BOMBAY HIGH COURT

Mahendra Bhawanji Thakar

Vs.

S.P. Pande

Special Civil Appln. No. 57 of 1962

(Kotval and Gokhale, JJ.)

06.03.1963

JUDGMENT

Kotval, J.

1. In this petition is challenged a notice under Section 34 of the Indian Income-tax Act, Act XI of 1922, issued against the petitioner by the Income-tax Officer, Special Investigation Circle, Nagpur. The second respondent is the Appellate Assistant Commissioner of Income-tax, who passed an appellate order in consequence of which the impugned notice under Section 34 of the Indian Income-tax Act came to be issued against the petitioner.

2. The circumstances under which the notice came to be issued against the petitioner may be briefly stated as follows. The petitioner's father, the late Bhawanji Naranji, was carrying on a mining business, principally at Nagpur. He passed away on 25th August 1956, and by a will bequeathed his movable and immovable properties to the petitioner. He originally hailed from Cutch but migrated to Nagpur for business and became a lessee from Government of manganese mines in and round about Nagpur district.

3. For the assessment year 1947-48 he had made a return, of his income and was duly assessed to income-tax as per Exhibit 1. By that order passed on 7-12-1948 he was assessed to a total income of Rs. 39.750/-. According to the petitioner, at the time that the assessment order was passed he had produced all the evidence in his possession, including his account-books and the Income-tax Officer was satisfied as to the genuineness of the transactions therein disclosed. It is unnecessary for the purpose of deciding this petition to refer to the several transactions which have been set forth by the petitioner in paragraphs 3 and 4 of his petition, though no doubt, they were referred to extensively in the arguments before us.

4. After the first assessment was made on 7-12-1948, the assessee taking advantage of the

voluntary disclosure scheme then announced by the Government of India, made a statement of disclosure in a petition filed by him on 22-10-1951. That disclosure was made voluntarily, and on the basis of that disclosure a revised assessment was made on 1-3-1952. By that revised assessment, the petitioner's father was assessed to a total income of Rs. 64,584/-. After that order was passed, a fresh notice was issued against the petitioner's father and the Income-tax authorities purporting to act under Section 34 of the Income-tax Act as it then stood read with Section 23(3) assessed him afresh for the same assessment year 1946-47. That assessment order is at Exhibit 6, and according to that assessment order the total income to which the petitioner's father was assessed was Rs. 1,37,034/-.

5. When this assessment order was passed the Income-tax Officer found that certain income had been concealed and therefore ordered a notice to issue under Section 28(3) of the Income-tax Act. Meanwhile, the petitioner's father appealed to the Appellate Assistant Commissioner of Income-tax and the Appellate Assistant Commissioner upon certain findings to which we shall presently refer, reduced the total income by Rs. 58,400/-. At the same time he made observations in paragraphs 11 and 12 of his order to the effect that certain transactions in gold which the assessee had entered into had not been disclosed and required his explanation. The Appellate Assistant Commissioner, therefore, ordered that the assessee should be served with a notice in respect of that income which was from some undisclosed source.

6. It was pursuant to the observations made by the Appellate Assistant Commissioner of Income-tax in that order, dated 29-9-1961, that the notice impugned in the present petition came to be served. As we have already said, by that time, the petitioner's father having passed away, the notice came to be served upon the petitioner. The order of the Appellate Assistant Commissioner of Income-tax is at Exhibit 8 and the notice issued pursuant to the direction therein is at Exhibit 9. That notice was issued on 5th January 1962 and as is not unusual with the notices issued by this Department, specifies nothing more than that it purports to have been issued under Section 34 of the Indian Income-tax Act. We shall presently show that Section 34 is a fairly long section and it is not without some difficulty that even persons well-versed in the law can understand its voluminous provisions and yet no particular clause of that section is even referred to in the notice beyond the fact that it was under Section 34, and specifying only the obvious fact that the officer considered that certain income had escaped assessment. The petitioner has challenged this notice inter alia on the ground that both when it was issued and served on the petitioner, the issuance of it was barred by limitation laid down in Section 34 itself. That is the principal point with which we are concerned here.

7. Having set forth the facts resulting in the issuance of the notice impugned in this petition and in order to understand further developments in the case of the petitioner, we may here set forth the several provisions of the law and particularly the considerable number of amendments which Section 34 underwent, and which have a material bearing upon the decision of this petition. In doing so we shall only quote the portions of Section 34 which are relevant for the points taken in

this petition. After all the amendments it had undergone, Section 34, as it stood before the new Indian Income-tax Act, Act 43 of 1961, was passed stood as follows :

> "34. Income escaping assessment. (1) If-
> (a) 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 underassessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or
> (b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax 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 any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under clause (a) at any time and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, 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 or recompute the loss or depreciation allowance; and the provisions of this Act shall so far as may be, apply accordingly as if the notice were a notice issued under that sub-section;

> Provided that the Income-tax Officer shall not issue a notice under clause (a) of Sub-Section (1) -
> (i) for any year prior to the year ending on the 31st day of March, 1941;
> (ii) for any year, if eight years have elapsed after the expiry of that year, unless the income, profits or gains chargeable to income-tax which have escaped assessment or have been underassessed or assessed at too low a rate or have been made the subject of excessive relief under this Act, or the loss or depreciation allowance which has been computed in excess, amount to, or are likely to amount to, one lakh of rupees or more in the aggregate either for that year, or for that year and any other year or years, after which or after each of which eight years have elapsed not being a year or years ending before the 31st day of March, 1941.
> (iii) for any year, unless he has recorded his reasons for doing so, and, in any case, falling under clause (ii), unless the Central Board of Revenue and, in any other case, the Commissioner, is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

Provided further that the Income-tax officer shall not issue a notice under this Sub-Section for any year, after the expiry of two years from that year, if the person on whom the assessment or re-assessment is to be made in pursuance of the notice is a person deemed to be the agent of a non-resident person under Section 43 :

Provided further that the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.

