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(1958) 04 AP CK 0010

In the Andhra Pradesh High Court

Case No : WA No''s. 183 of 1956 and 9, 15, 16 and 17 of 1958

Vutukuri Kanakiah APPELLANT

Vs

Additional Income Tax Officer RESPONDENT

Date of Decision : 16-04-1958

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 115
Income Tax Act, 1922 — Section 23(1), 23B, 31, 33, 33A
Sea Customs Act, 1878 — Section 30

Citation : (1958) 04 AP CK 0010

Hon'ble Judges : Chandra Reddy, O.C.J.;Seshachelapathi, J;Kumarayya, J

Bench : Full Bench

Advocate : D. Narasaraju, V. Neeladri Rao, P. Rama Rao and V. Vedantachari, for the Appellant;

Final Decision : Dismissed

Judgement

Kumarayya, J.—This is an application under article 226 of the Constitution of India for issuing a writ of certiorari to quash the order of the Additional Income Tax Officer, Visakhapatnam, dated March 31, 1955. The petitioner who is one of the partners of the registered firm of Messrs. Vuppala Peda Venkataramaniah and Sons, Oil Mills, Anakapalli, submitted a return of Income Tax on August 31, 1951, for the assessment year 1951-52. He declared his income as Rs. 30, 823 including therein a provisional sum of Rs. 10, 986 as his share of income from the aforesaid firm. As the firm''s assessment was not completed by that time he requested the Department to accept that share of income provisionally as correct income and make assessment subject to the condition that it may be revised, if necessary, by the Department u/s 35 as and when the firm''s assessment is completed. The Income Tax Officer, as is evident from the order dated October 31, 1951, acceded to his request, made an assessment and determined the sum payable as Rs. 5, 841-1-0. The assessment of the firm u/s 23(1) was completed on March 31, 1955, and the total income was computed at Rs. 1, 10, 934 for the assessment year 1951-52. According to this, the assessee''s correct share of income was found to be Rs. 27, 279 instead of Rs. 10, 986 as adopted in the original assessment. The Income Tax Officer thereupon revised the assessment of income in pursuance of the agreement at the time of the original assessment u/s 35 of the Act and passed the impugned order. The petitioner has challenged the legality of the order made and the competence of the authority purporting to make the order u/s 35 of the Income Tax Act Several contentions were raised by the respondent. It was urged that as the assessee had expressly agreed to a revision of his income and as the provisional assessment was made at his instance, it is not open to him to turn round when the assessment of the firm warrants further taxation on him and say that the Income Tax Department had no longer any authority to revise the assessment. His second contention is that the earliest assessment being made on a provisional basis the assessee had no vested right to any finality of that assessment. The third contention is that since he has a remedy by way of revision, he cannot invoke the writ jurisdiction of this court under article 226 of the Constitution of India. It is further urged that as the share income from the partnership firm is part of the income on which the assessment was made, the record of the assessment of the firm''s income in so far as the petitioner''s share is concerned is in fact a part of the record of the assessment of the petitioner''s income. The Income Tax authority could therefore u/s 35(1) rectify the mistake apparent from such record. Lastly, it was urged that the provisions of section 35(5) did apply to this assessment as the provision is merely declaratory of the pre-existing law and has retrospective operation Three points emerge out of the rival contentions which require consideration :

(i) is the original assessment a provisional one and could be varied at any time on the completion of the firm''s final assessment and what is the effect of the petitioner''s agreement in writing ;

(ii) did the provisions of section 35(5) apply to such assessments made in the year 1951 and

(iii) whether the impugned order has been validly made u/s 35(1) of the Income Tax Act

2. I will take up the second point first, for if that is decided against the petitioner, that will be the end of the matter and the petitioner would fail. Section 35(5) has been introduced by virtue of Act XXV of 1953, which received the assent of the President on May 24, 1953. It reads as below

" (5) Where in respect of any completed assessment of a partner in a firm it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm u/s 31, section 33, section 33A, section 33B, section 66 or section 66A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or, if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a

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mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm. "

3. Section 1(2) reads thus

" Subject to any special provision made in this behalf in this Act, it shall be deemed to have come into force on the 1st day of April, 1952.

