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MA NWE v. MA SAI DA.

HEALD, OFFG. C.J., AND MAUNG BA, J.

only a quarter share, but, if the property was inherited during the last marriage, the step-parent is entitled to half. We therefore cannot accept the rule of division laid down in *Ma Leik's* case. As regards the *hnapazon* of the last marriage, the division made by the lower Court is correct and is in accordance with the rule of partition laid down in the Full Bench case of *Ma Nyein E* v. *Maung Maung and two* (1).

We accordingly modify the decree of the lower Court by increasing Ma Nwe's share in the inherited property of her father from one half to three-fourths. She is entitled to her costs on the value of the quarter share in this Court and on the value of the three-quarter share in the Court below.

Ma Sai Da's cross-appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Otter.

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Mar. 25.

V.E.A. CHETTYAR FIRM

v.

THE COMMISSIONER OF INCOME-TAX. *

Income-tax Act (XI of 1922), ss. 33, 66 (1)—Review order by Commissioner—Court cannot compel Commissioner to state a case on orders passed under s. 33—Specific Relief Act (I of 1877), s. 45—Powers of the Court defined under a special Act cannot be enlarged by reference to a general Act—No power to issue mandatory order.

Where the Commissioner of Income-tax passes an order on review under the provisions of s. 33 of the Income-tax Act and refuses on the application of an assessee to refer the matter to the High Court under the provisions of s. 66 (1), there is no provision in the Act enabling the High Court to require the Commissioner to do so. The High Court cannot use its discretionary powers under s. 45 of the Specific Relief Act in such a case, for the conditions for the exercise of the power of the Court to require the Commissioner to state and refer a case are expressly laid down in s. 66 (3) of the Income-tax Act. Where

* Civil Miscellaneous Application No. 96 of 1928

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the Legislature has in a special Act laid down particular conditions for the exercise of the power by the Court it cannot disregard those conditions and claim powers beyond those given in the special Act by reference to a general 742 Act.

Alcock, Ashdown & Co., Ltd. v. *Chief Revenue Authority of Bombay*, 47 Bom. 742 (P.C).—*distinguished.*

In re Sheik Abdul Kadir, 49 Mad. 725—*dissented from.*

Foucar for the applicants.

HEALD, J.—The applicants, who are the V.E.A. Chettyar firm, made a return of their income for purposes of income-tax for 1927-28 and produced their books of account before the Income-tax Officer. That officer discovered certain omissions and other suspicious features in the accounts, and after enquiry held that applicants had not complied with the requirements of section 22 (4) of the Income-tax Act. He accordingly proceeded to make an assessment under section 23 (4) of the Act, that is an assessment "to the best of his judgment", and assessed applicants on Rs. 1,50,000. No appeal lies against such an assessment, but applicants were entitled to apply for cancellation of the assessment under section 27 of the Act, and did so apply. The Income-tax Officer refused to cancel the assessment and applicants appealed to the Assistant Commissioner against the order refusing cancellation. The Assistant Commissioner set aside the assessment under section 23 (4) of the Act and directed that a fresh assessment be made in accordance with law. The Income-tax Officer then made a fresh assessment of Rs. 36,642 instead of Rs. 1,50,000. Applicants were satisfied with that assessment and took no further steps. The Commissioner however took up the case in review under section 33 of the Act and restored the assessment to Rs. 1,50,000. Applicants then applied to the

Commissioner to state the case under section 66 (1) or section 66 (2) of the Act, but the Commissioner refused to do so.

Applicants now ask us for an order under section 66 (3) of the Act or under section 45 of the Specific Relief Act requiring the Commissioner to state the case and refer it to this Court.

It is clear that the case does not fall within the purview of section 66 (2) because the order on which the case arises is not an order under section 31 or 32 of the Act, but is the order of the Commissioner made under section 33 of the Act. There is therefore no question of our making an order under section 66 (3) of the Act, and the preliminary question which arises is whether we have power to make an order under section 45 of the Specific Relief Act.

