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Judgment
10, 1965

IN THE PRIVY COUNCIL

No. 31 of 1964

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
STUDIES
- 3 FEB 1966
25 H. QUEEN'S GATE
LONDON, W.C.1.

ON APPEAL FROM
THE SUPREME COURT OF CEYLON

B E T W E E N :

LILY HARRIET RAM ISWERA, Widow
(substituted for H.V. RAM ISWERA)
Appellant

- and -

THE COMMISSIONER OF INLAND REVENUE
Respondent

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CASE FOR THE APPELLANT

Record

1. This is an appeal from the Judgment of the Supreme Court of Ceylon (Sri Skanda Rajah J. and L.B. de Silva J.) dated the 13th November 1962, affirming the decision of the Board of Review dated the 9th January 1962 which in turn affirmed the assessment made on the Original-Appellant. p. 27.
2. On the 23rd May 1963 final leave to appeal to Her Majesty in Council was granted to the Original-Appellant but before the dispatch of the Record it became defective by the death of the Original Appellant whereupon the Supreme Court was of the opinion that the above named Appellant, Lily Harriet Ram Iswera, was the proper person to be substituted on the Record in place of the deceased. It was certified accordingly and she is hereinafter sometimes referred to as the Substituted Appellant. p. 38.
3. The matter arises upon assessments to income tax made upon the Original Appellant for the years of assessment 1950/51 and 1951/52 and the question at issue shortly stated is whether, on the facts and circumstances proved in the Case Stated, the inference that the transaction in question was an adventure or concern in the nature of trade is in law justified. p. 16.
4. The charge to income tax is imposed by Sections

80934

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Cap. 188.

5 and 6 of the Ceylon Income Tax Ordinance which in so far as relevant to the question as above stated is in the following terms:-

"Section 5 (Imposition of Income Tax)

(1) Income tax shall, subject to the provisions of this Ordinance and notwithstanding anything contained in any other written law or in any convention, grant, or agreement, be charged at the rate or rates specified hereinafter for the year of assessment commencing on the first day of April, nineteen hundred and thirty-two, and for each subsequent year of assessment in respect of the profits and income of every person for the year preceding the year of assessment..."

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"Section 6 (Income chargeable with tax)

(1) For the purposes of this Ordinance, "profits and income" or "profits" or "income" means:-

(a) the profits from any trade, business, profession, or vocation for however short a period carried on or exercised;"

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The word "trade" is defined in Section 2 of the said Ordinance to include "every trade and manufacture, and every adventure and concern in the nature of trade."

p. 16

5. The facts set out in the case stated as found by the Board of Review and as contained in the Judgment of Sri Skanda Rajah J. are as follows:-

pp.27/28.

"The assessee, who is a Proctor and Notary, was at one time living with his wife and five daughters in a rented house at Hulftsdorf. Four of their five daughters were attending the St. Bridget's Convent. His wife made inquiries from brokers, who came to assessee's office, for the purchase of a building site close to St. Bridget's Convent. A broker named Boteju offered for sale a land in extent 433 perches situated in Alexandra Place and adjoining St. Bridget's Convent. The owner of the land Mrs. Thambyah was willing to sell this land only to a person buying the entirety. This offer was, however, turned down as the land was very much in excess of

