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order entailed the penalty of the written statement being struck off. We are, therefore, satisfied that there was nothing wrong either technically or on the merits against the order of the Munsif. On the other hand, we find that the order was evidently justified in the circumstances of the case. The defendant had a long time within which to produce the account books and, if any further delay was allowed, it was feared that the books would be tampered with. The Munsif distinctly said so in his order of 30th October, 1928.

In the result, we dismiss the application with costs.

MISCELLANEOUS CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

1930 *December*, 5.

IN THE MATTER OF GUR CHARAN PRASAD.*

Income-tax Act (XI of 1922), sections 28, 34, 58(1)—Imposition of penalty on re-assessment—Penalty in respect of super-tax found payable on re-assessment—Jurisdiction—Procedure.

A return of income was made by an assessee and he was assessed to income-tax in accordance therewith. Subsequently re-assessment proceedings were taken against him under section 34 of the Income-tax Act, his account-books were sent for and examined, and it was found that his income had been much larger than the figure at which it had been returned. Accordingly he was assessed to income-tax of a much larger amount than the original assessment, as well as to a certain amount of super-tax, and a penalty was also imposed upon him of a certain sum with regard to the enhanced income-tax as well as another penalty with regard to the super-tax. *Held*,—

(1) The Income-tax Officer had jurisdiction to impose a penalty in the matter of income-tax in the proceedings for assessment taken under section 34 of the Income-tax Act. The penalty under section 28 can be imposed not only in the course of the original assessment proceedings, but also when further proceedings are taken under section 34.

(2) The Income-tax Officer had no jurisdiction to impose the penalty in the matter of super-tax. Section 28, being a

*Miscellaneous Case No. 433 of 1930.

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penal provision, must be strictly construed and there is not a word in it relating to super-tax. In the absence of any express words in the section it would not be correct to read the word "income-tax" in it as including super-tax, by way of implication from sections 55 and 58(1). Although section 58(1) does not categorically exempt section 28 from application to super-tax, the scope of the section itself is confined to the charge, assessment and collection of super-tax and does not include the subject of penalties.

(3) The procedure of the Income-tax Officer in imposing the penalty simultaneously with making the re-assessment was not defective. There is nothing in section 28 to indicate that the order of re-assessment should be made first and then a notice should be issued to the assessee to show cause why a penalty should not be imposed.

Dr. *K. N. Katju* and *K. Verma*, for the applicant.

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

MUKERJI and BENNET, JJ. :—This is a reference by the Income-tax Commissioner of two points :—

(1) Has the Income-tax Officer jurisdiction to impose a penalty in the matter of income-tax in proceedings for assessment taken under section 34 of the Income-tax Act?

(2) Has the Income-tax Officer jurisdiction to impose a penalty in the matter of super-tax under the circumstances of this case?

The facts as found by the Income-tax Commissioner are that a certain assessee had made a return of income and had been assessed on 27th February, 1928, and subsequently on 15th March, 1929, a notice was issued under section 34 read with section 22 (2) of the Indian Income-tax Act, requiring the assessee to furnish a return, and on 20th April, 1929, the applicant furnished the return showing the same figure Rs. 72,380 as his total income. This was the same figure which he had previously returned, as is admitted before us. Subsequently the applicant's books were produced and his total income was found to have been Rs. 2,92,952 for the year in question. Accordingly the applicant was assessed to

income-tax amounting to Rs. 27,265-13-0 and to super-tax Rs. 28,366. In addition to these assessments a penalty of Rs. 20,000 for income-tax and Rs. 20,000 for super-tax was imposed on the assessee under the provisions of section 28.

The first question referred to us is whether the Income-tax Officer could impose the penalty of Rs. 20,000 under section 28 of the Income-tax Act in regard to the assessment of income-tax which he found to have been under-assessed by Rs. 27,265-13-0 less the original assessment of Rs. 6,635-3-0. The argument of the learned counsel for the assessee is to the effect that the penalty under section 28 can only be imposed in the course of the original assessment proceedings, and that it cannot be imposed when the original assessment has been made and when further proceedings have been taken at a later date under section 34 of the Indian Income-tax Act. The argument is based on the fact that section 28 does not refer to section 34. But the section 28 does begin as follows: "If the Income-tax Officer . . . . . in the course of *any proceedings* under this Act is satisfied that an assessee has concealed the particulars of his income." This shows that section 28 is not merely intended by the Act to apply to an assessment under the preceding sections but that it may refer to any proceeding whatever under the Income-tax Act. Now section 34 is a section which lays down proceedings under the Income-tax Act and accordingly proceedings under section 34 are proceedings in the course of which section 28 may be applied.

