INCOME-TAX REFERENCE.

1935

Before Derbyshire C. J. and Costello J.

July, 9, 10.

In re KESHARDEO CHAMARIA*.

Income-tax—Reference to High Court, when necessary—Assessee's request for reference if any ground—Indian Income-tax Act (XI of 1922), as amended by Indian Income-tax (Second Amendment) Act (XXII of 1930), ss. 30, 31, 66(2).

Where the Commissioner of Income-tax had held that all the questions raised on appeal before him by the assessee (who had been found to have made deliberate and inexcusable default in making his return in spite of repeated notices to do so) were questions of *fact*, but nevertheless "at the request of the assessee" submitted for decision by the High Court the question of law formulated by the assessee, *viz.*, "whether in the "circumstances of the case there were any materials on which the Income-"tax Officer could base his finding that the assessee was not prevented "by sufficient cause from filing the return called for under section 22(*2*) or "producing the accounts called for under section 22(*4*),"

held that (*i*) there was *no* question of law, which could be referred for the opinion of the High Court under the provisions of section 66(*2*) of the Income-tax Act; (*ii*) therefore, there was no obligation on the Commissioner of Income-tax to have formulated the question, which he had submitted to the High Court; (*iii*) but, as the question was before the High Court and as the matter had been fully argued on behalf of the assessee, the answer to the question referred must be in the affirmative.

In re *Abdul Bari Chowdhury* v. *Commissioner of Income-tax, Burma* (1) explained and distinguished.

Jotram Sher Singh v. *Commissioner of Income-tax* (2) referred to.

REFERENCE under section 66 (*2*) of the Indian Income-tax Act at the instance of the assessee.

The facts of the case and the arguments appear sufficiently in the judgment.

A. C. Sen for the Assessee.

A. K. Roy, Advocate-General, *Radhabinode Pal* and *Rameshchandra Pal* for the Income-tax department.

Cur. adv. vult.

COSTELLO J. This matter comes before us on a reference by the Commissioner of Income-tax under section 66(*2*) of the Indian Income-tax Act, 1922.

*Income-tax Reference, No. 5 of 1935, under section 66(2) of the Indian Income-tax Act.

(1) (1931) I. L. R. 9 Ran. 281. (2) (1934) I. L. R. 56 All. 933.

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The Commissioner says in the opening paragraph of the case which has been put before us, that "At the request of the assessee named above" (that is to say Keshardeo Chamaria) "the question of law formulated in paragraph 8 of the Statement of Case is submitted to Their Lordships the Judges of the Calcutta High Court for favour of their decision". The question, therefore, upon which our opinion is sought is this :—

> Whether, in the circumstances of this case, there were any materials on which the Income-tax Officer could base his finding that the assessee was not prevented by sufficient cause from filing the return called for under section 22(2) or producing the accounts called for under section 22(4) ?"

In order to make clear how this matter arises, it is necessary that I should recite one or two facts in the history of the case. There were two income-tax matters proceeding against this assessee simultaneously—one in respect of the assessment for the year 1932-33 under section 23 of the Act and the other in respect of the assessment for 1931-32 under that section read with section 34 of the Act and in both cases notices were issued and orders passed on the same dates and there is one common order sheet. The assessee has filed an application for reference under section 66 (2) of the Act in respect of both assessments, but as the facts and circumstances are identical, the Commissioner of Income-tax has stated a case only in respect of the assessment for the year 1932-33 and he proposes to decide the question at issue in the other assessment in accordance with whatever decision which we give in this matter.

The chronology of the case is as follows :— On the 30th August, 1932, the Income-tax Officer issued a notice under section 22(2) calling for a return of income by the 18th October, 1932; but instead of making that return the assessee on the 18th of October, 1932, filed a petition, in which he said that he had been away for a change, which had not improved his health and, therefore, he proposed to go away for another change to Bangalore. Accordingly, on the same day, the 18th of October, 1932, the Income-tax

