

Sockalingam Chettiar V N V. Karuppan Chettiar. A. K. R

169 [PRIVY COUNCIL]1965

1965 Present: Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Pearce, and Lord Wilberforce

V. N. SOCKALINGAM CHETTIAR, Appellant, and A. K. R. KARUPPAN CHETTIAR, Respondent

PRIVY COUNCIL APPEAL No. 30 OF 1964

S. C. 517/1960—D. C. Colombo, 44567/M

Profits tax—Property owned in Ceylon jointly by a person resident in India and a person resident in Ceylon—Agreement by former to sell his half share to the latter—Stipulation that, until date of transfer, transferee should pay " Ceylon Income Tax " in respect of the profits of the transferor—Does the expression " Ceylon Income Tax " include Profits Tax ?—Income Tax Ordinance (Cap. 242)—Profits Tax Act (Cap. 243), ss. 13, 14.

The appellant and his son-in-law, the respondent, were the owners, in equal shares, of an estate in Ceylon known as the Kalugala Estate. The respondent, who was resident in Ceylon, managed the estate and sent monthly accounts to the appellant, who was resident in India. In 1956 they decided to terminate their business association and entered into a written agreement on or about 21st August 1956 for the purpose of making available to the appellant a clear sum of money which could be remitted to him in India. Both profits tax and income tax had, in the past, been paid by the respondent out of the estate funds. At the time of the Agreement profits tax was mentioned and the parties were aware of the prospect that profits tax assessments of considerable amounts would be made in respect of the estate. Clause 1 of the Agreement was as follows :—

"1. Till the date when a transfer is being effected to the 2nd party (the respondent) by the 1st party (the appellant) of his half share in the Kalugala 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 of the profits of the 1st party V. N. S. "

In Clause 5 of the Agreement, the expression " Ceylon Income Tax " was used so as to cover Ceylon Profits Tax.

In 1958, the appellant was assessed to Ceylon profits tax in respect of his share of the profits of the estate for the years 1955, 1956 and 1957. The total of these assessments was Rs. 29,747. He claimed that the respondent was liable to pay this sum under the terms of clause 1 of the Agreement and, upon the respondent refusing to do so, instituted the present action against him. The respondent contended that clause 1 was limited to income tax and did not extend to profits tax.

Held, that, upon a consideration of the Agreement in all its terms and circumstances, the expression " Ceylon Income Tax " as used in clause 1 extended to cover Ceylon Profits Tax.

Held further, that the Profits Tax actually assessed upon the appellant was covered by the words " that may fall due hereafter and the arrears if any payable to the date hereof".

APPEAL from a judgment of the Supreme Court.

S. P. Khambatta, Q.C., with Dick Taverne, Q.G. and M. I. Hamavi Haniffa, for the plaintiff-appellant.

E. F. N. Gratiaen, Q.C., with Walter Jayawardena, for the defendant-respondent.

Cur. adv. vult.

October 18, 1965. (Delivered by LORD WILBERFORCE)—

The appellant appeals against the judgment of the Supreme Court of Ceylon dated 28th January 1963 whereby the judgment of the District Court of Colombo dated 20th October 1960 was reversed and against the decree of the Supreme Court whereby the appellant's claim against the respondent was dismissed and the respondent's claim against the appellant in reconvention was allowed in the sum of Rs. 21.086.55.

The appellant and respondent, who are related to each other as father-in-law to son-in-law, owned an estate known as the Kalugala Estate in equal shares. The appellant was resident in India and only rarely visited Ceylon. The respondent was resident in Ceylon; he managed the estate and sent monthly accounts to the appellant. In 1956 the appellant and the respondent desired to terminate their association, and, following upon some discussions which took place in India between them, a written agreement was prepared and executed in Ceylon on or about 21st August 1956 by an attorney for the appellant and by the respondent personally. The original of this agreement was written in Tamil, but a sworn translation into English was before the District Court and both that court and the Supreme Court founded their decision upon that translation. The Agreement, expressed to have been made between the two parties after discussion, was in nine clauses, of which clauses 1 and 2 are those upon which the present proceedings are primarily based. Their Lordships however consider that it is necessary to consider the whole agreement in order to understand its operative portion and consequently set it out in full:

"1. Till the date when a transfer is being effected to the 2nd party by the 1st party of his half share in the Kalugala 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 of the profits of the 1st party V. N. S.

