
(1959) 07 GAU CK 0010
In the Gauhati High Court
Case No : Civil Rule No. 29 of 1959

Murlidhar Jalan

APPELLANT

Vs

Income Tax Officer, Dibrugarh

RESPONDENT

Date of Decision : 18-07-1959

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 19, 19(1), 19(1)(d)

Citation : (1959) 07 GAU CK 0010

Hon'ble Judges : C.P. Sinha, C.J;G. Mehrotra, J

Bench : Division Bench

Advocate : D. Pal, H. Goswami and S.R. Khound, for the Appellant; S.M. Lahiri, Advocate-General and B.N. Choudhuri, for the Respondent

Final Decision : Dismissed

Judgement

G. Mehrotra, J.—This is an application under Article 226 of the Constitution of India praying for -- (a) a writ of mandamus calling upon the respondents to withdraw, cancel or forbear from giving effect to the notices issued against the applicant under Sec. 46 (5A) of the income tax Act; (b) a writ of certiorari calling upon the respondents to send for the records of the case and the proceedings be thereafter quashed; (c) a writ of prohibition calling upon the respondents to cancel or to forbear from giving effect to or in any way taking any steps in respect of the notices issued under Sec. 46 (5A) of the income tax Act.

2. The petitioner carries on business and is regularly assessed to income tax under the income tax Act, hereinafter called the Act. u/s 5(4) of the Taxation on Income (Investigation Commission) Act, 1947, the case of the petitioner was referred to the income tax Investigation Commission. An application was then made under Sec. 8A of the said income tax Investigation Commission Act, and the case of the petitioner was settled. The total quantum of income tax alleged to have escaped assessment was estimated by the Commission at Rs. 19,81,302/- and the amount which was found payable under the terms of the settlement was determined at Rs. 14,77,644/-.

According to the petitioner this sum of Rs. 19,81,302/- included a sum of Rs. 13,69,561/- as the income of Jalan Industries Limited (Salvage Department) assessable for the assessment years 1947-48 to 1951-52. Out of the amount settled by the end of 31st January, 1956 a sum of Rs. 1,67,000/- was paid. The case of the Hindu Undivided Family Narsingdas Surajmal of which the petitioner was the "Karta" was also referred to the income tax Investigation Commission u/s 5(1) of the Taxation on Income (Investigation Commission) Act, 1947 which was also settled under Sec. 8A and a sum of Rs. 6,46,777/- was determined under the said settlement by the said Hindu undivided family.

Out of this demand of Rs. 6,46,777/- a sum of Rs. 2,89,777/- was paid till the 31st January, 1956. By a decision of the Supreme Court sub-sec. 4 of Sec. 5 of the Taxation on Income (Investigation Commission) Act of 1947 was held to be ultra vires, void and unenforceable as offending against the provisions of Art. 14 of the Constitution. The effect of this decision was that the settlement arrived at between the petitioner and the department u/s 8A of the Act became void.

After the decision of the Supreme Court Ordinance No. VIII of 1954 was promulgated by which two sub-sections (1A) and (1B) were added to Section 34 of the Indian income tax Act, 1922 with effect from 17th July, 1954. By Sec. 2 of the income tax (Amendment) Act 1954 these two subsections were reproduced and two other sub-sections numbered as (1C) and (ID) were added with effect from 17th July, 1954. These provisions will be referred to later.

3. The income tax Officer, Dibrugarh issued three notices under Sec. 34 (1A) of the income tax Act for the assessment years 1944-45, 1945-46 and 1946-47 against the applicant and proceeded to assess income, profits or gains of the petitioner for each of the aforesaid three years. u/s 34(1B) of the Act the petitioner applied to the Central Board of Revenue for settlement of the dispute relating to the assessment for the aforesaid years.

The Central Board of Revenue by its letter dated 31st January, 1956 issued by Sri V. Gauri Shankar, Under Secretary, Central Board of Revenue informed the petitioner that the Board had ordered that the total amount of income of the petitioner for the assessment years 1944-45 to 1946-47 assessable to tax under Sec. 34 (1A) of the income tax Act was Rs. 9,50,376/- and the petitioner had to pay Rs. 8,99,206/-. Out of which a sum of Rs. 1,67,000/- which had already been paid by the 31st January, 1956 under the settlement arrived at under Sec. 8A of the Taxation on Income (Investigation Commission) Act, 1947 was deducted and the net balance which the petitioner had to pay was a sum of Rs. 7,32,206/-.

The petitioner paid another sum of Rs. 5,78,438/- between 22nd March, 1956 and 14th March, 1957. This payment was made for the liability of Jalan Industries Limited (Salvage Department). The amount of Rs. 8,99,206/- after deducting a sum of Rs. 1,67,000/- already realised under the earlier settlement was to be paid in instalments. The first instalment of Rs. 1,00,206/- had to be

paid on or before 30th September, 1956, the second instalment of Rs. 1,00,000/- had to be paid on or before 31st December, 1956, the third instalment of Rs. 1,00,000/- had to be paid on or before 30th September, 1957, the fourth instalment had to be paid on or before 31st December, 1957 and the fifth instalment had to be paid on or before 25th March, 1958.

One of the clauses of the terms of settlement is that in default of payment of any of the instalments on the due date as specified in column 4 of the settlement, the entire sum then remaining due was to become payable forthwith with interest thereon at the rate of 6 per cent from the date of default till realisation. By a notice dated the 10th February, 1956, the income tax Officer, Central Circle, Calcutta made a demand of the sum of Rs. 7,32,206/- found due under the settlement.

This demand notice also specified the instalments and the dates when each instalment was payable. The first two instalments were paid in time by the petitioner. On 30th September, 1957 the petitioner sent two cheques of Rs. 50,000/- which covered the third instalment of Rs. 1,00,000/- which became payable on the 30th of September, 1957, but a request was made that these cheques should be presented after a fortnight to enable the petitioner to arrange for the money as at that time Bank strike was going on.

These two cheques were presented to the Reserve Bank of India on the 30th October, 1957; and the amount was realised. The amount of the next instalment which fell due on the 31st December, 1957 could not be paid in time. On the 16th December, 1957 the petitioner wrote a letter to the Directors of Inspection (Special Investigation), Central Board of Revenue, New Delhi praying for extension of time for payment of the instalments which fell due on the 31st December, 1957 and 25th March, 1958.

On the same date another letter was written to the income tax Officer, Dibrugarh asking him to keep the collection in abeyance till the matter was disposed of by the Central Board of Revenue. By a letter dated 14th January, 1958 the Under-Secretary, Central Board of Revenue informed the petitioner that the Board was unable to agree to an over-all revision of the instalment plan prayed for, but for the instalment of Rs. 1,66,000/- which fell due on the 31st December, 1957 the Department extended the period up to 28th February 1958.

Thereafter the income tax Officer, Dibrugarh asked the petitioner to pay up the instalment of Rs. 1,66,000/- due on the 31st December 1957 by 28th February, 1958 and the amount of the last instalment was to be paid on the due date that is 25th March, 1958. On 10th February, 1958 the petitioner made another application to the Directors of Inspection (Special Investigation), Central Board of Revenue for reconsideration of his petition dated 16th December, 1957 by which a revision of the order fixing the date and instalment was prayed for.

On the 1st March, 1958 the Under-Secretary Central Board of Revenue again informed the petitioner that the Central Board of Revenue saw no reason to alter

their decision communicated in its letter dated the 14th January, 1958. The petitioner wrote another letter on the 3rd March, 1958 to the Under Secretary, Central Board of Revenue, but in reply it was stated that the Board was not prepared to reconsider its decision.

