

31/83

50 OF 1982

SUPREME COURT OF MAURITIUS

Appeal to Privy Council

Additional Brief

Commissioner of Income Tax

(Applicant)

VERSUS

Espérance Co. Ltd.

(Respondent)

IN THE SUPREME COURT OF MAURITIUS

In the matter :—

COMMISSIONER OF INCOME TAX

Applicant

versus

ESPERANCE CO. LTD.

Respondent

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IN THE SUPREME COURT OF MAURITIUS

In the matter of :—

THE COMMISSIONER OF INCOME TAX

Applicant

versus

THE ESPERANCE CO. LTD.

Respondent

And in the matter of :—

THE COMMISSIONER OF INCOME TAX

Appellant 10

versus

THE ESPERANCE CO. LTD.

Respondent

MOTION PAPER

Counsel is instructed to move this Honourable Court for an Order—

- (a) granting leave to the abovenamed Applicant (now Appellant to appeal to Her Majesty in Council against the judgment of the Supreme Court (Their Lordships P. Y. Espitalier-Noel and A. M. G. Ahmed) delivered on the 9th April, 1982 by which the assessment of the Commissioner of Income Tax No. L 0009210 dated the 16th October 1981 was set aside; 20
- (b) directing that the said judgment be suspended pending the present appeal.

The said Applicant being ready and willing to fulfill any formality which the Court may direct for the due prosecution of the appeal.

And this for the reasons set forth in the hereannexed affidavit.

Under all legal reservations.

Dated this 26th day of April, 1982.

G. RAMDEWAR
of Jules Koenig Street, Port Louis
Principal Crown Attorney and
Attorney for 30
The Commissioner of Income Tax
K. P. MATADEEN
Applicant's Counsel

IN THE SUPREME COURT OF MAURITIUS

In the matter of:—

THE COMMISSIONER OF INCOME TAX

*Applicant**versus*

THE ESPERANCE CO. LTD.

Respondent

And in the matter of:—

THE COMMISSIONER OF INCOME TAX

*Appellant 10**versus*

THE ESPERANCE CO. LTD.

Respondent

I, Max Henry, Commissioner of Income Tax, make oath and say that:—

1. The Commissioner of Income Tax is the Appellant in the above case.
2. On the 16th October 1981, the Commissioner of Income Tax made an assessment on the Esperance Co. Ltd. as per Assessment No. L 0009210.
3. The said assessment was not accepted and an appeal was lodged in the Supreme Court.
4. On the 9th April, 1982, the Supreme Court (Their Lordships P. Y. Espi- 20 talier-Noel and A. M. G. Ahmed) gave a judgment setting aside the assessment of the Commissioner of Income Tax dated the 16th October, 1981 and bearing No. L 0009210.
5. The Commissioner of Income Tax is dissatisfied with the said judgment and intends to appeal against it to Her Majesty in Council because—
 - (a) The Court erred in holding that only a prospective effect was intended to be given to the new provisions introduced by the Income Tax (Amendment No. 2) Act of 1971 and that because the bonus issues of share capital had been last effected by Mon Loisir Sugar Estate Co. Ltd. in 1969, that is before the enactment of the anti avoidance pro- 30 visions in 1971, the subsequent repayment of preference share capital effected by that Company on the 29th June 1981 could not be considered as a dividend chargeable to tax either under paragraph (a) or under paragraph (d) of Section 2 (2) of the Income Tax Act 1974.

- (b) The Court was wrong in holding that a repayment of share capital is affected by the provisions of subsection 6 (1) (d) of Section 5 of the Income Tax Ordinance 1950 as amended by the Income Tax (Amendment No. 2) Act of 1971 or by the provisions of Section 2 (2) (d) of the Income Tax Act 1974 only if both components of a combination of issue of bonus shares cum repayment of shares capital are effected after the 1st July, 1971.
- (c) The Court was wrong in holding that the repayment of capital wholly constituted by bonus issues can be considered as a genuine repayment of capital. 10

6. The present appeal is a fit and proper one to be submitted to Her Majesty in Council in that it raises a question of great public importance inasmuch as—

- (a) there is an intricate question of law involved;
- (b) the case is in the nature of a test case in regard to the repayment of share capital represented by bonus shares issued by the Company of which Esperance Co. Ltd. is a shareholder;
- (c) the interest at stake is considerable in that—
- (i) the bonus shares issued by the company of which Esperance Co. Ltd. is a shareholder amount to Rs 25,000,000;
- (ii) the total value of bonus shares issued by other Companies in similar circumstances and which may be affected by the Court's decision may well exceed the Rs 100,000,000 mark; 20
- (d) the decision of the Court will serve as a guide to the Income Tax Authorities in respect of bonus shares issued before 1971 followed by a subsequent repayment of share capital after 1st July 1971.

