BOMBAY HIGH COURT

S.C. Prashar

Vs.

Vasantsen Dwarkadas

Appeal No. 1 of 1955; Misc. No. 266 of 1954

(Chagla, C.J. and Tendolkar, J.)

05.10.1955

JUDGMENT

Chagla, C.J.

1. This appeal arises out of a petition filed challenging a notice issued by the Income-tax Officer under Section 34, Income-tax Act and praying for a writ restraining the Income-tax Officer from proceeding further pursuant to that notice.

2. It appears that the firm of Purshottam Laxmidas, who are the second petitioners, was started on 28-10-1935 and in this firm there were two partners Dwarkadas Vussonji and Parmanand Odhavji. Dwarkadas died on 1-4-1946 and Vasantsen the first petitioner is his son. Another firm by the name of Vasantsen Dwarkadas was smarted on 28-1-1941 and in that firm there were three partners, Vasantsen the first petitioner, Narandas Shivji and Nanalal Odhavji, and this firm was dissolved on 24-10-1946. The firm of Vasantsen Dwarkadas filed a return of income for the assessment year 1942-43 and it also claimed registration as a firm. The Income-tax Authorities refused registration and came to the conclusion that the firm of Vasantsen Dwarkadas belonged to Dwarkadas the father of the first petitioner, and it added the income of this firm to the income of Dwarkadas. In the subsequent assessment years Vasantsen Dwarkadas applied for registration but registration was refused. For the assessment years 1942-1943 to 1948-49 several appeals were filed before the Income-tax Appellate Tribunal by the firm of Vasantsen Dwarkadas both against the quantum of income assessed and against the refusal of the Income-tax Officer to register the firm of Vasantsen Dwarkadas. An appeal was also filed by the firm of Purshotam Laxmidas against its assessment and there, was also an appeal for the assessment year 1942-43 by the first petitioner 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 1942-43 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 to the income of Purshottam Laxmidas, and this question also came up before the Income-tax Appellate Tribunal in the appeals filed by Purshottam Laxmidas against their assessments and the Income-tax Tribunal by a consolidated order dated 14-8-1951 disposed of all these appeals, and its decision was that there was overwhelming evidence to come to the conclusion that, 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 1942-43, the opinion expressed by the Tribunal was that the income of Vasantsen Dwarkadas should be deleted from the assessment of Dwarkadas. It further expressed the opinion that if the Income-tax officer could include this sum in. the income of Purshottam Laxmidas he was of course at liberty to do so. Therefore in substance what the Appellate Tribunal decided with regard to the income of Vasantsen Dwarkadas for the assessment year 1942-43 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 effect could be given to that expression of opinion by the Income-tax Authorities, the Income-tax Authorities should do so by including this income in the assessment of Purshottam Laxmidas. Armed with this opinion of the Income-tax Tribunal, the Income-tax Officer issued a notice under Section 34. Income-tax Act on the 30-4-1954 and by this notice the firm of Purshottam Laxmidas was called upon to submit a return of its total income for the year ending 31-3-1953. It is this notice which is challenged by the petitioners.

3. Under Section 34, sub-Clause (1)(a) if the Income-tax Officer has reason to believe that income has escaped tax owing to an omission or failure on the part of an assessee to make a return, or under sub-Clause (b) notwithstanding that there has been a return of income in consequence of information in the possession of the Income-tax Officer he has reason to believe that income has escaped tax, authority is conferred upon the Income-tax Officer to issue a notice upon the assessee calling upon him to make a return pursuant to the provisions of the income-tax Act. A time limit is fixed for the issue of notice under Clauses (a) and (b). Under clause (a) notice must be issued at any time within eight years from the end of the assessment year, and in case falling under clause (b) notice must tae issued within four years from the end of the assessment year. Sub-Section (3) of Section 34 provides a period of limitation for the making of an order cl assessment and in the case failing under clause (a) the order has to be made before the expiry of eight years and in the cases falling under clause (b) it has got to be made before the expiry of four years from the end of the year in which the income was first assessable. But the first proviso to Sub-Section (3) gives an additional period of one year where a notice under Section 34 has been served and the assessment can be completed within one year after the service of the notice even though such period may exceed eight years or four years as the case may be. There was a second proviso to Sub-Section (3) and that was to the effect

> "Provided further 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."

