transferred to a lower post, or even from being reverted to his substantive post, without charges or hearing; and it seems to me therefore that he was not entitled to a *mandamus* to restore him to his position in the event of his summary or arbitrary transfer or reversion by a competent authority.

For these reasons I would allow the appeal, set aside the order of the learned Single Judge and restore that of the General Manager of the Northern Railway. I would leave the parties to bear their own costs.

As the appeal involves the decision of a substantial point of law, I would permit the respondent, if he so desires, to prefer an appeal to the Supreme Court.

Bhandari, C.J.

FALSHAW, J. I agree.

Falshaw, J.

CIVIL WRIT

Before Bishan Narain, J.

M/S. RAM PARSHAD-NAND LAL AND OTHERS,—

Petitioners.

v.

THE CENTRAL BOARD OF REVENUE, NEW DELHI AND ANOTHER,—*Respondents.*

Civil Writ (Application) No. 275 of 1955

1956

Jan., 25th

Income-tax Act (XI of 1922)—Sections 31(4) and 35—Assessment of firm's income cancelled—Whether the assessment of the income of the individual partners can be corrected so as to exclude the income from the firm—Such mistake, whether error apparent on the face of the record—Writ of Mandamus, whether should be issued to correct the mistake—Constitution of India, Article 226.

R.P., N.L., A.D. and H.L. constituted a Joint Hindu Family. In 1941, brothers separated. R.P. and N.L. entered into a contractual partnership and carried on business in the name of Firm R.P. N.L. A. D. and H. L. formed a firm styled as L.R. A.D. In the assessment year 1944-45 all the four brothers assessed as members of Joint Hindu Family by the Income-tax Officer on 31st January, 1947. This order was challenged and in appeal the I.T. Tribunal on 24th July, 1950, held that two partnership firms were separate and the partners should be assessed separately. R.P. and N.L. in their individual capacity as well as on behalf of their firm filed separate returns on 1st July, 1951. On 13th August, 1951, the I.T.O. assessed the firm and the individual partners. Appeal under section 30 of the Act was taken against this order to the Appellate Assistant Commissioner who cancelled the assessment of the firm on 13th March, 1953. on the ground that it was not completed within the time allowed by law. He passed no orders under section 31(4) for amendment of the assessment of the individuals constituting the firm and did not exercise or refuse to exercise his discretion under section 31(4). R.P. and N.L. applied to Income-tax Authorities that the order of the Appellate Assistant Commissioner be implemented under section 35 of the Act. The Income-tax Authorities refused to give this relief. The assessees moved the High Court under Article 226 of the Constitution.

Held, that the mistake like the present one must be deemed to be a mistake apparent from the record. The rectification is to be made within four years and these four years are to be computed from the date of the final order passed in the case of the firm. The final order cancelling the assessment of the firm's income was made on the 13th March, 1953, and thus the rectification in the assessment of the individual partner's income can be made till March, 1957, either on the application of the petitioners or on his own motion by the Commissioner or the Appellate Commissioner. This mistake by the Appellate Assistant Commissioner, in his order, dated the 13th March, 1953, is an error apparent from the record and can be and should be rectified under section 35(1) read with section 35(5).

Held further, that an obvious injustice has been done to the petitioner. The department has refused to make the consequential changes flowing from the order of the Appellate Assistant Commissioner, dated the 13th March, 1953. It

is true that the assessment of the firm's income was cancelled on the ground of limitation, but it is a curious argument that for this reason the department should not be compelled to implement the order of the Appellate Assistant Commissioner when he failed to make the necessary order under section 31(4) of the Act. After all the firm's assessment of income was cancelled in accordance with law and the petitioners are seeking only consequential relief. This is eminently a case in which this Court should interfere under Article 226 of the Constitution.

Petition under Article 226 of the Constitution of India, praying that Writs of Mandamus, Certiorari, Prohibition, etc., be issued against respondents, directing them to rectify the mistake in the assessment of the partners in view of the orders of the Appellate Assistant Commissioner, dated 13th March, 1953, to revise the assessment on the individual partners and to refund the tax illegally charged from the petitioners, and such other orders be passed as this Hon'ble Court may deem fit in the interests of justice.

C. L. AGGARWAL, for Petitioners.

S. M. SIKRI, Advocate-General and H. R. MAHAJAN, for Respondents.

ORDER

BISHAN NARAIN, J. This is a petition under Article 226 of the Constitution for issue of a writ in the nature of *mandamus* directing the respondents to give effect to the order of the Appellate Assistant Commissioner, Income-tax, Ambala, dated the 13th March, 1953, and to refund the tax illegally charged by the Income-tax Department. Bishan Narain, J.

