

(1937) 05 AHC CK 0007
In the Allahabad High Court
Case No : Mis. Case No. 320 of 1935

RAJMANI DEVI

APPELLANT

Vs

COMMISSIONER OF INCOME TAX, U.P.

RESPONDENT

Date of Decision : 04-05-1937

Acts Referred:

Citation : (1937) 05 AHC CK 0007

Judgement

This is a reference under 66(3) of the Indian Income Tax Act, XI of 1922. The proceedings in connection with which the reference arose were proceedings under Sec. 27 of the Act and the assessment year was the year 1932-33 ending with Chait 1989. The assessee was one Lala Ramji Das who was a banker and carried on money-lending business on an extensive scale. He maintained his accounts by the year ending on the 15th Chait which corresponds roughly with the financial year. The previous year or the accounting year would in the present case end with the 15th of Chait 1388. When the assessment began Ramji Das was alive, but he died on April 9, 1933, and the application under Sec. 27 which was submitted by Ramji Das was continued by his widow Mst. Rajmani Devi. The Income tax Officer dismissed the application under Sec. 27 on April 13, 1934, and an appeal against the said decision was dismissed by the Assistant Commissioner on July 24, 1934. On August 27, 1934, the assessee filed a combined application for review and reference to the High Court. On October 8, 1934, the learned Commissioner refused to state a case and on the application for review he remitted certain issues to the Income tax Officer. We are not concerned in the present proceeding with the result of the application for review. The assessee, then filed an application in the High Court praying that we should require the Commissioner to state a case under Sec. 66(3) of the Act. By our order dated February 27, 1936, we required the Commissioner to state a case and formulated three questions of law. We mentioned then that the only matter which he had to decide at that state was whether a question of law arose out of the decision of the Assistant Commissioner, and we were of the opinion that the three questions formulated by us did arise and we did not agree with the

opinion of the Commissioner that no question of law arose although counsel for the department also pressed that point before us even at that stage.

The learned Commissioner has now stated a case and has referred the three question of law which we had ourselves formulated, but once more he has lodged a mild protest questioning our jurisdiction in requiring him to state a case under Sec. 66(3), for he is still of the opinion that a question of law did not arise. He thinks that a question of law is foreign to an appeal pending before the Assistant Commissioner against an adverse order passed by an Income tax Officer under Sec. 27. He says :

"The expression "prevented by sufficient cause in Sec. 27 involves some definite active cause, making compliance with a notice impossible and not a passive cause such as the opinion that compliance is not obligatory because of rights supposed to be secured under the Act."

This means that if an applicant wishes to submit that he was prevented by sufficient cause from complying with the terms of a notice, the applicant must allege and prove some such fact as illness or accident etc., and a decision on this point would obviously be a decision on a question of fact. The learned Commissioner is further of the opinion that it is not possible for an applicant to say that he was prevented by sufficient cause from complying with the notice, because the notice was illegal. We may state at the very outset that we cannot agree with the general proposition that it is not possible to evolve a question of law out of the various circumstances mentioned in Sec. 27 of the Act.

It now remains to discuss a few decisions of some of the High Courts on which reliance has been placed by the learned Commissioner. They are the cases of Jot Ram Sher Singh v. Commissioner of Income Tax; Mohan Lal Hardeo Das v. Commissioner of Income Tax, Bihar and Orissa; In re Abdul Bari Chowdhary v. Commissioner of Income Tax, Burma and A. K. R. P. L. A. Chettiar Firm v. Commissioner of Income Tax, Burma. In Jot Ram Sher Singhs case the matter that was directly decided by this Court was that a question whether an assessment under Sec. 23(4) is valid or not is not a question of law that arises or Can arise out of an order of the Assistant Commissioner passed under Sec. 31, and consequently such a question cannot be made the ground for an order by the High Court under Sec 66(3) requiring the Commissioner to state a case, and therefore that case is not of any help to the point that we are at present considering. The learned Commissioner, however, has made reference to a certain passage occurring at page 277 of the Allahabad Law Journal Reports. The passage is :

"A refusal to make a fresh assessment under Sec. 27 can proceed only on the ground that the assessee was not prevented by any sufficient cause from complying with the notice u/s 22 or Sec. 23 If any question of law arises from such refusal it can certainly be the subject of reference under the order of the High Court. But any question of law which arises from the best judgment

assessment sought to be set aside by an application under Sec. 27, cannot fall within the purview of Sec. 27."

