

(1965) 09 KL CK 0015
In the High Court Of Kerala
Case No : O.P. No. 2425 of 1964

Ameen Pillai Rawther Hassan Kari Rawther and Another	APPELLANT
Vs	
Asst. Controller of Estate Duty, Ernakulam and Others	RESPONDENT

Date of Decision : 01-09-1965

Acts Referred:

Constitution of India, 1950 — Article 226
Estate Duty Act, 1953 — Section 58(4)

Citation : AIR 1966 Ker 100

Hon'ble Judges : V.P. Gopalan Nambiyar, J

Bench : Single Bench

Advocate : K. Velayudhan Nair, M.C. Sen and T.K.M. Unnithan, for the Appellant;
C.T. Peter, (for No. 1) and Govt. Pleader (for Nos. 2 and 3), for the Respondent

Final Decision : Allowed

Judgement

V.P. Gopalan Nambiyar, J.—The petitioner prays for the issue of a writ of certiorari or other appropriate writ direction or order quashing Exts. P-I to P-8 and for restraining the respondents from taking any coercive steps, for collecting estate duty and penalty in pursuance of Exts. P-I to P-3.

2. One Ameen Pillai (hereinafter referred to as the deceased) died in May 1059. It is admitted that he left two widows and eight children. One of the daughters died in 1962. The petitioners are two of the sons of the deceased. The estate of the deceased was assessed to estate duty under the provisions of the Estate Duty Act (Central Act XXXIV of 1953 -- hereinafter referred to as the Act). A copy of the assessment order has been produced as Ext. P-I dated 17-10-1962, The petitioners are not parties to the said assessment. It is seen that only the two widows and five children of the deceased were parties By proceedings of the 1st respondent dated 23-1-1963, a penalty of Rs. 1217 was imposed on the seven named assesses who were parties to Ex. P-I. The petitioners allege that on "27-9-1964, the 3rd respondent, the Village Officer, attached movables in the residence of the petitioners under a list, copy of which has been produced as Ex.

P-2. It is stated in paragraph 12 of the petitioners' affidavit that the attachment was for the purpose of collection of the duty (and the penalty?) imposed under EXS. P-1 to P-3. It is stated that the petitioners did not receive any notice either of the assessment evidenced by Ex. P-1 or of any demand for payment of duty or penalty. On these grounds, it is claimed that Exs. P-1 to P-3, are illegal and are liable to be quashed.

3. From Ex. P-1 and from the counter-affidavit filed on behalf of the 1st respondent, it is seen that the circumstances leading to the assessment and the subsequent proceedings are as follows:

4. No statutory return of accounts as required by Section 53(3) of the Act was delivered to the Controller within 6 months of the death of the deceased by any of the accountable persons. Notice u/s 55 of the Act was issued to one of the accountable persons, (No. 1 in Ex. P-1) and was returned unserved. Thereafter notice u/s 55 of the Act and E. D (I) Forms with a proposal dated 30-1-1962 were issued to all the seven accountable persons in Ex. P-1 fixing the value of the Estate- at Rs. 3,20,590 and calling for objections and appearance on 21-2-1962, These notices were served on a few of the accountable persons and returned refused, by the rest. In response to these notices, No. 7 in Ex. P-1 appeared through an Advocate, who took time repeatedly, and who, in spite of notices of adjournment of the proceedings, failed to appear and render any assistance. There was no response from the other persons to whom the notices were issued. Notices dated 25-7-1962, were issued to all the seven persons, fixing the date of hearing for 15-8-1962 and informing that failure to appear may entail the completion of the assessment on the basis of the proposal already issued. These notices were served on three persons in Ex. P-1. refused by three, and not served on the remaining one. On 6-8-1962, the Advocate on behalf of No. 7, appeared and stated that there was a settlement executed by the deceased in 1951 of all the deceased's properties on his wife and children, and that the document was With No, 1 to Ex. P-1. Steps were taken to get the said document, and for this purpose notice dated 27-9-1962, was issued to No. 1 in Ex. P-1 which was acknowledged by him on 18-9-1962 (stated in the counter-affidavit to be an obvious mistake for 13-10-1962 as the notice itself was despatched only on 3-10-1962), As there was no response, assessment was eventually completed on 17-10-1962 fixing the value of the Estate at Rs. 3,20,590 and the duty at Rs. 24,338.50 payable on or before 17-11-1962. Demand notice is slated to have been served on three of the persons in Ex. P-1, refused by three others, and the notice addressed to the remaining one was returned unserved. On failure to comply with the demand, notice for imposition of a penalty u/s 73, Clause 5 of the Act was issued to all the seven persons and a penalty of Rs. 1217 being 5 per cent of the demand, was imposed as evidenced by Ex. P-3, fixing the date for payment of 5-2-1963 On that date, three of the accountable persons in Ex. P-1 appeared and produced the settlement deed dated 27-1-1951 executed by the deceased, in favour of his two wives and all the eight children, and also another partition deed dated 11-4-1960 by which the children of the deceased partitioned

