GUJARAT HIGH COURT

Commissioner of Income-tax

Vs.

Shantilal Punjabhai

Income-tax Ref No. 27 of 1963

(J.M. Shelat, C.J. and P.N. Bhagwati, J.)

01.10.1964

JUDGMENT

J.M. Shelat, C.J.

1.This reference arises out of re-assessment of the assessee for the assessment years 1944-1945, 1945-1946 and 1940-1947, the relevant previous years being Samvat Years 1999, 2000 and 2001 respectively. The reassessment proceedings were adopted having recourse to the second proviso to Section 34(3) of the income-tax Act of 1922. The facts for all the assessment year are similar and hence, it is possible to take the facts relevant to the assessment year 1944-1945 as typical. That was also the way in which the case was presented to us by the learned Advocate General.

2. The assessee Shantilal Punjabhai used to be assessed in the status of an individual. For the assessment year 1944-1945, he filed his returns in which he included his share of profits in the firm of Messrs. Bharat Cloth Agency. The assessee, at the material time, was a member of the Hindu undivided family known as Punjabhai Deepchand. In the course of the assessment proceedings of that family also for the assessment year 1944-1946, the Income-tax Officer found that the assessee was the nominee of the Hindu undivided family in the said firm and. therefore, included the share of profits of the assessee in the said firm in the computation of the total income of the Hindu undivided family. The Hindu undivided family thereupon went in appeal before the Tribunal and the Tribunal, by its order dated May 6, 1953, held that there was not sufficient evidence from which it could be said that the assessee was a partner in the said firm as the nominee of the Hindu undivided family, and directed that the share of profits of the assessee should be deleted from the assessment of the H. U. F.

3. Thereafter, the Income-tax Officer issued a notice under Section 34 read with Sub-Section (3) of Section 34 dated March 30, 1954 and served it on the assessee on April 1, 1954, with a view to assessing in his hands his share of profits from Messrs Bharat Cloth Agency. In due course,

the Income-tax Officer completed the assessment and added Rs. 11,159 to the total income of the assessee. On appeal by the assessee, the Appellate Assistant Commissioner confirmed the assessment and the assessee thereupon went to the Tribunal in a further appeal, contending that the second proviso to Section 34(3) was ultra vires the Constitution as being violative of Article 14 of the Constitution and further that Section 34(3) could not over-rule the main provisions of Section 34 and therefore, the reassessment was time-barred and bad in law. Reliance was placed by the assessee at that time on the decision of the High Court of Bombay in *S.C. Prashar v. Vasantsen Dwarkadas*[1], The two members of the Tribunal while agreeing that the assessee's appeal should be allowed, gave differing reasons. The Accountant Member held that once it was established that the provisions of Section 34(3) were applicable to the facts, it made no difference to its application whether the period of limitation under Section 34(1) was four years or eight years as Sub-Section (3) abrogated both of them. On the question of constitutional invalidity, he held, however, against the Department. The President, on the other hand, held that the period of limitation in this case was not eight years but four years, as it was obviously not a case of concealment and therefore, the assessment could have been re-opened under Section 34(1) on or before March 31, 1949, and as amendment of Section 34(3) was not retrospective, he was inclined to hold that the right to issue notice under Section 34 for the assessment year 1944-1945 was already barred when the Amendment Act of 1953 came into force. As regards the question of constitutional invalidity, the President was doubtful whether Article 14 applied and said that he "would leave the matter at that"

4. On these facts, three questions have been referred to us. namely –

> (1) Whether on the facts and in the circumstances of the case, and having particular regard to the finding of the Tribunal that the business belonged to Shri Shantilal, or at any rate the business did not belong to the H. U. F. of Shri Punjabhai Deepchand the proceedings started under Section 34 read with Section 34(3) Proviso (2) for assessment year 1944-1945 on 1-4-1954 were bad in law, on the ground that the provisions of the present Section 34(3) (Proviso 2) of the Act, are ultra vires the Indian Constitution.
> (2) Whether on the facts and in the circumstances of the case Shri Shantilal was a stranger to the proceedings under Section 34 read with Section 34(8) (Proviso 2) started on 1-4-1954 by his own assessing Income-tax Officer. And
> (3) whether on the facts and in the circumstances of the case and having particular regard to the finding of the Tribunal that this being not a case where the period of limitation is 8 years, the remedy or the right to reopen the assessment under Section 34(1)(b) read with 2nd Proviso to Sub-Section (8) of Section 34 lost on 1-4-1952 can be revived by providing an extended period of limitation.

5. It is not disputed by the learned Advocate General that as Section 34 then stood, the period of limitation was four and not eight years, as this was not a case of concealment under Section 34(1)(a). But the contention of the Revenue was that the action of the Department was saved by

the second proviso to Section 34(3) inserted by the Legislature by the Amendment Act 25 of 1953 where under the Act was brought into force retrospectively as from April 1, 1952 and that therefore, the re-assessment proceedings initiated by the Income-tax Officer on March 30, 1954, i.e. after the Amendment Act came into operation, were valid in law. The question, therefore, is whether the second proviso to Section 34(3) suffers from constitutional invalidity by reason of its being violative of Article 14.