2. The 2nd party shall receive the entire refund in Ceylon Income Tax due to the first party and for that purpose the 1st party

shall sign and deliver the relevant documents whenever called upon to do so by the 2nd party.

3. The 2nd party A. K. R. shall tender such relevant documents and cause to be nullified the penalty already imposed by the Indian Income Tax authorities in connection with the said estate and in spite of it, if tax is to be paid the 1st party V. N. S. shall pay only a third of the amount and the balance two-thirds by the 2nd party A. K. R.
4. The 1st party himself shall pay the Income Tax levied in India affecting the half share in the said estate belonging to the 1st party.
5. To enable the 1st party to obtain Exchange Control permit for the sum of Rs. 250,000/- being the sale price of the said half share and the sum of Rs. 125,000/- being the profits attached thereto aggregating to a sum of Rs. 375,000/- the 2nd party shall pay the Ceylon Income Tax arrears payable by the 1st party and deliver to the 1st party the Income Tax Clearance Certificate.
6. All estate accounts and Audit Statements that may be required in connection with the Exchange Control the 2nd party shall, when called upon by the 1st party deliver and get back through the auditor.
7. From 1.4.56 if Income Tax becomes payable in Ceylon for the share of the profits of the 1st party V. N. S. the same shall be paid by the 2nd party A. K. R. and for that if reduction is made by way of refund in the Income Tax Office in India in the assessment of the 1st party V. N. S. such amounts shall be paid without delay to second party A. K. R. by the 1st party V. N. S.
8. If Income Tax payments receipts were required for obtaining refunds of Income Tax either in Ceylon or in India, the same shall be delivered to the party requiring and got back through the auditor.

9. If a Valuation Report was needed in respect of the said estate and for that purpose when the Valuer visits the said estate at the expense of the 1st party it shall be done with the sanction of the 2nd party A. K. R.

And further agreeing to furnish other details when required we have set our signatures to two of the same tenor and written by the same hand as these presents and held one by each of us."

In 1958, the appellant was assessed to Ceylon profits tax in respect of his share of the profits of the estate for three years described in the assessments as for 1955, 1956 and 1957: each of these assessments related to the previous accounting year. The total of these assessments was Rs. 29,747. He claimed that the respondent was liable to pay this sum under the terms of clause 1 of the Agreement of 21st August 1956 and upon the respondent refusing to do so, commenced proceedings against him by Plaint on 11th August 1958. The respondent denied the claim contending that clause 1 was limited to income tax and did not extend to profits tax; and by way of reconvention he claimed that the appellant was in default in that he, in breach of the same Agreement, had failed to provide the respondent with the documents necessary to obtain refunds of income tax: he claimed against the appellant the sum of Rs. 29,939'30 representing the amount of the refunds which, as he claimed, would have been obtained had the appellant complied with his obligations.

At the trial before the District Court, the appellant succeeded in his claim. As to the reconvention, it was not disputed that by the time of the trial the appellant had received by way of refund two sums of Rs. 14,311-30 and Rs. 1,875-25 making a total of Rs. 16,186-65. There was a further refund of Rs. 6,355 which was not paid to the appellant but set off against a claim against income tax due. The appellant did not dispute his liability to account to the respondent for the sum of Rs. 16,186-55 and the learned judge held, as regards any additional sums, that there was no evidence fixing the amount of them and further that the appellant had never been called on to provide any documents with regard to them and was therefore not

shown to be in default. Consequently he gave judgment for the appellant in the sum of Rs. 29,747 less Rs. 16,186-55—namely Rs. 13,560-45.

