
(1959) 03 GAU CK 0002
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 : 18-03-1959

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 19, 21, 22

Citation : AIR 1960 Guw 76 : (1961) 41 ITR 80

Hon'ble Judges : Mehrotra, J

Bench : Single Bench

Judgement

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 u/s 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 u/s 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 this Taxation on Income (Investigation Commissioner) Act, 1947, the case of the petitioner was referred to the Income Tax Investigation Commission. An application was then made u/s 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.

3. 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 u/s 8A and a sum of Rs. 6,46,777 was determined under the said settlement by the said Hindu undivided family.

4. 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-section (4) of section 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 article 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.

5. After 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 section 2 of the Income Tax (Amendment) Act, 1954, these two sub-sections were reproduced and two other sub-sections numbers as (1C) and (1D) were added with effect from 17th July, 1954. These provisions will be referred to later.

6. The Income Tax Officer, Dibrugarh, issued three notices u/s 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.

7. The Central Board of Revenue by its letter dated 31st January, 1956, issued by Sri V. Gauri Shanker, 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 u/s 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 u/s 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.

8. 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 installments. The first installment of Rs. 1,00,206 had to be paid on or before 30th September, 1956, the second installment of Rs. 1,00,000 had to be paid on or before 31st December, 1956, the third installment of Rs. 1,00,000 had to be paid on or before 30th September, 1957, the fourth

installment had to be paid on or before 31st December, 1957, and the fifth installment had to be paid on or before 25th March, 1958.

9. One of the clauses of the terms of settlement is that in default of payment of any of the installments 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 realization. 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.

10. This demand notice also specified the installment and the dates when each installment was payable. The first two installments were paid in time by the petitioner. On 30th September, 1957, the petitioner sent two cheques of Rs. 50,000 which covered the third installment 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.

11. 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 installment 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 installment which fell due on the 31st December, 1957, and 25th March, 1958.

12. 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 installment plan prayed, for, but for the installment of Rs. 1,66,000 which fell due on the 31st December, 1957, the Department extended the period up to 28th February, 1958.

13. Thereafter the Income Tax Officer, Dibrugarh, asked the petitioner to pay up the installment of Rs. 1,66,000 due on the 31st December, 1957, by 28th February, 1958, and the amount of the last installment 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 installment was prayed for.

14. 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.

15. Thereafter the Income Tax Officer, Dibrugarh, sent a letter to the petitioner on 12th March, 1958, stating that in view of the Boards decision refusing to alter the installments, 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 installment of Rs. 2,66,000 was due to be paid by the petitioner on 25th March, 1958, and he asked the petitioner to arranger for deposit of the amount.

16. 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.

17. 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 installment 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.

18. The petitioner on 15th October, 1958, enclosed a cheque for 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, installment of Rs. 5,000 per month to clear up the demand. In the alternative he prayed that the sum of Rs. 3,32,000 still due from the petitioner in respect of the settlement arrived at u/s 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) for 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 (Head quarters) 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 collector u/s 46 (2) of the Act and the shares lodged by the petitioner as security would be put to sale.

19. 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 rejected and the Income Tax Officer was directed to issue notices u/s 46 (5A) of the Act.

20. The Income Tax Officer, Dibrugarh, in pursuance of the aforesaid instructions issued notices u/s 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 u/s 46 (5A) which was refused by the Commissioner of Income Tax. Thereupon the present petition was filed in this court on the 2nd April, 1959, with the prayers which I have already set out.

21. To this petition the Income Tax Officer, Dibrugarh, the Commissioner of Income Tax, Assam, Tripura and Manipur, Central Board of Revenue, New Delhi, and the Union of India have been impleaded as response to the notice issued by this court the Income Tax Officer, Dibrugarh, filed an affidavit in reply and had contested the allegations made and the points raised by the petitioner.

22. Notices issued u/s 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 u/s 46 (5A) are illegal inasmuch as there was no proper notice of demand u/s 29 of the Income Tax Act which was condition precedent for the initiation of the proceedings u/s 46.

