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the plaintiffs. It is beside the point to consider whether the action of the plaintiffs in constructing a *bandhara* at Girasgaon would prejudicially affect the natural right of the defendants. The point here is: Are the plaintiffs entitled to store the water by building a *bandhara* across the stream in exercise of their natural right to use the water of the stream. That point must be found against them for the reasons already stated.

[The rest of the judgment is not material to the report.]

Appeal allowed.

K. B. S.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Gajendragadkar and Mr. Justice Tendolkar.

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A. A. ANSARI, APPLICANT v. THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, RESPONDENT.*

Taxation on Income (Investigation Commission), Act (XXX of 1947), ss. 5 (1), 8 (5), 3, 5 (2), and 6 (5)—Indian Income Tax Act (XI of 1922), ss. 34, 66 (2)—Excess Profits Tax Act (XV of 1940), s. 15—Evasion of payment of Income-tax—Case referred to the Investigation Commission for investigation and report on loss of revenue—Whether Commission empowered to estimate income of assessee for ascertaining loss of revenue—No appeals against the decision of the Commission—Only power to refer to High Court under s. 8 (5).

On the contention that the Investigation Commission to which a case has been referred by the Central Government under s. 5 (1) of the Taxation of Income (Investigation Commission) Act, 1947, for investigation and report had no power merely to estimate the income of the assessee,

Held, that the Commission in investigating and reporting on a case referred to it by the Central Government had jurisdiction to estimate the income of the assessee to ascertain the loss of revenue.

On the contention that as in the present case circumstances referred to in sub-s. (5) of s. 6 of the Act did not obtain the only power the Commission had was to report under s. 5 (2) of the Act,

Held, that sub-s. (2) of s. 5 of the Act deals with a case where either the Commission on the materials before it or even by exercising its best judgment is unable to decide what income has escaped taxation, or where in the opinion of the Commission no substantial evasion has

* Income Tax Reference No. 17 of 1952.

taken place and when according to the Commission the circumstances and materials are such that the investigation should be closed. It cannot possibly deal with a case where in the opinion of the Commission (as in this case) there has been a substantial evasion of tax and that evasion can be determined by such materials as the Commissioner can bring on record.

The Taxation on Income (Investigation Commission) Act, 1947, is not a taxing statute. It neither deals with assessment of income nor brings any income to tax. Its only purpose is to investigate into the income of persons which has escaped tax. Therefore, there was no reason to incorporate in the Act any provision similar to s. 23 (4) of the Indian Income Tax Act, 1922.

The scheme of the Act is to make the decision of the Commission to the extent that it determines the income which has escaped tax, final, to do away with all provisions with regard to appeals which are found in the Income-tax Act and to give to the assessee only the power to have the matter referred to the High Court under s. 8 (5) of the Act.

Gunda Subbayya v. Commissioner of Income-tax, Madras⁽¹⁾ and *Commissioner of Income-tax, Burma v. Messrs. Ein Shin*,⁽²⁾ referred to.

The case of A. A. Ansari, applicant, proprietor of Messrs. Munshi & Co. was referred by the Central Government to the Income-tax Investigation Commission for investigation under s. 5 (1) of the Taxation of Income (Investigation Commission) Act, 1947. The investigation related to assessment years from 1941-42 to 1948-49.

In the course of their investigation the Income-tax Investigation Commission (hereinafter referred to as the Commission) found that the account-books for the assessment years 1941-42, 1942-43 and 1943-44 produced by the assessee before the Income-tax Officer and on the basis of which he was assessed to tax were not reliable. The assessee's case that the subsequent books of accounts upto November 1947 were burnt in a fire to an adjacent house which extended to the house in which the assessee's office was located was disbelieved by the Commission. Moreover, some books of accounts for the relevant period for the assessment years 1944-45 and 1945-46 (marked Exhibits A, B, C & D) were produced before the Commission by some of the employees of the assessee and the assessee admitted that these account-books were genuine.

The assessee had also claimed deduction in respect of payments alleged to have been made to three persons, viz. Mirza Muzaffar Baig, Tauzh-uddinkhan and Abdul Baka Khan, alleging that he had entered into certain agreement with them for

⁽¹⁾ [1947] 15 I. T. R. 290.

