

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 35 of 1984

Between:

1. RANCHODBHAI NATHUBHAI PATEL  
s/o Nathubhai Patel
2. ASHWINBHAI DAYABHAI PATEL  
s/o D.N. Patel
3. NIDHIKANT DAYABHAI PATEL  
s/o D.N. Patel

Appellants

and

COMMISSIONER OF INLAND REVENUE

Respondent

B.C. Patel for the Appellants  
M.J. Scott and S.M. Shah for the Respondent

Date of Hearing: - 20th November, 1984  
Delivery of Judgment: 24th November, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

The appellants are the executors of the last will of Dayhabhai Nathubhai Patel ("the deceased") probate of which was granted out of the Supreme Court at Suva on 27th February, 1980.

The deceased died on 21st April, 1979 at Navgam Udna in the province of Surat in India which was also the place of his birth. He had come to Fiji in 1935 to join his parents here but returned to the place of his birth in 1961 and resided there until his death.

In the course of administration of his estate the question arose as to his domicile. If the deceased was domiciled in Fiji at the date of his death, his estate would have been partially exempted from estate duty by virtue of the proviso to the First Schedule to the Estate and Gift Duties Act (Cap. 203), the relevant parts of which read :

" Provided that -

(a) .....

(b) in the case of the estate of a person who to the satisfaction of the Commissioner was domiciled in Fiji at the date of death the first \$75,000 of the final balance of his estate shall be exempt from the payment of estate duty ....."

In response to an inquiry by the respondent on the topic the appellants' solicitors, by letter dated 27th June, 1980, said :

" The deceased was domiciled in Fiji. He was staying in India not as a matter of choice but because of ill-health. He also maintained all his investments in Fiji and even expended them by developing one of the properties in Lautoka which now forms part of his estate. "

On 17th November, 1980 the respondent - obviously for the purpose of obtaining data upon which he could carry out the duty imposed upon by the proviso to which we have just referred - requested the appellants to -

" ..... supply the following information :

1. Date and place of deceased's birth.
2. Date of departure from Fiji.
3. Did he return to Fiji, if so, how often and when. Please state the dates.
4. Provide details of remittance from Fiji since deceased's departure.

5. Advise the kind of passport the deceased had.
6. Did he have a residence in India? If not, where did he reside.
7. Provide medical evidence to support the contention that he was residing in India for health reasons.
8. Forward statutory declarations from executors and others with knowledge to support the claim. "

In May 1981 the solicitors for the appellants duly complied with the requisition and on 1st October, 1981 the respondent notified the appellants that -

"the question of domicile has been carefully considered and I am of the opinion that the deceased was domiciled in India. "

The appellants being dissatisfied with the respondent's finding, in exercise of the right conferred by section 55 of the Estate and Gift Duties Act gave notice requiring him to state a case for the opinion of the Supreme Court. And the questions ultimately posed by the respondent for the opinion of the Court were :

- "1. Whether the deceased was domiciled in Fiji at the date of his death?
2. Whether the respondent has correctly assessed the appellants by denying them the rebate sought. "

The learned Judge did not make answer to the first question. Instead, he said :

" This is an issue which the legislature requires the Commissioner to decide. On the facts of this case the Court is not entitled to substitute its opinion for that of the Commissioner. "

It is implicit in the question that the Supreme

Court has, under the section 55 procedure, power itself to decide what was the deceased's domicile. In the Court below and in this Court the respondent submitted that the Court did not have such power; that the jurisdiction to decide such question was conferred by the legislature upon him and not the Court, and that the Court could only intervene and set aside his determination if it was of the opinion that there was no material or no sufficient material upon which it was based or that it was arrived at through error of law. To set forth, as the respondent did, Question 1 in the case stated, was inconsonant with that view as to the jurisdiction. And it was likely to mislead the appellants into assuming that the respondent accepted that the Supreme Court had jurisdiction to consider it. Be that as it may, the second question is so couched as to subsume the first question and to encompass the foregoing submission of the appellants to which we shall shortly refer.

In the event, the learned Judge upheld the respondent's submissions. In so doing he relied upon, inter alia, the decision of the High Court of Australia in McCormick v. The Federal Commissioner of Taxation (1945) A.C. 71 C.L.R. 283. That case is in pari materia with the present in that it had to do with a case stated by way of appeal from the decision of a revenue Commissioner, exercising a statutory power similar to that conferred in the present case. The power was contained in section 14(1)(ii) of the Gift Duty Assessment Act, 1941-42 which provided :

" ..... gift duty shall not be payable in respect of .....