"Though the assent was given in 1953, the amendment became part of the Act on April 1, 1952, itself according to the clear terms of section 1(2). As the original assessment was made in 1951, the question for consideration is, whether this Act has greater retrospective operation than the language of section 1(2) renders it necessary. It may be remembered that section 35(1) is a general provision for rectification of mistakes apparent from the record and section 35(5) is only a special provision to meet certain contingencies. It provides that where the share of a partner in the profit or loss of the firm is not included in the assessment of the partner or if included is not correct, the inclusion of the share in the assessment or the correction thereof shall be deemed to be a rectification of a mistake apparent from the record within the meaning of sub-section (1). In other words, what is not in fact a mistake apparent from the record within the meaning of section 35(1) is made to be treated so in the specified cases by the deeming provision in section 35(5). The legal fiction has been introduced by the amendment. Besides, a fresh starting point for computing the period of limitation in such cases has also been introduced. This would show that the amendment is not but declaratory of the pre-existing law as alleged. It in fact affects the rights of the assessee in the specified case not to be taxed as the pre-existing provision of section 35 had warranted. This aspect has been elaborately dealt with in Lakshminarayana Chetty v. First Additional Income Tax Officer, Nellore, with which I respectfully agree. Further as there is nothing in the section which would render the amendment more retrospective than its language, it is impossible to hold that section 35(5) can cover the assessments made prior to April 1, 1952. The impugned order therefore is not covered by section 35(5) It is then argued that the original assessment of the petitioner should be deemed to be a provisional assessment which can be re-opened and rectified at any time till a final assessment is made. It would appear that the original assessment order dated October 31, 1951, purports to have been made u/s 23(1) of the Income Tax Act and not u/s 23B. Section 23B is the provision which empowers the Income Tax Officer to make a provisional assessment. Sub-section (2) provides that a partner of a firm may be provisionally assessed in respect of his share in the firm''s income, if the firm''s return has been received, though the return of the partner may not have been received. Such is not the case here. But at the same time, it must be remembered that for an assessment u/s 23(1) which is final, a return made u/s 22 should be correct and complete. The return that was submitted so far as his share in the firm was concerned cannot be said to be

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correct or complete. It was not considered by the parties as such and was therefore made subject to revision if need be. Nevertheless, the assessment was made under a section which would suggest that it was a final assessment, though its finality in point of fact is open to doubt in view of the offer and acceptance stated therein. However, when once a final assessment is made, as observed in Commissioner of Income Tax v. Khemchand Ramdas, it cannot be reopened except in the circumstances detailed in sections 34 and 35 of the Act and within the time limited by those sections. So then, the point for consideration is, whether section 35(1) applied to the present case. It would apply only if what the Income Tax Officer has done is in rectification of the mistake apparent from the record. There should be a mistake and that should appear from the record. The record contemplated must ordinarily be the record of final assessment of the assessee himself though the mistake discovered later on may be the product of any subsequent circumstance. In Commissioner of Income Tax v. Khemchand Ramdas what was a correct assessment of a registered firm was held to be a mistake in consequence of subsequent cancellation of registration. The following observations of their Lordships at page 426 are worthy of mention"

It is not necessary to determine that question inasmuch as, in their Lordships'' opinion, the case clearly would have fallen within the provisions of section 35 had the Income Tax Officer exercised his powers under the section within one year from the date on which the earlier demand was served upon the respondents. For, looking at the record of the assessments made upon them as it stood after the cancellation... it would be apparent that a mistake had been made in stating that no super-tax was leviable. The Income Tax Officer took no further step, however, until May, 1929, and by then he was hopelessly out of time whichever of the two sections was applicable. "