Therefore, the period of limitation laid down in Sub-Section (3) with regard to the making of the order of assessment was not to apply to re-assessments made under the various sections enumerated in this second proviso. This second proviso was amended by Act 25 of 1953. That Act provided that it was deemed to have come into force on 1-4-1952 and it received the assent of the President on 24-5-1953, and the amended proviso was to this effect :

> "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 reassessment made under Section 27 or to an assessment or re-assessment made on the asses-see 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 36A."

The important alterations made in the second proviso will be immediately noticeable. In the first place, the second proviso was no longer a proviso to Sub-Section (3) but it was a proviso to the whole section. In the second place, no limitation was to apply in cases falling under the second proviso not only with regard to an assessment made on the assessee but also against third person or against a person who was a stranger to the assessment, and whereas the original proviso limited its operation to an order made under the various sections enumerated, the amended proviso extended its ambit by providing that the assessment or re-assessment may be made in consequence of or to give effect to any finding or direction contained in an order under the various sections.

4. It is under this amended second proviso that the Income-tax Officer has purported to issue this notice. It may be pointed out that as the assessment year 1942-43 ended on 31-3-1943 and inasmuch as the notice was issued on the 30-4-1954, whether the period of limitation for the giving of notice was four years or eight years, the notice was beyond time judged by the period of limitation laid down in the body of Section 34 itself, and therefore unless the Income-tax Officer could bring himself within the ambit of the proviso the notice will be bad. The unamended proviso would not help the Income-tax Officer because he is not seeking to assess the assessee pursuant to an order made by the Income-tax Tribunal. He is seeking to assess a third party, a stranger to the assessment, and it is because of this that the Income-tax Officer is compelled to contend that the second proviso being in operation when the notice was issued; on 30-4-1054 the notice must be governed by the amended proviso and not by the original proviso.

5. Therefore, on the validity of the notice, the very short question that we have to consider is whether, if the remedy or the right to issue a notice under Section 34 was already barred at the date when the amending legislation came into force, the amending legislation could revive the remedy by providing an extended period of limitation. The amending Act came into force on 1-

4-1952 and on that date the period of eight years from 31-3-1943 had already expired. Therefore the remedy available to the Income-tax Officer of assessing the assessee in respect of escaped income had already become barred. Could a legislation by providing that from 1-4-1952 there would be no limitation at all in respect of that remedy revive the remedy which was already lost to the Income-tax Officer ? It seems to us that the proposition of law is settled beyond any doubt that although limitation is a procedural law and although it is open to the Legislature to extend the period of limitation, an important right accrues to a party when the remedy against him of another party is barred by the existing law of limitation and that vested right cannot be affected except by the clearest and most express terms used by the Legislature. It is not suggested that a sovereign Parliament cannot take away vested rights, but the Court must be loath to construe any legislation as interfering with vested rights unless the law making authority has clearly so provided. What the Advocate-General is really contending for is to give retrospective effect to an Act which came into force on 1-4-1952 by depriving the assessee of the right which had accrued to him of no further action being taken against him under Section 34. As the law stood, the assessee could say to himself on 1-4-1952 that any fear of proceedings being taken under Section 34 was effectively at an end, and therefore unless there is anything in the second proviso which would lead us to the conclusion that the Legislature not only brought into force the Act, which received assent on 24-5-1953, on 1-4-1952, but it revived a remedy already lost, we could not possibly accede to the contention that the amended proviso has a retrospective effect in the manner suggested by the Advocate-General.

