

In the circumstances I am of the opinion that both the orders of the lower Court treating the statement of Mr. Laxmi Chand as made on a valid reference under section 20 of the Evidence Act and superseding the appointment of Diwan Sham Lal as an arbitrator must be set aside and the cases sent back to the lower Court for a decision on the merits of all the objections raised against the statement of Mr. Laxmi Chand treating this statement as the award of an arbitrator. The appellants will be entitled to costs from the respondents.

D. K. MAHAJAN, J.—I agree.

K.S.K.

CIVIL MISCELLANEOUS

Before S. K. Kapur, J.

M/S R. G. GOVAN & CO. PRIVATE LTD. AND ANOTHER,—*Petitioners*

versus

THE COMMISSIONER OF INCOME-TAX (CENTRAL) AND OTHERS,—

Respondents

Civil Writ No. 1592-C of 1965.

March 22, 1966

Finance Act (X of 1965)—S. 68—Interpretation and Scope of—Specification of the period for payment of tax due—Whether necessary to be made by the assessee—Amount of which disclosure is made—Whether to be excluded from assessment—Taxing statute—How to be interpreted.

Held, that a plain reading of clauses (i) to (iii) of sub-section (1) of section 68 of the Finance Act, 1965, shows that a person making a disclosure is entitled to take benefit under any of the three clauses. An assessee is entitled to make a disclosure at any time before 1st day of June, 1965, but after 28th February, 1965, as is provided in the proviso to sub-section (2) of section 68. Having done so, he may wait till 31st day of May, 1965, to pay any amount, not less than 50 per cent of the tax due, and furnish adequate security for payment of the balance by the said date as provided in clause (iii) of sub-section (1) of section 68.

Held, that the requirement as to specification of period in sub-section (2) of section 68 does not apply to an assessee choosing to take the benefit of clause (iii) of section 68(1). Period is required to be specified by clause (ii) with

M/s R. G. Govan & Co. Private Ltd., etc. v. The Commissioner of Income-tax (Central), etc. (Kapur, J.)

respect to the entire tax due on the disclosed amount in the declaration, while under clause (iii) he may give an undertaking to pay the "balance" at any time before 31st May, 1965. In such an event, the assessee cannot obviously specify the period in the declaration. Moreover, the language of sub-section (2) and particularly the words "required to be specified under clause (ii) ..." suggest that that specification is required only where an assessee chooses to act under clause (ii) of section 68(1).

Held, that under sub-section (6) of section 68, only those amounts have not to be included in the assessment order with respect to which the tax referred to in sub-section (3) is paid. It follows that in case a disclosure statement is made, but the amount is not paid, the same is includable in the assessment order and immediately the payment is made in accordance with sub-sections (1) and (3) of section 68, the statute supervenes and renders the Income-tax Officer incapable of realising more than the rate specified in sub-section (3) of section 68 under any other provisions of the Income-tax Act.

Held, that the taxing statutes must, when penned in obscurity, be so construed as to resolve the ambiguity in favour of the subject. If the person sought to be taxed comes within the letter of the law, he must be taxed, however, great the hardship may appear to the judicial mind to be. On the other hand, if the State, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be.

Petition under Articles 226 and 227 of the Constitution of India, praying that this Hon'ble Court may be pleased to issue :—

- (a) *A writ, order or direction in the nature of certiorari and/or otherwise quashing the assessment order, dated 22nd March, 1965, Annexure 'F' to the petition together with the notice of demand issued in pursuance thereof.*
- (b) *A writ, order or direction in the nature of certiorari and/or otherwise quashing the order dated 30th March, 1965, Annexure 'G' to the petition, together with the notice of demand issued in pursuance thereof.*
- (c) *A writ, order or direction in the nature of certiorari and/or otherwise quashing the order, dated 25th March, 1965 of the Respondent No. 1, Annexure 'E' to the petition.*
- (d) *A writ, order or direction in the nature of mandamus directing the Respondent No. 1 to consider and accept the declaration dated 22nd*

March, 1965, made by the petitioner company under the provisions of section 68 of the Finance Act, 1965, Annexure 'D' to the petition.

