Privy Council Appeal No. 87 *of* 1922.

The Tata Iron and Steel Company, Limited - - - - *Appellants*

v.

The Chief Revenue Authority of Bombay - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH MARCH, 1923.

Present at the Hearing :

LORD DUNEDIN.
LORD ATKINSON.
LORD WRENBURY.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment of the High Court of Bombay on a question referred to it under Section 51 of the Indian Income Tax Act, 1918. The facts out of which the appeal has arisen are shortly as follows:—For the official year 1919–1920 the appellant Company was, by the Collector of Income Tax, assessed on a sum of Rs. 61,84,848, alleged to be income earned in the previous year, 1918–1919. The Company claimed to deduct from this assessment a sum of 28 lacs of rupees, paid by it to certain underwriters on an issue of 700,000 preference shares of the Company of Rs. 100 each, as expenditure incurred by the Company for the purpose of making profits in its business. By Section 9, sub-section 1, of this Act it was provided that the tax (*i.e.*, the income tax) shall be payable by an assessee under the head of "Income derived from business," in respect of the profits of any business carried on by the taxpayer, and by sub-section 2, ix, it is further provided "that an allowance is to be made in respect of any expenditure (not being in the nature of

capital expenditure) incurred solely for the purpose of earning such profits."

The appellant Company claimed to deduct from the income on which they had been assessed, this sum of 28 lacs of rupees, paid to the underwriters to help to float the issue of these preference shares. The Collector of Income Tax and the Chief Revenue Authority were of opinion that the payment of the 28 lacs was in reality capital expenditure, inasmuch as it was expended to procure capital, and was not an allowable deduction from the profits of the business under the provisions of this Income Tax Act.

A reference by case stated was accordingly made by these officials to the High Court under Section 51 of this Income Tax Act of 1918 of the question whether the expenditure of these 28 lacs could be allowed under Section 9, sub-section 2, ix, of this statute, as not being in the nature of capital expenditure, nor as having been incurred "solely for the purpose of earning such profits" within the meaning of this sub-section. The High Court delivered judgment on the 28th February, 1921, holding that the words "any expenditure (not being capital expenditure) which had been incurred solely for the purpose of earning profits" meant profits generally and not merely profits earned in the year of assessment, but that the expenditure in this case of the 28 lacs was in the nature of capital expenditure, and therefore not an allowable deduction. From this judgment the appellant Company have by leave of the High Court of Bombay appealed to His Majesty in Council. On the appeal being called on for hearing, a preliminary objection was raised by the respondent to the effect that the appeal was not competent, inasmuch as no such appeal, it was contended, lay from the decision of the High Court on a reference by case stated under Section 51 of the statute, that such a decision is only advisory, as it is styled, and was something in the nature of an opinion for the guidance of the Revenue Authorities as to how they should deal with the question referred to the High Court.

The point thus raised, which is one of some difficulty, was very well argued by the counsel on both sides. It is admitted that no statute, Imperial or Indian, is to be found giving expressly, or by implication, a right of appeal, either with or without the leave of the High Court of Bombay, to His Majesty in Council from a decision or order made, or judgment given by the High Court under the provisions of the 51st section of the Indian Income Tax Act of 1918, neither can any such statute be found giving a general right of appeal to His Majesty in Council from the orders or judgments of any class of Courts, as the 3rd section of the English Appellate Jurisdiction Act of 1876 gives a general right of appeal to the House of Lords from the judgments or orders of the Courts therein mentioned. It has been contended, however, that a general right of appeal of a character somewhat similar to that given by the Appellate Jurisdiction Act has been given in

Bombay by the 39th clause of the Letters Patent of the High Court of Bombay, dated the 28th December, 1865. This 39th clause provides that any person may appeal to Her Majesty in Council. First, in any matter (not being of Criminal Jurisdiction) from any final judgment, decree or order of the High Court of Judicature at Bombay, made on appeal, and, second, from any final judgment, decree or order made in the exercise of its original jurisdiction by the High Court from which an appeal does not lie to the High Court under the 15th clause.

