(1935) 11 AHC CK 0035

Allahabad High Court

Case No: None

Gopinath Naik APPELLANT

Vs

Commissioner, Income Tax RESPONDENT

Date of Decision: Nov. 22, 1935

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 98
- Evidence Act, 1872 - Section 167
- Income Tax Act, 1961 - Section 66(3)

Citation: AIR 1936 All 286

Hon'ble Judges: Sulaiman, C.J; Niamatullah, J; Bajpai, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Niamatullah, J.

This is a reference u/s 66(3), Income Tax Act. The assessee is one Pandit Gopinath Naik of Bakhera Bazar, District Basti. He submitted a return u/s 22(2) for the assessment year 1929-30. The return, was not accepted by the Assistant Commissioner, who was empowered to act as an Income Tax officer. He was assessed at an income of Rs. 10,450 including Rs. 1,00,000 as his income from money-lending business. He appealed to the Commissioner, who set aside the assessment and directed a fresh assessment. The case was subsequently dealt with by the Income Tax Officer, Basti, who issued a notice u/s 23(2) directing the assessee to produce his accounts for money-lending business. The accounts were produced, and it was discovered that there were serious omissions which created a strong suspicion that the accounts had been manipulated. An opportunity was given to the assessee to explain certain matters. No explanation was, however, furnished, but a fresh return was submitted. The Income Tax Officer called upon the assessee to substantiate the new return. He also summoned the assessee, who did not, however, appear, nor did he produce any evidence. The I.T.O. came to the conclusion that the accounts were incomplete and unreliable." He estimated the income of the assessee from money lending business to be Rs. 1,22,000. The estimate was based on calculating the net profits at the rate of 8 per cent per annum on Rs. 15 lacs which was taken to have been invested by the assessee in his money lending, business. The order of the I.T.O., and his reasons in support of it appear from. App. C.

2. The assessee appealed to the Asst. Commissioner, who agreed with the I.T.O., in rejecting the assessee''s account-books as unreliable. He, however, estimated the amount invested by the assessee in money-lending business to be Rs. 11 lacs only. The Asst. Commissioner based his estimate, partly at any rate on certain "enquiries," of which there is no record and which were admittedly made behind the back of the assessee, from persons supposed to have an idea of the extent to which the assessee had made investments in his money lending business. His order is Appendix D. The assessee applied to the Commissioner for revision of the Assistant Commissioner''s assessment and for a statement of a case being prepared for reference to the High Court. The Commissioner declined to interfere or to make a reference to this Court. The assessee moved this Court u/s 66(3), and the Commissioner was required to prepare a case for the determination of the following two questions:

(1) Whether the estimate of 11 lacs as the capital invested by the assessee is based on such evidence as the Assistant Commissioner was in law empowered to act upon.

(2) Was the Assistant Commissioner authorized u/s 13, Income Tax Act, or otherwise to make private inquiries and to take the result of such inquiries into account in making the assessment?

3. On receipt of this Court''s order requiring a statement of the case to be prepared, the Commissioner asked for a report from the Assistant Commissioner as regards the nature of the enquiry made by him and referred to in his order, Appendix D. That report disclosed the fact that the Assistant Commissioner had enquired from the people of Basti about the money lending business of the assessee. They could not point out any big investment. "Rather they stated that his money-lending business was much like before." The Assistant Commissioner says that he was led by what the people of Basti had stated to him to conclude that the Income Tax Officer''s estimate of the assessee''s investment, namely 15 lacs, was excessive, and so he reduced it to 11 lacs, because the assessee had been assessed in the year immediately preceding at an income of one lakh based on investments amounting to 10 lakhs in the money-lending business. In accepting that exemplar he was influenced by the fact that the assessee had taken no exception to it. The additional: sum of one lakh, which brought the total to 11 lakhs estimated by him, was due to the fact that he had discovered certain omissions in the assessee''s accounts. One of the questions argued before us was whether the report of the Assistant

Commissioner, above referred to, can be accepted as a supplement to his order, Appendix D, by which he had estimated that the assessee had invested 11 lakhs in his money-lending business. We think that the report may be accepted as an explanation of certain obscure portions of his order of assessment, which by itself does not clearly show the data on which he proceeded.

4. The first question raises a point of some nicety and of not a little difficulty. In the present case the Assistant Commissioner based his assessment on the estimated amount of the assessee''s investment in money-lending business, assumed to yield a profit of 8% per annum. The estimate itself is based on the amount of investment assumed in the year immediately preceding and the result of his enquiry at Basti. I use the word "assumed" deliberately, because in that year the assessment was one u/s 23(4), that is to say, a best judgment assessment, the assessee not having com-plied with a notice requiring him to submit a return. For the present year the assessee complied with the notice and furnished a return. Though the Income, tax Officer did not accept the return as-correct, he made the assessment not u/s 23(4) but u/s 23(3).

5. In my opinion there is an essential difference between cases in which action is taken u/s 23(3) and those u/s 23(4). I do not pause to consider the question whether the Income Tax Officer could have proceeded u/s 23(4) in the present case, as he professed to act u/s 23(3). Where a return is furnished, but is considered by the I.T.O. to be incorrect or incomplete, he is to serve a notice on the assessee requiring him on a date to be therein specified either to attend the I.T.O.''s office or to produce, or cause to be produced any evidence on which the assessee may rely in support of his return. Section 23(3) provides that on the day so specified:

The I.T.O. after hearing such evidence as such person may produce and such other evidence as the I.T.O. may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment.

