Commissioner of Wealth Tax, Calcutta

Vs

Mrs. O. M. M. Kinnison (Dead), Through Her Executors and Trustees

Civil Appeals Nos. 1181-86(NT) of 1974

(R. S. Pathak, Sabyasachi Mukharji JJ)

29.08.1986

JUDGMENT

PATHAK, J. -

1. These appeals by certificate granted by the High Court of Court Calcutta are directed against a judgment of the High Court disposing of six wealth tax references on the following questions of law :

> 1. Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that the assessee who has a life interest in the testamentary trust estate of late C.H. Kinnison comprising inter alia of the shares in an Indian company and commission from the managing agency of an Indian company can be said to have an interest in such shares and commission and that such interest is property located in India so as to be taxable under the Wealth Tax Act ?
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> 2. Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that the life interest of the assessee in the testamentary trust estate of late C.H. Kinnison is not an annuity which is exempt under Section 2(e)(iv) of the Wealth Tax Act?

2. Heilgers & Co. were managing agents of the Kinnison June Mills Co. Ltd. and the Naihati Jute Mills Co. Ltd., both Indian companies, for several years. Heilgers & Co. entered into a sub-partnership from time to time with James Alexander Kinnison under which the two shared equally the emoluments from the managing agency. The last of such sub-partnership agreements was entered into on December 16, 1907.

3. Kinnison died on April 13, 1916 leaving a will dated June 2, 1916 under which he gave all his property to his wife Helen. Helen Kinnison executed two deeds of assignment dated December 12, 1927 assigning her share of the emoluments under the sub-partnership in favour of her son Clive Hastings Kinnison. Thereafter the son began to receive the half share of the emoluments from the managing agency.

4. On February 25, 1935 Clive Hastings Kinnison executed a will appointing his wife, Olive Kinnison, and one William John Collyer, a solicitor, as executors and trustees, and under the terms of the will he gave a pecuniary legacy of Pounds 5000 to his wife and devised and bequeathed his real and personal estate to the trustees upon trust to apply the income from the trust estate in accordance with the provisions of the will. Clive Hastings Kinnison, who was domiciled in England,

died on March 9, 1943. The High Court of Justice in England granted probate of the will on June 1, 1943. The net value of the personal estate was determined at Pounds 7,73,978 and the estate duty payable in the United Kingdom amounted to Pounds 5,34,544 10 s. 5 d. Letters of Administration were obtained in India on August 23, 1944 and the stamp duty paid at the time of obtaining the Letters of Administration amounted to Rs. 4,44,258.

5. The widow, Olive Kinnison, was a non-resident and not a citizen of India. The question arose whether she was liable to wealth tax on her interest in the Indian assets in the hands of the trustees. The average income derived by her during the three years preceding the date of valuation, March 9, 1957 relevant to the assessment year 1957-58 totalled Rs. 3,25,585. She was then 63 years of age. Taking the average income into account and applying the appropriate multiplying factor in order to arrive at the capital value of the assets in her hands, the Wealth Tax Officer computed the net wealth at Rs. 20,34,906. Adopting the assessment year 1957-58 as typical of these years, similar wealth tax assessments were made for the assessment years 1958-59 to 1962-63.

6. The assessee appealed against the wealth tax assessments before the Appellate Assistant Commissioner and contended that she was a non-resident and that the value of the assets located outside India should be excluded in computing the total wealth. The corpus of the trust consisted of certain shares in an Indian company and the income from the managing agency of the Indian companies. The contention was repelled by the Appellant Assistant Commissioner, who held that the assessee possessed rights and interest in the shares and the managing agency which were tangible movable properties located in India and, therefore, subject to wealth tax under the Wealth Tax Act. He rejected also the contention regarding the valuation of the assets.

7. The assessee then appealed for all the six assessment years to the Appellate Tribunal. She contended that the assets held by her were situated outside India, and being non-resident she was not taxable thereon. Alternatively, she urged that she was entitled to exemption under sub-clause (iv) of clause (e) of Section 2 of the Wealth Tax Act. The Appellate Tribunal did not accept either contention and dismissed the appeals.

8. At the instance of the assessee the Appellate Tribunal referred the two questions of law set out earlier to the High Court of Calcutta for each of the six assessment years. By its judgment dated February 16, 1973 the High Court answered the first question in favour of the assessee and against the revenue and the second question in favour of the revenue and against the assessee. Thereafter the revenue obtained a certificate under Section 29 of the Wealth Tax Act to enable it to prefer an appeal to this Court against the judgment of the High Court on the first question.

