

(1973) 06 CAL CK 0024

In the Calcutta High Court

Case No : Appeal from Original Order No. 545 of 1971

Girindranath Paul

APPELLANT

Vs

Income Tax Officer and Others

RESPONDENT

Date of Decision : 27-06-1973

Acts Referred:

Income Tax Act, 1922 — Section 22(2), 34, 34(1)

Citation : 78 CWN 84 : (1975) 99 ITR 426

Hon'ble Judges : Salil Kumar Datta, J;Gupta, J

Bench : Division Bench

Advocate : D. Pal and Sanjay Bhattacharjee, for the Appellant;Nanda Lal Pal, for the Respondent

Judgement

Salil Kumar Datta, J.—This is an appeal by the petitioner against an order dated July 2, 1971, passed by Banerjee J. discharging the rule obtained by the petitioner against proceedings initiated against him u/s 34 of the Indian Income Tax Act, 1922. The facts as stated in the petition are as follows: The petitioner was originally assessed for 1959-60 by A. K. Sanyal, Income Tax Officer, "J" Ward, District 1(2), Calcutta, respondent No. 1 in the rule u/s 23(3). On July 3, 1961, N. C. Addy, the Income Tax Officer, "C" Ward, District 1(2), Calcutta, the respondent No. 2, issued a notice u/s 34, advising the petitioner that as he had reason to believe that the income assessable to Income Tax for assessment year 1959-60 had escaped assessment, he proposed to assess the said income that had escaped assessment. The petitioner was thereby required to deliver within thirty-five days of receipt of notice, a return in the attached form for the said year ending March 31, 1960. It was further stated that the notice was being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax, Calcutta. The said notice is annexure "B" to the petition.

2. In the assessment year 1959-60, as already stated, the respondent No. 1 completed the assessment of the petitioner u/s 23(3) of the Act and computed the income of the petitioner at Rs. 23,590. At the time of this assessment the

petitioner produced all books of account, documents and other evidence relevant for the purpose for the assessment year 1959-60, and the petitioner's representative had discussion with the Income Tax Officer regarding various points of assessment including sales effected by the petitioner; The Income Tax Officer on due consideration of the materials and on full satisfaction about the sources of income and the genuineness of the sales effected by the petitioner computed the income as stated above as will appear from the assessment order, annexure "A". At the time of this assessment there was no omission or failure on the part of the petitioner to disclose fully and truly all material facts necessary.

3. The petitioner thereafter submitted a return under protest showing the income as shown in the return at the time of original assessment. On September A, 1964, the petitioner received a notice u/s 22(2) of the Act calling upon him to produce the books of accounts and papers for the financial year 1958-59 and for three preceding years. Again, by three notices dated September 14, 1964, u/s 23(2) of the Act, addressed to the individual members of the then non-existent Hindu undivided family, including the petitioner, the respondent No. 1 called upon them either to attend his office personally or through a representative or to produce documents and evidence in support of the return. On receipt of the said notices the petitioner made an application on September 24, 1964, to the respondent No. 2 stating that in compliance with the said notice u/s 34 he had already submitted a return under protest and also filed an application dated September 14, 1964, to which there was no reply. The petitioner by the said application again requested the respondent No. 2 to disclose the material facts on which the case of the petitioner was reopened. By another application dated September 24, 1964, the petitioner stated that at the time of the original assessment he produced all books of account and disclosed all material facts to the Income Tax Officer and there was no failure on his part to disclose fully and truly all materials necessary for assessment for 1959-60, and accordingly, the condition precedent for assumption of the jurisdiction was not satisfied. The petitioner further stated that if the respondent No. 2 was determined to proceed u/s 34 of the said Act, the petitioner requested him to furnish the material facts on which the Income Tax Officer had reason to believe that the income had escaped assessment on account of failure to disclose the material facts on the part of the petitioner. Thereafter, in spite of demands made by the petitioner for production of such material, the respondent No. 2 without furnishing any material or reply to the petitioner's said letter sent a notice to him informing that the case was fixed for hearing on June 19, 1966. The petitioner appeared on that date before respondent No. 2 but instead of furnishing any material respondent No. 2 refixed the case on July 27, 1966. On that date also the petitioner appeared but no material was disclosed. The petitioner thereafter appeared on September 7, 1967, when he reiterated his demand and was informed that the case was fixed on September 22, 1967. Thereafter, it was refixed on September 30, 1967, and the petitioner having fallen ill prayed for an adjournment to which there was no reply. The petitioner in the circumstances

apprehended that respondent No. 2 without disclosing the material would complete the assessment for the year 1959-60 and would take steps for recovery of tax on the basis of the illegal assessment.

