

(1962) 12 CAL CK 0001
In the Calcutta High Court

MORGAN

APPELLANT

Vs

INLAND REVENUE COMMISSIONERS.

RESPONDENT

Date of Decision : 20-12-1962

Acts Referred:

Finance Act, 1894 — Section 2(1)(d), 22(2)(a)

Citation : (1963) 49 ITR 59

Hon'ble Judges : Upjohn, J;Diplock, J;Denning, J

Bench : Full Bench

Judgement

UPJOHN L. J. This is an appeal from Cross J. given on April 18 of this year when the held that no claim to duty arose u/s 2 (1) (d) of the Finance Act, 1894, upon the death of the settlor, Henry Frederick Stanley Morgan, who died on June 15, 1959. On February 6, 1952, the settlor made a settlement of shares in Morgan Motor Co. Ltd. upon each of his five children. The trusts declared by the settlement in favour of his respective children and their testamentary beneficiaries were in identical form and so throughout, for the purposes of argument, only the trusts declared in favour of his son Peter have been considered.

The trust were very simple in form. The shares in the company were settled upon trust for Peter for the point lives of the settlor and Peter, and upon the death of the settlor during the lifetime of Peter in trust for Peter absolutely but if Peter predeceased the settlor, then in trust for a class of persons described thus : "For the person of persons who would be entitled to the residuary personal estate of Peter if the settlor and his wife were then dead in the same share and subject to the same trusts as should be applicable to such estate." The settlement contained a clause of revocation but this was later released. Later on it was apprehended, rightly that the settlement in this form was well devised to attract the maximum amount of duty upon the death of the first to die (see now Parker v. Lord Advocate), and so on May 1, 1957, Peter made a revocable assignment whereby he assigned to the trustees all the interest to which he was entitled in

the investments settled under the settlement of 1952 during the joint lives of his father and himself and also all that interest to which he was entitled contingently upon surviving his father to the intent that the investments should be held upon the trusts thereafter declared and contained concerning the same. Peter then declared that he might by deed executed by him at any time with consent in writing of the trustees revoke the provisions of the deed and thereupon the interest created by clause 1 should belong to Peter as if the deed had never been executed. Subject to that, the trustees were to hold the investments upon trust to pay the income to Peter during his life and upon his death upon trust for the persons who would then be entitled to the residuary personal estate of Peter if the settlor and any wife of his were then dead and in the same shares and subject to the same trusts as were applicable to such estate, being the like trusts as were declared by the settlement of 1952, in the event of Peter predeceasing his father but -and now follow some important words which I quote -"excluding any person whose interest shall not vest (either in possession or in reversion) before the expiry of 21 years from the death of the last survivor of the descendants of [the settlor] living at the date of this deed." I shall call this the settlement of 1957. The whole question is whether on the death in Peter's lifetime of his father, the settlor, duty is exigible u/s 2 (1) (d).

The relevant part of the section 2 (1) is in these terms : "Property passing on the death of the deceased shall be deemed to include the property following that is to say :... (d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

For the section to apply three matters have to be established (see Lord Morton in *Davigdor-Goldsmid v. Inland Revenue Commissioner*) (i) there must be an annuity or other interest : (ii) purchased or provided by the deceased. So far there is no difficulty; the deceased father has provided the shares (iii) A beneficial interest therein must accrue or arise by survivorship or otherwise on the death of the deceased. That is the problem.

Some reliance was placed on the identity of the trustees under the settlement of 1952 and the settlement of 1957, but that seems to me quite unimportant. Liability to estate duty in general depends not on a transfer of a legal or equitable estate on death but upon a transfer of a beneficial interest. This is clear beyond argument in a case u/s 2 (1) (d) where all that is taxed is the "beneficial" interest accruing or arising on the death. One must fasten on the beneficial interest and disregard changes in the purely legal or equitable interests held by trustees. *Cross J.* held that there was no claim under this subsection.

Mr. Newsom for the Crown submits that is wrong and he submits that the son Peter could not deal with his interest, first, during the joint lives of himself and his father, and, secondly, after his father's death so as to create a continuing interest; he could only deal with them separately. Therefore, so the argument

runs, he could deal with two interests only his own interest during the joint lives of himself and his father and his interest in capital if he survived his father, in which case he would of course, become absolutely entitled to the whole capital. Nothing that Peter could do in his fathers lifetime could amalgamate these interests. On his fathers earlier death there must inevitably, whatever Peter did, arise his new interest in capital and, therefore, there must necessarily arise a claim for duty u/s 2 (1) (d). Mr. Newsoms argument can briefly be stated by saying that no dealing by Peter with his interest during the joint lives and his interest thereafter could possibly make any difference-any dealing by Peter, described by Mr. Newsom as a sub-settlement, can be ignored.

