provision in the Supreme Court Rules making them applicable in such matters is Rule 1 of Order 12. But Order 12 deals with civil appeals, i.e., appeals from orders in civil proceedings. Therefore, the provisions of Order 45, C. P, C., cannot be applied in proceedings in applications for certificates in respect of appeals to be preferred from orders under Article 226.

There is another provision which applies the provisions of Order 45 of the Code in matters relating to appeals to the Supreme Court pending before the High Court, that is Rule 26 of Chapter XXIII of our Rules of Court. But, as pointed out above, the High Court's power to make these rules is questionable.

22. The proceeding that is pending now is a proceeding under Article 133(1). Under Article 225 the rule-making powers of High Courts existing on 25-1-1950 were preserved but no new or additional rule-making powers have been conferred upon them either by that article or any other article. Before 26-1-1950 there was no such proceeding as one for the grant of a certificate of fitness of a case for appeal to the Supreme Court (because the Supreme Court did not exist then) and, therefore, the High Courts had no power to make rules regulating the procedure in applications for such a certificate.

The result is that a High Court has no stalutory power to make any rules governing the procedure in an application for a certificate. The rules contained in Chapter XXIII of the Rules of Court, 1952, made by this Court are, therefore, not made in exercise of the powers conferred by Article 225. No other authority for them was suggested to us. Only the Supreme Court has the powers to make rules governing the procedure in applications for certificates under Articles 132, etc.; they are 'matters pertaining to appeals' within the meaning of Article 145(1)(b).

The jurisdiction to issue writs is itself a new jurisdiction conferred by Article 226; therefore the powers of a High Court existing prior to 26-1-1950 could not deal with appeals in writ matters. The use of the words 'subject to the provisions of this

Constitution' in Article 225 restricts, and not enlarges, the High Court's powers. If some of the existing powers are inconsistent with the provisions of the Constitution, they would not be preserved under Article 225; that is the only meaning of the words. For any power not vested in a High Court prior to 26-1-1950 there must be authority elsewhere in the Constitution. It can, therefore, be said that the High Court has no power even to make rules governing the procedure in petitions for writs.

23. It would be idle to rely upon Article 227. The power of a superior Court to issue a writ of certiorari, mandamus, or prohibition is derived from its supervisory jurisdiction over the inferior Court or tribunal; it keeps the inferior Court or tribunal within the limits of its jurisdiction by issuing an appropriate writ. After the express grant of power to. issue such a writ upon a High Court, the power of Superintendence conferred upon it under Article 227 must be deemed to relate to administrative matters.

Whatever superintendence it can exercise injudicial matters would now be exercised through theissue of an appropriate writ under Article 226. Therefore, an order of an inferior Court or tribunal cannot be interfered with under Article 227. Besides therecan be no justification for a High Court's directingan inferior Court or tribunal not to act in accordance with the law as interpreted by itself. I amsupported in this view by Mukand Lal v. GayaPrasad : AIR1934All585 .

24. The result is that the operation of the impugned order cannot be stayed under Article 226 or 227 or under Order 45, Rule 13 or under Section 151, C. P. C. This result is quite consistent with the provisions of Articles 132, 133 and 134 which simply confer jurisdiction upon a High Court to issue a certificate. Even this power is conferred upon it impliedly. No other power has been conferred by the Constitution upon a High Court in a matter relating to an appeal to the Supreme Court.

The power to stay execution or operation of a, decree or order passed by it because an, appeal from it is contemplated or has been filed cannot be said to be a power incidental to the power of granting a certificate and cannot be assumed to be included in it. While the Constitution enjoins that an appeal cannot be filed in the Supreme Court without a certificate, it does not enjoin a party that has obtained a certificate to prefer an appeal in the Supreme Court; as far as it is concerned he may not file any appeal.

Therefore, it could not have been contemplated that a High Court granting a certificate should have power to stay execution, or operation of the decree or order passed by it. If an appeal is preferred, the execution or operation may be stayed during its. pendency but it cannot be stayed in anticipation of an appeal, which may not Be filed at ail. If we grant stay the question arises what would be its duration. If We stay the execution or operation during the pendency of the appeal in, the Supreme Court, the appeal may not be filed at all. I am quite alive to the fact that an application for a certificate is combined with the appeal to the Supreme Court; but that is only the result of an Act of the Legislature and Rules of this Court.

The Constitution does not contemplate an application for a certificate to be combined with the appeal to the Supreme Court and I am considering whether it contemplated that the High Court should have the power to stay the execution or operation. I also do not understand why the procedure should affect the right. If the procedure were that a party should obtain a certificate first and then file the appeal, in that case so

long as he did not file the appeal he would be said to be without a right to ask for stay of execution or operation from the High Court. If he would have no right then there is, BO reason why he should have it now because an application for a certificate is included in the appeal.

Even according to the provisions in Order 45, the appeal is not admitted merely on the certificate being granted, if the party does not furnish security and deposit costs of translation, printing etc., the appeal may not be admitted notwithstanding the grant of a certificate. If even after the grant of a certificate it cannot be said that an appeal exists, I do not see how an appeal can be said to exist even before a certificate is granted. The application must, therefore, be dismissed.

