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K.R. PATEL (DEAD) THROUGH L.R.S.

v

COMMISSIONER OF INCOME TAX

AUGUST 27, 1999

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[D.P. WADHWA AND M.B. SHAH, JJ.]

Income Tax Act, 1961—Sections 11(1), 160(1) (iv), 161(1), 168 and 256(1)—Will-Executors and trustees appointed under Will—Whether income from the estate should be assessed in their hands as executors or trustees—Administration of estate not completed during the relevant assessment period—Held, there is no rule of law as to when executor sheds his character as an executor and wears the robes of a trustee—It all depends on the construction of the Will as to when the testator desired the trust to come into being—Will providing trust was to come into being only after completion of administration of the estate—Held, under the facts, income from the estate should be assessed in their hands as executors—Indian Succession Act, 1925—Sections 2(c), 2(f), 211(1), 302, 317 and 366.

The Bombay Public Trusts Act, 1950—Sections 2(13), 17, 18, 19, 20, 21, 29, 36 and 66—Public Trust created by Will—Will providing that all properties not bequeathed specifically be converted into cash and used for charitable purposes in the absolute discretion of the trustees—Registration of Trust under the Act—Effect of—Held, trustees are not free to deal with the properties of the trust even if the Will empowers them to do so.

F Appellant, K and B, since dead, were appointed as executors and trustees under a Will executed by J who died on January 8, 1962. It was provided in the Will that the executors and trustees should first pay all the debts, funeral, death and other testamentary expenses, estate duty, Government dues; that they should convey the two immovable properties bequeathed under the Will after obtaining probate of the Will and till then to deal with the rents and income arising therefrom in the same manner as of other estate; and that they should convert all the properties both movable and immovable, including business, which had not been bequeathed specifically under the Will into cash and then donate the money so collected for charitable purposes in their absolute discretion. Probate of the Will was granted on April, 5, 1963. Immovable properties mentioned in the Will were transferred and all

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payments as devised by the Will were made to respective legatees by February, A 1964. The trust was registered under Section 18 of the Bombay Public Trust Act, 1950 on December 29, 1964.

The executors and trustees filed income-tax return for the assessment year 1964-1965 for the previous year (October 20, 1962 to October 17, 1963). Return was signed by them as executors of the Will. It was contended before the Income-tax Officer that the income assessable in their hands as trustees and not as executors, and its income was exempt from tax under Section 11(1) of the Income Tax Act, 1961. The Income-tax Officer assessed the income in their hands as executors. Appeal preferred by the assessee before the Appellate Assistant Commissioner was dismissed on the ground that the administration of the estate had not been completed. Against the order of the Appellate Assistant Commissioner, appeal filed by the assessee before the Appellate Tribunal was allowed on the ground that they had shed their character as executors and acquired that of trustees on April 5, 1963 when probate was granted; and that even otherwise the income of immovable properties specifically bequeathed and of assets sufficient to pay off the monetary legacies and the outstanding estate duty would be assessable in their hands in their capacity as executors while the income from remaining assets would be assessable in their hands as trustees. It held that the income ought to have been assessed in their hands as trustees. The Appellate Tribunal referred three questions at the instance of the revenue to the High Court under Section 256(1) of the Income Tax Act, 1961. High Court held that K and B did not hold the properties as trustees at any point of time; that during the assessment year 1964-1965, K and B did not receive any income as trustees and were not liable to be assessed as trustees; and that Section 168 of the Act would apply for assessment of the income. Aggrieved by the findings of the High Court, assessee has filed the present appeal. F

The appellant contended that the income was assessable in their hands as trustees under Section 160(1) (iv) read with Section 161(1) of the Act on the grounds that the residue after payment of debts and legacies was *ipso facto* ascertainable and in its entirety available for the trust; that but for specific bequests and liabilities the whole properties of the testator were stamped with trust; that on correct construction of the terms of the Will the trust was created right on the date of death of the testator and in any case upon grant of probate to the executors-cum-trustees on April 5, 1963. G

