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Judgment
13/1964

IN THE PRIVY COUNCIL

No. 47 of 1962

O N A P P E A L

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
22 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

BETWEEN

78558

KANJEE NARANJEE

Appellant

and

THE COMMISSIONER OF INCOME TAX

Respondent

CASE FOR THE APPELLANT

- 10 1. This is an appeal brought by leave from the RECORD
Judgment and Order of the Court of Appeal for App. p 40
Eastern Africa dated 30th November 1962 App. p.63
dismissing the Appellant's appeal against so
much of the Judgment and Decree of the High App. p.15
Court of Tanganyika dated 9th June 1962 as App. p. 5
confirmed an amended assessment to income tax
raised upon the Appellant in respect of the income
for the year 1958 of two settlements constituted
by the Appellant and his Wife respectively in
1955.
- 20 2. The substantial question arising on this

Act No.10 of
1958

appeal is whether the settlements of the Appellant and his Wife respectively are revocable settlements within the meaning of Section 25 of the East African Income Tax (Management) Act 1958 ("the Act").

3. The provisions of Section 25 of the Act at the material time were as follows :

25.(1) All income which in any year of income accrued to or was received by any person under a settlement, whether revocable or not and whether made or entered into before or after the commencement of this Act, from assets remaining the property of the settlor shall be deemed to be income of the settlor for such year of income and not income of any other person. 10

(2) All income which in any year of income accrued to or was received by any person under a revocable settlement shall be deemed to be income of the settlor for such year of income and not income of any other person. 20

(3) Where in any year of income the settlor, or any relative of the settlor, or any person under the direct or indirect control of the settlor or of any of his relatives, by agreement with the trustees of a settlement in any way, whether by borrowing or otherwise, makes use of

any income arising, or of any accumulated income which has arisen, under such settlement to which he is not entitled thereunder, then the amount of such income or accumulated income so made use of shall be deemed to be income of such settlor for such year of income and not income of any other person.

(4) For the purposes of this section, a settlement shall be deemed to be revocable if under its terms the settlor -

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(a) has a right to re-assume control, directly or indirectly, over the whole or any part of the income arising under the settlement or of the assets comprised therein; or

(b) is able to have access, by borrowing or otherwise, to the whole or any part of the income arising under the settlement or of the assets comprised therein; or

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(c) has power, whether immediately or in the future and whether with or without the consent of any other person, to revoke or otherwise determine the settlement and, in the event of the exercise of such power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property comprised in the settlement or to

the income from the whole or any part of such property :

Provided that a settlement shall not be deemed to be revocable by reason only that under its terms the settlor has a right to re-assume control, directly or indirectly, over any income or assets relating to the interest of any beneficiary under the settlement in the event that such beneficiary should predecease him.

(5) In this section -

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"settlement" includes any disposition, trust, covenant, agreement, arrangement, or transfer of assets, other than -

(i) a settlement made for valuable and sufficient consideration;

(ii) any agreement made by an employer to confer a pension upon an employee in respect of any period after the cessation of employment with such employer, or to provide an annual payment for the benefit of the widow or any relative or dependant of such employee after his death, or to provide a lump sum to an employee on the cessation of such employment;

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"settlor", in relation to a settlement, includes any person by whom the settlement was

made;

"relative" has the same meaning as in section 37. RECORD

4. The other relevant statutory provisions are in the Act and are as follows :

(1) "2 (3)(c) References in this Act to 'under' in relation to any enactment, rule, schedule, part, section, sub-section, paragraph, will, settlement or other document, include references to, in accordance with, by virtue of, and in consequence of, such enactment, rule, schedule, part, section, sub-section, paragraph, sub-paragraph, will, settlement or other document, as the case may be".

(11) "2 (4) References in this Act to 'under', 'subject to', or 'notwithstanding', in relation to any enactment, rule, schedule, part, section, sub-section, paragraph, sub-paragraph, will, settlement or other document, mean under, subject to, or notwithstanding, as the case may be, the provisions of such enactment, rule, schedule, part, section, sub-section, paragraph, sub-paragraph, will, settlement or other document, as the case may be."