- (e) *A writ, order or direction in the nature of mandamus or otherwise directing the Respondent No. 3 to pass assessment order in accordance with law after excluding the amounts forming the subject-matter of the declaration made under section 68 of the Finance Act, 1965.*
- (f) *Any other writ, order or direction which may do complete justice to the petitioner in the circumstances of the case.*

K. K. JAIN WITH BISHAMBER LAL, ADVOCATES, for the petitioners.

HARDYAL HARDY, SENIOR ADVOCATE, WITH D. K. KAPUR, ADVOCATE, for the Respondents.

JUDGMENT (Oral)

KAPUR, J.—This is yet another attempt on the part of the Revenue to establish a more lucrative interpretation of a provision of tax law, namely, section 68 of the Finance Act, 1965, enacted on 11th May, 1965, but brought into effect retrospectively from 1st March, 1965, based on an argument which, when analysed, amounts to saying that certain ambiguities in the Act should be resolved in favour of the State.

I am concerned in this case with the assessment year, 1960-61, the accounting year being the year ended 30th June, 1959. Petitioner No. 1, Messrs. R. G. Govan and Company Private Limited, 58-Janpath, New Delhi (hereinafter referred to for convenience as the petitioner company) filed a return of income with respect to the said assessment year showing a sum of Rs. 1,15,658 as its total income. The petitioners in the writ petition claim that a settlement was arrived at between the parties whereby the petitioner-company agreed to the inclusion of Rs. 4,49,642, provided no penalty was imposed on the petitioner-company for this non-disclosure. There is a controversy over this compromise also, and it is hardly necessary for me to go into

M/s R. G. Govan & Co. Private Ltd., etc. *v.* The Commissioner of Income-tax (Central), etc. (Kapur, J.)

this question. It is alleged by the petitioner-company that before the assessment order was made, it filed a declaration on 22nd March, 1965, in accordance with section 68 of the Finance Act, 1965, making a disclosure of certain concealed income. The petitioner-company also enclosed a cheque for Rs. 50,000 with the disclosure statement. It is not disputed that the disclosure statement and the accompanying letter, collectively marked Annexure D to the writ petition, were filed with the Commissioner of Income-tax on 22nd March, 1965. The Commissioner of Income-tax, however, declined to accept the said disclosure and by his letter dated 25th March, 1965, wrote to the petitioner-company: "Please refer to your letter dated the 22nd March, 1965. The declaration sent along with your letter is invalid. The cheque for Rs. 50,000 is returned herewith."

The real controversy between the parties revolves round the question whether or not the disclosure conformed to the provisions of section 68. In the forwarding letter written by the petitioner-company to the Commissioner of Income-tax, dated the 22nd March, 1965, enclosing the declaration of undisclosed income, it is *inter alia*, stated:

"The tax liability of the company amounts to Rs. 2,83,297. According to the provision of "Section 68 of the Finance Bill, 1965, the company was required to file the declaration within three months and deposit the amount of tax at 60 per cent or give Bank Guarantee and pay the amount within six months. In our case, the declaration has to be filed earlier because the assessment becomes time-barred by 31st March, 1965. Therefore, the declaration has to be filed before the said date and the company will not be able to avail of the period of three months for the purpose of making the payment or giving guarantee for the same. As the time is too short at the disposal of the company to make the necessary arrangements, it is requested that the period of three months may be allowed as contemplated by the said section for making the payment or giving the guarantee. In order to prove our bona fide a cheque of Rs. 50,000 is enclosed for immediate payment and for the balance the necessary arrangements are being made to meet the provisions of section 68 of the Finance Bill, 1965."

Subject-matter of the most serious controversy is the statement contained in columns 8 and 9 of the declaration making the disclosure which may be quoted—

“8. If the whole or part of the income-tax required to be paid has not been paid, state:—

- | | |
|--|--|
| (i) The amount which remains to be paid. | Rs. 2,33,297 shall be paid on or before 30th |
| (ii) period within which the declarant undertakes to make the payment. | September, 1965. |

9. Details of the security offered for payment of the amount mentioned against item No. 8. The company having been left with no cash resources due to losses

- | | |
|--|--|
| (a) Name and address of the scheduled Bank which has guaranteed the payment (the Bank Guarantee should be enclosed). | in subsequent years is not in a position to make down right payment or arrange Bank Guarantee but undertakes |
| (b) Distinctive numbers, face value and market value of the securities of the Central Government, which have been assigned to the President of India (the application should be accompanied by the original G.P. notes or stock certificates and the deed of assignment in favour of the President.) | to pay its total income-tax liability by instalments out of future profits or raising loans. |

It is necessary to refer for a moment to the dates when the Act was passed, as otherwise it may remain ambiguous as to why mention was made in the letter, dated 22nd March, 1965, of Finance Bill, 1965. As I have stated earlier, the Finance Act, 1965, was enacted on 11th May, 1965, but section 68 was enforced retrospectively from 1st March, 1965. It appears, however, that the disclosure statement was made on the publication of the Finance Bill, 1965, since clause (1) of the Bill provided that section 68 shall come into force retrospectively.