On behalf of Peter it is argued that this is merely a variation or a resettlement and you must look at the facts as they are at the date of the death. It is said one must approach section 2 (1) (d) being in mind that, although many settlements come under its provisions, the subsection is not necessarily aimed at settlement at all; what you have to do in every case is to look at the beneficial trusts as they are immediately before the relevant death and immediately after the relevant death, and you have to see whether an interest was provided by the person so dying and, if so, whether any beneficial interest arose on the death. That seems to me to be a complete answer to the substance of the Crowns argument. Consider as an example a trust created by X for A for the joint lives of A and X and on the death of X, if he predeceases A, then for B, and on the death of A, if he predeceases X, then for C. The only persons beneficially interested are A, B and C. Mr. Newsom recognises that, of course, A, B and C can put an end to the trust altogether and can entirely defeat the Crowns claim if they rearrange the trust so that no beneficial interest arises on the death of X, but he contends that if one person only makes some rearrangement this is only a variation or sub-settlement which cannot affect the matter. I do not agree with this. Take the case I have just envisaged. Suppose B assigns his interest to C. The trust has been modified but it is still in existence. On the death of the first to die of A or X, what interest arises in C ? C knows that he has in any event the beneficial reversion expectant on that event either through his own title or as assignee of B. There will be a passing for the purposes of section 1 but nothing arises u/s 2 (1) (d) in the sense of a contingent interest becoming vested. It was vested before the relevant death. Then supposing in Xs lifetime C, having acquired Bs interest, chooses to grant a life interest to A. After this grant A knows he has a whole life interest regardless of whether A or X dies first. Nothing arises and nothing passes on Xs death. The fact that purely as a matter as a matter of limitations As joint life interest ceases on the death of X but at once starts again, does not give rise to a claim for duty for no beneficial interest arises on the death (see *In re Parkes Settlement*), and there is no passing u/s 2. Viscount Simonds reservations on this case in *Parker v. Lord Advocate* turn, I think on the particular phraseology of the trusts in *In re Parkes Settlement* and do not challenge its authority for that general proposition. Mr. Newsom relied on some observations of Jenkins L. J. in *Midland Bank Executor & Trustee Co. v.*

Inland Revenue Commissioners. There he was dealing with the case of a derivative settlement, and he pointed out that if a life tenant assigns his life interest to another then on the death of that other all that passes is the life interest and not the funds subject to the head settlement. I respectfully agree, but it does not support the argument that a sub-settlement cannot affect the Crown's claim to duty u/s 2 (1) (d).

In return to the problem : what beneficial interest arose on the death of Peter's father ? When considering this question, one must necessarily take individual beneficial interests before and after the death and compare them and see if any beneficial interest arises. As to Peter then. Before the death Peter knows that he will have a full life interest in the funds regardless of the death of his father : he will remain entitled to the income of the funds for the rest of his life; no beneficial interest arises so far as Peter is concerned. As to the other persons entitled under the settlements of 1952 and 1957. On the settlor's death in Peter's lifetime the contingent interest of the class who took under the settlement of 1952 ceased : call them class A. The contingent interest of the class who take under the settlement of 1957 became vested : call them class B. If therefore class A and class B are different, I can see no answer to a claim for duty u/s 2 (1) (d), for it is a plain *Parker v. Lord Advocate* case. But suppose class A and class B are the same; no interest arises on the death of the settlor. It is though in the example I gave earlier, B and C are the same person. In fact it matters not whether Peter or the settlor die first. From the moment of the execution of the deed of 1957 the class knows that in any events it will take an absolute interest subject only to Peter's life interest. The question is therefore whether class A and class B can be regarded as the same. They are identical except for the exclusion under the terms of the settlement of 1957 of those whose interest might not vest within the period allowed by the rule against remoteness. That this exclusion will have any operation in fact seems to me extremely unlikely. While estate duty problems are frequently decided on the most technical consideration. I do not think it can properly be said that on the settlor's death any beneficial interest arises by virtue of the interest of class B becoming invested and class A being divested. The most that can be said is that it is conceivably possible that the interest of individual members of class B might be fractionally larger than that of class A by the conceivable exclusion of one or more members of class A from class B. It is a question of degree in each case, but in this case I would regard the difference as *de minimis*. The contrary was not seriously pressed on us.