In their Lordships' view the words "original jurisdiction" are only used in contradistinction to the words "made on appeal" mentioned earlier in the clause; but it is quite obvious that the matters to be dealt with under the original jurisdiction are serious and important, because by the succeeding clause, namely, Clause 40, specified provision is made for obtaining the permission of the Court to appeal to Her Majesty in Council in respect of preliminary or interlocutory judgments, decrees, orders or sentences (not being matters of criminal jurisdiction) of the High Court. The granting of this permission is entirely discretionary with the Court or Judge empowered to give it. There is not an appeal as of right in these interlocutory matters, and but for the provision of Clause 40 an appeal in such matters would be incompetent. *Goldring* v. *La Banque d'Hochelaga*, 5 A.C. 371.

It is not pretended that the permission in this clause referred to was ever asked for or obtained in the present case, nor was it argued that the decision was an interlocutory judgment, order, or decree within Clause 40.

In order therefore that the appeal in this case should be held to be competent, the decision and order of the High Court under Section 51 of the Income Tax Act must come within Clause 39 of the Letters Patent. It must be either a final judgment or a final decree or a final order. Now what is a final judgment as understood in English litigation? In *Ex parte Moore*, 14 Q.B.D., 627, 632, Lord Selborne laid it down that to constitute an order a final judgment, nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits.

In *Onslow* v. *The Commissioners of Inland Revenue*, 25 Q.B.D., 465, reported in the Court below, in 24 Q.B.D. 584, it was determined on high authority what it is that amounts to a final judgment. The facts of the case are as follows:—By the 18th section of the Stamp Act of 1870 (34 & 35 Vic. 7) it is provided that, subject to certain regulations (irrelevant for the present purpose), the Commissioners may be required by any person to express an opinion with reference to any executed instrument upon the question whether this instrument is chargeable with any duty, and if so, what amount of duty is to be charged? The appellants in this case requested the Commissioners to do these things, but were dissatisfied with the amount of the duty which the

Commissioners assessed upon the instrument in reference to which they asked their opinion. The 19th section of the statute enables any person so dissatisfied, on payment of the duty assessed, to appeal against the assessment to the Court of Exchequer, and for that purpose to require the Commissioners to state and sign a case upon which their opinion was required and the assessment made by them, which the Commissioners are bound to do. What the Court may do upon the hearing of this case is the matter of importance. It may determine the question submitted, and if the instrument in question be in the opinion of the Court chargeable with any duty, the Court shall assess that duty. If it is decided by the Court that the assessment of the Commissioners is erroneous, any excess of duty which may have been paid under this erroneous assessment, or any penalty which has been paid in respect of it shall be ordered by the Court to be repaid to the appellants with the costs incurred by them in relation to the appeal. But if the assessment of the Commissioners be confirmed by the Court, the costs incurred by them in relation to the appeal are to be paid by the appellant. On the 21st January, 1890, the Court below decided the question submitted in favour of the Commissioners. Onslow appealed, but omitted to serve notice of appeal within the time required by order 58, rule 3, of the Rules of the Supreme Court of 1883. In July, 1890, he applied to the Court of Appeal to extend the time for appealing, on the ground that doubts had arisen as to whether the order of the Court below was " a judgment " or an " order " within the meaning of rule 15 of the above-mentioned rules. This rule ran thus : " No appeal to the Court of Appeal from any interlocutory order or from any order whether final or interlocutory in any matter not being an action shall except by special leave of the Court of Appeal be brought after the expiration of twenty-one days, and no other appeal shall be brought except by leave of the Court after the expiration of one year."

Lord Esher delivered the judgment of the Court. After quoting the opinions of several authorities, which as the judgment is printed it is not easy to distinguish from portions of his own judgment, he refers particularly to opinions expressed by Cotton L.J. in *Ex parte Chinery* (12 Q.B.D., 342), with which Bowen and Kay L.JJ. had concurred. He said :

> " I think we ought to give to the words ' final judgment ' in this subsection their strict and proper meaning, *i.e.*, a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained and established, unless there is something to show an intention to use the words in a more extended sense."

He proceeds :

> " Bowen L.J. says there is an inherent distinction between judgments and orders, and that the words 'final judgment ' have a professional meaning ; by which expression I think he meant to say, as Cotton L.J. had previously said, that a judgment is a decision obtained in an action, and if that was his meaning, both these learned Lords Justices gave judgment to the same

> effect, and Fry L.J. agreed with him. A 'judgment,' therefore, is a decision obtained in an action, and any other decision is an order . . . . That in my opinion is a proper distinction, and, therefore, in the present case the decision is an order and not a judgment, and the appeal should have been brought within 21 days. Under the circumstances, however, we will, as an indulgence, extend the time for appealing."

