1974
May 31
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CYPRUS CEMENT COMPANY LIMITED
v.
REPUBLIC (DIRECTOR OF DEPARTMENT OF INLAND REVENUE AS COMMISSIONER OF STAMP DUTY)

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THE CYPRUS CEMENT COMPANY LIMITED,

Applicant,

and

THE REPUBLIC OF CYPRUS, THOUGH THE DIRECTOR OF THE DEPARTMENT OF INLAND REVENUE OF THE MINISTRY OF FINANCE, AS COMMISSIONER OF STAMP DUTY,

Respondent.

(*Case No.* 29/73).

Stamp Duty—Loan to Company—Secured by mortgages upon its immovable properties—Documents embodying agreements for the loan dutiable under item 12 (*e*) *of the First Schedule to the Stamps Laws* 1963 *to* 1972 (*and not under item* 3 *thereof*)*—Additions of Stamp Duty regarding interest and commitment charge excluded—Because in the circumstances of this case neither the interest nor the commitment charge could be calculated with any accuracy and without relying on uncertainties and assumptions—Cf. further immediately herebelow.*

Stamp Duty—"Εμπράγματον βάρος" (" Charge" or "incumbrance") in item 12 (*e*) *of the aforesaid First Schedule to the Stamp Laws* 1963 *to* 1972*—It includes mortgage of immovable property—Unofficial English translation of the said statute and item cannot be invoked in its interpretation—Cf. The Companies Law, Cap.* 113, *sections* 90 *and* 91.

Stamp Laws 1963 *to* 1972*—Item* 12 (*e*) *of the First Schedule to the said Laws—It applies to instruments* (*or agreements*) *whereby mortgages of immovable property are created by Companies.*

Statutes—Construction—"Εμπράγματον βάρος" ("Charge" or "incumbrance") in item 12 (*e*) *of the said First Schedule to the Stamp Laws* 1963 *to* 1972*—Unofficial English translation cannot be invoked in its interpretation—It is a cardinal rule that the intention of the legislature must be deduced from the language used—And the beliefs and assumptions of those who frame the statute cannot make the law—And if there is nothing to modify, alter or*

qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.

Mortgages—Instruments creating mortgages on immovable property of companies—Dutiable under item 13 (*e*) *of the First Schedule to the Stamp Laws* 1963 *to* 1972—*See further* supra.

Companies—Mortgages—Created by Companies—Duties payable—See supra.

Words and Phrases—"Εμπράγματον βάρος" ("Charge" or "incumbrance") in item 12 (*e*) *of the First Schedule to be Stamp Laws* 1963 *to* 1972.

Stamp Laws 1963–1972—*Mortgages created by Companies—Dutiable under item* 13 (*e*) *of the First Schedule to said Laws—Cf. item* 3 (*a*) *and* (*b*) *of said Schedule—Cf. sections* 12 *and* 21 (*e*) *and* (*g*) *of the Immovable Property* (*Transfer and Mortgage*) *Law,* 1965 (*Law No.* 9 *of* 1965)—*Cf. The Department of Lands and Surveys* (*Fees and Charges*) *Law, Cap.* 212 *as amended by Law No.* 81 *of* 1970.

Administrative acts or decisions—Wrong reasoning not affecting the validity of otherwise valid decision—In cases where the said decision has other legal support—As in the case in hand where the administration was under an obligation to act, that is to say, it had a duty to collect the right stamp duty and had no discretion to do otherwise (Miltiades Papadopoullos *v.* The Republic (1968) 3 *C.L.R.* 662 *at p.* 674 followed).

Cases referred to:

Davies Jenkins and Co. Ltd. v. *Davies* [1967] 2 W.L.R. 1139, at p. 1156;

I.R.C. v. *Dowdall O'Mahoney and Co.* [1952] A.C. 401;

Miltiades Papadopoullos v. *The Republic* (1968) 3 C.L.R. 662, at p. 674.

The facts are set out in full detail in the judgment of the learned Judge of the Supreme Court.

Recourse:

Recourse against the decision of the respondent relating to the stamp duty payable on three documents embodying the terms under which loans were granted to the applicant.

