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No. 5 of 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :

N	RENGASAMY PILLAI	Appellant
	- and -	
THE COMPTROLLER OF INCOME TAX		Respondent

CASE FOR THE RESPONDENT

STEPHENSON HARWOOD & TATHAM,
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Solicitors for the Respondent

O N A P P E A L

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B E T W E E N :

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CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from the Judgment and Order of the Federal Court of Malaysia dated 13th May 1968 dismissing the appeal of the Appellant against the Judgment of the High Court in Malaya dated 14th November 1967.

pp.44-51

pp.24-31

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2. The Respondent served a notice of assessment on the Appellant and the Appellant did not pay the amount demanded. The Respondent sued the Appellant and on the 3rd July 1964 the Respondent obtained judgment in the Penang High Court in the sum of \$309,660. After this judgment and following upon a hearing of the Appellant's objection to the assessed tax before the Board of Review, the Respondent reduced the tax claimed by \$191,839.20. The Appellant still did not pay the tax in full. On the 17th August, 1967, the Respondent took out a Bankruptcy Notice which demanded the payment of a sum of

p. 1

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\$54,826.68.

3. The question in issue in this appeal is the validity of the Bankruptcy Notice.

4. The relevant statutory provisions are :

(i) The following Sections of the Income Tax Ordinance 1947.

Section 82:- Subject to the provisions of Section 87 of this Ordinance, tax for any year of assessment levied in accordance with the provisions of Section 38 or 39 of this Ordinance shall, notwithstanding any objection or appeal against the assessment on which such tax is levied, be payable at the place stated in the notice given under Section 72 of this Ordinance within 1 month after the service of such notice: 10

Provided that -

(a) Where collection of tax has remained in obedience pending the determination of any objection or appeal against an assessment made prior to the first day of January 1960, such tax shall be payable not later than the first day of September, 1960; 20

(b) The Comptroller in his discretion may extend the time limit within which payment is to be made

Section 84:- (1) subject to the provisions of sub Section (3) of this Section, if any tax is not paid within the periods prescribed in Section 82 of this Ordinance - 30

(a) A sum equal to 5 per centum of the amount of the tax payable shall be added thereto, and the provisions of this Ordinance relating to the collection and recovery of tax shall apply to the collection and recovery of such sum;

(b) The Comptroller shall serve a demand note upon the person assessed; and if payment is not made within one month from the date of the service of such demand note, the Comptroller may proceed to enforce payment as hereinafter provided;

10 (c) A penalty imposed under this sub-section shall not be deemed to be part of the tax paid for the purpose of claiming relief under any of the provisions of this Ordinance.

(2) (Repealed by Ordinance No. 11 of 1948).

(3) The Comptroller may, for any good cause shown, remit the whole or any part of the penalty due under sub-section (1) of this section.

20 Section 86:- (1) Tax and any penalty may be sued for and recovered in a court of competent jurisdiction by the Comptroller in his official name with full costs of suit from the person charged therewith as a debt due to the Government.

(2) The Comptroller may appear personally or by counsel in any suit instituted under this section.

30 (3) In any suit under sub-section (1) of this section the production of a certificate signed by the Comptroller giving the name and address of the defendant and the amount of tax due by him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for the said amount.

(4) In addition to any other powers of collection and recovery provided in this Ordinance, the Comptroller may, with the approval of the Minister of Finance and where the tax charged on the income of any person who carries on the business of shipowner

RECORD

or charterer or of air-transport has been in default for more than three months, whether such person is assessed directly or in the name of some other person, issue to the Comptroller-General of Customs and Excise, or other authority by whom clearance may be granted, a certificate containing the name or names of the said person and particulars of the tax in default. On receipt of such certificate, the Comptroller-General of Customs and Excise or other authority shall be empowered and is hereby required to refuse clearance from any port, aerodrome or airport in Malaysia to any ship or aircraft owned wholly or partly or chartered by such person until the said tax has been paid. 10

(5) No civil or criminal proceedings shall be instituted or maintained against the Government, the Comptroller-General of Customs and Excise or other authority in respect of a refusal of clearance under this section, nor shall the fact that a ship or aircraft is detained under this section affect the liability of the owner, charterer, or agent to pay harbour or other dues and charges for the period of detention. 20

(6) In sub-sections (4) and (5) of this section "Comptroller-General of Customs and Excise" includes the Regional Comptroller of Customs in the States of Malaya and the Regional Comptrollers of Customs and Excise in Sabah and in Sarawak. 30

(ii) The Bankruptcy Ordinance No.20 of 1959.

