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Court in the events that happened was determined by the amount of the award. There being no award pursuant to the provisions of the Land Acquisition Act the order of the District Court which is based upon such an alleged award cannot stand.

The result is that the appeal is allowed, and the order of the District Court is set aside, and the proceedings will be returned to the Collector in order that he may make an award according to law. We assess the costs of the appeal at five gold mohurs and they will be the appellant's costs in the cause, which means that if in the event the appellant wins he will get his costs, and if he loses he will not have to pay them.

BA U, J.—I agree.

FULL BENCH (CIVIL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, Mr. Justice Baguley, Mr. Justice Mosely, and Mr. Justice Ba U.

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Mar. 2.

MAUNG TUN AUNG
v.
MA E KYI.*

Minor's contract to marry—"Capacity to act in the matter of marriage"—Burmese Buddhist marriage—Cohabitation with intent to become husband and wife in presenti—*Promise to marry* in futuro—*Promise by Burmese Buddhist minor to marry—Contract Act (IX of 1872), s. 11—Majority Act (IX of 1875), s. 2* (a).

The expression "capacity to act in the matter of marriage" in s. 2 of the Majority Act means the capacity to be a party to a valid marriage, and relates to the acts of the parties by which their status is changed; the expression does not refer, and is not applicable to, a pre-nuptial agreement to contract a marriage in the future.

Mozharul Islam v. *Abdul Gani*, A.I.R. (1925) Cal. 322—*referred to.*

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* Civil Reference No. 4 of 1936 arising out of Civil Second Appeal No. 246 of 1935 of this Court.

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A marriage between Burmese Buddhists is created by cohabitation coupled with intent to become husband and wife.

Ma Hla Me v. *Maung Hla Baw*, I.L.R. 8 Ran. 425—*referred to.*

But this cohabitation must be with intent to become husband and wife *in presenti*, the agreement being contemporaneous with the cohabitation and forming an integral part of the marriage. Such an agreement is quite different from a contract to marry *in futuro*; the latter is not an act in the matter of marriage within s. (2) (*a*) of the Majority Act, and cohabitation accompanied by an agreement to marry *in futuro* does not create a change of status. Consequently a Burman Buddhist who is under the age of eighteen is not competent to enter into a valid or binding contract to marry *in futuro*, and the Burmese Buddhist law has no application in such a case.

Mi Kin v. *Myin Gyi*, S.J. (1872-1892) 104; and other cases *considered.*

Kan Gaung v. *Mi Hla Chok*, (1907) 2 U.B.R. 5; *Maung Gale* v. *Ma Hla Yin*, 11 L.B.R. 99; *Maung Nyein* v. *Ma Myin*, (1918) 3 U.B.R. 75; *Tun Kyin* v. *Ma Mai Tin*, 10 L.B.R. 28—*overruled.*

The following reference for the decision of a Bench was made by

MYA BU, J.—In this case there is involved a question of considerable importance to the Burmese Buddhist community.

The plaintiff, Ma E Kyi, a minor, sues Maung Tun Aung, also a minor, for compensation for breach of promise to marry. They are Burmese Buddhists, and the plaintiff's case is that they had fallen in love with each other and gave way to improper desires with the result that one day she found herself to be in the family way and reported the fact to her mother, and that thereupon the mother spoke to the defendant when he gave her a promise to marry the plaintiff, but subsequently he failed to keep it. According to the case put forward, it is evident that the act which resulted in the pregnancy was not facilitated by, but had preceded, the alleged promise.

The main question that arises is whether, in view of the minority of the defendant at the time of the alleged promise, it was valid and enforceable. If, as pointed out in *Maung Hmaing* v. *Ma Pwa Me* (1), a breach of promise of marriage "must be decided rather by the Contract Act than by the Buddhist Law" then, in my opinion, the promise must be held to be invalid by reason of the defendant's minority and cannot, therefore, be the basis of a suit for compensation for its breach. That a promise of

(1) (1872-1892) S.J. 533.

marriage made by a Burmese Buddhist would be tested by the rules of the Contract Act and that a promise made by a minor male under the age of 18 years without the consent of his parents was ordinarily voidable was held in the case of *Maung Tun Kyin* v. *Ma Mai Tin* (1) by Mr. Justice Ormonde who, however, added that if the minor had clandestine intercourse with the woman his parents were not at liberty to withhold their consent to the marriage and that he was then bound by the contract and could be sued for its breach.