Unfortunately, no reasons have been given by the Commissioner of Income-tax as to why he rejected the declaration. One has, therefore, to go into the realm of conjectures to find out what may have impressed the Commissioner to do so. Mr. Hardyal Hardy, the learned counsel for the Commissioner, has, therefore, taken all pleas

M/s R. G. Govan & Co. Private Ltd., etc. v. The Commissioner of Income-tax (Central), etc. (Kapur, J.)

in justification of the said non-speaking order. The section is couched in not too happy a language, but it has to be read keeping the general principle in mind, which has been announced in innumerable decisions, that such statutes must, when penned in obscurity, be so construed as to resolve the ambiguity in favour of the subject. It is a taxing statute and it is a sound general rule applicable to all fiscal legislation that if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the State, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. It is true that a balance must be struck and a safe medium drawn even in construing fiscal statutes between the view of the revenue laws, which treats them as harsh enactments to be circumvented and defeated if possible and a view under which they acquire an expansive quality and may be made to reach out and bring within their grasp and under the discipline of their severe provisions, subjects and cases which it is only conjectured, may have been within their intent; but at the same time it cannot be denied that the power to tax is or can be a destructive power and the rule of strict construction operates as a potential safeguard. It would be, therefore, wise to adhere to the rule that a subject must not be allowed to be subjected to a taxing provision unless the statute unambiguously so authorises. I propose to discuss this case in the light of the above rule. Mr. Hardy, the learned counsel for the respondents firstly says that the department had discovered this concealment and, therefore, it was no longer open to the assessee to disclose the same thereafter. But that argument is not justified in the face of the provisions of section 68 (1). Admittedly, neither the assessment had been made at the time of making the disclosure, nor had any proceedings been taken for the assessment of the disclosed amount nor the income, which was disclosed had been shown in the return of income. That being so, I think, the petitioner-company could legitimately make a disclosure under section 68 with respect to an income not disclosed in the return for the assessment year in question. That seems to be the only possible reading of clauses (a) to (c) of sub-section (1) of section 68.

Mr. K. K. Jain, the learned counsel for the petitioner, says that under section 68, the Revenue is enjoined not to charge any rate other

than the one specified in sub-section (3) of section 68 with respect to the disclosed income in case the disclosing party complies with any of the three conditions set out in clauses (i), (ii) and (iii) of sub-section (1) of section 68, that is, if he—

- “(i) pays the amount of income-tax as computed at the said rate, or
- (ii) furnishes adequate security for the payment thereof in accordance with sub-section (4) and undertakes to pay such income-tax within a period, not exceeding six months, from the date of the declaration as may be specified by him therein, or
- (iii) on or before the 31st day of May, 1965, pays such amount as is not less than one-half of the amount of income-tax as computed at the said rate or furnishes adequate security for the payment thereof in accordance with sub-section (4), and in either case assigns any shares in, or debentures of, a joint stock company or mortgages any immovable property, in favour of the President of India by way of security for the payment of the balance, and undertakes to pay such balance within the period referred to in clause (ii).”

Mr. Jain has laid a great emphasis on the letter dated the 22nd March, 1965, wherein, according to the learned counsel, a complete undertaking had been given to comply with the provisions of section 68. He further says that under clause (iii) of sub-section (1) of section 68, it was open to the petitioner-company to pay an amount not less than one-half of the amount of income-tax at any time on or before 31st day of May, 1965, and to furnish security and an undertaking for the balance. To my mind, a plain reading of clauses (i) to (iii) shows that a person making a disclosure is entitled to take benefit under any of the three clauses. An assessee is entitled to make a disclosure at any time before 1st day of June, 1965, but after 28th February, 1965, as is provided in the proviso to sub-section (2) of section 68. Having done so, he may wait till 31st day of May, 1965, to pay any amount, not less than 50 per cent of the tax due, and furnish adequate security for payment of the balance by the said date as provided in clause (iii) of sub-section (1) of section 68. At one stage, it struck me as if under sub-section (2) of section 68, an assessee is at all events required to specify the time in which he undertakes to make the payment, in the declaration. That somewhat tempted me to go into the

