Privy Council Appeal No. 62 *of* 1922.

Alcock, Ashdown and 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 7TH JUNE, 1923.

Present at the Hearing:

VISCOUNT HALDANE.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* LORD PHILLIMORE.]

This is an appeal from an order made by the High Court of Judicature at Bombay on the 21st October, 1920, discharging with costs a rule nisi directed to the Chief Revenue Authority of Bombay, whereby the Authority was called upon to show cause why he should not be ordered to refer to the Court for its decision certain questions stated in Exhibit D to a petition presented to him, or in the alternative why he should not hear and determine according to law the application of the petitioners.

The following is the matter in dispute. The applicants for the rule, Alcock, Ashdown and Company, Limited, the present appellants, were called upon under the Indian Excess Profits Duty Act, 1919, to make a statement of their profits for the year 1918. Under the powers given them by the Act they elected to have the standard of their profits ascertained upon an average of the four years 1913, 1914, 1916 and 1917. They thereupon made a return of the average capital and the average profits of these four years and of their capital and profits for the year 1918,

whereby they purported to show that the percentage of profit for 1918 was not in excess of the average profit on the average capital of the four standard years; and they claimed, therefore, to be exempt from Excess Profits duty.

The Collector of income tax, however, made an assessment upon them whereby he brought out their excess profits at upwards of 17 lacs of rupees, on which a 50 per cent. duty would have to be paid after some minor deduction had been made, and he required the payment of this duty by three instalments.

The appellants appealed to the Chief Revenue Authority, and their appeal was heard on the 3rd August, 1920. At the hearing of that appeal, counsel for the appellants asked the Authority to state a case for the opinion of the High Court, and by letter dated the 5th their agents set out the questions upon which they desired the case to be stated. In the meanwhile, and apparently before this letter had reached the Authority, he, by letter dated the 5th, informed them that at the hearing he had confirmed the assessment made by the Collector of income tax. In his letter he further said that it had been decided that as the law was quite clear on the point, it was unnecessary to refer the case to the High Court.

On the 11th August the Authority sent an answer to the agent's letter of the 5th—which, by some accident, is referred to as dated the 4th. This answer was to the following effect :—

> "I have the honour to state that the appeal was finally decided by me on the 3rd instant. A reference to the High Court was deemed unnecessary.
>
> "In calculating the income liable to duty, income from investments excluded from business capital has been specifically excluded. This is added as, from your letter under reply, you seem to be under some misapprehension and think that such income has also been charged with duty."

Thereupon the appellants obtained the rule nisi. In their petition to the Chief Revenue Authority they had made the following averment :—

> "The Collector has disregarded the first proviso to Section 6 (1) of the Act, and has held that the investments of the petitioner did not form part of the business capital of the petitioner, notwithstanding that under Sections 6 (1) *b* (iii), under which the petitioner is to be assessed, the interest on such securities is to be brought into account and notwithstanding the nature of the petitioner's business. The Collector has arrived at his assessment by a compromise which is not justified by the provisions of the Act."

The application for the rule was supported by an affidavit of which the following are material passages :—

> "During the war it was impossible for Messrs. Alcock, Ashdown and Company, Limited, to expand their business by the erection of new buildings and it was impossible for them to obtain plant, machinery, stock and materials, and that therefore part of their profits which were *bona fide* retained in the said business for the purpose of expanding the same had to be retained in the form of cash and investments pending such time as they were able to expend the same for the purposes aforesaid. In addition

to such accumulated profits the said cash and investments included Rs. 22,07,984–5–3, which the Company owed.

" On the 31st December, 1917, their cash and investments amounted to Rs. 23,70,478 and on the 31st December, 1918, to Rs. 50,13,786.

" By the 31st December, 1919, the said item of cash and investments had been reduced to Rs. 32,77,555, and now stands at the sum of Rs. 30,15,292."

And there was a further submission that an allowance of 6 lacs was the allowance of an arbitrary figure.

On showing cause the Authority exhibited to an affidavit copies of " the decisions "—in other words, the reasons for the decisions, of the primary Revenue Authority and of the Chief Authority on appeal. From these it appears that both the Revenue Authorities had purported to follow the principle of construction laid down by them in a previous case, whereby they had arrived at the conclusion that in calculating capital, only the capital actually employed in the business was to be taken into account ; that in this case the Income Tax Collector found that 50 lacs of rupees were invested in securities or kept as fixed deposits in other concerns, that in his view this money was money employed in those concerns and not in the business of the company, that from the statement of the representative of the appellants it appeared that at the most about 16 lacs would be required in the near future for the expansion of the business, that the whole of it could be safely disregarded in computing capital employed in the business, but however that might be, he (the Collector) had taken an arbitrary figure of about 6 lacs which he thought might be regarded as capital temporarily set aside but required for business purposes, and regarding the rest as capital not to be employed in the business, had reduced the capital from over 56 lacs to about 16, and therefore brought out a huge profit.

