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be so satisfied when he issues the notice. We consider therefore that there was no defect in procedure and further it is not alleged that the assessee was in any way prejudiced by the procedure adopted. As the reference has been decided to an equal extent in the affirmative and in the negative, we direct that the parties shall pay their own costs. The learned Government Advocate states that he is entitled to a fee of Rs. 250 and we direct that that amount be taken as his fee.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

IN THE MATTER OF SETH GANGASAGAR.*

1930 *December*, 8.

Income-tax Act (XI of 1922), sections 22(4) and 23(4)—Production may be required of only relevant accounts or documents—Assessment based entirely on materials actually produced is one under clause (3) and not clause (4) of section 23—Income-tax Act, section 66(2) and (5)—Reference to High Court—Issue of law not correctly stated—High Court can re-frame the real issue and decide it.

Where, in a reference to the High Court under section 66(2) of the Income-tax Act, the question as framed by the Commissioner was a question of fact pure and simple but an issue of law did properly arise upon the statement of facts, the High Court could itself frame and decide that issue of law.

Section 22(4) of the Income-tax Act does not mean that the Income-tax Officer should require the production of accounts or documents which he does not think to be relevant at all. The word "require" really means 'require as a piece of relevant evidence'.

In making assessment for the year 1929-30 the Income-tax Officer required the assessee to produce his account books for the year 1925-26. The assessee said that these were lost, but his statement was disbelieved. The Income-tax Officer based his assessment on the entries in the other books produced by the assessee, and he did not think that there was any concealed income which could have been discovered from the production of the books for 1925-26; but he stated that

* Miscellaneous Case No. 554 of 1930.

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because the assessee had deliberately failed to produce these books the assessment was made under clause (4) of section 23. *Held*, the assessment should not be treated as one made under clause (4), but as one made under clause (3), of section 23. There was a right of appeal in the case of clause (3), which was shut out in the case of clause (4).

Mr. *U. S. Bajpai*, for the Crown.

Messrs. *G. Agarwala* and *Kartar Narain Agarwala*, for the applicant.

MUKERJI and BENNET, JJ. :—This is a reference by the Income-tax Commissioner under section 66(2) of the Indian Income-tax Act made at the instance of one Seth Gangasagar.

The facts leading to this reference, briefly, are these. Seth Gangasagar was directed to produce his books in respect of his income for the "previous year", which commenced in Diwali 1984 and went up to the Diwali of 1985. He produced his account books, but failed to produce the account book of the year 1981 to 1982. He also failed to produce the account books of a certain firm known as Jogiram Janki Prasad. The Income-tax Officer, Mr. Dhown, looked into the accounts submitted, calculated the income, allowed certain deductions, disallowed others and ultimately found that the total income which was taxable came to Rs. 7,00,000 and odd. He calculated the income-tax and the super-tax and declared that the net amount came to Rs. 1,96,933-12-0. Having said so, the learned officer made the following remark: "The assessment is wholly based on accounts, but is made under section 23(4) of the Income-tax Act for the assessee's failure to comply with all the terms of the notice under section 22(4), in that the following accounts were deliberately withheld by the assessee, which according to general reputation the Rai Bahadur has got and which he could produce . . ."

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The assessee Seth Gangasagar thereupon filed an application under section 27 of the Income-tax Act before the same learned officer. It was disallowed and then the assessee went up in appeal to the Assistant Commissioner of Income-tax. The appeal was under section 31 of the Income-tax Act. The appellate officer found that the assessee had really got in his possession the account books of the year 1918 to 1982 and had deliberately concealed them. As regards the other account books, he came to the conclusion that they were not in the assessee's possession. Then he considered the question whether the account books of the year 1981 to 1982 were relevant to the enquiry or not. He remarked: "The third point raises the question whether the books of account for the year 1981 to 1982 could be relevant to the assessment for the year 1929-30. I think this question is not very material. An Income-tax Officer acts within his powers when he calls for the books of account of an assessee for three years prior to the year under assessment, which he is authorized to do under section 22(4) of the Income-tax Act."

