
(1981) 02 GUJ CK 0006
In the Gujarat High Court
Case No : Estate Duty Reference No. 7 of 1975

Bhimraj Saremal	Vs	APPELLANT
Controller of Estate Duty, Gujarat		RESPONDENT

Date of Decision : 02-02-1981

Acts Referred:

Income Tax Act, 1922 — Section 25A

Citation : (1981) 24 CTR 216 : (1981) 132 ITR 35

Hon'ble Judges : B.K. Mehta, J;B.J. Diwan, J

Bench : Division Bench

Advocate : J.M. Thakore, A.G, for the Appellant; N.U. Raval, for the Respondent

Judgement

Mehta, J.—This reference arises out of estate duty proceedings for the estate of one Shri Saremal Jethamal who expired on May 143, 1965. It was claimed by the accountable person before the Assistant Controller of Estate Duty that only 1/2 share in the said estate belonged to the deceased and, therefore, passed as his property on his death. The Assistant controller, however, was not impressed by this claim and brought to tax the entire estate. The attempt of the accountable person to challenge the said order before the Appellate Controller as well as before the Appellate tribunal failed. At the instance of the accountable person, therefore, the following question is referred to us.

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the entire value of the estate was taxable in the estate of the deceased and that the wife of the deceased had no interest in the estate brought to tax. ?"

At the time of hearing of this reference, the learned Advocate_General appearing for the assessee raised the following two contentions :

(1) On a true construction and effect of the deed of portion effect between the assessee, Saremal, and his two sons of July 25, 1957, the deceased and his wife took the remaining properties other than those allotted to the sons as tenants-in-

common and, therefore, on the death of Saremal the interest of his widow in the properties could not and did not pass and, therefore, could not be brought to tax.

(2). Assuming without admitting that the document in question constituted a deed of relinquishment of the rights and interests of two sons, the remaining properties being joint family properties she would be entitled to 1/2 share in the properties u/s 6 of the Hindu Succession Act.

2. Before we deal with the contention urged by the learned Advocate General on behalf of the accountable person, it would be profitable to refer to what the Tribunal has decided in its order while it rejected the appeal of the accountable person. The Tribunal considered the document in question and referred to certain relevant portions thereof in order to reach the conclusion that by the said document the entire remaining properties, after allotting share to two son, Bhimraj and Jugraj, which comprised o cash amounts of Rs. 2,00,000 and Rs. 2,25,000, respectively, belonged to the deceased Saremal alone and the wife had no interest therein. The Tribunal reached the conclusion in the following terms :

"7. In our view these narration make it clear that at least as far as all the immovable properties are concerned they are held to be of the deceased Saremal, and his wife is not shown to have pay interest. Similarly, with regard to the business also, case 4 is quite important. The business of Saremal Bhimraj is passed on the deceased and the business of Ratanchand Jethmal is made into a partnership between the father and sons. Here also there is no reference to the wife of the deceased having any interest. Hence though portion of clause 3 can be interpreted to mean that the property which remained after payment of cash and shares to the sons would be that of the deceased and hi wife (though another interpretation is also possible as already indicated earlier in this order) the latter narration makes it clear that the wife has been excluded from the business and immovable properties. This is further strengthened by the assessment order in the case of the deceased in the status of individual both for Income Tax and wealth-tax, wherein the assets and income were all taxed to which the assessee has agreed."

3. It would be also necessary at this stage to shortly refer to as to who were the members and what were the properties of the family of Saremal Jethmal before the deed of partition was effected on July 25, 1957. The members of the family were Saremal himself, his two sons, Bhimraj and Jugraj, his wife, Bai Varju, and his minor daughter, Lila. The properties, comprised of -

(1) village Rohida and immovable properties comprising of 6 residential buildings, shop building one shed and open land;

(2) two immovable properties in Sabarmati, Ahmedabad.

