

Babu Ram Vs. Assistant Commissioner of Income Tax. (Also Prabhu Dayal V. Asstt. Cit. Gianchand V. Asstt. Cit. Asstt. Cit V. Gianchand.).

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Court : Delhi

Decided On : Apr-30-1997

Reported in : (1997)59TTJ(Del)105

Appellant : Babu Ram

Respondent : Assistant Commissioner of Income Tax. (Also Prabhu Dayal V. Asstt. Cit. Gianchand V. Asstt. Cit. Ass

Judgement :

ORDER

VIMAL GANDHI, J.M. :

These cross-appeals by the assesseees and the Revenue are directed against different orders of CIT(A). The major common controversy involved in most of appeals relates to assessment of moneylending business for which documents were seized in search carried by the Revenue on 8th August, 1995, in the premises of three brothers namely, Shri Babu Ram, Shri Gian Chand and Shri Prabhu Dayal, all sons of late Shri Shiv Charan Das. These brothers were admittedly carrying on kirana business (separately) at village Dhaunj, Distt. Faridabad, and were assessed in individual capacity relating to that business. No income from moneylending business was shown in the returns submitted by the brothers till the date of search. At the time of search, Shri Babu Ram and his

brothers as also their sons admitted that they were carrying on moneylending business but did not remember whether income from above source was shown. However, during the course of assessment proceedings taken subsequent to the raid, Shri Babu Ram and his brothers took the stand that moneylending business belonged to their mother Smt. Yashoda Devi. In these circumstances, it was claimed that income from moneylending business is liable to be assessed in the hands of Smt. Yashoda Devi. The AO and on appeal, learned CIT(A) rejected this claim and assessed income from moneylending in the hands of three brothers in their individual capacities. The income was computed on the basis of material seized from premises of each of the brothers. A few entries which discernibly and clearly showed that transaction belonged to a particular brother and, therefore, income pertaining to such transaction was added in the hands of that brother although the document containing the transaction was not seized from that brother. The case has a chequered history and assessments for the asst. yr. 1986-87 made earlier in the hands of Shri Babu Ram was treated null and void. The fresh assessment made was also set aside for making de novo assessment. Those had been made and confirmed on appeal. In some years, the assessed has also challenged validity of assessments and additions made other than from moneylending business. Those would be separately discussed but first we consider main claim relating to moneylending business.

2. During the course of search operation, Shri Babu Ram had stated that he was not aware whether income from moneylending business was disclosed to IT Department. He further stated he was partner in moneylending business with his brother Shri Gian Chand. Shri Satya Pal, son of Shri Babu Ram had also stated that his father is doing moneylending business. Shri Prabhu Dayal had also admitted that books seized from his premises belonged to him.

3. However, during the course of assessment proceedings, the three brothers took up the plea that moneylending belonged to their mother Smt. Yashoda Devi. In this connection reference is invited to proceedings for asst. yr. 1986-87 in the case of Shri Babu Ram, where it was claimed that all the seized documents related to business carried on by Smt. Yashoda Devi. In fact on 5th February, 1988, Shri Babu Ram produced ledger for Samvat Year 2034 in respect of village Dhaunj and

it was contended that names of creditors, rate of interest payable to them was recorded in that ledger as on 31st March, 1977. Vide application dt. 4th February, 1988, the AO was requested to impound this ledger. The AO accepted the request and impugned the ledger. The AO after examination of the relevant material concluded that alleged ledger for Samvat Year 2034 relating to cash available as on 31st March, 1977, was a cooked up affair. The above conclusion was raised in the following circumstances :

1. That no such book was found at the time of search of the premises.
2. That none of the entries in ledger of Samvat Year 2034 is recorded or connected with loose documents or ledgers and other documents found and seized during the course of search.
3. That no such details of loans or interest payable were furnished with the returns of income filed in case of Smt. Yashoda Devi for asst. yrs. 1978-79 to 1983-84 although these returns were filed after the search.
4. That for Samvat Year 2034 claimed to have been written by Shri Subhash, son of Shri Prabhu Dayal. In 1977, Shri Subhash was not more than ten years old and therefore, could not be expected to write these account books.
5. That total credits of Rs. 4,44,245 shown in the Bahi in name of 34 persons are of family members or close relations of Shri Babu Ram. These persons were minors on 21st March, 1977, and had no source of income. The AO made above observations based on statement of Shri Babu Ram recorded on 5th February, 1988. The affidavits of some of above creditors and their statements filed before the AO were rejected.
6. The AO further observed that writing made in the Bahi was fresh and not ten years old as claimed.
7. The AO further observed that credits/deposits as on 31st March, 1977, have not been proved inspire of his request and opportunity provided to the assessee. It was further held that balance shown in account of Shri Babu Ram was raised to Rs. 62,650 whereas credited deposit in the Bahi as on 31st March, 1977, was Rs.

94,510.

8. The AO further held that it was unbelievable that children without any source of income could possess more capital as compared to their fathers having different sources of income. He refused to believe that based on entries in above Bahi, Smt. Yashoda Devi should have assets on more than Rs. 35 lacs as on 31st March, 1986.

For holding that books of account and other documents seized at the time of search belonged to the person from whose house these were seized and not to Smt. Yashoda Devi, the AO relied upon the following circumstances :

1. That at the time of search, Shri Babu Ram his son Satya Pal and Shri Prabhu Dayal admitted that these persons were carrying moneylending business and the documents seized from their premises belonged to them. No claim was made that Smt. Yashoda Devi had inherited moneylending business from her late husband Shri Shiv Charan and was thus owner of the same.

2. That Smt. Yashoda Devi at the time of search was 80-85 years old. She was a patient and hard of hearing. She could not be imagined to carry on moneylending business on such extensive scale as revealed in the seized documents more specially in presence of three sons.

3. That documents at Sl. No. 4 of Panchnama (Bahi for Samvat Year 2040 p. 170) clearly recorded that Mohd. Sam Nuru had mortgaged his land for sum of Rs. 2,600 in favor of Shri Babu Ram S/o Shri Shivcharan. A receipt duly signed by the mortgagee was found in seized documents. This documentary evidence showed that Shri Babu Ram was carrying on moneylending business.

4. That several exercise books bore name of Shri Ramesh, son of Shri Babu Ram who was writing books on behalf of his father. Shri Ramesh is unmarried and is maintaining accounts on behalf of his father. Similarly, Shri Mahesh was maintaining books on behalf of his father. Shri Prabhu Dayal. In none of the seized documents there was name of Smt. Yashoda Devi.

5. The seized documents also contained details of construction made by Shri Babu Ram, expenses incurred on marriage of daughter, etc. This also showed that books of accounts etc. pertained to Shri Babu Ram.

6. That books of accounts are seized from house of Shri Babu Ram from separate residences of Shri Prabhu Dayal and other brother Shri Gian Chand relating to carrying on of kirana and moneylending business. The AO on the basis of above documents concluded that all seized documents by stretch of no imagination can be held to be ownership of widow. He further observed that there were specific transactions in seized documents pertaining to Shri Gian Chand and other brothers. In various agreement deeds and sale deeds found from residence of Shri Prabhu Dayal, it was clearly mentioned that amounts were advanced by Shri Prabhu Dayal. Only he was party to deeds and, therefore, seized documents belonged to him alone and not to Smt. Yashoda Devi.

Accordingly he treated documents found from respective places as belonging to the person from whose premises these were seized. He computed income in the shape of interest income and amount shown as advanced to different persons as out of undisclosed sources and charged them to tax. In reply to show-cause notice, the three brothers maintained that books of accounts related to the business carried by Smt. Yashoda Devi and not to these brothers. The AO rejected these claims and computed income of each of the brothers on the basis of documents seized from his premises.

