APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Anantakrishna Ayyar.

1929, December 5.

NARAYANA CHETTIAR (FOURTH DEFENDANT), APPELLANT,

v.

KADIR SAHIB AND OTHERS (PLAINTIFF AND DEFENDANTS 2 AND 3, ETC.), RESPONDENTS.*

Indian Tariff Act (VIII of 1894), sec. 10 (b), construction of—Sale of salt—Payment of price including excise duty by purchaser to seller—Reduction of duty subsequent to transaction—Refund of excess duty to seller—Right of purchaser to sue the seller for the refund of duty received by the latter in the absence of contract to pay amount refunded—Right of purchaser under sec. 10 (*b*).

Where a contract for the purchase of salt contained no provision regarding subsequent reduction of the excise duty, and the purchaser paid the seller the price including the duty, payable on the salt at the time of sale, and the Government, subsequent to the transaction, reduced the duty and gave to the seller a refund of the amount of such reduction, the purchaser is entitled to sue to recover such amount from the seller under section 10 (*b*) of the Indian Tariff Act (VIII of 1894), even though there is no express provision in section 10 (*b*) for the institution of a suit by the purchaser.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Tinnevelly in Appeal Suit No. 47 of 1926, preferred against the decree of the Court of the District Munsif of Tinnevelly, in Original Suit No. 321 of 1924.

Section 10 of the Indian Tariff Act (VIII of 1894) runs as follows:—

In the event of any duty of customs or excise on any article being imposed, increased or decreased or remitted after the

* Second Appeal No. 1339 of 1926.

making of any contract for the sale of such article without stipulation as to the payment of duty where duty was not chargeable at the time of making of the contract, or for the sale of such article duty-paid where duty was chargeable at that time,—

(*a*) if such imposition or increase so takes effect that the duty or increased duty, as the case may be [or any part thereof], is paid, the seller may add so much to the contract-price as will be [equivalent to the amount paid in respect of such duty] or increase of duty, and he shall be entitled to be paid and to sue and recover such addition, and

(*b*) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the purchaser may deduct so much from the contract-price as will be equivalent to the decrease of duty, or remitted duty, and he shall not be liable to pay, or be sued, for, or in respect of, such deduction.

V. Rajagopala Ayyar for appellant.

T. M. Krishnasami Ayyar for first respondent.

P. N. Marthandam for third respondent.

T. E. Ramabhadrachariyar for fourth respondent.

The JUDGMENT of the Court was delivered by

ANANTAKRISHNA AYYAR, J.—The fourth defendant is the appellant in this second appeal. The plaintiff is a salt merchant trading at Erode. The defendants, it was alleged, were trading at Tinnevelly in salt. The plaintiff purchased from the firm of the defendants, in March 1922, 400 bags of salt. The salt was sent by the defendants to the several places mentioned by the plaintiff. The plaintiff paid the defendants the price of the salt which included the excise duty of Rs. 2,000 charged on the 400 bags calculated at Rs. 5 per bag according to the rate of excise duty prevalent at the time. The transaction took place on the 5th March 1922. Subsequently the Government of India reduced the excise duty on salt from Rs. 5 to Rs. 2-8-0 per bag. It was to have effect from a date prior to the 5th March 1922. The

NARAYANA CHETTIAR v. KADIR SAHIB.

ANANTA-KRISHNA AYYAR, J.