[1](1956) 29 ITR 857 : AIR 1956 Bom 530

6. Before we proceed to deal with that question, it would be necessary to recapture briefly the history of the various changes that have been made in Section 34 of the Act. Section 34, before its amendment in 1939, provided for a period of one year for bringing to lax income, profits or gains escaping assessment in any year. In 1939, the entire section was substituted by a new provision, the material portion of which was that if in consequence of definite information which has come into his possession, the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed or have been assessed at too low a rate, etc., he may, in any case in which he has reason to believe that the assessee has concealed particulars of his income or deliberately furnished inaccurate particulars thereof at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gain, a notice and may proceed to assess or reassess such income, profits or gains. The section thus provided two periods in which action could be taken, a period of eight years and a period of four years. The first would apply to cases in which the Income-tax Officer has reason to believe that the assessee had concealed income or furnished inaccurate particulars thereof, and the second was to apply in all other cases. This section remained in force until March 30, 1949 when the Income-tax and Business Profits Tax (Amendment) Act, 1948, passed on September 8, 1948 substituted a new section in place of the old. That section inter alia provided that if the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, etc., or notwithstanding that there has been no omission or failure on the part of the assessee, the Officer has. in consequence of information in his possession, reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for ant year, or even under-assessed, etc.. he may in cases falling under clause (a) at any time within eight years, and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee a notice containing all or any of the requirements which may be included in a notice under Sub-Section (2) of Section 22, and may proceed to assess or re-assess such income, profits or gains, Sub-Section (3) provided that no order of assessment under Section 23, to which clause (c) of Sub-Section (1) of Section 28 applied, or of assessment or re-assessment in cases falling within clause (a) of Sub-Section (1) of Section 34, shall be made after the expiry of eight years and no

order of assessment or re-assessment in any other case shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable. Sub-Section (3) had two provisos, and since proviso (2) only is relevant for our purposes, we shall be content by reciting that proviso only. That proviso laid down that :

> "Nothing contained in this Sub-Section shall apply to a re-assessment made under Section 27 or in pursuance of an order under Section 31, Section 33, Section 33A, Section 33B, Section 66 or Section 66A."

The Amendment Act of 1948, by which Section 34, so amended, was substituted, created different conditions precedent to action in the two kinds of cases to which the periods of eight and four years were applicable in cases where the period was eight years, it was necessary that the Income-tax Officer should have reason to believe that escapement was due to the omission or failure on the part of the assessee either to make a return of his income for the year or to disclose fully and truly all material facts necessary for his assessment. In cases where the period of four years applied, it was necessary that though there was no omission or failure on the part of the assessee, the Income-tax Officer should be in possession of information which led him to believe that there was escapement of assessment. The section, as enacted by the Amendment Act of 1948, was once again amended in 1963 by the income-tax (Amendment) Act, 1953 which, in the absence of a special provision in any section, came into force from April 1, 1952. Section 18 of this Amendment Act was amended the second proviso to Sub-Section (3), and so amended the proviso read as follows :

> "Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or re-assessment may be made, shall apply to a re-assessment made under Section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Section 31, Section 33, Section 33A, Section 33B, Section 66 or Section 66A."

The Amendment Act also contained Section 31, which provided –

> "For the removal of doubts, it is hereby declared that the provisions of Sub-Sections (1), (2) and (3) of Section 34 of the principal Act shall apply and shall be deemed always to have applied to any assessment or re-assessment for any year ending before the first day of April, 1948 in any case where the proceedings in respect of such assessment or re-assessment were commenced under the said Sub-Section after the eighth day of September 1948, and any notice issued in accordance with Sub-Section (1) or any assessment completed in pursuance of such notice within the time specified in Sub-Section (3), whether before or after the commencement of the Indian Income-tax (Amendment) Act, 1953 shall, notwithstanding any judgment or order of any Court.

Appellate Tribunal or income-tax authority to the contrary, be deemed to have been validly issued or completed, as the case may be, and no such notice, assessment or re-assessment shall be called in question on the ground merely that the provisions of Section 34 did not apply or purport to apply in respect of an assessment or reassessment for any year prior to the first day of April 1948."

The effect of these provisions has to be examined in cases in which a notice or an assessment took place after April 1, 1952 as a result of a direction, such as is mentioned in the second proviso to Sub-Section (3) of Section 34 as amended by this Act. There were further amendments in 1953 as also in 1959, but we do not cite them here as they have no relevance to the facts of the present reference.

