

(1958) 12 CAL CK 0001
In the Calcutta High Court

MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD.	APPELLANT
Vs	
INLAND REVENUE COMMISSIONERS.	RESPONDENT

Date of Decision : 18-12-1958

Acts Referred:

Finance Act, 1914 — Section 14, 18

Citation : (1960) 38 ITR 56

Hon'ble Judges : Romer, J; Jenkins, J

Bench : Full Bench

Judgement

December 18. JENKINS L.J., after stating the facts, continued : On the part of the trustees, Mr. Pennycuick argued, albeit somewhat faintly, the the deceased was merely one of the objects of a discretionary trust whose death merely put an end to his chance of participating in the income to some unpredictable extent through the exercise of the discretion in his favour and enhanced the respective chances of the two daughters of so participating by reducing the number of objects of the discretion. If the trust could properly be regarded as a discretionary trust it appears to me that Mr, Pennycuicks argument on this part of the case would be unanswerable. But I agree with the judge that this is not a discretionary trust in any relevant sense. The nephew and the nephews wife no doubt had a discretion as to the directions to be given from time to time, but it appears to me that their power of giving directions was in the nature of power of appointment and that each direction given was in the nature of a revocable appointment under that power conferring on each object of the direction (or in other words each appointee) a definite interest in the share of income assigned to him or her continuing until revoked by some subsequent direction or until the previous death of the appointee. Mr. Pennycuick did not dispute that if this view was right this branch of his argument could not be supported.

I, therefore, reject the contention that no estate duty at all became payable on the death of the deceased because he was merely an object of a discretionary trust.

It remains to consider the more difficult question in the case, which may be put in this way : Granted that some properly passed on the death of the deceased within the meaning of section 1 of the Act, what was the property which then passed and upon which duty then became exigible ?

To this question the Commissioners of Inland Revenue propound the short and simple answer that in as much as the deceased was at the time of his death in receipt beneficially of one-fifth of the income of the retained shares under the direction then in force, and on his death that share of income ceased to be payable to him and became applicable for the benefit of his two sisters in such shares and manner as the nephew and the nephews wife or the survivor of them should from time to time direct, the share required to produce that income passed, that is to say changed hands, on his death, with the result that duty became payable on one-fifth of the corpus of the retained shares, the nature of the dispositions by which this actual passing of one-fifth of the capital was brought about being immaterial. It is also argued on the commissioners side that the combined effect of the deed of October 25, 1941, and of the other of Simonds J. was to accelerate the interests in income limited by the codicil to take effect after the expiration of 21 years from the death of the testator and that the deceased should accordingly be regarded as having been at the time of his death beneficially entitled in possession to one-fifth of the income of the retained shares under the trusts of the codicil as so accelerated. Consideration of this branch of the commissioners argument may conveniently be deferred until a later stage in this judgment.

On the other hand, it is urged on the part of the trustees that all that passed on the death of the deceased was the principal value. actuarially ascertained as at the date of his death, of a one-fifth share of the income of the retained shares for the period until the expiration of 21 years from the death of the testator or until the previous death of the daughter, to which there should, I think, be added the principal value (if any) attributable at the date of the death of the deceased of one-fifth of any income which in the event of the death of the daughter before the expiration of the 21 year period the trustees might think fit to distribute during the residue of that period under the authority conferred by the order of Simonds J. in lieu of accumulating it in accordance with the trusts of the codicil.

The principles relied on by the trustees in support of this submission, and their application to the present case, may be thus stated :

(1) u/s 1 of the Act duty is leviable "upon the principal value ascertained as hereinafter provided of all property... settled or not settled, Which passes on the death" of every person dying after the commencement of Part 1 of the Act; and u/s 22(1)(h) of the Act "settled property" means property comprised in a settlement.

(2) In this case the claim clearly concerned with a passing of settled property. In order to make good a claim to duty in respect of the passing on a death of

settled property it is necessary (a) to identify the settlement comprising the property which or part of which is alleged to have passed; (b) to identify the property comprised in the settlement; and (c) to show that under the trusts of that settlement that property, or some part thereof, passed on the death in question.

(3) The relevant settlement in the present case must be either (i) the settlement constituted by the codicil or (ii) the settlement constituted by the deed of October 25, 1941, in conjunction with the order of November 1, 1940, or (iii) the settlement constituted by the combined effect of the codicil, the deed and the order.

(4) The property comprised in the settlement constituted by the codicil was clearly the fund or capital represented by the retained shares together with the income arising from that fund. But admittedly there was no dutiable passing of any part of that fund on the death of the deceased under the trusts of the settlement constituted by the codicil taken alone. It is therefore necessary to look further in order to make good the claim to duty.