Dismissing the appeal, the Court

HELD : 1. Public Trust is constituted under the Bombay Public Trust H

- A **Act, 1950.** There are various sections under the Act regarding registration of properties of the trust both movable and immovable. These properties have to be registered with the Charity Commissioner under the Act and a proper register has to be maintained containing particulars of the properties of the trust. Under Section 36 of the Bombay Public Trust Act notwithstanding anything contained in the instrument of trust no sale of immovable property or lease for a period exceeding three years in the case of non-agricultural land or a building belonging to a public trust shall be valued without the previous sanction of the Charity Commissioner. Sanction may be accorded subject to such conditions as the Charity Commissioner may think fit to impose with regard to interest, benefit or protection of the trust. It would, therefore, appear that trustees are not free to deal with the properties of the trust even if the will empowers them to do so. The trust cannot be said to be registered merely when an application under Section 18 is filed. Registration of the trust is effected only after the order is passed by the competent authority under Section 20 of that Act and entries made in the register. But in the present case registration of the trust was after the close of the previous year and by that date all payments devised by the Will had been made to different legatees. [54-B-F]

Chhatrapati Charitable Devasthan Trust v. Parisa Appa Bhoske & Ors., AIR,(1979) Bom. 218, referred to.

- E 2. There is no rule of law as to when an executor sheds his character as an executor and when wears the robes of a trustee. It all depends on the construction of the Will as to when the testator desired the trust to come into being. For that it has also to be seen as to when the functions of the executor administrating the estate of the testator comes to an end. Under Section 302 of the Indian Succession Act, 1925 when probate in respect of any estate has been granted, the High Court may, on application made to it, give to the executor any general or special directions in regard to the estate or in regard to the administration thereof. Section 317 of the Act imposes various duties on the executors. Then under Section 366 the surplus or residue of the deceased's property, after payments, of debts and legacies, shall be paid to the residuary legatee. [60-A-C]

Navnit Lal Sakarlal v. Commissioner of Income Tax, (1992) 193 ITR 16 (SC) and Administrator of West Bengal for the Estate of Raja P.N. Tagore v. Commissioner of Income Tax, West Bengal, (1965) 56 ITR 34 (SC), referred to.

- H *Commissioner of Income-tax, Madras v. Estate of Late T.P. Ramaswami*

Pillai, (1962) 46 ITR 666 (Madras); Court Receiver v. Commissioner of Income Tax, Bombay City, (1964) 54 ITR 189 (Bombay); CIT, Tamil Nadu I v. Estate of V.L. Ethiraj, (1979) 120 ITR 666 (Madras) and CIT v. Estate of Late A.V. Viswanatha Sastri, (1980) 121 ITR 270 (Madras), referred to. A

3. Keeping in view the provisions of the Bombay Public Trust Act, 1950, it would appear that the testator was very particular that all the properties which she had not bequeathed specifically under the Will should be converted into cash and then the money so collected could be donated for charitable purposes. This direction of the testator under clause 20 of the Will is of great significance and understanding as to what stage the trust comes into being. On an examination of clause 20 of the Will read with other clauses, it is apparent that the trust was to come into being only after funeral and other expenses met, legatees paid and properties converted into cash by the executors and trustees that administration of the estate would come to an end and all the amount thus lying with the executors and trustees would form the corpus of the trust. Functions of the trustees and executors as imposed upon them did not come to an end till February 1964 and it, therefore, cannot be said that there was any trust created under the Will till that time. Section 168(3) of the Act makes it clear that executor will continue to be assessed until the estate is distributed among the beneficiaries according to their several interests. [54-G-H; 61-A-B] B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5649 of 1990. C

From the Judgment and Order dated 28.9.83 of the Bombay High Court in I.T.R. No. 157 of 1974 D

Buddy A. Ranganadhan for the Appellant. E

K.N. Shukla, K.C. Kaushik and S.K. Dwivedi for the Respondent. F

The Judgment of the Court was delivered by

D.P. WADHWA, J. A Division Bench of the High Court of Judicature at Bombay on a reference under Section 256(1) of the Income-tax Act, 1961 (for short the 'Act') decided all the three questions of law referred to it for its opinion by the Income Tax Appellate Tribunal ('Appellate Tribunal' for short) in favour of the revenue. The assessee is aggrieved. The questions of law are: G

"1. Whether, on the facts and in the circumstances of the case, K.R. Patel and B.G. Amin held the properties as trustees from the time of the death of Bhikhubai Chandulal, or whether they held the estate in that capacity from April 5, 1963, when probate of the Will was obtained? H

A 2. Whether, on the facts and in the circumstances of the case, K.R. Patel and B.G. Amin received income of certain part of the estate as executors and income of the remaining part of the estate as trustees?

