

FULL BENCH.

*Before Sir Shadi Lal, Chief Justice, Justice Sir Alan
Broadway, Mr. Justice Fforde, Mr. Justice Zafar Ali
and Mr. Justice Jai Lal.*

DUNI CHAND—Petitioner

versus

THE COMMISSIONER OF INCOME TAX

Respondent.

Civil Reference No. 21 of 1928.

*Indian Income Tax Act, XI of 1922, section 30 (1)
proviso—Assessment under section 23 (4)—whether open to
appeal—on ground that assessment was ultra vires—Right
of appeal—not inherent—but must be conferred by Statute.*

The question for decision by the Full Bench was, whether a person, who has been assessed by the Income Tax officer under section 23 (4) of the Indian Income Tax Act, XI of 1922, is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act or whether the proviso to section 30 (1) operates as a bar to the appeal.

Held, that where the Assistant Commissioner is satisfied that the assessment under section 23 (4) was made, not ostensibly but genuinely, under that sub-section, he must stay his hands and decline to adjudicate upon the merits of the appeal on the short ground that the proviso to section 30 (1) bars an appeal in such a case; and it is immaterial whether the order of the Income Tax officer is impeached on the ground that the assessee was not amenable to the provisions of the statute or on any other ground mentioned in the sub-section.

The proviso to section 30 (1) shuts out an appeal in every case in which the assessment has been made under section 23 (4) and makes no distinction between an assessment which is *ultra vires* and one which, though *intra vires*, is wrong on the merits.

Held also, that the doctrine is well established that there is no inherent right of appeal and that a right of

1929

May 31.

appeal must be given by a statute or by some authority equivalent to a statute.

Case referred under section 66 (3) of the Indian Income Tax Act, by A. Raisman, Esquire, Commissioner of Income Tax, Punjab and N.-W. F. Province, for the opinion of the High Court.

MEHR CHAND MAHAJAN, for Petitioner.

JAGAN NATH AGGARWAL, for Respondent.

The Order of Mr. Justice Zafar Ali and Mr. Justice Jai Lal, dated the 20th March 1929, referring the case to a Full Bench:—

This reference under section 66 (3) of the Income Tax Act (XI of 1922) has been made by the learned Commissioner of Income Tax in compliance with an order of a Division Bench of this Court, dated the 6th February, 1928 (1).

The assessee on whose application the said order was passed is *Bhagat Duni Chand* whose ancestral home is at Haripur, a town in the North-West Frontier Province, and he owns there some house property also. He, however, asserted that he had migrated from Haripur to Srinagar in Kashmir and had long been residing and carrying on business there and had thus ceased to be a resident in British India. The Income Tax Officer of the Hazara Circle, which comprises Haripur, did not accept this plea and he served on *Bhagat Duni Chand* a notice under section 22 (4) requiring him to produce his accounts, etc., relating to his business in Srinagar. As *Bhagat Duni Chand* omitted to do so, the Income Tax Officer made an assessment under section 23 (4) to the best of his judgment. *Bhagat Duni Chand* then appealed to the Assistant Commissioner to urge that the Income Tax Act was not applicable to him because he was not

1929

DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.

1929
DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.

a resident of British India. The Assistant Commissioner held that the appeal was incompetent, inasmuch as the assessment had been made under section 23 (4) of the Act.

Bhagat Duni Chand contends that he is entitled to an adjudication by the Assistant Commissioner on his plea that he is not a resident in British India and is therefore not liable to be assessed in British India.

The question which the Commissioner was directed to refer was: "Whether *Bhagat Duni Chand* was or was not a resident of British India, or does the proviso to section 30 bar an appeal on the question of liability to assessment when action had been ostensibly taken under section 23 (4)."

The answer to this question depends entirely on the interpretation of clause (1) of section 30 with the proviso attached thereto. This clause (1) gives right of appeal to an assessee who—

- (1) objects to the amount or rate at which he is assessed under section 23 or 27, or
- (2) denies his liability to be assessed under the Act, or
- (3) objects to the refusal of an Income Tax Officer to make a fresh assessment under section 27, or
- (4) objects to any order against him under sub-section (2) of section 25 or section 28, made by an Income Tax Officer.

The proviso denies the right of appeal to a person who has been assessed under sub-section (4) of section 23 or under that sub-section read with section 27.

It is contended on behalf of the assessee that he is "outside the Act," in other words that he is not amenable to it. On the other hand it is urged on behalf of the Income Tax Commissioner that the expression "denies his liability to be assessed under the Act" is wide enough to cover the case of a person like the present assessee and, therefore, that such a person is not entitled to appeal except as laid down in section 30. It is argued that the right to appeal does not exist in the nature of things but is always a creature of legislation.

The question, in our opinion, is eminently one for a reference to a Full Bench owing to its importance and the possibility of the correctness of either view. We therefore direct that the case be placed before the learned Chief Justice to constitute a Full Bench for the hearing of this reference.

JUDGMENT OF THE FULL BENCH.

