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CASES DETERMINED BY THE HIGH COURT AT PATNA AND BY THE SUPREME COURT ON APPEAL FROM THAT COURT

REPORTED BY

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Before S. K. Jha, Nazir Ahmad and Prabha Shanker Mishra, JJ.

1984.

May, 21

M/S. JAMUNADAS MANNALAL, JHUMRITELAIYA.*

v.

THE COMMISSIONER OF INCOME-TAX, BIHAR.

Income Tax Act, 1961 (*Central Act, no. XLIII of* 1961) *sections* 139, 144, 256 (1) *and* 271 (1) *and* (2)—*section* 271 (1) (*a*)—*provisions of—penalty, whether to be levied even after charging interest under section* 139—*period of default, whether ends with the filing of return of income under section* 139 (4) *or best judgment assessment of income under section* 144—*section* 271 (2)—*quantifying of penalty—assessed tax, whether to be taken as payable by unregistered firm—words "notwithstanding anything contained in any other provisions", effect of—section* 256 (1)—*question of law referred by Income Tax Appellate Tribunal to High Court for opinion,—effect—narrowing down the controversy to one of the several contentions—whether can be redrafted.*

Per Curium:—The period of default, in filing return by the assessee reckoned from the due date of filing the return has to be taken to have come to an end with the filing of the return of the income, if it is filed before the best judgment assessment under section 144 of the Income Tax Act, 1961, hereinafter called the Act, and within the period prescribed under section 139 (4) of the Act and in a case of no return of income filed at all with the assessment of income as prescribed under section 144 of the Act.

Held, that the penalty in the instant case is leviable under section 271 (1) of the Act even after charging interest under section 139 Period of default is not circumscribed by the period of assessment

*Taxation Case nos. 37 and 38 of 1975. Re: Statement of case under section 256(1) of the Income-Tax Act, 1961 by the Income-Tax Appellate Tribunal, 'B' Bench, Patna in the matter of assessment of Income-Tax on M/s. Jamunadas Mannalal, Jhumritelaiya for the assessment year 1965-66 and 1966-67.

year and it ends either with the filing of the return of income in accordance with law or with the assessment of income in lieu thereof under section 144 of the Act. The provisions as made, suffer from no ambiguity and is sufficiently workable keeping in view the ceiling on the quantum of penalty;

Held, further, in view of the provisions, particularly made, of imposition of penalty upon a registered firm it is irresistible to conclude in terms of the language of section 271 (2) of the Act that while quantifying the penalty the assessed tax is not to be taken as one payable by the assessee as a registered firm but as if it is unregistered firm. Any other meaning given to it shall cause serious violence to the non-obstante clause and the words notwithstanding anything contained in any other provisions of the Act shall lose its purpose;

Held, also, that in the instant case penalty under section 271 (1) is leviable upon the assessee and the amount of penalty is Rs. 8,680 calculated on the basis of tax on registered firm has been validly levied on the assessee for the assessment year 1966-67.

Per Majority (Nazir Ahmad J, contra)

Where the question of law framed by the Income-tax Appellate Tribunal referred to the High Court for opinion under section 256 (1) of the Act, has got the effect of narrowing down the controversy to only one of the several contentions which can be raised, to question the validity of the imposition of penalty under section 271 (1) (*a*) of the Act;

Held, that the real issue may escape if other or alternative contentions are not permitted to be raised. In such a situation on being reframed it will not be a new question of law rather it shall new point of view on the same question which has been decided by the Tribunal. The real controversy relates to the question as to whether the assessee is liable to penalty under section 271 of the Act or not. Merely because some contentions were not raised before the Tribunal, the assessee ian not denied the opportunity to raise such contentions;

Per Nazir Ahmad J,

Held, that even if a question of law is redrafted by the High Court to the effect whether penalty can be imposed under section 271 (1) (*a*)

of the Act, then it will be a wider question than what was raised before the Tribunal and such a question can not be redrafted, as such a question was not raised before the Tribunal and in such a case it can not be said that it is a different aspect of the same question.

Case laws discussed.

Statement of case under section 256 (1) of the Income Tax Act, 1961.

The facts of the case material to this report are set out in the judgment of P. S. Mishra, J.

Case in the First instance was heard by S. K. Jha and A. K. Sinha, JJ. who referred it to a larger Bench.

On this reference.

M/s. Kashi Nath Jain and *Rameshwar Prasad II* for the petitioner.

M/s. B. P. Rajgarhia, S. K. Sharan and *Samrendu Pratap Singh* for the opposite party.

P. S. MISHRA, J.—At the instance of the assessee, M/s. Jamunadas Mannalal, a registered firm, at Jhumritelaiya in the district of Hazaribagh, Income Tax Appellate Tribunal 'B' Bench, Patna, has referred to this Court the following questions of law for opinion:—

"(1) Whether penalty under section 27(1)(*a*) could be imposed even after charging interest under section 139 for delayed submission of return, (2) Whether on the facts and in the circumstances of this case the Income Tax Officer had forfeited his rights to impose penalty under section 274(1)(*a*) by not completing the assessment under section 144, (3)Whether on the facts of the case a penalty of Rs. 8,680 calculated on the basis of tax on unregistered firm could be levied in this case when no tax was payable by it as a registered firm."

2. Assessment years involved are 1965-66 and 1966-67. There being separate penalty orders for the two years, and separate appeals

by the assessee before the Appellate Assistant Commissioner of Income Tax, Ranchi Range, Ranchi, and the Income Tax Appellate Tribunal 'B' Bench, Patna and two references although by a common order have been made by the Tribunal, in this Court also the references in question have been registered as two Taxation cases; one for the assessment year 1965-66 and the other for the assessment year 1966-67. A Bench of this Court consisting of S. K. Jha and A. K. Sinha, JJ heard the matter and on 31st March 1988 noticed that on the question as to what should be the period for which there can be said to be a default for levying penalty in terms of section 271(1)(*a*) of the Income Tax Act, 1961, the two Hon'ble Judges of this Court, namely, S. P. Sinha, J (as he then was) and S. Sarwar Ali, J (were in disagreement in the case of *Additional Commissioner of Income Tax, Bihar* Versus *Dongarsidas Biharilal*(1). They, accordingly thought it desirable that the matter should be heard by a Full Bench for an authoritative exposition of law.

3. Admitted facts, *inter alia*, are as follows:—

The assessee is a registered firm. As provided under section 139(1)(*a*) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') it could file its return of income by the 30th June, 1965 for the assessment year 1965-66 but it failed to do so. Similarly for the assessment year 1966-67, its return of income was due on 30th June 1966. It did not, however, file the return within time. The assessee was given a notice by the Income Tax Officer concerned as provided under sub-section (2) of section 139 of the Act to furnish a return of its income for the assessment year 1965-66. The assessee did not respond to this notice. The assessee submitted a return for the assessment year 1965-66 on 17th October 1966 and for the assessment year 1966-67 on 28th August 1968 under section 139(4) of the Act. Penalty proceedings were initiated for not filing the return of income by the due date under section 139(1) of the Act and notices were issued under section 274/271(1)(*a*) of the Act which were duly served on the assessee. The Income Tax Offier concluded that the assessee failed to submit return of its income for these two years by the due

(1) 116 I.T.R. 897.

date and delayed the filing of return without reasonable cause. He accordingly imposed a penalty of Rs. 8,310 being two per cent of the tax assessed as unregistered firm for every month of default for the assessment year 1965-66 and Rs. 8,680 being two per cent of the assessed tax as unregistered firm for the assessment year 1966-67, after deducting the advance tax already paid, for every month during which default continued. The assessee preferred appeals before the Appellate Assistant Commissioner of Income Tax, Ranchi Range, Ranchi and its appeals having been dismissed by the Appellate Assistant Commissioner, it appealed before the Appellate Tribunal. The Appellate Tribunal also found no merit in the appeals as to the question that no liability to pay penalty existed but it found force in the arguments of the assessee's counsel that in determining the quantum of penalty payments of advance taxes should have been considered. It accordingly directed the Income Tax Officer to recompute the penalties after due consideration and adjustments of advance taxes paid for both the years under appeal and both the appeals were partly allowed. The assessee then moved the Tribunal for a reference under section 256(1) of the Act.

4. The assessee had paid advance taxes leviable to a registered firm for the assessment years 1965-66 and 1966-67. For the years 1966-67 it had paid its tax liabilities as a registered firm in full. Its contention on that basis was that since no tax was payable by it for the assessment year 1966-67 no penalty could be imposed upon it for that year and accordingly the penalty of Rs 8,680 calculated as the amount of 2 per cent of the tax assessed as an unregistered firm could not be levied. Third question under reference is, therefore, confined to the assessment year 1966-67 only.

5. Mr. K. N. Jain, learned counsel appearing for the assessee at the first instance suggested that the question, "whether penalty under section 271(1)(*a*) could be imposed even after charging interest under section 139 for the delayed submission of return," requires a reframing so as to include other aspects of law. According to him the wider and real issue involved in the case is:— "Whether on the facts and in the circumstances of the case, penalty under section 271(1) is leviable or not." As to whether

penalty under section 271(1)(*a*) could be imposed evenafter charging interest under section 139 or not, is only one of the aspects of the real question as to whether on the facts and in the circumstances of the case, exercise of power to impose penalty under section 271(1)(*a*) is legal or not. Penalty can be levied after interest is charged upon the tax payable, at the best, is a ground like several other grounds to show that the imposition of penalty upon the assessee is invalid. Mr. B. P. Rajgarhia, learned senior standing counsel of the Income-tax Department appearing for the Commissioner of Income Tax, Bihar, however, seriously objected to the reframing of the question on the ground that as suggested by Mr. Jain if the question is reframed it shall not be one arising out of the Tribunal's order.

6. Until the decision of the Supreme Court in the case of *Commissioner of Income Tax, Bombay* versus *Scindia Steam Navigation Co. Ltd.*(1), there was no judgment of the Supreme Court as to what precisely may be the meaning and import of the words, :— "any question of law arising out of" the Tribunal's order. A wide divergence of judicial opinion required a review of the various judgments of the High Courts and accordingly after doing so, Supreme Court said:—

"It will be seen from the foregoing review of the decisions that all the High Court are agreed that section 66 creates a special jurisdiction, that the power of the Tribunal to make a reference and the right of the litigant to require it, must be sought within the four corners of section 66(1), that the jurisdiction of the High Court to hear references is limited to questions which are properly referred to it under section 66(1), and that such jurisdiction is purely advisory and extends only to deciding questions referred to it. The narrow ground over which the Hign Courts differ is as regards the question whether it is competent to the Tribunal to refer, or the High Court to decide, a question of law which was not either raised before the Tribunal or decided by it, where it arises on the facts found by it."

(1) 42 I.T.R. 589.

The Supreme Court noticed that one view was that the words "any question of law arising out of" the order of the Tribunal signify that the quesion must have been raised before the Tribunal and considered by it, and the other view was that all questions of law arising out of the facts found would be questions of law arising out of the order of the Tribunal. The Supreme Court summed up as follows:—

"(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order."

While applying the above said law to the facts of the case before them, the Supreme Court further observed:—

"Now the only question on which the parties were at issue before the income-tax authorities was whether the sum of Rs. 9,26,532 was assessable to tax as income received during the year of account 1945-46. That having been decided against the respondents, the Tribunal referred on their application under section 66(1), the question, whether the sum of

Rs. 9,26,532 was properly included in the assessee company's total income for the assessment year 1946-47, and that was the very question which was argued and decided by the High Court. Thus it cannot be said that the respondents had raised any new question before the Court. But the appellant contends that while before the income-tax authorities the respondents disputed their liability on the ground that the amount in question had been received in the year previous to the year of account, the contention urged by them before the court was that even on the footing that the income had been received in the year of account, the proviso to section 10(2)(*viii*) had no application, and that it was a new question which they were not entitled to raise. We do not agree with this contention. Section 66(I) speaks of a question of law that arises out of the order of the Tribunal. Now a question of law might be simple one, having its impact at one point, or it may be complex one, trenching over an area with approaches leading to different points therein. Such a question might involve more than one aspect, requiring to be tackled from different stand points. All that section 66(I) requires is that the question of law which is referred to the court for decision and which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been argued before the Tribunal. It will be an overrefinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of section 66(I) of the Act. That was the view taken by this court in Commissioner of Income-tax versus Ogale Glass Works Ltd. and in Zoraster and Co. versus Commissioner of Income-tax, and we agree with it. As the question on which the parties were at issue, which was referred to the court under section 66(I), and decided by it under section 66(5) is whether the sum of Rs. 9,26,532 is liable to be included in the taxable income of the respondents, the ground on which the respondents contested their liability before the High Court was one which was within the scope of the question, and the High Court rightly entertained it."

The Supreme Court has thus clarified that a question of law in issue should not be taken to be inhibited by the grounds or contentions which are raised before the Tribunal. If the question framed by the Tribunal has got the effect of narrowing down the controversy to only one of the several contentions which can be raised to question the validity of the imposition of penalty under section 271(1)(*a*) applying the law laid down by the Supreme Court it must be held that the real issue may escape if other or alternative contentions are not permitted to be raised. As the question referred to us in the inhibited form covers only a part of the real controversy, it is pertinent and reasonable to argue that the question should be reframed, so that the real issue arising out of the order of the Tribunal may be decided. Some contentions like one to which I shall presently advert although arise out of the order of the Tribunal were not argued before it. The real controversy relates to the question as to whether the assessee is liable to penalty under section 271(1) or not. Merely because some contentions were not raised before the Tribunal the assessee can not be denied the opportunity to raise such contentions.

7. Mr. Rajgarhiya placed reliance on the judgment in the case of *Kusumben D. Mahadevia* versus *Commissioner of Income-tax, Bombay City*(1) as also on some judgments of the High Courts and contended that a question of law which may become available from the facts before the Tribunal cannot be allowed to be raised if it was not raised before the Tribunal and decided by it. He submitted that a question can be framed by this Court only if the contention sought to be raised is co-extensive with the question of law referred to this Court by the Tribunal or is one which may be said to be included in it. Observations of Hidayatullah J. in Kusumben's case as also in the other cases decided by the Supreme Court as to the true scope of the jurisdiction of the High Court have been noticed by the Supreme Court in the

(1) 89 I.T.R. 540.

case of Commissioner of Income Tax Vs. Scindia Steam Navigation Co. Ltd. (supra) and as analysed by Venkatarama Aiyar J. Who spoke for the majority including Justice Hidayatullah found nothing in those cases that runs counter to the conclusions referred to above. It may be an over refinement of the position to hold that each aspect of a question is itself a distinct question. In the words of one of the distinguished Judges of this Court:—

"It is an accepted principle of law that where the question referred for opinion did not cover the real controversy in issue, the High Court could reframe the question and decide the real controversy. It cannot be gain said that a controversy may involve different approaches for its solution. Where the real controversy is, whether the penalty levied under section 271(1)(*a*) was legal and valid, it can be read from different angles." (See 116 ITR 897)

I am in respectful agreement with these observations. In the instant case the real controversy in issue as to whether the penalty could be levied under section 271(1)(*a*) or not has been approached by the Tribunal from a particular angle, which approach the learned counsel for the assessee says requires no consideration by this Court. Mr. Jain has fairly conceded that statutory interest realised under section 139(8) has got no bearing or effect upon the powers of the competent authorities to impose penalty under section 271(1)(*a*). Liability to pay penalty is not controlled by the provisions under section 139(8). The only answer to the question no. 1 referred to this Court by the Tribunal, therefore, is that the penalty under section 271(1)(*a*) would be imposed even after charging interest under section 139 for delayed submission of return. But the real issue can still be approached from another angle. In such a situation on being reframed it will not be a new question of law rather it shall be a new point of view on the same question which has been decided by the Tribunal. Both Mr. Jain and Mr. Rajgarhiya addressed us at length on the question as reframed i.e. whether on the facts and in the circums-

(1) 39 I.T.R. 540.

tances of the case, penalty under section 271(1)(*a*) is leviable or not According to Mr. Jain section 271(1)(*a*) speaks of the default in furnishing the return of total income under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 and the failure to furnish it within the time allowed and in the manner required by sub-section (1) of section 139 or by such notice, as the case may be. Under section 139(1) every person, if his total income or the total income of any other person in respect of which he is assessable under the Act exceeded the maximum amount which is not chargeable to income-tax during the previous year is obliged to furnish a return of his income or the income of such other person during the previous year in accordance with law before the expiry of four months from the end of the previous year or where there is more than one previous year from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th June of the assessment year, whichever is latter, if the person concerned is one whose total income includes any income from business or profession, and in the case of every other person by the 30th day of June of the assessment year. If no return is filed on or before the due date there is a default. Except in accordance with the proviso of section 139(1) in no other case the return of income required to be filed under section 139(1) can be filed after the due date. A return filed under section 139(2) or under section 139(4) cannot be said to be a return filed under section 139(1). Thus even if a return is filed under section 139(4) the default in filing the return under section 139(1) is not removed. In fact the beginning and the end of the default in the filing of the return under section 139(1) coincide. Either the return under section 139(1) is filed or not filed at all. That being the position, according to Mr. Jain it is not possible to quantify the amount of penalty on the basis of the amount of the tax payable by the defaulting assessee for every month during which the default continued. In other words once there is a default in filing the return under section 139(1) of the Act there is no continuity attached to if and if there is any it is *ad infinitum*. In the absence of a terminus provided

under section 271 and/or any other provision of the Act imposition of penalty is neither practicable nor possible. Mr. Rajgarhiya on the other hand contended that the qualifying expression, return of total income, of the assessment year concerned must be deemed to be satisfied either by the filing of the return under section 139(4) of the Act or if no return is filed at all with the conclusion of the assessment proceeding because the penalty is leviable upon the assessed tax in addition to the amount of the tax payable. After detail arguments from both the sides were heard, Mr. Jain, however, indicated that he was not pressing his contention. In view of this stand of Mr. Jain, perhaps, we are not required to probe into it but to leave this controversy at that will mean to leave this Court's controversial view in the judgment of S. P. Sinha, J.—"The default cannot be carried over beyond the assessment year. Like an assessment of income to income-tax which must remain confined to an assessment year, the assessment of penalty must also remain confined to an assessment year" as it is. The very purpose for which we constituted the Full Bench would stand defeated if we do not predicate into this question. I propose, therefore, to deal briefly, but not dismissively, with this aspect.

8. Mr. Jain started by reminding us the well settled principle of construction of taxing statutes that when the provision is ambiguous or is capable of two meanings, the construction beneficial to the citizens should be adopted and referred to a Division Bench decision of the Calcutta High Court in *C.I.T. vs. Vegetable Products Ltd.*(1) and the judgement of the Supreme Court affirming the said Calcutta decision in [1973] 88 ITR 192] for this purpose. Without disputing this rule of interpretation of statutes Mr. Rajgarhiya, on the other hand, drew our attention to the judgment of the Supreme Court in *Rajputana Agencies Ltd. vs. C.I.T.*(2) to read a passage from Maxwell on the Interpretation of Statutes, 10th

edition page 284, which is quoted with approval in the said case: —

"The tendency of modern decisions upon the whole, is to narrow materially the difference between what is called a strict and beneficial construction." This and like rules of interpretation of statutes have been variously stated.

No doubt one has to look merely on what is clearly said in a taxing statute. There is no room of any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing has to be read in, nothing has to be complied, one can only look fairly at the language used. (*See* IRC 1921 IRB 64). Even so the fundamental rule of construction is the same for all statutes, whether fisical or otherwise. To arrive at the real meaning it is always necessary to get an exact conception of the aim, scope and object of the whole Act. [See *Heydon's* case (1584) 3 Co Rep 7b]. *Att. Gen.* vs. *Carlton Ban* (1899) 2UB 158]. With these cautions, I shall now proceed to read the words of the relevant provisions of the Act and to test the correctness or otherwise of the contention of Mr. Jain.

9. Section 139, in its relevant parts, as existing in the relevant year runs as follows: —

> "139(1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed;

(1) (1971) 80 I.T.R. 14.
(2) (1959) 95 I.T.R. 168.

(*a*) in the case of every person whose total income, or the total income of any other person in respect of which is assessable under this Act, includes any income from business or profession, before the expiry of six months from the end of the previous year or where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of June of the assessment year, whichever is later;

(*b*) in the case of every other person, before the 30th day of June of the assessment year:

Provided that, an application made in the prescribed manner, the Income-tax Officer may, in his discretion, extend the date for furnishing the return;

(*i*) in the case of any person whose total income includes any income from business or profession previous year in respect of which expired on or before 31st day of December of the year immediately preceding the assessment year and in the case of any person referred to in clause (*b*), up to a period not exceeding beyond 30th day of September of the assessment year without charging any interest;

(*ii*) in the case of any person whose total income includes any income from business or profession the previous year in respect of which expired after 31st day of December of the year immediately preceding of the assessment year, after the 31st day of December of the assessment year without charging any interest; and

(*iii*) up to any period falling beyond the dates mentioned in clauses (*i*) and (*ii*), in which case, interest at

the rate of six per cent, per annum will be payable from the 1st day of October or the 1st day of January, as the case may be, of the assessment year to the date of the furnishing of the return;

(*a*) in the case of a registered firm or an unregistered firm which has been assessed under clause (*b*) of section 183, on the amount of tax which would have been payable if the firm had been assessed as an unregistered firm;

(*b*) in any other case, on the amount of tax payable on the total income, reduced by the advance tax, if any, paid or by any tax deducted at source, as the case may be.

* * *

(2) In the case of any person who, in the Income-tax Officer's opinion, is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the Income-tax Officer may, before the end of the relevant assessment year, serve a notice upon him requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:

Provided that on an application made in the prescribed manner the Income-tax Officer may, in his discretion, extend the date for furnishing the return, and when the date for furnishing of the return, whether fixed originally or on extension, falls beyond the 30th day of September or as the

case may be, the 31st day of December of the assessment year, the provisions of sub-section (*iii*) of the proviso to sub-section (1) shall apply.

* * *

(4) Any person who has not furnished a return within the time allowed to him under sub-section (1) or sub-section (2) may before the assessment is made furnish the return for any previous year at any time before the end of the four assessment years from the end of assessment year to which return relates, and the provisions of sub-clause (*iii*) of the proviso to sub-section (1) shall apply in every such case.

* * *

(7) No return under sub-section (1) need be furnished by any person for any previous year if he has already furnished a return of income for such year in accordance with the provisions of sub-section (2).

(8) Notwithstanding anything contained in clause (*iii*) of the proviso to sub-section (1), the Income-tax Officer may in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable any person under any provision of the section.

This section has undergone some amendments and as stands today, in its relevant part it runs as follows:

"Return of income—(1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed—

(*a*) in the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act, includes any income from business, or profession, before the expiry of (four months) from the end of the previous year or where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of June of the assessment year, whichever is later;

(*b*) in the case of every other person, before the 30th day of June of the assessment year:

* * *

"(2) In the case of any person who, in the Income-tax Officer's opinion, is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the Income-tax Officer may, before the end of the relevant assessment year, issue a notice to him and serve the same upon him requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such other person during the

previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:

[Provided that, on an application made in the prescribed manner, the Income-tax Officer may, in his discretion, extend the date for furnishing the return, and, notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of sub-section (8)].

"(2)(*a*) Any person who has not furnished a return within the time allowed to him under sub-section (1) or sub-section (2) may before the assessment is made, furnish the return for any previous year at any time before the end of the period specified in clause (*b*) [and the provisions of sub-section (8) shall apply in every such case].

(*b*) The period referred to in clause (*a*) shall be—

(*i*) where the return relates to a previous year relevant to any assessment year commencing on or before the 1st day of April, 1967 four years from the end of such assessment year;

(*ii*) where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April, 1968, three years from the end of the assessment year;

(*iii*) Where the return relates to a previous year relevant to any other assessment year, two years from the end of such assessment year."

* * *

"(8)(a) Where the return under sub-section (1) or sub-section (2) or sub-section (4) for an assessment year

is furnished after the specified date, or is not furnished, then (whether or not the Income-tax Officer has extended the date for furnishing the return under sub-section (1) or sub-section (2), the assessee shall be liable to pay simple interest at twelve per cent per annum, reckoned from the day immediately following the specified date to the date of the furnishing of the return or, where no return has been furnished, the date of completion of the assessment under section 144, on the amount of the tax payable on the total income as determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source:

Provided that the Income-tax Officer, may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any assessee under this sub-section."

In the instant case for the year 1965-66 the return of income was due by 3rd June 1965 and it was filed on 17th October 1966 and for the year 1966-67 the return was due on 30th June 1966 and it was filed on 28th August 1968. Evidently the law applicable was as existed for the years 1965-66 and 1966-67, as quoted above.

