

(1934) 01 AHC CK 0022
In the Allahabad High Court
In Re: Jot Ram Sher Singh

Date of Decision : 11-01-1934

Acts Referred:

Citation : (1934) 01 AHC CK 0022

Hon'ble Judges : Niamatullah, J; Bennet, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Niamatullah, J.—This is an application by a firm styled Sher Singh Joth Ram of Muzaffarnagar, u/s 66(3), Income Tax Act, for an order requiring the Commissioner of Income Tax to state a case and to refer certain questions for decision by this Court. The case relates to the assessment of Income Tax on the applicants for the year 1930-31. The assessees made a return, in which they showed a loss of Rs. 2845-5-0 in 1929-30. They had to be assessed on the income of the preceding year, i.e., 1929 30, corresponding to the Sambat year 1986. A notice was issued u/s 23(2) requiring them to prove the correctness of their return. They produced certain accounts, and were assessed, on the 30th May 1930, on an income of Rs. 5,113. The order of assessment, recorded by the Income Tax Officer, shows that the account books for 1986 Section were before him, whether complete accounts had been produced or those for a particular branch of the assessees business were the only accounts then produced is not clear. It is, however, clear that the Income Tax Officer did not then raise any question concerning the accounts. These proceedings took place before the Income Tax Officer, Muzaffarnagar, who made certain enquiries from the Income Tax Officer, Rohtak, where the assessees had some business connections. The latter informed the Income Tax Officer, Muzaffarnagar, that the assessees had considerable business in that district in the names of their sons and grandsons, and suggested that the personal accounts of their sons and grandsons should be carefully examined. In the meantime the Income Tax Officer, Muzaffarnagar, who had first made the assessment was succeeded by another officer, who took proceedings u/s 34 which provides for assessment on income which had escaped notice and for cases in which too low an assessment was made. The assessees

were called upon by a notice to produce their accounts for Section 1986. They did not produce such accounts and alleged that the same had been lost. They relied upon evidence consisting of a police report and a telegram and other evidence.

2. The Income Tax Officer however did not accept the story of the loss of the accounts and proceeded to make a fresh assessment u/s 34. It cannot be disputed that all the provisions contained in Sections 22 and 23 are applicable to proceedings u/s 34. The Income Tax Officer made an assessment to the best of his judgment u/s 23(4) as the result of the failure of the assesseees to produce their account books for Section 1986. There is no doubt that if the finding of the Income Tax Officer, namely, that the account books had been deliberately withheld, were correct, assessment u/s 23(4), i.e. assessment to the best of his judgment, was justified. The significance of such an assessment is that no appeal lies therefrom (see proviso to Section 30).

3. In making a fresh assessment the Income Tax Officer, estimated the assesseees' income to be Rs. 75,000. They were accordingly called upon to pay Income Tax on that amount, The assesseees made an application u/s 27 which empowers the Income Tax Officer to cancel the assessment and to make a fresh assessment if he is satisfied that the assesseees were presented by sufficient cause from complying with the notice u/s 23(2). The Income Tax Officer dismissed the assesseees' application u/s 27 holding that no sufficient cause had been established. The cause which the assesseees had attempted to show was the loss of their accounts for Section 1896, a fact which had already been investigated and found not proved. An appeal to the Assistant Commissioner from the order of the Income Tax Officer u/s 27 was unsuccessful. The assesseees applied to the Commissioner u/s 33 for revision of the orders passed by the Income Tax Officer. The Commissioner set aside the assessment and directed further enquiry and a fresh assessment. The Income Tax Officer again assessed the tax on an income Rs. 75,000. The assesseees again applied u/s 27 and finally moved the Commissioner in revision. The previous revision had been disposed of by Mr. Muir, who was subsequently succeeded by Mr. Wali Mohammad, who dealt with the second revision. The revision was dismissed and an application by the assesseees for a reference to the High Court was also dismissed. The principal question which the assesseees desired to raise and which, they submitted, is one of law, was whether an Income Tax Officer can arbitrarily assess on an assumed income in making a best judgment assessment u/s 23(4). The Commissioner held that in the first place the assessment was not arbitrary, and in the second place even if it was arbitrary, there could be no appeal or reference against it. There were other subsidiary questions which it is not necessary to mention. A preliminary question which calls for decision in this case is whether the High Court can require the Commissioner to state a case for decision by the High Court of questions of law arising from an assessment u/s 23(4) Income Tax Act. Having carefully examined the scheme of the Act, I am constrained to hold that the High Court has no such power. Section 66(1) empowers the Commissioner to