23. In this connection it was urged that the liability in respect of the amount of settlement u/s 34 (1B) is not a tax liability and thus no notice of demand could be issued u/s 29 and further that the notice purporting to be a notice of demand does not fulfill the requirements of section 29 and does not conform to the form prescribed for a notice under the said section. Secondly, it was contended that the provision of section 34 (1B) and (1C) are beyond the legislative competence of the Parliament inasmuch as these sub-section 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.

24. In this connection it was urged that the language of section 46 (5A) when contrasted with the language of section 46 (2) shows that sub-section (5A) of section 46 does not apply to a liability other than tax liability. Lastly, it 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 u/s 46 (5A) are said to have been issued.

25. 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.

26. 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 section 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;

27. 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 section 22, and may proceed to assess or reassess the income, profits or gains of the assessee for all or any of the years referred to in clause (i), and thereupon the provisions of this Act, (excepting those contained in clauses (i) and (iii) of the proviso to sub-section (1) and in sub-section (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 has been issued under clause (a) of sub-section (1) or under sub-section (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 reassessment 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.

(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.

(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 reassessment 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.

28. Section 45 of the Act is as follows :

Any amount specified as payable in a notice of demand under sub-section (3) of section 23A or u/s 29 or an order u/s 31 or section 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 u/s 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.

29. Section 46, clause (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 of 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 sub-section 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 sub-section (2) of section 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 or 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.

30. Before a notice of demand can be issued u/s 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 section 29 will not be attracted and no notice of demand could be issued u/s 29.

31. 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 was contended by the petitioner that sections 45 and 46 are to be read together and no action can be taken u/s 46 (5A) of the Act unless the assessee is a defaulter within the meaning of section 45 of the Act.

32. A person can only be a defaulter u/s 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.

33. 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 section 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.

34. The provisions of sections 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 had been made applicable to the liability of the amount of settlement by virtue of section 34 (1C) and not on its own terms. Therefore, it cannot be said that the provisions of section 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 u/s 29 of the Act. If the assessee had been given a notice of demand, though not strictly in the form prescribed for notices u/s 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 present case did not conform to the prescribed form u/s 29 assumes that the liability of the amount of settlement is a tax liability within the meaning of section 29.

35. The scheme of section 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 u/s 22, sub-section (2), even though the period has expired and thereupon the Income Tax Officer can proceed to assess or reassess the income, profits or gains of the assessee. The assessee to whom notice has been given u/s 34 (1A) can apply u/s 34 (1B) to the Central Board of Revenue to have the matters relating to his assessment settled.

36. 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 sections 34(1A) and 34(1B) the liability of the amount of settlement is a tax liability. It was contended that the tax 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.

37. Strictly speaking the amount could not be tax, but the liability is none the less in respect of the tax which is due from the assessee for the period 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 u/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 tax liability within the meaning of section 29 of the Act.

38. In that view of the matter the next question to be considered is how far the notice given to the assessee on February 10, 1956, "annexure C" to the petition -

fulfills the requirements of section 29. It was contended by the counsel for the petitioner that the notice u/s 29 is to be in a prescribed form. Rule 20 of the Rules framed under the Act provides that a notice of demand u/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.

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

40. 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 rules 20 and 20A in terms refer to section 29 of the Act. Rule 20A lays down that notwithstanding anything contained in rule 20, a particular form is prescribed for assessment u/s 18A. As there is no reference to section 29 in rule 49, any notice issued under rule 49 also shows that it is in respect of the sum of money specified in an order under sub-section (1B) of section 34. Section 34 (1B) does not provide for any notice. I do not think that there is much substance in this contention.

41. Once it is accepted that the liability under the order of settlement is a tax liability, what section 29 required 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 purposes of the Act and for the ascertainment and determination of any class of income. Clause (2) (e) of section 59 gives power to the Central Board of Revenue to frame rules, providing for any matter which by the Act is to be prescribed.

42. One of the matters which by the Act is to be prescribed is the form of notice of demand u/s 29. The central Board of Revenue, therefore, was empowered to frame rules u/s 59(2)(e) providing for the form of the notice of demand u/s 29 and in the exercise of the aforesaid power rule 49 was framed. Section 29 itself does not give any power to frame rules and the power for enacting rule 49 is to be found in section 59. It is, therefore, not necessary to refer to section 29 in rule 49 itself. The fact that in rules 20 and 20A there is a reference to section 29 is not of much consequence. An argument was addressed in this connection to the effect that the power given to frame rules u/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.

