
(1963) 10 GUJ CK 0006
In the Gujarat High Court
Case No : Estate Duty Ref. No. 1 of 1963

Mahendra Rambhai Patel

APPELLANT

Vs

Controller of Estate Duty, Gujarat State

RESPONDENT

Date of Decision : 28-10-1963

Acts Referred:

Estate Duty Act, 1953 — Section 10, 11, 12, 13, 14

Citation : AIR 1965 Guj 9 : (1965) 55 ITR 1

Hon'ble Judges : J.M. Shelat, C.J.; P.N. Bhagwati, J

Bench : Division Bench

Advocate : I.M. Nanavati and G.T. Nanavati, for the Appellant; J.M. Thakore, General, instructed by M.M. Thakore and M.C. Doc, Partners of Bhaishanker Kanga and Girdharlal, for the Respondent

Judgement

Bhagwati, J.

(1) This Reference raises an interesting question relating to the applicability of Sections 5 to 23 of the Estate Duty Act, 1953, in relation to a settlement made by one Rambhai Patel of Uganda. The settlement was made on 26th June 1941, and the subject matter of the settlement consisted of 160 shares in a limited company called Central Cotton Trading Company (Uganda) Limited. It appears that prior to the date of settlement a declaration of trust was made by Rambhai Patel on 19th December 1939 settling on trust his six annas share in a partnership business carried on in the name of Central Cotton Trading Company Uganda for the benefit of his two minor sons, Mahendra and Manubhai. The partnership thereafter was converted into a limited company, namely, Central Cotton Trading Company (UGANDA) Limited and in respect of the six annas share settled on trust, 160 fully paid up shares were allotted. 80 shares bearing numbers 279 to 358 being allotted in the name of Purushottam Patel in trust for Mahendra and 80 shares bearing Nos. 1 to 80 being allotted in the name of Rambhai Patel in trust for Manubhai. Rambhai Patel thereafter made a declaration of trust in respect of these 160 shares by the settlement 26th June

1941 and in terms of settlement and with a view to effectuating it. Rambhai Patel and Purushottam Patel transferred the respective 80 shares standing in their names to the trustees with the result that a trust was constituted in respect of these 160 shares on the terms and conditions contained in the settlement. The settlement was for the benefit of Mahendra and Manubhai, the minor sons of Rambhai Patel, with certain limitations over in case of death of either, Rambhai lived for several years after making of the settlement and died on 17th October 1953. We are, however, not concerned with the position arising on the death of Rambhai Patel. What concerns us in this Reference is the position arising on the death of Manubhai. Manubhai died on 7th June 1954 when was only about 16 years of age and he did not leave behind him any widow or issue. As a matter of fact, he was not married at the time of his death. On the death of Manubhai a question arose whether estate duty was exigible on any part of the trust property. The Revenue claimed that on the death of Manubhai one half of Manubhai in the trust property passed with in the meaning of S. 5 and that estate duty was, therefore, chargeable the principal value of the said share. The claim of the Revenue was contested by Mahendra who the person accountable for the estate duty within the meaning of the Act and there were two grounds on which Mahendra sought to repel the claim of the Revenue. In the first place, Mahendra contended that there was no passing of property within the meaning of Section 5 on the death of Manubhai, since Manubhai had no interest in the trust property vested in him which could pass on his death. The second contention was that in any event even if there was passing of property with in the meaning of Section . Section 23 applied to the facts of the case and property, could not therefore, be deemed to pass so as to attract the charge of estate duty. There were also one or two minor contentions urged on behalf of Mahendra but it is not necessary to refer them since they were not independent arguments but represented merely one or the other aspect of the main contentions and they would be covered by what we say in regard to the main contentions. The Deputy Controller of Estates Duty, Bombay negative the contentions urged on behalf of Mahendra and held one half share of Manubhai in the trust property passed on his death u/s 5 and that it was not exempted u/s 23 and that the principal value of the said one half share namely, Rs.10,43,050/- was, therefore liable to be included in the principal value of the estate for the purpose of charge of estate duty. Mahendra thereupon preferred an appeal to the Central Board of Revenue. The only attack in the appeal was directed against the addition of Rs.10,43,050/- being the principal value of one half of the trust property which, according to the Deputy Controller of Estate Duty, Bombay, passed on the death of Manubhai u/s 5. The same contentions were advanced and they were rejected by the Central Board of Revenue. The Central Board of Revenue held on a construction of the provisions of the settlement that each of the two beneficiaries namely, Manubhai and Mahendra was entitled to the whole of the income of his share of the trust property and that though surplus income in excess of the amounts spent by the trustees on the maintenance and advancement of each beneficiary was to be accumulated until he attained the age of twentyfive, such surplus belonged to

him as his absolute property and in the event of his death before twenty-five, was heritable by his heirs. On this construction of the provisions of the settlement, the Central Board of Revenue applied the well-established principles of law relating to charge of estate duty and observed that since there was a change in the persons beneficially interested in the one half share of Manubhai in the trust property, in that the moment before his death he was entitled to the whole income and the moment after his death, other persons namely, his brothers were entitled to the whole income, the said one half share in the trust property passed on his death within the meaning of Section 5. The argument of Mahendra based on Section 23 was repelled by the Central Board of Revenue by holding that the interest of Manubhai under the settlement was an interest in possession since he was entitled to the whole income of his one half share in the trust property and that it could not, therefore, be said that his interest determined by reason of his death before it became an interest in possession so as to bring the case within the exemption contained in S 23. The Central Board of Revenue in this view of the matter dismissed the appeal. Mahendra being aggrieved by the decision of the Central Board of Revenue applied for a reference of certain questions of law which according to him arose out of the order of the Central Board of Revenue u/s 64(1). The Central Board of Revenue was however of the opinion that only one question of law arose out of its order and it accordingly referred the following question of law, namely:-

"Whether on the facts and in the circumstances of the case, the inclusion , in the estate of the deceased, of the amount of RS. 10,43,050/- being trust funds in question, was justified in law?"

for the decision of the Court.

(2) The decision of this question, it would be apparent from what is stated above, must turn largely on the true interpretation of the provisions of the settlement. The question which we must ask ourselves is: what on a true construction of the provisions of the settlement was the nature and content of the interest conferred on Manubhai under the settlement ?. The answer to this question will furnish a key to the solution of the problem before us, for it will then be a mere matter of application of the principles embodied in Section 5 and 23. It would, therefore, be in the fitness of things and make for greater clarity if we first clear the ground by determining the nature and quality of the interest of Manubhai under the settlement and then apply the principles as we apprehend them on a construction of Sections 5 and 23 aided by English authorities which fortunately illumine this difficult branch of the law and clear up many of the obscurities with which it abounds. We will, therefore, first turn to an examination of the provisions of the settlement.

