

[1955] 28 ITR 561 (MAD.)

HIGH COURT OF MADRAS

M.S. Subbulakshmi

vs.

Commissioner of Income-tax

RAJAGOPALAN AND RAJAGOPALA AYYANGAR, JJ.

CR NO. 43 OF 1953

JULY 21, 1955

G.R. Jagadisan and T.V. Balakrishnan for the Applicant.

C.S. Rama Rao Sahib for the Respondent.

#### JUDGMENT

Rajagopala Ayyangar, J.—In this reference under section 66(1) of the Indian Income-tax Act, the Income-tax Appellate Tribunal has referred the following questions for our decision :

1. Whether the trust deed dated 9th May, 1946, is covered by the provisions of section 16(1)(c) of the Act and the income received from Messrs. Narayanan & Co. was not includible in that of the assessee ?
2. Whether the document dated 9th May, 1946, in respect of the royalties from the Gramophone Co., Ltd., is covered by the provisions of section 16(1)(c) and the income received therefrom was not includible in that of the assessee ?

The questions however as drawn up do not bring out the actual controversy between the assessee and the department as will be seen from our discussion of the points involved in assessment.

The assessee, Srimathi M.S. Subbulakshmi, is a musician and cinema actress in South India. This reference is concerned with the assessment of this assessee for four years from assessment years 1946-47 to 1949-50. She acted the title role in a motion picture called "Meera". This film was produced by a concern by name Chandra Prabha Cinetone of which her husband Sri Sadasivam was the sole proprietor. On 9th September, 1943, an agreement was concluded between the assessee and her husband, the latter as the proprietor of Chandra Prabha Cinetone, under the terms of which the assessee agreed to play the part of the title role in that film. This agreement is appended to the statement of the case and marked annexure A. Under clause 4 thereof Chandra Prabha Cinetone (who was termed "the producer") reserved the right to grant to any gramophone company records of the songs of the assessee recorded in the film but this was to be without prejudice to the royalty rights of the assessee in these songs. It was expressly provided that the assessee's royalty shall belong exclusively to her and she was entitled to stipulate her own terms with the gramophone company separately for the payment to her of such royalties. For her services by way of acting etc., her remuneration was provided by clause (5) of the

agreement whereunder she was allotted the distribution and exploitation rights of the picture in the districts of Madura, Ramnad, Pudukottah State and Tirunelveli "with all the revenue accruing therefrom but limited to a period of 10 years from the date of the first release of the said film." The value of this right was estimated at Rupees one lakh and fifty thousand and this amount was to be in the form set out above. The production of the picture was then proceeded with and the film itself was released on 3rd November, 1945. Before this date however the assessee entered into an agreement with a firm of distributors by name Narayanan & Co. This agreement forms annexure B to the statement of the case by the Tribunal. The main terms of this agreement were three in number. First, the distributor was given the right to exploit the picture for a period of four years from the date of the first release in the territories assigned to the assessee. It will be seen that the effect of this was that the assessee had carved out of the ten year term which she had obtained under the agreement dated nth September, 1943, a four year term in favour of the distributor. (2) During this period the distributor was to exploit the picture in these territories retaining for himself a distribution commission at 12½ per cent. on the picture share realisations and was to pay over the rest to the assessee. The distributor also guaranteed the assessee that the picture realisations would amount at least to Rupees two lakhs, and (3) he made an immediate advance to the assessee of a sum of Rs. 75,000, the distributor being entitled of course to adjust this advance from and out of the amount payable to the assessee when the realisations started coming.

On the same date as this agreement the assessee's husband as the proprietor of Chandra Prabha Cinetone also entered into a distribution agreement with Messrs. Narayanan & Co., the terms of which were nearly similar, but the advance which he received was Rs. 1,25,000. Though this agreement by Sri Sadasivam has been referred to by the Tribunal and by the tax authorities, in our opinion it has really no relevance to the questions arising for decision in the assessee's assessment proceedings.

We have already mentioned the fact that the picture was released on 3rd November, 1945, and by the end of the assessee's accounting year which was the year ended 31st March, 1946, the share of the picture realisations due to the assessee from out of the remuneration reserved to her under clause 5 of the agreement dated nth September, 1943, and which she obtained from the distributor, Narayanan & Co., under the agreement dated 19th October, 1944, amounted to Rs. 83,050. The assessee also received during the same period, the year ended 31st March, 1946, a sum of Rs. 6,553 from the gramophone company by way of royalties on the sale of her song-records.

