

(1961) 02 CAL CK 0015

In the Calcutta High Court

Case No : Income-tax Reference No. 49 of 1956

P.J.P. THOMAS

APPELLANT

Vs

COMMISSIONER OF Income Tax, CALCUTTA.

RESPONDENT

Date of Decision : 28-02-1961

Acts Referred:

Income Tax Act, 1961 — Section 16(3)(b), 34, 66(1)

Citation : (1962) 44 ITR 897

Hon'ble Judges : Tendolkar, J;P.B. Mukharji, J

Bench : Full Bench

Judgement

P.B. MUKHARJI J. - This Income Tax reference u/s 66(1) of the Income Tax Act raises the two following questions of law for our decision :

"In the facts and circumstances of these cases, whether the dividends paid by J. Thomas and Co. Ltd. to Mrs. Judith Thomas, grossed up to the sums of Rs. 97,091, Rs. 78,272, Rs. 1,00,000 and Rs. 16,385 respectively for the four years in question could be included in the income of Mr. P.J.P. Thomas and be taxed in his hands under the provisions of section 16(3)(a)(iii) of the Indian Income Tax Act ?

In the facts and circumstances of these cases, whether the dividends referred to above could be included in the total income of Mr. P.J.P. Thomas under the provisions of section 16(1)(c) of the Indian Income Tax Act ?"

The Tribunal held that the transfer of shares in question in this case was hit by section 16(3)(a)(iii) of the Income Tax Act and also held that such transfer could be construed to be a revocable one within the meaning of section 16(1)(c) of the Act.

The facts giving rise to these questions of law may be briefly stated. The assessee is P.J.P. Thomas who held 750 "A" shares in J. Thomas and Co. Ltd., Calcutta. He entered into an engagement to marry one Mrs. Judith Knight. The engagement was announce on the 3rd September, 1947. The assessee and Mrs.

Judith Knight on the 10th December, 1947 presented to the company an application to transfer the said shares to Mrs. Judith Knight. The company transferred those shares to Mrs. Knight and registered the same in the name of Mrs. Knight on its books on the 15th December, 1947. Marriage took place between the assessee and Mrs. Judith Knight, within three days after the registration, in the 18th December, 1947. The fact of the marriage was communicated to the company on the 26th January, 1948, and the name of Mrs. Judith Knight was rectified as Mrs. Judith Thomas in the books of the company.

It is undisputed that during the relevant period the shares stood registered in the name of the assessee's wife and the income in question arose to her as the wife of the assessee. The four accounting years with which the assessments are concerned are those ending respectively on the 30th April, 1948, 30th April, 1949, 30th April, 1950, and 30th April, 1951, and the four assessment years were 1949-1950, 1950-51, 1951-52, and 1952-53.

It will be appropriate at this stage to set out the relevant portion of the transfer deed in respect of the above shares whose interpretation will be relevant to answer the questions stated. The relevant portion of the transfer deed runs as follows :

"I, Philip John Plasket Thomas, of 8, Mission Row, Calcutta, in consideration of my forthcoming marriage with Judith Knight of 35, Ridgeway, Kingsbury, London (hereinafter called the said transferee) do hereby transfer the 750 "A" shares numbered 1-750 standing in my name in the books of J. Thomas and Co. Ltd. to hold to the said transferee, executors, administrators, and assigns, subject to the several conditions on which I hold the same at the time of the execution thereof. And I the said transferee do hereby agree to take the said shares subject to the same conditions."

The main argument on behalf of the assessee on section 16(3)(a)(iii) of the Income Tax Act is that it does not apply because Mrs. Judith Knight was not the wife of Mr. Thomas when he transferred the shares to her. In other words, it is contended on behalf of the assessee that in order to apply and attract section 16(3)(a)(iii) of the Act, it must be a transfer to the wife as such by the husband as such at the date of the transfer.

This leads to the consideration first of section 16(3)(a)(iii) and of the exact terms of the deed of transfer. Before setting out the provision of the statute which falls for consideration it may be useful to emphasise and consider the relevant terms of the transfer deed. The important provision in the transfer deed is the mention of the consideration as "in consideration of my forthcoming marriage with Judith Knight." Apparently, at that date Mrs. Judith Knight was either a widow or divorcee - we are told in fact, that she was a divorcee -and had not yet married Mr. Thomas but the fact remains that at the date of the deed of transfer, the transfer was taking place in consideration of the "forthcoming marriage" between Judith Knight and Thomas. The effect of this document is that if the consideration

failed, that is, the forthcoming marriage did not take place, then Thomas would be in a position to recall the shares from Mrs. Judith Knight and all or such dividends as she might have withdrawn between the date of the deed and the failure of consideration of the marriage.

Now comes section 16(3)(a)(iii) of the Income Tax Act. Section 16 deals with "exemptions and exclusions in determining the total income." Sub-section (3) of section 16 was added to the statute book by section 2 of the Indian Income Tax (Amendment) Act, 1937 (IV of 1937). It reads as follows :

"16. (3) In computing the total income of any individual for the purpose of assessment, there shall be included -

(a) So much of the income of a wife or minor child... as arises directly or indirectly - ...

(iii) From assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart;...."