10. Mr. Jain has submitted that in a case in which there is a default in furnishing the return under sub-section (1) or sub-section (2) of section 139, for the purposes of interest the terminus is indicated in the words, "reckoned from the date immediately following the specified date to the date of the furnishing of the return or where no return has been furnished, the date of completion of the assessment under section 144, on the amount of the tax payable at the total income as determined on regular assessment, as reduced by the advance tax if any paid, and any tax deducted at source", in sub-section 8(*a*) of

section 139. Under the Explanation at the foot of sub-section 8(a) of section 139, 'specified date', in relation to a return for an assessment year has been defined. Thus, according to Mr. Jain, both, the date from which the interest shall be reckoned and the date up to which it shall be charged, are indicated and this leaves no ambiguity in so far as the charging of the interest is concerned. Such words, however, are not available in section 271(1) and or any other provision of the Act in respect of the imposition of penalty.

Section 271(1) at the relevant time reads as follows:—

"271(1) If the Income-tax Officer or the Appellate Assistant Commissioner in the course of any proceeding under this Act, is satisfied that any person—

(*a*) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 or section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of section 139 or by such notice, as the case may be, or

* * *

he may direct that such person shall pay by way of penalty—

(*i*) in the cases referred to in clause (*a*), in addition to the amount of tax, if any, payable by him, a sum equal to two per cent of the tax for every month during which default continued, but not exceeding in agreement fifty per cent of the tax:"

Subsequently clause (*i*) was substituted by the Direct Taxes (Amendment) Act, 1974, with retrospective effect from the date of the commencement of the 1961 Act, the effect being to substitute "assessed tax" for "tax" and to insert the Explanation. After the amendment this provision reads as follows:—

"Failure to furnish returns, comply with notices, concealment of income, etc.—(1) If the Income-tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person—

(*a*) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 or section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of section 139 or by such notice, as the case may be, or

(*b*) has without reasonable cause failed to comply with a notice under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or

(*c*) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty,—

(*i*) in the cases referred to in clause (a),—

(*a*) in the case of a person referred to in sub-section (4A) of section 139, where the total income in respect of which he is assessable as a representative assessee does not exceed the maximum amount which is not chargeable to income-tax,

a sum not exceeding one per cent of the total income computed under this Act without giving effect to the provisions of sections 11 and 12, for each year or part thereof during which the default continued;

(*b*) in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent, of the assessed tax for every month during which the default continued.

Explanation.—In this clause, "assessed tax" means tax as reduced by the sum, if any, deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C.

According to Mr. Jain his case will be one falling under section 271(1)(*a*)(*i*)(*b*). 'A sum equal to 2 per cent of the assessed tax for every month during which the default continued', can be determined and quantified only if the date on which the default shall cease is known. Sub-section (4) of section 139, Mr. Jain has submitted, is suigeneris. A return filed under section 139(4) is not a return either under section 139(1) or under section 139(2). Section 271(1)(*a*) has referred to section 139(1) and (2) but has not referred to section 139(4). It has also not referred to the default either ending with the filing of the return under section 139(4) or with the date of completion of the assessment under section 144 as provided under section 139(8). It will be going beyond the words of a penal provision in a taxing statute to read a terminus with the filing of the return or the completion of the best judgment assessment under section 144.

11. The above argument is both ingenious and intelligent but, as I shall presently demonstrate, has got no merit. Before Mr. Jain's argument is accepted it shall have to be concluded that a return of total income for a particular year of assessment under sub-section (1) of section 139 or under sub-section (2) of section 139 is different from the return of total income

which the assessee may file under section 139(4). Reference to sub-section (1) of section 139 or to the notice under sub-section (2) of section 139 has been made in section 271(1)(a) for the only purpose of identifying the default which shall attract the penalty. These sections, *inter alia*, are referred to for reckoning the date from which the default shall be calculated. Inclusion or reference to these sections makes the beginning of the default known. The default is caused on account of non-filing of the return of total income. Once this return is filed under section 139(4) the income tax officer is obliged to take that return into consideration for the purposes of assessment. Provision for the best judgment assessment as engrafted under section 144 shall not be attracted in such a case. The default in filing the return of the income comes to an end no sooner a return is filed under sub section (4) of section 139.

12. In a case in which return of income is not filed at all, not even under sub-section (4) of section 139, the Income-tax Officer is still required to make an assessment under section 144. The default on account of non-filing of the return of income shall automatically come to an end with the best judgment assessment. This process has to be repeated year after year. One assessment will be followed by another assessment. Each assessment year shall require filing of a return of income. The default shall remain attached to the return of income of each assessment year.

13. Will then like a return of income remaining confined to an assessment year the default shall also remain circumscribed within 12 months of the relevant assessment year? According to S. P. Sinha, J. (as he then was), in the case of *Additional Commissioner of Income-tax, Bihar* versus *Dongarsidas Biharilal*, (supra) the default cannot be carried over beyond the 12 months of the relevant assessment year. According to S. Sarwar Ali, J. in that very case, the period of default for the purposes of levying penalty cannot be confined to an assessment year.

14 Before I deal with the question posed above, I propose to advert to yet another aspect of the matter. Mr. Jain has emphasised that the imposition of the penalty is linked with the tax payable. If the tax is not payable by the assessee no penalty can be imposed. As I have pointed out earlier the assessee is a registered firm. Admittedly the assessee paid advance tax for the assessment year 1965-66 as also assessment year 1966-67. For the assessment year 1966-67 the advance tax paid was enough to discharge any tax liability of the firm. As to whether the quantification of the penalty for the said assessment year is in accordance with law or not, I shall separately examine while examining the 3rd question referred to us. Confining to the question as to whether the imposition of a penalty on a registered firm shall still be permissible, even if there is no tax liability, I find it difficult to accept Mr. Jain's contention. In the case of *Khusiram Murarilal* v. *Commissioner of Income-tax, Central, Calcutta*(1) the question which fell to be determined was whether imposition of a penalty on a registered firm under section 28(1)(*b*) of the Indian Income Tax Act, 1922, was justified in law. It was urged in that case on behalf of the assessee that inasmuch as under section 28(1)(b) a person can be made liable to pay penalty, in addition to the amount of income tax and super tax, if any, payable by him in cases falling under clauses (*b*) and (*c*), no order for payment of penalty can be made against a registered firm, because under the Income-tax Act no tax is made payable by the firm. It was a case where no tax liability had been created on a registered firm although individuals constituting the firm were each separately liable to pay the taxes. The Court observed:

"Even when construed by its own language the concluding paragraph of section 28(1) cannot be said to make it a condition

(1) (1954) 25 I.T.R. 572.

precedent that a person must be liable to pay some income-tax or it may be also super-tax if he is to be made liable for a penalty." It was also observed: "It was not really necessary for clause (d) of the proviso to enact specifically that a registered firm would be liable to pay a penalty despite the fact that it could not be charged and was not, in fact, charged to income-tax or super-tax. The whole argument of Dr. Sen Gupta was that the concluding paragraph of section 28(1) had left a gap which had been attempted to be filled up by clause (*d*) of the proviso, but the attempt had not been successful. In my view the gap which undoubtedly existed in the concluding paragraph of section 28(1) was only an absence of a provision regarding the quantum of the penalty that could be levied from a registered firm because the quantum depends upon the amount of income-tax payable."

In the case of *Commissioner of Income-tax, Madras and another* v. *S. V. Angidi Chettiar*(1) the above quoted observations of the Calcutta High Court were approved by the Supreme Court and the law was stated in the following words:—

> "In our view the learned Chief Justice was right so enunciating the law. Under section 23(5) of the Indian Income-tax Act, before it was amended in 1956, in case of a registered firm the tax payable by the firm itself was not required to be determined but the total income of each partner of the firm including therein the share of its income, profits and gains of the previous year was required to be assessed and the sum payable by him on the basis of such assessment was to be determined. But this was merely a method of collection of tax due from the firm.

(1) (1962) 44 I.T.R. 739.

> The penalty provisions under section 28 would therefore in the event of the default contemplated by clause (*a*), (*b*) or (*c*) be applicable in the course of assessment of a registered firm. If a registered firm is exposed to liability of paying penalty, by committing any of the defaults contemplated by clause (*a*), (*b*) or (*c*) by virte of section 44, notwithstanding the dissolution of the firm the assessment proceedings are liable to be continued against the registered firm, as if it has not been dissolved."

It is noticeable that in concluding the quantum of penalty the amount of the tax payable has to be kept in mind and as provided under sub-section (3) clause (d) of section 271 the penalty imposed must not exceed in the aggregate twice the amount of the tax sought to be evaded. It must be the sum payable at the time of imposition of the penalty. If at that time original assessment was there it shall be calculated on that basis. If on the other hand it was not there and there has been a reassessment, it shall vary accordingly.

15 In the case of the *Commissioner of Income-tax, West Bengal* v. *Vegetables Products Ltd.*(1) interpretation of section 271(1)(*a*)(*i*) had fallen for consideration. In that case for the assessee's assessment for the assessment year 1960-61, the relevant account year ending on December 31, 1959, the Income-tax Officer issued a notice under section 22(2) of the Indian Income Tax Act, 1922 on June 1, 1960. The same was served on the assessee on June 13, 1960. The notice required the assessee to submit its return on or before July 18, 1960. On July 18, 1960, the assessee moved for extension of time for submitting its return. The Income-tax Officer extended the time by two months and at the same time he informed the assessee that no further time would be allowed. The assessee failed to furnish its return within the extended time. Thereafter, a notice under section 28(3) of the 1922 Act was served on the assessee on January 16, 1961. On the very next date, viz. January 17, 1961, the assessee

(1) (1973) 88 I.T.R. 102.

filed its return for the assessment year in question. The assessment was completed by the Income-tax Officer on October 31, 1962. Meanwhile, on April 1, 1962, the Income-tax Act, 1961, came into force. As under the provisions of section 197(2)(g) of the Act, the proceeding for the imposition of the penalty had to be initiated and completed under the Act, a fresh notice under section 274(1) of the Act was served on the assessee. The assessee objected to the validity of the notice. In determining the penalty due from the assessee, the Income-tax Officer took into consideration not the amount demanded under section 156 of the Act but the amount assessed under section 143 of the Act. In appeal, the Appellate Assistant Commissioner confirmed the order of the Income-tax Officer. On a further appeal, the Tribunal came to the conclusion that the penalty under section 271(1)(*a*)(*i*) is to be levied on the tax assessed minus the amount paid under the provisional assessment order. On the basis of that finding, it determined the penalty payable by the assessee. It was contended on behalf of the revenue before the Supreme Court that on a proper construction of section 271(1)(a)(i), it would be seen that the penalty had to be determined on the basis of the tax assessed under section 143 of the Act. It was submitted that if that is not the true construction then the effectiveness of the section may be taken away by the assessee paying the tax due by him a day before the demand notice is served on him. This contention found support from the decisions of the Lahore High Court in *Vir Bhan Bansi Lal* Vs. *Commissioner of Income-tax*(1), and the Delhi High Court in *Commissioner of Income-tax* Vs. *Hindustan Industrial Corporation*(2). Assessee's contention on the other hand was that the penalty can be only imposed on the amount payable under section 156. This view found support from a decision of the Mysore High Court in *M. M. Annaiah* vs. *Commissioner of Income-tax* (3). Submission on behalf

(1) 6 I.T.R. 616.
(2) 86 I.T.R. 657.
(3) (1970) 76 I.T.R. 582 (Mys.).

of the assessee further was that if the interpretation placed by the revenue on section 271(1) (*a*)(*i*) is accepted as correct, the result would be that the advance tax paid or taxes deducted at the source cannot be taken into consideration in determining the penalty payable. The Supreme Court observed:

> That expression can be reasonably understood as refer- other interpretation sought to be placed on section 271(1) (*a*) (*i*) by the parties would lead to some inconvenient result, but the duty of the court is to read the section, understand its language and give effect to the same. If the language is plain, the fact that the consequence of giving effect to it may lead to some absurd result is not a factor to be taken into account in interpreting a provision. It is for the legislature to step in and remove the absurdity. On the other hand, if two reasonable constructions of a taxing provision are possible that construction which favours the assessee must be adopted. This is a well accepted rule of construction recognised by this Court in several of its decisions. Hence all that we have to see is, what is the true effect of the language employed in section 271(1) (*a*) (*i*). If we find that language to be ambiguous or capable of more meanings than one, then we have to adopt that interpretation which favours the assessee, more particularly so because the provision relates to imposition of penalty".

The Supreme Court determined the meaning of the expressions used under section 271(1) (*a*) (*i*) and held—"The word assessed" is a term often used in taxation law. It is used in several provisions in the Act. Quantification of the

tax payable is always referred to in the Act as a tax "assessed". A tax payable is not the same thing as tax assessed. The tax payable is that amount for which a demand notice is issued under section 156. In determining the tax payable, the tax already paid has to be deducted. Hence there can be no doubt that the expression "the amount of the tax, if any, payable by him" referred to in the first part of section 271(1) (*a*) (*i*) refers to the tax payable under a demand notice. We next come to the question what is the meaning to be attached to words "the tax" found in the latter part of that provision. It may be noted that the expression used is not "tax" but "the tax" The definite article "the" must have reference to something said earlier. It can only refer to the tax if any, payable by the assessee mentioned in the first part of section 271(1) (*a*) (*i*).

* * *

That expression can be reasonably understood as referring to the expression earlier used in the provision, namely, "the amount of the tax, if any, payable" by the assessee. At any rate, the provision in question is capable of more than one reasonable interpretation. Two High Courts, namely, Calcutta and Mysore, have taken the view that the expression "the tax, in section 271(1) (*a*) (*i*) refers to "the tax, if any, payable" (by the assessee) mentioned in the earlier part of the section. It is true that the Lahore and Delhi High Courts have taken a different view. But the view taken by the Calcutta and Mysore High Courts cannot be said to be untenable view. Hence, particularly in view of the fact that we are interpreting, not merely a taxing provision but a penalty provision as well, the interpretation placed by the Calcutta and Mysore High Courts cannot be rejected. Further, as seen earlier, the consequences of accepting the interpretation placed by the revenue may lead to harsh results".

16. There is no difficulty in recognising as to when the default would arise. Section 271(1) (*a*) has indicated the

three situations, namely (*i*) non-furnishing of return as required under sub-section (1) of section 139, or (2) non-furnishing of return even after notice under sub-section (2) of section 139 or section 148 or (3) non-furnishing of return within the time allowed by the Income-tax Officer. Similarly clause (*b*) of the said section states about the default caused by non-compliance with a notice under sub-section (1) of section 142 or sub-section (2) of section 143 or a direction issued under sub-section (2A) of section 142 clause (*c*) of the said section refers to the act of concealment of the particulars of income or furnishing of inaccurate particulars of such income Liability as to the penalty for not filing the return of income as provided under sub-section (1) of section 139 is unconnected with the liability created on account of not filing the return of income in response to the notice under sub-section (2) of section 139. Default in not filing the return of income as required under sub-section (1) of section 139 shall however survive until the return of income is filed in response to the notice under section 139 (2) or under section 139(4). The return of income is the same whether filed under section 139(1) or in response to a notice under section 139(2) or under section 139(4). S. P. Sinha, J. in *Addl, Commissioner of Income-tax, Bihar* vs. *Dongarsidas Biharilal* (Supra) has said in this regard:

> "The provisions of this section, in so far as it concerns the idea of default are clear and unambiguous. Whenever an assessee fails either completely or partially to furnish, without any reasonable cause, the return of total income which he was required to furnish under sub-section (1) or sub-section (2) of section 139 or under section 148 of the Act within the time allowed he is in default. The difficulty, however, arises in so far as it concerns the period of default, *i.e.*, how long the default will continue. The starting point of default is known,

being the day following the date on which he should have furnished the return but failed to do so. The termination point, however, is not specified".

Mr. Jain has advanced a similar argument as one considered by S. P. Sinha, J. that for the levy of interest in terms of section 139(8) of the Act, it is specifically provided— "from the day immediately following the specified date to the date of the furnishing of the return, or where no return has been furnished, the date of completion of the assessment under section 144". No difficulty in computing the period of default for the purpose of penalty would have arisen had there been similar provisions made in this regard. He has submitted on this basis that the provisions contained in section 271(1) (*a*) (*i*) are unworkable and even if the legislature intended to levy penalty for default in filing of return of income the intention has failed. Sinha J: in this context. observed:

"The plain meaning of the provisions contained in sub-clause (*i*) under section 271(1) (*a*), as it appears to me, is that for the default under section 271(1) (*a*), the quantum of penalty shall be 2 per cent of the assessed tax for every month of default and may go up to 50 per cent of the assessed tax. The said provision only describes the limits within which the quantum of penalty would vary. It has no bearing on the question as to how long could tht dtfault go. I, therefore, think that the provisions contained in sub-clause (*i*) under section 271(1) (*a*) do not provide the answer to the question in issue".

After saying so Sinha, J. proceeded further and said — "I therefore, think that the period of default for the

purpose of levying penalty in terms of section 27(1) (*a*) (*i*) is terminable". In absence, therefore, I think for levying penalty in terms of section 271(1) (*a*) of the Act, the period of default starts on the day following the due date for compliance with the terms of section 139(1) or section 139(2) of the Act and remains circumscribed within the twelve months of the relevant assessment year. Similar would be the position where steps have been taken to tax an escaped income under section 148 of the Act. There also the period of default in filing the required return of income will remain circumscribed within twelve months of the year in whi ch steps for assessment of escaped income have been taken".

17. Is it so that the answer to the question in issue is not provided in section 271(1) (*a*)? The relevant and pregnant words are, "for every month during which the default continued". It is the default in filing the return of income as provided in the words "failed to furnish the return of total income". So long the return of total income of a particular assessment year is not filed the default continues. The day it is filed, may be under section 139(4), it ends. If it is not filed at all and assessment is completed under section 144, the default must be assumed to have come to an end because in lieu of the return of the total income the taxing officer, at this stage is required to make the assessment of the total income or loss to the best of his judgment, before determining the sum payable by the assessee or refundable to the assessee on the basis of such assessment. It is thus obvious that a return of income or the assessment of the amount of income or loss under section 144 of the Act shall alone terminate the default. This conclusion, in my opinion is in no way against the interest of the assessee. The maximum limit of the quantum of penalty is prescribed. The default may be found to have continued for several years yet the penalty cannot exceed the ceiling imposed under the Act. But if it is

kept confined to the period of twelve months of the assessment year, a sum equal to 2 per cent of the assessed tax may not ever touch the ceiling. Unless some charge is made in the language of the section, it is not possible to circumscribe the period of penalty to twelve months only. The Madhya Pradesh High Court considered a case in which a return of income was not filed as provided under section 139(1). No return was filed even after a notice under section 139(2) but was filed much later evidently under section 139(4). It concluded that default as prescribed under section 271(1) (*a*) continued till the date of filing of the return. Incidentally a Patna case in *Additional C. I. T. vs. Bihar Textiles*(1) was considered by the Madhya Pradesh High Court. The Patna view was that once notice under section 139(2) of the Act has been issued to be the assessee, there cannot be any penalty under section 271(1) (*a*) for failure to furnish the return as required by section 139(1). The Gujrat Court noticed that almost every High Court held against it (See 1979 Tax. L.R. 101). Comenting upon the said Patna view the Bombay High Court said in *I. T. Commissioner, Poona* vs. *D. V. Save*(2).

"However, in all the above catena of decisions a discordant note was struck by the Patna High Court. The argument which appealed to the Patna High Court which have been extracted in the paragraph quoted above have been fully dealt with in the judgments of the Rajasthan, Delhi fully dealt with in the judgments of the Rajasthan, Delhi and Andhra Pradesh High Courts. All the other refinements of the various arguments and their several facts which could have been urged on behalf of the assessees have been studiously considered by these High Courts and properly dealt with. Non of these arguments, nor any of the facets thereof

(1) (1975) 100 I.T.R. 958 (Pat.).
(2) (1979) Tax L.R. 1323.

have been accepted by these High Courts and in our view these High Courts have taken the correct view of the statutory provision and the interpretation put on the provision and the view taken by the Patna High Court applying the same does not qualify as a reasonable and possible interpretation which would bring into play the principle in Vegetable Products Ltd.'s case".

18. I have given my careful consideration and I have no manner of doubt that the defaults envisaged by section 271(1) (*a*) are not to be classified as Mr. Jain has been trying to do, by referring to the particular provisions of sections 139(1), 139(2) or section 148. A penalty for a default under section 139(1) can be imposed even if a return under section 139(2) or under section 139(4) is filed. Similarly a default caused on account of not responding to the notice under section 139(2) or section 148 can attract the penal consequences. In my view, the period of default reckoned from the due date of filing the return has to be taken to have come to an end with the filing of the return of income, if it is filed before the best judgment assessment under section 144 and within the period prescribed under section 139(4) and in a case of no return of income filed at all with the assessment of income as prescribed under section 144. In this respect I am in respectful disagreement with the view taken in the case of *Additional C. I. T.* vs. *Bihar Textile*(1) and the view taken by S. P. Sinha, J., in *Additional Commissioner of Income Tax, Bihar* vs. *Dongarsidas Biharilal* (Supra). The view that I have taken must necessarily lead to answering the 1st question referred to us against the assessee, both in its original form as also reframed. The penalty on the facts and in the circumstances of the case is leviable under section 271(1) even after charging interest under section 139. Period of default is not circumscribed by the period of assessment

(1) (1975) 100 I.T.R. 256.

yera and it ends either with the filing of the return of income in accordance with law or with the assessment of income in lieu thereof under section 144. The provisions as made, suffers from no ambiguity and is sufficiently workable keeping in view the ceiling on the quantum of penalty.

19. Mr. Jain has stated that on the facts and in the circumstances of this case the second question namely, 'whether in the facts and in the circumstances of this case the Income-tax Officer has forfeited his rights to impose penalty under section 271(1) (a) by not completing the assessment under section 144', does not arise. This question therefore, needs no discussion.

20. There is no manner of doubt that the right to impose penalty cannot be forfeited except in the case in which it is barred under some law like a law of limitation. This question has to be answered against the assessee.

21. Mr. Jain has, however, pressed the third question referred to us by the Tribunal, namely, whether on the facts of tht case a penalty of Rs. 8,680 calculated on the basis of tax on unregistered firm could be levied in this case when no tax was payable by it as registered firm. This amount of penalty calculated on the basis of 2 per cent of the tax for every month during which default continued has been imposed for the assessment year 1966-67. The assessee's case in this regard is that it paid advance taxes as registered firm and its entire tax liability for assessment year 1966-67 had been fully discharged by the payment of advance taxes. In the case of *Commissioner of Income Tax, West Bengal*, vs. *Vegetables Products Ltd.* (Supra), the Supreme Court has already held that if no tax is payable no penalty can be

imposed. According to Mr. Jain the only mode of calculating the amount of penalty for the assessment year 1966-67, will be one provided under section 271(1) (*i*) (*b*) read with the Explanation. The clear mandate of the legislature is that the penalty will be a sum equal to 2 per cent of the assessed tax for every month during which the default continued. The assessed tax has been defined in the explanation to mean tax as reduced by the sum, if any, deducted at source under Chapter XVII B or paid in advance under Chapter XVII C. The assessee paid advance taxes as under Chapter XVII-C and thus there was no assessed tax available to the authority concerned upon which he would have determined the quantum of penalty. In this view of the matter imposition of penalty for the assessment year 1966-67 is illegal. Mr. Jain has further submitted that assessed tax in the case of the assessee will be the tax payable as registered firm. Advance taxes were to be paid accordingly by the assessee and it so paid the tax to satisfy its tax liability. According to Mr. Jain sub-section (2) of section 271 opens with the words, "when the person liable to penalty is a registered firm". This liability to penalty is evidently to be assessed on the assessed tax that is to say, tax as reduced by the sum paid in advance. He has supported his submissions by a decision of the Gauhati High Court in *Commissioner of Income-tax, Assam, Nagaland, etc.* vs. *Maskara Tea Estate*(1). It has been held in the said case that the non-obstante clause in section 271(2) does not override the provisions of section 271(1) (*i*) and if a person committing a default under clause (*a*) of section 271(1) is a registered firm, its case does not fall automatically under sub-section (2) of section 271. Section 271(1) (*i*) does not exclude registered firms but incorporates "all persons". One cannot skip over the relevant clause (*i*) and jump to section 271(2) to stamp the registered firm with liability in the absence of any clear intendment expressed in the section. Gauhati High Court has followed the Madras High Court in

(1) (1981) 130 I.T.R. 955.