4. That was a case where the assessee originally was assessed u/s 23(4) as a registered firm and no super-tax was levied but later on the registration was cancelled and the Income Tax Officer assessed the firm to super-tax after the lapse of one year from the original assessment which was deemed to be final. As would appear from the observations of their Lordships the order effecting the cancellation was deemed to be part of the record and the record of assessment made after the cancellation of the registration was considered for arriving at a conclusion whether there was a mistake apparent, which needed rectification. But it is significant that in this case it was the record of the assessee himself though discovery of mistake was the result of a subsequent event which the parties did not imagine at the time of final assessment. In Habibullah v. Income Tax Officer V Circle, Madras, the Madras High Court had to deal with the question in Somewhat different circumstances. There the partner''s income was determined before the firm''s assessment was completed and mistake was discovered as a result of the firm''s assessment. The following is the line of argument adopted and observations made in the case

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" The learned counsel for the Department was, in our opinion, right in his contention, that in the circumstances of this case, the assessment of Mohideen for 1946-47 and 1947-48 could have been rectified u/s 35(1) itself, as it was really a case of rectifying a mistake apparent on the face of the record of assessment. The assessment orders dated 20th February, 1950, specifically referred to the shares of the assessee in the losses sustained by the two firms of which he was a partner, Dinshaw & Co., and Palaniappa Chettiar...That the figures shown in the orders of assessee''s assessment on 20th February, 1950, were incorrect, tested by another portion of the record of that assessment, the assessment of Dinshaw & Co., and Palaniappa Chettiar which were completed only later, did not admit of any controversy. The assessment of Dinshaw & Co. was completed on 31st October, 1950, and that of Palaniappa Chettiar on 30th June, 1951. At any time thereafter, when the mistake on the face of the assessee''s record of assessment was established, the Income Tax Officer could have rectified the assessment of the assessee u/s 35(1). But that rectification could have been validly effected only if it had been ordered within four years from 20th February, 1950, as that was all the period for which section 35(1) provided. "

5. This was a case where the partner''s assessment was completed as in the present case accepting provisionally the estimate of his share of the profit or loss in the firm, the assessment of which was not completed and it was discovered later as a result of the firm''s assessment that the partner''s assessment was incorrect. My attention is invited to the dictum of a Division Bench of this court in Lakshminarayana Chetty v. First Additional Income Tax Officer, Nellore. It was a case where a partner was assessed to tax before the assessment of the firm was completed and the following were the observations made

" But it is said that section 35 of the Act even without the amendment would have enabled the Income Tax authorities to reopen the assessment on the ground that there was a mistake apparent from the record. But from the record of final assessment, it is impossible to say that there was a mistake apparent from the record for the assessing authority accepted a certain figure as representing the share of the assessees in the firm and made a final assessment. The mistake is not in the record but by a subsequent assessment of the firm, it was discovered that the earlier assessment was wrong to the extent of the assessees'' share in the firm. It is not a mistake apparent from the record but a mistake discovered from the disposal of another case. "

6. It does not appear from the facts of that case that the assessee therein had made a similar request as in this case and that the Income Tax Officer on the basis of the same had made the assessment with due reference to offer and acceptance. It does not also appear that the assessment order suggested in any manner that it was provisional inasmuch as by virtue of agreement it was open to revision on the completion of the firm''s assessment. That case therefore, on facts, is distinguishable and the observations therein evidently were confined to

