lord must possess in order to enable him to demolish and erect a new building."

Demolition of the existing building and subsequent erection of a new building are only intermediate steps in order to make the building fit for occupation by the landlord;

In *Krishanlal Iswarlal Desai's case*(1) this Court said in connection with the provisions of s. 17(1) of the Act:

> "What is, however, clear beyond any doubt is that when the possession is obtained in execution it must be followed by an act of occupation which must inevitably consist of some overt act in that behalf....."

'Occupation' of the premises in cl. (g) does not necessarily refer to occupation as residence. The owner can occupy a place by making use of it in any manner. In a case like the present, if the plaintiffs on getting possession start their work of demolition within the prescribed period, they would have occupied the premises in order to erect a building fit for their occupation.

We therefore hold that the respondent's case came within cl. (g) of sub-s. (1) of s. 13 of the Act and therefore dismiss the appeal with costs. Three months allowed for vacating the premises on the defendant tenant undertaking to vacate the premises himself during this period.

*Appeal dismissed.*

---

## COMMISSIONER OF INCOME-TAX, MADRAS

*v.*

## THE AMRUTANJAN LTD., MADRAS

1964

April, 28.

(K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.)

*Income Tax—Object and scope of s. 23-A—"Company in which the public are substantially interested"—Meaning of—Indian Income Tax Act, 1922 (11 of 1922), s. 23-A.*

The Income-tax Officer found that the respondent company had declared during the three years ending March 31, 1947, March 31, 1948,

(1) [1964] 1 S.C.R. 553.

1964

I.T., Madras v. Srutanjan Ltd.

and March 31, 1949, dividends which were considerably less than 60% of the amount available for distribution as computed under s. 23-A of the Income-tax Act, 1922. He served a notice on respondent company to show cause why an order under s. 23-A be not passed against it. After hearing the respondent the Income-tax Officer passed an order that the undistributed portion of the assessable income of the respondent as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof, shall be deemed to have been distributed as dividend among the share-holders. The order of the Income-tax Officer was upheld by the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal.

A reference was made to High Court and the relevant question referred was whether the provisions of s. 23-A were correctly applied for the three relevant years. The High Court held that respondent company was one in which the public were substantially interested and, therefore, the Income-tax Officer had no jurisdiction to pass the order under s. 23-A for any of the three years. The appellant came to this Court with certificate of fitness from the High Court. Dismissing the appeal.

HELD:—The respondent company was one in which the public were substantially interested and therefore, the Income-tax Officer had no jurisdiction to pass an order under s. 23-A.

The Indian Income-tax Act, 1922 does not define the expression "company in which the public are substantially interested". Normally, a company would be deemed to be one in which the public are substantially interested where more than half the voting power is vested in the public. Where the controlling interest *i.e.* a minimum of 51% of the voting right is held by a single individual or a group of individuals acting in concert, the company would be regarded as one in which the public are not substantially interested.

The distinction between the controlling group and public is not along the line which distinguishes directors from the remaining members of the company. If a director does not belong to a controlling group, he will be regarded as a member of the public for purposes of the third proviso and explanation to s. 23-A, even though such director was directly entrusted with the management of the affairs of the company.

Section 23-A was enacted with the object of preventing avoidance of super-tax by share-holders controlling the affairs of a company in which the public are not substantially interested, by the expedient of not distributing dividends out of the profits. For many years, the rates of super-tax applicable to companies were much lower than the higher rates applicable to other assessees. That gave inducement to persons controlling companies to avoid the higher incidence of super-tax by transferring to limited companies the businesses. The profits of business could be accumulated till they were distributed in the form of capital and in the meanwhile accumulations of undistributed profits remained available to them for the purposes of their other businesses. Section 23-A was enacted with a view to foil attempts made by persons holding controlling

interests in companies to avoid payment of super-tax applicable to non-corporate assessees by refusing to agree to distribution of profits. Under s. 23-A an Income-tax Officer was authorised to make an order by which a fictional or notional income which was not in fact received by the share-holders, was deemed to be distributed and was liable to tax as it had arisen or accrued to them. However, no such order could be passed in respect of a company in which the public were substantially interested and to a subsidiary company of such a company if the whole of the share capital of such subsidiary company was held by the parent company or by the nominee thereof.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 521—523 of 1963.

Appeals from the judgment dated April 5, 1960 of the Madras High Court in Case referred No. 80 of 1955.

*C. K. Daphtary, Attorney-General, K. N. Rajagopal Sastri* and *R. N. Sachthey*, for the appellant (in all the appeals).

*S. Narayanaswamy* and *R. Gopalakrishnan*, for the respondent (in all the appeals).

April 28, 1964. The Judgment of the Court was delivered by

*Shah J.*

SHAH, J.—One Nageswara Rao Panthulu set up a business of manufacturing a "pain-balm" which was marketed in the trade-name of "Amrutanjan". In September 1936 the respondent company was floated as a public limited company under the Indian Companies Act, 1913, to acquire and carry on the business of manufacture and sale of "Amrutanjan". The authorised capital of the company was 7,000 ordinary shares and 3,000 preference shares of Rs. 100/- each, and the issued and paid-up capital was 2,500 ordinary and 3,000 preference shares. The preference shareholders were under the Articles of Association entitled to a fixed dividend of 7½ per cent on the face value of the shares, with no right in the balance of the profits. The respondent company took over the business conducted by Nageswara Rao Panthulu for Rs. 5,50,000/- paid in the form of 2,500 ordinary and 3,000 preference fully paid-up shares. This company was managed by a firm which after the death of

1964

I.T., Madras v. Ratanjan Ltd.

