

IN THE SUPREME COURT OF FIJI

Court of Review

Review No. 6 of 1986

Between:

RAMESH SAMJI

Appellant

- and -

COMMISSIONER OF INLAND
REVENUE

Respondent

Mr. F.G. Keil for the Appellant.
Mr. M.J. Scott & Mrs. Sharma for the Respondent.

JUDGMENT

Ramesh Samji is the son of Samji Jadavji some time storekeeper of Nadi town. He was born in 1944 and went to India with his parents in 1948. There his father established a small clothing shop at Rajkot Bombay. He returned in 1965 and his uncle Manji as his father's attorney transferred to him his father's two lots of Vadawa subdivision, then contained in one Native Lease No. 7190, although he was as yet not quite 21 years of age. There is no evidence as to how he came, but when he got to Fiji he had himself issued with a Fiji passport. He left Fiji in March 1966, and returned to Bombay in that same month. He came again to Fiji in August, 1978 by which time he had a new Fiji passport. He was accompanied this time by his wife and daughter, both of whom were born in India but had Fiji passports, but he did not bring his son. He said that the son had examinations in June in India and was to follow later. In the event he stayed in India. He also had a Fiji passport.

The taxpayer said in evidence that he came to Fiji to start his own business in the premises which he had bought from his father and which were occupied by his uncle Manji. I would mention here that when he bought the lease there were two buildings upon it, one a concrete building occupied for both business and private purposes by his uncle Manji who was conducting business as Samji Jadavji & Co., and one a wood and iron building. The taxpayer told the Court that he replaced the wood and iron building in 1972 with a concrete building containing four shops and offices; when he got here in 1978 he found that Manji refused to vacate the premises he occupied, and had further, used the taxpayer's powers of attorney granted to him in 1965 and 1973 to grant himself and his firm a ten year tenancy from 1976 with a right of renewal for a further ten years. The taxpayer said that he took counsel with his other relatives in Nadi and as a result in April 1979 advertised the whole property for sale, intending however, to sell only the building occupied by Manji. This would necessitate a further subdivision of the land. He accepted an offer from Karsanji, who also gave evidence, who agreed to give \$200,000 for that part of the property occupied by Manji. The agreement between the taxpayer and Karsanji was at this stage oral only, and nothing was put on paper until 1981 when Karsanji came to India and was given an option in writing to buy the property. The taxpayer had returned to India in August 1979, and has not been to Fiji since until he came to give evidence in this appeal.

Among the terms upon which Karsanji bought the property were that taxpayer was to subdivide the lease, and also to get Manji and his family out and give him vacant possession of the building. The taxpayer was not able to do this until he had engaged in costly litigation, and it was not until March 1985 that the transfer to Karsanji's company was executed. A deposit of \$20,000 had been paid in 1981 when the option agreement was signed, and the balance of \$180,000 in 1985. The Commissioner of Inland Revenue took

the view that at that time the taxpayer was normally residing out of Fiji and he wished to tax him under section 11(e) of the Income Tax Act. Section 11 starts off by a quite ample definition of 'total income' and then goes on with a proviso, which begins 'Provided that, without in any way affecting the generality of this section total income for the purpose of this act shall include: (and there follow twenty eight specific matters) of which (e) is as follows:

"In the case of a person residing or having his head office or principal place of business outside Fiji but carrying on business in Fiji, either directly or through or in the name of any other person, the net profit or gain arising from the business of such person in Fiji."

There is nothing abnormal in that. But now comes the sting.

"Provided that any person normally residing outside Fiji who engages in the sale or other disposition either directly or by the sale of options to purchase or by any other means whatsoever of any land in Fiji or any estate or interest in any such land shall be deemed to be carrying on business in Fiji, and any profit or gain derived from the carrying on or carrying out of any undertaking or scheme connected with the disposition either directly or indirectly of any land in Fiji or any estate or interest in any such land, including schemes involving the interposition of a company, entered into or devised for the purpose of making a profit shall be deemed to be total income for the purpose of this Act."