This is the relevant portion of section 16(3)(a)(iii) with which we are concerned. On an examination of the language of this section, it is clear (1) that it relates to the computation of the total income of any individual for the purpose of assessment and (2) that the income of a wife of such individual, which arises directly or indirectly from the assets transferred directly or indirectly to the wife by the husband, with the exception of transfers for adequate consideration or in connection with an agreement to live apart, is added back to the husband's income. In other words, for the purposes of Income Tax the income of the wife in such a case becomes the income of the husband and taxable as the husband's income in the husband's hands, although the income apparently arises to the wife. It is not necessary for the purposes of this reference to go into the history of this legislation in section 16(3) which has been sufficiently indicated by the Supreme Court in the decision of *The Commissioner of Income Tax, Madhya Pradesh and Bhopal Vs. Sodra Devi*, . The section makes, on a plain reading and interpretation of it, the following points clear, namely :

"(1) that there must be a transfer by a husband to a wife;

(2) that the income accruing to the wife must be from assets transferred directly or indirectly to the wife by the husband;

(3) that the transfer should be without adequate consideration and not in connection with an agreement to live apart; and

(4) that such income to the wife must also arise directly or indirectly from the transfer of such assets."

In order to determine whether in a particular case section 26(3)(a)(iii) of the Act applies or not, the relevant point of time must be, on the section itself, the time of computation of the total income of the individual for the purpose of

assessment. Now, at the time of the computation of the total income of the husband in this case they had already married and the assessee and Mrs. Judith Knight had become husband and wife. The section does not limit any particular time as to when the transfer of assets in section 16(3)(a)(iii) of the Act should take place. The word "transferred" in that section leaves it unqualified as to the time of the transfer. The qualifications of the word "transferred" that appear expressly on the statute are "directly or indirectly" and "to the wife by the husband". It appears to me that as the addition of the wife's income to the husband's income under this sub-section is made, the relevant time of the relationship between husband and wife which has to be considered by the taxing authorities is the time of computing of the total income of the individual for the purpose of assessment. That is how I read the opening words of section 16(3) of the Act : In computing the total income of any individual for the purpose of assessment."

The argument, therefore, of the assessee that because Mrs. Judith Knight was not the wife of the assessee at the time of the deed of transfer, hence section 16(3)(a)(iii) of the Act could never apply to the assessee is, in my view, wrong, first, because the crucial date to determine the relationship between the husband and wife is the date when the taxing authorities are computing the total income of the husband in which time they had become husband and wife in this case and secondly, because the nature of the document in this case is such that the transfer or the disposition or the settlement of these shares can only be construed as a transfer to a person as wife and in no other capacity. The whole object and purport and purpose of this transfer of shares was by a husband to a wife. Interesting arguments were advanced to us whether the words "husband" or "wife" in section 16(3)(a)(iii) of the Act could mean prospective husbands and prospective wives. It was the assessee's contention that the word "husband" or the word "wife" did not include prospective husband or prospective wife. They mean a legal husband and a legal wife. I am inclined to agree with that proposition that the words "husband" and "wife" must mean in this section legal husband and legal wife. For this purpose the learned counsel for the assessee relied on the decision of the Kerala High Court in *The executors of the will of T.V. Krishna Iyer Vs. Commissioner of Income Tax*, where the question arose whether a concubine could come within the meaning of section 16(3)(a)(iii) and it was held that she could not and the word "wife" meant in this section a legally wedded wife. We agree with this observation. This argument, however, is based on the confusion regarding the nature of the deed in this particular case and the time when it fell to be construed by the taxing authorities, which was after the marriage had taken place.

The next important point for consideration u/s 16(3)(a)(iii) of the Act is the question of "adequate consideration". On behalf of the assessee reliance has been placed on a number of decisions which may be briefly reviewed. The first is the well known decision of the Patna full bench in *RAI BAHADUR H. P. BANERJEE Vs. COMMISSIONER OF Income Tax, BHARATPUR and ORISSA*, . That case held that

all transfers by a husband to his wife of assets otherwise than for adequate consideration covered all transfers in the nature of gifts or transfers made purely on the ground of natural love and affection. The point of the decision was based on the word "consideration" being construed by the full bench of the Patna High Court as "valuable consideration" and not merely "good consideration" such as natural love and affection. Many reasons were put forward by the Patna full bench why the word "consideration" should be so construed. One was the definition of the word "consideration" in the Contract Act. The other one was the use of the words "natural love and affection" in section 25 of the Contract Act and the particular context of section 25 of the Contract Act. The third was that even if it could be assumed that natural love and affection amounted to consideration within the meaning of section 16(3)(a)(iii) of the Income Tax Act, it could not come under the words "adequate consideration" within the meaning of that section. These reasons will be found in the judgment of the full bench delivered by Harries C.J. at pages 147 to 149 and in the observations of Manoharlal J. at pages 151 to 154 of the Patna report which I have already quoted.

The next case is one of the Lahore High Court, (1943) 11 ITR 448 , where the Lahore High Court took the same view of interpretation of the expression "adequate consideration" in section 16(3)(a)(iii) at pages 452-53 of the report.

The next case is *Tulsidas Kilachand Vs. Commissioner of Income Tax, Bombay City*, . where the Bombay High Court took the same view that the words "adequate consideration" in section 16(3)(b) did not include within their scope natural love and affection.