4. These assessments were challenged in appeal and it was reiterated that moneylending business and its income was wrongly assessed in the hands of three brothers in their individual capacities. The moneylending business belonged to Smt. Yashoda Devi. It was claimed that AO wrongly ignored documentary evidence available on record and illegally held that income from moneylending was assessable in the hands of three brothers. This was in spite of finding that at several places, learned AO amended that moneylending business was jointly carried on by the two brothers.

The learned CIT(A) after a very detailed discussion upheld the assessment, though he allowed some relief to assessees under the various Acts. Being still

aggrieved, the assessees have come up in appeal on this main point.

5. We have heard both the parties. In respect of main issue whether income from moneylending business is assessable in the hands of Shri Babu Ram, Shri Gian Chand and Shri Prabhu Dayal, in their individual capacities and whether the documents and papers found and seized from residential and business premises of above persons and belonged to them or to Smt. Yashoda Devi, the learned counsel for the assessed Shri Anand Prakash reiterated the submissions advanced before the lower authorities. There was slight change in the submission and that change is this :

Whereas before lower authorities in the course of assessment proceedings, Shri Babu Ram and others had taken a categorical stand that the documents belonged to Smt. Yashoda Devi, here the stand was that documents do not belong to above persons. It is for the Revenue to prove that assessment on the basis of seized documents in the hands of the assessed is justified. It was argued that Revenue has not been able to establish above. The documents and the moneylending business on account of which substantial additions have been made in three hands, do not belong to these assessees. It might belong to some other legal entity.

In support of above contention, Shri Anand Prakash drew our attention to order of CIT(A) for the asst. yr. 1983-84 in the case of Shri Babu Ram, dt. 25th June, 1991 where the learned CIT(A) has held as under :

'It is evident from the statement of Shri Babu Ram that moneylending business was being carried by him and his brother.'

Such like observations are found in other part of the order. In spite of above observations, the learned CIT(A) upheld separate assessment of moneylending business in the hands of Shri Babu Ram and his brother Gian Chand. The legal consequences of above finding was that income belonged to the joint venture (AOP) of two brothers and was to be assessed accordingly was not properly appreciated by the learned CIT(A) while upholding assessments. The assessment of moneylending business thus in the hands of the assessees, as made out by the

AO was unmaintainable.

6. Shri Anand Prakash further reiterated that claim of the assessed that moneylending business and seized documents belonged to Smt. Yashoda Devi was supported by statement of Shri Babu Ram, his son Rameshwar and affidavits of other members of family. There was further documentary evidence in the shape of Bahi for Samvat Year 2034 produced before the AO on 4th February, 1988. As per entries in the above Bahi, there was sufficient cash balance with Smt. Yashoda Devi to explain all the entries found in the subsequent ledgers. This was on account of accumulation of interest on principal amount forming basis of investment in moneylending business. The AO ignored above ledger totally without giving any opportunity to the assessed to explain their (case) as would be evident from the following circumstances. The ledger was produced before the AO on 5th February, 1988. In the hurriedly completed assessment, the AO rejected above Bahi without giving any notice to the assessee. The above assessment was set aside on appeal. The notice for reassessment was also issued on 14th March, 1988, which was followed by another notice under s. 143 for 5th April, 1988. The assessment was itself made on 15th April, 1988, without any further requirement and without affording any opportunity to the assessee. The aforesaid order was again set aside by the CIT(A) on 3rd January, 1989, for redoing the assessment after affording proper opportunity of being heard to the assessee. Even in the assessment taken on consequent to above order of CIT(A) no specific notice with reference to ledger for Samvat Year 2034 was given. Shri Anand Prakash submitted that AO wrongly concluded that claim of assessed for deposits as on 31st March, 1977, on the basis of party ledger for Samvat Year 2034 have been proved to be false. The AO in reaching above conclusion solely relied upon an other order which stood set aside and had no existence. The reliance of AO on above order was misplaced and wrong under the law. Even the second order was passed without affording any opportunity of being heard to the assessed and is thus against principle of 'audi alterem partem' and is liable to be quashed.

Shri Anand Prakash further claimed that moneylending business was carried by Shri Shiv Charan, the father and husband of Smt. Yashoda Devi. Shri Shiv Charan died somewhere in 1952-53 that is before Hindu Succession Act came into

operation in 1956. The joint family business carried on by their family devolved by survivorship and was carried by the family up to August, 1981. In August, 1981, there was a partition in the family as per terms of family settlement dt. 20th August, 1981. The family settlement is referred to in the plaint and decree of suit No. 416 of 82. The family settlement makes a specific reference to moneylending business. It is stated in the said family settlement that after 20th August, 1981, the moneylending business would belong to Shri Babu Ram, Prabhu Dayal and Gian Chand and the branch of fourth brother will have no interest in it. From the above documentary evidence, it is clear that moneylending business was a joint family business carried on by three brothers. Thus none of three brothers as individuals became owner of this business.

7. Shri Anand Prakash further submitted that the claim relating to business of moneylending being carried by Smt. Yashoda Devi was rejected on the basis of statement of Shri Babu Ram. He further submitted that certain transactions held to belong to Shri Gian Chand were found in documents recovered from residence of Shri Babu Ram and were written in hands of Shri Rameshwar s/o Shri Babu Ram. These documents made it clear that business was carried by Shri Babu Ram and Shri Gian Chand jointly as partners and not as separate individuals.

Shri Anand Prakash further submitted that there was inherent contradiction in the stand of the Revenue. It holds brothers to be partners yet does not determine their income from the joint business. It holds them accountable individually on the basis of presumption raised under s. 132(4A). Then even this criteria is given a go-bye when income of certain transactions found recorded in books of Babu Ram and recovered from his possession is nonetheless held to belong to Shri Gian Chand. Such contradiction is bound to be there so long eyes are close to facts recorded in the material seized during the search and the evidence gathered in the course of prolonged assessment proceeding. He argued that in the light of contradictions and contradictory findings and in the interest of justice, all assessments should be set aside with directions to lower authorities to consider the matter de novo in the light of material available on record.

The assessed further moved application under r. 29 of IT Rules to place on record a copy of family settlement dt. 20th August, 1981, in terms of which suit in the Court of senior sub-Judge, Faridabad was instituted on 7th September, 1982, and decreed on 5th October, 1982. Copies of the plaint and the Court decree are part of the seized record. The AO also referred to family settlement in question and put to Shri Babu Ram some questions while recording his statement on 5th February, 1988. The assessed further referred to para 10 p. 20 of assessment order for asst. yr. 1986-87, dt. 15th April, 1988, wherein reference has been made to the copy of plaint and family settlement dt. 20th August, 1981. It was observed by the ITO that the assessed (Shri Babu Ram) along with his brothers constituted members of a joint Hindu family. It is further claimed that assessed throughout presumed that above family settlement deed was seized in search along with other miscellaneous papers from the residence of Shri Prabhu Dayal. Under the above bonafide belief, the copy of settlement deed was not placed on record in proceedings before the lower authorities. However, in the peculiar facts of the case and to give a complete picture with relevant facts, request to admit copy of family settlement as additional evidence was made.

The assessed further filed application dt. 1st October, 1996, under r. 10 of ITAT Rules to take on record affidavit of Shri Subhash Chand s/o Shri Prabhu Dayal. The background of this application is stated to be query raised by the Bench on 19th September, 1996, as to where was ledger for Samvat Year 2034, etc. when search of residential premises of assessed and his brother had taken place on 8th August, 1996. It is claimed that on the next date of hearing i.e., 26th September, 1996, the Bench was informed that aforementioned ledgers were with Shri Subhash Chand s/o Shri Prabhu Dayal, who had written the said ledgers and retained them at his residential premises in Mukesh Colony, Ballabgharh. The above premises were not subjected to search. These ledgers were handed over to Shri Rameshwar s/o Shri Babu Ram, sometime towards the end of 1986 or the beginning of 1987. The assessed sought to state these facts through an affidavit of Shri Subhash Chand in terms of r. 10 of ITAT Rules, 1963.