I am supported by a recent decision of Ramabhadran J.C. in Gajjan Mal Mohan Lall v. State of Himachal Pradesh, AIR 1957 Him-Pra 5 (Z21). The learned Judicial Commissioner held that an order rejecting a petition for a writ under Article 226 is not a judgment, decree or final order in a civil proceeding within the meaning of Article 133(1). Sinha C. J. and Mudholkar J. have taken the same view as I have in Sriram Hanumanbux v. State of Madhya Pradesh, (S) AIR 1955 Nag 257 (Z22); they decided that no certificate can be issued for an appeal against refusal to issue a writ. They observed :

''The extraordinary jurisdiction vested in the High Court under Article 226 is not meant to declare any rights. A writ under Article 226 is issued only to ensure that the law of the land was being properly administered and the refusal to issue the writ has only the effect of saying that the High Court does not see any irregularity in the administration of the relevant law.'

25. Our attention was drawn to the following four recent decisions of this Court:

1. Application in Supreme Court Appeal No. 62 of 1956: Collector of Mirzapur v. Firm Goverdhan Dass Kailash Nath, (Z23), decided by our brothers Agarwala and Randhir Singh on 14-11-1956.

2. Application in Supreme Court Appeal No. 85 of 1956 : Government of U. P. v. Sri Sri Vikram Narain Singh (Z24), decided by our brothers V. Bhargava and Gopalji Mehrotra on 23-11-1956.

3. Application in Supreme Court Appeal No. 22 of 1953 : Diwan Sugar Mills v. Government of U. P. (Z25), decided by our brothers Agarwala and Oak on 11-7-1955, and

4. Application in Supreme Court Appeal No. 231 of 1956 : Jain Transport and General Trading Company, Mathura v. State of U. P. (Z26), decided, by our brothers B. Mukerji and G. Mehrotra on 18-1-57. In all these cases our learned brothers issued certificates for fitness of appeal under Article 133 against orders passed on petitions for the issue of writs of certiorari and mandamus. The question whether a proceeding under Article 226 is a civil proceeding within the meaning of Article 133 was not discussed in the last case and, therefore, it is left out of consideration; in the other three cases it was held to be a civil proceeding. In the first case it was observed that the answer to the question depends upon the nature of the proceeding; this of course, is obvious : In the third case of Diwan Sugar Mills (Z25), the answer was said to depend upon the matter coming before the High Court and it was stated that it is a

civil proceeding if the procedure in the High Court is governed by the Code.

While a proceeding cannot be a civil proceeding if it is not governed by the Code, it cannot be said that a proceeding is a civil proceeding merely because it is governed by it as any proceeding can be made governed by the Code. With great respect to the learned Judges I am unable to agree that the words 'other proceeding' were inserted in Article 132 by way of abundant caution. I, think it is a wrong thing to say that certain words in a constitution are used abundanti cautela. Only those words which arc added by way of an explanation or illustration or interpretation can be said to have been added by way of abundant caution but the words in question cannot be treated as such.

In the very context in which they are used they cannot be ignored as redundant. Also there was no occasion for any caution, and the object of employing them by way of caution has not been served. In the first and the third cases it was held that a proceeding involving a question regarding property or status or office is a civil proceeding and in the second case, that a proceeding for a writ to enforce a right is a civil proceeding.

A proceeding for a writ cannot be said to involve a question regarding property relating to property or status. Questions of civil rights and properties are not decided in a proceeding under Article 226. For this, there are civil and other Courts and it is well known that Article 226 is not meant for obtaining a relief obtainable from them. The object behind a writ of certiorari, prohibition, mandamus, injunction etc., is simply to keep Courts and tribunals within the limits of their jurisdiction and to compel them to exercise jurisdiction when it is necessary to do so.

So long as a Court or tribunal exercises jurisdiction vested in it, it is not amenable to the writ jurisdiction of a High Court. A High Court cannot revise an order passed by it as. if it were sitting in appeal over it. Reference may be made to M. D. Thakar v. Labour Appellate Tribunal : AIR1957Bom46 . In Banker's Life & Casualty Co. Ltd. v. John W. Holland, (1953) 98 Law Ed 106: (346 US 379) (Z28), Clark J. laid clown that the traditional use of a writ has been to confine the inferior Court of tribunal to the lawful exercise of a prescribed jurisdiction or to compel it to exercise it when it is its duty to do so.

It does not decide the questions of civil rights or merits but only sees that they are decided according to law by the inferior Courts and tribunals. The inquiry that it conducts is into the jurisdiction of the inferior Court or Tribunal and the manner in which it is exercised; this inquiry is quite distinct from the proceeding before the inferior Court or Tribunal. Whatever may be the nature of the proceeding, whether it be civil or criminal or any other kind of proceeding, the nature of the inquiry conducted by the High Court remains the same, namely, whether the inferior Court is acting within its jurisdiction and when it should not and without violating the principles of natural justice. Such an inquiry cannot partake of the nature of the proceeding before the inferior Court.