Accordingly, for the relevant purpose I regard class A and class B as the same and would hold, therefore, that no interest arises u/s 2 (1) (d).

In the alternative, Mr. Bathurst relied on the power of revocation under the settlement of 1957 and said that really the interest that arose in class B was nil as it was revocable. In fact the power of revocation was only with the consent of trustees and there is no assurance that such consent would have been forthcoming, and I reject that argument. A power of revocation only with the

consent of trustees has never been regarded as the equivalent of a power of revocation without such consent. This argument on the part of the subject seems to me dangerous from his point of view, for if Peter had an unfettered power of revocation, it might well be argued that having regard to section 22 (2) (a) of the Finance Act, 1894 on the settlors death Peter became absolutely and indivisibly competent to dispose of the property but I say no more about for we really heard no argument on this aspect of the case from the Crown, which made no claim that footing.

I would dismiss this appeal.

DIPLOCK L. J. This being a case about estate duty it was my original intention to limit my judgment to saying "I agree." But in the context of what will shortly be said by the Master of the Rolls a judgment in those terms, like the words of the Finance Act, 1894 with which we are concerned would be capable of more than one construction. Fortunately, at the conclusion of the argument I was sufficiently puzzled to write down that same evening, without citation of authorities, the logical steps leading to the decision of this appeal at which I had tentatively arrived. When I came to set then down in black and white I was surprised to find that they did not lead me where I thought they would, but to the opposite conclusion. I will seek to explain why.

Section 2 (1) (d) of the Finance Act, 1894 provides that property passing on the death of the deceased - and thus attracting estate duty u/s 1 - shall be deemed to include "any annuity or other interest purchased or provided by the deceased... to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." By the settlement of February 6, 1952 (which I will call "the original settlement"). Mr. Henry Morgan (whom I will call "the deceased") settled certain shares, which it is conceded were "an interest provided by the deceased" upon trusts of which Mr. Peter Morgan (whom I will call "Peter") was one of the beneficiaries. The question in this case is whether the revocable settlement (which I will call "the sub-settlement") made on May 1, 1957, by Peter of his interest under the original settlement prevented "any beneficial interest" - in the shares - "accruing or arising by survivorship or otherwise on the death of the deceased" on June 15, 1959.

Under the original settlement : (A) Peter was entitled (1) to an interest in possession in the income of the shares during the joint lives of himself and the deceased and (2) contingently upon his surviving the deceased, to an absolute interest in expectancy in the shares themselves and (B) a specified class of persons (whom I will call "the class") were entitled contingently upon the deceased surviving Peter, to an absolute interest in expectancy in the shares themselves upon the death of Peter. In the event which occurred, namely, Peter surviving the deceased the trusts of the original settlement in favour of the class failed and no beneficial interest accrued or arose in favour of them under the original settlement upon the death of the deceased. In the absence of the sub-

settlement Peters previous absolute interest in expectancy in the shares themselves or the death of the deceased would have become an absolute interest in possession in the shares themselves. It is conceded that this would have been a beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased and would by virtue of section 28 of the Finance Act, 1934, have attracted estate duty on the full value of the shares since that section provides that the extent of the beneficial interest accruing or arising shall be ascertained without regard to any interest in expectancy the beneficiary may have had therein before the death.

By the sub-settlement, however, Peter had resettled the whole of his interest under the original settlements. The trustees of the sub-settlement were the same as the trustees of the original settlement, but I do not think this makes any difference. His interest in possession in the income of the shares during the joint lives of himself and the deceased the settled upon himself. This can be ignored. Although an additional trust was interposed, his ultimate beneficial interest in the income of the shares during the joint lives remained the same. His absolute interest in expectancy in the shares themselves contingent upon his surviving the deceased he resettled so as to grant to himself a life interest therein after the death of the deceased and to grant to the class an absolute interest in the shares expectant upon his own death. I will assume for the purpose of testing the matter that the class consisted of ascertainable persons and was identical in the original settlement and the sub-settlement although technically this is not the case. I will also ignore at this stage of the argument the fact the sub-settlement was revocable by Peter with the consent of the trustees.