On the respondent appealing from this judgment, the Supreme Court held that the respondent was not liable to pay any of the sums assessed upon the appellant in respect of profits tax and consequently dismissed the appellant's claim. On the reconvention the Supreme Court held that the appellant was in default and was liable to account to the respondent not only for the sum of Rs. 16,186-55 admittedly received by way of refund but also for a further Rs. 4,900 expected to be payable to the appellant. The Supreme Court therefore gave judgment in favour of the respondent for the sums of Rs. 16,186-55 and Rs. 4,900 making a total of Rs. 21,086-55.

On the appellant's claim the issue is whether, on the true construction of the Agreement of 21st August 1956, the expressions " Ceylon Income Tax " as used in clause 1 of the Agreement extends to Ceylon Profits Tax : a subsidiary question is whether, if this be so, the Profits Tax actually assessed upon the appellant was covered by the words " that may fall due hereafter and the arrears if any payable to the date hereof ".

Before considering the construction of the Agreement, it is necessary to refer briefly to the legislation under which income tax and profits tax is charged in Ceylon. Income Tax is levied under the Income Tax Ordinance (Cap. 242 of the Legislative Enactments of Ceylon) in respect of any profits or income arising in or derived from Ceylon by reference to specified sources of profits or income. Profits Tax is charged under a separate enactment (Cap. 243) but through the same office. The profits to be charged with Profits Tax are to be ascertained in accordance with the Income Tax Ordinance subject to certain modifications : there is a general provision (section 14 of the Profits Tax Act) that Profits Tax is to be charged, levied and recovered in like manner as the income tax and applying numerous provisions of the Income Tax Ordinance for that purpose. In view of the reference in the Agreement of 21st August 1956 to

refunds, it is relevant to note that there are Double Taxation arrangements in force between Ceylon and India which, in the case of a person resident, as was the appellant, in India might result in refunds of Ceylon Income Tax being available to him ; moreover it is provided in the Profits Tax Act (Section 13) that profits tax may be deducted in arriving at the amount of profits to be charged with income tax but only when the profits tax has been paid ; so that if (as happened in the present case) the income tax was paid first, there was the possibility of a subsequent refund on payment of the profits tax. No doubt the possibility existed also of refund of income tax in the event of an overcharge of this tax being established, and of profits tax in the same event. In fact part of the refund admittedly received by the appellant, namely Rs. 1,875-25, was in respect of profits tax.

In considering the question what was the intention of the parties with regard to the payment of the taxes in question, it is necessary to start from the actual wording used. Clause 1 of the Agreement in terms refers to income tax only, so that prima facie the intention should be taken to be that only the tax called by that name should be within the Agreement. It was for the appellant to satisfy the Court, whether from the provisions of the agreement as a whole or from the factual circumstances in which the agreement was entered into, that the common intention was to confer upon the words used a wider meaning, so as to include all Ceylon taxes upon income or profits. As regards surrounding circumstances, their Lordships regard it as of importance to recognise that the evident purpose of the agreement was to liquidate the business relationship of the parties in the Kalugala Estate and to do so in a way which would enable the appellant to obtain a clear sum of money which could be remitted to him in India. As the trial judge pointed out, the parties might be expected to deal in the liquidation agreement with any outstanding or prospective taxes in Ceylon and the Agreement shows that to some extent at any rate they had in mind that these taxes would be paid by the respondent, who was resident there, and that he should take any refunds. The question is how far this intention should be taken to go. On this question there are three relevant points. First both profits tax and income tax had, in the

past, been paid by the respondent out of the estate funds: secondly, in the preliminary discussions which took place in India between the appellant and the respondent before the agreement was prepared, profits tax, as the respondent stated in his evidence, was mentioned: and thirdly in 1956 there was the prospect—indeed the certainty—that claims for profits tax would be made. The position in fact was that income tax had been paid up to 1st April 1956, but that the last year for which profits tax had been paid was the year 1954, in respect of the profits of the previous year. These considerations point strongly towards the probability that profits tax in respect of subsequent years up to the dissolution must have been in the minds of the parties.

