

MANU/BH/0067/1930

Equivalent Citation: AIR1930Pat538, (1931) ILR 10 PAT 218, 129Ind. Cas.529

**IN THE HIGH COURT OF PATNA  
FULL BENCH**

Decided On: 07.08.1930

Appellants:**Surajmull-Brijlal**  
**Vs.**

Respondent:**Commissioner of Income Tax**

**Hon'ble Judges/Coram:**

*Courtney Terrell, C.J., Kulwant Sahay, James, Sankara Balaji Dhavle and Saiyid Fazl Ali, J.*

**JUDGMENT**

**Saiyid Fazl Ali, J.**

**1.** This matter comes before us in connexion with an application made by Messrs. Surajmull Brijlal before a Division Bench of this Court; praying for a writ of mandamus against the Commissioner of Income Tax of Bihar and Orissa directing him to cancel and vacate a certain order passed by him against the firm on 12th February 1929.

**2.** The learned Judges to whom the application was made were of opinion that before dealing with the application on its merits it was necessary to decide whether this Court had the power to issue the "prerogative writ of mandamus" and as it appeared to them that the question was one of far reaching importance, they referred it to a Full Bench. The prerogative writ of mandamus as the term is understood in England, is to be carefully distinguished on the one hand from the mandamus, which can be granted by any of the superior Courts at Westminster to examine witnesses in India or any place under the British dominions in foreign parts and on the other from such injunctions mandatory or prohibitory as are issued by the Courts of this country as well as in England in suits or actions. It is in form a command issued in the King's name from the King's Bench Division of the High Court of Justice and directed to any person, corporation or inferior Court of judicature requiring him or them to do something therein (specified which appertains to his. or their case and which the Court holds to be consonant to right and justice. It is used principally for public purposes and to compel performance of public duties though it may also be used to enforce private rights when they are withheld by public officers.

**3.** By the phrase "prerogative writ" is meant a writ issued not as an ordinary writ of strict right, but as the discretion of the sovereign acting through that Court in which the sovereign is supposed to be personally present. So far as this country is concerned Section 45. Specific Relief Act, now empowers the High Courts of Calcutta, Madras, Bombay and Rangoon to make orders which secure the same result as the writ of mandamus issued by the King's Bench Division and the conditions which are set forth in that section are substantially the same as those under which the writ of mandamus is issued in England. It is noticeable that the Patna High Court is not included in Section 45. Specific Relief Act, and one of the questions which we will have ultimately to consider will be whether this Court possesses the power to issue

the prerogative writ of mandamus notwithstanding the fact that it is not referred to in Section 45, Specific Relief Act.

**4.** It appears that the very question which we are now called upon to decide was raised but left undecided in the case of Krishna Ballav Sahay v. Governor of Bihar and Orissa A.I.R. 1926 Pat. 305, though the observations made by Sir Jwala Prasad, who was one of the Judges before whom the case was argued, sufficiently indicate that he was inclined to take the view that this Court has no power to issue a writ of mandamus. The argument of Sir Jwala Prasad in that case, though succinctly put, appears to me to be irrefutable and sufficient to dispose of the issue before us. I will, however, deal with the matter in some detail, because the question raised is one of considerable public importance and it was argued at great length both by Mr. Bose who appeared for the applicants and by the learned Government Advocate who appeared for the Income Tax Department.

**5.** The argument of Mr. Bose briefly is that the Calcutta High Court undoubtedly had and still has the power to issue the writ of mandamus and that power has been inherited by the Patna High Court. Mr. Bose traces the origin of this power to the Charter granted to the Supreme Court at Fort William in Bengal in the year 1774 and it is contended by him that the Calcutta High Court having succeeded to almost all the powers which were originally possessed by the Supreme Court, has the power to issue the writ independently of the provisions of the Specific Relief Act. There is no doubt that Mr. Bose is correct when he says that the Supreme Court had the power to issue not only the writ of mandamus, but also other prerogative writs such as habeas corpus and certiorari. This is clear from Clause 21 of the Charter which says that:

the Supreme Court of Judicature at Fort William in Bengal is hereby empowered and authorized to award, and issue a writ or writs of mandamus, Certiorari Precedendo or error...and directed to such Courts or Magistrates as the case may require and to punish any contempt of a wilful disobedience there unto by fine or imprisonment.