Explanation : Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section.

* * * *

3. No order of assessment or re-assessment, other than an order of assessment under Section 23 to which clause (c) of Sub-Section (1) of Section 28 applies or an order of assessment or re-assessment in cases falling within clause (a) of Sub-Section (1) or Sub-Section 1(A) of this section 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 :

Provided that where a notice under clause (b) of Sub-Section (1) has been issued within the time therein limited, the assessment or re-assessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if at the time of the assessment or re-assessment for four years aforesaid have already elapsed :

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to a re-assessrnent 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 33-A, Section 33-B, Section 66 or Section 66-A.

4. A notice under clause (a) of Sub-Section (1) may be issued at any time notwithstanding that at the time of the issue of the notice the period of eight years specified in that Sub-Section before its amendment by clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956), had expired in respect of the year to which the notice relates." As the section originally stood in the Indian Income-tax Act of 1922, before the process of amending that section commenced, it was a simple section and dealt with escaped assessment in any year or with the case where the income, profits or gains chargeable to income-tax had been assessed at too low a rate. By that section, the Income-tax authorities were given powers within one year of the end of the assessment year, to issue a notice with a view to assessing or re-assessing such income, profits or gains and to such proceedings all the other provisions of the Act applied. It may be noticed that the period of

limitation was one year and there was no distinction between the class of persons whose income, profits or gains had escaped assessment or the amount thereof.

8. It was by the Amending Act of 1939 that for the first time the distinction was introduced into Section 34 between an assessee who had concealed the particulars of his income or deliberately furnished inaccurate particulars thereof and cases of other assessees. By the Amending Act of 1939, in the case of the former class, the period of limitation prescribed was eight years and in other cases, four years from the end of the assessment year. Moreover, a condition was laid down to the exercise of the power, namely, that "definite information" should have come into possession of the Income-tax Officer who in consequence thereof discovered that income, profits or gains chargeable to income-tax had escaped assessment. There were other conditions laid down in the provisos with which we are here not concerned.

9. The third major change that the section underwent was when it was amended by virtue of Section 8 of the Income-tax and Business Profits Tax Amendment Act, 1948, (Act 48 of 1948), which came into force from the 30th March 1948. In the section as amended also a distinction was made between the assessees who had omitted or failed to make a return or to disclose fully and truly all material facts necessary for the assessment for that year and the assessees in whose cases no omission or failure had taken place. In the case of the first class of assessees, the Income-tax Officer could proceed against them, if he had "reason to believe", whereas in the case of the second class, the jurisdiction of the Income-tax Officer was subject to a further condition viz., if "the Income-tax Officer has in consequence of information in his possession reason to believe" that income, profits or gains had escaped assessment. In other words, there was an added requirement that the Income-tax Officer ought to have some information in his possession before he could proceed against the latter category.

10. The limitation, for taking proceedings against the two categories remained the same as before, namely, that in the case of the first category the proceedings had to be taken within eight years and in the case of the second category within four years from the end of the assessment year. Three provisos to the section laid down further conditions for the exercise of the power to reopen assessment. These provisos to Section 34, Sub-Section (1), were completely removed and substituted by new provisos which we have reproduced above. The old provisos as they stood in 1948 are material for our purposes. They ran as follows :

> "Provided that -
> (i) the Income-tax Officer shall not issue a notice under this Sub-Section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;
> (ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, this Sub-Section shall have effect as if for the periods of eight years and four years a period of one year was substituted."

11. Further changes came to be incorporated by the Amending Act 8 of 1954 with effect from 17-7-1954. The principal change effected was that Sub-Sections (1A) to (1D) were added, but we are not concerned with these particular amendments.

12. What is more important for our purposes is the further amendments in 1956 by the Finance Act of 1956 which took effect from 1-4-1956. It was by that Finance Act that the three provisos to Section 34, Sub-Section (1) were added. The second proviso is what applies in this case. Another change made was that Act 1 of 1959 added to Section 34, the fourth Sub-Section by virtue of Section 2 of the Indian Income-tax Amendment Act, 1959. That is the sub-section which we have already quoted.

13. At the same time, Act 1 of 1959 itself made a provision upon which reliance was placed in the present case on behalf of the Department. That provision is Section 4 of the Amending Act 1 of 1959 which runs as follows :

"Saving of notices, assessments, etc., in certain cases.-

No notice issued under clause (a) of Sub-Section (1) of Section 34 of the principal Act at any time before the commencement of this Act and no assessment, re-assessment or settlement made or other proceedings taken in consequence of such notice shall be called in question in any Court, tribunal or other authority merely on the ground that at the time the notice was issued or at the time the assessment or re-assessment was made, the time within which such notice should have been issued or the assessment or re-assessment should have been made under that section as in force before its amendment by clause (a) of Section 18 of the Finance Act, 1956, (18 of 1956), had expired."

