

*Privy Council Appeal No. 47 of 1962*

Kanjee Naranjee        -        -        -        -        -        -        -        -        *Appellant*

v.

The Commissioner of Income Tax        -        -        -        -        -        *Respondent*

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL, 1964**

*Present at the Hearing:*

LORD EVERSLED

LORD MORRIS OF BORTH-Y-GEST

LORD DONOVAN

*[Delivered by LORD EVERSLED]*

This appeal has raised before their Lordships the question of the meaning of a few words in the East African Income Tax (Management) Act (No. 10) of 1958. The relevant words are found in sub-section (4) of section 25 of that Act and are: "For the purposes of this section a settlement shall be deemed to be revocable if under its terms the settlor . . . (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". The words are upon the face of them simple enough; but the problem presented by their meaning in their context and in the circumstances of the present case have proved far indeed from simple. Weston J. in the High Court of Tanganyika in a most careful judgment arrived at a conclusion adverse to the appellant and in favour of the respondent, the Commissioner of Income Tax; and his conclusion was unanimously confirmed by Her Majesty's Court of Appeal for Eastern Africa, consisting of Sir Ronald Sinclair, President, Sir Trevor Gould, Justice of Appeal, and Mr. Justice Mayers, Acting Justice of Appeal. Of these three learned Judges, Mayers J. delivered the leading judgment in which he carefully reviewed all the cases cited before the Court. Both Sir Ronald Sinclair and Sir Trevor Gould delivered short independent judgments agreeing with Mayers J.'s conclusion. In these circumstances their Lordships have felt considerable diffidence in expressing a view different from that which had appealed to all the Judges in East Africa; but after a most careful consideration of all the arguments they have felt in the end compelled so to do.

The proceedings arose out of two settlements, one made by the appellant before their Lordships, Mr. Kanjee Naranjee and the other by his wife, Ujambai Kanjee Naranjee. The two settlements appear to have been in all relevant respects in identical language so that before their Lordships' Board (as indeed, as they understand, in the courts below) reference was made only to the language of the former of the two settlements, it being conceded that a conclusion as regards that settlement must necessarily apply equally to the other. In this judgment, therefore, their Lordships will confine themselves only to the settlement made by the appellant. The settlement is dated 5th June 1955 and the parties thereto are expressed to be, (1) the appellant as settlor (2) the appellant and (3) the appellant's wife, Ujambai Kanjee Naranjee, the second and third parties being defined as "the trustees of the settlement". The purpose of the settlement as expressed in its first recital was to make provision for the existing and future sons of three sons of the settlor and by the terms of the operative clauses of the settlement it is made clear that in no circumstances (that is to say, if all the trusts in favour of the grandsons

indicated should wholly fail) does the settlor (or his wife) retain or become entitled to any beneficial interest under the settlement. Moreover, by its second recital it is stated that the settlement "shall be absolutely irrevocable in all circumstances".

The property settled by the settlement consisted of shares in two companies known as Kanjee Naranjee Finance Corporation Limited and Kanjee Naranjee Limited, both incorporated in Tanganyika. It may be stated (1) that the shares in the Finance Corporation are held by a number of persons all, it is assumed, closely connected with the appellant or his wife who are its sole directors, and (2) that the shares in the Kanjee Naranjee Company Limited are held as to one each by the appellant and his wife personally and as to the balance by the appellant and his wife as trustees of the settlement; the appellant and his wife being again the sole directors but (in this case) the appellant is under the Company's articles of association its governing director for life. The settlement contains the usual power for the trustees to continue to hold the shares originally settled or, (in this case with the Settlor's consent) to dispose of them and (again with the same consent) to invest the proceeds of sale in any investments of the nature authorised by clause 10 of the settlement. The terms of clause 10 are of vital significance for the purposes of the present proceedings and they are as follows:

" 10. The Trustees may invest any money for the time being subject to the trusts 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 company or such firm company or bank."

It becomes now necessary for their Lordships to set out in full the first four sub-sections of section 25 of the Income Tax (Management) Act above mentioned. These terms are 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.

(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.

(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—

- (a) has a right to reassume 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
- (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 reassume 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.”.

The only other reference to the Act which their Lordships need make is to its second section which (by the first sub-section) provides that “the year of income” therein mentioned means the calendar year and (by sub-section (2)) that references to the word “under” in relation to a settlement include references to “in accordance with, by virtue of and in consequence of” such settlement.