The facts of the case briefly are these. Ram Parshad, Nand Lal, Arjan Das and Hardwari Lal, sons of Lakhpat Rai, constituted a joint Hindu family residing in Moga Mandi, District Ferozepore, where they carried on business. In 1941, it appears that there was partition in the family and the brothers separated. Ram Parshad and Nand Lal then entered

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into a contractual partnership and carried on their business at Moga, in the name of firm Ram Parshad-Nand Lal. Arjan Das and Hardwari Lal formed a firm styled as Lakhpat Rai-Arjan Das and carried on business at Talwandi. In this petition we are concerned only with firm Ram Parshad-Nand Lal and its partners Ram Parshad and Nand Lal, who had equal shares in the firm. For the assessment year 1944-45 all the four brothers were assessed as members of the joint Hindu family by the Income-tax Officer by his order, dated the 31st January, 1947. Appeals were taken against this order and ultimately the Income-tax Tribunal by its order, dated the 24th July, 1950, held that the two partnership firms were separate and, therefore, their partners should be assessed separately. In pursuance of this order Ram Parshad and Nand Lal in their individual capacity as well as on behalf of their firm filed separate returns on the 7th July, 1951, under section 22 of the Income-tax Act. It may be stated here that the firm Ram Parshad-Nand Lal was registered for the purposes of the Income-tax Act, as provided in section 26-A of the Act. The Income-tax Officer, Ferozepore, by his order, dated the 13th August, 1951, assessed the total income of the firm at Rs. 22,058 and allocated Rs. 11,029, to each of the two partners. On the same day he assessed the income of each brother in his individual capacity at Rs. 165 (income from house property) and Rs. 11,029 (share of profit from the firm), making it a total income of Rs. 11,194 and calculated tax on this amount. The tax was deposited on the 15th September, 1951. An appeal, however, was taken to the Appellate Assistant Commissioner, under section 30 of the Act, against the assessment of the income of the registered firm Ram Parshad-Nand Lal. The Appellate Assistant Commissioner cancelled the assessment of the firm by his order, dated the 13th March, 1953, on the ground that it was not

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completed within the time allowed by law. He, however, passed no order under section 31(4) for amendment of the assessment of the individuals constituting the firm. He neither exercised nor refused to exercise the discretion vested in him under this provision of law. Ram Parshad and Nand Lal then applied to the Income-tax authorities that the order of the Appellate Assistant Commissioner be implemented under section 35 of the Act. This relief, however, was refused to them; hence the present petition under Article 226 of the Constitution.

The only question that requires decision in this case is whether, after the assessment of the firm's income has been cancelled, the assessment of the income of the individual partners can be corrected so as to exclude the income from the firm.

Under section 23(1) of the Income-tax Act, the income of an assessee is to be assessed and then the amount of the tax is to be determined in accordance with law in force during the assessment year. Under section 23(5)(a) when the assessee is a firm registered under the Income-tax Act, then the net income of the firm is to be assessed but the amount of tax is not to be determined. The share of each partner of such a firm in the net income is to be assessed as his individual income under that heading and then along with any other income of the individual partner his total income is to be assessed and the amount of tax payable on this total income by him must then be determined. Under the second proviso to section 39(1) of the Act, a partner may appeal against the assessment of the firm's income or its apportionment and need not appeal against the assessment of his individual income in respect of matters decided in the order of assessment relating to the firm. Section 31(4) lays down that if any change is made in the assessment of the

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firm the Appellate Assistant Commissioner may authorise the Income-tax Officer to amend accordingly the individual assessment of the partners of the firm. The assessee has a right to appeal to the Appellate Tribunal, if the assessment by the Appellate Assistant Commissioner is objected to, and the provision corresponding to section 31(4) is found in section 33(5) of the Act.

In the present case an appeal was filed under section 30(1), but the Appellate Assistant Commissioner did not make any order under section 31(4). He neither exercised the power under section 31(4) nor did he refuse to do so. He just ignored it and did not advert to it in his order. Neither the firm nor any of its partners filed an appeal under section 33 of the Act. Instead the partners applied under section 35 of the Act for rectification of the mistake and for the relief which was not granted to them under section 31(4) of the Act. The Income-tax authorities, however, refused to grant this relief with the consequence that while the assessment of the income of the firm had been cancelled yet on that income of the firm its partners have been made to pay the income-tax. The position is anomalous, but before me it has been strongly urged on behalf of the Income-tax authorities that the partners of the firm are not entitled to this relief and the question arises if the position taken up by the respondents is in accordance with law.

The arguments advanced on behalf of the respondents are that no order was passed by the Appellate Assistant Commissioner under section 31(4) and as no appeal was filed against his order, dated the 13th March, 1953, this order has become final and no discretion can be exercised now under this provision of law. It is further argued that this mistake cannot

be considered an error apparent from the record under section 35(1) of the Act. It is conceded that under section 35(5) it would be such an error but it is argued that this subsection was introduced by Act XXV of 1953, which was passed on the 24th May, 1953 and as the assessment relates to the year 1944-45, this subsection canot be given retrospective effect and be made applicable to this case particularly when the legislature while making Act XXV of 1953 retrospective, limited that period to 1st April, 1952, under section 1(2) of the Act.