Prima facie all these cases are against the assessee. But what is contended on behalf of the assessee is that these cases are distinguished on the ground that they all related to cases of husbands and wives and not one of them related to a case of a prospective husband and a prospective wife, as in the instant case before us. Therefore it was contended on behalf of the assessee that while natural love and affection might not be included in the words "adequate consideration" u/s 16(3)(a)(iii), marriage itself could be an adequate consideration and a valuable consideration. In other words, the essence of the assessee's point of contention is that before marriage a prospective wife can stipulate for monetary consideration as valuable consideration for her agreeing to marry. There is nothing wrong in a woman, specially in the case of a widow or a divorcee, stranded once, to make sure that before she entered marriage again she would like to secure herself financially. In that case it is contended with considerable force on behalf of the assessee that marriage will provide valuable consideration and cannot be dismissed as mere natural love and affection after marriage not amounting to valuable but only good consideration.

There is considerable force in this argument. As has been put in Simonds edition of Halsburys Laws of England, Volume 34, Article 791, an offer to make a settlement in the event of a marriage taking place may, by a marriage following

on the offer, become a contract binding on all the parties concerned. Upon that, the House of Lords decisions in *Hammersley v. Baron De Biel* [(1845) 12 Cl : Fin. 45 (H.L.)]. : *Maunsell v. While* [(1845) 4 H.L.C. 1039.] are cited. At page 447 in the same volume of Halsbury, as proposition 4, it is laid down, "it will be proved that the marriage took place on the faith of the offer." Upon this, many authorities are cited. It is also said that the court may infer that marriage took place on the faith of the offer from the fact of its taking place immediately after the offer. The authorities in *Luders v. Anstey* [(1799) 4 Ves. 501.], *Alt v. Alt* [(1862) 4 Giff 84.] and *Viret v. Viret* [(1880) 50 L.J.Ch. 69.] and *Estcourt v. Estcourt* [(1816) 1 Cocks Eq. Cas. 20.] establish the point that the court would be justified in inferring that marriage took place on the faith of the offer if the marriage followed soon after the offer.

In this case I have little hesitation to hold that the marriage did take place soon after the offer. In fact, as will appear from the dates already discussed the marriage followed within three days of registration. In fact, from the dates it is irresistible inference that Mrs. Judith Knight did not wish to get on to the marriage register until she first got on to the companys register of shareholders. It will, therefore, be the most proper inference to hold in this case that marriage was a part of the financial and valuable consideration for which the transfer of these shares was made to the prospective wife. From that point of view, the facts in this case may answer the question of valuable consideration and the decisions quoted above are not an obstacle in the way of the assessee. But the assessees difficulties arise when the adequacy of that consideration is considered. Even if marriage can be a valuable consideration for a transfer of assets, even then in order to avoid the addition, the husband has to show that the consideration was adequate. Now, in this case apart from the facts, the question would arise; can marriage, even considered as a valuable consideration which will support transfer of assets, ever be judged on that basis ? it is unquestioned that section 16(3)(a) (iii) of the Act exempts the husband from the wifes income if it arises from transfer of assets made by the husband to the wife on adequate consideration. Could marriage by itself be ever an adequate consideration ? The word, "adequate" in this context appears to exclude marriage itself as a valuable consideration because there can be no objective measure for assessing adequacy of marriage as a valuable consideration. It is quite true that a woman may not marry a man unless the man secures her financially before marriage and in such an event the financial and monetary consideration is enough consideration to support a contract but that does not solve the difficulty in the interpretation of section 16(3)(a)(iii) of the Act because the adequacy of such consideration is put down as a test. What will induce a woman to feel financially secure before she marries a man cannot be a justiciable concept by either the Income Tax authorities or the Income Tax Tribunal or even by this court. It is also difficult to dissociate from such monetary consideration how much of it is affected by the question of natural love and affection which are excluded from its consideration. The price that a spouse might put on her marriage may be a matter of her own

assessment but it can never provide a dependable test for courts, tribunals or taxing authorities for interpreting the adequacy of the consideration involved. For instance, in this case, the grossed up incomes and the dividends include such enormous figures as Rs. 1,00,000 for one year. How is any Income Tax authority or Income Tax Tribunal or any court going to judge and by what test whether that sum of Rs. 1,00,000 is adequate or not for a prospective wife to stipulate as a condition of her marriage with her prospective husband as giving enough financial security to her when obviously and prima facie during coverture and life as husband and wife the husband must be bearing the normal expenses for maintenance and upkeep of the wife. Therefore, as an ante-nuptial arrangement of this nature where marriage is put forward as valuable and financial consideration itself, it is not possible to determine the adequacy of such consideration and hence in the context of the expression "adequate consideration" in section 16(3)(a)(iii) of the Income Tax Act, it is not possible to include marriage within the expression "adequate consideration".