The present proceedings arose out of the circumstance that the appellant had in respect of the “year of income 1958” been personally assessed in respect of the whole of the dividends received by the appellant and his wife as trustees of the settlement on the footing that such income had arisen “under a revocable settlement” within the meaning of section 25(2) of the 1958 Act: and it has been and was before their Lordships the contention of the Commissioner for Income Tax that the settlement here in question was a revocable settlement by virtue of the terms of section 25(4)(b) of the Act, because according to the meaning and effect of clause 10 of the settlement the settlor was “able to have access by borrowing or otherwise” to the income or assets of the settlement: and this contention (as already stated) has found favour with all the Judges in East Africa before whom the case came. Their Lordships hope that they will not be thought disrespectful to these learned Judges if they do not at length relate the reasoning in their judgments or cite at length from them. Before the High Court and the Court of Appeal in East Africa numerous citations were made from English decisions including particularly House of Lords decisions. Before their Lordships these citations were less in number though Mr. Monroe for the appellants, strongly relied upon the speeches of Lord Simonds and Lord Morton in the case of *Wolfson v. C.I.R.* 31 T.C. 141 at pages 167 and 171. Their Lordships agree with the learned Judges in Africa in thinking that the observations of Lord Simonds and Lord Morton in *Wolfson’s* case cannot be conclusive in favour of the appellant’s argument here and cannot indeed potently support it; for in the *Wolfson* case the vital words in the corresponding English statute were “if and so long as the terms of a settlement are such that . . .”; and it was the view of the noble Lords referred to that the fact that the settlor could bring to an end the settlement then in question by getting the relevant company (the shares in which were the subject of the settlement) wound up (as he could) was a fact which was altogether *dehors* the settlement itself and which could not be invoked to make good the argument of the Commissioner for Inland Revenue that the *terms* of the settlement were such that the settlor could bring it to an end. In the present case the facts and circumstances are essentially different. The question before their Lordships is whether “under” (that is, in consequence of) the settlement and particularly in consequence of the language of clause 10 the settlor “is able to have access” by borrowing or by any other means to any of the income or assets of the settlement. Inevitably therefore the answer to the problem turns on the scope and meaning which the legislature must be taken to have intended to be attached to the formula “is able to have access to”—a formula which, as their Lordships were informed and readily accept, is not to be found in any other similar legislation. All the learned Judges in the courts below naturally and properly drew attention to the contrast between the “ability” postulated by paragraph (b) of the sub-section and the words “right” and “power” specified in paragraphs (a) and (c) respectively. Founding upon this contrast Weston J. in the High Court concluded that by the words “able to have access” was intended “has the legal competence to have access” and thought that the sense thereby conveyed was the same as the sense conveyed when it is in

England said that everyone is able to have access to the Courts of Justice or to the Ritz Hotel; and that it was accordingly irrelevant that the individual wishing to have such access must first take the steps necessary to get himself to the Courts or to the Ritz Hotel. In other words the essential formula meant (according to the learned Judge) that there was no lawful bar to be found in or under the settlement to the passing of any of the settlement income to the settlor. The learned Judge accepted that because the settlor was one of the trustees, there would be a "lawful bar" derived from the well known rule of equity against the trustees lending to one of themselves—such bar being preserved of necessity by the implication of the final words of the clause "and (the Trustees) may so invest notwithstanding that the Trustees or any of them may have an interest in such public or private company or such firm company or bank". But in the view of the learned Judge, particularly having regard to the words just recited, there was or would be no bar to the trustees lending to the settlor as a member of a firm. Before leaving the judgment of Weston J. their Lordships observe that in the view which he took the effect of the words of paragraph (b) were of wider implication than would have been the case if they had read "is enabled to have access". As later appears their Lordships have not been able to discern a real difference between the words "is able to have access" and "is enabled to have access"—unless it is to be taken that the second formula imports an expression implicit in clause 10 that the settlor is as such given *power* to have access to the settlement property notwithstanding that he is also a trustee.