The inferior Court may be seized of the jurisdiction in respect of civil rights or rights to property or status, but the High Court is not concerned with any dispute regarding them. I am, therefore, unable to agree with the view that a proceeding under Art 226 is civil or criminal or other according as the nature of the proceeding before the inferior Court or Tribunal. I am also unable to accept the proposition that a

proceeding is a civil proceeding because it relates to a civil right; it is contradicted by the provisions of the Codes of Civil and Criminal Procedure.

There are several proceedings which are undoubtedly criminal proceedings though they relate to civil rights, for instance proceedings under Ss. 88 (6) and (6-C), 133, 145, 147, 488 491, 499 (3), 514, 522 and 552 of the Code of Criminal Procedure, Though all these proceedings relate to civil rights, they are within the jurisdiction of Criminal Courts and are governed by the Code of Criminal Procedure and, therefore, they are criminal proceedings.

There are many matters relating to civil rights in respect of which proceedings can be taken in criminal Courts as well as in civil Courts, for instance, the matters in respect of which criminal proceedings can be taken under Sections 279, 280, 289, 290, 323, etc., 374, 379 etc.; 403 etc., 417 etc., 426 etc., 447 etc., 482 etc., 491, 493 etc. and 500 of the Indian Penal Code. On the other hand, there are some proceedings in civil Courts which are of a criminal nature and are still civil proceedings.

A witness who fails to comply with a summons issued by a civil Court may not only be prosecuted in a criminal. Court but also be fined by the civil Court itself under Order 16, Rule 12 of the Code of Civil Procedure. A person disobeying an injunction issued by a civil Court may be punished by attachment of his property and by imprisonment in a civil jail under Order 38, Rule 2 (3). Though these are proceedings in which punishments are inflicted, they are undoubtedly civil proceedings.

There are some proceedings which are governed by the Code of Criminal Procedure but may be taken by any Court of civil, criminal or revenue jurisdiction, for instance, those under Sections 476 and 480 and making, and withdrawing, a complaint of any of the offences mentioned in Section 195. In the face of these provisions it cannot be laid down that a proceeding is a civil proceeding merely because it relates to a civil right, status or office and is a criminal proceeding merely because it ends in infliction of punishment.

26. I am, therefore, of the opinion that neither have we jurisdiction to stay execution or operation of the impugned order nor would we be justified in doing so. The application deserves to be dismissed.

Beg, J.

27. I had the advantage of leading the judgment of my learned brother. So far as the merits of the case are concerned, I agree with him that no case for grant of interim stay has been made out. Under the circumstances, I do not think it necessary to discuss in detail the various questions of law that have been raised before us in the case. I would, however, like to make some observations on some of the points which have been urged before us.

28. On the question as to whether the proceedings before us are of a civil nature or not, I am inclined to take the view that they are of a civil nature. A civil proceeding is a proceeding in which a Court administers civil law and the subject-matter of which relates to civil rights. The expression 'civil proceedings' has not been defined anywhere in the Constitution. It is a word of wide and multifarious signification. Similarly, the expression 'civil law' is used in various senses.

In England sometimes it is used to denote the system of jurisprudence administered in the Roman Empire as distinguished from common law of England and the common law. In jurisprudence it is sometimes used to denote the rule of action which a particular nation, commonwealth or city has established for itself more properly called ''municipal law'', to distinguish it from the 'law of nature' and from international law. It is also used in opposition to the law of nations and maritime law. Sometimes its meaning is confined to that division of municipal law which is occupied with the exposition and enforcement of civil rights as distinguished from criminal law. (See Corpus Juris Secundum, Vol. 14, page 1155).

29. Austin in his book on Jurisprudence (1885 Edition) Vol. 1, page 32, has quoted with approval the following definition of civil law by Hobbes :

'By civil laws (says he), I understand the laws that men are therefore bound to observe, because they are members, not of this or that commonwealth in particular, but of a commonwealth. For the knowledge of particular laws belonged to them that profess the study of the laws of their several countries : but the knowledge of civil laws in general, to any man. The ancient law of Rome was called their 'civil law' from the word civitas, which signifies a commonwealth : And those countries which having been under the Roman Empire, and governed by that law, still retain such part thereof as they think fit, call that part the 'civil law', to distinguish it from the rest of their own civil laws'.

30. Salmond in his book on Jurisprudence has divided all laws into two branches, namely, 'public law' and 'private law'. Private law, according to him, is comprised of two branches viz., the civil law and the criminal law. Both these kinds of laws are again divisible into two categories, one being the substantive law and the other being the law of procedure (Vide Salmond's Jurisprudence, Sixth Edition page 487).

31. In Indian Law, ordinarily the expression 'civil law' is used in opposition to criminal law. The boundary that divide the domain of the civil law and the criminal law have not, however, been contiguous. There has existed a no man's land between them. This region has been clouded with uncertainty and doubt in the Indian legal history. It has been occupied by a variety of proceedings at various times. Some of these proceedings are said to lie in an area which has sometimes been styled as the sphere of special jurisdiction. At other times these proceedings have been characterised as sui generis.