the properties retained by the deceased in the A schedule, of the settlement deed of 1951. As there was failure to pay the duty and penalty, the requisite notice u/s 73(5) of the Act, read with Section 46(2) of the Indian Income Tax Act, 1922, was issued to the Collector on 21-6-1963 with the names of the seven accountable persons and the details of the properties, for realising the arrears. The Collector of Quilon required the complete names and addresses of all the accountable persons and he was thereupon furnished with the names and addresses of all the persons found in the settlement deed dated 25-7-1951.

5. On these facts alleged in the counter-affidavit, and disclosed by Ex P-I, it is claimed on behalf of the 1st respondent that the assessment proceedings and the subsequent proceedings for recovery are legal and proper and not liable to be set aside.

6. The case of the petitioners is that they never had any notice, either of the proceedings for assessment or of the proceedings for demand and recovery of the tax. According to them, if proper computations and deductions are made, the estate of the deceased is not dutiable at all, and an assessment made without affording them any opportunity to prove this aspect of the case is opposed to the principles of natural justice. The particulars of this claim have been detailed in sub-paragraphs C and D of paragraph 8 of the counter affidavit. Among them, I may refer to the following:

(a) While the properties covered by the settlement deed of 1951 were excluded in valuing the assets of the deceased, buildings, valued at Rs. 40,000 which were all on the properties covered by the settlement were included in the reckoning.

(b) An extent of 18 acres 56 cents of land specified in Annexure II to the petition were lands in possession of the deceased on Kutha-kapattom. They were in possession of strangers even during the lifetime of the deceased and had been assigned permanently to them by the Government.

(c) 2 acres and 9 cents of paddy land comprised in 655/55 were sold for arrears of agricultural Income Tax in the year 1958, during the lifetime of the deceased.

7. The question for consideration on the above facts is whether there has been a valid assessment to estate duty against the petitioners and whether they are liable to be proceeded against, in pursuance of Exs P-I to P-3

8. Section 5(1) of the Act reads: "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 territories which immediately before the 1st November, 1956 were comprised 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."

The expression "passes on death" was explained in the Attorney General v.

Milne 1914 AC 765. Lord Parker of Waddington stated:

"The expression "passing on death" is not further defined, hut is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition the property passes." The above exposition has been accepted in subsequent decisions both in England and in this country. *Sec Mahendra Rambhai Patel v. Controller of Estate Duty* AIR 1965 Guj 9.

9. Section 53(1) of the Act, in so far as it is material, provides that on the death of the deceased:

"(a) every legal representative to whom such property so passes for any beneficial interest in possession or in whom any interest in the property so passing is at any time vested. . . shall be accountable for the whole of the estate duty on the property passing on the death, but shall not be liable for any duty in excess of the assets of the deceased which he actually received or which, but for his own neglect or default, he might have received." Clause 3 of Section 53 reads

"Every person accountable for estate duty under" this section shall, within six months of the death of the deceased, deliver to the controller an account in the prescribed form and verified in the prescribed manner of all the properties in respect of which estate duty is payable.""

10." .Section 55 of the Act provides inter alia that every accountable person and every person whom the Controller believes to have taken possession or administered any part of the estate in respect of which duty is leviable, shall, if so required, deliver to the Controller a statement of such particulars and accounts as the Controller may require, relating to the property

And Section 58(1) of the Act provides:

"In any case where no account has been delivered as required by Section 53 or Section 56 or the person accountable fails to comply with the terms of the notice served under Subsection (2) the Controller shall make the assessment to the best of the judgment and determine the amount payable as estate duty "