6. The important question which arises in this connexion, is whether if the return is found to be incorrect or incomplete and the assessee produces no evidence it is open to the I.T.O. to assess the income in any manner he thinks fit, or whether the assessment must proceed on some "evidence." It is argued by the learned advocate for the Income Tax Department that there is nothing in Section 23(3) which makes it incumbent on the I.T.O. to base his assessment on "evidence" whatever it may mean. It is pointed out that Section 23(3), as it stands, merely makes it obligatory that the evidence, which the assessee may produce or the I.T.O. may call for, should be heard, but that if no such evidence is produced by the assessee nor is any called for by the I.T.O. himself, it is open;to him to make the assessment on such basis as he thinks fit. If this line of argument is accepted, an assessment, made u/s 23(3), will, in many cases be virtually an assessment u/s 23(4), i.e., best judgment assessment which may be based on a pure conjecture. This kind of assessment is however

allowed only in cases falling within the purview of Section 23(4), i.e., where the assessee fails to make a return or fails to produce his accounts, when required to do so, or fails to comply with all the terms of the notice u/s 22(4).

7. In the present case these conditions were ex-hypothesi absent, and the I.T.O. did not proceed u/s 23(4). It follows that a case for assessment to the best of the judgment of the I.T.O. did not exist. It seems to me that, where the I.T.O. acts u/s 23(3), the assessment must be based on "evidence." The obligation to hear evidence which may be produced by the assessee or may be called for by the I.T.O. himself is a clear index to the further obligation to "determine the sum payable by" the assessee on the basis of the evidence adduced in the case.

8. Where the assessee himself does not produce any evidence, the I.T.O. cannot be at a loss to make the assessment, because the law has given him ample powers to call for evidence. Section 37 of the Act empowers him to enforce the attendance of any person and to examine him on oath or affirmation, compel the production of documents and to issue commission for the examination of witnesses. Where the assessee himself does not produce any evidence, comparatively slight evidence, coupled with the inference drawn from the conduct of the assessee, will be enough for compliance with the requirements of Section 23(3). The next question is as to what is meant by the word "evidence" used in Section 23(3). It is not defined in the I. T. Act itself. So far as I have been able to ascertain, no rules have been made u/s 29 laying down what should be considered to be evidence for the purpose of assessment. I think that, on the one hand, the legislature did not intend that the evidence on which the Income Tax authorities are to act, should be evidence which fulfils all the technical requirements of the Evidence Act; on the other hand mere conjecture, surmise or assumption of a fact, as distinguished from inference from proved circumstances, does not amount to evidence within the meaning of Section 23(3). Where the I.T.O. based his assessment on the statements of witnesses, they should be produced before him ''on the day specified in the notice issued under Sub-section 2," i.e., the day on which the assessee is to attend and to produce his evidence, which implies that the evidence should be "produced" in his presence. Whether the evidence should be in every case on oath and be in accordance with the rules of relevancy laid down in the Evidence Act are questions which do not call for decision in the present case. It is enough to say, for the purpose of this case, that the result of the enquiries made by the Assistant Commissioner from certain residents of Basti in the absence of the assessee is not evidence within the meaning of Section 23(3).

9. The only other ground, on which the Assistant Commissioner based his assessment is that, in the year immediately preceding, the assessee''s investment had been found to be ten lakhs. As already mentioned, in that year the assessment was u/s 23(4), i.e., best judgment assessment, which need not have been based on evidence. There no appeal is allowed from such assessment which may be based on

no data or may be arbitrary. If a mere conjecture, surmise or assumption, however shrewd, is no ''evidence" within the meaning of Section 23(3), as I hold, such conjecture, surmise or assumption, made in the previous year u/s 23(4) can be no more evidence. There is nothing to show that the assessment for the last year which was a "best-judgment" assessment was based on any known data. It was a conjecture or assumption, which the I.T.O. was entitled to make in view of the assessee''s conduct. The assessee''s conduct this year, though open to objection otherwise is admittedly not such as to justify assessment of that kind. The I.T.O. should have based it on "evidence" as required by Section 23(4). It was open to the I.T.O. to have relied on the records of several past years which were in his possession. It is not disputed that the assessee was assessed for several years in the ordinary course and not u/s 23(4); and if the I.T.O. had taken those assessments as a guide it could not have been said that his assessment for the year in question was based on no evidence. The Commissioner contends in his remarks made in the statement of the case:

The Assistant Commissioner''s estimate of the investment is, however, based not on the result of those inquiries, but on other data. These data, were furnished by the assessment for the year 1928-29, the year immediately preceding the assessment year in dispute, in which the total investment was estimated by the Income Tax Officer of the time at 10 lakhs and the estimate was accepted by assessee without a demur and without having recourse to the remedy provided by Section 27 against a best-judgment assessment u/s 23(4).

10. A "best-judgment" assessment remains what it is, even though the assessee may not ''demur" or may have no '' recourse to the remedy provided by Section 27." Moreover, all that the assessee could have done u/s 27 was to offer to satisfy the I. T.O.:

that he was prevented by sufficient cause from making the return required by Section 22, or that he did not receive the notice issued u/s 22(4) or Section 23(2), 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 notice....