(3) The terms of the settlement were of a simple character and the settlement was substantially for the benefit and advantage of Mahendra and Manubhai, the two minor sons of Rambhai Patel. Clause 1 made a gift of the said 160 shares in favour of Mahendra and Manubhai and provided that the trustees should hold the

said 160 shares in trust for the benefit and advantage of Mahendra and Manubhai in equal shares. There were no words of contingency in the gift and it is, therefore, clear that under this clause, unless there be anything in the subsequent clauses which might point clearly and unmistakably in a different direction, Mahendra and Manubhai each got a vested interest in one half of the said 160 shares. Now ordinarily in the absence of any provision to the contrary in the settlement, a person who is given a vested interest in a fund but also to require the trustees to transfer the fund to him. Mahendra and Manubhai each would, therefore, have been entitled to claim the income of his one half share to him. But clauses 2 and 4 postponed the period of distribution and also provided as to what was to happen to the income of the said 160 shares in the meantime. Some argument turned on the true construction of Clauses 2 and 4 and we will, therefore, reproduce these clauses in full rather than give a mere summary of them, so that the Argument may be properly appreciated. Clauses 2 and 4 were in the following terms:

" 2. The trustees shall stand possessed of the said shares until each of the beneficiaries shall the complete the age of 25 years and until the said time, out of the profits arising therefrom to apply either the whole or part thereof as the said Trustees may deem fit and proper in the maintenance and advancement of the beneficiaries. The Trustees are hereby authorised to invest such unused or accumulated funds from the profits in any security or concern as they may deem fit and proper.

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4. If and when each of the said beneficiaries complete the age of 25 years, the trustees shall transfer out of the said 160 shares his portion of the shares and the accumulation thereof or any other investment in lieu thereof as thereof as provide in classes 2 and 3 hereof absolutely."

Now what is the true meaning and effect of these clauses which deal both with corpus and with income? So far as regards corpus, Mr.I.M.Nanavati contended that on true construction of these clauses, neither of the two beneficiaries was entitled to any vested interest in one half of these the said 160 shares until he attained the age of twenty-five and that the interest of beneficiary in one half of the said 160 shares was contingent on his attaining the age of twenty-five. We do not agree that this the right construction of clause 2 and 4. Clause 2 and 4 merely postponed the period of distribution and did not in any way affect the vesting of interest in one half of the said 160 shares in each of the two beneficiaries effected under clause 1. The interest of each beneficiary in one half of the said 160 shares vested in him the moment the gift in clause 1 took effect and Clauses 2 and 4 merely postponed possession of such one half until he completed the age of twenty-five. Clauses 2 and 4 did not have the effect of making contingent the interest of each beneficiary in one half of the said 160 shares which was vested under clause 1. In regard to income, Clause 2 provided that the trustees should out of the income of one half share of each beneficiary

apply such amount being the whole or part thereof as they might think fit and proper for the maintenance and advancement of such beneficiary and accumulate the surplus income and Clause 4 directed the trustees to hand over accumulation of surplus income to such beneficiary on his completing the age of twenty-five. The construction which Mr.I.M.Nanavati, however, pressed upon us to accept was that Clause 2 dealt with the income of the said 160 shares as a whole until the period of distribution in respect of either of the two beneficiaries arrived and provided that such income-being the entire income of the said 160 shares-should be utilised either wholly or in part as the trustees thought fit and proper for the maintenance and advancement of both the beneficiaries irrespective of their share in the said 160 shares. This construction is in our opinion fallacious for it sins against the fundamental rule of interpretation that in construing any writing, be it a writing, settlement or anything else, every clause must be with reference to the context and other clauses of the writing so as, as far as possible, to make a consistent whole and that no part of the writing should be construed in isolation for the intention of the author of the writing is to be found not in one part of the writing or in the other, but in the entire writing and that intention can be gathered by viewing a particular part of the writing not detached from its context in the writing but in connection with its whole context. If Clause 2 is read with the recital in the settlement and Clauses 4,6,and 7, it is clear that Clause 2 cannot bear the construct it. The last recital in the settlement clearly shows that the intention of the settler was that out of the said 160, 80 shares should be for the benefit and enjoyment of one beneficiary and 80 shares should be for the benefit and enjoyment one beneficiary and 80 shares should be for the benefit and enjoyment of the other beneficiary. The intention of the settler was not that any part of the income of 80 shares intended for one beneficiary should at the discretion of the trustees be utilised for the benefit of the other beneficiary. No doubt Clause 2 started with the words "the trustees shall stand possessed of the shares" and then proceeded to deal with "the profits arising therefrom" meaning thereby the profits of the shares referred to in the earlier words, but the context makes it clear that by using the words " the said shares"the settler did not mean to refer to the said 160 shares as a whole but intended to refer to one half of the said each beneficiary making up in the aggregate the said 160 shares. That is the only way in which Clauses 2 and 4 can be reconciled and harmoniously read. If the reference were intended to be made to the said 160 shares as a whole, the plain and grammatical meaning of the opening of Clause 2 would be that the trustees would stand possessed of the said 160 shares, until two of the beneficiaries, that is,until both the beneficiaries completed the age of twenty-five, but that would be contrary to the Clause 4, for under that Clause when either beneficiary attained the age of twenty-five,the trustees were bound to transfer his one half of the said 160 shares to him together with the accumulation of surplus income in respect of such one half. What Clause 2, therefore, meant to provide was that the trustees should stand possessed of the two halves of the said 160 shares, one half being for the benefit and advantage of one beneficiary and the other being for the benefit and

advantage of the other beneficiary and that possession of each one half of the said 160 shares should remain with the trustees until the beneficiary entitled to such one half completed the age of twenty-five, when under Clause 4 possession of such one half should be handed over to him. This construction which we are inclined to place, apart from making a consistent provision out of clauses 2 and 4, does not in any way strain the language of Clause 2. Even when we turn to Clauses 6 and 7 we find that the words "the said shares" are used in those Clauses to denote not the said 160 shares as a whole but the one half share of the respective beneficiary in the said 160 shares. There is also another circumstance which throws considerable light on the construction of Clause 2 and shows that the construction which we are placing upon these Clauses is the right construction and not the construction contended for by Mr. I. M. Nanavati. That circumstance relates to the accumulation of surplus income referred to in both Clauses 2 and 4. Clause 4 provided that when any beneficiary attained the age of twenty-five, the trustees should transfer to such beneficiary his one half share in the said 160 shares as also the accumulation of surplus income in respect of such one half share. Clause 4 clearly postulated the existence of a distinct and separate accumulation of surplus income in respect of one half share of each beneficiary in the said 160 shares. Now there could not be a distinct and separate accumulation of surplus income in respect of one half share of each beneficiary unless the amount to be utilised for the maintenance and advancement of each beneficiary was to go only out of the income of his one half share in the said 160 shares. Unless the income in respect of the one half share of each beneficiary were treated by the settlement as distinct and separate, there could not be distinct and separate accumulations of surplus income in respect of the one half share of each beneficiary in the said 160 shares. Clause 2, therefore, made a distinct and separate provision in regard to the income of the one half share of each beneficiary in the said 160 shares and provided that until such beneficiary attained the age of twenty-five, the trustees should apply the whole of the income of the one half shares of such beneficiary in the said 160 shares or such part thereof as they thought fit and proper for the maintenance and advancement of such beneficiary and accumulate the surplus income in excess of the amounts so applied and when such beneficiary completed the age of twenty-five, Clause 4 provided that the trustees should transfer to such beneficiary the accumulation of surplus income together with his one half share in the said 160 shares. The net position which thus obtained was that though each of the two beneficiaries, namely Mahendra and Manubhai, was given a vested interest in one half of the said 160 shares, such one half was not to be handed over to him until he attain the age of twenty-five and in the meantime out of the income of such one half, the trustees were bound to provide for his maintenance and advancement in such amount as they thought fit and proper and the surplus income was to be accumulated and when he attained the age of twenty-five, such one half together with the accumulation of surplus income was to be handed over to him. Mahendra and Manubhai each had thus a vested interest in one half of the said 160 shares and had also the vested right to the

