For these reasons, I would accept the petitions, set aside the order of the trial Court overruling the objection raised by the petitioners and direct that, as the rule which is sought to have been contravened was not made in accordance with the provisions of law, the proceedings must be quashed. I would order accordingly.

Bhandari, J.

SONI, J.—I agree.

Soni, J.

CIVIL WRIT

Before Kapur and Soni, JJ.

IN THE MATTER OF LALA LACHHMAN DASS NAYAR AND OTHERS CARRYING ON BUSINESS IN CO-PARTNERSHIP UNDER THE NAME AND STYLE OF THE INDIAN WOOLLEN TEXTILE MILLS, CHHEHARTA.

1952

Sept. 15th

Versus

UNION OF INDIA

Civil Writ No. 147 of 1952

Indian Income-tax Act (XI of 1922) as amended by Act XLVIII of 1948—Section 34—Jurisdiction and powers of the Income-tax Officer—Extent of—Amendment made by Act XLVIII of 1948—Whether retrospective—Section 3—Operation of the Act as amended from time to time—Section 31—Appeal pending—Whether bars a writ under Article 226 of the Constitution—Remedy of an aggrieved assessee—Whether under the provisions of the Act only—Constitution of India—Article 226—Extraordinary jurisdiction of the High Court—Whether can be invoked without exhausting remedies under the Income-tax Act—Protection under the law—Whether can be refused by Court to a dishonest citizen—Mandamus—Writ of—When to issue—High Court,—Power of—to direct exercise of discretion by Income-tax Officer—Extent of.

L.D. and his seven sons formed a Hindu undivided family and were being assessed as such up till 1937-38. For 1938-39 returns were made on the basis of contractual partnership consisting of joint Hindu family of L. D. and his seven sons as one partner having 14 annas share and D. R., a son of L. D., as the other partner having 2 annas share. The Income-tax Officer refused to register it as a firm for the purposes of the Income-tax Act but ultimately the Privy Council held it registrable as a valid partnership in July 1947. In the meanwhile the firm

continued to submit returns and assessments for some years were made on the total income of the firm in the hands of the Hindu undivided family. The Income-tax Act was amended by Act XLVIII of 1948 and the Income-tax Officer acting under section 34 as amended issued notices to the firm, the Hindu undivided faimly and D. R., as a result of which certain income was disclosed which had escaped assessment in the previous years. The assessees filed appeals against the orders and notices of demand issued by the Income-tax Officer and during the pendency of those appeals they applied to the High Court for quashing the proceedings and the notices of demand by issuing appropriate writs under Article 226 of the Constitution of India on the ground that the proceedings taken and the notices of demand issued were illegal, *ultra vires* and without jurisdiction.

Held, that—

(1) the Income-tax Act has entrusted to the Income-tax Officer the decision of the facts and the law to decide whether the provisions of section 34 are applicable;

(2) the exigencies of the State require that there should be a tribunal to expeditiously and at a small expense decide questions which arise in the matter of assessment;

(3) machinery has been created by the Act for the determination of the liability of an individual for assessment and the extent thereof;

(4) it is that machinery and that alone which can be used for the purposes of assessment and all complaints against such assessment are to be adjudicated upon in accordance with the machinery provided by the Act;

(5) it is the statutory duty of the Income-tax Officer to make the assessment which can only be challenged by way of appeal under the Act and the case stated to the High Court;

(6) whether the attack on the proceedings under section 34 of the Act is due to the want of preliminary conditions or conditions precedent or to the bar of time, or illegality due to the matter being *res judicata*, or due to the provision being *ultra vires*, or the amendment being prospective, they are all questions of law and do not affect the jurisdiction of the Income-tax Officer. As these are all errors of law, the jurisdiction of the High Court cannot be invoked

because, *inter alia*, the decision of these points is within the jurisdiction of the various authorities upon whom the duty has been cast under the Income-tax Act of determining the assessments and reviewing them subject to the opinion of the High Court upon a case stated;

(7) the petitioners having filed appeals under the provisions of the Indian Income-tax Act, should not be allowed to resort to the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India for the appeal once filed cannot be withdrawn without the consent of the Income-tax Department;

(8) that, section 34 of the Income-tax Act is a procedural section and merely deals with the machinery and does not provide for charging Income-tax and is therefore retrospective in effect. Section 35 (1), proviso 2, also makes it clear that section 34 retrospective effect;

(9) that, the Income-tax Act as amended from time to time has no operative effect except so far as it is rendered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act;

(10) if a petitioner is entitled to certain protection given by law the Court will not hesitate to extend it to him even though he may not be a good citizen so long as he has not suppressed material facts in his petition. The morals of a citizen are no criterion for giving of redress to which he is by the law of the land entitled.

Held per Soni, J.

(1) Writs of mandamus are issued in proper cases to fill in gaps where no legal remedy or no adequate legal remedy is available. They are meant to supplement not to supersede legal remedies. They are meant to promote the orderly administration of justice by the duly constituted Tribunals of the land, and are not intended to by-pass them.

(2) With regard to the accommodation for the payment of income-tax the discretion is vested in the Income-tax Officer under sections 45 and 46 of the Income-tax Act. The High Court can only compel him to exercise his discretion but cannot direct him as to the manner in which that discretion is to be exercised.

Praying:—

A. A rule directing the respondent Income-tax Officer to show cause within such time as this Hon'ble Court may fix in that behalf—

(i) why a writ in the nature of mandamus should not be issued commanding the said respondent—

(a) not to treat your petitioners as in default pending final determination of their cases on appeal; and/or pending refund of tax overpaid by your petitioners;

(b) not to proceed on the basis of the various illegal notices under section 34 as amended in 1948 as aforesaid and/or upon the basis of the pretended orders made in pursuance thereof;

(c) to carry out the directions of the appellate Assistant Commissioner under section 31(4) issued on March 3, 1952, and to delete the share of the profits of the firm out of the total income of the Hindu undivided family and Daulat Ram as computed in the order of March 15, 1950, against them and to issue necessary refund orders in respect of tax collected on the basis of the order made by the Income-tax Officer on March 15, 1950;

(d) to register the firms constituted in 1942 under section 26-A as he is in law bound to do.

(ii) Further, in the alternative why a writ in the nature of prohibition should not be issued commanding the said respondent to cease forthwith abusing or usurping a jurisdiction not vested in him in law—

(a) by proceeding on the basis of the said purported notices under section 34 of the Act as amended in 1948 and/or upon the basis of the said pretended orders made in pursuance thereof;

(b) by proceeding on the basis of his erroneous finding that the instrument of partnership, dated May 27, 1942, was void *ab initio* and on the orders made on the basis thereof;

(c) by proceeding on the basis of the illegal notices of demand on the said alleged Hindu undivided family.

(iii) Further, or in the alternative, why writs in the nature of certiorari should not be issued commanding the said respondent to certify and return to this Hon'ble Court all the records relating to—

(a) the said various assessment proceedings commenced by the said nine notices under section 34 of the Act, issued on March 26, 1951;

(b) the proceedings commenced by the said notices under section 34 of the Act issued on February 9, 1950, and February 20, 1950;

(c) the proceedings following upon the orders of refusal to register as aforesaid in respect of 1945-46, 1946-47 and 1947-48, resulting in the issue of several notices of demand on the alleged Hindu undivided family and Daulat Ram as aforesaid;

(d) the proceedings resulting in the orders of assessment on your petitioners individually as partners in addition to the order on the firm and the notices of demand issued thereon, so that conscionable justice may be therein administered by quashing all the said various notices and/or proceedings taken thereon and/or any orders made on the basis thereof.

B. A Rule directing the respondent Appellate Assistant Commissioner to show cause why—

(i) a writ in the nature of mandamus should not be issued commanding the said respondent—

(a) not to act upon his said orders of April 9, 1952;

(b) to take into consideration the order of the Tribunal, dated October 29, 1951, and to give clear directions on the basis thereof for the deletion out of the total income of the partners the shares of the profits of the firm.

(ii) further, or in the alternative why a writ in the nature of certiorari should not be issued commanding the said respondent to certify and return to this Hon'ble Court the records relating to the appeals disposed of by them as aforesaid so that conscionable justice may thereon be administered.

C. The issue of such peremptory order or orders if the said respondent makes no answer or makes insufficient or false answer.