11. His failure to satisfy the I.T.O. on any of the matters referred to in that section can throw no light on the arbitrary character or otherwise of the best-judgment assessment. It should be noticed that an application u/s 27 is not aimed at the merits of the assessment, but has reference to wholly collateral matters. The Commissioner further observed that:

The estimate itself is, in the Commissioner''s opinion, founded on adequate grounds which have not been rebutted by any evidence produced by the assessee. In using this language to convey his reply to the first question, the Commissioner desires, very respectfully, to point out that the wording of the question is such that it might be read as implying that a greater burden of proof is thrown upon the Income Tax authorities than the law itself prescribes; the scheme of the Act, as will be clearly seen from the wording of Sub-section (2), Section 23, is that if the Income Tax Officer has bona fide grounds for holding a certain belief, he must give the assessee an opportunity of producing evidence to rebut the belief; but subject to such evidence, the burden of producing which is on the assessee, it is not necessary that the materials on which the Income Tax authority bases his belief should have the formality of judicial evidence.

12. I am unable to concur with the Commissioner in the view he takes of the scheme of the Act. It is true, Section 23(2) provides that, where the I.T.O. has reason to believe that a return is incorrect or incomplete, he may call upon the assessee to substantiate it and that, to that extent, the onus lies on the assessee. It could not be otherwise. The assesses alleges by his return that his assessable income is what is stated therein. But the I.T.O. denies that fact. The onus is undoubtedly on the assessee, if he maintains that his return is correct; but if the return is set aside and the I.T.O. puts forward an affirmative case that the assessee''s income is more and gives a definite figure, the onus is on him to support his case. It cannot be said that the onus lies on the assessee not only to substantiate his return but also to disprove every allegation or assertion which the I.T.O. may choose to make. This is clear from Section 23(3) which makes it incumbent on the I.T.O. to make the assessment:

after hearing such evidence as such person may produce and such other evidence as the I.T.O. may require on specified points.

13. That part of the section obviously means that the I.T.O. shall hear the evidence which the assessee may produce in support of his return, and that if the return or the evidence in support thereof is not accepted, the I.T.O. shall hear such further evidence as may be necessary for making the assessment. The words "may require" refer to his requirements in making the assessment and not to evidence which he may call for. It is clear to my mind that the section con-templates that if the evidence adduced by the assessee is not accepted, the I.T.O. must have recourse to other evidence to base his assessment on. It does not place the I.T.O. absolutely on the defensive, so that, if the assessee''s attempt to substantiate his return fails, the I.T.O. can assume the income of the assessee to be anything which his imagination may lead to. Reliance was placed by the learned Advocate for the Commissioner on the following observation occurring in The Commissioner of Income Tax, Bihar and Orissa v. Rameshwar Singh of Darbhanga 1933 ALJ 527, at p. 536:

In the High Court the Chief Justice(Courtney-Torrell), after pointing out that the question is one of quantum only says: ''Learned Counsel for the assessee has argued that the officer is not entitled to make a guess without evidence, and I agree with that contention, but in this case the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many occasions, afford ample material for the assessment made. I would answer the question in the affirmative.'' The other

Judges concurred, and their Lordships also agree, adding only that if the assessee wished to displace the taxing officer''s estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof, which he apparently made no attempt to do.

14. It is argued that their Lordships have laid down the rule that the I.T.O. is to make an estimate, and the onus is thrown on the assessee to disprove that estimate. The observation must be considered in the light of the facts of that case which was one in which the assessee''s return was out of the question. The I.T.O. had made an estimate, which was based on evidence. The Chief Justice clearly pointed out that the estimate was based on evidence, as it should have been. He clearly says that the I.T.O. is not entitled to make a guess without evidence; but he found that the guess, (which amounts to estimate if there is evidence in support of it) was in that case, borne out by the evidence, and the only question was one of quantum. Their Lordships approved of this view and held that the assessee should have adduced evidence to rebut the estimate. It seems to me that the case was one in which the initial onus resting on the Income Tax Officer (the return being ignored) was discharged, and a case existed for the assessee to rebut the estimate made by the Income Tax Officer. I think that the case quoted above does-not support the contention put forward on behalf of the department.

15. In the present case, if instead of 15 or 11 lakhs, the Income Tax Officer or the Assistant Commissioner had taken the assessee''s income to be 50 lakhs he would have had no means of rebutting that assumption. In my opinion, to countenance the rule contended for by the Commissioner will lead to highly undesirable results. For the reasons explained above, I answer the first question in the negative. The answer to the second question will, in a great measure, follow from that to the first. Section 13 merely provides for methods of accounting. It throws no light on the main question in the case as to whether the result of private enquiries made by the Assistant Commissioner is or is not evidence for the purpose of Section 23(3). I answer the second question also in the negative.

Bajpai, J.

16. In this case u/s 66(3), Income Tax Act, the High Court, after the refusal of the Commissioner to state a case on the assessee''s application, required the Commissioner to state a case and to refer it by an order dated 27th October 1933. The Commissioner was directed to prepare a case for the determination of the following questions of law:

1. Whether the estimate of eleven lacs as the capital invested by the assessee is based on such evidence as the Assistant Commissioner was in law empowered to act upon

2. Was the Assistant Commissioner authorized u/s 13, Income Tax Act, or otherwise to make private enquiries and to take the result of such enquiries into account in

making the assessment?