At the same time, there are judicial pronouncements to the effect that a promise of marriage and the breach of such a promise are questions of marriage to be determined in the case of Buddhists according to the Buddhist Law [*Kan Gaung* v. *Mi Hla Chok* (2)] and that a promise of marriage by a minor could be enforced [*Maung Nyein* v. *Ma Myin* (3)]. A good deal of weight is lent to these pronouncements by the decision of a Full Bench of the late Chief Court of Lower Burma in *Maung Gale* v. *Ma Hla Yin* (4), where an affirmative answer was given to the question :

" In suits for compensation for breach of promise to marry as between Burman Buddhists residing in Burma is the matter involved merely one of contract or does it include any question regarding marriage ? In other words, whether a promise of marriage and breach of such a promise are questions of marriage to be decided in the case of Buddhists according to the Buddhist Law ?" It is to be borne in mind that the primary question which necessitated the reference to the Full Bench was whether, in suits for compensation for breach of promise of marriage between Burmese Buddhists, appeals lay under section 30 of the Lower Burma Courts Act, and the observation of the learned Chief Judge " As to whether the promise is valid or not by reason of questions regarding the consent of the parents the Courts would have to resort to the Burmese Law to decide it" makes it doubtful that the reasoning would apply equally to a case in which the question is as to the validity of the promise or regarding the competency of a party to the contract regulated by section 11 of the Indian Contract Act which depends upon the question of majority as provided by section 3 of the Indian Majority Act. If, however, a promise of marriage falls within the meaning of the term " marriage " in section 2 *(a)* of the Indian

(1) (1919-20) 10 L.B.R. 28.
(2) (1907-09) 2 U.B.R. (Contract), 5.
(3) (1917-20) 3 U.B.R. 75.
(4) (1921-22) 11 L.B.R. 99.

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Majority Act that doubt must vanish. With all respect it appears to me that there is much room for doubt that it falls within the purview of that section.

If the decisions in *Kan Gaung* v. *Mi Hla Chok* (1), *Maung Nyein* v. *Ma Myin* (2) and *Maung Gale* v. *Ma Hla Yin* (3) are correct then the case of a breach of promise of marriage between Burmese Buddhists is governed entirely by the Burmese Buddhist Law and the validity of the promise given by a young man under 18 years of age will not be open to question provided he is physically competent for marriage. It may, however, be pointed out that the rules of Burmese Buddhist Law are capable of being interpreted as showing that a boy under 16 years of age cannot in any circumstances effect a valid marriage without the consent of his parents and, therefore, is incapable of giving a valid promise of marriage. Therefore, whether the question of the validity of a promise of marriage by a minor is one governed by the ordinary law of contract read with the age of majority fixed by the Indian Majority Act, or whether it is governed by the Burmese Buddhist Law, the answer so far as a boy under 16 years of age is concerned must be the same, *i.e.*, that it is invalid. In the present case, the defendant gave his age as 15, but inasmuch as his definite age did not form part of the subject of enquiry, that statement cannot be considered to be a proper basis for a finding that he was at the time of the alleged promise a boy under 16 ; and if the question as to the validity of the promise is to be determined in accordance with the Burmese Buddhist Law, then a definite question will arise : Whether the minor defendant was below 16 or not at the time of the alleged promise. But a decision as to his actual age at the time of the alleged promise will not be necessary unless the question is governed by the Burmese Buddhist Law. As pointed out above, whether this question is governed by the Burmese Buddhist Law or by the ordinary law of contract read with the age of majority recognized by the Indian Majority Act is a question regarding which there has been a conflict of judicial opinion ; and with all respect I feel grave doubt that in the cases of *Kan Gaung* v. *Mi Hla Chok* (1), *Maung Nyein* v. *Ma Myin* (2) and *Maung Gale* v. *Ma Hla Yin* (3) the distinction, which in my opinion is quite appreciable, between the question of the validity

(1) (1907-09) 2 U.B.R. (Contract), 5. (2) (1917-20) 3 U.B.R. 75.
(3) (1921-22) 11 L.B.R. 99.

of a promise and that of whether a promise is one of valid marriage was borne in mind.

