

32/1965

IN THE PRIVY COUNCIL

No. 30 of 1964

ON APPEAL FROM

THE SUPREME COURT OF CEYLON

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 FEB 1966
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :

V. N. SOCKALINGAM CHETTIAR Appellant

- and -

A.K.R. KARUPPAN CHETTIAR Respondent

80971

CASE FOR THE APPELLANT

Record

10 1. This is an appeal from the decree of the Supreme Court of Ceylon, dated the 28th January 1963, allowing with costs the present Respondent's appeal from the decree of the District Court of Colombo, dated the 20th October, 1960, giving judgment for the present Appellant. p.83, 1.18

2. The principal issues arising in this appeal are:-

20 (i) whether the Respondent's obligation under an Agreement, dated the 21st August 1956, to repay to the Appellant certain Ceylon income tax incurred by the Appellant obliged him to repay to the Appellant profits tax incurred by the Appellant;

(ii) whether the Appellant fulfilled his obligations under the said Agreement to sign and deliver relevant documents to enable refunds of tax to be obtained by the Respondent.

30 3. The Appellant alleged in his Plaint that on the 21st August 1956 the Appellant and Respondent agreed that the Appellant should sell his half share of the Kalugala Estate to the Respondent; that the Respondent undertook to pay to the Income Tax Department of Ceylon all Income Taxes payable by the Appellant on the profits of the Appellant's share of the Estate; and that the Respondent had p.16, 1.1.

- Record failed to pay Rs.29,747/- which he was liable to pay under the terms of the said Agreement.
- p.21, 1.29. 4. The Respondent in his Answer admitted the Agreement of the 21st August 1956; denied that any sums were payable to the Appellant; alleged that the Appellant agreed to pay to the Respondent any refund of income taxes due to the Appellant and to sign and deliver the relevant documents when^{er} ever called upon to do so by the Respondent; and claimed in reconvention Rs.19,939/30 for refunds due to the Appellant and a further Rs.10,000/- for refunds lost through the Appellant's failure to furnish relevant information and documents. 10
- p.26, 1.11. In his Replication the Appellant denied that he had failed to furnish relevant information and documents and alleged that the Respondent had at no time called for them. He denied that Rs.29,939/30 or any other sum was due to the Respondent.
- p.38, 1.1. 5. The only witness for the Appellant was one Palaniappa Sevagan Chettiar, the Appellant's attorney. He said the Appellant was resident in India and had only visited Ceylon twice since 1941. The Respondent was the Appellant's son-in-law and together the Appellant and Respondent were the co-owners of the Kalugala Estate. The witness had been present at the signing of the Agreement of the 21st August 1956. He produced the notices of assessment on the Appellant of the sums claimed and the receipts for payments made. The Respondent had been asked to pay this sum. No demands had been made by the Respondent for the witness to sign any documents for the purposes of meeting a refund. 20
- p.38, 11.11-16.
p.38, 11.17-20.
p.39, 1.4.
p.39, 11.9-17.
p.39, 1.19. 30
- p.40, 1.1. Cross-examined he agreed the sums claimed by the Appellant related to profits tax for 1955, 1956 and 1957. He also agreed that two sums had been received by the Appellant as refund of tax, namely Rs.14,311/30 under S.45(2) of the Income Tax Ordinance and a relief of Rs.1,875.25 out of profits tax. 40
- p.42, 1.32.
p.44, 11.27-32.
p.55, 1.26.
p.55, 1.32.
p.57, 11.28-30. 6. The first witness for the Respondent was one Namasivayam Annamalai, a Chartered Accountant who did the income tax returns of both the Appellant and the Respondent. He said that the total sum due to the Respondent by way of refund under S.45

(2) of the Income Tax Ordinance was Rs.13,838/19. Further the Appellant would also be entitled to double taxation relief to the extent of Rs.4,900/- to Rs.5,000/- but for this the Appellant would have to produce the Indian relief orders from the taxing authority there to the Income Tax Department in Ceylon. The Respondent had asked him to get the refund. They informed the agent to get the refund. That had not been given up to date. The sum due

10 "has still not been paid as far as I know by the Ceylon authorities for the reason that they have got to produce the relief orders issued to the plaintiff in India. We have called for them. Whenever he comes to our office we ask for them, but they have not been produced".

Record
p.57, 11.9-33.

The Respondent himself also gave evidence. He had not wanted to pay more than two lakhs for the Appellant's share of the estate. The latter had said that some Rs.30,000/- of tax refunds would be due to the Respondent. On being told by the Respondent that profits tax would still be payable the Appellant had said that he believed there would be no profits tax, but in any event the Appellant would pay any profits tax due. The Respondent and indeed every one knew the difference between income tax and profits tax. He had asked for the documents for the recovery of the double taxation relief through the auditors, but they had not yet been given to him.

p.58, 1.19.
p.59, 11.1-10.