income of his one half share in the said 160 shares. With only this restriction that though he was presently entitled to receive maintenance and advancement out of such income, the amount of such maintenance and advancement was in the discretion of the trustees and the surplus income in excess of the amount applied by the trustees for such maintenance and advancement could be received by him only when he completed the age of twenty-five. It was for this reason that Clause 5 provided that neither Mahendra nor Manubhai should have any right to sell, mortgage or encumber in any manner his interest in the corpus or income until he completed the age of twenty-five. We may point out here as an additional argument in support of our view, that if the interest of Manubhai and Mahendra in their respective one half share in the said 160 shares had been contingent on their respectively attaining the age of twenty-five or if they had no vested right to the income of their respective one half share in the said 160 shares, it would have been totally unnecessary to have Clause 5 in the settlement. Clause 5 became necessary because settler wanted that neither Mahendra nor Manubhai should be entitled to sell, mortgage or encumber in any manner either interest in one half of the said 160 shares or his vested right to the income in respect of such one half share. Having said what was to happen to the corpus and income until Mahendra and Manubhai respectively attained the age of twenty-five and what was to be done to the corpus and accumulation of surplus income when Mahendra and Manubhai respectively attained the age of twenty-five, clauses 6 and 7 proceeded to declare what was to happen if either Mahendra or Manubhai died before attaining the age of twenty-five, Clause 6 provided that if either Mahendra or Manubhai died before completing the age of twenty-five leaving a male issue or issues surviving him., the trustees should possess of his one half of the said 160 shares on trust for such male issue or issues till each of them completed the age of twenty-one. If either Mahendra or Manubhai died before completing the age of twenty-five without leaving any male issue, Clause 7 provided that the trustees should stand possessed of his one half of the said 160 shares on trust for the other living sons of Rambhai patel, is the then living brothers of the deceased, in equal shares after making certain provisions for the female or issues if any of the deceased. If, therefore, either Mahendra or Manubhai died before attaining the age of twenty-five, his vested interest in one half of the said 160 shares was to be divested and such one half share was to go to the male issue or issues if he died leaving male issue or issues and if he died without leaving male issue, then it was to go to his brothers living in equal shares. But what was to happen to the accumulation of surplus income in respect of one half share if either Mahendra or Manubhai died before completing the age of twenty-five? The gift over in clauses 6 and 7 was confined only to the one half share of each beneficiary in the said 160 shares and provided for its destination in case of death of such beneficiary before completing the age of twenty-five and did not extend to the accumulations of surplus income in respect of such one half share did not, therefore, go over on the death of such beneficiary to the persons ultimately entitled to the corpus of such one half share. Mr. IM Nanavati contended that the words "the said shares" in clause 6

and 7 referred not only to the one half share of the dying beneficiary in the said 160 shares but also to the accumulation of surplus income in respect of such one half share, but this contention was a contention of despair, for it is clear on a comparison of the language of clauses 2 and 4 on the one hand and 6 and 7 on the other, that wherever the settler intend to refer to the accumulation of surplus income, he did so in express terms and made a clear distinction between "the said shares" or "his portion of the shares" on the one hand and "accumulated funds" or accumulation thereof on the other. If the settler intended that the accumulations of surplus income should also be the subject of a gift over along with the one half shares, he would have used the language for the purpose of giving effect to his intention and he would not have stopped short at the words "the said shares" in clauses 6 and 7 but would have proceeded to include "the accumulation thereof" as he did in clause 4. We cannot, therefore, agree with Mr. I. M. Nanavat that clauses 6 and 7 contained a gift over in case of death of either beneficiary before completing the age of twenty-five not only in respect of his one half share in the said 160 shares but also in respect of such one half share. To our mind, it is clear that the accumulation of surplus income in respect of the one half share of each beneficiary in the said 160 shares was not intended to go over to the persons mentioned in clauses 6 and 7 on the death of such beneficiary before completing the age of twenty-five and since such beneficiary had a vested right to the income of his one half share during his life time, such accumulation of surplus income would on the death of such beneficiary pass by testate or intestate succession. This being the position, it is clear that Manubhai was entitled to the whole of the income of his one half share in the said 160 shares, though he attained the age of twenty-five, he could not claim to receive such income save and except such part thereof as might be paid to him by the trustees as and by way of maintenance and advancement. The surplus income was liable to be accumulated and he was entitled to receive the accumulation of surplus income when he attained the age of twenty-five. If he died before completing the age of twenty-five, the accumulation of surplus income would not go over to the persons ultimately entitled to the corpus of his one half share but would pass by testate or intestate succession. Until his death the whole income of his one half share in the said 160 shares therefore belonged to him even though he died before completing the age of twenty-five and from and after his death his brothers then living became entitled to the whole income of such one half share in the said 160 shares.

(4) this being the nature and quality of the interest conferred on Manubhai under the settlement, the first question that arises for consideration is : did the one half share of Manubhai in the said 160 shares pass on his death u/s 5 ? Section is the charging section and imposes charge in general terms on all property, settled or not settled, in the following terms:-

(5) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not

settled, including agricultural land situate in the territories which immediately before the 1st November 1958 were comprised in the States specified in the First Schedule to this Act, which passes on the death of such person, a duty called 'estate duty' at the rates fixed in accordance with Section 35.

(2)The Central Government may, by notification in the Official Gazette, and the names of any other States to the First Schedule in respect whereof resolutions have been passed by the Legislatures of those states adopting this Act under clause (1) of Article 352 of the Constitution in respect estate duty on agricultural land situate in those States, and on the issue of any such notification the States so added shall be deemed to be States specified in the First Schedule within the meaning of sub-section (1)."