6. An argument was advanced by the Advocate-General that if the right is not barred and only the remedy is barred, the remedy could be revived by the Legislature, and a rather curious suggestion was made that the Income-tax Department had the right to collect income-tax from all persons who were liable to pay tax, that that right never got barred, and also the liability of every person to pay tax which was due from him also continued indefinitely, and therefore it was argued that all that the Legislature was doing was to revive a remedy in respect of a right which was still subsisting. This distinction between right and remedy as far as Section 34 is concerned is entirely out of place. In one sense the Income-tax Officer has the right to issue a notice under Section 34 provided the notice is within the period of limitation. In another sense it may be said that the remedy of the Income-tax Officer to bring to tax escaped income is available to him under Section 34 provided he avails himself of that remedy within the period of limitation. But no distinction can be drawn as far as Section 34 is concerned between the right of the Income-tax Officer and the remedy available to him. If the remedy is lost, the right is also lost, and if the right is lost, much more so is the remedy. The Legislature itself has provided a complete answer to the argument advanced by the Advocate-General, if according to the Advocate-General on the passing of this Act and the enacting of the amended second proviso the remedy under Section 34 was revived irrespective of when that remedy became barred, then it is difficult to understand why the Legislature in terms provided that the Act should come into force on 1-4-1952. Therefore, the Legislature provided the terminus for the purpose of considering questions of limitation as 1-4-1952. If on that date the remedy was not barred, then undoubtedly the extension

of limitation by the amended second proviso would apply. But if the remedy was barred, then the Legislature did not want to go further back than 1-4-1952.

7. In support of his proposition the Advocate-General has relied on a decision of the Calcutta High Court in *Income-tax Officer Companies District 1, Calcutta v. Calcutta Discount Co. Ltd*[1]*.,* In that case the Calcutta High Court considered the amendment of Section 34 introduced by Act 48 of 1948, and the question that arose was whether the amended section applied to assessments for the years 1942-43, 1943-44 and 1944-45, and the Calcutta High Court held that the amended section did apply. It should be noticed that the amended Section 34 did not in any way affect the question of limitation. The period of limitation under the amended Section 34 continued to be the same as it was before the amendment, and the learned Chief Justice in his judgment is at pains to point out at two places that the amended section would not have had retrospective effect if it had attempted to revive a remedy which had already been barred. At p. 490 the learned Chief Justice says :

[1](1953) 23 ITR 471 : AIR 1953 Cal 721

> ".... and since the time limits for so proceeding were the same, the new section affects no rights previously unaffected."

And at the bottom of that page :

> "It is true that if tune is enlarged by a new enactment, but at the date when the enactment comes into force, no proceeding can any longer be commenced in a particular case under the previous law, the new enactment will not apply to such a case."

And lower down on p. 491 :

> "As to time, none has a vested rights in a period of limitation and a change of the period which does not altogether take away a right of action subsisting at the date of change or revive a right, then already barred under the old law, can always be made and the period applicable thereafter will be the new period, whether enlarged or abridged."

Therefore, in our opinion, it is clear that the notice issued by the Income-tax Officer under Section 34 which is challenged by the petition under appeal was a notice that was issued out of time, and is therefore invalid.

8. The second question that has been urged before us is that even so the petitioner had no right to maintain this petition and obtain an appropriate writ against the Income-tax Officer. The startling argument was seriously urged before the learned Judge below, and perhaps not equally seriously was urged by the Advocate General before us, that that High Court has no jurisdiction to issue a writ under Article 226 of the Constitution in a case where a question arises under the Income-tax

Act. What is said is that the Income-tax Act sets up its own machinery for the purpose of deciding questions that arise under that Act, and if an assessee is dissatisfied with any action taken by the income-tax officer, then he must get his grievance redressed by resorting to the machinery under the Act and not by coming to the High Court for a prerogative writ under Article 226. It is said that if the notice under Section 34 was bad and the assessment made under that notice was invalid, it was open to the assessee to appeal to the Appellate Assistant Commissioner, then to appeal to the Appellate Tribunal, and finally to come to the High Court under Section 66. But the law does not permit, it is said, an assessee to by-pass the machinery specially set up and by a short cut to approach the High Court and get the necessary relief.

It is too late in the day to argue that the powers of the High Court under Article 226 and Article 227 are not of the widest. Except for the territorial limitation placed upon it by the Constitution, there is no limit upon the right or the power of the High Court to issue a writ under Article 226 or Article 227. Undoubtedly, the Courts for their own guidance have put limitations upon their very wide power, but those are self-imposed limitations, they are not legal or constitutional limitations. The Supreme Court has emphasised this position in law in a recent decision in *K.S. Rashid and Son v. The Income-tax Investigation Commission*[2], The Supreme Court points out in that judgment :

> "Article 226 of the Constitution confers on all the High Courts new and very wide powers in the matter of issuing writs which they never possessed before. There are only two limitation placed upon the exercise of such powers by a High Court; one is that the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction', that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. The other is that the person or authority to whom the High Court is empowered to issue writs 'must be within those territories' and this implies that they must be amenable to its jurisdiction either by residence or location within those territories." Therefore, apart from these two limitations, it is for the High Court to decide whether in a particular case it will or it will not issue a writ.