Two important instances of this- kind of proceedings are to be found in the proceedings for contempt of Court and in the proceedings for disciplinary action. Sometimes proceedings of contempt of Court have been held to be civil and at other times criminal. They have also been held to he sui generis. Similarly, proceedings for disciplinary action have been held to be judicial proceedings by the Allahabad High Court (Vide S, An Advocate v. Judges, Allahabad High Court : AIR1934All898 and P, a Pleader, Bansi v. Judges of Allahabad High Court : AIR1937All167 .

On the other hand, the same proceedings have been held not to be either of a civil or of a criminal nature, by Madras, Bombay, Patna and Lahore High Courts (Vide In the matter of Mr. E. Raghava Reddi, AIR 1922 Mad 440 (FB) (Z31); Krishnaswami v. Council of the Instotite of Chartered Accountants of India : AIR1953Mad79 ; Ganesh Section Dandvate v. Government Pleader, ILR 32 Bom 106 (Z33); Bir Kishore Roy v. Emperor, AIR 1919 Pat 279 (Z34) and In the matter of Ram Lal Anand, Advocate,

Lahore, AIR 1949 Lah 83 (FB) (Z35).

According to them, these proceedings are merely administrative proceedings and are not judicial proceedings at all. The purpose of the addition of the expression ''other proceedings'' in Article 133 of the Constitution may be to cover proceedings of this nature. The framers of the Constitution seemed to have considered the question of interpretation of the Constitution as one of paramount importance. They, therefore, thought that every case involving this question should be made appealable to the Supreme Court.

Accordingly, they framed a separate Article for this special purpose, and in their solicitude and anxiety to see that no kind of proceeding involving this question, of whatever nature it might be regarded by the Court, is shut out, they framed this Article, and added the expression 'or other proceedings' to the words ''civil or criminal'. The expression 'other proceedings' does seem to envisage the existence of certain types of proceedings which may be regarded to be neither civil nor criminal.

32. In the present case, however, the question that arises is whether the proceedings before use are of a civil nature or not. Article 133 of the. Constitution applies to a 'civil proceeding of a High Court' only. In this connection, it may be noted that what Article 133 lays down is that judgment or decree or final order which is sought to be appealed against should be passed in a 'civil proceeding''. It does not lay down, that the Court passing the order should be a civil court. A civil proceeding is one which is taken for the enforcement of a civil right.

Whether a proceeding is civil or not depends, in my opinion, on the nature of the subject-matter of the proceeding and its object, and not on the mode adopted or the forum provided for the enforcement of the right. The expression 'civil rights' in a broad sense comprises the entire bundle of private rights that a human being or any person recognises by law as a juristic entity might, as such, possess under law and for the recognition, declaration or enforcement of which law makes a provision.

The expression ''private rights' in this connection will be deemed to include the rights also of a municipal or a local body as well as the State or the Government when acting in its private capacity, e.g. as an owner of property, or as a contracting party or a party entering on commercial undertakings etc. In such cases the State or Government acts like a private individual or citizen and is deemed to be on a pastwith him. Such rights may relate to property oroffice, or they may arise out of obligations of a contractual or tortious or of any other nature, or they mayrelate merely to the status of a person.

Judged from this stand-point, the present proceeding does appear to be a civil proceeding. The applicants in it claimed a right to certain plots of land which is immovable property in law. This proceeding was resorted to for the purpose of and with the object of enforcing their right to this immovable property. The applicants alleged that the law under which they were being deprived of the said property was ultra vires and contravened their fundamental right to hold and possess the said property. They further alleged the act of expropriation without compensation was against law.

It was directed against parties who were alleged to be taking steps, to deprive the petitioners of their rights in the property which, according to them, was rightfully in

their possession and ownership. The object of the proceedings taken by the petitioners was to enforce this right by having the proceedings taken against them and the orders passed therein quashed. Thus both from the point of view of the subject-matter as well as from the point of view of their object, the proceedings taken in the present case were clearly of a civil nature in the terms of the above definition of a civil proceedings.

33. This proceeding, no doubt, was taken in the High Court under Article 226 of the Constitution. For this reason, it has been strenuously argued before us that the proceeding is of a special nature, and, being of a special nature, it has ceased to be civil. I find some difficulty in holding that a proceeding, which deals with right of a civil nature and is otherwise civil, ceases to be so just because a party chooses to resort to Article 226 of the Constitution for the enforcement of such a right.

The fact that a right has been created by the Constitution or the forum for its enforcement prescribed by it should not, in my opinion, make any difference, if the subject-matter of the right sought to be agitated in the proceedings is itself of a civil nature, and the object of the proceedings is merely the enforcement of such a right, and not punishment of a wrong. It may be that the Constitution has created a new, and sometimes an alternative mode or forum, for the enforcement of such a right, and, in that sense, the mode adopted and the forum provided is a new one.