For the application of that section it is necessary that the doing of the act ordered should be under any law for the time being in force, clearly incumbent on the person ordered to do the act, and it is therefore necessary to consider whether the stating of a case in circumstances such as those of the present case is clearly incumbent on the Commissioner of Income-tax.

Applicants rely on the judgment of their Lordships of the Privy Council in *Alcock's* case (1), and on a decision of a Full Bench of the High Court of Madras in *Abdul Kadir's* case (2).

In the Privy Council case the question arose under the provision of section 51 of the Income-tax Act of 1918, which provided that if in the course of any assessment under the Act or any proceeding connected therewith, other than a proceeding under Chapter VII, a question has arisen with

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reference to the interpretation of any of the provisions of the Act or of any rule thereunder the Chief Revenue authority "may", either on its own motion or on reference from any Revenue officer subordinate to it, draw up a statement of the case and refer it with its own opinion thereon to the High Court, and "shall so refer" any such question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary. Their Lordships pointed out that under the latter part of that section if the assessee applies for a case the Authority must state it, unless he can say that it is frivolous or unnecessary, and that it will be a misfeasance and a breach of the statutory duty if he does not do it. As for the earlier part they said that although the word "may" does not mean "shall", nevertheless there may be circumstances which couple with the power a duty to exercise it, and they held that supposing there was a serious point of law to be considered there did lie a duty upon the Chief Revenue authority to state a case for the opinion of the Court and that if he did not appreciate that there was such a serious point it is in the power of the Court to control him and to order him to state a case. It is to be noted however that there was in section 51 no provision similar to that of the present section 66 (3) which gives the High Court express power to require the Commissioner of Income-tax to state a case and refer it and the intention of the Legislature in amending the Act was doubtless to state expressly the conditions for the exercise of the power of the Court to require the Commissioner to state and refer a case.

The Madras case was decided under the present Act and was similar to the present case in that an order under section 33 of the Act had been made by the

Commissioner. In that case the learned Judges said that as to orders in review passed by the Commissioner under section 33 there is nothing to operate upon except section 66 (1) and the assessee has no remedy unless we hold that the Court has power to order the Commissioner to state a case embodying any point of law that may arise in the course of proceedings under section 33. They went on to say that unless the Court had such power the result would be that the Commissioner by calling up the records under section 33 would be in a position to burke any further enquiry whatever, that they did not think that that could have been intended, and that accordingly they held that the principle of *Alcock's* case must be applied to orders under section 33.

If that decision is correct, it settles the preliminary question which arises in the present case, but with all respect I suggest that it is not correct. Where the Legislature has in a special Act laid down particular conditions for the exercise of a power by the Court, I do not think that we are justified in disregarding those conditions and holding by reference to a general Act that we have powers beyond those given in the special Act. I entirely agree that the Act is defective and needs amendment, but I do not think that for that reason we are justified in going beyond its express terms and holding that we have powers which the Act itself does not confer.

I would therefore hold that in the circumstances of the present case we have no power under the Income-tax Act to require the Commissioner to state and refer the case, and that we are not entitled to have recourse to section 45 of the Specific Relief Act for that purpose.

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I would accordingly dismiss the application, but in the circumstances I would make no order for costs.

OTTER, J.—The short history of this case is that on the 24th June 1927 the applicant firm having been served with a notice under section 22 (2) of the Income-tax Act of 1922 returned an income of Rs. 16,826-8-0 from its business for the year 1927-28. On 30th June 1927 notice under sections 22 (4) and 23(2) of the Act was served on the firm, and in response the agent appeared and produced certain account books of the firm. Upon examination, the books appeared to disclose large payments to two Chettyar firms. Upon enquiry as to the names and addresses of the persons to whom these payments were made, and although adjournments were granted to enable the information to be obtained, the Income-tax Officer was informed by the agent that he could not furnish the names and addresses required. Furthermore the Income-tax Officer had received information that two advances had been made by the firm, *viz.*, Rs. 5,000 on a mortgage deed and another of Rs. 3,000 upon a pro-note. No entry in the books regarding either of these transactions appears in the books produced. For these reasons the Income-tax Officer came to the conclusion that the applicant firm were keeping two sets of account books, and that therefore they had not complied with the Notice dated 30th June 1927 and he proceeded to assess the applicant firm under section 23(4) of the Act at Rs. 1,50,000. On an application under section 27 of the Act the Income-tax Officer refused to cancel his assessment, and on appeal to the Assistant Commissioner the latter by an order of 10th March 1927 cancelled the assessment and ordered a fresh