D. Interim injunction upon the said respondent in terms of prayers (A) (i) (b), A (ii) (c); B (i) (a)

E. Costs of and incidental to this application;

F. Such further or other orders or directions as your Lordships may deem proper.

ORDER

Kapur, J.

KAPUR, J. This is a petition by L. Lachhman Dass Nayar and seven others for the issue of appropriate writs against the various officers of the Income-tax Department in regard to actions taken and orders passed by those officers.

The facts of this case are rather complicated and may therefore be stated at some length. Prior to the assessment year 1937-38, Lachhman Dass, petitioner along with his seven sons formed a Hindu undivided family and were being assessed as such. For the year 1938-39 returns were made on the basis of partnership consisting of the joint Hindu family of Lachhman Dass with his seven sons as one partner having fourteen annas share and Daulat Ram, one of the sons of Lachman Dass, as another partner owning two annas share. The Income-tax Officer refused to recognise this partnership as a partnership for the purposes of the Income-tax Act, but on appeal to the Appellate Tribunal it was held on the 8th of September 1942 that this firm was registrable, and the case being taken to the High Court at Lahore the decision was against the firm but their Lordships of the Privy Council ultimately held that the firm was registrable, as it was a valid partnership. This was on the 29th July 1947.

For the assessment years 1940-41 to 1944-45 the assessment had been completed but was subsequently cancelled in consequence of the order of the Lahore High Court. It appears that during the pendency of the proceedings

which ended with the order in question no assessments were made on the returns which had been filed by the firm as constituted except for the year 1941-42. Later on as a result of proceedings being taken under section 34 of the Income-tax Act the total income of the firm except of 1941-42 was assessed in the hands of the Hindu undivided family on the 14th February 1945, but assessment in regard to other years was not made.

On the 16th of March 1949, Mr Paras Parshad, Income-tax Officer, issued five separate notices under section 34 of the Income-tax Act as amended by Act XLVIII of 1948 on the said firm and on the Hindu undivided family and Daulat Ram as partners. These several notices were served on the various parties on the 2nd of April 1949. Under protest returns were made on the 13th June 1949 which showed that an income of Rs 7,07,000 was excluded from earlier returns. These secreted incomes were thus disclosed.

On the 15th of March 1950, the Income-tax Officer made five separate orders of assessment under section 23 (5) read with section 34 of the Income-tax Act including the undisclosed income (upon the firm and carried the said income in the hands of the partners thereof in accordance with the provisions of section 23 (5) (b) of the Act). On the same date the Income-tax Officer made further orders of re-assessment on the undivided Hindu family and on Daulat Ram including in that the share of the profits of the said firm as computed on the re-assessment. Appeals were taken by the firm and the partners against these orders and the Appellate Assistant Commissioner by an order, dated the 16th November 1950, set aside the assessments made on the firm on the various grounds stated in the annexure marked 'A' attached to the petition. The appeal for the year 1940-41 of the Hindu undivided family was dismissed but the others were kept pending. Thus four appeals of the Hindu undivided family and five of Daulat Ram were not decided. Five further appeals were taken to the Appellate Income-tax Tribunal by the firm and one by the Hindu undivided family which were

Lala Lachhman Das Nayar and others v. Union of India

Kapur, J.

decided on the 29th October 1951, and the order is attached to the petition as annexure 'B'. The parties are not agreed as to what is the effect of this order. The petitioners rely on the following passage from the order:—

> "The retention or the inclusion in the hands of a partner of a share of the income assessed in the firm's file, which assessment has been cancelled, cannot be supported."

The respondents submit—

> "The Tribunal did not decide the question raised before it as to what would be the position if the income of the share of a partner is taken directly in the hands of the partner without having been assessed in the hands of the firm."

By his order, dated the 3rd March 1952, Mr H. P. Sharma, Appellate Assistant Commissioner, gave directions to the Income-tax Officer under section 31 (4) to carry out the directions indicated by the Appellate Tribunal. Before us a complaint was made by the petitioners that the Income-tax Officer had not given them the relief to which they were entitled under section 31 (4) of the Act, but the learned Advocate-General read out an order of the Income-tax Officer showing that this relief had been given. The dispute still remains as to the adequacy of the relief, the petitioners claiming much more than has been given to them by the Income-tax Officer.

By an order, dated the 9th April 1952, the Appellate Assistant Commissioner dismissed the nine appeals which had been brought by the partners on the ground that notice under section 34 was valid but the complaint of the petitioners is that this is in disregard of the order of the Appellate Tribunal, dated the 29th October 1951. It is submitted by the petitioners that the Assistant Income-tax Commissioner has failed to do what in law he was bound to do, i.e., that he could not merely dismiss but he had to carry out the orders of the Appellate Tribunal.

On the 26th March 1951, Mr Paras Parshad, Income-tax Officer, issued nine several notices under section 34 of the Income-tax Act as amended in 1948 in respect of three years of assessment 1942-43, 1943-44 and 1944-45, three each on the firm and three each on the two partners of the firm. This notice is annexure 'C' attached to the petition and is based on under-assessment. Objection is taken to the legality of these notices on four grounds which are given in paragraph 17 of the petition and are as follows:—

" (a) That section 34 as amended in 1948 has no application to assessments for the years 1942-43, 1943-44 and 1944-45.

(b) That assuming but not admitting that the said amendment applies to the said years of assessments, the condition precedent to the amended section had not been fulfilled.

(c) That the said notices were in any event barred by limitation.

(d) That the said alleged under-assessment, which is denied, has been caused by the refusal of the Income-tax Officer to accept the firm as assessee and not by any of the reasons stated in section 34 (1) (a) of the Act as amended in 1948".

This is denied by the respondents who submit that section 34 is applicable to the assessment years, that the conditions precedent for the operation of the amended section are fulfilled, that the notices were not barred by limitation as section 34 is a procedural section and therefore retrospective and paragraph (d) was denied. The respondents also submit that action had been taken under section 34 (1) (a) on the ground of escapement of income.

On the 15th March 1952, the Income-tax Officer—now it was Mr. Hans Raj Puri—made three orders of assessment for the years 1942-43. 1943-44

Lala Lachhman Das Nayar and others
v.
Union of India
Kapur, J.

and 1944-45 under section 23 (3) read with section 34 and also issued notices under section 28 of the Act. On the 17th March 1952, assessments were made on the Hindu undivided family and Daulat Ram, partners of the firm, and notices of demand were issued. The petitioners submit that notices issued and proceedings taken thereupon are illegal and *ultra vires* and should be quashed by a writ of certiorari and a writ of prohibition should issue against the Income-tax Officer commanding him to forbear from taking any further action on the orders passed. In reply to this part the respondents submit that the action taken is legal and that no orders should be passed under Article 226 of the Constitution of India as the assessees have already appealed from these various orders which according to them is the proper remedy provided by the Income-tax Act.

The submission of the petitioners is that notices to the firm for the years 1942-43, 1943-44 and 1944-45 were without jurisdiction as the claim for income-tax was barred by time, and that there was no escapement of income-tax as there had already been an assessment and the matter had already been decided by the Assistant Income-tax Commissioner at a previous date.

We now come to the years of assessment 1945-46, 1946-47 and 1947-48. On the 24th May 1943, the petitioner decided to effect a partial partition of the business of the firm and all the members of the undivided Hindu family including Daulat Ram became partners to the extent of two annas share each and necessary adjustments were made in the books of account. On the 27th June 1947, the Income-tax Officer accepted the facts of partial partition and granted registration to the firm under section 26-A of the Act in respect of the year of assessment 1945-46, and on the 6th July 1949, assessments for the year 1945-46 were made on the individual partners of the firm. On the 12th August 1949, the Income-tax Officer cancelled the registration on the ground as stated in paragraph 24 of the petition that one of the partners, Brij Behari Lal, was a minor at the date of the

execution of the partnership deed and therefore the instrument of partnership was void *ab initio*. This, the petitioners submit, was an error of law apparent on the face of the record. To this part of the petitioners' case the respondents' reply is that the Income-tax Officer was entitled to cancel the registration as he came to know the real facts and did not consider that in fact there was a partition or that there was a real new firm which had come into existence. They also submit that the order passed by the Income-tax Officer cancelling the registration is prior to the coming into force of the Constitution and therefore this Court cannot interfere by the issue of a High Prerogative Writ against the order passed. In support of their submission that the Income-tax Officer had the power to and rightly cancelled the registration they rely upon Rule 6-B of the Rules made under S. 59 of the Act which authorizes the Income-tax Officer to cancel the registration.

