Bombay High Court
Princess Maheshwari Devi Of ... vs Commissioner Of Income-Tax on 15 March, 1982
Equivalent citations: (1983) 33 CTR Bom 117, 1984 147 ITR 258 Bom, 1983 12 TAXMAN 220 Bom
Author: Kania
Bench: M J Rao, M Chandurkar
JUDGMENT Kania, J.

1. This is a reference under s. 256(1) of the I.T. Act, 1961 (referred to hereinafter as "the said Act"). The assessee was married to the Maharaja of Kotah on December 5, 1956. On September 11, 1963, the assessee obtained a decree of nullity of her marriage with the said Maharaja of Kotah in the Bombay City Civil Court at Bombay. The said decree shows that the petition filed by the assessee in the Bombay City Civil Court, she had claimed monthly alimony as well as a gross sum as permanent alimony and, therefore alternatively, prayed that, the event a periodic or monthly sum as permanent alimony was granted the same be secured by a charge on the immovable property of the said Maharaja of Kotah. The operative part of the said decree, with which we are concerned, runs as follows :

"THIS COURT by and with such consent DOTH FURTHER ORDER that the respondent to day to the petitioner a sum of rupees twenty-five thousand as permanent lump sum alimony and pay to her a further sum of rupees seven hundred and fifty per month as and by way of permanent alimony with effect from first day of August one thousand nine hundred and sixty-three till her re-marriage....."

2. In the previous year relevant to the assessment year 1964-65, the assessee received a sum of Rs. 25,000 on account of permanent lump sum of alimony from the said Maharaja and further received a sum of Rs. 6,000 on account of the monthly alimony of Rs. 750 per month. In each of the previous years relevant to the assessment years 1965-66, 1966-67 and 1967-68 the assessee received Rs. 9,000 as aggregate monthly alimony paid by the said Maharaja under the said decree. In the assessment proceedings, the assessee claimed exemption from tax in respect of the aforesaid amounts. The said claim was rejected by the ITO. The appeals preferred by the assessee to the AAC were dismissed and so also the appeals preferred by the assessee to the Income-tax Appellate Tribunal. From this decision of the Tribunal, the following two questions have been referred to us :

"(1) Whether, alimony received by the assessee under section 25 of the Hindu Marriage Act, 1955, on nullity of marriage, is income in her hands and liable to tax ?

(2) Whether, on the facts and in the circumstances of the case, the alimony of Rs. 750 per month received by the assessee from her ex-husband on the nullity of marriage is income in her hands liable to tax ?"

3. We may point out that question No. 1 is admittedly not properly framed. It is common ground that we are not concerned in this reference with deciding the general question whether any alimony received by an assessee under s. 25 of the said Hindu Marriage Act, 1955, is liable to tax and the real controversy which the first question should have brought out is whether, on the facts and in the

circumstances of the case, the lump sum alimony of Rs. 25,000 received by the assessee, as aforesaid, was income in her hands and liable to tax. We accordingly reference the question No. 1 with the consent of both the counsel, as follows :

"Whether, on the facts and in the circumstances of the case, the lump sum alimony of Rs. 25,000 received by the assessee from her ex-husband under section 25 of the Hindu Marriage Act, 1955, on the nullity of marriage, is income in her hands and liable to tax ?"

4. We propose to consider first question No. 2 which relates to the monthly alimony of Rs. 750 received by the assessee during the relevant assessment years. In this regard the submission of Mr. Dastur, the learned counsel for the assessee, is that alimony is an extension of the husband's obligation under the Hindu law to maintain his wife. Section 25 of the Hindu Marriage Act merely recognized and enlarges the scope of the obligation. Thus, alimony received on nullity of marriage cannot be said to have any definite source. The right to receive alimony is not alienable but is merely a personal right and is normally liable to alteration. Moreover, it cases on remarriage. Thus, according to Mr. Dastur, alimony cannot be said to be from any particular source. Nor can it be said to be a return for any past service or any definite consideration. It is merely a personal payment and not income. It was submitted by him that English decisions are not of much value in deciding the question before us, became the charging provisions under the relevant English Income-tax Act are differently worded and the scheme is different, and, normally the question in such a case before an English court was whether the payment in question amounted to annual payments.