This decision clearly establishes that the decision and an order made by the Court under the 51st Section of the jurisdiction cannot be held to be a "final judgment" within the meaning of the 39th clause of the Letters Patent, since there is nothing to show an intention in the year 1862 to use those words in a sense more extended than their legal sense.

Lord Lindley said :—

> "I am of the same opinion. I was at first struck by the fact that the declaration of this Court upon a case stated for the opinion of the Court of Chancery under 13 & 14 Vic. c. 35, is in several instances in that Act called a decree, which is, of course, the equivalent to the term judgment in the Queen's Bench Division. But the distinction just laid down by the Master of the Rolls is the proper one, and has my entire concurrence."

Bowen, L.J. (as he then was) also concurred. The statute to which Lord Lindley referred, provides that the Court on the hearing is to decide the question by the special case referred, and then by its decree declare its opinion upon rights involved therein, but without proceeding to administer any relief consequent upon such declaration. This declaration was, however, to have the same force and effect as if it had been made in a suit instituted by the parties by bill. It would appear to their Lordships that the ruling of the Court there was merely advisory. It is evident from this case of *Onslow* v. *Commissioners of Inland Revenue* that the use of the words "determine" and "decide," or the direction that money paid in excess is to be refunded or the awarding of costs against the unsuccessful party, are not things which distinguish a judgment from an order where questions are referred to the Courts by case stated.

The word judgment is indeed popularly used in many different senses, as when one says a certain man is a man of sound judgment, meaning that he is possessed of the intellectual faculty of deciding rightly on fact or circumstances, or where even in legal matters the expression of the opinion formed in a case by a judge who dissents from his colleagues is commonly called his judgment, though it can have no effect whatever on the determination of the suit or action in which it is delivered.

The decision appealed in this case is obviously not a "final decree" within the meaning of Clause 39 of the Letters Patent, neither can it on the ruling of case of *Onslow* v. *The Commissioners of Inland Revenue* be rightly decided a "final judgment." The question remains is it a "final order," or only advisory, made by the Court in exercise of its consultative jurisdiction ?

One must therefore ask oneself what is the nature and character of the acts which Section 51 of the Income Tax Act

authorises and empowers the High Court to do. . . It provides that if in the course of any assessment under this Act, or in any proceedings in connection therewith (save an immaterial exception) a question arises with reference to the interpretation of any provision of the Act or any rule thereunder, the Chief Revenue Authority may, either on his own motion or on reference from any officer of subordinate authority, draw up a statement of the case, and refer it with his own opinion thereon to the High Court, and shall so refer any such question on the application of the assessee unless he be satisfied that the application is frivolous. The opinion of the Revenue Authority thus dominates and conditions the right of the assessee.

Again it is the duty of the Revenue Official to make the assessment, and it is in the "*course*" of making it the question which may be referred must arise.

By Sub-section 2 of this Section, the Court may, if not satisfied with the statement contained in the case, send it back for additions or alteration. By Sub-section 3, it is provided that on the hearing of this case the High Court shall "*decide*" the questions raised thereby, and shall "deliver judgment" thereon containing the grounds on which the decision is founded, and shall send to the Revenue Authority a copy of this judgment under the seal of the Court and the signature of the Registrar, and the Revenue Authority shall dispose of the case accordingly, or if the case arose from any subordinate Revenue Officer, shall forward a copy of this judgment to such officer, who shall dispose of the case in conformity with it. This last provision merely means that the Revenue Officer, in proceeding with the work in the course of which he was engaged when the question referred arose, shall be guided by the decision given, and shall make his assessment accordingly — the ultimate result being that he assesses the taxpayer at an amount which in his instructed opinion he judges to be right. No suit can be brought to set aside or modify the assessment when so made. The amount of the taxpayers' liability is thus definitely fixed, but nothing more is done. The decision of the High Court does not in any way enforce the discharge of that liability. It would appear clear to their Lordships that the word "judgment" is not here used in its strict legal and proper sense.

It is not an executive document directing something to be done or not to be done, but is merely the expression of the opinions of the majority of the judges who heard the case, together with a statement of the grounds upon which those opinions are based. It amounts only to a ruling that a certain deduction claimed by a taxpayer to be allowed from the sum for which he has been already assessed to Income Tax is not permissible.