11. On behalf of the 1st respondent, it was argued that the petitioners are accountable persons under the statutory duty of delivering the account as provided in Section 53(3) of the Act, and liable to be assessed to the best of judgment u/s 53(4) for failure to comply with Section 53(3). The petitioners replied that the obligation u/s 53(3) and the resultant liability u/s 53(4) are only in respect of accountable persons, and they are not such, as the estate is not dutiable according to their case. Quite apart from this contention, I see nothing in these sections which justifies the imposition of (liability by an assessment order made under S. 56(4) upon persons not parties therein,

12. The above conclusion stands only reinforced by reference to the provisions

for Imposition of penalties, which have been resorted to, in the present case. Section 73, Clause 5 of the Act reads:

"The provisions of Sub-sections (1), (1A), (2), (8), (4), (5), (5A), (6) and (7) of Section 46 and Section 47 of the Indian Income Tax Act, 1922 (XI of 1922), shall apply as if the said provisions were provisions of this Act and referred to estate duty (including estate duty provisionally assessed) and sums imposed by way of penalty or interest under this Act instead of to income-tax and sums imposed by way of penalty or interest under that Act and to Controller of Estate Duty instead of to Income tax Officer,"

Section 46(1) of the Indian Income Tax Act, 1922 referred to by the above provision reads;

"When an "assessee" is in default in making a payment of income-tax, the Income Tax Officer may in his discretion direct that, in addition to the amount of the arrears a sum not exceeding that amount shall be recovered from the "assessee" by way of penalty." (underlining (here into "")) mine).

13. It is plain that Section 46(1) of the Income Tax Act, which is applied by Section 78 of the Act (Estate Duty Act) to recover estate duty and penalty, can be applied only against the "assessee in default". This is emphasised in more than one place in Section 46(1) of the Indian Income Tax Act, above quoted. It seems to me therefore that quite apart from the validity of the proceedings evidenced by Ext. P-1 against the petitioners who are not parties (hereto, proceedings for recovery of the duty and penalty covered by the same, cannot be directed against them u/s 46 of the Indian Income Tax Act, 1922 which has been applied to the Estate Duty Act by Section 73(6) thereof

14. On behalf of the 1st respondent, it was claimed that proceedings for assessment evidenced by Ext. P-1 were taken bona fide representation of the Estate of the deceased, with the result that all accountable persons, including the petitioners are bound by the assessment. The plea in this form was not taken in the counter-affidavit, and the petitioners have had no chance to meet it. I cannot entertain it under Article 226 of the Constitution. I may also express my views on the merits of the plea.

15. 1st respondent's counsel relied upon decision in *Alfred v. First Addl Income Tax Officer, Salem*, AIR 1958 Mad 11 and also on the recent decision of the Supreme Court in *First Additional Income Tax Officer, Kozhikode Vs. Susheela Sadanandan and Another*, . The Supreme Court observed:

"There is also a large body of authority holding that if a party bona fide impleaded one of the legal representatives as representing the estate of a deceased party and the said representative represented the estate, the decree obtained therein is binding on the other legal representatives of the deceased. It is unnecessary to survey the wide field of decisions on this aspect of the case, as this Court in a recent decision, in *Daya Ram and Others Vs. Shyam Sundari*, has

summarised the law. Rajagopala Ayyangar J. speaking for the Court, said thus:

"When this provision speaks of "legal representatives" is it the intention of the legislature that unless each and every one of the legal representatives of the deceased defendants, where these are several, is brought on record there is no proper constitution of the suit or appeal, with the result that the suit or appeal would abate? The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the Impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. Though this principle was laid down in the context of suits or appeals, it is one of general application. We do not see why the said principle cannot be invoked in the case of assessment of income from the estate of deceased person in the hands of his legal representatives. Here again no material was placed before the High Court. The Income Tax Officer, who filed (he affidavits, had no personal knowledge of what had happened at the time of the making of the assessment. Better material could have been placed to enable the court to come to a conclusion whether the Income-tax Officer acted bona fide in serving the notices only on E. D. Sadanandan, because he was the executor who intermeddled with the estate and was in actual management thereof". It was, of course, made clear by the Supreme Court that they should not be understood as having expressed any final views on the question.