make a reference to the High Court whenever in the course of any assessment, a question of law arises before him. But the right of the assessee to insist on the Commissioner making a reference to the High Court and his right to move the High Court for an order requiring the Commissioner to state a case and make a reference are limited. u/s 66(2) the assessee can apply to the Commissioner requiring him to refer to the High Court any question of law arising out of orders u/s 31 or Section 32, or of a decision by a board of reference u/s 33-A. No order u/s 32 was passed against the assessee, nor are we concerned with any decision by a board of reference u/s 33-A.

4. The only question is whether there was an order u/s 31. That section deals with the exercise by the Assistant Commissioner of his appellate power. Section 30 prescribes the limits of the appellate powers of the Assistant Commissioner. An appeal lies to the Assistant Commissioner from an assessment u/s 23 or Section 27 but no appeal lies from an assessment u/s 23(4). Appeals also lie from an order of the Income Tax Officer refusing to make a fresh assessment u/s 27, an order u/s 25(2), Section 25-A or Section 28. It is thus clear that the Assistant Commissioner can pass an order u/s 31 (in appeal) in certain cases which do not include one in which an assessment u/s 23(4) has been made. Section 30, proviso, expressly declares that there shall be no appeal from an assessment to the best of the Income Tax Officer's judgment u/s 23(4) or under that Sub-section read with Section 27. Accordingly no question of law or fact arising from such assessment can be the subject of consideration by the Assistant Commissioner for the simple reason that no appeal lies to him, with the result that the Assistant Commissioner can never have an occasion to pass in appeal an order u/s 31 in relation to a best judgment assessment. As already shown the High Court can require the Commissioner to make a reference for decision by the High Court of a question of law only if it arises from an order u/s 31. It is argued on the authority of (Kunwarji) Ananda Vs. Commissioner of Income tax, that the order of the Assistant Commissioner, rejecting an appeal on the ground that it did not lie, is an order u/s 31 "disposing of an appeal". This is the view taken by the majority of the Judges composing the Full Bench. It is said there is no other section under which such an order in limine can be passed. With great respect I would point out that a Tribunal cannot "dispose of an appeal" if what purports to be an appeal is no appeal and is held by the tribunal to be incompetent. Where the Assistant Commissioner rejects what purports to be an appeal on the ground that none lies, he gives effect to the proviso to Section 30, and his order should be deemed to be one under it and not u/s 31. In passing such an order the Assistant Commissioner refuses to entertain the appeal, and cannot be considered to be "disposing of an appeal," which implies the assumption that the appeal lay, was entertained and disposed of, after discussion of some question falling within the purview of the appeal.

5. In my opinion it is not open to the Assistant Commissioner to express the opinion that the Income Tax Officer should not have assessed to the best of his judgment u/s 23(4) if the latter stated in his order that a case existed for

assessment to the best of his judgment. Any abuse of power by the Income Tax Officer or perversity of judgment is to be corrected by the Commissioner in revision, but the Assistant Commissioner has no jurisdiction where he has before him what purports to be an appeal from an assessment u/s 23(4). It is only if he has jurisdiction to entertain the appeal that he can say whether the assessment was perverse or arbitrary. That stage cannot be reached if he is not allowed by law to entertain an appeal from it. A refusal to make a fresh assessment u/s 27 can proceed only on the ground that the assessee was not prevented by any sufficient cause from complying with the notice u/s 22 or Section 23. If any question of law arises from such refusal, it can certainly be the subject of reference under the orders of the High Court. But any question of law which arises from the best judgment assessment, sought to be set aside by an application u/s 27 cannot fall within the purview of Section 27. This being so, the question whether a wholly arbitrary assessment u/s 23(4) on assumed income or on conjectural estimate thereof involves an error of law cannot be the subject of reference under the orders of the High Court. All other similar questions arising in connection with such assessment cannot be brought before the High Court at the instance of the assessee, unless the Income Tax Commissioner chose to act u/s 66(1). Whether this is a lacuna in the Act or the power of the High Court was deliberately excluded by the legislature in respect of assessment made u/s 23(4), it is difficult to say. As the law stands, the assessee has to be content with such relief as the Commissioner may give him in the exercise of his revisional powers u/s 33, which undoubtedly confers upon him a wide discretion in dealing with questions arising in the course of assessment by officers subordinate to him. He can, in the exercise of those powers interfere with an assessment made by the Income Tax Officer to the best of his judgment u/s 23(4). He may also decide the question whether such assessment was arbitrary and unreasonable. As a matter of fact, Mr. Muir did interfere with the first assessment. The Commissioner may also make a reference to the High Court for decision of any question of law that may arise in revision; but he cannot be ordered by the High Court to do so, nor can the assessee claim as of right that any question of law be referred to the High Court.