3. Whether, on the facts and in the circumstances of the case, K.R. Patel and B.G. Amin were liable to be assessed as trustees under Section 161 of the Income-tax Act, 1961?"

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These questions arose from the order of the Appellate Tribunal in the following circumstances.

One Mrs. Bhikubai Chandulal Jalundhwala, a resident of Bombay, executed a Will on January 5, 1962. She died three days after on January 8, 1962. During her life time she was possessed of considerable properties both movable and immovable. K.R. Patel, the appellant and B.G. Amin, solicitor, since dead, were appointed as executors and trustees under the Will. The executors and trustees under the Will were directed first to pay all the debts, funeral, death and other testamentary expenses, estate duty, Government dues as soon as possible. Two immovable properties under the Will were bequeathed to two different individuals. It was provided in the Will that the executors and trustees should convey these immovable properties after obtaining probate of the Will and until this was done to deal with the rents and income arising therefrom in the same manner as of other estate. The Will also recited that the testator had during her life time gifted her one immovable property to K.R. Patel and under the Will she provided for payment of Rs. 40,000 to him to construct a floor on the said property. Testator also devised payment to each of her employees amounting to their respective six months salary.

Then the executors and trustees were directed under the Will to wind up the business of the testator which she was running in the name of Karamchand Ambalal & Co. or to sell the same as a going concern. Clauses 11, 15, 16 and 20 of the Will are particularly relevant for purposes of this appeal and are as under:

G "11. I direct that except as to the parts of my estate and properties which are bequeathed specifically by this my will or are otherwise disposed of by me prior to my death my executors and trustees shall convert all my moveable and immovable properties into cash.

H 15. I direct that my executors and trustees of this my Will shall convey to the respective legatees of my aforesaid immovable properties after obtaining probate of this my Will and until such properties are transferred to the names of the respective legatees the rents or income

arising therefrom shall be collected by my executors and trustees and A
shall be dealt with by my trustees in the same manner as my other
estate.

16. After my executors and trustees have sold my other remaining properties both movable and immovable (and have converted the same into cash) my executors and trustees shall stand possessed of the same and the same shall be dealt with by them as hereunder provided. I direct that my executors and trustees shall sell all the shares and securities of which I may be possessed of at the time of my death. I also direct that my executors and trustees shall realise all my investments whatsoever made and shall convert the same into cash. C

20. As to the entire residue of the amount lying with my executors and trustees I direct that my said executors and trustees shall use the same for providing educational and medical aid to the needy at their absolute discretion and in such manner as my said executors and trustees may deem fit. I direct that in furtherance of and for giving effect to the provisions of this clause my executors and trustees shall donate such amount or amounts to such educational institution, university or hospital authorities or maternity homes on such terms and conditions as may appear to be just and necessary and which in their absolute discretion they may think proper. My executors and trustees shall also be entitled to use such part or parts of said money for the benefit of and for providing aid to such religious institution or institutions as they may in their absolute discretion think fit." D E

The executors and trustees filed estate duty return in July, 1962 disclosing total value of the estate as Rs. 19 lakhs. Assessment was completed on March 17, 1963 on a total value of the estate of Rs. 24 lakhs. The estate duty amounting to little over Rs. 4.57 lakhs was paid on March 28, 1963. Probate of the Will was granted on April 5, 1963. Immovable properties mentioned in the Will were transferred in October, 1963 and February, 1964. By February, 1964 all the payments as devised by the Will were made to respective legatees. F G

On June 19, 1963 an application was filed by the executors and trustees under Section 18 of the Bombay Public Trust Act, 1950 for registration of the public trust created under the Will. The application was filed under protest. It was contended that it was not a case of creation of a trust under the Will but was a case of assignment of power to deal with estate in the manner indicated in the Will. However, it was held that the trust properties vested in H

A the two executors and trustees as trustees under the terms of the Will as well as under Section 211(1) of the Indian Succession Act, 1925. It was also held that the trust was public trust. The trust was registered on December 29, 1964.

