be normally allowed except in specified cases and that divorce, as far as possible should not be permitted but at the same time it is no use keeping the parties tied together when we find as a fact that the decree remained unexecuted during the period specified by law. The only circumstances in which a decree for divorce can be refused is when either the decree-holder creates a situation which makes it impossible for the parties to live together and taking advantage of his own wrong wants relief by way of a decree for divorce. Section 23 controls granting of relief in matrimonial proceedings and lays down a set of rules which will disentitle a petitioner to any relief even if grounds for granting such relief exist and one of the rules is that no party to a proceeding can take advantage of his or her own wrong. It is for this reason that a decree-holder who conducts himself in a manner as to make it impossible for the judgment-debtor to comply with the decree is refused a decree for divorce. No such circumstances have been shown to exist in the instant case and all that we find is that according to the respondent, the appellant did not win her confidence as envisaged in the compromise.

(13) For the foregoing reasons, I must hold that in view of the established fact that there has been no restitution of conjugal rights for a period of more than two years after the passing of the decree the marriage between the appellant and the respondent must be dissolved.

The appeal is accordingly allowed and a decree for divorce passed in favour of the appellant against the respondent, with no order as to costs.

N. K. S.

INCOME TAX REFERENCE

Before Harbans Singh, C.J.

(on difference between Mahajan and Sandhawalia, JJ.)

THE COMMISSIONER OF INCOME-TAX,—*Applicant.*

versus

RAGHBIR SINGH TRUST, DISTRICT AMRITSAR,—*Respondent.*

Income Tax Reference No. 3 of 1966

August 20, 1970.

Income Tax Act (XI of 1922)—*Sections* 34(1)(b), 34(3), *second proviso and* 66—*Assessee creating Trust and filing two income tax returns one individually and the other on behalf of the Trust—In the individual assessment*

proceedings, the creation of Trust held to be invalid—Income of Trust held to be individual income of the assessee—Assessee claiming reference under section 66—High Court holding the Trust valid—Notice under section 34(1) (b) issued to the Trust after four years of the last assessment year and assessment made—Such assessment—Whether barred by time—Second proviso to section 34(3)—Whether applicable to the case.

Held, (per Harbans Singh, C.J., on difference between Mahajan and Sandhawalia, JJ.), that two conditions have to be satisfied before the second proviso to section 34(3) of Income-tax Act, 1922, can apply to a particular case of reassessment viz. (a) that the reassessment should be made 'on the assessee or any person', and (b) such a reassessment should be in consequence of or to give effect to any finding contained in an order under section 66 of the Act. When an assessee creates a Trust, it becomes an altogether separate entity and in no way connected with the assessee as an individual. The mere fact that the assessee is a trustee and in that capacity files a separate return of the Trust, will not make any difference. If in the previous assessment proceedings of the assessee the litigation is fought by the assessee on the sole contention that the income of the Trust validly constituted should not be added to his income and he claims reference under section 66 of the Act, in those proceedings Trust is not a party and is also not so intimately connected with the proceedings as not to be treated as a stranger. Moreover, the only finding that is necessary for the decision of the reference to the High Court made at the instance of the assessee is whether the Trust was validly constituted and whether the income of the Trust could be treated as the income of the assessee individually. The other finding as to who should be treated as recipient of such income is merely an incidental finding not necessary at all for the decision of the reference and will not be a finding within the provision of second proviso to section 34(3) of the Act. Hence in such a case, the proceedings initiated under section 34(1)(b) of the Act and assessment made after four years of the last assessment year is barred by time and the case is not covered by second proviso to section 34(3) of the Act.

(Paras 35, 39, 41 and 42)

Case referred by a Division Bench consisting of Hon'ble Mr. Justice D. K. Mahajan, and Hon'ble Mr. Justice S. S. Sandhawalia, on 18th March, 1970, to a third Judge on account of difference of opinion. The case was finally decided by Hon'ble the Chief Justice Mr. Harbans Singh, on 20th August, 1970.

Reference made under Section 66(1) of the Indian Income-tax Act, 1922 by the Income-Tax Appellate Tribunal (Delhi Bench) for decision of the below noted question of law arising out of the Tribunal order dated 5th September, 1964, in ITA No. 6372 of 1962-63 regarding assessment year 1954-55:—

> *"Whether on the facts and in the circumstances of the case the assessment made under Section 34(1)(b) for the assessment year 1954-55 was barred by time and was not saved by the second proviso to Section 34(3) of the Income-tax Act, 1922?"*

D. N. AWASTHY AND B. S. GUPTA, ADVOCATES, for the applicant.

DEVA SINGH RANDHAWA, ADVOCATE, for the respondent.

ORDER

D. K. MAHAJAN, J.—This reference relates to the assessment year 1954-55—the account year ending on 31st March, 1954. The assessee is S. Raghbir Singh Trust, District Amritsar, Raja Sansi (hereinafter referred to as the 'Trust').

(2) The relevant facts, necessary for the determination of the question of law, that has been referred for our opinion, may now be stated. S. Raghbir Singh (hereinafter referred to as assessee) was originally a member of the joint Hindu family consisting of himself, his sons and his wife. This family disrupted on the 10th of April, 1953. The assets of the family were partitioned. S. Raghbir Singh received 400 shares of Simbhaoli Sugar Mills Private Limited, among other assets of the joint Hindu Family, as his share. He was also assigned the obligation to pay off a debt of nearly Four Lakhs of Rupees which had been contracted by the joint Hindu family and was due to Rai Bahadur Seth Jessa Ram-Fateh Chand. On the 14th of April, 1953, the assessee executed a deed of trust, whereby he constituted a trust of 300 out of 400 shares of Simbhaoli Sugar Mills. The trustees appointed under the Trust Deed undertook to accept the obligations and to carry out the same in accordance with the objects of the Trust. The relevant objects of the Trust were, to pay the debts in the first place and, thereafter, to provide funds for the maintenance and education of assessee's children and grand-children. 80 per cent of the income of the Trust was to be spent on the children and grand-children; and the remaining 20 per cent was to be spent on various charitable purposes enumerated in the Deed of Trust. Thus the Trust Deed came into being during the assessment year 1954-55. For that assessment year, the assessee filed a return of his income excluding the income for 300 shares which had been transferred to the Trust. He also filed a return, as a President of the Trust, regarding the income of the 300 shares belonging to the Trust as assessable in the hands of the Trust. Both these returns came up before the same Income-tax Officer. The Income-tax Officer passed orders in both the returns. While dealing with the return of the Trust, the Income-tax Officer passed the following order :—

> "No assessment is made in this case; and the income accruing to the so-called Trust is to be assessed in the hands of S.B.S.

Raghbir Singh for whom a separate file exists (G.I.R. No. 15/R. 18)".

With regard to the return filed by S. Raghbir Singh in his individual capacity, he took into account the income of the Trust and added it as the income of the assessee and accordingly assessed the assessee. S. Raghbir Singh was dissatisfied with this assessment; and he went up in appeal to the Appellate Assistant Commissioner. His contention before the Appellate Assistant Commissioner was that the income of the Trust could not be taken into account and treated as his individual income. This contention failed; and the order of the Income-tax Officer was affirmed. An appeal to the Tribunal by S. Raghbir Singh met with the same fate.

(3) S. Raghbir Singh then claimed a reference to this Court; and ultimately, his contention prevailed in this Court, because in that reference, this Court, in the answer to the question referred, held that the income of the Trust was not the income of S. Raghbir Singh and, therefore, it could not be taken into account while assessing his individual income. This decision is reported as *S. Raghbir Singh* v. *Commissioner of Income-tax, Simla* (1). The Department took an appeal to the Supreme Court against this decision by special leave; and the Supreme Court ultimately affirmed our decision and its judgment is reported as *Commissioner of Income-tax, Punjab, Jammu and Kashmir and Himachal Pradesh* v. *S. Raghbir Singh* (2).

(4) On the 19th of September, 1961, the Income-tax Officer issued a notice to the Trust under section 34(1)(b) of the Indian Income-tax Act, 1922 (hereinafter referred to as the Act), in order to assess the income regarding which the Trust had filed its return on the 15th of July, 1954. This assessment was completed on the 23rd of February, 1962. The Trust's case was that the provisions of section 34(1)(b) read with the Second Proviso to sub-section (3) of section 34 were not applicable to his case. This contention was not accepted by the Income-tax Officer. Against this decision, the Trust preferred an appeal to the Appellate Assistant Commissioner; and it was urged that the assessment was barred by limitation. The contention of the Trust was repelled by the Appellate Assistant Commissioner; and he affirmed the order of the Income-tax Officer. The Trust then preferred an appeal to the Tribunal. Before the Tribunal, the contention of

(1) (1961) 42 I.T.R. 410.