6. It is difficult to find any reason for distinction between questions of law arising from orders u/s 31 and those u/s 33, Prima facie there is as much reason for power being given to the High Court to require a reference to be made in respect of questions of law arising from orders u/s 33 as in case of orders u/s 31. The present case itself affords a striking instance of the desirability of such power being given. The Income Tax Officer, who made an assessment in the first instance, found the income to be Rs. 5,113. In making a fresh assessment to the best of his judgment his successor estimated the income to be Rs. 75,000. The "estimate" rests on nothing but what the Income Tax Officer chooses to assume as the income in Sambat 1986; The so-called reasons, on which the estimate is based, if justifiable, can as well warrant the assumption that the income was much more or much less, where the Income Tax Officer is to make

an assessment to the best of his judgment it should not be an assessment by way of penalty; his judgment ought to proceed on some data, including legitimate presumptions arising from non-production of the account books. The assessee's books for the preceding years and those for subsequent years were available and in making an assessment to the best of his judgment the Income Tax Officer might well have drawn inferences from receipts in those years. Such inferences together with other facts which a careful enquiry might disclose could have formed a satisfactory basis for an assessment. It should be borne in mind that an assessment u/s 23(4) should not be influenced by a desire to punish the assessee for non-compliance with a notice u/s 22 or Section 23, however culpable such non-compliance may be. Any deliberate concealment or misstatement of the particulars of his income by the assessee is made punishable by Section 28 and if his act amounts to an offence under that section, he should be tried and convicted if the offence is proved in which case the law gives him a right to appeal but to punish him indirectly by making a so-called best judgment assessment is wholly unwarranted. The question of law, which arises in such cases, has reference to the meaning of the expression "assessment to the best of his judgment," and its application to the facts of a particular case.

7. My examination of the relevant sections of the Income Tax Act has led me to the conclusion that the High Court cannot in this case direct the Income Tax Commissioner to make a reference to this Court for decision of the questions which the assessee desires to raise. The view that I have taken is in accord with *Abdul Bari v. Commr. of Income Tax* AIR 1931 Rang. 194. We have been referred to *Muhammad Hayat Haji Muhammad v. Commr. of Income Tax* AIR 1931 Lah. 87 in which the High Court passed an order requiring the Income Tax Commissioner to make a reference for decision of questions of law arising from assessments u/s 23(4). No question was, however, raised in this case as regards the power of the High Court to require the Commissioner to make a reference. It was merely assumed that the High Court had such power. The result is that I dismiss the application with costs.

Bennet, J.

8. This is an application by an assessee asking for this Court to call on the Commissioner of Income Tax to state a case u/s 66(3) of the Income Tax Act. The questions on which learned Counsel presses that a case should be stated are those numbered (1), (3), (4) and (5) in the application and are as follows:

(1) Whether in the absence of any evidence whatever to prove the possession of the Jour account books for the Sambat year 1986 by the petitioner, the Income Tax Officer was justified in law in holding that the petitioners had been guilty of non-production of the said books?

(3) Whether the Income Tax Officer being fully aware by 15th January 1931 that the petitioners were not in possession of the aforesaid four account books for the

Sambat year 1986 was justified in commencing proceedings u/s 34 of the Act and whether his action in demanding production of the said books and then proceeding u/s 23(4) of the Act was legal and regular?

(4) Whether under the circumstances of the case the assessment was really made u/s 23(3) of the Act and the appeal to the Assistant Commissioner of Income Tax should have been entertained and heard on the merits?

(5) Whether the assessment being purely arbitrary and based on no materials whatever was justified in point of law?

