BOMBAY HIGH COURT

Commissioner of Wealth-Tax

Vs

Purshottam N. Amersey

(Kotwal, C.J. V Desai, J.)

16.03.1968

JUDGMENT

Kotval, C.J.

1. The only question referred for our decision is :"Whether, on the facts and in the circumstances of the case, and having regard to the terms of annexure 'A', the Tribunal was justified in holding that the interest of the assessee under the trust had no value ?"

2. This question has been framed in connection with the assessments to wealth-tax of two individuals who are brothers, Purshottam N. Amersey and Manoranjan N. Amersey, but at the hearing before the Tribunal and before us it was agreed that the facts and circumstances in the cases of both the assessee are the same and that the documents which fall to be considered in each case are also similar. Therefore, in the statement of the case reference has been made to the facts of only one case, that of the assessee, Purshottam, and we shall also for the purposes of the decision of this reference refer to the facts and circumstances of that case.

3. Purshottam Amersey and his brother were partners along with others in Messrs. Amersey Damodar of Bombay. In that firm, Purshottam had to the credit of his account in the year 1949 a sum of Rs. 4,50,000 lying in deposit with the firm. On 8th September, 1949, he declared a trust of this amount. The amount was not made over to anyone but it appears that by a mere book entry the amount standing to the credit of Purshottam was held to the credit of the trust fund. Under the provisions of that trust, to which we shall presently advert, both the assessee were entitled to certain benefits which in the assessment year 1960-61 the authorities under the Wealth-tax Act sought to bring to tax in the hands of these two persons as individuals. Both these persons are otherwise, it appears, wealthy persons and own considerable property which has been taken into account towards the computation of their net wealth. So far as their beneficial interest arising out of the trust deed is concerned, having regard to the provisions of section 21(2) of the Wealth-tax Act, the interest can at the opinion of the department be taxed as being the net wealth of the beneficiaries under the trust or it can be taxed in the hands of the trustees subject to the conditions prescribed in that section. The assessees have no objection to the amount of net wealth being taxed in the hands of the trustees, but the department finds it advantageous to add it to the net wealth of the assessee as the beneficiaries under the trust fund and assess the assessees along with their other considerable wealth. That has given rise to the question which has been referred.

4. Now, the terms of the indentures of trust dated 8th September, 1949, are in both the cases identical and so we will refer to the terms of one of them. The trust deed executed by Purshottam recites that he as the settlor was appointing three persons as the trustees, the three persons being himself, his father, Nandlal, and his mother, Bai Manjulabai. The subject of the trust is the amount of Rs. 4,50,000 lying in deposit with the firm of Messrs. Amersey Damodar of Bombay. The first clause merely sets out that the trust is being declared out of natural love and affection which the settlor bears towards the members of his family and diverse other good causes and consideration. The second clause lays down the terms and conditions of the trust and is important for the purposes of the question referred. That clause provides as follows :

> "2. The trustees shall hold and stand possessed of the trust fund upon trust :
> (a) To recover the interest, dividends, profits and income of the trust fund and to pay out of the same the charges for collection and all other outgoings, if any;
>
> (b) To apply the balance of such interest, dividends, profits and income of the trust fund (hereinafter for brevity's sake referred to as 'the net income') for the support, maintenance and advancement in life and otherwise for the benefit of the settlor and his wife (provided such wife is born before the date of these presents) in such manner as to enable the settlor to live as far as possible with the same comforts and to enjoy life in the same manner as he is accustomed to do And in case of any surplus income at the end of any year to accumulate the same for a period of eighteen years from the date hereof and to add the same to the corpus of the trust fund And after the expiration of the said period of eighteen years in case of any surplus income at the end of any year to hand over the same to the settlor Provided further that in applying the net income as aforesaid the trustees shall not be entitled to take into account any other income from any other source that the settlor may be receiving at the time AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED that the trustees shall not be liable or accountable to any one for any act bona fide done by them or for any payment bona fide made by them in pursuance of the provisions of this clause and in particular they shall not be accountable or responsible f or the amounts expended or applied by them or the manner in which or the purpose for which the same shall be applied and all moneys so expended or applied by the trustees in their absolute discretion shall not be questioned by any party in any court of law or otherwise howsoever;
> (c) If a child or children is born to the settlor, then on the death of the settlor to divide the corpus of the trust fund amongst all the children of the settlor, if more than one in the proportion of four shares for every male child to one share for every female child;
> (d) If no child is born to the settlor, then on the death of the settlor, leaving a wife him surviving and provided such wife is born before the date of these presents, to pay the net income to such wife until her death or remarriage whichever event shall first happen Provided further that in the event of such wife being born after the date of these presents, to pay to the wives an amount equivalent to twenty-five per cent. of the corpus of the trust fund at the time of the death of the settlor;
> (e) Subject to the provisions of sub-clause (d) hereof, on the death of the settlor without a child being born to him, the trustees shall hold and stand possessed of the corpus of the trust fund upon trust to divide the same amongst the heirs of the settlor according to the law of intestate succession amongst Hindus."