Now the expression "passes on the death" might have created some difficulty if interpretation but two generations of judicial decision have imparted to that expression as occurring in Section 1 of the U.K. Finance Act, 1894, which imposed for the first time in England the duty called "estate duty", exact shades of meaning that could not have been originally discerned and our Act being modelled on the English statute, it would be a fair presumption to make that when the Legislature enacted our Act, the Legislature used the expression "passes on the death" in the sense in which it had been judicially interpreted in England. We might, therefore, usefully refer to English decisions on the interpretation of Section 1 of the U.K. Finance Act, 1894, in order to comprehend the true import of passing of property referred to in Section 5 of our Act. The question as to when property can be said to pass on death must be approached as one of substance and not of technicality. Ordinarily, when a person dies and his estate devolves on his heirs, there is passing of property. But the category of passing of property is not exhausted by this case. There are very many more cases in which property passes on death and estate duty accordingly payable. The expression "passes on the death" is not defined either in the U.K. Finance Act, 1894, or in our Act, but the classical meaning of it was given by Lord Parker of Waddington in *Attorney General v. Milne*, (1914) AC 765 p. 779, when he said that it is used to denote some actual change in the title or possession of the property as a whole which takes place at the death. He added that for the purpose of the Section it is absolutely immaterial to whom or by virtue of what disposition the property passes. This statement of the meaning of the expression which has almost become sanctified into a definition has always been regarded as the starting point of the development of the law in relation to passing of property on death. A few years later, Viscount Haldane L. C. said in *Nevill v. Inland Revenue Commissioners*, (1924) AC 385 at p. 389: " 'Passes may be taken as meaning 'changes hands' ". This observation emphasizes by a very apt and precise use of language that what is material to consider in passing of property is whether there is any change in the beneficial possession or enjoyment of property. This theme was expanded on in several subsequent decisions, but it is not necessary to refer to all of them. It will be sufficient if we refer only to one of them, namely, that in *Scott and Coutts and Co. v. Inland*

Revenue Commissioners (1937) AC 174. In that case, by a deed of settlement made in July, 1889, the Fifth Earl of Cadogan and his eldest son settled the Cadogan Estates to the use of the eldest son as tenant for life with remainder to the use of his sons successively in tail male and in default of such issue to the use of the second son of the Fifth Earl for life with remainder to the use of his sons successively in tail male with remainders over. In 1893 the fifth Earl bought the life estate of his second son, and then conveyed it to the trustees for the life of the second son upon discretionary trusts in favor of the second son, his wife, and his children or remoter issue and, subject to this trust, upon trust to accumulate the surplus of the rents and profits, invest it, and apply the proceeds in discharging debts or incumbrances upon the estates, with a proviso limiting the duration of the trust. In 1908 the eldest son of the Fifth Earl died and the only son of that son died in 1910. In 1915 the Fifth Earl died and was succeeded by his second son as Sixth Earl and the life estate of the Sixth Earl became an estate in possession. In 1933 the Sixth Earl died and was succeeded by his only son who became the Seventh Earl and tenant in tail male in possession of the estates. On these facts the question arose whether the property passed on the death of the Sixth Earl within the meaning of Section 1 of the U.K. Finance Act 1894. Lord Russell of Kilowen accepted the law to be that in order to constitute a passing of property on death within the meaning of Section 1 of the U.K. Finance Act, 1894, there must be a passing beneficially from some person or persons to another person and upheld the claim of the Crown in the following words:-

"On the death of the Sixth Earl the Seventh Earl in tail male became, instead an estate in remainder, an estate in tail male in possession. He became entitled to receive the whole income of the estate, which immediately before the death of the Sixth Earl was primarily applicable of the benefit of the discretionary trust. That in my opinion was a change of hands in the beneficial title or possession of the property as a whole occurring on the death of the Sixth Earl which constituted a passing of the property on that death within the meaning of S. 1 of the Finance Act, 1894".

The learned Law Lord also said in the course of his speech that to answer the question whether a fund passes on the death of a person, a comparison must be made between the persons beneficially interested in the fund the moment before the death and the persons so interested so interested the moment after the death. These last observations contain a practical application of the test formulated by Lord Parker of Waddington in *Milne's Case*, 1914 AC 765 (SUPRA). If there is a change in the beneficial possession or enjoyment of the property as a whole, it operates as passing of property. As observed by Radcliffe in *Public Trustees v. Indian Revenue Commissioners*, (1960) 1 All ER 1 at p.11, passing of property is equivalent to changing hands in enjoyment. In order to arrive at correct decision on the question as to when property passes, we must focus our attention on a "comparison between the persons beneficially interested in the fund the moment before the death, and the persons so interested the moment after the death". (Vide the observation of Clauson L.J. in *In re Hodson's*

Settlement *Brooke v. Attorney General*. (1939) 1 Ch 343 and the observations of Lord Tomlin in *Attorney General v. Lloyds Bank Ltd.*, (1935) AC 382). If after such comparison it appears that the beneficial possession or enjoyment of the property or a definable part thereof is in substance and effect unaffected by the death, the property or that part of it can not be said to have passed on death even if, as a matter of terminology, one set of limitations has ceased to have effect and another has become operative or the beneficiary was entitled to income only before death and has become entitled to capital thereafter. What attracts the charge of estate duty is not mere change of source or title but change of beneficial possession or enjoyment. If the same person remains in beneficial possession or enjoyment of the property both before and after death without interruption, there is no passing of property even if there is change of source of title. Lord Evershed M.R. said in *Re Parkes' Settlement ; Midland Bank Executor and Trustee Co. Ltd, v. Inland Revenue Commissioners* (1956) 1 All ER 833 . 838:

"I agree with counsel for the trustees that prima facie there must, in order to give rise to a valid claim for duty, whether under S. 1 or S.2 of the Finance Act, 1894, be a change not merely of source or title, but of possession or enjoyment".

We might also in this connection refer to *In re, Jones' Will Trusts; Soames v. Attorney General* (1947) 1 Ch 48. There the deceased had a contingent interest in the residuary estate left by a testatrix (subject to payment of two annuities) on his attaining the age of twenty-five. The will, however, contained no disposition of the income until the deceased attained the age of twenty-five and such disposition, therefore, fell to be regulated by Sections 31(1) of the Trustee Act, 1925, under which the deceased became entitled to the whole of the income of the residuary estate between the date on which he attained the age of twenty-one and the date of his death, which occurred before twenty-five. Even though at the date of his death he had no vested interest in the residuary estate, Roxburgh, J. held that estate duty was payable since the deceased was by virtue of being entitled to the whole income of the residuary estate in beneficial possession or enjoyment of the residuary estate and on his death there was a change of beneficial possession or enjoyment of the residuary estate. What we must, therefore, consider is whether there is any change or shifting of beneficial interest --- and by beneficial interest we mean not the equitable interest recognized by English law but beneficial possession or enjoyment of trust property --- from one person to another. If there is, there would be passing of property within the meaning of Section 1 of the U.K. Finance Act, 1894, and Section 5 of our Act, but not otherwise.

