

# **BOMBAY HIGH COURT**

Behramji Sorabji Lalkaka

Vs

Commissioner of Income-Tax

(M.C. Chagla, C.J. Tendolkar, J.)

16.03.1948

## **JUDGMENT**

### **M.C. Chagla, C.J.**

1. Two questions have been raised on this reference and they are concerned with certain income arising to Freny, the daughter of the settlors, under the trust deed dated January 15, 1936. The settlors, who are the assessee and his wife, had three children Freny, Feroza and Phiroz and the trust deed provided that the properties belonging to the settlors which were moveables should be divided into three parts, one for each of the three children of the settlors, and the scheme of the trust deed was that during the lifetime of the settlors the trustee should hold these properties in trust and give the income for the maintenance of the three children of the settlors and the property was to be handed over to these three beneficiaries after the death of the survivor of the settlors. The trust deed made provisions with regard to the death of any of the three beneficiaries before the death of the survivor of the settlors, and Clause 4 deals with Phiroz predeceasing the survivor of the settlors. That clause considers various contingencies, whether Phiroz died leaving a widow surviving and any issue, or a widow surviving and no issue, or no widow surviving but leaving issue, and also the one with which we are concerned, viz. if he died surviving neither widow nor issue. In fact Phiroz died a bachelor after he had attained majority and in that eventuality Clause 4(d) of the trust deed provided that the property coming to him should be divided into four equal parts and one part was to abide any will or codicil or any power of appointment which Phiroz might exercise and the remaining three parts were to be divided absolutely between Freny and Feroza, and if no power of appointment was exercised or if there was no provision in the will of Phiroz, then that part was also to go to Freny and Feroza equally. As neither of these two contingencies took place, therefore under the provisions of this trust deed it is clear that on the death of Phiroz the trustees held absolutely in equal shares for Freny and Feroza the property mentioned in Schedule E to the trust deed. The trust deed also contains a power of revocation which is set out in Clause 10 and that power is exercisable by the assessee at

any time with the consent of his wife, Freny, Feroza and Phiroz or any two of them.

2. Now the first question that arises is whether the income that arises to Freny under this trust deed is income arising from a revocable trust within the meaning of Section 16(1)(c), and, if it is so, then undoubtedly that income would be deemed to be the income of the assessee. It is contended by Sir Jamshedji that the power of revocation given to the assessee under Clause 10 is a contingent power; it is based upon the contingency of his getting the consent of two of the beneficiaries and therefore this is not a revocable trust deed. Now Section 16(1)(c) provides that all income arising to any person by virtue of a revocable transfer of assets would be deemed to be the income of the transferor. The expression "revocable" is not qualified in any manner. The section does not speak of an absolute or unqualified power of revocation. If there is an income arising by virtue of a transfer of assets which is revocable, then that income must be deemed to be the income of the assessee. The only question that has got to be asked is whether the transfer is capable of being revoked by the assessee or not. There can be no doubt that this trust deed is capable of being revoked. It may be that before the power is exercised the consent of two beneficiaries might have to be taken, but even so although the revocation may be contingent or conditional, still the deed remains a revocable deed of trust. Our attention has been drawn to a decision (*Ramji v. Commissioner of Income-tax, Bombay*<sup>1</sup>) to which Kania J. (as he then was) and myself were parties and we were considering the construction of the first proviso to Sub-clause (c). Kania J. took the view that if the right to assume power over the income or assets was contingent then Section 16(1)(c) would not apply. With very great respect I took the other view, viz. that the words of the section were wide enough to cover even a provision for re-transfer which was contingent in its nature. 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 resume 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. But the relevant and material question is whether the settlor has taken such a power to himself. Therefore, in my opinion, this deed of trust is a revocable deed of trust and falls under Section 16(1)(c) of the Act and therefore the income arising to Freny under this deed of trust must be taken to be the income of the settlors. That disposes of the first question.

3. The second question is whether the income which Freny receives from the property which was originally earmarked for Phiroz and which on the death of Phiroz is now held by the trustees absolutely in trust for Freny to the extent of a moiety can be deemed to be the income of the assessee within the meaning of Section 16(1)(c) of the Act. Now, as I have pointed out, under Clause 4 of the deed on the death of Phiroz the trustees hold the property which was intended for him and which is described in Schedule "E" in the events that have happened absolutely for Freny and Feroza in equal moiety. We are inclined to agree with the contention of Sir Jamshedji

that as far as this particular property is concerned the trust has come to an end and the trustees are merely bare trustees holding the property for Freny and Feroza who are absolutely entitled to the same. If the trust has come to an end with regard to this particular property and if Freny has become absolutely entitled to the moiety of the property, then Section 16(1)(c) can have no application because that clause only refers to the income which arises to any person by virtue of a revocable transfer of assets. This income which arises to Freny no longer arises by virtue of the trusts made by the settlors but it now arises by reason of the fact that she has become absolutely entitled to the property and she claims the income as the absolute owner of the property. It may be that the trustees are still in possession but they are not trustees to carry out the trusts mentioned in the trust deed. They are merely bare trustees. The trusts are extinguished and they are carried out as far as this particular property is concerned.