assessment to be made. Thereupon the Income-tax Officer reassessed the applicant firm at Rs. 36,642.

On the 12th June 1928 the Commissioner of Income-tax, Burma, called upon the applicant firm under section 33 of the Act to show cause why the order of 10th March 1927 should not be set aside and the original assessment restored. By an order dated 7th July 1928 the Commissioner of Income-tax (after hearing the applicant firm) set aside the order of 10th March 1927 and restored the original assessment of Rs. 1,50,000.

The applicant firm applied to the Commissioner of Income-tax to state a case for the opinion of this Court under section 66 (2) or section 66 (1) of the Act. This the Commissioner refused to do, and this Court is now asked to direct the Commissioner under section 66 (3) of the Act, or under section 45 of the Specific Relief Act [read with section 66 (1) of the Income-tax Act] to state a case for the consideration of this Court.

The first question arising is whether, assuming a question of law arises, this Court has power to make the order asked for. It is now admitted that the application cannot be made under section 66 (2) of the Act, for this provision applies only to orders passed under sections 31 and 32 of the Act. It is said however that we can act under section 45 of the Specific Relief Act read with section 66 (1) of the Income-tax Act. It must be borne in mind that section 66 of the present Income-tax Act takes the place of section 51 of the Act of 1918, the latter section having been repealed by the present Act. Section 51 of the old Act was a general section which empowered the Chief Revenue Authority "in the course of any assessment . . . . . or any proceedings" . . . . . (other than a proceeding under Chapter 7

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of that Act) "to state a case upon a question with reference to the interpretation of any of the provisions of the Act . . . . . and shall so refer any such question on the application of an assessee unless it is satisfied that it is frivolous or vexatious."

Section 66 of the present Act is different. By sub-section (1) it is provided that if in the course of *any assessment under the Act* . . . . . a question of law arises, the Commissioner may either on his own motion or on reference from an Income-tax authority draw up a statement of the case to refer it to the High Court.

Sub-section 2 provides that "within one month . . . . . the assessee . . . . . may . . . . . require the Commissioner to refer . . . . . any question of law arising out of such order . . . . . to refer it . . . . . to the High Court." Sub-section 3 gives an assessee the right upon refusal by the Commissioner under sub-section 2 to apply to the High Court, and this Court may require the Commissioner to state a case. Thus so far as section 66 as it stands alone is concerned an assessee can only get a case stated where an order was passed under section 31 or section 32 of the Act.

It is said however that by virtue of section 45 of the Specific Relief Act read with sub-section 1 of section 66 of of the Income-tax Act, we have power to order the Commissioner to state a case in respect of an order under section 33 of the Act and a number of cases were cited before us.

Alcock, Ashdown & Co., Ltd. v. *Chief Revenue Authority of Bombay* (1), was a case decided by the Privy Council under the old section 51 ; and upon the wording of that section it was held to be the duty of the Revenue Authority to state a case where a serious question of law

(1) (1923) 47 Bom. 742.

arises, the reason being that though the sub-section was not mandatory upon the Revenue Authority, there may be circumstances which would couple with the power given by the Statute a duty to exercise it.