14. These are the material provisions of the law which fall to be considered in this case. We have already recounted the facts as to how the notice, dated 5-1-1962, came to be served upon the petitioner. Soon after the notice was served, the petitioner filed a return on 9-2-1962 in which he took an objection that the notice was illegal as the issuance of that notice was barred by time under the provisions of Section 34(1)(a). The petitioner relies upon the provision of Section 34(1) read with proviso (ii) thereof; whereas; on behalf of the Department, the issuance of the notice under Section, 34(1)(a) is sought to be justified upon several other provisions of law. Upon the arguments of Counsel for the Department, the provisions relied upon to show that the notice was not time barred are as follows :

(A) Clause (ii) of the first proviso to Sub-Section (3) of Section 34.
(B) Sub-Section (4) of Section 34, and
(C) Section 4 of the Amending Act 1 of 1959.

We will presently consider each one of these grounds and whether the notice impugned in the present petition can be saved under any one of more of these grounds.

15. Before we proceed to discuss the applicability of the said provisions however we must state here certain admitted positions. It is not disputed by the Department in this case that the income, profits or gains escaping so far as the petitioner is concerned were not a lac of rupees or more. They amount or are likely to amount to less than one lac of rupees. This affects the applicability of the 2nd proviso to Section 34, Sub-Section (1). Secondly, it is admitted that the sanction of the Central Board of Revenue was not obtained as required by proviso (iii) to Section 34(1). Thirdly that the impugned notice was issued under Section 34(1A) and no other Sub-Section.

16. So far as the applicability of Section 34(1)(a) before the amending Act of 1959 is concerned, it was held in *Debi Dutt Moody v. Belan*[1] that under Section 34, as it was before the amendment by Section 18 of the Finance Act of 1956, it was incumbent on the Income-tax Office that in the cases falling under clause (a) of Sub-Section (1) of Section 34, the notice should be issued within 8 years from the end of the assessment year and that if once that period of 8 years had elapsed then the assessee acquired a valuable right and the provisions of Section 34 would not enable the Department to get over that right in favour of the assessee. It is said that it was expressly in consequence of this decision of the Calcutta High Court that the amendment of Section 34 by Act 1 of 1959 was brought into effect. So far as the other requirements of Section 34(1)(a) are concerned, it is not in dispute before us that the notice impugned in the present petition was a notice issued under clause (a). It is also not in dispute that the notice pertains to escaped income which

[1] AIR 1958 Cal 398

is not above one lakh of rupees nor is it the Department's case that it was likely to be one lakh of rupees or more.

17. Upon these facts, therefore, it is clear that the provision of the second clause of the 1st proviso to the amended Section 34 would be attracted in the instant case unless the Department is in a position to show that any other provision of the law saves the notice.

18. Now, as we have said, in justification of the notice issued under Section 34(1)(a) reference was made to three separate provisions of law and therefore we turn to examine each one of the provisions invoked. The first is the second proviso to Sub-Section (3) of Section 34 which says.

> "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 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."

It is conceded on behalf of the petitioner that the order of the appellate Officer, dated 29-9-1961, pursuant to which the impugned notice was issued was an order under Section 31. Therefore, the proviso would be attracted.

19. But it has been argued on behalf of the petitioner that the proviso has recently been declared ultra vires of Article 14 of the Constitution by the Supreme Court of India and that the Department cannot any longer take advantage thereof. No doubt, this is not a point upon which the petition was in terms founded. But the petitioner had taken an objection to the notice and when the second proviso was invoked by the Department, the petitioner had pleaded that the second proviso was not attracted in the instant case. That plea of course did not expressly raise any constitutional ground, but the question which has been raised is so fundamental and in our opinion the decision of the Supreme Court to which we shall presently refer is so clear that we cannot, on the mere technical ground that the point was not taken decline to take notice of the judgment, nor ignore the point really decided by the Supreme Court. On the other hand, it seems to us that, it is now merely a question of applying the law as declared by the Supreme Court.

20. The decision of the Supreme Court referred to is a recent decision in *S.C. Prashar v. Vasantsen Dwarkadas*[2], That was a decision which was given in an appeal upon a certificate of fitness granted by this Court against the decision of a Division Bench of this Court in a Letters Patent Appeal in *S.C. Prashar v. Vasantsen*[3], The point upon which the Division Bench decided the case in this Court was undoubtedly 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 in the case before the learned Single Judge against whose decision the Division Bench heard a Letters Patent Appeal. The learned Single Judge, Mr. Justice S.T. Desai, upheld that objection and himself held that the second proviso to Section 34(3) did infringe Article 14. What the learned Single Judge held will be found at page 200 of 58 Bom LR.

[2] Civil Appeal No. 705 of 1957 D/-12-12-1962

[3] 58 Bom LR 184 : AIR 1956 Bom 530

> "In my judgment the classification is based on real and substantial distinction. It is not arbitrary but rests on a substantial basis. I am, therefore, of opinion that the challenge to the proviso so far as it relates to the assessee who was a party to the various proceedings enumerated in it must fail.