(1) any gift concerning which the Commissioner is satisfied -

(i) .....

(ii) that the gift is made for or towards maintenance .....

And a question was posed in the case stated as to "whether the conditions stated in section 14(1)(ii)

exist or are fulfilled is a matter the Court may decide upon this appeal". And it was unanimously held that it did not. The general view finds succinct expression in the opinion of Dixon J. (as he then was) in the following excerpt :

" The fourth question asks: Is the question whether the conditions stated in section 14(1) (ii) exist or are fulfilled is a matter the Court may decide? The Court has I think, adopted the general view, in dealing with Federal legislation in pari materia, that references to the opinion, judgment, discretion, satisfaction of the Commissioner are intended to make his decision the criterion of the specific matter indicated, subject usually to reconsideration by a Board of Review. The result is that in such cases the Court on appeal does not substitute its decision for that of the Commissioner but considers only whether he has exercised his judgment or discretion unaffected by extraneous or irrelevant considerations or any misconception or misapplication of the law. "

To the same effect are the decisions of the High Court in Moreau v. Federal Commissioner of Taxation (1926) 39 C.L.R. 65; Australian Scale Co. Ltd. v. Commissioner of Taxes for Queensland (1935) 53 C.L.R. 534; Commissioner of Taxes v. Ford Motor Company of Australia Pty Ltd. (1942) 66 C.L.R. 261; Kolotex Hosiery (Australia) Pty Ltd. v. Federal Commissioner of Taxation (1975) 132 C.L.R. 535, 540.

Mr. Patel submitted that the foregoing cases were distinguishable. He contended that, by section 55 of the Estate and Gift Duties Act, the Court was empowered to determine de novo the question stated in the case. And, of course, as we have already remarked the Commissioner in performing his duty under subsection (2) of section 55 had obligingly stated the vital question for the opinion of the Court. But jurisdiction is never conferred by consent or by mistake.

Mr. Patel invited our attention to section 73

of the Act which provides :

"1. For the purposes of this section -

'Discretions Review Board' or 'Board' means the Discretions Review Board constituted under the Income Tax Act;

'Discretion' means a discretion or power to determine any matter vested in the Commissioner such as is specified in the Fourth Schedule.

2. Where the Commissioner makes a decision of a discretion and makes an assessment of estate duty ..... accordingly, the administrator ..... may object to the decision by stating the grounds of his objection and requiring the objection to be heard and determined by the Discretions Review Board ..... "

He next referred to the Fourth Schedule from which it is manifest that the matter for determination by the Commissioner pursuant to the proviso to the First Schedule is not included and is accordingly not a matter which can come under the purview of the Discretions Review Board. It followed, he submitted, that whereas "discretions and powers to determine" vested in the Commissioner under nine sections of the Act are reviewable and may be confirmed modified or cancelled on such review (subsection (4) of section 73), the power conferred by the proviso to the First Schedule, - if the submission made by the respondent is correct - is not so reviewable. He went on to submit that the powers conferred by subsections (4), (7) and (8) of section 55 indicate that the section contemplates original as opposed to appellate jurisdiction. Subsection (4) provides :

" On the hearing of the case, the Supreme Court shall determine the question submitted ..... "

Subsections (7) and (8) provide :

"(7) If and so far as any appeal relates to a question of fact, the Supreme Court may make such order as it thinks fit as to the trial of that issue and as to the reception of evidence on affidavit or otherwise.

(8) Any allegations of fact comprised in a case stated by the Commissioner under this section may be disputed by the appellant on the hearing of the appeal. "

In support of his submission he cited the Federal Commissioner of Taxation v. Lewis Berger & Sons Australia Ltd. (1927) 39 C.L.R. 468. We think, however, that case to be clearly distinguishable on the facts because it concerned an appeal from a Review Board (which had already considered and varied the Commissioner's decision), was on a point of law only.

Despite Mr. Patel's lucid and attractive argument, we think that his attempt to overcome the inveterate practice by which discretionary decisions are dealt with by the Courts, will not avail the appellants.

Although subsections (1) and (2) do not describe or nominate the procedure they authorise, as an appeal, it is clear from succeeding subsections that indeed it is. Subsections (3) and (7) refer to "the appellant" and subsection (6) refers to "any such appeal".

