

(1958) 06 CAL CK 0034
In the Calcutta High Court

PUBLIC TRUSTEE

APPELLANT

Vs

INLAND REVENUE COMMISSIONERS.

RESPONDENT

Date of Decision : 26-06-1958

Acts Referred:

Finance Act, 1894 — Section 1, 2, 2(1)

Citation : (1959) 37 ITR 43

Hon'ble Judges : Ormerod, J;Evershed, J

Bench : Full Bench

Judgement

LORD EVERSLED M. R. The originating summons in this case raised the question of the liability to estate duty under the Finance Act, 1894, in respect of a share of the income of the estate of the late Lord Northcliffe which one Henry Preuss Arnholz, who died on August 31, 1955, had enjoyed for his life.

I do not think it necessary that I should go at length into the facts or, indeed into the arguments of this case, both of which are fully stated in the judgment of Dankwerts J. Suffice then to say that under Lord Northcliffes will the income of the residuary estate was, for a period terminating as provided by the will, divided among a number of income beneficiaries, each taking a specified share or fraction, so that when any one income beneficiary died, the total income was then divided among the survivors or survivor.

At the date of Arnholzs death his share amounted to the three of the 49 1/2 shares into which the income was then divisible; but the interest in the income which Arnholz enjoyed was expressed to be given to him by paragraph (26) of clause 6 of Lord Northcliffes will as being in respect of his acting as executor and trustee, and by way of remuneration for his so doing; though the will also contained as reference to the fact that Arnholz was indeed a very old friend of the testator.

By an order of the court made in In re Northcliffe, it was held that on the death of any income beneficiary, save at any rate the last, there was a "passing" within

the terms of section I of the Finance Act, 1894, of a share of the corpus of the estate corresponding to the share of the income which at his death the dying income beneficiary had enjoyed.

The claim to duty has been resisted by the Public Trustee, as the present trustee of Lord Northcliffes estate, in reliance upon the last three lines of paragraph (b) of section 2(1) of the Finance Act, 1894.

In order to make that statement intelligible, I will read the whole paragraph, which is introduced by the opening sentence of the sub-section : "Property passing on the death of the deceased shall be deemed to include the property following, that is to say :-.... (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office...."

Accordingly, it has been the contention of the Public Trustee, following an earlier decision in *Attorney-General v. Eyres*, that the interest which Arnholz had as an income beneficiary was only an interest as the holder of an office, namely, the office of executor and trustee; but since the exemption appears in the second half of paragraph (b) of section 2(1), and since it has been held and is conceded that there was here a passing of a proportionate share of the corpus u/s 1, it will be apparent that the contest has raised the question of the application (and, indeed, under Mr. Pennycuicks argument, the validity today) of the celebrated dichotomy between section 1 and 2(1) of the Finance Act, 1894, which is enshrined in the well-known speech of Lord Macnaghten in *Earl Cowley v. Inland Revenue Commissioners* in 1899.

Mr. Pennycuick has also contended that even though the dichotomy has the consequence, if valid, that the Crown cannot charge under the terms of paragraph (b) of sub-section (1) of section 2, but must direct their attention exclusively to section 1 of the Act, none the less the exempting words, introduced after a semi-colon by the words "but exclusive of property," amount to an exemption which is not limited by the scope of paragraph (b), but is of general application and corresponds accordingly to the exemptions which sub-sections (2) and (3) of section 2 of the Act of 1894 confer. I understand that Mr. Pennycuick finds some peg in the semi-colon to which he seeks to attach that argument.

I confess that upon that last matter I have not been at all persuaded that those words of exemption in paragraph (b) can be interpreted save as a qualification of the earlier language of paragraph (b) itself : and, if that is right, then Mr. Pennycuick is faced, as he concedes, with the formidable difficulty that if he dictum of Lord Macnaghten must be treated as binding upon us today, then he cannot rely upon something which is exclusive to paragraph (b) of section 2(1) of the Act, since the charge admittedly is made u/s 1.

On the other side, Sir Lynn Ungood-Thomas, for the Crown, has intimated an argument - though he has not developed it - that, on the facts of this case, Arnholz could not be said to have enjoyed his interest as holder of an office within the meaning of paragraph (b) of section 2(1), so that no question at all arises on that paragraph. In the circumstances, I do not find that Danckwerts J. rejected it.

However, Sir Lynn has also contended, as I follow him, that even if today the dichotomy cannot be as rigid as might have previously been supposed, still, if the subject is to rely upon those exempting words in paragraph (b), he must say that his interest is one which is properly described and brought into charge by virtue of the enlarging effect of paragraph (b), as distinct from being something which has come into charge by virtue of section 1 of the Act. Again, in the circumstances, I do not find it necessary to say anything upon that point either.

Mr. Pennycuicks argument concedes that until a very recent case, that of *Sanderson v. Inland Revenue Commissioners*, he would have been in very great difficulty in prevailing upon this court to say that we could now treat Lord Macnaghtens dictum as not excluding him from any reference to paragraph (b) of section 2(1) of the Act; but in that case Lord Radcliffe, in the course of his speech, indicated that this dictum should, to use his own words, be resigned "to the list of the many minor mysteries of the law." Mr. Pennycuick says that we, having so resigned it, can treat the matter as *res integra*, and, in so doing, should decide the matter in his favour.