Other provisions in the Agreement itself reinforce this probability. Clause 5 requires the respondent to pay " the Ceylon Income Tax arrears " payable by the appellant in order that the appellant might obtain an " Income Tax Clearance Certificate" and thereafter an Exchange Control permit. This provision suggests two things : first, the parties could hardly have supposed that an Exchange Control permit would be given unless the Profits Tax liability was cleared; and secondly it is unlikely that the respondent would have made himself a party to an arrangement by which all the appellant's assets were removed from Ceylon unless prior thereto the profits tax liability in respect of the estate had been discharged. But if these considerations suggest (as their Lordships think they do somewhat strongly) that " Ceylon Income Tax " must extend in clause 5 to cover Ceylon Profits Tax, the same words can hardly fail to do so in clause 1.

It remains to see whether any conclusions favourable or otherwise to the appellant's argument can be drawn from the words in clause 1, "that may fall due hereafter and the arrears if any payable to the date hereof ". The Supreme Court took the view that these words showed that Profits Tax was not in the mind of the parties. Their Lordships can agree that the words " that may fall due hereafter " may not cover Profits Tax on previous years' profits, but they see no reason why the reference to arrears should not do so. It was no doubt correct to say that, until assessments were raised, there

would, technically, be no arrears, but to use the words " arrears " to refer to Profits Tax known to be outstanding and which would have to be paid or provided for, seems to their Lordships an entirely natural use of the expression. The addition of the cautionary " if any ", which words are not repeated in clause 5, is too uncertain an indication to carry any weight. The ultimate question comes to this : whether the parties to this Agreement, who were not inexperienced in business affairs, aware as they clearly were of the prospect that profits tax assessments of considerable amounts would be made, and making arrangements to terminate the appellant's business associations with Ceylon and to make available to him a clear sum of money in India, would, if they had not intended that the profits tax liability should be included in the agreement, have contented themselves with the use of the expression " Ceylon Income Tax " or would, on the contrary, have expressly excluded Profits Tax from the scope of the Agreement. Their Lordships have come to the clear conclusion in all the circumstances that they would have done the latter and that the omission to do so is consistent only with an intention that Profits Tax should be covered. They are of opinion that the Agreement considered in all its terms, and in relation to the circumstances in which the parties stood in 1956 affords an indication, amply sufficient to outweigh the prima facie inference to be drawn from the reference to Income Tax, that the parties had in mind all the Ceylon taxes chargeable on the profits of the estate, and for these reasons they reach the same conclusion as the learned judge in the District Court namely that the appellant's claim should succeed.

The respondent's claim in reconvention was founded upon clause 2 of the Agreement of 21st August 1956 and depended upon his showing that the appellant was in default in having failed to deliver relevant documents after having been called on to do so by the respondent. The evidence as to this matter was as follows : the appellant's attorney, P. Sevagan Chettiar, said that the respondent had not asked him for any documents. The accountant who did the income tax returns for both parties said that he informed the agent to get the refund: the respondent said that he asked the appellant for the document through the auditors. Nothing in writing was

produced by which the documents had been requested. On this evidence the trial judge rejected the defendant's evidence that refund documents had been called for, but the Supreme Court accepted the evidence of the accountant that he had repeatedly requested them from the appellant's attorney saying that this was uncontradicted. This was a misapprehension, since the plaintiff's attorney had denied any such request was made. The position was that there was a conflict of evidence on which the trial judge did not accept the evidence given for the respondent: their Lordships are of opinion that his finding ought not to be disturbed. It appears that the appellant is now entitled to a refund of Rs. 4,900 or thereabouts and it is quite clear that he must account for this, when received, to the respondent, or put the respondent in a position to receive it. But the respondent has not established any breach by the appellant of his contractual obligation and consequently his claim in reconvention must fail.

As regards the question of refunds, mention should be made of one other point. As has been pointed out, the refunds admittedly received, and of which the trial judge took account, included one of Rs. 1,875'25 in respect of profits tax. This was correct since if "Income Tax" includes profits tax for one purpose, it must do so throughout the Agreement. No adjustment is therefore needed to the figure for which judgment was given.

Their Lordships are consequently of opinion that the appeal must be allowed as to both the claim and the reconvention and that the judgment and decree of the Supreme Court should be set aside with costs and the judgment and decree of the District Court should be restored. They will advise Her Majesty. The respondent must pay the costs of the appeal.

Appeal allowed.