5. The rest of the clauses except the two mentioned below are hardly material for the decision of the question before us. In clause 4 it is provided that the trustees shall be at liberty to keep the trust fund a s a deposit at interest in the firm of Messrs. Amersey Damodar - a firm in which the assessees, as we have said, were themselves partners. Next as regards the vacancy in the office of trustee, clause 8 provides that the surviving or continuing trustee or trustees for the time being or they refusing the retiring trustees or failing them the heirs, executors and administators of the last surviving or continuing trustee should appoint a new trustee or trustees "but so as not to be more than five nor less than two..." trustees upon "every or any such appointment".

6. It will be noticed that sub-clause (b) of clause 2 of the trust deed provides that the trustees shall "apply" the balance of the trust funds after the charges for collection and other outgoings "for the support, maintenance and advancement in life and otherwise for the benefit of the settlor and his wife (Provided such wife is born before the date of these presents) in such manner as to enable the settlor to live as far as possible with the same comforts and to enjoy life in the same manner as he is accustomed to do...." The words within the brackets, it was explained, were inserted in this sub-clause in order to guard against the trust being voidable on the ground of infringing the rule against perpetuity. The provision giving interest to the assessee is a very general provision that the trust fund shall be applied for the support, maintenance and advancement in life of the settlor and his wife. On that date, 8th September, 1949, the settlor was not married. The assessee, Manoranjan Amersey, was married on the 18th December, 1950, and the assessee, Purshottam, was married on the 22nd April, 1958, that is to say, about seven and a half years after the trust deed. The words in sub-clause (b) of clause 2 may, therefore, have been inserted as explained in order to indicate that the wife to be was, on the date of the settlement, not (sic) in existence. However, we say this only by way of an explanation and it does not affect the decision on the question before us.

7. Before we proceed to state the respective contentions of the parties, it is necessary at this stage to clear a small point is whether sub-clause (b) of clause 2 of the trust deed makes the wife an immediate beneficiary under the trust deed or whether so long as the settlor was alive the wife had no beneficial interest under the trust deed. No doubt in clause 2(b) the words used are "..... for the benefit of the settlor and his wife.....", but it seems to us that though these words are put in, in order to refer generally to the parties to the trust, the subsequent provisions make it clear beyond any doubt that, so long as the settlor was alive, it was for his support, maintenance and advancement in life that the balance of the trust funds was to be applied. Firstly, the words "for the benefit of the settlor and his wife" are immediately succeeded by the words "in such manner as to enable the settlor to live as far as possible with the same comforts and to enjoy life in the same manner as he is accustomed to do", which would indicate that the main provision laying down the conditions upon which the trust fund was to be applied was with reference only to the assessee and not to his wife. Similarly, the later provisions in sub-clause (b) of clause 2 says that any other income from any other source that the settlor may be receiving trust funds as aforesaid., suggesting that he was to enjoy the beneficial interest himself at some stage. But any doubt in this matter as to whether the wife a s all a beneficiary is dispelled by a consideration of sub-clause (d) of clause 2. In the event that no child is born to the settlor and his wife, then on the death of the settlor, the provision is "to pay the net income to such wife until her death or re-marriage whichever event shall first happen". The provision to pay the net income to the wife comes in only at this stage, which clearly suggests that the earlier reference to the wife in sub-

clause (b) of clause 2 was only a general reference to the overall purpose of the trust deed.

8. Now, when the wealth-tax authorities sought to bring to tax the interest of the assessee under the provisions of the trust deed, it was contended before the Wealth-tax Officer that the assessee's life interest was not definite and ascertainable and, therefore, the trustees alone should be taxed directly in respect of the entire estate in their hands under section 21(4) of the Wealth-tax Act. That it appears was the principal contention before the Wealth-tax Officer and that contention was negatived by the Wealth-tax Officer.

9. When the assessee took the matter to the Appellate Assistant Commissioner another contention was also raised. It is stated in the first paragraph of the Appellate Assistant Commissioner's order : "The first contention raised in this appeal in that the assessee is incapable of being assessed in respect of his life interest in the trust created by the deed dated September 8, 1949". The principal contention which was urged before the Wealth-tax Officer was also raised before the Appellate Assistant Commissioner as can be seen from paragraph 2 of the Appellate Assistant Commissioner's order :

> "It is contended that the assessee has no right to any portion of the income of the said trust, that his share therein is indeterminate and unknown, that the assessee has really no life interest at all in the said trust and finally that no purchaser would be willing to pay any amount for the so-called life interest."