(3) Movable properties comprising of two business carried on under the name and style of Saremal Bhimraj and Ratanchand Jethmal and other cash, shares, gold and silver ornaments and other household effects.

4. It should be also noted that for the assessment year 1958-59, the ITO had recognised this partition in question effected in July, 25, 1957, and an order in that behalf has been made under s. 25A of the Indian I.T. Act, 1922.

5. In our opinion, the first contention of the learned Advocate-General is well founded and, therefore, we are not inclined to go into the second contention urged in the alternative by him. If the document entitled as the partition of the joint family properties executed on July 25, 1957, is recognised by the ITO as a partition under s. 25A of the Indian I.T. Act, section of the learned Advocate-General.

In *Additional Income Tax Officer, Cuddapah Vs. A. Thimmayya and Others*, , as to what is the scheme of s.25A of the Indian I.T. Act, 1922, has been considered and Shah J. (as he then was), speaking for the Supreme Court analysed it under (p. 671) :

"The scheme of section 25A is therefore clear : A Hindu undivided family hitherto assessed in respect of its income will continue to be assessed in that status notwithstanding partition of the property among its members If a claim is raised at the time of making an assessment that a partition has been effected, the Income Tax Officer must make an inquiry after notice to all the members of the family and make an order that the family property has been partitioned in define portions, if he is satisfied in the behalf. The Income Tax Officer is by law required still to make the assessment of the income of the Hindu undivided family, as if no partition had taken place and then to apportion the total tax liability and to add to the separate income of the members or groups of members the tax proportionate to the portion of the joint family property allotted to such members or groups of members and to make u/s 23 assessment on the members accordingly. In no claim for recording partition is made, or if a claim is made and it is disallowed or the claim is made and it is disallowed or the claim is not considered by the Income Tax Officer, the assessment of the Hindu undivided family which has hitherto been assessed as undecided will continue to be made as if the Hindu undivided family has received the income and is liable to be assessed."

In *Joint Family of Udayan Chinubhai, etc. Vs. Commissioner of Income Tax, Gujarat*, , the Supreme Court, speaking through Shah J., considered as to what is the jurisdiction of the ITO under s. 25A of the Indian I.T. Act, 1922, and ruled as under (p. 420) :

"An application under sub-section (1) of section 25A of the Indian Income Tax Act, 1922, by a Hindu undivided family or any member thereof that partition has taken place among the members of the family, invest the Income Tax Officer with authority to make an order recording that the Joint family property has been partitioned, if he is satisfied on inquiry that the property of the family has been partitioned among the various members or groups of members "in definite portions." The jurisdiction may be exercised by the Income Tax Officer, even if

there be partition between groups of members of the family. A complete partition in definite portions among all the members of the family is not a condition of the exercise of the jurisdiction. We do not agree with the plea raised by counsel for the department that by the expression "group of members" it is intended to refer to a group consisting of a head of a breach and his sons who remain undivided. Section 25A(1) applies to families governed by the Dayabhaga school of Hindu law as well as the Mitakshara school of law : and if the interpretation suggested by counsel for the revenue be correct, the expression "group of members" will be meaningless in relation to a Hindu family governed by the Dayabhaga school of Hindu law.

But an order recording partition can be made only of the properties of the joint family are partitioned in "definite portions" that is, the properties are physically divided if they admit of such division, otherwise, in such division as they admit of. In *GORDHANDAS T. MANGALDAS Vs. COMMISSIONER OF Income Tax, BOMBAY.*, , the High Court of Bombay held that section 25A contemplated a physical division of the joint family property; a mere division of interest in such property is not enough. Beaumont C.J., in delivering the judgment of the court, observed at page 195 :