Additional C. I.T. vs. *Murugan Timber Depot*(1) and dissented from the view of the Gujrat High Court in *C.I.T.* vs. *R. Ochhavlal and Co.*(2). It has, however, not referred to a judgment of the Calcutta High Court in *Commissioner of Income Tax, West Bengal III* vs. *Priya Gopal Bishoyee*(3). After expressing the view as above the Gauhati Court has said: "The view that we have expressed finds ample support from the observations of their Lordships in *C. I. T.* vs. *Vegetable Products Ltd.* (Supra)". The Calcutta High Court considered the question, whether in the case of a registered firm which was liable to penalty under section 271(1) (*a*) read with section 271(2) of the Income-tax Act, 1961, the principle of the decision in *Vegetable Products Ltd.* (Supra) is not applicable for computing the penalty and answered it in the negative. Sabyasachi Mukherji, J. speaking for the Court noticed the view of the Supreme Court that the expression "the amount of tax, if any, payable by him" in the earlier part of section 271(1) (*a*) (*i*) referred to the tax payable under a notice of demand and the words "the tax", in the latter part of the provision would only refer to "the tax", if any, "payable" by the assessee mentioned in the earlier part of section 271(1) (*a*) (*i*) of the Act and a retrospective amendment subsequent to the decision of the Supreme Court in the Act by the Direct Taxes (Amendment) Act, 1974 under which explanation was added to section 271(1) (*i*) defining assessed tax to mean tax as reduced by the sum if any deducted in advance. The legal friction that is created by sub-section (2) of section 271 was noticed by him upon which he concluded: "Therefore for the purposes of imposition of penalty, the firm, even if it is registered, and if it has committed a default as contemplated under section 271, it would be treated on the same basis as if it was an unregistered firm". Before the Calcutta Court it was a case in which at

(1) (1978) 113 I.T.R. 50.
(2) (1976) 103 I.T.R. 618.
(3) (1981) 127 I.T.R. 778.

the date when the penalty was imposed there would have been no assessed tax if it was a registered firm, but if it was an unregistered firm and for the purpose of determination of imposition of penalty it would be treated as an unregistered firm and if it was so treated, fictionally there was a tax liability. Mukherji, J. said:—

"In this case, default upon which penalty was imposed was the delay in submission of the return. Therefore, the fact is that payment of the assessed tax on the basis of a registered firm would not exonerate the assessee from the imposition of the penalty on the basis that it was an unregistered firm calculating the default for the months for which the default had continued".

A similar question was considered by the Madhya Pradesh High Court. Answer given by it in the case of *Delux Publishing Co.* vs. *Additional Commissioner of Income-tax, Bhopal*(1) is:—"By section 271(2) of the Act a fiction is created and even if the person liable to penalty is a registered firm the penalty impossible under section 271 of the Act shall be the same amount as would be imposable on that firm if that firm were an unregistered firm Therefore, in the case of a registered firm the tax assessable has to be worked out as if it were an unregistered firm and on that basis the penalty has to be calculated because the fiction created has to be carried to its logical extent".

* * *

In our opinion in cases covered by section 271(2) of the Act, in order to calculate the penalty, the tax payable by the assessee on the income assessed has to be determined on the basis that the assessee is an unregistered firm and the penalty has to be calculated on the tax so determined."

(1) (1981) 127 I.T.R. 782.

A similar view has been expressed by the Bombay High Court in *Commissioner of Income Tax, Poona* vs. *M/s. India Automobiles, Kolhapur*(2). In the words as used in the said decision:—

> "Now, on a perusal of sub-section (2) of section 271, it appears to us that where a registered firm becomes liable to penalty, for the purpose of determining the penalty imposable, a fiction is introduced by the said sub-section that the said registered firm is to be treated as an unregistered firm. If such a fiction is introduced, there is no reason why it should not be carried to its logical conclusion, which would be that, in the computation of its total income, the assessee firm would be entitled to a deduction of an amount equivalent to the annuity deposit which it would have had to pay had it been an unregistered firm. Once the firm is treated, for the purpose of penalty, an unregistered firm, there is no reason why it should be denied such benefits by way of deduction as are available to an unregistered firm. It is true that, being a registered firm, it was really not required to pay any annuity deposit at all, but that, to our mind would make no difference and it would be entitled to a deduction in the computation of its total income for the purposes of determination of the tax payable, on which penalty is based, of the amount of the annuity deposit which it would have been required to pay, had it, in fact, been an unregistered firm." —

The Bombay High Court was really considering the question as to whether deduction under section 280-0 of the amount of annuity deposit which the assessee might have

(2) (1982) Tax L.R. 152.

paid if it was an unregistered firm, whether paid or not, could be permitted to be deducted or not in computing the penalty imposable on the assessee (registered firm) under section 271(1) (*a*) read with section 271(2) of the Income Tax Act. Punjab High Court in [(1981) 128 ITR 467] has held: "even though a registered firm has been granted certain concessions under the provisions of the Act regarding the payment of income-tax, yet the legislature in its wisdom thought that if such a firm misuses the concession given to it any default and incure the imposition of penalty, in that case the concession given shall be withdrawn. This has been precisely provided under sub-section (2) of section 271". In *Jain brothers* vs. *Union of India and others*(1), the Supreme Court held that the levy of penalty on a defaulting registered firm as if it was unregistered does not involve discrimination. In the words of the Supreme Court:—"It was, however open to the legislature to say that once a registered firm committed a default attracting penalty, it should be deemed or considered to be an unregistered firm for the purpose of its imposition. No question of discrimination under Article 14 can arise in such a situation. We fully share the view of the High Court that there was nothing to prevent the legislature from giving the benefit of a reduced rate to a registered firm for the purpose of tax but hold the same when it committed a default and became liable to imposition of penalty". In view of the provisions particularly made for imposition of penalty upon a registered firm it is irresistable to conclude, in terms of the language of section 271(2) that while quantifying the penalty the assessed tax is not be taken as one payable by the assessee as a registered firm but as if it is unregistered firm. Any other meaning given to it shall cause serious violance to the nonobstante clause and the words notwithstanding anything contained in other provisions of this Act shall lose its purpose.

(1) (1970) 77 I.T.R. 107.

22. *Commissioner of Income Tax Assam, Nagaland etc.* vs. *Maskara Tea Estate* (Supra) has proceeded on the basis that to attract nonobstante clause, the main sub-section must be applicable. The liability of the person must be determined and in doing so, one is to look at the preceding sub-section (1). On due scrutiny of section 271(1) (*a*) as well as clause (*i*), if a person is liable and if it happens to be a registered firm, sub-section (2) is attracted. The conditions precedent for the applicability of sub-section (2) are the two clauses of defaults referred to in section 271(1) (*a*) and (*i*) as sub-section (2) is applicable only to "person liable to penalty" and also that section 271(1) (*a*) (*i*) does not exclude registered firm but incorporates all persons. This view, I am afraid, cannot be accepted. Legal fiction which is created by sub-section (2) of section 271 is independent of the tax liability. Once it is found that there is a default so as to attract the penal provisions under section 271(1) (*a*), sub-section (2) of section 271 shall come into play. If the assessee is a registered firm, legal fiction created by it shall not permit to give to the assessee benefits of its being a registered firm. The assessee must answer the requirements as if it is not a registered firm. Its assessed tax for the purposes of imposition of penalty shall be that which shall be determined on the footing that it is not a registered firm. There is no abuse of the nonobstante clause involved if it is applied in that manner. Person liable to penalty is one who has committed a default as envisaged under section 271(1). If it is a registered firm it shall be in the same equation with unregistered firms as a person liable to penalty. Section 271(*a*) (*i*) has to be read alongwith 271(2) and not sepa-

In my view section 271 shall operate in the case of a registered firm at the time of quantification of the penalty under section 271(1) (*i*) (*b*) and tax determined to be payable by it as

an unregistered firm shall be the tax for the computation of the penalty.

23. For the view that I have taken, I am unable to agree with the answer provided by the *Commissioner of Income-tax Assam, Nagaland etc.* vs. *Maskara Tea Estate* (Supra) and the cases taking views similar to one taken in that case. In my opinion the question under reference has to be answered in the affirmative. The amount of penalty calculated on the basis of tax on unregistered firm is valid.

24. To conclude I hold that on the facts and in the circumstances of the case penalty under section 271(1) is leviable upon the assessee and the amount of penalty of Rs. 8,680/- calculated on the basis of tax on unregistered firm has been validly levied on the assessee for the assessment year 1966-67. It is thus obvious that all the questions referred to this Court have to be answered against the assessee. The question as to whether penalty under section 271(1) (*a*) could be imposed even after charging interest under section 139 for delayed submission of return in all its aspects including the broad question as reframed, whether in the facts and in the circumstances of the case, penalty under section 271(1) is leviable or not is answered in the affirmative. The second question whether on the facts and in the circumstances of this case, the Income-tax Officer had forfeited his right to impose penalty under section 1271(1) (*a*) by not completing the assessment under section 144 is answered in the negative. The third question whether on the facts of the case a penalty of Rs. 8,680/- calculated on the basis of tax on unregistered firm could be levied in this case when no tax was payable by it as a registered firm is answered in the affirmative. All the questions are thus answered against the assessee and in favour of the revenue.

25. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be sent to the

Income-tax Tribunal, Patna Bench, as required under section 260(1) of the Income-tax Act. The parties shall bear their own costs.

Nazir Ahmad, J.—I have gone through the order of P. S. Mishra Justice and I am to say that question no. 1, as referred by the Incom-tax Appellate Tribunal, B Bench, Patna, in R. A. nos. 51 and 52 (Pat.) of 1974-75 is as follows:—

> "(1) Whether penalty under section 271(1) (*a*) could be imposed even after charging interest under section 139 for delayed submission of return?"

I also agree with him that Mr. K. N. Jain, learned Advocate appearing for the assessee, at first suggested that question no. 1, as mentioned above, requires a re-framing. He wanted a re-framing of the question as follows:—

> "Whether, on the facts and in the circumstances of the case, penalty under section 271(1) (*a*) is leviable having in view the provisions of section 139 of the Income-tax Act, 1961."

P. S. Mishra Justice has pointed out the contention raised by Mr. Jain. His contention was that section 271(1)(*a*) of the Income-tax Act, 1961 (hereinafter as the said Act), speaks of the default in furnishing return of total income under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 and the failure to furnish it within the time allowed and in the manner required by sub-section (1) of section 139 or by such notice, as the case may be. According to Mr. Jain under section 139(1) a definite period has been fixed for filing the return and if no return is filed on or before the due date there is a default, and so a return filed under section 139(2) or under section 139(4)

cannot be said to be a return filed under section 139(1) of the said Act and thus even if the return is filed under section 139(4), the default in filing the return under section 139(1) is not removed and so, according to Mr. Jain, in fact the beginning and the end of the default in filing the return under section 139(1) coincide and either return under section 139(1) is filed or not filed at all and that being the position, according to Mr. Jain, it is not possible to quantify the amount of penalty on the basis of the amount of the tax payable by the defaulting assessee for every month during which the default continued. In other words once there is a default in filing the return under section 139(1) of the said Act, there is no continuity attached to it and if there is any, it is ad-infinitum and that in absence of teminus provided under section 271 and/or any other provision of the said Act the imposition of penalty is neither practicable nor possible. The entire argument of Mr. Jain has been quoted by P. S. Mishra Justice in paragraph 7 of his judgment.

2. The question which Mr. Jain actually wanted to reframe is a question whether, on the facts and in the circumstance of the case, the penalty under section 271(1)(*a*) of the said Act is leviable having in view the position of section 139 of the said Act, and for this purpose he wanted that question no. 1 referred by the Tribunal for decision of this Court be redrafted and so subsequently be suggested as follows:—

> "Whether on the facts and in the circumstances of the case, penalty under section 271(1)(*a*) is leviable?"

Such wider question was never raised before the Tribunal nor a reference on such a wider question was asked for. The question which Mr. K. N. Jain had originally raised was a question which was different from the question referred by the Tribunal.

3. It is evident from the order of the Appellate Tribunal that the first contention on behalf of the assessee was that the Income-tax Officer having charged interest under section 139 cannot impose penalty unler section 271(1)(*a*) of the said Act. The Tribunal held that this contention was not acceptable, because it is the intention of the Legislature to charge interest and penalty both for default of delayed return. Thus it is evident that no argument was advanced on the point that the Income-tax Officer had no jurisdiction to impose the penalty as no terminus has been provided under section 271 and/or the imposition of penalty is neither practicable nor possible. In my opinion this cannot be a different aspect of the question, because the question now raised goes to the root of the jurisdiction of the Income-tax Officer to impose a penalty. Challenging the jurisdiction of the Income-tax Officer is not a different aspect of the same question but a different and new question altogether. Moreover, P. S. Mishra Justice has also clearly pointed out towards the end of paragraph 7 that Mr. Jain indicated that he was not pressing his contention and thus Mr. Jain ultimately withdrew his claim for re-framing question no. 1 as suggested by the Tribunal. This will be another point to be considered whether when the assessee does not raise an issue, can this Court suo motu raise a question and decide the same.

4. The Allahabad High Court in the case of *Amrit Banaspati Co. Ltd.* vs. *Commissioner of Inmoce-tax. U.P.*(1) has pointed out that the Tribunal in the case referred the following question:—

> "Whether on the facts and in the circumstances of the on a true interpretation of the provisions of clause (*ii*) of sub-section (2) of section 10 of the Income-tax Act, the assessee was entitled to

(1) 54 I.T.R 229.

deduction for the expenses of a capital nature included in the cost of repairs to the premises of which he was a tenant?"

In this decision it was suggested that the question referred by the Tribunal should have been whether carrying out the three items of works amounted to repairing the godown and not the question formulated by the Tribunal. It was held under such circumstances that the Court in exercise of its power of re-drafting a question cannot substitute a question which was not sought to be referred in the application made under section 66(1); it cannot answer a question which was not mentioned in the application under section 66(1) itself and that the Court has no jurisdiction to amend the question referred by the Tribunal by substituting in its place a different question.

5. P. S. Mishra Justice has relied on the case of *Commissioner of Income-Tax, Bombay* vs. *Scindia Stem Navigation Co. Ltd.*(2), a decision of the Supreme Court. In this decision it was held that the jurisdiction of the High Court in a reference under section 66 of the Income-tax Act is a special one, different from its ordinary jurisdiction as a Civil Court, and the High Court, hearing a reference under that section, does not exercise any appellate or revisional or supervisory jurisdiction over the Tribunal and that it acts purely in an advisory capacity, on a reference which properly comes before it under section 66(1) and (2) and that it gives the Tribunal advice, but ultimately it is for the Tribunal to give effect to that advice. It has also been held in this decision that it is of the essence of such a jurisdiction that the Court can decide only questions which are referred to it and not any other questions; the Tribunal should have had an occasion to consider the question so that it may decide whether it should refer it for the decision of the Court. It has

(2) 42 I.T.R. 589.

also been held in this decision that the power of the Court to issue a direction to the Tribunal under section 66(2) of the Income-tax Act is in the nature of amandmus and it is well settled that no mandamus will be issued unless the applicant had made a distinct demand on the apporpriate authorities for the very reliefs which he seeks to enforce by mandamus and that had been refused: It has also been held that the power of the Court to direct a reference under section 66(2) is subject to two limitations—the question must be one which the Tribunal was bound to refer under section 66(1) and the applicant must have required the Tribunal to refer it. It has also been pointed out that the form prescribed under rule 22-A of the Income-tax Rules for an application under section 66(1) shows that the applicant must set out the questions which he desires the Tribunal to refer and that, further, those questions must arise out of the order of the Tribunal, and that under section 66(2), the Court cannot direct the Tribunal to refer a question unless it is one which arises out of the order of the Tribunal and was specified by the applicant in his applicatin under section 66(1). At page of 602 of this decision an observation has been quoted with approval of the Patna High Court in the case of *Maharaj Kumar Kamal Singh* v *Commissioner of Income tax* to the effect that the provisions of section 66(1) and 66(2) do not confer upon the High Court a general jurisdiction to correct or to decide a question of law that may possibly arise out of the income-tax assessment and that the section, on the contrary, confers a special and limited jurisdiction upon the High Court to decide any specific question of law which has been raised between the assessee and the Department before the Income-tax Tribunal and upon which question the parties are at issue. At page 603 of this decision an observation has been quoted with approval from the case of Chainrup Sampatram vs. Commissioner of Income-tax that the Indian Income-tax Act has not charged the High Court with the duty of setting right in all respects all assessments that might

come to its notice, its jurisdiction is not either appellate or revisional; nor has it a general power of superintendence under section 66 and that its sole duty is to serve as the appointed machinery for resolving any conflict which may arise between an assessee or the Commissioner on the one hand and the Tribunal on the other regarding some specific question or questions of law. This clearly goes to show that unless a dispute is raised by the assessee or the Commissioner, the Court cannot re-draft a question to decide a matter which is no longer in issue between the parties. It has also been held at page 605 of this decision while quoting an observation if Chagla, C. J. that if the Tribunal does not refer a question of law under section 66(1) which arises out of the order then the only jurisdiction of the Court is to require the Tribunal to refer the same under section 66(2) and that it is true that the Court has jurisdiction to resettle questions of law so as to bring out the real issue between the parties but it is not open to the Court to raise new questions which have not been referred to it by the Tribunal. It has been observed at page 610 of this decision that if it is held that the Court can allow a new question to be raised on the reference, that would in effect give the applicant a right which is denied to him under section 66(1) and 66(2), and enlarge the jurisdiction of the Court so as to assimilate it to that of an ordinary Civil Court of appeal. It has also been held in this decision that the correct view to take is that the right of the litigant to ask for a reference, the power of the Tribunal to make one, and the jurisdiction of the Court to decide it are all co-extensive and, therefore, a question of law which the applicant cannot require the Tribunal to refer and one which the Tribunal is not competent to refer to the Court, cannot be entertained by the Court under section 66(5). It was observed at page 612 that as the question on which the parties were at issue, which was referred to the Court under section 66 (1) and decided by it under section 66 (5) is whether

the sum of Rs. 9,26,532 is liable to be included in the taxable income of the respondents, the ground on which the respondents contested their liability before the High Court was one which was within the scope of the question, and the High Court rightly entertained it. Thus, from this decision it is evident that unless a question is at issue between the parties, it cannot be re-drafted by this Court. When Mr. K. N. Jain withdrew his claim for re-drafting the question, the Court has no right to re-draft the question, specially when the effect of re-drafting will be that the assessee claims that the Income-tax Officer had no jurisdiction to impose a penalty in view of the provisions of section 271 (1) (*a*) read with section 139 of the Income-tax Act, 1961. This clearly goes to show that it is not a different aspect of the same question but the two questions are independent of each other.

6. In the case of *B. B. Iranee* vs. *Commissioner of Income-Tax, Bombay City-II*(1) it has been held that though in the assessee's application under section 66 (2) of the Income-Tax Act one of the questions raised related to the earlier losses ascertained in 1946 and the facts relating thereto were narrated, the High Court directed the Tribunal to refer only the question whether the Tribunal erred in law or misdirected itself in rejecting the assessee's claim to set off the alleged losses of 1941 of the Hong Kong business against the income of the assessment year 1947-48. On a reference the High Court held that the question as framed was confined to losses of the year 1941 but in deference to counsel's argument considered the contention that the loss suffered by the assessee during the period of 1941 to 1945, was ascertained only in 1946 and that in must be deemed to have been incurred only in that year. Under these circumstances the Supreme Court held that the assessee was not entitled to raise the question relating to ascertainment of the loss only in 1946, as it was a question entirely different from that propounded for the decision of the High Court.

(1) 60 I.T.R. 437.

7. In the case of *T. D. Kumar and Brothers (P) Ltd.* vs. *Commissioner of Income-tax, Calcutta* (1) the appellant applied to the Tribunal for a reference, inter alia, of the question whether having regard to the decision of the Tribunal in the relevant assessment proceeding an order imposing penalty under section 28(1)(*c*) could be made. The Tribunal refused to state a case and the appellant applied to the High Court under section 66(2) for an order directing the Tribunal to state a case, and argued, that even if the facts found by the Tribunal be correct, section 28(1)(*c*) was not attracted, regard being had to the proper meaning of the word "Income" in that section. In those circumstances their lordships of the Supreme Court held that the question on which a reference was sought was a limited question which did not arise of the Tribunal's order and that the question sought to be raised before the High Court was a new question and was not an aspect of any question raised before the Tribunal and the High Court was right in rejecting the application under section 66(2), and it was also observed that it is only a question that has been raised before and decided by the Tribunal that can be held to arise out of its order and that in respect of a question which was not raised or argued before the Tribunal, or decided by it, a reference under section 66(2) cannot be asked for.

8. In the case of *Seth Pushalal Mansinghka (P.) Ltd.* vs. *Commissioner of Income-tax, Delhi, Rajasthan and Madhya Pradesh*(2) it was held by their lordships of the Supreme Court at page 168 that when a question of law is neither raised before the Tribunal nor considered by it, will not be a question arising out of the order of the Tribunal and the High Court will be acting beyond its jurisdiction in dealing with any such question.

(1) 63 I.T.R. 67.
(2) 66. I.T.R. 159.

9. It has been held in the case of *Commissioner of Income-tax, West Bengal-II* vs. *Smt. Anusuya Devi*(1) by their lordships of the Supreme Court at pages 756 and 757 that it is well settled that the High Court may decline to answer a question of fact or a question of law which has no bearing on the dispute between the parties or though referred by the Tribunal does not arise out of its order. It has been observed at page 757 that the power to re-frame a question may be exercised to clarify some obscurity in the question referred, or to pinpoint the real issue between the tax-payer and the department or for similar other reason; it cannot be exercised for re-opening an enquiry on questions of facts or law which is closed by the order of the Tribunal.

10. It has been held in the case of *Commissioner of Income-tax, Andhra Pradesh* vs. *Krishna and Sons*(2) by their lordships of the Supreme Court that the jurisdiction of the Supreme Court arising in appeal over the judgment of the High Court on a reference under the Income-tax Act is also advisory, the Supreme Court can only record its opinion on questions which are referred; not on questions which could have been, but have not been referred.

11. It has been held by their lordships of the Supreme Court at page 196 in the case of *Commissioner of Income-Tax U. P.* vs. *Devi Prasad Vishwanath Prasad*(3) that it was not open to the High Court to direct the Tribunal to state a case on a question which was never raised before or decided by the Tribunal at the hearing of the appeal.

12. It has been held in the case of *Lakshmiratan Cotton Mills Co. Ltd.* vs. *Commissioner of Income-Tax, U. P.*(4) by their lordships of the Supreme Court that the High Court had no power to call for a statement of the case on

(1) 68) 1 I.T.R. 750.
(2) 70 I.T.R. 733.
(3) 72 I.T.R. 194.
(4) 73 I.T.R. 634.

questions which were incorporated neither in the application under section 66(1) nor in the application under section 66(2) of the said Act and the power under section 66(4) might be exercised to call for a supplementary statement only when the court is satisfied that the statement of case referred under section 66(1) and (2) were not sufficient to enable it to determine the question raised by that statement and that section 66(4) did not confer a power to raise any additional question and to call for a statement of a case on the question not referred by the Tribunal.

13. In the case of *Commissioner of Income-tax, Rajasthan* vs. *Indra and Co.* (1) it has been pointed out at page 707 by the Rajasthan High Court that an argument had been addressed that if interest has been charged for any period during which the default continued the penalty cannot be imposed. The question referred by the Tribunal was "whether the Tribunal rightly held that the orders of penalties in question under section 271(1) (*a*) of the Income-tax Act, 1961 were tenable in law?". In those circumstances it was held that this aspect of the matter had not been referred to the High Court and so they refused to make any pronouncement relating to it.

14. In the case of *Commissioner of Income-tax, Andhra Pradesh* vs. *Kotrika Venkataswamy and Sons*(2) the question referred was "Whether, on the facts and in the circumstances of the case, and on a true appreciation of the material on record, was the Appellate Tribunal justified in coming to the conclusion that the department did not prove the concealment of income in respect of the following additions, viz., inflation of purposes—transaction in the name of K. Venkatasesshaiah Chetty, Rs. 21,500, (2) speculation losses in the names of seven persons, Rs. 26,789/-?". It was contended before their lordships of the Supreme Court that the question which was submitted

(1) 79 I.T.R. 702.
(2) 79 I.T.R. 499.

by the Tribunal for reference to the High Court was itself wide enough to include the question about the jurisdiction of the Tribunal to reach a conclusion different from that which it had reached in the assessment proceeding. The Supreme Court held that the form of the question submitted clearly shows that what the Tribunal was asked to do was to submit a case to the High Court on the question whether the Tribunal was justified in coming to the conclusion on the facts and in the circumstances of the case that no concealment was proved by the department and that question cannot include an enquiry whether the Tribunal had jurisdiction to reach a question different from the conclusion it had reached in the proceeding for assessment.