10. The Appellate Assistant Commissioner held so far as the second contention before him was concerned that it could not be said that the assessee's interest was absolutely without value. As to the other question, whether the assessee's share was inderterminate or unknown, the Appellate Assistant Commissioner held that the assessee's interpretation of the clause regarding the extent of his interest in the trust would be only germane to the question of valuation and it could not affect the question whether the assessee is not possessed of the asset at all. On this view the Appellate Assistant Commissioner dismissed the appeal, though he made a change in the language, with which we a re not here concerned.

11. The assessee carried the matter by way of appeal to the Income-tax Appellate Tribunal and the Tribunal has allowed the assessee's appeal. Before the Tribunal, the principal contention was that the value of any asset has to be estimated so as to arrive at its price "if sold in the market on the valuation date". The Tribunal considered the circumstances and the terms of the deed of trust and came to the final conclusion that : "In our opinion the value of the said interest is nil". The reasons which prevailed with the Tribunal were as stated in paragraph 6 of its order that having regard to the nature of the benefit given to the assessee under the trust deed, the interest available to the assessee will have no value in the market whatever because the benefit received is of a peculiar kind. The Tribunal stressed that under the trust deed no cash payment to the assessee as such was contemplated but that the provision was to apply the trust fund for the support, maintenance and advancement in life of the assessee. Secondly, they pointed out that upon the terms of the trust deed the interest of the assessees was a personal interest and "is restricted in its enjoyment to them personally and such interest is not capable of being transferred to third parties". Therefore, it was property which was incapable of being transferred to any third parties and no question arose of its fetching any price in the market. The Tribunal also gave an alternative finding that, even assuming that the above interpretation of the document was not correct, nobody would be wiling to come forward to purchase an asset of this kind, because even

a willing purchaser, who was desirous of taking an assignment of the respective interests of the assessees under the trust deed, would not be in a position to compel the trustees to make any payment to them. Thus, the content or quantum of the interest so far as third parties were concerned, would be of a problematic character and, therefore, the Tribunal held that the interest of the assessee was such "as would lead the asset being of no value o r of insignificant value". It will be noticed that here (paragraph 7) the Tribunal came to the conclusion that the asset was of an insignificant value whereas in the earlier paragraph and in its final conclusion it has held that "the value of the said interest is nil".

12. In the arguments before us counsel on behalf of the department has challenged the interpretation placed upon the terms of the deed of trust and the finding that the value of the interest of the assessee was nil. At any rate, counsel has urged that those considerations which had prevailed with the Tribunal in coming to the conclusion, that the value of the s aid interest is nil, are hardly germane to the question which really arises, namely, whether in the circumstances and upon the terms of the trust deed the interest of t he assessee had no value. He has urged that the question whether the property was not capable of being transferred or that the benefit reserved under the deed was of a peculiar kind is irrelevant upon a consideration of the provisions of the Wealth-tax Act in determining whether this was the net wealth of the assessee under section 3 of the Act, Mr. Joshi has urged that the simple question which the authorities had to decide was, in the first place, whether this was net wealth in the hands of the assessee and for that purpose they had to determine whether it constituted an asset within the definition of that word in section 2(e) read with the definition of "net wealth" in section 2(m) and that the question as to the mode of valuation has been unnecessarily mixed up with the question whether it was "net wealth" in the hands of the assessee. He urged that the question which the Tribunal has considered arises only upon the provisions of section 7(1) which deals with the question as to how the value of the assets is to be determined and even there the Tribunal has misconstrued the provisions of that sub-section.

13. In reply Mr. Kolah on behalf of the assessee has urged that, having regard to the provisions of section 3, which must be read in the light of section 7(1), the Tribunal was right in the conclusion which it reached that the assessee's beneficial interest in the trust fund was of no value. Counsel for both the parties have referred to certain decisions to which we will presently advert. Mr. Kolah also, raised the other contention which, as we have said, was the principal contention which the assessee raised before the Wealth-tax Officer to begin with, namely, that having regard to the provisions of section 21(4) of the Act, the share of the assessee under the trust deed was indeterminate and unknown and that, therefore, the net wealth could be taxed in the hands of the trustees alone having regard to the provisions of section 21(2). Mr. Joshi has objected to the assessee being allowed to raise this question upon the present reference and considerable arguments took place as to whether that question ought to be considered by us and whether the assessee can at the stage of reference be allowed to raise it.

