~~G.L.~~ ~~G.L.1.6.2~~

Judgment 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.

80971

B E T W E E N :

V.N. SOCKALINGAM CHETTIAR (Plaintiff) Appellant

- and -

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

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C A S E FOR THE RESPONDENT

Record

1. The Plaintiff-Respondent Appellant (hereinafter called the "Appellant") appeals against the judgment and decree of the Supreme Court dated the 28th January 1963 whereby, on appeal, the Supreme Court (H.N.G. Fernando J. and Tambiah J.), reversing the judgment and decree of the District Court of Colombo dated the 20th October 1960, dismissed the Appellant's claim and ordered the Appellant to pay the Respondent the sum of Rs.21,086.55 upon the Respondent's claim in reconvention. The District Court (Sirimanne A.D.J.) had ordered the Respondent to pay the Appellant a sum of Rs.13,560.45 upon the cause of action pleaded in the plaint and dismissed the Respondent's claim in reconvention.

p.80,l.8 - p.84,l.17

p.70,l.20 - p.74,l.20

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2. The main point arising for decision in this appeal is whether the words "Ceylon Income Tax" occurring in a written agreement entered into between the parties include a reference to Excess Profits Tax. The clause on which the Courts below have expressed divergent views is as follows :-

Record
p.24,11.26-31

"Till the date when a transfer is being effected to the 2nd party by the 1st party of his half share in the Kaloogala Estate in accordance with the agreement entered this day to sell and transfer same, the 2nd 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 share of the profits of the 1st party V.N.S."

p.24,1.17 -
p.26,1.10

This clause is contained in a written agreement dated the 21st August 1956 made by the parties in connexion with the Appellant's promise to transfer to the Respondent the Appellant's undivided half share of a tea plantation situated in Ceylon and co-owned by the parties until the 7th September 1956 when the transfer contemplated in the agreement was actually effected.

p.16,1.1 -
p.21,1.25

3. On the 11th August 1958, the Appellant filed plaint in the action, in which the present appeal arises, praying for judgment against the Respondent in a sum of Rs.29,747/-. The basis of the claim was that the Respondent had, in breach of the said written agreement, failed to pay the excess profits tax (referred to in the plaint as Income Tax) on the profits of the half share of the plantation sold to the Respondent by the Appellant.

p.21,1.28 -
p.26,1.10

4. In his answer, filed on the 14th November 1958, the Respondent denied the claim, the basis for this denial being that the Respondent had not failed to pay any income tax demanded; and, by way of reconvention, the Respondent claimed from the Appellant a sum of Rs.29,939/30 on the ground that, the Appellant had, in breach of clause 9 of the said written agreement, failed and neglected to sign and deliver certain documents to enable the Respondent to obtain refunds of income tax to which the Respondent was entitled under the written agreement.

p.36,1.28 -
p.37,1.33

5. The parties went to trial on the issues which are set out in paragraph 7 below.

6. Oral evidence was given for the Appellant by his attorney and for the Defence by the Respondent and by Annamalai, a Chartered Accountant, employed by the firm of Accountants who act for both parties.

Record
p.39,l.1 - p.55,l.8
p.58,l.19 - p.69,l.29
p.56,l.17 - p.58,l.15

7. On the 20th October 1960, the learned District Judge gave judgment answering the issues in the case as follows :-

p.73,ll.12-27

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1. Did the defendant by his agreement dated 21st August 1956 promise to pay all Income Tax payable by the Plaintiff to the Income Tax Department on the profits of the plaintiff's half share of Kalugala Estate?

Answer - Yes.

2. Has the Department of Income Tax called upon the Plaintiff to pay a sum of Rs.29,747/- on account of the plaintiff's half share of the profits on the said estate?

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Answer - Yes.

3. Has the plaintiff paid this sum to the Income Tax Department?

Answer - Yes.

4. If so, what sum is the defendant liable to pay the plaintiff?

Answer - Rs.13,560.45.

5. At the time of the negotiation of the sale of the plaintiff's half share in Kalugala Estate was the plaintiff entitled to various refunds in respect of Income Tax paid and or payable by plaintiff up to September 1956?

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Answer - Yes.

6. Under the Agreement "X" was the defendant entitled to receive the entire refund of Ceylon Income Tax due to the plaintiff?

Answer - Yes.

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7. And for that purpose was the plaintiff under a duty to sign and deliver relevant documents to the defendant?

Answer - Yes - if he had been requested to do so.

8. Had the plaintiff failed and neglected to sign and deliver the relevant documents necessary to enable the defendant to get the refund of income tax due as agreed? 10

Answer - No.

9. (a) To what relief under Section 45(2) of the Income Tax Ordinance was the plaintiff entitled to?

Answer - (a) The amounts to which the plaintiff was entitled by way of relief under Sections 45(2) and 46(1) during the period relevant to this case are the two sums Rs.14,311.30 and Rs.187.25. 20

(b) To what refund on account of overpayment of Income Tax was plaintiff entitled to?