5. The facts of the case appear from the Statement of Facts by the Appellant, the Judgments of the High Court and the Court of Appeal for Eastern Africa and so far as material may be summarised as follows:-

(1) By an Indenture of Settlement ("the Husband's Settlement") dated 5th June 1955 the Appellant created a trust fund for the benefit of his then existing and any future grandsons and in default thereof for certain

other persons and declared the Settlement to be irrevocable. The sole Trustees of the Husband's Settlement at all material times were the Appellant and his Wife.

(ii) By an Indenture of Settlement ("the Wife's Settlement") also dated 5th June 1955 the Wife of the Appellant created a trust fund for the benefit of her then existing and any future grandsons and in default thereof for certain other persons and declared the Settlement to be irrevocable. The sole Trustees of the Wife's Settlement at all material times were the Wife and the Appellant. 10

(iii) The Wife's Settlement is identical in terms to the Husband's Settlement and the Husband's Settlement is exhibited. The provisions of Clause 10 of the Husband's Settlement are as follows :

"10. The Trustees may invest any money
"for the time being subject to the trusts 20
" of this settlement in any investments
"authorised by law or in or upon ordinary
"preference preferred deferred or other
"stock or shares of any public or private
"company wherever incorporated or carrying
"on business or in making loans secured or
"unsecured or fixed deposits to or with
"any person firm company or bank and they
"may so invest notwithstanding that the
"Trustees or any of them may have an
"interest in such public or private 30
"company or such firm company or bank."

(iv) In the year of income 1958 the Trustees of the Husband's Settlement derived an income of £54,085 from shares comprised in the settled fund.

(v) In the year of income 1958 the Trustees of the Wife's Settlement derived an income of £2,335 from shares comprised in the settled fund.

10 6. The Respondent claimed that the Husband's Settlement was revocable within the meaning of sub-section (4) of Section 25 of the Act and, therefore, that the said sum of £54,085 should be deemed to be the income of the Appellant for the year of income 1958 under the provisions of sub-section (2) of Section 25 of the Act and he assessed the Appellant accordingly. The Respondent also claimed that the Wife's Settlement was revocable within the meaning of sub-section (4) of Section 25 of the Act and, therefore, that the
20 said sum of £2,335 should be deemed to be the income of the Appellant for the year of income 1958 under the provisions of sub-section (2) of Section 25 and sub-section (1) of Section 74 of the Act and he assessed the Appellant accordingly.

It was not in dispute that if the income arising under the Wife's Settlement fell to be treated as

the settlor's income, by virtue of Section 74(1) the Appellant, as the settlor's husband, would be assessable in respect of that income.

App. p. 1

7. The Appellant appealed to the High Court of Tanganyika on the following amongst other grounds :-

(1) Neither the Husband's Settlement nor the Wife's Settlement constituted a revocable settlement for the purposes of Section 25 of the Act.

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(11) The Appellant was not under the terms of the Husband's Settlement able at any material time to have access by borrowing or otherwise to the whole or any part of the income arising under that Settlement or of the assets comprised therein nor was the Wife under the terms of the Wife's Settlement able at any material time to have access by borrowing or otherwise to the whole or any part of the income arising under the Wife's Settlement or of the assets comprised therein within the meaning of Section 25 (4) of the Act.

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App. p.15

8. On the 9th June 1962 the High Court of Tanganyika dismissed the appeal of the Appellant. In delivering his judgment Mr. Justice Weston

took the view that the words of Section 25 (4)(b) of the Act were to be widely construed. He thought that no settlement could fail to be regarded as a revocable settlement by virtue of the provisions of Section 25 (4)(b) of the Act unless its terms expressly or impliedly kept the settlor effectively away from all income arising out of it. The intention of the Legislature was that a settlement should be deemed to be revocable where its terms were found to be such that there was no lawful bar to the passing of any income arising out of it into the hands of the settlor. Because of the provisions in Clause 10 of each of the settlements there was no bar legal or equitable, in the view of the learned judge, to the Appellant becoming a partner in a firm and borrowing or taking on fixed deposit from the trustees income arising out of the settlement. Accordingly Mr. Justice Weston held that the Husband's Settlement and the Wife's Settlement were revocable within the meaning of the Act and that the Appellant was lawfully assessed in respect of the income arising out of them in the year of income 1958.