⁽²⁾ [1939] 7 I. T. R. 21.

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sharing the profits which he earned in the lorry business and he relied on the service agreements with them. The Commission was not satisfied that these service agreements were genuine. They observed, "We are not satisfied that the story as to their being entitled to a share of the profits is true. It is significant that so far his claim is limited just to the amounts that would have constituted a three-annas share of what the assessee alleged to be the income. Even the receipts produced as receipts granted by them have been drawn up on this basis and do not bear any relation to the true income of the concern. It is doubtful if Touzh-uddinkhan and Mirza Muzaffar Baig were at any time in the service of the assessee at all, not to speak of the terms on which they had been employed. As we are arriving at the assessable income only by a rough estimate, we think that the most convenient course in the circumstances will be to hold the assessee liable to be taxed in respect of the whole income during the relevant period, but allow a deduction for such amounts as were claimed to have been paid to these three persons in the assessments for the account years 1940, 1941 and 1942. Accounts for 1943 and 1944 are to a large extent available (viz. Exhibits A to D). As the assessee has adduced no satisfactory evidence we are not prepared to act on the receipts purporting to have been given by these persons, when, as already observed, they bear no relation to realities. For the years 1943 and 1944, deduction under this head will be allowed only to the extent of sums that appear for (sic) Exhibits A to D to have been paid to these persons."

The Commission appointed an Authorized official, gave him directions and suggestions and asked him to look into such new evidence as the assessee may produce before him and to make the necessary calculations as per the Commissioner's directions. The Authorized Official in the light of the Commission's directions estimated the probable gross income, the net income and the profits of the lorry business during the relevant years with due regard to possible changes in circumstances, to the difference in the number of lorries worked by the assessee during the different years, to the difference in the rates for lorry-hire that prevailed during different years and to other material conditions.

After the Authorized Official had submitted his calculations to the Commission, the matter came up for the consideration of the Commission. Legal advisers of the assessee appeared

before the Commission and raised various contentions against the calculations submitted by the Authorized Official. The Commission made its report on September 27, 1949. In making their report they made substantial changes to the advantage of the assessee in the estimates arrived at by the Authorized Official. They reduced the percentage rate for ascertaining gross profits from $45\frac{1}{2}$ per cent (adopted by the Authorized Official) to 35 per cent. They allowed a more liberal allowance for expenses. They raised the depreciation allowance to figures allowed under statute. They also took into account the fact that it would not be fair to assume that the traffic was at all times of the same character on the basis of mathematical average, as also the difficulty on the part of the assessee to procure petrol and other materials at controlled rates. After taking into considerations all these factors they reported to the Central Government that the assessments of the assessee for the various years should be raised as indicated by them.

The Central Government after considering this report directed that appropriate assessment proceedings under the Indian Income-tax Act, 1922, and the Excess Profits Tax Act, 1940, should be taken against the assessee with a view to assessing or re-assessing the incomes that had escaped assessment. In pursuance of this order the Income-tax Officer started re-assessment proceedings under s. 34 of the Indian Income Tax Act, 1922, and s. 15 of the Excess Profits Tax Act, 1940, for assessment years 1941-42 to 1948-49 and assessed the income for these years which had escaped Income-tax and Excess Profits Tax.

On the application of the assessee, the High Court of Bombay directed the Commissioner of Income-tax, Bombay City to refer the following questions to it:—

(1) Whether the Commission which had power to investigate and report in a case referred to them by the Central Government had any jurisdiction to estimate the income of the assessee to ascertain the loss of revenue.

(2) Whether the Commission erred in law in not giving effect to the service agreements for the years 1943 onwards.

These questions were accordingly referred to the High Court.

The reference was heard.

Sir Jamshedji B. Kanga with *Y. P. Pandit* and *J. P. Pandit*, appeared for the applicant,

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Sir Nusserwanji P. Engineer with *G. N. Joshi*, for the respondent.