I am not unmindful of the situation that section 16(3)(a)(iii) of the Act provides as between husband and wife as such, a case of transfer for adequate consideration which will be excluded from the operation of this sub-section. But a transfer as between husband and wife as such for adequate consideration can certainly be objectively measured because there marriage itself is not the consideration but the consideration will be measured by the market standards of the assets, and price at the date of transfer and there is no difficulty in evaluating such a consideration. It may be an unusual instance for which this sub-section provides because such a case of transfer between husband and wife for adequate consideration may not be frequent and will perhaps be few and far between for the simple reason that as between husband and wife during coverture certain transfers are not made as between ordinary contracting parties, but even then when they do take place, the taxing authorities or the Income Tax Tribunal or the courts will always have enough materials to judge of the adequacy of such a consideration. But this argument is not available where marriage itself is put forward as a consideration; for then marriage is an immeasurable consideration even though a valuable one and being immeasurable its adequacy cannot be justiciable by objective tests. Hence taking a proper view and interpretation of the expression "adequate consideration", I am of the opinion that in the context of section 16(3)(a)(iii) of the Act, marriage as consideration is excluded from the expression "adequate consideration".

I am also of the view that the transfers contemplated u/s 16(3)(a)(iii) of the Act are essentially transfers post-nuptial. The cases ordinarily contemplated under this sub-section are post nuptial agreements as between husband and wife. But then in this case although the deed of transfer was ante-nuptial, the nature of the transfer in its essential feature, object and purpose is, as I have held, post-nuptial and the transfer is to the wife as wife and in that capacity and end in view throughout.

In that view of the matter, the case of *Narayana & Sons v. Commissioner of Income Tax* [A.I.R. 1955 T.C. 30.] has no application to the facts of this case. That case was of a Hindu undivided family and the court was not dealing with the case of a transfer by a husband to his wife but of a transfer of assets by a Hindu joint family and, therefore, the fact that one of the transferees was the wife of the karta of the joint family and the other of another member of the coparcenary did not affect the question. In that context, it was said by the court there that so long as the transaction was supported by consideration, any inadequacy in the quantum of that consideration would not avail the department and that such a transaction was neither bogus nor benami. The case, therefore, is neither relevant nor is an authority on the point before us. On behalf of the assessee, the learned counsel referred to the case of the Kerala High Court in *MAKKAR PILLAI Vs. COMMISSIONER OF Income Tax, BANGALORE.*, where the learned counsels own commentaries on his fourth edition, volume 2, page 631, of the Income Tax Act was approved as saying that section 16(3) was not intended to prevent evasion of tax but on the contrary it was intended to widen the area of taxable income by including in that category certain forms of income. In fact, this argument is really against the assessee in this case before us because the argument is based on the fact that the husband or the parent is bound to maintain his wife or child and any settlement or disposition that he makes upon them would be to provide maintenance for them which in any case he was bound to do. The transfer of assets was at best only an arrangement for providing maintenance to these dependent relations. Therefore, if expenditure was incurred directly by the assessee for such purpose out of his income, he could not claim any allowance. If this reasoning be applied, then in this case the assessee does not succeed.

The decision in *Cohen v. Sellar* lays down the proposition that if a man who had promised to marry a woman and had given to her an engagement ring in contemplation of marriage and then refused without legal justification to carry out his promise, he could not demand the return of the engagement ring but if a woman who had received an engagement ring in contemplation of marriage refused to fulfill the conditions of the gift and to carry out her promise, she must return the ring. This, if anything, bears on the nature of the contract and the condition of the gift. The principle is clear that where, as in the case before us, the whole transfer is said to be for the consideration of the forthcoming marriage then if the marriage did not take place, the consideration would have failed and there would be no doubt that the assets and dividends would be returnable to the party who transferred them provided the failure of the marriage was not due to his fault. The same principle is discernible from the other English decision in *Synge v. Synge* (1894) 1 Q.B.D. 466, which lays down that where a proposal in writing to leave property by will, made to induce a marriage, was accepted and the marriage took place on the faith of it, then if the proposal related to a defined piece of real property, the court had power to decree a conveyance of that property after the death of the person making the proposal against all who

claimed under him as volunteers. Similarly, the case cited before us by the assessee of *Nanjundaswami Chetty v. Kanagaraju Chetty* ILR (1919)Mad. 154.], lays down the proposition that a settlement of a portion of joint family property by a Hindu in favour of his foster-daughter in pursuance of a promise made by him in consideration of her marriage with another who offered to marry her on such a condition, was not a gift but was valid and binding on the alienors son to the extent of the alienors share as an alienation for consideration. This bears only on the question as indicated by Abdur Rahim J. at page 159 of that report where the learned judge said :

"If a person contracts a marriage in consideration of a promise, then it seems to us that the marriage is valuable consideration within the meaning of this definition (under the Contract Act)."

I have already said that marriage itself could be a valuable consideration for transfer but then the context of "adequate" consideration in section 16(3)(a)(iii) excludes such valuable consideration from the ambit of operation of this sub-section.