5. In support of this contention, Mr. Dastur drew our attention to Sch. D of the English I.T. Act, 1952, where the charge of tax was levied in respect of what is referred to as "an annual payment". (See Simon's Income-tax, 2nd Edn., Vol. IV p. 114). It was pointed out by him that in the United Kingdom where a husband pays alimony to the wife, generally either the husband gets a deduction in respect of the said amount in the computation of his taxable income and the wife is taxed in respect of it, or the husband is not given any deduction, but the wife is not taxed in respect of the amount receive. It was thus pointed out by him that either the deduction was granted to the husband or no tax was levied on the wife in respect of such payments. In support of this, he drew our attention to Simon's Income-tax, 2nd edn., vol. III, p. 239 para. 402. It was submitted that in the United Kingdom the wife was taxed in respect of the receipt of alimony only where the amount of alimony was delivered at source from the income of the husband, and in that case amount was not included in the income of the husband.

6. It was, on the other hand, submitted by Mr. Joshi that when a decree provides for the payments of monthly alimony, the alimony paid is a periodic payment made under a legal obligation created by the decree, and it clearly constitutes income. That obligation may be created by a decree or under a contract, but that would make no difference. In the present case, the decree confers on the assessee a right to receive a certain amount per month as alimony. That payment is regular periodic payment received by the assessee pursuant to a legal right created in her favour by the decree and it has a definite source. Hence, it must be regarded as income and is liable to be taxed as such. It was submitted by him that, under the Hindu law, there was no earlier right in the assessee to get maintenance from her husband on the basis of separate residence and that the right to monthly

alimony on nullity of marriage is a right, which is created in her favour by the decree alone.

7. Before going into as discussion of the arguments, we may notice some of the relevant provisions of the law at this stage. Section 25 of the Hindu Marriage Act, 1955, deals with permanent alimony and maintenance. Sub-section (1) of the said section runs as follows :

"Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife of the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum of such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent".

8. Sub-section (2) of the said section provides that on changed circumstances an order made for alimony under sub-s. (1) can be varied, modified or rescinded. Sub-section (3) provides that if the party in whose favour such an order had been made, remarries or is guilty of the conduct set out therein, the court is entitled to rescind the order for alimony. Section 12 of that Act provides for the annulment by a decree of nullity of voidable marriages. We may at this stage point out that, as far as the general right of a wife to maintenance is concerned, no rule of Hindu law has been shown to us that during the subsistence of the marriage a wife is entitled to stay separately from the husband and claim maintenance, except under certain special circumstances which would justify her staying separately from her husband. Clause (24) of s. 2, being the definition section under the said Act, gives an inclusive or extensive definition of the term "income" and provides that it includes, inter alia, profits and gains. At the relevant time, sub-s. (3) of s. 10 of the said Act, read with the opening portion thereof, ran thus :

"10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included - .....

(3) any receipts which are of a casual and non-recurring nature, unless they are -

(i) capital gains, chargeable under the provisions of section 45; or

(ii) receipts arising from business or the exercise of a profession or occupation; or

(iii) receipts by way of addition to the remuneration of as employee".

9. The corresponding provision of the Indian I.T. Act, 1922, was s. 4(3)(vii).

10. It appears that Mr. Dastur is right in contending that the right to receive alimony is a personal right and is not alienable. If an authority were needed for that proposition, reference could be made to Watkins v. Watkins [1896] p. 222 (CA), which lays down that sums of money ordered under s. 1 of

the Divorce and Matrimonial Causes Amendment Act, 1866 (29 and 30 Vict. C. 32) to be paid by a husband for the maintenance of his divorced wife, are a purely personal allowance, and so long as the order subsists can neither be alienated nor released. He is also right when he states that in view of the different words of the charging provisions in the English Income-tax Acts, it would not be safe to place complete reliance on English decisions in interpreting the word "income" used under the said Act. The question whether the monthly alimony paid under a decree of nullity, as in the case before us, would be "income" will have to be considered primarily in the light of the provisions of the said Act and the interpretation thereof contained in various decisions. As we have pointed out, the definition of the term "income" contained in the said Act is merely an inclusive definition and it does not throw any direct light on the question whether the payment of monthly alimony under a decree could be regarded as "income" under the said Act. Nor is any clear guidance to be obtained from looking at the scheme of the Act and the other provisions of the said Act. If, therefore, we are to look for light, it is to the decided cases that we must turn.

11. In CIT v. Shaws Wallace and Co.. , their Lordships of the Privy Council had occasion to consider the scope of the word "income" as the said term was used in the Indian I.T. Act of 1922 and their Lordships observed as follows (p. 280 of 2 Comp Cas) :

"The object of the Indian Act is to tax 'income', a term which it does not define. It is expanded, no doubt into 'income, profits and gains', but the expansion is more a matter of words than of substance. Income, their Lordships think in this Act connotes a periodical monetary return coming in with some sort of regularity or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, of the crop of field."