[2] AIR 1954 SC 207

9. Strong reliance was placed by the Advocate-General on a judgment of the Punjab High Court in *Lala Lachman Das Nayar In re*[3]*.,* In that case Kapur and Soni, JJ. held that a challenge could not be made to the validity of a notice under Section 34 by a writ of prohibition or mandamus under Article 226 of the Constitution. When one looks at the facts of that case it is clear that in all the matters which were considered by the Punjab High Court in that decision not only notice had been issued under Section 34 but assessment had been completed, and what was really challenged in substance was not so much the notice as the invalid assessment made pursuant to a bad notice. If an assessee does not challenge the notice issued under Section 34 and allows the Income-tax Authorities to assess him and then challenges the assessment, the position may be very different, because then it may be said that the Income-tax Act itself gives him an adequate remedy for the purpose of challenging the assessment. But the case we are dealing with is where

the assessee immediately on the issue of the notice under Section 34 challenges the competency or the authority of the Income-tax Officer to take any assessment proceedings pursuant to that notice and attacks the very basis of the assessment proceedings which the Income-tax Authorities propose to initiate.

10. This position is made clear and emphasised by the Supreme Court in its judgment in *State of Tripura v. Province of East Bengal*[4], In that case the Ruler of Tripura sought to challenge the validity of the Income-tax Act in so far as it purported to impose a liability to pay1 agricultural income tax on the plaintiff, and he sought an injunction restraining the Income-tax Authorities from taking any steps to assess him, and the Supreme Court at page 28 points out :

> "The position here is entirely different. The gist of the wrongful act complained of in the present case is subjecting the plaintiff to the harassment and trouble by commencing against him an illegal and unauthorised assessment proceeding which may eventually result in an unlawful imposition and levy of tax."

The Supreme Court distinguishes the judgment of the Privy Council in *Raleigh Investment Co. Ltd v. Governor General in Council*[5] by pointing out that in that case the suit in substance was to modify or set aside the assessment already made, and it quotes a passage from the judgment of the Privy Council :

> "In form the relief claimed does not profess to modify or set aside the. assessment.

[3] AIR 1953 Pun 55 [5] AIR 1947 PC 78

[4] AIR 1951 SC 23

> In substance it does for repayment of part of the sum due by virtue of the notice of demand could not be ordered so long as the assessment stood. Further, the claim for the declaration cannot be rationally regarded as having any relevance except as leading up to the claim for repayment, and the claim for an injunction is merely verbiage. The cloud of words fails to obscure the point of the suit."

Therefore, Tripura's case and Raleigh's case make it abundantly clear that there is a vital distinction between a case where the plaintiff is seeking to prevent illegal and unauthorized proceedings being commenced against him and his being subjected to harassment, and a case where he has already been assessed and he is challenging the validity of the assessment. But the importance of Tripura's case goes further. It lays down this important proposition that an illegal threat to assess can be challenged otherwise than by the machinery provided by the In-come-tax Act. Therefore, to the extent that the Advocate General argued that when the Income-tax Act provides a particular machinery the aggrieved party can challenge a threat to assessment only by means of that machinery, that contention has been held to be untenable by the Supreme Court. But it is pointed out that even so the only remedy which the aggrieved party has is by filing a suit and not by asking for a prerogative writ under the Constitution. It must be borne in mind that when Tripura's case was decided the Constitution had not been enacted and the right to issue

prerogative writs was confined to the High Courts within the limits of the Presidency Towns, and therefore the Ruler of Tripura State could only challenge the illegal notice issued against him by filing a suit and no other remedy was open to him. But even though a suit may be an alternative and adequate remedy, all that that proposition establishes is that the Court in its discretion will not issue a writ but will compel the aggrieved party to resort to the ordinary remedy available to him at law, and therefore what we have really to consider is not whether the Court is precluded from issuing a writ in income tax matters, but whether in the exercise of its discretion it would issue a writ under the circumstances of the case.