43. Any notice, therefore, of demand in respect of a sum due under the order passed u/s 34 (1B) cannot be said to be a matter which is prescribed by the Act. I have already pointed out section 29 also requires that a form of notice to be issued u/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 rule 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 rules 20 and 20A.

44. In my opinion, therefore, if the liability under the settlement is not a tax liability, section 29 would not be attracted and no notice could be given u/s 29. The question, therefore, of the assessee being a defaulter would not arise and it cannot be said that section 46 cannot be applied to the recovery of the aforesaid amount as no notice u/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 section 29 and the assessee not having paid up the amount specified in the said notice was a defaulter and the provisions of section 46 were attracted.

45. As regards the second contention that section 34 (1B), (1C) and (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 enumerates 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 the meaning of the 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 the 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 section 34 (1B), (1C) and (1D) are beyond the legislative competence of the Parliament.

46. The constitutionality of section 46 (5A) has been challenged both on the ground that it violates the provisions of articles 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 article 19(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 u/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 article 19(5).

47. 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 article 265 of the Constitution read with article 245 and the legislative List. As such, its validity cannot be tested with reference to the requirements of article 19 of the Constitution. The contention is that articles 19, 21, 31(1) deal with what is known as the police power 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 article 265 of the Constitution. If the purpose of the taxing law is to augment the revenue of the state, its validity cannot be tested with reference to the requirement of articles 19(5). Such a law falls outside the ambit of article 19 of the Constitution. The contention in reply by the counsel for the petitioner is that article 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 article 19. There is nothing in article 19 or article 265 to make such a law immune from attack on the ground of violation of the fundamental rights guaranteed under article 19. It was alternatively 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 article 19 of the Constitution, but when it provides for the recovery in a manner so as to affect the fundamental right guaranteed under article 19(1) (f) of the Constitution without laying down any rules for the guidance of the Income Tax Officer when and in what circumstances the manner provided u/s 46(5A) is to be adopted, the validity of such a provision can be tested on the grounds of articles 19(5) of the Constitution.

48. 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, page 716). In the case of *Provident Bank v. Billings*, the Supreme Court of America referring to the taxing power observed :

This vital power may be abused, but the Constitution of the United States was not intended to furnish the only security where there is taxation, as well as against unwise legislation generally.

49. 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 the citizen enumerated under article 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 citizens; but the purposes of enacting a taxing legislation cannot be said to be regulatory one.

50. 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.* 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 *Ananthakrishnan v. State of Madras*.

51. The validity of the Madras Stamp Act of 1922 by which a fee of Rs. 625 was prescribed for enrollment as an advocate was challenged and it was contended that the petitioner as a citizen of Indian 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 article 19(6) the 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 do we find any prohibition against taxation of fundamental rights. Part III does not contain any such inhibition.

52. Dealing with the argument that the fundamental rights are under the Constitution in a paramount position and 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 XII 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 the 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.

53. 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 restrains has no application to the

laws of taxation.

54. In the case of *Guruviah Naidu and Bros. v. State of Madras* 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 therefore 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 rule 5 satisfied the test of reasonableness laid down by article 19(6) the restriction imposed would be unconstitutional. There is, however, one 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 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 article 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 article 19(6) and, therefore, not subject to the tests of a valid legislation under that provision. The saving in article 31, sub-clause (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.

55. Cooley in his *Constitutional Limitations* dealing with the taxing power observed :

It is unlimited in its range, acknowledging in its very nature no limits so that security against its abuse is to be found only in the responsibility of the legislation which imposes the tax to the constituency who are to pay.

56. If it is accepted that the activities which are protected under article 19 are immune from a tax, it will lead to very anomalous results. Cases where the law under which a 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 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 article 19, has to be tested with reference to article 19. In the case of *Ramjital v.*

Income Tax Officer, Mohindargarh, an application was made under article 32 of the Constitution for an appropriate order for the protection of what the petitioner claimed to be his fundamental rights guaranteed by articles 19 and 31. On November 14, 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 sections 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 article 32 of the Constitution.

