

1938

Present : Poyser and Keuneman JJ.

COSMAS v. THE COMMISSIONER OF INCOME TAX

2—D. C. (Inty.) Special

Income tax—Case stated to Supreme Court—Notice to opposite party—Delay in giving notice—Rejection of appeal—Ordinance No. 2 of 1932, s. 74 (3).

Where a person, on whose application a case was stated for the opinion of the Supreme Court under section 74 of the Income Tax Ordinance, transmitted the case to the Supreme Court on January 17, 1938, and gave notice to the Income Tax Commissioner on March 21, 1938,—

Held, that the appellant had failed to comply with the requirement of section 74 (3) that the notice should be given at or before the time he transmits the case to the Supreme Court.

THIS was a case stated for the opinion of the Supreme Court by the Board of Review under section 74 of the Income Tax Ordinance.

S. J. C. Schokman, C.C., for the Commissioner of Income Tax.—There is a preliminary objection to the hearing of the case stated as the assessee-appellant has not given notice to the Commissioner within the time prescribed by section 74 (3) of Ordinance No. 2 of 1932. The Commissioner in his affidavit states that notice was given to him on March 21, 1938. The stated case was transmitted to this court on January 17, 1938.

All the provisions of section 74 (1), (2), and (3) must be complied with before the Supreme Court can hear and determine under section 74 (5) the question of law arising on the stated case. The provisions of section 74 (3) are peremptory and not directory.

In England the Queen's Bench has held that it has no jurisdiction to hear a case stated by the Justices under 20 & 21 Victoria c. 43, s. 2, unless the stated case has been transmitted and the respondent given notice within the time prescribed in the section (vide *Edwards v. Roberts*¹, *Aspinall v. Sutton*²).

The Supreme Court has rejected appeals under the Civil Procedure Code where the appellant has failed to comply strictly with the requirements of the law (vide *Attorney-General v. Karunaratne et al*³, *Obeyesekera v. Edwardias et al.*⁴). It has also refused to allow applications for leave to appeal to the Privy Council where the provisions as to the giving of notice of the application to the opposite party have not been complied with (vide *Weerakoon Appuhamy v. Wijesinghe*⁵). The same principles would apply in the present case.

N. Nadarajah (with him E. F. N. Gratiaen and D. W. Fernando), for the assessee, appellant.—There is no provision of law which enables the Supreme Court to reject a stated case on the ground of delay in giving notice to the other side after the application has been entertained under section 74 (1). The provisions of section 74 (3) are only directory and the Commissioner in this case has had notice of the stated case.

¹ (1891) 1 Q. B. D. 302.

² (1894) 2 Q. B. D. 349.

³ 37 N. L. R. 57.

⁴ 23 N. L. R. 124.

⁵ 30 N. L. R. 256.

“At or before the time” in section 74 (3) means “about the time” and would permit of the notice being sent to the other party within a reasonable time of the stated case being transmitted to the Supreme Court (*vide ex parte Rosenthal—In re Dickinson*¹).

May 30, 1938. POYSER J.—

This is a case stated for the opinion of the Supreme Court under the provisions of section 74 of the Income Tax Ordinance, 1932. The case was stated by the Board of Review on January 4, 1938. The appellant in accordance with the provisions of section 74 (2) transmitted the case to the Supreme Court on January 17, 1938, thus complying with the provisions of the sub-section. Section 74 (3) is as follows:—

“At or before the time when he transmits the stated case to the Supreme Court, the party requiring it shall send to the other party notice in writing of the fact that the case has been stated on his application and shall supply him with a copy of the stated case”.

The appellant only gave the Commissioner of Income Tax notice of the case stated on March 21, that is, about five weeks after he had transmitted the case stated to the Supreme Court. A preliminary objection has therefore been taken on behalf of the Commissioner of Income Tax that the Court should not adjudicate on the case stated. I think this preliminary objection is well founded. The words “at or before the time”, though they might possibly give some latitude, certainly do not permit of a delay of some five weeks in complying with the provisions of this sub-section.

Various cases were cited to us which support the argument for the Commissioner of Income Tax. In *Edwards v. Roberts*², the Court held that it had no jurisdiction to hear an appeal against a decision of justices by way of a case stated under 20 & 21 Vict. c. 43 s. 2, unless the necessary provisions of that section in regard to the giving of notice to the respondent of the appeal had been complied with. In another case (*Aspinall v. Sutton*³) the Court held in regard to the same section referred to in *Edwards v. Roberts (supra)* that the provisions of this section requiring the case stated to be lodged at the Crown Office within three days were peremptory and if not complied with the Court would not adjudicate on the case stated. In *ex parte Rosenthal—In re Dickinson*⁴ it was held in regard to the interpretation of a County Court rule requiring that the deposit on an appeal from a County Court shall be paid “at or before the time of entering an appeal”, that the neglect to comply with this provision was not a formal defect or irregularity, and that when an appeal had been entered on February 17, and the deposit had not been paid till March 6, the appeal could not be heard. It will be noticed in this case that Bacon V. C. in the course of his judgment stated that there was no one more reluctant than him to adhere too closely to the rules and orders of the Court where the failure to comply with them has been purely formal and technical. He however held that non-compliance with the rule above stated was not a formal or technical non-compliance with the rule and that he was unable to hear the appeal.

¹ (1881) L. R. 20, Ch. D. 315.

² (1891) 1 Q. B. D. 302.

³ (1894) 2 Q. B. D. 349.

⁴ 20 Ch. D. 315.

This Court in regard to the provisions of the Civil Procedure Code, has always construed them strictly. It has also strictly construed the rules applicable in regard to leave to appeal to the Privy Council—see *Weerakoon Appuhamy v. Wijesinghe*¹.

In this case there has been a very considerable delay in the compliance with the provisions of section 74 (3). We have not been referred to any provisions in the Income Tax Ordinance which gives us any discretion in regard to a party's non-compliance with the provisions in regard to a case stated. The provisions of this Ordinance in regard to procedure must, in my opinion, be construed just as strictly as the provisions of the Civil Procedure Code, and that being so we cannot, in my opinion, hear the case that has been stated.

The respondent, the Commissioner of Income Tax, is entitled to costs.

KEUNEMAN J.—I agree.

Appeal rejected.