7. The question as to the validity of the second proviso to Section 34(3) as brought into the Act by the Amendment Act of 1953 arose first before the High Court of Bombay in (1956) 20 ITR 857 : AIR 1956 Bombay 530, wherein the constitutional validity of the second proviso was challenged by the assessee there by a writ petition under Article 226. In that case, a firm by the name of Purshottam Laxmidas was started on October 28, 1935 which had two partners. Dwarkadas Vussonji and Parmanand Odhavji Dwarkadas died on April 1, 1941 and Vasantsen, petitioner No. 1, was his son Another firm by the name of Vasantsen Dwarkadas was started on January 28, 1941 which had three partners. Vasantsen, petitioner No. 1, Narandas Shivji and Nandlal Odhavji. This firm was dissolved on October 24, 1946. The firm of Vasantsen Dwarkadas filed a return of income for the assessment year 1942-1948 and also claimed registration as a firm. The income lax authorities refused registration and came to the conclusion that the firm of Vasantsen Dwarkadas belonged to Dwarkadas, the father of petitioner No. 1 and they added the income of this firm to the income of Dwarkadas. In the subsequent assessment years. Vasantsen applied for registration hut that was refused. For the assessment years 1042-1943 to 1948-1949, several appeals were filed before the Income-tax Appellate Tribunal by the firm of Vasantsen Dwarkadas, both against the quantum of income assessed and also against the refusal to register the firm of Vasantsen Dwarkadas An appeal was also filed by the firm of Purshottam Laxmidas Against its assessment and there was also an appeal for the assessment year 1942-1943 by petitioner No. 1 as the heir and legal representative of his father against the decision that the income of Vasantsen Dwarkadas should be included in the income of Dwarkadas After the decision in Vasantsen's case, in the assessment year 1942-1943, the Income-tax Officer gave a finding that the firm of Vasantsen Dwarkadas was only a branch of the firm of Purshottam Laxmidas and he added the income of Vasantsen Dwarkadas in the income of Purshottam Laxmidas, and this question also came up before the Tribunal in appeals filed by Purshottam Laxmidas against their assessment and the Tribunal, by a consolidated order dated August 14, 1951 disposed of all these appeals and its decision was that there was overwhelming evidence to came to the conclusion alia the business done in the name of Vasantsen Dwarkadas belonged to the firm of Purshottam Laxmidas. With regard to the appeal filed by Vasantsen, as the representative of his father for the assessment year 1942-1943, the Tribunal's conclusion was

that the income of Vasantsen Dwarkadas should be deleted from the assessment of Dwarkadas. The Tribunal also came to the conclusion that if the Income-tax Officer could include this sum into the income of Purshottam Laxmidas, he was a liberty to do so Thus, what the Tribunal decided with regard to the income of Vasantsen Dwarkadas for the assessment year 1942-1943 was that it was erroneous to include that income in the assessment of Dwarkadas that in its opinion the income of Vasantsen Dwarkadas was the income of Purshottam Laxmidas and that if offer I could be given to that expression of opinion, the income tax authorities should do so by including this income in the assessment of Purshottam Laxmidas. In consequence of this direction, the Income tax Officer issued a notice under Section 34 on April 10, 1954 and by this notice the firm of Purshottam Laxmidas was called upon to submit a return of its total income for the year ending March 31, 1953. It was the validity of this notice that was challenged in the petition. S.T. Desai, J., as he then was, who tried the petition, held that the Income-tax Officer in issuing the notice which was clearly more than eight years after March 31, 1943, was in error because Section 34 as amended in 1953 could not apply to the assessment year 1942-1943 which did not fall within eight years from April 1, 1952, and that further retrospective operation could not be given to the section than what the Legislature had already given. He also held that the second proviso to Section 34(3), in so far as it affected persons other than assessees not parties to the proceeding, was ultra vires as it contravened Article 14, but since the petitioners were parties to the proceedings, they fell within the category of assessees. He also held that once a final assessment was arrived at and the assessment was completed, it could not be reopened or reagitated except in the circumstances detailed in Sections 34 and 35 of the Act and within the time limited by those sections. The matter was carried to the Appellate Court where Chagla, C.J. and Tendolkar, J. held, confirming the decision of Desai, J. that the remedy available to the Income-tax Officer had already become barred under Section 34 before the amendment in 1953. The vested right of the assessee could not in affected except by clear and express terms used by the Legislature. The Legislature did not intend to give any retrospective operation further back than April 1, 1952. The remedy and the right of the Officer to reassess was lost before April 1, 1952 and therefore, the notice was invalid. They also held that although limitation was a procedural law and although it was open to the Legislature to extend the period of limitation. An important right accrued to a party when the remedy against him was barred by the existing law of limitation and that vested right could not be affected except by the clearest and most express terms used by the Legislature. As regards the second proviso to Section 34(3), they held that the proviso offended Article 14 of the Constitution in so far as is affected third parties, and was, therefore, invalid to that extent. It is important to notice that the contention raised before the Appellate Bench on behalf of the assessee was in a limited form and the answer to that contention was also in a limited form. The contention reproduced at page 903 of the report was that although the amended proviso might be valid to be extent that it affected an assessee. It was bad to the extent that it affected a stranger. The answer which the Appellate Bench gave to this contention is summarised at page 903 of the report, wherein Chagla, C.J. and Tendolkar, J. have stated that in their opinion. The learned trial Judge was right in the view that he took that this proviso offended against Article 14 so far as it affected third parties.

8. The matter was carried to the Supreme Court where it was heard by a Bench consisting of five Judges and separate judgments were delivered by S.K. Das, J., Kapur, J. and Sarkar, J. and one by Hidayatullah, J. on behalf of himself and Hagbubar Dayal, J. Before the Supreme Court, three questions were raised, (1) whether the second proviso to Sub-Section (3) of Section 34 was constitutionally valid and applied to the case. (2) whether the validity of the notice dated April 30, 1953 could be challenged in view of the provisions of Section 31 of the Amendment Act of 1953, and (3) with regard to the effect of the provisions of the Income-tax (Amendment) Act, 1959. As already stated, we are not concerned with the third question and therefore, we will be concerned only with the question as to what extent the judgment of the High Court of Bombay was affected in relation to questions Nos. (1) and (2).