Executors and trustees filed income-tax return for the assessment year 1964-65 for the previous year (October 20, 1962 to October 17, 1963) on

B February 13, 1965. Return was signed as executors of the Will. Before the Income-tax Officer it was contended that the income-tax return was assessable in the hands of the executors and trustees as trustees and not as executors and that since the properties left behind by the testator were held under trust for whole charitable and religious purposes its income was exempt from tax

C under Section 11(1) of the Act. Various other contentions were raised but all these were rejected by the Income-tax Officer who assessed the income in the hands of the executors and trustees as executors.

Against order of the Income-tax Officer, an appeal was filed before the Appellate Assistant Commissioner, who also held that the executors and

D trustees were liable to be assessed in the capacity of executors inasmuch as the administration of the estate had not been completed. The matter was then taken to the Appellate Tribunal. By order dated July 16, 1971 the Appellate Tribunal held that the income ought to have been assessed in the hands of the executors and trustees as trustees and in any case the executors and trustees had shed their characters as executors and acquired that of trustees

E on April 5, 1963 when probate was granted. Appellate Tribunal further held that even otherwise the position was that the whole estate including the immovable properties and amount suggested to be distributed by way of legacy had vested in the executors and trustees as trustees and thus the income of the immovable properties specifically bequeathed and of assets

F sufficient to pay off the monetary legacies and the outstanding estate duty would be assessable in their hands in their capacity as executors while the income from remaining assets would be assessable in their hands as trustees. Appellate Tribunal accordingly directed to make fresh assessment in the capacity as trustees.

G At the instance of the revenue three questions set out in the beginning of this judgment were referred by the Appellate Tribunal under Section 256(1) of the Act to the High Court for its decision. High Court answered these questions in the following manner:

H “1. K.R. Patel and B.G. Amin did not hold the properties as trustees either from the time of the death of Bhikhubai or from the date on

which probate of the Will was obtained. A

2. During the assessment year 1964-65, K.R. Patel and B.G. Amin received no income as trustees.

3. During the assessment year 1964-65, K.R. Patel and B.G. Amin were not liable to be assessed as trustees." B

During the assessment proceedings it appears that B.G. Amin, one of the two executors and trustees, died and further proceedings were carried on by the surviving trustee K.R. Patel. During the pendency of this appeal K.R. Patel also died. The trust had been named as Bhikhubai Chandulal Jalundhawala Trust. After the death of K.R. Patel the trustees were appointed by the Deputy Charity Commissioner of the Trust, who have been impleaded as appellants. C

The question that arises for consideration is if the provisions of Section 160(1)(iv) read with Section 161(i) would apply as contended by the assessee, or Section 168 of the Act as held by the High Court, would apply. These provisions are as under: D

"160. (1) For the purposes of this Act, "representative assessee" means—

(i)

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(iv) in respect of income which a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise including any wakf deed which is valid under the Mussalman Wakf Validating Act, 1913 (6 of 1913), receives or is entitled to receive on behalf or for the benefit of any person, such trustee or trustees; F

(v)

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Explanation 1.- A trust which is not declared by a duly executed instrument in writing including any wakf deed which is valid under the Mussalman Wakf Validating Act, 1913 (6 of 1913), shall be deemed, for the purposes of clause (iv), to be a trust declared by a duly executed instrument in writing if a statement in writing, signed by the trustee H

A or trustees, setting out the purpose or purposes of the trust, particulars as to the trustee or trustees, the beneficiary or beneficiaries and the trust property, is forwarded to the Assessing Officer—

(i) where the trust has been declared before the 1st day of June, 1981, within a period of three months from that day; and

B (ii) in any other case, within three months from the date of declaration of the trust.

C *Explanation 2.-* For the purposes of clause (v), "oral trust" means a trust which is not declared by a duly executed instrument in writing including any wakf deed which is valid under the Mussalman Wakf Validating Act, 1913 (6 of 1913), and which is not deemed under Explanation 1 to be a trust declared by a duly executed instrument in writing."

D "161. (1) Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him."