While so, on 9th May, 1946, the assessee executed two settlement deeds whose reality and bona fides are not disputed by the tax authorities. Under the first settlement which has been appended as annexure E-1 to the statement of the case by the Tribunal, the assessee settled one-half of the sums which would be coming to her from the distribution rights allotted to her under the agreement dated nth September, 1943, in trust for two named beneficiaries, R. Anantanarayanan and N. Ramachandran who, we are informed, are the nephews of her husband Sadasivam. The assets which were the subject-matter of the settlement were vested in three trustees including her husband Sadasivam who was designated the managing trustee. The two other trustees were the assessee's auditor and the secretary of a bank. The operative portion of this trust deed is to be found in clause 3 thereof which runs thus:

"The settlor, as settlor, assigns unto the trustees all that her rights under the said agreements of nth September, 1943, and 19th October, 1944, in respect of the one-half of all the sums of money accruing to her during the said period of ten years from 3rd November, 1945, to hold unto the trustees in trust for the benefit of the said Sri R. Anantanarayanan and Sri N. Ramachandran, the beneficiaries under the trust in equal shares."

and the succeeding clause, clause 4, provides :

"The trustees shall be entitled to receive from the distributors one-half of the said sums as and when they accrue and the settlor shall not have any right or interest in the said one-half of the said sums hereby assigned to the trustees."

Under clause 6 provision is made for the receipt by the trustees of collections from the picture after the expiry of the distribution agreement with Messrs. Narayanan & Co., and it provides : "On the expiry of the said agreement of 19th October, 1944, the trustees shall be entitled to deal with the rights under the agreement of 11th September, 1943, hereby assigned to them in such manner as they may deem fit." Clause 7 directs the trustees to keep a separate account for each of the beneficiaries. "The sums accruing to the benefit of each beneficiary shall be entered in the accounts separately maintained for him and such sums shall first go in reduction of the deposit amount of Rs. 18,750 transferred to each beneficiary until it is fully discharged." This clause needs some little elucidation. Under the trust deed the assessee was creating a trust only in respect of sums to be received in future from the distribution rights allotted to her under clause 5 of her agreement with Chandra Prabha Cinetone. As she had already received an advance of Rs. 75,000 from Messrs. Narayanan & Co., under the distribution agreement, Messrs. Narayanan & Co. had a right to deduct this sum of Rs. 75,000 from out of the realisations. The trust account was therefore directed to be kept in the form of debiting the beneficiaries with Rs. 37,500 being one-half of that advance. As this had to be distributed between the two beneficiaries in equal shares the amount debited to each was Rs. 18,750. It will however be noticed that this is not a debit in any real sense but one merely for the purpose of account keeping which arose out of the subject-matter of the settlement being the excess realisation over the advance of Rs. 75,000.

The purpose for which the trustees were to apply these moneys is set out in clause 8 namely : "for the expenses necessary for the education (technical or otherwise) marriage or any personal requirements of the beneficiaries and the unexpended sums shall be invested in the joint names of the trustees in any investments authorised by law for the investment of trust funds. The funds standing to the benefit of such beneficiary shall be separately invested." Under clause 9, "after the expiry of the said period of ten years and after receiving all the sums due to the trustees according to these presents, the total amount remaining with them at that time and all the investments made under the preceding clause and all accumulations shall be paid or delivered to the respective beneficiaries under these presents who will be entitled to the same in absolute right." There were other provisions among which the only ones that need mention are clauses 17 and 19, the former providing that "the properties of the trust shall vest in the trustees for the time being in office" and "on death, resignation, removal or retirement of any trustee they shall continue to vest in the remaining surviving trustees ; and on the appointment of any new trustee the said properties shall vest in him also along with the other trustees." The latter clause provides that the "trust shall be irrevocable." There is however one clause here which has been reserved for being mentioned last as it is that around which the entire controversy in this reference centres and this is contained in clause 2 of the deed. It runs : "This trust shall be deemed to have commenced on the 1st day of November, 1945." In relation to this there is a paragraph in the preamble which might be set out here. Its terms are :

"Whereas with a view to confer the said benefits (the benefits arising under the agreements of 11th September, 1943, and 19th October, 1944) upon the said persons (the beneficiaries named) the settlor, on and with effect from the 3rd day of November, 1945, constituted a trust and vested all the rights of the settlor under the said agreement to the extent indicated hereunder upon trust."