14. Section 3, which is the charging section in the Wealth-tax Act, provides that, subject to the other provisions contained in the Act, there shall be charged a tax in respect of the net wealth on the corresponding valuation date of every individual. We are not concerned here with the other provisions of this sub-section. The expression "net wealth" in the sub-section is defined in section 2(m) to mean "the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the

valuation date ...." We are not here concerned with the inclusive clause of this definition. The net wealth, therefore, consists of all the assets wherever located belonging to the assessee on the valuation date. The word "assets" is also defined in section 2(e) to include "property of every description, movable or immovable. "Then there are certain specific exclusions none of which can be applied here. It is clear from these provisions laying down the charge of the tax that every kind of property, movable or immovable, of an assessee has to be taken into account and its aggregate value computed in accordance with the provisions of the Act. The first question, therefore, which has to be determined in any assessment under the Wealth-tax Act is what constitutes the net wealth of the assessee.

15. Section 7 deals with the question of how the value of the asset is to be determined and sub-section (1) provides as follows :

> "Subject to any rules made in this behalf, the value of any asset, other than cash, for the purposes of this Act, shall be estimated to be the price which in the opinion of the Wealth-tax Officer it would fetch if sold in the open market on the valuation date."

16. The Tribunal has stressed the concluding words of sub-section (1) of of section 7, "if sold in the open market on the valuation date" and in view of those words it has proceeded to consider whether the interest of the assessee under the trust could have any value in the open market on the valuation date and has come to the conclusion that it had little or no value. Therefore, the Tribunal allowed the appeal and held that the interest was not an asset under the Wealth-tax Act. Now, it seems to us that virtually the order of the Tribunal amounts to this that, having taken into account the provisions of section 7(1) which merely deals with how the value of assets has to be determined, it has ultimately held that the interest of the assess was not an asset at all. We shall presently show that it reached this conclusion because of a misconstruction of section 7(1) and because of an incorrect view as to what its provisions implied.
17. The definition of "assets" in section 2(e) read with the definition of "net wealth"
in section 2(m) are extremely comprehensive provisions and all assets are include in "net wealth" by the very definition and in the definition of "asset" property of every description, movable or immovable, is included. Therefore, when section 3 imposes the charge of wealth-tax upon the net wealth, it necessarily includes any and every description of the property of the assessee, movable or immovable, barring of course the exceptions stated in section 2(e) or any other provisions of the statute. What is more, it is clear upon the wording of section 3 that the moment a right, interest or other property falls within the definition of "assets" the Act assumes that it must have some value. that is by section 3 merely states that there shall be charged a tax in respect of the net wealth. Since "net wealth" includes all a sets wherever located belonging to the assessee and since "assets" includes the property of every description, movable or immovable, it is clear that everything of value which an assessee possesses is brought into the ambit of the charging section and is assumed to have some value, however little. Therefore, in the first place, it is not enough to say, as the Tribunal has stated in its order at certain places, that the interest of the assessee in the present case was "of insignificant value". Even if it is of insignificant value, it will clearly be chargeable under section 3 for the proper amount of wealth-tax.

18. Section 7 merely deals with the made in which the value of the assets has to determined and we agree with Mr. Kolah that the charging section because of its opening words "Subject to the other provisions contained in this Act" must be held to be subject to section 7(1); but we do not

think that section 7(1) could be utilised in the manner in which it has been used in this case to nullify the provisions of section 3 itself. What has been done in the present case is that, utilising the provisions of the Act which only provides a machinery for determining the value of the asset, a conclusion has been reached that the asset in this case has no value whatever, in other words, that it is not an asset at all. The fallacy of this reasoning lies in this that it was not clearly realised that the purpose of section 7 was not to indicate what is not an asset but merely to indicate how it has to be valued if it is an asset.

19. In our opinion, the Tribunal should have first of all considered whether the interest of the assessee amounted to his "net wealth" within the meaning of section 3 read along with the definition and that would entail a finding from the Tribunal whether or not the interest was an asset. If it was an asset it would be his net wealth. Once it is held that the interest of the assessee was his asset, the Tribunal could not have come to the conclusion on the basis of section 7(1) that it was not his asset, which is virtually what the Tribunal has done. It was, therefore, rightly argued by Mr. Joshi on behalf of the Commissioner that the only question that arose upon the findings of the Tribunal was one of valuation and the Tribunal could not have come to the conclusion that "the value of the said interest is nil" as it has done in the concluding portion of paragraph 8 of its order.