E F "168. (1) Subject as hereinafter provided, the income of the estate of a deceased person shall be chargeable to tax in the hands of the executor—

G (a) if there is only one executor, then, as if the executor were an individual; or

(b) if there are more executors than one, then, as if the executors were an association of persons;

H and for the purposes of this Act, the executors shall be deemed to be resident or non-resident according as the deceased person was a resident or non-resident during the previous year in which his death took place.

(2) The assessment of an executor under this Section shall be made A separately from any assessment that may be made on him in respect of his own income.

(3) Separate assessments shall be made under this section on the total income of each completed previous year or part thereof as is included in the period from the date of the death to the date of complete distribution to the beneficiaries of the estate according to their several interests. B

(4) In computing the total income of any previous year under this Section, any income of the estate of that previous year distributed to, or applied to the benefit of, any specific legatee of the estate during that previous year shall be excluded; but the income so excluded shall be included in the total income of the previous year of such specific legatee." C

"Executor" has been defined in the Indian Succession Act, 1925 to mean a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided (clause (c) of Section 2). "Probate" means a copy of a Will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator (clause (f) of Section 2). D

Public Trust is constituted under the Bombay Public Trust Act, 1950. It is not disputed that in the present case public trust has been constituted and registered under this Act. Public trust is defined therein under clause (13) of Section 2 thereof. Applicability of the Bombay Public Trust Act is again not disputed. Under Section 18 of the Bombay Public Trust Act it shall be the duty of the trustee of a public trust to which that Act applies to make an application for registration of the public trust. Section 29 applies to public trust created by Will and it is as under: F

"29. Public trust created by Will.—In the case of the public trust which is created by a Will, the executor of such Will shall within one month on which the probate of the Will is granted or within six months from the date of the testator's death whichever is earlier make an application for the registration in the manner provided in Section 18 and the provisions of this Chapter shall *mutatis mutandis* apply to the registration of such trust: G

Provided that the period prescribed herein for making an application H

A for registration may, for sufficient cause, be extended by the Deputy or Assistant Charity Commissioner concerned."

There are various sections under the Bombay Public Trust Act regarding registration of properties of the trust both movable and immovable. These properties have to be registered with the Charity Commissioner under that

B Act and a proper register has to be maintained containing particulars of the properties of the trust. Under Section 36 of the Bombay Public Trust Act notwithstanding anything contained in the instrument of trust no sale of immovable property or lease for a period exceeding three years in the case of non-agricultural land or a building belonging to a public trust shall be valid

C without the previous sanction of the Charity Commissioner. Sanction may be accorded subject to such conditions as the Charity Commissioner may think fit to impose with regard to interest, benefit or protection of the trust. It would, therefore, appear that trustees are not free to deal with the properties of the trust even if the Will empowers them to do so. Executors and trustees filed application for registration of the trust under the provisions of the

D Bombay Public Trust Act on the directions issued by the Assistant Charity Commissioner. They filed the application on June 19, 1963 under protest. The trust was registered on December 29, 1964. Non-registration of the trust under the Act entails penalty under Section 66 of that Act. A Division Bench of the Bombay High Court in *Chhatrapati Charitable Devasthan Trust v. Parisa*

E *Appa Bhoske & Ors.*, AIR (1979) Bom. 218 has taken the view that unless a trust is duly registered under Section 18 of the Bombay Public Trusts Act read with Sections 17, 19, 20, 21 of that Act, the trust cannot be said to be registered merely when an application under Section 18 is filed. Registration of the trust is effected only after the order is passed by the competent authority under Section 20 of that Act and entries made in the register.

F Registration of the trust under the Bombay Public Trust Act is certainly an important event but in the present case registration of the trust was after the close of the previous year and by that date all payments devised by the Will had been made to different legatees.

G If we keep the provisions of Bombay Public Trust Act in view it seems that under the Will which appears to have been drafted by a solicitor, well-versed with the provisions of the Bombay Public Trust Act, the testator was very particular that all the properties which she had not bequeathed specifically under the Will should be converted into cash and then from the money so collected that could be donated for charitable purposes (clause 20 of the Will).