On the other hand there are to my mind formidable difficulties with which respondents Nos. 1 and 2 are faced in their attempt to meet the challenge against the constitutionality of that part of the second proviso to Sub-Section (3) of Section 34, which renders the bar of time-limit applicable to the case of any person alleged to have escaped assessment and who is sought to be assessed or re-assessed in consequence of or to give effect to any finding or direction contained in any order in the various proceedings enumerated in that proviso. The person sought to be

affected is not the assessee who was a party to the proceedings but any person who was not a party to those proceedings, and the expression 'any person' would include even a person who was not in any way concerned in those proceedings. The main ground on which the second category mentioned by me above is sustainable as a reasonable and just classification is obviously lacking in the case of this third category. Separate considerations do affect this category.

X X X X X X

There is always strong presumption that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It is well understood that the Court need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism. It is well established that with reference to taxing statutes, the Legislature has considerable latitude in making classifications. It can select persons or things as it chooses for purpose of taxation. But after giving full consideration to all these well established general principles it is extremely difficult for me to see how persons who may well have been total strangers to the various proceedings enumerated in the second proviso to Section 34(3) can be regarded as a category resting on a rational basis. Such a classification, in my Judgment, is without a rational distinction and obnoxious to the constitutional guarantee which applies to all matters great or small. Very readily I feel bound to extend to such persons the benefit of the time-limit expressly prescribed by the section and to hold that legislation segregating such persons in a class which has no systematic relation to a class or persons benefiting by the time-limit is a classification arbitrary and unjustifiable. The proviso, so far as it affects persons other than assessees not parties to the proceedings enumerated in it must, therefore, be held to be ultra vires the Legislature." He thus distinguished between the assessee against whom a finding is recorded or a direction given and other persons who were not assessees, and upheld the objection on the score of unconstitutionality in the case of the latter class. In appeal a Division Bench upheld the decision of the learned Single Judge but not on the point of unconstitutionality made by him but upon an interpretation of the relevant provisions of the Income-tax Act itself. However, 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. Jutice A.K. Sarkar, in the last but one paragraph where he referred to the decision which he was about to deliver on that very day in *Commissions of Income-tax v. Sardar Lakhmir Singh*[4], Mr. Justice S.K. Das, after adverting to the distinction between persons who are liable to pay tax and have failed to pay it and with regard to whom a finding or direction is given and persons who are liable to pay tax and have failed to pay it and with regard to whom no finding or direction is given observed :

> "I am in agreement with the view expressed by the learned Chief Justice that no rational basis has been made out for the distinction between the two classes of people referred to above, who really fall in the same category and with regard to whom there was no

difficulty in having a uniform provision of law. I am further in agreement with the view of the learned Chief Justice that the principle laid down by this Court in *Suraj Mall Mohta and Co. v. A.V. Visvanatha Sastri and another applies." (Reference was to the case reported in*[5]

Mr. Justice Das also referred to Suraj Mall Mohta's case, 1955 (1) SCR 448 and observed :

"This Court pointed out that Section 34 of the Indian Income-tax Act and Sub-Sections (4) and (5) of the Impugned Act dealt with persons who had similar characteristics and properties and therefore a different treatment of some out of the same class offended the equal protection clause embodied in Article 14 of the Constitution." (He was referring to the facts of Suraj Mall Mohta's case, 1955 (1) SCR 448 .

"It seems to me that the position is the same here. 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 really belong to the same category and therefore require equal treatment. The second proviso to Sub-Section (3) of Section 34 which came into effect from April 1, 1952 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 could be proceeded against at any 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, in my opinion, is unequal treatment which is not based on any rational ground. Desai, J. put the matter on a somewhat narrower ground. He held that so far as assessees were concerned, there might be a rational ground for distinction because the appeal proceedings etc. might take a long time and the assessee being a party to the appeal could not complain of such delay; therefore, assesses did not occupy the same position as strangers. But the learned Judge held that there was no rational distinction so far as strangers were concerned and there was no reason why they should be deprived of the benefit of the time limit prescribed by Sub-Section (1). He therefore held that the proviso, so far as it affected persons other than assessees not parties to the proceedings enumerated in it, must be held to be ultra vires the Legislature. Even on this narrow ground it seems to me that the respondents are entitled to succeed."

No doubt, his Lordship further went on to say that in that case Purshottam Laxmidas was not even a party, though Purshottam Laxmidas was a party to certain other appeals before the Appellate Tribunal and he therefore observed :

[4] Civil Appeals Nos. 214 and 215 of 1958

[5] 1955 (1) SCR 448

"I have some difficulty in appreciating how the firm Purshottam Laxmidas can be treated as an assesses within the meaning of the second proviso to Sub-Section (3) of Section 34 for the assessment year 1942-43. If the firm cannot be so treated, then even on the narrow ground stated by Desai, J. the proviso would be of no help to the present appellants."

To the same effect is the decision of Mr. Justice Kapur in his judgment in the last four

paragraphs.

21. No doubt, two of the Judges, of the Full Bench namely, Mr. Justice Hidayatullah and Mr. Justice Raghubar Dayal specifically found that the provisions of the second proviso to Section 34(3) did not infringe Article 14, but in view of the majority decision, they concurred in the final order passed in the appeal and allowed the appeal. This decision of the Supreme Court of India, therefore, clearly rules out any possibility of the second proviso to Section 34(3) being invoked in the present case because that decision is absolutely binding upon this Court.