15. In the case of *Karnani Properties Ltd.* vs. *Commissioner of Income-tax, West Bengal* (1) the question referred was "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the services rendered to the tenants by supplying electrical energy, hot and cold water and maintenance of lifts and other amunities, constituted a business activity of the assessee and as such the income arising therefrom was assessable under section 10 of the Income-tax Act, 1922." It was held by the Supreme Court that in absence of a question whether the findings were vitiated for any reason being before the High Court, the High Court has no jurisdiction to go behind or question the statement of facts made by the Tribunal.

16. In the case of *Agha Abdul Jabbar Khan* vs. *Commissioner of Income-tax, M. P.* (2) the question referred by the Tribunal was "Whether the income from the property transferred to the assessee's wife for a consideration of Rupees one lakh could be assessed in his hands under section 16(3) of the Indian Incom-tax Act, 1922?". The High Court, instead of answering the question, for mulated two other questions, *viz.*, whether there could be in law an oral transfer of the property

(1) 82 I.T.R. 547.
(2) 82 I.T.R. 872.

in lieu of Rupees one lakh due as dower debt and if so whether the income from the property was liable to be included in the assessable income of the assessee under section 16(3). In these circumstances the Supreme Court held that the High Court had no jurisdiction to raise new questions of law: the questions raised by it did not flow from the question referred by the Tribunal and that if the High Court thought that the question referred to it did not bring out the real point in issue, it was open to it to call for a fresh statement of a case and direct the Tribunal to submit for its opinion the real question arising for decision and that the High Court was not entitled to deal with the reference as if it was dealing with an appeal before it.

17. In the case of *Commissioner of Income-tax, Bihar and Orissa* vs. *S. P. Jain*(1) their lordships of the Supreme Court at page 395 have pointed out that the answer to question no. 1 had not been pressed and hence no answer to it was given.

18. In the case of *Madras Machine Tools Manufacturer* Ltd. vs. *Commissioner of Income-tax, Madras*(2) it has been pointed out at page 125 that the assessee at whose instance the reference on the 3rd question has been made does not want to prosecute the same and so it is unnecessary to consider that question and express any opinion thereon and that when the party who has caused a reference does not want to press the same, the Court should refrain from answering the said question.

19. It has been held in the case of *Jagan Nath Pyare Lal* vs. *Commissioner of Income-tax, Patiala* (3) *by the Punjab* and Haryana High Court that where a question of law is neither raised before nor considered by the Tribunal, it will not be a question arising out of its order notwithstanding that it arises on the findings given by it. In the case before their lordships it was held that the question whether registration could be

(1) 87 I.T.R. 370.
(2) 98 I.T.R. 119.
(3) 92 I.T.R. 207.

refused to a partnership business on the ground that the application for registration had not been signed by one of the partners was neither raised before nor considered by the Tribunal and the High Court could not go into the question on a reference.

20 It has been held in the case of *Additional Commissioner of Income-Tax, Bihar* vs. *Dongarsidas Biharilal* (supra) that it is an accepted principle of law that where the question referred for its opinion does not cover real controversy in issue, the High Court can re-frame the question and decide the real controversy. Similar view has been taken in the case of *Commissioner of Income-Tax, Hyderabad* vs. *G. M. Chamabasappa*(1).

21. From the aforesaid decisions it is evident that when Mr K. N. Jain did not press the question which he argued and when he specifically mentioned that he did not want re-framing of question no. 1 referred by the Tribunal and that the question referred by the Tribunal may be answered, then it cannot be said that there is any controversy between the assessee and department in connection with the matter for which a re-drafting of question no. 1 was suggested. Moreover, before the Tribunal the only dispute was that no penalty can be imposed when interest has been charged. Before the High Court Mr. K N. Jain for the assessee tried to raise a question that the Income-tax Officer had no jurisdiction to impose the penalty in view of the provisions of section 271(1)(*a*) read with section 139(1) which was in effect a different and new question. Even if a question is redrafted to the effect whether penalty can be imposed under section 271(1)(*a*), then it will be a wider question than what was raised before the Tribunal and such a question cannot be redrafted as such a question was not raised before the Tribunal and in such a case it cannot be said that it is a different aspect of the same question.

(1) 35 I.T.R. 261.

22. The other point which needs clarification is that the default under section 271(1)(*a*) is complete when the return is not filed on the due date and so the law on the date the return is due will be applicable and not the present law.

23. It has been held in the case of *Commissioner of Gift-Tax* vs. *C. Muthukumaraswamy Mudaliar*(1) by the Madras High Court that where the infringement is said to be the failure to furnish the return in time, the offence is complete when the return is not filed on the due date and in such cases the offence having taken place on the date fixed for furnishing the return, the law as on that date has to govern the levy of penalty.

24. It has been held in the case of *Smt. Indu Barua* vs. *Commissioner of Wealth-Tax North Eastern Region*(2) by the Gauhati High Court that the quantum of penalty must be determined on the basis of the law prevailing on the day when the default was committed and that failure to file returns in time is not a continuing offence and infringement of law is complete on the date when the assessee fails to file a return under section 14(1) of the Wealth-tax Act, 1957; and the quantum of penalty for default must be determined with relation to the law prevailing on the day when the default was committed and the law applicable on that date in regard to the penalty will be applicable and not the law amended from time to time.

25. It has been held in the case of *Commissioner of Wealth-Tax, Amritsar-I* vs. *M. R. Mahajan*(3) by the Punjab and Haryana High Court that the late filing of return as contemplated by section 18(1)(*i*) of the Wealth-tax Act, 1957, is not a recurring offence and the offence is complete on the date when the return is not filed as prescribed by law and the offence is committed when the return is not filed on the due date and

(1) 98 I.T.R. 540.

(2) 125 I.T.R. 436.

(3) 126 I.T.R. 706.

the penalty is to be computed in accordance with the provisions of law as it prevailed at the time of the commission of the offence.

26. It has been held in the case of *Commissioner of Wealth-Tax, Lucknow* vs. *Ram Narain Agrawal*(1) by the Allahabad High Court that the law operative on the date when the infringement takes place is the law applicable unless it is made applicable *ex post facto* and that the default in cases of non-filing of returns takes place after the expiry of time or notice.

27. It has been held in the case of *Commissioner of Wealth-Tax, Lucknow* v. *Chunni Lal Anand*(2) by the Allahabad High Court that for the assessment year 1968-69, the Wealth tax return was due on or before 30th June, 1968, and, therefore, for the purpose of levy of penalty for delay in submission of the return, the law as it stood on that date would be applicable and not the law as on the date of the beginning of the assessment year, namely, April 1, 1968, or the date on which the return was actually filed

28. It has been held in the case of *Additional Commissioner of Wealth-Tax, M.P.* vs. *Smt. Manjuladevi Muchhal*(3) by the Madhya Pradesh High Court that the assessee committed default in filing of the returns on the dates fixed for filing the returns, i.e., 30th June, 1961, 30th June, 1962 and 30th June, 1963, and the law for the purpose of penalty that would be applicable would be the law in force on those dates and not the law which had been brought into force on April 1, 1969.

29. The aforesaid views expressed by the different High Courts have been finally set at rest by their lordships of the Supreme Court in the case of *Commissioner of Wealth-tax, Amritsar* vs. *Suresh Seth*(4) where their lordships of the Supreme

(1) 106 I.T.R. 965.
(2) 116 I.T.R. 355.
(3) 119 I.T.R. 43.
(4) 129 I.T.R. 228.

Court have held that where the default complained of is one falling under section 18(1)(*a*) of the Wealth-tax Act, 1957 (e.g., failure to file the return of wealth before the due date without reasonable cause), penalty has to be computed in accordance with the law in force on the last day on which the return in question had to be filed and neither the amendment made in 1964 nor the one made in 1969 to clause (*i*) of)section 18(1) has retrospective effect. It has also been held that non-performance of any of the acts mentioned in section 18(1)(*a*) gives rise to a single default and to a single penalty, the measure of which, however, is geared up to the time lag between the last day on which the return has to be filed and the date on which it is filed; and that the default, if any, committed, is committed on the last date allowed to file the return and the default cannot be one committed every month thereafter and that the words "for every month during which the default continued" indicate only the multiplied to be adopted in determining the quantum of penalty and do not have the effect of making the default in question a continuing one, nor do they make the amended provisions modifying the penalty applicable to earlier defaults in the absence of necessary provisions in the amending Acts. It has also been held in this decision that the distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for the penalty and a wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default.

30. P. S. Mishra Justice has already quoted the relevant provisions of sections 139 and 271 of the said Act as they were in force in the assessment year 1965-66 and 1966-67 which are assessment years involved in the present cases and hence repetition is not necessary.

31. As regards question no. 1, as referred by the Tribunal, the learned Advocate for the assessee Mr. K. N. Jain did not press it. The question which has been referred is to the effect whether the penalty under section 271(1)(*a*) of the Income-Tax

Act, 1961, could be imposed even after charging interest under section 139 for the delayed submission of return. In this connection it has been held in the case of *Express Newspapers (P) Ltd.* vs. *Income-Tax Officer, Administration and Collection, Central Circle-XI, Madras,* & *another*(1) by the Madras High Court that when the Statute provides a time-limit for filing a return, it can also provide a penalty for non-submission of the return in time and in addition the Statute can also provide as a compensatory measure that interest should also be paid on the amount of tax for the period of delay and, therefore, the provision for payment of penalty as well as interest for the delayed submission of return cannot be said to offend any constitutional provision.

32. It has been held in the case of *T. Venkatakrishnaiah and Co.* vs. *Commissioner of Income-Tax. A.P.*(2) by the Andhra Pradesh High Court that the Income-Tax Officer was competent to levy a penalty under section 271(1)(*a*) although he had levied interest under clause (*iii*) of the proviso to section 139(1) as the imposts are different and distinct and they have been provided to meet different situations and contingencies and that the mere fact that under the Act the assessee can file return before the assessment is made or a revised return at any time before the assessment is made does not absolve the assessee from the levy of penalty under clause (*a*) of sub-section (1) to section 271.

33. It has been held in the case of *Narandas Paramanand Das* vs. *Income-Tax Officer and others*(3) by the Calcutta High Court that the legislature had made a distinction between the interest which is payable under section 139, proviso (*iii*) of the said Act, where the return is not filed within the statutory time or within the time as extended by the Income-Tax Officer and the penalty which is leviable under section 271 only if the

(1) I.T.R. 255.
(2) 93. I.T.R. 297.
(3) 98 I.T.R. 458.

Income-tax authority is satisfied that without reasonable cause the assessee failed to file the return of the total income within the time prescribed and the provision for calculation of the interest is not of the nature of penal interest and that penalty proceeding is a quite different proceeding and the levy of interest will not prohibit the levy of penalty and the penalty can be levied even if the return is filed before the assessment is made but after the prescribed time.

34. It has been held in the case of *D.B. Navalgundkar and Co.* vs. *Commissioner of Income-Tax, Mysore*(1) by the Karnataka High Court that there is nothing in the Income-tax Act, 1961, to indicate that section 139 of the Act prescribing the interest to be charged, and section 271(1)(*a*) prescribing the penalty to be levied for delay in submission of a return are alternative and not cumulative and, therefore, it is competent on the part of the Income-tax Officer to levy penalty under section 271(1)(*a*) of the said Act even where interest has been charged under section 139 of the said Act.

35 It has been held in the case of *Kerala Tile and Clay Works* vs. *Commissioner of Income-tax, Kerala*(2) by the Kerala High Court that for failure to file a return in time as required in section 139(1) of the said Act, penalty can be imposed as well as penal interest and that what is levied under section 271(1)(*a*) is penalty for the default and attempted evasion of tax and it is a punishment for failure of the assessee to comply with the statutory duty imposed by section 139(1), and it is deterrent in character and the liability to pay interest arises under section 139 and, no doubt, the two consequences arise out of the same default and one is compensatory and the other punitive and each is complementary to the other and both are provided for by the Act.

36. It is in view of these aforesaid decisions that Mr. K. N. Jain, learned Advocate for the assessee, did not press

(1) 98 I.T.R. 675.

(2) 104 I.T.R. 597.

question no. 1 as referred by the Tribunal and so it is to be answered against the assessee and in favour of the revenue.

37. As regards the finding of P. S. Mishra Justice that the period of default under section 271(1)(*a*) reckoned from the due date of filing the return has to be taken to have come to an end with the filing of the return of income, if it is filed before the best judgment assessment under section 144 and within the period prescribed under section 139(4) and is a case of no return of income filed at all with the assessment of income as prescribed under section 144 of the said Act. I agree with this finding. There are various decisions to support this view.

38. It has been held in the case of *C. V. Govindarajulu Ayer* vs. *Commissioner of Income-Tax, Madras*(1) by the Madras High Court that once the assessment proceedings have commenced with the general notice under section 22(1) of the Indian Income-tax Act, 1922, they can only come to an end by either an order of assessment or an order declaring that no assessment can be made and where there is no such order and eventually the proceedings are taken under section 34 of the aforesaid Act, such proceedings must be deemed to relate to the proceedings which commenced with the public notice under section 22(1).

39. It has been held in the case of *Commissioner of Income-Tax, Rajasthan* vs. *Indra and Co.*(2) at page 705, by the Rajasthan High Court that the default is in not furnishing the return and as soon as the return is furnished, there is end of the default. It has also been held in this decision that it has been expressly laid down in section 139(7) that no return under sub-section (1) need be furnished by any person for any previous year if he has already furnished the return of income for such year in accordance with the provisions of sub-section (2) and that in all the cases mentioned is section 271(1)(*a*) of the

(1) 16 I.T.R. 391.

(2) 79 I.T.R. 702.

said Act, the default continues only till the time when the return has been furnished or if no return has been furnished at all, it continues till the assessment is completed, but, if the return has been furnished, the default ceases whether such return is furnished under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 or under section 148, and that it is immaterial for the purpose of cessation of default that the return has been filed in obedience to any particular provision of law.

40 In the case of *Chunnilal and Bros.* vs. *Commissioner of Income-Tax, Madhya Pradesh*(1) the Madhya Pradesh High Court has approved the finding in 79 I.T.R. at page 702 where it has been held that in all cases mentioned in section 271(1)(*a*) the default continues only till the time when the return has been furnished or if no return has been furnished at all, it continues till the assessment is completed and that if the return has been furnished, the default ceases where such return is furnished under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 or under section 148 and that it is immaterial for the purpose of cessation of default that the return has been filed in obedience to any particular provision of law.

41 It has been held in the case of *P. N. Sikand* vs. *Commissioner of Income-Tax, New Delhi*(2) by the Delhi High Court that a default is for not filing the return in time and the period of default starts the moment the statutory period within which the return has to be filed is over, and continues till the filing of the return or assessment, whichever is earlier, and that the issue of a notice under section 139(2) cannot perse have the effect of wiping out of the earlier period of default and that this can be done only by expressly condoning the delay.

42. It has been held in the case of *Laxmi and Co.* vs. *Commissioner of Income-Tax*(3) by the Allahabad High Court

(1) 119 I.T.R. 199.
(2) 126 I.T.R. 202.
(3) 128 I.T.R. 259.

that the default of not filing a return under section 139(1) continues till the time when the return has been furnished or if no return has been furnished it continues till the assessment is made and that the assessee is liable to pay penalty under this provision for not having filed a return voluntarily under section 139(1) even if he files a return subsequently in pursuance of a notice under section 139(2).

43. In the decision in the case of *Additional Commissioner of Income-Tax, Bihar* vs. *Dongarsidas Biharilal*(1) a view has been taken by S. P. Sinha Justice (as he then was) that there is no provision under the Income-tax Act for carrying over the default in filing the return beyond the limits of an assessment year and that like an assessment of income to income-tax which must remain confined to an assessment year, the assessment of penalty must also remain confined to an assessment year, and that the default cannot be carried over beyond that assessment year. It has also been held in this decision that in terms of section 271(1)(*a*), the period of default starts on the day following the due date for compliance with the terms of section 139(1) or section 139(2) of the said Act remains circumscribed within 12 months of the relevant assessment year and that similar would be the position where steps have been taken to tax an escaped income under section 148 of the said Act and there also the period of default in filing the required return of income will remain circumscribed within 12 months of the year in which steps for reassessment of the escaped income have been taken. The entire finding of S. P. Sinha Justice (as he then was) appears to be not correct, as the provision under section 271(1)(*a*) read with clause (*i*) in the cases referred to in clause (*a*) in addition to the amount of tax, if any, payable by the assessee a sum equal to 2 per cent of the tax for every month during which the default continues but not exceeding in aggregate 50 per cent of the tax itself shows that the default can continue but the only limit is that

(2) 116 I.T.R. 897.

it cannot exceed 50 per cent of the tax and this shows that the default continues till the filing of the return or the assessment and so the view taken in the decision mentioned above is not a correct view in view of the aforesaid decisions and in this connection I agree with the findings of P. S. Mishra Justice, and the observation of S. P. Sinha Justice (as he then was) in the case of Additional *Commissioner of Income-Tax, Bihar* vs. *Dongarsidas Biharilal*(1) aforesaid has to be reversed.

44. I also agree with P. S. Mishra Justice as regards the findings that the view taken in the case of *Additional Commissioner of Income-Tax* vs. *Bihar Textiles*(2) of the Patna High Court is not a correct view. In this connection I am supported by various decisions.

45. It has been held in the case of *Commissioner of Income-Tax, Rajasthan* vs. *Indra and Co.*(3) by the Rajasthan High Court that an assessee is liable to penalty for not submitting his return as required under section 139(1) of the said Act, even though he subsequently files a return in pursuance of a notice under section 139(2) of the said Act and an assessment is made on the basis of that return.

46. It has been held in the case of *Commissioner of Income-Tax, Delhi I* vs. *Hindustan Industrial Corporation*(4) by the Delhi High Court that the plain language of section 139(2) of the said Act cannot be strained to hold either that the assessee is absolved of his statutory obligation to file a return of his income voluntarily under section 139(1) and that the default committed in not filing a return voluntarily under section 139(1) cannot be taken note of for initiating proceedings for imposition of penalty if a notice under section 139(2) is issued, or that the period of default shall cease from the date when the notice under section 139(2) is served on the assessee.

(1) 116 I.T.R. 897.
(2) 100 I.T.R. 253.
(3) 79 I.T.R. 702.
(4) 86 I.T.R. 657.

47. It has been held in the case of *Additional Commissioner of Income-Tax, Gujarat* vs. *Santosh Industries*(1) by the Gujarat High Court disagreeing with the Tribunal and rejecting the contention of the assessee, that the second clause of section 271(1)(*a*) of the said Act applies where a person failed to furnish a return of income within the time allowed strictly under sub-section (1) or sub-section (2) of section 139, and filing of the return after expiration of such time but before expiration of four years from the end of the assessment year under section 139(4) did not save him from penalty for the default contemplated under the second clause to section 271(1)(*a*) of the said Act and the words "within the time allowed by sub-section (1) of section 139" in the second clause of section 271(1)(*a*), according to their plain natural meaning, must be taken to refer to the time specified in sub-section (1) of section 139 or extended by the Income-tax Officer under the powers to that sub-section and not so as to include the time within which the return of income may be filed under sub-section (4) of section 139.

48. It has been held in the case of *Mullapudi Venkatarayudu* vs. *Union of India*(2) by the Andhra Pradesh High Court that the argument for the petitioner that, under section 271(1)(*i*) of the said Act, penalty can be levied for the period during which the default continued, and that as no return was filed by the assessee under section 139(1), the default continued indefinitely and no definite period could have been arrived at by the Income-tax Officer to determine the quantum of penalty, was without any merit. It was also held in this decision that the continuance of the default would be up to the date on which the return was filed either under section 139(2) or section 139(4) of the said Act, and that the petitioner had filed his return under section 139(2). It has also been held in this decision that because the Income-tax Officer issues a notice under section 139(2) after the termination of the period prescribed by section 139(1), the Income-tax Officer cannot be

(1) 93 I.T.R 563.
(2) 99 I.T.R. 448.

deemed to have condoned the non-compliance to furnishing a return under section 139(1) of the said Act.

49. It has been held in the case of *Commissioner of Income-Tax, Orissa* vs. *Gangaram Chapolia*(1) by the Full Bench of the Orissa High Court that even if the return of the assessee had been filed in the manner prescribed, as it was not filed within the time allowed under section 139(1) of the said Act, and as such one of the two conditions prescribed in section 271(1)(*a*) of the said Act had not been fulfilled, the assessee would be liable to penalty. It has also been held in this decision that it cannot be contended that as the assessee filed the return within the time allowed under section 139(4) of the said Act, he should be deemed to have filed the return within the time allowed under section 139(1) of the said Act and consequently no penalty under section 271(1)(*a*) was imposable and that section 139(4) was in the nature of a proviso to section 139(1) for all purposes under the said Act, and that the concession given under section 139(4) is restricted to the assessment and cannot be availed of by the assessee for all purposes under the Act including a penalty proceeding and that if the assessee's contention was to be accepted, the time limit prescribed in section 139(1) would be otiose and wholly unnecessary except for the purposes of charging interest.

50. It has been held in the case of *Metal India Products* vs. *Commissioner of Income-Tax, Lucknow*(2) by the Full Bench of the Allahabad High Court that where the assessee did not file his return within the time prescribed by section 139(1) of the said Act and where no notice was issued by the Income-tax Officer to the assessee under section 139(2) of the said Act, even if the assessee filed his return under section 139(4), that is, within four years from the end of the assessment year and before the assessment order was passed, the assessee is liable to pay the penalty under section 171(1)(*a*) of the said Act for not having filed a return within the time prescribed in

(1) 103 I.T.R. 628.

(2) 113 I.T.R. 830.

section 139(1) of the said Act and the time given under section 139(2). It has also been held in this decision that for the purposes of penalty, the filing of the return within the time prescribed by sub-section (4) of section 139 cannot be treated as a return filed within the time prescribed by sub-section (1) and that the emphasis of section 271(1)(*a*) is for checking evasion of the time prescribed by sub-section (1) or sub-section (2) of section 139. It has also been held in this decision that if the time prescribed by sub-section (1) or (2) passes, default take place attracting the liability for penalty.

51. It has been held in the case of *G. S. Atwal and Co.* vs. *Commissioner of Income-Tax, Central, Calcutta*(1) by the Calcutta High Court that the penalty can be imposed on an assessee under section 271(1)(*a*) of the said Act for delay in furnishing returns, even though the returns were filed before completion of the assessment and that once a default has been committed in complying with section 139(1), the fact that a notice under section 139(2) has been served subsequently on the assessee would not make any difference to the date of default and that the default would start from the date on which the return of income became due under section 139(1) of the said Act.

52. It has been held in the case of *Chunnilal and Bros.* vs. *Commissioner of Income-Tax, M.P.*(2) by the Madhya Pradesh High Court that an assessee's default in not furnishing his return within the time allowed and in the manner specified in section 139(1) of the said Act exposes him to penalty under section 271(1)(*a*) and the imposition of penalty would not be invalid merely because the assessee subsequently filed a return in response to a notice under section 139(2) or section 148. It has also been held in this decision that the default under section 139(1) ceases only on the filing of the return in response to a notice under section 139(2) or section 148 or in compliance with section 139(4) and that in the absence of an express

(1) 117 I.T.R. 171.
(2) 119 I.T.R. 198.

order of condonation of default, a mere issue of a notice under section 139(2) to a person who has not filed the return under section 139(1) would not amount to condonation of the default under section 139(1) and that the notice under section 139(2) neither arrests nor wipes out the default under section 139(1). It has also been held in the case of *Commissioner of Income-Tax, Poona* vs. *D. V. Save*(1) by the Bombay High Court that where an assessee does not file a return as provided under section 139(1) of the said Act and the I.T.O. issues a notice to the assessee under section 139(2), where after the assessee files the return, the assessee will not be absolved from the payment of penalty for not filing a return as provided in section 139(1) and penalty will be payable from the date fixed under section 139(1) for filing the return or the date to which the time for filing the return might have been extended by the I.T.O. up to the date on which the return is finally filed by the assessee.

53. It has been held in the case of *P. N. Sikand* vs. *Commissioner of Income-Tax, New Delhi*(2) by the Delhi High Court that sub-sections (1) and (2) of section 139 of the said Act deal with two different situations and the first imposes an obligation to file the return *suo motu* and the second to furnish a return in compliance with the notice under section 139(2), and that it is true that in terms of section 139(7), only one return is required to be filed, but that cannot have the effect of wiping out the earlier obligation to file the return *suo motu* under section 139(1) of the said Act.