Chagla C. J. This is a reference made to us by the Commissioner of Income Tax under s. 8 (5) of the Taxation on Income (Investigation Commission) Act No. XXX of 1947. The Central Government referred the case to the Commission for Investigation under s. 5 (1) of the Act. The Commission has investigated the case and has made its report and on that report the Central Government has passed an order under s. 8 (2) directing appropriate assessment proceedings being taken against the assessee under the Indian Income Tax Act and the Excess Profits Tax Act with a view to assess or re-assess the incomes shown in the schedule which had escaped assessment.

On this reference two questions of law have been raised, and in order to appreciate these two questions it is necessary to state a few facts. The assessee is a lorry driver and as pointed out in the report of the Commission he started life from humble beginning. At one time he owned four lorries, but by 1945 he had 24 lorries to his credit. In 1941-42 he did not show an income which was assessable, but from 1942-43 upto 1948-49 he showed an assessable income and he was assessed to tax. In 1941-42, 1942-43 and 1943-44 he produced books of account and he was assessed by the Income Tax Department on those books. From 1944-45 to 1948-49 no books of account were produced by the assessee before the Department and he was assessed on an estimate of his income. Before the Commission certain books for the assessment years 1944-45 and 1945-46 were produced. These were produced by the employees of the assessee. The case of the assessee with regard to his books of account was that the books had been destroyed by fire that took place in an adjoining building. The Commission came to the conclusion that the case of the assessee was false, that the books were being suppressed, and they succeeded in getting some of the books which were produced by the employees. The finding of the Commission with regard to the books that were produced for the assessment years 1941-42, 1942-43 and 1943-44 was that these books were not genuine. The Commission appointed an authorised official to collect various materials and the ultimate report of the Commission was based on the rates for lorry hire that prevailed in the various years. They also considered the ratio of expenditure to income, they took into consideration the difficulty on the part of the assessee to procure petrol during the war years, they

further gave a concession to the assessee by taking into consideration the fact that traffic was not at all times of the same character merely on the basis of a mathematical average, and taking all these into consideration they estimated the income of the assessee for various years.

The first question of law that arises for our consideration is whether the Commission, which had power to investigate and report any case referred to them by the Central Government, had any jurisdiction to estimate the income of the assessee to ascertain the loss of revenue, and what is urged by Sir Jamshedji on behalf of the assessee is that the power of the Commission does not include the power to estimate the income of an assessee. Sir Jamshedji says that it may be that the Commission may have the power to determine the income of an assessee on evidence and on materials placed before it, but it has no power merely on an estimate to arrive at the income. Sir Jamshedji says that the function discharged by the Commission is nothing better than a mere guess work and such a wide and extensive power has not been conferred upon the Commission by the Act. In order to appreciate the contention of Sir Jamshedji we must look at the object with which the Act was passed and the scheme of the legislation. As the preamble itself says, the Act was passed for the purpose of ascertaining whether the actual incidence of taxation on income was and has been in recent years in accordance with the provisions of law. That was one of the objects with which the Act was passed and a Commission was set up. S. 3 deals with the constitution and functions of the Commission, and the relevant function of the Commission with which we are concerned is sub-clause (b) of s. 3 and that provides that one of the duties of the Commission shall be to investigate in accordance with the provisions of this Act any case referred to it under s. 5 and make a report thereon; and when we turn to s. 5 it deals with the power of the Central Government to refer cases for investigation, and that section provides that the Central Government may at any time before September 1, 1948, refer to the Commission for investigation and report any case or points in a case in which the Central Government has *prima facie* reasons for believing that a person has to a substantial extent evaded payment of taxation on income, together with such material as may be available in support of such belief. Therefore it is only when the Central Government has come to a *prima facie* conclusion that a particular

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person has succeeded in evading payment of tax to a substantial extent that it would refer a case to the Commission, and the investigation and report of the Commission under s. 3 (b) is in relation to the reference made to it by the Central Government under s. 5. Therefore what the Commission has to investigate and ultimately report upon is the evasion of payment of taxation with regard to which the Central Government held a *prima facie* opinion. Then s. 6 deals with the powers of the Commission and the powers conferred upon the Commission are very wide. They include the power to collect materials from various sources and also the power after materials have been collected to bring those materials on the record and the power also includes the appointment of an authorized official to assist the commission in examining witnesses and collecting materials.