12. In Maharajkumar Gopal Saran Narain Singh v. CIT [1935] 3 ITR 237 (PC), the assessee, who owned a nine-annas share in an estate, with the object of discharging his debts and of obtaining for himself an adequate income for his life, conveyed the greater portion of his estate to his son-in-law's mother who owned the remaining seven-annas share in the estate. The consideration for the transfer was : (i) the payment of the assessee's debts amounting to Rs. 10,26,937; (ii) a cash payment of Rs. 4,73,063; and (iii) an annual payment of Rs. 2,40.000 to the assessee for his life. It was held by the Privy Council, inter alia, that this was clearly a case where the owner of the estate (the assessee) had exchanged a capital asset for (inter alia) a life annuity which was income in his hands and not a case in which he had exchanged his estate for a capital sum payable in installments and that this income was taxable under the I.T. Act, even though the annuity did not constitute or provide a profit or gain to the assessee. After referring to the aforesaid decision of the Privy Council in the case of Shaw Wallace & Co., their Lordship observed as follows (p. 242) :

"The word 'income' is not limited by the words 'profits' and 'gains'. Anything which can properly be described as income, is taxable under the Act unless expressly exempted. In their Lordships view the life annuity in the present case is income within the words used in the judgment of this Board which was delivered in the case of CIT v. Shaw Wallace & Co. ."

13. It has been plainly held by the Privy Council in this case that although what was parted with by the assessee, namely, his share in the estate was a capital asset, that part of the consideration which was in the form of annual sums, was income in the hands of the assessee, particularly as the document clearly showed that one of the consideration which led to the execution of the document by the assessee was the provision of as adequate income for himself.

14. In the judgment of the Board in the case of Raja Bahadur Kamakshya Narain Singh of Ramgarh v. CIT [1943] 11 ITR 513 (PC) delivered by Lord Russell of Killowen, their Lordship of the Privy Council, after referring to the aforesaid two decisions have observed as follows (p. 522) :

"The word 'income' is not limited by the words 'profits' and 'gains'. Anything which can properly be described as income, is taxable under the Act unless expressly exempted.

It is not in their Lordships opinion correct to regard as an essential element in any of these or like definitions reference to the analogy of fruit, or increase or showing or reaping or periodical harvests."

15. In this case the assessee received large payments by way of royalty under various mining leases, which were for a period of 999 years. In return for these rights the lesses were to pay a sum by way of salami or premium and an annual sum as royalty computed at a certain rate per ton on the amount of coal raised and coke manufactured, subject always to a minimum annual sum. It was held that salami was paid for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lease and that right being a capital assets the money paid to purchase it was a payment on capital account. But that, as for the annual royalty, including the minimum royalty, it was income flowing from the covenants in the lease and was in no sense a payment on capital account.

16. We come next to the case of Rani Amrit Kunwar v. CIT , which was decided by a full Bench of the Allahabad High Court. The assessee was the wife of the Ruler of the Kalsia State and the sister of the Maharaja of Nabha State. She was residing in Dehra Dun in British India for some years with her sons and daughters. She received annual payments from the Kalsia State for the purpose of meeting her household and living expenses and the education of her children and also received an annual allowance from the Nabha State as "wardrobe allowance", which was presented on certain festival day each year. She was not bound to account for the moneys. It was held that the allowance received by the assessee from the Kalsia State were remittances from her husband and were taxable as income which must be deemed to have accrued to the assessee in British India under s. 4(2) of the Indian I.T. Act, 1922, and the question whether the remittances received by her were casual and non-recurring did not arise; and that as far as the payments received from the Nabha State were concerned, there was no evidence to show that they were attributable to any custom usage or traditional obligation and there was consequently no origin for the payments which could amount in its nature to a definite source so as to render each payment "income" and not merely a casual or annual windfall. It was held that these payments from the Nabha State were not income and not assessable to income-tax. It is true that this decision, as pointed out by Mr. Dastur, is in so far as it relates to the payments from Kalsia State, not directly relevant because the decision seems to be based on the question of remittances made to British India as contemplated under s. 4(2) of that

Act. But there is discussion in this case which is useful for our purposes. In analysing the decision of the Privy Council in the case of Shaw Wallace & Co. , Braund J., who was delivered the leading judgment, has pointed out as follows (p. 573 of 14 ITR) :

