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INSTITUTE OF ADVANCED
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Judgment
27/1964

IN THE PRIVY COUNCIL

No.11 of 1963

O N A P P E A L

FROM THE COURT OF APPEAL FOR EASTERN AFRICA AT
NAIROBI

B E T W E E N :-

SARDAR MOHAMED MAHERALLY SHROFF

Appellant

- and -

THE COMMISSIONER OF INCOME TAX

Respondent

C A S E FOR THE RESPONDENT

RECORD

- 10 1. This is an appeal from a judgment of the Court of Appeal for Eastern Africa at Nairobi (Forbes V.-P., p.41 Crawshaw J.A. and Newbold J.A.) dated the 18th October, 1962, upon an appeal by the appellant from a Ruling and Order of the Supreme Court of Kenya at Nairobi (Madan J.) which dismissed the appellant's applications for an extension of time to enable him to file Memoranda of Appeal in the said Supreme Court of Kenya against assessments of income tax made by the Respondent. By the judgment of the
- 20 Court of Appeal for Eastern Africa, the judgment of the Supreme Court of Kenya was affirmed and the appeal was dismissed.
- 30 2. The matter arises in consequence of two assessments to income tax made upon the appellant under the East African Income Tax (Management) Act, 1958, by the respondent relating to the years of income 1960 and 1961. In accordance with the terms of Rule 3 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, (L.N. 12 of 1959) the appellant applied to a Judge to extend the period within which he might present memoranda of appeal against the aforementioned assessments, but the Judge refused to extend the period and his decision was supported by the Court of Appeal for Eastern Africa.

pp.25 & 30

pp.45 & 46

RECORD

3. The facts of the case are set out in detail in the Record and may be summarised as follows:-

pp.45 & 46

- (i) By assessments dated the 28th January, 1961, the respondent assessed the appellant to income tax for the years of income 1960 and 1961 estimating the income for 1960 as £55,000 and for 1961 as £10,000.
- (ii) In accordance with section 111 of the East African Income Tax (Management) Act, 1958, the appellant appealed to the Local Committee against the said assessments and on the 28th July, 1961, the appellant's appeals were not upheld. 10
- (iii) In the absence of proof to the contrary, notice of the decisions of the Local Committee were, by virtue of section 145(3) of the East African Income Tax (Management) Act, 1958, deemed to have been served on the appellant fourteen days after posting i.e. on the 11th August, 1961. 20
- (iv) In accordance with section 111(2) of the said Act, and within the period of time specified by such section, the appellant gave notice of appeal in writing to the Commissioner on the 8th September, 1961.
- (v) The time for filing memoranda of appeal prescribed by Rule 3 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, expired on the 25th October, 1961, and no memoranda were filed on or before that date. 30

4. The relevant provisions of the East African Income Tax (Management) Act, 1958, (hereinafter called the "Act") are as follows:-

" Section 111. (1) Any person who has given a valid notice of objection to an assessment and, consequent thereon, has been served with a notice under sub-section (3) of section 110 may appeal -

- (a) to the Local Committee appointed for the area in which he resides or, if he is a non-resident person, for the area which includes the capital of the Territory 40

from which any income included in the assessment accrued or was derived; or

(b) to a judge;

upon giving notice of appeal in writing to the Commissioner within 45 days after the date of service upon him of the notice under such subsection (3).

10 (2) Any person who, having appealed to a Local Committee, is dissatisfied with the decision of such Committee may, notwithstanding such decision, again appeal against the assessment to a judge upon giving notice of appeal in writing to the Commissioner within 45 days after the date on which a notice of such decision has been served upon him under paragraph (f) of section 112.

20 Section 117. (1) The appropriate authority may, in relation to each Territory, make rules governing appeals under this Part (other than appeals to a Local Committee) and providing for the method of tendering evidence and appointing places for the hearing of such appeals and prescribing the fees to be paid on such appeals.

(2) In this section, "the appropriate authority" means -

- 30 (a) in relation to Kenya, the Rules Committee established under section 81 of the Civil procedure Ordinance of Kenya;
- (b) in relation to Tanganyika, the High Court acting with the approval of the Governor;
- (c) in relation to Uganda, the Rules Committee established under section 85 of the Civil procedure Ordinance of Uganda."