(2) (1965) 57 I.T.R. 408.

the Trust was that the assessment was barred by limitation. The Revenue, on the other hand, contended that the time-limit had been extended by the Second Proviso to section 34(3), because the assessment was merely a consequence of the judgment of the Punjab High Court in S. Raghbir Singh's case (1). This contention was further fortified by the fact that S. Raghbir Singh was the author of the Trust. The contentions of the Trust, on the other hand, were, that section 34(1)(b) was *ultra vires* the Constitution; that the assessment was barred by limitation; and that the Trust did not fall within the expression 'any person' in the Second Proviso to section 34(3), in view of the decision of the Supreme Court in *S. C. Prashar and another* v. *Vasantsen Dwarkadas and others* (3). Therefore, the proceedings in *S. Raghbir Singh's case* (1) had no effect and did not render the assessment valid. The Tribunal allowed the Trust's appeal. It found that section 34(1)(b) was not *ultra vires* the Constitution and that section 34(1)(b) was applicable. The dividend income had escaped assessment and the Income-tax Officer received the information from the judgment in *Raghbir Singh's case* (1) and, therefore all the prerequisites for the initiation of proceedings under section 34(1)(b) were satisfied. However, the assessment under section 34(1)(b) was time-barred in view of section 34(3) and the bar of limitation was not saved by the Second Proviso in view of the decision of the Supreme Court in *S. C. Prashar's case* (3). The relevant part of the observations of the Tribunal are as follows :—

> "There is ample authority for the view that the trust is a person different from its settlor. It follows that Shri S. Raghbir Singh, the individual, who was the settlor, is a person different in the eye of law, from the trust of which he is the managing trust. In our opinion, therefore, the rule laid down in Prashar's case applies and the assessment is to be held to be bad, because the notice under section 34(1)(b) was issued to a person different from the person in whose case the Punjab High Court delivered this judgment."

The Department then moved the Tribunal under section 66(1) of the Act for referring the following question of law for our opinion:—

> "Whether on the facts and in the circumstances of the case, the assessment made under section 34(1)(b) for the assessment year 1954-55 was barred by time and was not saved

(3) (1963) 49 I.T.R. 1.

by the second proviso to section 34(3) of the Income-tax Act, 1922 ?"

By its order dated the 1st of October, 1965, the aforesaid question of law was referred for our opinion. It may be mentioned that before passing the order of reference, the Tribunal had remanded the case with a specific questionnaire for the purpose of elucidating the relevant facts. The questionnaire is reproduced below :—

"(A) RE. *PERSONAL ASSESSMENT OF SHRI RAGHBIR SINGH* :

Question—(i) Is Shri Raghbir Singh assessed in the status of an individual, or, in the status of a Hindu undivided family ? If the latter, then who is the Karta of the family ?

Answer. Assessed in the status of 'Individual'.

Question—(ii) Who filed the return of income ?

Answer. S.B.S. Raghbir Singh.

Question—(iii) We presume that the interest payment of Rs. 19,856 was disallowed in the case of Shri Raghbir Singh. If this presumption is correct, then :—

(a) Was it appealed against ?

(b) Who filed the appeal on behalf of the assessee before the Tribunal ?

(c) Who authorised the Advocate on behalf of the assessee ?

Answer. (a) Yes.

(b) Shri Deva Singh Randhawa, Advocate.

(c) S.B.S. Raghbir Singh.

(B). RE. *CASE OF RAGHBIR SINGH TRUST, RAJA SANSI* :

Question—(i) Did the trust file a return of income u/s 22(1), 22(2), or 22(3) ?

Answer. The return was filed u/s 22(1) on 15th July, 1954.

Question—(ii) If a return was filed along with an application u/s 48, then who signed the return ?

Answer. Signed by S. Raghbir Singh on behalf of the Trust.

Question—(iii) (a) What happened to the application u/s 48 ?

(b) Was a regular assessment order passed ? If so, furnish copy thereof.

Answer. (a) Assessment was made in this case u/s 23(3) and the income accruing to the Trust was held to be the income of S. Raghbir Singh.

(b) Regular assessment was made u/s 23(3). Copy of the assessment order is enclosed herewith.

Question—(iv) (a) When the present assessment proceedings commenced?

(b) Was the notice u/s 34 issued ? If so, was it issued with the sanction of the Commissioner u/s 34(1)(b) or with his sanction u/s 34(1)(a) ?

Answer. (a) The Income-tax Officer had solicited the approval of the Commissioner of Income-tax, Patiala, u/s 34(1)(b). There was a finding of the High Court in the case S. Raghbir Singh that the income in this case belonged to S. Raghbir Singh Trust. Therefore, the proceedings u/s 34(1)(b) were initiated on 19th September, 1961 as directed by the Commissioner of Income-tax.

Question—(v) Under what section was the assessment completed ?

Answer. Assessment was completed u/s 23(3) in the status of 'AOP'.

Question—(vi) From the remarks of the Appellate Assistant Commissioner, it appears that the assessment was made u/s 23, read with section 34(1)(b) read with

the second proviso to sub-section 3 of section 34. Is this correct ?

Answer. Assessment was made u/s 23(3) read with section 34(1)(b).

Question—(vii) The Appellate Assistant Commissioner states that the disallowance of the claim of interest was made as 'held *vide* my order dated 27th July, 1961 in appeal No. 4-AA and 66-AA of 1959-60 and 26-AA of 1960-61'. A copy of that order should be made a part of the case ?

Answer. Copy of the order dated 27th July, 1961, passed by the Appellate Assistant Commissioner, Amritsar, in appeal No. 4-AA and 66-AA of 1959-60 and 26-AA of 1960-61 is enclosed herewith."

(5) It is common case of the parties that no other facts are relevant for the decision of the question of law referred to us.

(6) Mr. D. N. Awasthy, learned counsel for the Department, has raised two contentions, namely, (1) that the order of assessment in *Raghbir Singh's case* (1) contains a finding with regard to the Trust and, therefore, one requirement of the Second Proviso to section 34(3) of the Act is satisfied; and (2) that the 'trust' falls within the meaning of the expression 'any person' in the Second Proviso.

(7) It is the validity of these two contentions which has to be examined. The learned counsel did concede that there was no direction in the order passed by this Court in *Raghbir Singh's case* (1) within the meaning of section 34(3) Second Proviso. So far as the learned counsel for the respondent-assessee is concerned, his contention is that both the requirements of the Second Proviso to section 34(3) are not satisfied. It is maintained that there is no finding within the meaning of the Second Proviso as to give jurisdiction to the Income-tax Officer to act under section 34(1)(b) and that the Trust was a total stranger to the proceedings that ended in the High Court in *Raghbir Singh's case* (1). At this stage, it will, therefore be necessary to reproduce the relevant statutory provisions, namely, section 34(1)(b) and sub-section (3) and the Second Proviso to it, which read as under :—

"34.—INCOME ESCAPING ASSESSMENT,—(1) If—

(a) * * * * *

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-Tax Officer has in consequence of information in his possession reason to believe that income, profits and gains chargeable to income-tax have escaped an assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made to the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under clause (a) at any time and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or reassess such income, profits or gain or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the Income-tax Officer shall not issue a notice under clause (a) of sub-section (1)—

(i) for any year prior to the year ending on the 31st day of March, 1941 ;

(ii) for any year, if eight years have elapsed after the expiry of that year, unless the income, profits or gains chargeable to income-tax which have escaped assessment or have been under-assessed or assessed at too low a rate or have been made the subject of excessive relief under this Act, or the loss or depreciation allowance which has been computed in excess, amount to, or, are likely to amount to, one lakh of rupees or more in the aggregate, either for that year, or for that year and any other year or years after which or after each of which eight years have elapsed, not being a year or years ending before the 31st day of March, 1941;

(iii) for any year, unless he has recorded his reasons for doing so, and, in any case, falling under clause (ii), unless the

Central Board of Revenue, and, in any other case, the Commissioner, is satisfied on such reasons recorded that it is a fit case for the issue of such notice :

Provided further that the Income-tax Officer shall not issue a notice under this sub-section for any year, after the expiry of two years from that year, if the person on whom the assessment or reassessment is to be made in pursuance of the notice is a person deemed to be the agent of a non-resident person under section 43 :

Provided further that the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be :

Explanation.—Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section.