M/s R. G. Govan & Co. Private Ltd., etc. v. The Commissioner of Income-tax (Central), etc. (Kapur, J.)

question whether sub-section (2) is mandatory or directory, and if mandatory, what is the effect of the petitioner-company saying in the declaration form that it shall pay "on or before 30th September, 1965" though the last day for payment was 22nd September, 1965. On closer scrutiny, however, it appears that the requirement as to specification of period in sub-section (2) does not apply to an assessee choosing to take the benefit of clause (iii) of section 68(1). Period is required to be specified by clause (ii) with respect to the entire tax due on the disclosed amount in the declaration, while under clause (iii) he may give an undertaking to pay the "balance" at any time before 31st May, 1965. In such an event, the assessee cannot obviously specify the period in the declaration. Moreover, the language of sub-section (2) and particularly the words "required to be specified under clause (ii)" suggest that that specification is required only where an assessee chooses to act under clause (ii) of section 68(1). My conclusion, therefore, is that no period need be specified in case an assessee decides to pay in accordance with clause (iii) of section 68(1).

In the light of these facts, Mr. Jain says that the petitioner-company rightly made the declaration on 22nd March, 1965, and the Commissioner could not reject the same on 25th March, 1965, without waiting to see whether it complied with clause (iii) of sub-section (1) of section 68 or not. Mr. Hardy, on the other hand says that the last date for payment in this case was 22nd September, 1965, i.e., six months from the date of the declaration as provided in sub-section (1) of section 68, but the petitioner-company unequivocally declared in reply to column 8 of the disclosure statement that the amount shall be paid on or before 30th September, 1965. According to Mr. Hardy, the disclosure statement on its face disclosed that the petitioner-company was not intending to comply with the provisions of section 68. Mr. Jain, on the other hand, relies on the undertaking contained in the said letter accompanying the declaration form. Mr. Hardy also contends that no steps had been taken by the petitioner-company to secure the payment of the amount by mortgage, etc., as contemplated by the later part of clause (iii). If I am right in reading clause (iii) to mean that under the statute an assessee making a disclosure was entitled to pay such an amount as was not less than one-half of the tax due on any date before 31st day of May, 1965, and furnish security for the "balance" on or before that date, then the petitioner-company's statement in reply to column 8 had no significance. The statute gave the right to a disclosing assessee to pay the amount and furnish security

for the balance in accordance with clause (iii). If no time need have been specified in the declaration as discussed above, I can see no cause to justify the action of the Commissioner in rejecting the declaration on that ground. Apart from the fact that the petitioner-company had given an undertaking in the letter, I think, it is legitimate to hold that the Commissioner of Income-tax ought to have waited to see whether the petitioner-company complied with clause (iii) of sub-section (1) of section 68 or not, and was consequently not justified in rejecting the disclosure statement on 25th March, 1965. By so rejecting the disclosure, I think, an assessee in such circumstances may legitimately say that it was rendered unable to comply with the statutory provision.

Mr. Hardy says that certain serious difficulties may arise unless it is held that a disclosing assessee must make the payment along with the disclosure statement. He refers to sub-section (6) of section 68, and points out that if an assessee makes a disclosure but does not pay the tax, the amount so disclosed may not be includable in the assessment order with the result that such an assessee may thereby avoid payment as well as the consequence of being proceeded against under sections 147 and 148 of the Act. That, according to Mr. Hardy, would be so, because an assessee would have a complete answer to an action under sections 147 and 148 that all the facts were available to the assessing authority before making the assessment and, therefore, no income escaped. I think, the apprehension of Mr. Hardy is unfounded. Under sub-section (6) of section 68, only those amounts have not to be included in the assessment order with respect to which the tax referred to in sub-section (3) is paid. It follows that in case a disclosure statement is made, but the amount is not paid, the same is includable in the assessment order and immediately the payment is made in accordance with sub-sections (1) and (3) of section 68, the statute supervenes and renders the Income-tax Officer incapable of realising more than the rate specified in sub-section (3) of section 68 under any other provisions of the Income-tax Act. That seems to be the only logical way of reconciling the different sub-sections in section 68. In that view it would in no case be necessary to invoke the provisions of sections 147 or 148.