9. The Appellant appealed to the Court of Appeal for Eastern Africa against that part of the Judgment of the High Court of Tanganyika which held the Husband's Settlement and the Wife's Settlement to be

App. 1

revocable. The appeal came on for hearing on the 6th and 7th October 1962 before Sir Ronald Sinclair, President, Sir Trevor Gould, a Justice of Appeal, and Mr. Justice Mayers, Acting Justice of Appeal, and on the 30th November 1962 the Court delivered Judgment unanimously dismissing the appeal

App. p.40 10. Delivering the leading judgment Mr. Justice Mayers pointed out that it was only necessary to deal with the Husband's Settlement in the circumstances of the case. It was not disputed that there was an absolute and bona fide transfer of the settled assets to the Appellant and his Wife in their capacity as trustees nor was it disputed that the Appellant at no time made any use, by borrowing or otherwise, of the income or assets of the Settlement. Accordingly, the liability, if any, of the Appellant to income tax in respect of the income of his Settlement did not arise under sub-section (1) or sub-section (3) of Section 25 of the Act. The Respondent's contention was that, because of the provisions in Clause 10 of the Settlement, the Settlement must be deemed to be revocable by virtue of the provisions of paragraph (b) of sub-section (4)

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of Section 25 of the Act.

It was accepted that in the absence of an express provision to the contrary a trustee could not lend to himself. But, because of the provisions of Clause 10 of the Settlement, loans could be made to a firm in which a trustee was interested and it would be possible for the Appellant to become a member of a firm and for that firm to obtain a loan from the trustees. This course of conduct would constitute the Appellant a person who was able to have access by borrowing or otherwise to the whole or any part of the income arising under the Settlement. In the view of the learned judge the phrase used in Section 25 (4) "if under its terms the settlor ... is able to have access" means "if the settlor is a person who can otherwise than in contravention of the terms of the settlement have access to its funds in the event of his doing whatever acts and things may be necessary for him to obtain such access."

The phrase "in consequence of" which was one of the meanings ascribed by the Act to the word "under" appeared wide enough to cover much that was not specifically provided for by the settlement so long as it was not prohibited by the settlement.

time make himself legally competent under the terms of the settlement to borrow the trust funds and so to have access to them. The possible necessity of his having to take a preliminary step which would be well within his competence was not a matter which disabled him from having access under the terms of the settlement.

App. p.6

10 The argument to which Sir Trevor Gould, J.A., acceded, and without which he would have had no hesitation in allowing the appeal, was based on the difference in the approach in paragraphs (a) (b) and (c) of Section 25 (4) of the Act. He was satisfied that the change to the concept of ability in paragraph (b) must be to convey something less than the "right" or "power" referred to in paragraphs (a) and (c) respectively. It was in accordance with the scheme of the Act that the legislature would intend to include within it a settlement under which the settlor
20 might be able to borrow as well as one which gave him a right to do so. The meaning to be attributed to the word "able" was ability in the sense of being one of the category of persons to whom the trustees might lawfully lend money under the terms of the settlement. The settlor's ability

so to have access would not be negatived by the fact that he had to take the preliminary step, itself within his ability, of forming a partnership. None the less the learned Justice of Appeal regarded the problem posed as one of considerable difficulty and arrived at his conclusion with hesitation.

11. The Appellant respectfully submits that the learned judges in the High Court and in the Court of Appeal were wrong in construing Section 10 25 (4) of the Act as if it meant no more than that a settlement was to be treated as revocable if its terms were such that the settlor was to be found, or could put himself, among the category of persons who were competent to borrow trust funds. If every settlement is to be regarded as revocable under Section 25 (4) (b) where the Settlor is not expressly excluded from having access, by borrowing or otherwise, to the whole or any part of the income arising under 20 the settlement or of the assets comprised therein, it was unnecessary to deal in subsection (4) (a) with the case where the settlor has a right to re-assume control over the trust

income or assets, or in sub-section (4) (b) with the case where the settlor has power to revoke or otherwise determine the settlement and, in the event of the exercise of such power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property comprised in the settlement or to the income from the whole or any part of such property. A settlor would clearly be able to have access to the trust funds if under the settlement he had such a right or power. It is respectfully submitted that the expression "if under its terms the settlor is able to have access, by borrowing or otherwise, to the whole or any part of the income arising under the settlement or of the assets comprised therein" must be construed as a whole and with due regard to the context in which the expression is found. So construed the expression implies that the ability referred to must be found in or conferred by the terms of the settlement and must be an ability to have access to the trust funds, not merely an ability to be counted among those who may be able to borrow from the trustees.