The mode and the forum for. the enforcement of a right may at any time be altered, or modified abolished or created by ordinary law. Thus the Allahabad High Court might be invested by law with the power to try original suits of title of a certain type in a regular way. If it so happens that the fact that the forum of these suits is shifted from an inferior court to a higher court would not change the character of the proceedings.

Similarly special procedure might be prescribed for certain special type of civil cases. Thus special procedure is prescribed for proceedings under the Insolvency Act or for proceedings under the U. P. Encumbered Estates Act. That, however, would not alter the character of these proceedings as civil proceedings. I fail to see how the mere fact that the mode and the forum have been prescribed by the Constitution Act and not by the ordinary law, can be a reason for changing the nature or the character of a particular right or proceeding. It is significant to note in this connection that sometimes Article 226 provides an alternative mode for the enforcement of some of the previously existing civil rights. These rights could be enforced by ordinary courts prior to the Constitution, and can, even after the Constitution be enforced by them, but what the Constitution has done is to provide an alternative remedy of a cheap and expeditious nature in certain cases of a special type. Does it mean that such previously existing civil rights have ceased to be civil just because the Constitution has provided a new or an alternative mode for enforcing the same

In fact the grant of relief being discretionary, the High Court does sometimes refuse to act under Article 226 on the ground that an alternative mode of relief is open to a party. Does it then mean that a right which was not civil in the High Court becomes a civil right when agitated in the lower court or vice versa? The contrary view appears to land one in a number of inconsistencies. Supposing, for example, Article 226 were to be removed from the Constitution and engrafted in the C. P. Code, can it be said that a proceeding which was not civil before has become civil merely as a result of this change

Or, supposing a power to issue writs is also conferred on the inferior courts and a right of appeal given to the High Court, does it mean that a proceeding, which was not civil before, then becomes a civil proceeding? Or, supposing the procedure prescribed for a writ proceeding in the High. Court is made analogous to suit, would it convert the nature of proceeding from one that is not civil into one that is civil?. The High Court exercises original jurisdiction in Testamentary, Matrimonial and Company matters. Does it mean that the jurisdiction in these matters ceases to be civil merely because it is exercised by the High Court

Further, does the same jurisdiction become civil when so exercised by the District Court and not by the High Court. Further, under Clause 9 of the Letters Patent the High Court had power to transfer any civil case before itself under certain circumstances, and try it under its extraordinary civil jurisdiction. Similarly under Article 228 of the Constitution, the High Court has power to transfer before itself certain cases involving a substantial question of law as to the interpretation of the Constitution. If the High Court were to withdraw any case of such a nature from a civil court subordinate to it, would the case that was civil in the lower court cease to be civil merely because the forum has been changed to that of High Court and the power has not been exercised under the ordinary law but under the Constitution Act

It is always open to the legislature to change the forum for a relief or to create a new or an alternative forum for the relief of the same right. Thus, lately the legislature has been constantly shifting the forum of the suits of a certain type relating to tenancy land from the revenue court to the civil court and again from the latter to the former. Further, the Statute has also been creating new forum for certain type of rights. For example, in U. P., Panchayat Courts have been created for the trial of certain types of civil suits and a special procedure of a more simplified form prescribed therefor. Does it mean that the nature of the proceeding changes with every change in the forum although the subject-matter and the object remain the same

It is open to the legislature to multiply any number of courts and give them any appellation. Would it mean that with every such addition a new type of proceeding is being added? If so, there will be no end to the category of proceedings. In such a situation, can there be any uniform test for determining their character? The contrary view does not seem to provide a consistent answer to the above question. Thus, neither the mode, procedure and forum prescribed nor the nature of legislation prescribing it can form a satisfactory basis for the definition of a civil proceeding.

Under the circumstances, it seems more logical to hold that it is the content of the proceedings that should determine their colour. In other words, it is the inherent nature of the rights in controversy in a proceeding and the real purpose of the proceedings that would determine the stamp that law would put upon it and the label that it would apply to it rather than extraneous garb in which the right is sought to be clothed and brought before the court or the status of the Court where the right is agitated or the mode of procedure or forum for the adjudication of right or the character of the legislation prescribing the same.

Reference in this connection might also be made to the Full Bench case of the Allahabad High Court reported in District Board of Farrukhahad v. Prag Dutt : AIR1948All382 .

34. Article 226 may relate to Civil rights if the subject-matter of the proceeding

before the Court is of a civil nature, and if the subject of the proceeding is to enforce this right. Article 226 itself says that directions, orders or writs mentioned therein could be issued for the enforcement of the rights conferred by Part III and for any other purpose. The rights mentioned in Part III are the fundamental rights guaranteed by the Constitution.

The words 'for any other purpose' have also been interpreted by their Lordships of the Supreme Court to mean 'legal rights'. As observed by their Lordships in : [1952]1SCR28):

'The concluding words of Article 226 have to be read in the context of what precedes the same. Therefore, the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article'.

35. No doubt, Article 226 has carved Out a new area of power for the High Court. As observed by their Lordships of the Supreme Court in : [1954]25ITR167(SC) :

''While Article 225 of the Constitution preserves to the existing High Court the powers and jurisdictions which they had previously, Article 226 confers, on all the High Courts, new and very wide powers in the matter of issuing writs, which they never possessed before (p. 210).'