The view of the Judges in the Court of Appeal was to the same effect as that of Weston J. Mayers J. observed (at page 53 of the record) that there was nothing in the settlement to restrict the category of persons to whom loans might be made under clause 10, the disability of the appellant in his personal capacity being derived from the rule of equity from which he could relieve himself at anytime by retiring from the trusteeship. In the view of that learned Judge the words of paragraph (b) meant no more than the settlor "had the capacity to get access to the trust property" and signified that "... 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". Sinclair, also directed himself particularly to the final words of clause 10 comprehending a firm of which the trustee might be a partner and was of the view that the settlor was "competent" to have access to the trust property and not the less so because he might have first to take some preliminary step, well within his power, to get the necessary capacity. Finally Gould J. A. also referring to the case of a partnership of which the settlor might be a member concluded that the settlor's ability to borrow would not arise from any power acquired by him as a partner but "... the terms of the settlement place him as a partner, in the category of persons who may borrow".

Before their Lordships Mr. Borneman on behalf of the respondent, the Commissioner of Income Tax, naturally relied upon the arguments which had been accepted by the Eastern African Court of Appeal. He was however before their Lordships disposed to put in the forefront of his argument that the settlor could at any time place himself within the category of persons contemplated by paragraph (b) of the sub-section by the mere act of retiring from the trusteeship of the settlement—which he could well do upon his own initiative without the concurrence of anyone else. Mr. Borneman did indeed suggest that even as a trustee the settlor was not debarred by anything in the settlement from being a borrower of the trust funds or income notwithstanding that in the court below it had been conceded that as a trustee he could not, under the general rule of equity, borrow from himself and his co-trustee and notwithstanding that such a submission was not put forward in the respondent's case before their Lordships. Mr. Borneman did not however press this point; and in any event their Lordships are satisfied that the necessary inference of the final words of clause 10 of the settlement is that so long as the settlor remains one of their number the trustees of the settlement could not, under the well-established equitable rule, lend to him. On the other hand Mr. Borneman did not suggest that the settlor could properly be said to be "able to borrow" or otherwise have access to the trust property or income

by virtue of being the sole governing director of a limited company, for in such case it would be in truth to the company that, in the event suggested, the lending would be made or the access given.

There can be no doubt that the reasoning of the Judges in the courts below and the arguments put forward on behalf of the respondent are of great weight and force. If, however, in the light of the arguments of each side the question for determination may be said to be extremely finely balanced, their Lordships have in mind what was said by Lord Simon in his speech in the case of *Scott v. Russell* (Inspector of Taxes) 30 T.C. 394 at page 424 "I must add that the language of the rule is so obscure and so difficult to expound with confidence that—without seeking to apply any different principle of construction to a revenue act than would be proper in the case of legislation of a different kind—I feel that the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected".

As indicated at the beginning of this judgment their Lordships have in the end reached the conclusion that the respondent's case for the appellant's personal liability to be taxed in respect of the income of the trust property for the year of income 1958 is not made out. It is to be noted that the liability to tax is imposed by sub-section (2) of the relevant section which provides that "all income which in any year of income accrued to . . . any person under a revocable settlement shall be deemed to be income of the settlor for such year of income . . .". The office of sub-section (4) is to define what is meant by the words "revocable settlement". The question then is—did the income here in question in the tax year 1958 accrue under a revocable settlement? In that year the appellant was in fact a trustee of the settlement and although no doubt he could or might have retired as such he did not do so. It was therefore during that year incompetent for the trustees of the settlement to lend to him personally any of the trust monies or income or allow him to have access thereto otherwise than in his capacity as trustee. Nor is there any evidence that during the year 1958 the settlor was in fact a partner in any firm. Even however if he had been and the firm to which he belonged was within the category of those who could be said to have "the ability to have access" to the trust property, still it would in such circumstances have been to the firm as a firm that the possible lending would have been made and the access given, although it is no doubt true that the settlor as partner would have been, with other partners, personally liable to repay. In the case postulated that to which the settlor or an individual would have access would be money which had become a partnership asset and not part of the settlement funds. In their Lordships' view the legal conclusion flowing from such a transaction is essentially the same as that in the case of the corporation solely controlled by the appellant in which case it would have been the Corporation and not the settlor in his personal capacity who would have had the necessary ability under paragraph (b) of the section—and none the less so even if the settlor were required to guarantee the loan.