9. Mr. Justice S.K. Das, while considering the question as to the constitutional validity and the right of an Income-tax Officer to issue the notice, observed that the question before him had two facets, (1) whether the proviso was constitutionally valid, and (2) if it was constitutionally valid, did it apply to a case when the time limit fixed by Sub-Section (1) of Section 34 had expired some time before April 1, 1952, the date on which the proviso came into effect. So far as the first facet of the question was concerned, he observed that he found him self in agreement with the view expressed by Chagla, C.J. that no rational basis had been made out for the distinction between the two classes of people referred to by him and who really fell in the same category and with regard to whom there was no difficult in having a uniform provision of law, and that the principle laid down by the Supreme Court in *Suraj Mall Mohta and Co. v. A.V. Visvanatha Sastri*[2], applied. He

[2](1954) 26 ITR 1

held that the second proviso patently introduced an unequal treatment in respect of some out of the same class of persons. Those whose liability to pay tax was discovered by one method would he proceeded against at am time and no limitation would apply in their case, and in the case of others, the limitation laid down by Sub-Section (1) of Section 34 would apply. This, he said, "in my opinion is unequal inherent which is not based on any rational ground." He also held that the finding which the Tribunal gave in its consolidated order dated April 14, 1951 was a finding given in appeal died by Vasantsen as the legal representative of his father for the assessment year 1942-1943. In that appeal. The firm of Purshottam Laxmidas was not a party, though Purshottam Laxmidas was a party to certain other appeals before the Tribunal. He said that be found some difficulty in appreciating how Purshottam Laxmidas could be treated as an assessee within the meaning of the second proviso to Sub-Section (3) of Section 34 for the assessment year 1942-1944. If, therefore, the firm could not be so treated, then within the harrow ground is led by Desai, J. the proviso would be of no assistance to the appellant. Regarding the second facet of the question, he first held that there was nothing in the proviso which would give it retrospective effect beyond April 1, 1952. Even before that date, the period of eight years from March 31, 1943 had already expired and the legislation which provided that from April 1, 1953 there would be no limitation in respect of certain cases, could not revive a remedy which was already lost to

the Income-tax Officer. He then observed that the proposition of law was well settled beyond any doubt that although limitation was a procedural law and although it would be open to the legislature to extend the period of limitation, an important right accrued to a party when the remedy against him was barred by the existing law of limitation and a vested right could not be affected except by express terms used by the statute or the clearest implication allowing therefrom, he therefore came to the conclusion that the Income-tax Officer bad no jurisdiction to issue the notice on the firm of Purshottam Dwarkadas under the second proviso to Sub-Section (3) because the time limit fixed by Section 34(1) had expired long before that proviso came into effect and the proviso did not in express terms or by necessary implication revive the remedy already lost before April 1, 1952. Dealing with the second question as let the effect of Section 31 of the Amendment Act, 1953, the learned Judge pointed out that the section fell into two parts. The first part was declaratory of the law and stated that Sub-Sections (1), (2) and (3) of Section 34 shall apply and shall be deemed always to have applied to party assessment or reassessment for any year ending before April 1, 1948 in any case where proceedings in respect of such assessment were commenced under the said Sub-Sections after September 8, 1948, and any notice issued in accordance with Sub-Section (1) or any assessment completed in pursuance of such notice within the time specified in Sub-Section (3), whether before or after the commencement of the Amendment Act of 1953, shall be deemed to have been validly issued, and the second part inter alia stated that no such notice shall be called in question on the ground merely that the provisions of Section 34 did not apply or purport to apply in respect of an assessement order prior to April 1, 1948. After considering the judgment of the Calcutta High Court in *Income-tax Officer v. Calcutta Discount Co. Ltd*[3]*.,* the learned Judge held that in its true scope and effect. Section 31 of the Amendment Act of 1953 put beyond any doubt that the view expressed by the learned Chief Justice of the Calcutta High Court in the aforesaid case was the correct view and that the amended Section 34 applied to assessment years prior to 1948-1949, but it did not say that an assessment which had become final and in respect of which, re-assessment proceedings

[3](1953) 3 ITR 471 : AIR 1953 Cal 721

had become lime-bar red before the amended section came into force, could be re-opened. He also staled that Section 31 did not say that the periods of limitation laid down in Sub-Sections (1) and (3) o) Section 34 were being done away with, but that on the contrary, the first part of Section 31 staled that the proceedings must have been commenced after September 8, 1948 (the date on which the Amending Act of 1948 came into force) under the said sub-sections and the notice must have been issued in accordance with Sub-Section (1). The Income-tax Officer therefore could commence proceedings under the said Sub-Sections or issue a notice in accordance with Sub-Section (1) only when he obeyed the injunction as to time laid down therein. Then only he could be said to have commenced the proceedings or issued a notice in accordance with the Sub-Sections. If he has done that and commenced proceedings after September 8, 1948, then the second part of the section provided that the notice or the assessment should not be called in question on the ground merely that the provisions of Section 34 did not apply or purport to apply in respect of any year prior to April 1, 1948. If there has been