Thereafter the income tax Officer, Dibrugarh sent a letter to the petitioner on 12th March, 1958 stating that in view of the Board's decision refusing to alter the instalments, the petitioner was asked to inform the Department if the amount of Rs. 1,66,000/- due on 28th February, 1958 had since been paid, and the letter also contained a reminder for the balance of the amount which fell due on the 25th March, 1958. Thereafter another letter dated 15th March, 1958 from Sri D.K. Dey, income tax Officer (Headquarters) for Commissioner of income tax, Assam, Tripura and Manipur at Shillong was issued wherein the petitioner was informed that the instalment of Rs. 2,66,000/- was due to be paid by the petitioner on 25th March, 1958, and he asked the petitioner to arrange for deposit of the amount.

On the 17th May, 1958 the income tax Officer, Dibrugarh passed an order to the effect that under the terms of the settlement Rs. 5,32,000/- became payable forthwith with interest thereon at the rate of 6 per cent from the date of default, that is, 30th September, 1957 and that a sum of Rs. 2,660/- was claimed as interest on the amount at 6 per cent for one month for the entire amount of Rs. 5,32,000/-.

Thereafter the petitioner by his letter dated 27th June, 1958 wrote to the income tax Officer, Dibrugarh, placing before him the difficulties in the matter of payment of instalment because of the slump in the tea market. Thereafter the income tax Officer, Dibrugarh by a letter dated 12th August 1958 asked the petitioner to pay the outstanding demand immediately and warned that in case of his failure to pay up the amount in time, interest under paragraph 7 of the terms of settlement will have to be paid.

The petitioner on 15th October, 1958 enclosed a cheque of Rs. 1,00,000/- towards his outstanding liability. The cheque was cashed by the income tax Officer. On the 24th December, 1958 the petitioner wrote a letter to the income tax Commissioner, Assam praying for instalments of Rs. 5,000/- per month to clear up the demand. In the alternative he prayed that the sum of Rs. 6,32,000/- still due from the petitioner in respect of the settlement arrived at under Sec. 34 (1B) be adjusted from the deposit of Rs. 6,46,777/- paid towards the settlement account of the Hindu Undivided joint family of Narsingdas Surajmal. The income tax Officer (Headquarters), or Commissioner of income tax, Assam, Tripura and Manipur by a letter dated 23rd February, 1959 informed the petitioner that unless the balance amount with interest was paid within ten days from the date of receipt of the letter coercive measures will be adopted against the petitioner. Thereafter by a letter dated 4th March, 1959 the income tax Officer (Headquarters) informed the petitioner that his prayer for the adjustment of the balance against the sum of Rs. 6,46,777/- has been rejected and unless the

petitioner paid within one week the amount due, the income tax Officer will be obliged to take action for the collection of the outstanding demand and issue certificates to the Collector u/s 46 (2) of the Act and the shares lodged by the petitioner as security would be put to sale.

By the letter of 10th March, 1959 the petitioner wrote to the Commissioner of income tax, Assam asking him to refer the matter to the Directors of Inspection and take steps after consulting them. Thereafter the petitioner came to know of the order of the Commissioner of income tax on 14th March, 1959 by which the prayer of the petitioner had been rejects and the income tax Officer was directed to issues notices under Sec. 46 (5A) of the Act.

The income tax Officer, Dibrugarh in pursuance of the aforesaid instructions issued notices under Sec. 46 (5A) of the Act to the persons specified in paragraph 35 of the petition. The petitioner then wrote a letter to the income tax Officer pointing out that this proceeding was illegal and asked him to withdraw the notices issued under Sec. 46 (5A) which was refused by the Commissioner of income tax. Thereupon the present petition was filed in this Court on the 2nd of April, 1959, with the prayers which I have already set out.

4. To this petition the income tax Officer, Dibrugarh, the Commissioner of Income-tax Assam, Tripura and Manipur, Central Board of Revenue, New Delhi at the Union of India have been impleaded as respondents. In response to the notice issued by this Court the income tax Officer, Dibrugarh filed an affidavit in reply and has contested the allegations made and the points raised by the petitioner.

5. Notices issued under Sec. 46 (5A) have been assailed by the petitioner on a number of grounds. Dr. Pal who represents the petitioner has canvassed mainly four points before us. His first contention is that the proceedings under Chapter VI started under Sec. 46 (5A) are illegal inasmuch as there was no proper notice of demand under Sec. 29 of the income tax Act which was a condition precedent for the initiation of the proceedings under Sec. 46.

In this connection (sic) was urged that the liability in respect of the amount of settlement under Sec. 34 (1B) is not a tax liability and thus no notice of demand could be issued under Sec. 29 and further that the notice purporting to be a notice of demand does not fulfil the requirements of Sec. 29 and does not conform to the form prescribed for a notice under the said section. Secondly it was contended that the provisions of Sec. 34(1B) and (1C) are beyond the legislative competence of the Parliament inasmuch as these sub-sections do not deal with tax liability and thus do not come under entry No. 82 of List I of the Seventh Schedule of the Constitution. Thirdly it was contended that section 46 (5A) is ultra vires as it is violative of Articles 14 and 19 of the Constitution.

In this connection it was urged that the language of Sec. 46 (5A) when contrasted with the language of Sec. 46 (2) shows that sub-sec. (5A) of Sec. 41 does not apply to a liability other than tax liability. Lastly was contended that the proceedings could not be initiated under Chapter VI as the recovery of the said

sum has become time barred on the 16th of March, 1959 when the said notices under Sec. 46 (5A) are said to have been issued.

6. The first point raised by the petitioner can be examined both on the assumption that the liability of the amount fixed under the settlement is a tax liability or that it is not a tax liability.

7. Section 29 of the Act provides that when any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the income tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable. The portion of Sec. 34 (1A) which is relevant for this case is as follows :

34 (1A) If, in the case of any assessee, the income tax Officer has reason to believe; --

(i) that income, profits or gains chargeable to income tax have escaped assessment for any year in respect of which the relevant previous year falls wholly or partly within the period beginning on the 1st day of September, 1939, and ending on the 31st day of March, 1946; and

(ii) that the income, profits or gains which have so escaped assessment for any such year or years amount, or are likely to amount, to one lakh of rupees or more;

he may, notwithstanding that the period of eight years or as the case may be, four years specified in sub-section (1) has expired in respect thereof, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Sec. 22, and may proceed to assess or re-assess the income, profits or gains of the assessee for all or any of the years referred to in cl. (i), and thereupon the provisions of this Act (excepting those contained in cls. (i) and (iii) of the proviso to sub-sec. (1) and in sub-sees. (2) and (3) of this section) shall, so far as may be, apply accordingly :

Provided that the income tax Officer shall not issue a notice under this sub-section unless he has recorded his reasons for doing so, and the Central Board of Revenue is satisfied on such reasons recorded that it is a fit case for the issue of such notice :

Provided further that no such notice shall be issued after the 31st day of March, 1956.

34 (1B) Where any assessee to whom a notice has been issued under clause (a) of sub-sec. (1) or under sub-sec. (1A) for any of the years ending on the 31st day of March of the years 1941 to 1948 inclusive applies to the Central Board of Revenue at any time within six months from the receipt of such notice or before the assessment or re-assessment is made, whichever is earlier, to have the

matters relating to his assessment settled, the Central Board of Revenue may, after considering the terms of settlement proposed and subject to the previous approval of the Central Government, accept the terms of such settlement, and, if it does so, shall make an order in accordance with the terms of such settlement specifying among other things the sum of money payable by the assessee.

34 (1C) Any sum specified in a settlement arrived at in pursuance of sub-section (1B) may be recovered and any penalty for default in making payment of any sum may be imposed and recovered in the manner provided in Chapter VI.

34 (1D) Any settlement arrived at under this section shall be conclusive as to the matters stated therein; and no person, whose assessments have been so settled, shall be entitled to reopen in any proceeding for the recovery of any sum under this Act or in any subsequent assessment or re-assessment proceeding relating to any tax chargeable under this Act or in any other proceeding whatsoever before any court or other authority any matter which forms part of such settlement

8. Section 45 of the Act is as follows :

Any amount specified as payable in a notice of demand under sub-section (3) of Sec. 23A or under Sec. 29 or an order under Sec. 31 or Sec. 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under Sec. 30, the income tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of.