Now, what is relied upon in s. 6 by Sir Jamshedji is sub-s. (5) of that section. That sub-section provides that if any person whose case is or the points in whose case are being investigated by the Commission refuses or fails to attend in person in compliance with a notice in that behalf duly served upon him or to give any evidence or to answer questions or to produce documents or to prepare and furnish statements when called upon to do so, the Commission may, if satisfied that the refusal or failure was wilful, close the investigation of the case and proceed to draw up its report on the case or on the points to the best of its judgment; and Sir Jamshedji says that it is only when the circumstances mentioned in sub-s. (5) are present that the power has been conferred upon the Commission to make a best judgment estimate of the income of the assessee. Sir Jamshedji says that the conferment of special power under sub-s. (5) excludes the conferment of general power in any other case. As in this case the circumstances referred to in sub-s. (5) did not obtain, according to Sir Jamshedji the Commission had no power to give a best judgment estimate of the income of the assessee. In advancing this argument Sir Jamshedji overlooks the very vital difference between the functions of the Commission as laid down in s. 3 and the powers of the Commission enumerated in s. 6. The function and the duty of the Commission is to investigate to what extent there has been an evasion of payment of tax and in order to investigate that ex-hypothesis the Commission must come to a conclusion as to what income has escaped tax and it is after that investigation that it must

report to the Central Government and inform the Central Government that in its opinion income has escaped tax and the extent of that income. It is only in the discharge of those functions and duties that the Commission has got to exercise certain powers and those powers are enumerated in s. 6 (5) and that sub-section gives the power to the Commission to proceed *ex-parte* against a recalcitrant assessee and to estimate the income to the best of its judgment in the absence of any evidence. It is also significant that sub-s. (5) of s. 6 gives the power to the Commission to impose a penalty upon the assessee for refusal or failure to co-operate as it were with the Commission. According to Sir Jamshedji, if the Commission has no materials before it on which it could base its report as to the income which has escaped tax, then the only power of the Commission is under sub-s. (2) of s. 5, viz. to report to the Central Government that in its opinion further investigation is not likely to reveal substantial evasion of taxation on income and on such report being made the investigation shall be deemed to be closed. It is clear that sub-s. (2) of s. 5 deals with a case where either the Commission on the materials before it or even by exercising its best judgment is unable to decide what income has escaped taxation. or it may deal with a case where in the opinion of the Commission no substantial evasion of taxation has taken place and when according to the Commission the circumstances are such and the materials are such that the investigation should be closed. But sub-s. (2) of s. 5 cannot possibly deal with a case where in the opinion of the Commission there has been a substantial evasion of tax and that evasion can be determined by such materials as the Commission can bring on record.

Sir Jamshedji says that what the Commission has done in effect is to assess the assessee under s. 23 (4) according to best judgment assessment, and Sir Jamshedji's contention is that unless express power was conferred upon the Commission as is conferred upon the Income Tax Officer under s. 23 (4), it is not open to the Commission to estimate the income of the assessee on a best judgment basis. Sir Jamshedji draws attention to the fact that when the Excess Profits Tax Act was enacted, certain sections of the Income Tax Act were incorporated in that Act, and Sir Jamshedji says that if the intention of the Legislature was to confer the power upon the commission which the Income Tax Officer has under s. 23 (4), we would have found a provision whereby s. 23 (4) would have