Section 3: (1) A Debtor commits an act of bankruptcy in each of the following cases:

(a) if in the Federation or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; 40

(b) if in the Federation or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof;

10 (c) if in the Federation or elsewhere he makes any conveyance or transfer of his property or of any part thereof, or creates any charge thereon which would under this or any other written law for the time being in force be void as a fraudulent preference if he were adjudged bankrupt;

(d) if with intent to defeat or delay his creditors he does any of the following things:

(i) departs out of the Federation or being out of the Federation remains out of the Federation, or

20 (ii) departs from his dwelling-house or otherwise absents himself, or begins to keep house or closes his place of business, or

(iii) submits collusively or fraudulently to an adverse judgment or order for the payment of money;

30 (e) if execution issued against him has been levied by seizure of his property under process in an action or in any civil proceeding in the High Court, Sessions Court or Magistrates Court where the judgment, including costs, is for an amount of one hundred dollars or more;

(f) if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;

40 (g) if he gives notice to any of his creditors that he has suspended or that

RECORD

he is about to suspend payment of his debts;

(h) if he makes to any two or more of his creditors, not being partners, an offer of composition with his creditors or a proposal for a scheme of arrangement of his affairs, such offer or proposal is not followed by the registration within fourteen days thereafter of a deed of arrangement with his creditors, in accordance with the rules for the time being in force for the registration of deeds of arrangement under this Ordinance; 10

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Ordinance requiring him to pay the Judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in the Federation, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained; Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a 20 30 40

creditor who has obtained a final judgment or final order;

10 (j) if the officer charged with the execution of a writ of attachment or other process makes a return that the debtor was possessed of no property liable to seizure; and for the purposes of this clause the date when the writ is lodged with the officer shall be deemed to be the date of the act of bankruptcy

(2) A bankruptcy notice under this Ordinance shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:

Provided that a bankruptcy notice -

20 (i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to or done to the satisfaction of the creditor; and

30 (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

40 (3) The word "debtor" in this ordinance shall be deemed to include any person who at the time when the act of bankruptcy was done or suffered by him -

RECORD

(a) was personally present in the Federation; or

(b) ordinarily resided or had a place of residence in the Federation; or

(c) was carrying on business in the Federation either personally or by means of an agent; or

(d) was a member of a firm or partnership which carried on business in the Federation.

(iii) The Courts of Judicature Act No. 7 of 1964. 10

Section 7: (1) All summonses, warrants, orders, rules, notices and mandatory processes whatsoever, whether civil or criminal, shall be issued and shall be expressed to be issued by the Chief Justice of the High Court issuing the same in the name of the Yang di-Pertuan Agong and shall be signed by a Registrar of such Court; and every such summonses, warrant, order, rule, notice and mandatory process shall be sealed with the seal of the Court issuing or making the same. 20

p. 2-3

5. By a Notice dated 28th August 1967 under Section 3 (2) of the Bankruptcy Ordinance the Appellant notified the Respondent that he disputed the validity of the Bankruptcy Notice on the ground that the sum specified in the Bankruptcy Notice exceeded the amount actually due for reasons therein more particularly set out. In an Affidavit of Marimuthu Vadivelu, and Inland Revenue Officer, dated 15th September, 1967, the validity of the Bankruptcy Notice was maintained and it was stated that the sum specified in the Bankruptcy Notice did not exceed the amount actually due for reasons expressly set out in the Affidavit. 30

6. In a Notice of Motion dated 15th September 1967 taken out by Solicitors on behalf of the Appellant application was made

to set aside the Bankruptcy Notice on grounds more particularly set out in the Notice of Motion. The matter came on for hearing in the High Court of Malaya at Ipoh on the 7th October, 1967, before Mr. Justice Chang Min Tat and on the 14th November, 1967, the learned Judge delivered judgment dismissing the Appellant's application.