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her requirements and she did not have the money to pay the price demanded. Sometime later, by deed No. 3684 of 3.3.51, attested by the assessee himself, his wife, whose address is given in this deed as "Soma Siri", Kalubowila Road, Dehiwala, an agreement was entered into between the Assessee's wife and Mrs. Thambyah for the former to purchase the land for Rs.450,000/- and the former deposited a sum of Rs.45,000/-. It was agreed, inter alia, that Mrs. Thambyah would convey the land to Mrs. Ram Iswera (the assessee's wife) or her nominees on payment of the balance sum of Rs.405,000/-. If Mrs. Ram Iswera failed to pay this sum on or before 20.4.1951 and obtain a conveyance, the sum of Rs.45,000/- paid as deposited would be forfeited by way of liquidated damages. Mrs. Ram Iswera would reconvey to Mrs. Thambyah a divided portion out of the land in extent 60 perches and Mrs. Ram Iswera would allow Mrs. Thambyah a right of user of a roadway to that divided portion. Mrs. Ram Iswera would have the roadway approved by the Municipal Council and constructed at her own expense. Mrs. Ram Iswera had to borrow the Rs.45,000/- to make the deposit. She had a house in McCarthy Road, another at Wellawatte and a third in Hultsdorf. They could not be sold as vacant possession could not be obtained. Soon after the agreement, and within nine days of it (i.e. before 12.3.1951), a sketch had been prepared showing a division of the land into fourteen lots - twelve building sites and two roadways - to be shown to prospective purchasers. A survey was made on 29.3.51 dividing the property according to the sketch. On 18.4.1951 Mrs. Thambyah conveyed three lots (A in extent 40 perches, B in extent 30 perches, C in extent 60 perches) and the road reservations (N and O) to Mrs. Ram Iswera for Rs.78,525/-. The deposit of Rs.45,000/- was set off against this sum and only the balance Rs.33,525/- was paid. Lot C was reconveyed to Mrs. Thambyah. The other nine building sites were conveyed by Mrs. Thambyah to Mrs. Ram Iswera's nominees for a total sum of Rs.434,725/-, i.e. only Rs.15,275/- less than the price of Rs.450,000/- agreed upon for the entire land of 433 perches. Thus Mrs. Ram Iswera was able to get 70 perches of this valuable land in the coveted residential

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area of Cinnamon Gardens for only Rs.15,275/-, whereas the market value was Rs.87,040/-. But, before the authorised adjudicator it was agreed that the nett profit made by Mrs. Ram Iswera out of this transaction was Rs.66,331/-."

p. 18.

6. The other 9 building sites were not conveyed to the Substituted Appellant. The Original Appellant negotiated the sale of these nine lots and, at the request of the Substituted Appellant, the owner, Mrs. Thambyah, conveyed these lots to others. The Substituted Appellant received from the persons to whom the building sites (excepting lots A and B) were conveyed the sum of Rs.434,725. The sum realised by the Substituted Appellant from the sale of 10 lots and the value of the two lots which remained unsold amounted to Rs.521,765. The difference in the amount realised by the Substituted Appellant from the disposal of the 433 perches of land and the purchase price paid by her to the owner Mrs. Thambyah was Rs.71,765. The assessor included this difference as profit in the assessment of the income of the Original Appellant.

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7. The Original Appellant appealed to the Commissioner of Inland Revenue against the assessment made of his income on the ground that the profit of Rs.71,765 made by the Substituted Appellant was not profits or income liable to be taxed under the Income Tax Ordinance. The appeal was heard by the Authorised Adjudicator. Before the Authorised Adjudicator it was agreed that the net profit was Rs.66,331. Subject to this variation the assessment was confirmed.

p. 19.

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pp. 4 - 8.

The reasoning of the Authorised Adjudicator is fully set out in the Record.

8. The Original Appellant appealed to the Board of Review against the decision of the Authorised Adjudicator. The matter came on for hearing before the Board of Review on 13th July, 18th July, and 2nd August 1961. The Board of Review held that the profit of Rs.66,331 was liable to be taxed under the Income Tax Ordinance as:-

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(a) the said sum of Rs.66,331 did not constitute a capital appreciation.

(b) the said sum of Rs.66,331 was a profit

arising from an adventure in the nature of trade.

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9. The reasoning of the Board of Review may be summarised as follows. The Board of Review concluded that the cases cited to it indicated that one or other of the following matters are relevant in determining whether a transaction is a transaction in the nature of trade:-

p. 23.

- 10 (a) The nature and quantity of the subject matter. Thus if a person buys a large quantity of consumable or perishable articles much in excess of what is required for his own use, he could be said to be engaged in a transaction in the nature of a trade.
- (b) Activity connected with the maturing of the subject matter.
- (c) Special knowledge of the participant.
- (d) Organisation involved in the transaction.

20 The Board of Review observed that a transaction can have more than one motivation, one of which may be indicative of an activity in the nature of a trade. In these circumstances it seemed necessary to determine the dominant motivation and ascertain whether this motivation connoted an adventure in the nature of a trade. The Board of Review referred to the facts of the case and examined the full essentials set out above relating to an adventure in the nature of a trade. The Board concluded that the ownership of 475 perches of land might well have been within the financial resources of the Original Appellant and his wife, since they apparently already owned property valued at about this price. However, the question for determination was whether the purchase of this extent of land WITHIN THE LIMITED PERIOD OF TIME STIPULATED IN THE AGREEMENT was within the financial resources of the Original Appellant and his wife. In the circumstances it appeared correct to infer that considering the nature and quantity of the subject matter that had to be purchased within the very limited period of time given, the transaction savoured of an adventure in the nature of a trade. This was emphasised from the fact that even the deposit was borrowed money and

p. 23.

p. 24.

p. 24.