(1A) * * * * *

(1B) * * * * *

(1C) * * * * *

(1D) * * * * *

(2) * * * * *

(3) No order of assessment or reassessment, other than an order of assessment under section 23 to which clause (c) of sub-section (1) of section 28 applies or an order of assessment or reassessment in cases falling within clause (a) of sub-section (1), or sub-section (IA) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable :

PROVISO FIRST : * * * *

PROVISO SECOND : Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to a reassessment made under section 27 or to an assessment or

reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in any order under section 31, section 33, section 33A, section 33B, section 66 or section 66A.

(4) * * * * *"

The Second Proviso has been specifically dealt with by the Supreme Court in *Income-tax Officer, A-Ward, Sitapur* v. *Murlidhar Bhagwan Das* (4). In order to see, whether the case falls within the rule laid down by the Supreme Court in *Murlidhar's case* (4), it will be necessary, at this stage, to state the finding that was recorded by this Court in *S. Raghbir Singh's case* (1), which is as follows :—

> "That there has been no transfer of the income from the Trust property to the author of the Trust, nor does the Trust make any provision, whatsoever, which entitles him, at any time named or in the future, to reassume power over the income of the assets directly or indirectly. That being so, the case does not fall within the mischief of the First Proviso; nor is the case covered by section 16(1)(c); the income from the shares must be deemed to be the income of the trust and not of the assessee. * *".

(8) Going back to *Murlidhar's case* (4), *K. Subba Rao, J.* (as he then was), while dealing with the question as to what is the meaning to be assigned to the expression 'finding' in the Second Proviso to sub-section (3) of section 34, after quoting Order 20, rule 5, Civil Procedure Code, observed as follows :—

> "* * Under this Order, a 'finding' is, therefore a decision on an issue framed in a suit. The second part of the rule shows that such a finding shall be one which by its own force or in combination with findings on other issues should lead to the decision of the suit itself. That is to say, the finding shall be one which is necessary for the disposal of the suit. The scope of the meaning of the expression 'finding' is considered by a Division Bench of the Allahabad High Court in

(4) (1964) 52 I.T.R. 335.

Pt. Hazari Lal v. *Income-tax Officer, Kanpur* (5). There, the learned Judges pointed out :

> 'The word 'finding' interpreted in the sense indicated by us above, will only cover material questions which arise in a particular case for decision by the authority hearing the case or the appeal which, being necessary for passing the final order or giving the final decision in the appeal, has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing.' "

We agree with this definition of 'finding'. But a Full Bench of the same High Court in *Lakshman Prakash* v. *Commissioner of Income-tax* (6), construed the word 'finding' in a rather comprehensive way. Desai, C.J., speaking for the court, observed :

> 'A finding is nothing but what one finds or decides and a decision on a question, even though not absolutely necessary or not called for, is a finding.'

(9) If that be the correct meaning, any finding on an irrelevant or extraneous matter would be a finding. That certainly cannot be the intention of the legislature. The Madras High Court also in *A. S. Khader Ismail* v. *Income-tax Officer, Salem* (7), gave a very wide interpretation to that word, though it did not go so far as the Full Bench of the Allahabad High Court. Ramachandra Iyer J., as he then was, speaking for the court, observed that the word 'finding' in the proviso must be given a wide significance so as to include not only findings necessary for the disposal of the appeal but also findings which were incidental to it. With respect, this interpretation also is inconsistent with the well-known meaning of that expression in the legal terminology. Indeed, learned counsel for the respondent himself will not go so far, for he concedes that the expression 'finding' cannot be any incidental finding, but says that it must be a conclusion on a material question necessary for the disposal of the appeal, though it need not necessarily conclude the appeal. This concession does not materially differ from the definition to the finding given in the present case. A 'finding', therefore, can be only that which is necessary

(5) (1960) 39 I.T.R. 265, 272.
(6) (1963) 48 I.T.R. 705, 718.
(7) (1963) 47 I.T.R. 16.

for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. * *"

"There is no doubt that incidentally the finding recorded by this Court did say that the income, which had been treated as the income of Raghbir Singh as an individual, was in fact, the income of the Trust. This Court was dealing with the assessment of Raghbir Singh as an individual. The income of 300 shares, that Raghbir Singh claimed as belonging to the Trust, was treated as his income on the mistaken belief that the Trust, which had been created by Raghbir Singh and to which 300 shares had been transferred, was not a valid Trust. Therefore, all that had to be decided was, whether there was a valid Trust? To that extent the finding cannot be incidental. But the question, whether the income of 300 shares belonged to the Trust, would be, in fact, an incidental finding. Applying the rule laid down in *Murlidhar's case* (4), it cannot be said that the incidental finding—'the income from the shares must be deemed to be the income of the Trust', is a finding as contemplated by section 34(3)—Second Proviso. In any case, it was not necessary for the purposes of *Raghbir Singh's* (1) case to determine as to whom the income of the shares belonged. All that was necessary was to determine if that income in the circumstances of that case was Raghbir Singh's income or not. Hence, the finding that the said income was the income of the Trust was unnecessary. Therefore, the first contention of Mr. Awasthy is rejected.

(10) The second contention has to be determined again with reference to the test laid down by the Supreme Court in *Murlidhar's case* (4), which is in the following terms :—

> "The words 'any person', it is said, conclude the matter in favour of the department. The expression 'any person' in its widest connotation may take in any person, whether connected or not with the assessee, whose income for any year has escaped assessment ; but this construction cannot

be accepted, for the said expression is necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be. That is to say, that person must be one who would be liable to be assessed for the whole or a part of the income that went into the assessment of the year under appeal or revision. If so construed, we must turn to section 31 to ascertain who is that person other than the appealing assessee who can be liable to be assessed for the income of the said assessment year. A combined reading of section 30(1) and section 31(3) of the Act indicates the cases where persons other than the appealing assessees might be affected by orders passed by the Appellate Commissioner. Modification or setting aside of assessment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be. In such cases, though the latter are not *eo nomine* parties to the appeal, their assessments depend upon the assessments on the former. The said instance are only illustrative. It is not necessary to pursue the matter further. We would, therefore, hold that the expression 'any person' in the setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal."

It will have to be determined, whether the assessment of the Trust depended upon the assessment of Raghbir Singh and that the Trust was intimately connected with the assessment of Raghbir Singh. In a wider sense both these requirements would be found to exist because in the chain of events, Raghbir Singh being the author of the Trust, cannot, from a layman's point of view, be divorced from the Trust. But in legal parlance, the Trust and Raghbir Singh were two separate entities, and thus two separate persons. It is only a fortuitous circumstance that Raghbir Singh was also the Chairman of the Trust. I put it to Mr. Awasthy, that if Raghbir Singh was not the Chairman of the Trust, and some third person was the Chairman of the Trust, would there be any connection between the Trust and Raghbir Singh ? The learned counsel had to admit that in such circumstances, there would be no connection and the case would not fall within the purview of section 34(3)—Second

Proviso. The learned counsel, however, stressed that the fact, that Raghbir Singh was the common factor *vis-a-vis* himself and the Trust, signifies that there was an intimate connection between the Trust and Raghbir Singh for the purposes of the aforesaid provision. I am unable to agree with this contention. It is precisely this type of argument which was negatived by their Lordships of the Supreme Court in *Murlidhar's case* (4). If the illustrations of persons given by their Lordships of the Supreme Court in *Murlidhar's case* (4) are kept in view, it will be found that the connection contemplated in those illustrations does not hold good between the Trust and Raghbir Singh as an individual. The learned counsel has not been able to persuade me, in spite of his vehement arguments, to take a contrary view. In my opinion, the second contention of Mr. Awasthy must also fail.

(11) The view, I have taken for my conclusion, that the Trust was a stranger *vis-a-vis* Raghbir Singh as an individual, finds support from the decision of the Gujarat High Court in *Commissioner of Income-tax, Gujarat* v. *Shantilal Punjabhai* (8). *Murlidhar's case* was considered in that case. The facts of that case were as follows :—

> "The assessee was being assessed in the status of an individual. For the assessment of year 1944-45, he filed his return in which he included his share of profit in a firm. In the course of the assessment of the Hindu undivided family, of which the assessee was a member, for the same assessment year, *viz.*, 1944-45, the Income-tax Officer found that the assessee was the nominee of the Hindu undivided family in the said firm and, therefore, included the share of profits of the assessee in the said firm, in the total income of the Hindu undivided family. On an appeal by the family to the Tribunal, by an order dated May 5, 1953, the Tribunal held that there was not sufficient evidence to show that the assessee was the nominee of the Hindu undivided family in the firm and directed that the share of profits of the assessee should be deleted from the assessment of the Hindu undivided family. The Income-tax Officer issued a notice to the assessee on 30th March, 1954, under section 34 of the Income-tax Act for including in the assessee's assessment as an individual his share of profits in the firm and revised

(8) [illegible] 57 I.T.R. 59.

the assessment by adding Rs. 11,159 to the total income of the assessee.