Should the taxpayer be sued for the Income Tax for which he has been assessed, proof of the assessment would be but the first step in the litigation, not the final one. These circumstances would, according to the judgment of Cotton L.J. in *The Standard Discount Company* v. *Otard de la Grange*, 3 C.P.D. 67, go to show that however

the order or decision might definitely and finally fix the amount of the assessment, it was only interlocutory. The Revenue Authorities are undoubtedly bound to act up to the decision of the Court made under Section 51 of the Income Tax Act.

Bowen L.J., in his judgment in *In re Knight and the Tabernacle Permanent Building Society* [1892], 2 Q.B. 613, 619, appears to attach much importance to the fact that in a case where appeal is only made to the Court by special case to exercise its consultative jurisdiction, and make a decision or order of an advisory character, the arbitrator or other person asking for the opinion is not legally bound to act upon it, though he might be morally bound to do so. In a Scotch case of *Peter Johnston* v. *Glasgow Corporation* (S.C. 1912, 300), where the reference was precisely the same in form as in the other case, the Court held that the Sheriff who had stated the case for the opinion of the Court was bound to act upon its decision, and would not be entitled to disregard it. It does not appear to their Lordships that the fact that the functionary who states a special case for the opinion of the Court is or is not bound to act upon it necessarily determines whether the order and decision of the Court is or is not merely advisory. In order to determine whether an order made by a Court on a case stated is final or merely advisory, it is necessary to examine closely the language of the enactment, whether statute, rule or order, giving the power to state a case.

When a case is stated for the " opinion " of the Court, that word would serve *prima facie* to indicate that the order made by the Court was only advisory. Where the case is referred for the " decision " or " determination " of a question, there is a *prima facie* difficulty in holding that the order embodying this determination or decision is advisory, but the use of these words or one of them is not decisive. In the case of *In re Knight and the Tabernacle Permanent Building Society* (*supra*) a case was stated for the opinion of the Court as to whether this Society had power to alter its rules in a certain way. The order made on this question was held to be advisory, but in giving judgment Lord Esher dealt with the case of *Ex parte County Council of Kent* (1891), Q.B. 725. In that case Section 29 of the Local Government Act, 1888 (51 & 52 Vic. 41) provided " that if any question arises or is about to arise as to whether any business power, duty or liability is or is not transferred to any County Council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may on the application of the Chairman of Quarter Sessions or of the County Council, committee or other local authority concerned, be referred for decision to the High Court of Justice in such summary manner as, subject to any rules of Court, may be directed by the Court, and the Court, after hearing such parties and taking such evidence (if any) as it thinks fit, shall decide the question."

The Court in this case had only to deal with the question, which set of authorities should be charged with such and such portions of administration. Lord Esher criticising this decision in the case said :

> " Where a statute provided that a case might be stated for the decision of the Court it was held that though the language might *prima facie* import that there has to be the equivalent of a judgment or order, yet when the context was looked at it appeared that the jurisdiction of the Court appealed to was only consultative, and that there was nothing which amounted to a judgment or order."

It would appear to their Lordships that having regard to the authorities cited, and for the reasons already stated, the decision, judgment or order made by the Court under Section 51 of the Income Tax Act in this case, was merely advisory, and not in the proper and legal sense of the term final, and thus so far as these considerations are concerned that the appeal is incompetent.

Sir William Finlay, however, in the last resort contended that in any event his client had, by virtue of the Royal Prerogative, a right to appeal to His Majesty in Council. He did not show how it was open to him, as the case stands, to rely upon the Royal Prerogative.

In any view it could not be exercised without leave granted. And without going the length of saying that this case is on a level with the case of *Attorney-General* v. *De Keyser's Hotel* (1920), A.C. 508, referred to in the argument, where the question was fully considered, their Lordships would be slow to advise His Majesty to grant special leave to appeal when the subject had been adequately dealt with in the Letters Patent.

Their Lordships will therefore advise His Majesty that the appeal is incompetent and must be dismissed, and that the appellants must pay the respondent's costs.

In the Privy Council.

THE TATA IRON AND STEEL COMPANY, LIMITED

v.

THE CHIEF REVENUE AUTHORITY OF BOMBAY.

DELIVERED BY LORD ATKINSON.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1923.