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 v.
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 SINGH.

against whom the plaintiff applicant's suit was dismissed. There is no mistake in the decree in this respect. The suit was dismissed with costs, which means costs incurred by all the defendants against whom the plaintiff's suit was dismissed. We are satisfied that the order passed by the learned District Judge in this connection is not open to challenge. The application is dismissed in that respect.

In the circumstances of this case parties shall bear their own costs of the proceedings taken before this Court and those in the court of the District Judge by the application for amendment.

MISCELLANEOUS CIVIL.

1932
 January, 15.

Before Mr. Justice Mukerji and Mr. Justice Bennett.

IN THE MATTER OF BHAGWATI PRASAD.*

Income-tax Act (XI of 1922), sections 23(4), 27, 30(1) and 66(5)—Assessment on alleged failure to comply with notice—Appeal alleging assessment under section 23(4) to be unwarranted—Right to be heard—Reference to High Court—High Court's power to re-settle the issues and decide them.

Where an assessment professing to be one under section 23(4) of the Income-tax Act is made against an assessee, and the assessee files an appeal contending *inter alia* that the Income-tax Officer was not justified in treating the case as one coming under section 23(4), the Assistant Commissioner of Income-tax should hear the assessee or his counsel and then decide whether the case really fell under section 23(4) and was therefore not open to appeal. He is not justified in rejecting the appeal upon an examination of the records in his chambers, without hearing the assessee or his counsel.

Such a case does not fall within the purview of section 27 of the Act, and an appeal is competent. Further, even if section 27 be applicable it may still be open to the assessee, if he has a good case, to file an appeal and to show that the assessment under section 23(4) was not justified.

Upon a reference to the High Court under section 66 of the Income-tax Act it is open to the High Court to re-settle the issues arising in the case and to answer them.

*Miscellaneous Case No. 58 of 1931.

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IN THE
MATTER OF
BHAGWATI
PRASAD.

Dr. K. N. Katju and Mr. A. Sanyal, for the applicant.

The Government Advocate (Mr. U. S. Bajpai), for the Crown.

MUKERJI and BENNET, JJ.—This is a reference by the learned Commissioner of Income-tax, made in pursuance of an order of this Court dated the 19th of June, 1931.

It appears that an assessment under section 23, sub-section (4), of the Indian Income-tax Act of 1922 was made against the assessee, one Babu Bhagwati Prasad of Gorakhpur. He filed an appeal before the Assistant Commissioner and one of his contentions was that the Income-tax Officer was not in the circumstances justified in treating the cases as one falling under section 23, sub-section (4).

The Assistant Income-tax Commissioner scrutinized the memorandum of appeal and the assessment order of the Income-tax Officer, but he did so behind the back of the assessee or his counsel. He came to the conclusion that the order under section 23(4) had been rightly made in the circumstances of the case. He refused to admit the appeal and directed that the appellant, the assessee, should be informed of the fact. The assessee went before the Commissioner of Income-tax, and he contended that the Commissioner should state the case before this Court. The Commissioner having declined, the assessee came to this Court and he obtained the order dated the 19th of June, 1931.

The two questions that really arose in the case were indicated in the order of this Court and were: (1) Was the assessee entitled to be heard before the Assistant Commissioner in order to show that in the circumstances of the case the Income-tax Officer was not justified in making an assessment under section 23, sub-section (4)? (2) Was the notice issued under section 22, sub-section (4), rightly issued, although an inquiry into the assessment had started? .

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The learned Commissioner in stating the case has framed the question No. 2, but in framing the question No. 1 he has missed the point that really arose for decision.

It has been held in this Court in two cases, and that opinion has been followed by the Bombay High Court, that it is open to a High Court to resettle the issues arising in the case and to answer them. The cases decided in this Court are *Shiva Prasad Gupta v. Commissioner of Income-tax* (1) and *In the matter of Kajori Mal Kalyan Mal* (2). The Bombay case is *Commissioner of Income-tax, Bombay v. National Mutual Life Association* (3).

We consider that in this case we ought to resettle the first issue and answer it. It is obvious that if the issue No. 1 be answered in the affirmative, the issue No. 2 will not require any answer, nor will the issue No. 3 as framed by the learned Commissioner.

The contention of Dr. Katju on behalf of the assessee is that the mere fact that the Income-tax Officer quoted section 23, sub-section (4), in his assessment order was not enough to preclude an appeal. To shut out an appeal there must be a genuine case under section 23, sub-section (4). The Assistant Commissioner in hearing an appeal must satisfy himself, on hearing the assessee or his counsel, and not by an *ex parte* examination of the records in his chambers, that the case fell within the purview of section 23, sub-section (4), and was, therefore, not open to appeal. The learned Government Advocate has argued that section 27 furnishes the real remedy of the assessee and that instead of appealing he should follow the procedure laid down in section 27.

We are of opinion that section 27 is applicable to the particular cases noted therein, and the present case does not fall within the purview of section 27.

(1) A.I.R., 1929 All., 819.

(2) [1930] A.L.J., 78.

(3) (1931) I.L.R., 55 Bom., 637.

Further, where section 27 is applicable it may still be open to the assessee, if he has a good case, to file an appeal and to show that the order under section 23, sub-section (4), was not justified.

Our view is supported by two Full Bench decisions of the Patna and Punjab High Courts, respectively, and they are *Kunwarji Ananda v. Commissioner of Income-tax* (1), and *Duni Chand v. Commissioner of Income-tax* (2).

Our answer to the issue No. 1, as resettled above, is that the Assistant Commissioner should have heard the assessee or his counsel and then should have decided whether the case really fell under section 23(4) of the Income-tax Act.

As no other question arises, we direct that a copy of this judgment be sent under the seal of the Court to the Commissioner of Income-tax. The Government must pay the costs of this reference to the assessee.

APPELLATE CIVIL.

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

AMIR HASAN KHAN (DEFENDANT) *v.* MUHAMMAD NAZIR HUSAIN (PLAINTIFF).*

1932
January, 18.

Transfer of Property Act (IV of 1882), sections 3 and 136—Actionable claim—Dower debt—Transfer to legal practitioner void—Muhammadan law—Widow in possession over her husband's property in lieu of dower—Transfer by the widow of the right to possession without transfer of the dower debt—Validity.

A claim to unpaid dower debt is an actionable claim as defined in section 3 of the Transfer of Property Act; and so a transfer of the dower debt in favour of a legal practitioner is void in view of the provisions of section 136 of the Transfer of Property Act.

*Second Appeal No. 1268 of 1929, from a decree of M. F. P. Herchenroder, District Judge of Cawnpore, dated the 12th of July, 1929, reversing a decree of Lakshmi Narain Tandon, Additional Subordinate Judge of Fatehpur, dated the 6th of November, 1928.

(1) (1931) I.L.R., 11 Pat., 187.

(2) (1929) I.L.R., 10 Lah., 596.