(5) Applying this test it is clear that on the death of Manubhai, one half share of Manubhai in the said 160 shares passed u/s 5. Manubhai of course had a vested interest in one half of the said 160 shares subject to defeasance on his death below twenty-five but that is as we pointed out above, immaterial for the purpose of determining whether such one half share passed on the death of

Manubhai. What the Act has in view for the purpose of the charge of estate duty is passing of property and not the interest of the deceased which if it be a limited interest can never pass. The Section expressly and in terms applies to settled property and as observed by Lord Maenaghten in *Ear Cowley v. Inland Revenue Commissioners* (1890) AC 108 . 212, one might "just as well strike the word "settled out of the Section altogether as hold that the Section does not embrace a case where a limited interest under a settlement ceases on death and passes to no one". In such a case the property which passes is the property comprised in the settlement and not the limited interest of the deceased in the property which can never pass. It is therefore, irrelevant to inquire whether the interest of Manubhai in one half of the said 160 shares was a vested interest or a contingent interest. In 1947 1-Ch 48 (supra), the deceased had a contingent interest in the residuary estate and yet it was held that the residuary estate passed on his death. The question to which we must, therefore, address ourselves is whether on the death of Manubhai there was any change in the beneficial possession or enjoyment of one half of the said 160 shares. We must make a comparison between the persons beneficially interested in the one half of Manubhai in the said 160 shares the moment before the death of Manubhai, and the persons so interested the moment after the death of Manubhai and see whether there is any change. The moment before the death Manubhai was beneficially interested in one half of the said 160 shares since he was entitled to the whole income of the said one half. No doubt until he attained the age of twenty-five, he could not require the trustees to pay him the whole income and all that he could ask the trustees was to apply the whole or part of the income as the trustees thought fit and proper for his maintenance and advancement, the surplus income being accumulated, but he was certainly entitled to the accumulation of surplus income and he could but for Clause 5 dispose it of during his life time even before attaining the age of twenty-five and if he died before that date, it could pass to his heirs by succession. The accumulation of surplus income belonged to Manubhai at all stages and he was beneficially entitled to the same though physical handing over of it was postponed. Manubhai had, therefore, clearly beneficial possession of one half of the said 160 shares the moment before his death. The moment after his death without male issue, his brothers then living became entitled to the whole income of his one half share in the said 160 shares. There was, therefore, clearly a change or shifting of beneficial possession or enjoyment of half of the said 160 shares on the death of Manubhai and having regard to the principles discussed above, it must be concluded that one half share of Manubhai in the said 160 shares passed on his death u/s 5.

(6) What we have said above also answers the contention of Mr. I.M. Nanavati on behalf of Mahendra that there was no passing of property on the death of Manubhai within the meaning of Section 5, since under Indian law there is nothing like a beneficial interest in property as distinguished from a legal interest in the said 160 shares or any part thereof which could pass on his death. Unlike the English law, the Indian law argued Mr. I.M. Nanavati, did not recognize any

distinction between legal and beneficial interest and a beneficiary under a settlement in India has therefore, no interest in the trust fund like his counterpart in England who had a beneficial interest. His right was only a personal right against the trustees to require them to perform the obligations imposed by the trust. Mr. I. M. Nanavati contended that Manubhai had, therefore, no interest in any part of the said 160 shares which could pass on his death so as to attract the applicability of the charge of estate duty u/s 5. According to Mr. I. M. Nanavati what happened on the death of Manubhai was a mere change of obligations performable on the part of the trustees. The trustees were until the death of Manubhai bound to perform the obligations in favour of one beneficiary namely, Manubhai himself and after the death of Manubhai they were bound to perform the obligations in favour of other beneficiaries, namely, the brothers of Manubhai and this, argued Mr. I. M. Nanavati, did not constitute passing property. The argument is clearly misconceived and based on a misappreciation of the true import of Section 5. We have already pointed out and we need not repeat it here that what Section 5 contemplates is not passing of the interest but this passing of the settled property itself. The question that requires to be considered u/s 5 is not whether the limited interest of the deceased in settled property has passed or not, for that by its very nature cannot pass but must cease with death, but whether the settled property has passed from the beneficial possession or enjoyment of one beneficiary to that of another. And if that be the correct way of looking at the Section, as we think it is, it does not matter that the beneficiary has no interest in the property comprised in the settlement but has mere personal right against the trustees to compel performance of the obligations under the trust. The test is not whether the deceased has any interest in the property capable of passing on death-though we may point out that even the right of the beneficiary against the trustees under the Indian law is transferable and can pass on death-but whether the property has changed hands in beneficial possession or enjoyment and judged by that test, it is clear from what we have stated above that the one half share of Manubhai in the said 160 shares did pass on his death within the meaning of Section 5.

(7) Mr. I. M. Nanavati then contended that in any event the exemption in Section 23 applied to the facts of the case and that the one half shares of Manubhai in the said 160 shares could not, therefore, be deemed to have passed on the death of Manubhai. Section 23 is in the following terms:---

"23. In the case of settled property where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and one or more subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death by reason only of the failure or determination of that interest.

Explanation 1 : --- Where property is settled by a person on himself for life and after his death on any other person, with an ultimate reversion of an absolute interest or absolute power of disposition to the settler, the property shall not be

deemed to pass to the settler on the death of such other person by reason only that the settler being then in possession of the property as tenant for life becomes, in consequence of such death, entitled to the immediate reversion or acquires an absolute power to dispose of the whole property.

Explanation 2 : --- Where the interest of a person in settled property consists of an interest in the residue or part of the residue of an estate of a testator or intestate and the said estate continues to be under administration until the death of the person, the said interest of the person in the residue or part of the residue shall be deemed to have become an interest in possession on the date as from which the income from the residue or part of the residue would have been attributable to that interest if the residue had been ascertained immediately after the death of the testator or intestate."

It will be seen that three conditions must be satisfied before an exemption can be claimed under the Section. Firstly, the interest of the deceased under the settlement should fail or determine by reasons of his death before becoming an interest in possession. Secondly, one or more subsequent limitations under the settlement should continue to subsist. And thirdly, the facts should be such that but for the exemption, the property would have been deemed to pass on the death of the deceased by reason only of the failure or determination of the interest of the deceased and for no other reason. Now the dispute between the parties centered round the fulfillment of the first two conditions. If the first two conditions were fulfilled, it was not the contention of the Revenue that Section 23 should not yet be held applicable on the ground of non fulfillment of the third condition. We will, therefore, confine our attention only to the question whether the first two conditions were fulfilled. Before however, we examine this question we must deal with a preliminary objection raised by the learned Advocate General to the applicability of S. 23. The Advocate General contended that since the claim of the Revenue was based on .5 Section 23 could not be invoked Mahendra. The argument was the familiar argument founded on Lord MacNAUGHTEN'S DICTUM IN Cowley's case 1809 AC 198 (supra) suggesting a dichotomy between Sections 1 and 2 of the U.K. Finance Act 1894. Lord Macnaghten said:

"If the case falls within Section 1 it cannot also come within Section 2. The Sections are mutually exclusive".