9. Section 46 cl. (1) lays down that when an assessee is in default in making a payment of income tax, the income tax Officer may in his discretion direct that in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty. Section 46(5A) is as follows :

The income tax Officer may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the assessee at his last address known to the income tax Officer) require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the income tax Officer, either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the taxpayer in respect of arrears or income tax and penalty or the whole of the money when it is equal to or less than that amount.

The income tax Officer may at any time or from time to time amend or revoke any such notice or extend the time for making any payment in pursuance of the

notice.

Any person making any payment in compliance with a notice under this sub-section shall be deemed to have made the payment under the authority of the assessee and the receipt of the income tax Officer shall constitute a good and sufficient discharge of the liability of such person to the assessee to the extent of the amount referred to in the receipt.

Any person discharging any liability to the assessee after receipt of the notice referred to in this sub-section shall be personally liable to the income tax Officer to the extent of the liability discharged or to the extent of the liability of the assessee for tax and penalties, whichever is less.

If the person to whom a notice under this subsection is sent fails to make payment in pursuance thereof to the income tax Officer, further proceedings may be taken by and before the. Collector on the footing that the income tax Officer's notice has the same effect as an attachment by the Collector in exercise of his powers under the proviso to subsection (2) of Sec. 46.

Where a person to whom a notice under this sub-section is sent objects to it on the ground that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for on account of the assessee, then, nothing contained in this section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, to the income tax Officer.

10. Before a notice of demand can be issued under Sec. 29 the sum is to be a tax, penalty or interest due in consequence of any order passed under or in pursuance of the Act. If it is a tax due in consequence of an order passed under the Act, then a notice of demand in the prescribed form is to be issued. If the contention of the counsel for the petitioner is accepted that the amount fixed by the settlement is not a tax liability, the provisions of Sec. 29 will not be attracted and no notice of demand could be issued under Sec. 29.

The question, therefore, of attacking the validity of the notice on the ground that it does not conform to the form prescribed under the rules would not arise. The only question in that event to be considered will be what is the effect of failure to issue a notice of demand in these circumstances on the proceedings under Chapter VI for the recovery of the amount of settlement. It was contended by the petitioner that Secs. 45 and 46 are to be read together and no action can be taken under Sec. 46 (5A) of the Act unless the assessee is a defaulter within the meaning of Sec. 45 of the Act.

A person can only be a defaulter under Sec. 45 if he has failed to deposit the amount in pursuance of the notice of demand u/s 29, The petitioner has rightly contended that if a notice of demand is not in the proper form the assessee cannot be regarded as a defaulter and no question of recovery u/s 46 will arise. But in case the liability under the order of settlement is not a tax liability, Section 29 of the Act will not be attracted and no notice of demand could be issued under

that Section.

The result will be that an assessee who is liable to pay the amount under settlement could never be a defaulter and no action could ever be taken against him under Chapter VI. This will be nullifying the very purpose of Sec. 34 (1C) of the Act. It is a rule of construction that the various sections of an Act should be read harmoniously. The scheme of the Act seems to be that after the liability has been determined on settlement, the amount of settlement is to be recovered in the manner provided in Chapter VI.

The provisions of Secs. 45 and 46 do not, therefore, in terms apply to the proceedings for recovery of the amount. The manner of recovery laid down in Chapter VI has been made applicable to the liability of the amount of settlement by virtue of Sec. 34 (1C) and not on its own terms. Therefore, it cannot be said that the provisions of Sec. 46 (5A) cannot be given effect to unless the assessee is declared a defaulter by his failure to pay up the amount mentioned in the demand notice issued under Sec. 29 of the Act.

If the assessee has been given a notice of demand, though not strictly in the form prescribed for notices under Sec. 29, by which he can know the amount of his liability and the period during which he is to pay, it cannot be said that any principle of natural justice has been violated so as to debar the Department from proceeding with the recovery of the amount in the manner provided in Chapter VI of the Act. In fact the argument of the petitioner that the notice of demand in the preserve case did not conform to the prescribed form under Sec. 29 assumes that the liability of the amount of settlement is a tax liability within the meaning of Sec. 29.

The scheme of Sec. 34 (1A) is that if the tax payable by an assessee on his income has escaped assessment for a particular period, notice could be given containing all the particulars under Sec. 22 sub-sec. (2) even though the period has expired and thereupon the income tax Officer can proceed to assess or re-assess the income, profits or gain of the assessee. The assessee whom notice has been given under Sec. 3 (1) (A) can apply under Sec. 34(1)(B) to the Central Board of Revenue to have the matters relating to his assessment settled.

After the terms of settlement have been accepted, an order is passed by the Central Board of Revenue in terms of the settlement. Having regard to Ss. 34 (1) (A) and 34 (1) (B) the liability of the amount of settler lent is a tax liability. It was contended that the ax necessarily implies an imposition on income which is to be computed in accordance with the provisions of the Act. Any liability, therefore, fixed under the settlement cannot be said to be a tax as it is not fixed on the basis of any income computed in accordance with the provisions of the Act.

Strictly speaking the amount could not be tax, but the liability is nonetheless in respect of the tax which is due from the assessee for the period during which his income escaped assessment. This provision for settlement of the income tax

liability was introduced in the income tax Act for the first time by the Ordinance followed by the amending Act. It is to my mind for the benefit of the assessee. Instead of going through the procedure of reassessment after notice has been given under S. 34 (1A), the assessee has been given an opportunity to settle his liability with the Central Board of Revenue. The amount, therefore, will be a tax liability within the meaning of S. 29 of the Act.

11. In that view of the matter the next question to be considered is how far the notice given to the assessee on 10-2-1956--"Annexure C" to the petition fulfils the requirements of S. 29. It was contended by the counsel for the petitioner that the notice under S. 29 is to be in a prescribed form. Rule 20 of the Rules framed under the Act provides that a notice of demand under S. 29 shall be in the form given below, and is to be accompanied by the assessment form appended hereto; provided that the said assessment form need not accompany the notice in case where a penalty has been levied subsequent to the assessment order and it is not practicable to include the amount of the penalty in the assessment form.

Rule 20A then provides that the notice of demand under S. 29 to be served upon the assessee in pursuance of an order under sub-s. (1) of S. 18A shall be in the form appended to the said rule. Strictly speaking the notice given on 10-2-1956 does not conform to the form appended to R. 20 or 20A. The Advocate General who appears for the Department, however, relies upon R. 49 which provides that the notice of demand in respect of the sum of money specified in the order under sub-s. (1B) of S. 34 is to be in the form appended to the said Rule. The present notice is in accordance with the form appended to R. 49.

Two submissions have been made on behalf of the petitioner in reply to the contention by the Advocate General. It is firstly urged by the counsel for the petitioner that Rr. 20 and 20A in terms refer to S. 29 of the Act. Rule 20A lays down that notwithstanding anything contained in R. 20, a particular form is prescribed for assessment under S. 18A. As there is no reference to S. 29 in R. 49, any notice issued under R. 4) cannot be regarded as notice under S. 29. The language of R. 49 also shows that it is in respect of the sum of money specified in an order under sub-s. (1B) of S. 34. Section 34 (1B) does not provide for any notice. I do not think that there is much substance in this contention.

Once it is accepted that the liability under the order of settlement is a tax liability, what S. 29 requires is that a notice of demand is to be issued in the prescribed form. The word "prescribed" has been defined under the Act to mean prescribed by the Rules. Section 59 of the Act gives power to the Central Board of Revenue to make Rules for carrying out the purpose of the Act and for the ascertainment and determination of any class of income. Clause 2 (e) of S. 59 gives power to the Central Board of Revenue to frame rules, providing for any matter which by the Act is to be prescribed.