"I think that the expression "definite portions", indicated a physical division in which a member takes a particular house in which he can go and live, or a piece of land which he can cultivate, or which he can sell or mortgage, or takes particular ornaments which he can wear or dispose of and that the expression "definite portions" is not appropriate to describe an undivided share in property where all a particular member can claim is a proportion of the income and a division of the corpus, but where he cannot claim any definite portion of the property..... No doubt the expression "division in definite portions" will have to be construed with regard to the nature of the property concerned. A business cannot be divided into part in the same manner as a piece of land" division may only be possible in the books. Special cases will have to be dealt with by the Income Tax Officer when they arise. If he comes to the conclusion that, having regard to the nature of the property, what has been done amounts to a division in definite portions, he will record his finding under sub-section (1) : if he comes to the conclusion that it does not, then he will have to go on assessing the family under sub-section (3)."

6. The effect of the order made under s. 25A of the Indian I.T. Act, 1922 would, therefore, be unequivocal in the sense that the department has recognised that not only the status of the family of the deceased Saremal had been severed but that the properties belonging to the family have been divided in definite portions. It may be that a partition may be effected in a given case between groups of members constituting a particular joint family. But, it, therefore, cannot be urged successfully when such a partition takes place between the groups of members of the family that the status of the family remains joint for that matter. Precisely this very contention, that when a partition has taken place between groups of

members, it is intended to refer to a group consisting of the head of branch and his sons who remain undivided, was rejected by the Supreme Court in the Case of Joint Family of Udayan Chinubhai, etc. Vs. Commissioner of Income Tax, Gujarat, . If the effect of an order made under s. 25A of the 1922 Act is one as we have stated, and we do not entertain any doubt about it in view of the principles enunciate by the Supreme Court in the aforementioned two pH decisions, the conclusion is inescapable, at least that the status of the joint family is severed, the consequence is that the nature of the joint interest which the member of the would from that moment be as tenants-in-common. The presumption is that every Hindu family is joint unless otherwise the contrary is proved. It is also settled that there is no presumption either way, when one member separated from the others, about the status of the remaining members of the family. There is no presumption that they remain united or not. It must be decided on the facts of each case (vide Bhagwan Dayal Vs. Mst. Reoti Devi, . Partition of a joint Hindu family consists in ascertaining and defining the shares of the coparceners in the joint property and actual division of the property by metes and bounds is not necessary to constitute partition. The division of the said properties by metes and bounds may take place subsequently. Even thier residing together after such partition and enjoyment the properties jointly would not change the tenor of the properties and make them joint. Partition may be effected, inter alia, by agreement or conduct which evinces an intention to sever the status of the joint family. However, merely because one member of the family servers his relations, there is no presumption, as stated above, that there is a severance between the other members is one of fact to be determined on a consideration of all the attendant circumstances (vide Girijanandini Devi v. Bijendra Narain Choudhary AIR 1967 SC 1224). In view of this settled legal position which has not been doubted even faintly by the learned counsel appearing on behalf of the revenue, the only question that remains to be consider is : whether in the deed of partition on JULY 25, 1957, as well as from the circumstances attendant thereto the intention can be spelt out that the deceased, Saremal, and his wife who constituted a group for the purpose of effecting the partition in the family; decided to continue as members of the joint family. The answer, in our opinion, is in the negative for obvious reason. The first and the foremost reason for our opinion is that the ITO concerned has by making an order under s. 25(1) recognised this partition in the sense that not only the properties have been divided into indefinite (sic) portions, such an order could not have been made unless the claim in the behalf had been made and the ITO had been satisfied on proper inquiry being made by him. If the status of the family against that, and in fact none think that any exception can be raised against that, and in fact none was raised by the learned counsel for the revenue, it cannot be gainsaid that the nature of the interest of Saremal and his wife, who were the remaining members of the family, ceased to be joint and they became tenants-in-common.