17. It is necessary to state the facts in some detail. For the assessment year 1929-30 the Assistant Commissioner of Income Tax of Benares who had been empowered u/s 5(4), Income Tax Act, to deal with the case as an Income Tax Officer, after rejecting the accounts produced by the assessee, assessed the amount of his income at Rupees 1,00,450 by his order dated 6th March 1930. The Commissioner on appeal by his order dated 1st August 1930 set aside the assessment and directed that a fresh assessment be made and the Income Tax, Officer was required specifically to deal with the following points:

1. Whether the accounts can be computed as complete or whether they should be rejected as incomplete.

2. In case the accounts are rejected as incomplete what should be estimated as the assessee''s income from money lending.

18. It may be mentioned that the Assistant Commissioner had estimated the income from money lending as one lac. By this time the Income Tax Officer of Basti was a full powered officer and it was not necessary for the Assistant Commissioner to deal with the matter. A fresh notice was issued u/s 23(2) and in compliance with that notice the assessee produced certain accounts for the money-lending business. In the Income Tax Officer''s opinion there were several omissions in the books and they were pointed out to the assessee''s representative who admitted the mistakes and requested an adjournment in order to enable him to explain the omissions. The case was postponed to 17th March 1931 and at the same time the Income Tax Officer u/s 23(3) asked for evidence on specified points. No evidence was produced on this date nor was any explanation offered, but a fresh return was received through the post. On receipt of this return the Income Tax Officer issued a fresh notice on 20th April 1931 u/s 23(2) requiring the assessee to produce evidence in support of the revised return, and at the same time he issued a summons u/s 37, Income Tax Act, for the personal attendance of the assessee. The date fixed for this purpose was 30th April 1931., On 2nd May 1931 the assessee sent a letter that he had no evidence to produce beyond the account books which had already been produced before the Income Tax Officer, and as regards his personal attendance he requested that the case might be postponed to some date in June. The Income Tax Officer could not postpone the case to June but fixed 13th May 1931 for hearing. The assessee once again sent a petition by post repeating that he could not produce any other evidence except the accounts which were already in the possession of the Income Tax Officer. The Income Tax Officer then on the same date wrote a letter to the assessee warning him that if the summons u/s 37 and the notice u/s 23(2) were not complied with by 18th May 1931 he would be compelled to hold adversely to the assessee that the revised return was not a return u/s 22(3) and that the income stated therein was not based on the accounts produced. There was no compliance, but an application was received on 1st June 1931 by which the assessee asked for an

adjournment to some date after the 8th of June. The Income Tax Officer allowed one more opportunity and postponed the case to the 8th June. The assessee failed to attend or produce evidence. The Income Tax Officer then on that date proceeded to assess the income of the assessee. He in his judgment pointed out various omissions, falsehoods and concealments and observed:

Taking all these facts into consideration it is difficult for me to accept the books produced by the assessee. No income can be deduced from them. I feel convinced that they are incomplete and fictitious.

19. He then turned his attention towards the computation of the income of the assessee. He said:

The total investment of the assessee according to the books produced before roe comes to about 5 lakhs only. But my predecessor in the year 1928-29 estimated a total investment of 10 lakhs. The assessee himself never disclosed his entire investment and in the year Samvat 1981, for which 10 lakhs were estimated, he showed a total investment of Rs. 2,70,231 only. This figure can give some idea of the extent to which, as a matter of habit, he is prone to conceal. When however my predecessor made the estimate of 10 lakhs on the material available to him he was not aware of the investments to the extent of about 2 lakhs, which have now been incorporated in the books of Samvat 1985 through the personal account of Pandit Gopi Nath. At least there is nothing on the record to show that he was aware. Over and above these, as is shown in the course of this order, the assessee has at least concealed an investment of Rs. 11,735 on which Rs. 704 were credited as interest, against Tribeni Chippi. The record of the assessee is not very clean. There has not been any single assessment in any year which has been made on the basis of his books. Penalty u/s 28 too was imposed in one year. Concealments are discovered every year, and the books have to be rejected. In fact in the year 1928-29, after some concealments were discovered, he promised to my predecessor, as is apparent from his order, that he would in future produce the correct books. He has not fulfilled this promise. This year I have made detailed inquiries at Bakhera and the neighbouring places and also at Gorakhpur, the district in which the assessee has considerable investment. I am told that advances are made in the villages in the district of Gorakhpur and Basti and they are never shown in the books produced before us. His total investment is, in my opinion, of about 15 lakhs. The rate of interest charged by the assessee of course varies with the particular investment. It sometimes is in the neighbourhood of 24 per cent. But at the same time there are loans, I am told, in which the rate of interest is so low as 6 per cent. I therefore think it to be fair if I take an income of Rs. 1,20,000 from money lending.

20. It would thus appear that the estimate made by the Income Tax Officer was based on the fact that the estimate of the previous year by the former officer was 10 lakhs, that the previous order did not show that the officer was aware of investments to the extent of about two lakhs, that some further concealments had

been discovered, that the record of the asses-sea was not clean, that the promise to produce the correct books was not redeemed, and that the assessee had the reputation of a big money-lender. This reputation was based as far as one can gather on private inquiries. There was an appeal and the Assistant Commissioner want into the matter in detail and he also came to the conclusion that:

In view of the omissions and irregularities discussed above, it is clear that the books of Sam-vat 1985 are not complete and do not reflect the entire income of the appellant. Therefore the Income Tax Officer was justified in rejecting them and not basing his assessment on them.