From the words which we have underlines it is clear that the learned Judge was of the opinion that a question of law can arise from a refusal by the Income Tax Officer to cancel an assessment under Sec. 27 of the Act. This case, therefore, does not in any way support the opinion of the Commissioner. The Patna case also has no bearing on the present matter, for all that was decided in that case was that where an application u/s 27 of the Income -tax Act to reopen an assessment under Sec. 23(4) for failure to produce account books called for under Sec. 22(4) was dismissed by the Income tax Officer and an appeal therefrom was rejected by the Assistant Commissioner, such questions alone within the terms of Sec. 27 of the Act, which could have been taken on the appeal before the Assistance Commissioner, could be raised on a reference to the High Court under Sec. 66 and not questions regarding the assessment under Sec. 23(4) which is not appealable under Sec. 30(1) proviso. It would thus appear that all that was decided in this case was that as the assessment under Sec. 23(4) was not appealable no question regarding such assessment could be raised in proceedings under Sec. 27 and it was not decided as a general proposition that no question of law could arise in proceedings u/s 27. On the contrary the case decides that certain questions may form the subject of a reference u/s 66. The same may be said about the Rangoon case of Abdul Bari Chowdhary. Here also the question that was directly decided was that no question of law arises out of the Assistant Commissioners order in an appeal against a best judgment assessment because of the proviso to Section 30(1) and in the body of the judgment Page, C.J., observed :

"Under Section 27, however, the Income Tax Officer has to determine whether the assessee prevented by sufficient cause from

complying with the requirements of the law as set out in Sec. 27. That is essentially a question of fact and not of law."

We also agree that in the majority of cases no question of law would ordinarily arise out of the decision of an Assistant Commissioner dismissing an appeal against an order of the Income Tax Officer under Sec. 27, but we are not prepared to subscribe to the view that no question of law can ever arise in such a matter and that the illegality of a notice, non-compliance with which has brought about a best judgment assessment, cannot be agitated within the expression "prevented by sufficient cause." We have left for the last the consideration of the case reported in 9 Rang. p. 25 (A.K.R.P.L.A. Chettiyar Firm v. Commissioner of Income Tax, Burma). The facts of the case are not stated at length in the reports, but the learned Judges observed as follows :

"The order of March 23, 1930, was made in an appeal u/s 30(1) from a refusal of the Income Tax Officer, under Sec. 27 to cancel the assessment and proceed with a fresh assessment upon the ground that he was not satisfied that there was

sufficient cause shown by the assessee preventing him from producing the Shan States accounts pursuant to the notice duly served on him in that behalf u/s 22(4). In such an appeal the question whether the assessment was properly made or not was immaterial....."

So far there is nothing which militates against the view that we are taking, but the learned Judges proceed and observe :

"and it was equally immaterial whether the notice, which admittedly was served upon the assessee, calling upon him to produce the Shan States accounts, was valid or not."

This last passage, standing in the cryptic form in which it stands, undoubtedly favours the view taken by the Commissioner, and if it implies that the question about the validity of a notice can never in any form, as the basis of any allegation within the purview of Sec. 27, become the subject of a reference under Sec. 66 out of the appellate order of the Assistant Commissioner, then we respectfully beg to dissent from it.

On the authority of the cases mentioned above including the Allahabad case, it is well settled that where the Assistant Commissioner rejects an appeal in limine on the ground that the proviso to Sec. 30(1) bars any appeal against an assessment under Sec. 23(4), the question whether an assessment under Sec. 23(4) is valid or not is not a question of law and cannot be made the subject of a reference to the High Court. It may be further mentioned that the proviso to Sec. 30(1) bars not only an appeal against an assessment made under Sub-Sec. (4) of Sec. 23 but an appeal against an assessment under that sub-section read with Sec. 27, and in the two Rangoon cases mentioned above although the cases arose out of the proceedings under Sec. 27, pointed reference was made to the proviso to Sec. 30(1) of the Act, and it may be that in those two cases the appeal against the decision of the Income Tax Officer under Sec. 27 was dismissed by the Assistant Commissioner under the proviso to Sec. 30(1). If that is so, then obviously no question of law can arise and the decision would be in line with the decision of the Allahabad High Court in Jot Ram Sher Singhs case.