8. The request of the assessed to take copy of alleged family settlement as additional evidence and affidavit of Shri Subhash Chand under r. 10 of ITAT Rules

was opposed by the Revenue. It was contended that additional evidence does not satisfy requirement of r. 29 of ITAT Rules and that discretion cannot be exercised in an arbitrary manner. It was further contended that assessed was in possession of the document throughout the assessment proceedings as well as the appellate proceedings. But the said document was not produced before the lower authorities. The learned Departmental Representative had referred to the decision of Honble Bombay High Court in the case of Velji Deoraj & Co. vs . CIT : [1968]68ITR708(Bom) and other decision of Honble Supreme Court. It has been contended that fresh claim regarding ownership of money through family settlement cannot be permitted to be raised. Likewise application for production of affidavit of Shri Subhash Chand was opposed. It was contended that AO had already held that alleged Bahi for Samvat Year 2034 was a concocted document.

We have given careful thought to the above claims of the assessee. In the light of the view which we are taking of the matter in issue, copy of alleged settlement deed and affidavit of Shri Subhash Chand would not advance the case of the assessee. On comparison of copy of settlement deed with copy of plaint, we find that in the plaint, it is stated 'in that family partition, the family properties were divided between the plaintiff and defendants by metes and bounds. The suit property described in para No. 1 of the plaint fell to the share of the plaintiff No. 1. The suit property described in para No. 2 of the plaint fell to the share of plaintiff No. 2. The suit property described in para Nos. 3 & 4 of the plaint fell to the share of the plaintiffs Nos. 1 & 2 in equal shares. The suit property described in para No. 5 of the plaint fell to the share of plaintiff No. 3. Since then the plaintiffs are in exclusive possession of the properties which fell to their shares mentioned above as the sole owners thereof. The house No. 44K and measuring 2257 sq. ft. situated at 100 ft. road, Adarsh Nagar, Ballabgarh, fell to the share of the defendants. Since then the defendants are also in peaceful possession of the same as its owners'. However, in the alleged family settlement in para No. 1, agricultural land has been given to Shri Prabhu Dayal, Babu Ram and Gian Chand to the exclusion of sons of Indermal. There is no reference of this property in the plaint. In para No. 2, of the settlement, jewellery and cash had been divided. In para No. 3, plots over which houses stood constructed is given exclusively to Shri Prabhu Dayal, Babu Ram and Gian Chand. There is no reference in the settlement

to properties given exclusively to plaintiff No. 1, plaintiff No. 2 or plaintiff No. 3 or to plaintiff Nos. 1 & 2 jointly to the exclusion of other in the family settlement as stated in the plaint referred to above. The division through metes and bounds and giving sole ownership of the parties as stated in the plaint is not reflected in the family settlement. The family settlement now sought to be produced has been prepared subsequently in order to advance the case pleaded after the raid. As stated earlier, it does not achieve the desired object. We hold this settlement as cooked-up and do not admit the document as an additional evidence.

9. The claim that moneylending business belonged to HUF was never advanced before the AO or before the appellate authority although proceedings in this case are going on since the raid took place in 1986. The assessee throughout categorically claimed in the assessment proceedings that business of moneylending belonged to their mother Smt. Yashoda Devi. This claim was rejected by the AO after detailed discussion. The order of AO has been approved on appeal by the CIT(A). Likewise AO before whom Bahi alleged to be for Samvat Year 2034 was produced in February, 1988, rejected the same as an afterthought. He clearly noted entries made in Bahi and rejected them as fabricated and unreliable. The fact that it was not seized during the course of search, was also noted by the AO and the assessed were fully aware of findings recorded against them, but no attempt was made to file above documents in any proceedings after the above finding. therefore, at this late stage, copy of settlement deed and affidavit of Shri Subhash Chand cannot be read in evidence. The requests of the assessed for additional evidence and under r. 10 of IT Rules are rejected.

10. The claim of the assessed that documents seized during the course of search and moneylending business do not belong to the assessee but to their mother Smt. Yashoda Devi is only stated to be rejected. The learned AO gave sound reasons for rejecting above claim and we need not repeat all reasons except highlighting that assessee had set up a highly improbable case by claiming that more than 80 years old lady was carrying on such extensive moneylending business. A lady who had an added disadvantage of a weak eye-sight. The case subsequently set up in assessment proceedings was directly opposed to the admission made by Shri Babu Ram and his son Rameshwar and his brother at the

time of search when it was admitted that they were carrying on moneylending business. On facts, it is obvious that moneylending business was being carried on by Shri Babu Ram, Shri Prabhu Dayal and Shri Gian Chand.

11. The case that disputed moneylending business belonged to HUFs of Shri Babu Ram etc., is also not acceptable. Shri Shiv Charan, father of Shri Babu Ram and husband of Smt. Yashoda Devi in his life-time might have been carrying on moneylending business. However, there is no documentary evidence on record to show that such a business was carried by him. There is further no evidence on record to show that Shri Shiv Charan died before coming into operation of Hindu Succession Act. A copy of plaint filed with senior sub-judge has been seized during the course of search operation. The suit for declaration was filed with the senior sub-judge on 7th September, 1982 by Shri Gian Chand (Plaintiff No. 1). Shri Babu Ram (Plaintiff No. 2) and Shri Prabhu Dayal (Plaintiff No. 3) against sons of Inderlal as defendants. In para No. 1, plaintiff No. 1 claimed to be sole owner of house having area of 450 sq.yd. in village Dauj. In para 2, plaintiff No. 2 made similar claim in respect of house measuring 175 sq. yds. In para Nos. 3 & 4 plaintiff, Nos. 1 & 2 claimed joint ownership of two houses. In para No. 5, plaintiff No. 3 claimed sole ownership of a house measuring 250 sq. yd. Para No. 6 of plaint is relevant and is reproduced below :

'6. That the plaintiffs and Shri Inder Lal father of the defendants were members of the joint Hindu family and were joint owners of the suit properties described in paras 1 to 5 and on house situated at Chawla colony, Ballabgarh. After the death of Shri Inder Lal, the relations between the plaintiffs and the defendants became strained. There had been frequent disputes between the plaintiffs and defendants regarding the management of the joint family property.'

After para No. 6 and in para 7, there is reference to family partition between the plaintiff and defendants on 20th August, 1981. The properties allotted under above family partition to different members have already been described in the earlier part of the decision.

12. The copy of plaint does establish that there was an HUF of four brothers and they were joint owners of certain properties. But it is not stated in the plaint that

above properties were at any time held by common ancestor of the parties and were acquired through survivorship. The four brothers as members of the family could buy property in several manners. In fact Revenue has produced on record copies of sale deed to show that part of the properties were in fact purchased by brothers and not inherited by them from their father.