defendants' firm accordingly obtained refund from the Government of Rs. 1,000 representing the difference in the excise duty at the rate of Rs. 2-8-0 per bag in respect of the 400 bags. This amount was received by the firm of the defendants on 1st April 1922. The plaintiff instituted the original suit in the Court of the District Munsif of Tinnevelly claiming the sum of Rs. 1,000 which the defendants got from the Government, with interest thereon. The plaintiff also alleged in the plaint that there was a specific agreement between the parties at the time of the transaction that in case the Government should reduce the excise duty on salt, then the plaintiff should have the benefit of the said reduction and the defendants who dealt directly with the Government should, on obtaining such refund, pay the same over to the plaintiff. The defendants in their written statement denied the specific agreement set up by the plaintiff. The fourth defendant pleaded that he was not a partner in the firm of the first defendant. With reference to the general allegation in the plaint that under the Indian Tariff Act the plaintiff was entitled to this sum of Rs. 1,000 even though the specific agreement set up by him be not proved, the defendants contended that, on a proper construction of section 10 of the Indian Tariff Act, the plaintiff was not entitled to the refund of the same. Both the lower Courts held that the fourth defendant was a partner in the firm of the first defendant. They also found against the specific agreement set up by the plaintiff with reference to the revision of the salt duty at the instance of the Government. Both the lower Courts, therefore, decreed the claim of the plaintiff on the ground that, on a proper construction of section 10 of the Indian Tariff Act (VIII of 1894), in cases where subsequent to the contract of sale there is a reduction of duty on salt, the purchaser is entitled to the benefit

of such reduction. The lower appellate Court further found that the defendants must be taken to have purchased the salt from the Government as agent of the plaintiff, and in that view also the defendants were bound to refund to the plaintiff the sum of Rs. 1,000 which they got from the Government. This second appeal has been preferred by the fourth defendant, and, on his behalf, his learned Advocate raised two contentions before us. The first was that the lower appellate Court was in error in having allowed the plaintiff to set up a new case of agency, whereas in the plaint the case set up was one of sale. The learned Advocate drew our attention to the plaint, where there are no allegations regarding any agency, and also to the circumstance that no issue had been raised with reference to this question of agency.

The second contention that he raised related to the construction of section 10 of the Indian Tariff Act. He drew our attention to the corresponding section of the English Finance Act of 1901 and he argued that, though the Act purports to revise the terms of the contract between the parties, the Legislature has taken, as the critical period with reference to which adjustment has to be made, the time of delivery of the goods. He drew our attention to section 10 of the English Act where the word "delivery" is used. He also drew our attention to section 20 of the Customs Consolidation Act of 1876 where the words used are "time of clearance or delivery." He also drew our attention to certain decisions where the Court while dealing with the Indian Act used the word "delivery" in the course of the judgment. We, however, feel ourselves unable to accept this contention of the learned Advocate. Section 10 of the Indian Act, which evidently was taken from the English Act, does not use the word "delivery" or "clearance". The difference in language and omission of these words, is

NARAYANA CHETTIAR v. KADIR SAHIB.

ANANTA-KRISHNA AYYAR, J.

rather significant. It may be that, as a matter of convenience, the point of time relating to delivery may be a convenient point with reference to which adjustment of rights of parties could be regulated. But we feel ourselves bound in construing section 10 of the Indian Act to be guided by the express terms of the Act. As the terms "delivery" or "clearance" have been, as we take it, intentionally omitted in the Indian Act, we are led to infer that there has been some change of policy in the Indian Act from that of the English Act. The learned Advocate for the appellant then argued that the test to be applied is whether the transaction between the parties had been, as he said, "closed" or not. Here again the wording of the section does not, in our view, lend support to this contention. As we read clause (*a*) of section 10, that gives to the seller, in cases where the duty has been enhanced after sale, the right to recover such additional duty from the purchaser. This clearly, in our opinion, contemplates a case where the accounts between the parties had been settled and the purchaser had paid the seller the whole of the price agreed between the parties. If with reference to clause (*a*) a seller is entitled under this Act to recover from the purchaser, even though the transaction had been "closed", the amount of the extra duty that he had to pay, one fails to see why a different policy must be taken to have been adopted with reference to clause (*b*) of the same section. Clause (*b*) of the section gives the purchaser the benefit of any decrease of duty. It declares that the purchaser may deduct so much from the contract-price as will be equivalent to the decrease of duty or remitted duty; and it proceeds further to enact that "he shall not be liable to pay or be sued for in respect of such deduction". The learned Advocate drew our attention to the change of language used in clauses (*a*)