We may, however, mention that under Sec. 66 a reference can be made in connection with any question of law arising out of an appellate order passed by the Assistant Commissioner under Sec. 31. A perusal of Sec. 31 makes it quite clear that an appeal does lie under that section to the Assistant Commissioner from an order of the Income Tax Officer refusing to make a fresh assessment under Sec. 27 and the Assistant Commissioner may confirm such order or cancel it and direct the Income Tax Officer to make a fresh assessment. If, therefore, any question of law can arise out of the appellate order of the Assistant Commissioner we fail to see why such a question cannot be made the subject of a reference under Sec. 66. If, however, after having cancelled an assessment under Sec. 27, the Income Tax Officer proceeds to make a fresh assessment he has under Sec. 27 to make it in accordance with the provisions of Sec. 23, and if

while making this fresh assessment he has once more to invoke the aid of Sec. 23(4) because of any default made by the assessee and an appeal is filed against that order, then the Assistant Commissioner would be entitled to reject the appeal in limine under the proviso to Sec. 30(1), and on the authorities mentioned it would not be possible to argue that any question of law arises out of the order of the Assistant Commissioner rejecting the appeal. So far as the present case is concerned, it is clear that the Assistant Commissioner did not and could not reject the appeal against the Sec. 27 order passed by the Income Tax Officer under the proviso to Sec. 30(1) but could at worst only confirm the order of the Income Tax Officer under Sec. 31 of the Act, and we are of the opinion that if a question of law arises from the appellate order of the Assistant Commissioner it can certainly be made the subject of reference under the orders of the High Court and as a matter of fact when we directed the Commissioner to state a case we were of the opinion that the three questions of law which we formulated for the benefit of the Commissioner did arise, and we now propose to give our opinion on the said three questions which have been referred to us.

It might, however, be convenient to state a few facts in order to appreciate the questions. In the course of the assessment year 1932-33 ending with the 15th of Chait 1939 a notice under Sec. 22(2) for the filing of a return was issued on April 1, 1932. After some extensions, with which we are not concerned, the return was submitted on September 3, 1932. On October 15, 1932, the Income Tax Officer issued two separate notices, one under Sec. 22(4) for the production of accounts and a second under Sec. 23(2) requiring the assessee to attend in person. The date fixed for the compliance of the above two notices was October 20, 1932. The assessee appeared on October 20, 1932, and produced certain books. From that date till about December 22, 1932, the accounts were scrutinised and witnesses were examined. The Income Tax Officer came to the conclusion that all the account books required in pursuance of the notice under Sec. 22(4) were not produced and the assessee's explanation for their non-production was unsatisfactory. He, therefore, thought that there was a default which entitled him to proceed under Sec. 23(4) and he made a best judgment assessment. The appeal against that judgment was rejected by the Assistant Commissioner, and in connection with proceedings under Sec. 27 the Commissioner, as we have mentioned before, stated the present case only after a direction by us.

The first question of law that has been referred to us is :-

"Was the notice under Sec. 23(2) issued to the assessee irregular by reason of the fact that a wrong year was mentioned and by reason of the fact that the words in the printed notice or to produce, or to cause to be there produced any evidence on which such person may rely in support of the return were scored out ?"

On October 15, 1932 a notice under Sec. 22(4) and another under Sec. 23(2) were issued. Sec. 23(2) says :

"If the Income Tax Officer has reason to believe that a return made under Sec. 22 is incorrect or incomplete he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income Tax officers office or to produce, or to cause to be there produced any evidence on which such person may rely in support of the return."

The notice that was issued in the present case is printed at page 12 of the case. It is as follows :

"To enable me to test the correctness of the return made by you under Sec. 22 of Act XI of 1922 for the year ending Shait Sambat 1988, I hereby require you to attend in person on October 20, 1932."