For these reasons and the fact that the question is of considerable importance and interest to the Burmese Buddhist community, especially to those under 18 years of age, in the regulation of their own conduct in an important social matter, I consider it highly desirable to refer, and do refer, the following question for the decision of a Bench, full or otherwise, as the learned Chief Justice may determine :

> "Whether the Burmese Buddhist Law forms the rule of decision of the question as to the validity of a promise of marriage made by a Burmese Buddhist young man below the age of majority fixed by the Indian Majority Act ? "

Tun Aung for the applicant. The promise to marry made by the defendant-appellant is not enforceable in law because at the time he made the promise he was under 18 years of age. He might have been "physically competent" to enter into a marriage as understood by the Burmese Buddhist Law, but a promise to marry stands apart from the marriage itself. The marriage itself is governed by the personal law, but the contract to marry, which is only a prelude to the marriage, is governed by the general law of the land, namely, s. 11 of the Contract Act and s. 3 of the Indian Majority Act.

Maung Hmaing v. *Ma Pwa Me* (1) ; *Ma Yon* v. *Maung Po Lu* (2) ; *Kan Gaung* v. *Mi Hla* (3) ; *Mi Kin* v. *Nga Myin Gyi* (4) ; *Tun Kyin* v. *Ma Mai Tin* (5) ; *Maung Gale* v. *Ma Hla Yin* (6) ; *Ma E Sein* v. *Maung Hla Min* (7); *Maung Thein Maung* v. *Ma Saw* (8) ; and s. 33 of the Digest.

Maung Nyein v. *Ma Myin* (9) is the only case which definitely ruled that a suit like the present is

(1) S.J. (1872-1892) 533.
(2) (1897-1901) 2 U.B.R. 499.
(3) (1907-09) 2 U.B.R 5.
(4) S.J. (1872-1892) 114.
(5) 10 L.B.R. 28.
(6) 11 L.B.R. 99.
(7) I.L.R. 3 Ran. 455.
(8) I.L.R. 6 Ran. 340.
(9) 3 U.B.R. 75.

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maintainable. The origin of this mistaken view of the law was *Kan Gaung*'s case.

E Maung for the respondent. A suit for damages for breach of a contract to marry is ordinarily governed by the Contract Act. Section 11 of the Act deals with capacity to contract, and uses the words "according to the law to which he is subject", which necessitates a reference to the Indian Majority Act. S. 2 of that Act exempts from its operation cases of marriage, dower, etc., and this is how the Burmese Buddhist Law becomes operative.

The words "to act" in the matter of marriage were the subject of consideration in *Bai Shirinbai* v. *Kharshedji* (1), and a suit for the dissolution of marriage was held to be "acting" in the matter of marriage. See also *Abi Dhunimsa* v. *Muhammad Fathi* (2); *Fatima Khatun* v. *Fazlal Karim* (3). On an analogy the parties who are making arrangements for the marriage can be said to be acting in the matter of marriage.

Under s. 2 of the Majority Act a minor would be competent to contract a valid marriage when he is of age under his personal law. If he is competent to contract a marriage he must be equally competent to make an agreement to be married which precedes the actual marriage.

The state of society during the days when the *Dhammathats* were written did not contemplate suits for breach of promise to marry. They only dealt with seduction and clandestine intercourse, and *Kan Gaung*'s case went wrong in failing to consider this.

As regards the cases cited, the Full Bench in *Maung Gale* v. *Ma Hla Yin* was considering the

(1) I.L.R. 22 Bom. 430. (2) I.L.R. 41 Mad. 1026.
(3) 47 Cal. L.J. 372.

meaning of what is now s. 11 of the Burma Courts Act, and the point in issue here was not directly before it. *Tun Kyin* v. *Ma Mai Tin* took the correct view when it said that this was a question of contract, but the question has to be decided in accordance with the personal law.