7. In his judgment the Additional District Judge first considered the question whether the Respondent's undertaking to pay Income Tax did make him liable to pay Excess Profits Tax. He accepted the evidence of the Appellant's attorney that the Appellant had always lived in India and had only come to Ceylon a couple of times. He then went on to say (referring to the Respondent as "the Defendant"):-

p.60, 11.17-20.
p.62, 11.30-33.

"It would be natural to expect an arrangement by which taxes in Ceylon should be paid by the person who resided here, i.e. the defendant. One should also take note of the fact that all income tax due from the estate had been paid up to 31.3.56 and there were no arrears due on that account, except of course for the short period 1.4.56 till the date of execution of the deed which was in September

p.70, 1.21.
p.71, 1.14.

p.71, 11.17-42.

Record

that year. Defendant himself admits this. There was really no arrears on that account.

Profits Tax had been paid only up to 1954. The translation of para 1 of "X" as rendered by the defendant himself (XI) reads as follows:-

1. "Till the date when a transfer is being effected to the second party by the first party of his half share in Kaloo-gala Estate in accordance with the agree- 10
ment entered this day to sell and trans-
fer same, the second party A.K.R. shall
pay the Ceylon Income Tax that may fall
due hereafter and the arrears if any
payable to the date hereof in respect of
the half share of the profits of the
first party V.N.S."

I have no doubt whatsoever in my mind that the "Ceylon Income Tax and the arrears in respect of the half share of the profits of the first party" referred to above include both Income Tax and Profits Tax. That is to say, all taxes due to the Income Tax Department. The Tamil words "Ceylon Income Tax Valri" would mean all taxes due to the Ceylon Income Tax Department - the words "Ceylon Income Tax" being used to distinguish these taxes from those due in India." 20

p.72, 11.1-16. After considering two English cases he went on:-

p.72, 11.17-23. "Profits (or excess profits) made by a person form part of his income, and the tax on such profits is a tax on his income. Such a tax therefore does not, in my view, cease to be income tax. In short, profits tax is a species of Income Tax. If indeed the parties agreed that this tax should not be paid by the defendant it would undoubtedly have been specified in the agreement. I hold that the defendant is liable to pay such taxes." 30

p.72, 11.24-31. The learned Judge said that the Appellant had received by way of refund a sum of Rs.16,186.55 since the action had been filed, but disallowed the Respondent's claim for a further sum of Rs.6,355/- since the Appellant did not actually receive it as 40

it was set off against Income Tax due for April 1956 to September 1956.

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Regarding the claim for a lost refund under double taxation relief, he noted that the Respondent claimed that about Rs.10,000/- was due, while his accountant had said the sum due was about half this amount. All this said the learned judge was pure conjecture. The Department of Income Tax would know the answer and no one had been called from there. He went on:-

p.72, 11.32-40.

"I reject the defendant's evidence that he called upon the plaintiff or his Attorney in Ceylon to sign any papers in order to claim a refund. There is not one single letter written by the defendant to this effect during the whole period. It was only after the plaintiff sent the letter of demand P6 in 1958 that the defendant stated in his reply P7 that the plaintiff was "in default in respect of the obligations on his part". Evidence of oral requests to sign papers cannot be taken seriously. In my opinion the defendant never asked for any documents because he was never keen on finding out what he had to pay on account of taxes due from the plaintiff. The distinction now drawn between Income Tax and Profits Tax is in my view an afterthought.

p.72, 1.41 to
p.73, 1.11.

Giving credit to the defendant for the two sums refunded, there is now due to the plaintiff Rs.13,560.45."

He therefore entered judgment for the Appellant for Rs.13,560/45 and costs and dismissed the claims in reconvention.

p.73, 1.28.

8. The present Respondent appealed to the Supreme Court on the grounds inter alia that Rs.25,307/30 was due to the Respondent, consisting of Rs.14,052/30 admittedly received by the Appellant as refunds, Rs.6,355/- proved as an overpayment of Income Tax and a sum of Rs.4,900/- or Rs.5,000/- as double taxation relief; that under the agreement of the 21st August, 1956 the Respondent was not liable to pay profits tax to the Appellant; and that the uncontradicted evidence of the Respondent had established that at the initial negotiations between him and the Appellant, the latter undertook

p.74, 1.23.
p.75, 11.2-30.

p.76, 11.3-6.

p.76, 11.12-15.

Record

to pay the profits tax, if levied.

p.80, 1.8.

9. On the 28th January 1963 the Supreme Court allowed the present Respondent's appeal. The judgment of the court, delivered by H.N.G.

p.81, 11.14-19.

Fernando J., stated that the trial judge had misconstrued the paragraph of the Agreement imposing on the Respondent the obligation to repay tax payable by the Appellant:-

p.81, 11.19-43.

