THE MANAGER, BANK OF CEYLON, HATTON
VS
THE SECRETARY, HATTON DICKOYA URBAN COUNCIL

SUPREME COURT.
BANDARANAYAKE, J.
AMARATUNGA J. AND
MARSOOF J.
SC APPEAL 67/2004.
H. C. (CENTRAL PROVINCE).
MAGISTRATE'S COURT (HATTON).
30TH MAY, 13TH JULY AND 30TH SEPTEMBER, 2005.

By laws under Urban Councils Ordinance - Urban Councils Ordinance, sections 164, 165, 165B and 165C - Whether the appellant Bank is liable to pay licence fees separately for money lending and pawn brokering-Meaning of "Banking" under common law and statutes such as the Bank of Ceylon Ordinance and Banking Act, No. 30 of 1988- Existence of doubt regarding the meaning of "Banking" (whether money lending and pawn brokering can be separated) Interpretation of statutes - Doubts in taxing statutes to be resolved in favour of the tax payer - Validity of the Magistrate's order on the appellant Bank to pay licence fees on pawn brokering in addition to payment for money lending.

On the application of the respondent Secretary aforesaid, the Magistrate, Hatton ordered the recovery of Rs.3,375 from the appellant Bank as licence fees for pawn brokering with GST whilst the Bank had already paid Rs. 3000 for money lending for the year 2000 on Document XI.

HELD:

1. Having regard to the common law and statutes such as the Bank of Ceylon Ordinance and the Banking Act, No. 30 of 1988 and the meaning of "Banking", the Bank of Ceylon is carrying on banking business including money lending and pawn-brokering. These two activities cannot be separated.

2. In any event there is a doubt whether money lending and pawn-brokering may be separated. In the circumstances the doubt should be resolved in favour of the Bank being the tax payer. Taxing statutes should be strictly construed in favour of the tax payer.

3. As such, the order of the Magistrate that the appellant is liable to be additionally taxed for pawn-brokering and the order of the High Court affirming that order are invalid and cannot be sustained.

APPEAL from the judgment of the High Court.

Cases referred to :

1. *United Dominions Trust* vs. *Kirwood* (1966) 2 QB 431.
2. *State Saving Bank of Victoria Commissioners* vs. *Per. Mewan Wright and Co.* Ltd. (1915) 19 CLR 459.
3. *Tuck and Sons* vs. *Priester* (1887) 19 QBD 629.

M. K. Muthukumar with *Jinadasa Gamage* for appellant.

S. Mandaleswaran with *P. Peramunagama* for respondent.

Cur.adv. vult.

7 December, 2005.

SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the order of the High Court of the Central Province dated 21.05.2004. By that order the learned High Court Judge had affirmed the judgment of the learned Magistrate of Hatton and dismissed the appeal. The respondent - appellant - appellant (hereinafter referred to as the appellant Bank) appealed against the said order on which this Court granted special leave to appeal.

The facts of this appeal, *albeit* brief, are as follows :

The complainant - respondent - respondent (hereinfter referred to as the respondent), being the Secretary of the Hatton - Dickoya Urban Council, filed a complaint against the appellant Bank in the Magistrate's Court of Hatton to recover the tax due under section 165B(3) of the Urban Councils Ordinance for conducting the business of pawn-brokering. The respondent had claimed in the said complaint that the appellant Bank was liable to pay Rs. 3,000 as the licence fees for pawning business, Rs. 375 as goods and services tax and Rs. 625 being charges for office expenses, totalling to a sum of Rs. 4,000. Learned Magistrate by his order dated 23.01.2001 allowed the respondent's application and imposed a fine of

Rs. 3,375 payable to the respondent Urban Coucil, which order was affirmed by the learned High Court Judge of the Central Province by his order dated 21.05.2004.

Both counsel agreed that the only question that has to be examined in this appeal is whether the respondent is entitled to levy a tax from the appellant Bank separately for the business of pawn brokering carried on by the appellant Bank in Hatton apart from various businesses of banking carried on by the appellant Bank in the said area.

Learned Counsel for the respondent contended that the respondent is entitled to levy a tax under section 165B(1) of the Urban Councils Ordinance for the two businesses carried on by the appellant Bank, namely money lending and pawn brokering set out in item 2 and item 7 of the third Schedule to the Gazette notification dated 14.02.1997, published in terms of the Urban Councils Ordinance. He further contended that the sum of Rs. 3,000 paid by the appellant by document marked XI for the year 2000 was for the business of money lending and that the present claim was for the recovery of the taxes for the business of pawnbrokering in terms of section 165B(3) of the Urban Councils Ordinance.