16. On behalf of the petitioner, reliance was placed on the decision of the Federal Court In AIR 1949 195 (Federal Court) in which it was observed:

"It is axiomatic that if a person is not a party to, or properly represented in any proceedings, he cannot be bound by those proceedings. The ordinary rule of law is that in case of death of a party a valid award cannot be given which will bind the estate unless the legal representatives of the deceased are made parties to the reference. This can be done by giving notice to them where the reference is not through Court and where proceeding for substitution of the legal representatives is not necessary As pointed out by that learned Judge. Sir Ashutosh Mookerjee, in *Manindra Nath v. Mohanundra Roy*. 13 Ind Cas 161: 15 Cal LJ 360 the submission to arbitration is not revoked by the death of one of the parties if the intention is that not merely the parties themselves should be bound by the decision of the arbitrator but also their representatives-in-interest; but if the hearing is not completed, it will be necessary to bring the representatives of the deceased party on the record or to make them party to submission. If, on the death of a party, his representative in-interest proceeds with the arbitration and becomes a party to it, the award pronounced in the reference is binding on him. The principle that in a pending suit all parties must join in the reference also applies to arbitrations out of Court. If one of the parties dies and his

representatives do not join, the reference would be bad."

17. Petitioner's counsel contended that there is a fundamental difference between the assessment to Income Tax and assessment to estate duty. Be that as it may, it seems to me that the theory of a bona fide representation of the estate in assessment proceedings, as expounded by the Supreme Court in *First Additional Income Tax Officer, Kozhikode Vs. Susheela Sadanandan and Another*, is inapplicable here. There is no pleading that of the seven persons proceeded against in Ex P-I, any one, or some of them, could or did, represent the estate of the deceased, indeed, the principle of representation is un-known to Mohammedan Law by which the parties are governed in the present case. On the facts too it transpires that at the earlier stage, a notice u/s 55 of the Act was issued to No. (I) in Ex. P-I. At a later stage, No. 7 in Ex. P-I appeared by Advocate, and gave information about the settlement deed in 1951. Summons to produce the same was again issued to No. 1 in Ex. P-I At the penalty stage of the proceedings, three of the persons in Ex. P-I (other than Nos 1 and 7) appeared on 5-2-1968, and produced the settlement deed dated 25-7-1951 and also the partition deed dated 11-4-1960 from which it was seen that the deceased left other children, besides those proceeded against in Ext P-I. It was No. 6 in Ex. P-I that filed an appeal against Ex. P-I. In these circumstances, even if a plea of bona fide representation of the estate were to be entertained, I am inclined to hold against such a plea on the merits

18. It was argued that the petitioners had no opportunity to prove their case that the estate was not dutiable by reason of the circumstances detailed in subparagraphs (c) and (d) of para 8 of the affidavit referred to earlier. The point is sought to be answered by reference to paragraphs 11 and 12 of the counter affidavit. It was slated that information from the Agricultural Income Tax Officer Kotlarkara was to the effect that the deceased had 86 acres and 63 cents of land and that he was assessed on the entire income from these lands from 1955-56 to 1959-60 Counsel for the 1st respondent stated that this would not have happened if the settlement deed, of 1951 were a genuine and bona fide Transaction, and that only lands covered by the Agricultural Income Tax assessment were taken into account for purposes of estate duty. But, the fact remains that the petitioners never had any chance to show that the settlement deed of 1951 was a real and genuine transaction. There is further nothing to show that the petitioners case that a portion of the deceased's Kuthagapallom properties had been assigned away by the Government to strangers during his lifetime, and that a portion had been sold away for arrears of agricultural Income Tax, had even been considered by the Department. These allegations are not even traversed in the counter-affidavit, except in a general way in paragraph 11, that the facts stated in the affidavit could not be verified by the Department on account of the non-co-operative attitude of the assesses in Ex. P-I. The fact that an appeal filed against Ex. P-I, by one of the assesses was dismissed, as stated in paragraph 13 of the counter-affidavit, cannot in my view, advance the case of the Department. The petitioners have been denied any opportunity to state their

case against the assessment, and the order evidenced by Ex. P-1 offends the rules of natural justice.

19. It follows that neither Ex. P-1 nor Ex. P-3 can be enforced against the petitioners. It follows also that the attachment on the petitioners' moveables evidenced by Ex. P-2 cannot be proceeded with.

20. A writ of prohibition will issue against the respondents from enforcing Exs. P-1 to P-3, or taking any steps in pursuance thereof against the petitioners.

21. The O. P. is allowed as above. There will be no order as to costs,

22. Nothing contained in this judgment shall be understood as an expression of opinion by me against the validity or effect of Exs. P-1 and P-3 against those who are parties to the said proceedings.