One of the matters which by the Act is to be prescribed is the form of notice of

demand under S. 29. The Central Board of Revenue, therefore, was empowered to frame rules under S. 59 (2) (e) providing for the form of the notice of demand under S. 29 and in the exercise of the aforesaid power R. 49 was framed. Section 29 itself does not give any power to frame rules and the power for enacting R. 49 is to be found in S. 59. It is, therefore, not necessary to refer to S. 29 in R. 49 itself. The fact that in Rr. 20 and 20A there is a reference to S. 29 is not of much consequence. An argument was addressed in this connection to the effect that the power given to frame rules under S. 59 (2) (e) is confined to matters which are to be prescribed by this Act. Section 34 (1B) does not prescribe for any notice.

Any notice, therefore, of demand in respect of a sum due under the order passed under S. 34(1B) cannot be said to be a matter which is prescribed by the Act. As I have already pointed out S. 29 also requires that a form of notice to be issued under S. 29 is to be in the prescribed form and if a rule has been framed providing for the form the said rule is nothing else but one relating to a matter which is prescribed by the Act. Moreover, from the note appended to R. 20 it is clear that any of the particulars which are not required in a particular type of demand may be deleted. In that view of the matter, substantially the contents of the notices dated 10th February conform to the requirements of Rr. 20 and 20A.

In my opinion, therefore, if the liability under the settlement is not a tax liability, S. 29 would not be attracted and no notice could be given under S. 29. The question, therefore, of the assessee being a defaulter would not arise and it cannot be said that S. 46 cannot be applied to the recovery of the aforesaid amount as no notice under S. 29 could be given, but if the amount under the order is a tax liability the notice issued on the 10th February was a notice of demand in compliance with the provisions of S. 29 and the assessee not having paid up the amount specified in the said notice was a defaulter and the provisions of S. 46 were attracted.

12. As regards the second contention that S. 34 (1B), (1C), (1D) are void for want of legislative competence, the Act comes under Item 82 of List I of the Seventh Schedule which provides for taxes on income other than agricultural income. It need not be emphasized that the list enumerated broad categories and the entries in the list are to be given large and liberal interpretation. The items in the lists are not to be interpreted in a narrow and pedantic sense. They are to be given meaning of widest amplitude, every general word should be held to extend to all ancillary and subsidiary matters which fairly and reasonably can be said to be comprehended in it. The income tax Act is an Act relating to taxes on income other than agricultural income. The provision relating to settlement of amount of tax which escaped assessment, and the provision for the mode of its recovery are matters which are necessarily ancillary to the matter of taxation. It cannot, therefore, be said that the provisions of S. 34 (1B), (1C) and (1D) are beyond legislative competence of the Parliament.

13. The constitutionality of S. 46 (5A) has been challenged both on the ground

that it violates the provisions of Arts. 19(1) (f) and 14 of the Constitution. It was contended that the power given to the income tax Officer to issue notices to the debtors of the assessee directing them not to pay the amount of debt to the assessee, but to pay the same towards the liquidation of the amount of settlement, affects the right of the assessee to hold and dispose of the property. The debt due to the assessee is a property and any power given to regulate the holding and disposal of such property unless saved by Art. 19 (2) (5) must be struck down. It was urged that the power given is unrestricted; no provision has been made for appeal against the order issued under S. 46 (5A), no rules of guidance have been laid down in the section for the officer who has been empowered to issue an order under the aforesaid section. The restriction, therefore, is unreasonable and cannot be sustained under Art. 19 (2) (v).

It was contended by the Advocate General in reply to the contention of the petitioner that the impugned law has been enacted by the Parliament in the exercise of its taxing power under Art. 265 of the Constitution read with Art. 245 and the legislative List. As such, its validity cannot be tested with reference to the requirements of Art. 19 of the Constitution. The contention is that Arts. 19, 21, 31 (1) deal with what is known as the Policepower of the State in America. Article 31(2) deals with the power of eminent domain. The taxing power is an attribute of sovereignty. It has been expressly recognised by Art. 265 of the Constitution. If the purpose of the taxing law is to augment revenue of the State, its validity cannot be tested with reference to the requirement of Art. 19 (2) (5). Such a law falls outside the ambit of Art. 19 of the Constitution. The contention in reply by the counsel for the petitioner is that Art. 265 only lays down that no tax be levied or collected except by a valid law.

If any law is enacted providing for levy or collection of tax, such a law itself will be subject to the fundamental rights enshrined in Chapter III of the Constitution and the validity of such a law can be tested with reference to Art. 19. There is nothing in Art. 19 or Art. 265 to make such a law immune from attack on the ground of violation of the fundamental rights guaranteed under Art. 19. It was in the alternative contended that so far as the law provides for imposition and assessment of tax and its recovery, it may be immune from an attack under Art. 19 of the Constitution, but when it provides for the recovery in a manner so as to affect the fundamental right guaranteed under Art. 19 (1) (f) of the Constitution without laying down any rules for guidance of the income tax Officer when and in what circumstances the manner provided under S. 46 (5A) is to be adopted, the validity of such a provision can be tested on the grounds off Art. 19 (2) (v) of the Constitution.

14. Taxation is the legal capacity of sovereignty or one of its governmental agents to exact or impose a charge upon persons or their property, for the support of Government and for the payment for any other public purposes, which it may constitutionally carry out (Willis" Constitutional Law p. 716). In the case of *Providence Bank v. Billings*, (1860) 7 Law Ed 939, the Supreme Court of

America refer-taxing power observed :

This vital power may be abused, but the Constitution of the United States was not intended to furnish the correction of every abuse of power which may be committed to the State Governments. The intrinsic wisdom and justice of the representative body and its relations with its constituents, furnish the only security where there is taxation, as well as against unwise legislation generally.

15. The taxing power of the State is one applicable to all persons who are subject to the sovereignty of the State and the obligation of such persons is to provide for the maintenance and conduct of the State. By extending special protection to certain rights of citizen enumerated under Art. 19, it cannot be said to be the intention of the Constitution makers to affect the fundamental obligation of the citizen to provide for the maintenance and conduct of the State. Imposition of tax to some extent puts a restraint on the rights of a citizen; but the purposes of enacting a taxing legislation cannot be said to be regulatory one.

The primary object of a tax legislation is to provide for the revenue of the State. In the case of *Brushaber v. Union Pacific Railroad Co.*, (1915) 60 Law Ed 493 it was observed that it was well-settled that the due process clause of the 5th amendment is not a limitation upon the taxing power conferred upon the Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand, a taxing power, and taking the same power away, on the other by the limitation of due process clause. The matter came up for decision before the Madras High Court in the case of *S. Ananthakrishnan Vs. The State of Madras*, .

The validity of the Madras Stamp Act of 1922 by which a fee of Rs. 625/- was prescribed for enrolment as an advocate was challenged and it was contended that the petitioner as a citizen of India was entitled to carry on any profession. The imposition of the enrolment fee was a restriction placed on his right to carry on business and unless that was justified by the tests laid down under Art. 19 (2) (vi) imposition was illegal. Venkatarama Ayyar, J. formulated the proposition at page 405 of the report as follows :

But what follows from this? Does the favoured position granted to the fundamental rights carry with it any immunity from taxation? The right to levy tax is an incident of sovereignty and the legislatures as sovereign bodies have plenary powers of taxation subject only to such limitations as may be prescribed by the Constitution and nowhere in the Constitution do we find any prohibition against taxation of fundamental rights. Part III does not contain any such inhibition.

Dealing with the argument that the fundamental rights are under the Constitution in a paramount position the legislatures of the country have no power to abrogate or abridge them, that the power to tax is the power to destroy and that, therefore, part 12 is inoperative in respect of the rights conferred under Part III, it was observed that

Part III renders void in terms only laws in force before commencement of the Constitution and the laws to be enacted by the States, that is, in future. It does not apply to the Constitution itself and it is not laid down that the other portions of the Constitution should be void as against the provisions of Part III.