We shall be considering at a subsequent stage the implication of this preamble and the legal effect of clause (2) on the question of the liability of the assessee to be taxed on the income which accrued to her between 1st November, 1945, and 9th May, 1946, the date on which this trust deed was executed.

The other deed executed also on the same date and marked as annexure E-2 to the statement of the case by the Tribunal effected a disposition of the royalties which the assessee was entitled to receive from the gramophone records of her songs in the films entitled "Sakunthala" and "Meera" made by the Gramophone Co., Ltd., Jessore Road, Dum Dum. The beneficiaries under this deed were her two minor stepdaughters Radha and Vijaya. The trustees under this deed were identical with those in the other deed and the operative words of this document are to be found in paragraph 3 :

"The settlor as settlor hereby assigns unto the trustees all the right to receive from the said gramophone company all the sums of money payable by the said company to the settlor by way of royalty on the sale of the gramophone records hitherto taken or which may be taken hereafter of the songs of the settlor for a period of eleven years commencing from the 1st day of January, 1946, to hold unto the trustees in trust for the benefit of the said Srimathi Radha and Srimathi Vijaya in equal shares."

Paragraphs 4 and 5 were consequential on the constitution of this trust.

"4. The trustees shall be entitled to receive from the Gramophone Company, Limited, all moneys payable by way of royalty for the said period of eleven years as and when they accrue and the settlor shall not have any right or interest in the said moneys.

5. The trustees shall collect from the Gramophone Company, Limited, all sums which they are entitled to receive in accordance with the terms of these presents for the said period of eleven years."

After making provision for the investment of the moneys received under this trust and the purposes for which, during the minority of the beneficiaries, the trustees were to use these funds, the deed proceeds to provide :

"10. After the expiry of the said period of eleven years and after receiving all the sums due from the Gramophone Company Limited, according to these presents, the total amount remaining with the trustees at that time, the investment made by the trustees and all accumulations standing to the benefit of each beneficiary shall be paid or transferred to her who shall be entitled to the same in absolute right."

Under clause 12 any royalty which accrued after the expiry of the said period of 11 years was to belong entirely to the settlor and by clause 21 the settlor stated that the "trust shall be irrevocable." The other clauses of the deed are the usual ones not relevant in the present context. As in the previous trust deed, there is also a clause in this providing for the retrospective operation of the trust. This is contained in clause (2) which runs thus :

"The trust shall be deemed to have commenced on the 1st day of January, 1946"

The assessment for the assessment year 1946-1947, that is, the accounting year ended 31st March, 1946, was completed by the Income-tax Officer by his order dated 24th November, 1949. During this year the amount payable to the assessee under the agreement with Messrs. Narayanan & Co. was Rs.

83,050. She also received from the Gramophone Co., Limited, for the period between 1st January, 1946, to 31st March, 1946, a sum of Rs. 6,553. The assessee contended that one half of the sum of Rs. 83,050, i.e., Rs. 41,525, was the income of the beneficiaries under the settlement deed annexure E-1 and the entire sum of Rs. 6,553 that of her step-daughters under annexure E-2. This was however rejected by the Income-tax Officer who held that the income belonged to the assessee during this period had not been effectively transferred to the beneficiaries. In regard to the settlement deed annexure E-1 he was of the opinion that the deed constituted merely a declaration of a trust to come into existence in future and had not yet taken effect since no funds were transferred to the trustees in pursuance of the trust deed. In regard to the other settlement deed he held that it came into effect only on the date of its execution and that the assessee could not give any retrospective operation to the deed and divest herself of title to income which had become hers before that date. On these grounds he added these amounts to the assessable income of the assessee. For the assessment years 1947-48, 1948-49 and 1949-50 the only items in controversy were the sums received in respect of collections from "Meera" from Messrs Naraynnan and Co. There were no royalties paid by the gramophone company during this period. The assessment for these three years was completed by the Income-tax Officer on 27th December, 1949, and following his reasoning in his order in respect of the earlier year he held that there had not been any disposition as to render the realisation from the picture not those of the assessee.