54. It has been held in the case of *Laxmi and Co.* vs. *Commissioner of Income-Tax*(3) by the Allahabad High Court that the failure to furnish a return voluntarily under section 139(1) of the said Act is distinct and separate from the failure to file a return in pursuance of a notice under section 139(2) and the legal consequences of the omission or

(1) 119 I.T.R. 266.
(2) 126 I.T.R. 202.
(3) 129 I.T.R. 259.

failure to file the return under section 139(1) as well as that of not complying with the notice under section 139(2) are dealt with in section 271 and that an analysis of section 271(1)(*a*) of the said Act shows that penalty becomes imposable the moment the default takes place and that an assessee is liable to pay penalty under this provision for not having filed a return voluntarily under section 139(1) even if he files a return subsequently in pursuance of a notice under section 139(2) of the said Act.

55. It has been held in the case of *Commissioner of Income-Tax, Patiala-II* vs. *Dehati Co. Co-operative Marketing-cum-Processing Society*(1) by the Punjab and Haryana High Court that it cannot be said that once a notice requiring the assessee to furnish a return under section 139(2) or section 148 of the said Act, is issued, penalty cannot be imposed for failure to furnish the return under section 139(1) of the said Act.

56. In view of the aforesaid decisions it has to be held that the decision in the case of *Additional Commissioner of Income-Tax* vs. *Bihar Textiles*(2) of the Patna High Court to the effect that once a notice under sub-section (2) of section 139 of the said Act has been issued to an assessee during the relevant assessment year, there cannot be any penalty under section 271(1) for failure to furnish the return as required by sub-section (1) of section 139 and that where the return is filed beyond the time given in the notice under section 139(2) of the said Act, penalty will have to be calculated only from the expiry of the time fixed for filing the return in the notice under section 139(2) of the said Act is not a correct decision.

57. In view of my findings and discussions above, it is thus evident that an assessee is liable to penalty for not submitting his return as required under sub-section (1) of section 139 of the said Act even though he subsequently files a return in pursuance of a notice under section 139(2) of the

(1) 180 I.T.R. 504.
(2) 100 I.T.R. 253.

said Act and an assessment is made on the basis of the return and so the decision in the case of *Additional Commissioner of Income-Tax* vs. *Bihar Textiles* (supra) has also to be reversed.

58. I also agree with P.S. Mishra Justice that question, nos. 2 and 3 as referred by the Tribunal have also to be answered against the assessee and in favour of the revenue.

59. Although I agree that the two decisions of this Court namely, the decisions in the case of *Additional Commissioner of Income-Tax* vs. *Bihar Textiles*(supra) and in the case of *Additional Commissioner of Income-Tax, Bihar* vs. *Dongarsidas Biharilal*(supra) have not been correctly decided and they require to be reversed but I am of the view that only for the purpose of reversing these two decisions the Court should not redraft question no. 1 for which I have already given my reasons above. I have given findings to other issues as P. S. Mishra Justice and S. K. Jha Justice have not agreed with my view that redrafting of question no. 1 as referred by the Tribunal cannot be made for the reasons discussed above.

S. K. Jha, J.—I agree with Brother P. S. Mishra, J.

R. D. *Question answered.*

TAX CASE

Before S. K. Jha and Ashwini Kumar Sinha, JJ.

1984

May, 23

COMMISSIONER OF INCOME-TAX, BIHAR, PATNA.*

v.

M/s. VARIETIES, PATNA.

Assessee's Combined trading account for readymade garment and other cloth—considered without reference to whole account—addition of the amount on readymade garment alone—legality of—reduction of 5 per cent on cloth account on the reduced sale, by Income-Tax Appellate Tribunal, correctness of.

Where the account of the assessee was a Combined Trading account for readymade garment and other cloth as well and the Appellate Assistance Commissioner of Income-tax added the amount on one item alone *i.e.*, on readymade garments on the ground that the sales were suppressed;

Held, that this combined trading account could not be considered without referring to the whole account. Recasting of readymade garments account by the Appellate Assistant Commissioner Income-tax had an inemitable repercussion

*Taxation Case No. 53 of 1974. Re: Statement case under section 256(2) of the Income-Tax Act by the Income-Tax Appellate Tribunal Patna Bench 'B' in the matter of assessment of Income-Tax on M/s. varieties, Patna for the assessment years 1968-69.

on the result of other cloth account and it was wholly erroneous on the part of the Appellate to Assistant Commissioner Income-tax to have ignored the same completely. The Income Tax Appellate Tribunal has correctly found that the portion of account had an important relation in the context in which it appeared and a portion of the account could not be taken or interpreted bereft of that context.

Held, further that the Income Tax Appellate Tribunal correctly held that the rate of percentage fixed at 17.5 per cent by the Appellate Assistant Commissioner was high and that 12.5 per cent was a reasonable one and as such the Tribunal correctly gave reduction of 5 per cent in this account *i.e.*, in cloth account on the reduced sale of Rs. 4,95,885 which resulted in a further reduction of Rs. 28,189.

Statement of case under section 256(2) of the Income-tax Act. 1961.

The facts of the case material to this report are set out in the judgment of Ashwini Kumar Sinha, J.

Messers B. P. Rajgarhia and *S. K. Sharma* for the petitioner.

Mr Kashi Nath Jain, for the opposite party.

ASHWINI KUMAR SINHA, J.—Pursuant to this Court's order dated 20th January, 1976, the Income-tax Appellate Tribunal, Patna Bench, 'B' has stated the case and submitted the statement under section 256(2) of the Income-Tax Act 1951 (hereinafter referred to as 'the Act') of the case and forwarded the following question of law for the opinion of this Court:

> "Whether on the facts and in the circumstances of this case, the Tribunal was justified in law in

giving a reduction of Rs. 24,799 in the cloth account of the assessee?"

After the order was passed by this Court, it seems that on 15th March, 1976, on a miscellaneous application filed by the assessee before the Tribunal under section 254 of the Act, the Tribunal accepted the assessee's contention and held that the sales on which the relief at 5 per cent had to be calculated would be Rs. 5,63,794 instead of Rs. 4,95,885 adopted in the Tribunal's original order and thus it was held that the assessee was entitled to a relief of Rs. 28,189 instead of Rs. 24,799 as calculated earlier. The Tribunal held that apparently there had been a mistake of arithmetical calculation in respect of the reliefs allowed. Thus the figure of Rs. 24,799 was corrected by order dated 15th March, 1976.

2. While submitting the statement of case, the Tribunal has suggested that the figure to be considered in the question of law should now be Rs. 28,189 and not Rs. 24,799 as originally allowed. We accept the suggestion of the Tribunal and re-frame the question as follows:

"Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in giving a reduction of Rs. 28,189 in the cloth account of the assessee?"

3. The assessee is a partnership firm. The assessment year involved is 1968-69 with the year ending 9th August, 1967 as the corresponding previous year. The assessee is a dealer in cloth and readymade garments. The assessee admittedly maintained onely one combined trading account for readymade garments as well as other cloths On a sale of Rs. 6,69,929 the assessee showed a gross profit of Rs. 82,849. The Income-tax Officer found that the sales included the sale of readymade garments to the tune of Rs. 67,909. The

Income-tax Officer considered the gross profit to be low and found that the assessee did not maintain any qualitative or quantitative details of the stock handled by it. He, therefore, rounded up the total sale to Rs. 6,70,000 out of which he took Rs. 70,000 as the sale of readymade garments. Having details of the stock handled by it. He, therefore. rounded up the total sale to Rs. 6,70,000 out of which he took Rs. 70,000 as the sale of readymade garments. Having rounded of the total sale and also having rounded of the sales of readymade garments, he applied a rate of 12½ per cent to the sale of cloth estimated at Rupees six lakhs and applied a rate of 20 per cent to the sale of readymade garments estimated at Rs. 70,000. Having applied the two rates of percentage, as just mentioned above, the Income-tax Officer made an addition of Rs. 6,151 to the results disclosed by the assessee.

4. The assessee want in appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner found that the addition made by the Income-tax Officer was not adequate. He, in his turn, found that the closing stock of the readymade garments was not shown separately by the assessee. Admittedly, the readymade garments business was started for the first time during the year in question and so there was no opening stock. The assessee showed the closing stock of all the goods including readymade garments at Rs. 1,93,399, but the assessee, as just stated above, had not shown the closing stock of the readymade garments seperately. The assessee, when asked, expressed its inability to give the seperate figure relating to the closing stock of the readymade garments alone. In this background the Appellate Assistant Commissioner then found that the opening stock of the readymade garments of the assessee of the subsequent assessment year, namely, 1969-70 was shown Rs. 13.026 worth of readymade garments. The Appellate Assistant Commissioner adopted this figure as the closing

stock of the year under consideration and then he recast the whole trading account of the readymade garments alone as mentioned below:

	Rs.		Rs.
"*Purchases*	1,01,470	Sales	67,909
		Closing Stock	13,026
		Less	20,535
	1,01,470		1,01,470

This recasting of the trading account by the Appellate Assistant Commissioner showed a loss of Rs. 20,535 according to the assessee's own books of account and the Appellate Assistant Commissioner considered this loss of Rs. 20,535 as ridiculous and he held that the rate of 20 per cent was reasonable profit in the readymade garments. On the basis of 20 per cent normal gross profits, the Appellate Assistant Commissioner held that the suppression amounted to Rs. 42,646. The Appellate Assistant Commissioner also held that applying 20 per cent normal gross profit would not be absurd. Thus invoking his power of enhancement, he enhanced the addition made by the Income-tax Officer from Rs. 6,151 to Rs. 42,646.

5. It is pertenent to state here that the Appellate Assistant Commissioner enhanced the percentage to 17.2 (which was taken by the Tribunal 17.5 per cent by way of rounding of).

6. Aggrieved by the above order of the Appellate Assistant Commissioner, the assessee went in further appeal before the Tribunal. On behalf of the assessee it was contended that the enhancement made in the readymade garments account was not only uncalled for, but excessive. It was further contended that a portion only of the combind trading account could not be considered without referring to the

whole account produced by the assessee and it was contended that the recasting of the readymade garments account by the Appellate Assistant Commissioner had inevitable repercussions on the results of other cloth account and the Appellate Assistant Commissioner should not have ignored that completely. In other words, it was contended that the addition to the profit and sales of the readymade garments account was bound to result in corresponding reduction in the sale and profit of the other cloth account as, admittedly, no suppression of sale was found by the revenue authorities on the other cloth account. It was further contended on behalf of the assessee that the addition made by the Appellate Assistant Commissioner was under a wrong conception of law, revealing a gross profit of Rs. 1,03,384 on the total sale of Rs. 6,02,020 giving a margin of profit of 17.2 per cent.

7. The Tribunal held that the closing stock of readymade garments for the year under consideration was correctly take at Rs. 13,026 and the rate of 20 per cent applied by the Appellate Assistant Commissioner for determining the profit in readymade garments was also fair and reasonable. The Tribunal, however, on a pure mathematic held that the sale of readymade garments calculated at 20 per cent profit on the cost came to Rs. 1,06,135 and on that basis it held that the addition by the Appellate Assistant Commissioner on this item (i.e. readymade garments) should have been Rs. 38,226 instead of Rs. 42,646. The Tribunal, therefore, gave a reduction of Rs. 4,420 on this account.

8. Here at this stage it is pertinent to mention that we are not concerned with this reduction of Rs. 4,420 on the readymade garments account.

9. With regard to the other cloth account, the Tribunal accepted the contention advanced on behalf of the assessee and held that only portion of the account could not be taken and interpreted bereft of the context in which it appeared

ignoring the consequence of such interpretation on the other part of the accounts. Though it will be bare repetition, the assessee admittedly was maintaining only one combined trading account for both the items, i.e. for readymade garments as well as other cloth account. Having agreed with the contention advanced on behalf of the assessee with regard to the consequential adjustment in the other cloth in gross profit of 17.5 per cent (here I must make it clear that the Tribunal is rounding of 17.2 per cent found by the Appellate Assistant Commissioner to 17.5 per cent) as very high. The Tribunal held that the rate of 12.5 per cent (as taken by the I. T. O.) was a reasonable one in the other cloth account and thus the Tribunal gave a reduction of 5 per cent in this account (i.e. other cloth account) on the reduced sale of Rs. 4,95,855 (wrongly printed as Rs. 4,93,885 in the paper book). Giving a reduction of 5 per cent on the other cloth account on the reduced sale, the Tribunal held that the assessee was entitled to a further reduction of Rs. 24,779. In other words, the Tribunal sustained some part of the addition as given by the Appellate Assistant Commissioner, but also gave a reduction of Rs. 24,779. At this stage, it would be pertinent to mention that the assessee, as already stated above, by a miscellaneous application, brought to the notice of the Tribunal about the mistake of calculation which the Tribunal appreciated and held that there was a mistake of calculation and the sales on which the relief at 5 per cent had to be calculated would be only Rs. 5,63,794 (Rs. 6,69,929 less Rs. 1,06,135) instead of Rs. 4,95,885, adopted in the Tribunal's original order and, therefore, the assessee was held to be entitled to a relief of Rs. 28,189 instead of Rs. 24,779 as calculated earlier. Thus the figure was rectified under section 154 of the Act.

10. The learned Senior Standing Counsel appearing for the Revenue has argued with all tenacity that the Tribunal was wrong in thinking that the Appellate Assistant Commissioner had made an addition in the gross profit in the

other cloth account; on the contrary, the learned Senior Standing Counsel submitted that the Appellate Assistant Commissioner had not touched the cloth account at all and the Appellate Assistant Commissioner had taken only the closing stock of garments which was the opening stock in the subsequent year as shown by the assessee himself. The learned Senior Standing Counsel has submitted that it was erroneous on the part of the Tribunal to hold that the Appellate Assistant Commissioner had made any addition on the cloth account. On the other hand, the learned counsel for the assessee submitted that the Appellate Assistant Commissioner did enhance the margin of profit from 12.5 per cent to 17.2 per cent on the total sale and then came to a finding that the gross profit to be revcaled to be at Rs. 1,03,384 as against Rs. 82,450 as shown by the assessee (and accepted by the I. T. O.). This the learned counsel appearing for the assessee demonstrated before us that the gross profit of Rs. 1,03,384 taken to be by the Appellate Assistant Commissioner on the total sales of the other cloth, i.e. Rs. 6,02,020, when calculated mathematically is really 17.2 per cent.

11. In support of the submission the learned Senior Standing Counsel for the Revenue relied upon the case of *Chainrup Sampatram* versus *Commissioner of Income-tax, West Bengal*(1). The facts of the case relied upon were entirely different and the ratio of that case is not applicable in the instant case. What happened in that case is that the assessee, a registered firm consisting of two partners and carrying on business at Calcutta as bullion merchants dealing mainly in silver kept its books on the merchantile basis. In the relevant year of account some bars of silver were sent to the Indian State of Bikaner from Calcutta where the partners resided and their value at cost was credited in the assessee's books at Calcutta. In the assessment proceeding it was contended on behalf of the assessee that the silver bars had been

(1) (1953) 24 I.T.R. 481. (S. C.).

sold to the partners for their domestic use, but the Revenue authorities held that the alleged sale was not a genuine one and the silver bars sent to Indian State of Bikaner still formed part of the assessee's stock-in-trade at the close of the year of account. Having held as such, the Revenue Authorities accordingly included in the taxable profits a sum of Rs. 2,20,887 as the excess arising from the valuation of the silver bars at the market rate at which the rest of the closing stock at Calcutta was valued in the assessee's books The Appellate Tribunal on appeal upheld the action of the lower authorities. Then on a reference to the High Court under section 66(2) of the then Act the High Court answered the question in the affirmative in other words, the High Court also affirmed the decisions of the Revenue authorities. The matter went to the Supreme Court by way of special leave. The Supreme Court on the facts of that case held that on the finding of the Income-tax authorities the silver bars lying at Bikaner had not really been sold but remained part of the unsold stock of the assessee's business at the end of the accounting year. The whole of the profits of that year must be taken to have accrued or arisen at Calcutta where the business was carried on since it was still in the stock in the hands of the assessee and no part of that business admittedly had been transacted at Bikaner. Thus the Supreme Court held that the sum of Rs. 2,20,887 was very correctly held to be assessable to tax.

12. From the facts of the case relied upon by the learned Senior Standing Counsel for the Revenue, it is obvious that the facts there were absolutely different, the point to be decided was absolutely different and hence, in my opinion, the learned Senior Standing Counsel, though has relied upon this case with some tenacity, is completely under a misconception.

13. In the instant case the Income-tax Officer did not disbelieve the gross profits at Rs. 82,849 (inclusive of both the items, i.e. readymade garments and other cloth account)

and fixed the margin profit at the rate of 12½ per cent on the cloth account. The Appellate Assistant Commissioner held that there suppression of sales so far as readymade garments were concerned, but accepted the opening stock and the purchases as disclosed by the assessee on the cloth account. Still, on a wrong parity of reasoning held that the gross profit was at Rs. 1,03,384 on the total sale of Rs. 6,02,020.

14. The account of the assessee being a combined trading account for readymade garments and other cloth as well, the assessee had shown a gross profit of Rs. 82,849 (inclusive of both the items). When the Appellate Assistant Commissioner added the amount on one item alone, i.e. on readymade garments on the ground that the sales were suppressed then I hold that this combined trading account could not be considered without referring to the whole account. Recasting of the readymade garments account by the Appellate Assistant Commissioner had an inevitable repercussion on the result of other cloth account and it was wholly erroneous on the part of the Appellate Assistant Commissioner to have ignored the same completely. The Tribunal, in my opinion, has very correctly held that the portion of account had an important relation in the context in which it appeared and a portion of the account could not be taken or interpreted bereft of that context In my opinion, the Tribunal took a very correct view of law, as it had the consequential adjustment in the other cloth account which, as found by the Appellate Assistant Commissioner resulted in the gross profit of 17.5 per cent. At this stage though it will be a bare repetition, it must be mentioned that the Income-tax Officer had fixed it up at 12.5 per cent only, and it was not a subject matter of enhancement before the Appellate Assistant Commissioner and even then the Appellate Assistant Commissioner invoking his power of enhancement increased the gross profit to 17.2 per cent (which was rounded up by the Tribunal to 17.5 per cent). I, however, hold that the Tribunal very correctly held that the rate of percentage thus fixed was high

and that 12.5 per cent was a reasonable one and in that view of the matter, hold that the Tribunal very correctly gave a reduction of 5 per cent in this account (i.e. in the cloth account) on the reduced sale at Rs. 4,95,885 which very correctly resulted in a further reduction of Rs. 28,189.

15. For the foregoing reasons, I hold that there is no substance in the submissions advanced by the leanred Senior Standing Counsel for the Revenue and I hold that the Tribunal was justified in law in giving a reduction of Rs. 28,189 in the cloth account of the assessee. The answer to the question, thus, in my opinion, is in the affirmative in favour of the assessee and against the Revenue. Hearing fee Rs. 250.

S. K. JHA, J: I agree.

16. In reference to the tenacity of the learned Senior Standing Counsel for the Revenue, I wish to highlight the main point involved in this case. The decision of the Supreme Court in 24 I. T. R. 481, referred to by my learned Brother, was laying down a principle of law, namely, as to whether the silver bars in which the assessee of Calcutta in that case was dealing lying at Bikaner and not transacted upon in any manner still formed a part of the stock in trade and was liable to tax. On the contrary, in the case at hand it is a mere quantification of the correct figure to be arrived at in the process of airthmetical calculation or computation. It involves no question of law at all. Since, however, the question as framed by this Court for calling for a reference under section 256(2) of the Act has a large ambit, it has necessitated us to go into the facts for the purpose of finding out as to whether on the facts and in the circumstances of this case, the Tribunal was right in its computation of the amount of deduction to be allowed to the assessee. There lies the whole difference between the decision of the Supreme Court and the instant case.

R. D. *Question answered*

CIVIL WRIT JURISDICTION

Before Lalit Mohan Sharma and Najir Ahmad, JJ.
July 9,

1984

TATA ENGINEERING AND LOCOMOTIVE CO. LTD.*
v.
THE STATE OF BIHAR AND ANOTHER

Bihar Finance Act, 1961, *section* 13(1) *and* 13(1)(*b*)—*provisions of—special rate of tax on certain sales or purchase—whether to be applicable to raw materials* (*inputs*) *only.*

Where in view of the notification issued by Government of Bihar on 12th April 1982 under section 13(1) of the Bihar Finance Act, 1961, hereinafter called the Act, providing for special rate of tax on certain sales or purchase the writ-petitioner filed application before Deputy Commissioner, Commercial Taxes, Jamshedpur under section 13(1)(*b*) of the Act for grant of certificate in respect to a large number of commodities, but certificate was issued with regard to some of the items only and was rejected with respect to the rest;

Held, that the notification dated 12th April 1982, gives the clue to the interpretation of the expression by mentioning the word "inputs" after the word "Industrial raw materials." Considered in that light, the Deputy Commissioner is right in holding that such items which are just to be fitted in finished goods manufactured by the writ petitioners cannot be treated as raw materials (inputs).

Indian Copper Corporation v. *Commercial Taxes Commissioner* (1),—distinguished.

*Writ Jurisdiction Case No. 1339 of 1982(R) in the matter of an application under Article 226 of the Constitution of India.

(1) (1965) A.I.R. (S.C.) 891.

Application under Articles 226 and 227 of the Constitution.

The facts of the case material to this report are set out in the judgment of L. M. Sharma, J.

M/s *K. D. Chatterjee* and *Chunni Lal* for the petitioner.

M/s. R. B. Mahto (Addl. A.G.) and *S. K. P. Sinha, J.C O. Addl. A. G.* for the respondents.

LALIT MOHAN SHARMA, J.—The point pressed by the petitioner in this writ application relates to the scope of interpretation of section 13(1), Part I, of the Bihar Finance Act, 1961, dealing with the levy of tax on the sale and purchase of goods in Bihar. Section 12 prescribes the general rate of tax and section 13 special rate on specified sales. The relevant provisions of section 13(1)(b) are in the following terms.—

"13 Special rate of tax on certain sales or purchase—(1) Notwithstanding anything contained in this part but subject to such conditions and restrictions as may be prescribed;

* * *

(*b*) Sales to or purchase by a registered dealer of goods required by him directly for use in the manufacture or processing of any goods for sale in Bihar or in course of inter-State trade or commerce;

* * *

and in respect of which the purchaser has been granted a certificate by the prescribed authority in the prescribed manner and for the prescribed period shall, unless the goods are taxable at a lower rate under section 12, be subject to sub-section (2), leviable to tax at such rate as may be

notified by the State Government in this behalf not exceeding 4 percentum;

Provided that the State Government may, from time to time by notification in the Official Gazette, exclude any goods or class or description of goods from the operation of this section."

2. The State Government issued notification no. S.O. 604, dated 12th April 1982, as contained in Annexure 6 to the writ application under section 13(1) stating that—

"The Governor of Bihar is pleased to direct that the Sales Tax on Industrial raw materials (inputs) payable under the said section 13(1)(*b*) of the Act shall be at the rate of one percentum."

The notification came by way of substitution to the earlier notification in this regard and was directed to come into force with effect from 1st April 1982.

3. The petitioner filed an application before the Deputy Commissioner, Commercial Taxes, Jamshedpur, Circle (Respondent no. 2) prescribing authority in this regard under section 13(1)(*b*) for grant of a certificate in respect to a large number of commodities in view of the notification (Annexure 6). The respondent no. 2 passed an order as contained in Annexure 1 for issuing a certificate as prayed for but only in regard to some of the items. By the present writ application, the petitioner challlenges that part of the order by which the claim of the petitioner has been rejected in regard to many items.

4. Mr. K. D. Chatterjee, the learned counsel for the petitioner, contended that the scope of section 13(1) is not limited to raw materials only and the notification (Annexure 6) is bad in so far as it restricts the scops to raw materials. The

petitioner must be held to be entitled to the benefits of the special rate of tax with respect to all the goods required for use in manufacture or processing, as contemplated by section 13(1)(*b*). It has also been argued that only uniform rate has to be fixed in regard to all the items and the order in regard to two rates as mentioned in Annexure 1 with respect to two sets of items is illegal. Alternatively, it is suggested that the expression 'raw material' should be given a wider meaning as was observed in *Indian Copper Corporation* v. *Commercial Taxes Commissioner*(1). I do not find any merit in this argument inasmuch as the opening line of the section subjects the provision of the section to the conditions and restrictions as may be prescribed. No right of paying tax on special rate has been unconditionally conferred in regard to any goods. A purchaser can get the benefit of this section only subject to the prescribed conditions and restrictions and then only on obtaining a certificate by the prescribed authority in this regard. I am not able to discover any limitation on the power to prescribed conditions and restrictions and no reason could be placed on behalf of the petitioner for holding the notification (Annexure 6) as illegal. It cannot be justifiably suggested that Annexure 6 makes an illegal discrimination between industrial raw materials and other materials because the two groups are well defined two categories, permitting classification which would stand the test of Article 14 of the Constitution. For the same reason, there does not appear to be any warrant for holding that one uniform rate of tax must be fixed with respect to all items. The petitioner's own application, as contained in Annexure 8 itself, gives a lie to the stand. By the said application, the petitioner wanted to pay special rate of one per cent on the items contained in Annexure A to the Annexure B and at the rate of 3 per cent on the goods as contained in Annexure E.