57. 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 petitioners income was illegal. The State by insisting on collecting the tax so illegally assessed was threatening to invade the petitioners fundamental right to property guaranteed by article 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 article 31(1). What the petitioner in that case intended to enforce was the right not to be taxed except in accordance with law under article 265 of the Constitution.

58. It was observed that clause (1) of article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise article 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.

59. In my opinion, the protection against imposition and collection of taxes arises directly from article 265 and is not secured by clause (1) of article 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 article 19. This case only lays down that any attempt to enforce the guarantee given to a citizen under article 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 article 31(1) not to deprive a citizen of his property, without the authority of law, does not apply to a taxing statute.

60. It is true that the case was not one where the validity of a taxing law was challenged on the ground of violation of article 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 article 19 of the Constitution.

61. 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 article 19. But if the State has acted in the exercise of its taxing power, the limitations imposed on the exercise of police powers under article 19 cannot be placed on the exercise of the taxing power of the State.

62. In my opinion, therefore, the validity of the law which provides for a levy or collection of a tax cannot be tested with reference of article 19 of the Constitution. Such a law is outside the ambit of article 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 article 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 article 19(1)(f), the law laying down such a procedure will be void under article 13 of the Constitution.

63. This argument overlooks the distinction between the case where the law itself has the effect of infringing the fundamental right guaranteed under article 19 and the case where any action taken under a valid law results in the infringement of article 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 article 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 article 19. Moreover, the result of acting u/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.

64. Such a law, if at all, is one dealing with the deprivation of property and will thus be outside the scope of article 19. In the case of *Collector of Malabar v. Erimmal Ebrahim Hajee* the question which arose for consideration was whether the provisions of section 46(2) of the Income Tax Act and section 48 of the Madras Revenue Recovery Act were ultra vires. The respondent in that case was arrested in pursuance of a warranty issued by the Collector of Madras u/s 48 of the Madras Revenue Recovery Act. A certificate had been issued by the Income Tax Officer u/s 46(2) of the Act against the respondent and the Collector proceeded u/s 48 of the Madras Revenue Recovery Act, 1864, and issued a warrant against the respondent.

65. On this a petition u/s 491, Criminal Procedure Code, was filed challenging the validity of section 46 (2) of the Income Tax Act and section 48 of the Madras Act. The validity of these two sections was challenged on the ground that it offended against articles 14, 19, 21 and 22 of the Constitution. Dealing with the question

of the infringement of article 19 of the Constitution, it was observed as follows :

It was held by the majority of the learned judges in *A. K. Gopalan v. State of Madras* that the right 'to move freely throughout the territory of India' referred to in article 19 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 article 21, he cannot claim to exercise any of the rights guaranteed by sub-clause (a) to (e) and (g) of article 19(1), for those rights can only be exercised by a free man. In that sense, therefore, article 19(1)(d) has to be read as controlled by the provisions of article 21, and the view that article 19 guarantees the substantive right and article 21 prescribes a procedural protection is in correct. This decision must now be taken as having settled once for all that the personal rights guaranteed by sub-clauses (a) to (e) and (g) of article 19 are in a way dependent on the provisions of article 21 just as the right guaranteed by sub-clause (f) of article 19(1) is subject to article 31. If the property itself is taken lawfully under article 31, the right to hold or dispose of it perishes with it and article 19(1)(f) cannot be invoked. Likewise, if life or personal liberty is taken away lawfully under article 21, no question of the exercise of fundamental rights under article 19(1) (a) to (e) and (g) can be raised.

66. This case, therefore, is an authority for the proposition that if the liberty of a person has been affected under article 21 or if the individual has been rightfully deprived of his property under article 31 of the Constitution, the question of exercising the rights guaranteed under article 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 article 19 is subject to article 31 of the Constitution. But it is not an authority for the proposition that article 19 is subject to article 265 of the Constitution. What this case, to my mind, lays down is that once a person's personal liberty has been affected or question of infringement of the guarantee under article 19 will not arise. Such a law falls outside the ambit of article 19.

67. The deprivation is also not hit by article 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 article 31(2) has been violated. If article 31(1) or 31(2) has not been violated and the law falls outside the ambit of article 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 section 46 (5A) gives an unfettered discretion to Income Tax Officer and is, therefore, violative of article 19 being an unreasonable restriction on the right of the petitioner to hold and possess property cannot be accepted.

