

1988 January 28

[TRIANAFYLLIDES, P., SAVVIDES, LORIS,STYLIANIDES, KOURRIS, JJ.]

THE ADMINISTRATORS OF THE ESTATE OF
CHINNACOLANDAY KRISHNA PILLAY, DECEASED, 1.ADAMOS
ADAMIDES, 2.PANAYIOTIS CONSTANTINOU,

Appellants-Applicants.

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTRY OF FINANCE,
2.THE COMMISSIONER OF ESTATE DUTY,

Respondents.

(Revisional Jurisdiction Appeal No. 526).

Construction of statutes—Should secure the object of their being workable, unless crucial omission or clear direction makes that end unattainable—Repugnancy or inconsistency either within a section or as between a section and other parts of the law should as far as possible be avoided—Statutes should be read "subject to their not being made absurd by matters which never could have been within the calculation or consideration of the legislature—The Estate Duty Law, 1962 (Law 67/62), as amended by Laws 71/68 and 3/76, proviso to section 56(b)—The law should be read without the said proviso.

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Taxation—Estate Duty—The Estate Duty Law, 1962 (Law 67/62), as amended by Law 71/68 and 3/76—The proviso to section 56(b)—A transplantation from section 60(b) of the old Law, Cap. 319—Completely repugnant to new Juridical order established by Art. 146 of the Constitution—The Law should be read without it.

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Taxation—Estate Duty—Refund of estate duty paid—The Estate Duty Law, 1962, as amended by Laws 71/68 and 3/76, section 56.

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The applicants-administrators with will annexed of the late Chinnacolanday Krishna Pillay—paid the estate duty as assessed. When, however, they received information that the deceased, who, at the time, was living in South. Africa, married there without an ante-nuptial

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agreement, with the result of creation of community of property, they applied to the Court by originating summons and, finally, obtained a decision that the estate of the deceased, as well as his liabilities as at the time of his death consist of the one half of those shown in his name at the time of his death, as there was a community of property between the spouses.

The applicants apprised the Commissioner of this decision and requested refund of the appropriate part of the estate duty. The request was turned down on the ground that the proviso to section 56(b) applies in that the matter could have been raised by an appeal and no appeal by way of recourse had been filed.

This is an appeal from the judgment of the Court, whereby the applicants' recourse against respondent's said decision, was dismissed.

Held, *allowing the appeal and annulling the sub judice decision*: (1) The proviso to section 56(b) of the Estate Duty Law, 1962 (Law 67/62), as amended by Laws 71/68 and 3/76, is a mere translation of the corresponding provision (Section 60(b)) of the Old Estate Duty Law, Cap. 319. The new law, however, did not provide for an appeal; but for a recourse as per Article 146 of the Constitution.

(2) The system of appeals established by Cap. 319 is incompatible with the new Juridical order established by the Constitution. The transportation of the old proviso of section 60(b) into the new law was a mistake. The legislator, having regard to the whole structure of the Law and the new legal and Judicial Order, could not be taken to have intended this to be part of the Law. The Law should be read without the second proviso.

(3) The Commissioner laboured under a misconception of law. Appellants could not file a recourse prior to the decision concerning their application for refund.

Appeal allowed. No order as to costs.

Cases referred to:

Murray v. Commissioner of Inland Revenue [1918] A.C.541;

Whitney v. Commissioners of Inland Revenue [1926] A.C.37;

The Queen v. Justices of County of London and London County Council [1893] 2 Q.B. 476.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J) given on the 17th August , 1985 (Revisional Jurisdiction Case No. 277/83)* whereby appellants' recourse against the refusal of the respondents to refund estate duty paid in respect of the property of the deceased Chinnacolanday Pillay was dismissed. 5

Fr. Saveriades, for the appellants.

A. Evangelou, Senior Counsel of the Republic, for the respondents. 10

Cur. adv. vult.

TRIANTAFYLLIDES P.: The Judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: The question raised in this appeal is whether the appellants-applicants are entitled to a refund of an amount of £4,364.30 paid on 25/9/80, or they are prevented to prefer a claim for the return thereof by the proviso (b) to section 56 of the Estate Duty Law, 1962, (Law No. 67/62). 15

The salient facts of the case over which there is no dispute are as follows:- 20

Chinnacolanday Krishna Pillay died in Limassol on 21/11/78 leaving a will dated 24/1/52. The named executors renounced their executorship and letters of administration with the will annexed were granted to the applicants by the District Court of Limassol in Probate Application No. 25/79 on 6/2/79. 25

On 30/3/79 the applicants delivered to Respondent Commissioner a simplified declaration of the deceased's property

* Reported in (1985) 3 C.L.R 1759.

in Cyprus contending that he was not of Cyprus domicile at the time of his death. The domicile of origin was that of South Africa and the last domicile of choice was United Kingdom.

5 On 8/2/80 the Commissioner, on the assumption that the domicile of the deceased was not Cyprus, disregarded the property abroad, and consequently the estate duty payable was assessed as nil.

