1921.

SITARAM BHAURAO v. JIAUL HASAN SIRAJUL KHAN.

That at all events is in harmony with the conclusion come to by the High Court at Bombay. The conclusion is, that you are to look at the intention of the parties in determining what system of law was to be taken as applying and what was to be taken to be the date of the sale with reference to which the ceremonies were performed. That view is expressed at length in the judgment of the High Court, and their Lordships agree with it. If that view is right, as their Lordships think it is, it disposes of the whole of the controversy in this case, with the result that the appeal fails and must be dismissed with costs, and their Lordships will therefore humbly advise His Majesty accordingly.

Solicitor for appellant: Mr. *E. Dalgado.*

Solicitors for respondent: Messrs. *T. L. Wilson & Co.*

Appeal dismissed.

A. M. T.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920. *October* 12.

IN THE MATTER OF THE SPECIFIC RELIEF ACT, 1877, IN THE MATTER OF THE EXCESS PROFITS DUTY ACT, 1919, AND IN THE MATTER OF DORAISWAMI IYER & Co.

Excess Profits Duty Act (X of 1919), secs. 3, 15, Sch. I—"Offices or employments," meaning of—"Excepted business"—Agents of a mill company remunerated by commission—Indian Income-Tax Act (VII of 1918), sec. 51—Reference on application of assessee—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5 c. 89), sec. 39—Specific Relief Act (I of 1877), sec. 45—High Court's power of interference.

The petitioners, who acted as agents of a mill company and were remunerated by a commission, claimed to be exempted from the excess profits duty under clause 2 of Schedule I of the Excess Profits Duty Act, 1919. The Collector and the Chief Revenue-Authority in appeal decided that the petitioners were not exempt from such duty inasmuch as they constituted a separate firm whose business was different from that of the mill company and was not an "office or

employment" which would be exempted under the Act. The petitioners requested the Chief Revenue-Authority to refer the question of exemption to the High Court under section 51 of the Income-Tax Act, 1918 ; but the latter declined to do so and the petitioners applied to the High Court under section 45 of the Specific Relief Act:—

Held, that the proviso to Schedule I must be read as governing generally the three kinds of businesses enumerated under headings (1), (2) and (3) of the Schedule; or, in other words, as including the businesses mentioned therein as within the terms of section 3 of the Act.

Held, further on the facts, that the petitioners were not to be considered as carrying on a business excepted under the above Schedule.

Held also, that it was not incumbent on the Chief Revenue-Authority to make a reference to the High Court whenever an application for a reference was made to him, and that in the present case he exercised a proper discretion in coming to the conclusion that a reference was unnecessary.

PETITION under section 45 of the Specific Relief Act, I of 1877.

The petitioners, Doraiswami Iyer and Co., were carrying on business in Bombay as Agents of the Aurangabad Mills, Ltd., a joint-stock Company incorporated under the Indian Companies Act VI of 1882, situated in Aurangabad in the territories of His Highness the Nizam of Hyderabad.

The petitioners were entitled under their agreement with the said Company to a remuneration of 10 per cent. on the net annual profits of the Company for their services as such Agents of the Company, subject to a minimum of Rs. 12,000 per annum irrespective of the profits of the Company.

A notice, dated 6th May 1920 was served on the petitioners by the Collector of Income Tax, Bombay, assessing them in the sum of Rs. 23,042-13-0 as excess profits duty and demanding payment of the same from them.

On 12th June 1920, the petitioners presented a petition to the Chief Revenue-Authority claiming exemption from duty under clause (2) of Schedule I to the Excess Profits Duty Act, 1919.

1920.

DORAISWAMI IYER & CO., IN THE MATTER OF.

Thereupon, in pursuance of a letter from the Income Tax Commissioner requesting the petitioners to see him in his office in connection with the said petition, the petitioners deputed K.S. Ramaswami, a partner in their firm, to see the Income Tax Commissioner on 12th June 1920, when the question of exemption was discussed and the matter was adjourned for further argument.