A marriage between Burman Buddhists is created by cohabitation coupled with an intention to become husband and wife. *Ma Hla Me* v. *Maung Hla Baw* (1). The agreement to marry is merely evidence of an intention to become husband and wife.

PAGE, C.J.—This case raises a question of interest to Burmans generally.

The question propounded is :

"Whether the Burmese Buddhist Law forms the rule of decision of the question as to the validity of a promise of marriage made by a Burmese Buddhist young man below the age of majority fixed by the Indian Majority Act ? "

The facts are simple and not in dispute. A young Burmese boy, 15 years old, fell in love with a Burmese girl of about the same age. From November 1934 till January 1935 he used to visit her at night with the knowledge and connivance of the girl's mother. One day in January 1935 the girl told her mother that she thought that she was going to have a child, and the mother asked her daughter to let her know when the boy came again to the house. Three or four days later during the night the mother, finding that the boy was in the house, sent for Ko Pan Ye one of her relations who lived near by, and in his presence the boy promised to marry the girl in *Tabaung*, that is, two months later. The boy's parents, however, were better off than the parents of the girl, and they

(1) I.L.R. 8 Ran. 425.

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persuaded him to refuse to carry out his promise to marry her, upon which the girl brought the present suit in the Township Court of Pyinmana against the boy for damages for the breach of his promise to marry her. A decree was passed in the plaintiff's favour for Rs. 100, and an appeal from that decree was dismissed by the District Court of Pyinmana. The defendant then filed a second appeal to the High Court, out of which the present reference arises.

Now, under section 11 of the Contract Act (IV of 1872) it is provided that

"every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

Under section 3 of the Indian Majority Act 1875 (IX of 1875), it is enacted that, save as therein provided,

"every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before."

But by section 2 of this Act it is provided *inter alia* that :

"2. Nothing herein contained shall affect—

(*a*) the capacity of any person to act in the following matters (namely)—Marriage, Dower, Divorce, and Adoption ; "

It follows, therefore, that unless entering into an agreement to marry is an act in the matter of marriage within section 2 (*a*) the defendant-appellant was not competent to make a valid contract to marry the plaintiff-respondent, and the present suit is not maintainable and must be dismissed.

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The expression "capacity to act in the matter of marriage" is ambiguous and unhappy, but it appears to us to mean the capacity to be a party to a valid marriage, and to relate to the acts of the parties by which their status is changed · and we are of opinion that the expression does not refer, and is not applicable to, a pre-nuptial agreement to contract a marriage in the future [*Mozharul Islam* v *Abdul Gani Ala* (1)].

Now,

"a marriage between Burmese Buddhists is created by cohabitation coupled with intent to become husband and wife"

[*per* Baguley J. in *Ma Hla Me* v. *Maung Hla Baw* (2)].

In order that such a marriage should be created no doubt the cohabitation must be accompanied by an agreement to become husband and wife *in presenti*; but such an agreement differs *toto cœlo* from a contract to marry *in futuro*, the latter agreement being antecedent to and forming no part of the proposed marriage. Cohabitation accompanied by an agreement to marry *in futuro* does not create a change of status, although in cases where the parties to the agreement are competent to bind themselves by a contract to marry and the agreement is broken the cohabitation in certain circumstances may affect the *quantum* of the damages that are awarded as compensation for the breach of the contract. It follows, therefore, in our opinion, that entering into an agreement to marry *in futuro* is not an act in the matter of marriage within section 2 (*a*) of the Indian Majority Act, and that the capacity of a person to enter into such a contract is to be determined, as it is in the case of all other contracts

(1) A.I.R. 1925 (Cal.) 322. (2) (1930) I.L.R. 8 Ran. 425.

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not expressly excepted therefrom, by the general law of the land to which all persons are subject.

Now, the general law which determines the age at which a person domiciled in British India is competent to enter into a contract is the Indian Majority Act, and as we hold that a contract to marry *in futuro* is not within section 2 (*a*) of the Act, it follows, in our opinion, that the appellant was not competent to enter into a valid or binding contract to marry *in futuro* until he had completed the age of eighteen years. The result is that the suit out of which the present reference arises necessarily must fail.

