FULL BENCH.

Before Broadway, Dalip Singh and Tapp JJ.

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Jan. 2.

FEROZE SHAH—Petitioner

versus

THE COMMISSIONER OF INCOME-TAX—Respondent.

Civil Miscellaneous No. 163 of 1930.

Privy Council Appeal—against order refusing to issue a mandamus *under section 66 (3) of the Indian Income-tax Act, XI of 1922—whether competent—Letters Patent, clause 29—Judgment.*

The petitioner (Assessee) moved the High Court under section 66 (3) of the Indian Income Tax Act, 1922, for an order directing the Income-tax Commissioner to state a case on certain questions in connection with his assessment. The High Court, having refused to issue the mandamus, holding that no question of law was involved, the petitioner applied to the High Court for a certificate for leave to appeal to the Privy Council and claimed that he had a right to the certificate having regard to the provisions of clause 29 of the Letters Patent, inasmuch as the sum involved in the case exceeded Rs. 10,000.

Held, that the order refusing to issue the mandamus was a final judgment, passed in the exercise of the High Court's original jurisdiction, and that the petitioner was therefore entitled to appeal to the Privy Council as of right.

Tata Iron and Steel Co. v. *Chief Revenue Authority, Bombay* (1), and *Tohar Mal-Uttam Chand* v. *Commissioner of Income Tax* (2), referred to.

Application under clause 29 of the Letters Patent, read with sections 109, 110, and Order 45, rules 2 and 3, Civil Procedure Code, praying that a certificate be granted for appeal to His Majesty in Council.

(1) (1923) I. L. R. 47 Bom. 724, 732 (P. C.).
(2) (1927) 2 Reports of Income-Tax Cases 301.

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GOBIND DAS, for Petitioner.

JAGAN NATH AGGARWAL and AMAR NATH CHONA, for Respondent.

The judgments of Broadway and Tapp JJ., dated the 6th May 1930, referring the case to a Full Bench :—

BROADWAY J.

BROADWAY J.—The petitioner, *K. S. Mian* Feroze Shah, *Kaka Khel*, applied to this Court under section 66 (3) of the Income-tax Act, 1922, for an order directing the Income-tax Commissioner, N.-W. F. P., to state a case on certain questions in connection with his assessment for the year 1926-27.

This Court held that no questions of law were involved and dismissed the application.

The petitioner has now moved this Court under clause 29 of the Letters Patent asking for the grant of a certificate for leave to appeal to His Majesty in Council.

Admittedly the provision of section 66-A of the Income-tax Act, 1922, do not apply and Mr. Petman for the petitioner has rested his case solely on the Letters Patent and has urged that under clause 29 leave to appeal should be granted for the reasons that :—

(1) the sum at issue is more than Rs. 10,000.

(2) it should be declared that the case is a fit one for appeal to the Privy Council.

As to the latter contention I may say at once that I am not prepared to certify the case as a fit one for appeal.

As to the first contention the relevant portions of clause 29 are as follows :—

" And we do further ordain that any person * * may appeal to us * * in our * * Privy Council * *

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and from any final judgment, decree or order made in the exercise of original jurisdiction by * * any Division Court from which an appeal does not lie to the * * High Court * * provided * * that the sum or matter at issue is of the amount or value of not less than 10,000 rupees * *.

It has not been disputed that the sum involved in this matter exceeds Rs. 10,000 in value. It is also clear that the order refusing the application was made in the exercise of the Court's original jurisdiction.

It is true, as urged by Mr. Jagan Nath for the respondent, that this Court has no original side, but as was held by their Lordships of the Judicial Committee in *Tata Iron and Steel Co., Ltd.* v. *Chief Revenue Authority of Bombay* (1), "the words original jurisdiction' are only used in contradistinction to the words 'made in appeal' mentioned earlier in the clause."

Mr. Jagan Nath then cited *Bulaqi Shah and Son* v. *Collector of Lahore* (2), and *Delhi Cloth and General Mills Co., Ltd.* v. *Income-tax Commissioner, Delhi, etc.* (3), and contended that as a decision on a case stated was not a "final judgment" (as was held in Bulaqi Shah's case) a refusal to grant a mandamus could not be held to be one, and that therefore clause 29 of the Letters Patent could not be invoked.