H This direction of the testator under clause 20 of the Will is of great significance

and understanding as to what stage the trust comes into being. It was submitted by the learned counsel for the appellant that in the Will certain specific bequests and liabilities were already mentioned and the residue was *ipso facto* ascertainable and in its entirety available for the trust. He said residue in clause 20 was in fact a misnomer and that but for the specific bequests and liabilities the whole properties of the testator were stamped with trust. He said there was no debt to be paid and there was no impediment, dispute or difficulty in regard to the administration of the estate of the deceased and the completion of the administration of the estate was a fairly simple exercise. According to the learned counsel on correct construction of the terms of the Will the trust was created right on the date of the death of the testator, i.e., January 8, 1962 and in any case upon the grant of probate to the executors-cum-trustees on April 5, 1963. He said there was nothing to show that there was refusal or lack of assent by the executors to the vesting of the residuary legatee which was the trust. On the other hand he said the assent could be inferred from the facts that the property was valued, there was no dispute as to the administration of the estate, and the executors-cum-trustees applied for and obtained probate from the High Court. In support of his submissions he referred to three decisions of the High Courts, namely, *Commissioner of Income-Tax, Madras v. Estate of Late Sri T.P. Ramaswami Pillai*, (1962) 46 ITR 666 [Madras], *Court Receiver v. Commissioner of Income-Tax, Bombay City*, (1964) 54 ITR 189 [Bombay] and *Commissioner of Income-Tax, Tamil Nadu-I v. Estate of V.L. Ethiraj (By official trustee)*, (1979) 120 ITR 271 [Madras].

Strong reliance has been placed by the appellant on the decision of the Madras high Court in *Commissioner of Income-tax, Tamil Nadu v. Estate of V.L. Ethiraj*, (1979) 120 ITR 271. In this case one Ethiraj executed his Will under which he created a trust in respect of his properties and appointed the official trustee of Madras as the sole executor and trustee. Ethiraj died on September 8, 1960. Official trustee applied for the probate of the Will of Ethiraj under Section 222 of the Indian Succession Act read with Section 7(6) of the Official Trustees Act, 1913. Probate was granted to him on May 3, 1961. After obtaining probate official trustee sold various properties of the testator as directed in the Will. He was to perform various other functions. Balance of the money realised from the estate of the testator was to be utilised in awarding scholarships for students studying in the Ethiraj College for Women. For the assessment year 1961-62 official trustee was assessed under Section 168 of the Act in his capacity as an executor. For the subsequent years 1962-63 onwards the ITO proposed to assess the income in his hands in his

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- A capacity as executor. Official trustee, however, claimed that he should be assessed only as a trustee on the ground that he was only a trustee as such the income derived by him from the properties held for charitable purposes could not be assessed. He placed reliance on two decisions one of the Madras High Court in *CIT v. Estate of late T.P. Ramaswami Pillai*, (1962) 46 ITR 666 (Mad) and the other of *Bombay High Court in Court Receiver v. CIT*, (1964) 54 ITR 189 (Bom). Plea of the official trustee was negatived by the ITO as well as by the Appellate Assistant Commissioner. He succeeded before the Appellate Tribunal. One of the questions which were referred to the High Court and arising out of the order of the Appellate Tribunal was if on the facts and circumstances of the case Appellate Tribunal was right in holding that
- C the properties of Ethiraj (deceased) under his Will became vested in the official trustee of Madras as a "trustee" from the very inception and, therefore, the income of the estate was not assessable in his hands under the provisions of Section 168 of the Act. High Court examined the provisions of the Administrators-General Act, 1963 and the Official Trustees Act, 1913 and held as under:

- D "It appears to be quite clear that though the official trustee has been appointed both as sole executor and as sole trustee, the executorship must automatically come to an end on his obtaining the probate, that the taking out of probate by the official trustee should be taken to be an act of acceptance of the trusteeship and that on the date of the obtaining of the probate the trust had come into existence and the properties had vested in the official trustee."

- E F High Court, however, did not agree with the Appellate Tribunal that the properties vested in the official trustee on the death of the deceased as trustee.