9. The facts of the case have been set out in the order of the Income Tax Officer making the assessment dated 29th June 1932. Those facts are that for the year in question 1930-31 there was first of all an assessment made and in that assessment dated 20th May 1930, a tabular statement was quoted showing totals which are derived from the account books for the Sambat year 1986 which were produced. The Income Tax Officer does not appear to have done more than to object to seven items which the assessee desired to deduct and the Income Tax Officer refused to allow this deduction and made an assessment on the tabular statement of an income of Rs. 5,113. Subsequently a notice was issued u/s 34 on the ground that income had escaped assessment, and the Income Tax Officer required that the books should be produced again. By this time the books had been lost according to the assessee and they were not produced. The Income Tax Officer therefore claimed that he had a right to make a best judgment assessment u/s 23(4) and proceeded to do so. A revision was filed to the Commissioner against that best judgment assessment and the Commissioner set it aside by an order dated 28th November 1931, and required the Income Tax Officer to weigh the evidence more carefully. An assessment was made again by the Income Tax Officer on the 29th June 1932, and he again assessed the income at Rs. 75,000.

10. It is this assessment order which is now called in question. The actual assessment portion of the order occupies two typed pages and the Income Tax Officer has given certain reasons for coming to the conclusion that the income was Rs. 75,000. The assessee claims that those reasons are arbitrary and that the assessment is based on no materials, and therefore is not a valid assessment in law. The assessee made an application u/s 27, for cancellation of the best judgment assessment on the grounds that he was prevented by sufficient cause from producing the books, and that application was rejected. The assessee then filed an appeal before the Assistant Commissioner of Income Tax both against the order rejecting the application u/s 27, of the Income Tax Act, and against the best judgment assessment u/s 23(4) and he claimed that it should be treated as an assessment u/s 23(3). On the 1st September 1932, the Assistant Commissioner held that there was no sufficient reason to interfere with the order u/s 27 and he dismissed the appeal under that head. In regard to the appeal against the assessment u/s 23(4), he held that no appeal lay and that he was unable to entertain such an appeal. An application was then made to the

Commissioner to state a case which he refused to do. In this connection the Commissioner referred to the ruling reported in : *In re Abdul Bari v. Commissioner of Income Tax Burma* AIR 1931 Rang. 194, that the assessee had no right of application or reference to the High Court in the case of a best judgment assessment u/s 23(4). The first question which has arisen for decision in this appeal is whether the order which the assessee desires can be made by this Court. The powers of this Court to require the Commissioner to state a case are given in Section 66(3) which begins: "if on any application being made under Sub-section (2) the Commissioner refuses to state a case etc." This shows that the power of requisition of this Court is limited in the same manner that an application under Sub-section (2) is limited. Sub-section (2) states:

Within one month of the passing of an order u/s 31 or Section 82, the assessee in respect of whom the order was passed may...require the Commissioner to refer to the High Court any question of law arising out of such order.

11. A requisition therefore must be in regard to any question of law arising out of an order u/s 31 or Section 32. Section 31 deals with the hearing of an appeal by an Assistant Commissioner, and Section 32 deals with the hearing of an appeal by the Commissioner against an order passed by an Assistant Commissioner u/s 28, or an order enhancing an assessment u/s 31(3). Section 28 deals with an order directing a penalty for concealment of income. We are not concerned here with any order u/s 32. Learned Counsel for the assessee argues that the order of the Assistant Commissioner is an order u/s 31 and that therefore a requisition can be made by this Court. On the other hand it is contended by the learned Counsel for the Income Tax Commissioner that the order is not one u/s 31 and that therefore there can be no requisition by this Court. There were in fact two appeals before the Assistant Commissioner, Nos. 25 and 26. One of these appeals was against the order of the Income Tax Officer rejecting the application u/s 27 of the Income Tax Act, and the other appeal was against the assessment u/s 23(4). The Income Tax Officer disposed of these two appeals by one order dated 1st September 1932 noting on the other appeal that it was governed by this order. In regard to the appeal against the order u/s 27 he held that there was no sufficient reason to interfere with that order. He found that the assessees had been in possession of the books and that they had purposely withheld them and that their story that the books had been lost was untrue. Now the first question which the assessee desires to be treated as a question of law is in regard to this finding of fact and is as follows:

Whether in the absence of any evidence whatever to prove the possession of the four account books for the Sambat year 1986 by the petitioner, the Income Tax Officer was justified in law in holding that the petitioners had been guilty of non-production of the said books?