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Officer made an order to the effect that the return should be filed on the 30th October, 1932. Apparently no attention was paid to that order, for the next thing, which happened, was that the assessee put in another petition dated the 8th of November, 1932, in which he said that he was unable to do anything in the matter until the Official Receiver, High Court, Calcutta, and Rai Rampratap Chamaria Bahadur arrived in Calcutta. He said that they were both away from town "on a change" during the *Pujâ* holidays. He also said that his estate was the subject matter of certain suits then pending in the High Court on its Original Side. He asked for two weeks' time in which to do what was necessary in the matter. As a result of the receipt of that petition, the Income-tax Officer made an order directing the assessee to prove his assertion by documents, which he was to produce on the 23rd of November. No attention was paid to that order, but on the 23rd of November a third petition was put in by the assessee in which he stated that he had no independent source of income of his own, but he was a co-sharer with other members of the firm of Messrs. Hardutrai Chamaria and Company and the partnership and the connected joint estate were now being dealt with in suits. He, therefore, asked that his personal assessment might be deferred till after the disposal of these suits, which were then pending. After receiving that petition the Income-tax Officer made an order to the effect that he could not wait indefinitely and he called for the accounts of 1931-32 under the provisions of section 22(*4*) of the Act and fixed the 21st December, 1932, for the production of those accounts. The accounts which he asked for were municipal bills of house property, counterfoils of rent receipts, deeds, lease papers and bank pass book. On the day when these accounts ought to have been produced, *i.e.*, the 21st December, 1932, the assessee put in a fourth petition, in which he said:—

The petitioner in compliance with notices under section 22(*4*) enters appearance and submits that the documents of properties required to be

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produced are obtainable from Rai Bahadur Seth Rampratap Chamaria and from the receiver appointed by the Hon'ble High Court, who is still in office. The petitioner, therefore, prays that his assessment file may be struck off in the circumstances.

So that once more the assessee made no serious attempt to comply with the requirements of the Income-tax Officer. Thereupon, the Income-tax Officer directed compliance by means of the notice under section 22(4) and that the compliance was to take place on the 12th January, 1933. On that date the assessee at last made an appearance before the Income-tax Officer together with a pleader, but, instead of producing all the accounts required by the Income-tax Officer, he merely produced one solitary bank pass book containing entries for the period from the 15th January, 1929, to the 21st November, 1932, and no other accounts whatever. On the same day he put in another petition, in which he said this :—

> By an order of the High Court dated 2nd April, 1931, in Suit No. 183 of 1929 some of the properties in suit mentioned in schedule thereof were transferred from the Official Receiver appointed in the said suit by order dated 28th July, 1930, to the joint management of the petitioner and Rai Bahadur Rampratap Chamaria and papers in respect of those properties are in joint custody of the petitioner and the said Rai Bahadur Rampratap Chamaria and return of income as well as evidences of those properties can only be submitted in such joint capacity inasmuch as by virtue of disagreement between the parties concerned, the petitioner moved the High Court before the last *Puja* vacation for re-appointment of the Official Receiver for those properties and that matter is pending decision.

In passing we observe that in that statement there is an admission that for some period at any rate the assessee had control over the documents to which I have just referred. In the concluding paragraph of that petition the assessee said this :—

> The petitioner herewith applies for a notice under section 37 in the joint name of the petitioner and the said Rai Bahadur Rampratap Chamaria for production of papers called for by notice under section 22(4) and prays that such notice may be issued to enable the petitioner to comply.

The Income-tax Officer declined to issue a notice or summons under section 37 and on the 15th February, 1933, he made an assessment under the provisions of section 23(4) on the basis of a total income of Rs. 45,600 made up as follows—income

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from property Rs. 43,200; income from business Rs. 2,400.

Thereupon about a month later, that is to say on the 6th March, 1933, the assessee made a petition under the provisions of section 27 of the Indian Income-tax Act of 1922. That petition is set out at page 17 of the paper book and in paragraph 3 thereof the petitioner set forth a number of grounds upon which he relied for having the assessment made under section 23 (4) set aside. It is to be observed that none of those grounds, with the possible exception of that appearing under the letter (i), that is to say, the last of the grounds set out in the petition, are really grounds admissible for an application under section 27. Section 27 provides as follows:—

> Where an assessee, or in the case of a company, the principal officer thereof, within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (4) of section 22, or sub-section (2) of section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last-mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of section 23.

That section, therefore, provides in essence that the only ground on which an assessment under section 23 (4) can be attacked is that the assessee for reasons outside his control was unable to comply with notices, which are the preliminary stages and indeed the condition precedent to the making of an assessment under section 23(4). Now the ground set out in the petition of the 6th March, 1933, under the letter (i) reads as follows:—

> The petitioner does not yet know the details of his total income nor has he in his exclusive possession the documents not produced under section 22(4).