The taxpayer contends that he is normally residing in Fiji. There is authority to shew that persons sometimes absent from Britain and even residing out of Britain have been held for the purposes of taxation to be 'ordinarily resident' in England. Here the converse is to be shewn. The word 'normally' in the Fiji Act has been held to correspond with the term 'ordinarily' used in the English legislation see Weller v. Commissioner of Inland

Revenue (1981) in the Fiji Court of Appeal. I am indebted to counsel for the citation of all the cases bearing in the matter, viz. Levene v. I.R.C. (1928) A.C.217: 97 LJKB 377: I.R.C. v. Lysaght (1928) A.C. 234: 97 LJKB 385: Nilish Shah v. Barnet London B.C. and other appeals (1983) 2 A.C. 309: 2 W.L.R. 16: 1 A.E.R. 226: Eastleigh B.C. v. Betts (1983) 2 A.E.R. 1111: 2 A.C. 613: Reed v. Clark (1985) 3 W.L.R. 142: F.C.T. v. Pechey (1975) 5 A.T.R. 322: Weller v. Commissioner of Inland Revenue No. 75 of 1981 in the Fiji Court of Appeal.

From these it seems clear that the English term 'ordinarily resident' is not a term of art and that the two words must be construed as bearing their normal meaning. In Levenes' case Viscount Cave L.C. said :-

"I think that [ordinary residence] connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."

In Lysaght's case Viscount Sumner said:

"I think the converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not extraordinary."

In Nilish Shah's case Lord Scarman, delivering the judgment of the House of Lords adopted the words of Lord Denning M.R. in the Court of Appeal (1962) 1 A.E.R. 698, 704; 2 Q.B. 720: 2 W.L.R. 474, 482.

"The words 'ordinarily resident' means that a 'person must be habitually and normally resident here' (that is, in England) 'apart from temporary or occasional absences of long or short duration.'"

So that if I apply this to section 11(e) the taxpayer, to be normally residing outside Fiji, would be habitually and normally residing in Rajkot. Here we have a taxpayer who derived all his income from Fiji and has done since 1965. He was born in Fiji and he and all his family hold Fiji passports. In 1965 he was resident in Fiji for the best part of at least seven months. In 1978 he came to Fiji

with his wife and daughter intending to remain here and commence business. After a year's stay he returned to India. During his stay he arranged to sell part of his property. He has remained resident in India ever since. In my view, although it seems rather hard, he is habitually and normally resident outside Fiji and if he engages in business, becomes subject to the provisions of section 11(e).


The question is, can it be said that the taxpayer has engaged in the sale of land in Fiji. In Weller's case the Fiji Court of Appeal held that although Weller sold his house he had not 'engaged' in the sale of land, but the Court was careful to say that it should not require a plurality of dealings to constitute 'engaging'. The Court said:-

"As has been so often said, a word must be construed in the context in which it is used. To engage in the selling of land means more than to decide to sell and thereafter complete the transaction in a straightforward way. It could mean devoting some substantial time to achieving and perfecting a sale."

Now the transaction in which the taxpayer took part involved first an application for subdivision of lease 7190 into two lots, then advertising for sale in two daily newspapers, then consideration of several replies and determination to accept Karsanji's offer. Taxpayer advertised both lots comprised in Native Lease No. 7190 and since Karsanji was interested only in the main shop, a subdivision was necessary. A subdivision had already been applied for in February, although the advertisements did not appear until April. By February 1981 the subdivision had proceeded sufficiently to warrant Karsanji having his solicitors, who were also the taxpayer's solicitors, prepare an option to sell and taking it with him to India where he and the taxpayer executed it. It was provided that it could be exercised by 30th October 1982 and was subject to the vendor giving vacant-possession.

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Karsanji duly exercised his option as provided on 28th October 1982, but took care to reserve the necessity for payment until he was given vacant possession. In the event that necessity did not arise until the taxpayer had taken unsuccessful actions in the Supreme Court and Court of Appeal, and had later been able to get an order for possession. That was the end of 1984 and the property was eventually transferred to Karsanji in March 1985. All this must be considered to be engaging in sale, and it seems to me that the requirements of the section are complied with. Hence the taxpayer is deemed to be carrying on business in Fiji, and the taxpayer's appeal must be dismissed. He will have to pay the costs of the appeal.



(K.A. Stuart)
Court of Review

6th November, 1987.