On 19th June 1920, K. S. Ramaswami appeared before the Chief Revenue-Authority, and after submitting that the petitioners were exempt from payment of excess profits duty applied that the Chief Revenue-Authority should refer the case to the High Court under section 51 of the Indian Income-Tax Act, which was made applicable to the Excess Profits Duty Act by section 15 of the last-mentioned Act, and also in pursuance of Rule 31 of the Excess Profits Duty Rules, 1919.

The Chief Revenue-Authority decided that the petitioners were not exempt from such duty on the ground that their business was not an excepted business as they were a firm and not an individual and as such could not be servants of the Company. The Chief Revenue-Authority declined to state a case for reference to the High Court on the ground that although the petitioners' application was not frivolous he considered a reference unnecessary, no other mill agents having applied for such exemption except in one other case in which he had decided against the said applicant. The Chief Revenue-Authority, however, reduced the duty by giving 25 per cent. allowance under section 7 as usually allowed to Mill Agents, they having no actual capital.

In their petition to the High Court, the petitioners submitted that the Chief Revenue-Authority in refusing to state a case for reference failed and refused to exercise

his discretion in that behalf according to law and that such refusal was arbitrary and capricious, inasmuch as they were entitled to exemption from payment of excess profits duty under clause (2) of Schedule I of the Excess Profits Duty Act.

The petitioners accordingly prayed: (i) that the High Court should call upon the Chief Revenue-Authority under section 45 of the Specific Relief Act to draw up a statement of the case and refer it with its own opinion thereon to the High Court, (ii) in the alternative, that the High Court should order the Chief Revenue-Authority under the said section to hear and determine according to law the petitioners' application to refer the said question to the High Court.

Setalvad J. granted a Rule calling upon the Chief Revenue-Authority to show cause why an order as prayed for by the petitioners should not be made.

The Rule was brought on for hearing before Macleod C. J. and Fawcett J.

Coltman, with *B. J. Desai*, for the petitioners, in support of the Rule.

Sir Thomas Strangman, Advocate-General for the Chief Revenue-Authority, to show cause.

MACLEOD, C. J.—This is a Rule granted to the petitioners whereby it was ordered that the Chief Revenue-Authority of Bombay should show cause, if any, why it should not, under section 45 of the Specific Relief Act, draw up a statement of the case showing why the petitioners have not been exempt from payment of excess profits duty under clause 2 of Schedule I of the Excess Profits Duty Act X of 1919 and refer it with its own opinion to the High Court, or, in the alternative, why the Chief Revenue-Authority under the said section of

1920.

DORAISWAMI IYER & CO., IN THE MATTER OF.

the said Specific Relief Act should not hear and determine according to the law the petitioners' application to refer the said question to this Honourable Court.

Under section 15 of the Excess Profits Duty Act, sections 49 to 52 of the Indian Income-Tax Act of 1918 are applicable. Section 51 of the Income-Tax Act says:—

"If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VII, a question has arisen with reference to the interpretation of any of the provisions of this Act or of any Rule thereunder, the Chief Revenue-Authority may, either on its own motion or on reference from any Revenue-officer subordinate to it, draw up a statement of the case, and refer it, with its own opinion thereon, to the High Court, and shall so refer any such question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary."

The Collector and the Chief Revenue-Authority decided that the petitioners were liable to be assessed under the Excess Profits Duty Act, as under section 3 the Act was applied to every business other than the business specified in Schedule I. The petitioners contend that they come within one of the exceptions in Schedule I. The Chief Revenue-Authority in its decision states :—

"The appellants are really a separate firm carrying on under a contract a commission business for the Mills firm. This does not seem to me to be at all an "Office or employment" which under Schedule I would be exempted. The appellants really constitute a separate business technically from that of the Mills Co., of which they act as agents. The point is, I think, clear and it seems to me not necessary to refer it to the High Court as asked by appellants."

Therefore the Chief Revenue-Authority was satisfied that a reference was unnecessary, and under section 51 of the Indian Income-Tax Act the Chief Revenue-Authority was authorized to come to that decision. We are asked under section 45 of the Specific Relief Act to hold that the making of the reference was clearly incumbent on the Chief Revenue-Authority in its public

character; but it is clearly not incumbent to make a reference whenever an application for a reference is made, although it may be stated that section 51 is rather too wide in its terms. There certainly might be cases in which, if the application for a reference were refused, the Court might consider that it was a case in which it was incumbent on the Chief Revenue-Authority to make the reference. However, it may be as well to consider the petition on its merits and to see whether the Chief Revenue-Authority exercised a wise discretion in coming to the conclusion that a reference was unnecessary.