The assessee took the matter before the Appellate Assistant Commissioner and the assessment for all the four years was dealt with together. The orders of the Income-tax Officer were confirmed and the assessee's appeal dismissed on the ground that there was no tangible transfer of definite property under annexure E-1 but what was transferred was merely a liability, a moral liability to pay one-half of Rs. 75,000 which had been received as advance by the assessee from Messrs. Narayanan and Co. The appellate authority took into account the manner in which Messrs. Narayanan and Co. kept their accounts, how they had treated the two advances to the assessee and her husband Sadasivam as if they were a single advance and started making payment only after the full amount due from both of them under these advances was recouped. This recoupment had been completed by 31st December, 1947, and it was only after January, 1948, that they started making payment to the assessee and the method of payment adopted by them thereafter was by making out a single cheque in respect of the amount due under the distribution agreement in favour of the Indo-Commercial Bank Limited under an arrangement by which the cheque when realised was allocated by the trustees, one half to the assessee and the other half to the two beneficiaries—to each a moiety thereof. The Appellate Assistant Commissioner stated that on 9th May, 1946, there was only a transfer of liability and not any property or right to property and that the provisions of the trust deed were not acted upon till January, 1948, since no money came into the hands of the trustee till that date. He recorded: "I am inclined to concede that a valid trust was intended by the appellant as trust author because a trust was drawn up and the beneficiaries were indicated and the trust properties were legal and the trustees were certain. And there is no doubt that the trust has been acted upon and has been given effect to from 1st January, 1948, the date on which the trust author deposited a sum of Rs. 50,000 for the purposes of the trust." In this view he directed that effect be given to the trust by excluding from the assessment of the assessee half the income derived from the exploitation of the picture with effect from 1st January, 1948. In regard to the royalty from the Gramophone Company which was the subject matter of the other settlement deed annexure E-2 the Appellate Assistant Commissioner sustained the order of the Income-tax Officer on the ground that retrospective operation could not be given to the trust deed by the author of the trust.

From these orders of the Appellate Assistant Commissioner appeals were preferred to the Tribunal both by the department seeking the restoration of the order of the Income-tax Officer and by the assessee

seeking to negative her liability to be assessed even for the period anterior to 1st January, 1948. The Appellate Tribunal dismissed the appeal of the assessee and allowed that of the department. The grounds upon which the Tribunal proceeded were broadly two. The first was that the trust deed did not involve the transfer of any asset but constituted merely an application of income by the assessee. Secondly, they were not inclined to hold the trust genuine for the reason that the beneficiaries were taken to have been initially saddled with a liability to repay Rs. 37,500 to Messrs. Narayanan and Co. The Tribunal stated :

"The 'trust' which was intended to be a boon to the boys could very well have been a curse if the events happened otherwise. There cannot, in our opinion, be a valid trust which saddled beneficiaries initially with uncertain benefit dependant upon several circumstances. The 'trust' in our opinion is not a valid one."

In regard to the settlement deed under annexure E-2 two reasons were assigned for confirming the decision of the lower authorities. The first was that the income which had accrued to the assessee before 9th May, 1946, could not by reason of the mere execution of the document be treated as the income of the beneficiaries, that is, the deed could not have retrospective operation for tax purposes; secondly, that this also was really an application of income which had accrued to the assessee and that the latter could not get rid of her liability to tax by means of the settlement. It was in these circumstances that at the request of the assessee the Tribunal came to make this reference.

The questions which arise for our consideration may broadly be stated as follows:

1. What is the true legal effect of the two deeds ? and
2. Can the deeds have operation before the date of their execution?

For this purpose the two deeds have to be dealt with separately but before doing so we might premise that there is no foundation for the casual observation in the order of the Appellate Tribunal that the trusts in question are either valid or genuine.