Further, section 34 itself states that under that section there may be a notice under sub-section (2) of section 22 "and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section." Thus section 34 also shows that proceedings taken under it follow the routine laid down by chapter IV for the original assessment of

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income to income-tax, and that section 28 which is a part of that procedure will also apply to the re-assessment proceedings under section 34.

We therefore answer the first question in the affirmative.

The second question is: "Has the Income-tax Officer jurisdiction to impose a penalty in the matter of super-tax under the circumstances of this case?" As stated already the Income-tax Officer imposed a penalty of Rs. 20,000 in regard to super-tax as well as the penalty of Rs. 20,000 in regard to income-tax, and he purported to impose this penalty for super-tax under the provisions of section 28. Now for the Crown the argument as to the jurisdiction of the Income-tax Officer to impose this penalty for super-tax is stated as follows. Chapter IX of the Indian Income-tax Act deals with super-tax, and it states that super-tax is "an additional duty of income-tax (in this Act referred to as super-tax)". Section 58(1) of that chapter is as follows: "All the provisions of this Act, except section 3, the proviso to sub-section (1) of section 7, the provisos to section 8, sub-section (2) of section 14, and sections 15, 17, 18, 19, 20, 21 and 48, shall apply, so far as may be, to the charge, assessment, collection and recovery of super-tax." Now it is argued for the Crown that section 28 is not one of the sections of the Act exempted from application to super-tax. On the other hand the learned counsel for the assessee points out that the provisions of the Act are by section 58(1) only to apply "so far as may be, to the charge, assessment, collection and recovery of super-tax." There is nothing stated in regard to penalties. It was argued that penalty would come under the heading of assessment and no doubt section 28 does come in chapter IV which is headed "Deductions and Assessment". But if that argument were accepted, then we would point to chapter VI which

is headed "Recovery of Tax and Penalties", where section 47 states that any sum imposed by way of penalty under section 28 may be recovered in the manner provided by that chapter for the recovery of arrear of tax. If therefore the argument were sound that section 28 applied because chapter IV is headed "Deductions and Assessment", then the situation would be that the income-tax authorities could impose a penalty in regard to super-tax but could not recover that penalty. It is clear that the legislature could not have had such an intention. Now we consider that a section in regard to a penalty such as section 28 must be strictly construed. The section states that "he may direct that the assessee shall, in addition to the *income-tax* payable by him, pay by way of penalty a sum not exceeding the amount of *income-tax* which would have been avoided if the income so returned by the assessee had been accepted as the correct income". There is no word whatever in this section in regard to super-tax. If the legislature had intended that super-tax should also involve a penalty, we consider that the legislature would have clearly specified in this section "in addition to the income-tax or super-tax if any payable by him." But in the absence of such precise words in the section we do not consider that the meaning should be read into this section by way of implication from section 58(1) and section 55. The learned Government Advocate further referred to the fact that Act XI of 1922 is known by the title of "Indian Income-tax Act." But the correct title of the Act is "an Act to consolidate and amend the law relating to income-tax and super-tax." The very title of the Act therefore observes the distinction to be drawn between income-tax and super-tax. Further, in section 2 of the Act there is no definition of income-tax as including super-tax. And the definition in section 55 that super-tax is an additional duty of income-tax also adds, "in this Act referred to as super-tax". The Act therefore carefully states in section 55 that super-tax

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is referred to in the Act as super-tax. It would therefore not be correct to read the word "income-tax" in section 28 as including super-tax unless it were clearly laid down in section 58(1) that the provisions of the Act in regard to penalties would apply to super-tax.

Accordingly we answer the second question in the negative.

In argument before us a third point was raised in regard to procedure. We may observe at once that this point was not referred to us under section 66 of the Income-tax Act. The point was that on 15th March, 1929, the Income-tax Officer issued a notice to the assessee for re-assessment under section 34. On 16th December, 1929, having examined the books of the assessee he issued a further notice to the assessee to show cause on the 19th December why a penalty should not be imposed on the assessee under section 28. On the 21st December, 1929, the Income-tax Officer passed an order for re-assessment and also in the same order he directed that the assessee should pay a penalty under section 28.

Now the point taken for the assessee is that section 28 states that if the Income-tax Officer is satisfied *that an assessee has concealed the particulars of his income, he may impose a penalty.* From these words it is argued that the order of re-assessment should have been made first and then a notice should have issued to the assessee to show cause why a penalty should not be imposed on him. There is nothing whatever in section 28 to indicate that this procedure is necessary. We consider that the requirements of section 28 were fulfilled when on 21st December, 1929, the Income-tax Officer was satisfied that the assessee had concealed his income and he thereupon proceeded to impose the penalty under that section. The notice was only issued in compliance with the proviso in that section and that proviso does not say that the Income-tax Officer should

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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.