The learned Advocate General argued relying on this dictum that there was also a similar dichotomy between Sections 5 and 7 of our Act and that these Sections were mutually exclusive. If, therefore a case fell within Section 5, it could not come within Section 7, and it was unnecessary to refer to the latter Section. Talking his stand on this position, the learned Advocate General contended that Section 23 applied to exempt only that property which fell within Section 7 and no operation where property passed u/s 5. This contention though it might have had some plausibility if the dictum of Lord MacNaughten had stood unreversed can no longer be regarded as valid after the decision of the House of Lords in

1960 All ER 1 (SUPRA) IN THIS CASE THE House of Lords held that Lord MacNauthen's construction of Sections 1 and 2 was mistaken. These Sections were not mutually exclusive. Viscount Simonds in his speech, explained the inter-relation between sections 1 and 2 in the following words:-

"My lords, if I were today looking at this Act for the first time, I should say that these sections were straightforward and clear, the first section imposing the charge in general terms and the second defining by inclusion and exclusion the precise area of that charge. I should unhesitatingly reject any suggestion that the two sections were in any way mutually exclusive or, as corollary, that if any property clearly "passed on the death of the deceased under S.1, it was unnecessary to look at S.2. I should point to the first category of property which under S.2 (1) (a), is to be deemed to be included in property passing on the death, viz, "property of which the deceased was at the time of his death competent to dispose and ask how this category which embraces the whole free estate of the deceased can be excluded from S.1, and if it must (as it clearly must) pass under that Section, what meaning can so far be given to S.2(1), except that it is not purporting to bring into charge property which is not within S.1 but aims at defining all the various kinds of property which it is thought to charge. I should then look at S.2(1) (b) , and, bearing in mind that S. 1 referred to property settled or not settled and that S.2(1)(a) had dealt with property that was not settled, I should expect to find S.2(1)(b) dealt with settled property. And that is what I should find. In language that is apt to cover all settled property and, in particular, the commonest form of settled property, viz, property in which a life interest is given with remainders over, the second main category of property is exhaustively defined. It would not occur to me that S.2(1)(b) was intended to cover only property which did not pass (whatever that as yet undefined word might mean) under S.1...

Thus, my Lords, I come to the end of my examination of S.1 and S.2 with the clear conviction which is not weakened but rather is confirmed by other sections, that S.2 is a categorical description of the property "settled or not settled" on which the new estate duty is imposed

Lord Radcliffe also said much to the same effect when he observed in the course of his speech at page 10:--

"...Settled estate duty apart, S.1 would be read as the Section that imposed the charge of duty for all the purpose of the Act and it would be noted that the duty is granted on "all property real or personal settled or unsettled, which passes ondeath". it would be appreciated that the words "passing on death had not at that time any precise significance in law; that they were not words of art or technical import: and that the conception of "estate duty" that was then being imposed was in many of its aspects radically different from the conceptions that had governed the familiar legacy and succession duties. Nor, since was to be imposed on property settled as well as property not settled, did it present itself as another form of probate duty. So approached, S.2 seems to be a natural

sequel of S.1. its purpose is to explain and refine on the meaning of the words "property"....which passes ondeath which S.1 had declared to be subject to the charge of duty. Sub-section (1), therefore selects certain categories of property and, aided by the interpretation section, S.22, brings them expressly under the description of property passing on death, indifferent to the whether if it itself had not been part of the original scheme of the Finance Act, 1894, any one of those categories or any particular form of property falling within one of the categories would, or would not, have been treated by the Courts as covered by the general words of S.1. I can see no significance one way or the other in the fact that it declares its purpose by saying that the categories selected shall be "deemed" to be included in the property passing" which charged by S.1. such a phrase give statutory certainty to what might otherwise be in some aspects uncertain and, in a few, impossible. Thus sub-section (1) (a) names a category, "property of which the deceased wascompetent to dispose" which seems plainly to embrace all property which within his absolute disposition at his death. Other uses of the same phrase in other sections of the Act show that there atleast it is used in the in this a general sense. Sub-section (1)(b), consistently with this, names a category "Property" which the deceased or any other person had an interest ceasing on the death of the deceased; this seems the apt and natural expression to describe settled property in which the settled had a life interest, settled property in other person had an interest terminable with the life of the deceased and property in which there subsisted some interest for life, such as a life annuity, which did not carry the ownership of the whole income. No doubt, much that is described in these two heads of S2(1) would have been charged in any event by force of the words used S.1. In that sense, it is permissible to say of S.2 (1), as has so often been said, that it "sweeps up" what is not covered by S.1. But that is to describe its effect, rather the effect that S. 1 would have in the hypothetical situation of S. 1 standing without S. 2. It is not to describe its construction; and the distinction is important.

The question in that case arose in regard to the applicability of the excepting words in Section 2(1) (b), namely, "but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a Corporation sole" in a case in which the Crown sought to charge estate duty u/s 1. The question was :- If the words of Section 2 (1)(b), are fit and natural description of the property on which the duty is claimed, are the words of exemption found in the Sub-section which relate to the holder of an office, a recipient of charitable benefit or a corporation sole to be ignored merely because the property can be charged with duty under Section 1, even if there had been so Section 2 at all? The House of Lords held that Sections 1 and 2 were not mutually exclusive and the excepting words in Section 2(1)(b) were operative in regard to property which fell within that sub-section even though that property might fall also within the wide words of Section 1 and merely because the property fell within Section 1, the exemption did not cease

to be available. Now the same reasoning must apply equally in the construction of the corresponding provisions of the Indian Act. Section 5 corresponds to Section 1 and Sections 6 and 7(1) corresponds to Sections 2(1) (a) and 2(1)(b) without the excepting words, while Section 7(4) and 23 finds their respective counter parts in the excepting words of Section 2(1)(b) and Section 5(3). Section 5 imposes the charge in general terms on all property, settled or unsettled, which passes on the death and Sections 6 to 16 define a process inclusion and exclusion the precise area of that charge. Section 5 on the one hand and sections 6 to 16 on the other hand are not mutually exclusive and sections 6 to 16 do not in all cases bring in to charge property which would not otherwise fall within Section 5. They merely explain and refine upon the meaning of the words "property which passes on the death" which Section 5 declares to be subject to the charge of estate duty. No doubt Sections 6 to 16 used the words "deemed" but it must be remembered that "deemed" is a word which Lord Radcliffe said in *St. Aubyn v. A.G.* (1951) 2 All ER 473 is apt to include the obvious, the uncertain and the impossible. Even if therefore, Section 23 were regarded as an exception only in regard to property falling within Section 7, it would be no answer to the claim for exemption based on Section 23 that though the property falls within Section 7, it also falls within Section 5 and the Revenue seeks to charge it u/s 5 and u/s 7. There is no dichotomy between S. 5 and S. 7 and even if the claim for estate duty is based on S. 5, Section 23 can be invoked as answer to the claim of the Revenue if the claim otherwise falls within the language of Section 7. Of course Mr. I.M. Nanavati contended that even though the property falls within Section 5 and does not come within Section 7. Section 23 would yet be operative for it occurs in Part III headed "Exceptions from the charge of duty" and the exceptions contained it is a general exception to the charge of estate duty imposed by Section 5 and explained and refined upon by the succeeding Sections 6 to 16. The contention is not without force but it is not necessary to determine it since we are of the view that the present case is indubitably covered by Section 7. The interest of Manubhai which extended to the whole income of one half of the said 160 shares ceased on his death and by the cesser of such interest a benefit accrued or arose to the extent of whole income of such one half share and such one half share could, therefore, in any event be deemed to have passed u/s 7. This position was clear and indisputable and was in fact admitted by the learned Advocate General. It must, therefore, follow that in the present case Section 23 can be invoked to defeat the claim of the Revenue even though the Revenue seeks to charge estate duty u/s 5, if the conditions for the applicability of Section 23 are otherwise satisfied.

