
(1970) 02 AHC CK 0014
In the Allahabad High Court
Case No : (E.D.R.) Misc. Case No. 12 of 1964

Abbas Ali Meerza

APPELLANT

Vs

The Controller of Estate Duty, U.P., Lucknow

RESPONDENT

Date of Decision : 27-02-1970

Acts Referred:

Estate Duty Act, 1953 — Section 10, 64(1)

Citation : AIR 1971 All 167 : (1970) 78 ITR 759

Hon'ble Judges : T.P. Mukerjee, J; R.S. Pathak, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Mukerjee, J.—This is a reference made by the Central Board of Revenue, New Delhi, u/s 64(1) of the Estate Duty Act, 1953 (as it stood prior to the amendment by the Estate Duty (Amendment) Act of 1958), hereinafter referred to as the Act. The question referred by the Board for the opinion of this Court is as follows:

"Whether on the facts and in the circumstances of the case, the inclusion of the following house properties in the estate of the deceased as property passing or deemed to pass on the death of the deceased under the Estate Duty Act, 1953, is justified in law:--

(i) Afzal Manzil;

(ii) Khiliaganj;

(iii) Golaganj ?"

2. The material facts are as follows. The three properties mentioned in the question referred to above, originally, formed a part of the estate of the deceased the late Shri Ishaque Ali Meerza (hereinafter referred to as the deceased) who died on December 2, 1954. The applicant, Shri Abbas Ali Meerza, is the son of the deceased and an accountable person under the Act. The accountable person submitted a return before the Assistant Controller of Estate

Duty, Lucknow, for the purpose of assessment of estate duty under the Act The Assistant Controller completed the assessment determining the principal value of the dutiable estate at Rs. 2,11,558. The estate duty payable on the estate was computed at Rs. 10,194.75. The accountable person eventually took the assessment to the Central Board of Revenue in second appeal and contended that the following three properties were not liable to be included in the dutiable estate:

(i) The house named Afzal Manzil:

(ii) the house at Khialiganj;

(iii) the house at Gopalganj;

With regard to the first property, namely, the house named Afzal Manzil, the accountable person contended that it had been gifted by the deceased to his wife Smt. Umatul Kubra by means of an oral Hiba on the 9th August, 1952. more than two years before his death and therefore, it was not liable to be included in the principal value of the estate of the deceased. It was found by the Assistant Controller as a fact that the deceased continued to reside in the house until he died on December 2, 1954 and this was admitted before the Central Board of Revenue. The Board held that as the deceased resided in the gifted property till the date of his death it could not be said that the donee retained the bona fide possession and enjoyment of the gifted property to the entire exclusion of the donor and, therefore, the case fell within the mischief of Section 10 of the Estate Duty Act and the gifted property must be deemed to have passed on the death of the deceased under that Section.

3. As regards the second property, namely, the house at Khialiganj, the case of the accountable person was that the house had been purchased by Smt. Wazirunnissa Begum, daughter of the deceased, in 1942, out of her own fund. It was alleged that subsequently she migrated to Pakistan and at the time of migration she gifted the house to her minor sister Smt. Nazneen Begum, another daughter of the deceased. The Assistant Controller found that the property had been purchased on the 22nd October. 1942, in the name of Smt. Wazirunnissa when she was a minor and after the purchase there was mutation of the name of the deceased in the first instance and thereafter of the name of Smt. Nazneen Begum. It was also found that in the Income Tax returns the deceased continued to return the income from the house as his own income. On these facts, the Assistant Controller held that the property was in fact, purchased by the deceased in the name of Smt. Wazirunnissa who was merely a name-lender. The Appellate Assistant Commissioner further found that there was no evidence of the alleged gift of the property in favour of Smt. Nazneen Begum, the minor daughter of the deceased. The Assistant Controller, therefore, included this property also in the principal value of the estate of the deceased. The Central Board of Revenue upheld the finding of the Assistant Controller in point but granted some reduction in the value of the property as assessed by the Assistant

Controller of Estate Duty.

4. With regard to the third property at Golaganj, Lucknow, the case of the accountable person was that he acquired it under an oral gift from the deceased in October 1952. The Assistant Controller, however, disbelieved the plea of the alleged oral gift and held that, the property continued to belong to the deceased till his death. He further held that even on the assumption that the property had been given to the applicant it was liable to be included in the estate of the deceased, for the purpose of estate duty, in view of the provisions of Section 10 of the Act. The Central Board of Revenue maintained the findings of the Assistant Controller of Estate Duty.