In the result, the appeal was dismissed. Thereupon Seth Gangasagar made an application to the Income-tax Commissioner, as already stated, to state a case for the consideration of the High Court. In the application the assessee said: "The view of law taken by the Income-tax Officer and the Assistant Commissioner of Income-tax that the assessment should be made under section 23, clause (4) of the Indian Income-tax Act is incorrect, among others, for the following reasons . . ." We take it that the point of law that Seth Gangasagar wanted to raise was whether, in the circumstances of the case, the assessment should be deemed to have been properly made under section 23(4) or whether it should have been treated as having been made under section 23(3) of the same Act.

The Commissioner of Income-tax thought that the petition of Seth Gangasagar did not raise any point of

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law at all, and if any question did arise, it was the following, viz.: "Whether the findings of the Income-tax Officer and the Assistant Commissioner that the assessee could have produced the account books for the year 1981 to 1982, had he been so minded, were legally valid findings."

The question as framed was a question of fact pure and simple and the High Court could not give any answer to such a question.

It has however been held in this Court in *Shiva Prasad Gupta* v. *Commissioner of Income-tax* (1), that when a case has been stated before the High Court by the Commissioner, the High Court can look into the facts and re-settle the issues, as it were, and decide the issues of law that properly arose on the statement. The fact therefore that the Commissioner of Income-tax misunderstood the petition made before him and failed to formulate the only point of law that arose on the petition and on the decision of the Assistant Commissioner of Income-tax, does not preclude this Court from framing the issue of law that arose and deciding it. As stated above, the issue of law that arose in this case is as follows: "Whether in the circumstances of this case, the Income-tax Officer was right in calling his assessment an assessment under section 23(4) of the Act or whether in law the assessment was one under section 23(3) of the Act, and whether in the latter case the assessee had a right of appeal in the regular way?"

Now we come to the facts of the case. It appears that Seth Gangasagar was in the habit of submitting a statement of his income. For some time the Income-tax Officer accepted his statement, but later Seth Gangasagar discontinued submitting the statement of his income. When he was required to state his income in a later year, he submitted a statement which was found to have been false, and it materially concealed his

(1) A.I.R., 1929 All., 819.

income. He was prosecuted and convicted for concealment of his income and he was assessed to the best of judgment by the then Income-tax Officer for the year 1927-28. In that year, i.e., during the assessment for the year 1927-28, a controversy arose as to whether the account books of the year 1981 to 1982 were in the possession of the assessee or not. The assessee asserted that the books had been lost in transit between Bombay and Khurja, but his statement was not believed. This statement formed the subject-matter of a criminal prosecution, but no charge was framed and no conviction was obtained. In the following year, namely 1928-29, the assessee was again called upon to produce among other documents the account books for the year 1981 to 1982. He re-asserted what he had stated before, that the books were not in his possession or power and that they had been lost. His statement was disbelieved, and for the second time, an assessment to the best of the Income-tax Officer's judgment was made. We are now concerned with the third year, namely 1929-30. In this year again, for the third time, the assessee has been asked to produce his account books of the year 1981 to 1982. The Sambat year 1981 to 1982 would correspond to the English year 1925-26. The assessee again protested that his account books had been lost. This statement has again been disbelieved. The Income-tax Officer, as already stated, based his assessment on the actual entries in the other books produced by the assessee and made his assessment. He did not believe that there was any extra income on which the assessee should have been assessed and that such income could have been discovered by the production of the books of the year 1981 to 1982. We have already quoted from the order of the Income-tax Officer. He said that his assessment was wholly based on accounts. But he thought that because the assessee had failed to produce the books for the year 1981 to 1982 the assessment should be

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treated as one under section 23(4) of the Income-tax Act.