(5) If the settlement constituted by the deed and the order is regarded as the relevant settlement, then the property comprised in that settlement, or in other words the property of which it disposed, was (quoad the deed) the income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter, and also (quoad the order) in the event of her death before the expiration of such period, so much of the income arising from the retained shares during the residue of such period as the trustees might think fit to deal with in the manner authorized by the order in lieu of accumulating it in accordance with the trusts of the codicil.

(6) If the settlement constituted by the combined effect of the codicil, the deed and the order is regarded as the relevant settlement the same result follows. The only property disposed of by the joint effect of these instruments was (quoad the codicil and the deed) the income arising from the retained shares during the period until the expiration of 21 years from the death of testator or the previous death of the daughter and (quoad the order), in the event of her death during the 21-years period, so much of the income arising from the retained shares during the residue of such period as the trustees might think fit to deal with as aforesaid.

(7) The only part played by the codicil was to provide for the benefit of the four shipping companies (and to the extent of any intestacy) for the benefit of the daughter the limited interest in income subsequently disposed of by the deed, and to impose in the event of the daughter dying within the 21-year period the trust for accumulations during the residue of that period; and the only part played by the order was to authorize, not direct, the trustees, in that event, to apply the income arising during the residue of that period as if that period had in fact expired, in lieu of accumulating it as directed by the codicil. No trusts giving

rise to any passing on the death of the deceased subsisted at his death by virtue of any instrument other than the deed, and the only property on which the deed could operate, or on which it could impose trusts, was the interest of the disposing parties, viz., the interest of the four shipping companies and the daughter in the income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter.

The somewhat complicated and unusual nature of the trusts declared by the codicil, and the circumstance that the trusts declared by the deed are in favour of the same persons as those entitled under the trusts limited by the codicil to take effect after the expiration of the 21-year period, and are actually declared by reference to those trusts, tend to some extent to obscure the point at issue.

But it is in fact a question of considerable general importance, which so far as I can see enters into every case in which there has been a derivative disposition or settlement of a limited interest greeted by a previous settlement. I will attempt some examples.

A settles property on B for life with remainder to Bs children. B assigns his life interest to C, who dies in the lifetime of B. On the death of C what duty is payable? On the trustees view of the matter there would pass on the death of C, as part of his free estate, property consisting of the residue of Bs life interest, the value of which would be actuarially ascertained as at the death of C, and no liability to duty on the corpus of the fund would arise to the death of B, the cesser of whose life interest would attract duty in the ordinary way. On the view contended for by the commissioners, as I understand it, the capital of the entire settled fund would pass on Cs death and attract duty accordingly, on the ground that the whole of it then changed hands besides which duty on the capital of the entire settled fund would become payable in the ordinary way on the death of B, by virtue of the cesser of his life interest under the settlement. It seems to me that this cannot be right.

As a further example, one may take the case of a settlement of property by A on B for life with remainder to Bs children, followed by a settlement by B of his life interest X for Z with remainder to Xs children. X dies in the lifetime of B. According to the trustees contention the property passing on the death of X would be the property in which Xs life interest subsisted, i.e., the life interest of B, and the passing on the death of X would be limited to that property, the principal value of which would be actuarially ascertained as at the death of X. According to the commissioners contention, duty would be exigible on the death of A on the capital of the entire settled fund as in the first example, besides being exigible in the ordinary way on the subsequent cesser of Bs life interest. Again, it seems to me that this cannot be right.

As a third and final example, one may take the case of a settlement by the will of a testator A of his residuary estate in trust for X during the period of 21 years

from As death or until the previous death of Y, with a trust for accumulation from the death of Y until the expiration of the 21-year period in the event of Y dying before such expiration, followed by a life interest to Z with remainder as to capital and income in trust for Zs children at 21 or marriage. X executes a declaration of trust of his limited interest above described, under which that limited interest is to be held in trust for Z for life with remainder to Zs children as above. Z dies before the expiration of the 21-year period and in the lifetime of Y. In this simplified version of the present case the commissioners contention involves the conclusion that on the death of Z there would be a passing not merely of the property comprised in the declaration of trust made in Zs favour by X, i.e., the income to arise from the residuary estate during the period until the expiration of 21 years from the death of the testator or the previous death of Y, which was all X had to dispose of, but of the capital of the entire residuary estate. Again it seems to me that this cannot be right.