68. The next ground on which the validity of section 46 (5A) is challenged is that it violates the guarantee of equal protection of laws under article 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 that the one provided for u/s 46 (2). The germ of discrimination lies in the conferment of arbitrary and naked power on the 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.

69. Such a power, it is contended, contains in itself the germ of discrimination and is hit by article 14 of the Constitution. It was contended by the Advocate-General in reply that the law applies equally to all the assesses. It makes no discrimination between assesseees. 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 section 46(2) has been held not to violate article 14 and the same reasoning will apply to section 46 (5A) of the Act. Article 14 had been the subject-matter of interpretation in various decisions of the Supreme Court, it is not necessary to refer to all the cases.

70. Each law will have to be examined on its own facts and circumstances in order to determine whether it infringes article 14 of the Constitution. That a special and speedier method of recovery of the tax dues had 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 of maintain the Government can also not be denied.

71. 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 appraisalment of property for taxation, summary modes of procure 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.

72. To the same effect is the observation in Cooley's Constitutional Limitation, 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.

73. It cannot, therefore, be said that Chapter VI of the Act laying down summary method of realisation of the tax dues, is hit by article 14 of the Constitution. The question in the present case is if there are several modes of recovery provided under the Act, and procedure being more stringent than the other and if the

assessing authority is given power to apply any one of these methods at this discretion to any of the assesses, can it be said that such law giving wide discretion unregulated by the Act infringes article 14 of the Constitution ?

74. The conception of equality before the law does not involve the idea 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 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 v. 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 agents... 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 article 14 of the Constitution.

75. In the later case of Kathi Raning Rawat v. State of Saurashtra the Act was held to be constitutional. In the case of Kedarnath v. State of West Bengal both these cases were considered and it was observed by Patanjali Sastri, C. J., that :

Now, it is well settled that the equal protection of the laws guaranteed by article 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 would be enacted, section 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 by ordinary courts.

In other words section 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 impend in *State of West Bengal v. 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 circumstances, 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 fulfillment 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 indicted in what classes of case 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.

76. That there should be a special and summary procedure of 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 the *State Railroad Tax Cases* 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.

77. Chapter VI which, therefore, provides for special procedure cannot be struck down being in violation of article 14. The contention, as I have already referred to was that the germ of discrimination is to be found in section 46(5A) which gives unregulated power to the Income Tax Officer to apply the procedure provided under the aforesaid sub-section against some assesses and to apply the procedure provided u/s 46(2) which is less stringent against the other assesses placed in similar circumstances.

78. In the case of *Kashiram Agarwalla v. Collector of 24-Parganas* the question which came up for consideration was the validity of section 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 article 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 article 14 of the Constitution.

79. 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 a warrant of arrest. I shall deal with those cases of the Supreme Court later but observations quoted above are opposite to the facts of the present case.

80. In the case of *Collector of Malabar v. Erimmal Ebrahim Hajee* to which I have already referred, it was held that section 48 of the Madras Revenue Recovery Act and section 46(2) of the Income Tax Act were not violative of article 14.. In this case so far as the question of violation of article 14 was concerned, the reasoning 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 v. B. M. Desai* the validity of section 46(2) of the Income Tax Act and section 13 of the Bombay Revenue Recovery Act was upheld. The constitutionality of section 46(2) was attacked mainly on two grounds, firstly, on the ground that section 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-section (2) of section 46.

81. The second ground on which the protection under article 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 procedures provided, any uncontrolled discretion given to the executive authority to select either of the two procedures cannot be violative of article 14 of the Constitution.

82. Reliance was placed on the case of *Dwarka Prasad Laxmi Narain v. State of U. P.* 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 interests 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 article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in reasonableness.

83. This case dealt with the question of the ambit and scope of article 19(1)(g) and clause (6) and the question of article 14 was not examined in this case. Next, reliance was placed on the case of *Saghir Ahmed v. State of U. P.* In this case the validity of the U. P. Road Transport Act was challenged. Reliance was placed on the following passage at page 731 of the report :

The other contention of Mr. Pathak in regard to article 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 run 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 article 14 of the Constitution.