12. The assumption underlying this question is that it was necessary for the finding that there should be some oral evidence to the effect that the books were still in the possession of the assessee. This is a very common delusion and is

constantly brought forward in argument. The theory is contrary to the provisions of Section 103 Evidence Act, which is as follows:

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

13. In the present case it was admitted that these books had existed and had been produced before the Income Tax Officer in the original assessment dated 20th May 1930. The assessee desired the Court to believe that these books had been lost subsequently. The burden of proof of that fact lay on him. It was for the Income Tax Officer and the Assistant Commissioner to decide whether he had discharged that burden or not. They considered that the evidence which he produced was not sufficient to prove his allegation. No question of law arises from their decision on this point. The question No. 3 which I have quoted does not appear to embrace any point of law which could arise and it appears to be merely an argument against the action of the Income Tax Officer based on the idea that because the assessee had made the allegation in regard to the loss of his books, which was subsequently held to be untrue, therefore the Income Tax Officer ought not to have taken proceedings under Sections 34 and 23(4) of the Act. No question of law can arise out of such an argument.

14. The remaining questions Nos. 4 and 5 raise the point in regard to the assessment u/s 23(4) and therefore this involves the point as to whether the order of the Assistant Commissioner in respect of this matter was or was not made u/s 31. The Assistant Commissioner held in regard to the appeal No. 25:

I hold that the assessment is one u/s 23(4) and I decline to admit the appeal, and further he held

I hold that the assessment was properly made u/s 23(4) by the Income Tax officer against which no appeal lies. I am therefore unable to entertain the other appeal also which is against the assessment.

clearly therefore the Assistant Commissioner refused to entertain this appeal u/s 31 on the ground that no appeal lay. This is in accordance with the proviso in Section 30 which is as follows:

Provided that no appeal shall lie in respect of an assessment made under Sub-section (4), Section 23, or under that sub-section read with Section 27.

15. In spite of this clear provision in the Act learned Counsel for the assessee has argued at length that an appeal does lie against an assessment u/s 23(4). I cannot imagine that any clearer provision could be made in the Act to show that no appeal shall lie in respect of an assessment u/s 23(4). The intention of the Act clearly is that in the case of an assessment u/s 23(4) there shall be no appeal, but the remedy of the assessee is limited to an application to the Commissioner to make a revision u/s 33, In the present case the assessee did go once in

revision to the Commissioner and the Commissioner set the assessment aside by his order of 28th November 1931. But instead of applying again in revision to the Commissioner against the new assessment of 29th June 1932, the assessee has adopted the wrong remedy and has attempted to proceed by way of appeal to the Assistant Commissioner and by way of requiring the Commissioner to state a case and by way of requiring this Court to direct the Commissioner to state a case. It is not apparent why the assessee should have adopted this wrong method of procedure in view of clear provisions of the Act.

16. Learned Counsel for the assessee relies on certain rulings, one of which is by a Bench of the Patna High Court in *Maharajadhiraja of Darbhanga Vs. Commissioner of Income Tax*, There does not appear to be any reference to the question before us in that ruling. On pp. 278 and 279 there was some discussion in regard to a reference at the instance of the assessee to the High Court u/s 66, but it is clearly stated that the reference was in regard to a question of law arising out of an order u/s 31 or Section 32, and there was no suggestion that a reference could be made where there was a case of a best judgment assessment u/s 23(4). The ruling therefore does not support the case of the assessee at all. Another case on which the assessee relies is *Muhammad Hayat Hajil Muhammad Sardar v. Commissioner of Income Tax* AIR 1931 Lah. 87. In that ruling a Pull Bench of the Lahore High Court considered the question as to whether in the making of an assessment u/s 23(4) the Income Tax Officer possesses arbitrary authority or should be guided by judicial principles. It was held that he did not possess arbitrary authority but was not bound by strict judicial principles, and he should be guided by rules of justice, equity and good conscience, and that the assessment should be reasonable and should not proceed purely on the Income Tax Officer's private opinion to the exclusion of the material before him.

17. But the ruling is no authority whatever for the proposition put forward by learned Counsel for the assessee, that is, that the assessee has a right to ask this Court to call upon the Income Tax Commissioner to state a case on this point. Learned Counsel has altogether failed to notice that the ruling in question arises on a reference by the Commissioner of Income Tax himself, as is stated on p. 130 of 12 Lah. A reference by the Commissioner comes u/s 66(1) and such a reference may be on a question of law arising

in the course of any assessment under this Act or any proceeding in connexion therewith other than a proceeding under Ch. 8.