20. Even in the conclusion to which the Tribunal reached that the interest of the assessee in the trust property had no value whatever and upon the reasoning which it followed, which in our opinion was incorrect, there is another error of construction of section 7(11). The principle which sub-section 1 of section 7 lays down is that the value of any asset is to be the estimated price which the asset "would fetch if sold in the open market on the valuation date". From its order it appears that the Tribunal construed this clause of sub-section (1) of section 7. It proceeded to consider whether the interest of the assessee in fact had any value in the open market and having considered several of the terms of the trust deed, on which we will presently have something to say, it held that "this is a property which is incapable of being transferred to any third parties as the interest of the respective beneficiaries is restricted to them personally". Then it proceeded further and held that even assuming that this interpretation of section 7(1) was incorrect, in their opinion in f act nobody would be willing to come forward to purchase an asset of this kind. They showed certain circumstances and concluded that "in our opinion, it is such as would lead the asset being of no value or of insignificant value". Later on, in paragraph 8, however, they came to the conclusion that the value of the interest was nil.

21. Now, it was rightly argued on behalf of the department that, in the first place, these findings of the Tribunal are themselves conflicting and that the Tribunal was in two minds as to whether the asset had some little or no value at all. At one stage, it said that it was of insignificant value and at another stage that it had no value, but apart from that it seems to us that the cardinal error which the Tribunal made was to hold that under the words of section 7(1) ".....it would fetch if sold in the open market....." it must have regard to the actual facts and the actual circumstances and decide whether the asset could be sold or not in the open market. In that respect it seems to us that the Tribunal was clearly wrong on a point of construction. When the statute uses the words "if sold in the open market", it does not contemplate any actual sale or the actual state of the market, but only enjoins that it should be assumed that there is an open market and the property can be sold in such a market and on that basis directs that the value should be found out. It is a hypothetical case which is contemplated by those words of the sub-section. The tax Officer

must assume that there is an open market in which the asset can be sold and proceed to value it on that basis. The use of the words "if sold" creates a fictional position which the tax officer has to assume.

22. The Wealth-tax Act is a comparatively new taxation statute and there is little to guide the court in the construction of section 7, but much assistance can be derived from the interpretation of similar provisions in other statutes, particularly the English statutes which are in pari material. Reliance was placed upon two decisions in England, which, in our opinion, are apposite in the construction of section 7(1). One such section was section 7, sub-section (5) of the British Finance Act, 1894, which also provided for the valuation of property as follows :
"The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

23. The concluding words "if sold in the open market" are identical with the words used in section 7(1) of the Indian statute.

24. In Commissioner of *Inland Revenue v. Crossman*[1] the House of Lords was called upon to construe those very words. In that case the deceased was entitled to a number of ordinary rigid restrictions upon the alienation and transfer of those shares in the company and an argument similar to the one which prevailed with the Tribunal was urged that, in view of the restrictions on alienation and transfer of the shares, no one would in fact purchase those shares nor could they be put in the open market. In dealing with the point Viscount Hailsham L. C. pointed out (see page 39) 2 E. D. C. 537, 550,551,552. that :

> "In order to reach the right conclusion upon the construction to be placed upon the sub-section and its application to the facts of the present case, it seems to me essential to determine what is the property which has to be valued"

and then he proceeds to state what that property was in the following words :
"In my view, the property which, passed at the death of the deceased consisted of the shares in the company, and this is not the less try because the terms of the articles limited the rights of the deceased shareholder or of his executors to deal with the shares, and gave certain privileges and rights of pre-emption on his death. If I am right so far, it follows that the Commissioners have to estimate the price which the shares would fetch if sold in the open market at the time of the death of the deceased."

25. Then the House of Lords referred to the decision of Lord Blanesburgh in an Irish case, Attorney-General for *Ireland v. Jameson*[2] where Lord Blanesburgh had taken a view taken in the present case by the Tribunal and commenting on that view Lord Hailsham observed :

> "My Lords, it seems to me that this construction involves treating the provisions of section 7, sub-section (5), as if their true effect were to make the existence of an open market a condition of liability instead of merely to prescribe the open market price as the measure of value" and in a later passage at page 49 2 E. D. C. 537, 551, 552. :
> "But the purpose of section 7, sub-section (5), is not to define the property in respect of which estate duty is to be levied, but merely to afford a method of ascertaining its value.

> If the view entertained by the Court of Appeal were correct, it would follow that any property which could not be sold in the open market would escape estate duty altogether. That seems to me quite an unnecessary and unnatural construction to place upon the language of the statute.... I think that full justice is done to the meaning of the sub-section if the property to be valued is determined by the earlier sections and section 7 is treated as being merely a statutory direction as to the method by which the value is to be ascertained. In order to comply with that statutory direction, it is necessary to make the assumptions which the statute directs. This is not to ignore the limitations attached to the share."