SIR SHADI LAL C.J.—The question of law, which SHADI LAL C.J. we have to determine, may be formulated in the following terms:—

Whether a person, who has been assessed by the Income Tax Officer under section 23 (4) of the Indian Income Tax Act (XI of 1922), is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act; or whether the proviso to section 30 (1) operates as a bar to his appeal.

It is common ground that in the proceedings before the Income Tax Officer the assessee put forward the claim that he had migrated from Haripur in British India to Srinagar in the Jammu and Kashmir State, and had been residing and carrying on business at the latter place. He accordingly urged that he had

1929

DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.

1929

DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.
SHADI LAL C.J.

ceased to be a resident in British India, and that, as no income, profits or gains had accrued or arisen to him, or been received by him, in British India, he did not come within the ambit of the Act. The Income Tax Officer did not accept this plea, and served on him a notice under section 22 (4) requiring him to produce certain accounts. The assessee did not comply with the notice, and the Income Tax Officer thereupon made an assessment under section 23 (4) to the best of his judgment. The question arises whether the assessee can appeal to the Assistant Commissioner against the assessment, or whether his right of appeal is barred under the proviso to section 30 (1).

The doctrine is well-established that there is no inherent right of appeal, and that a right of appeal must be given by a statute or by some authority equivalent to a statute. Now, section 30 (1), which deals with the right of appeal in cases under the Indian Income Tax Act, provides that "any assessee objecting to the amount or rate at which he is assessed under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income Tax Officer to make a fresh assessment under section 27, or to any order against him under sub-section (2) of section 25 or section 28, made by an Income Tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order." The right conferred by this sub-section is, however, subject to the proviso 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."

The reason for enacting this proviso is obvious. The law punishes a person who does not comply with a requisition of the Income Tax Officer by depriving

him of his right of appeal. But the appellate authority must, before denying him the right of appeal, be satisfied that he had really incurred the penalty prescribed by the law, and that the Income Tax Officer had acted legally in assessing him under section 23 (4) of the Act. The mere fact that the assessment purports to have been made under that sub-section does not shut out the appeal: it must be shown that the circumstances of the case bring it within the scope of that sub-section. When the Assistant Commissioner is satisfied that the assessment was made, not ostensibly but genuinely, under that sub-section, he must stay his hands and decline to adjudicate upon the merits of the appeal on the short ground that the proviso to section 30 (1) bars an appeal in such a case. And it is immaterial whether the order of the Income Tax Officer is impeached on the ground that the assessee was not amenable to the provisions of the statute, or on any other ground mentioned in the sub-section. The language of the sub-section makes it clear that the denial of his liability to be assessed under the Act can be put forward by the assessee as a ground of attack against the assessment; but that ground, just as any other ground specified in the sub-section, is open only to a person who has not incurred the penalty prescribed by the proviso.*

It is contended by the learned counsel for the assessee that, though his client is debarred by the proviso from challenging the assessment on the merits, he is entitled to show that he was outside the statute and that the Income Tax Officer had absolutely no jurisdiction to proceed against him. There is, however, no warrant for making this distinction. The proviso shuts out an appeal in every case in which the assessment has been made under section 23 (4), and

1929

—
DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.
—
SHADI LAL C.J

1929
DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.
SHADI LAL C.J.

makes no distinction between an assessment, which is *ultra vires*, and one which, though *intra vires*, is wrong on the merits. If once the appeal is barred, the assessee cannot avail himself of any ground of appeal whatever may be the category to which it belongs.

It is possible, as urged by Mr. Mehr Chand Mahajan, that this view of the law may result in hardship in some cases. Suppose a foreigner comes to India as a visitor, and, when called upon by an Income Tax Officer to make a return of his income, he fails to comply with the requisition in the belief that, as he was not carrying on any business in British India, he was not liable to be assessed to income tax under the Indian Law. If the Income Tax Officer assesses him to income tax under section 23 (4), the assessee has no right of appeal against the assessment, though it is palpably wrong. It is true that section 27 provides him with a remedy to reopen such an assessment, but the remedy is a precarious one and cannot be invoked unless he proves to the satisfaction of the Income Tax Officer that he was prevented by sufficient cause from making the return. If the assessment is *ultra vires*, the aggrieved person may perhaps bring a suit for a declaration that it is illegal, *vide, Haji Rehemtulla-Haji Tarmahomed v. The Secretary of State for India* (1).

Be that as it may, it is for the Legislature to provide a remedy for cases of hardship, if any. The duty of the Courts is to enforce the law as they find it and they cannot allow their interpretation of the law to be influenced by any extraneous circumstance.

I have bestowed upon the matter my careful consideration and reached the conclusion that the assessee has no right of appeal against the assessment made under section 23 (4) by the Income Tax Officer, and that he is prevented by the proviso to section 30 (1) from showing that he was not liable to be assessed under the Indian Income Tax Act.

1929

DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.
SHADI LAL C.J.