"..... in order to be income, it must be something which 'comes in' (1) periodically, (2) as a return, (3) with some sort of regularity or expected regularity, and (4) from a definite source. It appears to me to be beyond argument that a series of payments may be made periodically and with regularity or with expected regularity, notwithstanding that they do not have their origin in business activity, investment or enforceable obligation. That such a payment is something which 'comes in' and in which that expression was explained by Lord Macnaghten in Tennant v. Smith [1892] AC 150 at p. 164 (HL), is, I think, equally beyond doubt. And I should add as a third self-evident proposition that there may be a great deal of partial different between a payment which is one of a series of payments made with regularity or expected regularity on the one hand and what Viscount Dunedin describes in Bradfield College case [1932] AC 388 (HL), as 'merely a casual payment' and what Sir George Lowndes described in CIT v. Shah Wallace & Co. , as 'a mere windfall'. The principal emphasis, however, is laid on the words 'return' and 'definite sources' used by Sir George Lowndes. But these in my view present no difficulty. A regular payment or a payment expected to be regular may, I think, in principle be as much income when it is received from a giver who makes it systematically and for a known and rational reason (and a fortiori when it is received in accordance with custom) as it is if it is made in pursuance of some binding obligation whether arising out of business dealings out of an investment or out of some other enforceable obligation. And if the word 'return' had been used by Sir George Lowndes in the strict sense that nothing could be income in India which was not the result of some outlay, it would be difficult to see how anything could be taxable which was not the produce of some valuable consideration given by the recipient, however binding might be the actual obligation under which it was paid. For these reasons, in my view, it cannot be taken that Sir George Lowndes intended to lay down a general test in every case that every payment must be the result of some outlay on the part of the assessee before it is taxable".

17. In Raghuvanshi Mills Ltd. v. CIT , the supreme court has pointed out that the remarks of the judifical Committee in CIT v. Shaw Wallnce & Co. limiting income to "a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources" must be read with reference to the particular facts of that case. In Dooars Tea Co. Ltd. v. Commr. of Agrl. I.T. , the Supreme Court has pointed out that it is necessary to bear in mind that the word "income" as used in the Indian I.T. Act, 1922, is a word of elastic import and its extent and sweep are not controlled or limited by the use of the words "profits and gains" and they have pointed out that the diverse forms which income may assume cannot exhaustively be enumerated, and so in each case the decision of the question as to whether any particular receipt is income or not must depend upon the nature of the receipt and the true scope and effect of the relevant taxing provision.

18. In H. H. Maharani Shri Vijaykuverba Saheb of Morvi v. CIT , a Division Bench of this court had occasion to consider the scope of the word "income" as used in the Indian I.T. Act, 1922. In that case Maharaja Sir Lukhdhirji Bahadur of Morvi abdicated the gadi in favour of his son in January, 1948. From April, 1949, onwards, his son, who became the Maharaja, on abdication by the former Maharaja, paid him a monthly allowance. The allowance was not paid under any custom or usage

and it could not be regarded as maintenance allowance, as Maharaja Sir Lukhdhirji possessed a large fortune. It was held that a voluntary payment, which is made entirely without consideration and is not traceable to any source which a practical man may regard as a real source of his income, but depends entirely on the whim of the donor, cannot fall in the category of "income". It was held that as the payments had commenced long after Sir Lukhdhirji had abdicated, they were not made under a legal or contractual obligation. As the allowances were not also made under a custom or stage or as a maintenance allowance, they were not assessable. In this decision, the Division Bench of the Bombay High Court which decided the case, observed as follows (pp. 604-605) :

"Thus, voluntary and gratuitous payments, which are connected with the office profession, vocation or occupation may constitute 'income' although if the payments were not made, the enforcement thereof cannot be insisted upon. These payments constitute income because they are referable to a definite source, which is the office, profession, vocation or occupation. It could, therefore, be said that such a voluntary payment is taxable as having an origin in the office, profession or vocation of the payee, which constitutes a definite source for the income. What is taxed under the Indian Income-tax Act is income from every source (barring the exceptions provides in the Act itself) and even a voluntary payment, which can be regarded as having an origin, which a practical man can regard as a real source of income, will fall in the category of "income", which is taxable under the Act".

