

Judgment
10, 1965

IN THE PRIVY COUNCIL

No. 31 of 1964

ON APPEAL FROM
THE SUPREME COURT OF CEYLON

UNIVERSITY OF LONDON
INS.
- 3 FEB 1966
257
LONDON, W.C.1.
80940

B E T W E E N :

LILY HARRIET RAM ISWARA
(Substituted for her husband
Ram Iswara, deceased)

Appellant

- and -

THE COMMISSIONER OF INLAND REVENUE

Respondent

10

CASE FOR THE RESPONDENT

Record

1. This is an appeal from the Judgment of the Supreme Court of Ceylon, dated the 13th November, 1962, answering in the affirmative (and against the Assessee) the following question which, on a Case Stated by the Board of Review, at the Assessee's request, under Section 78 of the Income Tax Ordinance, the Supreme Court was finally called upon to decide:-

pp.27-32

20

"Whether, on the facts and circumstances proved in the case, the inference that the transaction in question was an adventure or concern in the nature of trade is in law justified."

p.27, 11.22-25.

30

2. The main question for determination on this appeal is whether or not, on the facts and circumstances proved in the case, the Supreme Court and the Board of Review were right to decide (in confirmation of the Assessor and Authorized Adjudicator) that a transaction of the purchase and sale of a large area of valuable land which the Appellant (the Assessee's wife) had initiated and carried through was an "adventure" or "concern in the nature of trade" the profits whereof were subject to tax under the Income Tax Ordinance.

Record

3. Relevant portions of the Income Tax Ordinance (hereinafter called "the Ordinance") are included in an Annexure hereto.

p.27, 1.26 to
p.28, 1.2.

4. The relevant facts were summarized by the Supreme Court in its Judgment dated the 13th November, 1962. The Assessee, who was a Proctor and Notary, was at one time living with the Appellant, his wife, and five daughters in a rented house at Hulftsdorf. Four of their five daughters were attending the St. Bridget's Convent. The Appellant made enquiries from brokers, who came to the Assessee's office, regarding the purchase of a building site close to St. Bridget's Convent. A broker named Boteju offered for sale 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 the Appellant's requirements and she did not have the money to pay the price demanded.

10

p.28, 11.2-18.

Some time later, however, an agreement was entered into between the Appellant and Mrs. Thambyah for the former to purchase the land for Rs.450,000/-. It was a term of the Agreement that the Appellant would reconvey to Mrs. Thambyah a divided portion of the land in extent 60 perches and would allow Mrs. Thambyah a right of user of a roadway to that divided portion. The Appellant would have the roadway approved by the Municipal Council and constructed at her own expense. The Appellant had to borrow Rs.45,000/- to make the deposit.

20

p.28, 11.18-39.

She had a house in McCarthy Road, another at Welawatta and a third in Hultsdorf. But they could not be sold as vacant possession could not be obtained. Soon after the agreement 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 29.3.1951 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 the Appellant for Rs.78,525/-. The deposit of Rs.45,000/- was set off against this sum and only the balance of Rs.33,525/- was paid. Lot "C" was reconveyed to Mrs. Thambyah. The other nine

30

40

3.

building sites were conveyed by Mrs. Thambyah to the Appellant's nominees for a total sum of Rs.434,725/-, i.e. only Rs.15,275 less than the price, Rs.450,000/-, agreed upon for the entire land of 433 perches. Thus the Appellant was able to acquire 70 perches of the land for only Rs.15,275/-, whereas the market value was Rs.87,040/-. Before the Authorized Adjudicator it was agreed that the net profit made by the Appellant out of this transaction was Rs.66,331/-.

Record

5. The Assessor having sought to make the Assessee liable for the said profit made by his wife on the ground that it was profit from an "adventure" or "concern in the nature of trade" within the definition of "trade" in Section 2 of the Ordinance and, therefore, subject to tax under Section 6(1)(a) thereof, the Assessee appealed to the Commissioner of Inland Revenue. The appeal was heard by an Authorized Adjudicator before whom both the Assessee and his wife (the Appellant) gave evidence. This evidence appears on pages 10 to 15 of the Record.

p.1.

6. By his Determination, dated the 22nd April, 1961, the Authorized Adjudicator, having scrutinised the evidence before him with care, and applying to the facts established all the relevant authorities, held that the transaction in question amounted - as the Assessor had said it did - to an "adventure in the nature of trade" the profits of which were, under Section 6(1)(a) and Section 2 of the Ordinance, subject to tax. Subject to a variation as to the actual amount of the said profit - it was reduced by agreement of the parties from Rs.71,765 to Rs.66,331 - the Authorized Adjudicator confirmed the assessment.

pp. 3- 9.

p.4, 11.14-16.
p.19, 11.4-11.