Trikamji Diwan Das v. *The Commissioner of Income-tax, Bihar and Orissa* (1) arose under the present Act. A Bench of the Patna High Court had directed the Commissioner to state a case under section 66 (1) of the Act *on the application of an assessee.* The matter came before the Chief Justice and another Judge of that Court, and the Chief Justice in his judgment expressed grave doubt whether the Commissioner could have been so directed and pointed out that in the Bombay case of *Alcock, Ashdown & Co., Ltd.* (quoted above) it was necessary to invoke section 45 of the Specific Relief Act. But as the matter was before the Court it was dealt with and the assessee's application was dismissed upon the facts. I would observe that neither of these cases is an authority for the proposition argued before us. The first was decided under the old section 51, and the remark by the Chief Justice in the second, was obiter. *In re Sheik Abdul Kadir Marakayar & Co.* (2) was also cited. There (in a case arising under section 33) and relying on *Alcock, Ashdown & Co., Ltd.*, a Full Bench of the Madras High Court held that it could not have been intended by the legislature to allow a Commissioner who takes action under section 33 to escape any further enquiry. It was not argued, so far as the report discloses, that as the wording of section 66 (1) makes no mention of an assessee the *Alcock, Ashdown* case should be distinguished. An obiter dictum of the Calcutta High Court was relied on to the effect that in such a case, and upon a properly constituted application, under section 45 of

(1) (1925) 4 Pat. 224. (2) (1925) 49 Mad. 725.

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the Specific Relief Act, the High Court might possibly pass an order such as is asked for in the present case; see *Kumar Sarat Kumar Roy* v. *The Commissioner of Income-tax, Bengal* (1). Two other cases were cited where applications under section 66 (1) of the Act were refused. In neither of these was section 45 of the Specific Relief Act relied on; see *Sin Seng Hin and one* v. *Commissioner of Income-tax, Burma* (2) and *Ratanchand Khimchand Motishaw* v. *The Commissioner of Income-tax, Bombay* (3). In considering whether section 45 of the Specific Relief Act can assist the applicant it is necessary to consider the provisions of that section. Sub-section (*b*) of that section is as follows :—

"that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character;"

Under section 51 of the old Act (as the Privy Council held) it was incumbent upon the Revenue Authority *in a proper case* to state a case for the opinion of the High Court upon *the application of an assessee.* But, as the late Chief Justice of this Court said in *Sin Seng Hin's* case, "there is no provision permitting an assessee to move the High Court in respect of an order under section 33 of the present Act."

It is perfectly true that the case of *Sheik Abdul Kadir Marakayar & Co.* is in favour of applicant's contention, and moreover that, as that Court thought, cases of apparent hardship might arise.

The learned Judges of the Madras High Court seem to have been under the impression that somewhere or other there is now a provision giving an

(1) 2 Income-tax Cases 279. (2) 2 Income-tax Cases 39.
(3) 2 Income-tax Cases 225.

assessee the right to ask for a case other than under section 66 (2) of the Act. The learned Chief Justice (at page 727) says, "that Court is asked to draw the inference that the power of the High Court was meant to be confined to cases under those sections (*i.e.* sections 31—32), and was by implication taken away in the case of orders under section 33". He does not go on to say however by virtue of what law, the right of an assessee to get such a case stated, exists.

This is not one of those cases where a statute has enacted something for a particular case only, that was already and more widely the law. In such cases it would be useless to argue that an intention to alter the general law is to be inferred from the partial or limited enactment. Here section 51 of the old Act which contained the whole law on the subject was repealed; and *after* the decision in *Alcock, Ashdown & Co., Ltd.*, by the Judicial Committee the legislature enacts in plain terms what the law is. There is now no other law. The position would be different if an assessee were mentioned in sub-section 1 of section 66. Then it might be said that "some law would be in force" within the meaning of section 45 (*b*) of the Specific Relief Act and the applicant might pray in aid that enactment to obtain a case.

For these reasons I think that in the present case this Court has no jurisdiction to entertain the application. It is unnecessary therefore to consider the merits of the application which must be dismissed, but without costs.