If four Hindu brothers jointly work and acquire property which are subsequently divided, the properties so allotted to each of the brother would not become Hindu undivided property of that brother and his family. In such a property son born to the person would not acquire a right by birth. Such property shall not belong to and held by the concerned person as Karta of his HUF. At any rate the question here pertains to moneylending business where money has been utilised for earning interest. No nucleolus of such money has been established. No material is available to show that funds utilised in moneylending business belonged to late Shri Shiv Charan and, thereafter passed on to other family members. In the absence of such an evidence and on the basis of copy of plaint and decree dt. 5th October, 1982, the claim that moneylending business belonged to HUF of Shri Shiv Charan and his sons or after death of Shri Shiv Charan to the HUF of four sons cannot be said to have been established on record. On the other hand documentary evidence seized during the course of search and the stand taken by the brothers during the assessment proceedings clearly establish that sons of Shri Shiv Charan and assesseees before us were carrying on moneylending business for the past several years along with the kirana business. The kirana business is admitted to be separately carried by each of the brother. The nature of moneylending business is not different from kirana business. The income of moneylending is to be assessed along with the income from kirana business. In this connection, reference may be made to the following documents/evidence available on record :

(a) In return for asst. yr. 1974-75, Shri Prabhu Dayal relating to kirana business, the assessed annexed a balance sheet showing 1/4th share in plot at New Mandi, Ballabgarh. Similarly, in the balance sheet for asst. yr. 1978-79 for the above business as his individual asset.

Shop No. 97, Agricultural land, residential building at Dhonj, building at Ballabgarh and agricultural lands with dates of purchases shown between 1976 to 1977 are described as individual assets. Shri Prabhu Dayal supported above claims by filing an affidavit dt. 30th September, 1977. Above properties were subsequently divided between 3 brothers and sons of 4th brothers who had died in the meanwhile.

(b) Shri Babu Ram and Shri Gian Chand also showed similar assets in their balance sheet relating to kirana business in returns up to asst. yr. 1981-82.

(c) Copy of sale deed dt. 6th April, 1971 (registered on 7th April, 1971) further showed that a plot of land No. 108A measuring 156 sq. yds. In Adarsh Nagar, Balabgarh on 20 ft. wide road, a shop No. 74 with similar situation were purchased from Walati Ram son of Shri Jiwan Mal etc. by S/Shri Prabhu Dayal, Inder Pal, Babu Ram and Gian Chand sons of Shri Shiv Charan for a total consideration of Rs. 9000. This house was subsequently subject-matter of partition dt. 20th August, 1981 and is also referred to in the suit.

In the light of above clear evidence that properties were jointly purchased by 4 brothers between 1971 to 1978 on dates mentioned in the balance sheets, we wonder how a claim that these belonged to the HUF of Shri Shiv Charan and his sons could be raised.

13. Shri Anand Prakash laid considerable stress on observation of AO in order dt. 15th April, 1988, in case of Shri Babu Ram for asst. yr. 1986-87 wherein it is claimed to have been held that brothers constituted members of joint Hindu family and carried on the business earlier carried on by assessee's father. The above referred to observations were made to refute the claim that moneylending business belonged to Smt. Yashoda Devi. There is no clear finding. At any rate no material has been produced before us to establish nucleolus fund of the HUF headed by Shri Shiv Charan which devolved on his sons and constituted funds of HUF comprised of four sons and their families. We have already considered in detail and referred to documentary evidence to show that property referred to in the plaint was acquired by assessee's from the sources contributed by them. In the above circumstances and in the light of evidence available on record, the moneylending business cannot be held to belong to any HUF.

14. Shri Anand Prakash also referred to observation of CIT(A) in order for asst. yr. 1983-84 in the case of Shri Babu Ram where he observed that moneylending business was jointly carried on by Shri Babu Ram and Gian Chand. It is further seen that Shri Babu Ram in his statement at the time of search had stated that moneylending business was carried on by him in partnership with Shri Gian Chand. After considering relevant material, the learned CIT(A) rightly upheld the assessment and did not commit any error in not directing that income from moneylending business should be assessed in the hands of Shri Babu Ram and Shri Gian Chand jointly as partners. This we hold on account of the peculiar circumstances mentioned below.

The statement of Shri Babu Ram that he was carrying on moneylending business jointly with Shri Gian Chand was not accepted by the AO. He had observed that books of account relating to moneylending business carried on by Shri Babu Ram were maintained by Shri Rameshwar and books of accounts in respect of business carried on by Shri Prabhu Dayal were maintained by Shri Mahesh. The AO assessed income from moneylending separately in the hands of three brothers on the basis of documents seized from the premises separately owned by them. The fact that documents and papers relating to business carried were kept separately and each of the brother was maintaining separate accounts is a pointer to the fact that these brothers were carrying on moneylending business separately. Further in the books seized, there are entries of moneylending business and kirana business, the latter having been accepted to be separately carried on by each of the brother, the former cannot have separate character. It is true that in books recovered from Shri Babu Rams residence, there were certain entries pertaining to Shri Gian Chand. But it is to be kept in mind that some of above entries were easily discernible and carried name of Shri Gian Chand specifically so that AO had no difficulty in holding that these related to income of Shri Gian Chand although recorded in the books belonging to Shri Babu Ram and seized from his residence. The AO computed income on the basis of documents seized from the respective premises of each of the brother and in our considered view committed no error in adopting above approach. On thorough examination, few entries which were found to belong to other brother were separated and added in the income of that brother but where addition is properly made it is being deleted (sic).

15. We now consider the specific grounds raised in appeal of each of the brothers. In appeals for asst. yrs. 1978-79 to 1983-84 in case of Shri Babu Ram, the only ground pressed at the time of argument was addition on account of income from moneylending business. The learned CIT(A) sustained addition of Rs. 20,000 in re-assessment proceedings under s. 148 of the IT Act.

16. Shri Anand Prakash, learned counsel for the assessed drew our attention to the reasons recorded by the AO on 17th March, 1987, at the time of issuance of notice under s. 148 of the IT Act. He submitted that reasons recorded were wrong, against facts on record and had no nexus with formation of belief that income had escaped assessment. therefore, the reassessment proceedings initiated in this case were bad in law. The above plea was raised through an additional ground of appeal.

17. After considering rival submissions of parties we are of view that legal ground sought to be raised should be permitted to be raised. We agree with Shri Anand Prakash that it is wrongly recorded by the AO that no return under s. 139(1) or 139(2) was filed by the assessee. The return was filed and original order of assessment is also available at p. 216 of the paper-book. Shri Anand Prakash also drew our attention to document No. 37 referred to in the reasons recorded and submitted that agricultural income and income from dairy farming as well as purchases of agricultural land and residential houses were duly shown in the balance sheet filed by the assessed for the relevant year in the original proceedings. After considering copy of balance sheet placed before us, we are unable to reject the contention raised by Shri Anand Prakash. Our attention was then drawn to para No. 2 of reasons recorded which is to the following effect :

'2. According to document No. 29 and 6, it was found that the assessed had been also enjoying income from pawning/money lending business and for that purpose he had been mortgaging land of various persons. The amount invested as per these documents was to the extent of Rs. 9,867. This fact was not shown in the copy of balance sheet found and seized. Accordingly income from moneylending including amount involved therein is estimated at Rs. 15,000.

He then drew our attention to the documents seized and contended that figure of Rs. 9,867 is not available in the seized document and estimate of income from moneylending at Rs. 15,000 is based upon no material.

We have considered copies of seized documents placed on record. The total of amount invested in the period under consideration may not be Rs. 9,867 but there are certain receipts and payments pertaining to the year under consideration of smaller amounts. There is further plethora of evidence to show that the assessed in the period under consideration was carrying on moneylending business and that he did not show any income from above source in the original return. therefore, any reasonable prudent man on the basis of material seized in the search could form a reasonable belief that income from moneylending in this case for the asst. yr. 1978-79 escaped assessment. The figures recorded in 'reasons for initiating proceedings are tentative and not conclusive. The proceedings cannot be treated as vitiated merely (sic - because) those estimates are wrong, when there is material to show that income chargeable to tax had escaped assessment. In above background, though we agree with Shri Anand Prakash that some facts taken into account by the AO at the time of initiating of proceedings are incorrect. His action for reopening proceedings is upheld on account of material available on record. In the above background, we do not find any force in the submissions of the assessee. As already submitted, the quantum assessment was not disputed.