After referring to various American authorities, it was held that "the Stamp Act being a measure of taxation must be constitutionally valid." It was further observed in this case that the power to tax is an attribute of sovereignty; it carries with it the power to determine when and how the tax shall be levied and it is no objection to its validity that it is levied before the commencement of the trade and not after. The theory of previous restraint has no application to the laws of taxation.

16. In the case of V. Guruviah Naidu and Brothers Vs. The State of Madras and Another, , the provision of the rules framed under the Madras General Sales Tax Act under which a dealer was required to take out a licence and pay the fees prescribed therefor was challenged. At page 168 of the report the observation is as follows :

Thus far we have proceeded on the basis that unless the system of licensing introduced by R. 5 satisfied the test of reasonableness laid down by Art. 19 (6) the restriction imposed would be unconstitutional. There is however some other approach to this problem which we consider worth pursuing..... The Constitution vests the Union and the States with a power of taxation, which, subject to a few exceptions is plenary in its nature. The imposition of a tax on a trade or on the profits of a trade is undoubtedly a burden and unless the tax was validly imposed, it would be an illegal and undue interference with the freedom of trade guaranteed by Art. 19(1)(g) and so invalid.

If a tax were a restriction which could be legally imposed on a business, the right to carry on which was guaranteed by the Constitution, the validity of the tax cannot be judged by standards applicable to regulations or restrictions imposed on the manner of carrying on the business -- restrictions which flow from the nature of the commodity or the repercussions of an unregulated trade on the health, morality or safety of the public. Taxation is the supreme function of the State, the exercise of a power which is necessary for the very existence and maintenance of the State.

The restraints imposed by taxation are wholly beyond the scope of Art 19 and therefore not subject to the tests of a valid legislation under that provision. The saving in Art. 31, sub-cl. 5 (b) (i) placing out of the purview of the main article the deprivation of property which taxes entail and which was put in only by way of abundant caution, is a pointer establishing the plenitude of the taxing power.

17. Cooley in his Constitutional Limitations dealing with taxing power observed :

It is unlimited in its range, acknowledging in its very nature no limit so that security against its abuse is to be found only in the responsibility of the

legislation which in poses the tax to the constituency who are to pay.

18. If it is accepted that the activities which are protected under Art 19 are immune from a tax, it will lead to very anomalous results. Cases where the law under which tax has been imposed is otherwise invalid, the realisation of tax may affect the fundamental right guaranteed to a citizen under the Constitution and he may be entitled to come to this Court for the enforcement of his fundamental right, but it cannot be said that the validity of a law providing for the levy and collection of tax, having the effect of restraining the activities of a citizen protected under Art. 19 has to be tested with reference to Art. 19. In the case of *Ramjilal Vs. Income Tax Officer, Mohindargarh*, , an application was made under Art. 32 of the Constitution for appropriate order for the protection of what the petitioner claimed to be his fundamental rights guaranteed by Arts. 19 and 31.

On 14-11-1948 the Commissioner of income tax by a notification informed that persons belonging to the native States of Nabha and Nalagarh would be assessed to income tax under the Patiala income tax Act. Prior to this there was no law in the Nalagarh State for imposition of income tax on the subjects of that State. The petitioner who was a resident of Ateli formerly forming part of the Nabha State, received a notice under Ss. 22 (2) and 38 of the Patiala income tax Act, and it was the validity of this notice which was challenged by the petitioner under Art. 32 of the Constitution.

It was contended by the counsel for the petitioner that the Patiala income tax Act did not apply to the petitioner and assessment of tax on the petitioner's income was illegal. The State by insisting on collecting the tax so illegally assessed was threatening to invade the petitioner's fundamental right to property guaranteed by Art. 31 (1) of the Constitution. It was held in that case that the application was not one for the enforcement of the fundamental right under Art. 31 (1). What the petitioner in that case intended to enforce was the right not to be taxed except in accordance with law under Art. 265 of the Constitution.

It was observed that clause (1) of Art. 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise Art. 265 becomes wholly redundant. In the United States of America the power of taxation is regarded as distinct from the exercise of police power or of eminent domain. Our Constitution evidently has also treated taxation as distinct from compulsory acquisition of property and has made independent provision giving protection against taxation save by authority of law.

19. In my opinion, the protection against imposition and collection of taxes arises directly from Art. 265 and is not secured by clause (1) of Art. 31. It was contended by the counsel for the petitioner that this case is no authority for the proposition that the validity of a taxing statute cannot be tested with reference to Art. 19. This case only lays down that any attempt to enforce the guarantee given to a citizen under Art. 265 of the Constitution namely that no tax can be levied except by authority of law, is not a fundamental right and the guarantee

afforded under Art. 31 (1) not to deprive a citizen of his property, without the authority of law does not apply to a taxing statute.

It is true that the case was not one where the validity of a taxing law was challenged on the ground of violation of Art. 19. But their Lordships of the Supreme Court referred to the law in the United States of America that the power of taxation is regarded as distinct from the exercise of police power or eminent domain. If the exercise of a taxing power is distinct from the exercise of police power or of eminent domain, the exercise of such power legitimately cannot be tested with reference to the restrictions placed on the right of the State to exercise its police power as contained in Art. 19 of the Constitution, Article 19, to my mind, enumerates certain activities of a citizen which have been protected. The State in the exercise of the police powers cannot encroach upon these activities and any restraint placed on those activities in the exercise of its police power have to be tested with reference to the provisions of Art. 19 (2). But if the State has acted in the exercise of its taxing power, the limitations imposed on the exercise of police powers under Art. 19 cannot be placed on the exercise of the taxing power of the State.

20. In my opinion therefore the validity of the law which provides for a levy or collection of "a tax cannot be tested with reference to Art. 19 of the Constitution. Such a law is outside the ambit of Art. 19. It is however, contended that the validity of those provisions of the income tax Act by which tax has been levied on the income of the petitioner and those for the collection of the said tax, may not be liable to be tested with reference to Art. 19 and that the activities enumerated under Art. 19 may not be immune from taxation. But when the procedure provided for the recovery of the amount is such as to result in infringement of the right guaranteed under Art. 19 (1) (f), the law laying down such a procedure will be void under Art. 13 of the Constitution.

This argument overlooks the distinction between the case where the law itself has the effect of infringing the fundamental right guaranteed under Art. 19 and the case where any action taken under a valid law results in the infringement of Art. 19 of the Constitution. If the law providing itself for the imposition of tax and for recovery of the said tax cannot be tested with reference to the requirements of Art. 19, it is difficult to hold that the result flowing from the exercise of power under the said law can be tested with reference to the provisions of Art. 19. Moreover, the result of acting under S. 46 (5A) is to deprive the assessee of his property and not only to regulate the use of the property or to restrain the right to hold and possess the property.

Such a law, if at all, is one dealing with the deprivation of property and will thus be outside the scope of Art. 19. In the case of *The Collector of Malabar, Kozhikode and Another Vs. Erimmal Ebrahim Hajee*, the question which arose for consideration was whether the provisions of S. 46 (2) of the income tax Act and S. 48 of the Madras Revenue Recovery Act were ultra vires. The respondent in that case was arrested in pursuance of a warrant issued by the Collector of

Malabar under S. 48 of the Madras Revenue Recovery Act. A certificate had been issued by the income tax Officer under S. 46 (2) of the Act against the respondent and the Collector proceeded under S. 48 of the Madras Revenue Recovery Act, 1864, and issued a warrant against the respondent.

On this a petition under S. 491, Criminal Procedure Code was filed challenging the validity of S. 46 (2) of the income tax Act and S. 48 of the Madras Act. The validity of these two sections was challenged on the ground that it offended against Arts. 14, 19, 21 and 22 of the Constitution. Dealing with the question of the infringement of Art. 19 of the Constitution, it was observed as follows :

It was held by the majority of the learned Judges in A.K. Gopalan Vs. The State of Madras, , that the right to move freely throughout the territory of India referred to in Art. 19 (1) (d) of the Constitution was but one of the many attributes included in the concept of the right to "personal liberty" and when a person is lawfully deprived of his personal liberty without offending Art. 21, he cannot claim to exercise any of the rights guaranteed by sub-cl. (a) to (e) and (g) of Art. 19 (1) for those rights can only be exercised by a free man.