It is argued on behalf of the assessee that there were two irregularities in this notice. The first irregularity is that the year ending Shait Sambat 1988 was mentioned, though the correct year which ought to have been mentioned was the year ending Shait Sudi 15, Sambat 1989. The learned Commissioner has rightly pointed out that this did not in any way mislead the assessee and we might further mention that the assessee did appear in person and did not lodge any protest in respect of this mistake. Moreover, the difference is only that of fifteen days and the account-books, such as were furnished, were in respect of the correct year ending Shait Sudi 15, Sambat 1989. The proceedings in connection with which the notice was issued related to the year ending Shait Sudi 15, Sambat 1989 and these were the only proceedings pending at that time and the assessee knew perfectly well what account books he was required to produce. We are, therefore, of the opinion that this irregularity does not in any way vitiate the notice.

The other irregularity is a more serious irregularity, and it is that the words "or to produce, or to cause to be there produced any evidence on which such person may rely in support of the return" were scored out. The contention on behalf of the assessee is that out of the alternatives provided in Sec. 23(2) it is for him and not for the Department to choose the alternative. There are three alternatives provided by provided by Sec. 23(2) -

- (1) to attend at the Income Tax Officers office,
- (2) to produce any evidence on which the assessee may rely, and
- (3) to cause to be there produced any evidence on which the assessee may rely.

In the present case the Income Tax Officer did not give the assessee the option of choosing any one of the three alternatives but asked the assessee to attend the Income Tax Officers office. The learned Commissioner says :

"It is the Income Tax Officer, when he arrives at a certain frame of mind, who is required to give a notice and it is for him, I submit, to decide which of the alternatives he will choose. If he thinks that for his purposes it will be enough that the assessee came and explained how he had made out the return, there is

no reason why he should enforce the other alternative, particularly when he knows that such an explanation would be supplemented by the accounts he had required the assessee under Sec. 22(4) to produce. It is the Income Tax Officer who has, in a certain frame of mind, to issue the notice and the alternatives would appear to be intended for him."

There is no question of enforcing the other alternatives. The question is whether it is not the privilege of the assessee to choose one of the several alternatives provided by the section. If the contention of the Department were correct, then the word "either" ought more appropriately to have occurred at a different place and the section might read as follows :-

"He shall serve on the person who made the return a notice either requiring him on a date to be therein specified to attendor.....".

But as the section reads the alternatives seem to be for the benefit of the assessee who has got to choose as to which of the options he will exercise. This is also more reasonable. The assessee has submitted his return and the Income Tax Officer has reason to believe that the return is incorrect or incomplete, and although the Income Tax Officer may be of the opinion that the explanations furnished by the assessee might remove the Officers suspicion, yet the assessee might feel that no amount of explain actions furnished by him would remove the doubts of the Officer, and it would be necessary for him to produce some evidence in support of the return, and if the notice directed only the attendance of the assessee the latter would not be able to produce valuable evidence. It may also be that the assessee might find it extremely inconvenient to attend in person and at the same time might feel that the Officer could be given every satisfaction by the production of some evidence. From every point of view we are of the opinion that the law intended to give the options to the assessee and not to the Department. It was contended by Mr. Varma on behalf of the Department that if the law were interpreted in the way in which we feel inclined to interpret it, the position would become unworkable. He said that if the option were with the assessee, then under certain circumstances there could be no default in compliance with a notice under Sec. 23(2) and the Income Tax Officer could never proceed to pass a best judgment assessment. The illustration that he gave was that the assessee who admittedly keeps no accounts and whose calling does not necessarily involve the keeping of accounts might on a notice issued under Sec. 23(2) decide to attend at the Income Tax Officers office and not to produce any evidence with the result that even though the Income Tax Officer may not be satisfied with the explanation of the assessee the Income Tax Officer would not be able to say that there was non-compliance with the notice and would have to proceed under Sec. 23(2), and in that case he would be compelled to accept the return filed by the assessee. There is really no substance in this contention, because first it was never intended that the Income Tax Officer should invoke the powers vested in him under Sec. 23(4) in the majority of cases and further if the assessee chooses not to produce any evidence in support of the return it might