18. In asst. yr. 1979-80, the assessed has challenged addition of Rs. 9,475 on account of moneylending business. No separate arguments were advanced in support of this claim. The ground is accordingly rejected.

19. In asst. yr. 1980-81, assessed has challenged addition of Rs. 30,228 on account of income from moneylending business. No separate arguments were advanced in support of this claim. The ground is accordingly rejected.

20. In asst. yr. 1981-82, assessed has challenged addition of Rs. 53,424 on account of income from moneylending business. No separate arguments were advanced in support of this claim also. The ground is accordingly rejected.

21. In asst. yr. 1982-83, the assessed has challenged addition of Rs. 6,741 as interest and Rs. 2,25,354 on account of unexplained investment in moneylending business. The assessed has further challenged chargeability of interest under s. 217 of IT Act. In ground No. 1, the assessment has been challenged as illegal, unjustified and having been made without opportunity of being heard to the appellant. While in ground No. 5, reliance by the AO on seized documents for making assessments have been challenged.

22. The learned AO considered question of addition of Rs. 6,741 and Rs. 2,25,354 on account of unexplained investments. He upheld the addition relying upon his appellate order dt. 25th June, 1991. No separate arguments were advanced at the time of hearing. We have already held that the assessment of moneylending business on the basis of entries in the books of accounts seized from the premises of the assessed is fully justified. As no arguments were advanced, nothing further need be stated on the above.

23. The matter relating to charging of interest under s. 217 has been set aside by the learned CIT(A) for fresh appraisal by the AO. We do not find any error in the above approach nor any was shown to us during the course of hearing of appeal. No arguments were advanced on other general grounds raised in the memo of appeal. These are accordingly rejected.

24. In appeal for 1983-84, the assessed has only challenged addition of Rs. 30,498 and Rs. 3,19,750 made on account of unexplained investment. These additions have been made on the basis of entries in seized books of accounts. The learned counsel for the assessed only reiterated his main submissions that books of accounts and moneylending business did not belong to Shri Babu Ram. He further submitted that ledger of Samvat Year 2034 was wrongly ignored by the CIT(A). The history of assessment of creditor, their affidavits and statement on oath were also not considered. The assessed had further relied upon Court decree dt. 5th October, 1982, through which immovable properties were divided among members of HUF. All the above material was ignored by the learned CIT(A).

We have already considered above submissions and did not attach any weight to ledger of Samvat Year 2034 as also to statement of creditors and their affidavits.

These persons are closely related to the assessed and are highly interested. They do not advance the case of the assessee. However, we are of view that the question of income from moneylending business and interest should be reconsidered. It is an admitted fact that moneylending business was carried on and continued by the assessed for the past several years. therefore, for purposes of computing interest and investment, income assessed in years earlier to 1983-84 has to be taken into consideration. The Revenue authorities must work out the funds which could be available with the assessed as on the opening day of the accounting period. They should allow set off of above funds and then compute income and investment from undisclosed sources. Subject to above directions, other arguments of the assessed are rejected.

1984-85

25. In the asst. yr. 1984-85, assessed has challenged addition of Rs. 98,343 as interest, Rs. 6,53,253, as unexplained investment in the moneylending business. The arguments in respect of above grounds were the same as taken in the other assessment years. Our directions given for the asst. yr. 1983-84 would also apply to this assessment year regarding addition on account of interest income and unexplained investment in moneylending business.

26. There is one more point in appeal for 1984-85 and for two subsequent years regarding investment in construction of house at Ballabgarh.

It has been contended that above house was constructed on plot which was allotted to the assessed in the family settlement. Reliance has been placed on Court decree referred to above. As the plot is claimed to belong to the bigger HUF, the investment in construction is also to be considered in the hands of HUF and not in the hands of Shri Babu Ram in his individual capacity. It is further claimed that money earned from moneylending business which is also ancestral business was used by the assessed in the construction of the house in all the three years.

The above claim has already been rejected after a thorough discussion. The investment made in the construction of house is to be explained by the assessee. No dispute had been raised that investment was made by the assessee. The

existence of ancestral moneylending business and claim that plot belong to any HUF has already been rejected. The quantum of addition has not been disputed. therefore, the addition for unexplained investment is confirmed.

1985-86

27. In this year apart from two main claims relating to addition of Rs. 2,01,516 as interest and Rs. 4,68,640 as unexplained investment in moneylending business, and construction of house property in Ballabgarh, the assessed has raised certain other points in the written submissions.

28. Our directions given for asst. yr. 1983-84 relating to assessment of interest and investment from undisclosed sources in the moneylending business shall apply in this year also. The addition on account of investment in construction from undisclosed sources has already been confirmed in the preceding assessment year. The facts and circumstances being identical, the said addition is confirmed in the year under account too.

29. The assessed further challenged addition of Rs. 42,091 made for unexplained expenditure on the occasion of marriage of assessee's daughter.

It is claimed that above expenditure of Rs. 42,091 was incurred by Smt. Yashoda Devi, the mother of the assessed who was carrying on moneylending business. As the expenditure was incurred by the assessee's mother, who was living in the same house, and as documents belonging to her were also recovered from the premises wherein she was living, no addition should be made in the hands of the assessee. In this connection, it is stated that exercise note book Sl. No. 3,023 etc. did not belong to assessed but belong to Smt. Yashoda Devi but no attempt has been made by the Revenue authorities to verify the correctness or otherwise of assessee's statement. It is claimed that when a document is recovered from common residence of two persons, it is natural and necessary to ascertain as to whom the said document really belongs. No presumption under s. 132A or in terms of s. 110 of Evidence Act can be raised to hold that it belonged to one person of AO's choice. No investigation in this regard was carried by AO and, therefore, entire approach of AO was wrong, erroneous and biased.

30. We have given careful thought to the above submissions and in that light examined relevant material. We are of view that learned AO was right in holding that the documents seized from the premises belonged to Shri Babu Ram and not to his mother. There is plethora of evidence for reaching above conclusion including admission of Shri Babu Ram. We have already held that moneylending business did not belong to Smt. Yashoda Devi and she had no funds to carry on marriage of assessee's daughter. There is no material on record to accept that expenditure on marriages were carried by Smt. Yashoda Devi and not by the assessee. The addition made for unexplained investment on marriage of assessee's daughter is fully justified in his assessment. We confirm the same.

31. In the next ground addition of Rs. 4,437 for unexplained expenditure on the occasion of marriage of assessee's son Shri Raghu has been challenged. The arguments addressed here are same as advanced in the case of assessee's daughter's marriage. For the reasons already given above, we confirm this addition also.

32. In the next ground of appeal, assessed has challenged addition of Rs. 7,339 in respect of cash in hand found with the assessee. Having regard to the additions which have been made in the hands of the assessee, the above amount should be treated as explained. Accordingly, addition of Rs. 7,339 is deleted.

33. In the next ground of appeal, assessed has challenged addition of Rs. 20,000 on account of entries in diary seized from the premises of Shri Gian Chand. The assessed has claimed that there is no material to hold that diary belonged to the assessee. No attempt was made to ascertain whether any person with the name Idhu at all existed and if he existed whether assessed had advanced Rs. 20,000 to him. In the absence of any cogent or relevant evidence, the addition of this amount in assessee's hand is claimed to be unsustainable.

We have considered above claim of the assessed in the light of orders of Revenue authorities and other material available on record. According to the AO at p. 116, of the diary seized from the premises of Shri Gian Chand, assessed is shown to have advanced Rs. 20,000 to Idhu of Jakoopur on 22nd March, 1985. When confronted the assessed could not explain source of advancing this amount. As no

Explanationn was put forward, the addition was made which was confirmed on appeal by the CIT(A).