Moreover Section 25 (3) deals with the case where the settlor actually makes use of trust income

by borrowing. The implication of this, it is submitted, is that Section 25 (4) (b) is concerned (as sub-sections (4) (a) and (c) clearly are) with something more positive than the possibility that the trustees will make a loan to the settlor out of the trust funds. To say that under the terms of a settlement there is nothing which prohibits the making of loans out of trust funds to the settlor is not to say that the settlor under the terms of the settlement is able to have access, by borrowing or otherwise, to the trust funds. The learned judges, it is respectfully submitted, have treated a term of the settlement which removes a possible obstacle to the trustees' lending trust funds to the settlor as if it conferred upon the settlor the ability to have access to the trust funds. They have erroneously concluded that because under the settlement the trustees were not excluded from lending trust funds to the settlor, therefore under the settlement the settlor was able to have access to the trust funds by borrowing. Competency to borrow has been confused with the ability to

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have access by borrowing or otherwise within the meaning of the Act.

In addition it is respectfully submitted that the learned judges were not justified in treating the Settlements as revocable in the relevant year when there was no evidence before them that in that year the Appellant ceased to be a trustee or became the member of a firm in order to enable him, (or any firm of which he was a member), to borrow from the trustees.

12. The Appellant humbly submits that the decisions of the High Court of Tanganyika and of the Court of Appeal for Eastern Africa are wrong and should be reversed and that this appeal should be allowed with costs both here and below for the following amongst other

R E A S O N S

1. BECAUSE neither the Husband's Settlement nor the Wife's Settlement constitutes a revocable settlement for the purposes of Section 25 of the Act.
2. BECAUSE the Appellant was not under the terms of the Husband's Settlement able at any material time to have access by borrowing or otherwise to the whole or any part of

the income arising under that Settlement or of the assets comprised therein nor was the Wife under the terms of the Wife's Settlement able at any material time to have access by borrowing or otherwise to the whole or any part of the income arising under the Wife's Settlement or of the assets comprised therein within the meaning of Section 25 (4) (b) of the Act.

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3. BECAUSE the High Court of Tanganyika and the Court of Appeal for Eastern Africa construed the provisions of Section 25 (4) (b) of the Act too widely and wrongly.

4. BECAUSE Clause 10 of the Husband's Settlement under which the Trustees could have made a loan to the settlor, had he not been a trustee, or to a firm in which he had an interest, had he been a member of a firm, did not confer upon the settlor such ability to have access, by borrowing or otherwise, as is referred to in Section 25 (4) (b) of the Act.

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5. BECAUSE Clause 10 of the Wife's Settlement

under which the Trustees could have made a loan to the settlor, had she not been a trustee, or to a firm in which she had an interest, had she been a member of a firm, did not confer upon the settlor such ability to have access by Borrowing or otherwise, as is referred to in Section 25 (4) (b) of the Act.

6. BECAUSE an ability of the Trustees to
10 lend to the settlor in certain circumstances does not imply an ability on the part of the settlor to have access by borrowing or otherwise to the trust funds.
7. BECAUSE even if, which is not admitted, the settlor could be described as being competent to borrow or having the capacity to borrow, it would not necessarily follow that he was able to have access by borrowing or otherwise.
8. BECAUSE even if, which is not admitted, by
20 ceasing to be a trustee or by joining a firm the settlor would have been able to have access by borrowing or otherwise to the trust funds, his ability to have access would not have arisen in consequence of the Settlement

or any provision thereof.

9. BECAUSE the Appellant was at all material times a trustee of the Husband's Settlement and had no interest in any firm to which the Trustees might have made a loan.
10. BECAUSE the Wife was at all material times a trustee of the Wife's Settlement and had no interest in any firm to which the Trustees might have made a loan.
11. BECAUSE the Judgments of the High Court of 10
Tanganyika and of the Court of Appeal
Eastern Africa were wrong and ought to be
reversed.

H H MONROE
STEWART BATES

No.47 of 1962

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL FOR
EASTERN AFRICA

BETWEEN

KANJEE NARANJEE Appellant

and

THE COMMISSIONER OF INCOME
TAX Respondent

CASE FOR THE APPELLANT

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