On the 18th August 1949, a fresh deed of partnership was executed and another application made to the Income-tax Officer on the 13th September 1950, for registration. On the 12th February 1951, this registration was refused and in the order, annexure 'F', dated the 12th February 1951, the Income-tax Officer said:—

> "By my order under section 26-A of date refusing registration of the firm I had held that the partners in the firm are (1) H.U.F. with Re 0-14-0 share and (2) L. Daulat Ram with Re 0-2-0 share and not L. Lachhman Das and his seven sons with equal shares, as alleged by the assessee."

In regard to this order the petitioners pray for a writ of mandamus directing the Income-tax Officer to register the firm and for a writ of prohibition restraining him from taking any further steps on the basis of his order. In reply to this part of the case the respondents have stated in their paragraph No. 30 that an appeal has been taken against this order and the petitioners are not entitled to any

Lala Lachhman Das Nayar and others
v.
Union of India
Kapur, J.

relief excepting that which is open to them under the provisions of the Income-tax Act itself. I may here add that in regard to this order a further argument was submitted by Mr Mitra that his application was bad in law, and the order passed thereupon would therefore be ineffective.

Notices under section 34 in regard to the assessment year 1945-46 were issued by the Income-tax Officer on the 9th February 1950 which were served on the assessees, the firm, and also on the individual partners on the 18th February 1950, and the 20th February 1950, respectively.

After his refusal to register the firm the Income-tax Officer made an order of assessment on the firm and issued notices of demand on the Hindu undivided family for 14 annas of the profits and upon Daulat Ram for 2 annas of the profits, as partners, under section 23 (5) (b) of the Income-tax Act. This was by an order, annexure 'F'. A similar order was made in regard to the year of assessment 1946-47 on the 26th March 1951.

On the 27th March 1951, the Income-tax Officer made orders of assessment in regard to the same income on the individual partners of the newly-constituted firm, i.e. the eight partners and served notices of demand on them. This order is annexure 'G' attached to the petition. The respondents submit in regard to this that this is a precautionary assessment and no demand has been made on the eight petitioners in regard to this assessment and it would be efficacious only if the order passed in regard to registration is not upheld.

On the 28th March 1951, a similar order was made in respect of the assessment year 1947-48 and is marked annexure 'H'.

The petitioners submit that they have either individually or as members of the undivided Hindu family paid large sums of income-tax which are set out in annexure 'J' and they also state that

they have filed appeals in regard to various assessment years on the basis of being partners in the original registered firm consisting of the Hindu undivided family and Daulat Ram. In annexure 'L' which has been filed by the petitioners it is stated that on the calculations made by the Income-tax Officer Rs 3,92,000 is the disputed amount which the Income-tax Officer is claiming and the liability for which the petitioners are denying. It is further stated in this order that there is an arrear of income-tax of Rs. 7,56,636-14-0 which, the calculations show, is due after giving credit for the disputed items of Rs. 3,92,000 and Rs. 39,451-14-0. The arrears of about seven-and-a-half lacs the petitioners have been called upon to pay in three equal instalments and the tax on disputed items and precautionary assessments will be treated as the last instalment which would be paid on the 14th December 1952, or within fifteen days from the decision of the appeals which had been filed by the petitioners whichever is earlier. The Income-tax Officer has also stated that if the appeals are not decided by then he would then consider the question of payment of the instalment dealing with the disputed items and precautionary assessments. It is in this setting that the petitioners have come to this Court for the issue of various appropriate writs in regard to the notices issued and orders made by the Income-tax Officers.

The learned Advocate-General on behalf of the respondents has submitted that the petitioners are not entitled to any relief by this Court at this stage because—

(a) the various orders which are now sought to be attacked are the subject-matter of appeals under the appropriate sections of the Income-tax Act;

(b) the High Court should not allow the statutory jurisdiction of the appellate authorities to be displaced;

(c) under Article 226 the High Court has not to act as an appellate authority and in regard to the Income-tax authorities

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

have already given time to the petitioners to pay and it is within their discretion to give further time or such time as the circumstances of the case require.

Mr Sikri has based his preliminary objections to the issuing of any writ on the following four grounds:—

(i) It is the express intention of the Legislature that the assessment as made by the Income-tax Officer is final and conclusive except as challenged in the manner provided by the Income-tax Act;

(ii) The Act gives adequate and effective remedy to the assessees;

(iii) By interfering under Article 226 at a stage previous to that contemplated by the Act when appeals are pending the assessees will be enabled to circumvent such orders as may be passed by an Assistant Income-tax Commissioner on appeal to increase the assessments or order fresh assessments and thus the limitation of time provided under section 34 will bar the powers of the income-tax authorities to levy proper taxation;

(iv) By allowing the shortcircuiting the procedure given by the Act the consequences to the collection of revenues and the administration of the country will be disastrous.

Mr Mitra for the petitioners has submitted in regard to the assessments for the years 1942-43, 1943-44 and 1944-45 that notices under section 34 and assessments thereupon are without juridiction because—

(i) the notices were issued purporting to be under the amended section 34—amended by Act XLVIII of 1948—which has no restrospective effect;

(ii) they were barred by time as they were beyond the period prescribed by section 34;

(iii) there was no escapement of tax due to any failure on the part of assessees, but if there was any escapement at all it was due to the Income-tax Officers not accepting the contention of the assessees for registration of the firm consisting of Hindu undivided family and Daulat Ram;

(iv) that the Assistant Commissioner had already held against the Income-tax Department in regard to the notice being bad and being barred by time and that constituted *res judicata* and the same matter could not have been re-opened at any subsequent stage between the same parties in regard to the same years;

(v) that it was not within the jurisdiction of the Dominion Legislature to legislate and thereby amend section 34 so as to affect those territories which constituted British India before the Independence Act because the Dominion Legislature could not make any laws about the territories which were not its own previous to its coming into existence.

Counsel in this case have debated the various questions that arise with great ability and we have received a great deal of assistance from them. This Court has taken the view that where there is a right of appeal and the Income-tax Act prescribes a particular mode of challenging an assessment, that is the only remedy open to an aggrieved assessee and no other. As this opinion of this Court has been challenged by Mr Mitra in a very elaborate argument I thought it politic to re-examine the question in the light of the criticisms

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

of Mr Mitra. In *Janda Rubber Works Ltd.* v. *The Income-tax Officer* (1), Khosla, J., and myself had occasion to consider this matter. There a private limited company failed to file a return under section 21 of the Income-tax Act for certain years. The Income-tax Officer proceeded to make assessments and levied the tax at Rs 50,000 per year on the basis of a later return made for the year 1948-49. He then took action under section 46 of the Act and got certain properties attached. The company through its manager requested the Income-tax Officer to postpone the sale of the property in order to enable him to make the necessary payment which request was acceded to and the sale was postponed. The company in the meanwhile made an application for voluntary liquidation and also for stay of proceedings for recovery of income-tax, and one of the objections taken on behalf of the Income-tax authorities was that section 67 of the Income-tax Act was bar to the jurisdiction of this Court. At that time the Constitution had not come into force and there was also the prohibition under section 226 of the Government of India Act of 1935. After referring to various authorities I said:—

> "Relying on these observations of their Lordships, I am of the opinion that if the assessment is determined by the Income-tax Officer the jurisdiction of the civil Court to entertain a suit and of any other Court to entertain any other proceedings is excluded, and as I have said before, their Lordships were of the view that a proper machinery having been provided under the Income-tax Act the legality or illegality of the assessment is to be determined by setting in motion the machinery provided by the Income-tax Act and not through any other Tribunal."

I also said that under the law in England where there is a right of appeal and an assessee fails to avail himself of it he cannot afterwards pray for a writ to recover the money over paid.

(1) A.I.R. 1950 E.P. 210.