21. He then proceeded to consider whether the estimate of an income of Rs. 1,20,000 made by the Income Tax Officer from money-lending business was a fair one. He said:

The Income tax Officer has estimated the total investment of the appellant at about 15 lakhs against 10 lakhs estimated previously. The partial account books of the appellant show his investments at a little under six lakhs, and the amounts of concealment discovered do not warrant the estimate of investments at such a high figure as 15 lakhs. I have also made inquiries and taking all the circumstances of the case into consideration, it would be fair to estimate his investments at 11 lakhs.

22. The income from this capital at the average rate of 8 per cent which appeared to the Assistant Commissioner a fair one was fixed at Rs. 88,000 against Rupees 1,20,000 determined by the Income Tax Officer. The assessee then requested the Commissioner to state a case to the High Court u/s 66(2); the Commissioner of Income Tax by his order dated 24th August 1932 refused to state a case, but on the assessee''s application the High Court required the Commissioner to refer a case and this, as mentioned before, has been done now. The Commissioner naked the Assistant Commissioner to report on the question as to how the estimate at 11 lakhs as the capital invested by the assessee was made, and in his report dated 20th December 1933, he says:

The assessee was assessed on 30th March 1929, for the year 1928-29 on Rs. 1,00,300 including an income of one lakh from business on estimated investments of about 10 lakhs. No exception was taken to this assessment by the assessee. A loan of Rs. 11,018-15-6, together with Rs. 716-9-3 on account of interest, or Rs. 11,735 in round figures due from one Tribeni Ram Chhipi of Gorakhpnr was found missing from the books of the assessee. Some omissions and discrepancies were also found out as discussed by me in my appellate order of 29th February 1932. On account of these omissions I added one lakh to the investments of 10 lakhs as were estimated before, which was a good evidence. Thus I determined his total investments at 11 lakhs.

23. The learned Commissioner is of the opinion that an estimate of 11 lakhs as the capital invested by the assessee is based on such evidence as the Assistant

Commissioner was in law empowered to act upon. It has been argued before us by the assessee that there was no basis in law for the estimate made by the Assistant Commissioner. Various considerations arise in connexion with the first question formulated by us. u/s 3, Evidence Act, a Court includes all persons except arbitrators legally authorised to take evidence and in view of Section 37, Income Tax Act, Income Tax Officers, Assistant Commissioners and Commissioners may be said to be a Court. But the Evidence Act applies only to "judicial proceedings" and u/s 37 a proceeding before an Income Tax Officer, Assistant Commissioner or Commissioner, shall be deemed to be a "judicial proceeding" within the meaning of Sections 193 and 228 and for the purposes of Section 196, I.P.C. It will, therefore, appear that the proceedings before the various revenue officers mentioned above are "judicial proceedings" to a limited extent only and they are Courts under the CPC to a limited extent only, namely to the extent indicated by Section 37. If an Income Tax officer in making an investigation was a Court, and, if proceedings before him were judicial proceedings, for all purposes, then there was no necessity for enacting Section 37. It is reasonable to hold that on the principle of expressio unius est exalusio al-terius such proceedings are not judicial proceedings for other purposes, and there can be little doubt that the detailed provisions of the Evidence Act will not apply to such proceedings and this is obvious because the same person cannot be a party, judge and witness in his own case. This is made further clear from the fact that u/s 23(4) the Income Tax officer has perforce to assess to the best of his judgment, and in that case, although the Income Tax Officer is not entitled to make an assessment capriciously and arbitrarily, but by honest means and in honest spirit, yet at the same time he cannot adopt lawyer-like methods and follow the strict provisions of the Evidence Act.

24. u/s 13, Income Tax Act, if no method of accounting has been regularly employed or if the method employed is such that in the opinion of the Income Tax Officer the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income Tax Officer may determine. This provision also shows that when the method adopted by the assessee has been rejected by the Income Tax Officer, then he is entitled to adopt a different basis and a different method, u/s 31(2) the Assistant Commissioner may before disposing of any appeal make such further enquiry as he thinks fit or cause further enquiry to be made by the Income Tax Officer. The scope of such an enquiry is not fettered by any limitations. It is therefore clear to my mind that the Evidence Act with all its details does not apply in the case of an assessment under the Income Tax Act, and a margin of approximation is undoubtedly left to the Income Tax authorities, specially when the assessee has been guilty of contumacy. In The Commissioner of Income Tax, Bihar and Orissa v. Kameshwar Singh of Darbhanga 1933 ALJ 527 at p. 536, their Lordships of the Privy Council quoted the following passage from the judgment of the learned Chief Justice of Patna:

Learned Counsel for the assessee has argued that the officer is not entitled to make a guess without evidence and I agree with that contention, but in this case the state of affairs in the previous years coupled with the fact that the assessee had a large mortgage loan business and must have enforced such mortgages by sale on many occasions afford ample material for the assessment made. I would answer the question in the affirmative,

and then Their Lordships proceed and say that with this observation of the Chief Justice:

the other Judges concurred and Their Lordships agree adding only that if the assessee wished to displace the taxing officer''s estimate it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof which he apparently made no attempt to do.