**6.** It may also be mentioned that similar powers were possessed by the Supreme Courts of Madras and Bombay also. The three Supreme Courts were abolished by the Indian High Courts Act of 1861 (24 and 25Vic. Ch. 104), and Section 9 of this Act provided among other things that subject to the provisions made in the Letters Patent which were to be issued later:

The High Court do be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such mentioned Courts.

**7.** There cannot therefore be any dispute that when the Supreme Court at Fort William was replaced by the High Court, the latter inherited most of the powers which the Supreme Court had, including the power to issue the prerogative writs of mandamus, habeas corpus and others. A question however has sometimes been raised as to whether the power of the three Presidency High Courts to issue those writs was confined to the Presidency towns or also extended to the towns in the mufassil. This question arose because of the limited area over which the three Supreme Courts exercised their jurisdiction. The limits of the jurisdiction of the Supreme Court at; Fort William were described in the first report of the commissioners appointed in 1853 to consider the reform of the judicial

establishments of India in these words:

The local jurisdiction of the Supreme Court at Fort William is limited to the town of Calcutta which for this purpose is bounded on the one side by the river Hooghly and on the other side by what is called the Mahratta Ditch. Within these limits the Court exercises all its jurisdiction, civil and criminal, over all persons residing within them...in like manner the Court exercises all its jurisdiction over all British-born subjects, that is persons who have been born in British India and there descendants who are residents in any of the provinces which are comprehended within the Presidency of Bengal or the subordinate Government of Agra.

**8.** It is true that the commissioners further refer to a few special cases where persons not living within the limits of the town of Calcutta could also be dealt with by the Supreme Court, but it is clear that the ordinary jurisdiction of the Court was to be exercised within the limits referred to in the above passage. The learned Government Advocate suggests that this is probably the reason why Section 45, Specific Relief Act, which now defines the powers of the High Courts at Calcutta, Madras and Bombay to issue orders in the nature of mandamus, expressly provides that such orders are to be issued only within the local limits of their original civil jurisdiction which does not extend beyond the Presidency towns. Similarly in the case of *R.v. Nataraja Iyer* [1913] 36 Mad. 72 *Sundara Ayyar, J.*, has after a most elaborate and illuminating discussion of the subject expressed the view that the Madras High Court had no power to issue a writ of certiorari on an officer outside the Madras Presidency town. In the same case however, *Sadasiva Ayyar, J.*, was inclined to take a different view and it has now been held in several reported cases that the powers of the three High Courts to issue the writ of habeas corpus are not confined to the local limits of their ordinary original civil jurisdiction "and that they may issue such writs even outside these limits. The leading case on the subject is the case of *Amir Khan* 6 B.L.R. 392 in which *Norman, J.*, after referring to a number of instances in which the writ of habeas corpus had been issued to persons in the mufassil since the year 1794 observed that it was not without surprise that he had heard the Advocate General challenge the jurisdiction of the High Courts to issue writs into the mufassil. The case of *Amir Khan* was referred to with approval by a Full Bench of the Madras High Court in *Govindam Nair v. Emperor* MANU/BH/0055/1926 where it was held that the High Courts having succeeded to the powers of the Supreme Court had the power to issue writs of habeas corpus outside the presidency towns and the same view was affirmed in *Mahomedali Allabux v. Ismail Abdulali* MANU/MH/0002/1926 : AIR1926Bom332 . It may therefore be assumed in favour of the applicants in this case that the High Court of Calcutta, when it replaced the Supreme Court at Fort William, had the power to issue the prerogative writs even outside the limits of the presidency towns.

**9.** The question however which is still to be decided in this case is as to how this power has been affected by Sections 45 and 50, Specific Relief Act, and whether the High Court of Calcutta has the power to issue any writ of mandamus since the passing of this Act apart from the provisions of Section 45. Section 45 provides that the High Courts of judicature at Fort William, Madras, Bombay or Rangoon may make an order requiring any specific act to be done or forborne within the local limits of its ordinary civil jurisdiction by any persons holding a public office whether of a permanent or a temporary nature or by the corporation or inferior Court of judicature provided certain conditions set forth in the section are fulfilled. Section 50 clearly says that neither the High Court nor any Judge there of shall hereafter issue any writ of mandamus. The plain construction of these two sections would lead one to

conclude that the High Courts of Calcutta, Madras and Bombay have no longer any power to issue the writ of mandamus except under the conditions prescribed by Section 45' of the Act. Mr. Bose however asks us to keep in view the distinction between the prerogative writ of mandamus or command issued from the High Court of Justice in the name of the King and a mandamus or order which issues in an action. He also refers to the English Judicature Act, 1873, Section 25, Sub-section (8) and Order 54, Rule 4, Supreme Court Rules, and argues that as those provisions have not affected the power of the King's Bench to issue the prerogative writ of mandamus, so the Specific Relief Act could not have been intended to affect the power of the Calcutta High Court to issue such a writ. So far as the effect of the Judicature Act is concerned Mr. Bose's contention is, I think, correct because as long ago as in 1876 in *Glossop v. Hestonand Isleworth Local Board* [1876] 12 Ch. D. 102 Brett, L.J., remarked:

I think the mandamus spoken of in Sub-section 8 of the Judicature Act is not the prerogative mandamus, but only a mandamus which may be granted to direct the performance of some act of something to be done, which is the result of an action where an action will lie.

**10.** There is however a marked difference-between the language of the Specific Relief Act and that of Section 25, Clause 8, Judicature Act, 1873, which runs as follows:

A mandamus or an injunction may be-granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order shall be made and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted it the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise or (if out of possession) does or does not claim a right to do the act sought to be restrained under any color of title, and whether the estates claimed by both or by whether of the parties are legal or equitable.

**11.** Now Section 44, Letters Patent of the Calcutta High Court, clearly provides that the provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council and there is no doubt that even if the Calcutta High Court possessed the power to issue the writ of mandamus such power could be taken away or curtailed by the Act of the Governor-General in Legislative Council. In fact even Mr. Bose does not dispute this proposition before us probably because though the contrary view was put forward on more than one occasion it has been always negative. The whole question therefore is what was meant by the legislature when Section 50 Specific Relief Act, was enacted.

**12.** In my opinion the language of the section is so clear and so unqualified that it is difficult to hold that the Calcutta High Court or any of the High Courts referred to in Chap, 8, Specific Relief Act have still any power to issue the prerogative writ of mandamus in spite of Section 50, Specific Relief Act. If the matter admitted of any doubt that doubt could be removed by a reference to the schemes of Chaps. 8, 9 and 10 of the Act. The heading of Chap. 8 shows that is relates to the enforcement of public duties and the provision of Section 45 also indicates that that; section was meant to deal with those cases where the prerogative writ of mandamus would have

been formerly issued. Chaps. 9, and 10 on the other hand deal with injunctions generally and the provisions made by Sections 53, 54 and 55 deal with those forms of injunctions which are generally issued in suits or actions. I may state here that even Mr. Bose concedes that he does not know of any case in which the prerogative writ of mandamus has been issued by the Calcutta, Madras or Bombay High Courts since the year 1877 when the Specific Relief Act was passed, which fact, though not conclusive by itself, goes a long way to show that there is no power any longer in the Calcutta High Court or the other Presidency High Courts to issue the prerogative writ of mandamus apart from the provisions of Section 45 Specific Relief Act.

**13.** It will be interesting also to note that in *Jatindra Mohan v. Sen Gupta* MANU/WB/0113/1924 which was a case under Section 45 Specific Relief Act, C.C. Ghose, J. took pains to point out, while discussing the principles under which mandamus was to be granted, that the writ of mandamus was a highly prerogative writ and was granted to ampicate justice and to preserve a right where there is no specific legal remedy. In fact the manner in which the application for a mandamus was treated in that case shows by it self that in the opinion of the learned Judge there was no distinction between the principles on which the prerogative writ of mandamus used to be granted and the principles on which a mandamus under Section 45, Specific Relief Act is now granted. In *Alcock Ashdown & Co. Ltd. v. The Chief Revenue Authority of Bombay* A.I.R. 1923 P.C. 138 the whole question was discussed on the footing of Section 45, Specific Relief Act, and there was no reference to there being any power in the Bombay High Court apart from that provision. I also notice that in *The Legal Remembrancer v. Moti Lal Ghosh* [1914] 41 Cal. 173 one of the arguments urged on behalf of the respondent was that there was no longer any power in the High Court to issue the writ of mandamus and in the matter of *G.A. Natesan* [1917] 40 Mad. 125 Courts Trotter, J., distinctly observed as follows:

The proceedings are taken under Section 45, Specific Relief Act, and are obviously analogous to proceedings for the obtaining of English prerogative writ of mandamus. The writ of mandamus has been abolished in this country and care must be taken to see that the analogy of the English cases does not lead one outside the words of the Indian Statute.