It is unnecessary, in my view, to discuss any further the intricacies of matrimonial alliance and transfer inter se between husband and wife u/s 16(3)(a)(iii) of the Income Tax Act. The hazards of a married life are many and the Income Tax Act seems to have added more to the list some of which raise strange and baffling propositions such as considered by the court whether (1) can there be a wife of a joint family under the Income Tax Act. (see the case reported in *Narayana & Sons v. Commissioner of Income Tax* [A.I.R. 1955 T.C. 30.]); (2) are the attributes of a wife enough to make a woman a wife such as a concubine or a fiancée as in *T.V. Krishna Iyer Vs. Commissioner of Income Tax*, the woman is not an individual (see *The Commissioner of Income Tax, Madhya Pradesh and Bhopal Vs. Sodra Devi*, . and (4) looking at the list of reliefs of the harassed husband, the Income Tax relief value of a wife comes to only about Rs. 10 or Rs. 12 a month on an analysis of the great advantages of taxation which a married man is supposed to enjoy over his unmarried fellowman in India. It shall rest content in this reference by holding the very old traditional orthodox and unfashionable view that a wife u/s 16(3)(a)(iii) means a legally wedded wife and no one else, although the customs of such legal wedding may liberally vary as being sanctified either in the church or on the marriage register before some ancient fire.

For the reasons, I answer the first question in the affirmative and hold that the dividends mentioned therein can be included in the income of Mr. Thomas and taxed in his hands u/s 16(3)(a)(iii) of the Indian Income Tax Act.

The next question relates to the application and interpretation of section 16(1)(c) of the Income Tax Act. Section 16(1) was introduced by section 18 of the Income Tax (Amendment) Act, 1939 (VII of 1939). The relevant portion with which we are concerned reads as follows :

"In computing the total income of an assessee... all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the India Income Tax (Amendment) Act, 1939, (VII of 1939), from assets remaining the property of the settlor or disponent shall be deemed to be income of the settlor or disponent, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor;

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settlor, disponent or transferor, or in any way gives the settlor, disponent or transferor a right to re-assume power directly or indirectly over the income or assets."

In order to complete the picture of this section, I shall also quote the two other provisos appearing in section 16(1)(c) as some argument has been advanced with reference to them :

"Provided further that the expression settlement or disposition shall for the purposes of this clause include any disposition, trust, covenant, agreement or arrangement, and the expression settlor or disponent in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made :

Provided further that this clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the settlor or disponent derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises."

It has been contended on behalf of the assessee that section 16(1)(c) has no application to the facts of the present case and the Tribunal was wrong in holding the transfer in this case as a revocable transfer within the meaning of section 16(1)(c). Section 16(1)(c), unlike section 16(3)(a)(iii), does not expressly refer to husband and wife or parent. It deals with settlement or disposition. It expressly says that such disposition may be revocable or not revocable. But the governing words of section 16(1)(c) are "from assets remaining the property of the settlor or disponent". In other words, although there is a settlement or disposition and although it may be revocable or not revocable, the acid test is that the assets remain the property of the settlor or disponent notwithstanding such settlement or disposition. Therefore it is said that income arising to a person by such settlement or disposition shall be deemed to be the income of the settlor or disponent. Now, this particular part of section 16(1)(c) has no application because here the assets, namely, the 750 shares did not remain the property of Mr. Thomas. The next part of section 16(1)(c) is concerned with a revocable transfer. It is there that the issue is joined. The second part of section

16(1)(c) of the Act uses the words "all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be the income of the transferor." The governing words or the governing tests is "revocable transfer." When there is a revocable transfer of assets then income arising to a person by such transfer shall be deemed to be the income of the transferor. In other words two apparent things are made to conform to the real nature of the transaction under this sub-section. The first apparent thing of a transfer while the assets remain the property of the settlor is, therefore, deemed to be income of the settlor and the second apparent thing of a revocable transfer makes the income derived thereunder still deemed to be the income of the transferor. It is contended on behalf of the department that this was a revocable transfer because if there was failure of marriage, the assets and the dividends thereon could be claimed back by the transferor. To that the answer of the assessee is that u/s 16(1)(c) of the Act and specially by its first proviso as quoted above, the transfer itself must contain a provision for re-transfer or the transfer itself must give the settlor a right to reassume power as provided in the first proviso. It is, therefore, argued on behalf of the assessee that the present transfer deed does neither contain such a provision nor give such a right. A number of authorities and decisions have been cited on this point both on behalf of the assessee as well as on behalf of the department. The assessee relied first on the case of TARUNENDRA NATH TAGORE AND OTHERS Vs. COMMISSIONER OF Income Tax, WEST BENGAL., . and particularly on the observations of Chakravartti C.J. at pages 503 and 504 of that report. In this case, however, there was actual provision in the deed itself relating to retransfer as the finding is at page 504 :

"It speaks merely of a provision. In my view, a provision exists in the present case for a retransfer of the assets and it is a direct provision, made in two forms. The transfer, therefore, was a revocable transfer as the Tribunal rightly held."

The next case on which the assessee relies is the decision of the Bombay High Court in RAMJI KESHAVJI Vs. COMMISSIONER OF Income Tax, BOMBAY., . This was a decision of Kania and Chagla JJ. This was a case of transfer between husband and wife and it was held there that the income during the transferees lifetime would not be deemed to be the assessee's income by virtue of the third proviso to section 16(1)(c). Kania J. was of the view that a contingent claim provided for in clause 4 of the deed of transfer in that case which stated that in the event of the assessee surviving his wife, the income should be paid to him, was not covered by the first proviso of section 16(1)(c) of the Income Tax Act. On the other hand, Chagla J. was of the view that the words of section 16(1)(c) of the Act were wide enough even to cover a provision for retransfer which was contingent in its nature. This case again did not actually decide the point which was put forward in this reference before us, namely, whether this provision could be an implied provision or an inference from or as a legal effect of the deed.