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been incorporated in the Act. The difference between the Excess Profits Tax Act and the Act we are considering is obvious. The Excess Profits Tax Act was a taxing statute. The excess profits under that Act were brought to tax and charged to taxation and therefore the charging section had to provide the machinery which was similar to the machinery employed for taxing income to income-tax. The Act in question which we are considering is not a taxing statute. It does not deal with assessment of income. It does not bring any income to tax. Its only purpose is to bring about an investigation into the income of certain persons which has escaped tax, and therefore there was no reason to incorporate in this Act s. 23 (4) or other sections of the Income-tax Act, because after the report is made by the Commission, the Central Government under s. 8 (2) after considering the report has to direct that proceedings will be taken against the person whose case was reported by the Commission and upon such direction proceedings have to be taken and completed under the appropriate law, notwithstanding the restrictions contained in s. 34 of the Income-tax Act or s. 15 of the Excess Profits Tax Act. Therefore the scheme of the Act is that the Central Government on a *prima facie* case being made out first refers a matter to the Commission, the Commission investigates and determines the income which has escaped tax and makes a report, the report is then considered by the Central Government, and if the Central Government is satisfied by the report it refers the matter to the Income-tax Department and the Excess Profits Tax Department, and on that reference being made the person concerned is assessed or re-assessed and he is then liable to pay tax which is determined by the proper authority. Therefore the Commission does not assess the tax which the assessee is liable to pay on his income, nor does it employ any assessing machinery because it is not its function to carry out any assessment, and that is the reason why we do not find the sections of the Income Tax Act incorporated in this Act as we find in the Excess Profits Tax Act.

The other contention of Sir Jamshedji is that if we were to put this construction on the Act, it would cause grave injustice to the assessee because he would be deprived of his right of appeal to the Appellate Assistant Commissioner and the Tribunal under the Income-tax Act. Sir Jamshedji says that if assessment was to be made under s. 34 and if income was to be determined in the ordinary course of assessment under the Income

Tax Act, his client would have a right to appeal and to have the findings of the Income Tax Officer decreed by a higher Tribunal. But Sir Jamshedji says that in the present case by reason of sub-s. (4) of s. 8 his client is denied the right of appeal. Sub-s. (4) of s. 8 makes the findings recorded by the Commission on the case or on the points referred to it, final. Sir Jamshedji's contention is that it was never the intention of the Legislature to make a mere estimate of the income arrived at by the Commission final. According to Sir Jamshedji, what was intended to be made final was the decision of the Commission arrived at on proper evidence or on certain materials such as suppression of books, etc., but certainly not a mere estimate arrived at without evidence and without proper materials. In our opinion, that contention of Sir Jamshedji is also fallacious, because the whole scheme of the Act again is to make the decision of the Commission, to the extent that it determines the income which has escaped tax, final, to do away with all provisions with regard to appeals which are to be found in the Income Tax Act, and to give to the assessee only the power to have a matter referred to the High Court under sub-s. (5) of s. 8 of the Act. There is another aspect of the case to which attention might be drawn. The whole of the contention advanced by Sir Jamshedji has proceeded on the basis that the Commission has arrived at a best judgment determination of the assessee's income. In other words, the Commission has exercised the powers which an Income Tax Officer might exercise under s. 23 (4) of the Income Tax Act. Sir Jamshedji obviously finds it difficult to contend that the Commission would have no power to determine the income of a person whose case was referred to it, if that determination was based on evidence and materials placed before it. The real, main and the only grievance is that the income in this case has been arrived at on a mere speculation or guess work.

Now, when we look at the scheme of the Income Tax Act and consider the provisions of ss. 23 (3) and 23 (4), the authorities make it clear that both when assessment is made under s. 23 (3) and when the assessment is made under s. 23 (4), it is competent to the Income Tax Officer to estimate the income of the assessee. Under sub-s. (3) the assessment is made when evidence is produced before the Officer. When that is the case the Officer may act in one of two ways. He may accept the evidence, he may accept the books of account, and he may base his assessment solely upon the evidence produced by the

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assessee; or the Income Tax Officer may not accept the books of account or the evidence of the assessee as genuine or reliable and he may collect other evidence besides that evidence and he may act not on the figures to be found in the books of account of the assessee, but on his own estimate of the assessee's income. In that sense the assessment of the Income Tax Officer would be a best judgment assessment, but still it would be an assessment under s. 23 (3). Under s. 23 (4) the Income Tax Officer acts when there is no evidence before him, when there is a default on the part of the assessee, and in the absence of any evidence he has got to exercise his best judgment to arrive at the assessment of the income of the assessee. But whether it is under sub-s. (3) or under sub-s. (4) that the Income Tax Officer proceeds, his estimate of the assessee's income cannot be either arbitrary or capricious. Therefore the line that divides sub-ss. (3) and (4) of s. 23 is a very thin line. It would not be true to say that it is only in the case of sub-s. (4) of s. 23 that the Income Tax Officer estimates the income by using his best judgment, and under sub-s. (3) there is no question of estimate and no question of best judgment.