He is there referring of course to the notices which had been served upon him under the provisions of that sub-section, requiring him to produce the various accounts, which I have enumerated and in fact he is saying once more that he was unable to produce the

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documents and the accounts called for, because they were not under his own control but were under the joint control of himself and of Rai Rampratap Chamaria Bahadur. That petition was dealt with by the Income-tax Officer on the 10th of May, 1933, and the decision of the Income-tax Officer appears in the order sheet which is set out at pages 18 and 19 of the paper book and is in these terms :—

I consider the grounds above and those submitted in the petition under section 27 as below :—

(1) The deposition made under section 37 will show that the assessee could easly have filed his return and produce his accounts, *etc.*, had he had the intention of doing so.

(2) Notice under section 34 after assessments under section 23 is only legal.

(3) He may refer to the style offered by him as " banker " before the Hon'ble High Court.

(4) Any leaving out of income will be covered by section 34 only.

(5) The assessee is a resident of Howrah. He was absent temporarily on account of a marriage ceremony authorising his pleader to act. He returned after a few days only.

(6) The assessee did not comply under section 22(*2*) at all and his compliance under section 22(*4*) was nominal only. He had sufficient opportunity to comply. No sufficient cause has been established, by which he was prevented from compliance.

I am, therefore, not in a position to entertain the petition under section 27. The petition is, therefore, rejected.

Then he added :—

The same reasons apply to petition under section 27 regarding assessment under sections 34 and 23(*4*). The said petition is, therefore, rejected.

That decision, as I have stated, is dated the 10th of May, 1933. About a month later—on the 8th of June, 1933—the assessee made an appeal against that decision and set out a large number of grounds, on which that appeal purported to be based. The grounds of appeal are to be found at pages 20 and 21 of the paper book. With regard to that appeal and the proceedings against which it was preferred, the Commissioner of Income-tax in the Statement of Case, that he has sent to us, says on page 6 this :—

The Income-tax Officer considered that he (the assessee) had reasonable opportunity to comply with the terms of the notice and that there was no sufficient cause preventing him from complying with the notices or from

making the return. He, therefore, rightly refused to re-open the assessment under section 27. Against this order an appeal is given by section 30 with this proviso that no appeal shall lie in respect of an assessment made under section 23(*4*) or under that section read with section 27. The result is that the only questions, that can be raised in an appeal against an order under section 27 and in case of assessment under section 23(*4*), are :—

(i) Whether the assessee was prevented by sufficient cause from making the return required by section 22,

or (ii) whether he received a notice issued under section 22(*4*) or section 23(*2*),

or (iii) whether he had a reasonable opportunity to comply with the terms of the notices,

or (iv) whether he was prevented by sufficient cause from complying with the terms of the notices ?

Then he says :—

The second matter did not arise for consideration in this case and as to the other items, the Assistant Commissioner did examine the evidence on record and come to a conclusion adverse to the assessee.

Now the scope of an appeal in such a case being thus limited, the only question of law, that can arise out of such appellate order must relate to the above matters, but it seems fairly clear that all these are questions of facts.

With that statement of the learned Commissioner of Income-tax I entirely agree. The relevant section, to which the learned Commissioner there refers, is section 30, sub-section (*1*), which provides :—

" Any assessee objecting to the amount or rate at which he is assessed under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer to make a fresh assessment under section 27, or to any order against him under sub-section (*2*) of section 25 or section 25A or section 28, made by an Income-tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order.

Then there is this important proviso :—

Provided that no appeal shall lie in respect of an assessment made under sub-section (*4*) of section 23, or under that sub-section read with section 27.

Then sub-section (*2*) is as follows :—

The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment or penalty objected to, or of the date of the refusal to make a fresh assessment under section 27, as the case may be ; but the Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

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In passing one may observe that the assessee delayed in making his appeal almost until it was barred by the limitation provided in that sub-section. Section 31 provides in sub-section (*3*) that:—

> In disposing of an appeal the Assistant Commissioner may, in the case of an order of assessment,—
>
> (*a*) confirm, reduce, enhance or annul the assessment, or
>
> (*b*) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment,
>
> or, in the case of an order refusing to make a fresh assessment under section 27,
>
> (*c*) confirm such order, or cancel it and direct the Income-tax Officer to make a fresh assessment,
>
> or, in the cases of an order under sub-section (*2*) of section 25 or section 28,
>
> (*d*) confirm, cancel or vary such order.