(1) (1965) A.I.R. (S.C.) 891.

5. As to the meaning of raw materials, Mr. Chatterjee urged that since the expression has not been defined in the Act, it has to be given an extensive meaning. Even assuming the suggested approach as correct one, it is not possible to allow the plea of the petitioner in the present sible to allow the plea of the petitioner in the present case because the notification (Annexure 6) gives the clue to the interpretation of the expression by mentioning the word "inputs" in brackets. Considered in that light, the Deputy Commissioner appears to be right in holding that such items which are just to be fitted in finished goods manufactured by the petitioner cannot be treated as raw materials (inputs). In regard to the decision in *Indian Copper Corporation* v. *Commercial Taxes Commissioner* (supra) it must be held that the same has no application to the present case. In the reported case, the appellant was engaged both in mining operation and in manufacturing process, the two processes being inter-dependant. It was, therefore, held that it was not correct to exclude from specification in the certificate of registration as a dealer under the Central Sales Tax Act the vehicles which were used for removing goods from the place where the mining operations were concluded to the factory where the manufacturing process started. It was pointed out that process of mining are and manufacture with the aid of ore copper goods was an integrated process and there would be no ground for exclusion from the vehicles those which were used for removing goods to the factory after the mining operations were concluded nor there was any ground for excluding locomotives and motor vehicles used in carrying finished products from the factory.

6. Mr. Chatterjee lastly argued that even accepting the principle adopted by the Deputy Commissioner as correct, he has not applied his mind to the items in question and the impugned part of his order has been passed in a mechanical manner without appreciating that they fulfilled the conditions for application of special rate of tax. The commodities in respect of which concessional rate of one per cent was claimed, but not allowed, have been detailed in Annexure 2

to the writ petition and the criticism of Mr. Chatterjee appears to be correct with respect to many of the items. By way of illustration, I will refer to some of the items from Annexure 2. The first item mentions welding rods and wire etc; the third item, oxygen and acetyline and industrial gas; the fourth item, grease and lubricants; and the fifth item, core oil. A large number of other items are similarly described. The stand of the petitioner is that even applying the stand of the Commercial Tax Department to these and other items they qualify for concessional rate. The statements made in the supplementary affidavit read with Annexure 13 thereto assert the relevant facts in this regard. The respondents have not filled a reply to this affidavit. We are not sure whether the relevant facts were placed before the Deputy Commissioner at the appropriate time, but any way, the Deputy Commissioner was under a duty to examine the use to which the items are put and then to decide the matter. After going through the different lists read with the impugned order, it is clear that the matter requires a fresh consideration by the Deputy Commissioner in regard to the items which have not been allowed concessional rate. The matter, therefore, must be remitted to him for this purpose.

7. In the result, I do not accept the main points urged on behalf of the petitioner and hold the Notification (Annexure 6) to be valid and binding and the approach adopted by the Deputy Commissioner in Annexure 1 as lawful; but in view of the observation in paragraph above, the matter is remitted to the Deputy Commissioner for reconsideration of the claim of the petitioner with respect to the relevant items.

NAZIR AHMED, J.—I agree.

R. D.—*Order accordingly.*

APPELLATE CIVIL

Before Brishketu Saran Sinha and Binodanand Singh, JJ.

August, 7.

1984.

DEB NATH MISHRA AND ANOTHER.*

vs.

THE STATE OF BIHAR AND ANOTHER.

Limitation Act, 1963 (*Central Act no. XXXVI of* 1963) *Article* 123 *and section* 17—*suit setting aside exparte decree—plaintiff asserting in plaint of having knowledge of fraud or collusion on* 25*th March*, 1972—*suit filed on* 22*nd May*, 1972—*further investigation regarding fraud or collusion, if necessary.*

Where in the plaint for setting aside exparte decree dated 30th June 1970 there was specific assertion that plaintiff had knowledge about the fraud and collusion on 25th March, 1972 and the suit was filed on 22nd May, 1972;

Held, that on the pleading of the plaintiff itself no further investigation is needed, and, as such, the suit was farred by limitation under Article 123 of the Limitation Act, 1963.

Appeal by defendants.

The facts of the case material to this report are set out in the the judgment of B. S. Sinha, J.

Messrs Tarakant Jha and *Ramesh Jha*, for the appellants.

Messrs C. K. Sinha (*G.P.I.*) and *Chandra Shekhar Prasad* (*J.C. to G.P.I.*), for respondent no. 1 and *Mr. Shyam Sundar Sinha Shyam*, for respondent no. 2.

*Appeal from Original Decree no. 555 of 1976. Against the decision of Shri Bindeshwari Prasad Verma, Subordinate Judge, Katihar, dated the 17th June, 1978.

BRISHKETU SARAN SINHA, J.—This appeal by the defendants first party in the court below, *i. e.*, defendants 1 and 2, is directed against the judgment and order dated 17th June, 1976, passed by Shri Bindeshwari Prasad Verma, Subordinate Judge, Katihar, in Title suit No. 259 of 1972.

2. The plaintiff, the State of Bihar, filed the aforesaid suit for setting aside an *exparte* decree passed by the Munsif, Katihar, in Title suit No. 639 of 1964 on the 30th of January, 1970.

3. The plaintiff's suit, in brief, was that the father of defendants 1 and 2 was an ex-intermediary in relation to cadestral survey khata nos. 139 and 140, appertaining to touzi no. 1239 of village Katihar, which in the revisional survey, have been numbered as nos. 617 and 637. In the year 1952 the interest of the ex-intermediary vested in the State of Bihar and, as such, defendants no. 1 and 2 had no right, title or interest in the suit property which is a tank having an area of 23 acres and a Bhinda around it of 17 acres. According to the plaintiff, Title suit No. 639 of 1964 was filed in the court of Munsif, Katihar, for a declaration that the survey entry with respect to the aforesaid two khatas in the revisional survey was erroneously shown to be in favour of the State of Bihar and that they had raiyati interest in those two khatas. In the aforesaid suit the State of Bihar appeared on 26th April, 1968, through an A.G.P. (defendant no. 3) and in which only petitions were filed for time to file written statement. Ultimately, on 5th January, 1970, when again an application was filed for time to file a written statement, the court directed that the suit be fixed for 19th January, 1970 for hearing *ex parte* and rejected the prayer of defendant for time. But it further observed that if on that date the defendant would file written statement then it would be considered. On 19th January, 1970, again only prayer was made on behalf of the defendant (the plaintiff in the present suit, under appeal) for time to file written statement which was rejected and the next date fixed was 28th January, 1970. On 28th January, 1970 also prayer for time to file written statement was made and no prayer was made to revoke the order for exparte hearing. The Munsif, therefore, directed the suit to be put up for hearing on the next day i.e., on 29th January, 1970. On that date again a prayer was made for time to file written statement and no prayer was made to set aside the order for *ex parte* hearing, which was again refused.—Later on, the case was taken up for *exparte* hearing on 29th January, 1970,

when no one appeared for the defendant in that suit, the case proceeded *exparte*. On 30th January, 1970 the final order was passed in that suit on the basis of which a decree was passed.

4. The plaistiff's case further was that thereafter on 25th March, 1972, for the first time defendants no. 1 and 2 started interfering with the possession of the plaintiff over the aforesaid two plots and then having discovered, on enquiry, that an *exparte* decree has been obtained in respect of the property by fraud, the present suit was instituted to set aside the *exparte* decree as, according to the plaintiff, it had been obtained by practising fraud by defendants 1 and 2 in collusion with the A.G.P. defendant no. 3, and the law moharrir.

5. Two sets of written statement were filed, one by defendants 1 and 2 and the other by defendant no. 3 who, at the relevant time, was one of the A.G.P.'s at Katihar.

6. The defence of defendants 1 and 2 was that the aforesaid property was in possession of the ex-intermediary before the vesting of zamindari and was being managed by the Manager of the Court of Wards as the interests of the ex-intermediary had been put in charge of the Court of Wards. It was their further case that on 16th August, 1952, the said property along with others was put in the possession and management of these defendants by the Manager of the Court of Wards and the same had never been treated as *Sairat* interest of the State. The allegation that there was fraud committed by these defendants in collusion with defendant no. 3 and the law moharrir was also denied.

7. In the written statement filed by the A.G.P. (defendant no. 3) it was stated that if a written statement in the earlier suit had not been filed, the fault was not his because it was for the G.P. to have sent the written statement after properly drafting the same and getting it verified and he had merely to file it in court. The written statement having not been sent to him, he was never in a position to file it. His further defence was that it was for the law clerk to take steps for filing the written statement with the aid of the G.P.

8. Both sides, in support of their respective cases, tendered a number of documents and led oral evidence on a consideration of which the learned Subordinate Judge decreed the suit of the plaintiff

on the finding that the defendants did not have a strong case and, therefore, had motive to commit fraud and that the decree in Title suit no. 639 of 1964 was actually obtained by deceitful means. He, accordingly set aside the *exparte* decree passed in the aforesaid suit.

9. In support of this appeal Mr. Tarakant Jha has advanced only two submissions. The first submission of the learned counsel is that the suit was barred by limitation. The second submission of the learned counsel is that on the pleadings and on the materials on record there was nothing to indicate that fraud was committed by defendants 1 and 2, nor was there anything to indicate that in the commission of the fraud, there was collusion between defendants 1 and 2 on the one hand and defendant no. 3 and the law moharrir on the other. Learned counsel has further urged that even if the case of these defendants in Title suit no. 639 of 1964 was a very weak one, that by itself would not be a ground to set aside the *exparte* decree in the absence of evidence in regard to fraud committed by the appellants or defendant no. 3.

10. Before taking up the question of limitation, it has to be noticed that this point was not urged before the trial court. Although in the written statement it was stated that the suit was barred by limitation, no issue even with regard to that matter was framed by the trial court. Mr. Jha, however, has urged that the question of limitation can be raised for the first time even before the appellate court if no further facts have got to be investigated. Submission of Mr. Jha is that on the pleading of the plaintiff itself, the suit was barred by limitation.

11. Article 123 of the Limitation Act provides a period to set aside a decree passed *exparte* or to re-hear an appeal decreed or heard *exparte*. The period is thirty days. Therefore, on the face of it, if the decree was passed on 30th January, 1970, in Title suit No. 639 of 1964, limitation would ordinarily begin to run from the 31st of January, 1970. However, in the instant case, the case of the plaintiff is that the *exparte* decree was a consequence of fraud. In that view section 17 of the Limitation Act would become relevant which provides that where, for a suit, a period of limitation is provided under the Limitation Act, the period of limitation shall not begin to run until the plaintiff or the applicant has discovered the fraud or mistake or could, with reasonable diligence, have discovered it.

Submission of Mr. Jha is that on the case in the plaint as filed by the plaintiff itself, it came to know about the fraud on 25th March, 1972, and the instant case was filed on 22nd May, 1972. He, therefore, submits that the case was barred by limitation as it was filed beyond the prescribed period of thirty days from the date of the knowledge of fraud. In paragraph 12 of the plaint it has been stated that the Block Development Officer, Katihar, made an enquiry in court and learnt for the first time on 25th March, 1972 that the defendants first party, i.e., the appellants got an *exparte* decree in suit no. 639 of 1964 on 30th January, 1970, and thereafter, on the basis of intensive enquiry, was convinced that the *exparte* decree has been obtained by committing worst fraud upon the plaintiff. Therefore, it will be seen that in paragraph 12 it has not been specifically stated as to when the plaintiff respondent came to know of the fraud. However, in paragraph 24 of the plaint it is further stated as follows:—

> "That the cause of action for this suit arose within the jurisdiction of this court on 30th January, 1970 the date of *exparte* decree obtained by fraud and collusion and on 25th March, 1972 when the plaintiff for the first time came to know of this *exparte* decree on enquiry on 25th March 1972 within the jurisdiction of this court."

In this para of the plaint there is the specific assertion that the plaintiff had knowledge about the fraud and collusion on 25th March, 1972. Hence on the pleading of the plaintiff itself no further investigation is needed and it has to be held that the suit was barred by limitation.

12. On behalf of the State a strange argument has been advanced to resist this submission. It was argued, and I must confess that I have not been able to understand the submission, that the party aggrieved by the *exparte* decree in Title suit no. 639 of 1964 was not the Block Development Officer but the Collector, Purnea. In support of this contention reference has been made to various provisions of the Bihar Land Reforms Act which provide that after the vesting in favour of the State, the interest of the ex-intermediary shall be managed by the Collector of the district concerned. Even with regard to this argument the definition of 'Collector', as given in that Act, has not been taken into account which provides that the Collector shall include various other authorities but not below the rank of

a Sub Deputy Collector, who may be notified on behalf of the State Government to act as the collector. It has not been shown that in Purnea the Collector alone was the authority who has been given the power with regard to the vested property of an ex-intermediary. Indeed, on the records of this First Appeal there is nothing to indicate that at any stage, with regard to either Title suit no. 639 of 1964 or the present suit out of which this appeal arises, the matter was ever before the Collector. Even the plaint in this suit has been verified and affidavited by the Additional Collector of Purnea and not by the Collector. Therefore, there is no substance in the submission that if this point was pressed then the plaintiff would have shown proceeding that the Collector had knowledge of the case within thirty days 22nd May 1972.

13. Under section 3 of the Limitation Act it is the duty of the court to dismiss a suit if it has been filed after the prescribed period and even though plea of limitation has not been set up as a defence. In the case of Gajadhar Rai *v.* Ram Charan Gope and others (A.I.R. 1930 Patna 256) a Full Bench of this Court held that under section 184 of the Bengal Tenancy Act, the Court was bound to dismiss the suit if it is a suit under Schedule 3 of the Act and is not instituted within the time prescribed in that Schedule although limitation has not been pleaded. Similarly, in *Ramayan Dubey and others* v. *Chitradeo Rai and others*(1) a Single Judge of this Court pointed out that it was the duty of the Court itself to see whether the suit was barred by limitation. In this case I have already pointed out that on the plaint itself, the suit was barred by limitation.

14. As learned counsel for the parties argued this appeal on merits also, I would record my findings on merits as well. The case of the plaintiff-respondent was based upon the fact that fraud was practised by the defendants appellants in collusion with defendant no. 3 and that was how an *exparte* decree was obtained. With regard to fraud, in paragraph 12 of the plaint it has been stated that when the plaintiff came to know about the *exparte* decree, an intensive enquiry was made into the whole matter and thereafter the plaintiff was convinced that the afore-mentioned *exparte* decree in Title suit,

(1) (1969) S.I.R. (Pat) 85

no. 639 of 1964 was obtained by the defendants first party by committing worst fraud upon the court. The facts which led to this conclusion have not been stated in the plaint itself and in the evidence led by the plaintiff nothing has been stated as to on what basis and on what enquiry the plaintiff came to the conclusion that fraud had been practised in the case. No doubt, evidence has been led that defendants 1 and 2 had a very week case when the filed Title suit 639 of 1964 and, therefore, they had a motive to practice fraud. However, in this connection it has to be born in mind that falsity of the claim itself does not constitute fraud. In the case of *Mt. Laganmani Kuar and another* v. *Ram Gobinda Singh and others*(1) *Sir Fazl Ali, J.*, with whom Harries, C. J. agreed, held:—

> "The question as to the falsity of the claim does not by itself constitute fraud. It has been held in a series of cases of this Court that this question can be gone into only to make the case of fraud probable and show by the fraud was committed."

It has, therefore, to be seen that apart from the weakness or falsity of the case of defendants 1 and 2 in Title suit No. 639 of 1964 whether there was any other material which would indicate that fraud had been committed.

15. In this connection it has to be born in mind that although Title suit no. 639 was filed in the year 1964, the State of Bihar, the plaintiff respondent in the present case, appeared through the A.G.P. on 26th April, 1968, and till 30th January, 1970, when the *exparte* decree was passed, even the written statement in the case had not been filed. The ordersheet of Title suit 639 of 1964 shows that on 18th December, 1969, the court, in granting time to the plaintiff-respondent, had awarded a cost of Rs. 10 still up to 29th January, 1970, when the case was taken up for *exparte* hearing, the written statement had not been filed. Admittedly the written statement after obtaining instruction, had not to be drafted and filed by the A.G.P. The plaintiff's own witness P.W. 3, the Law Moharrir has stated in paragraph 6 of his deposition that before preparing the written statement, statement of facts had to be called from the B.D.O. through

(1) 1992 S.I.R. (Pat) 357.

the law clerk and then that had to be sent to the Government Pleader. The Government Pleader would then prepare a written statement which would be sent to the Additional Collector for his approval and when the Additional Collector would sign it, he would give it to the law clerk who would give it to the A.G.P. who, in his turn, would sign it and file in court. It is obvious, therefore, that in the preparation of the written statement, on the plaintiff-respondent's own evidence, the A.G.P. had nothing to do with it.

16. In the instant case no evidence has been led as to what steps were taken from 26th April, 1968 to 29th January, 1970, by the plaintiff-respondent for the preparation of the written statement. Nothing has been stated even in the plaint to show as to whether statement of facts had been called for from the B.D.O. and whether it had been sent to the Government Pleader. In such circumstances, it is difficult to conclude as to how the A.G.P. was at fault in the matter. He has stated in his evidence on oath that he never received the written statement and for that he was always asking the law clerk to take necessary steps through the Government Pleader. But that was not done in the case. He was, therefore, not in a position to file the written statement and from what I have indicated above the fault was not his at all.

17. The trial court has stated that the decree was obtained by practising deceitful means only on the basis that after the learned Munsif had directed in Title suit 639 of 1964 that the case would proceed *exparte*, no petition was filed by the A.G.P. to set aside that order and gave fresh time for filing written statement. This by itself cannot be a ground for holding that there was fraud. This aspect of the matter is capable of innocent explanations as well. In the first order on 5th January, 1970, when the learned Munsif directed that the case would proceed *exparte*, on 19th January, 1970, he had further stated that if by then a written statement was filed it would be considered. Probably it was on the basis of that observation that subsequently the A.G.P. was making prayer only for extension of the time for filing written statement. After that the case was again put up for hearing on 19th January, 1970, then adjourned to 28th January, 1970 and again adjourned to 29th January, 1970, when the court finally refused to adjourn the case. In that date the learned Munsif proceeded with the case and no one appeared on behalf of

the plaintiff-respondent in Title suit no. 639 of 1964. If the plaintiff respondent did not choose to appear, it did so at its own risk and it was not incumbent upon the court to go on obliging the plaintiff respondent by adjourning the case sine die to suit its convenience. I am, therefore, on the materials on the record, unable to hold that any fraud was practised in this case by defendants 1 and 2, namely, the appellants, in collusion with defendant no. 3 and the Law Moharrir in the case concerned.

18. In the result, the appeal is allowed, the judgment and decree of the court below are set aside and the suit of the plaintiff respondent is dismissed with costs throughout.

BINODANAND SINGH, J.—I agree.

R. D. *Appeal allowed.*

CIVIL WRIT JURISDICTION

Before Satyeshwar Roy and Abhiram Singh, JJ.

1984

October, 22.

M/s Steel City Beverages P. Ltd. Jamshedpur.*

v.

The Union of India and Ors.

Central Excise Rules, 1944—*Rule* 8(1)—*notification contained in Annexure "2" issued under,—granting exemptions to manufacturer with respect to excise duty—whether applicable to writ-petitioner, manufacturing beverage '77', registered mark of Respondent no.* 5 *under certain conditions of put, by Respondent no.* 5.

Non alcoholic beverage known as '77' was admittedly registered trade mark of Modern Bakeries (India) Ltd., respondent No. 5, and it allowed the writ petitioner to use the same. In order to safeguard its interest and in order to keep up reputation, and good will of its trade mark respondent No. 5 imposed certain conditions. The conditions read as a whole clearly establish that the writ petitioner was not acting as an agent of respondent No. 5 in manufacturing and selling the beverage.

Held, that the writ petitioner, being a manufacturer was entitled to the exemption as contained in Annexure "2" which was issued under Rule 8(1) of the Central Excise Rules.

*Civil Writ Jurisdiction Case no. 27 of 1979(R.) in the matter of an application under Articles 226 and 227 of the Constitution of India.

Application under Articles 226 and 227 of the Constitution.

The facts of the case material to this report are set out in the judgment of Satyeshwar Roy, J.

M/s. B. C. Ghosh, P. K. Sinha, D. K. Sarkar and *S. N. Das* for the petitioners.

M/s Debi Prasad, Standing Counsel Government of India and *A. Sahay* for the respondents no. 1 to 4.

Mr. Kalyan Roy for respondent no. 5:

SATYESHWAR ROY J.—The petitioner a private limited company, is a manufacturer of soft drinks in its factory at Adityapur in the district of Singhbhum. Initially it was manufacturing Coca Cola and Fanta Orange. It entered into an agreement on 25th December, 1977 with respondent no. 5, Modern Bakeries (India) Ltd. for manufacturing non-alcoholic beverage known as '77'. The sole manufacturing, selling and distributing agent of the composition for preparation of '77' was respondent no. 5. The agreement entered into by and between the petitioner and respondent no. 5 is annexure 1 to the writ petition. According to the order dated 18th September, 1978 of respondent no. 2 contained in annexure 7, as the petitioner was manufacturing '77' for and on behalf of respondent no. 5 it was not entitled to exemption issued under rule 8(1) of the Central Excise Rules 1944 (the Rules) on 4th July, 1977, Copy of the notification issued under that rule is annexure 2.

2. In this application, the petitioner has prayed for issuance of appropriate writ for quashing annexure 7 on the ground that in terms of annexure 1, the petitioner was itself a manufacturer of soft drink '77' and was not manufacturing it for and on behalf of respondent no 5. It was, therefore, entitled to avail the exemption granted under annexure 2.

3. All the parties relied upon annexure 1 in support of their respective contention. The decision of this case will therefore, depend on the correct interpretation of annexure 1 to find out whether the petitioner was a manufacturer of soft drink '77'.

4. The petitioner has a factory in Adityapur and the same is registered under the Indian Factories Act, 1948, registeration no. being 18540/SBM. The petitioner is solely responsible for the engagement and supervision of the employees for its factory and in every respect it has full control over the activities carried on at that factory. Before manufacturing '77' it was also manufacturing other soft drinks in that factory. The petitioner in terms of annexure 1 agreed to manufacture '77' in its factory at Adityapur. Under annexure 1 respondent no. 5 agreed to sale to the petitioner the composition which was used for manufacturing '77'. The respondent no. 5 was the sole manufacturing, selling and distributing agent of that composition. For the manufacture of the soft drink '77', in addition to the said composition, other articles and chemicals like sugar, carbondioxide, highflow super cell, caustic soda flakes etc. were also necessary which were purchased by the petitioner from the market. Bottles for bottling the soft drink and crown corks were also purchased by the petitioner from the market. Respondent no. 5 had no control over the petitioner or its factory at Adityapur. Since respondent no. 5 allowed the petitioner to use the trade mark '77' owned by respondent no. 5, the latter was entitled to ensure the quality of the soft drink. In annexure 1 the territory within which the petitioner was entitled to sell '77' so manufactured in its Adityapur factory, was defined. According to the petitioner it was a manufacturer as defined under the Central Excise and Sell Act, 1944/the Act.

Respondent nos. 1 to 3 in their counter affidavit admitted that the soft drink '77' was manufactured by the petitioner at the Adityapur factory, but contended that the same was manufactured on behalf of respondent no. 5. The terms of annexure 1 would show that the petitioner was manufacturing '77' on behalf of respondent no. 5. In support of these assertions the respondents quoted some of the term and conditions of annexure 1 in the counter affidavit.

Respondent no. 5 filed another counter affidavit in which it admitted the case of the petitioner. It stated that it had no

control over or supervision in the factory of the petitioner situate at Adityapur and it was in no way concerned with the manufacture of soft drink '77' marketed by the petitioner.

5. There is no dispute that the soft drink '77' was manufactured as understood under the Act in the Adityapur factory of the petitioner. The word 'manufacturer' according to the Act shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account. According to respondent nos. 1 to 3 the petitioner was not a manufacturer, but was manufacturing it on behalf of respondent no. 5. According to the writ petition and the counter affidavit of respondent no. 5, the labour employed in the Adityapur factory was by the petitioner and the petitioner was engaged in manufacture of '77' on its own account. It was not disputed by respondent nos. 1 to 3 that if the petitioner was manufacturing the soft drink on its own account it was entitled to the exemption granted under annexure 2.