The purpose of the makers of the Constitution as stated in the same judgment following the observations of Patanjali Sastri C. J., was to provide a quick and inexpensive remedy for the enforcement of such rights. The fact that a new realm of power has been opened before the High Courts does not mean that they have ceased to function as ordinary Courts. The High Courts exercise these new powers as part of their ordinary general jurisdiction. This view would find support from the judgment of their Lordships of the Supreme Court in the case Romesh Thappar v. State of Madras : 1950CriLJ1514 . In this case while referring to Article 32 of the Constitution Patanjali Sastri, J. made the following significant observations:

'The Article does not merely confer power on this Court, as Article 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III, or for any other purposes, as part of its general jurisdiction, In that case, it would have been more appropriately placed among Arts. 131 to 139 which define that jurisdiction', (p. 126).

36. Reference in this connection might also be made to a judgment of the Calcutta High Court in Chairman Budge Budge Municipality v. Mangru : AIR1953Cal433 . While referring to Article 226, Chakravartti, C. J. observed as follows:--

'Such a power given to all the High Courts is undoubtedly a new power. But while it is new in the sense that the power to act or give relief in such manner or according to such procedure did not exist before, it is not new or special in the sense that it vests the High Courts with a new function outside and unrelated to the jurisdiction they normally exercise and constitute them special tribunals for a special purpose' (p. 441).

See also in this connection observations in Rashid Khan v. Income-Tax Investigation Commission AIR 1951 Punj 74 (Para 19) (Z 39).

37. It is interesting to note the position in this regard under the American and the English law. No doubt the decisions under those law on the point are not binding in India, but the line of reasoning adopted, is instructive and relevant to the issue before us. It may, however, be noted that the position in India is more analogous to the position in America than in England.

For in England the writ power is a vestige of the prerogative right of the Crown, but both in America as well as in India the fountain spring of power is not the Crown but enacted legislation or Statutory law. In India this law is to be found in the Constitution of India. In America proceedings taken for the issue of a writ of habeas corpus have been regarded as Civil proceedings. In Bailey on Habeas Corpus (1913 Ed.) Vol. 1 at page 10, the law on the point is stated thus :

''Much controversy has arisen with respect to the proceeding, as to whether it is a civil or criminal action, or a special proceeding, also whether it is a proceeding in the original action or proceeding on an independent action or proceeding. The determination of this question often arises and becomes important upon the question of review, and especially in respect to the jurisdiction of the reviewing court.

It is held by the Supreme Court of the United States, that the writ of habeas corpus is a new suit brought by the petitioner to enforce a civil right, which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty, and not by the government to punish for his crime. The judicial proceeding, under it is not to inquire into the criminal act which is. complained of, but into the right to liberty not- , withstanding the act.'

38. In (1883) 27 Law Ed. p. 826 (C), it was heldby the Court at page 827 that--

'The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes; but the judicial proceedings under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process.

The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offence; but, if he succeeds, he must be discharged from custody. The proceeding is one, instituted by himself for his liberty, not by the Government to punish him for his crime ..... Such a proceeding on his part is, in our opinion, a civil proceeding notwithstanding his object is by means of it, to get released from custody under a criminal prosecution.'

39. As to the judgment in a writ of mandamus, it was held by the Supreme Court in (1884) 28 Law Ed. 627 (B) that :

'Such a judgment is, in our opinion, a final judgment in a civil action, within the meaning of that term as used in the statutes regulating writs of error to this Court.''

See also Bailey's Treatise on the Law of Habeas Corpus and Special Remedies, (1913 Edition) Vol. 2, Chap. I, Article 198, at p. 775.

40. In Ferris's Law of Extraordinary Legal Remedies (1926 Edition), it is stated at p. 24 that:

'Habeas corpus is a high prerogative writ, summary in character, for the enforcement of the civil right of personal liberty.'

At page 28 of the same book it is stated that:

''Habeas corpus is a civil, separate proceeding to enforce a civil right, the right to personal liberty, whether the restraint be by virtue of criminal or civil process.'

41. As to writ of mandamus the legal position is stated at p. 319 thus :

'Although in England mandamus issues in the name of the King, and in this country usually in the name of the state, on the relation of an individual, and although it is said to partake somewhat of a criminal nature, it is nevertheless, a civil remedy for the protection of civil rights.'

42. In para 189 (p. 221) it is stated that although it was

''one of the highest writs known to our jurisprudence, it is generally held to have lost its prerogative character, being now merely a civil action or proceeding to enforce a legal right. Especially is this so because of our form of government.'

43. In para 213 at page 247, it is stated that:

'It is the inadequacy, not the mere absence, of all other legal remedies, and the danger of a failure of justice without it, that must usually determine the propriety of the writ, so where none but specific relief will do justice, specific relief should be granted, if practicable; and where a right is single and specific, it usually is practicable. Another remedy should be able to accomplish the same purpose as would mandamus if granted; that is, place the complainant in the same position as he was before the act complained of. The other remedy, to supersede mandamus, must be competent to afford relief upon the very subject-matter of the application, and he equally convenient, beneficial and effective.''