In that sense, therefore, Art. 19 (1) (d) has to be read as controlled by the provisions of Art. 21 and the view that Art. 19 guarantees the substantive right and Art. 21 prescribes a procedural protection is incorrect. This decision must now be taken as having settled once for all that the personal rights guaranteed by sub-cl. (a) to (e) and (g) of Art. 19 (1) are in a way dependent on the provisions of Art. 21 just as the right guaranteed by sub-cl. (f) of Art. 19 (1) is subject to Art. 31. If the property itself is taken lawfully under Art. 31, the right to hold or dispose of it perishes with it and Art. 19 (1) (f) cannot be invoked. Likewise, if life or personal liberty is taken away lawfully under Art. 21, no question of the exercise of fundamental rights under Art. 19 (1) (a) to (e) and (g) can be raised.

21. This case, therefore, is an authority for the proposition that if the liberty of a person has been affected under Art. 21 or if the individual has been rightfully deprived of his property under Art. 31 of the Constitution, the question of exercising the rights guaranteed under Art. 19 will not arise. It was strenuously contended that this case only deals with the question of arrest and not with the deprivation of property. It was further contended that this case is only an authority for the proposition that Art. 19, is subject to Art. 31 of the Constitution. But it is not an authority for the proposition that Art. 19 is subject to Art. 263 of the Constitution. What this case to my mind lays down is that once a person's personal liberty has been affected or that he has been deprived of his property, under a valid law, the question of infringement of the guarantee under Art. 19 will not arise. Such a law falls out-side the ambit of Art. 19.

The deprivation is also not hit by Art. 31 (1) as it is with the authority of law and also being a taxing statute is outside the Article. It has not been argued in the present case that Art. 31 (2) has been violated. If Art. 31 (1) or 31 (2) have not

been violated and the law falls outside the ambit of Art. 19, it is not necessary to consider whether the restriction placed on the assessee's right to hold and possess property is unreasonable. The argument, therefore that S. 46 (5A) gives an unfettered discretion to the income tax Officer and is therefore violative of Art. 19 being an unreasonable restriction on the right of the petitioner to hold and possess property cannot be accepted.

(22) The next ground on which the validity of S. 46 (5A) is challenged is that it violates the guarantee of equal protection of law under Art. 14 of the Constitution. It was urged that the income tax Officer has been given naked and arbitrary power to single out any defaulting assessee and subject him to a more stricter mode of recovery as provided for under the aforesaid sub-section than the one provided for under S. 46 (2). The germ of discrimination lies in the conferment of arbitrary and naked power on income tax Officer, a power which is neither to be exercised by a Judicial Officer nor is controlled by a right of appeal to a superior officer.

Such a power, it is contended, contains in itself the germ of discrimination and is hit by Art. 14 of the Constitution. It was contended by the Advocate General in reply that the law applies equally to all the assessees. It makes no discrimination between assessees. If in applying the aforesaid law any individual income tax Officer acts in a discriminatory manner his act may be challenged as being mala fide, but the law itself cannot be said to contain any germ of discrimination. It was further contended that S. 16 (2) has been held not to violate Art. 14 and the same reasoning will apply to S. 46 (5A) of the Act. Article 14 had been the subject-matter of interpretation in various decisions of the Supreme Court, and it is not necessary to refer to all the cases.

Each law will have to be examined on its own facts and circumstances in order to determine whether it infringes Art. 14 of the Constitution. That a special and speedier method of recovery of the tax dues has been provided for in Chapter VI of the Act, cannot be disputed. That special and speedier method of recovery of the tax liability is justified having regard to the nature of the liability and the necessity of realising the tax dues speedily to maintain the Government can also not be denied.

23. In America the necessity of summary modes of collection has been justified. In Willoughby's Constitution of the United States, second edition at page 1883, it is observed as follows :

For the collection of taxes, as well as for the appraisal of property for taxation, summary modes of procedure may be used; the justification for this being that, without such means, no Government could exist. Hence it has been held that, when a tax is assessed and collected according to customary modes and usages, or in subordination to the principles underlying them the requirements of due process are satisfied.

24. To the same effect is the observation in Cooley's Constitutional Limitations

Vol, II at page 1103 :

What method shall be devised for the collection of a tax, the legislature must determine, subject only to such rules, limitations, and restraints as the constitution of the State may have imposed.

25. It cannot, therefore, be said that Chapter VI of the Act laying down summary method of realisation of the tax dues, (sic) hit by Art. 14 of the Constitution. The question in the present case is if there are several modes or recovery provided under the Act, one procedure being more stringent than the other and if the assessing authority is given power to apply anyone of these methods at his discretion to any of the assesseees, can it be said that such law giving wide discretion unregulated by the Act infringes Art. 14 of the Constitution?

26. The conception of equality before the law does not involve the (sic) of absolute equality among human beings. Equality before the law means that among the equals the law should be equal and should be equally administered and that the like should be treated alike. This Article does not therefore absolutely prevent the State from discriminating. The State has the power of what is known as "classification" on the basis of a rational distinction relevant to the particular subject dealt with. In the case of *The State of West Bengal Vs. Anwar Ali Sarkar*, *Mukherjee, J.* observed that :

It appears to be an accepted doctrine of American Courts that the purpose of the equal protection clause is to secure every person within the States against arbitrary discrimination, whether occasioned by the express terms of the statute or by their improper application through duly constituted agent.....The position, therefore, is that when the statute is not itself discriminatory and the charge of violation of equal protection is only against the official, who is entrusted with the duty of carrying it into operation, the equal protection clause could be availed of in such cases; but the officer would have a good defence if he could prove bona fides. But when the statute itself makes a discrimination without any proper or reasonable basis, the statute would be invalidated for being in conflict with the equal protection clause, and the question as to how it is actually worked out may not necessarily be a material fact for consideration.

In this case the Act was struck down as being violative of Art. 14 of the Constitution.

27. In the latter case from *Kathi Raning Rawat Vs. The State of Saurashtra*, the Act was held to be constitutional. In the case of *Kedar Nath Bajoria Vs. The State of West Bengal*, , both these cases were considered and it was observed by Chief Justice Patanjali Shastri that :

Now, it is well settled that the equal protection of the laws guaranteed by Art. 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To

put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain.....

It has been further contended that even assuming that the scheduled offences and the persons charged with the commission thereof could properly form a class in respect of which legislation could be enacted, S. 4 of the Act is discriminatory and void, vesting, as it does, an unfettered discretion in the Provincial Government to choose any particular "case" of a person alleged to have committed an offence falling under any of the specified categories for allotment to the Special Court to be tried under the special procedure, while other offenders of the same category may be left to be tried in ordinary courts.

In other words S. 4 permits the Provincial Government to make a discriminatory choice among persons charged with the same offence or offences for trial by a Special Court, and such absolute and unguided power of selection, though it has to be exercised within the class or classes of offences mentioned in the schedule, is no less discriminatory than the wider power of selection from the whole range of criminal law conferred on the State Government by the legislation impugned in *The State of West Bengal Vs. Anwar Ali Sarkar*, . The vice of discrimination, it is said, consists in the unguided and unrestricted power of singling out for different treatment one among a class of persons all of whom are similarly situated and circumstanced, be that class large or small.

The argument overlooks the distinction between those cases where the legislature itself makes a complete classification of persons or things and applies to them the law which it enacts, and others where the legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics, but being unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose, in accordance with, and in fulfilment of, which the administrative authority is expected to select the persons or things to be brought under the operation of the law.