It is common ground that the appellant Bank is a branch office of the Bank of Ceylon established under the Bank of Ceylon Ordinance No. 53 of 1938 as amended. It is also common ground that the Bank had paid Rs. 3,000 as licence fee for the year 2000 (x). The contention of the respondents is that the said payment of Rs. 3,000 was made by the appellent Bank for carrying on the business of money lending and that a further sum has to be paid in terms of schedule III of the Gazette notification dated 14.02.1997 (P1) published under section 165 of the Urban Councils Ordinance for carrying on the business of pawn-brokering.

The Gazette notification dated 14.02.1997 (P1) refers to the by -laws made by the Urban Council in terms of sections 164, 165, 165B and 165C of the Urban Councils Ordinance. The said by -laws refer to 3 Schedules. The first Schedule deals with the licence duty referred to in section 164 of the Ordinance for the use of the premises for the specific purpose set out therein. The second Schedule refers to the tax imposed and levied on the trade, set out in section 165 of the Ordinance. The third Schedule deals with the tax imposed and levied on the business set out in section 165B of the Ordinance. It is apparent that none of these schedules refer to

banking business. The third Schedule, which deals with the business in the area, has 23 listings, but has not included banking business. However, the third Schedule refers to money lending and pawn-brokering among the other type of business.

Section 5 of the Bank of Ceylon Ordinance makes provision for the said Bank to establish and maintain branches in Sri Lanka or elsewhere. Part I of the first Schedule to the said Ordinance refers to the business, which the Bank is authorized to carry on and transact, subject to the limitations mentioned in Part II of the first Schedule. In fact,section 71of the Bank of Ceylon Ordinance, clearly refers to the scope of its business, which reads as follows :

> "Subject to the provisions of this Ordinance the business which the Bank is authorized to carry on and transact shall be the several kinds of business specified in Part I of the first Schedule subject to the limitations mentioned in Part II thereof."

It is thus evident that the Bank of Ceylon is empowered to carry on and transact business relating to money lending and pawn-brokering. However, it is apparent that none of the provisions in the Money Lending Ordinance, or the Debt Conciliation Ordinance or the Pawnbrokers Ordinance shall apply to such transactions. Sections 68 and 69, which are reproduced below, had quite clearly laid down that such Ordinance has no application to debts which are due to the Bank.

> "Section 68- Nothing in the Money Lending Ordinance or the Debt Conciliation Ordinance shall apply or be deemed to apply to any debt due to the Bank, or to prejudice or affect the rights of the Bank in respect of the recovery of any such debt.
>
> Section 69 - The Pawnbrokers Ordinance shall not apply to the Bank where the Bank carries on the business of a pawnbroker".

The claim made by the respondent was on the basis that the appellant Bank had been carrying on different businesses in terms of the Bank of Ceylon Ordinance. The respondent therefore was of the view that money lending and pawn-brokering are two different business. In fact learned Council for the respondent contended that in terms of the definition given under section 165B of the Urban Council's Ordinance, the financier, money lender

and pawnbroker are regarded as three different entitiies and therefore took up the position that the appellant Bank, being a establishment which carried on money lending as well as pawn-brokering, should pay the relevant taxes for the said businesses separately.

A careful examination of the definition given to the word "takings" under section 165B(b) indicates that the statute has referred to financier, money lender and a pawnbroker not as three different entities, but as a single person. The wording in the aforesaid provision, which is referred to below, clearly shows this position.

> "takings in relation to any business, means the total amount received or receivable from transactions entered into in respect of that business or for services performed in carrying on that business, and includes - (a) in the case of financier, moneylender or pawnbroker the money given out by him as loans, the interest received or receivable by him on such loans, and the sums received by him as fees or other charges in respect of such loans."

What the definition referred to above, explains is that, takings should include the total amount received from the transactions relating to financier, moneylender or the pawnbroker. When one refers to these three items, it is apparent that a modern day Bank would be forced to carry out all these transactions. Moreover, it is to be borne in mind that considering the characterietics of banking takings, in relation to a Bank would undoubtedly include handling deposits as well as make use of such deposits by lending it out at interest or investing it on mortgages etc. This was the view taken by Lord Denning M. R. in *United Dominios Trust* vs. *Kirkwood* (1) where reference was made to the characteristics of banking in the following terms :

> "Seeing that there is no statutory definition of banking, we must do the best we can to find out the usual characteristics which go to make up the business of Banking. In the eighteenth century, before cheque came into common use, the principal characteristics were that the banker accepted the money of the others on the terms that the persons who deposited it could have it back again from the banker when they asked for it, sometimes on demand, at other times on notice, according to the stipulation made at the time of deposit, and meanwhile the

banker was at liberty to make use of the money by lending it out at interest or investing it on mortgage or otherwise (emphasis added)."

A similar view was taken as far back as in 1914, by Issacs, J. in the High Court of Australia in State Savings Bank of Victoria Commissioners v Permewan Wright and Co. Ltd., [2] With regard to the definition of Banking, Issacs, J. thus stated that-

> "The essential characteristics of the business of banking... may be described as the collection of money by receiving deposits on loan, repayable when and as expressly or impliedly agreed upon, and the utilisation of the money so collected **by lending it again in such sums as are required** (emphasis added)."