**14.** In my opinion therefore it is quite clear that since the passing of the Specific Relief Act the Calcutta High Court has no power to issue the prerogative writ of mandamus apart from the terms of Section 45, Specific Relief Act. This being so, it is clear that the Patna High Court which was constituted long after the Specific Relief Act had been passed, could not have inherited any power to issue the prerogative writ of mandamus.

**15.** There is one more aspect of the case which might be referred to here. So far as the writ of certiorari is concerned, it has been held that the Presidency High Courts have the power to issue such writs independently of the provisions of Section 435, Criminal P.C, and Section 115, Civil P.C. This was the view taken by the Privy Council in *Mrs. Annie Besant v. The Advocate-General of the Government of Madras* A.I.R. 1919 P.C. 31. Similarly in the case of *Mahomedalli Bir v. Ismail Abdulali* MANU/MH/0002/1926 : AIR1926Bom332 , it was held by the Bombay High Court that the common law powers granted to the Supreme Court by its Charter to issue writs of habeas corpus are retained by the High Court and have not been abrogated by the provisions of Sections 491 and 491-A, Criminal P.C, though it may be mentioned that this view does not seem to have found favour with Rankin, C.J., in *Girindra Nath*

Banerjee v. Birendra Nath Pal MANU/WB/0195/1927 : AIR1927Cal496 . However that may be, these decisions can be of no avail to Mr. Bose because neither Sections 491 and 491-A, Criminal P.C. nor Sections 435 and 115, Criminal P.C., and Civil P.C., respectively, expressly take away the powers of the High Court to issue writs of certiorari and habeas corpus. On the other hand so far as the writ of mandamus is concerned, Section 50, Specific Relief Act, expressly takes away that power from the High Courts mentioned in Chap. 8 and therefore it cannot be held that the power is still retained by those High Courts.

**16.** I will now assume for the purpose of my argument that the Calcutta High Court still has the power to issue the prerogative writ of mandamus. I will also assume that the Calcutta High Court had the power to issue the writ of mandamus into the districts which now form the separate province of Bihar and Orissa.

**17.** It is however clear from Clause 9, Letters ' Patent of the Patna High Court, that on 1st March 1916 whatever jurisdiction the Calcutta High Court had over these tracts ceased. The question therefore which is to be considered now, is whether there is anything in the Letters Patent of the Patna High Court to indicate that this High Court was also invested with the power of issuing prerogative writs in the same way as the Calcutta High Court had the power.

**18.** Mr. Bose frankly concedes that beyond the recitals which precede the operative portion of the Letters Patent, there is nothing to show that the Patna High Court was invested with the powers which were formerly possessed by the Calcutta High Court. In my opinion these recitals are no more than mere historical allusions to certain provisions of the High Courts Act of 1861 which was enacted just before the establishment of the High Court of Calcutta, and of the two successive Letters Patent under which the Calcutta High Court was established and its power defined. In fact in the recitals there is not merely a reference to the Calcutta High Court but also a reference to the establishment of the High Court of Allahabad in the year 1866 and this is quite enough to show that the allusions were merely historical. Besides the Letters Patent of the Patna High Court clearly define the civil, criminal, admiralty, testamentary, matrimonial and other jurisdictions of the High Court and if it was intended that the Patna High Court should possess the power of issuing prerogative writs similar to those possessed by the Calcutta High Court and the High Courts of Bombay and Madras, there seems to be no reason why this could not have been provided by an express clause to that effect.

**19.** There is one other matter which deserves notice, in this connexion. The Specific Relief Act was enacted several years after the Allahabad High Court had been established. The fact therefore that there is no reference to the Allahabad. High Court in Section 45 of the Act has been taken to mean that the Allahabad High Court was not intended by the legislature to have any power to issue the writ of mandamus see Pollock and Mulla's Specific Relief Act, 5th Edn., p. 932 and Banerjee's Specific Relief Act 2nd Edn., Appendix A, p. 138. In 1918 in the case of Mrs. Annie Besant v. The Advocate-General of the Government of Madras A.I.R. 1919 P.C. 31, the Privy Council while pointing out that the three High Courts of Calcutta, Madras and Bombay possessed the power of issuing a writ of certiorari added:

Whether any of the other Courts which are by definition High Courts for the purposes of this Act (the Press Act) have the power to issue writs of certiorari is another question.