Learned counsel for the department could not point out to anything in the record to justify the remark that the trusts were invalid. So far as we are able to see, the circumstance which appears to have weighed with the Tribunal in regard to the deed E-1 was their understanding that there was a liability cast upon the beneficiaries to repay the sum of Rs. 37,500—a moiety of the advance which had been received by the assessee. This proceeds upon an entire misapprehension of the real nature of this provision. There was no liability cast upon the beneficiaries or the trustees on their behalf to repay the advance and therefore no question of the settlement being a transfer of a liability. The subject of the trust was the excess collection from the picture after the recoupment of the advance to Messrs. Narayanan and Co. The fact that Messrs. Narayanan & Co. had to adjust the amount of this advance before any sum was payable to the assessee was inherent in the very nature of the subject matter of the trust. This however does not constitute a transfer of a liability. It is just a case of a transfer of an asset subject to a deduction.

We have mentioned the fact that the Income-tax Officer thought that the trust deeds did not operate in presenti but merely contemplated a trust to come into existence on some future date, that is, when moneys were received. There were however no materials upon which such a conclusion could be reached.

These objections being out of the way the only question that arises in regard to the settlement annexure E-2 is whether it could operate retrospectively, for if it would not, the decision of the Income-tax authorities would be correct. In regard to the settlement deed annexure E-1 two questions arise : (1) Does the settlement constitute a transfer of an asset or is it merely a case of application of income which had accrued to the assessee? (2) Did the deed take effect from the date of its execution or from the anterior date which is referred to in the deed ?

We shall first deal with the deed marked E-1. This settlement constitutes a trust in favour of named beneficiaries, the subject matter of the trust being the assessee's right to receive the collections from the picture "Meera" by exploitation in certain named territories. The assessee had acted in the picture and obtained under the agreement with the producer, as her remuneration for so acting, distribution rights for a period of 10 years in specified districts. That this was remuneration for her personal services explains its origin but this cannot obviously deny to it the character of an asset or a property right. In the case of a concern carrying on film distribution business, its whole stock-in-trade would consist of such assets. The right which the assessee had acquired under annexure A was an incorporeal right, a species of intangible property—a right to exploit the picture for a limited duration in a defined territory. She had leased this right to Messrs. Narayanan and Co. for four years. In other words, she had transferred this right to them for a period of four years on terms and conditions set out in annexure B. She still continued to be the owner of that intangible property. If it was movable property which was tangible this transfer could have been effected by delivery or by declaration of trust. But in the case of intangible property, the only method recognised by the law for effecting a transfer is by writing. To this species belongs actionable claims whose mode of transfer is prescribed by section 130 of the Transfer of Property Act. The reasoning of the Tribunal that in a case where an incorporeal right is transferred there is no transfer of an asset but only an application of an income proceeds upon a misconception that property incapable of delivery is incapable of being assigned or held in trust. The law does not require that any transfer should be absolute or permanent in order that it may be valid. The rights of the assessee during any particular period may be transferred and when this is effected there is a transfer of an asset, i.e., of the rights under the agreement annexure A. We see therefore no reason to hold that there was no transfer of an asset involved in this settlement which as we have stated before is valid and, it is not disputed, was intended to be effective. There is therefore no question of the deed operating merely by way of transfer of an income constituting its application by the assessee after it had accrued to her. As the transfer of the asset involved in the deed is irrevocable for a period of ten years and as no benefit direct or indirect accrues to the settlor under this deed, the requirements of the third proviso to section 16(1)(c) of the Income-tax Act are satisfied and the income of the beneficiaries cannot be deemed to be the income of the settlor.

The next question is whether this would be the state of affairs only from and after the execution of the deed or whether it would be from the earlier dates mentioned in the two deeds. In respect of this matter the two deeds have to be dealt with separately as somewhat different circumstances apply to each of them. So far as the settlement annexure E-1 is concerned, we have already extracted the recital in the preamble setting forth the reason why the earlier date was mentioned. The assessee's case was that she entertained the idea of executing this trust deed as early as November, 1945, that there had been discussions upon this topic and some conclusions reached even then and that the document which ultimately came to be executed on 9th May, 1946, carried out the terms of this oral agreement. In proof of these facts, two pieces of evidence were placed before the tax authorities. The first was that the trustees had started keeping accounts in regard to the beneficiaries under this trust as early as November, 1945, and the second a letter addressed by Messrs. Narayanan & Co., to the trustees dated

6th July, 1945, which has been set out in annexure D of the statement of the case. The first could not obviously afford any great assistance. The letter referred to was in response to a query by the assessee when the assessment was being proceeded with before the Income-tax Officer whether Messrs. Narayanan & Co. were or were not informed of the trust deed before and after its execution. They wrote back to say:

"We hereby confirm that the settlement made by Srimathi M.S. Subbulakshmi in favour of the above two parties under a trust was made with our knowledge. We also confirm that Srimathi M.S. Subbulakshmi informed us of this idea sometime in November, 1945, itself but the document of trust was shown to us only after it was prepared in May, 1946."