"In the first place it has been proved in evidence that although the original agreement was written in the Tamil language, the words "Income Tax" rendered in Tamil actually occurred in the original. If then it was intended that there should be liability to pay Profits Tax as well, it is strange that the Tamil rendering of the words "Profits Tax" was not also included in the original. Mr. Wikramanayake has submitted that we should restrict ourselves to construing the English translation, but even if we do so the very fact that Profits Tax, which is a tax different from Income Tax and one levied under a different statute, is not mentioned in the agreement is a circumstance which would negative the existence of an intention to include within the scope of the clause the plaintiff's liability to pay Profits Tax. In any event, an analysis of the language employed also leads to the conclusion that only the Income Tax liability was contemplated.

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According to the clause the defendant undertook to "pay the Ceylon Income Tax that may fall due hereafter". These words do not apply to the plaintiff's existing liability to be assessed for Profits Tax for previous years.

Secondly, the defendant undertook to pay "the arrears (of Ceylon Income Tax) if any payable to the date hereof". At the time of the agreement, however, the plaintiff was not in arrears in respect of any Profits Tax because no assessments had yet been served on him and he could not be said to be in arrears until the time of such service."

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p.81, 1.43 to
p.82, 1.25.

The judgment went on to observe that it was known at the time of the Agreement that the

Appellant would be assessed for Income Tax. It was also apparently anticipated that some arrears were due. These two matters were the only ones for which provision was made and a heavy burden lay on the Appellant to establish a claim apparently contradicted by the terms of the document. Instead the trial judge said wrongly that if the Profits Tax was not to be paid by the Respondent, it would have been specified. Further there was no evidence of any consent by the Respondent to make payments in respect of Profits Tax.

Record

Regarding the Counterclaim, the Court held that the Respondent was entitled to judgment for Re.16,186.55 admittedly received by the Appellant as a refund and dealt with the double taxation relief claim as follows:-

p.82, 11.26-36.

"In addition it was proved at the trial through the evidence of an Accountant of the firm which acts for both the parties that a sum of Rs.4,900 or Rs.5,000 was expected to be payable to the plaintiff as a further refund under the Income Tax Ordinance. The Accountant also stated that he had repeatedly requested the plaintiff's attorney in Ceylon to furnish the necessary documents which would enable the defendant to obtain the refund under this head. This evidence was not contradicted at the trial and there is no good reason for rejecting it. By failing to honour his agreement the plaintiff deprived the defendant of the benefit of this refund to which the defendant was entitled under the agreement. The defendant has therefore successfully proved the damage suffered under this head by the breach of the agreement. This amount thereof is now due to the defendant.

p.82, 1.37 to
p.83, 1.10.

We direct accordingly that a decree be entered dismissing the plaintiff's action with costs, and for the payment by the plaintiff to the defendant of the aggregate sum of Rs.21,086.55. The Defendant will in addition be entitled to the costs of this appeal."

A Decree in accordance with the Judgment was made on the 28th January 1963.

p.83.

10. The Appellant obtained final leave to appeal to

p.87, 1.18.

Record

Her Majesty in Council on the 15th May 1963.

11. The Appellant humbly submits that the Supreme Court erred in the following respects:-

(i) On a proper construction of the Agreement of the 21st August 1956 the words "Ceylon Income Tax that may fall due hereafter and the arrears if any ... in respect of the half share of the profits" of the Appellant covered an assessment on the Appellant of profits tax for the year 1955, 1956 and 1957.

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(ii) If the Respondent was not liable to repay the profits tax liability of the Appellant, the Appellant's liability to pay refunds of tax received by him to the Respondent did not extend to paying the sum of Rs.1,875.25 received as a refund against profits tax paid by him. In any event on the evidence of the Respondent's accountant, only Rs.13,838.19 was due to the Respondent as refunds under s.45(2) of the Income Tax Ordinance.

(iii) The learned Additional District Judge was entitled to find on the evidence before him that the Appellant was not in breach of his obligations under the Agreement of the 21st August 1956 to sign and deliver documents relevant to a refund of Ceylon Income Tax.

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12. The Appellant respectfully submits that this appeal should be allowed with costs throughout, the Judgment and Decree of the Supreme Court be set aside, and the Decree of the District Court should be restored, or that the Decree of the Supreme Court should be varied, for the following amongst other

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R E A S O N S

(1) BECAUSE on a proper construction of the agreement of the 21st August 1956 the Respondent was liable to pay to the Appellant Rs.29,747/- the amount of the Appellant's liability to profits tax.

(2) BECAUSE in any event the sum found due from the Appellant to the Respondent as refunds under s.45(2) of the Income Tax Ordinance was excessive.

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- (3) BECAUSE the trial judge was entitled to find that the Appellant had not been proved to be in breach of this obligations to sign and deliver documents relevant to a refund of Ceylon Income Tax.
- (4) BECAUSE the judgment of the Additional District Judge was right, for the reasons therein stated.

S.P. KHAMBATTA.

DICK TAVERNE.

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(Plaintiff) Appellant

- and -

A.K.R. KARUPPAN CHETTIAR
(Defendant) Respondent

CASE FOR THE APPELLANT

T.L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Appellant.