22. Nevertheless Mr. Natu, appearing on behalf of the Department, has contested that position. He has referred to the provisions of Article 145(5) read with Article 141 of the Constitution. He has pointed out that even though three Judges of the Supreme Court held that Article 14 would be attracted and would make the second proviso to Section 34(3) unconstitutional, they were not the three learned Judges on whose decision the appeal was ultimately allowed. On the other hand, the appeal was allowed upon the decisions of Mr. Justice A.K. Sarkar, Mr. Justice Hidayatullah and Mr. Justice Raghubar Dayal. Of these three learned Judges Mr. Justice Sarkar alone had given it as his opinion that the second proviso was unconstitutional. But Mr. Justice Hidayatullah and Mr. Justice Raghubar Dayal agreed to allow the appeal of the Department because they held that Sub-Section (4) of Section 34 would save the notice in that case. On these facts, therefore, Mr. Natu urged that so far as the question of the applicability of Article 14 is concerned, of the three Judges who agreed that the appeal should be allowed, only one was of the view that the proviso was unconstitutional, whereas two were of the view that the proviso was not unconstitutional. Therefore, in that decision so far as the question of the applicability of Article 14 was concerned, the majority who allowed the appeal did not hold the proviso unconstitutional.

23. We do not think that we cacle 145(5) into the provisions of Article 141, and we do not think that the "law declared" can be approximated to the judgment delivered by the Supreme Court. On the other hand, having regard to the provisions of Artthink that for the purposes of this Court that was "the law declared by the Supreme C already referred to the reason for that amendment which was a decision of the Calcutta High Court. It is suggested that it was reported in AIR 1958 Calcutta 398. In fact, the very Objects and Reasons appended to the Amending Act indicate that it was in order to get rid of that decision that the amendment was incorporated into Section 34. In that case Debi Dutt was assessed for the year 1948-49 and paid the tax assessed. On 27-3-1957 however a notice under Section 34(1)(a) was issued which if was held was served on him on 28-3-1957. According to Debi Dutt he had been served by post on 4-4-1957 and therefore beyond 8 years from the end of the assessment year 1948-49 i.e., 31-3-1957- Upon the view which the Calcutta High Court took that he was served on 28-3-1957 it was unnecessary to decide anything further because the notice was not time-barred. It was within time by just three days but their Lordships felt that if they were wrong in then" decision on that point, still after the enactment of Section 18 of the Finance Act of 1956 amending the provisions of Section 34 the notice must be

held to be within time. The decision in that Case on the point before us was thus wholly obiter.

25. So far as Sub-Section (4) of Section 34 of the Income-tax Act is concerned it reads as follows :

> "A notice under clause (a) of Sub-Section (i) may be issued at any time notwithstanding that at the time of the issue of the notice the period of eight years specified in that Sub-Section before its amendment by clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956), had expired in respect of the year to which the notice related."
> 'We have already referred to the provisos to Section 34(1) which were radically altered by the Amending Act of 1953. The first proviso limits the period during which a notice contemplated in Sub-Section (i) of Section 34 can be issued to a period prior to the year ending on the 31st day of March 1941. In other words, no notice can be issued in respect of a period prior to that date. The second proviso says that the Income-tax Officer was not to issue a notice contemplated in clause (a) of sub-section (i) for any year if eight years have elapsed after the expiry of that year unless the income profits or gains are one lakh or in excess of one lakh of rupees or likely to be so. There are other conditions for limiting the issue of a notice with which we are not here concerned. The contention on behalf of the Department has been that when Sub-Section (4) of Section 34 was incorporated into Section 34 it permitted issuance of a notice for any year irrespective of whether eight years had elapsed before the issuance of the notice and whether or not the assessee had acquired a right by lapse of time or not and wiped out also the bar of the second proviso to Section 34(1).

26. We do not think that the ambit of Sub-Section (4) of Section 34 is so very wide. In fact, a consideration of its very terms indicates that it is of limited application. It is peculiarly worded. It only authorises the issuance of a notice at any time

> "notwithstanding that at the time of the issue... the period of eight years 'specified in that Sub-Section before its amendment by clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956) had expired in respect of the year to which the notice related." (the underlining (here in ' ') is ours).

Now turning to clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956) it provides as follows :

> "18. Amendment of Section 34.- In Section 34 of the Income-tax Act :
> (a) in Sub-Section (i), the words 'within eight years' shall be omitted;
> * * * *"

For the purposes of the point we are called upon to decide, we are not at present concerned with

the other clauses of Section 18 of the Finance Act of 1956, because Sub-Section (4) of Section 34 only refers to Sub-Section (i), clause (a) of that section before its amendment by clause (a) of Section 18 of the Finance Act. By clause (a) of Section 18 only the words "within eight years" were dropped. If matters had stood at that there was some thing to be said for the contention urged on behalf of the Department but it is of the utmost importance to notice that at the very time that the words "within eight years" were dropped from Sub-Section (i) of Section 34, the three provisos to Sub-Section (i) as they now stand were substituted. These were added by clause (b) of Section 18 of the Finance Act. Now clause (ii) of the first proviso to Section 34(1) reads as follows : "Provided that the Income-tax Officer shall not issue a notice under clause (a) of Sub-Section (i)