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they inferred that the Original Appellant would not have parted with Rs.45,000 of borrowed money unless the sale of the block was not dominant in his mind at the time he made the deposit. The motivation of residence in that area might also have been in his mind and in the mind of the Substituted Appellant, but it was difficult to accept the contention that this was the dominant motivation in the transaction.

- p. 25. 10. The Board of Review held that two other characteristics of an adventure in the nature of trade were applicable. There was evidence of demarcation of the premises by a plan as far back as March 12th, 1951. Such an activity as the demarcation of premises by a plan could be characterised as an activity connected with the maturing of the subject matter. Moreover the preparation of such a plan indicated organisation involved in the transaction. The Board of Review concluded that the sum of Rs.71,765 was rightly considered to be a profit arising from an adventure in the nature of a trade and was liable to be taxed under Section 6(1)(a) of the Income Tax Ordinance. 10
- p. 25. 11. The decision of the Board was communicated to the Original Appellant and to the Commissioner of Inland Revenue by letter dated 12th January 1962. Being dissatisfied with the decision of the Board the Original Appellant by his communication of 3rd February 1962 applied to the Board to have a case stated under Section 78(1) of the Income Tax Ordinance for the opinion of the Honourable Supreme Court on the questions of law arising in the case. The case came on for hearing before the Supreme Court (Sri Skanda Rajah J. and L.B. de Silva J.) on 16th, 17th and 18th October 1962. 20
- p. 26. 12. It was submitted for the Original Appellant that the dominant intention of the Substituted Appellant was to find a residence near St. Bridget's Convent. This question was considered with great care by the Board of Review, who rejected the submission and concluded that the dominant intention was an adventure in the nature of trade. The learned judge cited a passage from Gajendragadkar, J., in Naidu & Co. v. C.I.R. The following passage was italicised in his judgment:- 30
- Cap. 242. (1959) A.I.R. 359 (S.C.)

10 "There is yet a third class of cases in which the assessee or the Revenue may seek to challenge the correctness of the conclusion reached by the Tribunal on the ground that it is a conclusion on a question of mixed law and fact. Such a conclusion is no doubt based upon the primary evidentiary facts, but its ultimate form is determined by the application of legal principles. The need to apply the relevant legal principles tends to confer upon the final conclusion its character of a legal conclusion and that is why it is regarded as a conclusion on a question of mixed law and fact. In dealing with findings on questions of mixed law and fact the High Court would no doubt have to accept the findings of the Tribunal on the primary questions of fact; but it is open to the High Court to examine whether the Tribunal has applied the relevant legal principles

20 correctly or not; and in that sense the scope and inquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of Law."

pp. Record
29-30.

The learned judge referred again to the judgment in the case cited above at Page 364.

p. 30.

30 "It is patent that the clause "adventure in the nature of trade" postulates the existence of certain elements in the adventure which in law would invest it with the character of a trade or business."

And also at Page 366:-

p. 30.

40 "When Section 2(4) refers to an adventure in the nature of trade it clearly suggests that the transaction cannot properly be regarded as trade or business. It is allied to transactions that constitute trade or business but may not be trade or business itself. It is characterised by some of the essential features that make up trade or business but not all of them; and so, even an isolated transaction can satisfy an adventure in the nature of trade."

In the same case it had also been indicated:-

pp. 30-31.

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"It is, however, impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the Courts in tax proceedings. The decision about the character of a transaction in the context cannot be based solely on the application of any abstract rule or test and must in every case depend upon all the relevant facts and circumstances. It would besides be inexpedient to make any attempt to evolve such a rule or formula. In each case it is the total effect of all relevant factors and circumstances that determines the character of the transaction; and so, though the Court may attempt to derive some assistance from decisions bearing on this point, it cannot seek to deduce any rule from them and mechanically apply it to the facts before it."

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p. 31.
(1956) A.C. 14
(1959) A.I.R.
1252 (S.C.)

13. The learned judge shortly referred to Edwards v. Bairstow and Harrison and to Saroj Kumar Mazmudar v. C.I.R., which followed Naidu & Co. v. C.I.R. referred to above.