9. In this appeal we are concerned solely with the question whether the assessee is entitled to the benefit of clause (i) of Section 6 of the Wealth Tax Act. Clause (i) of Section 6 provides :

> 6. In computing the net wealth of an individual who is not a citizen of India, or of an individual or Hindu undivided family not resident in India or resident but not ordinarily resident in India or of a company not resident in India during the year ending on the valuation date -
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> (i) the value of the assets and debts located outside India; and
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> #(ii) * * *##
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> shall not be taken into account.

The clause provides for the exclusion of the value of the assets and debts located outside India when computing the net wealth of an individual who is not a citizen of India or not resident in India or resident but not ordinarily resident in India. It is not disputed that the assessee is a non-resident, and therefore, the only question is whether during the year ending on the valuation date her life interest in the testamentary estate of her husband Clive Hastings Kinnison consisting of the Indian shares and the commission from the managing agency of the Indian companies could be said to constitute an asset located outside India.

10. To resolve the question it is necessary to advert to some of the provisions of the will executed by Clive Hastings Kinnison. After setting forth certain bequests, including one of a pecuniary legacy to the assessee in the sum of Pounds 5000 to be paid to her upon his death, the testator devised and bequeathed all his real and personal estate to two trustees upon trust that they would at such time and in such manner as they thought fit sell, call in and convert into money such parts of the estate as may not consist of money, postponing such sale and conversion for such period as they thought proper, but all this without diminishing or abridging their statutory power of appropriation and without affecting the treatment and application of the income accruing from the estate for the time being remaining unsold from the time of the testator's death as if it was income from investments directed under the will. The trustees were enjoined, after meeting the funeral and testamentary expenses and debts and legacies, to invest the residue of the ready monies arising from such calling in and conversion of the estate, with the consent of the assessee during her life and afterwards at the discretion of the trustees, in the investments authorised under the will and to transpose such investments into others, and to stand possessed of the residue of such monies and all investments and the income thereof upon trust subject to the further powers and provisions declared under the will. It was provided that the trustees would pay the income of the residuary trust fund to the assessee during her life. After the death of the assessee the trustees would stand possessed of the residuary trust fund in trust for the benefit of the testator's children in accordance with the further provisions of the will. The trustees were also empowered to exercise the power of appropriation conferred upon a personal representative by Section 41 of the Administration of Estate Act, 1925. They were also empowered to determine what articles would pass under any specific bequest contained in the will and to determine whether any monies were to be considered as capital or income, and whether and in what manner any expenses or other payments ought to be borne or paid out of capital or income or apportioned between capital and income and how valuations were to be made for any purpose of hotchpotch advancement or appropriation or otherwise.

11. The High Court observed that ordinarily, as the shares and managing agency were both located in India, the right of the assessee to receive income out of such trust property from the trustees would have constituted an asset located in India for the purposes of the Wealth Tax Act, but in held that having regard to the nature and character of that right considered together with the provisions relating to the intervention of the trustees and the special directions and powers given to them the asset must be regarded as located outside India. That conclusion, said the High Court, arises from the nature and extent of the powers conferred on the trustees to deal with the estate before the assessee could be said to have any right to the residual income. The High Court observed that the testator intended that his property should be converted into personality and he gave the necessary direction to the trustees to dispose of the estate or part thereof by sale. It was pointed out that the testator never intended that the assessee should have any share in the trust properties, including the managing agency and the shares of the Indian companies, nor could the assessee in her capacity as beneficiary enter into possession of any of the trust properties nor claim any right of ownership in any of the trust properties, including the managing agency and the share. In the opinion of the High Court, the right which the assessee acquired under the trust was a right to have the trust

administered in accordance with the provisions of the will. While the legal ownership of the trust properties including the shares and the managing agency vested in the trustees and remained so vested, the beneficial interest of the assessee did not extend to any right in any of the trust properties in specie and did not confer upon her any right of ownership over any property. Having regard to the fact that the settlement under the will was an English settlement, created by the will of a testator who was an Englishman and resident of England, and the will being an English will which was proved in England, and the trustees to the settlement being residents of England, and the assessee, the beneficiary, was an English woman who resided in England, the appropriate forum for the administration of the trust estate and for enforcement of the rights of the beneficiary under the will were the appropriate courts in England. The High Court observed that the right of the assessee was a right in the nature of a chose-in-action enforceable in the appropriate courts of England, that the nature end character of the asset must be considered to be foreign in quality, and that the assets of the assessee must be regarded as foreign assets and therefore not located in India. In conclusion, the High Court held that the assessee was entitled to the benefit of clause (i) of Section 6 of the Wealth Tax Act.