A familiar example of this type of legislation is the Preventive Detention Act, 1950, which having indicated in what classes of cases and for what purposes preventive detention can be ordered, vests in the executive authority a discretionary power to select particular persons to be brought under the law. Another instance in point is furnished by those provisions of the Criminal Procedure Code which provide immunity from prosecution without sanction of the Government for offences by public servants in relation to their official acts, the policy of the law being that public officials should not be unduly harassed by private prosecution unless in the opinion of the Government, there were reasonable grounds for prosecuting the public servant which accordingly should

condition the grant of sanction.

28. That there should be a special and summary procedure for the recovery of the tax dues cannot be doubted. Having regard to the object of the income tax Act, it is fair to provide a special procedure for recovery of the tax dues and not to leave the authorities to realise the amount of tax dues through the normal procedure of Courts. In *State Railroad Tax Cases*, (1876) 92 US 575 the Court said

It is a wise policy. It is founded in the simple philosophy derived from the experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and often mode of procedure are necessary, than those which belong to Courts of justice.

Chapter XVI (VI?) which, therefore, provides for special procedure cannot be struck down being in violation of Art. 14. The contention, as I have already referred to was that the germ of discrimination is to be found in S. 46 (5A) which gives unregulated power to the income tax Officer to apply the procedure provided under the aforesaid subsection against some assesseees and to apply the procedure provided under S. 46 (2) which is less stringent against the other assesseees placed in the similar circumstances.

29. In the case of *Kashiram Agarwalla and Another Vs. Collector of 24-Parganas and Others*, the question which came up for consideration was the validity of S. 46 (2) of the income tax Act. The ground on which the validity was attacked was that it was left to the sweet will of the income tax Officer to issue a certificate for recovery of the amount under the Public Demands Recovery Act, and thereafter for the Collector to proceed under the provisions of the Revenue Acts providing for the recovery of the arrears of revenue or as a Civil Court. The Section giving unregulated discretion was violative of Art. 14 of the Constitution. After considering the cases referred to above, it was held that

if the law is the same for all, the provision of alternative procedure making it possible for the relevant authority to apply one procedure in some cases and the other procedure in other cases does not offend against Art. 14 of the Constitution.

It was contended by the counsel for the petitioner that this proposition has been very widely put. In fact for the purposes of that case, it was not necessary to decide that question. The case was concluded by the earlier decisions of the Supreme Court wherein it was expressly held that the proviso is not a distinct and separate mode of recovery but it only gives an additional power to the Collector to issue warrant of arrest. I shall deal with those cases of the Supreme Court later but the observations quoted above are apposite to the facts of the present case.

30. In the case of *The Collector of Malabar, Kozhikode and Another Vs. Erimal Ebrahim Hajee*, to which I have already referred, it was held that S. 48 of the

Madras Revenue Recovery Act & S. 46 (2) of the income tax Act were not violative of Art. 14. In this case so far as the question of violation of Art. 14 was concerned, the reasonings in the earlier case of Purshottam Govindji Halai were reiterated. It is urged by the counsel for the petitioner that in the case of Purshottam Govindji Halai Vs. Shree B.M. Desai, Additional Collector of Bombay and Others, , the validity of S. 46 (2) of the income tax Act and S. 13 of the Bombay Revenue Recovery Act was upheld. The constitutionality of S. 46 (2) was attacked mainly on two grounds, firstly on the ground that S. 46 (2) provided for two alternative modes of recovery and the authority had power to apply either of the two methods. This contention was repelled on the ground that the proviso does not indicate a different and alternative mode of recovery of the certified amount of tax, but only confers additional powers on the Collector for the better and more effective application of the only mode of recovery authorised by sub-s. (2) of S. 46.

The second ground on which the protection under Art. 14 was invoked was based on a comparison of different laws adopted by different States for the recovery of land revenue. This contention was repelled on the ground that the classification may be founded on different bases, namely, geographical or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the act under consideration. These two cases, it is contended, do not lay down that if there are two alternative procedures provided, any uncontrolled discretion given to the executive authority to select either of the two procedures cannot be violative of Art. 14 of the Constitution.

31. Reliance was placed on the case of Dwarka Prasad Laxmi Narain Vs. The State of Uttar Pradesh and Others, , wherein the provisions of the U.P. Coal Control Order were declared ultra vires. Under the Coal Control Order, no person was entitled to sell or store for sale or otherwise dispose of coal except under a licence. Clause 4 (3) of the Coal Control Order provided that the licensing authority may grant, refuse to grant, renew or refuse to renew a licence and may suspend, cancel, revoke or modify any licence or any terms thereof granted by him under the Order for reasons to be recorded. The phrase

"reasonable restriction" connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under Art. 19 (1) (g) and the social control permitted by clause (6) of Art. 19, it must be held to be wanting in reasonableness.

32. This case dealt with the question of the ambit and scope of Art. 19 (1) (g) and clause (6) and the question of Art. 14 was not examined in this case. Next, reliance was placed on the case of Saghir Ahmad Vs. The State of U.P. and Others, . In this case the validity of the U.P. Road Transport Act was challenged.

Reliance was placed on the following passage at page 741 of the report :

The other contention of Mr. Pathak in regard to Art. 14 though somewhat plausible at first sight does not appear to us to be sound. Section 3 of the Act authorises the State Government to declare that the road transport service in general or on particular routes should be rule and operated by the State Government exclusively or by the State Government in conjunction with railway or partly by the State Government and partly by others in accordance with the provisions of the Act. The whole question is how is the last part of the section to be implemented and carried out? If the State can choose any and every person it likes for the purpose of being associated with the transport service and there are no rules to guide its discretion, plainly the provision would offend against Art. 14 of the Constitution.

33. In that case how ever, it was held that the discretion to be exercised by the State was regulated discretion guided by statutory rules. In the case of Pannalal Binjraj Vs. Union of india (UOI), , the question was considered under what circumstances the law giving discretion to an executive body can be stuck down as violative of Art. 14 of the Constitution. The validity of S. 5 (7A) of the income tax Act was up for decision. Section 5 (7A) gives power to the Commissioner of income tax to transfer any case from income tax Officer subordinate to him, to another, and the Central Board of Revenue has been given power to transfer any case from one income tax Officer to another. Such a transfer can be made at any stage of the proceeding and shall not render necessary the reissuing of a notice already issued by the income tax Officer from whom the case is transferred.

The validity was attracted on the ground that S. 5 (7A) invests the Commissioner and the Central Board of Revenue with the naked and arbitrary power to transfer any case from one income tax Officer to another without any limitation in point of time, a power which is unguided and uncontrolled and is discriminatory in its very nature. It was open to the Commissioner to pick out the case of one assessee from those of others in a like situation and transfer the case from one State to the other or from one end of the Union to the other without specifying the area and without giving any reason thus subjecting the particular assessee to discriminatory treatment whereas the other assessees similarly situated with him would continue to be assessed at the place where they reside or carry on business under S. 64 (1) and (2) of the Act.

The discrimination involved in S. 5 (7A) is substantial in character and therefore infringes the fundamental right enshrined in Art. 14, and it also infringes Art. 19 (1) (g) in so far as it imposes an unreasonable restriction on the fundamental right to carry on trade or business. It was held in that case that there was no fundamental right in an assessee to be assessed in a particular area or locality, and the difference if any created in the position of the assessee and others who continue to be assessed by the income tax Officer in the area in which they reside or carry on business is not material difference but a minor deviation from the general standard and would therefore, not amount to the denial of equal

rights. The law has been laid down at page 410 of the report as follows :

There is a broad distinction between discretion which has to be exercised with regard to a fundamental right guaranteed by the Constitution and some other right which is given by the statute. If the statute deals with a right which is not fundamental in character the statute can take it away but a fundamental right the statute cannot take away. Where, for example, a discretion is given in the matter of issuing licences for carrying on trade, profession or business or where restrictions are imposed on freedom of speech etc. by the imposition of censorship, the discretion must be controlled by clear rules so as to come within the category of reasonable restrictions. Discretion of that nature must differentiate from discretion in respect of matters not involving fundamental rights such as transfer of cases.....In other words the discretion vested has to be looked at from two points of view, viz., (1) does it admit of the possibility of any real and substantial discrimination, and (2) does it infringe on a fundamental right guaranteed by the Constitution? Article 14 can be invoked only when both these conditions are satisfied.