7. Against the said decision of the Authorized Adjudicator the Assessee appealed to the Board of Review.

By its Order dated the 9th January, 1962, the Board of Review affirmed the assessment and dismissed the appeal with costs. It held that the profit in question (Rs.66,331/-) had arisen from an "adventure in the nature of trade" and did not constitute - as the Assessee had contended - capital appreciation.

pp. 21-25.

Record
p.23, 11.26-41.

In giving reasons for its decision the Board treated the following matters as relevant in determining whether the transaction in question was a transaction in the nature of trade:-

- (a) The nature and quantity of the subject-matter.
- (b) Activity connected with the maturing of the subject-matter.
- (c) Special knowledge of the participant.
- (d) Organisation involved in the transaction. 10

The Board also noted that a transaction can have more than one motivation, one of which may be indicative of an activity in the nature of trade. In these circumstances, it was necessary to determine the dominant motivation, and to ascertain whether this motivation connoted an adventure in the nature of trade.

- p.24, 11.21-29. 8. Applying the said principles to the facts of the case, the Board said as to "the nature and quantity of the subject-matter" that although the ownership of 475 perches of land might well have been within the financial resources of the Assessee and the Appellant the true 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 Assessee and the Appellant. This question, for reasons that it gave, the Board decided against the Assessee. It drew the inference "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". 20 30

p.24, 1.40 to
p.25, 1.5.

As to the "dominant motivation" the Board commented that in view of the insuperable difficulties which the Assessee and the Appellant would have had in the circumstances in finding the money required to complete the purchase of the premises within the required period of time, it was difficult to accept the position that the Assessee would have parted with Rs.45,000/- of what constituted borrowed money by way of a deposit, if the sale of this block was not 40

dominant in his mind at the time he made his deposit. The motivation of residence in that area may have also been in his mind and in the Appellant's mind, but it was difficult to accept the contention that this was the dominant motivation in the transaction in the circumstances in which it took place.

9. Continuing, the Board referred to "the demarcation of the premises by a plan as far back as March 12th 1951" which it regarded "as an activity connected with the maturing of the subject-matter" - the second of the matters referred to in paragraph 7 hereof as relevant in determining whether a transaction is in the nature of a Trade. Further, the preparation of such a plan was, in its opinion, indicative of "organisation" - the fourth of the said relevant matters set out in paragraph 7.

10

p.25, 11.8-15.

Returning to the subject of "dominant motivation", the Board said:-

20 "We therefore feel that although Mrs. Ram Iswara may have been motivated by a desire to leave her home at Hulftsdorf and reside in a house near St. Bridget's Convent, nevertheless the dominant motivation of the transaction which she ultimately undertook appears to us to be a blocking up of the premises and the selling of these blocks so as to make a profit on the transaction and obtaining a block for herself below the market value".

p.25, 11.16-22.

30 10. Aggrieved by the Decision of the Board of Review, the Assessee applied to the Board under Section 78(1) of the Ordinance, to State a Case for the Opinion of the Supreme Court of Ceylon on the questions of law that had arisen in the case and the Case was Stated accordingly.

pp. 16-26.

11. By its Judgment, dated the 13th November, 1962, the Supreme Court, affirming the decision of the Board of Review, answered in the affirmative the following actual question which it said, it was called upon to decide:-

40

p.27, 11.22-25

"Whether on the facts and circumstances proved in the case, the inference that the transaction in question was an adventure or concern in the nature of trade is in law justified?"

Record
pp. 27-32.
p.28, 11.40-41.

p.29, 11.9-16.

12. Delivering the main Judgment of the Supreme Court, Sri Skanda Rajah J. (with whom L.B. de Silva J. agreed) said that both sides relied on the findings of the Board of Review on the facts. As to the acceptance or otherwise of the conclusions of the Board of Review on questions of fact and on questions of mixed law and fact, the learned Supreme Court Judge referred in detail to the decision of the Supreme Court of India in Naidu and Co. v. Commissioner of Income Tax A.I.R. [1959] S.C. 359, 362, 363, which had been cited in the argument. He quoted a passage from the Judgment in that decision which, he said, "admirably sets down the scope and the nature of the power which the Court has, upon a Case Stated, to reject conclusions reached by the Board of Review on questions of fact and on questions of mixed law and fact".