10 On 1/9/80, when it was established that deceased had a Cyprus domicile at the time of his death, the applicants submitted a supplement to the simplified declaration of property, already filed and requested the Respondent Commissioner to revise the earlier assessment accordingly.

15 On 13/9/80 the Respondent Commissioner raised an additional assessment of £5,004.30. The applicants objected thereto on 24/9/80 on the sole ground that the assessment was excessive.

On 25/9/80 the Commissioner decided to revise the assessment to £4,364.30. He communicated forthwith this to the applicants, who on 27/9/80 paid the whole amount.

20 Early in January 1981 it came to the knowledge of the administrators that the marriage of the deceased to his wife was celebrated without an ante-nuptial contract in or about 1929 in the Union of South Africa where both had been born with a South African domicile of origin and that might have created community of a property in the sense that all the property, movable and
25 immovable, belonging to or acquired by either spouse before the change of domicile falls into the common ownership of both and that all the liabilities of either spouse are the joint liability of both.

30 He and his wife were born in South Africa. In 1955 they left that country and settled in England. At the same time all assets in his name in South Africa were liquidated and the proceeds transferred to England in his name, where they were invested in the purchase of immovables.

In 1961 he applied and acquired British citizenship. Thereafter he visited Cyprus a number of times.

In 1977 all his immovables in England were sold and the proceeds were deposited in external accounts in England and in Cyprus. Part of the money was employed in the purchase in his name, having obtained the necessary permit from the Council of Ministers, of a flat in Limassol. 5

The administrators, very sensibly and promptly by Originating Application No. 3/81, under section 53 of the Administration of Estates Law, Cap. 189, applied to the appropriate Court-the District Court of Limassol-for the determination of these issues and other consequential questions. 10

The summons was taken out on 15th January, 1981. Notice of this application was given to the Respondent Commissioner by letter dated 15/1/81, in which it was, inter alia, written:- 15

"In case that the answers to the questions raised are that the wife of the deceased was entitled to the one half of the above estate by virtue of the South African system, the assessment of the estate duty must be revised accordingly. The question as to the meaning of the 'community of property' has been recently raised by the U.K. Inland Revenue and we consider that directions must be given by the Court." 20

The Commissioner, if he so wished, he might have intervened in that application, but he decided not to do so.

All interested parties were served with the said application and the District Court of Limassol on 27/4/82 decided, inter alia, that the estate of the deceased, as well as his liabilities as at the time of his death, consist of the one half of those shown in his name at the time of his death, as there was a community of property between the spouses. 25 30

On 13/5/82 applicant 1 apprised the respondent Commissioner

of the Judgment of the Court and sent him a copy. He requested at the same time the refund of all the estate duty paid and the interest paid, as the value of the net estate was below the amount subject to estate duty.

5 By letter dated 20/1/83 the applicant repeated his previous request.

The Respondent Commissioner considered the matter and rejected the applicant's claim. His decision was communicated by letter dated 22/4/83, the material part of which reads as follows:-

10 "1.Repayment of money paid as Estate Duty is governed by section 56 of the Estate Duty Law which provides that where a claim is made to the Commissioner of Estate Duty for the return of any Estate Duty overpaid, such amount must be refunded, provided the claim is made within three years of the
15 date of issue of the notice of assessment and it is proved to the satisfaction of the Commissioner that the money have been overpaid.

2. Accordingly whenever the above condition is satisfied the Commissioner must refund the overpaid money. This is
20 not so, however, where the proviso to section 56 paragraph (b) applies. This provides that nothing in this section shall confer or be deemed to confer on any person any right to prefer a claim for the return or any right to a return of any money paid as Estate Duty on any ground which has been or
25 could have been raised by such person by way of appeal under this Law.

3. No appeal by way of a recourse was made before and the right to a return under section 56 has been extinguished by virtue of the proviso thereto.

30 4. Consequently no money could be refunded in the present case."

The applicants challenged the legality of this decision by the

recourse.

The learned trial Judge relying on proviso (b) to section 56 of the Estate Duty Law, 1962, (Law No. 67/62), as amended by Laws Nos. 71/68 and 3/76, dismissed the recourse, because the ground on which they claim the return of the amount of duty paid could, with diligence, be raised as a ground in an appeal, which they failed to do, not through lack of knowledge, but through lack of diligence.

A Law to provide for the imposition and collection of the Estate Duty was for the first time enacted in this country on 24/12/1942. It is Cap. 294 of the 1949 Codification and Cap. 319 of the 1959 Edition of the Laws of Cyprus.

Cap. 319 was in operation at the time of the establishment of the Republic of Cyprus.

The Estate Duty Law, Cap. 319, ceased to be in force on the 31st day of December, 1960, as provided in the proviso to paragraph 2 of Article 188 of the Constitution.

With a delay of almost 22 months the Estate Duty Law, 1962, (Law No. 67/62) was passed by the House of Representatives.

We went through the two Laws-the Estate Duty Law, Cap. 319 and the Estate Duty Law, 1962. In substance and effect the latter is no more than a copy of the old Law with the necessary adaptations in order to bring the Law in conformity with the new Legal Order created by the Constitution. The drafter translated Cap.319. The only radical change is the part under the heading "Appeals"- sections 38-46- which provided for appeals in the first instance to a Judge in Chambers and on a point of Law for an appeal to the Supreme Court from the decree or order of a Judge in Chambers.