19. In Smt. Dhirajben R. Amin v. CIT , the assessee was a member of a family which had a substantial interest in Alembic Chemical Works Ltd., & allied concerns. Resolutions were passed by the board of directors of two of the companies whereby the assessee was to be paid Rs. 1,000 per month by one of the companies and 20% of the profits of another company for services to be rendered by her. The amounts were disallowed as expenditure in the assessments of the two companies. The revenue authorities and the Appellate Tribunal found that no services had been rendered by the assessee and the payments were gratuitous and the amounts were assessed in the hands of the assessee. It was held that though no services had been rendered by the assessee to the companies, the payments were received periodically and arose from a definite source. The amounts received were therefore "income". In this decision it has been held by a Division Bench of the Gujarat High Court that though no services were rendered by the assessee, it was clear that the payments from the two companies were received by the assessee periodically and that those payments were received from definite sources. The resolutions passed by the two companies respectively were the genesis of those payments to the assessee and it was from definite sources that the assessee received those periodical payments and the systematic return, viz., those payments from the said two companies could be expected with regularity. Hence, these payments constitute income which was liable to income-tax for the assessment years in question. It may be pointed out that the aforesaid conclusion was arrived at after the Division Bench referred to the case of Maharani Vijaykuverba Sahib of Morvi and the decision of the Full Bench of the Allahabad High Court in Rani Amrit Kunwar [1946] 14 ITR 56, with which the Division Bench agreed.

20. In CIT v. Smt. Shanti Meattle , the facts were that the relations between the assessee and her husband were unhappy, resulting infrequent quarrels. A deed of separation was executed in order to prevent further deterioration in their relations. It permitted the wife to live apart and the husband

was denied access and prevented from filling a suit for restitution of conjugal rights. The agreement provided for payment of Rs. 2,000 per month to the assessee for maintenance of herself and her two children. It was held by a Division Bench of the Allahabad High Court that the agreement brought to an end all material rights which a husband can exercise in relation to his wife. Such an agreement was opposed to the basic tenants of Hindu law relating to marriages and the agreement was opposed to public policy and, as such, hit by s. 23 of the Indian Contract Act. Even if the agreement in question was void, the amounts received by the assessee could be taxed if they could be classified as income or if they could be said to arise from some source and were not exempt under s. 4(3)(vii) of the Indian I.T. Act, 1922. In the circumstances of the case, m the allowance received by the assessee from her husband was held to be taxable as income in her hands. It is true that there is an observation in this decision that every receipt generally may be described as income, unless it is expressly exempt with which a Division Bench of this court has expressed respectful disagreement (see the case of Mehboob Productions (P.) Ltd. , referred to hereafter). But the conclusion reached by the Division Bench of the Allahabad High Court have not been disagreed with or disapproved in any case brought to out notice. In CIT v. M. Ramalakshmi Reddy , it has been held by the Division Bench of the Madras High Court that a receipt cannot be treated as income where no characteristic of income can be detected in it. Where a person gets some receipt of money where he does not angle for it, or where it is not the product of an organised seeking after emoluments, or whether it is merely a chance encounter with a venture which while enriching him does not form part of any scheme of the profit making the idea of income is absent. It has been held there that the real basis for the concept of non-taxable casual receipt is that the transaction in question which produces it does not constitute any trade or an adventure in the nature of trade. It was sought to be argued on the basis of this decision that in the present case also the assessee could not be said to have entered into the marriage with any idea of profit making or getting money and that it could never be said that the decree of nullity was obtained pursuant to any scheme of profit making. In our view, with respect, the observation made by the Madras High Court in this case have to be read in the facts and circumstances of that case and cannot be read as general observations divorced completely from the facts of that case.

21. We come finally to the case of Mehboob Productions P. Ltd. v. CIT , which was decided by a Division Bench of this court and on which strong reliance has been placed by Mr. Dastur. In that case the assessee-company was doing business in production of films. Some time in 1957, the assessee completed the production of the film entitled "Mother India". In that very year it was a awarded a certificate of merit (presumably by the Govt. of India) and the assessee preferred a claim before the State Govt. that the picture should be declared as "exempt from entertainment duty" and that, as the proceeds of the exhibition of the film which represented entertainment duty. The claim of the assessee was accepted by the State Govt. on October 25, 1957 and, in pursuance of that decision, the assessee recovered from the various exhibitions and theatres in the then State of Bombay, an aggregate amount of Rs. 10 lakhs odd, being the amount these exhibitors and theatre owners had collected by the way of entertainment duty in the year of account. The assessee claimed that this amount of Rs. 10 lakhs odd was not liable to be included in its total income, because it was not a trading receipt, but only an amount received by way of a personal testimonial and that at any rate, it was a casual and non-recurring receipt and was, therefore, exempt under s. 4(3)(vii) of the Indian I.T. Act, 1922. It was held that, on the material available in the case, there was nothing to