In the next case *U. C. Rekhi* v. *The Income-tax Officer* (1) which was decided by another Bench consisting of Harnam Singh, J., and myself a notice had been issued under section 34 of the Income-tax Act and an objection was taken that the Income-tax Officer had no jurisdiction to proceed to assessment as the individual to be assessed was in fact not chargeable to income-tax, that he was not chargeable to income-tax within the Union of India because he was not residing there at all material times, that the Income-tax Officer could not give himself jurisdiction by wrongly deciding that the individual was chargeable, that the individual was not bound to challenge the decision of the Income-tax Officer by way of appeal and the case stated, and that there was no information before the Income-tax Officer on which he could take action under section 34 nor was there any discovery that the individual was not liable to assessment. After referring to various cases which have again been cited in the present case it was held by the Bench:—

> "A perusal of these English authorities thus shows that (1) if the Legislature has given to the Income-tax Officer the power under section 34 to do a certain act in consequence of information which comes into his possession and the discovery made by him therefrom it is not for this Court to undertake the very task which in the clearest language the Legislature has chosen to impose upon the Income-tax Officer; (2) the proper remedy for an assessee who feels aggrieved by the action of an Income-tax Officer under section 34 is to take the matter in appeal and then have a case stated to the High Court in accordance with the provisions of the Income-tax Act; and (3) it is not excess of jurisdiction if the Income-tax Officer gives himself jurisdiction to assess a person by determining in the first instance that the case falls within section 34 of the Income-tax Act."

(1) (1950) 52 P.L.R. 267

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

We then proceeded to examine the judgments of their Lordships of the Privy Council and of Indian Courts and finally it was held:—

> "I must, therefore, hold that the jurisdiction to proceed under section 34 is by law vested in the Income-tax Officer who has a statutory duty imposed upon him to proceed if he makes a discovery within the meaning of section 34 of that Act. He has to determine the facts and the law in order to give him the jurisdiction to proceed and if in the determination of this he goes wrong, the proper remedy for an assessee is to go up in appeal and to have a case stated to High Court under the provisions of the Income-tax Act."

The next case of this Court is *K. S. Rashid Ahmad* v. *Income-tax Investigation Commission* (1). There the Central Government referred the case of K. S. Rashid Ahmad and others to the Income-tax Investigation Commission for investigation and report and an application was brought under Article 226 of the Constitution for the quashing of that order and orders consequent thereupon. It was held after consideration of a large number of Indian and English cases:—

> "The observations of their Lordships of the Privy Council seem to show that full effect has to be given to the words used in the section, and as section 9 bars the jurisdiction of any Court to scrutinize except in the manner provided in subsection (5) of section 8 the acts or proceedings of the Commission or of any authorised official, this Court should not issue a writ of certiorari, and this argument of counsel must, in my opinion, prevail. Counsel for the petitioners argued that as the Constitution had come into force later section 9 must be held to have been repealed to that extent."

(1) 53 P.L.R. 57.

Quite recently in an unreported case *Vidya Parkash* v. *The State of Punjab* (1) which is a case under the Punjab Sales Tax Act, a similar view was taken by the learned Chief Justice and Falshaw, J. There several applications had been made by various persons selling Indian food preparations and it was contended that they were not liable to sales tax as in the Schedule to the Act among articles exempted from tax under section 6 of the Act Indian food preparations were included. The learned Judges refused to go into the merits of the applications because under sections 20, 21 and 22 of the Act there was provision not only for appeal and revision but also for statement of a case to the High Court in the manner of section 66 of the Income-tax Act. The learned Judges there observed :—

> "We think it is for the applicants to take their proper remedies under the Act rather than here seek to invoke an extraordinary jurisdiction under Article 226 of the Constitution."

The criticism of the judgments which were delivered under the Income-tax Act by this Court was that there it had been found that the action taken by the Income-tax Officer was within his jurisdiction and therefore no order could be issued under Article 226, but as I read those various judgments since I was the author myself I cannot say that that was the ground for refusing to issue the writs. It had been pressed before us that in view of the observations made by various Judges in England and by their Lordships of the Privy Council in Indian cases the only remedy open to the aggrieved assessee is that provided for by the Act and not the extraordinary remedy by way of a writ and this argument prevailed.

At this stage it would, I think, be necessary to discuss the question whether under section 34 the Income-tax Officer has the jurisdiction to decide whether there has been any escapement of income-tax and therefore the provisions of that section have become applicable. In *The King* v.

(1) C.W. No. 29 of 1951.

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

Bloomsbury Income-tax Commissioners (1) this contention was put in the following words :—

> "The Attorney-General contends: (1) that it is for the assessing authorities to decide in the first instance whether the applicant is chargeable to income-tax; (2) that if the surveyor has honestly come to the conclusion upon the information in his possession that the applicant has not made a full and proper return to income-tax, and the additional Commissioners have thereupon made an additional assessment upon him, this assessment is binding unless challenged by the means prescribed under the statutes."

The first case which deals with this matter is *Allen* v. *Sharp* (2). There it was held that an assessment under the Assessed-tax Acts is final and conclusive, unless appealed against in the manner by the statute and therefore the decision of the assessor that the assessee was a horse-dealer, however erroneous, could not be questioned in an action. The argument of Sir F. Thesiger was that the plaintiff was not liable to be assessed to the duty imposed on horse-dealers. He was neither a horse-dealer in fact, nor within the meaning of the statutes relating to assessed taxes. Parke B. said at page 363 of 2 Exchequer or 533 of 154 English Reports :—

> "On a careful consideration of these Acts of Parliament, they seem to me to differ from the statute of Elizabeth, as to poor rate, and that the Legislature intended that the assessment of the assessors appointed by the Commissioners should be final and conclusive, unless appealed from, in the first place, to the Commissioners, and further, if necessary, to the judges of the superior Courts. It

(1) (1915) 3 K.B. 768.

(2) 2 Ex. 352=154 E.R. 529

would be singular if there were no such provision; for, what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors, had a right to dispute the propriety of their assessment in an action against the collectors. * * * Without referring to the statutes, I should say, a priori, that the object of the Legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out. On reading the statutes, I come to the same conclusion. By the 9th section of the 43 Geo. 3, c. 99, the Commissioners are to meet and appoint assessors, who are to bring in their certificates of assessments verified on oath; and the assessors are thereby required, with all care and diligence, to charge and assess themselves and all other persons chargeable with the said duties. If the language had been 'to charge and assess all such persons as they honestly and bona fide, after due care and diligence, believed to be chargeable', their assessment would, beyond all question, be final."

It was held there that the only remedy was by appeal to the Commissioner. It was argued in that case that the Legislature meant that the decision should be final only in respect of such persons as were liable to be 'rated' but were rated for too much. The learned Baron held this construction to be too narrow.

Reference was next made to *Reg.* v. *Commissioners for Special Purposes of the Income-tax*, (1) Lord Esher M. R. considered the formula as to whether the Commissioners cannot give themselves jurisdiction by a wrong decision on the facts. His Lordship there said :—

" When an inferior Court or tribunal or body which has to exercise the power of

(1) 21 Q.B.D. 313 at p. 319.

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

This matter again came up for determination in *The King* v. *Bloomsbury Income-tax Commis-*

sioners (1). Lord Reading, C. J., referred to the cases that I have mentioned above and said at page 784:—

> "In my judgment this dictum states accurately the principle applicable to such cases."

His Lordship again said at page 784:—

> "In my judgment the decision and reasoning of Parke B. and the other learned Judges have a direct bearing upon the present application for prohibition.
>
> In my view an examination of the Income-tax Act shows that the scheme of the legislation is to entrust the decision of the facts to a tribunal of persons specially selected for the locality, and who are often in a better position than the Courts to determine the questions of fact, sometimes very complicated, which may arise. The exigencies of the State require that there should be tribunal to deal expeditiously and at comparatively little expense with all such questions and to decide them finally, reserving always to the individual the right to have the Commissioners' decisions on points of law reviewed by the Courts."

Avory, J., in the same case said at page 789 of the report:—

> "In such a case it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts including the existence of the preliminary facts on which the further exercise

(1) (1915) 3 K.B. 768.

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

of their jurisdiction depends—see also *Colonial Bank of Australasia* v. *Willan* (1),—and the principle of law to be applied to this case is that laid down by Tindal, C. J., in *Cave* v. *Mountain* (2) [approved and adopted by Lord Denman, C. J., in *Reg* v. *Bolton* (3), where he says, dealing with a question of the jurisdiction of magistrates, "But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend on the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation, and that the remedy for any person aggrieved by an assessment made under section 62 either by reason of his not being chargeable at all, or by reason of it being excessive, is by appeal to the General Commissioners and by special case."

The learned Judge again said at page 791:—

"For these reasons I come to the conclusion that the surveyor has jurisdiction to 'discover' and the additional Commissioners have jurisdiction to make an assessment in a case where the person charged denies that he is carrying on trade in the district and disputes any liability to the duties, and the question remains to be considered whether in this particular case there is any ground for saying that the additional Commissioners have exceeded or that the General Commissioners are about to exceed their jurisdiction."