4. The petitioner contended that the action of respondent No. 2 was without jurisdiction as the condition precedent for the exercise of the jurisdiction by the Income Tax Officer u/s 34(1)(a), as the notice purported to be, had not been satisfied. The petitioner further contended that there was no material before respondent No. 2 on which he could have reason to believe that the income had escaped assessment. It was further stated that respondent No. 2 was bound to disclose the material facts on which he had reason for such belief that the income had escaped assessment and no jurisdiction could be exercised u/s 34 without disclosing the material. The petitioner submitted that there was no failure on his part to disclose fully and truly primary facts material and relevant for assessment and as such the notice u/s 34 was illegal in the absence of the condition precedent for exercise of such jurisdiction. The petitioner on the above allegations and contentions moved this court on 5th October, 1967, in constitutional writ jurisdiction praying for a writ calling upon the respondents as also the Union of India to show cause why, inter alia, a writ of certiorari should not be issued cancelling or quashing the impugned notice u/s 34 and also for a writ of mandamus commanding the respondent to cancel and withdraw the impugned notice. There was also a prayer for issue of a writ of prohibition commanding the respondents to forbear from giving effect to or taking any step whatsoever in pursuance of the said notice of July 3, 1961, u/s 34 of the Act. On the said application a rule was issued in terms of the prayer and an interim order was also issued restraining the respondents from proceeding with the assessment.

5. The rule was opposed by the respondents and an affidavit-in-opposition on their behalf was filed by Nirmal Chandra Chakravathy, Income Tax Officer, "C" Ward, District 1(2), Calcutta. It was stated therein that for the assessment year 1959-60, there was a cash credit for Rs. 30,000 in the name of Messrs. International Traders of 67, Ezra Street, Calcutta. The petitioner at the time of assessment explained that the said amount was advanced by the above party for goods to be supplied in the next year. But subsequent enquiry revealed that the above transaction was not genuine and the sum represented concealed income of the assessee and accordingly action u/s 34(1)(a) was taken after obtaining the necessary satisfaction of the Commissioner. It was admitted that the petitioner filed a return under protest in response to the said notice. It was further stated that though all books were produced at the original assessment there was omission and failure on the part of the petitioners to disclose fully and truly all material facts for which the impugned notice was issued. It was denied that there was an illegal assumption of jurisdiction or that there was absence of condition precedent for exercise of such jurisdiction. It was stated that there were materials in possession of respondent No. 2 on which he had reasons to believe that the petitioner's income escaped assessment. It was further stated that the

respondent No. 2 was not bound to disclose the said materials to the petitioner as the law does not lay down that the respondent-income tax Officer was bound to disclose the material on which he had reasons to believe that the income had escaped assessment. It was further stated that there was inordinate delay of six years in moving the application and the rule in the premises should be discharged.

6. The petitioner filed an affidavit-in-reply reiterating the allegations and contentions made in the petition. It was denied that the cash credit for Rs. 30,000 in the name of M/s. International Traders appearing in the books of account was not genuine or that the said sum represented the concealed income of the assessee. The amount was advanced by M/s. International Traders to M/s. Green Engineering Works, a branch business of the petitioner during the relevant year for goods manufactured by the petitioner to be supplied to the said firm. In the subsequent year the goods were supplied for Rs. 35,360.36 and the advanced was adjusted and the balance was paid to the petitioner. It was further stated that the Income Tax Officer was fully satisfied about the genuineness of the said transaction and included the profit arising therefrom in the income of the petitioner. Accordingly, all material facts relevant to the assessment were disclosed and there was no omission or failure on the part of the petitioner to disclose fully and truly all material facts. It was submitted that purely on a change of opinion the proceeding was taken by respondent No. 2. It was denied that subsequent enquiries revealed that the transaction was not genuine or that the Commissioner of Income Tax was bona fide or at all satisfied for reopening the case u/s 34(1)(a) or that the sanction was at all obtained. Further, the books of account where cash credit entry of Rs. 30,000 appeared was produced at the time of original assessment and was considered by the assessing Income Tax Officer. The fact disclosed in the affidavit-in-opposition was not material or relevant within Section 34(1)(a) and the respondents were bound to disclose any other material in their possession to the court that led to the formation of the requisite belief for issue of the impugned notice. It was also reiterated that the Income Tax Officer was bound to disclose the material under the old Act as also the new Act. It was denied that there was any delay in moving the application, and as the question raised was one of jurisdiction, there could be no bar to the reliefs claimed in the application.

