APPELLATE CIVIL.

Before Sir Henry Pratt, Kt., Officiating Chief Justice, and Mr. Justice Cunliffe.

1928

July 16.

A.K.A.C.T.V.V. CHETTYAR
v.
THE COMMISSIONER OF INCOME-TAX.*

Income-tax Act (XI of 1922), ss. 22, 23 (1), (3), (4) ; 27, 30 (1) proviso—Appeal against refusal to make fresh assessment—No appeal against assessment under s. 23 (4) after default—No appeal after fresh assessment if made according to s. 23 (4)—Fresh assessment made under s. 27 read with s. 23 (1) or (3), appealable.

S. 30 of the Income-tax Act 1922 provides for an appeal to the Assistant Commissioner against a refusal of an Income-tax Officer to make a fresh assessment under s. 27. Under the proviso to that section no appeal lies against an assessment made under s. 23 (4) of the Act after default of an assessee to make a return or to comply with the terms of notices under s. 22 ; and also, if an assessee succeeds in his efforts to obtain a fresh assessment under s. 27, no appeal lies against that fresh assessment if it is made in accordance with the provisions of s. 23 (4). An appeal does lie if the fresh assessment is made under s. 27, read with s. 23 (1) or (3).

Clark and *Venkatram* for the applicant.

A. Eggar (Government Advocate) for the Crown.

PRATT, C.J., and CUNLIFFE, J.—This is an application for a *mandamus* to compel the Commissioner of Income-tax to state a case under section 66 of the Income-tax Act. The facts are set forth at length in the application.

The A.K.A. Firm of Rangoon, which consisted of two partners the applicant A.K.A.C.T.V.V. Chettyar and A.K.A.C.T.A.L. Alagappa Chettiar, discontinued business in 1925, August, the assets were divided between the two partners, who have been since carrying on business as separate joint family firms under the styles of A.K.A.C.T.V. and A.K.C.T.A.L. respectively.

* Civil Miscellaneous Application No. 26 of 1928.

For the financial year 1925-26 notice was served on the then agent of the A.K.A. Firm on 8th April 1925 to make a return for income-tax purposes.

Applicant eventually made a return and claimed the benefit of section 25 (*3*) of the Income-tax Act as the firm had been dissolved.

Applicant objected to producing the books of the firm, and to the proposed method of assessment. Ultimately the Income-tax Officer peremptorily settled March 31st, 1926, for the production of accounts. The accounts were not produced and the Officer made an assessment *ex parte* against each member of the A.K.A. Firm.

Applicant appealed to the Assistant Commissioner who dismissed his appeal, and left him to apply for a fresh assessment under section 27. An application was made under section 27 but was refused. An appeal to Commissioner of Income-tax was unsuccessful. The Commissioner was asked but declined to make a reference to this Court, hence the present application under section 66 (*3*) for an order to state a case on specified points of law.

A preliminary objection has been taken by the Government Advocate that the application is incomptent since no appeal lies to the Assistant Commissioner from the order refusing to make a fresh assessment under section 27.

It is contended that the proviso to section 30 that no appeal shall lie in respect of an assessment made under sub-section (*4*) of section 23 or under that sub-section read with section 27 precludes such an appeal, since it must be taken that, the Officer having dismissed the application for a fresh assessment under section 27, there remains an assessment under sub-section (*4*) of section 23 read with section 27.

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The contention is clearly not maintainable. There was an application for a fresh assessment under section 27, which was refused. The assessment under section 23 (4) was not cancelled. There was not therefore an assessment under section 23 (4) read with section 27 as argued. A refusal to make an assessment is not an assessment.

Section 30 definitely provides for an appeal against a refusal of an Income-tax Officer to make a fresh assessment under section 27.

What the proviso clearly means is (1) that there shall be no appeal against an assessment made under section 23 (4) and (2) that when an assessment under section 23 (4) has been cancelled under section 27 and a fresh assessment made there shall also be no appeal: that is to say that if the assessee succeeds in his effort to obtain a fresh assessment under section 27 he shall be debarred from appealing against that fresh assessment. The assessee is not precluded by the proviso from prefering the appeal against the refusal to make a fresh assessment under section 27, which is allowed in the body of section 30.

In his order rejecting the two applications for a reference to this Court under section 66 (2) on a number of questions the Commissioner of Income-tax took the view that the only questions for decision were of pure fact: viz:—whether applicants had a reasonable opportunity of complying with the Income-tax Officer's notice and whether there was an adequate reason for non-production of accounts. There was therefore no question of law to refer.

We consider that the only question for determination was whether applicant had sufficient cause for non-compliance with Income-tax Officer's notices. He obviously had not, and we see no reason to think the findings of fact wrong. Applicant and his

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quondam partner were obviously placing every obstacle in the way of a just assessment and they have only themselves to thank, if the result of their efforts is that they have been assessed in a way and under a section, which they do not like.

We do not feel called upon to require the Commissioner to state a case upon any of the points raised before us.

The application is dismissed with costs. Advocate's fee five gold mohurs.

APPELLATE CRIMINAL.

Before Mr. Justice Baguley.

KING-EMPEROR
v.
JAN MAISTRY AND OTHERS.*

1928

July 20.

Gambling Act (Burma Act I of 1899), ss. 11 and 12—Relative punishments under the sections—Offence of a daing *much more serious than that of a mere gambler.*

The law regards the offence of a *daing* (owner, keeper or manager of a gaming-house) as far greater than the offence of a mere gambler. The maximum fines and sentences of imprisonment that can be imposed on a *daing* under s. 12 of the Burma Gambling Act, are far heavier than those for the ordinary gambler who is dealt with under s. 11 of the Act. The *daing* makes opportunites for other people to break the law of the country.

BAGULEY, J.—The Second Additional Magistrate of Yenangyaung tried nine men under sections 11 and and 12 of the Gambling Act. Some he acquitted, some he fined Rs. 10 each under section 11, and the other two he found guilty under section 12 of the Gambling Act and fined one of them Rs. 15 and the other Rs. 20.

Criminal Revision No. 372B of 1928 against the order of the Second Additional Magistrate of Yenangyaung in Criminal Regular Trial No. 10 of 1928.