6. Annexure 2 is the notification dated 4th July, 1977. It reads as follows:—

> "Notification No. 211/77-C.E. dated July, 4, 1977 reading as follows:—
>
> In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules 1944, the Central Government hereby exempts aerated waters not containing extracts of cola (Kola)' nuts, and falling under sub-item (2) of Item No. 10 of the First Schedule to the Central Excise and Salt Act 1944 (1 of 1944) from so much of the duty of excise leviable ad-valorem: Provided that the exemption contained in this notification shall apply only to the first clearance for home consumption not exceeding

fifty lakh bottles, by or on behalf of a manufacturer from one or more factories during any financial year subsequent to 1977-78, and for such clearance not exceeding thirty seven lakh bottles during the period commencing on the 4th day of July, 1977 and ending on the 31st day of March, 1978".

7. The relevant terms of annexure 1 which were relied upon by the parties are as follows:—

"....

(A). The Company is the sole manufacturing/selling/distributing agent of a compositions (hereinafter referred to as the composition) the formula which is an industrial secret of M/s. CFTRI, Mysore from which a non-alcoholic beverage syrup is prepared which is used in the preparation of a non-alcoholic beverage (hereinafter referred to as the Beverage) for sale in bottles and other containers and in other forms or manners.

(B). The Company is the owner of trade marks 77 Double Seven that distinguishes the composition, the Syrup and the Beverage and of the trade mark consisting of a Distinctive Bottle in various sizes in which the Beverage will be marketed, the said trade mark 77 Double Seven and the Distinctive Bottle, being hereinafter referred to as the "Trade Marks".

(C). ....

....

(D). The Bottler desires to prepare and bottle the Beverage for distribution and sale in and throughout a territory to be defined and described hereafter and when so defined by the parties under

their signature shall form integral part of this agreement.

.....

.....

(*b*) It is an express condition of this agreement that the bottler will not sell or resell nor lend, sample, gift or otherwise dispose of the composition/ syrup inside or outside of his territory without the prior written consent of the company.....

.....

....

.....

(*c*) It is an express condition of this agreement that the bottler will not sell or re-sell the beverage outside of his territory without the prior written consent of the Company.

2. The Company undertakes to sell and deliver to the Bottler for destination such quantities of the composition as may be specified by the Bottler. The Company will ensure the quality of the composition to be supplied to the Bottler in conformity with the Food Laws.

3.(*a*) The Bottler will use the composition thus purchased from the Company exclusively for preparation of the syrup and the preparation and bottling of the beverage as prescribed from time to time by the Company.....

.....

(*b*) .....

4. (*a*) The Bottler shall make advance payment for each consignment of the composition by a crossed demand draft only. Cheques, hundies, etc. are not acceptable. The Company shall despatch the composition according to the mutual agreement between the parties as mentioned above in paragraph (2) FOR destination. The Bottler shall be liable to pay taxes, rates, local taxes central or State taxes or levies and all other expenditure incidental thereto.

.....

(*d*) .....

.....

5. (*a*) .....

(*b*) .....

6. (*a*) The Company reserves to itself the right to produce and sell the beverage in the territory of the Bottler either by itself or may appoint one or more bottler for the whole or part of the territory.

(*b*) .....

.....".

In annexure 1 'Company' refers hereto respondent no. 5. and "Bottler" refers to the petitioner.

8. According to Mr. Debi Prasad, learned counsel appearing on behalf of respondent nos. 1 to 3, as the respondent no. 5 had the exclusive right to prepare and sell the composition and the petitioner had no right to sell the beverage prepared by using that composition outside the specified territory and the petitioner is also required to maintain the standard of the beverage. it should be held that the petitioner was manufacturing the beverage on behalf of respondent no. 5.

Mr. Ghosh, learned counsel appearing on behalf of the petitioner, urged that on the grounds relied upon by Mr. Prasad, the petitioner did not become an agent of respondent no. 5. He submitted that the composition which was one of the ingredients for the manufacture of beverage was out right purchased by the petitioner from respondent no. 5, and at no point of time or at no stage of the manufacture of the beverage, respondent no. 5 had any control.

9. From the terms and conditions quoted herein-above, it is clear that the composition was purchased by the petitioner from respondent no. 5. Admittedly '77' was registered trade mark of respondent no. 5 and it allowed the petitioner to use the same. In order to safe guard its interest and in order to keep up reputation, and good will of its trade mark, respondent no. 5 imposed certain conditions. The conditions read as a whole, clearly establish that the petitioner was no acting as an agent of respondent no. 5 in manufacturing and selling the beverage.

Further, in the counter affidavit, filed on behalf of respondent no. 5 it has been asserted that they were not holding any licence under the Act for manufacturing the beverage, nor they had any factory for the same. They were not manufacturer within the meaning of section 2(*f*)(*iv*) of the Act. In my opinion, by no stretch of imagination respondent no. 5 can be said to be a manufacturer under the Act. Similar view was expressed by a Bench of the Delhi High Court in *Poona Bottling Co. Ltd.* versus *the Union of India* [1981 E.L.T.(J) 389]. This view is also supported by a decision of Gujrat High Court in *Cibatul Ltd.* Versus *the Union of India* [1978 E.L.T. (J) 68] and of Madras High Court in *Spancer Co. Ltd.* Versus *Assistant Collector of Central Excise* [1983 E.L.T. (J) 2098].

It is surprising that inspite of the decisions of the Government of India in *Surat Bolling Co. Ltd.* [1980 E.L.T. 3537 (G.O.I.)] and in *Punjab Beverages Ltd.* [1980 E.L.T. 475 (G.O.I.)] which followed *Cibatul's* case (supra) respondent nos. 1 to 3 contested this application.

10. For the reasons, aforesaid, this application is allowed, annexure 7 is quashed and it is held that the petitioner was entitled to the exemption as contained in annexure 2. Respondent Nos. 1 to 3 must pay cost of this application to the petitioner which is assessed at Rs. 500/ (Rupees five hundred).

ABHIRAM SINGH, J.—I agree.

R.D. *Application allowed.*

APPELLATE CIVIL

Before Uday Sinha and S. J. Hyder, JJ.

1984.

October, 23.

RAMESHWAR SINGH DEO AND OTHERS.*

v.

HEMANTA KUMAR SINGH DEO AND OTHERS.

Hindu Law—Impartible estate—whether can be owned and possessed by joint Hindu family—junior branch of joint Hindu family—rights of—no intention to forgo their right of Succession by members of junior branch—effect of—sanad, whether to include within its term all the maintanance holders.

A joint impartible estate can be owned and possessed by a joint Hindu family and the members of the junior branch of the joint Hindu family can be said to forgo their rights of succession to estate only if an intention on their part to seperate from the family can either be express or implied. In the instant case no such intention eithed express or implied on part of Gandharbaraj Singh Deo, a member of the junior branch of the joint Hindu family, is either alleged or proved.

Held, that the Sanad cannot in any way be construed to be only in favour of Dwijraj Singh Deo. It would include within its term all the maintanance holders.

Shib Prasad Singh v. *Rani Prayag Kumari Devi*(1); *Mirra Raja Puspavathi Vijayaram Gajapathi Raj Manni Sultan Bahadur and Ors.* v. *Sripushavathi Viswaswar Gaja-pathiraj Raj Kumar and Others.*(2) *V. T.S. Thyagasunderadoss Thewar and Ors.* v. *V. T. S. Sevuga Pandia Thewar and another*(3) *Dayaram and Others* v. *Dawalatshah and another*(4) followed.

*Appeals from Original Decree nos. 351 and 352 of 1967. From a decision of Shri S. S. Dayal, Subordinate Judge, Chaibasa, dated May 29, 1967.

(1) (1932) A.I.R. (P.C.) 216.
(2) (1964) A.I.R. (S.C.) 118.
(3) (1965) A.I.R. (S.C.) 1730.
(4) (1971) A.I.R. (S.C.) 681.

Jugeshwar Singh Deo and anr.—Appellate in F.A. no. 352 of 1967.

Appeal by the defendant.

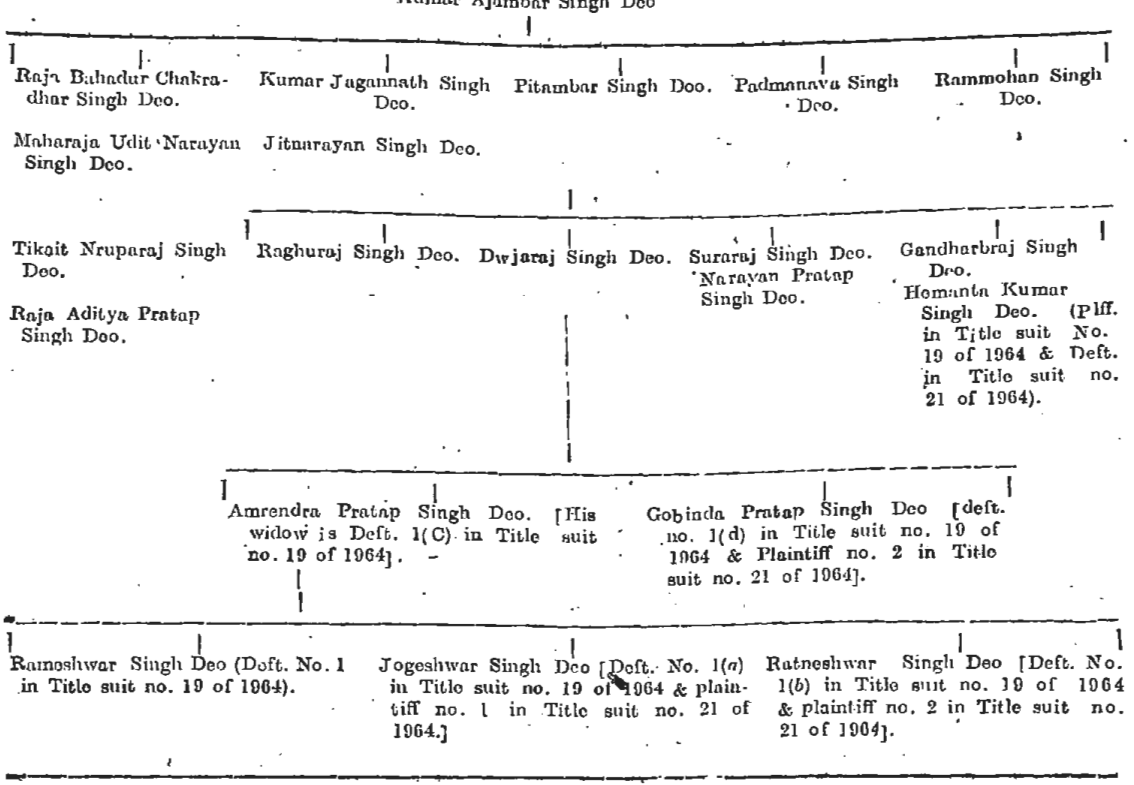
The facts of the case material to this report are set out in the judgment of S. J. Hyder, J.

M/s. P. K. Sinha, S. B. Sinha and *L. N. Deo,* for the appellents *in F. A. No.* 351 of 1967 *of respondents in F. A.* 352 *of* 1967.

M/s. R. N. Sahai Sinha and *B. Dutta* and *Mrs. M. M. Pal,* for the respondents in F. A. no. 351 of 1967 and appellents in F. A. no. 352 of 1967.

S. J. HYDER, J.—These are two connected appeals which arise out of a common judgment. The suits giving rise to these appeals were tried as analogous by the trial court and the evidence led in one of the suits has been read as an evidence in the other suit also. We, therefore, proceed to decide these appeals by means of this judgment.

2. In order to appreciate the facts of the case, the following pedigree is sub-joined:—


Kumar Ajambar Singh Deo
Raja Bahadur Chakradhar Singh Deo.
Kumar Jagannath Singh Deo.
Pitambar Singh Deo.
Padmanava Singh Deo.
Rammohan Singh Deo.
Maharaja Udit Narayan Singh Deo.
Jitnarayan Singh Deo.
Tikait Nruparaj Singh Deo.
Raja Aditya Pratap Singh Deo.
Raghuraj Singh Deo.
Dwjaraj Singh Deo.
Suraraj Singh Deo.
Narayan Pratap Singh Deo.
Gandharbraj Singh Deo.
Hemanta Kumar Singh Deo. (Plff. in Title suit No. 19 of 1964 & Deft. in Title suit no. 21 of 1964).
Amrendra Pratap Singh Deo. [His widow is Deft. 1(C) in Title suit no. 19 of 1964].
Gobinda Pratap Singh Deo [deft. no. 1(d) in Title suit no. 19 of 1964 & Plaintiff no. 2 in Title suit no. 21 of 1964].
Rameshwar Singh Deo (Deft. No. 1 in Title suit no. 19 of 1964).
Jogeshwar Singh Deo [Deft. No. 1(a) in Title suit no. 19 of 1964 & plaintiff no. 1 in Title suit no. 21 of 1964.]
Ratneshwar Singh Deo [Deft. No. 1(b) in Title suit no. 19 of 1964 & plaintiff no. 2 in Title suit no. 21 of 1964].

3. There is no dispute between the parties with regard to the correctness of the above pedigree. Kumar Ajambad Singh Deo had originally five sons. Three of the sons, namely, Pitambar Singh Deo, Padmanava Singh Deo and Ram Mohan Singh Deo died issueless and they need not detain us any further. Raja Bahadur Chakradhar Singh Deo, another son of Kumar Ajambar Singh Deo and his descendants are the former rulers of the erstwhile State of Seraikella, now merged in the State of Bihar, as part of the district of Singhbhum. It may be stated that Raja Bahadur Chakdadhar Singh Deo was the eldest son of Kumar Ajambar Singh Deo. The parties to this case are the descendants of the second son of Kumar Ajambar Singh Deo viz. Kumar Jagannath Singh Deo. Kumar Jagannath Singh Deo had a son, Jit Narayan Singh Deo, who in his turn had four sons, namely, Raghuraj Singh Deo, Dwijraj Singh Deo, Suraraj Singh Deo and Gandharbraj Singh Deo. Raghuraj Singh Deo died issueless. I shall have some thing more to say about it later in this judgment. Suraraj Singh Deo had a son, namely, Narayan Pratap Singh Deo who died sometime in the year 1945. Gandharb Raj Singh Deo's son, Hemanta Kumar Singh Deo is the plaintiff in Title suit no. 19 of 1964 and defendant No. 1 in the connected Title suit no. 21 of 1964. Dwijaraj Singh Deo's first son, Amrendra Pratap Singh Deo was the original defendant in Title suit no. 19 of 1964. He died during the pendency of the suit and his son, Rameshwar Singh Deo was impleaded as defendant no. 1 in his place and the two other sons of the deceased, namely, Jogeshwar Singh Deo and Rajneshwar Singh Deo were respectively impleaded as defendant no. 1(*a*) and 1(*b*) in Title suit no. 19 of 1964. The widow of Amrendra Pratap Singh Deo was impleaded as defendant no. 1(*c*) in the said suit. The brother of Amrendra Pratap Singh Deo, viz. Gobinda Pratap Singh Deo was made a party as defendant no. 1(*d*).

4. The British Government granted village Bhalu Pani as lakhraj rights to Jagannath Singh Deo. At the time of the grant the aforesaid village was part and parcel of Bengal but the administrative right over the same was handed over to the former State of Seraikella. Subsequent to the grant made in favour of Raghuraj Singh Deo, some other villages and some Nij jote lands in different villages were granted to Jagannath Singh Deo for his maintenance and the maintenance of his brothers by the former State of Seraikella. Raghuraj Singh Deo, the eldest of the grand-sons of Jagannath Singh Deo died sometime in the year 1929 without leaving any issue.

Thereafter the State of Seraikella resumed the grant made in favour of Jagannath Singh Deo including village Bhuiyan Nachna. Thereupon, Dwijraj Singh Deo, Narayan Pratap Sing Deo and Gandharb Raj Singh Deo preferred a memorial to the Viceroy of India who rejected it, with one exception. With respect to village Bhuiyan Nachna, it was held that it was a Khorposh grant made by the former State of Seraikella and the Darbar had no right to resume the said village. On September 18, 1935, the then Raja of Seraikella granted a fresh Sanad in the nature of Khorposh grant in the name of Dwijraj Singh Deo in respect of some villages and Nij jote lands. There is no controversy between the parties with regard to the facts stated above.

5. Hemanta Kumar Singh Deo, son of Gandharb Raj Singh Deo commenced Title suit no. 19 of 1964 for a decree for partition by metes and bounds of the plaintiffs' one-half share in Nij jote lands. He further claimed a declaration that the plaintiff was entitled to one-half share in the compensation money payable under the Bihar Land Reforms Act, 1950 (hereinafter referred to as 'the Act') for the acquisition of the property comprised in the villages which had been granted by the Darbar of the former State of Seraikella as khorposh grant ostensibly in the name of Dwijraj Singh Deo and other incidental reliefs. According to the plaintiff, the junior branch of the Seraikella State was joint Hindu family and the khorposh grant made by the Darbar of the former State of Seraikella in the name of Dwijraj Singh Deo was in his representative capacity as he was the eldest member of the said family. It was stated that Amrendra Pratap Singh Deo was well conversant with the court work and was doing the said work on behalf of the family. Gandharb Raj Singh Deo, father of the plaintiff, Hementa Kumar Singh Deo had implicit faith in Amrendra Pratap Singh and he gave certain papers to Amrendra Pratap Singh Deo but Amrendra Pratap Singh Deo misusing the confidence had obtained orders in his favour from the Land Reforms Deputy Collector. According to the plaintiff, villages Bhalu Pani and Bhuiya Nachna were also joint Hindu family properties. There were certain other allegations made in the plaint with which I shall deal subsequently in the judgment.

6. The suit was resisted by the defendants, *inter alia*, on the ground that the khorposh grant made by the Darbar of the erstwhile

State of Seraikella was governed according to custom. It was impartible and descendable by the rule of primogeniture. It was also stated that the Sanad issued by the Darbar was only in favour of Dwijraj Singh Deo. They contended that the suit of the plaintiff was liable to be thrown out. Certain other averments were made in the written statement which shall be dealt with later.

7. Survey proceeding having started to the Nij jote lands was recorded in the name of Amrendra Pratap Singh Deo, Gobind Pratap Singh Deo and Gandharb Raj Singh Deo. The share of Amrendra Pratap Singh Deo and Gobind Pratap Singh Deo was shown in the *khatian* as one-half and the name of Gandharb Raj Singh Deo was shown as owner of the remaining moiety share. Amrendra Pratap Singh Deo filed an objection against the entry under Section 87 of the Chotanagpur Tenancy Act stating that the custom of primogeniture prevailed in the family and his name alone should have been recorded in the revenue papers. He objected to the entry of the names of his younger brother. Gobind Pratap Singh Deo and Gandharb Raj Singh Deo. The claim was registered as suit no. 6 of 1961-62. It was subsequently transferred to the Civil Court. Gandharb Raj Singh Deo and Gobinda Pratap Singh Deo were defendants in the suit. On the death of Amrendra Pratap Singh Deo, his heirs were impleaded as party to the suit. The suit was numbered as 21 of 1964 in the court of the Subordinate Judge, Chaibasa, which was tried along with Title suit no. 19 of 1964. Needless to say that the suit was resisted by the defendants on the ground that the custom of primogeniture was not prevalent in the family and estate was not impartible.

8. Title suit no. 19 of 1964 was decreed by the Trial Court and suit No. 21 of 1964 was dismissed by it. In consequence the sons of Amrendra Pratap Singh Deo have preferred these two connected first appeals. The sons of Amrendra Pratap Singh Deo will be hereinafter be referded to as the defendant-appellants. Hementa Pratap Singh Deo's son. Gandharb Pratap Singh Deo shall be called as plaintiff-respondent.

9. The controversy between the parties in these two appeals is as to whether the grant made by the State of Seraikella in favour of Dwijraj Singh Deo was impartible and was governed by the rule

of primogeniture. The Trial Court, namely, the court of Subordinate Judge at Chaibasa, has answered the question in negative. The correctness of the findings recorded by the Trial Court have been assailed by the sons of Amrendra Pratap Singh Deo.

10. Before proceeding further with the main controversy between the parties, a submission made on behalf of the plaintiff-respondent in First Appeal No. 351 of 1967 may be noticed. Learned counsel for the plaintiff-respondent in the said appeal, relied on Section 4 of the Hindu Succession Act, 1956 and submitted that the custom of succession by lineal primogeniture being inconsistent with the provisions of the Hindu Succession Act, effect cannot be given to the same. Section 4 of the Hindu Succession Act in so far as it is relevant, is quoted below:—

"4. (1) Save as otherwise expressly provided in this Act—

(*a*) any test, rule or interpretation of Hindu Law or any custom or usage as part of that law in force, immediately before the commencement of this Act, shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) * * * *"

In my opinion, this submission urged is misconceived. The grant by the State of Saraikella was made in favour of Dwijraj Singh Deo who died in the year 1948. Immediately on the death of Dwijraj Singh Deo, the estate if governed by the rule of primogeniture would descend on the eldest son of of the deceased, namely, Amrendra Pratap Singh Deo. The Hindu succession Act came into force on 17th June, 1956. It is fundamental rule firmly established in the realm of jurisprudence that a law dealing with substantive rights shall not be construed to have retrospective operation unless such construction appears very clear from the terms of the Act or arises by necessary implication. Section 4 of the Hindu Succession Act is prospective in effect and does not have the exceptional consequence of divesting Amrendra Pratap Singh Deo of the

estate which may have devolved upon him by the alleged custom of primogeniture. The argument has only to be stated before being rejected. For the reasons stated above, I do not think it necessary to refer to the cases relied upon by the learned counsel in support of his submission. In all the cases relied upon by him, succession opened after coming into force of the Hindu Succession Act, 1956 and they are, therefore, distinguishable.

11. With the above observation, I revert to the Central question which requires determination in these first appeals and which I have already stated above. It is admitted on all hands that in the revenue papers, the village comprised in the khorposh grant and Nij jote lands were recorded in the revenue papers from 1925 onwards in the names of all the brothers of Raghuraj Singh Deo. True it is that the sanad granted by the then Ruler of Seraikella State in favour of Jagannath Singh Deo is not on the records. The entry of the names of the brothers of Raghuraj Singh Deo is never-the-less a circumstance which militates against the case of defendant-appellants.

12. Reliance has been placed by the learned counsel appearing on behalf of the defendant-appellants on ext. 4, the Memorial submitted by Dwijraj Singh Deo, Gandharb Raj Singh Deo and Narendra Pratap Singh Deo against the resumption of the estate granted to Kumar Jagannath Singh Deo by the then Roler of Saraikella State. His emphasis was on paragraph of the Memorial and submitted that it contains unequivocal admission on the part of Gandharb Raj Singh Deo stating that the family was governed by a rule of promogeniture. He contended that it was no longer open to plaintiff-respondent to go against the admission made by his ancestor. In my opinion, the argument is misconceived and it cannot be accepted.

13. Before dealing with the submission of the learned counsel, a preliminary observation may be made. When the

quondum Ruler of the eastwhile State of Saraikella proceeded to resume the estate granted to Jagannath Singh Deo, he issued noticed to Dwijraj Singh Deo, Gandharb Raj Singh Deo and Narain Pratap Singh Deo and made an order of resumption after hearing them. The very fact that the notices were issued to all the heirs of Raghuraj Singh Deo who had admittedly died issueless goes to show that the sanad under which the property was thus held was not governed by the rule of lineal primogeniture. In case the Sanad granted to Jagannath Singh Deo had been governed by the custom of primogeniture and the estate was impartible, notices would only have been issued to Dwijraj Singh Deo. Further Memorial to the Viceroy against the order of resumption should have been presented only by Dwijraj Singh Deo, Gandharb Raj Singh Deo and Narain Pratap Singh Deo should not have joined in the Memorial. The facts stated above indicate that there was no custom in the family according to which the sanad made in the name of Jagannath Singh Deo was descendable by the rule of primogeniture.

14. Much stress has been laid on the statement confained in paragraph 4 of the Memorial. I have gone through the Memorial and the annexures attached to it. In my opinion, the statement made in paragaprh 4 of the Memorial relates only to the custom prevalent in the family relating to the succession of Gaddi of the erstwhile State of Saraikella. In the said paragraph of the Memorial, it is stated that according to the family custom the eldest member succeeds to the Gaddi of the State and the junior members of the family are entitled only to the maintenance grants. Reading the Memorial as a whole, it is evident that what was stressed before the then Viceory of India by the memorialist was that the grant made in favour of Jagannath Singh Deo having survived for more than three generations, the same was not liable to be resumed by the Darbar of the State of Saraikella. It is clear from the everment made in

the Memorial that the property comprised in the grant made to Jagannath Singh Deo was referred to by the memorialist as belonging to the joint Hindu family in which all the members of the family had an interest. This submission made on behalf of the defendant-appellant cannot, thus, be sustained.