7. The rule came up for hearing before Banerjee J. and it was held that between the date of notice, i.e., July 3, 1961, and September 14, 1964, when the return was filed long beyond 35 days as required, the petitioner did not take any steps to challenge the notice u/s 34, but he went on making representations from time to time and ultimately moved this court on October 5, 1967, after a lapse of 6 years and there is no explanation for his inaction during the period. Further, a very material fact for use of discretionary power by this court was suppressed in that, nowhere in the petition, it was stated that the return was filed under protest. On the ground of delay and suppression of the material fact at the time the rule was issued, as indicated above, the court did not feel inclined to exercise

its jurisdiction for entertaining the application. The rule was accordingly discharged. The present appeal is against this decision.

8. About the suppression of the material fact, viz., absence of any statement in the petition that the return was filed on September 14, 1964, under protest, it appears that in paragraph 6 of the petition the petitioner stated that he submitted the return under protest and this fact of the filing of return by the petitioner under protest has been admitted by the respondents. Somehow, the above statement in the petition was overlooked by the court at the time of passing the order under appeal.

9. As to delay, the counsel for the petitioner Dr. Debi Pal (as he then was) and Mr. Sanjay Bhattacharjee, on the subsequent dates of hearing, contended that in the matter of issuance of a writ of prohibition, if the final order in a proceeding is yet "to be passed, the question of delay is immaterial particularly when the question involved is one of jurisdiction of the Tribunal or authority and, if absence of jurisdiction is patent on the record, issuance of a writ of prohibition would be a matter of right. Mr. Bhattacharjee further contended that the respondent No. 1 never replied to the various representations by the petitioner asking for disclosure of reasons and by their overt inaction, left an impression on the petitioner, till at the very late stage, that no further step would be taken in the matter, so that the petitioner had no opportunity or occasion to take appropriate steps in time or earlier. Reliance was placed on the decision in AIR 1937 265 (Privy Council) in which the prayer was for a writ preventing demolishing a building under impugned order. It was observed that there must remain something to which prohibition can apply, some act which the respondents, if not prohibited, may do in excess of their jurisdiction. The Privy Council quoted with approval the following observations of Wright J. in *In Re London Scottish Permanent Building Society*, (2) [1893] 63 LJQB 112 :

" " An application for prohibition is never too late so long as there is something left for it to operate upon "."

and also of Scrutton L. J. in *Rex. v. North*, [1927] 1 KB 491 (CA) :

"" When the sentence is unexecuted, a statement of intention to execute it may be followed by a writ of prohibition, however long a time may have elapsed since the original sentence was pronounced "."

10. It was further noted in the said decision that the fact that the respondents gave the appellants no opportunity of applying for prohibition or certiorari was also a material consideration.

11. Reliance was placed on the decision in *Madhavlal Sindhoo Vs. V.R. Idurkar and Another*, in which the court was moved for issue of a writ of prohibition restraining the respondents from taking further proceedings against the petitioner under a notice issued to him u/s 34 of the Act. The application was opposed on the ground of delay and Desai J. noticed that in England, though

grant of a writ is discretionary, a writ of prohibition is, in case of patent usurpation of jurisdiction as being without royal authority, demandable as of right. Following his earlier decision, it was held that in India, however, where absence of jurisdiction is not patent, that is apparent on the face of the proceedings but latent in the sense that it is not apparent, the court in its discretion may refuse the writ if the facts or circumstances attending the case show undue delay, insufficient materials, misconduct, laches or acquiescence on the part of the party applying for it or are such as would render it unjust on the part of the court to interpose. If there is patent lack of jurisdiction, and the court is immediately satisfied that the inferior court or authority had exceeded its jurisdiction, the court will very readily interpose, though not of right nor of course, yet almost as a matter of course unless an irresistible case for withholding the writ is made out.