26. In re Cassel : *Public Trustee v. Moutbatten*[3] is another casein which the provisions of section 7(5) and the other provisions of the British Finance Act, 1894, fell to be construed. In that case the testator bequeathed "Book House and contents" and the stables held therewith which he had taken on lease expiring in 1995, to trustees upon trust to allow "C" to have the use and enjoyment thereof for life, and after her death upon the like trust for the benefit of Lady "L" for life. "C", the first tenant for life, died and was succeeded a s tenant for life by Lady "L". The question was how the estate duty on C's death in respect of the benefit of the annual expenditure on Brook House, should be borne as between Lady "L" and the testator's residuary estate. In that connection the provisions of section 7(5) of the British Finance Act, 1894, fell to be construed. An argument was advanced before Russell J., as he then was, that the case would not be governed by section 7(5) and, therefore, the property could not be valued. This point, the learned judge answered at page 281 :

> "Next, how is the principal value of that property to be ascertained ? The machinery provided by the Act is section 7, sub-section (5), supplemented to some extent by section 7, sub-section (8). That machinery does not exactly fit the present case, because from the personal nature of division, the benefit of it could not be sold at all; an outsider purchaser would not obtain the delivery of the goods. Nevertheless, the machinery must be made to fit, and I think it can be made to fit."

27. The provisions of the Wealth-tax Act, in our opinion, indicate a similar construction. Though no doubt, section 3, which is the charging section, begins with the words "Subject to the other provisions contained in this Act" and because of those words would subject to section 7(1), a consideration of the definition of "net wealth" in section 2(m) and "asset" in section 2(e) clearly shows that property of every description, movable immovable, would be included in the definition of "net wealth" and the net wealth is chargeable to wealth-tax under section 3. Therefore, the first question which must be decided under the Act is whether the interest of the assessee, as in the present case, was his net wealth or, in other words, as asset of his. If it was, it would be chargeable to wealth-tax and though the provisions as to valuation may not directly apply they must be made to apply.

28. But it seems to us that it is not necessary to go so far as that in the present case. A consideration of the terms of the trust deed and of the interest granted to the assessee will clearly show that the conclusion which the Tribunal reached, that the value of the said interest is nil, is erroneous. We have already said that the mere fact that the property was not capable of being transferred is not a consideration which ought to have prevailed as shown by the authorities to which we have referred above. The error which the Tribunal committed in that respect was to

have regard to the actual position in the actual market whereas upon the statute what they should have considered is, assuming a hypothetical market, what would be the price if the interest was sold.

29. Now, turning to the provisions of the trust deed, we have already said that under the provisions of clause 2(b) so long as the assessee was alive we do not think that the wife had any interest in the trust fund or its income. We have indicated that reading clause 2(b) in the context of sub-clause (d) of clause 2, it is clear that the beneficial interest was in the first instance to go to the assessee for his "support, maintenance and advancement in life" and otherwise for his benefit. The object of the trust was to provide support, maintenance and advancement in life of the assessee and the subsequent conditions were all in favour of the assessee. It has been provided that the support and maintenance which he was to receive was such as to enable him to live as far as possible with the same comforts and to enjoy life in the same manner as he was accustomed to do. It was further provided that the trustees shall not be liable or accountable to anyone for any act bona fide done by them in pursuance of the provisions of clause 2(b) of the trust deed. The provisions are sweeping in their nature and objects of the trust are stated in the most generous terms in favour of the assessee. Since the assessee was a trustee along with his parents, it is clear that he could at any time have obtained whatever funds were available out of the income of the trust property. There is also no doubt that the assessee as the beneficiary under the trust deed could legally claim that the amount should be paid to him.

30. It was urged by Mr. Kolah that the condition of the trust was that he should receive the income of the trust fund only for the support, maintenance and advancement in life and in such a manner as to enable him to live as far as possible with the same comforts and to enjoy life in the same manner as he was accustomed to do. Therefore, Mr. Kolah urged that he was not the sole judge, but that his parents, who were also the trustees, could have judged for themselves whether he required the moneys according to his standard of life and they would be entitled to refuse to pay him if he lived extravagantly or spent in excess of the requirements of his maintenance or support.

31. We do not regard the provisions of the trust deed as indicating that the assessee could ever be denied payment of the trust funds. We have already said that in stating the purpose and object of the trust such general words have been used that it would be impossible having regard to those words to say that the assessee would not be entitled to any moneys out of the trust funds. The moment that conclusion is reached, the interest would be an interest having some value and if it has a value it would be chargeable in his hands. It was also urged that no one would come forward having regard to these terms to purchase such an interest. We have already said that the question whether an actual purchaser would purchase such an interest is irrelevant having regard to the provisions of section 7(1), because that section contemplates a hypothetical market and a sale in such a market, but we do not think also that in fact the interest of the assessee was such that nobody would ever care to purchase it. It was an interest which was a substantial interest and which was easily available to the assessee on the terms of the trust deed. He was himself a trustee and the other trustees were merely his parents. On the provisions of the trust deed it is clear that the assessee could compel payment from the trustees of the income from the trust funds to the extent it was available. Therefore, it could not be said that the value of the interest was nil. As to its being "insignificant", however insignificant it could be valued. In this matter we think that the Tribunal has clearly misconstrued the trust deed.