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the facts of that case. The question whether there is a mistake apparent from the record is always a question of fact. There can be cases where the record of the firm so far as the share of the partner is concerned is by agreement made the record of the partner''s assessment. If the assessment is expressly made subject to that agreement, it cannot be said that the firm''s assessment record does not form part of the record of the partner for the purpose of ascertainment of his share in income. Any mistake discovered would therefore fall within the ambit of section 35(1) of the Act. The order passed by the Income Tax Officer, rectifying this mistake cannot be said to be without jurisdiction. There is yet another ground which in my opinion does not entitle the assessee to a discretionary relief by this court in exercise of its extraordinary prerogative powers. There was no statutory limit of time in which the assessment under the provisions of sections 23 and 29 should have been completed. The Income Tax Officer, therefore, would have but for the promise of the assessee withheld his hand from making any assessment till the completion of the firm''s assessment. The assessee as is clear from the record made the Income Tax Officer act on his word and writing that his share of profit and loss in the firm as shown in the return may be treated as provisionally correct and may be rectified after the completion of the firm''s assessment. In fact the assessment order bears clear reference to this and to the provisional nature of the assessment to that extent. The question under these circumstances is, can the assessee now turn round and dispute the competence of the Income Tax authority to rectify the mistake and can he in law and equity be helped out of the situation created by his own acts and conduct to the detriment of the other party? No doubt after the final assessment an assessee has a vested right not to be assessed to enhanced tax save in cases falling under sections 34 and 35, but it cannot be said that he cannot waive this right or benefit without any offence to the public policy. He expressly waived his right and made the Income Tax authority act on such promise. His conduct ought not therefore to entitle him to the benefit of the discretionary relief under article 226 of the Constitution. Where a party has not come with clean hands to the court while invoking the extraordinary jurisdiction, it is only just and proper that he should be made to seek the ordinary remedy open to him. It is no doubt stated that a notice was not issued before the rectification of the mistake but under the circumstances of the case this omission is not material and has in no way resulted in prejudice. I, therefore, dismiss this petition. No order as to costs [The petitioner appealed.]

7. The Advocate-General (D. Narasaraju) for V. Neeladri Rao and P. Rama Rao, for the appellant V. Vedantachari for the respondent

Chandra Reddy, Offg. C.J.

1. This appeal is filed against the judgment of our learned brother Mr. Justice Kumarayya who dismissed a petition for the issue of a writ of certiorari to quash the order of the Additional Income Tax Officer, Visakhapatnam, dated 31st March, 1955. The facts giving rise to this appeal may be briefly stated

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2. The appellant, one of the partners of a registered firm of Messrs. Vuppala Peda Venkata Ramaiah & Sons, submitted a return of Income Tax on 31st August, 1951, for the assessment year 1951-52. He declared an income of Rs. 30, 823 including therein a provisional sum of Rs. 10, 986 as his share of income from the aforesaid firm. At that time, the firm''s assessment was not completed. Therefore, the assessee requested the taxing officer to accept his share of the income from the profits derived by the firm as shown in the return as correct subject to the condition that the assessment may be revised by the Department as and when the firm''s assessment was completed. The Income Tax Officer acceded to the request and that is not in dispute now. Accordingly, he made an assessment determining the tax payable as Rs. 5, 841. Finally, the assessment of the firm was made on 31st March, 1955, u/s 23(1) computing the total income at Rs. 1, 10, 934 for the assessment year 1951-52, which means the appellant''s correct share of the income was at Rs. 27, 279 and not Rs. 10, 986 as adopted in the original assessment. The Income Tax Officer thereupon made the final assessment on the basis of this income as per the agreement reached between him and the assessee and passed an order that was the subject-matter of the challenge before the learned Judge and before us too. Several points were debated before the learned Judge but only two or three contentions are relevant for the purpose of this enquiry. One is whether the order can be said to have been made u/s 23B of the Indian Income Tax Act (hereinafter called the Act) and whether section 35 of the Act is attracted to the instant case The first problem to be solved is whether the assessment made in the year 1951 is a provisional or a final one. The answer to this depends upon the interpretation of section 23B of the Indian Income Tax Act. Section 23B recites

" (1) The Income Tax Officer may at any time after the receipt of a return made u/s 22, proceed to make in a summary manner, a provisional assessment of the tax payable by the assessee, on the basis of his return and the accounts and documents, if any, accompanying it, after giving due effect to (i) the allowances referred to in paragraph (b) of the proviso to clause (vi) of sub-section (2) of section 10, and (ii) any loss carried forward under sub-section (2) of section 24

(2) A partner of a firm may be provisionally assessed under sub-section (1) in respect of his share in the firm''s income, profits and gains, if its return has been received although the return of the partner himself may not have been received

(3) A firm may be provisionally assessed under sub-section (1) as if it were an unregistered firm unless the firm fulfils such conditions as the Central Government may by notification in the official Gazette, specify in that behalf

(4) There shall be no right of appeal against a provisional assessment made under sub-section (1)