On the basis of this letter, arguments were addressed to us by learned counsel for the assessee that a trust was created orally in November, 1945, and the deed ultimately drawn up in May, 1946, merely recorded and gave formal effect to this oral trust. It was therefore urged that the trust must be deemed to have come into existence in November, 1945, and that the title of the trustees related back to that date with the result that a moiety of the income from the picture which had accrued from and after November, 1945, belonged not to the assessee but to the beneficiaries. We are unable to accept this argument of learned counsel for more than one reason. In the first place, the letter of Messrs. Narayanan & Co., annexure D, does not bear out the case of the assessee that there was a completed oral trust as early as November, 1945. It is only proof that there were some talks regarding a trust or some idea of a trust in relation to this asset in November, 1945, and that it ultimately took shape only in May, 1946, when the settlement deed, annexure E-1, was executed. One thing is clear that there cannot be a trust without the subject-matter of the trust being known and definite and it is nobody's case that the ten-year period which so to speak is the subject-matter of the trust was decided upon or agreed to in November, 1945. In those circumstances, even if there had been a tentative idea regarding the constitution of a trust no trust in law was created by those inconclusive talks. Secondly, the asset that is the subject-matter of transfer and trust in this case is an intangible incorporeal property incapable of delivery. A transfer in regard to this can be effected only by writing so that even if there was an oral arrangement satisfying all the other requirements to constitute a valid trust, a trust could not come into existence without a writing in that behalf. If there was no effective disposition of this asset except by the execution of the deed, the income, which had accrued to the assessee under the previous state of affairs, when the asset was her property, could not by the execution of the deed be made the income of the beneficiaries so as to avoid tax liability of the assessee quod that income which was hers when it arose. It may be that by the covenant in the deed the beneficiaries might as against her be entitled to the benefit of that deed as and from November, 1945, but this is not a matter with which the revenue authorities are concerned. The crucial fact was that the beneficiaries could not have enforced the trust against the assessee before the execution of the deed and this, in our opinion, concludes the case against the assessee. The asset, namely the right under the agreement annexure A, was the property of the assessee when the income accrued and the assessee cannot after its accrual dispose of the income so as to rid herself of tax liability ; we are therefore clearly of the opinion that the trust cannot operate except with regard to the income which flowed from the asset after 9th May, 1946.

The case of the assessee with regard to the retrospective operation of the settlement annexure E-2 rests on even more slender foundation. No completed oral understanding even is alleged as having been come to in January, 1946, on the basis of which retrospective effect was given to this settlement deed in respect of the royalties. The whole case rests on whether it is open to an assessee to say in regard to an income which has accrued to her from an asset which was hers on the date of the accrual of the income, that the asset shall belong to another as from an anterior date and so convert the income which had



accrued to her as the income of another for purposes of assessment to income-tax. On the basis of our reasoning in relation to the settlement deed annexure E-1 the case in regard to this one must a fortiori be answered against the assessee.

As we have stated earlier, the questions as framed do not bring out the real controversy between the parties. We therefore reframe these questions and answer them as follows :

(1)Whether the trust deed dated 9th May, 1946, ( vide annexure E-1) is valid and effective and covered by the provisions of section 16(1)(c) of the Act and whether it satisfies the requirements of the third proviso to that clause ?

(2)Whether the settlement deed dated 9th May, 1946, can have operation from any period earlier than the date of its execution ?

(3)Whether the settlement deed dated 9th May, 1946 (annexure E-2), in respect of the royalties from the Gramophone Company Ltd., can have retrospective effect from 1st January, 1946, so as to render the income received before 9th May, 1946, the income of the beneficiaries ?

Our answers to these questions are as follows : The first question is answered in the affirmative and in favour of the assessee. Our answer to the second question is in the negative and against the assessee and in regard to the third, our answer is in the negative and against the assessee. As neither side has succeeded wholly in this reference, there will be no order as to costs.