> (i) x x x x
> (ii) for any year, if eight years have elapsed after the expiry of that year, unless the income profits or gains chargeable to income-tax which have escaped assessment or have been under-assessed or assessed at too low a rate or have been made the subject of excessive relief under this Act, or the loss or depreciation allowance which has been computed in excess, amount to, or are likely to amount to one lakh of rupees or more in the aggregate, either for that year, or for that year and any other year or years after which or after each of which eight years have elapsed, not being a year or years ending before the 31st day of March 1941.
> * * * *"

27. What then was the exact effect of the changes made by Section 18 of the Finance Act ? Prior to the Finance Act of 1956, clauses (a) and (b) of Section 34 contemplated two categories of cases of escaped income :

> (a) those whose income escaped because they failed to disclose fully and truly all material facts (we will call them by the compendious if somewhat un-English expression "culpable escapees"), and
> (b) those whose income escaped assessment without any omission or failure on their part (we will call them "innocent escapees"). Culpable escapees could be dealt with at any time within eight years, whereas innocent escapees only within four years. The reason was obvious, A "culpable escapee" could not be treated on a par with an "innocent escapee." It was but just that a "culpable escapee" should be under a liability to have his escaped income taxed for a longer period than an "innocent escapee."

28. That was the position till 1956 when by the Finance Act of 1956 the words "within eight years" were removed from Sub-Section (i) of S, 34. Those words qualified the preceding words "in cases falling under clause (a) at any time". Therefore the effect of the removal of the succeeding word "within eight years" was that if Sub-Section (i) stood alone, action could be taken against the "culpable escapee" at any time i.e. without any bar of limitation whatsoever.

29. But then as we have said Sub-Section (i) alone was not amended. Simultaneously the old provisos were deleted and new ones added and we are here concerned with clause (ii) of the new proviso. That proviso brought in afresh a new distinction between-

> (a) income, profits or gains escaping which amount or are likely to amount to over one lakh of rupees or more, for certain years, and
> (b) escaped income, profits or gains below one lakh of rupees for similar years. Having made this dichotomy, the proviso in effect says that the Income-tax Officer shall not issue a notice under clause (a) (dealing with culpable escapees) of Sub-Section (i) of Section 34 "for any year if eight years have elapsed from that year..."' unless the escaped income, profits or gains fail in-category (a) above i.e. is over a lakh of rupees. Thus, while in the present Sub-Section the eight-year limitation in the case of "culpable escapees" was removed, in the new proviso it was retained only if the escaped income, profits or gains of such "culpable escapees" was or exceeded one lakh of rupees. The "innocent escapees" and their liability to be noticed within four years remained' untouched.

30. To put only the changes necessary to notice for our purposes in the form of a chart we give below the position before and after the amendments as follows :

31. With the alterations of the other terms and conditions upon which notices under Section 34 shall issue we are not here concerned. It will be noticed that the 1956 amendments tightened up the law only in regard to one class of "escapees" i.e. those "culpable escapees" whose escaped income, profits or gains was a lakh of rupees of over. In their case, there was after the amendment no period of limitation for garnering in their escaped income profits and gains. All other classes and categories remained under the same liabilities as before so far as this point of limitation is concerned.

32. It is in this context that we have to consider the applicability of Sub-Section (4) of Section 34 when it came into force on 12-3-1959 by the Indian Income-tax (Amendment) Act, 1959 (Act 1 of 1959). It was added after the amendments by which the three new provisos to Section 34(1) were substituted in 1956 and the words "within eight years" in Sub-Section (i) were deleted.

33. Now, Sub-Section (4) of Section 34 says that a notice under clause (a) of Sub-Section (i) of Section 34 may be issued at any time "notwithstanding that at the time of the issue of the notice the period of eight years 'specified in that Sub-Section before its amendment' by clause (a) of Sub-Section (18) of the Finance Act, 1956 (18 of 1956) had expired..." (underlining (here into ' ') is ours). Thus, Sub-Section (4) does not have regard to the 1956 amendments at all so far as Sub-Section (1) of Section 34 is concerned. We have already reproduced the old provisos before the 1956 amendments. In those provisos there was no reference whatsoever to "the period of eight years" except in proviso (iii) with which we are not here concerned. It dealt with the case of a

non-resident assessee. In the parent tub-section, however before the 1956 amendment "the period of eight years" was specified by the following words: "he may in cases falling under clause (a) at any time within eight years..... serve-on the assessee.....".

34. Thus, upon a mere reading of Sub-Section (4) side by side with the unamended sub-section (i) of Section 34 it is clear that by Sub-Section, (4) the Legislature intended to say that even, though the period of eight years for issuance of a notice against "culpable escapees" had expired a notice could issue at any time in their case. But at the very time that the Legislature enacted Sub-Section (4), it also introduced clause (ii) in the first new proviso. That proviso is in words which must be noted. It begins with the general provision that 'the Income-tax Officer shall not issue a notice under clause (a) of Sub-Section (i) .... for any year, if eight years have elapsed ...". Then it qualifies the general rule by saying "unless the income profits or gains..... amount to or are likely to amount to one lakh of rupees or more....". The proviso makes it amply clear that the only exception to the general rule that a notice shall not issue under Sub-Section (i), clause (a), for any new year if eight years have elapsed is where the escaped income, profits or gains is one lakh of rupees or more. Sub-Section (4) does not affect clause (ii) of the first proviso and must therefore be read along with it and an attempt made to reconcile the two. It seems to us that reading the two together it must be held that Sub-Section (4) of Section 34 applies only to cases of escaped income falling under clause (a) of Section 34 (culpable-escapees) where the escaped income, profits or gains is one lakh of rupees or more and not to other cases. In the present case, it is not in dispute that the escaped income, profits or gains was not, nor was it likely to be one lakh of rupees or more in any case. Therefore, Sub-Section (4) cannot help the Department.