compliance with the provisions of the Sub-Sections including the time limit fixed therein, then the notice issued or the assessment made was not liable to be challenged on the ground that the amended Section 34 did not apply in respect of an order prior to 1948-1949. The section did not abrogate the periods of limitation laid down in the relevant Sub-Sections of Section 34. If it did, it would be in conflict with Section 34 and the ground taken would be such conflict and not merely the ground that the provisions of Section 34 did not apply to any year prior to 1948-1949. On this reasoning, he came to the conclusion that Section 31 of the Amendment Act of 1953 did not validate the notice dated April 30, 1954, long before which date the assessment had become final and in respect of which reassessment proceedings had become time-barred and therefore, the notice in question was not issued in accordance with Sub-Section (1) of Section 34, and the first part of Section 31 required that the notice must be issued before the second part thereof could give any protection to it Kapur, J., at page 38 of the report, also came to the conclusion that the respondent's sub mission that there was no reasonable basis for classification between those who have escaped assessment under Section 34(1)(a) and those third parties who have escaped income-tax but with regard to whom, a direction or an order is made under proviso (2) to Section 34(3), was well founded and therefore, the provision was unconstitutional and hit by Article 14. Regarding the effect of Section 31 of the Amendment Act of 1953, he concluded that the important words in Section 34 were "in accordance with" which meant that the notice issued had to be in conformity with Sub-Section (1) of Section 34 which would include all the formalities and limitations therein mentioned. Therefore, the notice had to be one within eight years' period and at the impugned notice in that case was beyond that period, it could not be called a notice "in accordance with" and therefore, the deeming provision as to the validity was not applicable to such a notice Hidayatullah and Raghubiir Dayal, JJ. reached conclusions on this question different from those of S.K. Das and Kapur, JJ. As can be seen from page 46 of the report. Sarkar, J. held on the facts of the case that the notice was validated by Section 4 of the Income-tax (Amendment) Act, 1959 and on that question, being in agreement with Hidayatullah and Raghubar Dayal, JJ., the appeal was allowed. But as already stated, we are not concerned in this case with the effect of Section 4 of the Act of 1959 but are concerned only with the question as to the constitutional validity of the second proviso to Section 34(3) and the effect of the validating Section 31 of the 1953 Act. On the question of the constitutional validity of the proviso, Sarkar, J. plainly agreed with S.K. Das and Kapur, JJ. for the reasons given by him in another case, namely, *Commissioner of Income Tax v. Sardar Lakhmir Singh, also reported in the same volume*[4]*,* In the case of Sardar Lakhmir Singh, (1963) 49 ITR (SC) 70 too, there was division of opinion, S.K. Das, Kapur and Sarkar, JJ. forming the majority and holding that the second proviso to Section 34(3) was invalid in so far as it affected persons other than assessees on the ground that it infringed Article 14, and Hidayatullah and Raghubar Dayal, JJ. holding to the contrary. But regarding the question as to whether Section 31 of the Amendment Act of 1953 validated the notice or not, Sarkar, J. did not decide it. The result, therefore, was that so far as the question of constitutional validity was concerned, the majority view clearly was that the second proviso to Section 34(3) was invalid, being violative of Article 14 in so far as it affected persons other than assessees. On the question as to the right of the Income-tax Officer to reopen an

assessment which is barred under Section 34 and no subsequent enlargement of time can revive such right by Section 31 of the Amendment Act of 1953, as we have pointed out, in *Mathuradas Govinddas v. G.N. Gadgil*[5], the Bombay decision in *Prashar v. Vasantsen*[6], still holds good and is binding upon us as on this point, out of the five learned Judges, two took one view, two a contrary view and the fifth Judge. Mr. Justice Sarkar, did not express any opinion at all and therefore, as held by the Bombay High Court, Section 31 did not save the right of the taxing authorities to issue the notice after the right to do so was time-barred under Section 34(1).

10. Before we part with this question, we may mention a recent decision of the High Court at Bombay in *M.B. Thakar v. S.P. Pande*[7], pointed out to us by the learned Advocate General as a decision which has interpreted the Supreme Court decision in *Prashar v. Vasantsen*[8]. The learned Judges there have observed that the Supreme Court has there declared the second proviso to Section 34(3) as void on the ground of its being hit by Article 14. The learned Judges have then stated that the point upon which the Division Bench decided the case was a different point, not the constitutional point, but the question of the second proviso to Sub-Section (3) of Section 34 being ultra vires of Article 14 had been raised before the learned trial Judge against whose decision the Division Bench heard a Letters Patent appeal. They have also pointed out that the learned trial Judge upheld that objection and held that the second proviso infringed Article 14. At page 175 of the report, they further point out that the learned trial Judge distinguished between an assesses against whom a finding was recorded or a direction given, and other persons. Who were not assessees, and upheld the objection on the score of unconstitutionally in the case of the latter class. In appeal, the Division Bench upheld the decision of the learned trial Judge, but not on the point of unconstitutionality but upon an interpretation of the relevant provisions of the Income-tax Act itself. They then observe :

> "When the matter came before the Supreme Court, it seems to us that though a decision was taken only by a majority there is a clear pronouncement that the second proviso to Section 34(3) offends against Article 14. The decision is to be found clearly stated in the judgment of Mr. Justice A.K. Sarkar in the last but one paragraph where he referred to the decision which he was about to deliver on that day in (1968) 49 ITR (SC) 70 ."