(1) (1874) L.R. 5 P.C. 417.
(2) (1840) 1 Man. and G. 257.
(3) (1841) 1 Q.B. 66.

In *Reg* v. *Swansea Income-tax Commissioners* (1) which is the next case referred to by Counsel the applicants were assessed to income-tax by the General Commissioners under Case 1 of Schedule D, Income-tax Act of 1918. At the time the assessment was made it was impossible for the applicants to ascertain whether there would be a balance of profits for the year in question and therefore no notice of appeal against the assessment was given, and after the time for appealing had expired the applicants alleged that they had ascertained that their business had resulted in a loss, and they obtained a rule for a writ of prohibition. It was held that prohibition would not lie to the General Commissioners, who had acted in accordance with their statutory duty in making the assessment.

At page 256 Lord Hewart, C. J., said:—

> "The whole argument falls to the ground unless it is found or admitted that in the year referred to there was a loss, and it is suggested, with an appearance of seriousness, that this Court is the tribunal which should undertake the task of deciding whether there has been a loss or not, and for that purpose the Court ought to direct an issue or order pleadings to be delivered. In other words, the argument involves this, that this Court is to undertake the very task which in the clearest language the State has imposed upon the General Commissioners. That argument is put forward, paradoxically enough, in an argument for a writ of prohibition which is based upon a lack, or an excess, of jurisdiction in the Commissioners in entertaining the very question which under the statute they have to undertake. It is quite clear to my mind that this Court cannot

(1) (1925) 2 K.B. 250

Lala Lachhman Das Nayar and others
v.
Union of India
Kapur, J.

entertain the question whether there has been a loss in this particular year."

Avory, J., in a concurring judgment referred to the observations of Lord Esher M. R. in *Reg.* v. *Commissioners for Special Purposes of the Income-tax* (1), and held that it was for the Commissioners to decide in accordance with their statutory duty. The learned Judge also referred to the observations of Lord Reading, C. J., in the *Bloomsbury case* (2). Shearman, J., also agreed with the Lord Chief Justice.

Another case which deals with this matter is *Rex* v. *Inspector of Taxes for Parish of Kingsland* (3). The Lord Chief Justice said in regard to the question whether there should be a writ of prohibition where the surveyor says that he discovers that a person chargeable has been allowed a deduction not authorised by law :—

> "I think it is a fact that the question which had to be determined here was a question at the outset within the jurisdiction of the surveyor, and if there is exception taken to the additional first assessment which he has accordingly made, there is a clear right of appeal under the Act, and the right of appeal is at this present moment being pursued by the applicants in this case. I think, therefore, that the application for the writ of prohibition manifestly fails".

Lush, J., at p. 330 said :—

> "Now dealing with that case the position is this ; the applicants have to show in order to entitle themselves either to a writ of prohibition or a writ of certiorari, that the surveyor had no jurisdiction to enquire into the matters into

(1) 21 Q.B.D. 313 at p. 319.
(2) (1915) 3 K.B. 768.
(3) 8 T.C. 327.

which he did enquire, and to come to the conclusion to which he in fact came".

The learned Judge when dealing with section 125 which corresponds to section 34 of the Indian Income-tax Act said :—

> "Here the section manifestly gives to the surveyor, if he makes this discovery, the power to deal with the assessment. If he honestly comes to the conclusion that a mistake has been made, it matters nothing so far as his jurisdiction to amend the assessment is concerned, that he may have come to an erroneous conclusion, whether on law or on fact. His jurisdiction to amend is correctly and rightly exercised, even though he has taken an erroneous view of the law with regard to the mistake in allowance that has been made".

And he further said :—

> "So that, whether one looks at the application for a writ of prohibition or the application for a writ of certiorari, one finds that in each case jurisdiction is given to the surveyor to investigate the matters and to come to a conclusion, whether it is upon a matter of law or upon a matter of fact. That being so, it seems to me that both these applications necessarily fail".

In *Rex* v. *The General Commissioners of Income-tax for the Division of St. Marylebone* (1), an application was made for a *rule nisi* on the grounds—

> (1) that the petitioner was not ordinarily resident within the Commissioners'

(1) 13 T.C. 746.

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

Division when any of the assessments were made ;

(2) as regards the year 1920-21 his liability had already been finally determined ; and

(3) as regards subsequent years he had since 31st December 1920, been residing and was domiciled outside United Kingdom.

It was held that the liability of an assessee to assessment depended on questions of fact which it was the Commissioner's function to determine.

Quite recently in *Ebrahim Aboobakar* v. *The Custodian-General of Evacuee Property, New Delhi* (1), the Supreme Court have had occasion to consider the observations of Lord Esher, M. R., in *Reg.* v. *Commissioner of Income-tax* (2). The passage which I have referred to from the judgment of Lord Esher has received the approval of the Supreme Court of India.

Their Lordships of the Privy Council in *Commissioner of Income-tax, Bengal* v. *Mahaliram Ramjidas* (3), held that where income, which should have been assessed in the year of assessment, has escaped assessment, to enable the Income-tax Officer to initiate proceedings under section 34 of the Act, it is enough that the Income-tax Officer, on the information he has before him, in good faith considers that he has good ground for believing that the assessee's profits have for some reason escaped assessment or have been assessed at too low a rate. Section 34 of the Act does not require that a quasi-judicial enquiry should be held to establish the factum of escapement as a condition precedent to the operation of the section. Their Lordships referred to *Rex* v. *Kensington Income-tax Commissioners* (4), where it was contended on behalf of the subject tax-payer that the section imposed as a condition precedent to the operation of the section an obligation on the part of the

(1) A.I.R. 1952 S.C. 319.
(2) 21 Q.B.D. 313.
(3) I.L.R. (1940) 2 Cal. 215 P.C
(4) (1913) 3 K.B. 870.

surveyor to obtain legal evidence that the return was defective. The words to be construed were " if the surveyor discovers that any properties or profits chargeable to tax have been omitted from the first assessment ". Thier Lordships then quote a passage from the judgment of Lush, J., and observed at p. 223 :—

> " Their Lordships are of opinion, in accordance with that reasoning, that it cannot be a condition precedent to the operation of section 34 that the Income-tax Officer should hold a quasi-judicial enquiry, because the powers necessary for such an enquiry are not conferred upon him. "

Their Lordships said on p. 224. :—

> " Therefore a construction of section 34, which requires a quasi-judicial enquiry to be held before the powers under the section can be operated, would result in mere duplication of procedure and in two enquiries of the same kind, into the same matter, conducted by the same official, and without any advantage to the parties. A construction so unreasonable and unpractical ought not to be preferred when another construction is open. Accordingly their Lordships are of opinion that the Income-tax Officer is not required by the section to convey the assessee, or to intimate to him the nature of the alleged escapement, or to give him an opportunity of being heard, before he decides to operate the powers conferred by the section. In the opinion of their Lordships, the view which the learned Judges of the High Court have taken of the section is too narrow, and the notice sent to the respondents on February 8, 1934, is in form a competent preliminary to a new assessment. "

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

The words used in section 34 before the amendment of 1948 were—

> "If in consequence of definite information which has come into his possession the Income-tax Officer discovers that * * * *".

and by the amendment of 1948 the words are—

> "If the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee * * * *".

Both the words "discovers" as well as "reason to believe" have been interpreted by the learned Judges in other cases. The word "discover" as applied to the surveyor was considered in *Rex* v. *Kensington Income-tax Commissioners* (1). It means per Bray, J., "come to the conclusion from the examination he makes and from any information he may choose to receive", per Avory, J., "has reason to believe", and per Lush, J., "finds" or "satisfies himself". In *Nakkuda Ali* v. *Jayaratne* (2), their Lordships of the Privy Council in a case from Ceylon considered the words "has reasonable grounds to believe" and said at p. 77 :—

> "But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially? It is not difficult to think of circumstances in which the Controller might * * * * have reasonable grounds of belief without having ever confronted the licence-holder with the information which is the source of his belief."

(1) (1913) 3 K.B. 870.
(2) 1951 A.C. 66.

At page 78 their Lordships said :—

> "It is that characteristic that the Controller lacks in acting under reg. 62. In truth, when he cancels a licence he is not determining a question : he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it."