(8) This disposes of the preliminary contention of the learned Advocate General in regard to the applicability of Section 23. That leaves for consideration the question to which we referred earlier, namely, whether the first two conditions of Sections 23 were fulfilled in the present case. We will first take up the second condition which requires that one or more subsequent limitation under the settlement should continue to subsist. There is no doubt this condition was

fulfilled and in this connection we cannot do better than refer to the judgment of Vaughan-Williams J. in *Attorney General v. Wood* (1897) 2 Q.B. 102 . In this case the settlement was in favour of the settler during the joint lives of herself and her husband, thereafter for the survivor of life, thereafter to the issue of the marriage and in default of issue to the settler herself. The husband died during the settler's life-time and there were no issues. It was held that subsequent limitation continued to subsist at the death of the husband with in the meaning of the section, even though that subsequent limitation was in favour of the settler herself. Vaughan-Williams J explained at page 109 of the report as to when subsequent limitations can be said to be continue to subsist within the meaning of this condition, as follows:-

".....Now, did subsequent limitations under the settlement continue to subsist at the death of Mr. Vaughan? I think they did, notwithstanding the fact that Mrs. Vaughan thereupon standing the fact that Mrs. Vaughan thereupon became absolutely entitled to this property and could have demanded a transfer of it from the trustees. I think that "subsist" properly describes any estate created by the settlement which has not come to an end. I do not think that such an estate is the less a limitation because there is no estate beyond it - in other words, I think that limitations under the settlement continue until the death of a person who was at the time of his death during the continuance of the settlement competent to dispose of such property".

Applying this principles it is clear that Manubhai having died before attaining the age of twenty-five was at the time of his death not competent to dispose of his one half share in the said 160 shares and that limitations under the settlement did not, therefore, come to an end on the death of Manubhai and that the subsequent limitations set out in Clause 7 of the settlement in any event continued to subsist.

(9) Turning now to the questions whether the first condition could be said to have been fulfilled, we find that the first condition consists of two parts, namely that the interest of the deceased under the settlement must fail or determine by reason of his death and it must so fail or determine before becoming an interest in possession. Now the interest of Manubhai certainly by reason of his death. This could with no colour of reason be disputed by the learned Advocate General. But the learned Advocate General joined issue with Mr.I.M.Nanavati on the second part of the condition. He contended that the interest of Manubhai under the settlement was an interest in possession and that it could not, therefore, be said to have determined before becoming an interest in possession. Now that raises the question: What is Section 23 ? The answer is not difficult to find if we bear in mind that what the Act has in view for the purpose of imposing the charge of estate duty is the change of beneficial possession or enjoyment of property on death. If the deceased in entitled to the income of settled property or to any definite property and ascertained amount out of such income his under the settlement would certainly be an interest in possession, for he would have

present beneficial possession or enjoyment of settled property to the extent of such interest and on his death such beneficial possession or enjoyment would change resulting in passing of property. In order to understand the true import of the expression "interest in possession", it is necessary to refer to another expression used in the Act, namely, "interest in expectancy". This expression is defined by Section 2(ii) to include an estate in remainder and every other future interest, whether vested or contingent, but not so as to include reversions expectant upon the determination leases. It is evident from Section 38 that expression "interest in possession" has been used by the Legislature in contradistinction to the expression "interest to expectancy". Section 38 talks of an "interest in expectancy" falling into possession. When an interest in expectancy falls into possession it would become an interest. The definition of "interest in expectancy", may therefore be usually referred to by us for the purpose of arriving of the true meaning of the expression "interest in possession". "Interest in possession" means present beneficial possession or enjoyment of the property to the extent of the interest granted, whether such interest extends to the whole income of the property or to a definite and ascertained and definite amount of it. If the interest is an estate in remainder or reversion, there would obviously be no present beneficial possession or enjoyment of the property in which the estate is given. Equally if the interest is a future interest, whether vested or contingent, there would be no present beneficial possession or enjoyment of the property in respect of which the interest is created. Such interest would fall into possession when the property in respect of which such interest is created would fall into beneficial possession or enjoyment. Speaking of Section 7(6) of the U.K. Finance Act 1894, which corresponds to Section 38 of our Act, Romer L.J. stated in *Fry v. Inland Revenue Commissioners*, (1958) 3 All E.R. 90:

"It speaks of an interest in expectancy falling into possession, whereas such an interest always is in possession from the date when the instrument which creates it takes effect. What does or may, fall into possession is the property in respect of which the interest in expectancy has been created; and it was presumably in that sense that the legislature referred to the interest itself falling into possession".

It is therefore clear that interest in possession signifies the present beneficial possession or enjoyment of the property in respect of which the interest is created. It is only when the deceased has beneficial possession or enjoyment of the property that the concept of passing of property could become appropriately applicable and that is why Section 23 enacts that if the interest of the deceased fails or determines before becoming an interest in possession, the property shall not be deemed to have passed. The test which must, therefore, be applied in every case in which the point for determination arises whether the interest of the deceased under the settlement was an interest in possession is whether the deceased was in beneficial possession or enjoyment of the property to the extent of such interest extended to the whole income of the property or to a definite and ascertained part of it.

(10) It was this test which was applied by Sargant J., in *In re Johnstone v. Blackburn and East Lancashire Royal Infirmary* (!918) 2 Ch 374 for the purpose of holding that where a tenant for life of a settled legacy died before the expiration of a year from the testator's death and before the legacy was paid or appropriated, the estate legacy on his death, for he never became entitled to receive any amount in respect of the legacy and his interest did not, therefore, become an interest in possession.