5. At the instance of the accountable person the Board has referred the question, quoted above for the opinion of this Court.

6. Section 5 of the Act is the charging section which authorises the levy of estate duty in the case of every person dying after the commencement of the Act on the 6th October, 1953. Sub-section (1) of Section 5 runs as follows:

"Levy of estate duty:-- (1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the States specified in the First Schedule to this Act, which passes on the death of such person, a duty called "estate duty" at the rates fixed in accordance with Section 35."

This section imposed the liability to pay estate duty on property "which passes on the death" of the deceased. Section 6 says that the property which the deceased was, at the time of his death, competent to dispose of shall be deemed to pass on his death. Section 9 of the Act was enacted to include property gifted by the deceased within a certain period before his death, in the principal value of his estate for the purpose of assessment to estate duty. Originally, this period was one year but, subsequently, the period was enlarged to two years by an amendment of the section. Section 10 of the Act may be treated as a continuation of Section 9 and it relates to gifts made by the deceased of property in respect of which he, as donor, was not entirely excluded. The section as it stood at the material time was worded as follows:

"Gifts whenever made where donor not entirely excluded:-- Property taken under any Gift, whenever made, shall be deemed to pass on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and henceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise;

Provided that the property shall not be deemed to pass by reason only that it was, not, as from the date of the gift, exclusively retained as aforesaid, if, by means of the surrender of the reserved benefit or otherwise it is subsequently

enjoyed to the entire exclusion of the donor or of any benefit to him for at least two years before the death." By the Finance Act of 1965 a second proviso to Section 10 was added and it runs as follows:

"Provided further that a house or part thereof taken under any gift made to the spouse, son, daughter, brother or sister, shall not be deemed to pass on the donor's death by reason only of the residence therein of the donor except where a right of residence therein is reserved or secured directly or indirectly to the donor under the relevant disposition or under any collateral disposition."

It may be stated here that the Supreme Court has held in the case of *George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore*, that the second proviso to Section 10 added by the Finance Act of 1965 is effective from April 1, 1965 and has no retrospective operation. This second proviso to Section 10 is not, therefore, attracted in the present case. It may also be mentioned at the stage that the learned counsel for the accountable person did not argue his case in respect of the house at Golaganj and, therefore, we need not return an answer to the question in so far as this property is concerned. We have now to consider the question as regards the first two properties, namely, the property named Afzal Manzil, Lucknow and the house at Khialiganj Lucknow.

7. As we have already noted the finding of the Board in regard to these properties is that although it was gifted by the deceased to his wife on the 9th August, 1952, he continued to reside therein until the date of his death. The Board, therefore, held that the property must be deemed to pass on the death of the deceased, u/s 10 of the Act. Learned counsel for the accountable person has relied on two decisions of the Madras High Court in support of his contention that to such a case the provisions of Section 10 have no application and the value of the house "Afzal Manzil" should be excluded from the principal value of the estate of the deceased. The first decision of the Madras High Court is the case of *The Controller of Estate Duty v. Dr. Guruswamy*. AIR 1965 Mad 69 and the second decision is in the case of *V.N. Krishnaswamy Vs. Collector of Estate Duty, Madras*, . These two cases quoted above were decided on facts similar to the present case and if the decisions held the field an answer should be recorded, in favour of the accountable person with regard to the question relating to "Afzal Manzil". The learned counsel for the accountable person also relied on the decision of the King's Bench in *Attorney General v. Seccombe*, (1911) 2 KB 688. These decisions cannot, however, avail after the recent decision of the Supreme Court in *George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore*, The facts in *George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore*, were that one Dr. C. F. Da Costa had purchased a house in Bangalore in the joint names of himself and his wife in 1940. In 1954 they made a gift of the house to their two sons who accepted the gift and came in possession of the property. The parents of the donees, however, continued to reside in the house until Dr. Da Costa died in September, 1959, i. e. more than four years after the gift. One of the donees, who was the accountable person in the present case filed a return

excluding the value of the gifted house from the value of the dutiable estate of his late father.