* * * * *

* * * * *

It was held, that the assessee, though he was a member of the Hindu undivided family which was a party to the appeal, was not a party to the appeal but a stranger; the second proviso to section 34(3) was *ultra vires* so far as he was concerned and the right to reopen which had become time-barred before the 1st April, 1952, cannot be revived by the Amendment Act of 1953 which came into force on 1st April, 1952, notwithstanding the provisions of section 31 of the said Amendment Act of 1953."

(12) Two other decisions which lend support to the view, I have taken of the matter, are *Commissioner of Income-tax, Patna* v. *Smt. Rama Jain* (9) (decided by the Patna High Court); and *Commissioner of Income-tax, Madras* v. *K. R. Patel and others* (10), (decided by the Mysore High Court).

(13) Mr. D. N. Awasthy strongly relied on the decision of the Madras High Court in *N. Naganath Iyer* v. *Commissioner of Income-tax, Madras* (11). I reproduce the relevant part of that decision on which he relied for facility of reference:—

"* * The case before us is different; here, admittedly a joint family exists, and the father, Narayanaswami Iyer, can represent his son, Naganatha, in all matters concerning the affairs of the family. The latter, in such proceedings against the father, can be deemed as being, constructively, a party thereto. Therefore, the conclusion reached by this Court in *Narayanaswami Iyer* v. *Commissioner of Income-tax* (12), must be deemed to have been reached in the presence of Naganatha as well. The inclusion of the income from the Andhra Trading Company in the assessment of the family would certainly affect his interest in the family, for the family will have to pay the tax. The non-inclusion

(9) (1966) 60 I.T.R. 655.
(10) (1969) 73 I.T.R. 508.
(11) (1965) 57 I.T.R. 326.
(12) (1956) 29 I.T.R. 515.

of such income in the income of the family would benefit him *qua* such member. Naganatha being thus constructively party to the previous decision of this court, the finding given in that decision can be taken advantage of by the department for the purpose of initiating proceedings under section 34 against him. To this extent, the second proviso to section 34(3) should be regarded as valid."

In my opinion, this decision is distinguishable, for it proceeds on its own peculiar facts. And if this decision is taken to lay down a law contrary to the one enunciated by the Gujarat High Court, I would prefer to follow the view of the Gujarat High Court: inasmuch as *Murlidhar's case* has been fully discussed therein, and the interpretation placed by that Court is more in consonance with the decision in *Murlidhar's case*. There is no dispute now that, in case the Trust is held to be a stranger *vis-a-vis* Raghbir Singh as an individual, the decision of the Tribunal would be correct in view of the decisions in *S. C. Prashar and another* v. *Vasantsen Dwarkadas and others* (3), and *Commissioner of Income-tax, Bihar and Orissa* v. *Sardar Lakhmir Singh* (13).

(14) For the reasons recorded above, I must return the answer to the question referred in the affirmative. The assessment for the year 1954-55 was barred by time and it was not saved by Second Proviso to section 34(3) of the Income-tax Act, 1922. In the circumstances of the case, there will be no order as to costs.

March 18, 1970.

S. S. SANDHAWALIA, J.—(15) I have the privilege of perusing the judgment proposed by my learned brother, but with respect I must express my inability to agree.

(16) The facts which are not in dispute appear fully in the judgment of Mahajan J., and it is, therefore, unnecessary to recapitulate them. As the case turns primarily upon the scope and language of the second proviso to section 34(3) of the Indian Income-tax Act,

(13) (1963) 49 I.T.R. 70.

1922 (hereinafter referred to as the second proviso), it may at the very outset be set down *in extenso*.

> "34(3) No order of assessment or reassessment, other than an order of assessment under section 23 to which clause (c) of sub-section (1) of section 28 applies or an order of assessment or reassessment in case falling within clause (a) of sub-section (1) or sub-section (1A) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable ;
>
> Provided * * * *.
>
> Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to a reassessment made under section 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33A, section 33B, section 66 or section 66A."

(17) For facility of reference the question which has been referred in the present case is also quoted below:—

> "Whether on the facts and in the circumstances of the case the assessment made under section 34(1)(b) for the assessment year 1954-55 was barred by time and was not saved by the second proviso to section 34(3) of the Income-tax Act, 1922."

In the light of the relevant provisions of the statute quoted above and the question referred, only two precise contentions have been raised on behalf of the revenue, which have to be answered in their logical sequence. I would first take up the contention advanced by Mr. Awasthy on behalf of the Department that the order of the High Court in *Raghbir Singh's case* (1) (reported as 42 I.T.R. 410) in regard to the assessment of Raghbir Singh as an individual, contains a clear finding regarding the income of the present assessee, namely, the Trust.

(18) Ere one goes to details, one salient fact deserves to be highlighted. This is that the assessment year in *S. Raghbir Singh's case* (1)

and the assessment year in the present case of the Trust are identical, namely, 1954-55 for which the accounting year was the previous financial year ending the 31st of March, 1954. The issue in *S. Raghbir Singh's case* (1), as an individual before the High Court earlier was whether the income from 300 shares of Simbhaoli Sugar Mills Private Ltd. was to be assessed in the hands of S. Raghbir Singh as an individual or whether the same was to be assessed in the hands of the Trust as its income. It is thus profitable to set down the two questions which had been referred to the High Court in *Raghbir Singh's case* which were in the following terms:—

> "1. Whether the dividend income of the 300 shares of the Simbhaoli Sugar Mills Private Ltd., transferred by the assessee to S. Raghbir Singh Trust was the income of the assessee liable to tax ?
>
> 2. Whether the assessee was entitled to claim deduction of Rs. 19,856 paid as interest to R. B. Seth Jessa Ram-Fateh Chand against the dividend income of the aforesaid shares ?"

The Division Bench declined to answer the second question as according to it, it did not arise and confined itself to only question No. 1 and answered the same in the negative. In doing so it arrived at the following findings:—

> "I, therefore, find that in this case there has been no retransfer of the income from the trust property to the author of the trust, nor does the trust make any provision whatsoever which entitles him at any time named or in the future to reassume power over the income of the assets directly or indirectly. That being so, the case does not fall within the mischief of the first proviso, nor is the case covered by section 16(1)(c) *the income from the shares must be deemed to be the income of the trust and not of the assessee.*"

(19) It has been strenuously contended that the above-quoted finding of the Division Bench was in fact and law a necessary finding for the decision of the matter referred to it and is hence within the ambit of the word "finding" as used in the Second Proviso. I find merit in this contention of the learned counsel. The true meaning to be assigned to the words "finding or direction" used in the second

proviso now stands settled by the authoritative pronouncement of their Lordships of the Supreme Court in *Income-tax Officer* v. *Murlidhar Bhagwan Das* (4), in which they resolved the prior conflict on the point in the various High Courts. Their Lordships accepted the construction giving a limited and narrower meaning to the word 'finding' and expressly approved the following enunciation of the Division Bench of the Allahabad High Court in *Pt. Hazari Lal* v. *Income-tax Officer, Kanpur* (5):—

> "The word 'finding', interpreted in the sense indicated by us above, will only cover material questions which arise in particular case for decision by the authority hearing the case or the appeal which, being necessary for passing the final order or giving the final decision in the appeal, has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing."

Their Lordships then observed as follows:—

> "Therefore, the expression 'finding' as well as the expression 'direction' can be given full meaning, namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is empowered to give under the sections mentioned therein."

In the light of these observations, therefore, it has to be determined in the present case whether the finding of the Division Bench quoted earlier in *S. Raghbir Singh's case* (1), satisfies the indicia and the test laid down by their Lordships in *Murlidhar's case* (4). The undisputed facts would make it clear that the issue before the learned Judges of the Division Bench was whether the income from 300 shares of the Simbhaoli Sugar Mills Private Ltd., which constitutes the corpus of the present trust was assessable in the hands of the Trust or whether the same was to be assessed in the hands of S. Raghbir Singh as an individual. The material question which, therefore, arose and was to be resolved was to find whether the income fell in the hands of one or the other of the only two contenders for the same, namely,

S. Raghbir Singh as an individual or the Trust as a legal entity. There was no third party to which the income could go and be assessed in its hands. The test, therefore, was whether in order to give relief to S. Raghbir Singh whose case was before the Division Bench it was necessary to arrive at the finding whether the income belonged to him or the income was of the trust. It was in this context that the learned Judges of the Division Bench gave the finding in the clearest terms that the income from the said 300 shares was the income of the Trust and consequently S. Raghbir Singh was not to be assessed therefor as an individual. This finding, therefore, was on the material and the sole question which was raised before the Division Bench and a finding thereon was necessary to accord relief to the party before it. Consequently the finding given by the Bench was a necessary finding and with respect, if I may say so, appears to be the only finding which the Bench arrived at for answering the question referred to in the negative. In my view this clearly falls within the ambit of the word 'findings' as used in the second proviso and the contention of the revenue that the judgment of the Division Bench in *S. Raghbir Singh's case* (1), contains a finding *qua* the income of the present assessee, namely, the Trust pertaining to the identical assessment year must be accepted.