- G In *Commissioner of Income Tax, Madras v. Estate of Late Sri T.P. Ramaswami Pillai*, (1962) 46 ITR 666 (Madras) the testator created trust in respect of his properties. The trust was for various purposes, some being for the benefit of the wife of the testator and others for certain religious and charitable purposes. The testator appointed his son and brother-in-law as trustees and almost imposed certain duties of the executorial nature. These were like payment of specific legacies and funeral expenses. The trustees under the Will filed returns stating that they ceased to be executors and claimed that the trust was wholly for religious and charitable purposes and thus, the entire income from the properties was exempt from taxation. Revenue H contended that since the debts had not been fully discharged the trustees

could be assessed only as executors under Section 41 of the Income Tax Act, 1922 and income was not exempt from tax. The question which came up for consideration of the Court was whether any part of the income of the estate of the testator was exempt under the proviso to Section 4(3)(i) of the Income Tax Act, 1922. The Court said that to the extent the income from the properties specified in the Will had been applied towards payment of monthly allowances to the various relations of the deceased, there would be no exemption under Section 4(3)(i) and the rest of the income would be exempt from that provision. The Court observed that there was no invariable rule that an executor could not shed his character as executor and assume the character of trustee under the Will before all the debts are discharged and legacies are paid. The executor could vest the property in the legatees with mutual consent and hold the legacies as a trustee even before all the debts were discharged.

This judgment of the Madras High Court was followed by the Bombay High Court in *Court Receiver v. Commissioner of Income- Tax, Bombay City*, (1964) 54 ITR 189 (Bombay). In that case a Bench of the Bombay High Court was considering the Will under which the testator made certain dispositions which were all of religious and charitable nature. This constituted 1/3 of the property of the testator after funeral expenses, expenses for obtaining probate and paying debts of the testator, if any. One of the questions raised was whether on the facts and in the circumstances of the case 1/3 of the property mentioned in the Will could be said to be held under trust and thus exempt within the meaning of Section 4(3)(i) of the Income Tax Act, 1922. The Court answered the question in affirmative and said that it could not be laid down as a general rule that when debts of the testator are not paid, a trust cannot come into being. It would depend on the facts of each case. The Court said that there might be cases where the indebtedness of the testator was such as would come in the way of the creation of the trust. It may be otherwise as well. The question that arises in such cases is whether the executors had shed their character as executors and assumed the character of trustees under the will and each case has, thus, to be examined with reference to the terms of the Will.

We may also refer to a decision of this Court in *Navnit Lal Sakarlal v. Commissioner of Income-Tax*, (1992) 193 ITR 16 (SC). One Balabhai Damodardas executed a Will bequeathing all his property including his half share in a firm to his two grandsons. Damodardas died on December 31, 1957. His son Sakarlal took charge of the properties left by his deceased father and administered them. Income therefrom was assessed in the hands of Sakarlal

- A upto assessment year 1962-63. For assessment years 1963-64 to 1967-68, the Income Tax Officer sought to assess Navnit Lal, one of the beneficiaries under the Will respecting his half share in income from the properties left under the Will by his deceased grandfather. Sakarlal for all intent and purpose was executor of the will. The estate was not distributed or applied for the benefit of the beneficiaries till August 5, 1970. Even the firm in which the deceased had half share was continuing and the executor had yet to make arrangements regarding the revaluation of the share of the deceased in the firm. This Court said that in the absence of any steps taken by Sakarlal, the estate could not be deemed to have been vested in the beneficiaries and the administration of the estate could not be said to have come to an end. The Court said that "the
- B question in each case is: has the administration reached a point at which you can infer that the administration has been completed, the residuary estate has been ascertained, the bequest of the residue has been assessed to and the residuary estate, therefore, became vested in trustees, be they the executors themselves or strangers? In other words, can it be said that the residuary estate had taken concrete shape and could and should have been handed over by the executors to the persons beneficially entitled but for the fact that the estate is settled in trust and vested in the executors as trustees?" This Court upheld the order of the Appellate Tribunal that Navnit Lal, the grandson and beneficiary could not be assessed to tax on one half of the income from the properties of the testator.
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- E Reference may also be made to two more decisions, one of this Court in *Administrator General of West Bengal for the estate of Raja P.N. Tagore v. Commissioner of Income Tax, West Bengal*, (1965) 56 ITR 34 (SC) and other of the Madras High Court in *Commissioner of Income Tax, Tamil Nadu-II v. Estate of Late A.V. Viswanatha Sastri*, (1980) 121 ITR 270 (Madras).
- F In *Administrator General of West Bengal for the estate of Raja P.N. Tagore v. Commissioner of Income Tax, West Bengal*, (1965) 56 ITR 34 (SC) there were two questions before this Court for its decision :
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 - 1. Whether, on the facts and in the circumstances of the case, the assessments on the Administrator-General of West Bengal as an individual and not as representing the shares of the various beneficiaries under the Will of the late Raja P.N. Tagore separately was in accordance with law?
 - 2. If the answer to question No.1 be in the affirmative, then whether, on the facts and in the circumstances of the case, the assessment of the said Administrator-General at the maximum rate was legal?"
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Under the Will, the executor and trustees were required to manage the estate of the testator for a period of 15 years before the end of which numerous specific legacies were to be paid out of the savings from the income of the estate. The Administrator-General of West Bengal was appointed as administrator and the letters of administration *de bonis non* of the estate were granted to him. During the relevant accounting period the administration of the estate was not complete and the question as stated above was whether the income from the estate of the testator was specifically receivable on behalf of his sons, the residuary beneficiaries. This Court held that Section 41 of the Income-tax Act, 1922 was not applicable as the Administrator General received the income on his behalf as administrator and not on behalf of five sons of the testator. Both the questions were answered in affirmative in favour of the revenue. This Court held that as the administration of the estate was not completed, the Administrator-General received the income of the estate on his behalf and not on behalf of the residuary beneficiaries being the sons of the testator. The Court also observed that a share of the residue did not belong to the beneficiaries until it was ascertained either in whole or in part by transfer or assent to him or by appropriation.