12. It will be evident from a perusal of the judgment under appeal that in reaching its conclusions the High Court relied principally on Attorney-General v. Johnson [(1907) 2 KB 885]. In that case the testator, who at the time of his death was entitled to a certain tea estate situate in Upper Assam, executed a will appointing two executors and trustees, and after bequeathing certain legacies he left the residue of his real and personal estate to the trustees upon trust to sell the residuary estate (as did not already consist of money) and, after paying the legacies enumerated in the will, to invest the residue of the net moneys in the investments mentioned in the well. The trustees were directed to apply the annual income arising from the residuary estate and investments thereof to the payment of life annuities to certain persons, including one Marie Graf. The remainder, if any, of the annual income was to be distributed between a number of persons, including Henry James Reeves and the said Marie Graf. The trustees were also directed that until the sale of the estate they were to carry on the trade or business of a tea planter (which had been carried on by the testator), and for that purpose to employ the existing capital and such additional capital as they considered fit to draw from the residuary estate. Henry James Reeves and Marie Graf died a few years after the death of the testator, and the tea estate remained unsold when the proceedings commenced which gave rise to the litigation. The King's Bench Division of the High Court held that the share of the deceased beneficiaries, Henry James Reeves and Marie Graf, in the surplus income and in the annuities constituted property not situate out of the United Kingdom and, therefore, liable to estate duty and succession duty under the English law. Bray, J., who delivered the judgment, held that it was the intention of the testator that his property should be converted into personality, and he had given a direction to his trustees to sell, that he had never intended that the beneficiaries named in the will should have any share of his real estate or of his business, and that therefore, they could never enter into possession. The learned Judge emphasized that the testator wished the estate to be dealt with and managed by his trustees, an not by the beneficiaries. The testator merely gave the latter the right of having the trusts of the will administered in the proper forum, namely, in the courts of England, and the net surplus divided amongst them. He pointed out that it was an English chose-in-action. In reaching this conclusion, the learned Judge relied on the observations of Lopes, L.J., in Attorney-General v. Lord Sudeley [(1896) 1 QB 354] and Romer, J. in In re Smyth [(1898) 1 Ch 89]. The former of the two cases was affirmed in appeal by the House of Lords in Lord Sudeley v. Attorney-General [1897 AC 11]. As that case was the subject considerable comment in the courts in England, reference may be made appropriately to what was said there. The testator executed a will in which, after bequeathing various legacies and annuities, he gave all the residue of his real and personal

estate to two executors upon trust to pay the income to his wife and after her death to distribute it between his brother and certain other persons. The executors and trustees were to leave the residuary personal estate invested as they found it at the time of the testator's death unless they considered it proper to change any investment. By a codicil he revoked the gift to his brother and gave that share to his wife absolutely. The testator was domiciled in England, and upon his death the will and codicil were proved in England by his executors, who were themselves domiciled in England, but the testator's estate included mortgages of real estate in New Zealand. The wife died in 1893, and her will likewise was proved in England by her executors (the appellants), two of whom were also her husband's executors. In estimating the probate duty payable upon her one-fourth share of her husband's residuary personal estate, the appellants excluded the value of the New Zealand mortgages. The Attorney-General claimed that one-fourth of the value of the New Zealand mortgages ought to have been included for the purposes of probate duty. In resisting the claim the appellants stated that at the time of the wife's death her husband's personal estate had not been fully administered and was in the course of administration, that one legacy given by the will then remained unpaid, and that the amount of the clear residue had not yet been ascertained but it was envisaged that there would be a large residue excluding the New Zealand mortgages over and above the debts end legacies. It asserted that no appropriation had been made of the New Zealand mortgages, nor of any securities or portions of securities to particular shares of the net ultimate residue. The House of Lords held that the right of the wife's executors did not extend to one-fourth or any part of the mortgages in specie but consisted of the right to require her husband's executors to administer his personal estate and to receive from them a one-fourth part of the clear residue, and that this was an English asset of the wife's estate, and therefore, probate duty was payable under her will upon one-fourth part of the value of the New Zealand mortgages. Lord Halsbury, L.C. observed : (1897 AC p. 16)