(5) For the avoidance of doubt, it is hereby declared that the provisions of section 45 (except the first proviso) and section 46 apply in relation to any tax payable in pursuance of a provisional assessment made under sub-section (1) as

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if it were a regular assessment made u/s 23

(6) Income Tax paid or deemed to have been paid u/s 18 or section 18A in respect of any income provisionally assessed under sub-section (1) shall be deemed to have been paid towards the provisional assessment

(7) After a regular assessment has been made u/s 23, any amount paid or deemed to have been paid towards a provisional assessment made under sub-section (1) shall be deemed to have been paid towards the regular assessment ; and where the amount paid or deemed to have been paid towards the provisional assessment exceeds the amount payable under the regular assessment the excess shall be refunded to the assessee

(8) Nothing done or suffered by reason or in consequence of any provisional assessment made under this section shall prejudice the determination on the merits, of any issue which may arise in the course of the regular assessment u/s 23. "

3. It is plain from sub-section (1) that it confers power upon the Income Tax Officer to make provisional assessment in advance of regular assessment. At the relevant time the taxable income of the firm could not be determined and consequently the tax exigible in regard to the share of the income of the appellant could not be fixed. That being so, the appellant requested the Department to make an assessment on the basis of the figure mentioned in his return and that in the event of larger income being found to have been received by him he had no objection to have the assessment made on the basis of the correct figure. It is in compliance with this request of the appellant that the assessing authority computed the taxable income of the assessee. In this situation, we think that the assessment comes within section 23B(1)

4. Assuming it is not governed by that sub-section we feel that this could be sustained under sub-section (2). It is urged by the learned Advocate-General that sub-section (2) comes into operation only when the partner has not submitted his return and that it excluded the case of a partner submitting a return. We cannot accede to this contention. We think this provision enables the officer concerned to invoke the sub-section even in a case where the return of the partner has not been received. This interpretation of ours receives support from the language used, namely, " although the return of the partner... has not been received " which means " even if the return of the partner has not been received ". If the intendment of the sub-section was to exclude cases of partners submitting the return, the appropriate language would have been " if the return of the partner himself has not been received ". To accept the contention of the learned Advocate-General is to restrict unduly the scope and ambit of the section. For these reasons, we feel that the order of assessment as made in the year 1950-51, was only a provisional one having regard to the circumstances in which it came into being and that the order falls within the purview of either of the two sub-sections of section 23B There is another consideration which applies

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to the contention of the appellant. Admittedly, the assessment made on 31st October, 1951, was the result of the request of the appellant as mentioned supra. That being the case, we feel that it is not open to the appellant to challenge the validity of the order on the ground that such a course is not permissible under the provisions of the Act. Having induced the Department to adopt the course it did by his representation and conduct, he would not be permitted to question the validity of the order based upon his undertaking to pay the correct tax after the firm was finally assessed. In our judgment, the case falls within the doctrine embodied in section 115 of the Evidence Act

5. We are also supported in our view by the judgment of this court in Baroness Wilhelmine von Maltazan v. Customs Collector, Visakhapatnam, which arose u/s 30 of the Sea Customs Act. The learned Judges had to deal with the scope of clauses (a) and (b) of that section. The objection that the relevant provision of section 30 did not authorise the Customs Department for any provisional assessment and that consequently the authorities concerned could not call upon the assessee to pay the difference between the amount as assessed under the provisional assessment and the tax as determined on the final valuation of the property shipped, was negatived. In replying the argument this is what Mr. Justice Manohar Pershad, who spoke for the court, observed

" Strictly speaking, in the absence of any provision for provisional assessment, such an assessment would not be justified, but the question that arises is what is the effect and whether the petitioner can challenge the provisional assessment. The provisional assessment, we may point out, was made at the instance of the petitioner''s husband. Though such a provisional assessment was not permitted by the provisions of the Sea Customs Act, yet when the petitioner''s husband has taken advantage of the same, the petitioner cannot, in our opinion, now turn round and challenge it. "