(20) Before noticing the second contention raised by Mr. Awasthy, I would wish to advert in some detail to the facts and the ratio in *Murli Dhar's case* (4), in the context of the 'finding' given by the Division Bench in *Raghbir Singh's case* (1). In *Murli Dhar's case* (4), certain interest income of Rs. 88,737 was brought to tax for the assessment year 1949-50. The assessee appealed and the Appellate Assistant Commissioner held that the income was received in the previous accounting year and directed that the amount should be deleted for the assessment for the year 1949-50 and included in the assessment year ending 1948-49. Pursuant to this direction the Income-Tax Officer initiated the reassessment proceedings in respect of the year 1948-49 and served a notice on the assessee on 5th December, 1957. The issue before the learned Judges was whether the Second Proviso to section 34(3) applied and saved the notice which was served beyond the time prescribed by section 34(1).

(21) The learned Judges of the Supreme Court by a majority held that under the Income-tax Act the year was the unit of assessment and the jurisdiction of the Tribunals in the hierarchy created by

the Act was, therefore, confined to the year of assessment only. Consequently it was held that the assessment or reassessment made in consequence of any such finding or direction must necessarily relate to the assessment of the year under appeal, revision or reference, as the case might be. In the final summing up it was observed:—

> "In the result, we hold that the said proviso would not save the time-limit prescribed under sub-section (1) of section 34 of the Act in respect of an escaped assessment of a year other than that which is the subject-matter of the appeal or the revision, as the case may be. It follows that the notice under section 34(1) (a) of the Act issued in the present case was clearly barred by limitation."

It is thus patent that their Lordships found that a finding as regards an assessment year other than one under appeal, reference or revision was not, therefore, a necessary finding and classed it as an incidental one. As already noticed in the opening part of this judgment, in the present case the finding relates to the identical and the relevant assessment year and as such is a necessary finding for the decision of the case and cannot be classified as a merely incidental finding. The clear point of distinction, therefore, is that in *Murlidhar's case* (4), the finding related to the assessment year other than the one under appeal, revision or reference whereas in the present case the finding relates to the identical assessment years.

(22) The second contention which now falls for determination is whether the 'Trust' falls within the meaning of expression 'any person' as used in the Second Proviso. In order to clear the ground forthwith it may be stated at the very outset that it was never the case of the Department before us that the Trust and S. Raghbir Singh as a private individual are one and the same person. It was forcefully argued by Mr. Awasthy that the Trust and S. Raghbir Singh, though necessarily deemed to be separate and distinct entities, are nevertheless closely connected together. The sole contention in this regard was that though separate and distinct, they are so intimately connected with each other as to fall clearly within the rule laid down by their Lordships in *Murlidhar's case* (4), and consequently within the meaning of 'any person' as used in the Second Proviso. It deserves notice in this context that the Income-tax Appellate Tribunal primarily based its decision upon the fact that S. Raghbir Singh, the

settlor and the present Trust were different persons in the eye of law and applying the rule in *Prasher's case* (13), they proceeded to decide against the revenue. As is patent by a reference to the order of the Tribunal, they failed to refer to the admittedly relevant law as laid by their Lordships in this context in *Murlidhar's case* (4), which is squarely applicable.

(23) The words 'any person' as used in the Second Proviso fell for construction in *Murlidhar's case* (4), and their Lordships made the following crucial observations and it is on the true meaning to be assigned to these that the answer to the contention raised on behalf of the revenue must turn—

> "The words 'any person', it is said, conclude the matter in favour of the department. The expression 'any person' in its widest connotation may take in any person, whether connected or not with the assessee, whose income for any year has escaped assessment; but this construction cannot be accepted, for the said expression is necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be. That is to say, that person must be one who would be liable to be assessed for the whole or a part of the income that went into the assessment of the year under appeal or revision. If so construed, we must turn to section 31 to ascertain who is that person other than the appealing assessee, who can be liable to be assessed for the income of the said assessment year. A combined reading of section 30(1) and section 31(3) of the Act indicates the cases where persons other than the appealing assessees might be affected by orders passed by the Appellate Commissioner. Modification or setting aside of assessment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be. In such cases though the latter are not *eo-nomine* parties to the appeal, their assessments depend upon the assessments on the former. The said instances are only illustrative. It is not necessary to pursue the matter further. We would, therefore, hold that the expression 'any person' in the

setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal."

(24) A close analysis of this passage shows that their Lordships mentioned three cases, namely, a firm, a joint Hindu family, and an association of persons, who may well be deemed to be intimately connected *qua* a partner, or partners of the firms, member or members of the Hindu undivided family or an individual as the case may be. However, it is made clear that these cases are merely illustrative and not exhaustive of the categories of persons who may be so intimately connected as to come within the expression 'any person' as used in the Second Proviso. To my mind, from the above passage, three clear tests seem to emerge—

(i) Is the person one, who would be liable to be assessed for the whole of or a part of the income that went into the assessment of the year under appeal or revision ?

(ii) Would a modification or setting aside of assessment made on one person for a particular year affect the assessment for the said year or the other ?

(iii) Is the assessment to the two persons dependant upon the assessments of each other ?

(25) Without attempting to be exhaustive, it appears to me that the crucial test which their Lordships wanted to indicate was the test of the inter-dependence of the assessments. If the whole or the part of the income assessed from the hands of the one assessee in the identical and relevant assessment year becomes liable to tax in the assessment of the other for the said year, the two assessees cannot but be classified as intimately connected for the purposes of tax. The intimacy of connection, which their Lordships are visualising is, therefore, an intimacy and inter-dependance of the tax assessment of the two persons, for the identical and relevant assessment years. Indeed if it is so, a closer connection *qua* tax is difficult to visualise where a part or whole of the income of one assessee may be liable in the hands of the other or where the modification of one assessment would affect assessment of the other. In cases of such inter-dependence, the test of intimate connection laid by their Lordships must necessarily stand satisfied.

(26) Applying these tests to the present case, we would first see whether the income from the 300 shares of the Simbhaoli Sugar Mills for the assessment year 1954-55 which was the income in issue would be liable to be assessed for the relevant assessment year in the hands of the Trust if the same was to be excluded from the hands of S. Raghbir Singh as an individual. The answer to this question is evidently in the affirmative. Again, a modification of the assessment of S. Raghbir Singh as an individual for the relevant assessment year as regards the income from these shares was inevitably bound to affect the assessment for the said year of the Trust. Lastly it appears to be more than patent that the assessment of S. Raghbir Singh as an individual was clearly inter-dependent on the assessment to be made on the Trust or vice versa.

(27) Though the crucial test above seems amply satisfied in the present case, there are a host of other factors showing the patent intimacy of connection as regards tax assessment. It is undisputed that in the present case S. Raghbir Singh was the settlor and the creator of the said trust. It may well be noticed that the whole corpus of the Trust property, namely, 300 shares of the Simbhaoli Sugar Mills was wholly the property of S. Raghbir Singh which was gifted by him to the Trust for constituting the same. Coming to the purposes of the Trust the primary object of the same admittedly was to wipe off the considerable and heavy debt due by S. Raghbir Singh as an individual to R. B. Seth Jassa Ram Fateh Chand. Even after this debt has been wiped out, 80 per cent of the income from the corpus of the Trust was perpetually directed to the education of the children and the grandchildren of the settlor, namely, S. Raghbir Singh. The latter was also the Chairman of this Trust and this appointment was for life and irrevocable. In fact it is patent that the Trust functioned primarily through S. Raghbir Singh and even in the present case *qua* the tax assessments, the returns thereof and the conduction of the relevant appeals and revisions was being done by it through him. In the light of all these circumstances the irresistible conclusion that appears to be possible is that the Trust and S. Raghbir Singh as an individual were indeed more than intimately connected with each other and fall within the rule laid in *Murlidhar's case* (4).