Article 146 of the Constitution introduced in this country the Administrative Law which was applied in continental countries.

The Supreme Constitutional Court and the present Supreme Court were given exclusive jurisdiction to determine the validity of an act or omission of any organ, authority or person exercising executive or administrative authority.

5 The new Law-sections 37 to 42-provide for objections to any assessment, the grounds of the objection, the determination of the objection by the Commissioner; section 42 provides for recourse to the Constitutional Court by any person aggrieved by a decision of the Commissioner of Estate Duty. Nowhere provision is made for appeals to any Court or organ.

10 Section 60 of Cap. 319 ran as follows:-

15 "If at any time within three years of the date of issue of a notice of assessment a claim is made to the Commissioner for the return of any moneys paid as estate duty and it is proved to the satisfaction of the Commissioner that such estate duty has been overpaid, it shall be lawful for the Commissioner and he is hereby required to return the amount of duty which has been overpaid:

Provided that-

20 (a) Where by reason of any proceeding at law, any debt due from the deceased which might be allowed as a deduction has not been ascertained, and in consequence thereof the executor was prevented from claiming refund of estate duty as aforesaid within the said term of three years, it shall be lawful for the Commissioner to allow such further time for making a claim as
25 may appear to him to be reasonable;

(b) nothing in this section shall confer or be deemed to confer on any person-

30 (i) any right to prefer a claim for the return, or any right to a return, of any moneys paid as estate duty on any ground which has been or could have been raised by such person by

way of appeal under this Law;

(ii) any right of action against the Crown for the recovery or return of any moneys overpaid as estate duty."

This section, with the exception of paragraph (ii) of proviso (b), relating to actions against the Crown, was translated in Greek and transplanted in toto as section 56 in the new Law. 5

The second proviso on which the sub judice decision was based refers to appeals, but nowhere in the Law there is a provision for appeal. 10

A person aggrieved by a decision of the Commissioner of the Estate Duty is entitled, under Article 146 of the Constitution, to seek the annulment of such decision by recourse to this Court, under Article 146 of the Constitution.

Learned counsel for the appellants submitted that the second proviso, section 56(b) is not workable, it was included by error and should be disregarded. 15

Learned counsel for the respondents, on the other hand, submitted that the word "appeal" should be read as a "recourse" in which provision is made under section 42. 20

In *Murray v. Commissioners of Inland Revenue* [1918] A.C.541, Lord Dunedin stated (at p.553):-

"It is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a Judge to declare a statute unworkable." 25

This principle was reiterated in *Whitney v. Commissioners of Inland Revenue*, [1926] A.C.37, where Lord Dunedin said at p. 52:-

"A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

5 The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context.

In Halsbury' s Laws of England, 4th edition, volume 44, paragraph 872 we read:-

10 "872. *Statute to be construed as a whole.* For the purposes of construction, the context of words which are to be construed includes not only the particular phrase or section in which they occur, but also the other parts of the statute.

15 Thus a statute should be construed as a whole so as, so far as possible, to avoid, any inconsistency or repugnancy either within the section to be construed or as between that section and other parts of the statute."

20 Lord Esher, M.R. in *The Queen v. Justices of County of London and London County Council* [1893] 2 Q.B. 476, at p.488, referred to the necessity of reading enactments - "..... subject to their not being made absurd by matters which never could have been within the calculation or consideration of the legislature."

25 The applicants could not raise the question of the community of property between the deceased and his late wife at any time prior to their receiving information to that effect from London, and before the issue of the community of property, which in this case was a rather perplexed issue having regard to the fact that the couple changed domicile, was determined by the Court. So soon as they received such information they took out an originating
30 summons, which was ultimately determined on 27/4/82.

A system of appeals on the substance was set up in the Estate Duty Law, Cap. 319. The system of appeals, the grounds of appeal, the power of the Court, the contents of the judgment in the appeal, are completely different from the new Legal and Juridical Order established by the Constitution and consequentially by the Estate Duty Law of 1962. 5

The second proviso to section 56, on which the sub judge decision was based, appears to be a transplantation from the old Law into a different system, in which it does not suit and cannot live or work. It was a mistake or oversight of the drafter, and the legislator, having regard to the whole structure of the Law and the new Legal and Judicial Order, could not be taken to have intended this to be part of the Law. The Law should be read without the second proviso. 10

The Commissioner laboured under a misconception of law and his decision cannot survive judicial scrutiny. The appellants claimed the return of the estate duty paid so soon as the District Court of Limassol issued its Judgment in Originating Application No. 3/81. The appellants could not have resorted to the Court against the respondents on the matter of their right to prefer a claim for the return of the estate duty paid before a decision was taken on the matter by the Administration. Their right of recourse, under Article 146, cannot be made nugatory. 15 20

For all the foregoing, the appeal is allowed. The sub judge decision is declared null and void and of no effect.

In all the circumstances, we make no order as to costs. 25

Appeal allowed with no order as to costs.