P. Cacoyiannis, for the applicant.

A. Evangelou, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment* was delivered by:-

A. LOIZOU, J.: By the present recourse the applicant Company challenges the validity of the decision of the Commissioner of Stamp Duties relating to the stamp duty payable on three documents to which I shall refer in detail and deal with their legal character and effect in the course of this judgment.

The relevant facts are these. The applicant Company had secured a loan of £2,700,000.- which was agreed to be provided equally by the International Finance Corporation (IFC), the National Bank of Greece (*NBG*) and the Bank of Cyprus Limited (BC). The terms under which the said loans were to be granted, were embodied in three documents, copies of which have been produced as *exhibits* 6, 7 and 8 respectively.

It was a condition precedent in all Agreements that before the Company was entitled to withdraw any sum under the loan, it ought, *inter alia*, to secure same by way of mortgage. This word has the same meaning in all three Agreements, though it is defined only in Article 1 of *exhibit* 6, as meaning, " a validly constituted mortgage under and in accordance with the laws of Cyprus for securing the Loan, and any part thereof disbursed, ranking as a first mortgage and charge upon the immovable properties of the Company, such mortgage and charge to rank *pari passu* with the mortgage to secure the NBG Loan and the BC Loan".

Exhibit 6 was concluded on the 15th September, 1972, *exhibit* 7 on the 31st October, 1972 and *exhibit* 8 on the 25th October, 1972.

These three Agreements formed part of the written declarations of mortgages produced at the District Lands Office, under section 21 of the Immovable Property (Transfer and Mortgage) Law, 1965, Law No. 9 of 1965, by the mortgagor and the mortgagee on the 11th December, 1972; photocopies of the said

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* An appeal has been lodged against his judgment. The appeal has been heard and judgment thereon has been reserved.

declarations have been produced as *exhibits* 6'A', 7'A' and 8'A' respectively.

As it appears from the latter *exhibits*, a stamp of 200 mils was affixed on the original of each declaration of mortgage under section 5 (1) of the Stamp Law, 1963, being a secondary document, and item 14 of the First Schedule to the same Law, as amended by Law No. 38 of 1972, as a duplicate of an instrument chargeable with duty and in respect of which the proper duty had been paid.

The Commissioner of Stamp Duties decided (see his letters of the 11th January, 1973, *exhibits* 4 and 5) that *exhibits* 7 and 8 were dutiable under item 12 (3) of the First Schedule to the Stamp Law, as amended, and arrived at the maximum amount secured thereby, by calculating, for that purpose, the value of the commitment charge and the interest payable under the said Agreements. On the basis of this calculation and after the various terms and provisions set out in the said Agreements were taken into consideration, the stamp duty claimed and in fact paid on *exhibit* 7, was £2,660.600 mils and on *exhibit* 8, £2,690.088 mils. In the case, however, of *exhibit* 6, he charged same under item 3 (a) of the First Schedule to the Law, arriving at the maximum amount of the agreement by adding to the capital the value of the commitment charge and the interest payable thereunder.

It has been conceded, however, that from the amount of £2,408.400 mils the duty paid by the applicant Company with regard to this Agreement (*exhibit* 6) should be reduced by £255 which represent the duty applicable to the new shares in respect of which no stamp is, in law, chargeable.

In arguing the case before me, learned counsel for the respondent has urged me to consider that the Commissioner of Stamp Duties made a mistake in charging *exhibit* 6 under item 3 (a) and that it should be treated not as a wrong decision, but as a case of wrong legal reasoning which does not lead to annulment if the decision can have other legal support, inasmuch as in the case in hand, the administration was under an obligation to act, that is to say, it had a duty to collect the right duty and had no discretion to do otherwise.

I agree with this legal proposition which has already been adopted and followed in the case of *Miltiades Papadopoullos* v.

The Republic (1968) 3 C.L.R. 662, at. p. 674. Consequently, I shall treat all three Agreements on the same basis and consider whether they should have been treated as dutiable under item 12 (e) of the First Schedule to the Law, hereinabove referred to, or under item 3 (a) and (b) as claimed by the applicant, more so, as the amount collected on *exhibit* 6 exceeds the amount payable under item 12 (e).