It cannot, I think, be disputed that Mr. Pennycuicks argument has formidable and attractive points in its support. For example, he relied upon the language of paragraph (a) of the sub-section, which I will read, again prefacing it by the introductory words : "Property passing on the death of the deceased shall be deemed to include the property following, that is to say :- (a) Property of which the deceased was at the time of his death competent to dispose." It is certainly a forceful contention to observe that "property of which the deceased was at the time of his death competent to dispose," according to the ordinary use of the language, would include the testators own free estate, no less than property over which he had but a general power of appointment. So it is Mr. Pennycuicks contention that, notwithstanding Lord Macnaghtens dictum, section 2(1) cannot be regarded as dealing with property which is exclusive of property strictly within the first section; and that view is undoubtedly reflected in the speech of Lord Radcliffe. I add further that Lord Radcliffe notices language used by a very learned judge, Channell J., in *Attorney-General v. Dobree*, and also the differing views expressed by the House in a later case, that of *Attorney-General v. Milne*.

But, notwithstanding the weight of those arguments, I feel myself compelled to the view that in this court, as before Danckwerts J., we cannot do other than treat Lord Macnaghtens dictum as still applicable.

I think it will suffice, by way of supporting that conclusion, if I refer to the

language of Jenkins L. J. in *In re Duke of Norfolk*. The point was undoubtedly a different one, but no less clearly this court in its judgment, and in particular, the judgments of myself as Master of the Rolls and of Jenkins L. J., treated this dictum as one which this court must accept. Thus : "It is clearly not open," said Jenkins L. J., "to this court to depart from the construction placed on sections 1 and 2 over fifty years ago by the House of Lords in *Earl Cowley v. Inland Revenue Commissioners*." The Lord Justice then proceeded to cite the whole of the passage from Lord Macnaghtens speech, and without repeating it here, I have it in mind that the language includes the statement that you should read section 1 as though it had been headed : "With regard to property passing on death, be it enacted as follows," and that you should read section 2 as though it had been headed : "And with regard to property not passing on death, be it enacted as follows."

If that view is binding, it must be conclusive in this case, for Mr. Pennycuicks reliance upon the terms of paragraph (b) of section 2(1) becomes prefaced by the opening words : "With regard to property not passing upon death"; and *ex concessis* the property with which we are concerned did pass on the death. In the *Sanderson* case, Lord Radcliffes intimation of a contrary, or much modified, view was his own; it is, of course, plainly none the worse for that, but the four other members of the House did not share (or, if they did, they did not express their adherence to) Lord Radcliffes opinion. Upon well-recognized principles, therefore, it would not be right for us, after so long a time during which Lord Macnaghtens speech has been hallowed by those who practice in this branch of the law, to treat the matter as one thrown open again by Lord Radcliffes observations.

It may well be that this case has disclosed, perhaps for the first time, an anomaly which a strict application of the dichotomy has hitherto concealed, and there maybe other anomalies - one being in relation to a corporation sole - which if the views of the Crown, which have been indicated in argument, are right, may add some emphasis to the view that the matter is one which ought properly to be considered by, and resolved only by, the House of Lords itself.

The cases which have been cited were referred to by Danckwerts J., and it will, in the circumstances, not serve any useful purpose, or be of any use to the House (if this matter goes to the House) for me to repeat the citations or repeat the summary of the case as Danckwerts J. carefully and with accuracy expressed it.

Thinking, as I do, that we must still regard ourselves as bound by the view hitherto prevailing of the effect of Lord Macnaghtens speech in the *Cowley* case, in my judgment, we can do no other than dismiss the appeal.

ROMER L. J. I agree. Mr. Pennycuicks submission to us on the inter-relation of sections 1 and 2 of the Finance Act, 1894 is, as he indeed concedes, plainly at variance with the opinion that Lord Macnaghten expressed on the subject in the *Cowley* case, and it is for that reason that it seems quite clear to me that this

court cannot accept it, whatever views we might have formed on the matter if we had been able to approach it de novo.

As the Master of the Rolls has pointed out, in the Duke of Norfolk case, in 1950, this court said quite explicitly that Lord Macnaghtens opinion in the Cowley case, was binding upon this court, and it seems to me, therefore, that the only question is as to whether anything that has happened since justifies us in now expressing a different view and saying that the matter is open to review by us.

The only material thing which could possibly be relied upon is the speech of Lord Radcliffe in the Sanderson case. Notwithstanding the great weight which must, of course, be attributed to Lord Radcliffes opinion it was not, at all events, expressly adopted by the other Law Lords and it seems to me impossible to say that his speech amounts in itself to a justification for departing from the view which this court expressed in the case of the Duke of Norfolk. In those circumstances, therefore, the matter cannot be considered by us today, because we are just as bound now, as we were in 1950, by the views of Lord Macnaghten.

I desire to express no opinion, because it is not necessary to do so, on the submission which Sir Lynn Ungood Thomas made, that the Crown was entitled to succeed in this case, even apart from the question of Lord Macnaghtens views. On the pure question of construction arising u/s 2(1)(b), which the judge described as follows : "The question still remains whether the excluding provision which is contained in section 2(1)(b), is capable of application to the case of property which passes within the unextended or natural meaning of section 1 of the Act." I entirely agree with the conclusion at which he arrived, and which he expressed as follows : "It seems to me that grammatically the second or excluding portion of this provision must refer to the preceding or including part of the provision." I entirely accept that view of the matter, and I have nothing further to say upon that point or upon any of the other matters which have been discussed.

ORMEROD L. J. I agree that this appeal should be dismissed.

Appeal dismissed.

Leave to appeal to the House of Lords.

Solicitors : Russell & Arnholz; solicitor of Inland Revenue.