On this basis, the learned Judges held that the decision of the Supreme Court clearly ruled out any possibility of the second proviso to Section 34(3) being invoked in the case

[4](1963) 49 ITR (SC) 70 [6](1956) 29 ITR 857; AIR 1956 Bom 530 [8](AIR 1963 SC 1356)
[5] ILR (1964) 5 Guj 713 [7] AIR 1964 Bom 170

before them because that decision was binding upon the Court. We may, with respect, point out that it would not be strictly correct to say that the Division Bench which heard the Letters Patent appeal in Vasantsen's case, (1956) 29 ITR 857 : AIR 1956 Bombay 530 had not considered the question of the validity of proviso (2) to Section 34(3). In fact, the Division Bench expressly held, as already pointed out earlier, that that proviso was bad in so far as it affected persons other than the assessees and that is clear from the conclusion stated at p. 903 of the report in (1950) 29 ITR 867 : AIR 1956 Bombay 530 at p. 537 and the limited contention raised before them and

reproduced at p. 900 of that report, (ITR) . We may also point out, again with respect, that it would not be quite accurate to say that the majority view in the Supreme Court decision was an unqualified view that the proviso was bad, for Sarkar, J. has clearly stated that it was bad in so far as the proviso affected persons who were not assessees.

11. From the distinction made in *Prashar v. Vasantsen, both by the Supreme Court*[9]*,* as also the High Court of Bombay, (1956) 29 ITR 857 : AIR 1956 Bombay 530 the learned Advocate General contended that in the present case, it could not be said that the assessee Shantilal was not an assessee in the assessment proceedings against the Hindu undivided family because though he was assessed in the status of an individual, he was nevertheless a member of the H. U. F. as found by the Tribunal which Hindu undivided family was an assessee, and being a member of that Hindu undivided family, he must be held to be an assessee notwithstanding the Hindu undivided family being technically a separate entity under the Income-tax Act. Reliance was sought to be placed on the Supreme Court decision in *Income-tax Officer v. Murlidhar Bhagwandas*[10]*,* and in particular on the observations made at p. 846 of the report (ITR) by Subba Rao, J. who spoke for the majority. At p. 346 (of ITR) the learned Judge has observed, commenting on the expression any person" used in the second proviso, that such an expression in its widest connotation, might take in persons, whether connected or not with the assessee, whose income for any year has escaped assessment, but that such a construction could not be accepted, for that expression was necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be. Therefore, a person within the meaning of that expression in proviso 2 must be one who would be liable to be assessed for the whole or part of the income that went into the assessment of the year under appeal or revision. The learned Judge has then observed :

> "If so construed, we must turn to Section 31 to ascertain who is that person other than the appealing assessee who can be liable to be assessed for the income of the said assessment year. A combined reading of Section 30(1) and Section 31(3) of the Act indicates that cases where persons other than the appealing assessees might be affected by orders passed by the Appellate Commissioner. Modification or setting aside of assessment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be. In such cases though the latter are not eo nomine parties to the appeal, their assessments depend upon the assessments on the former. The said instances are only illustrative. It is not necessary to pursue the matter further. We would, therefore, hold that the expression 'any person' in the

[9](AIR 1963 SC 1356)
[10](1964) 52 ITR 335

> setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal."

The question which arose in that decision was as regards the meaning of the expression "assessee or any person" used in the second proviso to Sub-Section (3) of Section 34 in connection with assessment or re-assessment made in consequence of or to give effect to any finding or direction contained in an order under Section 31 or Section 33 or Section 33A or Section 33B or Section 66 or Section 66A. The respondent there was a firm carrying on business in different lines. It was assessed to income-tax under Section 23(4) for the assessment year 1949-1950 on the ground that the notice issued under Section 22(2) and (4) had not been complied with. The assessment, however, was cancelled under Section 27, but before cancellation it was found that an interest income received by the assessee had escaped assessment as the assessee bad failed to disclose the same. The Income-tax Officer issued a notice under Section 34(1)(a) for the assessment year 1949-1950 on the ground that the interest income had escaped assessment in that assessment year. After the assessment of that year was set aside under Section 27, the Income-tax Officer, ignoring the notice issued by him under Section 34(1)(a), included that amount in the fresh assessment made by him. The assesses preferred an appeal and the Appellate Assistant Commissioner in his order held that certain bonds, in respect of which the said interest income arose, were received by the assessee in the previous accounting year and therefore directed that the sum representing interest on the bonds should be deleted from the assessment for the year ending 1949-1950 and included in the assessment in the assessment year 1948-1949. Pursuant to this direction, the Income-tax Officer initiated proceedings under Section 34(1) of the Act in respect of the assessment year 1948-1949. The notice issued was served on the respondent on December 5, 1957. Thereupon, the assessee filed a petition in the High Court for quashing the said proceedings on the ground that the proceedings were initiated beyond the time prescribed by Section 34 of the Act. The Supreme Court by a majority judgment held, first, that the year was a unit of assessment and therefore, assessment or reassessment made in consequence of or to give effect to any finding or direction contained in an order under any of the sections set out in the proviso must relate to the assessment of the year under appeal, revision or reference, as the case may be. But, it was contended that the words "any person" used in the proviso concluded the matter in favour of the Department and it was in the light of this contention that the Supreme Court construed the meaning of those words. But the question before the Supreme Court was regarding the scope and extent of those words, that is to say, against whom a finding or a direction can be said to be a finding or a direction within the meaning of the proviso, and not the question as to the constitutional validity of the proviso or the extent of such invalidity. The decision on that question in (1956) 29 ITR 857 : AIR 1956 Bombay 5110 was never called in question and had to be considered That being the position, the limit laid down in (1956) 29 ITR 857 AIR 1956 Bombay 530 as in, the constitutional invalidity of the proviso and the distinction there made between assessees and non assessees remain intact.