show that the assessee company had produced the picture "Mother India" with the slightest expectation that the same would be exempt from entertainment duty and that the amounts collected by the exhibitors and by way of such duty would be directed to be paid over to it by the Govt. of Bombay. These receipts did not partake of that element of a return which is necessary for them to constitute income and further it was of the nature of a windfall. On both the counts, therefore, these receipts could not be included in this decision has been arrived at after considering the case of Rani Amrit Kunwar as well as the case of Shanti Meattle the case of Maharani Shri Vijaykuverba Saheb of Morvi [1963] 49 ITR 594 (Bom), the case of Smt. Dhirajben R. Amin , as well as the decisions of the privy Council cited by us earlier. Mr. Dastur placed very strong reliance on the following passage in the judgment of Desai J., which occurs after the consideration of the aforesaid decisions as well as some other decisions (p. 779) :

"The result of all this discussion is that in order to constitute income the receipt must be one which comes in, (a) as a return, and (2) from a definite source. It must also be of the nature which is of the character of income according to the ordinary meaning of that word in the English language and must not be one of the nature of a windfall".

22. Mr. Dastur also cited the following (p. 779 of 106 ITR) :

"Where the obtaining of a particular advantage or receipt could not be said to be within the ordinary contemplation of the party obtaining or receiving it, then only would it be proper to characterise the advantage or receipt as a windfall. on the other hand, where there was clear exception though small of receiving such advantage or profit, then it cannot be properly regarded as windfall merely because the advantage or receipt in much more than could have been reasonably contemplated.

That the advantage received must be attributable to some conscious process on the part of the assessee also appears to be implicit in the aspect of a 'return'. Now, it must be made clear that when we talk of return in the context of this aspect of the question we are not considering the return on any other or investment made by the assessee in the sense of capital employed. This may be one of the ways of securing a return, but not the only way. But return will involve conscious outlay of resources or of effort or of talent. It is the consciousness of the effort made which invests the receipt with the character of a return and removes it from the category of a windfall."

23. Mr. Dastur also submitted that in the course of his concurring judgment, Vimadalal J. held as follows and that it amounted to a proposition of law (p. 789) :

"If one analyses that definition, it is clear that the Privy Council laid down that in the order that a receipt by an assessee should constitute income, it must satisfy the following ingredients :

(1) it must be a periodical monetary return which, in my opinion, must mean a return for labour and/or skill and/or capital;

(2) coming in with regularity, or expected regularity;

(3) from a definite source;

(4) excluding a receipt "in the nature of a mere windfall," i.e., not a windfall in regard only to the extent or quantum of what is received".

24. He also contended that Vimadalal J. had in his judgment defined "income" as follows (p. 790) :

"Income is a monetary return expected by the assessee for the labour and/or skill bestowed, and/or capital invested by him; coming in from a definite source, which need not be a legal source, in the sense that the failure to pay the same need not be enforceable in a court of law and excluding a receipt 'in the nature of' a mere windfall which, as already stated above, must mean a windfall in regard to its very nature and not in regard to its extent or quantum."

25. Mr. Dastur pointed out that in the present case it could never be said that the assessee entered into the marriage with a view to obtain a decree for nullity and the alimony provided thereunder. There was, therefore, no conscious effort or any return expected by the assessee for the labour or skill bestowed by the assessee and in fact there was no question and hence the amount of alimony could never be regarded as the income of the assessee. In our view, the submission of Mr. Dastur cannot be accepted. It is significant that in this very decision, the learned judges, who decided the case, have cited with approval both the decisions in the case of Rani Amrit Kunwar , as well as the decision of this court in the case of Maharani Shri Vijaykuverba Saheb of Morvi . Both these decisions categorically laid down that even a voluntary payment can constitute income and both decisions show that where the payment comes with a regularity or expected regularity from a definite source it must be regarded as a return from that source. In view of this, it is not possible to hold that the learned judges of this court could have intended to lay it down as a test that in order to constitute income there must be a return expected by the assessee for labour or skill bestowed or capital invested by the assessee. It is significant that both the aforesaid decisions have been cited with approval by the Division Bench of this court and Desai J. has categorically pointed out that it is not as if no voluntary payment can constitute "income" (pages 774-775 of the said report). It was also contended by Mr. Dastur that, considering the facts of the case in the case of Mehboob Productions P. Ltd. , if it was held in that case that receipt of the sum of Rs. 10 lakhs odd was not income it can be said much less in the present case that the monthly alimony received by the assessee under the said decree was "income". It was contended by him that in the case of Mehboob Productions also, some effort had been made by the assessee to get the exemption from entertainment duty, and it was shown that any greater effort was made by the assessee in the case before us to obtain the decree for nullity. We are afraid, it is not possible or permissible to compare the facts of the two cases in this manner. Judgments are authorities (for the law) laid down and not for comparison of facts. It is significant that the case of Rani Amrit Kunwar , decided by the Allahabad High Court has been cited with approval by the Division Bench of this court as aforesaid and no dissent has been expressed from the conclusion in the case of Smt. Shanti Meattle [1973] ITR