Their Lordships do not forget the point already mentioned that the essential words in paragraph (b) are "is able"—words which are to be distinguished without doubt from the words "right" and "power" used in paragraphs (a) and (c) of the sub-section. Nevertheless their Lordships cannot in the context accept the view that the words "is able" mean or intend "capacity" in a sense so wide as to cover any person who is not, as a person, somehow barred or disqualified by the terms of the settlement from having access to the trust property and therefore to comprehend any person in the world notwithstanding that as a matter of practical necessity he has to take possibly elaborate steps first in order to put himself in the qualified class. True it is that the use of the words "by borrowing or otherwise" presuppose that the trustees will be willing parties to the transaction contemplated so that a person may properly fall within the scope of paragraph (b) notwithstanding that the concurrence of the trustees will be required before he can in fact enjoy access to the trust property. Nonetheless it has in the end seemed to their Lordships that the use of the vital words "is able" supposes that the settlor, if he falls within the contemplated category, has as an individual some

existing characteristic, some positive ability (as it was put by Mr. Monroe) and that it is not enough to say that there must be in the settlement some bar or disqualification to his having access to any of the trust property in order to prevent him from being comprehended within the paragraph. It is pertinent, in their Lordships' opinion, to observe that the "access" which the settlor must be able to have in order that the settlement should be treated as revocable within the meaning of the section must clearly be "access" otherwise than in his capacity as a trustee. The contrary was not indeed suggested. The point however as their Lordships think is to emphasise that by the words in question the legislature must have contemplated what is referred to above as a positive ability or characteristic possessed by the settlor in his personal or private capacity as distinct from an ability which he might have in fact in some other capacity. If this view is not right, then it would follow that any settlement of which the settlor happened to be a trustee would be "revocable" within the terms of the section even though the terms of the settlement were such as to make it clear that the trustees were prohibited from allowing any of the trust property or its income to get into the hands of the settlor, as a borrower or in any other way, in his private or personal capacity. Normally indeed such an ability or characteristic would properly be called either a right or a power and the use by the legislature of the words "is able" may well have been deliberately intended to cover both rights and powers and perhaps (if there be any such) some other qualification which though conferring upon the settlor in his private or personal capacity an ability or capacity for the purposes in question might not properly be called either a right or a power. Their Lordships have already said that the question involved is indeed most finely balanced; and nowhere is this better shown than in that part of *Weston J.*'s judgment in which he distinguished the words "is able" from the words "is enabled". It may not be useful to attempt to expound upon the question by way of illustration—for in the end the answer must depend upon the impression made on the mind by the simple words that are used. But suppose that instead of the word "person" in clause 10 of the settlement the words had been "person resident for the time being in Nairobi", would not the contrary argument involve the proposition that the paragraph would apply to the settlor although not during the relevant year resident in Nairobi because he could by acts of his own volition at any time acquire such residence? Their Lordships accept the submission put forward by Mr. Borneman that paragraph (b) of the sub-section should be regarded in some sense as a "sweeping up" provision intended to prevent evasion of taxation by any means however ingenious or elaborate. But if the Respondent's view of the meaning of paragraph (b) is accepted it is clear that not only both paragraphs (a) and (c) of sub-section 4 but also sub-section 3 would appear to be entirely otiose. True it is that upon the construction which their Lordships give to paragraph (b) the other two paragraphs of sub-section 4 may said to be in large measure (though not entirely) otiose. Still the legislature thought fit to enact all three paragraphs—and it is to be noted that paragraph (b) is inserted between paragraphs (a) and (c) and not—as would normally be the case with a "sweeping up" provision in the ordinary sense—at the end.

Their Lordships have therefore with all respect to the contrary views of the learned Judges in the courts below ultimately reached the conclusion that in respect of the tax year 1958 the settlor was not a person who could properly be described as "under the terms of the settlement . . . able to have access . . ." to any part of the trust property or its income.

Their Lordships will report to the President of Tanganyika their opinion that the appellant's appeal against the dismissal by the Court of Appeal for Eastern Africa of his appeal against that part of the order of the High Court of Tanganyika which confirmed the amended assessment upon him for income tax in respect of the income for the year 1958 of the two settlements made by him and his wife in 1955 should be allowed and that such assessment should be discharged accordingly and that the respondent should pay the costs of this appeal and the costs in the Court of Appeal and the whole of the costs (not one half) in the High Court of Tanganyika.



In the Privy Council

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KANJEE NARANJEE

v.

THE COMMISSIONER OF INCOME TAX

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LORD EVERSHED

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