12. The observations made at p. 346 of the report (ITR) clearly show that the words "any person" as used in I he proviso mean a person oilier than an assessee and therefore, under Vasantsen's case. (1956) 29 ITR 857 : AIR 1956 Bombay 530 the proviso would be invalid as against a

person, and consequently a notice for reassessment against 3 person who is not an assessee based on the second proviso and against whom the right of the Income lax Officer was barred on April 1, 1952, would be invalid. The Supreme Court in this decision approved the observations made by a Division Bench of the Allahabad High Court in *Hazari Lal v. Income tax Officer*[11], and overruled a later decision of a Full Bench of the same High Court in *Lakshman Prakash v. Commissioner of Income Tax*[12], so far as. the Full Bench gave a wider meaning to the word "finding" than the one given by the Division Bench in Hazari Lal's case, (1960) 39 ITR 265 : (AIR 1960 Allahabad 97. The learned Advocate General argued that though the Supreme Court disapproved the decision in (1963) 48 ITR 705 : (AIR 1963 Allahabad 172 (FB)) on the meaning of the word "finding", it did not disapprove the other conclusion of the Full Bench which was that though an Appellate Assistant Commissioner might not have power under Section 31(3)(b) to direct assessment to be made on a person who was not a party to the appeal before him. a Hindu undivided family cannot be said to be a different chargeable legal entity from the members who compose it, and the direction of the Appellate Assistant Commissioner to make an enquiry and to assess A as an individual if the income did not belong to the family but belonged to A as an individual and the assessment of A as an individual by the Income-tax Officer in pursuance of such direction were not illegal. He also relied upon the observation there made that at any rate as A had returned income as held by an individual and contended on appeal that the income belonged to him as an individual, be was estopped from contending that the assessment on him as an individual was illegal. The learned Advocate General pointed out to us the observations made by the Full Bench as pp. 712 to 713 of the report, (ITR) where the High Court has observed as follows :

> "The Income-tax law makes a distinction between an individual and a Hindu undivided family; though it is a human being who is being assessed, he can be assessed either as an individual or as a Hindu undivided family. If he is assessed as an individual, his income as an individual will be assessed, whereas, if he is assessed as a Hindu undivided family, the income of the Hindu undivided family will be assessed A human being may have two capacities; he may be an individual and also a Hindu undivided family, and in that case, be will constitute two assessees, (1) he, as an individual, to be assessed on his individual income, and (2) be as a Hindu undivided family, to be assessed on the income of the Hindu undivided family."

At p. 713 of the report. (ITR) the learned Chief Justice who spoke for the Bench, has also stated

> "I do not appreciate life argument of Sri R.S. Pathak that Lakshman Prakash before the Appellate Assistant Commissioner was a legal entity different from alia against whom the second assessment order was passed by the Income-tax Officer. Lakshman Prakash was the appellant before the Appellate Assistant Commissioner and he is the person against whom the second assessment order has been passed; the only difference is that in the appeal he challenged his being assessed to tax on the basis of the income derived by him

as a Hindu undivided family and now he

[11](1960) 39 ITR 265, at p. 267 : AIR 1900 All 97

[12](1968) 48 ITR 705 : AIR 1963 All 172 (KB)

has been assessed on the basis of the income derived by him as an individual.

Really he was before the Appellate Assistant Commissioner in both capacities. He was before him as a Hindu undivided family, because he was assessed as such, but he was also there as an individual, because he claimed before the Appellate Assistant Commissioner that he had filed the return as an individual and could have been assessed only on the income derived by him as such."

There is also a later decision of a single learned Judge of that High Court in *Mukand Lal v. Income-tax Officer*[13], where on a similar point, the learned Judge gave a similar decision following, as he was bound to follow, the decision in (1963) 48 ITR 706 : AIR 1963 Allahabad 172 FB). In the first place, the observations above-quoted from Lakshman Prakash's case, (1963) 48 ITR 705 : (AIR 1983 Allahabad 172 FB) would appear to be contrary to the observations made by the Supreme Court In (1964) 32 ITR 335 at p. 346 : (AIR 1965 Supreme Court 342 at p. 349 where the Supreme Court in clearest terms has stated that the expression "any person" used in the second proviso would mean a person other than the appealing assessee and who can be liable to be assessed for the income of a particular assessment year and that, modification or setting aside of an assessment made on a firm, a joint Hindu family, association of persons, for a particular year might affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be, and such persons, therefore, would fall within the category of "any person" used in the second proviso to Section 34(3). In the second place, it is somewhat difficult to appreciate how an individual member of a Hindu undivided family can be said to have two capacities under the income-tax Act in view of the conceptual treatment given to a Hindu undivided family under the Income-tax Act if it were to be held that a member of a Hindu undivided family possesses two capacities for the purposes of the Income-tax Act, one in the status of an individual and the other in the status of a Hindu undivided family, the result would be that there would be two assessees in respect of the taxable income of a Hindu undivided family, namely, the Hindu undivided family and a member of such family. The Income-tax Act however does not contemplate two different assessees in the same assessment year for the same taxable income. The learned Advocate General then argued that apart from the observations made by the Allahabad High Court, a Hindu undivided family in reality consists of members, so that for the purposes of assessment proceedings, the members of such a family are the real persons who are concerned. In support of this proposition, he gave an illustration wherein a Hindu undivided family would be possessed of immovable properties, the income of which would be taxed in the hands of the Hindu undivided family. He argued that after the tax has been paid on such income by the Hindu undivided family, the surplus income would go into the hands of the members but such surplus income would not be liable to be taxed in the hands of the members. That being so, he argued, it