It is not in dispute that entry shows that assessed had advanced Rs. 20,000 to Idhu of Jakoopur. The AO was justified in relying upon the document. The AO had asked the assessed to explain the above entry. No Explanationn was rendered except that moneylending business belonged to Smt. Yashoda Devi. Through documentary evidence, the Revenue has proved that the assessed was carrying on moneylending business on an extensive scale. It was not necessary for them to verify each and every entry in record, particularly when entries were made in the regular course of business which was admitted to have been carried by the assessed during the course of search operation. It is thus held that the assessed made investment of Rs. 20,000 from undisclosed sources. The addition is confirmed subject to availability of funds which is to be recomputed as directed above.

34. In the next ground of appeal, assessed has challenged addition of Rs. 1,000 towards unexplained investment in purchase of plot. Having regard to the income which has been assessed in the hands of the assessee, this petty addition is deleted.

1986-87

35. In this year, there are three appeals, by the assessed against different orders of CIT(A). In ITA No. 6310, the assessed has challenged assessment order dt. 4th March, 1991, as modified by learned CIT(A). In ITA No. 5533, the assessed has challenged order of CIT(A), dt. 20th June, 1994, which was based upon order dt. 17th June, 1994 of CIT(A) in the case of Shri Prabhu Dayal. The third appeal No. 2094 is against order of CIT(A), dt. 22nd November, 1994, in which certain additions have been discussed.

The facts as emerged from record are that assessed had filed return declaring income of Rs. 17,850. On 10th July, 1986, in search operation under s. 132(1), certain documents were seized. On the basis of seized record, AO completed assessment on 10th February, 1988, on total income of Rs. 9,53,850.

Subsequently, AO initiated proceedings under s. 147(a) on the ground that return filed originally showing income below the maximum amount which is not chargeable to tax was to be deemed as never to have been filed by virtue of sub-s. (1) of s. 139 introduced by Taxation Laws (Amendment & Miscellaneous Provisions) Act, 1986, w.e.f. 1st April, 1986. Notice under s. 148 was issued on 14th March, 1988 and served on the same date. assessed filed return of income on 4th April, 1988, in response to above notice under s. 148 disclosing income of Rs. 17,850 again. The AO completed fresh assessment on income of Rs. 9,53,850 vide order dt. 15th April, 1988.

The assessed appealed to CIT(A) which was disposed of vide order dt. 30th January, 1989. In the above order, learned CIT(A) set aside the assessment and directed the AO to make fresh assessment after providing opportunity of being heard. The ITO was also directed to allow assessed to produce creditors. Not being satisfied the assessed appealed against above order before the Tribunal complaining that no specific finding was recorded by the learned CIT(A) on legality and validity of action taken under s. 147/148 of IT Act. The Tribunal vide its order dt. 31st August, 1992, accepted this plea of the assessed and remanded the matter back to the CIT(A) for considering legal ground raised by the assessed in accordance with law. The CIT(A) took up the matter as directed by the Tribunal and disposed of the same vide order dt. 20th June, 1994. The learned CIT(A) upheld action of AO for detailed reasons given in appeal of Shri Prabhu Dayal disposed of vide order dt. 17th June, 1994. That order is subject-matter of appeal in ITA No. 5533.

36. In the meanwhile the AO took up fresh assessment proceedings in compliance to directions of CIT(A) dt. 30th January, 1989. He examined facts and circumstances of case and seized material and computed assessee's total income at Rs. 9,53,850 vide order dt. 4th March, 1991. That order was again subject-matter of appeal before CIT(A) and that appeal was disposed of vide order dt. 26th June, 1991. The learned CIT(A) upheld main addition of Rs. 3,19,035 and Rs. 3,35,960 on account of interest and unexplained investment in moneylending business. In respect of addition of Rs. 51,550 on account of unexplained investment in mortgage of land, the matter was remitted back to the AO for fresh

appraisal of the material. The other three additions namely, Rs. 20,058 on account of unexplained investment in construction of house, Rs. 79,000 on account of unexplained investment in immovable property and Rs. 39,983 on account of unexplained expenditure on assessee's daughter's marriage were confirmed. The learned CIT(A) deleted addition of Rs. 23,910 on account of pawning of jewellery. He confirmed assessment of Rs. 7,000 as short-term capital gain on sale of plot but set aside addition of Rs. 36,550 for unexplained expenses on loose documents. On chargeability of interest under s. 217 and 139(8) of IT Act, the matter was remitted back to the AO. The additional ground sought to be raised by the assessed was also rejected. The said order of CIT(A) dt. 25th June, 1991, is subject-matter of appeal in ITA No. 6310/D/91.

The AO again took up the issues remanded to him by the CIT(A) vide order dt. 25th June, 1991, and passed a fresh order on 28th July, 1993. On question of addition of Rs. 51,550 for unexplained investment in mortgage, the AO accepted that investment in these mortgages already stood included in separate addition of Rs. 3,19,035 and, therefore, no more addition is called for on this account.

On next issue regarding addition of Rs. 36,550, based on entries in loose documents, the AO accepted three transactions aggregating to Rs. 10,000 as explained. The balance entries were treated as investment from undisclosed sources. The AO also held that interest under s. 139(8) and 217 was rightly charged.

37. The assessed impugned above assessment order dt. 28th July, 1993, in appeal and raised first material ground relating to addition of Rs. 26,550 sustained by the AO. It was explained that entries on loose sheets are also recorded on document No. 42, p. 118 and covered by entries dt. 14th June, 1985, for which Rs. 41,000 has been separately considered. The learned CIT(A) after considering relevant material allowed relief of Rs. 11,000 to the assessed and sustained addition of Rs. 15,550.

On question of chargeability of interest under ss. 139(8), and 217 of IT Act, the learned CIT(A) agreed with the view expressed that no return was filed by the assessed under s. 139(1) of IT Act and return filed below the taxable limit was an

illegal return. The CIT(A) allowed relief of Rs. 11,000 to the assessed vide order dt. 22nd November, 1994. The said order is subject-matter of appeal in ITA No. 2094/D/95. This is how the three appeals were filed before us.

38. We have considered rival submissions of parties. We have also considered written arguments filed before us. In this year, the assessed has also challenged validity of action under s. 147(a) of IT Act. It is contended that AO could not himself ignore order dt. 10th February, 1988, and initiate action under s. 147(a) of IT Act. It is claimed that AO did not have jurisdiction to pass the assessment order in appellants case for asst. yr. 1986-87. The proceeding is a nullity and the authority taking it had no power to seisin over the case. The position of the present case was not such. A distinction has to be maintained between want of jurisdiction and an irregular exercise of jurisdiction. The present case may be a irregular exercise of jurisdiction but not want of jurisdiction. Such an order could not be treated as null and void. It was required to be annulled. The ITO had full jurisdiction to make an assessment and, therefore, order was not a nullity on account of irregularity having been crept in. The order could be varied in remedial proceeding by an authority having proper jurisdiction. The AO could not exercise above jurisdiction and treat earlier order dt. 10th February, 1988, as a nullity. The learned counsel for the assessed further challenged action taken under s. 147(a) and submitted that income had escaped assessment on 15th March, 1988 even before the assessed had filed appeal. It is reiterated that income stood assessed by a good order which was not a nullity. Thus, initiation of proceeding under s. 147 is claimed to be bad. The assessed in this connection had relied upon the following decisions :

1. Sant Baba Mohan Singh vs . CIT : [1973]90ITR197(All) ;
2. P. Dasa Munshi Reddy vs . P. Appa Rao : [1975]2SCR32
3. P. V. Doshi vs. CIT : [1978]113ITR22(Guj) and
4. Delhi Cloth & Gen. Mills Ltd. vs. R. R. Gupta : AIR 1977 SC2086 .