12. Mr. Nanda Lal Pal, learned counsel appearing for the respondents, did not dispute the principle laid down in the decision in *Madhavlal Sindhoo's* case noted above. There may be cases where absence of jurisdiction is patent or apparent on the face of the proceeding and there may be cases also where the absence of jurisdiction is latent in the sense that it is not so apparent. He referred to the decision in *P.C. Doshi and Another Vs. 7th Income Tax Officer, C-I Ward, Bombay*, in which the court held, following the above principle, that though in case of patent lack of jurisdiction a writ will go though as a matter of course, in case where the defect is not apparent the court in its discretion may refuse the writ if the circumstances attending show that there is undue delay, insufficient materials, misconduct, laches or acquiescence on the part of the applicant or unless it would be unjust for the court to interpose. If, therefore, the objection as to patent lack of jurisdiction fails and the delay is not explained the petition will fail.

13. Mr. Pal also referred to *Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others*, in which it was observed (page 335):

" It is well established that the writ of certiorari will not be granted in a case where there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances causes prejudice to the adverse party."

14. The court referred with, approval to the observation in *Lindsay Petroleum Co. v. Hurd*, [1874] LR PC 221, 229 set out below :

" the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be

asserted, in either of these cases, lapse of time and delay are most material. But.... if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of the defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

15. Mr. Pal, on these authorities, contended that the petitioner has not explained his inaction during 1961 to 1967 and accordingly the learned judge was justified in rejecting the application and the said order should not be reopened.

16. The principle laid down in the decisions referred to above indicate that a writ of prohibition will be available so long as there is something left for the writ to operate upon. Delay in applying for such writ again will be no bar if there is a patent lack of jurisdiction in the authority in its exercise of the powers based on such illegal assumption of jurisdiction and the writ will issue almost as a matter of course and right. If, however, the lack or usurpation of jurisdiction is not patent on the face of record, but latent, that is, not apparent, and requires further examination of records and investigation of facts, and there is delay in applying for the writ, issue of writ in such circumstances will be discretionary with the court depending on misconduct, laches or acquiescence on the part of the applicant unless it would be unjust for the court to interpose.

17. Mr. Bhattacharjee has contended that the jurisdiction of the Income Tax Officer to issue notice u/s 34(1)(a) is dependent, when a return is filed, on the omission of the assessee to disclose fully and truly all materials in connection with the assessment. The assessee here, according to Mr. Bhattacharjee, disclosed fully and truly all material facts at the time of assessment producing evidence and documents necessary for assessment and gave explanation in regard to the disputed amount which was found satisfactory by the Income Tax Officer who on the basis thereof completed the assessment. It was, therefore, obvious, according to Mr. Bhattacharjee, that there was a patent lack of jurisdiction in the Income Tax Officer when the impugned notice u/s 34 was issued.

18. Production of relevant books of account and other documents or evidence, from which the material facts with due diligence could be discovered by the Income Tax Officer, under Explanation to Section 34, will not necessarily amount to disclosure within the meaning of the section. As has been observed in the majority judgment of the Special Bench of this court in Lakhmani Mewal Das Vs. Income Tax Officer, "I" Ward and Others, Matter No. 326 of 1967, decided on January 13, 1972, untrue or fictitious disclosure by an assessee in regard to any material fact relating to assessment can never be said to be a disclosure made truly by the assessee within the meaning of Section 34(1)(a). The same, it appears, would be the position even if the disclosure is accepted by the Income

Tax Officer for the time being during the original assessment.

19. In the case before us, the Income Tax Officer has stated in his report initiating proceedings u/s 34 that the enquiries revealed that the impugned transaction was not genuine. In view of the allegations challenging the genuineness of the transaction as explained by the petitioner, it cannot be said on the face of the record that there has been at least a true disclosure of the material facts by the assessee as required in law necessary for his assessment. Accordingly, the assumption of jurisdiction by the Income Tax Officer does not suffer from any patent illegality and the petitioner is not entitled to the writ as a matter of course or right as contended on the authorities referred to above.

20. The court, however, on the proposition noted above may issue a writ of prohibition in its discretion if the applicant is not guilty of any misconduct, laches or acquiescence and it would be unjust otherwise to refuse the prayer on the facts of the case. In the present case, it appears that notice u/s 34 was issued as early as July 3, 1961, followed by the submission of return by the petitioner under protest. The Income Tax Officer did not take any positive steps in the matter till September 4, 1964, when he called upon the assessee to appear before him fixing September 14, 1964, with books of account and documents for the financial year 1958-59 and preceding three years. It will appear from the record, which, as required by us, was produced before us, that the case was refixed on September 22, following further information, then to September 24, 1964, and ultimately to November 26, 1964. No action was thereafter taken till June 4, 1966, and the case was refixed on July 27, 1966. The case was last fixed on September 30, 1967, when the petitioner prayed for adjournment on ground of illness. The present petition was moved on October 4, 1967, when the rule was issued.