The petitioners contend that all offices or employments without any exception come within the term "excepted business" in Schedule I. Now the proviso which comes after No. 3 in Schedule I is obviously taken from section 39, Chapter 89, of the English Finance Act (No. 2) of 1915. That section provided that the trades and businesses to which that part of the Act applied were all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom or owned or carried on in any other place by persons ordinarily resident in the United Kingdom excepting those described in (*a*), (*b*) and (*c*), but included the business of any person taking commission in respect of any transactions or services rendered, or any agent of any description not being a whole-time officer or servant of the business or a commercial traveller or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency.

The draftsman of Schedule I evidently took that section for his model, but did not exercise sufficient care in the transposition of its terms which became necessary owing to the businesses which were excepted

1920.

DORAISWAMI IYER & Co., IN THE MATTER OF.

being entered in a Schedule instead of in the body of the Act. The last paragraph of section 39 of the English Finance Act made it clear that certain businesses were included in the term "all trades and businesses" and did not come within any of the exceptions. The proviso in Schedule I can, strictly speaking, only be appropriately attached to Exception 2 and possibly to Exception 1, but I think the only way in which the proviso can be given any meaning is to read it as governing generally the three kinds of businesses which were enumerated under headings 1, 2 and 3, or, put in another way, as including the businesses mentioned therein as within the terms of section 3 of the Act. Any other construction given to the proviso would result in absurdity. If attached to heading No. 3 only it becomes meaningless. Obviously it was never intended that persons in the position of the petitioners acting as agents, secretaries and treasurers, or agents of a mill company under the usual form of agreement and remunerated by a commission which would depend either on the out-turn or on the amount of profits, were to be considered as carrying on a business excepted under Schedule I. Nor can it be said that the petitioners are whole-time officers or servants of the business, because all that the agreement provides for is that, subject to the control of the Directors, the said firm shall have the general conduct and management of the business and affairs of the company. They are not officers of the company in the strict sense of the word, nor are they servants. They are a firm which for a certain agreed remuneration has consented to do the work which is detailed under Clause III of the agreement. There is nothing whatever in the agreement which would prevent the petitioners carrying on any other business so long as they carried on the work under the agreement in the proper manner.

1920.

DORAISWAMI IYER & CO., IN THE MATTER OF.

I think, therefore, on every ground the Rule must be discharged with costs.

Solicitors for the petitioners : Messrs. *Bhaishankar, Kanga & Girdharlal.*

Solicitor for the respondents: Mr. *J. C. G. Bowen.*

Rule discharged.

G. G. N.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

GOPALJI KALLIANJI, APPELLANTS AND DEFENDANTS *v.* CHHAGANLALI VITTHALJI, RESPONDENTS AND PLAINTIFFS*.

1920. *December* 14.

Arbitration—Consent order for extension of time presented before award—Order signed after making of award—Validity of award—Application to set aside—Form of—Indian Limitation Act (IX of 1908), Schedule II, Article 158—Civil Procedure Code (Act V of 1908), Schedule II—Practice.

Both parties to a suit, which had been referred to arbitration, having consented to an order for the extension of time for making the award, the order was taken to the proper officer (*sc.* the Prothonotary) for signature. In the ordinary course of events the latter would have exercised his discretion to sign the order on the same day, but owing to pressure of work the order was not signed till some days later, the award itself having been made in the interval.

Held, that, though the Prothonotary had actually exercised his discretion later, his decision must in the circumstances be thrown back to the day on which the order was presented for his signature, and, as the order ought to have been signed as of that day, the award was not invalid.

The form which an application to set aside an award under the Second Schedule of the Civil Procedure Code should take is nowhere prescribed or indicated. It is sufficient if some notice is given to the proper office that the party objects to the award and the date on which such notice is given is, for the purpose of the Indian Limitation Act, the date on which the application is made.

* O. C. J. Suit No. 1144 of 1918 ; Appeal No. 39 of 1920.