10

13. Relevant points from the passage from the Judgment of Gajendragadkar J. in Naidu and Co. v. Commissioner of Income Tax A.I.R. [1959] S.C. 359, 362, 363 (which was cited with approval also, in the Ceylon case of Malvawitana v. Commissioner of Inland Revenue () 64 N.L.R. 217) as applied to the present appeal, are as follows:-

20

p.29, 1.22 to
p.30, 1.7.

- (a) The jurisdiction of the Supreme Court in deciding pure questions of law is not fettered by the Board of Review.
- (b) Apart from the questions of law in a case there may arise points which, as questions of fact, have been decided by the Board of Review. In such cases, subject to the rules stated in (c) and (d) infra, the findings of fact recorded by the Board will be regarded by the Supreme Court as conclusive.
- (c) If, however, any finding of fact by the Board of Review is based on an inference drawn from primary evidentiary facts proved in the case, its correctness or validity may be challenged in the Supreme Court but within narrow limits. In such cases either side may contend that the inference has been drawn from a consideration of inadmissible evidence or after the exclusion of relevant and admissible evidence and if the Supreme Court is satisfied that the inference is the result of improper admission

30

40

or exclusion of evidence it will examine the correctness of the conclusion.

Record

(d) A conclusion of fact may also be challenged on the ground that it is not supported by any legal evidence or that the impugned conclusion drawn from the relevant facts is not possible. The Supreme Court, if satisfied that the ground of the challenge is established, will consider whether or not the finding in question should be set aside as being perverse.

10

14. On mixed questions of law and fact, the learned Judge of the Supreme Court (Sri Skanda Rajah J.) drew particular attention to the following statements in the Judgment of Gajendragadkar J. in the said case of Naidu and Co. v. Commissioner of Income Tax A.I.R. 1959/ S.C. 359, 362, 363, which he considered relevant to the present appeal:-

"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.

20

30

p.30, 11.7-23.

"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 correctly or not; and in that sense, the scope of enquiry 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".

40

15. The learned Supreme Court Judge (Sri Skanda Rajah, J.) said that in the present case the Assessee had challenged the correctness of the conclusion of the Board of Review on the basis that it was a

p.30, 1.24 to
p.31, 1.23.

Record

conclusion on a question of mixed law and fact and it was therefore necessary to examine whether or not the Board of Review had applied the relevant legal principles.

On the subject of the principles applicable in determining whether any particular adventure is an "adventure in the nature of trade" the learned Judge referred to passages in the said Judgment of Gajendragadkar J. in Naidu and Co. v. Commissioner of Income Tax A.I.R. [1959] S.C. 359, 362, 364, 366, to the speech of Viscount Simonds in Edwards v. Bairstow [1956] A.C. 14 at p.29, and to Saroj Kumar Mazumdar v. Commissioner of Income Tax A.I.R. [1959] S.C. 1252, which followed the earlier Indian Supreme Court decision, supra. The learned Judge then referred to the facts established before the Board of Review which briefly were that:-

10

p.31, 11.24-38.

(1) neither the assessee nor his wife had sufficient money to pay the deposit the whole of which sum had to be borrowed;

20

(2) the transaction had to be concluded within a comparatively short period of time;

(3) there was evidence of preparation, organization and activity, e.g. there were sketches, survey plans dividing the land into 14 lots etc.;

(4) the quantity of land purchased was far in excess of the alleged requirements of the assessee's wife; and

30

(5) there was a considerable profit from the transaction within a short time, i.e. there was a profit motive which is characteristic of trade.

p.32, 11.1-8

The "total impression" or "picture" that these facts would leave on the mind of any reasonable person was, in the opinion of the learned Judge, correctly expressed in the conclusion of the Board of Review, that the "dominant motive or intention" of the Appellant was not to live near St. Bridget's Convent in the interests of her daughters' education but to profit from an "adventure in the nature of trade". For these and other reasons the learned Judge was clear that

40

the Board of Review had applied the relevant legal principles correctly, and he therefore answered the question referred to the Supreme Court for consideration in the affirmative.

Record
p.32, 11.27-29.

16. Against the said Judgment of the Supreme Court the Assessee applied for leave to appeal to Her Majesty in Council and this was granted to him by Orders of the Supreme Court, dated the 16th January, 1963, and the 23rd May, 1963.

pp.35, 38.

10 The Assessee (H.V. Ram Iswara) having died his wife (Lily Harriet Ram Iswara), the present Appellant, was substituted in his place by Order of the Supreme Court, dated 24th February 1964.