The other cases to which our attention was drawn on behalf of the assessee was In and Revenue Commissioners v. Wolfson [[1949] 1 All E.R. 865.]. This was a

House of Lords decision construing the English Finance Act of 1938 and its section 38(1). It was held there that the power referred to in section 38(1)(a) of the English Finance Act of 1938 must be found in the terms of settlement and not aliunde and as there was no such power conferred by the deed of covenant, the annual payments made thereunder should not be treated as income of the taxpayer. That case again has no application to the facts of this case. There the circumstances which were intended to influence the construction of the deed were the surrounding circumstances of (1) that the settlor as the holder of the shares was in a position to determine how much of the profits of the company should at all be distributed in any year by way of dividends and (2) the possibility of a special resolution winding up the company and therefore the dividends ceasing. In that context, it was held that the ability of the taxpayer to prevent the declaration of dividends during the relevant period or to secure the winding up of the company did not constitute a power in him to revoke or otherwise determine the settlement or any provision thereof within the meaning of the statute which the House of Lords was considering. No such question arises in the present case before us. It does not deal with the case of a legal effect of or inference from a document.

On behalf of the taxing authorities, reliance was placed on the decision in *TARUNENDRA NATH TAGORE AND OTHERS Vs. COMMISSIONER OF Income Tax, WEST BENGAL.*, . and on the observations in the very same pages which I have already quoted in order to show that Chakravarti C.J. in considering the nature of a revocable transfer did not at all suggest that the provision for the revocation of a transfer must be explicit and not implied. On the other hand, it was contended from the context and many of the observations in that judgment that the suggestion was clear there that the legal effect of or inference from a document might include revocation. The other case to which our attention was called by the learned counsel for the Commissioner of Income Tax is the decision of the Bombay High Court in *Behramji Sorabji Lalkaka v. Commissioner of Income Tax*. This is a decision of the Division Bench of Chagla C.J. and Tendolkar J. In that case, the expression, "revocable" in section 16(1)(c) of the Indian Income Tax Act was held not to be qualified in any manner and it was held that the section did not speak of any absolute or unqualified power of revocation and for the purpose of section 16(1)(c), a transfer in none the less revocable even if it could be revoked only with the consent of any named person or persons. Further, at page 307 of the report, Chagla C.J. observed :

"It is to be borne in mind that the first proviso to section 16(1)(c) is very wide in its terms and makes any transfer a revocable transfer if it contains any provision which in any way gives the settlor a right to reassume power directly or indirectly over the income or the assets. Therefore, it is sufficient if such a power is given to the settlor. It may be given in any way."

Tendolkar J. did not express himself on this point and observed at page 311 of the report dealing with the first proviso to section 16(1)(c) of the Act :

"That proviso deals with cases where a trust is not, in fact, revocable but is deemed to be revocable by reason of certain provisions contained therein. That is not the present case before us, and whatever may be the correct view of the first proviso, since it does not arise in the determination of the reference before us, I do not wish to express any opinion with regard to it. The correct interpretation of that proviso, to my mind, is not necessarily a guide to the correct interpretation of the substantive section 16(1)(c) which deals with the question as to whether a trust is or is not, in fact, a revocable transfer."

Finally, on behalf of the assessee our attention was drawn to the third proviso in section 16(1)(c) of the Act to suggest that such provisions as for a period not exceeding six years or during the lifetime of the person contained in the third proviso would seem to exclude any implied effect or legal effect or inference under the first proviso because they are by their nature explicit and the third proviso was a kind of exception on the first proviso. For that purpose, reference was also made to the Bombay decision in *The Commissioner of Income Tax (Central) Vs. Sir Kikabhai Premchand*, which again does not appear to have any application to the facts before us.

The point here is whether the express provision stating the consideration in the deed, "in consideration of my forthcoming marriage with Judith Knight", itself is an express clause from which it could be legally inferred that if the marriage did not take place then the transfer was revocable. The first proviso of section 16(1)(c) of the Act is really in two parts. The first part is whether the transfer contains any provision for retransfer. The second part is the other alternative which speaks of the transfer which "in any way gives the settlor" a right to reassume power over the income or the assets. The question again is here whether by virtue of the expression "in consideration of my forthcoming marriage with Judith Knight" in the deed of transfer, it could be said that it "in any way" gives the settlor a right to reassume power directly or indirectly over the shares and the dividends in the event of the marriage not taking place. The words "in any way" would seem to imply that the legal effect of a document can also satisfy the test. It is, however, unnecessary for us to decide this point on this reference, because the question of revocability could only arise between the date of the transfer and the event of marriage. As that time had long passed and as this reference is concerned with accounting and assessment years which were all after the event of marriage had taken place, no question of revocability of transfer, in fact, arises in this reference. Therefore, at the time when the taxing authorities were computing the income within the meaning of section 6(1) of the Act, no question of applying the provisions of section 16(1)(c) arose in the facts and circumstances of this case.

For these reasons, I hold that the answer to the second question should be in the negative and that in the facts and circumstances of the case, the dividends could not be included in the total income of Mr. Thomas u/s 16(1)(c) of the Income Tax Act.

Each party will bear his own costs of this reference.