7. It is therefore urgent and necessary that the Supreme Court—

- (a) grants to the Commissioner of Income Tax leave to appeal to Her Majesty in Council against the judgment of the Supreme Court dated the 9th April, 1982;
- (b) directs that the said judgment be suspended pending the hearing of 30 the appeal.

8. The Commissioner of Income Tax prays accordingly.
Sworn by the abovenamed deponent, at Chambers, Supreme Court House,

Port Louis, this 27 day of April 1982.

Before me,

*Master and Registrar,
Supreme Court.*

Submission of Counsel for the Applicant

COMMISSIONER OF INCOME TAX

versus

ESPERANCE CO. LTD.

The Commissioner of Income Tax has applied to the Supreme Court by way of motion for leave to appeal to Her Majesty in Council against a decision of the Supreme Court in *Espérance Co. Ltd. v. Commissioner of Income Tax* (Judgment No. 153 of 1982). No objection being taken by the respondent, the Court has orally granted the motion for leave, the conditions attached to the granting of leave to be stated in the written judgment which will be given in due course. Subsequently, Counsel for the respondent has drawn the attention of the Court to the case of *Le Cernéen v. Miss Daurat (1933) MR 39*. It is to be noted that there has been no formal objection.

Paragraph 3 of the Mauritius (Appeals to Privy Council) Order 1968 provides that an application for leave to appeal shall be made by motion or petition to the Court within 21 days of the date of the decision to be appealed from, and the applicant shall give all other parties concerned notice of his intended application. In the present case, judgment was delivered on the 9th April 1982 during vacation; notice of the motion was served on the respondent within the 21-day period; and the motion for leave was made on the first motion day available, i.e. on 3.5.82 at the start of the 2nd Term.

A strict application of *Le Cernéen v. Miss Daurat* would stand in the way of the applicant. However, since that case, much water has flown under the bridge. Although the decision has not been expressly overruled, yet the mainstream of our caselaw from *Seecharan v. R (1934) MR 4*, through *Atchia v. Atchia (1968) MR 13*, down to *Perrine v. Foogooa (1967) MR 134* shows that the Court has departed from the legal principles enunciated in the *Cernéen* case.

It is most respectfully submitted that the decision in the *Cernéen* case should not be followed to the letter. In other words the period within which the motion for leave to appeal to the Privy Council should not be held to be mandatory. The decision was given some 50 years ago. Subsequently, a number of judicial pronouncements have held that rules of court are directory and not mandatory, the locus classicus being the case of *Perrine v. Foogooa (1967) MR 134*. In the light of

that decision and the various other decisions quoted therein, it is submitted that the motion should be accepted without for that matter laying down that any excuse would justify a departure from strict compliance with paragraph 3. The leniency of the Court is understandably based on the principle that justice should not be derived on mere technical grounds when failure to adhere to the requirement of the law can be properly explained. In the present case notice of the motion was served on the respondent within the prescribed delay, and the motion made on the first motion day available. No prejudice has been caused to the respondent. On the other hand, if the Court were to refuse the motion, the applicant would forfeit his right to appeal to Her Majesty in Council. 10

Even if the Court were to rule that the *Cernéen* case is still binding then it is respectfully submitted that in view of the magnitude of the interest at stake in the present case, the Court should exercise its discretion and entertain the motion. It is also to be noted that even in that case, mention was made of the possibility of strict compliance being hindered by circumstances such as vacation time, though the Court was not prepared to accept any such hindrance as a reason justifying extension of time.

Incidentally, it is to be noted that the procedure to be followed in England when the Court is in vacation is expressly laid down in the Rules of the Supreme Court. The following from the Annual Practice 1952 is therefor respectfully submitted to the attention of the Court:— 20

- (a) 0.54, r. 24 (p. 1061).
- (b) 0.58, r. 3 (Head note: Fourteen days' notice: p. 1249).
- (c) 0.58, r. 8 (Head note: Time for Entry: p. 1261).
- (d) 0.58, r. 15 (Head note: Computation of time: p. 1274).