4. In this view of the case it is unnecessary to consider the other question raised by Sir Jamshedji, viz. that the power of revocation has come to an end with regard to this particular property when Phiroz died. Whether a power of revocation comes to an end when one of the objects of the trust is carried out, or whether it is necessary that all the objects should be carried out as mentioned in the trust deed, it is unnecessary for us to decide. Equally unnecessary to decide is the argument submitted by the Advocate General that under Section 16(1)(c) what is relevant is a provision with regard to revocation. According to him the material question to consider is whether the trust deed contains a power of revocation or not. It is irrelevant whether at the date of the assessment that power in fact did not exist and had come to an end. As the view we take is that Section 16(1)(c) does not apply at all because Freny now claims the property absolutely in her own right there is no need to go into these interesting points argued at the bar. We, therefore, answer the first question in the affirmative and the second question in the negative. There will be no order for costs of the reference.

**Tendolkar, J.**

5. This reference arises out of the assessment for the year 1939-40. On January 15, 1936, the assessee and his wife executed a deed settling several properties upon trust for the benefit of their three children, two daughters, Freny and Feroza, and a son, Phiroz. At the time of execution of this deed Feroza and Phiroz were minors. Clause 1 of the deed provides that the trustees shall during the lifetime of the settlors or either of them pay the interest and income of the investments mentioned in Schedules "D," "E," and "F" to the trust deed to Freny, Phiroz and Feroza respectively. Clause 2 of the deed provides that after the death of the survivor of them the settlors the trustees shall hold the investments mentioned in these three schedule absolutely for the said three children respectively. Clause 3 provides for the contingency of either of the two daughters predeceasing the survivor of the settlors. Clause 4 provides for the contingency of Phiroz, the

son, predeceasing the survivor and it states that in that event the trustees shall hold the investments mentioned in Schedule "D" to the trust deed upon the trusts therein mentioned. We are not concerned with the trusts enumerated in Clauses (a), (b) and (c), in the events that have happened. When Phiroz died he did not leave him surviving either a widow or any children. Clause (d) inter alia provides that if Phiroz died without leaving a widow or issue without exercising the power of appointment and without disposing of his share by a deed or otherwise then "on failure of any such appointment absolutely for the said Freny Behramji Lalkaka and Feroza Behramji Lalkaka in equal shares." Then Clause 10 of the deed of trust makes the trust deed revocable by the settlor with the consent of his wife and his three children or any two of them.

6. The assessment for the year 1939-40 was re-opened under Section 34 and the income that was stated to have escaped assessment was the income that came to the share of Freny under this deed of trust. That income consisted of two parts, one being the income of properties mentioned in Schedule D to which she was entitled during her lifetime, and the other being the income of the property to which she became entitled upon the death of Phiroz by virtue of Clause 4(d). It was contended that the trust deed was not revocable and that, therefore, the income coming to Freny could not be included in the income of the settlor under Section 16(1)(c); but that contention was overruled by the Income-tax Officer, and the Appellate Assistant Commissioner upheld the decision of the Income-tax Officer. Against that decision the assessee appealed to the Tribunal. Before the Tribunal, in addition to the contention that the trust deed was not revocable within the meaning of Section 16(1)(c), a further contention was raised that the income from the investments settled on Phiroz could not be regarded as the income of a revocable trust on the ground that the share of Phiroz had devolved on his death absolutely to Freny and Feroza and that, therefore, Section 16(1)(c) did not in any event apply to this part of the income of Freny. On these facts two questions have been referred to us by the Tribunal for our decision. The first is whether the trust deed under which Freny gets the income during the lifetime of the settlors of the property mentioned in Schedule D, is revocable, and the other is whether the income which came to Freny under Clause 4(d) of the trust deed upon the death of Freny could be regarded as the income of the assessee under Section 16(1)(c) of the Income-tax Act.

7. Now dealing with the first question, the relevant portion of Section 16(1)(c) is "all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be the income of the transferor." It is urged by Sir Jamshedji on behalf of the assessee that the words "revocable transfer" in this section require that the transfer should be revocable absolutely and unconditionally and that by reason of the fact that the transfer in this case could not be revoked under Clause 10 of the trust deed without the consent of the wife and the children or any two of them, it is not a revocable transfer within the meaning of Section 16(1)(c). Apart from any