We have given careful thought to the aforesaid submissions and examined impugned order in their light. In our considered opinion, the AO and the learned CIT(A) had elaborately discussed this issue to justify action under s. 147(a) of IT Act. They have referred to the relevant provision to demonstratively show that return filed below the taxable limit was to be treated as an invalid return and proceeding taken on the basis of above return has to be treated as null and void. The decision cited by the learned counsel for the assessed do not touch the point in issue. No arguments were addressed as to why provisions of sub-s. (10) of s. 139 introduced by Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, as applicable w.e.f. 1st April, 1986, were not applicable in this case. It is not claimed that above provisions were wrongly applied. For all the above reasons, we hold that proceedings were rightly initiated under s. 147(a) of IT Act.

We do not find any legal error in the assessment order of the AO.

39. The assessed had also contended that reasonable opportunity of being heard was not provided to the assessee. In this connection, we have seen assessment order and find that several dates were granted to the assessed to put forward its case. On majority of points, it did not give any Explanation except stating that moneylending business belong to Smt. Yashoda Devi. The assessed also took up a wrong stand that Explanation could not be furnished unless seized books were returned to the assessee. On account of above, the assessed might not have furnished several Explanations which it now intends to furnish but for above no blame can be fastened on the AO. The opportunity of being heard as required under the law was duly provided to the assessee.

40. The main addition i.e., addition on account of interest income and unexplained investment in the moneylending business has already been considered and upheld in earlier assessment year. The directions and findings given in 1985-86 shall also apply in the year under consideration.

41. The similar addition of unexplained investment of Rs. 79,000 in house property has also been considered in earlier years. The stand that investment was made by Smt. Yashoda Devi, the mother of the assessed has been reiterated. It has been further stated that AO admits that sale deed with regard to properties in question

were not found during the course of search nor the assessed was able to produce them in subsequent proceedings. The excise note-book in which entries relating to investment were recorded was found from common residence occupied by the assessed and his mother. The AO excluded Smt. Yashoda Devi by merely observing that he was sure that properties were not purchased in the name of Smt. Yashoda Devi. The AO further presumed that aforesaid exercise book belonged to the assessed and, therefore, assessed must have made investment of Rs. 79,000. It is claimed that addition based on several presumptions have no legal basis. Exercise note-book was not discovered from the personal possession of Shri Babu Ram. It was found from common residence and there is no automatic presumption that said note-book belonged to the assessee. Now when assessed had denied any unexplained investment in construction, the onus lay on the Revenue to establish its case. But nothing of that sort has been done and addition made is wholly unsupported by facts and evidence and is based on presumptions and assumptions.

42. The assessed further challenges addition of Rs. 39,983 on account of unexplained expenditure incurred on assessee's daughters marriage. These expenses are also claimed to have been met by Smt. Yashoda Devi who was claimed to have overall control. It is submitted that no attempt was made by the AO to ascertain facts and addition on surmises and conjectures has been made.

We have gone through above claim. As discussed in detail in earlier para, exercise book, belongs to the assessee. It is little too late in the day to claim that immovable properties belonged to Smt. Yashoda Devi particularly when all along the reliance was placed on settlement deeds, copy of plaint and degrees relating to ownership of immovable properties which claim had been considered in detail. The improbable claim that Smt. Yashoda Devi could make investment in house property when plot belongs to the assessed has only stated to be rejected. Likewise claim that Smt. Yashoda Devi met expenditure on marriage of assessee's daughter is also preposterous and cannot be accepted. The AO allowed reasonable opportunity to the assessed to explain above expenditure but no Explanation except the above one was rendered. The Explanation having been rightly rejected, the addition made on account of unexplained expenditure on both

the accounts is upheld.

43. The assessed has further challenged treatment of capital gain of Rs. 7,000 as short-term capital gain. The assessed had returned the gain as a long-term capital gain. In support of the ground, it has been contended that assessment order on this issue has no support in law. It is true that details of sale and purchase of property in which this capital gain arose were not filed by the assessee. But the Department has accepted the capital gain but converted into short-term capital gain without any supporting material. It is claimed that if categorisation of capital gain was to be changed, it was for the Revenue to place some material on record to support their conclusion. Without basis and material, categorisation has been wrongly changed.

44. We have gone through the above arguments. The assessed had returned capital gain of Rs. 7,000 but claimed it to be long-term capital gain. How long-term capital gain arose to the assessed has not been explained. The material facts are within special knowledge of the assessed and when those are not brought on record, an adverse inference has to be drawn against the assessee. This is what has been done and short-term capital gain has been charged to tax. The assessed wants to have benefits allowed in the case of a long-term capital gain. therefore, it is for the assessed to bring its case within the four corners of statutory provisions allowing this benefit. Without material, above benefit could not be granted. therefore, we uphold the assessment of Rs. 7,000 as short-term capital gain.

45. In appeal No. 2094, the assessed has challenged addition of Rs. 36,550 out of which AO allowed relief of Rs. 10,000 after verification. On further appeal, CIT(A) allowed relief of Rs. 11,000 and now only Rs. 15,550 has been sustained. This transaction is claimed to be related to moneylending business, about which detailed submission made by the assessed has been separately considered. It is not possible for us to accept that this moneylending business does not belong to the assessee. We, therefore, reject this claim of the assessee, subject to our earlier observations relating to moneylending business.

46. In appeal for the aforesaid assessment year, the objection relating to addition on account of interest and advances in respect of moneylending business has been challenged. It has been further claimed that estimate made by the AO is highly excessive and ignored the fact that all the advances are not allowable and do not produce income in the form of interest. For the reasons already discussed, we have no hesitation in holding that income from moneylending and unexplained advances has rightly been assessed in the hands of the assessee. The question of quantum of income be reconsidered as directed in earlier assessment years.

47. In the next ground of appeal, assessed has challenged AOs estimate of dairy farming income at Rs. 25,000. The assessed has submitted that he did not have any profit from this business. No accounts of this source of business were kept. The AO rejected assessee's submissions and made above addition which is claimed to be without basis and highly excessive.

After considering relevant submission of parties, and past record, we agree with assessed that estimate of income is on higher side. It is reduced to Rs. 15,000.

48. In the next ground of appeal, assessed has challenged addition of Rs. 30,000 on account of cash discovered from the residential premises. In its Explanationn the assessed claimed that out of above cash Rs. 25,000 belonged to retail kirana business which was carried on since long. Even in his balance sheet as on 31st March, 1986, he had shown cash in hand at Rs. 19,681. The remaining Rs. 8,050 belonged to assessee's mother, wife and his sons. The AO rejected this contention by observing that entries in balance sheet are not supported by any document. Against above, the assessed has contended that income from kirana business has been accepted in toto without any modification. This being so, it is not open to the AO to contend that balance sheets for the relevant year were not reliable.

After considering relevant material on record, we accept cash shown in the balance sheet as on 31st March, 1986, and are also inclined to allow some benefit for the subsequent earning, and hold that Rs. 25,000 be accepted as explained and addition be restricted to Rs. 10,000.

No other point was argued by the assessed during the course of hearing of appeal.

Shri Prabhu Dayal

49. In this case, appeals are for asst. yrs. 1978-79 to 1987-88 (except for 1982-83). In the written submission, assessed had argued that only ground in these appeals relate to assessment on income from moneylending business. In this respect, arguments advanced are the same as were advanced in the case of Shri Babu Ram and it is claimed that moneylending business does not belong to and cannot be assessed in the hands of the assessee.