11. With regard to a suit being an adequate alternative remedy, the observations of the Supreme Court in *Himmatlal Harilal Mehta v. State of Madhya Pradesh*[6] may be looked at. The Supreme Court in that case was dealing with the Sales Tax Act and there, there was no assessment to tax but there was only a threat by the State to realise the tax from the assessee, and the Supreme Court held that such a threat without the authority of law was a sufficient infringement of the assessee's fundamental right under Article 19(1)(g) and gave him right to seek relief under Article 226 of the Constitution, and it further pointed out that the impugned Act requiring the assessee to deposit the whole of the tax before he can get the relief provided by it cannot be said to provide an adequate alternative remedy. Here also it is very difficult to accept the contention that a suit would be an adequate remedy. A notice would have to be given under Section 80 and a suit usually results in dilatory proceedings.

12. But let us approach the matter, because the point raised is of considerable importance, and see whether, even if a suit in this particular case is an adequate alternative remedy, the challenge made by the petitioner constitutes an exception to the cases where the Court will not exercise its discretion in favor of the petitioner when he could resort to the ordinary remedy of law.

[6] AIR 1954 SC 403

The two exceptions to the ordinary rule that; the Court will not give relief by means of a write when the petitioner can get the same relief by ordinary legal remedies available to him which are well established are these : One is that if the threat involves an encroachment upon the fundamental right of the petitioner, the Court will interfere and will not compel him to exhaust his legal remedies, and the other exception which is equally well established is that if the authority against whom a complaint is made has violated rules of natural justice, the Court will interfere and protect the petitioner and not insist upon his going to a higher tribunal for relief. But the interesting question which was debated at the Bar was whether there was a third exception to this rule and the third exception that was suggested was when there is complete absence of jurisdiction and that absence of jurisdiction is apparent on the face of the record. It is necessary to clarify this expression "complete absence of jurisdiction." If we are dealing with a judicial or quasi-judicial tribunal, the expression "absence of jurisdiction" does not create any difficulty. But we have also to consider cases where the order challenged is the order of an administrative officer or an administrative tribunal and the allegation against him may be that he is acting without authority or beyond his competence. In such a case the expression "absence of

jurisdiction" would also apply, but with a different significance as just pointed out. In this particular case what is urged by the petitioner is that the Income-tax Officer in issuing the notice had no authority or competence to do so and that the assessment proceedings which he proposes to initiate pursuant to that notice would, be proceedings without any jurisdiction at all. What is the meaning to be attached to the expression "complete absence of jurisdiction apparent on the face of the record ?"

As we shall presently point out, two views are possible. One is that the absence of jurisdiction should be clear beyond any reasonable doubt on the construction of the statute which confers the jurisdiction or confers the power or competence, and that if two views are possible of a construction of a section then it would not be a case of absence of jurisdiction apparent on the face of the record. The other view is that if absence of jurisdiction can be established by reference to statute "without more and no evidence was necessary and no facts had to be proved in order to establish want of jurisdiction, then absence of jurisdiction is one which is apparent on the face of the record, or, as one learned Judge has said, apparent on the face of the statute. In this particular case before us it is not necessary to decide which of the two views is the correct view, because even assuming that the Court will exercise its discretion in favour of the assessee when alternative remedy is open to him only in a case where the section which confers jurisdiction or authority is clear beyond reasonable doubt, in our opinion there could not be a stronger case than this where even on a cursory perusal of Section 34 with its provisos it is clear that the Income-tax Officer has exceeded his competence and authority.

13. An attempt was made by the Advocate General to suggest that all that ? the Income-tax Officer was doing was construing Section 34 and in construing that section he came to the conclusion that he could issue a valid notice under the amended proviso and he did so, and according to the Advocate General this was nothing more or less than an error of law in the exercise of his jurisdiction. This is a totally erroneous view to take of the action of the Income-tax Officer. No tribunal and no officer can confer jurisdiction or authority or competence upon itself or himself by misconstruing a section, it is inarguable that an authority could claim to exercise jurisdiction by construing a section erroneously and thereby contending that the section so wrongly construed gives him the necessary power.