In *Commissioner of Income Tax, Tamil Nadu-II v. Estate of Late A.V. Viswanatha Sastri*, (1980) 121 ITR 270 (Madras) the testator, a senior advocate practising in the Supreme Court, died. He executed a Will by which he appointed his son as an executor of the Will. The son filed returns in his capacity as an executor for certain years. During that period, however, he received various amounts which were professional fees payable to the deceased. He did not offer these amounts for assessment claiming that these professional fees were not liable to be taxed in his hands. His plea was negatived by the revenue being of the view that Section 176(4) of the Income Tax Act, 1961 specifically provided for taxability of the professional income received after discontinuance of the profession and included the arrears of the professional fees in the income earned from the estate of the deceased. The Court held that the arrears of fees realised by the executor Will have to be taxed in his hands as a recipient in the year of receipt and brought to tax in the hands of the executor along with the income of the estate. The Court said that the legal fees due to the deceased on the date of death was one of the assets left by the deceased and would be part of his estate and realisation of the arrears would amount to recovery of part of the deceased's estate.

Examination of the provisions of law and decisions in the aforesaid cases does not lead us to lay any rule of law as to when an executor sheds

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A his character as an executor and when wears the robes of a trustee. It all depends on the construction of the will as to when the testator desired the trust to come into being. For that we have also to see as to when the functions of the executor administering the estate of the testator come to an end. Under Section 302 of the Succession Act, 1925 when probate in respect of any estate has been granted the High Court may, on application made to it, give to the executor any general or special directions in regard to the estate or in regard to the administration thereof. Section 317 of that Act imposes various duties on the executors. Then under Section 366 the surplus or residue of the deceased's property, after payments of debts and legacies, shall be paid to the residuary legatee. Sections 317 and 366 are as under:

C "317. *Inventory and account.*—(1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

E (2) The High Court may prescribe the form in which an inventory or account under this section is to be exhibited.

F (3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under Section 176 of the Indian Penal Code.

G (4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under Section 193 of that Code.

366. *Residue after usual payments to be paid to residuary legatee.*—The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the Will."

H In the present case when we examine clause 20 of the will read with

other clauses, it is apparent that the trust was to come into being only after funeral and other expenses met, legatees paid and properties converted into cash by the executors and trustees that administration of the estate would come to an end and all the amount thus lying with the executors and trustees would form the corpus of the trust. Functions of the trustees and executors as imposed upon them did not come to an end till February 1964 and it, therefore, cannot be said that there was any trust created under the Will till that time. Section 168(3) of the Act makes it clear that executor will continue to be assessed until the estate is distributed among the beneficiaries according to their several interests. A

Accordingly we uphold the decision of the High Court in the impugned judgment and dismiss the appeal with costs. B C

A.K.T.

Appeal dismissed.