25. Under circumstances like these the Income Tax Officer has to proceed upon the principles of natural justice. In the present case the Assistant Commissioner when disposing the appeal by his order dated 29th February 1932 had before'' him the order of the Income Tax Officer which had stated the circumstances of the case and from which I have quoted in extenso in an earlier portion of my judgment. He based his estimate on the fact that the partial account books of the appellants showed his investment at a little under six lakhs. He also took into consideration the fact that there were certain concealments, that no assessment in any previous year had been made on the basis of his books, that be had not fulfilled the promise of producing correct books and the fact that the assessment of the previous year upon a money lending business of ten lakhs had not been challenged in any manner available to the assessee. He also paid due regard to the fact that the ex parte detailed enquiries made by the Income Tax Officer showed that advances made in the Districts of Gorakhpur and Basti were never shown in the books. He then came to the conclusion that taking all the circumstances of the case into consideration it would be fair to estimate his investments at eleven lakhs.

26. He makes the basis of his estimate-further clear by his report dated 20th December 1933 which has been quoted in an earlier part of my judgment. I have no reason to doubt his statement contained in this report and I see no reason to accept the. contention of the counsel for the assessee that the Assistant Commissioner of Income Tax, when he says that he took into consideration the fact of the previous year''s assessment, took his cue from the argument of the Crown Counsel advanced before us when the question of asking the Commissioner to state a case was under consideration. His original appellate order clearly shows that he took all the circumstances of the case into consideration and he now definitely states that he took this factor into account. I am therefore of the opinion that in the peculiar circumstances of the cast the estimate of 11 lakhs as the capital invested by the assessee is based on such evidence as the Assistant Commissioner was in law empowered to act upon, and my answer to the first question is in the affirmative.

27. As regards the second question I have already said, when discussing the first question, that the Revenue Officers have a large discretion to make private enquiries and from the very nature of the proceedings it is apparent that such enquiries are essential. It is however necessary that the principles of natural justice should not be violated and the assessee should be permitted to meet the case as revealed by the enquiries. In the present case opportunity after opportunity was given to the assessee and he was asked to produce his books and to attend in person. His representative on one occasion admitted that omissions had been made and asked for time to explain them. No explanation was ever offered and the Assistant Commissioner in his report dated 20th December 1933 says that he used the result of his enquiry in favour of the assessee by reducing the estimate of the Income Tax Officer. My answer to the second question therefore is that the Assistant Commissioner was authorised u/s 13, Income Tax Act, and also otherwise to make private enquiries, but he is not permitted to take the result of such private enquiries into account in making the assessment without giving an opportunity to the assessee to meet them and (in the words of their Lordships of the Privy Council) "to displace the Taxing Officer''s estimate".
28. As the Judges composing this Bench differ on both the questions referred to by the Commissioner, the case will be laid before the Hon. Chief Justice for a reference u/s 98, Civil P.C., to another Judge or a larger Bench.

Sulaiman, C.J.

29. This case has been referred to a third Judge because of a difference of opinion between the two learned Judges who heard this reference u/s 66, Income Tax Act.

30. The two questions for consideration are as follows:

(1) Whether the estimate of 11 lakhs as the capital invested by the assessee is based on such evidence as the Assistant Commissioner was in law empowered to act upon?

(2) Was the Assistant Commissioner authorized u/s 13, Income Tax Act, or otherwise to make private inquiries and to take the result of such inquiries into account in making the assessment?

31. It appears that for the year 1928-29 (corresponding to 1384 Sambat), the assessee was assessed on the basis of a capital investment in money lending business amounting to 10 lakhs. This assessment was based on the best judgment estimate made in the absence of any evidence produced by the assessee.

32. For the year 1929-30 which is the year in dispute in this case, the assessee submitted a return for Rs. 29,810 which was considerably below the estimated income of the previous year. The Assistant Commissioner considered the return to be incorrect and incomplete and issued notice u/s 23(2) to the assessee to attend at the office or produce any evidence on which he might rely in support of the return.

The assessee appeared and produced certain account books after information was called for by the Assistant Commissioner under a fresh notice issued under that sub-section. Afterwards, on 6th March 1930, the Assistant Commissioner, the Income Tax Officer not being empowered at that time, made the assessment on an income of one lakh from the money lending business. On appeal the Commissioner of Income Tax set aside the assessment and sent the case back with certain directions. A fresh notice was accordingly issued by the Income Tax officer, who then became invested with the necessary powers, u/s 23(2) and the statement of the assessee was recorded. The account-books produced by him were again examined and then a fresh notice u/s 23(3) was issued to him on 16th March 1931. The assessee submitted a revised return, but the Income Tax Officer was still not satisfied and issued a fresh notice under Sub-section (2) for further information as well as for personal attendance. There were some adjournments of the hearing when another notice under Sub-section (3) was issued on 19th May 1931 for further particulars on specific points. Ultimately on 8th June 1931, the Income Tax officer made an assessment on the basis of a capital investment of 15 lakhs and calculating the income at the rate of 8 per cent per annum fixed Rs. 1,20,000 as the income from the money-lending business. The learned Income Tax Officer found fault with the account books produced by the assessee and considered them incomplete and unreliable and did not act upon them. In the course of his order he remarked:

This year I have made detailed inquiries at Bakhera and the neighbouring places and also at Gorakhpur, the district in which the assessee has considerable investment. I am told that advances are made in the villages in the districts of Gorakhpur and Basti and they are never shown in the books produced before us. His total investment is, in my opinion, of about 15 lakhs.