SIR ALAN BROADWAY J.—One *Bhagat Duni Chand* was a resident of Haripur in the district of Hazara in the North-West Frontier Province. He possesses there certain ancestral property. He was called upon by the Income Tax Officer of the Hazara Circle to furnish a return for purpose of income tax. He failed to comply with this demand, asserting that he had migrated from Haripur to Srinagar in Kashmir, many years ago, that he was carrying on his business in the Kashmir State alone and was no longer a resident of British India. The Income Tax Officer held that Duni Chand was still a resident in British India and had a business at Haripur from which he derived an income. A notice under section 22 (4) of the Income Tax Act was served on him calling on him to produce accounts. As he failed to comply with this notice, the Income Tax Officer took action under section 23 (4) of the Income Tax Act and assessed him on an income of Rs. 17,669 at the rate of 9 pies in the rupee.

BROADWAY J.

Against this assessment, *Bhagat Duni Chand* preferred an appeal to the Assistant Commissioner, who dismissed the appeal holding that it fell within the purview of the proviso to section 30 of the Income Tax Act and was therefore not competent.

Bhagat Duni Chand thereupon moved the Commissioner of Income Tax to make a reference to the

1929
—
DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.
—
BROADWAY J.

High Court. This was refused on the ground that no point of law was involved. Thereupon *Bhagat Duni Chand* came up to this Court under section 66 (3) of the Income Tax Act and a direction was issued by a Division Bench on the 6th of February, 1928, directing the Commissioner to refer the following question:—

“ Was the Assistant Commissioner bound to decide whether *Bhagat Duni Chand* was or was not a resident of British India or does the proviso to section 30 bar an appeal on the question of liability to assessment when action has been ostensibly taken under section 23 (4).”

In compliance with this direction, the Commissioner of Income Tax made the necessary reference, at the same time recording his opinion against the view advanced by *Bhagat Duni Chand*. In his opinion the Assistant Commissioner was not bound to decide whether *Bhagat Duni Chand* was or was not a resident of British India, and further he considered that the proviso to section 30 barred an appeal on the question of liability to assessment when an assessment has been made under section 23 (4).

In his reference the Income Tax Commissioner also pointed out that when an assessment was made under section 23 (4), the assessee has a right to make an application to the Income Tax Officer under section 27 for cancellation of the assessment, and a refusal on the part of the Income Tax Officer gives the assessee a right of appeal to the Assistant Commissioner. In addition to this the Commissioner of Income Tax has certain powers of revision under section 33. He further pointed out that if the assessee does not resort to section 27, the Assistant Commissioner has no

authority to entertain an appeal under section 30. All that the Assistant Commissioner is empowered to do is to consider whether the Income Tax Officer applied his mind to the relevant questions before making the assessment under section 23 (4). If he finds that the Income Tax Officer did so apply his mind, he has no power to entertain the appeal. As I understand the position when the Income Tax Officer acts under section 23 (4) and the assessee prefers an appeal to the Assistant Commissioner, all that the Assistant Commissioner has to do is to satisfy himself that the Income Tax Officer has carried out the necessary procedure which entitled him to take action under section 23 (4) and that he has not merely labelled his action as falling within the purview of that section. If the Assistant Commissioner finds that action has really and properly been taken under section 23 (4), he cannot entertain the appeal.

On behalf of the assessee Mr. Mehr Chand Mahajan has urged that the proviso to section 30 does not bar the Assistant Commissioner from examining the decision arrived at by the Income Tax Officer as to the liability of the assessee to assessment. Section 30 of the Income Tax Act runs as follows :—

“ Any assessee objecting to the amount or rate at which he is assessed under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income Tax Officer to make a fresh assessment under section 27, or to any order against him under sub-section (2) of section 25 or section 28, made by an Income Tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order;” and it is clear that the assessee has a right to appeal against the assessment made or against a refusal to

1929

DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.
BROADWAY J.

1929

DUNI CHAND
v.
COMMISSIONER
OF
INCOME-TAX.
BROADWAY J.

make a fresh assessment or against any order made under sub-section (2), section 25 or section 28. The appeal is against the assessment and it has been specifically provided that where an assessment has been made under sub-section 4 of section 23, no appeal shall lie. In my judgment the interpretation of this section and the proviso has been correctly stated by the Commissioner in his reference. Section 30 gives an appeal against an assessment or a refusal or an order and provided the Income Tax Officer has carried out the provisions of section 22 (4) and 23 (1) and then takes action under the latter section, the right to appeal against such an assessment has been taken away by the Statute. It seems to me clear that the object of the Legislature was to compel the assessee to lay all the necessary material before the Income Tax Officers in order to enable them to arrive at a correct decision. If an assessee fails to comply with the lawful orders of the Income Tax Officer, such an assessee is penalized by having his right to appeal taken away. The proviso distinctly lays down that no appeal shall lie in respect of an assessment made under sub-section 4 of section 23 and this to my mind clearly means that every matter that has to be decided before the assessment is arrived at is rendered unappealable.

I would answer the question referred accordingly.

FFORDE J.

FFORDE J.—I concur.

ZAFAR ALI J.

ZAFAR ALI J.—I concur.

JAI LAL J.

JAI LAL J.—I concur.

N. F. E.