

MISCELLANEOUS CIVIL.

Before Addison and Sale JJ.

NANNEH MAL-JANKI DAS (ASSESSEE)

Petitioner

versus

COMMISSIONER OF INCOME-TAX—

Respondent.

Civil Miscellaneous No. 567 of 1932.

Indian Income-tax Act, XI of 1922, Sections 23 (4), 27 — questions of legality of assessment, and of sufficiency of cause for re-opening assessment — whether questions of law under Section 66.

Held, that the questions (a) whether the Income-tax authorities acted rightly in making an assessment under Section 23 (4) of the Indian Income-tax Act, where the Income-tax Officer did not act *mala fide* or arbitrarily, and (b) whether there was sufficient cause for the re-opening of the assessment under Section 27, are questions of fact and, therefore, a *mandamus* could not be issued to the Commissioner of Income-tax, directing him to refer these questions to the High Court.

Abdul Bari Chowdhry v. Commissioner of Income-tax, Burma (1), *Chettyar S. P. K. A. A. M. Firm v. Commissioner of Income-tax* (2), and *Amrit Waman Dalal v. Commissioner of Income-tax, C. P.* (3), followed.

Chettyar P. K. N. P. R. Firm v. Commissioner of Income-tax, Burma (4), not followed.

Petition under Section 66 (3) of the Indian Income-tax Act, praying that a mandamus be issued to the Commissioner of Income-tax directing him to state the case and to refer certain points to the High Court.

(1) (1931) I.L.R. 9 Rang. 281 (F.B.). (3) (1934) 6 Income-tax Cases 301.
(2) (1929) I.L.R. 7 Rang. 669. (4) (1930) I.L.R. 8 Rang. 203.

KISHEN DAYAL and CHIRANJIVA LAL, for Petitioner.

JAGAN NATH AGGARWAL, for Respondent.

The order of the Court was delivered by—

ADDISON J.—This is an application for a *mandamus* to compel the Commissioner of Income-tax to state a case to this Court and to refer certain questions of law in connection with the assessment of the firm of Nanneh Mal-Janki Das.

The facts are simple. The assessee, who is a Hindu undivided family, was served with a notice under section 22 (2) of the Act on the 14th May, 1931, calling upon him to make a return of his income within 30 days of the receipt of the notice. This was not complied with and five months later, namely, on the 7th October, 1931, the Income-tax Officer served another notice under section 22 (4) of the Act asking the assessee to produce his accounts on the 10th October. This also was not done and an extension of time was applied for. The Income-tax Officer offered to give a week's time but the assessee refused to avail himself of this. The Income-tax Officer was not satisfied that the books were incomplete, as alleged, because they had never been shown to him. Ultimately on the 22nd October, 1931, the Income-tax Officer proceeded under section 23 (4) to make the assessment to the best of his ability. On receipt of the notice of demand the assessee applied under section 27 of the Act for cancellation of the assessment, and the making of a fresh assessment. He pleaded illness of the head of the family and also stated that there were disputes and suits between the members of the family and that owing to the appointment of a receiver in the suits the books could not be prepared. The Income-tax

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Officer went into these questions and rejected the application. The appeal to the Assistant Commissioner was dismissed. He disbelieved the plea of illness and held that the litigation did not constitute a sufficient cause as it had been going on for several years before. The assessee then applied to the Commissioner of Income-tax under section 33 and section 66 (2) of the Act. He rejected the petition under section 33 and also refused to state a case as he held that the only question arising in the case was whether there was sufficient cause which prevented the assessee from complying with the notices under sections 22 (2) and 22 (4) of the Act, and that this question was one of fact which could not be referred to this Court.

It was contended before us on the strength of *Chettyar S. P. K. A. A. M. Firm v. Commissioner of Income-tax* (1) that it was a question of law for the High Court to decide whether the income-tax authorities acted legally and rightly in making an assessment under section 23 (4). This view, however, was dissented from by a Full Bench of the same Court in *Abdul Bari Chowdhry v. Commissioner of Income-tax, Burma* (2). It was said there that whether the assessment made by the Income-tax Officer under section 23 (4) of the Act was valid or not was not a question of law that could be referred to the High Court. We are in agreement with this view and hold that the Commissioner of Income-tax was right in not referring the question as this is not a case where the Income-tax Officer made the assessment under section 23 (4) *mala fide* and arbitrarily in the sense that he acted recklessly or fraudulently. In such a case the High Court of Rangoon was of opinion that it might

(1) (1929) I. L. R. 7 Rang. 669. (2) (1931) I. L. R. 9 Rang. 281 (F.B.).

be able to order the Income-tax Officer to do his duty by virtue of its inherent prerogative powers. No attempt was made to argue that the assessment in the present case was *mala fide* or arbitrary.

The only other point taken before us was that the question arising under section 27 of the Act as to whether there was a sufficient cause for the reopening of the assessment was one of law. In this connection *Chettyar P. K. N. P. R. Firm v. Commissioner of Income-tax, Burma* (1) was relied upon. This authority, though it was not directly before the Full Bench which decided *Abdul Bari Chowdhry v. Commissioner of Income-tax, Burma* (2) was not approved by it. Again in *Amrit Waman Dalal v. Commissioner of Income-tax, C. P.* (3) it was held by the Judicial Commissioner, Nagpur, that on an assessment under section 23 (4) of the Act, after failure to submit a return, no question of law arises for reference to the High Court. The decision of the Income-tax Officer that no sufficient cause for non-submission of a return was shown by the assessee, upon whom the *onus* lay, was a finding of fact. It is unnecessary to go into the other cases as we are of opinion that the question, whether there were a sufficient cause for the reopening of the assessment is essentially a question of fact.

For the reasons given we hold that there is no force in this petition which we dismiss with costs.

P. S.

Petition dismissed.

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(1) (1930) I. L. R. 8 Rang. 203. (2) (1931) I. L. R. 9 Rang. 281 (F.B.).
(3) (1934) 6 I. T. C. 301.