In all three examples, and in all comparable cases, it appears to me that the true position in fact and in law is that a limited interest conferred on a person by a settlement has been disposed of by the beneficiary as a distinct item of property in right of his or her beneficial interest interest in it, and that any subsidiary limited interests carved out of the limited interest disposed of are to be regarded as taking effect exclusively out of and to the extent of the limited interest disposed of and not otherwise. I see no sufficient reason for regarding them in any other way for estate duty purposes.

The commissioners view would seem to produce somewhat remarkable results. For instance, it would mean that a life tenant could by an appropriate disposition of his life interest in a settled fund subject the capital of the fund, in which he had no interest whatever, to a claim for duty on the death of any person on whom he might choose to confer a life interest carved out of, and necessarily limited in its duration to the duration of, his own life interest. This seems to me absurd.

There is a remarkable dearth of authority on this question, which must have arisen time and again since 1894.

The authors and editors of three well-known works on death duties appear on the whole to favour the trustees view (see Diamond. 12th ed., pp. 52, 88; Hanson, 10th ed., p. 178; Green 4th ed., p. 53), though it is right to add that some doubt is expressed in Diamond at p. 88. All their works state the practice of the office to be in accordance with the trustees view. But the question must depend on the true construction of the relevant legislation, which is a matter for the court.

The point was touched on in *In re Harrison's Settlement* by Upjohn J., who was disposed to favour the view of the trustees in the present case.

Mr. Pennycuik, for the trustees, founded one of his arguments on the provisions as to settlement estate duty in section 5(1) and (2) of the Act of 1894, which

though repealed (with an immaterial saving in favour of the parties to a marriage) by sections 14 and 18 of the Finance Act, 1914, may, I think, properly be looked at for any aid they can give to the construction of section 1 of the same Act. As I understood this argument, it was to effect that if section 5(1) and (2) of the Act had remained in force the Crown could not have claimed settlement estate duty on the date of the deceased on the ground that the property, in the shape of the capital of the retained shares, passed on the death of the deceased under the disposition constituted by the deed of October 25, 1941, because that deed plainly effected no disposition of such capital, and that such a claim could only have been made good on the footing that the property which passed under that disposition was the limited interest in income to which it related. I may have misapprehended this argument, but it seems to me to come perilously near to begging the question, and I prefer to found myself on the more general considerations advanced by Mr. Pennycuik.

On the commissioners' side reference was made to section 15(1) and (2) of the Finance Act, 1896, as mitigating the hardship alleged by Mr. Pennycuik to ensue from the method of assessment contended for by them. This is an argument to which I can attach little weight. The exemptions afforded by the two sub-sections referred to are restricted in scope and would cover only a small proportion of the possible types of derivative settlements.

We were referred to the well-known case of *Attorney-General v. Milne and Another* for the observations made by Lord Parker of Waddington. This case was, I think, introduced into the discussion by Mr. Pennycuik in connection with his argument concerning section 5 of the Act of 1894; but I refer to it for Lord Parker's general statement as to the effect of section 1. It is in these terms: "The first section of the Finance Act, 1894, imposes in the case of every person dying after August 1, 1894, a duty, called estate duty, leviable on the capital value of all property which passes on the death of such person. The expression property passing on the death includes. According to the definition contained in the 22nd section of the Act, property passing either immediately on the death or after any interval either contingently or certainly, and either originally or by way of substitutive limitation, and the expression on the death includes at a period ascertainable only by reference to death. The expression passing on the death is not further defined, but is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition the property passes."

I cannot regard this general statement as meaning that where duty is claimed under s 1 on property comprised in a settlement on the death of a deceased person, on the ground that "some actual change in the title or possession of the property as a whole" took place on his death under the trusts of the settlement, it is not necessary to ascertain what property was comprised in the settlement, and what was the nature of the trust relied on as bringing about the dutiable change in

title or possession on the death in question.

We were also referred to *Christie v. The Lord Advocate*, where the daughter of the testator was entitled under his will to one-tenth of the income of the trust fund thereby constituted, reducible to a maximum of pounds 600 per annum on the death of her mother. The daughter having died in the lifetime of her mother, it was held that there was a passing on the death of the daughter of the one-tenth of the capital of the trust fund corresponding to the one-tenth share of income to which she was entitled at the time of her death, and an argument that what should be valued for estate duty purposes was the right to one-tenth of the income during the life of the widow, reducible on her death to an annual sum not exceeding Pounds 600, was rejected. That case gives effect to a well established principle which I would not challenge for a moment; but it does not appear to me to touch the question as to the property comprised in the settlement which is the substantial point at issue here.