The Chief Revenue Authority, while generally agreeing and confirming, said that he considered the Collector's allowance of 6 lacs was liberal.

When the matter came on for argument before the High Court, the first question to be decided was whether the Court had any jurisdiction to order the Authority to state a case. This was argued before the High Court upon the language of Section 51 of the Indian Income Tax Act of 1918, which is made by the Excess Profits Duty Act applicable also to cases under this Act. But in the case prepared for their Lordships' Board and in the argument before their Lordships, the objection to the jurisdiction was put more broadly. The High Court of Bombay in considering this point merely applied itself to the question whether or not the Authority had a duty in the circumstances to state a case. But as the point was raised before their Lordships, it took the form of saying that even if the Authority had a duty, the Court could not require him to exercise it ; and for this purpose reliance was placed upon the well-known general purview of Indian legislation which excludes matters of revenue from the consideration of the ordinary Civil Courts, the principle being exemplified in the case

of *Spooner* v. *Juddow* (4 Moore's Indian Appeals, p. 353, decided in the year 1850), and upon Section 106 (2) of the Government of India Act, and lastly, upon a recent decision of the High Court of Madras, given since this case was before the Court of Bombay (*Chief Commissioner of Income Tax* v. *North Anantapur Gold Mines, Limited*, I.L.R. 44 Madras, 718).

Upon the point thus broadly stated, their Lordships have no difficulty in pronouncing a decision. To argue that if the Legislature says that a public officer, even a Revenue officer, shall do a thing, and he without cause or justification refuses to do that thing, yet the Specific Relief Act would not be applicable, and there would be no power in the Court to compel him to give relief to the subject, is to state a proposition to which their Lordships must refuse assent. Section 45 of the Specific Relief Act enables any of the three High Courts to " make an order requiring any specific act to be done or forborne . . . by any person holding a public office whether of a permanent or a temporary nature, or by any corporation or by any Court of Judicature," provided that " such doing or forbearing is under any law for the time being in force, clearly incumbent on such person or Court in his or its public character or on such corporation in its corporate character " and subject to other certain conditions not material to this case.

It is true that the section is not to authorise the High Court " to make any order which is otherwise expressly excluded by any law for the time being in force." The excluding law is suggested to be the already cited clause in Section 106, sub-section 2, of the Government of India Act, which is in the following terms :— .

> " The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

In their Lordships' view, the order of a High Court to a Revenue officer to do his statutory duty would not be the exercise of " original jurisdiction in any matter concerning the revenue," and the latter part of the clause need not be considered, for the proceedings in this case had not to do with the collection of the revenue, but with the preliminary assessment to ascertain what that revenue was.

There remains, however, the question which was also considered by the High Court of Madras, though rather as a branch of the question on which their Lordships have just pronounced their decision than as a separate point in itself, and which was considered by the High Court of Bombay in the present case and in another case which has recently been before their Lordships. This question the Bombay Court determined adversely to the Chief Revenue Authority, holding that there would be under Section 51 of the Income Tax Act a duty to state a case if a point of law arose. Here it is necessary to refer somewhat in detail to the provisions of the two Acts. Section 15 of the Excess

Profits Duty Act, 1919, says that the provisions of various sections, including Section 51, "of the Indian Income Tax Act, 1918, shall apply, with such modifications, if any, as may be prescribed, as if the said provisions referred to excess profits duty instead of to income tax, and every officer or authority exercising powers under the said provisions may exercise the like powers under this Act in regard to excess profits duty as he or it exercises in regard to income tax under the said Act."

Section 51 of the Indian Income Tax Act must be set out at length :—

> "51. (1) If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VII, a question has arisen with reference to the interpretation of any of the provisions of this Act or of any rule thereunder, the Chief Revenue Authority may, either on its own motion or on reference from any Revenue officer subordinate to it, draw up a statement of the case and refer it, with its own opinion thereon, to the High Court, and shall so refer any such question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary.
>
> "(2) If the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Revenue Authority by which it was stated, to make such additions thereto, or alterations therein, as the Court may direct in that behalf.
>
> "(3) The High Court upon the hearing of any such case shall decide the questions raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Revenue Authority by which the case was stated a copy of such 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 on reference from any Revenue officer subordinate to it, shall forward a copy of such judgment to such officer, who shall dispose of the case conformably to such judgment.
>
> "(4) Where a reference is made to the High Court on the application of an assessee, costs shall be in the discretion of the Court."