18. Section 23(4) comes within Ch. 4 and therefore it was competent for the Commissioner to make a reference of the question of the principles which should guide an Income Tax Officer in making an assessment to the best of his judgment u/s 23(4). But it is not competent for the assessee to apply u/s 66(2) for a similar reference. Nor has this Court jurisdiction to direct the Commissioner to state a case on the point u/s 66(3). Learned Counsel laid stress on the case of *(Kunwarji) Ananda Vs. Commissioner of Income tax*, The Court had ordered the Commissioner to state a case on two points in regard to an assessee who

claimed that he had no income arising in British India, and who had been assessed u/s 23(4), and whose petition u/s 27 had been rejected. The Assistant Commissioner held that the assessment was rightly made u/s 23(4) and the petition rightly rejected u/s 27, and he then went on to discuss the merits of the case and held that there was income assessable in British India. Application was made in revision u/s 33 to the Commissioner and he was also asked to state a case u/s 66(2). He held that no case should be stated u/s 66(2), as the assessment was u/s 23(4), and that the Assistant Commissioner should have dealt with this latter point only and should have rejected the appeal in limine. The case was ordered to be stated on the two points.

(1) Whether a person who has been assessed u/s 23(4) is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the said Act, or whether the proviso to Section 30, Clause (1) is a bar to the appeal; and (2) Whether on the facts of the present case the assessee is liable to be assessed under the Act.

19. The Full Bench found unanimously against the assessee on both these points the question now before us was never precisely formulated in this case but it was raised in argument for the Commissioner and opinions have been given on it although as the learned Chief justice says on p. 309 column 2 "it does not directly arise". The learned Chief justice and three Judges held that

it is the duty of the Commissioner, if required by the assessee, to state a case raising the question of law whether or not the facts established before the Assistant Commissioner are such as to bring the assessee within the ambit of the proviso to Section 30(1). (P. 311 Col. 1)

20. He also held on p. 310, Cols 1 and 2 : "in so rejecting the appeal he is," in my opinion, u/s 31 "disposing of an appeal" and such disposal is "a proceeding in connection with an assessment under this Act". In Col. 2 he then proceeds to discuss the ruling *Duni Chand v. Commissioner of Income Tax* AIR 1929 Lah. 593 which says that,

when the Assistant Commissioner is satisfied that the assessment was made, not ostensibly but genuinely, under that sub-section, he must stay his hand 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.

21. With great respect to the learned Chief Justice of Patna I am unable to agree that this quotation supports the view that the order of the Assistant Commissioner is an order disposing of the appeal u/s 31. The other ground which is given on p. 310 Col. 1 is as follows:

Whatever the technical legal considerations the general duty of the Court to stand between the subject and the Crown in the matter of illegal taxation forces me to regard this contention as very unattractive.

22. Now in England there is such a general duty, because the English Courts

inherit the jurisdiction of the Court of the Exchequer, which had this special jurisdiction. But there is no such jurisdiction granted to the High Courts in India by their letters patent. Nor by any Act, as in general these Acts dealing with Land Revenue etc. provide that such taxation shall be excluded from the jurisdiction of the High Courts, and there are special revenue Courts in India for the exercise of such jurisdiction. In regard to this very matter of Income Tax, so far from the High Court having any general jurisdiction to stand between the subject and the "Grown" the jurisdiction of the High Court is limited to the decision of points of law on a reference arising under certain conditions. Mr. Justice Fazal Ali on p. 316 Col. 2 gave his reason in these words:

As far as I am aware there is no section in the Income Tax Act except Section 31 under which the order could have been passed.

23. And on p. 320 Col, 2 Mr. Justice Dhavle gave a similar ground:

If the order be not an order u/s 31, there is no other section in the Act under which it can come.

24. In my opinion with due respect to these learned Judges there is another section under which the order is passed, Section 30(1) proviso, and the learned Judges do not seem to have considered this view at all. I consider that this proviso deals with the preliminary point as to whether an appeal shall be heard u/s 31 and it is only where the Assistant Commissioner finds in favour of the assessee that he would proceed to hear the appeal u/s 31. I consider that the appeal u/s 31 relates to the matters enumerated by Sub-section 30(1), that is the amount or rate of assessment or the liability to be assessed, etc. The question of whether an appeal is barred by the proviso to Section 30(1) is a question which is decided under that proviso and not u/s 31. The judgment of the Patna High Court was not unanimous on the point, and Mr. Justice Wort says on p. 31.3 Col. 2.