Item 3 covers—" (a) Agreement or memorandum of agreement and all documents embodying any agreement and stipulating any fixed sum not otherwise chargeable". It then sets out a table of the sums and the duty payable thereon, and " (b) Agreement or memorandum of agreement and all documents embodying any agreement in which no fixed sum is stipulated not otherwise chargeable".

The three Agreements provided for the payment of interest on the balance due from time to time and a commitment charge payable on the unwithdrawn balance between certain dates.

The manner in which the chargeable duty has been claculated in relation to the commitment charge and the interest in respect of each document, appears in *exhibits* 6'B', 7'B' and 8'B'. It was estimated that on the average, the whole loan of £900,000 would be withdrawn, in the case of the IFC loan over a period of two years, the NBG loan over a period of twenty-six months and the BC loan twenty-five months. On the basis of this calculation average figures were arrived at which were added to the capital in each case. Likewise, the amount of interest likely to be paid by the applicant Company was calculated on the basis that the repayment of all three loans would be completed by the end of 1983.

It is apparent from a perusal of *exhibits* 6'B', 7'B' and 8'B' that the value of the commitment charge and the interest in each case added to the capital in order to arrive at the maximum amount secured by each instrument, was based on assumptions and factors arbitrarily arrived at having no certainty in their nature.

Extensive argument has been advanced by both sides regarding the issue whether interest and commitment charges are chargeable under the law. Without disrespect to their argument, it will serve no useful purpose to deal with this aspect, as in the circumstances of this case neither the interest, nor

the commitment charge could be calculated with any accuracy and without relying on uncertainties and assumptions. I find, therefore, that the additions made to the capital, as shown on *exhibits* 6'B', 7'B' and 8'B' are wrong with the exception of a special fee of £30,000.770 mils payable in the case of the IFC Loan as under term 8.03 of *exhibit* 6 for which there is no dispute.

Item 12 (e) of the First Schedule to the Stamp Law of 1963 (Law No. 19 of 1963) which required a stamp duty of 200 mils for every £100 or part thereof, read:-

> "Ἔγγραφον δι' οὗ συνιστᾶται ἐμπράγματον βάρος ὑπὸ τινος ἑταιρείας. Ἐπὶ τοῦ διὰ τούτου ἀσφαλιζομένου μεγίστου ποσοῦ".

Its English translation prepared at the Ministry of Justice was:-

> "Instrument creating a charge by a Company: On the maximum amount thereby secured".

Items 3 and 12 (e) were amended by section 2 of the Stamp (Amendment) Law, 1967 (Law No. 21 of 1967) for the purpose of specifically excluding mortgages of ships from any stamp duty under either of the two items. Item 12 (e) in its present form—First Schedule to the Law as amended by Law No. 38 of 1972—reads:-

> "Ἔγγραφον δι' οὗ συνιστᾶται ὑπὸ τινος ἑταιρείας ἐμπράγματον βάρος ἄλλο ἢ ὑποθήκη πλοίου ἐγγεγραμμένου εἰς τὸ Κυπριακὸν Νηολόγιον ἢ μεριδίου αὐτοῦ ἢ οἱουδήποτε ἄλλου συμφέροντος ἐν αὐτῷ:
>
> Ἐπὶ τοῦ διὰ τοῦ ἐγγράφου τούτου ἀσφαλιζομένου μεγίστου ποσοῦ".

The above, may be translated into English as follows:-

> "Instrument by which a charge (or incumbrance) is created, other than mortgage of ship registered in the Cyprus Register or share thereof or any other interest in it: On the maximum amount thereby secured".

The first contention put forward by learned counsel for the applicant Company is that item 12 (e) covers only the cases where a company creates a charge under sections 90 and 91 of

the Companies Law, Cap. 113. He based this argument on the wording of the section itself and derived assistance for his proposition from the unofficial English translation where the words "ἐμπράγματον βάρος" was translated as "charge" and that "charge" under section 90 (9) (a) of Cap. 113 does not include any mortgage of immovable property effected under any law relating to the registration of mortgage of immovable property in force for the time being.