In such a case, if the section has been wrongly construed, it would be a clear case of absence of jurisdiction apparent on the face of the record because the Court has got to look at the section and to decide whether the officer construing the section was in the right or in the wrong.

14. Turning to the authorities on this point, the most important is the decision of the English Court in *Farquharson v. Morgan*[7], In that case a County Court Judge made an order to enforce an award by execution as on an ordinary county court judgment under Section 24, Agricultural Holdings Act and on the face of the award it was apparent that the compensation had been awarded to the tenant for matters not within the Act, and the Court of Appeal interfered by a writ of prohibition notwithstanding the fact that there was an agreement contained in the lease between the lesser and the tenant to refer all disputes to arbitration and also the fact that the lesser

had by his conduct acquiesced in the exercise of jurisdiction by the County Court. Before we go further with this case it may be pointed out that there is a line of cases where it has been held that if a party does not object to jurisdiction at the earliest stage and sits on the fence and takes his chance which way the tribunal will decide, it is not open to him then to come to the Court and challenge the jurisdiction by asking for a writ under Article 226 because he lost before that tribunal.

But as this judgment points out, those would be cases where the want of jurisdiction would not be apparent, where it may be that some fact would have to be proved by the party or some action to be taken by the party, and the Court, would take into consideration the acquiescence of the party in submitting to the jurisdiction of the tribunal. But as already pointed out, in that case, although the lesser had acquiesced in the exercise of jurisdiction by the County Court, even so the Court of Appeal felt that this was a case where it was obligatory upon the Court to issue a writ of prohibition, and Lord Halsbury at page 556 points out :

> "It has been long settled that, where an objection to the jurisdiction of an inferior Court appears on the face of the proceedings, it is immaterial by what means and by whom the Court is informed of such objection. The Court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction."

And Lord Justice Lopes in his judgment at page 557 points out :

> "It seems to me that there has always been recognized a distinction between what I will call a latent want of jurisdiction, i.e., something becoming manifest in the course of the proceedings, and what I will call a patent want of jurisdiction, i.e., a want of jurisdiction apparent on the face of the proceedings.

While in cases of latent want of jurisdiction there has always been a great conflict of judicial opinion, as to whether the grant of the writ was discretionary or not, the authorities seem unanimous in deciding that, where the want of jurisdiction is patent, the grant of the writ of prohibition is of course."

And at page 559 the learned Lord Justice points out :

[7](1894) 1 QB 552

> "The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings, is explained by Lord Denman in - *Bodenham v. Ricketts*[8]*',* to be for the sake of the public, lest 'the case might become a precedent if allowed to stand without impeachment', and, I will add for myself, because it is a want of jurisdiction of which the Court is informed by the proceedings before it, and which the judge should have observed, and of which he himself should have taken notice."

And again at page 563 Lord Justice Davey draws a distinction between the case of a patent and latent want of jurisdiction and the distinction according to this learned Lord Justice is :

> ".....but the distinction does not, I think, depend on the existence of a formal record, but is one of substance, whether the defect is apparent or depends on evidence."

And a little lower down on the same page he observes :

> "In the present case the limits of the jurisdiction appeared, I repeat, on the face of the statute, and the fact of the excess appeared on the face of the amended award which the Court was asked to enforce."

15. Then there is a recent judgment of the Queen's Bench Division reported in - *'R. v. Comptroller-General of Patents*[9]*',* and the observations of the learned Chief Justice at page 865 are very pertinent :

> "Objection to jurisdiction can always be taken by plea, and, if an appeal lies from the Court of tribunal in which such a plea is raised, the appellate Court could, no doubt, decide the question of jurisdiction, but it by no means follows that, because there is an appeal, the power of this Court to issue a prohibition is taken away. There is no technical obstacle to the co-existence of a right to appeal and to a prohibition."

And at page 866 he says :

> "If the defect of jurisdiction is apparent on the face of the proceedings, the order of prohibition must go as of right and is not a matter of discretion." and further on the same page :
> "Where, however, the defect is not apparent, but depends on some fact in the knowledge of the applicant which he had the opportunity of bringing forward in the Court below and has allowed that Court to proceed without setting up the objection, the same cases show that the Court has a discretion to refuse writ and will leave the objector to his remedy by appeal."