**20.** Again by the amending Act 2 of 1923 the High Court of Judicature at Ban-goon was included within Section 45, Specific Relief Act, but neither the Patna nor the other High Courts were included. This clearly indicates that the intention of the Legislature was that the power of issuing mandamus was to be exercised only by the High Courts mentioned in Section 45, Specific Relief Act. The reason why the Patna, Allahabad and Lahore High Courts have not been included is not quite clear, though it may be that what the legislature intended was that the power should be confined only to those High Courts which had been invested with original civil jurisdiction. However that may be, it appears to me that it is difficult to hold in the present state of the law that the High Court of Patna has the power to issue the prerogative writ of mandamus. I express this view with all the greater confidence because, as I have already said, Sir Jwala Prasad was inclined to take the same view in the case of Krishna Ballav Sahay v. Governor of Bihar and Orissa MANU/BH/0055/1926 and also because the following observations made by Sir Dawson Miller, in *Trikamji Jivandas v. Commissioner of Income Tax* MANU/BH/0069/1924 point to the same conclusion:

In the Bombay case cited (47 Bombay 742), which was a decision of their Lordships of the Privy Council, Section 45, Specific Relief Act, which gives the three High Courts in the Presidency towns power to make orders in the nature of mandamus requiring specific acts to be done or forborne by persons holding a public office was relied on, but that section does not confer the same powers on this High Court.

**21.** I should like here to remark that merely because I find that this Court does not possess the power to issue the prerogative writ of mandamus I do not mean to suggest that this Court should not have such a power or that there is really any valid ground for discriminating between the four High Courts included in Section 45, Specific Relief Act, and the other High Courts which have not been so included. In my opinion, to justify the giving of the power to the four High Courts, and not giving it to the other, requires a stronger argument than this, that the former possess ordinary original civil jurisdiction while the latter do not possess such jurisdiction. As was pointed out by the Privy Council in *Alcock Ashdown v. The Chief Revenue Authority of Bombay* A.I.R. 1923 P.C. 138 the order of the High Court to the Chief Revenue Officer to do his duty would not necessarily be the exercise of original jurisdiction. Similarly in the case of *Amir Khan* 6 B.L.R. 392 Norman, J., said:

I may observe however that the issuing of the high prerogative writ of habeas corpus and subjiciendum is not a matter of ordinary original civil jurisdiction.

**22.** It appears to me that the correct way to approach the question is to enquire whether there is any good reason for supposing that cases similar to those which are dealt with by the Calcutta, Bombay, Madras and Rangoon High Courts under Section 45, Specific Relief Act, could never arise in the other High Courts. It is unnecessary for me here to discuss the circumstances under which such cases might conceivably arise even in this High Court, but as the case with which we are dealing at present happens to be one under the Income Tax Act, I would like to take this opportunity to point out that there is an obvious defect, perhaps wholly accidental, in Section 66 of the Act as it stands at present, which is apt to lead to hardship in certain cases, It will be noticed that there is no clear provision in this section which would make an order passed by the Commissioner of Income Tax of his own motion under Section 33 imposing tax and penalty, subject to reference, even though the tax and penalty might have been imposed contrary to the provisions of the Act. As an order of the

Assistant Commissioner passed in appeal under Section 31 and that of the Commissioner passed in appeal under Section 32 are subject to the provisions of Section 66, Clauses (2) and (3), it is anomalous that the order of the Commissioner passed on his own motion imposing tax and penalty should not be subject to the same provision. What would be the position, it may be asked, where the Commissioner of Income Tax in an appeal heard under Section 32 sets aside the assessment but subsequently calls for the record suo motu under Section 33 and himself makes an assessment: or where the tax and penalty imposed by the Income Tax Officer having been set aside by the Assistant Commissioner in an appeal under Section 31, the Commissioner purporting to act under Section 33 calls for the record and makes the assessment himself and restores the tax and the penalty which had been set aside by the Assistant Commissioner? There is no reason why the assessee in such cases should not be allowed to ask for a reference under Clause (2), Section 66. Such an anomaly can be removed only by the legislature amending Section 66, Income Tax Act, so as to include orders passed by the Commissioner of Income Tax under Section 33 or by making some other provision which would render the orders of the Income Tax Commissioner, if they are arbitrary and unreasonable, liable to be questioned before a superior authority. As the only question which was referred to us was whether this Court has the right to issue the writ of mandamus I would refrain from going into the merits of the present application. In my opinion the application must be dismissed with costs. Hearing fee two hundred rupees.

**Courtney Terrell, C.J.**

I agree.

**Kulwant Sahay, J.**

I agree.

**James, J.**

I agree.

**Sankara Balaji Dhavle, J.**

I agree.

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