I would, however, quote this passage from *Christie v. The Lord Advocate*, as having some bearing on the present case : "As Lord Macnaghten stated in the *Cowley* case, the Finance Act, 1894, has no regard to the destination of the property which passed or to the interest of the deceased, which, if it be a limited interest, can never pass. It was held in that case that on the death of the first equitable tenant for life under a settlement of real estate the property which passed on his death was neither the interest of the first tenant for life nor the interest of the second tenant for life who succeeded him but the settled property. That case, in my opinion, is conclusive, and establishes that on the death of Mrs. Norman, the life partner of one-tenth, the settled property (which for this purpose is the capital fund which produced the income to which she was entitled) passed on her death within the meaning of section 1 of the Act."

That passage appears to me to be wholly consistent with the trustees contention in the present case. That which passed on the death of the deceased was the settled property, and the settled property was (quoad the deed) the income arising from the retained shares during the 21-years period or until the previous death of the daughter, and (quoad the order), in the event of the daughters death during that period, so much (if any) of the income arising during the residue of that period as the trustees might think fit to distribute under the authority given by the order in lieu of accumulating it under the trusts of the codicil.

I now turn to Mr. Milner Hollands argument that the combined effect of the order and the deed was to accelerate the interests in the income of the retained shares which, according to the interests in these income of the retained shares which, according to the trusts of the codicil, were only to come into operation after the expiration of the 21-year period. For the purposes of this part of his argument, Mr. Milner Holland, while not admitting, was not concerned to dispute the general principles regarding derivative settlements propounded by the trustees. He said (in effect) that whatever the position might be in other cases, in the present case

the result of the deed and the order was to put the deceased in immediate possession of the income entitled at the expiration of the 21-year period, and in the event of his being alive at such expiration.

Under the deed (so the argument proceeded) the deceased by virtue of the referential trust thereby declared became entitled in possession to such share of the income of the retained shares during the 21-year period or until the previous death of the daughter as should from time to time be directed to be applied for his benefit. Under the codicil he was clearly entitled in expectancy to a like interest in the income of the retained shares after the expiration of the 21-year period, provided he should then be living. It is true that under the codicil there was interposed between these tax interests a trust for accumulation of the income from the death of the daughter until the expiration of the 21-year period in the event of her death during that period. But this trust was virtually abrogated by the order which authorized the trustees in lieu of accumulating the income to deal with it on the footing applicable to income to arise after the expiration of the 21-year period. In the result therefore, the deceased was at the time of his death entitled in possession to a share (fixed by the current direction at one-fifth) of the income of the retained shares during the lives and life of the nephew and the nephews wife and the survivor of them, divisible on his death in the lifetime of such survivor, and liable also in the event of the death of the daughter during the 21-year period to be temporarily defeated during the residue of that period if, and to the extent to which, the trustees might in that event decide to accumulate the income during the residue of that period notwithstanding that the order authorized them not to do so. The risks of defence or interruption attending the deceased's income interest above described do not affect the claim to duty on a share of income to which (no matter for what period) the deceased was entitled in possession at the time of his death. (See *Christie v. The Lord Advocate*.)

I cannot accept this argument, there was nothing here in the nature of a surrender or release. The deed, as it appears to me, disposed of the income of the retained shares during the 21-year period or until the previous death of the daughter as a distinct item of property. And on the footing that during the 21-year period or until the previous death of the daughter and no longer the referential trust was to take effect with respect to that property by virtue of that deed. It is in my view quite wrong to disregard the trust for accumulation or to invert the true position in regard to it by treating it as a trust for accumulation of so much (if any) of the income as the trustees might decide. It remained (in the contingency of the daughter's death during the 21-year period) a trust for accumulation save in so far as it might be ; displaced by any decision of the trustees to distribute without regard to it in reliance on the authority given by the order, it appears to me that the interposition of the trust for accumulation effectively prevented the transaction from bringing about the suggested acceleration and precluded any merger or coalescence of the trusts declared by the codicil after the expiration of the 21-year period and the trusts declared by

the deed in respect of the income arising during the 21-year period or until the previous death of the daughter.

Some colour is lent to this part of Mr. Milner Hollands argument by the circumstance that the trustees of the deed were the same persons as the trustees of the testators will and codicil. But this cannot in my view affect the legal position.

For the reasons I have endeavoured to state, I accept the trustees contention as to the property comprised in the settlement and passing on the death of the deceased, and reject the commissioners contention as to acceleration.

As to the commissioners alternative claim u/s 2(1)(b), no such claim can arise on the footing that section 1 is applicable, and in any case a claim on that basis, if it could be entertained, could only produce the same result on the footing that the trustees contention as to the property comprised in the settlement is accepted, as I think it should be.

For these reasons I would allow this appeal.