really work to the detriment of the assessee because then the Income Tax Officer might utilise the information which he has received about the income of the assessee and might place that information before the assessee and ask him to disprove the same. The Income Tax Officer might well summon certain witnesses under Sec. 37 of the Act to show what the income of the assessee is and on the basis of that evidence - the assessee being given the option to cross-examine such witnesses - proceed to assess the individual on an income higher than that stated in the return and public revenues would not in any way suffer. Further the same difficulties would arise if the option were with the Officer. He might decide to ask the assessee to attend in person or he might decide to ask the assessee to produce evidence in support of the return and in either event it is conceivable that the Income Tax Officer may remain unsatisfied, and if the Income Tax Officer knows that the assessee keeps no accounts he would not issue a notice under Sec. 22(4) and he will have to proceed under Sec. 23(3). It seems to us that if the Income Tax Officer were the final Judge in the matter of the alternatives it would work great hardship on the assessee and the assessee in those cases in which the Income Tax Officer requires only the attendance of the assessee might lose the valuable right of producing the evidence in support of the return and removing the doubts of the Officer. Our answer to the first question is therefore, in the affirmative. In view of a certain passage in the judgment of the Income Tax Officer in the Sec. 27 proceeding, it was argued that the question was only academic and did not really arise. The passage is :-

"After he had his full say and had produced all the evidence at his disposal he informed me by his letter dated December 22, 1932, that he did not want to adduce any further evidence because he had produced all the evidence which he wanted to adduce."

This is not at all a correct statement of facts and we are satisfied after what has been said by counsel that the assessee did not produce any evidence under Sec. 23(2).

The second question that has been referred to us is :-

"Is the issue of a valid notice under Sec. 23(2) a condition precedent under the circumstances of the present case to the making of an assessment under Sec. 23(4) ?"

A plain reading of Sec. 23(2) shows that under certain circumstances the issue of a notice under the above provision is mandatory and the question is whether it was so mandatory under the circumstances of the present case. The notice starts by saying : "To enable me to test the correctness of the return made by you". It is therefore, clear that the Income Tax Officer had reason to believe that the return filed by the assessee was incorrect or incomplete and moreover the very fact that a notice under Sec. 23(2) was issued shows that the Income Tax Officer had reached that frame of mind when he was not satisfied with the correctness of the assessee's return. The law provides that if that frame of mind has been

reached the Income Tax Officer shall serve on the person who made the return a certain kind of notice. There can, therefore, be no doubt that under the circumstances of the present case a notice under Sec. 23(2) was imperative. In the case of Muhammad Hayat Haji Muhammad Sardar v. Commissioner of Income Tax, Shadi Lal, C.J., at page 134 observed as follows :-

"If he, however, considers the return to be incorrect or incomplete, he had no authority to reject it and to make the assessment to the best of his judgment as he is entitled to do when no return is made. He must give the assessee an opportunity to prove the accuracy and completeness of the return made by him and he is, therefore, enjoined by Sec. 23, Sub-sec. (2), to serve on the latter a notice requiring him either to appear at the office of the Income Tax Officer, or to produce or to cause to be produced, evidence in support of his return."

A clear injunction is laid on the officer and the injunction must be obeyed. In connection with the first question we were of the opinion that the notice that was issued in the present case under Sec. 23(2) was an irregular and invalid notice, and as such, the notice was no notice at all, and for all practical purposes the position is that no notice under Sec. 23(2) was issued to the assessee. It is, however, argued that although a valid notice under Sec. 23(2) was necessary in the present case it is not a condition precedent to the making of an assessment under Sec. 23(4), and it is said that an assessment u/s 23(4) can be made in the present case because of a default in the compliance with the notice under Sec. 22(4).