The Respondent respectfully submits that this appeal ought to be dismissed, with costs throughout, for the following among other

R E A S O N S

20 1. BECAUSE in so far as the findings of the Authorized Adjudicator and the Board of Review were findings of fact those findings are conclusive.

2. BECAUSE having regard to the facts found the only possible conclusion in law was that the transaction in question was an adventure in the nature of trade within the meaning of the Ordinance so that the profit derived therefrom was taxable under Section 5 of the Ordinance.

30 3. BECAUSE in so far as the question for determination by the Supreme Court was a question of fact there were concurrent findings of the Authorized Adjudicator and the Board of Review which could not be disturbed and in so far as such question was a question of law, or a mixed question of fact and law, the relevant legal principles were correctly ascertained and applied to the primary facts as found.

40 4. BECAUSE for the reasons therein stated the determination of the Authorised Adjudicator, the decision of the Board of Review and the Judgment of the Supreme Court were correct and should be affirmed.

H.H. MONROE

R.K. HANDOO

A N N E X U R E

THE INCOME TAX ORDINANCE

("The Ordinance")

(C.242; Legislative Enactments of Ceylon,
1956 Revision, Vol. 8, p.520)

CHAPTER I

PRELIMINARY

1. This Ordinance may be cited as the Income Tax Ordinance.

2. In this Ordinance, unless the context otherwise requires - 10

* * * * *

"trade" includes every trade and manufacture, and every adventure and concern in the nature of trade;

CHAPTER II

IMPOSITION OF INCOME TAX

5. (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 or fixed by resolution under Section 23, for the year of assessment commencing on the 1st day of April, 1932, 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 - 20

(a) wherever arising, in the case of a person resident in Ceylon, and 30

(b) arising in or derived from Ceylon in the case of every other person,

but without prejudice to any provisions of this Ordinance which enact that tax is to be charged in particular cases in respect of the profits and income of a period other than the year preceding the year of assessment.

(2)

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

10

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

* * * * *

(h) income from any other source whatsoever, not including profits of a casual and non-recurring nature.

CHAPTER XI

APPEALS

20

APPEALS TO THE COMMISSIONER

73. (1) Any person aggrieved by the amount of an assessment made under this Ordinance may within twenty-one days from the date of the notice of such assessment appeal to the Commissioner by notice of objection in writing to review and revise such assessment.

APPEALS TO THE BOARD OF REVIEW

30

74. (1) For the purpose of hearing appeals in the manner hereinafter provided, there shall be a Board of Review (hereinafter referred to as "the Board") consisting of not more than twenty members who shall be appointed from time to time by the Minister.

(3) There shall be a legal adviser to the Board who shall be appointed by the Board.

APPEALS TO THE SUPREME COURT

78. (1) The decision of the Board shall be final:

Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Supreme Court

(2) The stated case shall set forth the facts, the decision of the Board, and the amount of the tax in dispute where such amount exceeds five thousand rupees, and the party requiring it shall transmit the case, when stated and signed, to the Supreme Court within fourteen days after receiving the same. 10

* * * * *

(6) Any two or more Judges of the Supreme Court shall hear and determine any question of law arising on the stated case and may in accordance with the decision of the Court upon such question confirm, reduce, increase, or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the Court thereon. Where a case is so remitted by the Court, the Board shall revise the assessment as the opinion of the Court may require. 20

* * * * *

(8) For the purpose of enabling the Commissioner or any other party to appeal to Her Majesty in Council against any order of the Supreme Court under sub-section (6) and for the purpose of the application of the provisions of the Appeals (Privy Council) Ordinance - 30

(a) an order made by the Supreme Court under sub-section (6) shall, together with any order of that Court under sub-section 7 Costs of Supreme Court, be deemed to be a final judgment of the Supreme Court in a civil action between the Commissioner and such other party.

AUTHORISED ADJUDICATORS

(Amendment of Income Tax Ordinance,
post 1956)

69A. (1) The Commissioner may authorise any number of persons, besides Assistant Commissioners, to hear and determine appeals made to the Commissioner.....

10 (2) Every person authorised by the Commissioner under sub-section (1) is hereinafter referred to as an "authorised adjudicator".

No. 31 of 1964

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME
COURT OF CEYLON

B E T W E E N :

LILY HARRIET RAM ISWARA
(Substituted for her husband
Ram Iswara, deceased)
Appellant

- and -

THE COMMISSIONER OF INLAND REVENUE
Respondent

CASE FOR THE RESPONDENT

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

Solicitors for the Respondent.