Privy Council Appeal No. 11 *of* 1963

Sardah Mohamed Maherally Shroff – – – – – *Appellant*

v.

The Commissioner of Income Tax – – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH JULY, 1964

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD HODSON.
LORD DONOVAN.
[*Delivered by* LORD HODSON]

The appellant was assessed to income tax by the Commissioner of Income Tax for East Africa for the years of income being the calendar years 1960 and 1961 in the estimated amounts of £55,000 for 1960 and £10,000 for 1961. These assessments were made under the authority of section 102(3) of the East African Income Tax (Management) Act 1958 (hereinafter referred to as the Act) which, in a case where a person has not delivered a return of income, allows the Commissioner of Income Tax to determine, according to the best of his judgment, the amount of that person's income, and assess him accordingly. The notices of the foregoing assessments describe the source of the appellant's income as being " Trade, Profession, etc. ". The trade or profession is not described, and there is, apparently, no obligation to do so. From a document filed by the appellant and entitled " Statement of Facts " it would appear that he is a citizen of Pakistan, and that he went to East Africa from Bombay in June 1960 to investigate the possibility of capital investment in East Africa. The same statement admits a number of transactions on the part of the appellant in East Africa such as the sale of foreign currency notes, the sale of some sarees, and the receipt of deposits in respect of a proposed property transaction, of which deposits a substantial sum was refunded and the balance treated as a loan to the appellant. From the sale of foreign currency notes, according to the same statement, the appellant made no profit, and from the other transactions a profit of some 1,200 shillings only—a sum not sufficient to render him liable to income tax when allowances are taken into account. It seems obvious that the respondent had different views about the appellant's income in East Africa—hence the estimated assessments.

The appellant objected to the assessments by notice in writing to the respondent, pursuant to the terms of section 109 of the Act, but the respondent refused to amend the assessments, and caused a notice confirming them to be served on the appellant. Thereupon, the appellant, as he was entitled to do under section 111(1)(a) of the Act, appealed to the local committee having jurisdiction to hear such an appeal pursuant to section 108 of the Act. On 28th July 1961 the clerk to such local committee issued a notice to the appellant informing him that his appeal was not upheld.

Under section 111 of the Act the appellant had a right to appeal from the local committee's decision to a judge upon giving notice of appeal in writing to the respondent within 45 days. This right of appeal was duly exercised by the appellant by giving a written notice to the respondent on September 8th 1961. Section 117 of the Act gives the appropriate authority the right to make rules governing appeals under part XIII of the Act (which includes

section 111); and under section 117(2) the appropriate authority for Kenya is the Rules Committee established under section 81 of the Civil Procedure Ordinance of Kenya. The Rules made pursuant to this power are entitled " Income Tax (Appeal to the Kenya Supreme Court) Rules 1959 "; and Rule 3 thereof prescribes that 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 the service upon the appellant of (in the present case) the notice of the decision of the local committee. That notice, it will be recalled, was dated 28th July 1961. By section 145(3) of the Act service of this notice was deemed to have been effected at the latest 14 days after the date of posting i.e. on 11th August 1961. The period of 75 days for serving a memorandum of appeal therefore expired on 25th October 1961. The appellant did not file his memoranda of appeal until 27th October 1961, and was thus two days out of time.

By notice of motion taken out on that day the appellant applied to a judge, as under the Act he was entitled to do, to enlarge the time for filing memoranda of appeal against the assessments in both cases (1960 and 1961).

The applications were made in reliance upon the proviso to Rule 3 which reads as follows:—

> " 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."

The applications were supported by affidavits of the appellant in which he swore that he had been suffering from high blood pressure for some years and that on or about the 12th September 1961 he received a severe attack of hyper-tension, as a result of which he was unable to instruct his advocate to proceed with his intended appeal. The affidavits also stated that during his illness the appellant had been treated by a Dr. Bowry who advised him that he was fit to resume work on the 12th October 1961. Dr. Bowry's certificate of that date was exhibited stating that the appellant had been suffering from hyper-tension since the 12th September 1961 and was fit to resume his duties.

On the 27th November 1961 Maden J. dismissed both the applications. He held that the appellant was not prevented by sickness from presenting his memoranda of appeal and pointed out that he was in a position to instruct his advocate from the 12th until the 25th October and had also had at his disposal the earlier period before he was taken ill i.e. from the 11th August until the 12th September. The judge also held that there had been unreasonable delay on the part of the appellant having regard to the period of fitness after his recovery, expressing the opinion that the memorandum of appeal was not so taxing or legally complex that it could not have been finalised within the statutory period of 75 days. Accordingly by order of December 6th 1961 the applications were dismissed. The appellant appealed to the Court of Appeal. The appeal was heard on the 18th October 1962 and was dismissed. The Vice-President with whom the other members of the Court agreed said that the Judge was not satisfied that the appellant was prevented from presenting the appeal and that the medical certificate did not show that he could not give instructions. The Vice-President added that he could not say that the Judge was wrong.