and (*b*) of the section, and he argued that, while it is specifically mentioned in clause (*a*) that the seller in case of increase of duty is given the right to sue for and recover such addition from the purchaser, clause (*b*), according to his suggestion, does not specifically entitle the purchaser to sue for and recover the difference. But clause (*b*) contains the words "But a purchaser shall not be liable to pay or be sued for in respect of such deduction." It contemplates a case where, when a suit is instituted against him, he can plead that in respect of this difference he is not liable. In our opinion the words "he shall not be liable to pay" also cover a case where he (the purchaser) might have already paid the whole of the amount originally agreed to. When the Act declares that he shall not be liable to pay a particular amount, it would follow that, if he had in fact paid the same, the general law would allow him to recover back what he had paid but was not bound to pay. We think that no sufficient grounds have been shown why the section should be construed in favour of the seller in one way, but against the purchaser in another way. We think that, reading clauses (*a*) and (*b*), it is reasonably clear that the intention of the Legislature was to revise the terms of the contract between the parties so as to give to the one or to the other the benefit of the increase or the decrease of duty in such cases.

With reference to the decisions that were quoted before us, we may at once say that no direct case, in which the question that has been raised before us arose for decision, has been quoted to us. The decision in *Probhudas* v. *Ganidada*(1) was a case where the question arose whether a purchaser would be entitled

(1) (1925) I.L.R., 52 Calc., 644.

NARAYANA CHETTIAR v. KADIR SAHIB. — ANANTA-KRISHNA AYYAR, J.

to the benefit of the revision of tariff valuation. The Privy Council held that revision of tariff valuation was quite different from revision of tariff *duty*. That was also the case in *Hajee Shakoo Gani* v. *Sabapathi Pillai*(1), though the actual decision in that case should not be taken to lay down correct law after the decision of the Privy Council in *Probhudas* v. *Ganidada*(2). With reference to the use of the word "delivery" in those two cases, we think that the word "delivery" should not be taken to have been used with a view to be an authoritative ruling on section 10 of the Indian Tariff Act on the question now before us. We are governed by the wording of the Indian Act. In the case of *Hajee Shakoo Gani* v. *Sabapathi Pillai*(1), the learned Chief Justice remarked that the Indian statute drafted bodily in section 10 the wording of the English Act. But a reference to the wording of section 10 of the Indian Act would make it clear that, except in a very general way, that observation is not strictly correct with reference to the particular question we have to decide in the present case. In any event we feel ourselves bound to construe section 10 of the Indian Act according to its wording; and for the reasons we have mentioned we feel ourselves unable to accept the contention raised by the learned Advocate for the appellant on this point. On the question of delivery being the test, there is one other point which would be against the view suggested by the learned Advocate for the appellant. It is not uncommon that, according to mercantile contracts, deliveries are stipulated for, and in fact made, long before the time when the price is to be paid. In cases, therefore, where delivery is made earlier and the price is agreed to be paid later—say, a month after the

(1) (1923) I.L.R., 47 Mad., 222. (2) (1925) I.L.R., 52 Calc., 644.

date of delivery—under section 10 (*a*) of the Act, the seller would be entitled to claim the increased duty, which in the meantime had been imposed by the Legislature. This also goes against the contention of the learned Advocate for the appellant, that the time of delivery is to be taken as the critical point in construing section 10 of the Indian Act.

For these reasons we think that the purchaser was entitled to the benefit of the reduction in the duty in the present case.

No question of limitation arises because the suit was filed within three years from the date of the defendants' getting the refund from the Government. Under the Act, whenever a seller receives a refund of such duty, he has to pay the same to the purchaser; and that being so, we find that the plaintiff had a cause of action in this suit and that the defendants were bound to refund to the plaintiff the sum of Rs. 1,000. For these reasons we hold that the lower Appellate Court was right in its construction of section 10.

On the question of agency found by the lower Appellate Court, we are clear that it was not open to it to allow a new case of agency to be set up by the plaintiff for the first time in appeal, and we do not agree with the learned Advocate for the respondents that the judgment of the lower Appellate Court could be sustained on that ground.

We, however, agree with the lower Appellate Court as regards the construction of section 10.

In the result, the Second Appeal fails and is dismissed with costs.

K.R.