32. Thus, in our opinion, the Tribunal went wrong both in its interpretation of section 7(1) read with the provisions of the charging section 3 as also in its construction of the trust deed in the present case. Its findings are, therefore, clearly induced by an error of law. We are unable to accept the conclusions that the value of the interest of the assessee was either insignificant or nil. It was a valuable interest which has to be valued having regard to the provisions of section 7(1) and the other provisions of the Act. The question referred to us, therefore, must be answered in the negative.

33. So far it will be noticed that we have considered the question arising upon the basis of section 3 with section 7(1) of the Act, but Mr. Kolah, on behalf of the assessee, raised a further question relying upon the provisions of section 21(4) of the Act. Section 21 makes provision for assessment in special cases and one of the cases contemplated in sub-assessment in special cases and one of the case of a trust the wealth-tax shall be levied upon and recoverable from the person on whose behalf the assets are held and the provisions of the Act were to apply accordingly, but then sub-section (2) gave a further option to the department. It made the following provision :
"Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf or for whose benefit the assets above referred to are held, or the recovery from such person of the tax payable in respect of such assets."

34. By this sub-section, therefore, an option was given to the department to assess either the trustees or the beneficiary in the case of a trust. Obviously such an option was given in the interest of the revenue. The department can at its choice add the amount of the net wealth to the assessment of the trustees or to the assessment of the beneficiary whichever was beneficial to the revenue and charge the wealth-tax on that basis, but sub-section (4) of section 21 provides :

> "Notwithstanding anything contained in this section, where the shares of the persons on whose behalf or for whose benefit any such assets are held are indetermine or unknown, the wealth-tax may be levied upon and recovered from the court of wards, administrator-general, official trustee, receiver, manager or other person aforesaid as if the persons on whose behalf or for whose benefit the assets are held were an individual.... for the purposes of this Act."

35. The effect of sub-section (4), therefore, is that sub-section (2) would not be available to the department where the shares of the persons on whose behalf any assets are held are indeterminate or unknown, that it is to say, if the shares of the beneficiary in the case of the trust are indeterminate or unknown. Relying upon this provision Mr. Kolah urged that in this case the shares of the assessee and his wife are indeterminate and unknown and, therefore, the department must necessarily go only against the trustees and cannot add the amount of the interest to the net wealth of the beneficiary. In this respect he pointed to the provisions of section 41(1), first proviso, of the Indian Income-tax Act, and the construction put upon that proviso in several cases; particularly he relied upon Commissioner of Income-tax v. Puthiya Ponmanichintakam Wakf ., *Commissioner of Income-tax v. Manilal Dhanji and Commissioner of Income-tax v. Lady Ratanbai Mathurada*[4]*s.* to urge that it must be held that the interest of the assessee and his wife in the present case was indeterminate and unknown.

36. Mr. Joshi on behalf of the department took strong exception to this point being allowed to be

raised by Mr. Kolah or it being determined at all, for he urged that it has not been raised, not argued before the Tribunal and the assessee did not ask for a question to be referred nor is it to be found referred to in the statement of the case. That the point was urged before the wealth-tax Officer is clear from the quotation in paragraph 5 of the statement of the case itself from the order of the Wealth-tax Officer. The Wealth-tax Officer dealing with this question said :

> "Therefore I hold that life interest of the assessee who was the settlor as well as one of the trustees extended to the full amount of the income. Therefore section 21[4] is not applicable to the assets in the hands of the trustees, except to the extent of the remainder after deduction of [sic] the value of life interest."

37. In the appeal before the Appellate Assistant Commissioner also this question was raised. He has stated in paragraph 2 of his order :

> "It is contended that the assessee has to right to any portion of then income of the said trust, that his share therein is indeterminate and unknown, that the assessee has really no life interest at all in the said trust and finally that no purchaser would be willing to pay any amount for the so-called life interest."

38. Therefore, the point that the assessee's share therein was indeterminate and unknown was clearly raised in the arguments on behalf of the assessee and that could only have reference to the provisions of section 21(4). Of course, the Appellate Assistant Commissioner brushed aside the question because in his view that contention of the assessee could only be considered for the purpose of evaluating the asset and not because the assessee was not possessed of the asset at all. He held in paragraph 5 :

> "Be that as it may, it cannot in my view be gain said that the assessee is possessed of an asset constituted of his life interest in the trust, and at its highest the assessee's contention can be considered for the purpose of evaluating the asset but not that the assessee is not possessed of the asset at all."