Shah J.

Nageswara Rao Panthulu consisted of Ramayamma, widow of Nageswara Rao, Kamakashamma, his daughter, Ramayamma's brother Ramchandra Rao and Kamakshamma's husband Sambu Prasad. Between April 1, 1946 to March 31, 1949 Ramayamma, widow of Nageswara Rao was holding 2,185 ordinary shares and her daughter Kamakhamma was holding 250 ordinary shares. Out of the preference shares only 385 were held by the directors including Ramayamma and Kamakshamma.

Under the Articles of Association of the company, both preference and ordinary shareholders were entitled to vote at the meeting of the company—each shareholder being entitled to exercise one vote for each share. In the course of assessment proceedings of the respondent company, the Income-tax Officer found that for the three years ending March 31, 1947, March 31, 1948 and March 31, 1949 the company had declared each year a total dividend of Rs. 38,750/- at the rate of 7½ per cent on the preference shares and 6½ per cent on the ordinary shares—which was considerably less than sixty per cent of the amount available for distribution as computed under s. 23-A of the Income-tax Act, as it stood at the material time. The Income-tax Officer served a notice, after obtaining the approval of the Inspecting Assistant Commissioner of Income-tax, requiring the respondent company to show cause why an order under s. 23-A of the Income-tax Act, 1922, should not be passed against the company and after considering the objections raised by the company ordered on March 31, 1953, that the undistributed portion of the assessable income of the company as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof, shall be deemed to have been distributed as dividend amongst the shareholders as at the date of the respective general meetings. This order was confirmed in appeal by the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal.

Several contentions were raised before the Revenue authorities and the Tribunal challenging the competence of the Income-tax Officer to pass an order under s. 23-A includ-

ing the contention that the said provision was unconstitutional or *ultra vires*. These have been negatived by the Tribunal and also by the High Court and it is unnecessary to refer to those contentions in these appeals as they do not survive for determination.

In a reference made under s. 66(1) of the Indian Income-tax Act, the Tribunal referred three questions to the High Court of Judicature at Madras. The third question, which alone is material in these apeals, reads as follows:

> "Whether the provisions of s. 23-A were correctly applied for the three relevant years?"

The High Court held that the respondent company was one in which the public were substantially interested, and therefore the Income-tax Officer had no jurisdiction to pass the order under s. 23-A of the Income-tax Act for any of the three years and on that footing answered the question in the negative. Against the order passed by the High Court, with certificate of fitness the Commissioner of Income-tax has appealed to this Court.

Section 23-A of the Indian Income-tax Act, 1922 before it was amended by the Finance Act, 1955, stood as follows:

> "(1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall,... make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof

1964

C.I.T., Madras
v.
Amrutanjan Ltd.

Shah J.

shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, .....

Provided .....

Provided further .....

Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.

*Explanation.*—For the purpose of this sub-section,—

a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty-five per cent of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by the public (not including a company to which the provisions of this sub-section apply) ....."

The section was enacted with the object of preventing avoidance of super-tax by shareholders controlling the affairs of a company in which the public are not substantially interested, by the expedient of not distributing dividend out of the profits. Under the annual Finance Acts for many years the rates of super-tax applicable to companies were much lower than the higher rates applicable to other assessees. That gave an inducement to persons controlling companies to avoid the higher incidence of super-tax by transferring to limited companies their businesses. Thereby the source of earning was secured, the profits of the business could be accumulated till they were distributed in the form of capital, and in the meanwhile accumula-

tions of undistributed profits remained available to them for purposes of their other businesses. With a view to foil attempts made by persons holding controlling interests in companies to avoid payment of super-tax applicable to non-corporate assessees by refusing to agree to distribution of profits, s. 23-A was enacted by the Legislature. The Income-tax Officer was thereby authorised, if satisfied when less than sixty per cent of the assessable income of the company, subject to reductions permitted thereby, was not distributed, to pass an order under which the income was deemed to be distributed among the shareholders entitled thereto. By the order so made a fictional or notional income which was not in fact received by the shareholders was deemed to be distributed, and in the hands of the shareholders such deemed income was liable to tax as if it had arisen or accrued to them. But by the express provision contained in s. 23-A, as it stood at the material time, no order could be passed in respect of any company in which the public were substantially interested and to a subsidiary company of such a company if the whole of the share capital of such subsidiary company was held by the parent company, or by the nominees thereof. The Act, however, did not define the expression "company in which the public are substantially interested". Normally a company would be deemed to be one in which the public are substantially interested, where more than half the voting power is vested in the public. Where the controlling interest *i.e.* a minimum of fifty-one per cent of the voting right is held by a single individual or a group of individuals acting in concert, the company would be regarded as one in which the public are not substantially interested. But the Legislature by the Explanation has raised a conclusive presumption in those cases where shares of the company carrying not less than twenty-five per cent of the voting power are held by persons other than the controlling group. For the purpose of computing twenty-five per cent of the voting power, however, rights of holders of shares entitled to a fixed dividend have to be excluded.