BOSE J. - This reference u/s 66(1) of the Indian Income Tax Act involves determination of two questions of law turning on the interpretation of the provisions of section 16(3)(a)(iii) and section 16(1)(c) of the Indian Income Tax Act. It has been argued that, in order that section 16(3)(a)(iii) of the Act may be attracted, the transfer has to be by the husband to a person who is actually the married wife of the transferor, at the time of the execution of the transfer and not merely a fiancée or the prospective wife and as Mrs. Judith Knight was not married to Mr. Thomas at the date of the execution of the transfer, the provisions in question are not attracted. Now, it is true that the relation of husband and wife is a condition precedent to the applicability of the section. But it appears to me that if the object of the transfer is to benefit the person who answers or will answer the description of wife or who fulfils or will fulfil the character of wife, it is immaterial that the transferee was not married to the transferor at the time of the execution of the transfer. The transferee in the present case does not acquire any absolute right or title to the property transferred until she actually becomes the wife of the transferor. Until marriage she has only an inchoate right which becomes perfected only on the marriage being solemnised. If the marriage does not take place at all the transferee loses her right and title to the property and becomes divested of the property. Furthermore, the material consideration u/s 16(3) is whether the transferee was actually the wife during the relevant period under assessment and the income from the property or assets transferred accrued to her as such in the said period. There is no dispute that the transferee was ultimately married to the transferor and she was the wife of the transferor during the relevant period. So this contention of the assessee must fail.

The next contention put forward on behalf of the assessee is that as the consideration for the transfer was the "forthcoming marriage" there was valuable and adequate consideration for the transfer and so the transfer in question is out of the mischief or operation of section 16(3)(a)(iii) of the Act. The answer of the learned counsel for the Commissioner of Income Tax is that the expression "adequate consideration" in the section has reference only to monetary consideration, the adequacy or inadequacy of which can be measured by objective standards and as marriage cannot be evaluated in money it is not such a "consideration" as is contemplated by the section. Our attention has been drawn to certain decisions, RAI BAHADUR H. P. BANERJEE Vs. COMMISSIONER OF Income Tax, BHIAR and ORISSA., . (1943) 11 ITR 443 Lahore . and Tulsidas Kilachand Vs. Commissioner of Income Tax, Bombay City, . to show that a transfer for natural love and affection by a husband to his wife is not a transfer for consideration, adequate or otherwise, and so comes within section 16(3)(a)(iii) of the Act. In the Lahore case, it is pointed out that the expression "consideration" in section 16(3)(a)(iii) means monetary consideration and not a mere sentimental consideration.

It appears to me, however, that consideration of marriage or a promise to marry

for a bona fide transfer of assets is a good valuable consideration but whether such consideration is adequate or not depends upon and has to be determined in the light of facts of a particular case. In Halsbury, Vol. 34, para. 814, page 459 (3rd edition it is stated that a valid marriage by itself irrespective of any pecuniary benefit or consideration constitutes valuable consideration for a settlement. There is a reference to a case in footnote (P) which is the case of *Ex parte Marsh* (1774) 1 Atk. 158 which is cited along with several other cases in the said footnote of Halsbury at page 459. In this case of *Ex parte Marsh* (1774) 1 Atk. 158, it is pointed out by the Lord Chancellor that "all marriage agreements differ from other agreements, for these do not arise from the consideration of a portion only but on account of the marriage". It is further stated in this very paragraph of Halsbury that a marriage that takes place on the faith of a voluntary settlement may supply ex post facto consideration and the case of *Prodger v. Langham* [(1663) 1 Sid. 133.] is referred to in support of this proposition. The case of *Prodger v. Langham* [(1663) 1 Sid. 133.] has been explained by Kay J. in the case of *Halifax Joint Stock Banking Company v. Gledhill* [[1891] 1 Ch.D. 31.] in the following words :

"The actual decision in *Prodgers v. Langham* [(1663) 1 Sid. 133.] was that a lease for the benefit of a daughter, if she married with her fathers consent, being voluntary, would be void against a subsequent purchaser for value by virtue of 27 Eliz c. 4, but that, although so void, it might be made effectual against such purchaser by a subsequent marriage of the daughter upon the faith of it.

This seems to have proceeded up the ground that the subsequent consideration of the marriage related back as though the settlement had been made upon the marriage".

In the case of *Synge v. Synge* [[1894] 1 Q.B.D. 466.] a husband had made an ante-nuptial promise in writing as an inducement to his marriage with a lady, as part of the terms of the marriage, to leave to the lady a certain house and land for her life. The lady consented to the terms proposed and the marriage took place. Upon the husband subsequently transferring the property by a deed to a third person the lady brought an action for damages for breach of contract. The lady was held entitled to recover damages. The Court of Appeal at page 469 observed :

"We are of opinion that the proposal of terms in this case was made as an inducement to the lady to marry, that she consented to the terms and married the defendant on the faith that he would keep his word, and that accordingly there was a binding contract on the defendants part to leave to his wife the house and land at Ardfield for her life.

Then, secondly, what is the remedy ? Marriage is a valuable consideration for such a contract of the highest order and where, as here, the contract is in writing, so that there is no question upon the Statute of Frauds, in the language already quoted, a Court of Equity will take case that the party who marries on

the faith of such a proposal is not disappointed and will give effect to the proposal."