33. When the matter went up in appeal before the Assistant Commissioner, no ground seems to have been taken against the Income Tax Officer making private enquiries, but a ground was taken that the estimate based on rumour or private information in a vague and fanciful way was ultra vires. There were several hearings before the Assistant Commissioner. He also seems to have acted u/s 31, Income Tax Act, in making further enquiries and taking some evidence. Statements of the assessee and at least of one witness were recorded and certain books were also examined. The appeal was ultimately disposed of on 29th February 1932 by an order under which the capital investment was reduced from 15 lakhs to 11 lakhs, but the average rate of 8 per cent was maintained. In view of the omissions and irregularities pointed out by him, it was clear that the account books of the assessee were not complete and did not reflect the entire income of the appellant, and accordingly the Income Tax Officer was justified in rejecting them and not basing his estimate on them. In proceeding to consider whether the estimate of the income of Rs. 1,20,000 made by the Income Tax Officer from money lending was a fair one, the learned Assistant Commissioner remarked:

The Income Tax Officer has estimated the total investment of the appellant at about 15 lakhs against 10 lakhs estimated previously. The partial account books of the appellant show his investments at a little under 6 lakhs, and the amounts of concealment discovered do not warrant the estimate of investments at such a high figure as 15 lakhs. I have also made inquiries, and taking all the circumstances of the case into consideration, it would be fair to estimate his investments at 11 lakhs. It is now ascertained that the bulk of his loans carry interest from C per cent to 9 per cent. per annum and only small loans bear 24 per cent. per annum.

34. On an application made by the assessee the Commissioner declined to state the case for the High Court, but on a further application made to the High Court, a Bench of this Court by their order dated 27th October 1933 asked the Commissioner to state the case on the two points quoted at the outset. In compliance with this order the case has been stated by the Commissioner. The Bench in the course of their order had directed that in preparing the statement of the case, it should be clearly shown whether any, and if so, what inquiries, were made by the Assistant Commissioner behind the back of the assessee, and his reference to inquiries was somewhat vague and in the context in which it occurred it gave the impression that he made inquiries behind the back of the assessee. The first question which has been argued before me at the bar is whether it would be proper to take into account the subsequent explanation furnished by the Assistant Commissioner as directed by this Court. The Assistant Commissioner in his '' explanation has said:

I inquired from the people of Basti about the money-lending business of the assessee. They could not point out to me any big investments, rather they stated that his money lending business was much like before. This led me to conclude that the Income Tax Officer''s estimate of the assessee''s investments of 15 lakhs was excessive despite the fact that he gave reasons for estimating them at 15 lakhs.

35. He then proceeded to give reasons why he kept the investments at 11 lakhs, emphasizing his reliance on the previous estimated investment of 10 lakhs and additions made thereon on account of certain discrepancies in the books. I do not think that it would be appropriate to take into account the explanation of the Assistant Commissioner detailing the reasons on which he proceeded in order to make the assessment at 11 lakhs. His explanation of the nature of the inquiry made by him was, of course, in response to the suggestion made by this Court. The propriety or otherwise of the order of assessment made by the Assistant Commissioner must depend on the order as it stands irrespective of additional reasons that have been given by him subsequently. No question arises before me as to whether the assessment of Income Tax on the basis of interest accrued On investments, even though not realized, because it was stated that the accounts were kept on a mercantile accountancy basis was correct. I therefore express no opinion on this point.

36. The principal question for decision is whether the private inquiries made by the Income Tax Officer and the Assistant Commissioner were proper, and the result of such inquiries could be taken into consideration by them in making the assessment. It seems to me that u/s 23 when a return is received by an Income Tax Officer, he is not bound to accept it as correct and complete. He is entitled to make inquiries as to whether there is reason to suspect that the return is incorrect or incomplete. He can also look into the previous assessments and consider whether there is any serious ground for suspicion. All such acts done by him are in the nature of administrative acts and in my opinion no objection can be taken to such private inquiries which must, of a necessity, be carried on behind the back of the assessee and even before he has any notice that such enquiries are being made.

37. If the Income Tax Officer is satisfied that the return is correct and complete, he has to proceed under Sub-section (1) of Section 23. He has to assess the income of the assessee on the basis of the return. If, however, he has reason to believe that the return is incorrect and incomplete, he has to serve notice under Sub-section (2) of that section on the assessee specifying a date and calling upon him to attend at his office or produce any evidence on which he may rely in support of his return. From this stage the proceeding assumes the character of a judicial enquiry, although not conducted by a Judicial Officer. The Income Tax Officer has to make up his mind as to whether the return is incorrect and should be relinquished and, if so, what should be the proper assessment.