21. A review of the course of the reassessment proceeding indicates that though the petitioner had been throughout by filing petitions challenging the jurisdiction of the Income Tax Officer to issue notice u/s 34 and pressing for disclosure of reasons thereof, the Income Tax Officer did not pass any order on the same nor indicate that he was not bound in law to disclose reasons for issue of such notice u/s 34--the position taken in the affidavit-in-opposition in the rule by the respondents. No positive action was taken during the period from issue of notice or from November 26, 1964, to June 4, 1966, and even thereafter though the case was fixed from time to time for hearing. The Income Tax Officer during the period did not pass any order on the objections as to his assumption of jurisdiction for reassessment nor completed or even commenced actual assessment proceeding though his hands were unfettered. There is no question of waiver or acquiescence, neglect or misconduct on the part of the petitioner nor is there any question of prejudice to the respondents as no positive steps for assessment had been taken in the meantime. Considering all circumstances it cannot be said that there was such delay or laches on the part of the petitioner as to disentitle him to the reliefs prayed for when practically nothing has been

done in the reassessment proceeding. Accordingly, we hold that the delay was immaterial in the circumstances of the case and the order discharging the rule should be set aside and the rule heard on merits.

22. This would dispose of the appeal but the learned counsel for both sides desired of us to dispose of the rule on merits as well and have addressed us at length in support of their respective contentions. Accordingly we proceed to consider the case on merits.

23. Section 34(1)(a), under which the notice was issued, provides :

" 34. Income escaping assessment.--(1) If--

(a) the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income u/s 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to Income Tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or.....

he may in cases falling under Clause (a) at any time serve on the assessee a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance ; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the Income Tax Officer shall not issue a notice under clause(a) of Sub-section (1)--.....

(iii) for any year, unless he has recorded his reasons for doing so and in any other case, the Commissioner, is satisfied on such reasons recorded that it is a fit case for issue of such notice.....

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

24. Mr. Bhattacharjee has contended, firstly, that the conditions precedent for exercise of jurisdiction by the Income Tax Officer under the Act are: (i) omission or failure on the part of an assessee to make a return u/s 22; or (ii) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. There is no dispute that the return was duly made resulting in the original assessment. As to the second condition reference was made to the decision in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, in which it was observed by Das Gupta J., representing the majority opinion, as follows :

"The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year ". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment, will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee or discovered by him on the facts disclosed, or otherwise, the assessing authority has to draw inferences as regards certain other facts ; and ultimately from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment the proper tax leviable."

25. As to the duty of the assessee to disclose all primary facts relevant for assessment, in view of the Explanation to the section set out above, it was observed :

"so far as primary facts are concerned, it is the assessee's duty to disclose all of them including particular entries in account books, particular portions of documents, and documents and other evidence which could have been discovered by the assessing authority from the documents and other evidence disclosed."

26. The duty, however, does not extend beyond the full and truthful disclosure of all primary facts and :

" Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences are ultimately to be drawn..... The position, therefore, is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of " under-assessment ", that would be sufficient to give jurisdiction to the Income Tax Officer to issue notice u/s 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts would not be open for the court's investigation. In other words, all that is necessary to give this special jurisdiction is that the Income Tax Officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts."

27. The non-disclosure alleged in the above case was that the assessee failed to disclose the true intention behind the sale of shares which was really a trade in sale of investments. The court was of opinion that whether the sales of certain shares were by way of changing the investment or by way of trading in shares was to be decided on a consideration of circumstances including frequency of sales and the question of intention of earning profit was really an inference to be

drawn by the authority from the material facts taken in conjunction with the surrounding circumstances. The court found that the sales of shares were disclosed and the memorandum of association of the assessee-company must have been shown to the Income Tax Officer and accordingly it was held that the condition precedent for exercise of jurisdiction u/s 34 of the Act did not exist and the Income Tax Officer had no jurisdiction to issue notices u/s 34 for the relevant years after the expiry of four years.

28. It was finally observed : (page 207)

" It is well settled, however, that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.....

The existence of such alternative remedy (meaning as laid down in the Act) is not, however, always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action."