(11) The same test was also applied in the leading case on the subject, namely, *Attorney General v. Power* A I.R(1906) .272. In this case one Hubert Power took a vested legal estate under a settlement with a limitation over on his dying under 21 subject to a provision that during his minority the trustees were to enter into the receipt of the rents providing there out such sum or sums as they thought proper in or towards his maintenance, education, advancement of benefit and to accumulate the surplus. If Hubert Power attained 21, the accumulations were to go to him but if he died before completing 21, they were to go to the persons who would ultimately become entitled to the property. Hubert Power died under 21 and other persons became entitled to the property. The question arose whether estate duty was payable in respect of the property which, it was claimed on behalf of the Crown, passed on his death. The claim to duty was resisted on the ground that the interest of Hubert Power under the settlement determined by reason of his death before it became an interest in possession and that subsequent limitations under the settlement continued to subsist at his death and that u/s 5 (3) of the U.K. Finance Act, 1894, which corresponds with Section 23 of our Act, the property could not be deemed to have passed on his death. It was admitted on both sides that subsequent limitations under the settlement continued to subsist at the death of Hubert Power and the only question debated was as to whether the interest of Hubert Power determined before it became an interest in possession. Palles, C.B. negated the claim of the Crown holding that the interest of Hubert Power under the settlement was not an interest in possession at the date of his death. The learned Chief Baron founded himself on the proviso in the settlement which provided that the trustees should during the minority of Hubert Power receive the rents and apply such sum or sums they thought proper in or towards his maintenance, education, advancement or benefit and accumulate the surplus and hold the same in trust for him if he should attain the age of 21 but if he died under 21, then upon trust for the person or persons who would become indefeasibly entitled to the property. He pointed out that the question for decision before him depended upon this proviso and said:---

".....It has been admitted by the Crown, and as I think rightly, that although this proviso may not vest a legal estate in the trustees, it was sufficient in equity to effectually capture the rents and profits of Hubert's (Power's) third share from his father's death in 1892 to his own death in 1898, and to dedicate them to the trusts thereby declared; and we have to determine whether the existence of these trusts is sufficient to prevent Hubert's estate being one in possession; and

as the only interest taxable under the Finance Act is a beneficial one, it immaterial, that the legal estate in Hubert's third remained in him till his death; the liability to duty is the same as if the legal estate had been in the trustees for such a period as was necessary for the performance of the trusts".

He then posed the question in the following terms:-

"Thus the question is: Did Hubert, under the trusts, take a beneficial interest in possession in the lands, which ceases on his death, within the meaning of Section 2(1)(b) and Section 5, sub section (3)?"

It is clear from what is stated above that the learned Chief Baron understood interest in possession to beneficial possession in the property. If Hubert Power had beneficial interest in possession in the property, then, said the learned Chief Baron, estate duty was payable to the extent to which a benefit accrued or arose by the cesser of such interest and the value of that benefit was fixed by Section 7(7) corresponding to Section 40 of our Act as the principal value of the property if his interest extended to the whole income and if the interest extended to less than the whole income, then the principal value of an addition to the property equal to the income to which the interest extended. This decision, therefore, clearly shows that interest in possession within the meaning of Section 5 (3) of the U.K. Finance Act, 1894, corresponding to Section 23 of our Act, means beneficial interest in possession of the property, that is beneficial possession or enjoyment of the property either to the extent of the whole income of the property or to the extent of a definite and ascertained part thereof. The learned Chief Baron again emphasized this meaning of "interest in possession" when he asked himself the question. "Was Hubert's interest an interest in possession", which I agree with the Attorney General means possession properly so called, as distinct from remainder or reversion?". It was because Hubert Power was not entitled to the whole income of the property or to any definite and ascertained part thereof but was entitled only to a part of the income which was fluctuating, uncertain and incapable of being defined or ascertained irrespective of its application, that the learned Chief Baron held that the interest of Hubert Power was not an interest in possession. If Hubert Power had been entitled to the whole income of the property or to any defined and ascertained part of it, the learned Chief Baron would have certainly held that the interest of Hubert Power was an interest in possession. This becomes clear when we turn to the following passage from the judgment of the learned Chief Baron and particularly the portions italicized (here into " ") by us:

"The principle of *In re Bowlby* (1904 2Ch 685) is more in point although that case was antithetical to the present. The judgment there very markedly show the "distinction in the ownership of the surplus, after payment of maintenance of the interest, during minority, on a legacy to a child, between the cases, on the one hand of the legacy being vested, on the other, of the legacy being contingent, with an express direction for the child's maintenance. In the one case, the surplus is the property of the child; in the other, it forms an accretion to the

capital, and does not necessarily go to the child or his representatives. The present is a correlative case. Here, although the estate is vested, subject to being divested, all the rents were captured by the trusts, and "the surplus income after payment of maintenance instead of being the property of the child in any event, formed an accretion to the estate and went with it to the present defendants". Thus, the reasoning in reference to the distinction between maintenance and interest there is applicable to the distinction here between maintenance and rents and profits. "Had Hubert here been entitled to the entire surplus of the rents and profits of his share, I should have held his estate was in one possession", but being as I hold him to be, entitled to part only of that surplus and that fluctuating, uncertain and incapable of "being defined or ascertained irrespective of its application, I must hold that his estate is not in possession, and that such sums as he might receive for maintenance were payable to him not by reason of his vested estate, which must be taken to be subject to the estate or interest of the trustees, but as maintenance of nominee out the express trust for its payment to him out of the interim income of an estate, the present income of which was not his, but the trustees.

This was the very ground on which "Power"s case, 1906 1 I R 272 was distinguished in 1947 1 Ch 48 (supra). In that case as we have already pointed above, the deceased was entitled to the whole of the income of the residuary estate subject to payment of two annuities and the learned Judge, therefore, held that the case before was distinguishable from Pawars"s case 19061 IR 272 and that a matter of fact the observations of the learned Baron in Power"s case 1906-1 IR 272 showed that the interest of the deceased was an interest in possession.

(12) In the present case we have already pointed out above while analysing the provisions of the settlement that Maubhai was entitled to the accumulation of surplus income of the amounts applied by the trustees for his maintenance and advancement before he completed the age of twenty-five and that though possession of it was not be handed over to him until he attained the age of twenty-five, it belonged to him all throughout and he was beneficially entitled to the same. Manubhai was, therefore, beneficially entitled to the whole of the income of his one half in the said 160 shares and his interest was, therefore, an interest in possession. His interest was not an estate in remainder or reversion nor was a future interest. He was presently entitled to the whole income of his one half share in the said 160 shares and after provision of maintenance and advancement if any surplus remained, it was to be accumulated and he was the beneficial owner of the accumulation of such surplus income and but for clause 5 he could dispose it of as he willed and if he died, it was heritable by his heirs. If the provisions of the settlement had been that the accumulation of surplus income should be held by the trustees in trust for Manubhai, only if Manubhai attained the age of twenty-five and if he died before attaining the age of twenty-five the accumulation of surplus income should go to others along with the one half share of in the said 160 shares, the position would have been the same as in

Power's Case 1906 1 IR 272 and it would not have been possible to say that the interest of Manubhai was an interest in possession. But Manubhai being entitled to the accumulation of surplus income in any event notwithstanding his death before attaining the age of twenty-five, the decision in Power's case 19061 IR 272 cannot apply and the present must be held to fall within the ratio of the decision in 1947 1 Ch 48 (supra). We are therefore, of the opinion that the interest of Manubhai under the settlement was an interest in possession and that such interest extended to the whole income of his one half share in the said 160 shares. This being the position the principal value of one half of share of Manubhai in the said 160 shares was rightly added to the principle value of the estate for the purpose of calculation of estate duty on the death of Manubhai.

(13)In the result our answer to the question referred to us will be in the affirmative. The applicant will pay the costs of the References to the respondent.

(14) Answered in affirmative.