The following among other authorities were canvassed at the hearing of the appeal, and as we are differing from the decision in some of the cases that have been determined in this Province it may be advisable to make some reference to them.

Mi Kin v. *Nga Myin Gyi* (1); *Nga Po Thaik* v. *Mi Hnin Zan* (2); *Maung Hmaing* v. *Ma Pwa Me* (3); *Maung Myat Tha* v. *Ma Thon* (4); *Ma Yon* v. *Maung Po Lu* (5); *Kan Gaung* v. *Mi Hla Chok* (6); *Maung Thein* v. *Ma Thet Hnin* (7); *Maung Nyein* v. *Ma Myin* (8); *Maung Po Thaw* v. *Maung Tha Hlaing* (9); *Tun Kyin* v. *Ma Mai Tin* (10); *Maung Gale* v. *Ma Hla Yin* (11); *Ma E Sein* v. *Maung Hla Min* (12); *Maung Thein Maung and two* v. *Ma Saw* (13); *Bai Shirinbai* v. *Kharshedji Nasarvanji Masalavala* (14); *Bai Gulab* v. *Thakorelal Pranjivandas* (15); *Makhan Lal* v. *Gayan Singh and others* (16);

(1) S.J. (1872-1892) 114.
(2) S.J. (1872-1892) 235.
(3) S.J. (1872-1892) 533.
(4) (1892) 2 U.B.R. 200.
(5) (1901) 2 U.B.R. 499.
(6) (1907) 2 U.B.R. 5.
(7) (1915) 8 L.B.R. 347.
(8) (1918) 3 U.B.R. 75.
(9) (1918) 3 U.B.R. 106.
(10) (1919) 10 L.B.R. 28.
(11) (1921) 11 L.B.R. 99.
(12) (1925) I.L.R. 3 Ran. 455.
(13) (1928) I.L.R. 6 Ran. 340.
(14) (1896) I.L.R. 22 Bom. 430.
(15) (1912) I.L.R. 36 Bom. 623.
(16) (1910) I.L.R. 33 All. 255.

Abi Dhanimsa Bibi v. *Muhammad Fathi Uddin and another* (1); *Fatima Khatun* v. *Fazlal Karim Mea* (2); *Mohori Bibee and another* v. *Dhurmodas Ghose* (3).

In *Kan Gaung* v. *Mi Hla Chok* (4) Shaw J.C. held that, although under the Contract Act a female minor could not sue for damages for breach of an agreement to marry her, "apart altogether from contract" the plaintiff was entitled to recover compensation from the suitor for the repudiation of his promise to marry her. U E Maung, who appeared for the respondent in the present case, however, conceded—in our opinion properly—that apart from contract the plaintiff in the present case would have no cause of action against the defendant, the intercourse that took place between them being voluntary, and by mutual consent.

In *Maung Nyein* v. *Ma Myin* (5) Heald J.C. held that the breach of a promise of marriage was a "matter of marriage" within section 2 (*a*) of the Indian Majority Act, but for the reasons that have been given the opinion to that effect that was expressed by Heald J. can no longer be regarded as correct.

We are also of opinion, with all due respect, that neither the decision of Ormonde J. in *Tun Kyin* v. *Ma Mai Tin* (6) nor the grounds upon which it is based can be supported in law.

In *Maung Gale* v. *Ma Hla Yin* (7) a Full Bench of the Chief Court (Robinson C.J., Maung Kin and Heald JJ.) held that a suit for damages for breach of an agreement to marry entered into between

(1) (1917) I.L.R. 41 Mad. 1026.
(2) 47 C.L.J. 372.
(3) (1903) 30 I.A. 114.
(4) (1907) 2 U.B.R. 5.
(5) (1918) 3 U.B.R. 75.
(6) (1919) 10 L.B.R. 28.
(7) (1921) 11 L.B.R. 99.