385 (All), only one particular observation being disapproved.

26. We will now come to the application of the principles discussed earlier in regard to the facts of the case. We find that it is not possible to contend that the decree is not the source of the payment of

alimony. Whatever were the earlier rights of the assessee, her right to obtain a particular amount in lump sum and an amount of Rs. 750 per month as alimony are definitely crcystallised in the decree. It cannot be said that the decree is a mere recognition or continuation of an earlier obligation. If the decree were set aside we fail to see how the assessee could claim the sum of Rs. 750 per month from her ex-husband. If the ex-husband failed to pay the amount, it is the decree which the assessee would have to execute. In our view, it is clear that the decree is the definite source of these receipts. The amount of Rs. 750 per month is what the assessee periodically and regularly gets and is entitled to get under this decree. This amount must, therefore, be looked upon as a return from the said decree which is the definite source thereof. The word return in our view in the case like this, can never be interpreted as meaning only return for labour or skill employed on capital invested. Such a definition of "return" would be too narrow and would exclude the case of voluntary payments when it is the settled position in law that in some cases even voluntary payments, when it is the settled position in law that in some cases even voluntary payments can be regarded as "income". Although it is true that it could never be said that the assessee entered into the marriage with any view to get alimony, on the other hand, it cannot be denied that the assessee consciously obtained the decree and obtaining the decree did involve some effort on the part of the assessee. The monthly alimony being a regular and periodical return from a definite source, being the decree, must be held to be income within the meaning of the said term in the said Act.

27. As far as the question of casual receipts is concerned, we are of the view that the monthly payments of alimony have their origin in a definite source, viz., the decree, they are regular in nature and the said decree was obtained by some effort on the part of the assessee. Hence these payments can never be regarded as a series of windfalls or casual payments.

28. Before parting with the question of monthly payments, there is however, one aspect of the matter, to which we would like to refer. It was rightly pointed out by Mr. Dastur that if such monthly payments are regarded as "income", the result might be that in respect of the said payments if they are made by the husband out of his income, the husband would get no deduction and the wife would be liable to pay income-tax. He pointed out that even the English I.T. Act of 1952 contains provisions for the avoidance of such double taxation. That is unfortunate. But this is a matter, which is not relevant for us. It is clearly desirable that a suitable amendment should be considered to see that in cases where the payments of alimony are made by a husband from his income and are such that they cannot be claimed as deductions from the income of the husband, in the assessment of his income, they should not be taxed in the hands of the wife. That, however, is not for the courts but for the Legislature to consider.

29. Coming next to the question of the lump sum payment of Rs. 25,000, the submission of Mr. Joshi was that the payment of that sum also has its origin in the decree for nullity and that payment also must be looked upon as a return from that decree. It was contended by him that once this is established, it makes no difference whether the payment under the decree is in the form of a single amount or in the form of periodical amounts. It was urged by Mr. Joshi that this lump sum represents nothing but a commutation of a part of the future alimony payable to the assessee. It was, on the other hand, contended by Mr. Dastur that regular monthly payments or periodic payments can never be equated with a lump sum payment or a single payment. It was urged by him that the