35. The other provision of law referred to in order to justify the notice issued in the instant case and to take it out of the limitation of eight years in the unamended Sub-Section (1) of Section 34 was Section 4 of the Amending Act of 1959 itself. That Act came into force on 12-3-1959 and Section 4 thereof reads as follows :

> " 'Saving of notices, assessments etc., in curtain cases' - No notice issued under clause (a) of Sub-Section (i) of Section 34 of the principal Act at any time before the commencement of this Act' and no assessment, re-assessment or settlement' made or other proceedings taken in consequence of such notice shall be called in question in any Court, tribunal or other authority merely on the ground that at the time the notice was issued or at the time the assessment or re-assessment was made the time within which such notice should have been issued or the assessment or re-assessment should have been made under that section as in force before its amendment by clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956), had expired." (the underlining (here into ' ') is ours). It is clear upon a mere reading of the terms of this Sub-Section that it saves only a notice and/or assessment made in certain cases. So far as the notice is concerned, it must be a notice issued under clause (a) of Sub-Section (i) of Section 34, "at any time before the commencement of this Act". By "this Act" is obviously meant Act of 1959, which, as we

have said, came into force on 12-3-1959. Therefore, the notice contemplated by this section is a notice issued before the commencement of that Act, i.e. before 12-3-1959. The notice in the instant case was not such a notice, for it was issued on 5-1-1962. So far as the assessment is concerned also the section says "no assessment, re-assessment..,. or other proceedings taken in consequence of such notice shall be called in question etc.". Therefore, the assessment or re-assessment must also be "in consequence of such notice", that is to say, a notice before the commencement of the Act, i.e. before 12-3-1959. The plain meaning of the provisions of this section is, therefore, that all notices issued prior to 12-3-1959 and assessments and re-assessments consequent upon a notice issued prior to 12-3-1959 alone would be valid. The section, therefore cannot possibly be attracted in the present case.

36. We have already referred to the recent decision of their Lordships of the Supreme Court in Civil Appeal No. 705 of 1957 and in that appeal also the provisions of Section 4 of the Amending Act of 1959 fell to be considered. After analysing the provisions of Section 4 of Act of 1959, Mr. Justice Sarkar pointed out that the first requirement of that section was that "there must be a notice issued under Section 34(1)(a) of the principal Act."

Then, he went on to observe :

"The next requirement of Section 4 of the Act of 1959 is that the notice must have been issued at any time before the commencement of that Act."

Of course, in the case before his Lordship a notice had been issued in 1954 prior to the coming into force of the Act. But that is not the case here. In the present case, the notice was issued alter the Act came into force on 5-1-1362. In that case also Mr. Justice Sarkar has made certain remarks which are pertinent for consideration of the other provisions of Section 34 also. He observed :

"But the section protects such notice only against the invalidity caused by Section 34(1) as it stood after the 1948 amendment, that is, against the invalidity caused by reason of the notice having been issued after the expiry of the time prescribed for it in this section as it then stood. Section 4 does not protect the notice from invalidity wise attaching to it. Now, it will be remembered that the 1939 amendment of Section 34 also prescribed a period of time for the issue of the notice. That prescription had to be obeyed whenever applicable. Section 4 provided for no immunity against a breach of that prescription. So, though Section 4 of the 1959 Act freed a notice from the bar of limitation in respect of it imposed by the 1948 amendment, it did not altogether do away with all prescriptions of time. In spite of Section 4, a notice contemplated by it would be subject to be prescription of time as to its issue under the 1939 Act and may be under Section 34 as it stood before the 1939 amendment. If the notice was issued after the 1956 amendment, it would also be

Subject to the prescription as to the time provided by that amendment."

We hold, therefore, that Section 4 of the Amending Act of 1959 would not save the notice issued against the petitioner in the instant case from the bar of clause (ii) of the first proviso to Sub-Section (i) of Section 34.