In the result, it must be held that the Commissioner of Income-tax acted without jurisdiction in rejecting the disclosure statement on 25th March, 1965. The impugned order of the Commissioner of Income-tax must, therefore, be quashed. Mr. Jain has asked me to

M/s R. G. Govan & Co. Private Ltd., etc. v. The Commissioner of Income-tax (Central), etc. (Kapur, J.)

quash the assessment order as well, which includes the amount disclosed. There is no justification for this prayer. As I have construed the section the amount has to be included in the assessment order till the tax thereon is paid in accordance with sub-section (3) of section 68. On payment alone the modified rate of tax becomes applicable and effect is required to be given to sub-section (6). This prayer of the petitioner-company, therefore, cannot be entertained.

There remain two more questions to be settled; (1) whether or not, in the circumstances of the case, the order, dated 30th March, 1965, made under section 23-A(1) ought to be quashed, and (2) whether a direction can issue to the respondents to accept the payment of tax, due under section 68 of the Finance Act, 1965, even though the time for making the payment fixed by the said provision had expired? So far as the first question is concerned, I think, in view of my finding that the amount of disclosed income has been rightly included in the assessment order as made, the order under section 23-A is legal. The question to be considered in deciding the legality of the order under section 23-A is whether the distribution as dividend is less than the statutory percentage of the total income of the petitioner-company as reduced by certain amounts mentioned in sub-sections (1) (a), (b) and (c) of section 23-A. The total income is defined by section 2(15) to mean, ".....total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in this Act." The disclosed income, undoubtedly, would be a part of the total income till excluded under sub-section (6). If that is to be taken as the 'total income', I see no objection to an order under section 23-A being based on the said 'total income', of the petitioner-company. On behalf of the petitioner-company, it has been suggested that if this be correct position of law, then there are bound to be serious complications inasmuch as an assessee may have to pay the extra tax in pursuance of an order under section 23-A, even if the payment is ultimately made in accordance with section 68 of the Finance Act, 1965. By way of illustration, it is said that if, as has happened in this case, an assessment order is made before 31st May, 1965, and so is an order made under section 23-A; the assessee will have to pay tax, although he pays the amount due under section 68 on or before 31st May, 1965. I do not think there are any such complications; for, if an assessee wants to avoid an order under section 23-A being made, there is nothing to stop him from paying the entire amount before the assessment order is made and thus take benefit of sub-section (6)

of section 68. Even if such an assessee has not paid the amount before the making of an assessment order or an order under section 23-A, he may still pay the amount within the period prescribed by section 68 and take recourse to such remedies by way of rectification, appeal or revision, as may be available to him for exclusion of the amount from the assessment order and/or modification of the order under section 23-A. In these circumstances, the order under section 23-A cannot be quashed at the present stage.

When I had dictated the judgment in Court up to this stage, a question arose as to whether, in spite of expiry of the time fixed by section 68 for payment of tax, a writ can issue to the respondents to receive the payment now? This is the second of the two problems mentioned by me above. The learned counsel took time to consider the matter and after hearing them, I reserved my orders to decide this point.

Mr. Jain, learned counsel for the petitioner-company, says that since the Commissioner of Income-tax, by wrongly rejecting the declaration, disabled the petitioner-company from making the payment, a writ can issue directing the respondents to accept the payment now. He says that the Commissioner returned the instrument of declaration and the cheque for Rs. 50,000 to the petitioner-company and, therefore, the petitioner-company could not have made the payment or, in other words, the Commissioner of Income-tax should be deemed to have waived the tender of money which, in the circumstances, would have been an idle formality. He has relied on *Charles A. Hills v. National Albany Exchange Bank* (1), and *Jefferson Tracey v. Mary Irwin* (2) in support of the proposition that when the tender or performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused; or that the payment or performance will not be accepted. He further cited *The Mayor and Assessors of the City and Borough of Rochester v. The Queen* (3), to show that this Court ought to compel the performance of a public duty by public officers, although the time prescribed by the statute for the performance by them has passed, in the circumstances of the case like the present. I think, there can be no dispute with this proposition of law as such and a public officer cannot

(1) 26 Law. Ed. 1052.

(2) 21 Law. Ed. 786.

(3) 120 E. R. 791.