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The learned judge concluded that the facts adopted by the Board of Review established that:-

- (1) the Original Appellant or his wife had no money to pay even the deposit. That sum had to be borrowed.
- (2) The transaction had to be concluded between 3rd March 1951 and 20th April 1951, a comparatively short period of time.
- (3) There was preparation, organisation and activity; within a few days of the agreement of 3rd March 1951 a sketch was prepared to be shown to prospective purchasers. Soon thereafter a survey plan was made dividing the land into 14 lots; twelve building sites and two roadways, i.e. the activity led to the maturing of the assets.
- (4) The quantity or extent purchased was far in excess of the alleged requirements of the Substituted Appellant.
- (5) There was considerable profit from the transaction in a short time, i.e. the presence of

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profit motive, which is a characteristic of trade.

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14. The learned judge posed the question what was the "total impression" or "picture" that these facts would leave on the mind of any reasonable person? Having considered all these matters in conjunction with the evidence that the Substituted Appellant had a desire to live near St. Bridget's Convent for the safe of education of four girls attending that institution, the Board of Review arrived at the conclusion that the dominant motive or intention was not this desire of hers and that the transaction presented a "picture" of an adventure in the nature of trade.

p. 32.

15. During the course of the hearing the learned judge had asked Counsel for the Assessee Appellant why, if it was the Substituted Appellant's dominant desire to live near St. Bridget's Convent for educating her daughters, she had shifted from Hulftsdorf to Dehiwala before 3rd March 1951, the date of the agreement (further away from St. Bridget's Convent than Hulftsdorp). Counsel for the Original Appellant ventured the explanation that she may have been at Dehiwala temporarily and the Notary might have been under the impression that he should give that address. The learned judge had then pointed out that it was the Original Appellant himself (her husband, a Proctor and Notary) who attested the agreement. If the Substituted Appellant was residing only temporarily at Dehiwala the Original Appellant would have known that and not give that as her address in the agreement. There had also been no indication of any attempt made at any time to eject the tenant from the house in McCarthy Road (owned by the Substituted Appellant) which was also in Cinnamon Gardens and near St. Bridget's Convent. The learned judge would have expected that to be done if the dominant motive or intention was that alleged by the Original Appellant. Those circumstances went to support the finding of the Board of Review, whose Order indicated that they had applied the relevant legal principles correctly. The learned judge therefore dismissed the appeal.

p. 32.

p. 32.

16. L.B. de Silva J. agreed with the Judgment given by Sri Skanda Rajah J.

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17. The Substituted Appellant humbly submits that this appeal should be allowed and that the Judgment and Decree of the Supreme Court of Ceylon should be set aside and the costs should be awarded to the Substituted Appellant throughout for the following, among other,

R E A S O N S

- (1) BECAUSE the profit of £66,331 realised by the substituted Appellant was not a profit arising from an adventure in the nature of trade. 10
- (2) BECAUSE the proper inference from the facts was that the dominant motive of the Substituted Appellant was the acquisition of land on which to build a home near St. Bridget's Convent.
- (3) BECAUSE in order to acquire such land it was in the circumstances of the case essential for the Substituted Appellant to acquire other land extending in all to 433 perches.
- (4) BECAUSE in the circumstances, since the Substituted Appellant had not sufficient money to acquire as an investment the whole of the 433 perches within the specified time, it was necessary for her to dispose of part thereof. 20
- (5) BECAUSE the substituted appellant still retained the land and residence on it in Alexandra Place which she acquired as aforesaid.
- (6) BECAUSE the demarcation of the premises by the plan on the 12th March 1951 was not an activity connected with the maturing of any land in the course of any adventure or concern in the nature of trade. 30
- (7) BECAUSE Sri Skanda Rajah J. in his judgment in the Supreme Court was wrong to infer that the realisation of a profit indicated a profit motive.
- (8) BECAUSE Sri Skanda Rajah J. in his judgment in the Supreme Court erred in inferring from the fact that the address of the Substituted 40

Appellant given in Deed 3684 was an address in Dehiwala that this was her permanent residence.

- (9) BECAUSE the object of the whole transaction was to acquire for residence thereon the piece of land on which the Substituted Appellant resides.
- (10) BECAUSE the decision of the Supreme Court of Ceylon is wrong.
- (11) BECAUSE the decision of the Board of Review for Ceylon is wrong.

E.F.N. GRATIAEN.

NEIL ELLES.

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