K. P. MATADEEN
Counsel for the Applicant

Submission of Counsel for the Respondent

IN THE SUPREME COURT OF MAURITIUS

In the matter of :

THE COMMISSIONER OF INCOME TAX

Applicant

versus

THE ESPERANCE CO. LTD.

Respondent

The Applicant has applied, under section 3 of the Mauritius (Appeals to the Privy Council) Order 1968, for leave to appeal to the Privy Council against a judgment of this Court delivered in the above matter on the 9th April, 1982. 10

Section 3 of the Order lays down that an application for such leave shall be made by motion or petition within twenty-one days of the date of the decision to be appealed from.

Notice of motion was given by the Applicant to the Respondent on the 26th April, 1982, but the motion itself was made on the 3rd May, 1982, that is, more than twenty-one days after the decision to be appealed from.

During the period of twenty-one days within which the Applicant's motion should have been made, the Court was in vacation, and the motion was made on the first motion day following the Court's vacation. 20

No objection was raised by the Respondent before and at the time the motion was made on the ground of non-compliance with the time-limit prescribed by section 3 of the Order.

The following questions arise for the determination of the Court :

- (a) Whether the Court has power to grant leave to appeal to the Applicant even though the time for making his motion has expired; in other words, whether the Court has power to extend the time-limit prescribed by section 3 of the Order in Council?
- (b) Whether the following facts have any bearing on question (a), namely—
 - (i) the fact that the Court was in vacation at the time the Applicant's motion should have been made;
 - (ii) the fact that notice of motion was given within the time prescribed;
 - (iii) the fact that no objection was raised by the Respondent?

A consideration of this Court's decisions in: *Bolgerd, Applicant, in re: Perrot v. Bolgerd and anor* (1872) M.R. 84; *Corson Lagesse & Co. v. Colonial Government* (1924) M.R. 96; in re: *Daurat v. Le Cernéen & anor.* (1933) M.R. 39, would lead to the conclusion that the above questions should be answered in the negative.

In the case of *Daurat*, the Court had to apply section 5 of the Order in Council on 15th February 1909, which was in almost exactly the same terms as section 3 of the Order of 1968. Notice of intention to appeal had been given by the applicants to the respondent in vacation, seventeen days after the judgment sought to be appealed from, which had been delivered on the last day of the term, but the motion to the Court was made a month after, on the first day of the following term. The Court held—

- (1) that section 5 of the Order in Council made no such reservation or distinction between term time and vacation as sought to be made by the applicants; that there was nothing to prevent the applicants from proceeding by way of petition and filing such petition during vacation; that under rule 161 of the Rules of our Supreme Court, provision was made for the Court to sit for, *inter alia*, hearing applications requiring an immediate or prompt hearing; that it was thus open to the applicants, if they had elected to proceed by motion, to apply for a special sitting, so as not to allow the time-limit to expire; the applicants had done neither;
- (2) that the giving of the notice of motion to the respondent within the twenty-one days prescribed was not relevant, as it was the Court which had to be moved within that period;
- (3) after referring to the local decisions of *Bolgerd* and *Corson Lagesse*, and certain decisions of the Privy Council, that, unless the motion for leave to appeal was made within twenty-one days after the judgment to be appealed from, there was no power, at least in this Court, to grant leave to appeal

The Court further relied on the peremptory character of the word "shall" in the section. In this connection reference may be made to the recent case of *Espitalier Noël Ltd. v. Serret* (Judgment No. 332 of 1980), in which this Court laid stress on the peremptory character of formalities to be fulfilled on appeal and held that a failure to comply with such formalities was fatal to the appeal.

The Court's ruling in the *Daurat* case would thus appear to dispose of questions (a) and (b) (i) and (ii) above.