6. This sums up the correct law, if we may say so with respect, and we concur in the opinion expressed therein another argument pressed by the learned Advocate-General was that since notice of making the final assessment was not served upon his client that would vitiate the impugned order. In support of this, he relied on the proviso to section 35(1) of the Act which reads

" Provided further that no such rectification shall be made having the effect of enhancing the assessment or reducing the refund unless the Assistant Commissioner or the Income Tax Officer has given notice to the assessee of his intention to do so and he has allowed him a reasonable opportunity of being heard

7. The stress of the argument on behalf of the appellant is that since it is the notice that gives jurisdiction to the assessing officer to enhance the assessment the want of it is fatal to the proceedings under the section

8. We do not think this argument is admissible. It is not by virtue of section 35 that the Department is empowered to levy the Income Tax. The charging

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sections are sections 3 and 4 of the Act and it is by force of these provisions that the concerned officers are competent to levy the Income Tax. The other sections only provide a machinery for quantifying the liability and the tax. In rejecting a similar argument, Kania, J., (as he then was) in Chatturam and Others v. Commissioner of Income Tax, stated that jurisdiction to assess and the liability to pay Income Tax were not conditional on the validity of notice. In that context, the learned Judge quoted with approval the dictum of Lord Dunedin in Whitney v. Commissioners of Inland Revenue

" Now, there are three stages in the imposition of a tax. There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment, that ex hypothesi has already been fixed. But assessment particularizes, the exact sum which a person liable has to pay. Lastly, come the methods of recovery if the person taxed does not voluntarily pay. "

9. We may also extract a passage from the judgment of Sargant, L.J., in the case of Williams, In re (referred to with approval in the judgment of Mr. Justice Kania)

" I cannot see that the non-assessment prevents the incidence of the liability, though the amount of the deduction is not ascertained until assessment. The liability is imposed by the charging section, namely, section 38 (of the English Act) the words of which are clear. The subsequent provisions as to assessment and so on are machinery only. They enable the liability to be quantified, and when quantified to be enforced against the subject, but the liability is definitely and finally created by the charging section and all the materials for ascertaining it are available immediately. "

10. There is thus no scope for the contention that the failure to issue notice has rendered all the proceedings void. Even otherwise, we think there is no substance in that contention for the reason that the appellant who was one of the partners of the firm was present at the time when the assessment of the firm was completed. That being so, there is no question of his not having any notice of the final determination of the firm''s income which has furnished the basis for the rectification of the provisional assessment

11. In the view taken above, it is not necessary for us to consider whether there is a mistake apparent from the record and which of the two views is correct, namely, whether the one adumbrated by this court in Lakshminarayana Chetty v. Additional Income Tax Officer, or that of the Madras High Court in Habibullah v. Income Tax Officer V Circle, Madras

12. Leaving these considerations apart, there is another weighty reason which necessitates the dismissal of the writ appeal. The jurisdiction of this court under article 226 of the Constitution could be invoked only in furtherance of justice ex debito justitiae, and not in the interest of injustice. It is not pretended by the learned Advocate-General that the requirements of justice impel us to exercise the extraordinary jurisdiction in favour of his client. Here, the assessee has

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induced the Income Tax Officer to believe that he could make an assessment provisionally subject to its being reopened when the final assessment of the firm was made. Having succeeded in making the Department act upon his assurance he wants to turn round and question the legality of the order of the Income Tax Officer for which he was himself responsible. In such circumstances, it would be a perverse exercise of jurisdiction under article 226 to quash the order of the Income Tax Officer Another answer to this appeal is that it is within the discretion of the learned Judge to issue certiorari or not and this court will not interfere with the exercise of the discretion unless it finds that it was exercised erroneously or improperly. It cannot be postulated in this case that any such complaint can be made as against the orders under appeal

13. For all the above reasons this appeal is dismissed with costs. Advocate''s fee Rs. 100

14. The above judgment covers the other Writ Appeals Nos. 15, 16 and 17 of 1958 as the questions raised by them also are the same as those in Writ Appeal No. 9 of 1958. These appeals are also dismissed with costs. Pleader''s fee Rs. 50 in each.

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