34. Applying the two tests laid down in the above case, the counsel for the petitioner contends that there is a possibility of a real and substantial discrimination in the present case inasmuch as the procedure provided under S. 46 (5A) is much more stringent than the one provided under S. 46 (2). It also impinges upon fundamental right guaranteed under Art. 19 (1) (f) of the Constitution. Section 46 (2) only gives power to the income tax Officer to forward to the Collector a certificate specifying the amount of arrears due and thereupon the Collector has to proceed to recover the amount specified therein as if it were an arrear of land revenue. If the Collector proceeds under the Land Revenue Act, the regular procedure for attachment is to be followed, opportunity is given to the assessee to file objections and the order passed by the Collector may be appealable to the proper authority.

But S. 46 (5A) gives power to the income tax Officer not only to require a person from whom money is due but from whom money may become due, to the assessee to pay up the amount to the Department. Such a power will effect the trade and business of the assessee and is also not examinable by any superior authority. There is, therefore, possibility of substantial discrimination. Section 46 (5A) provides another mode of recovery of tax. If the tax has been validly imposed, there was a liability to pay up the tax. If the debtors of the assessee are directed to pay up the tax dues they are only asked to discharge the liability of the assessee whether the liability is discharged by attachment or other modes of recovery provided under the Land Revenue Act or by simply issuing direction to the debtor of the assessee, to pay up the amount of debt due from them, does not to my mind, amount to any substantial discrimination.

That in some cases it may result in hardship to the assessee, is no ground for holding the law as substantially discriminatory. Ordinarily, the tax liability should not be recovered by coercive processes. The coercive processes should be

resorted to when all other means have been exhausted. But it cannot be said that the law on that account results in substantial discrimination. The provisions of Sec. 46 (5A) have already been quoted in extenso, and if no amount is due to the assessee, the debtor is not bound to pay anything. If no payment is made by the debtor under the notice further proceedings are to be taken by and before the Collector on the footing that the income tax Officer's notice has the same effect as an attachment of the Collector in the exercise of his powers, under the proviso to sub-sec. (2) of Sec. 46. There is, therefore, no substantial discrimination.

I have already dealt with the question as to how far Sec. 46 (5A) can be said to be violative of Art. 19 and in the view which I have taken on that question, it cannot be said that the discretion given under Sec. 46 (5A) impinges upon the fundamental right guaranteed by the Constitution. Where a discretion is given in the matter of granting or refusing a licence such a discretion affects the fundamental right, but where a discretion has been given in the matter of applying one or the other method of recovery of tax liability, the discretion cannot be said to impinge upon any fundamental right. I am, therefore, of opinion that section 46 (5A) does not violate the protection granted under Articles 14, 19 and 31 of the Constitution.

35. The last point raised was with regard to limitation. It was said that the order of the Central Board of Revenue under Sec. 34 (1B) was passed on the 31st January, 1956. The notice of demand was given on the 10th of February, 1956. The order under Sec. 46 (5A) was passed on the 16th March, 1959. This order was thus clearly beyond one year of the last day of the financial year in which the notice of demand was given. The contention raised by the petitioner is that the proceedings for recovery of the amount could not have been initiated beyond one year from the last day of the financial year in which the notice of demand was given, or at any rate within one year of the 30th September, 1957 inasmuch as the instalment due On that date was not paid in time and the whole amount became immediately due.

In the present case the default clause was taken advantage of by the Department when it passed the order on the 17th May, 1958 (Annexure N to the petition) to the effect that a sum of Rs. 5,32,000/- became payable forthwith with interest thereon from 30th September, as the instalment due on the 30th September, 1957 was paid on the 4th November, 1957, and the assessee was thus liable to pay interest of Rs. 2600/- on the aforesaid amount.

(35a) Section 46 (7) reads as follows:

Save in accordance with the provisions of sub-sec. (1) of Sec. 42 or of the proviso to Sec. 45 no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act :

Provided that the period of one year herein referred to shall

- (i) where an assessee has been treated as not in default under Sec. 45 as long as his appeal is undisposed of be reckoned from the date on which the appeal is disposed of;
- (ii) where recovery proceedings in any case have been stayed by any order of a Court, be reckoned from the date from which the order is withdrawn;
- (iii) where the date of payment of tax has been extended by an income tax authority, be reckoned from the date up to which the order is withdrawn;
- (iv) where the sum payable is allowed to be paid by instalments, from the date on which the last of such instalments was due.

36. It is very difficult to accept the argument of the petitioner's counsel in this behalf. The opening clause of sub-sec. (7) only lays down that the proceedings cannot be commenced after the expiration of one year from the last day of the financial year in which any demand is made. If the argument raised in connection with the notice of demand by the petitioner is accepted that no demand notice under Sec. 29 could be issued in regard to the liability under Sec. 34 (1B), the opening clause of sub-sec. (7) is not attracted and the question of the proviso does not arise. It is however conceded that sub-sec. (7) of Sec. 46 is attracted inasmuch as the words in the opening clause are not "a notice of demand under Sec. 29 ", but "when any demand is made".

The question, therefore, which arises for consideration is whether the proviso (iv) applies to the present case. When the sum is payable and is allowed to be paid in instalment the period of one year is to be counted from the date, when the last instalment was due. It is contended by the Advocate General that the last instalment was due in this case on the 25th March, 1958 and if that is the starting point of limitation the present order was well within time. The contention of the counsel for the petitioner is that the proviso is attracted only where there is no default clause, and secondly it is urged that the entire amount became due by virtue of the default clause on the 130th September, 1957 including the last instalment.

Therefore, the last instalment was due on the 30th September, 1957 within the meaning of proviso (iv) to Section 46(7). A number of authorities were cited by the counsel for both sides. Reference was made by the Advocate General to the case of AIR 1932 207 (Privy Council) . The counsel for the petitioner on the contrary relied upon the case of *Lalta Prasad and Others Vs. Gajadhar Shukul and Others* . The Privy Council was considering the case of a suit upon a mortgage under Article 132 of the Limitation Act. But the other case which is relied upon by the petitioner was a case under Art. 75 of the Limitation Act.

It is not necessary to examine those cases in detail. The answer to the question depends mainly on the interpretation of Sec. 46 (7) (iv) of the Act. The words used in Sec. 46 (7) proviso (iv) are not "when the last instalment becomes due", but when the "instalment was due". When the amount is payable by instalment,

it could not be said that if there has been a default in payment of any of the instalments the Department could take proceedings for recovery of the entire amount under Chapter VI, On a plain reading of Sec. 46 (7) proviso (iv), I am of opinion that it was attracted in this case.

The sum was allowed to be paid in instalments and consequently the period of one year was to commence from the date when the amount of the last instalment was due, that is the 25th March, 1958. Any right which might have accrued to the Department to enforce the default clause being a term of the contract is not relevant in interpreting the provisions of Sec. 46 (7) of the Act.

37. The Advocate General has further relied upon the proviso (iii) of Sec. 46 (7) in support of the contention that the proceedings are not barred by limitation. His contention was that the date of payment of the tax had been extended from time to time, and, as such, the period of one year was to be reckoned from the date from which the time for payment was extended. But as I am of opinion that the recovery proceedings are not barred, in view of proviso (iv) it is not necessary to examine this question.

38. In the result, therefore, we see no force in this petition and it is rejected with cost which we assess to Rs. 300/-.

C.P. Sinha, C.J.

39. I agree.