Answer - (b) Rs.6,355/- which was set off against Income Tax due.

(c) To what refund by way of relief under Section 46(1) of the Income Tax Ordinance was the plaintiff entitled to? 30

Answer - (c) Vide answer to Issue 9(a).

10. To what sum of money is defendant entitled to claim in reconvention?

Answer - nil.

8. The learned District Judge accepted the Appellant's contention that the relevant clause of the written agreement obliges the 40

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Respondent to pay not only income tax but also excess profits tax on the Appellant's half share of the plantation. His reasons for so holding may be summarised as follows :-

(a) Since the Appellant seldom came to Ceylon it would be natural to expect an arrangement by which taxes would be paid by the Respondent who was in Ceylon. — p.71,ll.12-19

(b) There were admittedly no income tax due except for the broken period between 1.4.56 and September 1956 when the property was transferred and the words 'arrears of income tax' must, therefore, have been used to include Excess Profits Tax which had not been assessed or paid beyond 1955. — p.71,ll.19-35

(c) That the Tamil words "Ceylon income tax valvi" would mean all taxes due to the Ceylon Income Tax Department. — p.71,ll.39-42

(d) In short profits tax was a species of income tax. If indeed the parties agreed that this tax should not be paid by the Respondent it would undoubtedly have been specified in the agreement. — p.72,ll.17-24

9. The learned District Judge dismissed the Respondent's claim in reconvention on the ground that there was no written demand addressed to the Appellant calling upon him to sign any papers and that evidence of oral requests to sign papers could be taken seriously. — p.72,l.41 - p.73,l.5

10. The Respondent appealed and the Supreme Court (H.N.G. Fernando J. and Tambyah J.) allowed the appeal, reversing the judgment both on the Appellant's claim in the plaint and on the Respondent's claim in reconvention. — p.74,l.22 - p.77,l.10

11. The reasons given by the Supreme Court for over-ruling the learned District Judge on the construction of the clause in question appear from the following passages in the judgment :

"The learned District Judge has upheld the plaintiff's claim declaring that he had no doubt whatever in his mind that the language — p.81,ll.15-37

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of the clause was intended to impose on the defendant the liability to pay all taxes due to the Income Tax Department. In our opinion, the clause by itself is in no way open to the construction placed upon it by the trial Judge. 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."

p.81,1.38 - p.82,1.19

(b) "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.

There is no doubt that in August 1956 the parties were aware that in respect of his ½ - share of the profits derived from April 1956 until the date of the transfer, the plaintiff would at some time be assessed for Income Tax. The terms of the agreement also appear to

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indicate that the parties may have thought that some arrears were due as well. These two matters were clearly provided for in the clause, and the defendant undertook to make the payments, and they were the only matters for which provision was actually made. In these circumstances, a heavy burden lay on the plaintiff to establish a claim which is to a large extent contradicted by the terms of the document. This aspect of the matter was unfortunately not appreciated by the learned trial Judge. On the contrary, his view was stated as follows :-

> "If indeed the parties agreed that this tax (the Profits Tax) should not be paid by the defendant, it would undoubtedly have been specified in the agreement."

We are quite unable to agree with that view. In a document in which a person undertakes to make certain payments, one would ordinarily expect the various contemplated payments to be expressly mentioned. It is unreasonable to expect in such a document any mention of payments which the person does not undertake to pay."

12. It is submitted, with respect, that the Supreme Court is right in its criticism of the Judgment of the learned District Judge. It is further submitted with respect that the interence drawn by the learned District Judge from the use of the words "arrears ..... in respect of the half share of the profits ....", is wrong because he failed to pay regard to the words "if any" occurring in the context.

p.71,ll.35-38

13. As to the rejection of the Respondent's claim in reconvention, the Supreme Court took the view that the learned District Judge had not paid due regard to the admission, in court, that a refund of Rs.16,186.55 was actually made to the Appellant by the Income Tax Department and had, without good reason, rejected the uncontradicted evidence of the Chartered Accountant who gave evidence for the Respondent both in regard to the amount of the refunds and to the repeated requests made to the

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Appellant's attorney for the necessary documents to enable the Respondent to obtain the refunds.

14. The Respondent respectfully submits that this appeal should be dismissed with costs for the following, among other

REASONS

1. BECAUSE the judgment of the Supreme Court is right.

2. BECAUSE the learned District Judge omitted to consider the effect of the words "if any" in interpreting the clause in question. 10

3. BECAUSE the words "Income Tax" do not, either in their ordinary signification or in the relevant context, include excess profits tax.

4. BECAUSE the learned District Judge was wrong in rejecting the oral evidence of the Respondent's witness, Annamalai. 20

E.F.N. GRATIAEN

WALTER JAYAWARDENA

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Lodged the 16th March 1965

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Respondent's Solicitors.