50. The above submission has already been considered in detail in the case of Shri Babu Ram and for the reasons given in those appeals, this claim is rejected. It is confirmed that the assessed was carrying on moneylending business and income on the basis of documents seized from his premises is to be assessed in his hands. The quantum of income assessed has not been disputed and need not be adjudicated upon. Accordingly, assessments for asst. yrs. 1978-79 to 1981-82 and 1983-84 to 1987-88 are confirmed.

51. In the grounds of appeal, the assessed has taken a ground challenging reassessment proceedings initiated under s. 147/148 and it was claimed that assessment order was illegal and invalid. But no arguments were addressed on these grounds and accordingly these are rejected. In the case of Shri Babu Ram in appeal for asst. yr. 1983-84 onwards, we have given direction that the question of income from moneylending (interest and unexplained investment) business should be considered and as it was a continued business, the income assessed in earlier year should be taken into consideration to work out funds which could be available with the assessed as on the opening day of the accounting period. The question of allowing of set off of above funds has also been directed to be reconsidered. The above directions will equally apply in the case of Shri Prabhu Dayal also.

52. In the case for asst. yr. 1987-88, the learned AO enhanced income from kirana business from Rs. 17,000 to Rs. 25,000 on the short ground that household expenditure was disclosed by the assessed at Rs. 8,000 only which was

insufficient to meet his family requirement. In this connection, learned counsel has drawn our attention to the income disclosed and assessed in earlier year and claimed that as against Rs. 14,500, higher income at Rs. 17,000 was disclosed. It is further claimed that assessed is living in a village where agricultural commodities are available to him without any cost being produced of his own fields. thereforee, expenditure of Rs. 8,000 is fully justified. We have seen grounds of appeal in the case of Shri Prabhu Dayal. There is no ground in the memorandum challenging addition of Rs. 8,000 on account of household expenses. thereforee, this ground of appeal is not entertained.

53. In the appeal for 1987-88, apart from challenging question of addition on account of moneylending business, the assessed has further challenged addition of Rs. 15,000 on account of investment made by Shri Sanjeev Kumar. This ground is conceded by saying that no arguments were addressed on this addition before the CIT(A) and the same position continued at this stage. The addition is accordingly upheld.

Shri Gian Chand

54. 1981-82. This appeal has been filed by the Revenue challenging addition of Rs. 24,000 made by the AO on account of unexplained investment.

55. The AO has discussed this issue at p. 3 of the assessment order. On scrutiny of pp. 89 to 94 of document No. 35, seized from residential premises of Shri Babu Ram, the AO concluded that the assessed made investment of Rs. 24,000. Shri Babu Ram when examined denied that investment was made by the assessee. The assessed also filed an affidavit supporting the claim that entries do not belong to the assessee. The AO, however, on examination of the documents held that these belong to the assessed and added the amount as unexplained investment.

56. On appeal, learned CIT(A) held that no presumption under s. 132(4A) can be drawn against the assessed as document was not seized from his premises. Merely because name of Shri Gian Chand is mentioned in one of the documents, it cannot be concluded that he made investment from undisclosed sources. The addition was deleted.

The learned Departmental Representative during the course of hearing of appeal supported above claim.

57. Shri Anand Prakash, learned counsel for the assessed on the other hand relied upon order of Dy. CIT(A), Rohtak. He argued that document on the basis of which addition had been made were not recovered from the residence of assessed nor are they in his handwriting. The Departmental Representative had placed no evidence on record to connect the said documents with the assessee. He also referred to affidavit filed by the assessed and statement on oath of Shri Babu Ram.

58. We have considered photostat copy of p. No. 89 and 90 of the document No. 35. These documents contain certain scribbles but on that basis, no inference can be drawn that Shri Gian Chand assessed made investment of Rs. 24,000 from undisclosed sources. thereforee, we uphold action of CIT(A). In the result, this appeal of the Revenue is dismissed.

1982-83

59. The Revenue has similarly challenged deletion of addition of Rs. 68,600 made in asst. yr. 1982-83 on account of entries on documents seized from the premises of Shri Babu Ram. The facts were admitted to be identical in this year in written submissions filed by the Revenue. Having regard to the reasons given by us in Revenues appeal for 1981-82, this appeal of the Revenue is also dismissed.

60. The assessed in his appeal for the year 1982-83 has challenged the addition of Rs. 13,000 on account of entries in documents seized from the premises of the assessee. It is contended that no presumption raised by s. 132(4A) was available while making assessment under s. 143(3) and, thereforee, it was for the Department to prove the transaction recorded in the seized document pertain to the assessee. The consistent stand of the assessed right from the very beginning was that he was not carrying on any moneylending business. Smt. Yashoda Devi, mother of the assessed was managing moneylending business with the help of Shri Inder Pal, one of her sons and after his death she was assisted by Shri Rameshwar and Shri Yogesh Prasad. thereforee, addition on account of

moneylending business is claimed to be unsustainable.

61. We have given careful thought to the submissions advanced by the assessed relating to addition in dispute. It is not in dispute that the documents seized from the assessee's premises showed that moneylending business was carried on by the assessed and his name was specifically written at the back of certain documents. The AO also gave five reasons in the impugned assessment order to hold that moneylending business was carried on by Shri Gian Chand and not by Smt. Yashoda Devi. The detail of gold ornaments pawn were also recorded in the seized documents.

On appeal, the seized documents were once again reviewed by the appellate authority and conclusion of the AO was endorsed by CIT(A) relating to carrying on of moneylending business. However, on scrutiny of entries in the seized documents, the learned CIT(A) allowed substantial relief to the assessed and sustained only addition to the extent of Rs. 13,000. His reasoning that addition could be sustained on account of presumption under s. 132(4A) may not be sound but on considering cumulative effect of the relevant circumstances we find that addition to the extent of Rs. 13,000 is fully justified. The seized material coupled with statement of Shri Sat Pal clearly establish that moneylending business was carried on by the assessee. The addition of Rs. 13,000 is also fully supported by entries in the documents. therefore, we do not see any good ground to interfere with the order of CIT(A) on this issue.

1983-84

62. In this appeal, the assessed has challenged order of CIT(A) restoring addition of Rs. 1,06,000 to the file of the AO. It was stated that in the set aside assessment, learned AO has again made the addition and that the matter was pending before the CIT(A). It was conceded that this ground has become academic. In the above circumstances, the request not to adjudicate this ground is accepted and appeal is filed. It may be treated as dismissed for statistical purposes.

1984-85

63. No submissions were made on ground No. 1. It is accordingly rejected.

64. On ground Nos. 2 and 3, the assessed challenged restoration of matter to the AO who had made fresh addition and the matter is pending adjudication, before the CIT(A) in the reassessment proceedings. This ground is also not adjudicated and is dismissed as not pressed with the observation that nothing here would prejudice the case of the assessed in proceedings pending before the CIT(A).

65. In the third ground of appeal, assessed has challenged addition on account of construction made by the assessed on plot. It is contended that the above plot belongs to the HUF having been received through family settlement as confirmed by the Courts decree. The contention for reasons discussed in detail in the case of Babu Ram is rejected. No attempt has been made by the assessed to explain investment of Rs. 53,310 in the construction. therefore, above investment is treated as unexplained and addition made thereof fully justified on facts of the case. It is upheld.

1985-86

66. The first ground of appeal is general and needs no adjudication.

The grounds Nos. 2, 3 and 5 were admitted to be purely academic requiring no adjudication. These are accordingly dismissed as not pressed.

67. In 4th ground of appeal, assessed has challenged addition on account of unexplained investment in construction of the house property. This addition is upheld on account of reasons recorded in ground No. 3 of asst. yr. 1984-85.

68. All the appeals are disposed of in terms stated above.