For our present purpose, the position, therefore, is that on the hearing of the appeal before him the Assistant Commissioner could have confirmed the order made by the Income-tax Officer, he could have cancelled it and directed the Income-tax Officer to make a fresh assessment or he might have varied the order. What he in fact did was to dismiss the appeal and confirm the order which the Income-tax Officer had made.

The appeal was heard on the 1st February, 1934, and the order made thereon is dated the 23rd February, 1934, and is set out at pages 22 and 23 of the paper book. The Assistant Commissioner sets out the question that he had to determine in this form:—

> The question for determination in this appeal is whether the appellant was prevented by reasonable cause from filing a return of income.

The judgment concludes in this way:—

> Even if it is conceded that the appellant had no individual income—I do not, however, admit this—this fact must have been within his knowledge, and he could have sent in a *nil* return—if he had been minded to do so. In my opinion, there was nothing to prevent him making such a return, and I, therefore, regard his default as deliberate and inexcusable.
>
> ORDER.
>
> The orders passed by the Income-tax Officer on the application filed under section 27 are hereby confirmed under section 31(*3*) (*c*).

That is the sub-section which I have already read. The assessee once again instead of submitting to the assessment made upon him moved the Commissioner of Income-tax to state a case to this Court, and what happened in that connection is thus described by the Commissioner himself in his Statement of Case at page 6:—

"If any of the above facts" (he is referring to the facts, which I have already quoted from that page) "be found in favour of the assessee, then section 27 is imperative and the Income-tax Officer is bound to cancel the assessment. If in any case even after finding any of the items in favour of the assessee the Income-tax Officer or the Assistant Commissioner did not cancel the assessment, there might be a question of law arising out of the order, *viz.*, whether or not under the circumstances they would be bound to cancel the assessment. The other possible questions of law that may arise would relate to the procedure followed in determining the above facts. In this particular case the assessee did complain of such procedural defects and in view of this allegation of defective procedure I caused enquiries to be made in exercise of my power under section 33 and as a result came to the conclusion that there was no substances in the complaint."

The learned Commissioner was there referring to the fact that in asking that a case should be stated for the opinion of this Court, the assessee did complain that there was some irregularity of procedure in connection with the proceedings before the Income-tax Officer when the petition under section 27 was being disposed of. The Commissioner of Income-tax has, in my opinion, throughout dealt with this matter in a most careful, conscientious, and extremely considerate manner towards the assessee and as soon as he found that there was some defect in the procedure adopted by the Income-tax Officer, he gave directions that further enquiries were to be made and, in fact, an enquiry was held and witnesses were properly examined and, after considering the result of that enquiry, the learned Commissioner came to the conclusion that there was no real substance in any of the complaints made by the assessee. Accordingly he held that there was no question of law which properly could be made the subject matter of a reference to this Court. The learned Commissioner puts the matter in these words:—

I hold that no question of law can arise or does arise out of the appellate order in this case.

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Then he says :—

In view, however, of a certain observation made by a learned Judge in a recent Rangoon case and in view of these observations alone I decide to refer the question formulated below.

The question "formulated below" is the question, which I have already read and which appears in paragraph 8 of the Statement of the Case. The Commissioner of Income-tax amplifies the matter in paragraph 9 of the Statement of Case and he there says :—

In the application under section 27 of the Act, the assessee did not ask that he should be allowed to adduce evidence in support of his contention that he was prevented by sufficient cause from filing a return under section 22(*2*) or producing accounts under section 22(*4*) but merely averred that the prayer for a notice under section 37 of the Act was illegally refused. This refers back to his petition of 12th January, 1933, reproduced in paragraph 3 above, in which he asked for a summons in the joint name of the assessee and Rai Bahadur Rampratap Chamaria for the production of the papers called for from assessee under section 22(*4*). The Income-tax Officer at this stage summoned Prahlad Rai, the constituted attorney of the Rai Bahadur, who, on examination, deposed that the accounts of this property were in charge of a *gomastâ*, Gobardhan Chaudhuri, and that *gomastâ* must produce all accounts and documents, if required to do so by either party to the suit. Apparently, no opportunity was given to the assessee to cross-examine that witness. This was an illegality on the part of the Income-tax Officer and the assessee could make a just grievance of this. I, therefore, took action under section 33 and directed the Assistant Commissioner to hold an enquiry for the purpose of determining what the exact position was and for coming to a decision on the question, whether or not the assessee was in a position to file a return and produce accounts to examine in the presence of the assessee, the Rai Bahadur, his constituted attorney Prahlad Rai and the *gomastâ* and to allow the assessee to cross-examine them. I also asked him to call for the accounts in question and examine them with a view to determining whether there was any evidence to show that the assessee had access to them or that part of the receipts from this property were being distributed periodically to the assessee. Those enquiries have, accordingly, been made and as a result of the same I find it impossible to give any relief in this case, and I find that between May, 1931, and October, 1933, the assessee on various dates drew in all the sum of Rs. 83,559 from the joint account, this being the account of the rents realised from the property in question, the other party to the suit having drawn the same sum.