In the *Raleigh Investment Company's case* (1), a suit had been brought by an assessee claiming repayment of a part of a larger sum of money under an assessment to income-tax made upon it, the claim was based on the fact that in the computation of assessable income effect had been given to a provision of the Income-tax Act which in the submission of the appellant was *ultra vires* the Indian Legislature. Lord Uthwatt who delivered the judgment of their Lordships said :—

> "In construing the section it is pertinent, in their Lordships' opinion, to ascertain whether the Act contains machinery which enables an assessee effectively to raise in the courts the question whether a particular provision of the Income-tax Act bearing on the assessment made is or is not *ultra vires*. The presence of such machinery, though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to inquire into the same subject-matter. The absence of such machinery would greatly assist the appellant on the question of construction and, indeed, it may be added that, if there were no such machinery, and if the section affected to preclude the High Court in its ordinary civil jurisdiction from considering a point of *ultra vires*, there would be a serious question whether

(1) 74 I.A. 50.

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

the opening part of the section, so far as it debarred the question of *ultra vires* being debated, fell within the competence of the legislature. In their Lordships' view it is clear that the Income-tax Act, 1922, as it stood at the relevant date, did give the assessee the right effectively to raise in relation to an assessment made on him the question whether or not a provision in the Act was *ultra vires*. Under section 30, an assessee whose only ground of complaint was that effect had been given in the assessment to a provision which he contended was *ultra vires* might appeal against the assessment. If he were dissatisfied with the decision on appeal—the details relating to the procedure are immaterial—the assessee could ask for a case to be stated on any question of law for the opinion of the High Court and, if his request were refused, he might apply to the High Court for an order requiring a case to be stated and to be referred to the High Court [see section 30 and *Secretary of State for India* v. *Meyyappa Chettiar* (1)]. It cannot be doubted that included in the questions of law which might be raised by a case stated is any question as to the validity of any taxing provision in the Income-tax Act to which effect has been given in the assessment under review. Any decision of the High Court on that question of law can be reviewed on appeal. Effective and appropriate machinery is therefore provided by the Act itself for the review on grounds of law of any assessment. It is in that setting that section 67 has to be construed.

In conclusion, their Lordships would observe that the scheme of the Act is to set up a particular machinery by the

(1) I.L.R. (1937) M. 211.

use of which alone total income assessable for income-tax is to be ascertained. The income-tax exigible is determined by reference to the total income so ascertained, and only by reference to such total income. Under the Act (section 45) there arises a duty to pay the amount of tax demanded on the basis of that assessment of total income. Jurisdiction to question the assessment otherwise than by use of the machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation to pay arising by virtue of the assessment. The only doubt, indeed, in their Lordships' mind, is whether an express provision was necessary in order to exclude jurisdiction in a civil court to set aside or modify an assessment."

In the next case on this subject *Commissioner of Income-tax, Punjab* v. *The Tribune Trust, Lahore* (1), the judgment was delivered by Lord Simonds who said at p. 315 :—

"Their Lordships, in the course of reviewing the Act, observed upon the language of the section conferring the exemption now in question. They would repeat that they do not find in it any justification for the view that an assessment, which may ultimately be held to be invalid in that it does not give effect to the provision for exemption, is thereby rendered a 'nullity'. In coming to this conclusion they find strong support in the recent decision of this Board in *Raleigh Investment Co., Ltd.* v. *Governor-General in Council* (2). Their Lordships, then, must answer the first question by saying that the assessments were not a nullity."

(1) 74 I.A. 306.
(2) 74 I.A. 50.

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

Continuing his Lordship said at p. 316 :—

> "They have reviewed the Code of income-tax law for the purpose of showing that it exhaustively defines the obligations and remedies of the tax-payer. It would be wholly incompatible with this that he should have a collateral right, necessarily vague and ill-defined founded on the principles of equity and good conscience. Their Lordships are of opinion that the only remedies open to the tax-payer, whether in regard to appeal against assessment or to claim for refund, are to be found within the four corners of the Act. This view of his rights harmonizes with the provision of section 67, to which reference has already been made, that no suit shall be brought in any civil court to set aside or modify any assessment made under the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced."

In another case *Rai Brij Raj Krishna* v. *K. S. Shaw and Brothers* (1), their Lordships of the Supreme Court again relied upon *Reg.* v. *Commissioners for Special Purposes of the Income-tax* (2), and *Colonial Bank of Australasia* v. *Willan* (3), and held that no suit could lie to set aside an order of Controller under the Bihar Buildings (Lease, Rent and Eviction) Control Act of 1947, because the Controller was entrusted with a jurisdiction including the jurisdiction to determine whether there is non-payment of rent or not as well as the jurisdiction, on finding that there is non-payment of rent, to order eviction of a tenant. Therefore, even if a Controller has wrongly decided the question whether there has been non-payment of rent, his order for eviction on the ground that there has been non-payment of rent cannot be questioned in a civil court.

(1) 1951 S.C.R. 145.
(2) 21 Q.B.D. 313.
(3) L.R. 5 P.C. 417.

From a perusal of all these cases I am of the opinion that the jurisdiction to determine whether the provisions of section 34 of the Income-tax Act become applicable to a particular case or not is of the Income-tax Officer and his powers fall within the rule laid down by Lord Esher in 21 Q.B.D. 313.

The next question which arises for determination is whether the only remedy open to the assessee in this particular case is to proceed in accordance with the provisions of the Income-tax Act or this Court should interfere at an intermediary stage and put an end to the assessment proceedings. The learned Advocate-General for the Income-tax authorities submits that the view has been consistently taken in this Court that where the Legislature has entrusted the decision of the facts and the law to the Income-tax Officer subject of course to appeal with a statement of the case to this Court and where the Income-tax Officer has made an assessment it is for him and on appeal for the authority given in the Income-tax Act to decide upon material facts before them whether section 34 is applicable or not and that their decision is final upon the facts although it is open, to review by the Appellate Tribunals and by the High Court upon a case stated. Mr Mitra for the petitioners has relied on a Single Bench Judgment of the Calcutta High Court, *Calcutta Discount Co., Ltd.* v. *The Income-tax Officer* (1), where it was held that notice issued under section 34 as amended by Act XLVIII of 1948 and the proceedings taken in consequence thereof were in the circumstances of that case without jurisdiction and a writ of prohibition was issued.

The view of this Court, however, on this point is different and I have referred to those cases. In *Thin Yick* v. *Secretary of State* (2), it was observed by Panckridge, J., at p. 269 :—

> " It is a well-known principle that where a statute creates a duty or imposes a

(1) 21 I.T.R. 579.
(2) I.L.R. (1939) 1 Cal. 257.

Lala Lachhman Das Nayar and others
v.
Union of India,

Kapur, J.

liability and prescribes a specific remedy in case of neglect to perform the duty or discharge the liability, no remedy can be taken but the particular remedy prescribed by the statute."

The learned Judge relied upon the observation of Lord Esher M. R. in *The Queen* v. *Country Court Judge of Essex and Clarke* (1), where the learned Master of the Rolls said at p. 707 :—

> "The ordinary rule of construction therefore applies * * * * that where the legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued."

I shall now refer to English cases upon which reliance was placed by the learned Advocate-General. He referred to the *Bloomsbury's case* (2). Sir John Simon, Attorney-General, who appeared for the Commissioners of Inland Revenue there argued :—

> "That the decision of the additional Commissioners can only be challenged by an appeal to the General Commissioners whose decision is final, subject to the right of the person assessed to require the statement of a case."

Lord Chief Justice Reading said at p. 786 :—

> "This proposition is really not in dispute and indeed it has been affirmed in *Rex* v. *General Commissioners of Taxes for Clerkwell* (3), where it was held that in these circumstances the applicant's remedy is by appeal and not by prohibition. An argument closely resembling that of the present applicant was

(1) 18 Q.B.D. 704.
(2) (1915) 3 K.B. 768.
(3) (1901) 2 K.B. 879.

there advanced in support of an application for prohibition against the Commissioners. It was there contended that the Commissioners had only acquired jurisdiction to assess the duty by an erroneous finding of facts and therefore that the prohibition should issue, but the Court of Appeal discharged the rule. They held that the remedy was by appeal on the ground that there was jurisdiction to charge a trader in respect of the whole profits of his trade if he is found within the district carrying on the trade in part, and that they had jurisdiction to decide all questions of fact necessary for making the full assessment and, therefore, to determine the true extent of the trade [per Stirling, L.J. (1901) 2 K.B. 895].