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Burmese Buddhists was a suit in which it was necessary to decide "a question regarding marriage" within section 13 of the Burma Laws Act (XIII of 1898), and, therefore, that it fell to be decided according to the principles of Burmese Buddhist Law. The ground upon which the decision in that case was based was stated by Robinson C.J. as follows :

> "Every marriage must be preceded by an offer and its acceptance. This prior agreement to marry is an integral part of every marriage. Any question therefore arising in connection with this promise must be held to be a question regarding marriage."

The fallacy, if we may say so, that appears to underlie this view is that no distinction is drawn by the learned Judges who decided *Maung Gale*'s case between the agreement that necessarily is entered into when the parties cohabit by mutual consent with intent to become husband and wife *in presenti*, the agreement being contemporaneous with the cohabitation and no doubt forming an integral part of the marriage, and a pre-nuptial agreement by two persons to marry *in futuro*, which may or may not in the event be found to have been the precursor of a marriage, but which neither affects the status of the parties to the contract nor forms an integral or any part of the proposed marriage. With all due respect, in our opinion, the decision in *Maung Gale*'s case is not in accordance with law, and must be regarded as overruled.

I would answer the question propounded in the negative.

MYA BU, J.—I agree.

MOSELY, J.—I agree.

BA U, J.—I agree.

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BAGULEY, J.—I agree with the answer to the question proposed by my Lord the Chief Justice in his judgment.

I would like to add that although the expression "capacity to act in matters of marriage" taken by itself, may sound unhappy, it seems to me that the word "act" was used in section 2 of the Indian Majority Act advisedly. This Act deals with other matters besides contract, and the word "act" in section 2 refers to marriage, dower, divorce and adoption.

A marriage comes into existence, so far as Mohamedans are concerned, from a simple contract; with people of other religions it may come into existence from the performance of a sacrament, *e.g.*, among Roman Catholics, and, I believe, Hindus. Among Burman Buddhists, as shown in the definition quoted, it is created by an act coupled with intent.

Again, a divorce may be effected by a contract, as when Burman Buddhists divorce by mutual consent. Among Mohamedans a divorce can be performed by a simple unilateral declaration on the part of the husband.

Further, adoption may be initiated by an agreement with the parents of the child adopted, but it is quite possible for a Burman Buddhist to adopt a foundling, and in such a case he enters into no direct contract with the infant, nor does he enter into a contract with any person on behalf of the infant. He merely performs an act from which a change of status emerges.

For these reasons it seems to me that the word "act" was advisedly used in section 2 of the Majority Act, and I do not see what other word could have been used, under the circumstances, to cover all

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these four matters, each of which, except possibly dower, involves a change of status, and dower had to be included because among Mohamedans dower is so intimately connected with marriage that a marriage contract without dower would appear unreal.

INCOME-TAX REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Ba U.

1936

Mar. 9.

THE COMMISSIONER OF INCOME-TAX, BURMA

v.

DEY BROTHERS.*

Income-tax—Income escaping assessment—Onus of proof—Finding of fact by income-tax authorities—Income-tax Act (XI of 1922), s. 34, applicability of—Sources of income assessed and unassessed—Examination of assessed income—Ascertainment of income escaping assessment—No revision of income duly assessed—Low rate charged—Materials for finding that income has escaped assessment.

Under s. 34 of the Income-tax Act an onus does not lie upon the income-tax authorities to satisfy the Court upon the facts that income, profits, and gains have escaped assessment. Otherwise in every case in which proceedings are taken under s. 34 the assessee would have an appeal upon the facts contrary to the intention of the legislature.

Under s. 34 if the income-tax authorities have not misdirected themselves in law, and there were any materials before the income-tax authorities upon which they could find that income, profits, and gains had in fact escaped assessment the Court will not interfere or disturb the finding of fact at which the income-tax authorities have arrived.

Dicta in Commissioner of Income-tax, Bombay v. *Gopal Manohar*, I.L.R. 59 Bom. 626 dissented from.

S. 34 is applicable to cases in which either no assessment at all has been made upon the person who received the income, profits or gains liable to assessment, or where an assessment has been made in the course of the year,

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* Civil Reference No. 3 of 1936.