The question is not free from difficulty and in *Tohar Mal-Uttam Chand* v. *Commissioner of Income-tax* (4), and *Siva Pratab Battadu* v. *Commissioner of Income-tax, Madras* (5), it was held that an appeal

(1) (1923) I. L. R. 47 Bom. 724 (P. C.).
(2) (1925) I. L. R. 6 Lah. 30.
(3) (1928) I. L. R. 9 Lah. 284 (P. C.).
(4) (1927) 2 Reports of Income-Tax Cases 301.
(5) (1925) 2 Reports of Income-Tax Cases 40.

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lies from an order of a Single Judge of the High Court refusing to ask the Commissioner to state a case apparently on the ground that such an order of refusal was a judgment.

These cases, however, did not touch the question now before us, but dealt with another clause of the Letters Patent.

After consideration it seems to me that none of the cases cited at the bar afford any real assistance. I am inclined to the view that the order of refusal is a final one and whether it be regarded as a "final judgment" or a "final order" falls within the purview of clause 29.

The question, however, is a difficult one and this view creates a somewhat anomalous position. I would, therefore, refer to a Full Bench the following question:—

In a case where the subject-matter involved is Rs. 10,000 or more in value does the refusal to issue a mandamus give the applicant an appeal to the Judicial Committee as of right.

TAPP J.

TAPP J.—I concur.

JUDGMENT OF THE FULL BENCH.

BROADWAY J.

BROADWAY J.—The question referred to this Full Bench is "in a case where the subject matter involved is Rs. 10,000 or more in value, does the refusal to issue a mandamus give the applicant an appeal to the Judicial Committee as of right?" The circumstances under which this question was referred are detailed in the order of reference dated the 6th of May 1930.* Briefly, one *Khan Sahib Mian* Feroze Shah, *Kaka Khel*, moved this Court under section 66 (3) of the Income-tax Act, 1922, for an order directing the

*Printed above.

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Income-tax Commissioner of the North-West Frontier Province to state a case on certain questions in connection with his assessment for the year 1927-28, which assessment had been based on his income for the year 1926-27. It was held that, no question of law being involved, the mandamus could not issue. Against this order refusing to direct the Income-tax Commissioner to state a case the petitioner desired to prefer an appeal to His Majesty in Council.

It was claimed that having regard to the provisions of clause 29 of the Letters Patent of this Court the petitioner had a right to the certificate prayed for inasmuch as the sum involved exceeded Rs. 10,000. Mr. Jagan Nath, on behalf of the Income-tax authorities, urged that the order refusing to grant the mandamus was not a judgment passed on the original side of this Court, and further that it was not necessarily final. It has been held by a Division Bench of this Court in *Tohar Mal-Uttam Chand* v. *Commissioner of Income-tax, Punjab, and North-West Frontier Province* (1), that an order of a Single Judge of the High Court dismissing an application made under section 66 (3) of the Income-tax Act on the ground that there was no question of law is a final judgment and is appealable under clause 10 of the Letters Patent. It is true that for the purpose of that case clause 10 of the Letters Patent alone was considered and that it was not necessary to hold that the judgment was a final one. It was, however, clearly held that an order refusing a mandamus was a judgment and in this view I concur. That the judgment refusing a mandamus was final is also to my mind perfectly clear. The only question for decision on an application under section

(1) (1927) 2 Reports of Income-Tax Cases 301.

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66 (3) of the Income-tax Act is whether a mandamus should or should not issue. A decision to the effect that it should not issue is, therefore, a final one so far as this Court is concerned. The refusal must, therefore, in my opinion, be regarded as a final judgment. As pointed out in my order of reference the refusal of the application was made in the exercise of this Court's original jurisdiction. I would merely refer to *Tata Iron and Steel Company, Limited*, v. *Chief Revenue Authority Bombay* (1), and to the remarks already cited by me.

BROADWAY J.

I would, therefore, hold that an order refusing to issue a mandamus must be passed by this Court on its original side and amounts to a final judgment, and that, therefore, the question referred should be answered in the affirmative.

DALIP SINGH J.—I agree.

DALIP SINGH J.

TAPP J.—I agree.

TAPP J.

A. N. C.

Reference answered in the affirmative.

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(1) (1923) I L. R. 47 Bom. 724, 732 (P. C.).