With regard to question (b) (iii), it would result that, if the Court has no power or discretion to extend the time allowed by the Order in Council for making the motion for leave to appeal, then the failure of the Applicant to comply with the time-limit cannot be cured by any waiver or implied consent on the part of the

Respondent. In that respect, reference may be made to the cases of *Bolgerd* and *Corson Lagesse*, in which, as it appears, no objection had been taken by the respondent, and the question was raised by the Court itself, and also to the case of *Retmeyer v. Obermuller* (1837) 2 Moo. 93) which was cited in *Corson Lagesse*. The respondent in the *Retmeyer* case had objected to the admission of an appeal to the Privy Council on the ground that the applicant had not furnished security within the time prescribed by the relevant Order in Council. But the Court had allowed the appeal to proceed. The respondent did not appeal against the permission given, but took the point before the Privy Council. Their Lordships held that the terms of the Order in Council were prohibitory, and left no discretion in the Court, and that the appellant's irregularity could not be cured by any waiver or implied consent on the part of the respondent. 10

Having regard to what precedes, the Respondent has thought it proper to call the attention of the Court to the fact that it may not have the power, in the present instance, to grant leave to appeal to the Applicant, and, in compliance with the Chief Justice's request, has here stated its views of the matter.

J. MARC DAVID Q.C.
of Counsel for the Respondent.

JUDGMENT

RECORD No. 25897

IN THE SUPREME COURT OF MAURITIUS

In the matter of :

THE COMMISSIONER OF INCOME TAX

*Appellant**versus*

THE ESPERANCE CO. LTD.

Respondent

AND

10

In the matter of :

THE COMMISSIONER OF INCOME TAX

*Applicant**versus*

THE ESPERANCE CO. LTD.

*Respondent**Judgment*

On the 9th April 1982, the Supreme Court delivered judgment in the case of the Esperance Company Ltd. v. The Commissioner of Income Tax, setting aside an assessment made by the Commissioner. Feeling aggrieved by that decision, the Commissioner moved the Court for leave to appeal to the Privy Council. Notice of motion was served on the Company on the 26th April 1982, but the motion itself was made on the 3rd May 1982, i.e. more than 21 days after the judgment. It may be noted that the judgment was delivered during vacation, and the motion made on the first day of the second term, which was also the first day on which the Court heard motions made subsequent to the judgment.

Learned Counsel for the Company has not objected to leave being granted, but with his usual fairness has called our attention to r. 3 of the Mauritius (Appeals to Privy Council) Order, 1968, which says:

3. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.

In *Daurat v. Le Cernéen* (1933) M.R. 39, the Court had to construe r. 5 of the Order in Council of the 15th February 1909, which is almost identical to r. 3 of the Order now in force. It held that unless the motion for leave to appeal was made within 21 days it had no power to grant leave to appeal.

We respectfully disagree with that decision, and shall now give our reasons for doing so. It must be noted that in coming to its decision the Court in *Daurat* relied upon two decisions of the Privy Council, *East India Company v. Syed Ally*, VII Moore Ind. App. 554, and *Retmeyer v. Obermuller*, 2 Moore 93. Now those cases turned on the construction of rules which are much stricter than our rule. In the *East India Company* case, the relevant enactment provided that "no appeal shall be allowed by the Supreme Court (of Madras) unless the petition for that purpose shall be preferred within six months from the day of pronouncing of the judgment". In *Retmeyer* (a British Guiana case) the report reads: "Under section 25 of the Order in Council of 20th June 1831 (British Guiana), if the security to be given by the party or parties appellant for the prosecution of the appeal and for the payment of costs as may be awarded, shall in manner aforesaid be completed within 3 months from the date of the petition for leave to appeal, then, and not otherwise, the Court . . . shall make an order, allowing such appeal". In *Retmeyer* the words "and not otherwise" force one to the conclusion that, as the Privy Council held, those words "are prohibitory on the Court, and cannot be waived by the consent or subsequent appearance of the respondent to the appeal. The same is true in the *East India Company* case: the words "No appeal shall be allowed by the Supreme Court" deny to the Court jurisdiction to grant leave once the delay for appealing has expired. We may add that under those two rules, the delays for applying were fairly generous: six months and three months respectively. It is reasonable to conclude that a person who remains passive for so long does not deserve further time.