29. In *Chhugamal Rajpal Vs. S.P. Chaliha and Others*, the court was considering the validity of a notice u/s 148 of the Income Tax Act, 1961. The report in connection with the initiation of proceeding u/s 147, referred to certain communications, though facts thereof were not mentioned, and all that was said was that from the said communications, " it appears that these persons (alleged creditors) are name-lenders and transactions are bogus". The court found that the Income Tax Officer did not even come to a prima facie conclusion that such transactions were not genuine transactions except merely a vague feeling that they might be bogus transactions. It was held that such conclusion does not fulfil the requirement of Section 151(2) and :

" What that provision requires is that he must give reasons for issuing notice u/s 148. In other words he must have some prima facie grounds before him for taking action u/s 148 his conclusion is that there is a case for investigation as to the truth of the alleged transactions. That is not the same thing as saying that there are reasons to issue notice u/s 148.... From the report submitted by the Income Tax Officer to the Commissioner, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in question, income chargeable to tax has escaped assessment for that year, nor could it be said that he, as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year. We are not satisfied that the Income Tax Officer had any material before him which could satisfy the requirements of either Clause (a) or Clause

(b) of Section 147."

30. The court was further of opinion that the Commissioner had mechanically accorded permission. The impugned notice was accordingly quashed.

31. In *Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta*, in considering the import of the words "reasons to believe" in Section 34(1A), the court, following *Chhugamal Rajpal*, observed as follows (page 153):

"There can be no manner of doubt that the words "reasons to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court."

32. In the said case the reasons for belief were stated to be that the assessee who was at the relevant time managing director of about a dozen companies was believed to have made secret profits not offered for assessment and further he was believed to have received rupees 22 lakhs from "Oberois" which or at least its part represented income which had escaped assessment. It was held that there was no material or fact which had been stated in reasons for starting proceedings on which any belief could be founded of the nature contemplated in Section 34(1A). The impugned notices thereunder were accordingly quashed.

33. On these authorities, Mr. Bhattacharjee has submitted that there was no material relevant or otherwise before the Income Tax Officer in the instant case which could be the basis of his reasons that on account of the assessee's failure to disclose fully and truly all material facts necessary, the income had escaped assessment. The Income Tax Officer is not entitled to act on mere suspicion or change of opinion or initiate proceedings for making a roving enquiry on the basis thereof and, as the reasons for his belief, the conditions precedent referred to in the section do not exist, the impugned proceeding was without jurisdiction. The petitioner had fully and truly disclosed all materials at the original assessment proceeding and explained the impugned amount to the Income Tax Officer who accepted the same. Accordingly, there is no further scope for reassessment and there has been thus an usurpation of jurisdiction by the Income Tax Officer which he did not possess. These contentions have been disputed by Mr. Pal appearing for the revenue.

34. In *Calcutta Discount Company*, as referred to above, it has been laid down that if there are reasonable grounds for thinking that there was non-disclosure by the assessee having material bearing on the question of "underassessment", it will be sufficient to give jurisdiction to the Income Tax Officer to take action u/s 34. It is further laid down that whether the grounds are adequate or not for the

conclusion that there was a non-disclosure of material facts is not justiciable or open to the court's investigation and all that is necessary to give this special jurisdiction is some prima facie ground for thinking that there has been some non-disclosure of material fact.

35. Before we proceed further it would be convenient to look into the report of the Income Tax Officer to the Commissioner of Income Tax, West Bengal, for assumption of jurisdiction u/s 34. The reasons have been set out in the affidavit-in-opposition in brief but, following the practice consistently observed by courts we called upon the respondents to produce the relevant record which was accordingly produced before us. The report is as follows :

" In the books of accounts for the assessment year 1959-60 there appear cash credits to the extent of Rs. 20,000 in the name of M/s. International Traders of 67, Ezra Street, Calcutta. At the time of the original assessment it was explained by the assessee that the above sum was advanced by the above party for goods to be supplied in the next year. Subsequent enquiries suggest that the above transaction, is not a genuine one and the said sum represents the concealed income of the assessee which has escaped assessment. Hence action u/s 34 is necessary.