Thus it is apparent that the business of Banking would include the acceptance of deposits of money as well as utilisation of such money so collected by lending them on interest. This position is clearly laid down in the definition given to 'banking business' in Section 86 of the Banking Act, No. 30 of 1988, where it is stated that,

> "banking business means the business of receiving funds from the public through the acceptance of money deposits payable upon demand by cheque, draft, order or otherwise, and the use of such funds either in whole or in part for advances, investments or any other operaton either authorized by law or by customary banking practices."

The question that would arise at this juncture is that, if lending is part of the banking business, whether that would include pawning as well. The Pawnbrokers Ordinance, No. 8 of 1893 defines the pawnbroker in wide terms that includes every person who carries on the business of taking goods in pawn. The Encyclopedia Britannica (Vol. 15-pg. 354) refers to pawnbrokering and states that-

> "the oldest security device that is common everywhere is the pledge (or pawn). The borrower delivers the goods to be charged to the lender, who keeps them until repayment of the secured loan.... But pawnbrokers continued to operate on a minor scale,

and Banks keep documents of title (such as property deeds) as security."

On an examination of the Pawnbrokers Ordinance it is clear that the Ordinance does not speak of security for loans as only gold article. A pledge is defined as an article pawned with a pawnbroker obviously of value. Thus in simple terms the pledge is the security for the purpose of the money borrowed and when the pledge is with a movable item such as gold, it could not change the nature of the main business of money lending carried out by a Bank.

The tax in question was imposed by the respondent, in terms of section, 165A of the Urban Councils Ordinance. Section 165A reads as follows :

"An Urban Council may by resolution impose and levy annually on every person who.... carries on any business for which no license is necessary under the provisions of this Ordinance ... a tax according to the takings of the business."

As the appellant Bank came under the category that was carrying on a business for "which no licence was necessary", the respondent could impose only a tax. When such tax was imposed, the appellant Bank had duly paid the relevant and assigned amount for which a receipt was issued stating that the amount was paid for the purpose of payment for business licence (වෙළඳ බලපත්‍ර ගාස්තු) . The contention of the respondent is that the Council is entitled to levy a tax from the appellant Bank separately for the business of pawnbrokering carried on by the Bank apart from the various businesses of Banking carried on by the appellant Bank.

It is not disputed that the question at issue is regarding whether the appellant Bank has to pay for separate business licences to carry out business pertaining to money lending as well as for pawnbrokering. It is also not disputed that the appellant Bank has already paid Rs. 3,000 being the payment as conceded by the respondent for business licence. As referred to earlier, section 165A of the Urban Coucils Ordinance states that a business entity would be liable to pay a tax 'according to the takings of the business'. Depending on the 'takings' the amount that has to be paid as tax would be decided. Non payment of such tax would create a pecuniary burden on the person liable to pay such tax in terms of section 165B(3) of the Urban Councils Ordinance.

Referring to such statutes which incur pecuniary burdens, Maxwell is of the view that they should be subject to strict interpretation. It was further stated that (Interpretation of Statutes, 11th Edition, Sweet Maxwell p. g. 278)

> "Statutes which impose pecuniary burdens, also, are subject to the same rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language because of some decree they operate as penalties. The subject is not to be taxed unless the languages of the statute clearly imposes the obligation.
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> In a Taxing Act one has to merely look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no prescription as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used. **A construction for example, which would have the effect of making a person liable to pay the same tax twice in respect of the same subject matter would not be adopted unless the words were very clear and precise to that effect. In a case of reasonable doubt the construction most beneficial to the subject is to be adopted** (emphasis added)"

In fact Lord Esher, *M. R. InTuck and Sons* vs *Priester* (3) referring to strict construction in construing penal laws, stated that,

> "if there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

On a careful consideration of the issue before us, it is clear that the appellant Bank is carrying on banking business, which includes money lending as well as pawn-brokering. Both money lending and pown-brokering are part and parcel of the banking business of the appellant Bank and pawn-brokering cannot be separated from the money lending business of the appellant Bank. Therefore the respondent could levy a tax on the basis

of the issuance of business licence for the banking businesses of the appellant Bank which in turn would include money lending as well as pawn-brokering carried out by them.

It is common ground that the appellant Bank has already paid money for its business license (XI). In the circumstances there cannot be any basis for the respondent to levy a further tax for the business of pawn-brokering carried out by the appellant Bank.

For the aforementioned reasons I answer the question in the negative. This appeal is accordingly allowed and the order of the learned Magistrade Hatton dated 23.11.2001 and the order of the learned High Court Judge of the Central Province, dated 21.05.2004 are set aside.

I make no order as to costs.

N. G. AMARATUNGA, J. – *I agree.*

SALEEM MARSOOF, J. *I agree.*

Appeal allowed.