In my view, the unofficial English translation could not be invoked in interpreting a statutory provision. It is a cardinal rule of interpretation that the intention of the legislature must be deduced from the language used, for "it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the Law". (*Davies Jenkins & Co. Ltd.* v. *Davies* [1967] 2 W.L.R. 1139, at 1156 and *I.R.C.* v. *Dowdall O' Mahoney & Co.* [1952] A.C. 401). Also, as pointed out in Maxwell on Interpretation of Statutes, 12th ed. p. 28, "If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences".

The words "ἐμπράγματον βάρος" or "ἐμπράγματα βάρη" (in plural) can be found in a number of statutory provisions enacted since 1960 and they include mortgage of immovable property unless same is expressly excluded.

In the Immovable Property (Transfer and Mortgage) Law, 1965 (Law No. 9 of 1965) the term "ἐμπράγματον βάρος" is found in section 12 thereof and in the English translation prepared at the Ministry of Justice, it is translated "incumbrances". What constitute "incumbrances" are set out in the First Schedule to that Law and—paragraph 1—include a mortgage made under the provisions of the said Law.

In paragraph 7 of the Schedule to the Department of Lands and Surveys (Fees and Charges) Law, Cap. 212 as amended by Law No. 81 of 1970, mortgage of immovable property is expressly excluded when the term "ἐμπράγματον βάρος" is used. I have no doubt in concluding that item 12 (3) applies to mortgages by Companies of immovable properties, a fact apparent also from the amendment of 1967 hereinabove referred to by which mortgages of ships were expressly excluded from stamp duty under both items 3 and 12 (e) of the First Schedule.

It remains to consider, therefore, the alternative argument of counsel for the applicant, which is to the effect that even if the words "ἐμπράγματον βάρος" in item 12 (e) include a mortgage, *exhibits* 6, 7 and 8 did not create a mortgage—they were not instruments by which a charge (or incumbrance) was created—but were an undertaking to do so and a mortgage was created by *exhibits* 6'A', 7'A' and 8'A'.

So, for the purpose of better understanding the position, it is helpful to refer to the requirements of section 21 of the Immovable Property (Transfer and Mortgage) Law, 1965, a provision relevant to mortgages. Under the said section the written declarations required to be produced at the District Lands Office by the mortgagor and mortgagee of any immovable property must contain, apart from the description of the immovable property proposed to be mortgaged, a statement of whether or not there is any change in its condition and by paragraph (c) thereof –

> " In the case of the mortgagor, a contract of mortgage, stamped in accordance with the provisions of any Law in force for the time being, setting forth that on demand or on a date, whether specified or ascertainable, he is bound to pay to the mortgagee, whether on a contingency or not, a sum of money, whether specified or ascertainable, together with interest, if any, thereon or on any part thereof, at a rate specified or ascertainable by reference to any other rate and, in the event of legal proceedings for the recovery of the said sum and interest, the costs and expenses thereof".

By paragraph (g) thereof –

> " A statement that the parties desire that the mortgage aforesaid be registered".

It is clear from the very context of section 21 that what is meant by the words "ἔγγραφον δι' οὗ συνιστᾶται ἐμπράγματον βάρος" (instrument by which a charge (or incumbrance) is created) to be found in item 12 (e) and which, according to section 21 (c) " has to be stamped in accordance with the provisions of any law in force for the time being" is the agreement of mortgage referred to in paragraph (c) hereinabove set out and not the declarations that have to accompany same in accordance with the remaining paragraphs of the said section. The claim, therefore, that these agreements attached to the declarations

under paragraph (c) should be stamped as secondary documents or a duplicate of an instrument, cannot stand.

It is, therefore, my conclusion that all three Agreements, subject matter of these proceedings, are dutiable under item 12 (e) of the First Schedule to the Law excluding, however—other than the special fee in the case of *exhibit* 6—the additions made by the Commissioner of Stamp Duties regarding interest and commitment charge and I hereby make a declaration to that effect. Accordingly, the Administration to make the necessary adjustments and refunds from the amounts collected.

For all the above reasons, the present recourse succeeds to the extent hereinabove stated. In the circumstances, I make no order as to costs.

Recourse succeeded in part.
No order as to costs.