44. With regard to the writ of quo warranto, the following passage contained in para 107 of Ferris's Extraordinary Legal Remedies, at pp. 130 and 131 is relevant:

'The information was in England a criminal proceeding, and involved fine and imprisonment, as well as ouster of defendant from the usurped franchise. It lost this character except as to form, however, long before the American Revolution, although the form of a criminal proceeding was retained in England until the Statute 47 and 48 Vict. Chap. 61, and was applied to the mere purpose of trying the civil right of seizing the franchise or ousting the wrongful possessor; the fine being nominal only. The character of the proceeding, is, then, without any special legislation to that effect, generally considered as civil.

At common law the information differed from an indictment chiefly because it was

presented by the law officer of the Crown, without the intervention of a grand jury. But it is nevertheless a civil and constitutional proceeding.'

45. In the same para it is further stated that:

'.... an information in the nature of quo waranto is applied to the mere purpose of trying a civil right and ousting the wrongful possessor of an office.' (131).

46. As to the position in England, reference might be made to the law regarding the matter as stated in Halsbury's Laws of England Second Edition, Vol. 9, in Article 130 it is stated that:

''The applicant for a writ of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought. In order, therefore, that a mandamus may issue to compel something to be done under a statute, it must be shown that the statute imposes a legal duty.'

47. In Article 130 it is stated that:

'The legal right to enforce the performance of a duty must be in the applicant himself.'

48. In Article 130, it is stated that:

''When a mandamus is refused on the ground that there is another specific remedy, it is a remedy at law that is referred to. The existence of a remedy in equity is no answer to an application for a mandamus.'

49. In Article 131 it is stated that:

'The action of mandamus will lie where the party claiming the mandamus has a right of action, whether or not there is a right to claim damages, and has no other equally convenient and effective remedy. It is, in effect, a remedy ancillary to such a right of action.'

50. In Article 1364, it is stated that:

''The Rules of the Supreme Court as to costs apply, as far as they are applicable, to all civil proceedings on the Crown side.'

51. As regards the writ of Quo Warranto, it is stated in Article 1373 that:

'Although in form a criminal proceeding, an information in the nature of a quo warranto has long been applied to the mere purpose of trying the civil right to the office or franchise; and now it is provided by statute that proceedings in quo warranto shall be deemed to be civil proceedings whether for purposes of appeal or otherwise'.

Consolidation Act, 1925 (15 and 16 Geo. 5. C. 49), Section 48. Section 15 Supreme Court of Judicature Act 1884 lays down that ''proceedings in 'quo warranto' shall be deemed to be civil proceedings, whether for purposes of appeal or otherwise.''

52. With regard to writ of certiorari, it is stated in Article 1420 that:

'The writ of certiorari issue out of a superior Court and is directed to the Judge or other officer of an inferior Court of record. It requires that the record of the proceedings in some cause or matter pending before such inferior Court shall be transmitted into the superior Court to be there dealt with, in order to insure that the applicant for the writ may have the more sure and speedy justice. It may be had in either civil or criminal proceedings. The object of the writ, particularly in civil proceedings, is to give relief from some inconvenience or error supposed in the particular case, to arise from a matter being disposed of before an inferior Court less capable than the High Court of rendering complete and effectual justice.'

As to the law in India, the views expressed by the various High Courts on this point appear to be divergent. Even this Court has not spoken with one voice in this regard, and conflicting opinions seem to have been expressed in the Allahabad High Court itself. There is, however, a catena of Indian decisions on lines similar to that taken herein. Some of the Indian cases may now be briefly referred to.

53. In : AIR1952Mad300 , it was held that a writ of certiorari is a civil proceeding and the jurisdiction exercised by the High Court in regard thereto is in the nature of ordinary original jurisdiction. (See also : AIR1953Mad39 , Ramchandra Reddy v. Shankaramma, AIR 1953 Hyd 131 (Z-40), Gopeshwar Prasad Sahai v. State of Bihar, AIR 1951 Pat 626 (Z-41), ILR (1938) Mad 816: (AIR 1938 Mad 722) (R).

54. As to the position in this Court, in a number of unreported cases, proceedings of this nature in an application for the issue of a certificate for appeal to the Supreme Court have been treated to be civil proceedings (vide Application in Section C. Appeals Nos. 62 and 63 of 1956 (Z-23), Application in Section C. Appeal No. 85 of 1956 (Z-24), and applications in Section C. Appeal Nos. 22 and 23 of 1953 (Z-25). In : AIR1955All589 , a Bench of this Court applied Order 45, Rule 13, C. P. C., in a similar situation. In : AIR1956All585 , it was held that writ proceedings being in the nature of a suit, a decree should be prepared in writ cases, In : AIR1954All393 , while dealing with proceedings arising out of a writ of mandamus; it was observed that 'witnesses can, if necessary be examined and advantage taken of the provisions of the Civil P. C. for discovery and inspection.' (para 36). A discordant note seems, however, to have been struck in : AIR1952All99 .