It is now well settled on the authorities of several High Courts in India that a notice under Sec. 22(4) can be issued on the assessee at any stage and at any time and the only limitation that is fixed is that the assessee must have been served with a notice under Sec. 22(2) : see the case of Pallumal Bhola Nath, in re, Ramaswami Chettiar v. Commissioner of Income Tax, Muhammad Hayat Haji Muhammad Sardar v. Commissioner of Income Tax, Punjab, Harmukhrai Dulichand, in re, and Ram Khelawan Ugam Lal v. Commissioner of Income Tax. Some of the above cases also lay down that a combined notice under Secs. 22(4) and 23(2) can be issued after an assessee has made a return, and it was held in the case of Harmukhrai Dulichand that where an assessee had made a return in compliance with a notice under Sec. 22(2) and thereafter a notice has been served upon him under Sec. 23(2) and also a notice under Sec. 22(4) and the assessee has complied with the terms of the notice under Sec. 23(2) by producing the evidence upon which he relies, but has failed to comply with the notice under Sec. 22(4) to produce account books, the Income Tax Officer is entitled to make an assessment under Sec. 23(4) for failure to comply with the notice under Sec. 22(4), and a somewhat similar view was held in the case reported in ILR 52 Mad. page 194 (Ramaswami Chettiars Case). It is therefore, argued on behalf of the Department that the defaults mentioned in Sec. 23(4) are independent defaults and any one of them would entitle the Income Tax Officer to make an assessment to the best of his judgment, and although in the

present case the notice under Sec. 23(2) may be held to be invalid or irregular there was a non-compliance with the notice under Sec. 22(4) and the Income Tax Officer was entitled to proceed under Sec. 23(4). It must, however, be remembered that in the cases to which reference has been made the notice that was issued under Sec. 23(2) was a valid and a legal notice and there was a compliance with the said notice, but there was a non-compliance with the notice under Sec. 23(4) and therefore the Income Tax Officer could proceed under Sec. 23(4). In The present case the contention on behalf of the assessee is that because the Income Tax Officer had reached the frame of mind when he had reason to believe that the return made under Sec. 22 was incorrect or incomplete, he was bound to issue a valid notice under Sec. 23(2), and as this mandatory notice was not issued the officer could not proceed to make the best judgment assessment on failure of compliance with the notice under Sec. 22(4), because if a valid notice had been issued under Sec. 23(2) the assessee might have removed the suspicions of the Officer and might have satisfied him that his return was correct and complete, and it would be a great hardship if a best judgment assessment was made under Sec. 23(4) because of a non-compliance with the notice to produce accounts when such accounts were in reality not necessary for the purpose of checking the return. There is some force in this contention and to a certain extent it is supported by a dictum of Rankin, C.J., in the case of In the matter of Sadaram Puranchand, where the learned Chief Justice at page 731 (of AIR 1931 Cal.) observes :

"But I do not think that it was ever intended by the Act that failure to produce books prior to the filing of a return, should deprive the assessee of his right to have the return duly and properly inquired into. A return which by Sec. 22 is to be deemed to be a return made in due time cannot be treated as still born because of a previous failure to comply with a notice under Sec. 22(4)."

Reliance is also placed on the case of Kajori Mal Kalyan Mal of Cawnpore, where the assessee had not filed a return in pursuance of a notice under Sec. 22(2) nor had submitted his account books in pursuance of a notice under Sec. 22(4) and the Income Tax Officer had proceeded under the provisions of Sec. 23(4) and an application under Sec. 27 of the Act was rejected by the Income Tax Officer and the Assistant Commissioner. A reference was then made to the High Court and the learned Judges held that it was open to the High Court to formulate questions of law that really arose in a case and to answer them for the benefit of the Commissioner and the parties, and the fresh question of law that was formulated by the High Court was to the following effect :-

"Was the assessee prevented by sufficient cause from making the return required by Sec. 22 ?"

The answer that was given was that under Sec. 22(2) the Income Tax Officer must give the proposed assessee at least thirty days time within which to file a return. If this minimum is denied the notice becomes entirely illegal and no subsequent extension of time will cure the defect that initially lay in the notice

issued. It will be observed that in this Allahabad case there was a non-compliance with a notice under Sec. 22(4), but as the initial notice under Sec. 22(2) was an irregular notice the learned Judges held that there could possibly be no valid assessment of Income Tax under Sec. 23(4). The phraseology of Sec. 23(2) suggests that under the circumstances of the present case a valid notice under Sec. 23(2) was imperative, but the phraseology of Sec. 23(4) suggests that perhaps the Income Tax Officer could proceed to make a best judgment assessment because of the failure to comply with all the terms of a notice issued under Sec. 22(4). Our answer to the second question is that although the issue of a valid notice under Sec. 23(2) was not a condition precedent, under the circumstances of the present case, to the making of an assessment under Sec. 23(4) the issue of such a valid notice was imperative, and this opinion of ours will have a bearing on the answer to question No. 3.