37. We have reproduced at some length the passage from the judgment of Mr. Justice Sarkar in Civil Appeal No. 705 of 1957 because it also helps to show that the decision recently given by the Calcutta High Court in *Brindaban Chandra Basak v. Income-tax Officer*[6], upon which strong was placed by Mr. Natu, cannot assist the Department. In that case, the- Calcutta High Court was concerned with the assessment for the year 1942-4-3 and a notice was issued on 19-1-1960. When the bar of limitation was raised relying upon Sub-Section of Section 34 and clause (ii) of the first proviso thereof, the self-same argument which has been advanced before us on behalf of the Department was advanced on two ground's, namely, that the second proviso to Section 34(3) applied', and

[6]1962-46 ITR 14 (Cal)

alternatively that Sub-Section (4) of Section 34 applied. With the second proviso to Sub-Section (3) of Section 34 we are no longer concerned because we have already shown that it has been held void because it infringes the provisions of article 14. It was also held inapplicable in that case for other reasons. But so far as Sub-Section (4) of Section 34 of the Amended Act is concerned, undoubtedly the Calcutta High Court held that there was no real inconsistency or conflict between clause (ii) of the first proviso to Sub-Section (i) of Section 34 and Sub-Section (4) of Section 34, and it came to the conclusion that consequently the notice issued under Section 34(I)(a) in the year 1960 in respect of the assessment year 1942-43 would be valid even though the amount involved was less than one lakh of rupees. The learned Judges observed that clause (ii) of the first proviso in Sub-Section (i) of Section 34 was intended to have prospective operation only with effect from 27-4-1956, whereas Sub-Section (4) of Section 34 was intended to have retrospective operation and to cover cases where the right to issue notice in respect of any particular year had become barred by lapse of a period of eight years before the amendment of 1956 came into force. We may observe that some of the observations which the learned Judges made in coming to that decision are contrary to the observations which we have already quoted from the judgment of Mr. Justice Sarkar in Civil Appeal No. 705 of 1957 . To that extent therefore, the authority of Brindaban Chandra Basak's case, (1962) 46 ITR 14 (Cal) is in our opinion considerably shaken. But apart from that, we may also make two other points. The arguments in the Calcutta High Court were merely confined to the general point whether Sub-Section (4) was retrospective in its operation or not. The words of the section were not stressed in the argument. The import of the words "Specified in that Sub-Section before its amendment by clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956)" were completely missed. It was not noticed that before its amendment in 1956, the reference to the eight years was not to be found in clause (ii) of the proviso but only in the main body of the Sub-Section. Upon the view taken by the Calcutta High Court moreover it is difficult to see to what case., clause (ii) of

proviso to Sub-Section (i) of Section 34 can now possibly apply after the enactment of Sub-Section (4). A construction which leads to any part of an enactment being rendered nugatory ought to be ordinarily avoided.

38. Secondly we may observe that so far as this Court is concerned, in *Onkarmal Meghraj v. Commissioner of Income-tax*[7], the provisions of Sub-Section (4) of Section 34 were considered by this Court and Mr. Justice Shah in delivering the judgment on behalf of the Division Bench had held at page 1376 (of Bom LR) :

> "Evidently, this provision is prospective in terms and a notice under Section 34(1) (a) may, since the enactment of Act I of 1939, be issued at any time notwithstanding that the period of eight years prescribed by Sub-Section (1), clause (a), before it was amended by Act of 1956, had expired."

That view of this Court was not considered in Brindaban Chandra Basak's case, 1962-46 ITR 14 (Cal). In our opinion, we are not only bound by the decision of this Court in Onkarmal Meghraj's case 61 Bom LR 1373 but the view taken in that decision is further fortified by the remarks in the judgment of the Supreme Court to which we have referred. We cannot therefore accept the view expressed in Brindaban Chandra Basak's case, 1962-46 ITR 14 (Cal).

[7]61 Bom LR 1373

39. None of the provisions upon which the Department has relied therefore can save the notice from the operation of clause (ii) of the first proviso to sub-section (1) of Section 34 of the Amended Act. The notice issued on 5-1-1962 must, therefore, be declared as illegal and not justified upon the provisions of Section 4 of the Amending Act of 1959.

40. In the view we have taken, it is not necessary to consider the other points raised in this case on behalf of the petitioner, but we may briefly note them here.

41. It was urged by Mr. Bobde that the provisions of Sub-Section (1A) of Section 34 would be attracted and that as soon as the case would fall under that Sub-Section it would he taken out of the provisions of Sub-Section (4) or the proviso to Sub-Section (3). It was also argued on the basis of the decision of the Supreme Court reported in Calcutta Discount Co. Ltd. y., Income-tax Officer, AIR 1961 Supreme Court 372 that even assuming that the notice was valid it could not be held that any income of the petitioner had escaped assessment because the petitioner had at the time of the earlier assessment disclosed all primary facts fully and truly and therefore there was no question of any income having escaped or of failure to disclose fully and truly all material facts as required by clause (a) of Sub-Section (1) of Section 34. He pointed out that in the Supreme Court case referred to above a distinction has been clearly drawn between primary facts and other facts and it has been pointed out that if primary facts are disclosed fully and truly Section 34(1)(a) would not be attracted. Mr. Bobde on behalf of the petitioner has also requested us to note here that the notice impugned in the present petition was not sought to be justified

under the provisions of the new Indian Income-tax Act, 1961 (Act 43 of 1961). The question was raised but Mr. Natu on behalf of the Department did not invoke any of the provisions of that Act in support of the notice. The notice in the instant case was issued prior to the new Act 43 of 1961 came into force on 1-4-1962. However, as we have said, it is not necessary to consider all these questions because of the view we have taken that under Section 34(1) of the Act of 1922 as it stood after the 1956 amendment, the notice was bad, even having regard to its other provisions as amended in 1956 and 1959.

42. In the result, therefore, we allow the petition and quash the notice dated 5-1-1962. There shall be no order as to costs.
Petition allowed.