5. Rule 3 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, (L.N. 12 of 1959) is relevant and is as follows:-

40 "3. (1) Every appeal to a Judge under the Act shall be preferred in the form of a memorandum of appeal and shall be presented to the Registrar within 75 days after the date of

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service upon the appellant of -

- (a) the confirming notice; or
- (b) the amending notice; or
- (c) the notice of the decision of the Commissioner; or
- (d) the notice under paragraph (f) of section 112 of the Act of the decision of the Local Committee,

as the case may be:

Provided that, where a Judge is satisfied that, owing to absence from the Colony, sickness, or other reasonable cause, the appellant was prevented from presenting such memorandum of appeal within such period and that there has been no unreasonable delay on his part, the Judge may extend the period within which such memorandum of appeal shall be presented." 10

pp.13 & 14 6. By notice of motion taken out on the 27th day of October, 1961, the appellant applied to a Judge, pursuant to Rule 3 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, to enlarge the time for filing Memoranda of Appeal against the assessments for 1960 and 1961. The application was supported by the affidavit of the appellant stating inter alia that on or about the 12th day of September, 1961, he received a severe attack of hypertension as a result of which he was unable to instruct his advocate to proceed with the appeal. The affidavit also stated that during the appellant's illness he was treated by a Dr. A.N. Bowry who advised him that he was fit to resume work on the 12th day of October, 1961. The appellant further deponed that he verily believed that there had been no unreasonable delay on his part. 20 30

p.25 7. By a Ruling dated the 27th November, 1961, Madan J. dismissed the applications. In the course of his Ruling the learned Judge said that the application before him was made under Rule 3 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, and pointed out that the application and the 40

memorandum were filed in court two days after the 75 days prescribed by the Rules.

p.26 L.17

The learned judge then referred to the respondent's submission that the court had no jurisdiction to extend the time unless the application for such extension was made within the statutory period of 75 days. Counsel had relied upon the Authority of Commissioner of Income Tax v. A.Q. Tax Case No. 43 E.A. Tax Cases Vol. 2 Part III p.192 in which case Mayers J. held there was no inherent power in the court to grant an extension of time for lodging an appeal, and also that the court had no power to grant an extension of time for lodging an income tax appeal unless the application therefor is made within the time for appealing i.e. within 75 days in the instant case.

p.26 Ll.21-35

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The learned judge then said that if he did not arrive at the conclusion he later set out, he would have respectfully permitted himself to consider whether the Court is excluded from entertaining an application to grant an extension of time for lodging an appeal unless the application therefor is made within the time for appeals. He referred by way of example to the case of a man who having given notice of appeal as required by the Act then becomes incapacitated owing to sickness from lodging appeal until the 75th day had passed. In such a case the learned Judge intimated that he would probably find himself unable to adhere to the decision of Mayers J. in Tax Case No. 43 (supra) and that he would probably feel constrained to hold that the court has power to grant an extension of time under such conditions.

p.26 L.36-

p.27 L.14

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The learned judge then turned to the particular facts of the application before him. He referred to the fact that notice of intention to appeal against the decision of the Local Committee is dated the 8th September, 1961, and also to the fact that the appellant in his affidavit stated that he was ill from the 12th September to the 12th October and produced a medical certificate to that effect. The learned judge then pointed out that the appellant was in a position to instruct his advocate from the 12th October until the 25th October and that he also had at his disposal the earlier period before he was taken ill i.e. the 11th August until the 12th September.

p.27 Ll.19-35

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p.47

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p.27 L.36-
p.28 L.2

The learned judge stated that in order to succeed, the appellant must satisfy the court that -