It is worthy of observation that if the applicant's main contention is right it would have been open to the subject to proceed by prohibition in numerous and important cases in income-tax law which have been decided by the Courts and the House of Lords upon a case stated by the Commissioners and in which it has been assumed that the only remedy of the subject who disputes his liability is by appeal to the Commissioners and by a case stated on points of law.

I am of opinion that the Crown's contentions are right and that the rule should be discharged with costs."

Avory, J., at p. 790 said :—

"* * * * and that the remedy for any person aggrieved by an assessment made under section 52 either by reason of his not being chargeable at all, or by reason of it being excessive, is by appeal to the General Commissioners and by special case."

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

The learned Judge (Avory, J.) then referred to the observations of Parke B. in *Allan* v. *Sharp*, (1). In *Allan* v. *Sharp* Rolfe, B. said at page 535 of 154 E.R.:—

> "But reading that and the other statutes in *pari materia*, I cannot feel a doubt but that the legislature meant to make the decision of the assessor as to matters within his jurisdiction, whether acquiesced in or appealed from and confirmed, absolute and conclusive."

In *Besant* v. *Advocate-General of Madras* (2), the question was whether a writ of certiorari could issue in a case under the Press Act. Their Lordships at page 160 referred to section 22 of the Act which provides:—

> "22. Every declaration of forfeiture purporting to be made under this Act shall, against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on such application as aforesaid and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act."

The words of section 67 of the Income-tax Act are no doubt not as wide as that of section 22 of the Press Act, but even in Income-tax cases which were decided by the Privy Council their Lordships laid down a similar rule. In *Raleigh Investment Company* v. *Governor-General in Council* (3), their Lordships said:—

> "Jurisdiction to question the assessment otherwise than by use of the machinery

(1) 2 Ex. 352=154 E.R. 529.
(2) I.L.R. 43 Mad. 146
(3) 74 I.A. 50.

> expressly provided by the Act would appear to be inconsistent with the statutory obligation to pay arising by virtue of the assessment."

In the *Tribune case* (1), their Lordships observed :—

> "It is the Act which prescribes both the remedy and the manner in which it may be enforced."

A similar view was taken by the Madras High Court in *Secretary of State for India in Council* v. *Meyappa Chettiar* (2), as also by the Lahore High Court in *Sultan Ali* v. *Nur Hussain* (3).

An examination of the scheme of the Act and the words used in section 34 of the Act and the various cases that I have referred to above show that the legislature has entrusted the determination of facts and of law to the Income-tax Officers. A particular machinery has been set up under the Act by the use of which alone total assessable income for the purposes of the income-tax is to be ascertained and jurisdiction to question the assessment otherwise than by the use of this machinery is incompatible with the scheme of the Act. The challenge of the action of the Income-tax Officer by a writ of prohibition or mandamus is, therefore, not available to the assessee.

A further submission was made by the learned Advocate-General that the petitioners had already filed appeals and for that reason also they should not be allowed to resort to the extraordinary jurisdiction of this Court. He referred to section 31 of the Income-tax Act and particularly to subsection (3)(a) of that section where it is provided :—

> "(3) In disposing of an appeal the Appellate Assistant Commissioner may, in the

(1) 74 I.A. 306, 316.
(2) I.L.R. 1937 Mad. 211.
(3) A.I.R. 1939 Lah. 131 (F.B.)

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

case of an order of assessment,—

(a) confirm, reduce, enhance or annul the assessment."

An appeal filed according to him cannot be allowed to be withdrawn, and he relies on *Rex* v. *Income-tax Special Commissioners* (1), where it was held that an appeal to Special Commissioners of Income-tax could not be withdrawn without the consent of the Special Commissioners, since, when the notice of appeal was given, it became their duty to arrive at the true assessment. An appeal against an assessment under the Income-tax Act, 1918, it was held, was on a different basis from an appeal in private litigation. The same view was taken in *Commissioner of Income-tax, Punjab* v. *Nawab Shah Nawaz Khan* (2), where it was held that it is not open to an assessee who has preferred an appeal to withdraw the appeal so as to prevent the Assistant Commissioner from enhancing the assessment. The Income-tax Act is a special piece of legislation and so far as it goes it is self-contained. One of the grounds given by the Lord Chief Justice for refusing to issue a writ of prohibition in *Rex* v. *Inspector of Taxes for Parish of Kingsland* (3), was that the right of appeal was at that time being pursued by the applicants in that case.

Mr Mitra has referred to certain cases in which it was held that the filing of an appeal is no bar to a writ of prohibition. He relied on *White* v. *Steel* (4), at page 409 where it was so held : *Worthington* v. *Jeffries* (5) ; *The King* v. *North* (6), where Scrutton and Atkin, L. JJ., made observations supporting this contention and *Rex* v. *Postmaster-General* (7). He also referred to *Rashid Ahmad* v. *The Municipal Board, Kairana* (8), where it was held that an appeal under section

(1) (1936) 1 K.B. 487.
(2) 1938 I.T.R. 370 at p. 382.
(3) 8 T.C. 327.
(4) (1862) 12 C.B.N.S. 383
(5) (1875) 10 C.P. 379.
(6) (1927) 1 K.B. 491 at pp. 504 and 506.
(7) (1928) 1 K.B. 291 at p. 299.
(8) 1950 S.C.R. 566.

318 of the U.P. Municipalities Act was not in the circumstances of that case an adequate legal remedy the existence of which would disentitle the petitioner from maintaining an application under Article 32 of the Constitution of India. He then referred to a judgment of this Court, *Wanchoo* v. *The Collector of Delhi* (1), where a writ of prohibition was issued in spite of the fact that an appeal was pending with the Chief Commissioner. In the case decided by the Supreme Court as also by this Court writs of prohibition were issued because in both those cases a right of appeal was not considered to be an adequate remedy. The Advocate-General has submitted that whatever be the law in regard to appeals in other cases, in the matter of income-tax the right to appeal as well as the pendency of appeals would be a bar because an appeal once filed cannot be withdrawn and therefore a finding will have to be given by the authorities to which an appeal is taken as to the liability and propriety of the assessment and therefore this Court should not allow the jurisdiction of those tribunals to be taken away particularly when as a result of an appeal the assessment can be enhanced, modified or can be set aside with a direction of re-assessment. It appears to me that the distinction is there and in view of the judgment of their Lordships of the Privy Council in *Raleigh Investment Company's case* (2) and in the *Tribune Trust case* (3) and all the English cases, *Bloomsbury* case (4) and others that I have referred to above, the appeal or the procedure prescribed in the Indian Income-tax Act is the only remedy open to the petitioners and a writ of prohibition should not issue. In *Rex* v. *Inspector of Taxes for Parish of Kingsland* (5), the Lord Chief Justice took the existence of a provision for an appeal in the statute and the pursuing of that remedy into consideration in refusing a writ for prohibition.

Mr Mitra then took us through the various sections of the Income-tax Act in order to show

(1) 54 P.L.R. 206.
(2) 74 I.A. 50.
(3) 74 I.A. 306.
(4) (1915) 3 K.B. 768
(5) 8 T.C. 327

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

the scheme of the Act. His first submission was that the Income-tax Act as amended from time to time has no operative effect except so far as it is rendered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act, and in support he relied on section 3 of the Income-tax Act and on *Maharajah of Pithapuram* v. *Commissioner of Income-tax, Madras* (1), *Commissioner of Income-tax, Bombay* v. *D. N. Mehta* (2), and *Mishrimal Gulabchand* (3). There is no dispute as to the proposition as has been laid down in these various cases.

It was then submitted by counsel for the petitioners that the amendment of 1948 brought about by Act XLVIII of 1948 has no retrospective effect. Reference was made by him to *Joseph Suche & Co., Limited* (4), *The Midland Railway Company* v. *Annie Pye* (5), *Lauri* v. *Ranad* (6), in *re Norman*, Ex-parte *Board of Trade* (7), *Bourke* v. *Nutt* (8), in *re Athlumney* (9), *Ingle* v. *Barrand* (10). In reply the learned Advocate-General submitted that section 34 of the Act was a procedural section and merely deals with machinery and does not provide for charging income-tax and is therefore retrospective in effect. He relied on the *Commissioner of Income-tax, Bengal* v. *Mahaliram Ramjidas* (11), *Abbott* v. *The Minister for Lands* (12), and he also referred to Odgers on the Construction of Deeds and Statutes at page 195

(1) (1945) 13 I.T.R. 221 (P.C.)