authority, and reading the section by itself, I am unable to agree with this contention. It would involve my reading into the section words which are not there, and the Court is not entitled to do so unless it appears that giving effect to the section as it stands would lead to an obvious absurdity or inconvenience which could not have been contemplated by the Legislature. No such position arises in this case. The words "revocable transfer" are well-understood in law; and a transfer to my mind does not cease to be revocable because the power of revocation cannot be exercised by the settlor without the consent of the named individuals or any of them. However, Sir Jamshedji has relied upon two reported cases in support of his contention. The first is a decision of the House of Lords in *Wiggins v. Watson (Trustees)* [1934] A.C. 264. In that case a settlor by a settlement covenanted with the trustees that he would during the joint lifetime of himself and his son pay the trustees an annuity for the benefit of his son. That trust deed contained a proviso to the effect that the settlor might at any time or times by a deed or deeds with the consent of any one of five persons of whom two were the trustees revoke the settlement. It was held by Lord Buckmaster that Section 20(1) of the Finance Act of 1922 did not apply to that case since the power of revocation could only be exercised with the consent of some persons other than the settlor. But, to my mind, that case is of no assistance to us in interpreting Section 16(1)(c) of the Indian Income-tax Act, because when one turns to Section 20(1) of the Finance Act of 1922 under which that case was decided, that section in terms provides that the settlement must be "revocable without the consent of any other person." Indeed, the absence of these words in the Indian statute strengthens the argument that we should resist any attempt at interpolation of those words into the section as it stands. The next case relied upon by Sir Jamshedji is a decision of a Division Bench of this Court in *Ramji v. Commissioner of Income-tax*<sup>2</sup>, *Bombay* In that case there was a deed of trust under which the nett income of certain properties was to be paid to the wife of the settlor during her lifetime. The deed further provided that in the event of the settlor surviving his wife the income should be paid to him. A Division Bench consisting of Kania J. and Chagla J. (as they then were) came to the conclusion that the third proviso to Section 16(1)(c) applied as the trust was not revocable for a period exceeding six years, and that, therefore, Section 16(1)(c) did not apply to the facts of the case at all. That really disposed of the reference in that case; and it was not necessary for their Lordships to decide or to express any opinion as to whether the first proviso to Section 16(1)(c) applied to the facts of that case. But, nonetheless differing opinions were expressed by the learned Judges on the applicability of the said proviso. Kania J., although as I read his judgment he did not decide that the proviso did not apply, was inclined to take the view that since the probability of a retransfer was conditional on the death of the settlor's wife the case did not fall within the first proviso. On the other hand, Chagla J. clearly came to the conclusion that the terms of the proviso were sufficiently wide to cover the case in which the retransfer to the settlor was conditional. With great respect to the learned Judges, these observations were to my mind obiter, and it does not appear to me to be

necessary for the purpose of deciding the reference before us, to determine which is the correct view of the first proviso to Section 16(1)(c). 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. Neither of these two cases to my mind strengthen the argument of Sir Jamshedji, and I am clearly of the opinion that for the purposes of Section 16(1)(c) a transfer is nonetheless revocable even if it can be revoked only with the consent of any named person or persons.

8. With regard to the second question that has been raised before us, the determination of that question really depends upon the true construction to be put on the trust deed. It is contended by the Advocate General on behalf of the Commissioner that although under Clause 4(d) Freny takes the property mentioned in Schedule "E" absolutely upon the death of Phiroz, the period of distribution is postponed under Clause 2 of the deed of trust until after the death of the survivor of the settlors. Now that clause is in these terms:

2. After the death of the survivor of them the Settlers the trustees shall subject as hereinafter mentioned hold the investments mentioned in Schedule "D" hereto in trust absolutely for the said Freny Behramji Lalkaka, the investment mentioned in Schedule "E" hereto in trust absolutely for the said Phiroz Behramji Lalkaka and the investment mentioned in Schedule "F" hereto in trust absolutely for the said Feroza Behraraji Lalkaka.

This clause must be read with what precedes it, viz. Clause 1 in which it is stated that the three children will be entitled during the lifetime of the settlors or either of them to the income of the property set out in Schedules "D," "E" and "F." Clause 2, therefore, refers only to the possibility of all the three children surviving the settlors; and provides that after the death of the survivor the three children will respectively become entitled to the properties mentioned in Schedules "D," "E" and "F." Clause 2, to my mind, does not deal with the contingency of the death of any of these three children during the lifetime of the settlors or either of them; and, therefore, I am not prepared to read Clause 2 of the trust deed as postponing the period of distribution of any interest that devolves on Freny upon the death of Phiroz. If that is the correct interpretation of the trust deed, then it follows that upon the death of Phiroz, Freny and Feroza became absolutely entitled to the properties mentioned in Schedule "E" in equal shares. That position having arisen, to my mind, the trust was extinguished in so far as it related to the properties in Schedule "E." Any income, therefore, received by Freny from this portion of the properties ceased to be the income

of a trust and was outside the scope of Section 16(1)(c).

9. The result, therefore, is that with regard to the second question, Freny having become entitled absolutely under Clause 4(d) of the trust deed to the income of the property which had been allocated to Phiroz during his lifetime, her income is not touched by the provisions of Section 16(1)(c) at all. I agree, therefore, that the answers to the two questions should be as indicated in the judgment of my Lord the Chief Justice. Answers accordingly.

#### Cases Referred.

1(1944) 47 B.Om. L.R. 169 : S.C. 13 I.T.R. 105

2(1947) 47 Bom. L.R. 169 : S.C. 13 I.T.R. 105