The assessee's contention is that the books which were not forthcoming, namely of the year 1981 to 1982, were not required for the purposes of assessment and he should not have been called upon to produce them and that, in any case, his statement that the books were lost should have been believed. We are not in a position to say whether the books are actually in the possession of the assessee or whether they are lost, but we think that there is a good deal of strength in the contention that the books for the year 1981 to 1982 were not "required" within the meaning of section 22(4) of the Indian Income-tax Act. An Income-tax Officer is entitled to call for documents which in his opinion would furnish him with relevant material for assessment of tax. The sub-section (4) of section 22 runs as follows: "The Income-tax Officer may serve on any person upon whom a notice has been served under sub-section (2), a notice requiring him . . . to produce . . . such accounts or documents as the Income-tax Officer may *require*." The word "require" really means require as a piece of relevant evidence. The word "require" does not mean that the Income-tax Officer should ask for documents or account books which he does not think to be relevant at all. We have more than once pointed out the fact that the actual assessment was made on the account books which were actually produced before the Income-tax Officer. He did not say in his order that he guessed that any profit had been concealed by putting away the account books of the year 1981 to 1982. For the purposes of assessment, therefore, the books of the year 1981 to 1982 were not "required". In the circumstances the question arises, whether the assessment is really under sub-section (4), section 23 or it is really under section 23, sub-section (3).

If we look to the principle on which the two sub-sections of section 23 are based, we shall at once see why the two rules are different. Where the Income-tax Officer does not get proper material on which to find out the true income of an assessee, it is in the interest of the State to guess the income of the assessee. The assessee cannot complain that he has been over-taxed, if, owing to his own failure, the Income-tax Officer is not able to do justice towards him. It is the assessee who is in default and he has no right to complain. But where the proper materials are before the Income-tax Officer, he would utilise them and make an assessment under section 23(3), which assessment would be liable to be re-examined by the appellate officer. When an assessment is made by the Income-tax Officer more or less on matters which have been guessed out, there cannot be any proper appeal to an appellate court. The Income-tax Officer does very often possess extraneous information as to the income of a man and if he thinks that the assessee's proper income is at a certain figure, it is but right that his judgment should be final and there should be no appeal. There would be no sense in substituting the Income-tax Officer's "guess" by his superior officer's "guess". It is on this principle that an appeal is shut out in the case of what has been called "Best judgment assessment". It is true that all these reasons are not to be found within the four corners of the Indian Income-tax Act, but one can easily see the reason for the rule.

If we are right in thinking that this is the principle on which the two rules, namely sub-section (3) and sub-section (4) of section 23, are framed, we can have no hesitation in coming to the conclusion that the assessment made in this particular case should not have been declared to have been an assessment under section 23(4). It should have been treated as an assessment under section 23(3).

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This, therefore, is our answer to the question which we have ourselves formulated.

As the applicant has succeeded entirely, we direct that he shall get his costs from the Government. We assess the fees payable to the learned Government Advocate at Rs. 200. Let a copy of this judgment, under the seal of the Court, be sent to the Commissioner of Income-tax. The Government Advocate is allowed a month's time within which to file a certificate of payment to him.

REVISIONAL CRIMINAL.

Before Mr. Justice Kendall.

1930 *December*, 8.

EMPEROR *v.* BANSIDHAR AND OTHERS.*

Criminal Procedure Code, section 162—*Right of accused to copies of statements made by prosecution witnesses before the police—Copies refused because the entries in police diary were only memoranda and not full statements—Application not mentioning that purpose is to contradict.*

It is only in the two cases mentioned in the second proviso to section 162(1) of the Criminal Procedure Code that the court can refuse to furnish the accused with copies of the statements made by the prosecution witnesses to the police. So, where the trial court refused to supply such copies on the ground that what was recorded in the police diaries were not full statements but only memoranda, it was *held* that the court acted illegally in not following the mandatory provisions of the statute and this vitiated the proceedings. The object of the law was to enable the accused to contradict a witness in court by making use of a previous statement of his, and it might be that the memoranda in the police diary were just as effective for that purpose as full statements would be. It was, therefore, not possible to say that the accused were not prejudiced.

The fact that the application for the copies mentioned that they were needed for cross-examination and did not specifically mention the purpose of contradiction did not disentitle the accused to get the copies.

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* Criminal Reference No. 676 of 1930.