84. In that case, however, it was held that the discretion to be exercised by the State was regulated discretion guided by statutory rules. In the case of *Pannalal Binjarj v. Union of India* the question was considered under what circumstances the law giving discretion to an executive body can be struck down as violative of article 14 of the Constitution. The validity of section 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 one Income Tax Officer sub-ordinate 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.

85. The validity was attacked on the ground that section 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 alike situation and transfer the case from one State to another 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 assesses similarly situated with him would continue to be assessed at the place where they reside or carry on business u/s 64 (1) and (2) of the Act.

86. The discrimination involved in section 5 (7A) is substantial in character and, therefore, infringes the fundamental right enshrined in article 14, and it also infringes article 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 general standard and would, therefore, not amount to the denial of equal rights. The law has been laid down at page 588 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 state 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 be differentiated from discretion in respect of matters not involving fundamental rights such as transfers 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 impinge on a fundamental right guaranteed by the Constitution ? Article 14 can be invoked only when both these conditions are satisfied.

87. Applying the two test 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 u/s 46 (5A) is much more stringent than the one provided u/s 46 (2). It also impinges upon the fundamental right guaranteed under article 19(1)(f) of the Constitution. Section 46 (2) only gives power to the Income Tax Officer to forwards 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.

88. But section 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 affect 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 is 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.

89. 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 section 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 before the Collector of the footing that the Income Tax Officers notice has the same effect as an attachment by the Collector in the exercise of his powers, under the proviso to sub-section (2) of section 46. There is, therefore, no substantial discrimination.

90. I have already dealt with the question as to how far section 46 (5A) can be said to be violative of article 19 and in the view which I have taken in that question, it cannot be said that the discretion given u/s 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.

91. The last point raised was with regard to limitation. It was said that the order of the Central Board of Revenue u/s 34 (1B) was passed on the 31st of January, 1956. The notice of demand was given on the 10th of February, 1956. The order u/s 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 installment due on that date was not paid in time and the whole amount became immediately due.

92. In the present case the default clauses 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 installment due on the 30th September, 1957, was paid on the 4th November, 1957, and the assessee was liable to pay interest of Rs. 2,600 on the aforesaid amount.

93. Section 46 (7) reads as follows :

Save in accordance with the provisions of sub-section (1) of section 42, or of the proviso to section 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 being in default u/s 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 time for payment had been extended;

(iv) where the sum payable is allowed to be paid by installments, from the date on which the last of such installments was due.

94. It is very difficult to accept the argument of the petitioners counsel in this

behalf. The opening clause of sub-section (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 u/s 29 could be issued in regard to the liability u/s 34 (1B), the opening clause of sub-section (7) is not attracted and the question of the proviso does not arise. It is, however, conceded that sub-section (7) of section 46 is attracted inasmuch as the words in the opening clause are not "a notice of demand u/s 29", but "when any demand is made."

95. The question, therefore, which arises for consideration is whether proviso (iv) applies to the present case. When the sum is payable and is allowed to be paid in installments the period of one year is to be counted from the date when the last installment was due. It is contended by the Advocate-General that the last installment 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 30th September, 1957, including the last installment.

96. Therefore, the last installment 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 *Lasa Din v. Gulab Kunwar*. The counsel for the petitioner on the contrary relied upon the case of *Lalta Prasad v. Gajadhar Shukul*. 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 article 75 of the Limitation Act.

97. It is not necessary to examine those cases in detail. The answer to the question depends mainly on the interpretation of section 46 (7) (iv) of the Act. The words used in section 46 (7), proviso (iv), are not "when the last installment becomes due", but when the "installment was due". When the amount is payable by installment, it could not be said that if there has been a default in payment of any of the installments the Department could take proceedings for recovery of the entire amount under Chapter VI. On a plain reading of section 46 (7), proviso (iv), I am of opinion that it was attracted in this case.

98. The sum was allowed to be paid in installments and, consequently, the period of one year was to commence from the date when the amount of the last installment 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 section 46 (7) of the Act.

99. The Advocate-General has further relied upon proviso (iii) of section 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.

100. In the result, therefore, we see no force in this petition and it is rejected with costs which we assess at Rs. 300.

C.P. Sinha, C.J.

I agree.