Then the Commissioner proceeds to deal with the evidence which was given at the enquiry held by the Assistant Commissioner, and it appears, as the Commissioner says in the middle of page 9 of the paper book :—

If this is correct, it follows that the assessee made no effort whatever to get access to the accounts for the purpose of filing his income-tax return and producing them before the Income-tax Officer.

Then he says :—

"The evidence of the witness" (the witness in question is the *gomastā*) "is, in my view, contradictory and I refuse to believe that the assessee would allow the Rai Bahadur access to the accounts in March, 1933, if the Rai Bahadur had refused him access to the same accounts a month or two before. I should perhaps place on record that this witness is now the servant of the assessee exclusively and this perhaps explains the unsatisfactory nature of his evidence".

The learned Commissioner closes his Statement of Case by saying in paragraph 10 :—

In my respectful opinion, therefore, the assessee was not prevented by sufficient cause from filing the return called for under section 22 (2) or producing the accounts called for under section 22 (4) and that there were materials, on which the Income-tax Officer could base his finding to this effect. In my view, therefore, the question formulated should be answered in the affirmative.

In my opinion, the view taken by the learned Commissioner of Income-tax is entirely correct. It appears from the summary of the evidence appearing at page 9 of the paper book that there was ample material upon which both the Income-tax Officer and the Assistant Commissioner could come to the conclusion that the assessee was not prevented by sufficient cause from complying with the terms of the notice which had been served upon him. The learned Commissioner of Income-tax is, in my opinion, also correct in taking the view that the questions which the Income-tax Officer and the Assistant Commissioner had to decide were purely questions of fact and, as the Commissioner said, no question of law did or could arise out of the appellate order made by the Assistant Commissioner.

In referring this case for the opinion of this Court, the learned Commissioner has, obviously, gone out of his way to be generous and indulgent, and indeed needlessly indulgent to the assessee. There was no need at all, in law, in my opinion for this reference ever to have been made, especially having regard to the fact that it was made solely upon the basis of an observation made by one of the learned Judges of the Rangoon High Court, which was contrary to the view

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expressed by four other learned Judges of that Court, including the Chief Justice himself. The case referred to by the learned Commissioner, in which the observations of Mr. Justice Dunkley appear is that of *In re Abdul Bari Chowdhury* v. *Commissioner of Income-tax, Burma* (1). The judgment of Mr. Justice Dunkley appears at page 303. The learned Judge begins his judgment by saying "I agree with my Lord, the Chief Justice".

The passage, to which the Commissioner of Income-tax refers, appears at page 304, and is as follows:—

> It follows that a question arising from the actual assessment under section 23 (*4*) cannot be brought before the High Court under the provisions of section 66, sub-section (*2*) or (*3*), under any circumstances. The only question in any way connected with such an assessment, which could be raised before the High Court, would be a question of law arising out of the Income-tax Officer's order under section 27, refusing to cancel the assessment under section 23 (*4*) and to make a fresh assessment. Under the provisions of section 27, that order must be based on a finding that the assessee was not prevented by sufficient cause from making the return required by section 22, or complying with the terms of the notices issued under section 22 (*4*) or section 23 (*2*), as the case may be, and the only question of law, which could possibly arise out of such a finding, is whether there were any materials on which the Income-tax Officer could base his finding.

