

ORIGINAL CIVIL.

Before *Kemfry J.*

OFFICIAL TRUSTEE OF BENGAL

v.

G. A. ARRATOON.*

1930

May 26, 30.

Marriage settlement—Construction—Income—Dividend—Deduction of income-tax—Deficit.

The words "sum actually realised by way of dividends or income" in a deed of settlement do not mean dividend free of income-tax. It requires a clear indication on the part of a testator or a settlor to establish that the beneficiary's income-tax is to be paid for him.

Pratt v. Gamble (1) followed.

ORIGINATING SUMMONS by the Official Trustee of Bengal, for construction of portions of a marriage settlement.

One Arratoon Stephen vested certain securities in the Official Trustee upon trust to pay the income thereof to his son and his wife and the survivor of them for life, with the usual gifts over to the issue of the intended marriage. The deed of settlement contains the following covenant by the settlor:—

If the said marriage should be solemnized, then if in any year after the solemnisation thereof the said securities specified in the schedule hereto shall not yield an annual income of Rs. 14,000 then the settlor, his heirs, executors or administrators shall on demand by the Official Trustee pay to the Official Trustee any deficiency between the sum actually realised by way of dividends or income on the said securities and the sum of Rs. 14,000.

There had been in fact a deficit every year since the deed was executed. On demand by the Official Trustee, the executors made good the deficits. The executors then claimed the amounts of income-tax that had been deducted at the source from the dividends declared in respect of the securities.

Thereupon the Official Trustee moved the Court for a construction of the covenants in the settlement.

*Originating Summons, No. 918 of 1930.

(1) [1917] 2 Ch. 401.

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W. Westmacott for the Official Trustee. Income means the net amount actually received by the Official Trustee after income-tax has been deducted at the source. It is clearly the settlor's intention that the beneficiaries should receive a yearly income of Rs. 14,000 and that, in the event of such securities failing to yield the aforesaid income, it should be supplemented and the deficiency made up. It is abundantly clear from the covenant that the settlor intended that the beneficiaries should in no case receive less than Rs. 14,000 per annum.

Apart from the construction of the deed, however, the question is concluded by authorities. Income-tax paid on such profits is part of the profits. *Ashton Gas Company v. Attorney-General* (1). The point is made still clearer in *Purdie v. Rex* (2).

Applying the principles laid down in these cases, it seems that the "income" referred to in the deed can only mean the actual dividend that the Trustee has received.

Torick Ameer Ali for the defendants.

Cur. adv. vult.

REMFRY J. In this originating summons, the Official Trustee of Bengal applies to this Court to ascertain the construction to be placed on certain portions of a marriage settlement.

The father of the bridegroom made a settlement on the marriage wherein it is recited that it is the intention of the settlor that the beneficiaries thereunder should receive a yearly income of Rs. 14,000 being equivalent to 7 per cent. per annum on the nominal value of the securities settled thereunder and that, in the event of such securities failing to yield the aforesaid income, to supplement and make up the deficiency.

The covenant is as follows: * * * "if in any year "the said securities * * * shall not yield an annual "income of Rs. 14,000, then the settlor * * * shall on

(1) [1906] A. C. 10.

(2) [1914] 3 K. B. 112, 116.

“demand * * * pay any deficiency between the sum
“actually realised by way of dividends or income on
“the said securities and the sum of Rs. 14,000.”

The securities consisted of 7 per cent. preference shares, additional preference shares and 2nd debentures in limited companies.

The Official Trustee contends that deficiency ought to be calculated by deduction from Rs. 14,000 the net amount of the dividends actually recovered by him after deduction of income-tax by the companies at the source. The executors of the testator contend that they are entitled to deduct from the Rs. 14,000 the gross amount of dividends declared including the amount of income-tax deducted by the company at the source.

It appears from the correspondence between the parties that the companies paid 7 per cent. less 18 pies income-tax. It does not appear whether any part of that deduction has been or is recoverable. The Official Trustee does not claim that the amount paid for any deficiency should be sufficient to pay the income-tax in itself, and so result in the receipt of Rs. 14,000 a year free of income by the trust.

As the settlement is in terms which are capable of meaning either of the results contended for, that is, is ambiguous, in my opinion, the document must be read in the light of the surrounding circumstances.

The recital seems by itself to be clear—a settlement of an income of Rs. 14,000 without any indication that it should be free of income-tax. The circumstance that the securities could only yield an income of Rs. 14,000 less income-tax confirms what is after all the meaning of the words used.

The covenant of course is the operative part and, if clear, must be construed without reference to the recital. “The sum actually realised by way of dividends or income” are the words used. It is contended that “actually realised” means the sum paid to the trustee—after deduction of income-tax. But “actually realised” is qualified by the words “by way of dividends or income.”

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In my opinion, the holder of these securities is entitled to the dividend declared; and, when paid that dividend less income-tax, has received "by way of dividend" the full dividend declared. He can only demand that sum from the company, for he is entitled to the whole dividend but payment of the whole dividend less income-tax is under the Income-tax Act a discharge of the company's liability. The company in fact has paid the shareholder's income-tax: that is plain, for in certain cases the shareholder can claim a refund of a portion or may be the whole of the income-tax deducted at the source, for the rate of income-tax on the dividend is determined by the shareholder's entire income and not by the company's income at all.

It was argued that the decision of Rowlett J. in *Purdie v. Rex* (1) showed that the company and not the shareholder paid income-tax. That learned Judge certainly says so. But he was considering the position from the point of view of the Government, and was not concerned with the construction of a deed providing for payment by dividend. The principle is clearly established that it requires a clear indication of the intention on the part of a testator or a settlor to establish that the beneficiary's income-tax is to be paid for him—see *Pratt v. Gamble* (2).

In the settlement under consideration, in my opinion, the expression actually realised by way of dividends means that Rs. 14,000 in the year has been paid as dividends in respect of the securities. If the companies paid nothing in any year, there is no indication whatsoever that the settlor covenanted to pay more than Rs. 14,000. That makes it clear that the settlor was not minded to provide Rs. 14,000 a year free of income-tax—but the question is what is the meaning of the covenant. As I construe it, it means Rs. 14,000 by way of dividends, *i.e.*, that the beneficiaries are to receive dividends to the extent of Rs. 14,000 or failing that an additional sum, and that the receipt of dividends for Rs. 14,000 although income-tax be deducted at the source, is all that the

(1) [1914] 3 K. B. 112.

(2) [1917] 2 Ch. 401, 402.

covenant contemplates. The fact that the securities could not produce in any year a larger income is a circumstance which confirms my view. It is also to be observed that the settlor reserved to himself the option of taking back the securities on payment of Rs. 2,00,000 to the trustee, in which case he was to be released from the covenant in question. If he had availed himself of the option, it is clear that the beneficiaries could not have claimed from him the refund of any income-tax payable in respect of any dividends resulting from the investment of that Rs. 2,00,000.

In my opinion, therefore, the true construction of the covenant is that any deficiency is to be calculated by deducting the full amount of dividends received in respect of the securities including any income-tax deducted at the source from Rs. 14,000.

Attorney for plaintiff: *P. Oddie.*

Attorneys for defendants: *Morgan & Co.*

S. M.

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