Now, if the only thing that the legatee is entitled to is the fourth share of an ascertained residuary estate, I say that to my mind it is impossible to maintain that the character of any part of that estate can be ascertained so as to make it possess a specific locality until that has happened; it is a condition precedent to know what the residuary estate is, and until that has been ascertained you cannot tell of what it will consist. The right of the person to bring an action or to insist upon the performance of the trust may be one thing; but I want to know what the thing is, and until I ascertain that, and until the thing comes into existence, it appears to me the question does not arise. Well, if that is right, then the thing that the legatee is entitled to, call it a debt, call it something that must be administered either by trustee or executor, the character of that, the local character, is fixed by the persons, call them debtors or call them trustees, I do not care which. Under these circumstances it appears to me there can be but one answer to the question, and that is that the debtors are here and have to administer here. The fixing of the character of the asset by the presence of the debtor may or may not have been logical, but it is so; and if it is a debt and the debtor is here, that is the character of the asset as fixed by the residence of the debtor, and the asset is English.

To the same effect, Lord Herschell pointed out : (1897 AC pp. 18 & 19)

. . . . until the estate is fully administered it is impossible to say of what assets the residuary estate will consist; we do not know how much the amount of the debt remaining unpaid was in the present case, and there was only one legacy unpaid . . . . In truth, the right she had was to require the executors of her husband to administer his estate completely, and she had an interest to the extent of one-fourth in what should prove to be the residuary estate of the testator, Algernon Tollemache. Well, where was that situate ? It seems to me that it can only be said to have been situate in this country.

Lord Macnaghten and Lord Shand were of the same opinion. Lord Davey pointed out that at the time of the lady's death the testator's personal estate had not been fully administered and the amount of the clear residue had not been ascertained, and that the lady "at the time of her death had no right of property in or right to claim any part of the mortgages in specie, and that the appellants, her executors, acquired only a right to have the estate duly administered and to enforce that right by an action for the purpose."

13. In Philipson-Stow v. Inland Revenue Commissioners [1961 AC 727] the House of Lords doubted the correctness of Attorney-General v. Johnson [(1907) 2 KB 885], and in Skinner v. Attorney-General [(1939) 3 All ER 787] and in In re Smith, Decd. Executor Trustee and Agency Company of South Australia Ltd. v. Inland Revenue Commissioners [1951 Ch D 360] considerable difficulty was expressed by the court in following Lord Sudeley v. Attorney-General [1897 AC 11]. But subsequently the Judicial Committee of the Privy Council in Commissioner of Stamp Duties (Queensland) v. Hugh Duncan Livingston [1965 AC 694] pointed out that Lord Sudeley v. Attorney-General [1897 AC 11] had been reaffirmed by the House of Lords in Dr. Barnardo's Homes National Incorporated Association v. Commissioners for Special Purposes of the Income Tax Acts [(1921) 2 AC 1], and that it was in no way qualified by Skinner v. Attorney-General [(1939) 3 All ER 787]. In our own country, the Madras High Court has held in A. & F. Harvey Ltd. v. CWT [(1977) 107 ITR 326 (Mad)], a case where under the terms of a will executed and probated in England, the beneficiary, who was a resident in England, was to be paid by the executors who were also in England, the dividends on certain shares of a company in India, that the right which the beneficiary had was merely a right to proceed against executors for the purpose of claiming the income referable to the shares in question, and that such right could not be regarded as an asset situate in India, and therefore, the value thereof could not be brought to tax under the Wealth Tax Act.

14. In the present case, it does not appear that on the relevant valuation dates the estate of the testator had been completely and finally administered and that the trustees had proceeded to the point where it could be said that there was a clear and ascertained residue from which the income payable to the assessee as a beneficiary under the will could be known, and whether the assessee was entitled to income arising from the Indian shares and the managing agency of the Indian companies. All that the assessee was entitled to on the valuation dates was the right to have the trust administered and, as the High Court has observed, having regard to the several considerations patent in this case that the settlement was an English settlement created by an Englishman who was resident in England, that it was an English will proved in England and the trustees were residents in England and moreover that the assessee, the beneficiary, was an Englishwoman who was also residing in England, therefore the proper forum for the enforcement of the rights of the beneficiary under the will was the appropriate court in England. We agree with the High Court that the asset in question was a right in the nature of a chose-in-action enforceable in England. The right of the assessee was a right enforceable in that court and, therefore, must be regarded as a foreign asset, an asset not located in India.

15. We affirm the answer returned by the High Court to the first question referred to it, and agree that the question must be answered in the negative, in favour of the assessee and against the revenue and that the appeal must, therefore, be dismissed.

16. As the respondent has not entered appearances in this appeal there is no order as to costs.

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