16. Therefore, these authorities clearly establish that a patent want of jurisdiction entitles the petitioner to obtain immediate relief from the High Court, even though he could raise

[8]6 N and M 170

[9](1953) 1 All England Reporter 832

the plea of want of jurisdiction in a higher tribunal and even though, as the English cases point out, he may have acquiesced in the want of jurisdiction. But what is emphasized in those cases is that the want of jurisdiction must be a patent one. In our opinion, the want of jurisdiction pleaded by line petitioner in the case before us is undoubtedly a patent one, and if it is a patent

want of jurisdiction, not only we would be rightly exercising our discretion in interfering, but according to the English Courts it would be our duty and our obligation to prevent an authority from assuming Jurisdiction which it patently does not possess. In view of the conclusion we have come to it would perhaps be unnecessary to consider another plea urged by the petitioner which was accepted by the learned Judge below, and that was that the amended proviso even assuming it applied was void as against him by reason of Article 14 of the Constitution.

17. It will be remembered that the Tribunal gave its finding that the income of the firm of Vasantsen Dwarkadas was the income of Purshottam Laxmidas in the assessment of Dwarkadas and to that assessment Purshottam Laxmidas was a stranger, and what is urged is that although the amended proviso may be valid to the extent that it affects an assessee, it is bad to the extent that it affects a stranger. Before we consider this constitutional aspect of the matter, let us once more look at the language of this amended proviso. We suppose it is always difficult to draft a taxing statute, but whether it is always necessary to make it more difficult than it reasonably should be, we always find it hard to understand. The right to assess a stranger to assessment under Section 34 arises in consequence of or to give effect to any finding or direction contained in as order under the various sections enumerated in the proviso, and here we are concerned with Section 33. In the first place, it is difficult to understand how a tribunal can give a finding or a direction affecting a third party who is not before the tribunal. In this very case the assessee before the tribunal was Vasantsen Dwarkadas, the first petitioner, as representing his father; in that appeal the firm of Purshottam Laxmidas was not before the tribunal; and yet this proviso contemplates that a finding or a direction could be given by the tribunal affecting Purshottam Laxmidas on which action can be taken by the Income tax Authorities, and it is precisely because the tribunal in its order has given a direction or a finding, whichever way one looks at it, that tine Income tax Officer can include the income of Vasantsen Dwarkadas in the income of Purshottam Laxmidas in the assessment off Dwarkadas, that these proceedings have ensued.

18. What is the result of a stranger being, liable to be proceeded against under Section 34 ? The result is that if a stranger is in some way associated with an assessee and the assessee's assessment is under consideration and if he has the misfortune of having some finding or direction given by the tribunal in respect of him, then, although otherwise no action could have been taken under Section 34 because such action would have been barred by limitation, action can be taken under the Proviso and he loses the right that he had of considering that any further proceedings under the Income tax Act with regard to his income for past years were not competent or not open to the Income tax Authorities.

The Advocate General says that the persons, who are sought to be roped in by this amended proviso are persons who are liable to pay tax and who have not paid the tax, and he says that that is a perfectly good classification based on rational and reasonable considerations and does not come within the mischief of Article 14. But the difficulty in the way of the Advocate General is that the only persons liable to pay tax and who have not paid the tax who are affected by this proviso are the persons who are in some way associated with an assessment of some assessee.