It is now settled law that the distinction between the controlling group and the public is not along the line which distinguishes directors from the remaining members of the

1964

C.I.T., Madras v. Amrutanjan Ltd.

Shah J.

company. If a director does not belong to the controlling group, he will be regarded as a member of the public for the purposes of the third proviso and the Explanation to s. 23-A even though such director was directly entrusted with the management of the affairs of the company.

The Commissioner contends that the Explanation to sub-s. (1) of s. 23-A is in reality a clause which defines what a company, in which the public are substantially interested, is. In terms, however, the Explanation raises a presumption and does not purport to define a company in which the public are substantially interested. On an analysis of the provisions of the third proviso to s. 23-A and its explanation, the following position emerges:

(1) Where there is no individual member or a group of members acting in concert holding fifty-one per cent or more of the voting power, which controls the working of a company, it is from its very nature a company in which there is no controlling member or group and therefore the public are substantially interested;

(2) Where a shareholder holds or a group of shareholders acting in concert hold fifty-one per cent or more of the voting power, the question is one of fact to be determined in each case, whether it is a company in which the public are substantially interested, having regard to the purpose for which the holding of fifty-one per cent or more is utilised;

(3) Where not less than twenty-five per cent of the voting power is allotted unconditionally to, or is acquired unconditionally by or is beneficially held by the public, it shall be presumed that the company is one in which the public are substantially interested. But in considering whether shares carrying not less than twenty-five per cent of the voting right are held by the public, shares entitled to a fixed rate of dividend have to be excluded.

The reason of the rule which excludes from the computation of voting power holders of shares entitled to a fixed rate of dividend is that s. 23-A is directed primarily against the accumulation of undistributed dividends to avoid payment of non-corporate rates of super-tax. But shareholders who are entitled to a fixed rate of dividend are not directly interested in such accumulation: it matters little to them whether the dividend is immediately distributed to the ordinary shareholders or is accumulated, and therefore in assessing whether the twenty-five per cent of the shares are vested in persons other than the controlling group, the shares yielding a fixed rate of dividend have to be ignored. But for the purpose of ascertaining the voting power, voting rights attached to all the shares must be taken into account.

No investigation has been made by the Income-tax Department whether there is any group of persons controlling the working of the company. It is true that Ramayamma was holding 87·40 per cent of the ordinary shares issued by the company, and there is obviously no person who could hold twenty-five per cent or more of the ordinary shares. In the present case, as already observed, the preference shareholders were entitled to vote at the meeting, and the Articles of Association of the Company made no distinction between the preference and the ordinary shareholders in the matter of exercise of voting rights. The total voting power was 5,500—one vote for each share, ordinary and preference alike—and twenty-five per cent of that voting power is 1,375, but to invite the presumption under the Explanation this power must be exercisable only by the ordinary shareholders, and not by shareholders entitled to a fixed rate of dividend. The presumption under the Explanation could arise only, if twenty-five percent of the voting power was held by persons entitled to ordinary shares outside the controlling group.

It was suggested that the expression "twenty-five per cent of the voting power" would mean not twenty-five per cent of the total voting power, but power exercisable in respect of shares other than shares entitled to a fixed rate of dividend. *Prima facie,* such an interpretation is not warranted if regard be had to the terms of the Explanation.

1964

C.I.T., Madras v. Amrutanjan Ltd.

Shah J.

But even that argument is of no value, for twenty-five per cent of the voting power attached to the ordinary shares is not exercisable by the public. This, therefore, is a case in which shares not entitled to a fixed dividend carrying not less than twenty-five per cent of the voting power are not shown to have been allotted unconditionally to, or acquired unconditionally by or beneficially held by the public. The Explanation, therefore, has no operation.

Whether in view of the third proviso the company may be regarded as one in which the public are substantially interested, is a question to which no attention was paid by the Tribunal. Whether in fact there exists such a controlling interest in the hands of one shareholder or a group of shareholders as would render the company one in which the public are not substantially interested is a question which therefore cannot be decided by this Court.

The order of the High Court must therefore be confirmed, but on different grounds. The interpretation of the Explanation by the High Court, for reasons already set out, was incorrect. The Explanation had no application, because no presumption on the facts found could arise thereunder. The Revenue authorities have not made any investigation on the question whether there existed any controlling interest in a group of persons, so as to bring the case within the third proviso.

The appeals must be dismissed with costs. One hearing fee.

*Appeals dismissed.*

---

1964

April, 29.

## COMMISSIONER OF INCOME-TAX, MADRAS

*v.*

## SIVAKASI MATCH EXPORT COMPANY

(K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.)

*Income Tax—Partnership deed—Application for registration—Discretion of Income-tax Officer in granting Registration—Jurisdiction of the Income Tax Officer—Jurisdiction of High Court on reference on*