And the jurisdiction arises when "any administrator who is dissatisfied on any point of law or fact with any assessment of estate duty made by the Commissioner ..... delivers to the Commissioner a notice in writing requiring him to state a case .....". The appeal, then, is from the decision of the Commissioner on any point of law or of fact. In the present case the appellants' dissatisfaction with the assessment has to do with respondent's decision on the question whether or not the deceased was domiciled in Fiji which, by virtue of paragraph 5 of the proviso to the Second Schedule to the Act

was for determination "to the satisfaction of the Commissioner". In our view, the mere fact that "the power to determine" involved in the respondent being satisfied one way or the other (as is contemplated by the proviso) is not included as one of the "powers to determine" reviewable under section 73 cannot and does not transmogrify a case to be heard pursuant to section 55 from one of appellate jurisdiction to one of original jurisdiction. And on the hearing and determination of the appeal, this Court cannot substitute its opinion on the question for that of the respondent. It can consider only whether he has allowed himself to be satisfied on a consideration of matters which are to be conveniently described as and encompassed in the phrase "extraneous and irrelevant considerations" (McCormick's case supra) or by misapplication of the law.

We turn then to consider whether in this case we can properly find that the respondent in reaching his conclusion that the deceased was domiciled in India and not Fiji at the date of his death, was affected by one or other of those considerations.

There is before us no memorial of the reasons why the respondent was not so "satisfied". That, however, is of little moment for as Sir Owen Dixon put it in Avon Downs Proprietary Limited v. The Federal Commissioner of Taxation (1949) 78 C.L.R. 353, at page 360 -

" Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may on a full consideration of the material that was before him, be found to be capable of some such misconception. If the result appears unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that



you should be sure of the precise particular in which he has gone wrong'. "

In this case the respondent by his initial inquiry asked apposite questions of the appellants and as a result had before him a deal of material which is now before us and which we have considered. Before us it was stated to be common ground that prior to 1961 (when he left Fiji for the last time and returned to his ancestral home in India) the deceased had abandoned his domicile of origin and acquired a domicile of choice in Fiji. We do not know whether that was categorically stated to the respondent before he made his decision but it was implicit in a letter written on 27th June, 1980 by appellants' solicitors to the respondent in which it was asserted that he was domiciled in Fiji at the date of death.

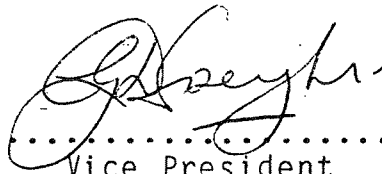
The respondent had before him evidence as to the deceased having resided with his wife in the traditional family home in the village of his birth and in the country of his original domicile from 1961 to the date of his death; as to his ill-health; that he travelled on a Colony of Fiji passport in 1961; that on 3rd May, 1961 he registered as a citizen of the United Kingdom and Colonies under British Nationality Act, 1948; that he became a citizen of Fiji on its becoming an independent nation on 10th October, 1970; that he had throughout the period since his departure maintained investments in Fiji; that he had left behind him in Fiji when he left in 1961 two sons and a daughter and those sons still reside here and are intimately identified with deceased's business ventures here.

All this was appropriate material upon which to base a decision as to where deceased was domiciled. As it succinctly put in Halsbury 4th Ed. Vol. 8 para. 421 :

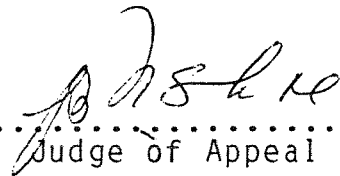
" A person is domiciled in that country where he either has or is deemed by law to have his permanent home. Every individual is regarded as

belonging, at every stage of his life, to some community consisting of all persons domiciled in a particular country; the rules as to domicile are such that this legal idea may correspond to the social realities of the situation. "

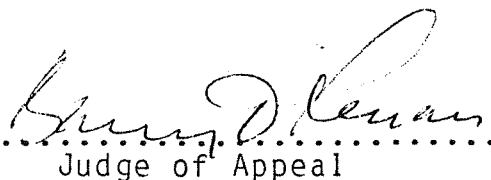
In our view there is nothing in the material before us to indicate that in his inquiry as to which such community the deceased belonged, the respondent failed to meet the prescription of Sir Owen Dixon in the Avon Downs Pty Ltd. supra. He certainly addressed himself to the right question. And there is nothing in the material before us to indicate that he did not take account of all the relevant considerations or that he took account of any irrelevant considerations and we are unable to hold that the decision itself is unreasonable. It follows that no inference adverse to his decision can be drawn. The appeal, therefore, must be dismissed and it is dismissed accordingly with costs to the respondent.



.....  
Vice President



.....  
Judge of Appeal



.....  
Judge of Appeal