Sir Nusserwanji has drawn our attention to one or two authorities which make this position clear. In *Gunda Subbayya v. Commissioner of Income Tax, Madras*,⁽¹⁾ it was pointed out by a Bench of the Madras High Court consisting of Sir Lionel Leach, Chief Justice, Madhavan Nair J. and Varadachariar J. that the only difference between an assessment under sub-s. (3) in a case where the assessee's books are found unreliable and are rejected and the assessee fails to produce other evidence, and an assessment under sub-s. (4) is that the Act contemplates a more summary method when the Income Tax Officer is acting under sub-s. (4). To the same effect is the judgment of the Rangoon High Court in *Commissioner of Income-tax, Burma, v. Messrs. Ein Shin*,⁽²⁾ and the distinction there drawn between sub-ss. (3) and (4) by Chief Justice Roberts, Mr. Justice Blagden and Mr. Justice Wright was that in the case of sub-s. (3) the Income Tax Officer has to arrive at an assessment to the best of his judgment on the evidence before him, whilst under sub-s. (4) he has to arrive at an assessment to the best of his judgment in the absence of such evidence. Therefore the judgment or the estimate of the Income Tax Officer is emphasized whether he is acting under sub-s. (3) or sub-s. (4).

⁽¹⁾ [1939] I. T. R. 21.

⁽²⁾ (1947) 15 I. T. R. 290.

Once that distinction between sub-s. (3) and (4) is realized the whole substratum of Sir Jamshedji's contention disappears, because when we look at the facts of this case the assessment made by the Commission, if we might use that expression, is really not under sub-s. (4) but sub-s. (3). This is not a case where there was any default on the part of the assessee. This was not a case where the Commission had no materials at all. On the contrary, this was a case where the Commission had materials on which it based its judgment, and the materials were, first, certain genuine books produced by the employees of the assessee, rates for which lorries could be hired during the relevant period, and the ratio between income and expenditure. It was on these materials that the Commission exercised its best judgment and arrived at an estimate of the income of the assessee. Therefore this was not a case at all where the Commission could have acted *ex parte* in default of any evidence being led by the assessee and acted under s. 23 (4). Therefore this case, if analogy were to be used, falls rather under s. 23 (3) than under s. 23 (4), and as we said before even Sir Jamshedji is not bold enough to contend seriously that the Commission has no power to determine the income of the person whose case is referred to it on proper materials and evidence placed before it.

Sir Jamshedji has attempted to urge that the estimate made by the Commission was not its own estimate but the estimate of the authorized official employed by it. We have not permitted him to urge that point because that was not the question which we asked the Commission to refer to us. He has also suggested that it is not clear what were the terms of reference made to the Commission by the Central Government when the case was referred to it. The order of reference is not before us, but there again no question can arise with regard to the order of reference made by the Central Government, because the grievance on this reference of the assessee is not that the Commission was not properly constituted or that the case was not properly referred to it, but the grievance is that the case having been properly referred to it, the Commission has acted in excess of its jurisdiction. In our opinion, therefore, as far as question (1) is concerned, the Commission had the jurisdiction to estimate the income of the assessee to ascertain the loss of revenue.