Admittedly, persons who are liable to pay tax and have not paid tax could not be proceeded against after the period of limitation unless a finding or direction with regard to them was given by some-tribunal under the various sections mentioned in, the second proviso. Therefore, of the large category of people who may be liable to pay tax and have failed to pay tax, a certain number is selected for action and. with regard to that small number the right of limitation given to them has been taken away. The question is whether there is any basis for distinguishing between persons who are liable to pay tax and who have failed to pay tax and with regard to whom a finding or direction is given, and persons who are liable to pay tax and have failed to pay tax and with regard to whom no finding or direction is given. The Advocate General says that the category of people who are liable to pay tax and who fail to pay tax is so large that it is not possible for, the Legislature to embrace the whole of that class. That would be a perfectly valid argument if we could be satisfied that it was not possible for the Legislature to reach all persons belonging to a particular category or that persons dealt with by the law and not dealt with by the law belonging to different categories. Neither of these two factors present in this case. As we have already said, the persons with regard to whom a finding or direction is given and persons with regard to whom no finding or direction is given belong to the same category, and as we shall presently point out, there is no reason why the Legislature should have excepted persons with regard to whom no finding or direction is given. The Advocate General says that it is because of the finding or direction given that the attention of the Income Tax Authorities is directed to the fact that a particular person has not paid tax which he was liable to pay. But the attention of the Income-tax Authorities may be drawn by hundred different ways to the fact that other persons have also not paid tax which they were liable to pay. Why should persons who happen to be mentioned in an order of the tribunal be treated differently than the persons whose liability to pay tax has been communicated to the Income-tax Authorities in a different manner ? We see no rational basis whatever for the distinction made between these two types of people who fall in the same category and with regard to which there was not the slightest difficulty in having a uniform provision of law.

19. The case of *Suraj Mall Mohta and Co. v. Visvanatha Sastri*[10], which the Supreme Court was considering, is very similar to the case before us. In that case Sub-Section (4) of Section 5, Taxation on Income (Investigation Commission) Act was challenged, and the Supreme Court pointed out that there was nothing uncommon either in properties or in characteristics between persons who were discovered as evaders of income-tax during an investigation conducted under Section 5(1) and those who were discovered by the Income-tax Officer to have evaded payment of Income-tax. Both these kinds of persons have common properties and common characteristics and therefore require equal treatment, and therefore they held that both under Section 34, Income-tax Act and Sub-Section (4) of Section 5 of the impugned Act dealt with persons who have similar characteristics and similar properties, the common characteristics being that they are persons who have not truly disclosed their income and have evaded payment of taxation on income, and on this ground they held Sub-Section (4) of Section 5 of the impugned Act to offend against Article 14 of the Constitution. The position here is identical. Whether persons who evade

tax are discovered by means of a finding given by a tribunal or they are discovered by any other method, they have common characteristics and therefore, to use the language of the Supreme Court, they require equal treatments

[10]1954 S.C. 545 (AIR V 41)

In this case the treatment is patently unequal. Those whose liability to pay tax is discovered by one method can be proceeded against at any time and no limitation would apply in their case, and in the case of others the limitation is laid down in the body of Section 34.

20. The Advocate General finally relied in this connection upon a very recent decision of the Supreme Court in *Sakhawat Ali v. State of Orissa*[11], and there the section in the Orissa Municipal Act, by which a person who was employed as a paid legal practitioner on behalf of the Municipality or as legal practitioner against the Municipality was disqualified from standing for election to a seat in the Municipality, was challenged as offending against Article 14 of the Constitution. The challenge was repelled by the Supreme Court and what is relied upon is the observations of Bhagwati, J. at p. 170. The learned Judge says :

> "The simple answer to this contention is that legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by Article 14 of the Constitution."

Social legislation would be impossible, social reform would be impossible, if the Legislature was to be expected to pass legislation embracing the whole people, and therefore if social reform is enacted by stages that would be permissible under Article 14. Bhagwati, J. himself points out that it you go by stages you must apply the law to a particular category and postpone the application of the law to another category for a future time. If in this case we were satisfied that the Legislature was dealing with one category of tax evaders and will be dealing with another category or other categories in future, then undoubtedly this case would fall within the ratio of the judgment of the Supreme Court on which the Advocate General has relied. But as we have pointed out, in this case there are no different categories. The category is one and it is not pointed out, and it cannot be pointed out1 that there would be any difficulty in the application of this particular proviso to other tax evaders besides those who have-been discovered by the fortuitous circumstances of having the honour of being associated with the particular assessment and the further honour of being mentioned in the judgment of a particular tribunal. In our opinion, the learned Judge below was right in the view that he took that this proviso offended against Article 14 so far as it affects third parties.

21. The result is that the appeal fails and must be dismissed with costs. Costs to be taxed on the

basis of a long cause.
Appeal dismissed.
[11]1955 S.C. 166 (S) AIR V 42