38. Under Sub-section (3) of this section the Income Tax Officer has to hear such "evidence" as the assessee may produce and "such other evidence as the Income Tax Officer may require" on specific points; and he has then to assess the income and determine the same payable by the assessee on such basis. Now Section 37 of the Act empowers the Income Tax Officer to enforce the attendance of persons and examine them on oath or affirmation, compel the production of documents and issue commissions for the examination of witnesses. All these are matters which have necessarily to be resorted to in the presence of and within the knowledge of the assessee. Sub-section (3) of Section 23 speaks of the Income Tax Officer hearing such other evidence as he may require, that is to say, evidence other than that produced by the assessee which the Income Tax Officer considers necessary to take, but the word used is "evidence" and not other words like "information." It would seem to follow prima facie that what the sub-section authorizes the Income Tax Officer to do is to take evidence in rebuttal of the evidence produced by the assessee and which prima facie should be taken in the presence of the assessee and of which the assessee should have knowledge in order that he may be able to meet such evidence. On the other hand Sub-section (4) of Section 23 makes an entirely different provision. Where the assesses fails to make a return or fails to comply with all the terms of the notices issued to him, the Income Tax Officer "shall make the assessment to the best of his judgment." Here there is no question of his taking any further evidence nor is there any necessity for him to take any evidence at his own

instance. The penalty prescribed for failing to make the return or for failing to comply with the terms of a notice is that the matter is left to the final discretion of the Income Tax Officer to make the best of the assessment he can and his order is final and no appeal lies therefrom.

39. Obviously there ought to be a difference between a case where a further appeal is allowed and a case where no such appeal lies. Where an appeal lies to a higher Court, it would be inappropriate) that the Income Tax Officer''s assessment should be based on the result of private enquiries made by him behind the back of the assessee, of which no record is kept,'' for such materials would not be before the appellate Court which has to exercise its own judgment in seeing whether the assessment is correct or not correct. On the other band, where the income tax] Officer''s order is to be final, there is no such necessity, though there is a remedy by way of getting this order set aside if sufficient cause is shown.

40. Now the provisions of Section 23 apply to, the Income Tax Officer just as much as they would apply to the Assistant Commissioner in hearing an appeal. It would therefore follow that even though the order of the Assistant Commissioner is final on facts, he also would not be competent to make private inquiries behind the back of the assessee and collect information which the assessee has no opportunity to meet. It therefore seems to me that the inquiries made by the Income Tax Officer from the people of the district, after proceedings u/s 23(3) had started, of which no notice had been given to the assessee, were illegal and not authorized by Sub-section (3). Similarly the inquiries made by the Assistant Commissioner during the hearing of the appeal behind the back of the appellant were not justified by the provisions of Sub-section (3) and the result of such private inquiries should not have been made the basis of any assessment.

41. On the other hand, I see no objection in the Income Tax Officer or the Assistant Commissioner acting upon the assessment for the previous year if no better evidence is forthcoming. An Income Tax Officer and for the matter of that, an Assistant Commissioner is not bound to accept either the correctness of the return or the genuineness and completeness of the account books produced before him or the truth of the evidence produced by the assessee. If he has round for believing that such evidence is untrustworthy, he can certainly reject it. Having rejected such evidence it is open to him to pursue the inquiry further and take more evidence which he considers necessary; but he is not bound to do so. In the absence of any better evidence he is certainly entitled to fall back on the assessment of income made during the previous year even though that assessment might have been the best judgment estimate. The fact that during the previous year the income was assessed on a certain figure is certainly some evidence on which he can proceed, even independently of any presumption of continuity. If the assessee fails to produce satisfactory evidence, he fails to displace the previous year''s estimate which is certainly admissible against him.

42. In this view of the matter I am of the opinion that the finding of the Assistant Commissioner was based partly on the result of private inquiries made by him and partly on the admitted circumstances of this case. So far as it was based on the private inquiries, it was improper and is vitiated. But if it could be based on the other circumstances, without taking into account the result of. the private inquiries, then the finding would not be illegal according to the principle underlying Section 167, Evidence Act. I am not called upon to say whether in this particular case the assessment at 11 lakhs could have been made on the other circumstances of this case excluding the result of the private inquiries. This is for the Assistant Commissioner to decide. My answer to the first question is that the estimate was based on evidence which the Assistant Commissioner was partly empowered to act upon and partly not empowered to act upon, and my answer to the second question is in the negative. This being my opinion on the two questions that arise in this case and on which the learned Judges have differed, let the case go back to the Bench for final disposal.

Niamatullah and Bajpai, JJ.

43. Having regard to the decision of the Hon''ble Chief Justice, to whom the case was referred in view of difference of opinion between the Judges composing this Bench, the two questions, which are the subject of reference u/s 66, Income Tax Act are answered as follows:

(1) The estimate of 11 lakhs as the capital invested by the assessee is based partly on such evidence as the Assistant Commissioner was in law empowered to act upon and partly on evidence which he was not empowered by law to act upon.

(2) The Assistant Commissioner was not authorized u/s 13, Income Tax Act, or otherwise, to make private inquiries and to take the result of such inquiries into account in making the assessment.

44. As regards costs, we direct that the department should pay three-fourths of the costs incurred by the assessee and that the assessee should pay one-fourth of the costs incurred by the department. We certify that counsel for the department has earned Rs. 1,000 as his fee. He is given six weeks'' time to file a certificate. Costs awarded by this order will include costs of all the hearings including those entailed by the assessee''s application for an order to the Commissioner that a reference be made. The assessee''s costs shall be taxed according to the certificate filed by counsel. Let a copy of our judgment be sent to the Commissioner of Income Tax making the reference.