8. The Assistant Collector of Estate Duty, however, negated the claim and included the value of the property in computing the principal value of the estate of the deceased, and the Central Board of Revenue affirmed the action of the Assistant Controller of Estate Duty. On reference, the Mysore High Court had to decide the question as to whether on the facts and in the circumstances of the case the value of the house at Bangalore had been correctly included in the estate of the deceased as property passing or due to pass fell u/s 10 of the Act. The High Court answered the question in the affirmative and in favour of the revenue. The matter then was taken by the accountable person to the Supreme Court. The Supreme Court observed that the answer to the question depended upon the proper interpretation of Section 10 of the Act. The Supreme Court noted that the intention of the Legislature in enacting Section 10 is to exclude from liability to the estate duty certain category of goods; and the gift of immovable property u/s 10, the Supreme Court continued, would be dutiable unless the donee assumed immediate, exclusive and bona fide possession and enjoyment of the subject matter of the gift and there is no beneficial interest reserved to the donor by contract or otherwise. The Supreme Court pointed out that the crux of the section lies in two parts:

1. The donee must bona fide have assumed possession and enjoyment of the property which is the subject matter of the gift to the exclusion of the donor immediately upon the gift and,
2. The donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or any benefit to him by contract or otherwise.

9. In the opinion of the Supreme Court both these conditions are cumulative. The Supreme Court remarked that the second part of the section has two limbs: (i) the deceased must be entirely excluded from the property and (ii) from any benefit by contract or otherwise. Clarifying the position the Supreme Court said that, as a matter of construction, the words "by contract or otherwise" in the second limb of the section would not control the words "to the entire exclusion of the donor" in the first limb. In other words, in order to attract the section it is not necessary that the possession of the donor of the gift must be referable to some contractual or other arrangement enforceable in law or in equity. Even if the donor is content to rely upon the mere filial affection of his sons with a view to enable him to continue to reside in the house, it cannot be said that he was, "entirely excluded from possession and enjoyment" within the meaning of the first limb of the section, and, therefore, the property would be deemed to have passed on the death of the donor and would be subject to levy, of estate duty. It appears from all these cases that the first limb of the section may be infringed if the donor keeps or enjoys the property or its income even though he has no right to do so. On a review of the cases cited before it the Supreme Court held

that Section 10 of the Act was attracted to the case before it and that the house at Bangalore was liable to estate duty in respect of the gift made in the year 1954. It may be noted in this connection that in the opinion of the Supreme Court the view taken by Hamilton, J. of the Kings Bench in the Seccombe's case (1911) 2 KB 688 could not be sustained as it was inconsistent with the opinion of the Judicial Committee in John Chick's case 1958 AC 435. The Supreme Court quoted with approval the observation of Viscount Simond's in John Chick's case 1958 AC 435 to the following effect:--

"Where the question is whether the donor has been entirely excluded from the subject matter of the gift that is the single fact to be determined, and, if he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee."

10. The facts of the present case being similar to those in the case of George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore, , it must be held that the house property known as Afzal Manzil shall be deemed to have passed on the death of the deceased and is, therefore, liable to be included in the estate of the latter for the purpose of levy of estate duty.

11. Coming to the question relating to the house of Khialiganj, Lucknow, the finding of the Board is that it has been acquired by the deceased in the benami of his daughter Smt. Wazirunnissa Begum. The Board based its finding on the fact that the property had been mutated in the name of the deceased on the 27th March, 1943 and the property continued to remain mutated in the name of the deceased till his death. The Board also found that the deceased had been including the income from this property in the return of his personal income assessment to Income Tax as long as he lived. In the case of SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS., the Supreme Court has laid down that an inference from the facts of a case that a transaction is a benami transaction is a pure question of fact which cannot be made the subject of reference u/s 66 of the income Tax Act. The same observation applies with equal cogency to a reference u/s 64(1) of the Estate Duty Act.

12. The result is that our answer to the question referred, in so far as it relates to the house property Afzal Manzil and the house at Khialiganj, Lucknow, is in the affirmative and in favour of the revenue, and we return no answer to the question with regard to the property at Golaganj. The Controller of Estate Duty, U. P., Lucknow, will get Rs. 200/- from the assessee as costs of this reference. Counsel's fee is assessed at the same figure.