39. Upon the view that the Appellate Assistant Commissioner thus took - a view which in our opinion was not correct - he did not further go into the question because he felt that it was only a question which had to be considered in evaluating the asset.

40. When the matter came before the Tribunal the principal contention raised on behalf of the assessee was that, assuming that it was an asset, it could not be brought within the words "if sold in the open market" in that section. The Tribunal, as we have shown, accepted this contention and since it accepted this contention there was no question of considering the question arising under section 21(4), but the Tribunal has in paragraph 8 of its order held :

> "Having considered the terms of the agreement and the contentions of the parties, we are of the view that no amount is liable to be taken in these two assessments as representing the value of the interest of the respective assessees under the two trusts."

41. In other words, the Tribunal has stated that upon the view which they were taking the question under section 21(2), as to whether the amount is liable to be taken in the assessments

made on the beneficiaries or on the trustees, did not arise for decision. It seems to us that this passage in the order of the Tribunal can only have reference to sub-section (2) of section 21 and, if so, it could only arise upon the argument that the shares of the assessee and his wife were indeterminate and unknown within the meaning of those words in sub-section (4). In that view it does appear that the question must have been adumbrated before the Tribunal although, upon the view which they took, it became unnecessary to decide it and the Tribunal have said so. We were also referred by Mr. Kolah to the memorandum of appeal on behalf of the assessee to the Tribunal and in ground No. 1 that question has in terms been raised. Though this document is not included in the paper-book it was certainly a part of the record of the Tribunal and so we have referred to it. The view which the Tribunal took upon this question in paragraph 8 of its order is referred to also in the statement of the case in paragraph 9.

42. In this view and in the circumstances, we do not think that we can shut out the assessee from raising the question. In fact, for a considerable time we felt that we would ourselves have to determine that question and after reframing the question referred. The question is really part and parcel of a question of valuation of the assessee's interest. The principal question before the authorities was whether the assessee's interest in the trust fund should be valued for the purpose of wealth-tax and that entailed deciding the two questions, whether it was an asset, in the first place, and, therefore, constituted his net wealth and, in the second place, how it was to be valued. The two, it seems to us, were merely answers to one and the same question. It has been held recently by the Supreme Court that an aspect of a question is itself a distinct question for the purpose of section 66(1) of the Act : see *Bhanji Bagawandas v. Commissioner of Income-tax*[5]As to the argument on behalf of the department that the assessee has not asked for a reference and should have had the question framed and referred, we do not see how it is possible for the assessee to do so. Upon the findings given by the Tribunal that the interest of the assessee did not constitute his asset at all, no further question arose to be decide in favour of the assessee. He had thus wholly succeeded before the Tribunal and we cannot see how the assessee in those circumstances could have asked that a reference be made upon another aspect of the same question. We do not think, therefore, that in the present case the assessee could or ought to have asked for this question to be referred. Mr. Joshi on behalf of the department relied upon a decision of this court in *Girdhardas & Co. Ltd. v. Commissioner of Income-tax*[6]. That case turned upon its own facts and, even so, all that was laid down in that decision was that, where a party which has lost the case before the Tribunal applies for a reference and a reference is determined upon, the party which has won may apply for reference of other questions of law which arise from the order of the Tribunal. The decision is not an authority for the proposition, however, that every party must in every case apply for a reference of other questions which arise from the order of the Tribunal or that if the successful party does not do so, it cannot raise it thereafter. The principles which are to be observed in references were generally laid down by the Supreme Court in Commissioner of Income-tax v. Sc india Steam Navigation Co. Ltd. . and that case also stresses that where the question itself was in issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been argued before the Tribunal. This decision also stresses that it will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of section 66(1) of the Act.

43. In view of what we have said were of the opinion that the assessee is entitled to raise the question that his share and that of his wife in the fund were indeterminate and unknown and that,

therefore, having regard to the provisions of section 21(4), the department can only assess the trustees and not the assessee. We would have proceeded to determine the question ourselves, but we do find that, though the question was raised before the Tribunal, the Tribunal has not considered it or given any finding on it, because it held that the assessee's share under the trust deed was not an asset at all. We, therefore, think it fair both to the department and to the assessee that this question should be pronounced upon by the Tribunal and a clear-cut finding given. With these observations we would dispose of the question referred to us by answering it in the negative. The assessee will pay the costs of this reference to the Commissioner.

Cases Referred.

1[1937] A. C. 26; 2 E. D. C. 537
2[1905] 2 I. R. 218
3[1927] 2 Ch. 275; 2 E. D. C. 345, 352
4[1968] 67 I. T. R. 504
5[1968] 67 I. T. R. 80
6[1957] 31 I. T. R. 82