Sd. N. C. Addy, ITO, " C " Ward, Dist. I(2), Cal. "

36. The Commissioner's order thereon is :

" I am satisfied on the reasons recorded by the Income Tax Officer that it is a nt case for the issue of the notice u/s 34. "

37. It further appears from the record that there was a local enquiry prior to the report made through office agency and it was stated in the enquiry report that the firm, M/s. International Traders of 67, Ezra Street, Calcutta, who, according to the petitioner, advanced the sum of Rs. 30,000 for supply of goods in the next year, was not traceable at all at the said address as having never any office there. The Income Tax Officer accordingly had prima facie ground for thinking that the alleged transaction with M/s. International Traders was fictitious and thus there has been some untrue disclosure of material fact by the assessee at the time of assessment leading to an escapement of income for the said amount of Rs. 30,000. This further fact is not a mere suspicion nor any roving enquiry but is based on the results of the enquiry and the reasons for belief have thus a rational connection and relevant bearing with the formation of the belief. In his report to the Commissioner he had mentioned about the enquiry which suggested to him that the alleged transaction of advance of Rs. 30,000 by the said firm was not a genuine transaction. This position is different from the state of affairs in Chhugamal's case where the Income Tax Officer had merely a vague feeling that the hundi transactions might be bogus transactions and required investigation. In Sheo Nath Singh's case the reason for the belief of the Income Tax Officer was the belief that the assessee, managing director of a dozen companies, made secret profits and was also believed to have received a sum of

Rs. 22 lakhs or part from " Oberois ", which the court held was no material or fact for starting proceeding u/s 34(1)(a). In the case before us the further fact before the Income Tax Officer was the enquiry report stating that the firm was never at the given address, which is beyond mere suspicion or opinion, and is not a roving enquiry and his conclusion therefrom that the transaction was not genuine could not be open to court's investigation. It is also no matter of importance that the exact nature of enquiries was not stated in the report to the Commissioner who is entitled to act on the report of his officer that such enquiries in fact were made. On an analysis of the relevant facts it appears that the Income Tax Officer had before him materials from which he had reasons to believe and accordingly came to the conclusion that the impugned transaction was not genuine, amounting to concealment of income leading to its escapement, which warranted the action taken On the satisfaction of the Commissioner.

38. It would further appear that the satisfaction of the Commissioner in the instant case was not mechanical as he recorded his satisfaction on the reasons given by the Income Tax Officer stating that it was a fit case for issue of notice under the section. Mr. Bhattacharjee of course suffered from the handicap in that he had no opportunity to examine or even see the report or to Consider the enquiry report which, it is stated by the respondents, the petitioner is not entitled to see and we have not been shown any authority laying a contrary proposition and the relevant law also does not appear to provide for the same. The court, of its own, following the uniform and consistent practice followed, in such types of cases, has examined the records. We are satisfied about the existence of the relevant facts, namely, the local enquiry report and the report of the Income Tax Officer and the Commissioner's note embodying his satisfaction for issue of notice. Accordingly, we hold that the Income Tax Officer had the material or primary facts before him as the basis of his reasonable belief that a specified amount had escaped assessment leading to the initiation of the proceeding on the satisfaction of the Commissioner as required in law.

39. The last point requiring consideration relates to the question of assumption of jurisdiction by the Income Tax Officer in issuing notice u/s 34. As we have seen, the conditions precedent for assumption of jurisdiction in terms of Section 34(1)(a), under which the notice has been issued, are the omission or failure on the part of the assessee to make a return of his income or to disclose fully and truly all material facts necessary for assessment in that year and the Income Tax Officer has reason to believe that thereby income, profits or gains chargeable to Income Tax has escaped assessment for that year or has been under-assessed or assessed at too low a rate or have been granted excessive relief. The first condition obviously does not apply as the assessee had already filed his return on basis whereof an assessment of his income had been originally made.

40. As to the second condition Mr. Bhattacharjee submitted that not only all evidence and necessary documents were produced by the assessee at the time

of original assessment, the disputed amount of Rs. 30,000 was also explained to the Income Tax Officer as being advance price of goods to be supplied in the next year and the said explanation was accepted by the Income Tax Officer. There was thus a full and true disclosure by the petitioner of all material facts necessary for his assessment for that year. In this state of affairs, it is contended, the Income Tax Officer had no jurisdiction to invoke Section 34 and reopen the assessment.