Does this splitting of Peters absolute interest in expectancy in the shares themselves, contingent upon his surviving the deceased, into two elements, a life interest in income therefrom and an absolute interest in the shares expectant upon the termination of that life interest, affect the liability to estate duty which would otherwise have arisen upon the death of the deceased u/s 2 (1) (d) ?

It is contended by the Crown, in my view correctly that the section is not concerned with who is entitled to the beneficial interest : it is merely concerned with whether a beneficial interest accrues or arises on the death of the deceased to which someone is entitled; it matters not to whom. The beneficial interest must, it is true, be in "the annuity or other interest provided by the deceased" but this requirement is satisfied in the present case for the ultimate beneficial interests under the sub-settlement are beneficial interests in the shares which were provided by the deceased.

The matter, I think, may be tested by seeing what beneficial interests Peter and the class had in the shares before and after the death of the deceased. I have already set out what their respective interests in the shares were under the original settlement before the death of the deceased. As a result of the sub-settlement those original interest before the death of the deceased were varied so that (A) Peter was entitled to (1) an interest in possession in the income of

the shares during the joint lives of himself and the deceased; (2) contingently upon his surviving the deceased to a life interest in expectancy on the death of the deceased in the income of the shares. In effect, therefore, he had a life interest in possession in the income of the shares. (B) The class were entitled to : (1) an absolute interest in expectancy in the shares themselves on the death of Peter contingently upon the deceased surviving Peter (2) an absolute interest in expectancy in the shares themselves upon the death of Peter contingently upon Peter surviving the deceased. The effect of the sub-settlement was thus to eliminate the contingency to which the class absolute interest in expectancy under the original settlement was subject and to give them an absolute interest in expectancy in the shares themselves on the death of Peter.

It follows that (A) so far as Peter is concerned, upon the death of the deceased his beneficial interest in possession in the income of the shares continued to exist. It is true that the title by which he held it was a different title; that the trustees in whom the legal title to the shares was vested were trustees under a different trust. But it seems to me that section 2 (1) (d) requires one to look to the nature of the beneficial interest enjoyed by the person entitled to it, not to the title under which he enjoys it; and in Peters case the nature of his beneficial interest did not change upon the death of the deceased. In my view, therefore, his life interest in the shares would not attract estate duty. (B) So far as the class is concerned (assuming the class to be the same under the original settlement and the sub-settlement, and ignoring the fact that the sub-settlement is revocable) their beneficial interest in the shares too was unaffected by the death of the deceased. In my view nothing happened to their interest to attract estate duty.

Does the fact that the sub-settlement is revocable with the consent of the trustees affect the matter ? So far as the class is concerned, I do not think it does. The chance that their beneficial interest in expectancy in the shares upon the death of Peter may be defeated before it comes into possession cannot be the fact that no beneficial interest in expectancy in the shares accrued or arose upon the death of the deceased. The fact that the sub-settlement is revocable has the result that Peters life interest in the income of the shares is capable of enlargement into an absolute interest in possession in the shares themselves in the future with the trustees consent. But this enlarged beneficial interest will arise (if at all) when the sub-settlement is revoked. The possibility that some subsequent event may enlarge Peters beneficial interest does not in my view itself constitute a beneficial interest accruing or arising on the death of the deceased. After all, since the Variation of Trusts Act, 1958, every trust has been capable of being revoked or varied by the court. I do not think, therefore, that the fact that the sub-settlement is revocable in certain events affects the liability to estate duty.

There remains to be considered what, if any, difference results from the fact that the class under the sub-settlement is defined slightly differently from the class

under original settlement. So far I have treated the class as if it consisted of persons whose identity was ascertainable at the date of the original settlement. In fact it did not, for under both the original settlement and the sub-settlement it included persons to be appointed by Peter by his will. But, I have already pointed out, section 2 (1) (d) of the Finance Act, 1894, is not concerned with the persons to whom a beneficial interest accrues; it is only concerned with whether a beneficial interest accrues to which someone is entitled. I do not think that it makes any difference that the beneficial interest in the shares expectant upon Peters death is vested in unascertained persons or that the definition of those persons differs in the original settlement and the sub-settlement.