55. In support of the contrary view strong reliance was placed by the Seamed counsel on Tobacco . v. The State : AIR1951Pat29 , and other cases under the Sales Tax and Income-tax Acts in which the opinion given by the High Court was not held to be given in a civil proceeding. These cases, in my opinion are distinguishable. They were decided on the footing that the High Court did not pass any judgment at all in those cases hence Article 133 of the Constitution was inapplicable to them. As observed in : [1951]19ITR108(SC) , in such cases the High Court acts merely in an advisory or consultative capacity and the order passed by it cannot be said to be passed either in its original or its appellate jurisdiction. About the writ proceedings, it cannot be said that the High Court does not pass any judgment in them or that it exercises neither its original nor its appellate jurisdiction in disposing of the same. In the order dated 10-1-1957 in the recent Full Bench case of this Court arising out of Aidal Singh v. Karam Singh, Special Appeals Nos. 53, 57 and 76 and : AIR1957All414 , it has already been held that an order of a single Judge in a writ matter is applicable to a Bench, Moreover, it was also argued that in such mutters the State nets not in its private capacity but in its sovereign capacity. It is, however, not necessary for me to go into this matter or to express any opinion on it as this question does not arise here.

56. In this connection learned counsel for the contesting parties also argued that the original jurisdiction exercised in Insolvency, Matrimonial, Probate and Company matters of a like nature by the High Court was not civil jurisdiction. Again, for the reasons given by me already, I find it difficult to uphold this contention. Learned counsel further relied on the separate mention of the Testamentary, Intestate and Matrimonial jurisdictions in the Letters Patent as indicating that these were not embraced in the civil jurisdiction and were not a part of it. I do not think that from the premises postulated by him the conclusion that he wants me to draw necessarily follows. The mention of these types of jurisdiction in the Letters Patent is not on the basis that they are exclusive of or contrasted with civil jurisdiction. These jurisdictions might be inclusive within the broader genus of civil jurisdiction. They had to be mentioned separately and specifically with a view to single them out, because the specific areas covered by them had to be carved out from the larger area of civil jurisdiction and demarcated as particular fields of civil jurisdiction in which the High Court could function on the original side, and further, these had to be denominated as special spheres in which the newly erected High Court of Allahabad as inheritor of the old Court was continuing to function in place of its predecessor with the like power and authority as the latter had.

57. In Ba Thaw Maung v. Ma Pin , it was held that once a proceeding, even though under a special Act like the Provincial Insolvency Act (1920), reached the High Court, the procedure, orders and decrees of the Court as well as the right of appeal to the Privy Council was governed by the provisions of the Civil Procedure Code. Similarly in Pramatha Nath v. Sanat Kumar , it was held that once a proceeding under a Special Act like the Bengal Money Lenders Act (Act X of 1940) reached the High Court, ''further rights of appeal are governed by the provisions of the Civil Procedure Code.'

58. Article 28 of the Letters patent gave power to the High Court to adopt rules of the C, P. Code from time to time. Section 129 of the Civil Procedure Code entitles the High Court to frame rules regulating its original civil jurisdiction. In Ch. XV, of the High Court Rules, this Court has framed rules regulating its original and extraordinary original civil jurisdiction.

59. Chapter XXIII, Rule 26 of the Rules of Court lays down that:

'In cases not governed by the Code, the provisions of Order XLV of the Code shall, so far as may be and with such adaptations and modifications as may be found necessary, apply.'

Order XII, Rule 1, of the Supreme Court Rules (1950) runs as follows:--

''Subject to any special directions which the Court may give in any particular case, the provisions of Order XLV of the Code, and of any rules made for the purpose by the High Court or other authority concerned, so far as may be applicable, shall apply in relation to appeals preferred under Articles 132(1), 133(1) and 135 of the Constitution.'

60. In ILR 40 Cal 955 (Z-7), the Calcutta High Court went to the extent of. holding that even if no application for leave to appeal were pending, stay could under its inherent powers, be granted by the High Court.

61. For the above reasons, as at present advised, I am inclined to hold that this Court

has in a proper case powers to issue a stay order.

62. In this connection, the question of the amplitude and scope of Article 227 of the Constitution was also raised. In regard to this matter I may mention that I am of opinion that the power of superintendence granted to the High Court under Article 227 is extensive enough to cover not only the administrative, but also the judicial power. I have already given reasons for the same in my judgment in Jodhey v. State : AIR1952All788 and my judgment dated 10-1-1957, in the Full Bench .case arising out of Special Appeals Nos. 53, 57, 76 and 105 of 1956: : AIR1957All414 . I do not, therefore, think it necessary to repeat the same. As, however, I agree with my learned brother, on the question of merits, I am of opinion that the application should be dismissed.

BY THE COURT

63. For the reasons given in our respective judgments we dismiss this application. The costs will be borne by the parties themselves. The interim stay order is discharged.