ROMER L.J. I agree. I am quite unable to accept the trustees contention that Geoffrey Harrison was a member of a discretionary class consisting of himself and his two sisters and that accordingly no income passed or could be deemed to have passed on his death within the meaning of section 1 or section 2 of the Finance Act, 1894. I agree with the reasons stated by Jenkins L.J. in his judgment, which I have had the advantage of reading, for rejecting this submission and have nothing to add with regard to it.

On the principal question it is, I think, clear that on the death of Geoffrey on October 7, 1955, estate duty became payable u/s 1 of the Act. The reason for this is that the share of income from the retained shares which he was enjoying at his death became payable thereafter to other persons, viz., his sisters or one of them. As a result there was a passing of property on his death and the only question is-of what did that property consist ? The judge held that the property was one-fifth of the capital of the retain shares settled by the testators codicil; the appellants contend in effect that it was one-fifth of the property settled by the deed of October 25, 1941.

The terms of this deed were not precisely in accord with the order made by Simonds J. on November 1, 1940. That order required that the interest in Jeannette Wightman-Harrison and the steamship companies in the income to arise from he shares settled by the codicil and the investments for the time being representing the same during the period of 21 years from the date of the testators death should be "assured" to the trustees of his will. The deed of October 25, 1941, did not assure these interests to the trustees but took the form of a declaration by Mrs. Wightman Harrison and the companies that the interests should be held by the trustees upon the referential trusts therein mentioned, which were in fact the trust authorized by the order. It seems to me.

however, that this discrepancy between the order and the deed is immaterial.

The "interests" dealt with by the order and the deed where the beneficial interests of the companies in the income of the retained shares during a period of 21 years from the testators death or until the daughters earlier death and such interest on the daughter herself might have in the same income, and for the same period, as the testators sole next-of-kin. This income was the only relevant property which the companies and Mrs. Wightman-Harrison possessed and they settled it by the deed of 1941.

Immediately prior to the execution of this deed Geoffrey had no beneficial interest whatever in this property of Mrs. Wightman-Harrison and the shipping companies. The property was certainly income, payable for an uncertain but limited period, of the retained shares but (apart from the "authority" conferred on the trustees by the order of 1941) Geoffrey's only beneficial interest in any income of the retained shares was expectant on his surviving the testator by 21 years. It seems to me that the effect of the deed of 1941 was not to accelerate Geoffrey's interest in the retained shares under the codicil trusts but to create new interests under a separate trust, which had not existed previously, of segregated property. The fact that the limitations of the income declared by that trust were, by reference, the same as those of the codicil trusts under which Geoffrey would have become entitled had he lived long enough, does not prevent the limitations from constituting a separate and independent trust, and I think that they did. If that view be right it follows. As it seems to me, that the beneficial interest which Geoffrey was enjoying at the time of his death was an interest arising under the deed and not an interest arising under the codicil. What, then, was the "property" in which that interest subsisted? The answer to that question must surely be the property settled by the deed, namely. The income of the retained shares of which Mrs. Wightman Harrison and the shipping companies were the beneficial owners. This answer would perhaps have been still clearer if the "assurance" envisaged by the order of 1940 had been effected and if such assurance had been made in favour of trustees other than the trustees of the testators will and codicil: but in my opinion the transaction, even in the form which it took, sufficiently established a sub-settlement of "property" which, although deriving in a sense from the codicil settlement, had an independent existence of its own. Mr. Pennycuik submitted in effect that the expression "settled property" in section 1 of the 1894 Act is referable to property which is settled by a disposition and which passes under that disposition; and that the section should in this regard be confined to property passing under a disposition on the death of a person entitled under that disposition. It appears to me that, at all events in general, this contention is well founded and. Applying it to the present case, the disposition under which Geoffrey was entitled at his death to one-fifth of the income of the retained shares was, in my opinion, the deed of 1942 and not the testators codicil. The fact that but for the provision of the codicil the deed could have had no effective operation has, as it seems to me, no relevant materiality. On these grounds it appears to me that the appellants are

entitled to the declaration claimed subject to the point, to which my Lord has referred, that regard should also be had to the benefit which might have accrued to Geoffrey during the 21-year period under the authority conferred on the trustees by the order of 1940.

The considerations which. If correct, defeat a claim to duty u/s 1 of the Act on the value of one-fifth of the corpus of the retained shares also, by parity of reasoning, are an answer to the Crown's alternative claim based on section 2(1) (b).

JENKINS L.J. I am authorized by Willmer L.J. to say that he concurs in the judgments which have just been delivered.

Appeal allowed. Leave to appeal.