In the ultimate analysis it seems to me that this case turns upon what is meant by "beneficial interest" in section 2 (1) (D) of the Finance Act, 1894. This is the problem which caused my mind to waver during the hearing of the able arguments of counsel and has resulted in the difference of opinion among the members of this court. But it is in my view erroneous to equate "beneficial interest" with "equitable interest." It is an interest whether legal or equitable to which a person is entitled in his own right and not merely as trustee for another an interest of which he is entitled to the beneficial enjoyment. Peters interest in the shares under the original settlement which he resettled under the sub-settlement, were of course, equitable interests; the legal title to the shares was vested in the trustees. He transferred the beneficial interests in those equitable interests to the trustees; those he resettled on the cestui que trust under the sub-settlement, of which he himself was one, splitting them up in the manner I have already discussed. Fresh beneficial interests then accrued or arose but they so on the execution of the sub-settlement not on the death of the deceased. On the death of the deceased there accrued or arose in the trustees of the sub-settlement (I ignore the fact that they were same persons as the trustees of the original settlement) a legal interest in the shares in place of an equitable interest in expectancy therein contingent upon Peter surviving the deceased but neither before nor after the death of the deceased had they any beneficial interest in the shares and it is only with beneficial interests that section 2(1) (d) of the Finance Act, 1894, is concerned.

That Peter by the exercise of conveyancing ingenuity has been able to avoid the payment of estate duty on his fathers estate which would otherwise have been exigible does not shock me. Estate duty was a subject with which I was happily unfamiliar before I sat in this court. But I have since learnt enough about it to satisfy me that to assume an ethical basis for its incidence is no reliable guide to the construction of the Finance Act, 1894.

I, too, would dismiss this appeal.

LORD DENNING M. R. I confess I have found this a difficult case. One thing is clear and it is that, by reason of the settlement of 1952 Peter had these two beneficial interests in the fund; (1) so long as he and his father were both alive, he had the income of the fund; (2) if his father died before him, he took the

capital of the fund. If that settlement has remained unchanged the result would be that the capital would pass to Peter on his fathers death : and estate duty would have been payable on it. The case would have come precisely within section 2 (1) (d) because the beneficial interest in the capital would have accrued by survivorship to Peter on his fathers death (see *Parker v. Lord Advocate*).

Now what is the effect of the settlement of 1957 ? It seems to me that Peter simply assigned his two beneficial interests - his interest in the income and his contingent interest in the capital - he assigned them to trustees. If he has assigned those interests to anyone other than trustees - for instance if he had raised money on them and assigned them to a purchaser or a mortgagee - I should have thought that on the fathers death estate duty would have been payable just the same as if he had not disposed of them at all. The beneficial interest in the capital would have accrued by survivorship or otherwise on the fathers death just as it did before. The only difference would be that it would have accrued, not to Peter but to this assignee. If this be so, can it make any difference that Peter assigned his interests to trustees on terms that they were to hold them on trust for himself for life ? I see no difference. In each case the beneficial interest in the capital passes, but it passes into the hands of the trustees instead of into the hands of Peter or his assignee. True the trustee will hold the capital interest (when they get it) on trust for Peter for life : but it has passed to them nevertheless.

I go further. I do not think that Peter in 1957 did dispose of his contingent capital interest. At any rate he did not dispose of it so as to destroy it absolutely. The reason is because the settlement of 1957 was revocable. Peter would revoke it at any time with the consent of his co-trustee. Suppose that he revoked it the day after his fathers death. He could then have become entitled to the capital interest in the fund, just as if the settlement of 1957 had never been executed. What does this come to ? It means that, in order to avoid estate duty, the lawyer turns magician. He advises his client to execute a revocable settlement and in an instant before our very eyes, the contingent capital interest is gone. No one can see it. It is replaced by a continuous life interest. No estate duty is payable. And then, whilst we sit admiring the performances, wondering what is coming next, he can, when he pleases, bring back the capital interest. He advises his client to revoke the settlement, with of course the consent of his co-trustees and at once the capital interest is there intact. It makes me rub my eyes. I cannot believe it is true. Those near me acclaim the feat. But I do not I have a feeling that the contingent capital interest remained there all the time cloaked by a revocable sub-settlement. Pull the covering aside and you will see it as it really is, a contingent capital interest which became absolute on the fathers death; and on which, therefore, estate duty is payable. I would, therefore allow this appeal.

Appeal dismissed with costs.

Leave to appeal to the House of Lords on condition that if the appellants succeed they will not seek to disturb the orders for costs in this court and the court below.

Solicitors : Solicitor of Inland Revenue : Peacock & Goddard for Russell & Co.,
Malvern.