M/s R. G. Govan & Co. Private Ltd., etc. v. The Commissioner of Income-tax (Central), etc. (Kapur, J.)

escape the performance of his obligations by saying that he defaulted in the performance of duty and cannot be compelled to do so after the time prescribed by the statute has expired. The position would, however, be different where there are reciprocal obligations to be performed by both the parties. In this case, whereas the duty of the Commissioner was to accept the payment, it was the duty of the petitioner-company to tender the same. The facts disclosed show that the petitioner-company never tendered the amount due on or before 31st May, 1965, and never offered to take any steps as required by sub-clause (iii) of clause (c) of sub-section (1) of section 68 of the Finance Act, 1965. I have been asked to hold that taking of any steps or tendering of money would have been a mere formality, as the petitioner-company was fairly certain that the payment or performance would not be accepted by the Commissioner, who had earlier returned the cheque for Rs. 50,000 and had also returned the declaration form. That again is a matter of guess. So far as the cheque for Rs. 50,000 is concerned, it was not a tender of money due in accordance with sub-clause (iii) of clause (c) of sub-section (1) of section 68. The petitioner-company nowhere alleges in the petition that it did not make the payment, because it was certain in its mind that the Commissioner would decline to accept the payment. May be that if the petitioner-company had offered the money, without prejudice to the rights and contentions of the respondents, the Commissioner may have accepted it, or may be he had not, but it is difficult to find positively that the petitioner-company did not offer to comply with sub-clause (iii) of clause (c) of sub-section (1) of section 68 due to any such belief in its mind. Under section 68, the petitioner-company was bound to pay by the specified date. I think, the petitioner-company was, therefore, bound to offer to perform its part of the obligation, unless there be any clear indication that the Commissioner would not have accepted the performance even without prejudice. The petition was filed in June, 1965, while the declaration had been rejected by the Commissioner in March, 1965. This shows that the petitioner-company took no steps to file the petition or to have it heard before 31st May, 1965. In these circumstances, it is reasonable to deduce that the petitioner-company was not anxious to fulfil its obligation cast on it by the statute. I am prepared to accept, as has been suggested by the petitioner-company that there may have been a *bona fide* mistake in believing that the circumstances did not call for the offer to perform any obligation on its part, but that does not, in view of what I have

said above, help the petitioner-company. In the circumstances, I hold that no writ can issue to the respondents to accept the payment now.

In the result, though the order of the Commissioner of Income-tax dated 25th March, 1965, rejecting the disclosure statement is quashed, no relief can be given to the petitioner-company and the petition must, therefore, fail. Having regard, however, to the fact that it is possible that the petitioner-company may not have made the payment, in view of the rejection of the declaration, I leave the parties to bear their own costs.

B.R.T.

CIVIL MISCELLANEOUS

Beofre Inder Dev Dua and R. S. Narula, JJ.
YOGESH CHANDER BAHREE,—*Petitioner*

versus

THE REGISTRAR, PUNJAB UNIVERSITY,—*Respondent*

Civil Writ No. 1894 of 1965.

March 22, 1966

Code of Civil Procedure (Act V of 1908)—Order XLVII, Rule 4(2) proviso (a)—High Court Rules and Orders Volume V—Chapter 1-A rule 10—Petition under Art. 226 Constitution of India, dismissed in limine—Application for review of that order—Notice of the application—Whether necessary to be given to opposite party—Order passed without notice reviewing earlier order of dismissal—Whether a nullity.

Held, that the requirement of proviso (a) to sub-rule (2) of rule 4 of Order 47 of the Code of Civil Procedure is mandatory for cases to which the Code of Civil Procedure is applicable and in which there is an opposite party who is entitled to appear and be heard in support of the order which is likely to be set aside in the review proceedings. The requirement is no doubt procedural but it is certainly not intended to be in the discretion of the reviewing Court to review a particular order which falls within the four corners of the proviso after giving notice to the opposite party or without giving such a notice. An order on an application for review without issuing a notice required by the above-said proviso would not be without inherent jurisdiction and would not, therefore, be a nullity and cannot be ignored by the affected party. Every Court has jurisdiction to pass a correct order as well as a *bona fide* incorrect order. The error in the incorrect order may be due to a factual mistake, a legal mistake or a jurisdictional mistake or irregularity. In either case, so long as the order is passed with inherent jurisdiction by a competent Court, no party to the order even if he had