RECORD

pp. 24-31

10 7. The first ground upon which the validity of the Bankruptcy Notice was disputed, namely, that the judgment had been varied by consent, was not pursued at the hearing and the learned Judge took it as abandoned. In any event the ground was completely devoid of merit in the view of the Judge.

20 The second ground was that the sum claimed under the Bankruptcy Notice was in excess of the sum actually due. The learned Judge reviewed the facts and the computations and concluded that the Respondent had not claimed in his Bankruptcy Notice any sum in excess of what was clearly due by the Appellant.

30 A third ground of attack comprised a number of objections to the form of the Bankruptcy Notice: (1) that it offended Section 7(1) of the Courts of Judicature Act No. 7 of 1964, (2) that the endorsement thereto had not been signed by the Respondent or on his behalf and (3) that the request for the Notice was not signed personally by the Respondent but by his assistant.

The learned Judge was of the view that the objections were unfounded in fact and in law.

40 8. In a Memorandum of Appeal dated 18th December 1967 the Appellant set out the grounds upon which he appealed to the Federal Court of Malaysia against the whole of the decision of Mr. Justice Chang Min Tat.

pp. 32-39

RECORD

pp. 44-49

9. The matter came on for hearing on the 16th April, 1968, and on the 13th May 1968 before the Federal Court (Syed Sheh Barakbah, Lord President, Ismail Khan, Acting Chief Justice and Suffian, Federal Judge) and on the 13th May, 1968 Mr. Justice Suffian delivered a judgment, with which his brethren concurred, dismissing the Appellant's appeal.

10. Two reasons were adduced before the Federal Court for the invalidity of the Bankruptcy Notice. First that the Notice specified a sum in excess of the amount actually due. It was not disputed that if the sum specified in the Bankruptcy Notice exceeded the amount actually due, the Notice was void. It was submitted on behalf of the Appellant that the Respondent should first have served a demand note under paragraph (b) of Section 84 (1) of the Income Tax Ordinance 1947 before he could impose a penalty under paragraph (a). In the judgment of Mr. Justice Suffian there was no need to serve a demand note under paragraph (b) because, in relation to the sum demanded under the Bankruptcy Notice, the Respondent was not imposing a penalty for the first time. A demand note was required only when a person was assessed to tax for the first time, not against a judgment debtor like the Appellant. 10
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The second ground of appeal was that the Bankruptcy Notice was not issued or expressed to be issued by the Chief Justice of the High Court in the name of the Yang di-Pertuan Agong as required by Section 7 (1) of the Courts of Judicature Act, 1964. Mr. Justice Suffian stated that the provision in Section 7(1) was a general provision and that Bankruptcy was a special matter which was dealt with by special law. To be valid the Bankruptcy Notice only had to comply with Section 3 (2) of the Bankruptcy Ordinance 1959. The Bankruptcy Notice was in the prescribed form and therefore valid. 30
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11. By an Order dated 6th May, 1969, of the Federal Court of Malaysia final leave was granted to the Appellant to appeal to His Majesty the Yang di-Pertuan Agong against the whole of the Judgment and Orders of the Federal Court of Malaysia.

10 12. The Respondent humbly submits that the decision of the Federal Court of Malaysia is right and should be affirmed and that this Appeal should be dismissed with costs here and below for the following amongst other

R E A S O N S

- 20
1. BECAUSE the sum specified in the Bankruptcy Notice was not in excess of the amount actually due
 2. BECAUSE the Bankruptcy Notice was in the prescribed form and valid
 3. BECAUSE the reasoning in the High Court in Malaya is correct and ought to be confirmed
 4. BECAUSE the reasoning in the Federal Court in Malaysia is correct and ought to be confirmed.

STEWART BATES

No. 5 of 1969

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