would not be possible to say that the members of such a family are not the assessees, for if they are non-assessees or strangers to the assessment proceedings against the family, the balance of income that would go into the hands of such members would have to be taxed. In our view, the learned Advocate General is not right In the illustration which he gave, for the surplus balance which would go into the hands of the members of the family cannot be taxed in their hands because the

13(1963) 49 ITR 354 (All)

same income is not liable to be taxed at two different points, and in the case of a Hindu undivided family, such surplus income which goes into the hands of the members of the family would not be liable to tax by reason of the provisions of Section 14(1) of the Act. The learned Advocate General then argued that in the present case, the assessee himself had filed a return showing therein the share of the profits in the firm of Bharat Cloth Agency as his separate income. That income was wrongly taxed by the taxing authorities not in his hands but in the hands of the Hindu undivided family. That being so, according to the learned Advocate General, it cannot be said that the assessee Shantilal was not an assessee in respect of the assessment proceedings taken out against the Hindu undivided family, first because he was a member of that family, and secondly, because he himself had filed a return in which he had shown this income to be his individual income. He, therefore contended that the assessee being not a stranger the decision of the Supreme Court in Vasantsen's case AIR 1963 Supreme Court 1356 would not apply, and so far as he is concerned, there would be no constitutional invalidity to the second proviso of Section 34(3). It must, however, be borne in mind that there were two separate and distinct assessment proceedings, one in respect of the assessee in his status as an individual and the other in respect of the Hindu undivided family. The assessment proceedings in respect of assessee Shantilal were in respect of his income arising from his self-acquired and separate property. The assessment proceedings against the H. U. F. were proceedings against the entire entity, and though assessee Shantilal was a member of that family the assessment was on the income derived by the H. U. F. from the property or business of that H. U. F. In that assessment, the income accruing or arising from the separate properly of the assessee Shantilal could not be assessed, as the business carried on by the assessee Shantilal was not the business of the H. U. F. The income-tax Officer held that Shantilal was the nominee of the Hindu undivided family, meaning thereby that the business belonged to the Hindu undivided family, find it was that conclusion of the Income-tax Officer which was reversed by the Tribunal, the Tribunal holding that the Department had failed to prove that the assessee Shantilal was the nominee of the family, in other words, that the income arising from the firm's business was the income of the Hindu undivided family. The direction given by the Tribunal was on the question which was between the Department and the Hindu undivided family and the only finding that could be given by the Tribunal was between the two parties, namely, the Hindu undivided family and the Department, and not between the Department and the assessee Shantilal who was not an assessee nor a party to those assessment proceedings. Therefore, if any action had to be taken in consequence of the finding or the direction given by the Tribunal, that action could be taken not against the assessee Shantilal, but against the H. U. F it may be that the assessee Shantilal may fall within the scope

of the expression "any person" in the second proviso according to the decision of the Supreme Court in (1964) 52 ITR 335 , but, as stated earlier, not as an assessee but as a person other than the assessee who might be affected by the order of the Tribunal. That being so, the assessee Shantilal was not an assessee but a stranger to the proceedings before the Tribunal and consequently, in his case, the second proviso to Section 34(3) of the Act cannot be invoked by the revenue.

13. Lastly, the learned Advocate General pointed out to us Section 63 of the Act which pro vides that a notice can be served, in the absence of the Karta or manager of a Hindu undivided family, upon any adult member of the family. The section was relied upon by the learned Advocate General in order to show that a member of a Hindu undivided family cannot be said to be a non-assessee or a stranger to the assessment proceedings against the H. U. F. In our view, there is no substance in this contention, for Section 63 provides a permissive method of service upon an H. U. F. and recognises service on a member of the H. U. F. in the absence of the manager of the family upon an H. U. F. Such a permissive provision being merely a procedural provision cannot possibly be held to render a member of a Hindu undivided family as an assessee in the assessment proceedings against a Hindu undivided family.

14. For these reasons, it is not possible to accede to the contention urged by the learned Advocate General that the assessee Shantilal was an assessee for the purposes of the assessment proceedings against the Hindu undivided family Our answers to the questions, therefore, are as follows :

Question No. 1 - in the affirmative.
Question No. 2 - in the affirmative, and
Question No. 3 - in the negative

15. The Commissioner will pay to the respondent the costs of this reference.
Reference answered accordingly.