It was not argued before me that the partners did not make a valid application under section 35 to the proper authorities and it was assumed in the course of arguments that the application which was made by the petitioners was valid. I have already said that the Appellate Assistant Commissioner failed to exercise his power under section 31(4). This is obviously an error and it would not be difficult to hold it to be apparent from the record and in spite of the partners' failure to appeal under section 33 of the Act, it would be open to the Appellate Assistant Commissioner or the Commissioner to apply section 35(1) and grant the necessary relief. This matter, however, need not be pursued further as I am of the opinion that the petitioners are clearly entitled to the required relief under section 35 of the Act. Subsection (5) of section 35 reads :—

> "35(5). Where in respect of any completed assessment of a partner in a firm it is found on the assessment or reassessment of the firm or on any reduction or enhancement made in the income of the firm under section 31, section 33, section 33-A, section 33-B, section 66 or 66-A that the share of the partner in the profit or loss of

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the firm has not been included in the assessment of the partner or, if included is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of subsection (1) shall apply thereto accordingly, the period of four years referred to in that subsection being computed from the date of the final order passed in the case of the firm."

Thus the mistake like the present one must be deemed to be a mistake apparent from the record under this provision of law. The rectification is to be made within four years and these four years are to be computed from the date of the final order passed in the case of the firm. The final order cancelling the assessment of the firm's income was made on the 13th March, 1953, and thus the rectification in the assessment of the individual partner's income can be made till March, 1957, either on the application of the petitioners or on his own motion by the Commissioner or the Appellate Assistant Commissioner. It is true that each assessment year is a separate and a self-contained period and the law which is to be applied to each individual year is the one in force in that year. This, however, does not affect the applicability of subsection (5) of section 35 to the assessment year 1944-45. Admittedly, Act XXV of 1953 came into force on the 1st April, 1952. The present mistake was made by the Appellate Assistant Commissioner in his order, dated the 13th March, 1953. Section 35(5) provides the limitation for rectification of the

mistake in four years from the date of the final order, i.e., the 13th March, 1953. It follows that the petitioners can take advantage of this subsection to get the mistake rectified which was made in 1953. Section 35(1) or section 35(5) has nothing to do with any particular assessment year and can be invoked only to rectify a mistake whenever it be made provided the necessary rectification is made within four years. Even if the matter had been a little doubtful, I would have construed section 35(1) and section 35(5) so as to enable the petitioners to get the order of the Appellate Assistant Commissioner implemented by rectification of the mistake. I, therefore, hold that the mistake by the Appellate Assistant Commissioner in his order, dated the 13th March, 1953, is an error apparent from the record and can be and should be rectified under section 35(1) read with section 35(5).

It was finally argued that in the exercise of my discretion I should not interfere in these proceedings under Article 226 of the Constitution. There is no substance in this argument. An obvious injustice has been done to the petitioners. The department has refused to make the consequential changes flowing from the order of the Appellate Assistant Commissioner, dated the 13th March, 1953. It is true that the assessment of the firm's income was cancelled on the ground of limitation, but it is a curious argument that for this reason the department should not be compelled to implement the order of the Appellate Assistant Commissioner when he failed to make the necessary order under section 31(4) of the Act. After all the firm's assessment of income was cancelled in accordance with law and the petitioners are seeking only consequential relief. It appears to me that this is eminently a case in which this Court should interfere under Article 226 of the Consitution.

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The result is that this petition is accepted and an order in the nature of a writ is passed directing the respondents to rectify the mistake in the assessment of the partners in view of the order of the Appellate Assistant Commissioner, dated the 13th March, 1953, and to revise the assessment of the individual partners and to refund the tax charged from them in accordance with law. The respondents shall pay the costs of this petition.

Counsel's fee Rs. 100.

APPELLATE CIVIL

Before Falshaw, J.

M/S. D.L.F., HOUSING AND CONSTRUCTION, LTD., NEW DELHI,—*Appellants.*

versus

SHRI BRIJ MOHAN SHAH AND ANOTHER,—*Respondents.*

First Appeal from Order No. 89 of 1955

1956

Jan., 31st

Arbitration—Agreement providing for arbitration by Managing Agents or Technical Director—Whether words can be implied to the effect that by agreement between the parties one or the other can be selected—Such agreement whether vague and uncertain and, therefore, invalid.

Held, that the arbitration clause was bad as being vague and uncertain. Two arbitrators are named with an indication that one of them is to be selected, but without any provision as to how the selection is to be made and it is not possible to imply the words in such a clause that one or either was to be selected by agreement between the parties.

First Appeal from the order of the Court of Shri Pritam Singh, P.C.S., Commercial Sub-Judge, Delhi, dated the 27th May, 1955, holding that the arbitration clause in the contract between the parties is vague, uncertain and was not valid and legal and, therefore, it could not be given effect to, and dismissing the application of the defendants.

A. N. GROVER, for Appellants.

A. R. WHIG, for Respondents.