- (a) owing to sickness, which is the ground relied upon in this case;
- (b) he was prevented from presenting his memoranda of appeal within the permitted period; and
- (c) there was no unreasonable delay on his part;

he held that the application failed on all three grounds. 10

p.28 Ll.3-
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After referring to the fact that the appellant recovered on the 12th October, the learned judge said that the appellant had not stated he was "prevented" from presenting his memoranda of appeal nor was there any matter in his affidavit which would justify the learned judge in holding that the appellant was hindered or stopped from lodging in Court his memoranda of appeal during the period of his fitness. 20

p.28 L.11-
p.29 L.13

p.1

The learned judge also considered that there had been unreasonable delay on the part of the appellant, referring to the period of fitness after the appellant's recovery and expressed the opinion that the Memorandum of Appeal which consisted only of three grounds was not so taxing or complex legally that it could not have been finalised within the statutory period of 75 days. He concluded by referring to the submission which had been made that because there was only a delay of two days the application should therefore be granted, and stated that in the context of statutory limitation, the length or shortness of the delay is irrelevant. For the reasons outlined above he dismissed the application and a similar one which had been consolidated therewith. 30

p.30

8. By an Order dated the 6th day of December, 1961, the applications made by the appellant were dismissed.

p.31

9. By a Notice of Appeal dated the 7th day of December, 1961, the appellant appealed to the Court of Appeal against the decision of the learned judge. By a Memorandum of Appeal dated the 15th day of February, 1962 the grounds of appeal were set out as follows:- 40

p.35 Ll.4-
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" The learned judge misdirected himself in holding that the appellant had not stated that he was prevented from presenting his Memorandum of Appeal and misconstrued the meaning of the word "prevented" in the proviso to Rule 3 of the Income Tax (Appeal to Kenya Supreme Court) Rules, 1959.

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The learned judge erred in finding that there had been an unreasonable delay on the appellant's part.

The learned judge erred in holding that the fact that the Memorandum of Appeal had been presented only two days out of time was irrelevant.

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The learned judge erroneously permitted himself to be influenced by the brevity and apparent simplicity of the Memorandum of Appeal and failed to appreciate that the said document did not necessarily reflect the time and labour involved in taking instructions for preparing the appeal and the statutory annexures thereto.

The learned judge erred in refusing the application for extension of time for the lodgment of appeal in all the circumstances of the case."

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10. The case came on for hearing in the Court of Appeal at Nairobi on the 18th October, 1962 (Forbes V.-P, Crawshaw J.A. and Newbold J.A.) and on the same day the Court of Appeal dismissed the appeal.

pp.36-40

p.42

11. For the appellant is was submitted to the Court of Appeal that the time when the appellant was ill was the most material time and that there had been no unreasonable delay. It was submitted that the delay of two days was relevant. Counsel for the appellant agreed that the medical certificate did not say in so many words that the appellant was unable to attend to his affairs.

p.37L1.10-14
p.38 L.27
p.40L1.11-15

p.47
p.37 L.21
p.39 L.1
p.40 L.22

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12. Counsel for the respondent was not called on.

p.37 L.25
p.39 L.5

13. The judgment of the court was given orally by Forbes V.-P. The learned Vice-President said that the

p.40 L.25

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learned judge in the Supreme Court was not satisfied that the appellant was prevented from presenting his appeal. He pointed out that the medical certificate did not show that the appellant could not give instructions. The grounds of the appeal were the same as had been raised before the Local Committee. The learned Vice-President concluded that he could not say the judge was wrong and dismissed the appeal.

p.43

14. An Order granting Final Leave to the Appellant to appeal to Her Majesty in Council was made on the 26th day of April, 1963. 10

15. The respondent humbly submits that the decision of the Court of Appeal is right and should be affirmed and that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

(1) BECAUSE appeals against assessments to income tax in Kenya made under the East African Income Tax (Management) Act, 1958, are governed by the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, made pursuant to section 117 of that Act; 20

(2) BECAUSE the appellant did not file either his memoranda of appeal or applications for an extension of time within the prescribed period of 75 days;

(3) BECAUSE the appellant failed to satisfy the Court that he was prevented by sickness from presenting his memoranda of appeal within the prescribed period and that there had been no unreasonable delay on his part; 30

(4) BECAUSE the appellant failed to adduce evidence on which the learned judge could have been satisfied in the terms of the proviso to Rule 3(1) of the Income Tax (Appeal to the Supreme Court) Rules, 1959.

(5) FOR the reasons given in the Ruling of the Supreme Court;

(6) FOR the reasons given in the judgment of
the Court of Appeal.

H. H. MONROE

G. C. THORNTON

No. 11 of 1963

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C A S E FOR THE RESPONDENT

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