lump sum payment of Rs. 25,000 under the decree to a certain extent diminished, extinguished or satisfied the right of alimony created under the decree and that such a receipt should be regarded as a capital receipt. It was urged by him that where a lump sum is paid, which satisfies a right or obligation, it would normally be a capital receipt, unless the payment is in respect of a commercial, business or revenue asset or represents the commutation of an existing right to recurring income receipts in circumstances which show that the lump sum represents the present value of the future income receipts. It was submitted by Mr. Dastur that in the present case the lump sum payment of Rs. 25,000, to a certain extent, diminishes the right of the assessee to obtain alimony which right must be regarded as of a capital nature. It was urged by him that the burden was on the revenue to establish that this receipt is of a revenue nature. It was submitted by him, in the alternative, that the said amount, even if regarded as of an income nature must be regarded as a windfall and it was exempt under s. 10(3) of the said Act, as it stood at the relevant time, as a casual non-recurring receipt. In this regard we must point out that the decision in Maharajkumar Gopal Saran Narain Singh [1935] 3 ITR 237 (PC), discussed earlier by us, shows that a capital asset can be exchanged for receipts which may be in part income receipts and in part capital receipts. In that case, for instance, the nine-annas share in the estate, which was a capital asset, was converted partly into capital receipts and partly into annual payments which constituted receipts. Reference may also be made here to the decision of the Supreme Court in P. H. Divecha v. CIT [1963] 48 ITR 222. In that case a firm which was conducting business in electrical goods, including electric lamps, entered into an agreement in 1938 with Philips Electrical Co. under which the firm was given exclusive rights to purchase and sell electric lamps manufactured by Philips in certain areas. The firm was entitled to 12 1/2 per cent. commission on the gross invoice amount and a further discount of 2 per cent on the net invoice prices to cover breakage or fault in the manufacture. If Philips sold goods directly to the buyers in those areas, the firm was entitled to compensation at 5 per cent. of the amount of invoices covering such sales. The firm on its part undertook to sell any Philips lamps in those areas and to prevent re-exportation of the lamps by third parties. The agreement was to continue unless determined by either party by giving three months' notice. There was no provision in the agreement for the payment of compensation to the firm on the termination of the agreement nor was compensation payable for temporary suspension of supplies. The agreement continued for a period of 16 years. Thereafter, Philips Electrical Company decided to take over the distribution of lamps in those areas and served a notice upon the firm terminating the agreement with effect from June 30, 1954. The firm was, however, free to deal in their lamps as regular lamp dealers. As a result of discussion between the firm and Philips Electric Company, certain minutes were recorded covering inter alia, the furnishing by the firm of the names of dealers over the part six months, the execution of local orders, certain outstanding contracts and the payment of commission on such contracts, and the disposal of the stocks of the firm. As a gesture of goodwill, Philips Electrical Co. agreed to pay in installments Rs. 40,000 per annum for a period of three years to each of the partners of the firm. The question was whether the sum each of the assessee, who were partners of the firm, was assessable to income-tax. It was held that in the absence of any proof that the amount payable to the partners represented the likely profits of the firm that would have arisen if the agreement had not been terminated, it could not be said that it replaced those profits. Although the amount was large, there was nothing to show that it was an adequate measure of the profits that were expected to be made during the three years in which the amount was to be paid. It was also held that as the said payment was not related to any business done or to loss of profits and it was not recompense for

services, past or future, the payment did not bear the character of income taxable under the Indian I.T. Act, 1922. We may also refer to the decision in Glasson v. Rougier [1944] 26 TC 86 (KB), where Macnaghten J. held that (p. 90) :

"It is well settled that a sum of money paid in commutation of annual sums which are 'income' for the purpose of the Income-tax Act is chargeable to income-tax; just as in the computations of the profits of a business a sum paid in commutation of an annual expense is allowed as an 'expense'".

30. In our view, from the point of view of taxability the decree must be regarded as a transaction in which the right of the assessee to get maintenance from her ex-husband was recognized and given effect to. That right was undoubtedly a capital assets. By the decree that right has been diminished or party extinguished by the payment of the lump sum of Rs. 25,000 and balance of that right has been worked out in the shape of monthly payments of alimony of Rs. 750 which, as we have pointed out, could be regarded as income. It is, in our view, beyond doubt that, had the amount of Rs. 25,000 not been awarded in a lump sum under the decree to the assessee a larger monthly sum would have been awarded to her on account of alimony. It is not as if the payment of Rs. 25,000 can be looked upon as a commutation of any future monthly or annual payments because there was no pre-existing right in the assessee to obtain any monthly payment at all. Nor is there anything in the decree to indicate that Rs. 25,000 were paid in commutation of any right to any periodic payment. In these circumstances, in our view, of this we do not think it necessary to consider whether the said receipt could be regarded as casual receipt or in the nature of a windfall.

31. In the result, we answer the question, as re-framed by us, as follows : Question No. 1 : In the negative and in favour of the assessee. Question No. 2 : In the affirmative and against the assessee.

32. In view of the divided success which the parties have achieved in the reference, there will be no order as to costs.