41. The disclosure required u/s 34(1)(a) must be a full and true disclosure of all material facts necessary for assessment and, assuming that there was a full disclosure of all material facts, it has to be examined if the assessee had also truly disclosed all material facts for the assessment. If an assessee purports to make disclosure of all material facts necessary for assessment and also produces documents and evidence in support of a transaction which in reality never took place, it cannot be said that there was a true disclosure of material facts by the assessee. If the Income Tax Officer has reasons to believe, on discovery of material facts, that the income escaped assessment on account of the omission or failure of the assessee to disclose fully and truly all material facts as the transaction explained by the assessee to be a genuine transaction is not so but a fictitious transaction, there will be no illegal assumption of jurisdiction by the Income Tax Officer in the circumstances as there was no true disclosure by the assessee as required. The assumption of jurisdiction in this state of affairs on the contrary will be in terms with the section as the disclosure of the primary or material facts by the assessee transpired to the Income Tax Officer, on discovery of further primary facts, to be not a true disclosure as required by law. In the Full Bench case, Lakhmani Mewal Das's case noted above, which was concerned with hundies, it was observed by A.K. Mukherjea J., speaking for the court, as follows :

"the hundies could tend to show as if certain transactions had taken place but, in reality, the transactions never took place. In such a case, the discharged hundies are not evidence of facts. They are mere papers fabricated to give the false appearance of certain monetary transactions which never took place. As mere formal evidence, the discharged hundies are genuine, but they are genuine in the sense that they are genuine documents and the tenor of their contents is such as if these had been real transactions. Even so it cannot be said that they represent true facts. In such a case, though the assessee discloses the discharged hundies before the Income Tax Officer or gives a list of addresses of the spurious creditors and though he discovers books of accounts " falsely showing as if actual transactions had taken place between the spurious creditors and himself, one can hardly say that the assessee had made a full and true disclosure of the material facts.It is, in my opinion, a mockery to hold that the assessee had in such a case made a full and true disclosure of factsthe duty that is imposed upon the assessee either u/s 34(1)(a) of the Indian Income Tax Act, 1922, or u/s 147(a) of the Income Tax Act, 1961, is a duty not merely of disclosing fully all material facts but also of disclosing them truly. Therefore, if in any particular case the Income Tax Officer has reason to believe that there has been an escapement from assessment of income caused by the fact that the

assessee in that case did not disclose the material facts truly, that would certainly be a case where the Income Tax Officer would have jurisdiction to reopen the assessment under the provisions of those sections. "

42. As has been laid down above, when the assessee makes a disclosure about a transaction and supports it by explanation and evidence, and a party to the transaction is found on enquiry never to have his place of business at the disclosed address, it becomes obvious that the disclosure by the assessee at the time of assessment prima facie may appear to the Income Tax Officer not to be a true disclosure as contemplated in the section and such conclusion is not for the court's investigation. Accordingly, the assessee cannot be heard to complain that the assumption of jurisdiction by the Income Tax Officer in initiating proceedings u/s 34(1)(a) is not warranted by law.

43. The allegation that the Income Tax Officer discharged his duties perfunctorily in making the assessment or in accepting the explanation offered by the assessee at the original assessment cannot stand in the way of reopening the assessment when the disclosure of the primary facts by the assessee at the time of assessment has been found to be prima facie untrue and there is no legal impediment against such action. It is again not a mere opinion or belief or suspicion in the mind of the Income Tax Officer that the impugned transaction might be "bogus", but it is, as his report indicates, a positive inference of fact on discovery of new fact and a prima facie conclusion that the impugned transaction of Rs. 30,000 was not a genuine transaction, in respect whereof the Income Tax Officer had reasons to believe that the income escaped assessment. Further, the report of the Income Tax Officer as appeals from the record, based on local enquiry which indicated that the firm alleged to have advanced the amount never existed at the given address. This was an honest and bona fide conclusion arrived at by the Income Tax Officer on a consideration of the relevant facts. The report of the Income Tax Officer and relevant facts here are materially different from the opinions of the Income Tax Officer which were under scrutiny in Chhugamal's case or in Sheo Nath Singh's case, or in the Full Bench case referred to by Mr, Bhattacharjee. Further change of the incumbent in the office of the Income Tax Officer has little bearing relating to the legality of the proceeding as contended by the petitioner.

44. As all the contentions raised in the appeal on merits fail, the appeal is dismissed without, however, any order as to costs in the circumstances. All interim orders, if any, are dissolved.

45. As prayed for by Mr. Bhattacharjee, learned advocate for the appellant, the operation of this order is stayed for a period of eight weeks.

Gupta, J.

46. I agree.