The second question of law which has been referred to us is whether the Commission erred in law in not giving effect to

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the service agreements for the year 1943 onwards. The position with regard to this question is this. The case of the assessee was that he had entered into certain agreements with three persons by the names of Mirza Muzaffar Baig, Tauzh-Uddin Khan and Abdul Baka Khan for sharing profits which he earned in the lorry business, and he relied on certain service agreements. The contention of Sir Jamshedji is that the Tribunal acted arbitrarily and capriciously in giving effect to these service agreements for the years prior to 1943 and not giving effect to these agreements subsequent to 1943. The view taken by the Commission, as is clear from its report, is that it is not satisfied as to the genuineness of these service agreements. It was not even satisfied whether these three persons were at any time in the service of the assessee at all, nor was it satisfied if they were in the service of the assessee on the terms they were employed, and the Commission has given a very good ground as to why it has not accepted these agreements as genuine. The assessee produced certain receipts showing that certain amounts had been received by these persons under these service agreements and the Commission pertinently points out that these receipts proceeded on the basis of the income disclosed by the assessee and not the genuine income as now ascertained. Therefore the Commission points out that if there was a genuine service agreement to share profits, the profits that would have been shared would have been genuine profits and not the profits disclosed for the purpose of tax. Having come to that conclusion, as a matter of concession, inasmuch as the Commission was making a rough estimate of the income of the assessee, it allowed to the assessee as a deduction such amounts as he claimed to have paid to these three persons in the accounting years 1940, 1941 and 1942. With regard to the accounts of 1943 and 1944 it pointed out that the account books were available and it directed that if these account books showed that any sums were actually paid pursuant to these service agreements then only those sums should be allowed as deductions. We fail to see how any question of law arises on this decision of the Commission. No fault can be found with the real decision of the Commission that the service agreements were not proved or were not genuine and that these three persons really did not share profits as alleged by the assessee. If any fault is to be found with the Commission's report at all, it can only be with the concession made by the Commission as an indulgence

to the assessee, and surely no question of law can arise out of a concession made by the Commission to the assessee, to which concession in law the assessee was not entitled.

The result therefore is that we must answer the first question submitted to us in the affirmative and the second question in the negative. The applicant must pay the costs.

Attorneys for applicant: *J. P. Pandit.*

Attorneys for respondent: *N. K. Petigara.*

Answer accordingly.

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APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas

KANJI KARSONDAS THAKKAR, AND OTHERS (ORIGINAL DEFENDANTS),
PETITIONERS *v.* NATHUBHAI KHIMJI, (ORIGINAL PLAINTIFF), OPPONENT*

*Civil Procedure Code (Act V of 1908), O. XXVI, r. 15—Expression
“Expenses of the Commission”—Whether includes costs of the Opponent—Bombay Pleaders Act (XVII of 1920), Sch. III, r. VI—Civil
Manual, Vol. I, ch., I, r. 53.†*

The expression “expenses of the commission” occurring in O. XXVI, r. 15, of the Civil Procedure Code, 1908, is intended to provide for the deposit of the expenses of the Commissioner and other expenses directly attributable to the issue of the commission. The expression cannot be extended to include costs of the opponent’s pleader or the expenses which the opponent himself may have to incur for travelling to the place where the Commissioner proposes to examine witnesses.

Saboora Bivi Ammal v. Julaiika Bivi Ammal,⁽¹⁾ relied upon.

Abdurahiman Settu v. Muhammad Kasam,⁽²⁾ and *Ghanshyam Das v. Kisturibala Debi,*⁽³⁾ referred to.

Nripendra Bhushan v. Raja Pramatha Bhushan,⁽⁴⁾ distinguished.

*Civil Revision Application No. 1212 of 1952.

† The rule is as follows:—

“53. The sum to be fixed by the Court for the expenses of the Commission should ordinarily provide for a fee to be paid to the Commissioner. If at any time the sum so fixed is found to be insufficient it may for special reasons be increased by the Court. When the commission is executed to the satisfaction of the Court, the full sum mentioned should be paid to the Commissioner but where the commission is not executed at all, or not fully or satisfactorily executed, or the work turns out to be less than was expected, it will be in the discretion of the Court to direct a smaller amount to be paid, or to make any other order in the matter which it thinks just and proper in the circumstances.”

⁽¹⁾ [1950] A. I. R. Mad. 144.

⁽²⁾ [1949] A. I. R. Mad. 490.

⁽³⁾ [1936] A. I. R. Pat. 33.

⁽⁴⁾ [1927] A. I. R. Cal. 90.

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