Now, as I read that judgment, it seems to me that at the very utmost what Mr. Justice Dunkley intended to say was that there might possibly be a question of law: in this respect that the assessee might be able to ask the Commissioner of Income-tax to state a case, if he was in a position to say that there were *not any* materials, on which the Income-tax Officer could base his finding, or as it is usually put in analogous circumstances, that there was *no* evidence, on which the Income-tax Officer could find as he, in fact, did find. That is putting the matter at the very highest, but having regard to the opinion expressed by Sir Arthur Page C.J. and the other three Judges, who agreed with him but did not give separate judgment, I incline to the view that even that is not

(1) (1931) I. L. R. 9 Ran. 281, 299, 300, 303.

the correct position. Touching this particular point, Sir Arthur Page said at page 299 of the report:—

Under section 27 the issue is one essentially of fact, namely, whether the assessee was prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (*4*) of section 22, or sub-section (*2*) of section 23, or that he had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with the terms of the last-mentioned notices.

That of course is a quotation from the Act itself The learned Chief Justice proceeds as follows:—

If he satisfies the Income-tax Officer that he was not in default the Income-tax Officer "shall cancel the assessment." In an appeal under section 30 (*1*) against the refusal of the Income-tax Officer to make a fresh assessment under section 27 the only question, that arises, is the same question of fact as that, which fell to be determined by the Income-tax Officer under section 27, and in such an appeal it is immaterial whether the assessment made under section 23 (*4*) was valid or not.

Lower down at page 300, the learned Chief Justice says this:—

I wish to add that, of course, in a proceeding under section 27 the onus lies upon the assessee, and, if the assessee fails to produce any evidence in support of his application that the assessment made under section 23 (*4*) should be cancelled, that in itself would provide material, upon which the Income-tax Officer would be justified in basing a refusal to cancel the assessment that had been made under section 23 (*4*). On the other hand, if the assessee adduced evidence in support of his application under section 27 the weight to be attached to that evidence is a matter for the Income-tax Officer to determine.

And again at page 301, Sir Arthur Page said:—

Under section 27, however, the Income-tax Officer has to determine whether the assessee was prevented by sufficient cause from complying with the requirements of the law as set out in section 27. That is essentially a question of fact, and not of law. If the assessee satisfies the Income-tax Officer that in the circumstances of the case he was prevented by sufficient cause from complying with the requirements of the law prescribed under section 27, it is provided that the Income-tax Officer "shall" cancel the assessment.

The view taken by the majority is not the view of Judges of the Rangoon High Court only, for the case, which I have just cited, was followed by the Allahabad High Court in the case of *Jotram Sher Singh* v. *Commissioner of Income-tax* (1). At page 945 Mr. Justice Bennet, who was sitting with Mr. Justice Niamatullah, said this:—

Now the first question, which the assessee desires to be treated as a question of law, is in regard to this finding of fact and is as follows: "Whether in

(1) (1934) I. L. R. 56 All. 933, 945.

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"the absence of any evidence whatever to prove the possession of the four "account books for the Sambat year 1986 by the petitioners, the Income-tax "Officer was justified in law in holding that the petitioners had been guilty of non-production of the said books?" The assumption underlying this question is that it was necessary for the finding that there should be some oral evidence to the effect that the books were still in the possession of the assessee. This is a very common delusion and is constantly brought forward in argument. The theory is contrary to the provisions of section 103 of the Indian Evidence Act, which is as follows: "The burden of proof as to any particular fact lies "on that person who wishes the court to believe in its existence, unless it is "provided by any law that the proof of that fact shall lie on any particular "person". In the present case it was admitted that these books had existed and had been produced before the Income-tax Officer in the original assessment dated the 20th May, 1930. The assessee desired the court to believe that these books had been lost subsequently. The burden of proof of that fact lay on him. It was for the Income-tax Officer and the Assistant Commissioner to decide whether he had discharged that burden or not. They considered that the evidence which he produced was not sufficient to prove his allegation. No question of law arises from their decision on this point.

It is, in my opinion, clear beyond all question, both from the circumstances of the case and the authority of the two decisions to which I have referred, that in the present instance there was no question of law which could be referred for the opinion of this Court under the provisions of section 66(2) of the Income-tax Act. Therefore, there was no obligation on the Commissioner of Income-tax to have formulated the question, which he has submitted to this Court—no necessity whatever. But, as that question is before this Court and as the matter has been fully argued by Mr. Sen on behalf of the assessee, we are in a position to say that the answer to the question must be in the affirmative.

As regards costs, the assessee must pay the costs of the other side seven gold mohurs for the vakil and, as regards the two advocates, such fees as have been actually paid to them.

DERBYSHIRE C. J. I agree.

Advocate for assessee: *A. C. Sen.*

Advocate for Income-tax Department: *Rameschandra Pal.*

G. S.