15. As to what is the meaning of impartible property, the law is firmly settled. It is now well recognised that the property although partible by nature may be custom or by terms of the grant made by a Government be impartible in the sense that it always devolves on the senior member of a family to the exclusion of other members. The existence of custom at variance with the ordinary law of inheritance has to be established by the party who relies on the existence of such custom. It is also not in doubt that the custom pleaded must be ancient and invariable and should be established by clear and unambiguous evidence. It is equally well settled that there cannot be a disposition of property intervives which brings into existence a law of inheritance which is at variance with the law relating to succession. However, the sovereign may make a grant in favour of a subject which militates against the law of inheritance. In other words, the subject is not authorised to transfer property making it governable by a rule of succession at variance with the personal law of the transferee. Such right has been given to the sovereign only. The defendant-appellants have relied both on custom governing the family and also on the terms of the grant made by tht then Ruler of erst-while State of Saraikella in the name of Dwijrai Singh Deo in the year 1936.... It shall be my endeavour to find out if any of the two cases pleaded by defendant-appellants has been established or not.

16. I have already given some of the reasons which derogates from the existence of custom prevelent in the family pleaded by defendant-appellants. No other document except Ext. 4 has been brough to our notice in support of

the custom relied upon by defendant-appellatns. Out of defendant-appellants, only Jageshwar Singh Deo, defendant no. 1(*a*) has entered the witness box. In his cross-examination he has specifically admitted that there is no document to show that the law of lineal primogeniture was prevalent in the family except the decision in Nirmal Singh Deo's case. A copy of the said decision is Ext. J on the record. It is an order passed by the Subdivisional Officer, Seraikella, in Misc. Case nos. 127 and 183 of 1956-57 whereas the suit giving rise to First Appeal no. 351 of 1967 was instituted in the year 1964. The said document is wholly insufficient to establish the existence of custom as alleged by the defendant-appellants.

17. In the absence of any other documentary evidence, I have to find out as to how far the defendant-appellants have succeeded in proving the existence of the alleged custom by means of oral evidence. The defendant-appellants have produced as many as 15 witnesses in support of their case. Lal Bihari Patnaik is D. W. 2. In his cross-examination he has pleaded complete ignorance about the affairs of the family. He has, however, admitted that the descendants of Dwijraj Singh Deo and Gandharb Raj Singh Deo are in separate cultivatory possession of the lands in dispute, namely, Nij Jote lands. D. W. 3 is Ishwar Pradhan. In his examination-in-chief, he has stated that his father was the Thekedar of village Bhalu Pani and he used to collect rent from the tenants and pay the same to Amrendra Pratap Singh Deo. In his cross-examination he conceded that Amrendra Pratap Singh Deo used to make such collection from the lifetime of Dwijraj Singh Deo. This admission supports the contention of the plaintiff-respondents that Amrendra Pratap Singh Deo used to look after the affairs of the family. D. W. 4 is Balram Singh. He stated that he was the priest of Amrendra Pratap Singh Deo from the age of 17 years In his examination-in-chief, he said that all the brothers used to have joint cultivation of the lands. He further stated that Amrendra Pratap Singh Deo used to give expenses of

education to Hemanta Kumar Singh Deo, plaintiff-respondent. D. W. 5 is Chanshyam Raut. He is resident of village Bhalu Pani. True it is that he stated in his examination-in-chief that Dwijraj Singh Deo was Zmindar of village Bhalu Pani and after his death, Amrendra Pratap Singh Deo become its Zamindar. In his cross-examination, he conceded that he had not esen Raghuraj Singh Deo and Dwijraj Singh Deo. According to him, Amrendra Pratap Singh Deo alone used to grant lease under his own signature on stamp papers of village Bhalu Pani. The testimony of this witness does not inspire confidence in asmuch as he admitted in his cross-examination that a patta was granted in his favour by Dwijraj Singh Deo 23-24 years ago. His statement was recorded in 3rd May, 1967. Be that as it may, the fact of Dwijraj Singh Deo realising rent from the tenants by granting patta is not in any way inconsistent with the family being joint. He does not state a word about the existence of custom in the family.. according to which, a property is desconded by the rule of primogeniture. Similarly, Patan Manjhi (D. W. 6) does not state anything about the existence of custom in the family accordingly to which the property held by the agnates of the State of Saraikella was impartible and was governed by the rule of primogeniture. Same observation applies to the testimonv of Balbhadra Pradhan (D W. 7). D. W. 8 is Kedarnath Rath. He also does not say anything about tht existence of the custom relied upon by defendant-appellants. All that he states is taht there were records available in the Collectorate of Seraikella which went to prove that the rule of primogeniture was applied to the estate of maintenance holders of the Stat of Seraikella. He further stated that notices of the resumption proceeding were issued on the death of Raghuraj Singh Deo against the two brothers and the nephew of the deceased. The testimony of this witness does advance the case of the defendant-appellants. D. W. 9 is Narendra Nath Sarangi. In his examination-in-chief, he admitted that Nij Jote lands were being cultivated by Gobinda Pratap Singh Deo and his sons. The

testimony of this witness militates against the theory of succession by lineal primogeniture propounded by the defendant-appellant. D. W. 10 is Sanatan Singh Sardar. He states that Nij Jote is in village Bundu were owned jointly by Amrendra Pratap Singh Deo and his younger brother; Gobinda Pratap Singh Deo who carried their cultivation jointly. He admitted that Hemanta Kumar Singh Deo, plaintiff-respondent no. 1 also went there to look after the lands. D. W. 11 is Kandan Manjhi. He does not speak about the existence of custom in the family. His evidence is, therefore, rejected. The testimony of D. W. 13 Ujjal Thathari and D. W. 14, Abhay Chawan Das also do not state anything about the existence of custom in the family. As already stated above, D. W. 15 is defendant no. 1(*a*) in original suit no. 19 of 1964. He is only aged about 30 years. No doubt he states in his examination-in-chief that his family was not governed by the Mitakshara School of Hindu Law but according to the rule of lineal primogeniture. The age of this witness makes him incompetent to speak about the existence of custom which must be ancient. He conceded that the entries in the Khewat and Khatian were in the joint names of all the members of the family. He went to the extent of saying that even village Bhuiya Nachna was a part of the Khorposh grant. He stated that Gandharb Raj Singh Deo lived with Dwijraj Singh Deo until his lifetime and he took up separate residence after Dwijraj Singh Deo's death. The testimony of this witness is wholly insufficient to make out the custom relied upon by the defendant-appellants. The remaining witnesses examined on behalf of the defendant-appellants are formal and it is not necessary to refer to their evidence. From a resume of the entire evidence produced on behalf of the defendat-appellants oral as well as documentary, it is clear that it is wholly inadequate to prove the existence of a custom of an impartible estate in the family of Jagannath Singh Deo. The Trial Court was right in recording a finding against the defendant-appellants on this aspect of the case. I, therefore, affirm the finding of the Trial Court on this point.

18. The Sanad granted to Kumar Jagannath Singh Deo is not on record. It is, therefore, not possible to construe the provisions of that Sanad. Any how, the grant made in favour of Kumar Jagannath Singh Deo was resumed by the Darbar of Seraikella after the death of Raghuraj Singh Deo. The order of resumption passed by the Darbar was affirmed by the Crown Representative with the exception of village Bhuiya Nachna. Learned counsel for the defendant-appellants relies on Ext. B which is a fresh grant made by the Darbar in the year 1936. It has been strongly urged before us by the Learned Counsel that the said grant was only in the name of Dwijraj Singh Deo and was for Khorposh purposes. He submitted before us that from the terms of the said grant, it is evident that it was only in the name of Dwijraj Singh Deo and the estate, thus, granted for Khorposh purposes would descend on his heirs only and the Gandharb Raj Singh Deo and his heirs would have no interest in the subject matter of the said grant.

19. Earlier in this judgment I have already stated that it is possible for a Sovereign to make a grant which derogates from the law of succession governing the grantee. This Raj of Seraikella was undoubtedly possessed of all the insignia of a Sovereign. It was no doubt possible for the Ruler to make a grant which could belong exclusively to Dwijraj Singh Deo and would consequently descend on the eldest among his heirs.

20. I have gone through the said grant. I am unable to accept the submission of the Learned Counsel for the defendant-appellants that the grant was only in the name of Dwijraj Singh Deo in his individual capacity. As already outlined above, the grant made by the then Raja of Seraikella was made after resumption of the estate which had been originally granted by the Ruler of Seraikella to Kumar Jagannath Singh Deo and had been resumed by the State of Seraikella after the death of Raghuraj Singh Deo, one of the

grand-son of Kumar Jagannath Singh Deo. The grant was made for the purpose of maintenance to co-nominee grantee as well as his dependent, Gandharb Raj Singh Deo and Narayan Singh Deo and their heirs. This object of the grant is specifically stated in the Sanad (Ext. B). In view of the words used in the Sanad it is not possible to construe that is had been made only in favour of Dwjraj Singh Deo. As alrealy stated, Dwijraj Singh Deo was the eldest surviving brother after the death of Raghuraj Singh Deo.

21. Learned Counsel has placed strong reliance on the decision of the Privy Council in *Shiba Prasad Singh* vs. *Rani Prayag Kumari Devi*(1). Learned Counsel has relied on the following passage in the said case:—

> Impertibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have; (1) the right of partition, (2) the right to restrain alienation by the head of the family except for neses-sity, (3) the right of maintenance and (4) the right of surviership. The fisst of tthese rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in Satraj Kumar's case (9) and Rama Krishna *vs.* Venkata Kumara (11), and so also the third as held in Gandhara *vs.* Rajah of Pittapur (12). To this extent, the general law of the Mita-kshara has been superseded by custom and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and sepa-rate property. But the right of surviership is

(1) (1932) A.I.R. (P.C.) 216.

not inconsistent with the custom of impartibility. This right, therefore still remains, and this is what was held in Baijnath's case (8). To this extent, the estate still remains its character of joint family property and its devolution is governed by the general Mitakshara Law applicable to such property. Though the other rightst which a coparcener acquires by birth in joint family property no longer exist, the birth right of the senior member to take by survivership still remains. Nor is this right a mere spes succession similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being recounced and surrendered such being their Lordship's view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship. Admittedly there is no evidence in this case of any such intention. The plaintiffs, therefore, have failed to prove separation, and the defendant is entitled to succeed to the impartible estate. Being entitled to the estate, he is also entitled to the improvements on the estate, being the immoveable properties specified in items 9 to of 19 Sch. 'Kha'. These improvements, in fact, form part of the impartible estate."

He has also relied on the Supreme Court's decisions reported in *Mirza Raja Pushpavathi*, *Vijayaram Gajapathi*

Raj Manni Sultan Bahadur and others vs. *Sripushavathi Viswaswar Gajapatiraj Raj Kumar and others*(1), *V. T. S Thayarasundaradoss Thewar and others* vs. *V. T. S. Sevuga Pendia Thewar and another*(2) and *Dayaram and others* vs. *Daudatshah and another* (3). In the decisions of the Supreme Court, the dictum laid down by the Privy Council in *Shiba Prasad Singh's* case (supra) quoted above, has been approved.

22. I am unable to understand how the decisions of the Privy Council in Shiba Prasad Singh's case (Supra) supports the submission urged on behalf of the defendant-appellants. The passage from Shiba Prasad Singh's case (Supra) extracted by me presupposes that even if an impartible estate can be owned and possessed by a joint Hindu family. In the case of *Shiba Prasad Singh's* case (Supra), the Privy Council has approved its earlier decision in *Baijnath Prasad Singh* vs. *Tej Bali Singh*(1), in which it has been held that a joint impartible estate in the sense stated above, can be owned and possessed by a joint Hindu family and the member of the junior branch of the joint Hindu family can be said to forego their rights of succession to the estate only if an intention on their part to separate from the family can either be expressed or implied. In the instant case, no such intention either express or implied on the part of Gandharb Raj Singh Deo is either alleged or proved.

23. Learned Councel, however, strongly relies on the following passage contained in the Sanad (Ext. B) for a submission that it was made only in favour of Dwijraj Singh Deo. The passege runs as hereunder:

> "Your enjoyment of the Khorposh tenure (Khorposh) shall be subject to your attendance on us here in

(1) (1964) A.I.R. (S.C.) 118.
(2) (1965) A.I.R. (S.C.) 1780.
(3) (1971) A.I.R. (S.C.) 681.
(1) (1921) A.I.R. (P.C.) 62.

the State as well as outside in the social and other functions befitting to your status and position."

It was contended on behalf of the defendant-appellants that the above injunction contained in the Sanad (Ext. B) discloses that only Dwijraj Singh Deo was required to attend the Darbar and, as such, the grant should be construed only in his favour. I am not inclined to accept this submission. The injunction, quoted above, in the Sanad is to all the maintenance holders and each of the beneficiaries is required to attend the Darbar according to his means and status. At any rate, the Sanad of 1936 cannot be taken to be in favour of Dwijraj Singh Deo on the basis of the aforesaid injunction contained in the Sanad. Even if Dwijraj Singh Deo was required to attend the Darbar and to assist it, the expenses incurred by Dwijraj Singh Deo in that connection were to be borne by all the maintenance holders.

24. For the reasons stated above, I am of the view that the Sanad (Ext. B) cannot in any way be construed to be only in favour of Dwijraj Singh Deo. It would include within its term all the maintenance holders.

25. This brings me to the provisions of the Bihar Land Reforms Act, 1950 (hereinafter referred to as 'the Act'). The said Act came into force on 1st January, 1956. The intermediaries interest vested in the State of Bihar on the issue of notification under section 3 of the Act. Section 2A of the Act defines 'intermediary'. According to the said definition, the expression 'Intermediary interest' shall include the expression 'Proprietor' or 'tenture holder' or 'estate of tenture'. Section 2(q) defines 'tenture' to include within its ambit, a tenure created for the maintenance of any person commonly known as Khorposh and Babuana. Under section 2(r), the tenure holder means a person who has acquired from the proprietor or from any other tenure holder right to hold land for

any purpose for collecting rent or for bring it under cultivation. Section 6 of the Act, *inter alia*, lays down that on or from the date of vesting of all the lands used for agricultural or horticultural purposes which were in possession of the intermediaries on the date of such vesting shall belong to the intermediaries. From the provision of the Act quoted above, it is evident that the plaintiff-respondent was also an intermediary in relation to the Khorposh grant including the Nij jote lands. He was, therefore, entitled to all the benefits conferred by the Act including the right to receive compensation and a share in the Nij jote lands comprised in the Sanad of 1936 (Ext. B). Some observation shall apply to village Bhalu Pani and Bhuiya Nachna.

26. It is then contended that Amrendra Pratap Singh Deo executed two deeds of gift in favour of Jageshwar Singh Deo and Ratneshwar Singh Deo on 7th September, 1962 and they become the owners of the land governed by the said deeds of gift. It is not in dispute that the intermediaries interest vested in the State of Bihar on 1st January, 1956. Amrendra Pratap Singh Deo was not the owner of the agricultural land to the exclussion of plaintiff-respondent and Govind Pratap Singh Deo. He could not, therefore, transfer in favour of his sons, referred to above, anything more than the share of which he was the owner. The gift deeds, refegred to above, would not, therefore, confer exclusive title on the defendant-appellants in respect of the lands governed by the said deeds of gift.

27. It was faintly argued before the trial court that the suit was barred by section 35 of the Act. The argument has

not been reiterated before this Bench. I am in agreement with the reasons given by the trial court for rejecting that contention.

28. Finally it has been urged that the suit is barred by the principle of *resjudicata*. This submission is based on the fact that Gandharb Raj Singh Deo had filed a claim before the Deputy Collector, Land Reforms which gave rise to Compensation Case no. 172 of 1956-57. The Deputy Collector after examining the evidence came to the conclusion that the estate was impartible and was governed by the rule of lineal primogeniture. He, however, refused to pay interim compensation to Amrendra Pratap Singh Deo on the ground that the payment of ad-interim compensation was a matter in dispute and not be paid to Amrendra Pratap Singh Deo unless the matter was decided by a competent Civil Court. Ultimately, the matter came up in M. J. C. no. 741 of 1958 before this Court and it was held by Ramaswamy, C. J. and Choudhury, J. by an order dated 9th March, 1960 that the grounds on which the payment of ad-interim compensation have been withheld were not legally sustainable. They, accordingly, allowed the application filed by Amrendra Pratap Singh Deo. It may be stated that this Court in the aforesaid M. J. C. was not required to determine whether the estate was impartible or not and was governed by the rule of primogeniture. The decision of the aforesaid M. J. C. application, cannot, therefore, relied upon to sustain the submission of the Learned Counsel. The suit is not barred by the principle of *resjudicata*. No other submission has been urged in support of these appeals.

29. I am, therefore, of the opinion that the trial court was right in passing the decree in favour of the plaintiff-respondent in Title suit no. 19 of 1964. The said court was also right in dismissing Title suit no. 21 of 1964. I, accordingly,

dismiss these two appeals and affirm the decrees passed by the trial court. In view of the close relations subsisting between the parties, there shall be no order as to costs.

UDAY SINHA, J.—I agree with my learned brother that the appeal has no merit and must be dismissed. But I would like to add a few words of my own. The parties are governed by Mitakshra School of Hindu Law. There has been no partition in the family of the parties. According to defendant no. 1, the estate was impartible and governed by rule of lineal primogeniture by custom and not by grant.

2. While agreeing with my learned brother Hyder. J on all aspects. I am of the view that the plaintiffs are entitled to a decree for partition even on a reading of section 4 of the Hindu Succession Act. The provisions in section 4 are not retrospective. But it is not a question of retrospectivity. It is not a question of divesting an estate which the owner of an impartible estate was possessed. Even extending the true effect of section 4 prospectively, the plaintiff respondents must be granted a decree for partition for reasons I am setting out here and now.

3. In the case of *Shib Prasad Singh* (Supra) the Privy Council laid down that the incidents of an ordinary joint family property are four in number, viz., (*i*) the right to partition, (*ii*) the right to restrain alienation, (*iii*) the right of maintenance; and (*iv*) the right of succession by survivorship. A blanket is placed on the first three incidents. They are put on the shelf. The fourth right still exists in the co-parceners, namely, the right of succession by survivorship. The ban on the right of the co-parceners in regard to the first three incidents is removed by section 4 of the Hindu Succession Act which abrogated all Hindu test, rule or interpretation of Hindu Law, custom or usage as part of Hindu Law of Succession. The blanket having been removed (*a*) the right to partition, (*b*) the right to restrain alienation, except for necessity and (c) the right of maintenance get revived. There is a resurrectives of all those rights in the co-parceners. Thus the moment Hindu Succession Act became Law the plaintiffs became possessed of the right to claim partition, etc. This is not putting retrospectivity on

the section. It is like the moon coming out of partial eclipse. The defendant is not being divested of an estate but the restraints placed upon the rights of the co-parceners are removed. In this sense the Privy Council decision in *Shib Prasad Singh's* case (Supra) really boomerangs against the defendants appellants instead of aiding them. The Privy Council clearly laid down that to the extent that right of survivorship continued in members of the joint family, the estate retained its character of joint family properties. There can, therefore, be no doubt that the character of the estate in the hands of Dwijraj Singh Deo was joint family property at all times, but with certain riders. Section 4 of the Hindu Succession Act did away with those riders. On the 7th June, 1956 when Hindu Succession Act came into operation, the custom of impartibility and lineal primogeniture evaporated. The riders thus were set at nought by prospective operation of law. What was impartible till that date became partible on that day. The expanse of section 4 of the Hindu Succession Act fell for consideration in AIR 1980 Supreme Court 198 *Sundari* versus *Laxmi*. Kailasam, J. while considering with the effect of explanation to section 7(2) of the Hindu Succession Act on the undivided interest in the property of a Hindu in Aliyasanthana, Kutumba or Kavaru, and whether the members of such a family would be deemed to have been entitled to it absolutely observed as follows:

> "Section 4 of the Act gives overriding application to the provisions of the Act and lays down that in respect of any of the matters dealt with in the Act all existing laws whether in the shape of enactment or otherwise which are inconsistant with the Act are repealed. Any other law in force immediately before the commencement of this Act ceases to apply to Hindus in so far as it is in consistent with any of the provisions contained in the Act, It is, therefore, clear that the provisions of Aliyasanthana law *whether customary or statutory will cease to apply, in so far as they are inconsistent with the provisions of the Hindu Succession Act.*"

The above view supports the stand that restraints an partibility became non-existent on the enactment of Hindu Succession Act. The view that I have taken is supported by a Division Bench decision of

the Gujarat High Court in 139 ITR 77 at page 94: *Pratapsinhji N. Desai* versus *Commissioner of Income-tax, Gujarat-III* where a similar question fell for consideration. After a detailed discussion of the law on the subject Mehta, J. with whom Divan, C. J. agreed, observed as follows:

> "If the properties with which we are concerned in this reference, though impartible at one time, ceased to be impartible in view of the provisions made in the Hindu Succession Act as referred to by us hereinabove, the said properties will regain all their attributes of joint family properties, since the properties, though partible, were treated as impartible estate, having regard to the custom as to its descent and devolution on a single heir."

The same view has been taken by the Punjab High Court in AIR 1960 Punjab 145 : *Smt. Taro* versus *Darshan Singh* and AIR 1961 Punjab 510: *Hans Raj Basant Ram* versus *Dhanwat Singh Balwant Singh*.

4. A divergent view as to the effect of section 4 of the Hindu Succession Act was taken in 130 ITR 223 : *Commissioner of Income-tax, West Bengal-II* versus *U. C. Mahatab, Maharaja of Burdwan* where it was held by the Calcutta High Court that the question of the effect of section 4 on the impartibility of the estate and the rule of lineal primogeniture would arise, when succession opens on the death of the male holder. In the view of Mukharji, J. the holder of impartible estate could not be divested of the interest that he was possessed of since before the Hindu Succession Act until succession re-opened. The view taken by the Calcutta High Court was agitated before the Gujarat High Court in *Pratapsinhji N. Desai's* case (Supra) where on behalf of the Revenue it was contended that the properties which had been inherited by the assessee by the rule of lineal primogeniture would continue to be impartible till the succession opened under the Hindu Succession Act. The view taken by the Calcutta High Court and unsuccessfully agitated before the Gujarat High Court would amount to say that impartible estates by customs though abolished by the Hindu Succession Act would continue during the

life time of its holder since the Succession Act applies only to succession opening after the Hindu Succession Act was put on the Statute Book, *i.e.*, June 1956. Their Lordships of the Gujarat High Court laid down as follows:

> "We are afraid we cannot agree with this submission made on behalf of the Revenue having regard to the clear provisions made in section 4 in that behalf. Section 4 gives an overriding effect to the Act over any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the Act. Section 4 (1) (*a*) prescribes that save as otherwise expressly provided in the Hindu Succession Act, any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the said Act 'shall cease to have effect with respect to any matter for which provision is made in this Act'. On a plain reading of this sub-section (1) (*a*) we are unable to agree with the contention urged on behalf of the Revenue that the classical Hindu law as contained in the custom or usage would continue to be in operation even though a contrary provision has been made in that behalf in the Hindu Succession Act, till the succession opens after the said Act coming into force..... We must, therefore, reject the contention of the Revenue that the estate would still continue to be impartible estate till the succession opened on the demise of Narendrasinhji (Pratapsinhji)."

I am at one with the view taken by the Gujarat High Court and the Punjab High Court in regard to the effect of section 4 of the Hindu Succession Act, based as it is on the law laid down by

Kailasam, J. in the case of *Sundari* versus *Laxmi* (Supra). I regret, I find myself in respectful disagreement with the law laid down by the Calcutta High Court in this behalf.

5. The law laid down by the Privy Council in the case of Shib Prasad Singh (Supra) is still the law of the land, having received the approval of the Supreme Court in Nagesh Bisto Desai, etc., etc., *versus* Khando Tirmal Desai, etc., etc., AIR 1982 Supreme Court 887 and in Anant Kibe and others versus Purushottam Rao and others: AIR 1984 Supreme Court 1121. In my view, therefore, the plaintiff respondents are entitled to a decree also on the basis of section 4(1) of the Hindu Succession Act. That must be the law on the basis of prospective operation of section 4 of the Hindu Succession Act.

R. D: *Appeals dismissed.*

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