It is said that, though under this section the Chief Revenue Authority may, if he thinks fit, draw up a statement of the case and refer it to the High Court, he is not bound to do so, even on the application of the person to be assessed, if he is satisfied that the application is frivolous or that the reference is unnecessary, and that the Authority has in the present case shown that he is satisfied that the application was frivolous and the reference was unnecessary.

Their Lordships, however, agree with the Bombay High Court that this is too narrow a construction of the section. Take first the case which is last in the clause. If the assessee applies for a case, the Authority must state it, unless he can say that it is frivolous or unnecessary. He is not to wait for the Court to order him to do it; it will be a misfeasance and a breach of the statutory duty if he does not do it. Put that case aside. The rule here is supported upon the earlier part of the section. No doubt that part does not say that he shall state a case, it only says that he may. And as the learned counsel for the respondent

rightly urged, " may " does not mean " shall." Neither are the words " it shall be lawful " those of compulsion. Only the capacity or power is given to the Authority. But when a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it. To use the language of Lord Cairns in the case of *Julius* v. *The Bishop of Oxford*, 5 A.C., 214, 222—

> " There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

In their Lordships' view, always supposing that there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court, and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state a case.

So far their Lordships are in agreement with the High Court. There remains the question which has led to this appeal. The High Court has apparently considered that there is no serious point of law involved in this case. It was, indeed, contended by counsel for the respondent that the High Court had accepted the position that there was a question of law and then had gone on to decide it adversely to the appellants ; but their Lordships think this contention inadmissible. If there is a point of law, it ought to be decided in a regular manner and upon proper materials ; and here it should be said that the manner is not regular and that it is at least doubtful whether the materials are complete.

Their Lordships must therefore consider whether the High Court should have ordered a case to be stated. This, as it appeared to the learned Chief Justice, depended upon the question whether the Chief Revenue Authority had reasonable grounds for being satisfied that a reference was unnecessary. This is not quite the way in which their Lordships would put it. But to proceed : In the view of the Chief Justice profits not employed in the business are not capital for the purpose of this Act, and profits intended to be employed in the business are not therefore necessarily to be treated as capital, and finally, whether profits are or are not employed in the business is a question of fact to be determined by the Authority. Fawcett, J., agreed, and held that it was not shown to be clearly incumbent on the Chief Revenue Authority to refer these questions to the Court, and that he had reasonable grounds for being satisfied that the reference was unnecessary.

Quite recently, in the case of *The Gas Lighting Improvement Company, Limited* v. *Commissioners of Inland Revenue*, before the House of Lords, a decision has been given on the English Excess Profits Act, the terms of which, so far as they differ, are less

favourable to the present appellants than the terms of the Indian Act. In this case the House decided against the tax-payer that the question whether capital placed in a particular investment was capital employed in the business or was not, was not a pure question of fact upon which the decision of the Income Tax Commissioners would be conclusive but was a question of law or of mixed law and fact, the decision of the Commissioners upon which would be open to review; and accordingly it was reviewed, and judgment was given against the tax-payer that the particular investment in question did not form part of the capital of the business.

It follows that the decision of the Authority in this case could not be held to be conclusive as a decision upon a mere question of fact. Nor did the Chief Revenue Authority or his subordinate so treat it. They treated it as a matter of principle and refer to their judgments in a previous case as laying down the principle, that is laying down the law upon the subject.

In their Lordships' view, an important question of law upon the construction of the statute is involved. This may be most tersely expressed by asking the question what are the interest-bearing securities which form part of the assets of the business and are therefore to be treated as part of the capital; and one guide in arriving at this conclusion may well be the difference of language between the later Indian and the earlier English Act.

It is true that these are not Acts of the same legislature, and that the Indian Legislature and the draftsman whom it employed may have thought it unnecessary to introduce provisions like those contained in paragraphs 8 and 12 of Part 1 of the fourth schedule of the English Act, and may have meant no variation from the scheme of the English Act when it and he introduced the words "securities" and spoke of interest on certain securities as being profits from the business. Too much stress, therefore, should not be laid on these differences. At the same time, it is noteworthy that the Indian Act takes notice of the English Act in schedule 1, paragraph 4; and the Court may come to the conclusion that the reason for the differences between the two Acts is not a mere difference of drafting, but a deliberate variation due to the different conditions under which business is carried on in India and in England.

On the whole, their Lordships think that the Chief Revenue Authority should have been ordered to state a case, and they will humbly advise His Majesty that this appeal should be allowed, and that the rule nisi should have been converted into an order absolute in the terms of the first alternative expressed in the rule nisi, and that the appellants should have their costs in the High Court and before this Board.

In the Privy Council.

ALCOCK, ASHDOWN AND COMPANY, LIMITED

v.

THE CHIEF REVENUE AUTHORITY OF BOMBAY.

DELIVERED BY LORD PHILLIMORE.

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