The assessee's main contention is that in spite of the proviso to Sub-section (1), Section 30, he had an appeal to the Assistant Commissioner. The argument is based on the interpretation which he desires this Court to place upon the words "assessment" in the proviso to Sub-section (1), Section 30.... The argument is that when you come to the proviso to the sub-section the word "assessment" only is used, and it is contended that what is meant by the use of the word is merely assessment as regards the amount and that the proviso does not prohibit the assessee in the case of a "summary" assessment from appealing as regards his liability.... In my judgment the word "assessment" in the proviso is used in the wider sense.... If the assessee had no appeal there could be no order u/s 31 excepting an order stating that no appeal lay. It is not such an order which is contemplated by Section 66, and if it is not, the Commissioner cannot be called upon to state a case as no question of law arises (p. 314, Col, 2).

25. It appears to me that the main objections to the view of the majority of the Judges of the Patna High Court are : (1) The proviso of Section 30(1) is definite

"no appeal shall lie" and general. It does not say

no appeal shall lie as to the amount, rate or liability, but an appeal shall lie as to whether the facts established that the assessment was liable to be made u/s 23(4).

26. There is no suggestion in the Sub-section that the point is to be decided under the next section.

(2) Section 30(1) lays down the subject matter of an appeal u/s 31, and then proceeds to exempt a certain kind of case...presumably it must exempt it from the operation of Section 31.

(3) The obvious intention of the Act is to penalise an assessee who brings himself within the provisions of Section 23(4). It would be contrary to that intention to strain the language of the Act and allow such an assessee to have the right to bring any question before this Court by a case stated by the Commissioner at the instance of the assessee either directly or through this Court. There is no precisely similar procedure before the Civil Courts. But there are matters somewhat similar. For example appeals are in general disposed of under Order 41, just as in general the Assistant Commissioner disposes of appeals u/s 31 Income Tax Act. But where the appellate Court rejects a memorandum of appeal on the ground that no appeal lies, that order is passed under Order 7, Rule 11 which is applied to appellate Courts by Section 107(2). And where the appellate Court returns a memorandum of appeal for presentation to the proper Court it acts under Order 7, Rule 10 and Section 107(2). There is no provision in Order 41 for such orders by an appellate Court. It would not be correct to refer to such orders as "orders under Order 41, C.P.C." Similarly it is not correct to refer to the order of an Assistant Commissioner holding that no appeal lies because the assessment was made under conditions where Section 23(4) was properly applied as an order u/s 31; it is an order u/s 30(1) proviso.

27. Learned counsel also referred to certain rulings of the Rangoon High Court which were in his favour. But those rulings have been definitely overruled by the Full Bench ruling reported In *Re, Abdul Bari Chaudhury v. Commissioner of Income Tax* AIR 1931 Rang. 194. In that case the question considered was exactly the question which is now before us, and the five Judges unanimously held that the question whether an assessment u/s 23(4) is valid or not is not a question of law that arises or can arise out of an order of the Assistant Commissioner passed u/s 31, and consequently such a question cannot be made the grounds for an order by the High Court u/s 66(3) requiring the Commissioner to state a case. The judgment proceeds on the point that the proviso to Section 30(1) bars any appeal against an assessment u/s 23(4) and therefore such an assessment cannot be the subject of an order in appeal u/s 31 and therefore cannot be the subject; of a reference u/s 66(2) and (3). The Full Bench judgment of the Rangoon High Court in my opinion correctly lays down the law on the point and therefore I follow it. Some reference was made for the assessee, to Act No.

18 of 1933 amending the Indian Income Tax Act which was published in the U.P. Gazette of October 7, 1933, at p. 154. By Section 28 of the Amending Act an amendment is made in Section 66 of the Income Tax Act. It was claimed that by that amendment if there was a revision u/s 33 then a right to require a reference would arise u/s 66(2). This claim is incorrect. It is only in case that there is an order u/s 33 enhancing an assessment or otherwise prejudicial to the assessee that a reference can be claimed u/s 66(2).

28. For the reasons stated I consider that the assessee has no right to demand a reference on the points and that this Court is not entitled to order a case to be stated on these points. The application is therefore dismissed with costs. The fee of the learned Counsel for the Commissioner is assessed at Rs. 75