(28) Thus the rule in *Murlidhar's case* (4), has been reaffirmed and appears to be enlarged by the observations of their Lordships

of the Supreme Court in *Daffadar Bhagat Singh and Sons* v. *Income-tax Officer* (14). In that case the assessee-firm comprising a father and his two sons had filed a return for the relevant assessment year and also applied for registration under section 26-A of the Income-tax Act, 1922. The Income-tax Officer refused registration and further passed an order of assessment holding that the assessee constituted a Hindu undivided family. This was reversed on appeal by the Appellate Assistant Commissioner who allowed the registration and further held that the business belonged to the firm and consequently its income should be excluded from that of the Hindu undivided family. Thereafter the Income-tax Officer issued fresh notices to the assessee-firm. The appellant firm then filed a petition before the High Court which was dismissed on the ground that the Second Proviso was applicable because the members of the appellant-firm could not be regarded as strangers to the proceedings in respect of a Hindu undivided family along with others and the rule of intimate connection applied. Affirming the order of the High Court, Grover, J., speaking for the Supreme Court observed as follows :—

> "The second limb of the argument of Mr. Veda Vyasa is based on the premise that the appellant which was a partnership firm was a distinct legal entity and was thus a total stranger to the Hindu undivided family the assessment of which came up for consideration before the Appellate Assistant Commissioner in which the orders already referred were made by him. It is suggested that the appellant could not fall within the meaning of the expression 'any person' in the second proviso to section 34(3) of the Act. If the observations made in *Murlidhar Bhagwan Das' case* (4), are borne in mind it is again not possible to understand how the appellant can be taken out of the category of person or persons intimately connected with the assessment of the year under appeal. The returns, as stated before, were originally filed by the partnership firm comprising Bhagat Singh and his two sons. The question was of the assessment of the income of the business of the firm. The Income-tax Officer treated the father and the sons as a Hindu undivided family. On appeal, however, the Appellate Assistant

(14) (1969) 71 I.T.R. 417.

Commissioner accepted their contention that they formed a partnership firm. It is difficult, in these circumstances, to agree that the appellant was a total stranger to the assessment which was under appeal before the Appellate Assistant Commissioner and had no intimate connection with the person whose assessment was made by the Income-tax Officer and was set aside in appeal by the Appellate Assistant Commissioner."

(29) In view of the above, both the contentions raised on behalf of the revenue must succeed and consequently I would answer the question referred to us in the negative and in favour of the revenue.

ORDER OF THE COURT

(30) In view of the difference of opinion, the case is now submitted to the Hon'ble the Chief Justice under Section 66-A of the Income-tax Act read with clause 26 of the Letters Patent, and section 98(3) of the Code of Civil Procedure, for nominating a Judge to hear the case and to decide it in accordance with law.

JUDGMENT

HARBANS SINGH. C.J.—(31) This income-tax reference has been placed before me in view of difference of opinion between Mahajan, J. and Sandhawalia, J.

(32) The relevant facts have been given in considerable detail in the order of Mahajan J., and it is hardly necessary to repeat them in extenso. The family consisting of S. Raghbir Singh, his sons and his wife, disrupted on 10th of April, 1953 and the assets of the family were partitioned. *Inter alia* S. Raghbir Singh received 400 shares of Simbhaoli Sugar Mills Private Limited (hereinafter referred to as 'the Mills'), and out of these he transferred 300 shares to a trust which was to pay off the debt due to firm R. B. Seth Jessa Ram-Fateh Chand, and thereafter eighty per cent of the income of the Trust was to be spent for the education of S. Raghbir

Singh's children and grand-children, and the balance twenty per cent was to be spent on various charitable purposes mentioned in the deed. This Trust deed thus had come into being during the assessment year 1954-55. For that year two returns were filed by S. Raghbir Singh; one was in his individual capacity excluding the income arising from 300 shares in the Mills, and the other was filed by him on behalf of the Trust in his capacity as its president regarding the income of 300 shares which had been transferred by him to the Trust. No assessment was made in the case of the return filed on behalf of the Trust, and the Income Tax Officer directed that the income accruing to the so-called Trust is to be assessed in the hands of S. B. S. Raghbir Singh. S. Raghbir Singh in his individual capacity was separately assessed and the income of the 300 shares was also added to his income. Having failed before the Assistant Appellate Commissioner and the Income Tax Tribunal, he approached this Court to which two questions were referred. The second question was not answered by the Court, while the first question referred to the Court was as follows :—

> "Whether the dividend income of the 300 shares of the Simbhaoli Sugar Mills Private Ltd., transferred by the assessee to S. Raghbir Singh Trust was the income of the assessee liable to tax ?"

This question was answered in the negative, and the case is reported as *S. Raghbir Singh* v. *Commissioner of Income Tax, Simla* (1). An appeal filed by the Department in the Supreme Court was also dismissed, and the judgment of the Supreme Court is reported as *Commissioner of Income Tax, Punjab, Jammu and Kashmir and Himachal Pradesh* v. *S. Raghbir Singh* (2).

(33) It appears that after the decision of this Court the Income Tax Officer, on 19th of September, 1961, issued a notice to the Trust under section 34(1)(b) of the Indian Income Tax Act, 1922 (hereinafter referred to as 'the Act') with a view to assess the income arising out of 300 shares above-mentioned in respect of which the Trust had filed its return on 15th of July, 1954. The assessment was completed by the Income Tax Officer on 23rd of February, 1962. The objection taken on behalf of the Trust that the notice issued, as stated above beyond the time prescribed in sub-section (1)(b) of section 34 of the Act, was without jurisdiction, was not accepted by

the Income Tax Officer or by the Appellate Assistant Commissioner. The Tribunal, however, in appeal preferred by the Trust, accepted this contention and on an application made by the Department the following question was referred to this Court :—

> "Whether on the facts and in the circumstances of the case, the assessment made under section 34(1)(b) for the assessment year 1954-55 was barred by time and was not saved by the second proviso to section 34(3) of the Income Tax Act, 1922 ?"

Mahajan J., came to the conclusion that the decision of the Tribunal was correct and the assessment was barred by time and was not saved by the second proviso to sub-section (3) of section 34 of the Act. Sandhawalia J., however, took a contrary view, and it is in these circumstances that the matter has been placed before me.

(34) The only question involved in the present case is whether the second proviso to sub-section (3) of section 34 applies to the circumstances of this case. Notice in this case was issued under section 34(1)(b) of the Act on the ground that some income had escaped assessment for the year concerned. This could be done, as provided in this very sub-section, "at any time within four years of the end of that year". Again sub-section (3) provides that no order of assessment in a case like the present, after a notice under section 34(1)(b), can be made "after the expiry of four years from the end of the year in which the income, profits or gains were first assessable". It is, therefore, a common case that the notice under section 34(1)(b) could have been issued within four years of the end of the year in which the income was assessable in other words, it could have been issued within four years from the end of the assessment year 1954-55. The notice in this case was admittedly given long after that. The case of the Department, therefore, is that the second proviso to sub-section (3) was applicable. The relevant part of this proviso is to the following effect—

> "Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to a reassessment.....made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section.... 66 ....."

The contention is that in the order passed by the High Court under section 66 in the case of S. Raghbir Singh, noted above, finding was given that the income from the 300 shares, which was originally assessed as the income of S. Raghbir Singh in his individual capacity, was not the income of S. Raghbir Singh but that of the Trust, and that it was in consequence of or to give effect to this finding contained in this order under section 66 that action was taken and order of assessment made; consequently the limitation of four years was not applicable to the present case.

(35) Two conditions have to be satisled before this proviso can apply to a particular case of reassessment viz. (a) that the reassessment should be made 'on the assessee or any person', and (b) such a reassessment should be in consequence of or to give effect to any finding contained in an order under section 66.

(36) It is now to be examined whether these two conditions are satisfied in the present case.

(37) In the previous order, in consequence of which action is said to have been taken, the assessee was S. Raghbir Singh in his individual capacity. The assessee, in the present case is admittedly not S. Raghbir Singh in any capacity whatever. In the present case the assessee is the Trust. The mere fact that S. Raghbir Singh is one of the four trustees of this Trust or that he filed a return on behalf of the Trust in his capacity as such in the year 1954, would not make any difference. This was not disputed on behalf of the Department. The Trust may, however, fall within the meaning of 'any person'. However, their Lordships of the Supreme Court in *S. C. Prashar and another* v. *Vasantsen Dwarkadas and others.* (13) considered at length the argument put before them that this second proviso so far as it relates to the reassessment of any person other than the assessee, was *ultra vires* the Constitution, and it was held by majority that this proviso was valid so far as the case of "an assessee" is considered, but it was invalid so far as its application to "any person" is concerned. At pages 11 onwards of the report, S. K. Das, J., observed as follows :—

> ".....Chagla C. J., had pointed out, rightly in my opinion, that the persons with regard to whom a finding or direction is given and the persons with regard to whom no finding or direction is given belong really to the same

category, namely, the category of persons who are liable to pay tax and have failed to pay it for one reason or another. Admittedly, persons who are liable to pay tax and have not paid it could not be proceeded against after the period of limitation, unless a finding or direction with regard to them was given by some tribunal under various sections mentioned in the proviso; therefore, out of the large category of people who were liable to pay tax but failed to pay it, a certain number is selected for action by the proviso and with regard to that small number the right of limitation given to them is taken away .....