In the case of *Cohen v. Sellar* [[1926] 1 K.B. 536.], in dealing with the questions to whether a lady who had been given an engagement ring by the prospective husband in contemplation of marriage was entitled to retain it or not, upon the man refusing to marry the lady, McCardie J. laid down several propositions and one of such propositions was that "If the marriage actually takes place then the engagement ring or like gift will, in the absence of express agreement to the contrary, become, I infer, the absolute property of the recipient, and that property will not, I presume, be divested by subsequent divorce."

In the case of *Nanjundaswami Chetty v. Kanagaraju Chetty* ILR (1919) Mad. 154, a settlement of a portion of a joint family property was made by a Hindu in favour of his foster-daughter in consideration of her marriage with another who offered to marry her on such condition. The alienation was challenged by a person who claimed to be the adopted son of the settlor inter alia on the ground that it was not supported by any consideration. Abdur Rahim J., who delivered the judgment of the Division Bench after referring to the definition of "consideration" as given in section 2(d) of the Contract Act, observed at page 159 :

"If a person contracts a marriage in consideration of a promise, then it seems to us that the marriage is valuable consideration within the meaning of this definition. In this respect the law is the same in India as in England. In England a promise made in consideration of marriage is a binding and enforceable agreement. The definition of "consideration" as given in section 2 of the Contract Act seems to be general and wide enough to cover such cases."

The court held that the alienation was for valuable consideration.

Mr. Meyer has argued that it has not been proved that marriage took place on the faith of the offer or promise to transfer the shares-on the other hand, the document of transfer suggests that the marriage was already determined upon and arranged and so the transfer was a purely voluntary one unsupported by any consideration. Now it is true that the engagement was announced on 13th September, 1947, and for some unknown reason the marriage did not take place till 18th December, 1947. But it is significant that the parties to the marriage took steps to complete the transfer and its registration immediately before the marriage was solemnised. The application for transfer was presented to the company on the 10th December, 1947, and registration was completed on 15th December, 1947. So the inference appears to be irresistible that the transfer of the shares was intended to be a part and parcel of the marriage bargain and the marriage was the consideration for the transfer. The deed of transfer recites clearly the fact that the "forthcoming marriage was the consideration for the transfer." Mr. Meyer placed reliance on certain English decisions reported in *De Manneville v. Crompton* [(1) 35 E.R. 138.]; *Goldicutt v. Townshend* [(2) 54 E.R.

437.]; *Viret v. Viret* [(1880) 50 L.J. Ch. 69.]; and other cases to show that there must be sufficient evidence before the court to show that the marriage took place on the faith of the offer or promise to transfer or settle a property. These cases no doubt indicate that there was either a letter or some other writing to prove that marriage was intended to be the consideration for the proposed transfer, but in the present case the surrounding circumstances and the conduct of the parties to the marriage and the express recital of consideration in the deed of transfer suggest very clearly that the consideration for the transfer was the marriage.

It is well known that settlements or payments made for marriage are so made by way of provision for the wife. In early times among the Jews a dowry or purchase money was usually given to the bride's father. The practice of the ancient Germans was to purchase their wives. The co-emptio of the Roman law was in form a purchase of the bride to buy a wife remained in the middle ages the common expression for an engagement to marry. In modern times this practice has survived in the form of dowry, settlements and like dispositions.

But the further question that arises is whether the consideration is adequate or not. There is no doubt that a modern marriage in all countries involves certain financial and economic considerations. The question of adequacy will depend on the social and financial status of the wife, (as for example, when the bride is a rich heiress) the extent of her needs and activities of life, her external appearance, her earning capacity, her educational qualifications, the sacrifice that she may have to make or any loss that she may have to suffer by reason of the marriage, the value of the property transferred and such other factors. But as these considerations for determining the adequacy are likely to vary from case to case and no fixed objective standard can be laid down for the purpose, it is reasonable to hold that such a kind of consideration was not intended to be comprehended within the section. But assuming it is permissible or legitimate to enter into an inquiry of this nature for determining the adequacy of such a consideration, it is to be pointed out that there are no materials before us which will enable us to determine this question of adequacy. The assessee has not adduced any evidence on this point before the Income Tax department.

The other point raised is whether section 16(1)(c) is applicable to the facts of the case. It appears to me that here the Tribunal has gone wrong. As pointed out already, the transfer was, at the time it was made, a conditional one, but upon the marriage taking place it became an absolute transfer. There could be no question of any revocation after that. In the present case the marriage took place on 18th December, 1947, and upon that the transfer became irrevocable from its very inception. It was argued that unless there.....is an express clause for retransfer or for re-assumption of control over the property in the transfer deed, it is not a revocable transfer. In my view his argument is not sound. If the nature or the terms of the transfer are such that under certain circumstances the property has to revert to the transferor, as for example, upon a failure of

consideration, the provision of the Act is attracted. The expression "in any way" in the first proviso to clause (c) of section 16(1) of the Act is wide enough to cover such a case. The cases cited by the parties on this point have been dealt with by my learned brother at length and I do not propose to deal with them over again.

I agree that question No. 1 should be answered in the affirmative and question No. 2 in the negative.

Reference answered accordingly.