(2) (1935) 3 I.T.R. 147.

(3) (1950) 18 I.T.R. 75.

(4) (1876) 1 Ch. D. 48 at p. 50.

(5) 10 C.B.N. S. 179.

(6) (1892) 3 Ch. D. 402

(7) (1893) 2 Q.B.D. 369 at 373.

(8) (1894) 1 Q.B.D. 725.

(9) (1898) 2 Q.B.D. 547 at p. 551.

(10) 1927 A.C. 417.

(11) I.L.R. (1940) 2 Cal. 215 at p. 222.

(12) 1895 A.C. 225 at p. 431.

where the learned author said :—

> " A new class of legislation, namely, legislation against tax evasion, which is free from any presumption against retrospective effect is indicated by the judgment of the Court of Appeal delivered by Lord Greene in *Lord Howard de Walden* v. *Inland Revenue Commissioners* (1). The fact that the section (Section 18 of the Finance Act, 1936) has to some extent a retroactive effect appears to us of no importance when it is realised that the legislation is a move in a long and fiercely contested battle with individuals who well understand the rigour of the contest. "

Reference was also made by Mr Sikri to Section 35(1), proviso (2), which showed that that Section is retroactive.

Mr Mitra next contended that the various notices complained of in regard to years 1942-43 to 1944-45 were without jurisdiction for reasons which I have set out in the very beginning, i.e. the notices having been issued without the proper approval of the Commissioner, the notices being barred by time, the escapement of income-tax, if any, being due not to the failure of the assessee but because the Income-tax Officer refused to accept the registration of the petitioners' firms and because the Dominion Legislature could not legislate in regard to territory which was not its own and in regard to time when the Legislature itself did not exist.

These and the matters which I have referred to above, i.e. cases covered by the *Maharajah of Pithapuram's case* (2), and others, the retrospective nature of the amended section 34 are all questions which fall within the meaning of "error of law" as defined by their Lordships of

(1) (1942) 1 K.B. 389 at p. 398.

(2) (1945) 13 I.T.R. 22 (P.C.)

Lala Lachhman Das Nayar and others
v.
Union of India
Kapur, J.

the Privy Council in *Raleigh Investment Company* v. *The Governor-General in Council* (1). where it was observed :—

> "The cloud of words fails to obscure the point of the suit. An assessment made under the machinery provided by the Act, if based on a provision subsequently held to be *ultra vires*, is not a nullity like an order of a Court lacking jurisdiction. Reliance on such a provision is not an excess of jurisdiction but a mistake of law made in the course of its exercise."

Their Lordships also said at p. 63 :—

> "In their Lordships' view the construction of the section is clear. Under the Act the Income-tax Officer is charged with the duty of assessing the total income of the assessee. The obvious meaning, and in their Lordships' opinion, the correct meaning, of the phrase, 'assessment made under this Act' is an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that the assessing officer has taken into account an *ultra vires* provision of the Act is in this view immaterial in determining whether the assessment is 'made under this Act.' The phrase describes the provenance of the assessment : it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test."

Their Lordships also said in that judgment at p. 64:—

> "For if the assessment is determined to be right in law the jurisdiction of the civil

(1) 74 I.A. 50 at p. 62.

> Court to entertain the suit is excluded. The assessment is on the appellant's construction made under the Act. If, on the other hand, the assessment is determined to be wrong, the jurisdiction of the civil Court to entertain the suit arises. The result of an enquiry into the merits of the assessment is, on the appellant's construction, to determine whether jurisdiction existed to embark on the enquiry at all. Jurisdiction is made to depend not on subject-matter but on the correctness of the suitor's contention as respects subject-matter. The language of the section is inapt to justify any such capricious method of determining jurisdiction."

It follows therefore that section 34 gives to the Income-tax Officer, if he has reason to believe that there has been an escapement, power to take action. And if in coming to this conclusion he has taken an erroneous view of the law or of the facts it does not affect his jurisdiction; because the law imposes on him the statutory duty to determine the liability of the assessee to assessment including the question of escapement of taxes.

A further argument has been raised by the learned Advocate-General that by interfering with the assessment at this stage we shall be assisting a dishonest and defaulting assessee. If a petitioner is entitled to certain protection given by law the Court will not hesitate to extend it to him even though he may not be a good citizen so long he has not suppressed material facts in his petition. The morals of a citizen are no criterion for giving of redress to which he is by the law of the land entitled.

A consideration of the authorities referred to above shows that:—

(1) the Income-tax Act has entrusted to the Income-tax Officer the decision of the

Lala Lachhman Das Nayar and others
v.
Union of India

Kapur, J.

facts and the law to decide whether the provisions of section 34 are applicable;

(2) the exigencies of the State require that there should be a tribunal to expeditiously and at a small expense decide questions which arise in the matter of assessment;

(3) machinery has been created by the Act for the determination of the liability of an individual for assessment and the extent thereof;

(4) it is that machinery and that alone which can be used for the purposes of assessment and all complaints against such assessment are to be adjudicated upon in accordance with the machinery provided by the Act;

(5) it is the statutory duty of the Income-tax Officer to make the assessment which can only be challenged by way of appeal under the Act and the case stated to the High Court; and

(6) whether the attack on the proceedings under section 34 of the Act is due to the want of preliminary conditions or conditions precedent or to the bar of time, or illegality due to the matter being *res judicata* or due to the provision being *ultra vires* or the amendment being prospective, they are all questions of law and do not affect the jurisdiction of the Income-tax Officer.

If these are all errors of law, as in my opinion they are, the jurisdiction of this Court cannot be invoked because, *inter alia,* the decision of these points is within the jurisdiction of the various authorities upon whom the duty has been cast under the Income-tax Act of determining the assessments and reviewing them subject to the opinion of this Court upon a case stated.

Coming now to the years 1945-46, 1946-47 and 1947-48 the complaint of the petitioners seems to be that one Income-tax Officer registered a new firm which was constituted by a deed of partition, dated the 27th of May 1947, and another Income-tax Officer cancelled the registration and in spite of the fresh deed of partnership entered into the registration was not allowed. These are all questions again which fall within the jurisdiction of the Income-tax Officer or the appellate authorities under the Income-tax Act upon whom has been cast the duty of giving decisions under the various sections of the Income-tax Act. It cannot be said that they affect the jurisdiction of the Income-tax Officers. The Income-tax Officer refused registration because he was of the opinion that there was no genuine firm which had been proved to be in existence. It may be that the Income-tax Officer's opinion is wrong on this point. The determination of that again is for the Income-tax Officer to make and no objection can be taken on the ground of jurisdiction in regard to this matter.

The next submission of Mr Mitra was that there has been a second assessment made on the petitioners in spite of the fact that registration has been refused. That appears to be a precautionary assessment the efficacious existence of which will depend upon the determination of the question whether there has been a partition of the various members of the joint Hindu family and whether a genuine firm of eight members in place of two partners has been formed. In my opinion all these are questions of law which fall within the rule laid down by their Lordships of the Privy Council in the *Raleigh Investment Company's case* (1) .

I would therefore dismiss the petition and discharge the rule. The opposite party will have their costs which I assess at Rs 1,000.

Nothing that I have said in this judgment will affect the rights of the petitioners or the Income-tax Department in regard to the assessments for

(1) 74 I.A. 50.

Lala Lachhman Das Nayar and others v. Union of India

the various years and I have no doubt that till the matter is decided by the appellate authority the petitioners will not be made liable for payment of the sum of Rs 3,92,000 which is a disputed assessment.

Kapur, J.

Soni, J.

SONI, J. I agree. Writs of mandamus are issued in proper cases to fill in gaps where no legal remedy or no adequate legal remedy is available. They are meant to supplement not to supersede legal remedies. They are meant to promote the orderly administration of justice by the duly constituted Tribunals of the land, and are not intended to by-pass them. See *Elverton's case* (1).

With regard to the accommodation for the payment of income-tax, the discretion is vested in the Income-tax Officer under sections 45 and 46 of the Income-tax Act. This Court can only compel him to exercise his discretion, but cannot direct him as to the manner in which that discretion is to be exercised. See *Julius* v. *The Bishop of Oxford* (2).

(1) (1895) 156 U.S. 211.
(2) (1880) 5 A. C.214

147 HC—400—4-11-53—CP&S., Pb., Chandigarh