I am in agreement with the view expressed by the learned Chief Justice that no rational basis has been made out for the distinction between the two classes of people referred to above who really fall in the same category and with regard to whom there was no difficulty in having a uniform provision of law .....

....

The second proviso to sub-section (3) of section 34 .....

....

patently introduced an unequal treatment in respect of some out of the same class of persons. Those whose liability to pay tax was discovered by one method could be proceeded against at any time and no limitation would apply in their case, and in the case of others the limitation laid down by sub-section (1) of section 34 would apply. This in my opinion is unequal treatment which is not based on any rational ground."

(38) Desai, J., of the Bombay High Court, from where that appeal had been taken to the Supreme Court, had put the matter on a somewhat narrower ground, and dealing with the same, S. K. Das J., observed as follows :—

"He held that so far as assessees were concerned, there might be a rational ground for distinction because the appeal proceedings, etc. might take a long time and the assessee being a party to the appeal could not complain of such delay; therefore, assessees did not occupy the same position as strangers. But the learned Judge held that there was

no rational distinction so far as strangers were concerned and there was no reason why they should be deprived of the benefit of the time limit prescribed by sub-section (1). He therefore held that the proviso, so far as it affected persons other than assessees not parties to the proceedings enumerated in it, must be held to be *ultra vires* the legislature."

Even on the basis of this narrower view, the majority of the Supreme Court Judges held that the case was not covered by the proviso.

(39) The argument of the Department, which has been accepted by Sandhawalia J., was that although the Trust was not a party to the previous proceedings, in which the order or the direction had been given, yet S. Raghbir Singh, who was the assessee, was so intimately connected with the Trust that the Trust should be treated as covered by the word 'assessee'. For this reliance was placed on certain observations of their Lordships of the Supreme Court in *Income Tax Officer, A-Ward, Sitapur* v. *Murlidhar Bhagwan Das* (4). In that case the respondent-firm was assessed to income tax under section 23(4) of the Act for the assessment year 1949-50 on the ground that the notice issued under sub-section (2) and (4) of section 22 of the Act had not been complied with. This assessment was cancelled under section 27 on 27th of September 1955, but, before the said cancellation, it was found that some income received had escaped assessment as the assessee failed to disclose the same. The Income Tax Officer had issued a notice under section 34(1)(a) of the Act for the relevant assessment year 1949-50 on the ground that the said income amounting to Rs. 88,737 had escaped assessment in the said assessment year. After the assessment for that year had been set aside, the Income Tax Officer ignored the aforesaid notice and included the amount in the fresh assessment made by him. In appeal the Appellate Assistant Commissioner, however, held that this income was received in the previous accounting year and deleting the same from the assessment year 1949-50, directed that the same be included in the previous assessment year 1948-49. Pursuant to that direction, a notice was issued under section 34(1) of the Act, and on a petition under Article 226 of the Constitution the Allahabad High Court held that the proceedings were initiated beyond the time prescribed by section 34 of the Act and quashed the proceedings, against which the

Department filed an appeal to the Supreme Court. In the majority judgment delivered by Subba Rao J., (as he then was), it was held, first, that under the Income Tax Act, year is the unit of assessment, and the following observations made by the Judicial Committee in *Commissioner of Income-Tax* v. *S. M. Chitnavis* (15), were referred to with approval :—

> "For the purpose of computing the yearly profits and gains, each year is a separate self-contained period of time, in regard to which profits earned or losses sustained before its commencement are irrelevant."

Reference was also made to *Kikabhai Premchand* v. *Commissioner of Income-tax* (16), where the Supreme Court observed as follows :—

> ".....for income-tax purposes, each year is a self-contained accounting period and we can take into consideration income, profits and gains made in that year and are not concerned with potential profits which may be made in another year any more than we are with losses which may occur in the future."

Their Lordships then went on to consider the meaning of the words 'any person' and 'any finding or direction' as used in the proviso. As regards the meaning of the word 'finding', it was observed as follows at page 345—

> "A 'finding', therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context is that the income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question."

(15) 59 I.A. 290, at page 297.
(16) (1963) 24 I.T.R. 500 at page 508.

In view of this it was held that the finding given by the Appellate Assistant Commissioner that the income could not be assessed in the relevant year 1949-50 was the only finding within the meaning of the proviso, and the other finding that this income was properly assessable in the previous year was merely incidental and not a finding within the meaning of the proviso in consequence of which action could be taken without any care for the limitation. This was sufficient for the disposal of the case. However, their Lordships also dealt with the meaning of the words 'any person', and the observations made in this respect are the ones on which great reliance was placed on behalf of the Department. I would reproduce the relevant portion of these observations at page 346 of the report—

> "The words 'any person', it is said, conclude the matter in favour of the department. The expression 'any person' in its widest connotation may take in any person, whether connected or not with the assessee, whose income for any year has escaped assessment; but this construction cannot be accepted, for the said expression is necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be. That is to say, that person must be one who would be liable to be assessed for the whole or a part of the income that went into the assessment of the year under appeal or revision. If so construed, we must turn to section 31 to ascertain who is that person other than the appealing assessee who can be liable to be assessed for the income of the said assessment year. A combined reading of section 30(1) and section 31(3) of the Act indicates the cases where persons other than the appealing assessees might be affected by orders passed by the Appellate Commissioner. Modification or setting aside of assessment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be. In such cases though the latter are not *eo nomine* parties to the appeal, their assessments depend upon the assessments on the former. The said instances are only illustrative. It is not necessary to pursue the matter further. We would, therefore, hold that the expression 'any person' in the

setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal."

There is one thing to be noted that in the above case no reference is made by their Lordships to *Prashar's case* (4), referred to above, in which it had definitely been held that the proviso so far as it relates to persons other than the assessee was unconstitutional. Moreover, on a careful reading of these observations it is clear that, according to their Lordships, only those persons were covered by the proviso, even if they were not strictly parties to the appeal or revision, who in view of section 30 (1) and 31 (3) would be affected by the order passed by the Appellate Assistant Commissioner. The illustrations given are clearly indicative of the type of persons who would be covered. A firm, a Hindu undivided family, and an association of persons, no doubt are treated as separate entities under the Income Tax Act, but in the case of a firm, the burden of the tax imposed on it has ultimately to be borne by its partners and, consequently. any order passed by the appellate authority would, in a way, affect the partners and in a sense they may be treated as assessees. Again in the case of a Hindu undivided family, ultimately the tax is to be paid by the members of the family, and in the case of an association of persons, by the individual members and, therefore, in a sense, they may be treated as parties or intimately affected by the result of the appeal. In a later case reported as *Daffadar Bhagat Singh and Sons* v. *Income Tax Officer, A Ward, Ferozepur* (14), Supreme Court had to deal with the case of a partnership firm. The appellant firm filed a return for the assessment year 1952-53 on March 31, 1953, and also applied for its registration under section 26-A of the Act, the partners of the firm being Bhagat Singh and his two sons. The Income Tax Officer refused to register the firm or to assess it as a firm, and treating as a Hindu undivided family passed an order of assessment. On appeal, the Appellate Assistant Commissioner made an order on 11th of August, 1959 allowing registration of the partnership firm and further holding that the business belonged to the firm and consequently its income should be excluded from that of the family, and then directed the Income Tax Officer to assess the income of the business in the hands of the firm. On a notice having been issued under section 34 of the Act, an objection was taken that the notice was barred by time. On behalf of the Department the provisions of the proviso were pressed into service, and the

High Court of Punjab on a writ petition, following the observations of the Supreme Court in *Murlidhar-Bhagwan Das's case* (4), held them covered by the proviso. Before the Supreme Court two arguments were urged first that the finding or direction given by the Appellate Assistant Commissioner that the business belonged to the partnership and not the Hindu undivided family and the further direction that the income of the business should be assessed in the hands of the partnership firm were not necessary for the disposal of the appeal, and, secondly, that the partnership firm which was being sought to be assessed was distinct from the Hindu undivided family which had gone in appeal. Both these contentions were repelled. With regard to first, it was observed as follows :—

> ".....the assessee filed the return claiming the status of a firm together with an application under section 26A for its registration which was disallowed by the Income-tax Officer but was allowed by the Appellate Assistant Commissioner. The substantial issue before the Appellate Assistant Commissioner was one of status of the assessee and he held that it was a partnership firm and not a Hindu undivided family. This finding was necessary for deciding the appeal before the Appellate Assistant Commissioner and it is not possible to understand how it can be regarded as having been made only incidentally."