The point was taken before the Judge and also in the written case submitted to their Lordships that the appellant must fail because he did not apply for an extension of time within the prescribed period of 75 days, which, as the Judge at the hearing before him pointed out, would lead to odd results; but this point was abandoned by the respondent during the course of the hearing before their Lordships.

The principal ground of appeal was that the Courts of East Africa were wrong in drawing the inference against the appellant that he was not prevented by sickness from presenting his appeals and accordingly it was argued that they were wrong in refusing to extend the period.

On this matter, taking the view of the evidence including the doctor's medical certificate, most favourable to the appellant, it is impossible to say that the conclusion reached was wrong. The criticism was advanced that the judge was wrong in emphasising the relative simplicity of the memoranda of appeal since other documents, including a statement of facts, which would have to be drawn up on information supplied by the appellant were required to be lodged at the same time. The statements of fact in each case were before the judge and even if they were not specifically referred to in his judgment they must have been considered by him and in any event do not affect the validity of his comment. The appellant had long since consulted a firm of accountants through whom his appeals to the local committee at Nairobi had been lodged, and on their advice had subsequently, before the attack of hyper-tension referred to, instructed his advocate in these matters. Their Lordships therefore reject the argument based on the evidence relating to the appellant's period of sickness.

So far as unreasonable delay is concerned it was scarcely contended that the only relevant delay must be that which occurred in the two days following the expiration of the 75 day period; but it was submitted that taking into account the whole period of 75 days plus 2 days it ought not to be held that the delay was unreasonable. Their Lordships on a review of the facts disclosed by the evidence do not accept this submission.

Reference was made to Rule 21 of the Income Tax (Appeal to the Supreme Court of Kenya) Rules 1959 which reads:—" The rules determining procedure in civil suits before the Court in so far as such rules relate to . . . the enlargement of time shall, to the extent to which such rules are not inconsistent with the Act or these Rules, apply to an appeal to a judge under the Act as if such appeal were a civil suit . . . ". Hence reliance was placed on Order XLIX Rule 5 of the Civil Procedure (Revised) Rules 1948 which reads as follows:— " Where a limited time has been fixed for doing an act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require . . . . ".

It was urged that the East African Court was wrong in not taking into account the terms of Order XLIX Rule 5 in considering the appellant's applications. There are two answers to this. In the first place Rule 3 is complete in itself in laying down the grounds upon which an extension of time may be granted, and there is no room for the superimposition of Order XLIX Rule 5 which would be inconsistent if it sought to enlarge the range of discretion. In the second place, reliance on Order XLIX Rule 5 is of no assistance to the appellant in any event. Under Order XLIX Rule 5 the Court has power to enlarge time upon such terms (if any) as the justice of the case may require. Rule 3 is in equally wide terms containing as it does the words " or other reasonable cause " so that there is no limit to the power of the Court to consider any reasonable excuse put forward by an appellant. In this case the appellant was not in any way limited to the ground put forward, namely his sickness.

Finally it was argued that it had been pointed out by their Lordships in the case of *Vincenzini v. Regional Commissioner of Income Tax* [1963] A.C. 459 that the Rules are procedural and are to be construed subject to the overriding consideration that the right of appeal provided by the Statute survives.

It is true that there is nothing in the Rules providing that appeals shall be dismissed on failure to comply with Rule 3. Rules which provide for dismissal of appeals in the event of the appellant failing to appear at the hearing (Rule 11) and failure to deposit costs (Rule 12) may be contrasted, but the question of the survival of the right of appeal is not under consideration and it is not necessary to determine whether the right has lapsed or not. It has been conceded for the purposes of these appeals that the appellant is out of time, on the assumption that notices of the decision of the local committee were deemed to have been served on the appellant at the latest 14

days after posting i.e. on the 11th August 1961. It is on the footing that the 75 days runs from this date that the appellant has applied for an extension of his time but no application has been made as yet for the formal dismissal of the appeal.

The only question for determination is whether or not the Courts of East Africa were wrong in dismissing the appellant's applications made under the provisions of Rule 3.

Their Lordships are of opinion that there is no ground upon which these decisions should be reversed and will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

(90243) Wt. 8069/113 80 7/64 Hw.

In the Privy Council.

SARDAH MOHAMED MAHERALLY SHROFF

v.

THE COMMISSIONER OF INCOME TAX

DELIVERED BY

LORD HODSON

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW
1964