Under our rule, the delay for applying is only twenty-one days, and one can easily imagine circumstances where to insist upon strict compliance with the delay might lead to injustice. That is why as long ago as *Quesnel v. Dorelle* (1867) M.R. 61, this Court said: "It would really be a misfortune to this country, if the law stood thus, that for a formal and technical omission of pure procedure, parties could lose for ever and without a remedy, real and substantial rights; that such is not the law, we hasten to say "and" . . . The Judges who have framed those rules

retain in their application a certain amount of discretion, they are to be enforced in all cases, but they are to be enforced so as to further not to defeat the ends of substantial justice; non-compliance with their provisions ought to be visited with some penalty, but where 'such non-compliance' does not affect the substantial merits of a case, and where the Court is satisfied, not on mere statement of parties but upon proper evidence that the strict application of a rule, in a matter of form would work irremediable injury to one of the parties, it lies with the Court to modify the application under the penalty of costs, and this, in the way which would appear to them more conducive to the ends of justice." An examination of our case-law since *Quesnel* shows that at least where compliance with Rules of Court is concerned, this Court has been anxious to ensure "that the Rules of Court which are the channels through which justice is to be dispensed to litigants should not become the channels through which justice is denied to them" (per Rivalland, C. J., in *Perrine v. Foogooa*, (1967) M.R. 134). 10

As we have seen, our rule 3 is couched in terms which are not nearly as strict as those which led the Privy Council in the *East India Company* case and in *Retmeyer* to find that the Court had no power to give leave to appeal. Our rule is analogous to a number of enactments which have been held to be directory and not mandatory. It does not seem that its framers intended to curtail the jurisdiction of the Court to the extent of denying it any discretion to enlarge the delay if justice so requires. In applying the rule we may be guided by the wise words of Lord Collins in *In re. Coles and Ravenshear* (1907) 1 K.B. 1: "Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case." 20

There is a vital distinction between our rule and the rules upon which the *East India Company* case and *Retmeyer* were decided: in those cases, the rules were so framed as to impose an obligation upon the Court, and the Court was bound by the rules. Our rule leaves the jurisdiction of the Court unfettered, and imposes an obligation upon the parties. It follows that the Court retains a discretion to relieve the parties of a forfeiture to which they may have made themselves liable. 30

There is a feature in the present motion which clearly distinguishes it from *Daurat*. There the application was resisted. Here, it is not. Therefore, once we hold that we have jurisdiction, the issue seems to be covered by *Sarodia v. Bhanoo* (1964) M.R. 216. In that case, the appellant filed additional grounds of appeal outside the delay, but the respondent failed to lodge a preliminary objection as prescribed in r. 55 of the Supreme Court Rules. The Court entertained the additional grounds, for the reason that, the case being a civil one, it was unable to take any objection *proprio motu* in view of the well-established principle that in civil cases the Court should keep out of the ring. 40

There is in Mauritian law a specific text which, in the absence of an objection by the other party, debars us from intervening. That is a. 2223, C. Nap, which says: "Les juges ne peuvent pas suppléer d'office le moyen résultant de la prescription."

It is interesting to note that in both the *East India Company* case and in *Retmeyer* the Privy Council eventually granted leave to appeal. Now there is no doubt that the applicant, could have applied to the Court to have his motion heard during vacation, and the Court would have readily agreed. To that extent, he is to blame. But it must be added that he has followed the usual practice in making his application on the first motion day following the judgment. In the circumstances, by granting leave now, we may well be saving time, trouble and costs to all concerned. 10

We therefore grant the applicant leave to appeal against the judgment delivered by the Supreme Court on the 9th April, 1982 by which the assessment of the Commissioner of Income Tax No L 0009210 dated the 16th October 1981 was set aside under section 81(1) (b) of the Constitution of Mauritius set out in the Schedule to the Mauritius Independence Order 1968, upon condition, as required by section 4 of the Mauritius (Appeals to Privy Council) Order 1968—

- (1) that the applicant shall, within six weeks from the date of this judgment, enter into good and sufficient security to the satisfaction of the Master and Registrar in the sum of Rs 10,000 for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant 20 in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee of the Privy Council ordering the applicant to pay the costs of the appeal (as the case may be); and
- (2) that the applicant shall procure the preparation of the record and the despatch thereof to England within four months from the date of this judgment.

Costs of the present application to be costs in the cause.

M. RAULT
Chief Justice

A. M. G. AHMED 30
Judge

19th May, 1982.

CERTIFICATE

I certify that the foregoing are true copies of the motion made on 26.4.1982, of the affidavit sworn by the Commissioner of Income Tax on the 27th April 1982, of submissions made by Counsel for applicant and respondent and of the judgment delivered by the Supreme Court on the 19th May 1982 in respect of provisional leave to applicant to appeal to the Privy Council.

Given under my hand and seal.

This day of October 1982.

Master and Registrar, Supreme Court.