With regard to the second point, after referring to *Murlidhar-Bhagwan Das's case* (4), it was observed—

> ".....it is again not possible to understand how the appellant can be taken out of the category of person or persons intimately connected with the assessment of the year under appeal. The returns, as stated before, were originally filed by the partnership firm comprising Bhagat Singh and his two sons. The question was of the assessment of the income of the business of the firm. The Income-tax Officer treated the father and the sons as a Hindu undivided family. On appeal, however, the Appellate Assistant Commissioner accepted their contention that they formed a partnership firm. It is difficult, in these circumstances, to agree that the appellant was a total stranger to the assessment which was under appeal before the Appellate

> Assistant Commissioner and had no intimate connection with the person whose assessment was made by the Income-tax Officer and was set aside in appeal by the Appellate Assistant Commissioner."

It has to be borne in mind that the father and two sons were the persons who had filed the return. They had filed the return in their capacity as partners of the firm of which they sought registration. The Income Tax Officer held that the status of the father and the sons was not that of a partnership firm as claimed by them, but was that of a Hindu undivided family, and in appeal their original contention that they formed a partnership was upheld. So that Bhagat Singh and his two sons were the persons who filed the return and they were before the Appellate Assistant Commissioner and their claim was that they occupied the status of a firm and not of a Hindu undivided family before the Income Tax Officer, and they were before the appellate authority in their capacity as members of the Hindu undivided family, which they claimed they were not. In fact they were parties to the assessment and could be said to be assessees, as had been observed by Desai, J., of the Bombay High Court in *Prashar's case*, (3) which approach was also accepted by the Supreme Court. In any case, one thing is clear that neither *Murlidhar-Bhagwan Das's case* (4), nor *Daffadar Bhagat Singh's case* (14), runs counter to the decision in Prashar's case. In fact in *Daffadar Bhagat Singh's case* (14), the decision in *Prashar's case* (3), was approved by Grover J., delivering the judgment of the Court. His Lordship observed as follows :—

> "In *S. C. Prashar* v. *Vasantsen Dwarkadas* (3), this Court by majority, held that the provisions of the second proviso to section 34(3) in so far as they authorised the assessment of any person other than the assessee beyond the period of limitation specified in section 34 in consequence of or to give effect to a finding or direction given in an appeal, revision or reference arising out of proceedings in relation to the assessee, violated the provisions of article 14 of the Constitution and were invalid to that extent."

Prashar's case (3), was also referred to by the Supreme Court in *Commissioner of Income Tax, Bihar and Orissa* v. *Sardar Lakhmir Singh* (13).

(40) On behalf of the Department reliance was also placed on *Commissioner of Income Tax, Patiala* v. *The Ambala Flour Mills and others* (17). In that case originally there were three partners of the assessee firm. The partnership was dissolved on April 29, 1948, at the instance of one of the partners, namely, Jai Ram Das. Thereafter another partner, Balkrishan Das, severed his connections with the business and then Debi Prasad, the third partner, alone carried on the business. In the assessment year 1950-51, Debi Prasad filed three returns of income in the status of a firm, in the status of an individual and in the status of a firm consisting of Jai Ram Das and Debi Prasad. For the assessment year 1951-52, he filed a return in the status of an unregistered firm and for the assessment year 1952-53 in the status of a Hindu undivided family. The Income Tax Officer assessed the mills in three years of assessment in the status of 'an association of persons'. In appeals filed by Debi Prasad, the Appellate Assistant Commissioner annulled the orders of assessment and remanded the case to the Income Tax Officer, who assessed the income as the income of the family of Debi Prasad. The Tribunal while upholding the order directed deletion of direction of remand. The High Court held that Debi Prasad was not a stranger in respect of the income tax proceedings against Ambala Flour Mills; that the Appellate Assistant Commissioner could give such a direction, with the rider that the assessment against Debi Prasad could only be in the individual capacity and that the appeals filed by Debi Prasad were maintainable in law. On appeal by the Commissioner to the Supreme Court, it was held as follows :—

"(i) Debi Prasad had submitted the returns, and Debi Prasad appealed against the order of assessment. He could, in the circumstances of the case, not be called a stranger to the assessment. The income earned by the assessee was assessed to tax as income of an association of persons, of which on the finding of the Income Tax Officer, Debi Prasad was a member. In making a direction against Debi Prasad the Tribunal did not exercise his powers qua a stranger to the assessment proceeding.

(ii) The High Court in exercising advisory jurisdiction was incompetent to amend the order of the Appellate Assistant Commissioner. But on the question referred to the High

(17) (1970) 2 S.C. cases 96.

Court, no enquiry into the power of the Appellate Assistant Commissioner to make the impugned direction was competent. The second question only related to the assessment of the income in the hands of Debi Prasad after annulling the assessment of the Ambala Flour Mills. It was not contended before the Tribunal that the income of the Ambala Flour Mills could not be assessed in the hands of the family of Debi Prasad. The competence of the Appellate Assistant Commissioner to make the direction was not and could not be referred to the High Court."

This is hardly any authority for the proposition that is now being put forward that if a person cannot be treated to be, in any way, before the appellate authorities as an assessee, even then he can be covered by the second proviso. In this case the sole question was, the capacity in which Debi Prasad was to be assessed and, therefore, he could not be treated as a stranger.

(41) In the present case, the Trust was an altogether a separate entity and in no way connected with S. Raghbir Singh, as an individual, who was an assessee before the Income Tax Officer and who was the appellant in the High Court. The Trust had filed a separate return and as observed by the Tribunal no protective assessment was made in its case. The mere fact that S. Raghbir Singh was a trustee of the Trust and in that capacity had filed the return of the Trust, would not make any difference. The question for determination is whether the Trust can be treated as a stranger to the proceedings before the High Court which were conducted by S. Raghbir Singh in his individual capacity, or is the Trust so intimately connected with those proceedings as not to be treated as a stranger but in a way covered by the word 'assessee' ? The Trust itself had not been assessed and the litigation was being fought by S. Raghbir Singh, and his sole contention and interest was that the income of the 300 shares should not be added to his income. In those proceedings the Trust was not a party and, therefore, it could not be covered by the second proviso in view of the decision of the Supreme Court in *Prashar's case* (3).

(42) Moreover, as regards the second point, the only finding that was necessary for the decision of the reference to the High Court made at the instance of S. Raghbir Singh was whether the Trust was

validly constituted and whether the income of the 300 shares could be treated as the income of S. Raghbir Singh individually. The other finding as to who should be treated to be the recipient of the income of these 300 shares was merely an incidental finding not necessary at all for the decision of the reference. I am, therefore, in agreement with Mahajan, J., that this finding was merely incidental and not a finding necessary for the decision of the case and, therefore, this would not be a finding within the meaning of the proviso in pursuance of which any action could be taken.

(43) In view of the above, I find that both the tests which are necessary for bringing the case within the second proviso fail in this case, and, agreeing with Mahajan, J., I hold that the Tribunal was correct in its decision that the proceedings initiated and the assessment made were barred by time. The question, therefore, referred to this Court is answered in the affirmative and against the Department. I also agree with Mahajan, J., that there should be no order as to costs.

K.S.K.

FULL BENCH

Before D. K. Mahajan, H. R. Sodhi and Bal Raj Tuli, JJ.

INDER PARKASH ANAND,—*Petitioner*

versus

THE STATE OF HARYANA AND OTHERS,—*Respondents.*

Civil Writ No. 3604 of 1971

November 18, 1971.

Constitution of India (1950)—*Articles* 234, 235 *and* 309—*Punjab Civil Services Rules, Volume I, Part I—Rule* 3.26 *and Volume II, Rule* 5.32(c)—*Punjab Civil Services (Judicial Branch) Rules* (1951)—*Appendix 'B' item* (b)—*Government Servant—Superannuation age of—Whether* 58 *and not* 55 *years—Pre-mature retirement of a Government servant by an invalid notice—Whether can be challenged by a writ petition in the High Court under Article* 226 *of the Constitution—Persons appointed to the judicial service of the State—Whether become subject to the control of the High Court in all matters—State Government—Whether has the authority to order premature retirement of a judicial officer on its own initiative.*

Held, (by majority—Mahajan and Tuli, JJ., Sodhi, J., Contra) that the age of superannuation is the age at which, under the Service Rules, a