Question No. 3 runs as follows :-

"If the issue of the above notice is a condition precedent, is an assessee justified in disobeying a notice under Sec. 22(4) and can be said to be prevented by sufficient cause from complying with the said notice ?"

The meaning of the question is fairly clear, but in view of our answer to the second question the third question might be reframed as follows :-

"Whether the issue of the above notice is a condition precedent under the circumstances of the present case to the making of an assessment under Sec. 23(4) or not, was the assessee justified in disobeying a notice under Sec. 22(4) and can he be said to have been prevented by sufficient cause under Sec. 27 from complying with the said notice ?"

This necessitates an interpretation of Sec. 22 of the Act which for the purpose of the present case might be deemed to read as follows :-

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

It would thus appear that the assessee in order to succeed under Sec. 27 has got to establish any one of the following conditions :-

- (1) he was prevented by sufficient cause from making the return required by Sec. 22,
- (2) he did not receive the notice issued under sub-sec. 4 of Sec. 22.

- (3) he did not receive the notice issued under sub-sec. 2 of Sec. 23,
- (4) he had not a reasonable opportunity to comply with the terms of the last-mentioned notices, or
- (5) he was prevented by sufficient cause from complying with the terms of the last-mentioned notices.

It is contended on behalf of the assessee that the notice issued under Sec. 23(2) in the present case was an illegal notice and therefore it is tantamount to the non-receipt of such a notice and therefore he has established condition No. 3. There is some force in this contention and, as Sec. 27 reads, it might be argued that on the establishment of any one of the conditions mentioned in Sec. 27, the Income tax Officer has to cancel the assessment and has to proceed to make a fresh assessment. The argument on behalf of the Department, however, is that Sec. 27 is utilised by the assessee when there has been a best judgment assessment, and one has got to see as to what the default was which brought about the best judgment assessment and the assessee has got to satisfy that default can be condoned either because the notice in connection with which the default was made was not received or that he had no reasonable opportunity to comply with that notice or that he was prevented by sufficient cause from complying with that notice. In the present case the default was in connection with the notice u/s 22(4) and the assessee has therefore to satisfy that notice was not received or that he had no reasonable opportunity to comply with that notice or that he was prevented by sufficient cause from complying with that notice. Although perhaps, according to the wording of the section, there is some force in the contention of the assessee, yet it is more reasonable to accede to the argument of the Department and to hold that the assessee must satisfy the conditions laid down in Sec. 27 in connection with that particular notice non-compliance with which brought about the best judgment assessment.

We have already held in connection with the preliminary objection raised by the learned Commissioner that a question of law can arise in a matter like this, and in the case reported in *In Re: Sadaram Puranchand*, the learned chief Justice after narrating the facts of the case observed :

"I am prepared to hold as a matter of law that he (the Income Tax Officer) did not give to the assessee such reasonable opportunity as the Act requires to produce their evidence in support of their return."

In the present case we have already held that the notice under Sec. 23(2) was an illegal notice and we have also held that the Income tax Officer was bound to issue a valid notice under Sec. 23(2). It must, therefore, be deemed that no notice under Sec. 23(2) was issued to the assessee and to that extent the Income tax Officer was in default. The assessee was also in default in having failed to comply with the terms of notice under Sec. 22(4), but he can very well say that as the imperative notice u/s 23(2) was not issued to him, he could ignore the notice issued u/s 22(4) and in that sense was prevented by sufficient

cause from complying with that notice. Whether a valid notice under Sec. 23(2) was a condition precedent or whether it was only imperative under the circumstances of the present case it is clear that the assessee was denied a valuable right and he was, therefore, prevented by sufficient cause from complying with the notice issued under Sec. 22(4), and this is our answer to the third question.

A copy of our judgment will be sent to the learned Commissioner under the seal of the Court and the signature of the Registrar. The assessee is entitled to his costs as certified. Counsel for the Department is entitled to Rs. 500 as his fees. Six weeks are allowed him to file the certificate.

Reference answered.