7. In Joint Family of Udayan Chinubhai, etc. Vs. Commissioner of Income Tax,

Gujarat, by a consent decree of the High Court of Bombay, the joint family of the deceased was dissolved and the properties were divided and allotted to one member of the family, viz., Chinubhai on the one hand, and the other it was declared that these properties would absolutely belong to an vest in them in equal shares. This partition was recognised by the ITO concerned by making necessary order under s. 25A of the 1922 Act, and the assessments were made accordingly by the members of th two groups regarding the income from thier respective properties in thier individual hands. Some time later proceedings were initiated under s. 34 for the assessment years 1951-52 to 1953-54 by assessing the group of 4 members the status of HUF. In the context, the Supreme court ruled that though the property allotted to the group consisting of 4 members had not been divided by metes and bounds between than, the said group could not be assessed as members of an HUF because such a relationship did not exist between them after severance of the joint family status of which Chinubhai was the karta. Having realised this difficulty, the learned counsel for the revenue urged that at the time when actual partition by metes and bounds was effected by the deed of July 25, 1957, all the remaining properties other than cash, shares etc., allotted to the two sons were allotted as the sole and exclusive properties of deceased Saremal and his wife was not allotted any share or interest therein. This contention has not been urged in terns before the Tribunal. However, we have considered this contention as an aspect of the larger question; whether the remaining properties in question were, under the said deed of partition, allotted to deceased Saremal alone. We are of the opinion that even on a reading of the deed of partition we do not think that this contention is warranted.

8. In para. 1 of the deed of partition, m the names of the members of the family have been mentioned. In para. 2 the properties of the family have been specified, para. 3, which is relevant and material for purpose of this contention, is quoted below from the English translation of the original deed of partition which is in Gujarati and furnished to us as annexure to the statement of case :

"3. There are no other joint properties other than the above;" it that is any, the same has also (sic) having considered the estimated profit from business up to Ashad Vad 13,2013, as a factual one, Bhimraj and Jugraj have separated giving up all our right as also the rights for heir on the above joint family property and have decided to accept the cash and the shares of limited companies. Accordingly, the credit entries are to be passed in accordance with our agreed shares are to be accordingly debited. Saremalji and Bai varju Saremalji are the only owners of the balance of property and the future responsibility of sides Lila is to be shouldered by Saremalji."

Though the English translation of the document rendered to us appears to be a free translation, the exact translation of the relevant portion of para. 3 would read as under :

"3. All the movable and immovable properties other than these present represent

the right and interest of the sole owner Saremal and Bai Varju. Saremalji has to shoulder the responsibility of the interest the daughter, Lila."

in view of this unequivocal assertion and the statement in para. 3, it is, in our opinion, futile to read any other subsequent statement or citation in the document as an overriding condition and rendering the effect of the statement extracted above nugatory. A serious effort has been made on behalf of the revenue in this direction which has impressed the Tribunal favourably. Our attention has been incited to what has been stated in this connection in para. 4. The English translation, furnished to us with the statement of case, of the said para. 4 reads as under :

"4. Arrangements and the understanding regarding the business is that hereafter only Saremalji shall manage the business of Saremal Bhimraj and all the responsibility thereto is exclusively his and the partnership firm of Saremal Bhimraj and Jugraj shall hereafter run joint business of Ratanhcand Jethmal with effect from Ashad Vad 14 of 2013, and shall also attend the litigation..."

9. The translation rendered to us is not happy. IN effect and substance, it had been agreed in connection with the business concerns of the joint family that the business of Saremal Bhimraj was to be managed by Saremal and all the liabilities in connection with the said business were that of Saremal; while the other joint family business under the name and style of Ratanchand Jethmal together with all the pending litigation's in connection therewith were to be converted into a partnership firm consisting of the deceased Saremal and his tow sons, Bhimraj and Jugraj, as partners with effect from Ashad Vad 14, S.Y. 2013. Another para. on which reliance has been placed in this behalf is para. 11 of the partition deed. It provided that all the immovable properties would be of the ownership of Saremalji irrespective of the fact as to in whose name they stood We do not think that either of the paras relied upon can lead us to the conclusion that Bai Varju the widow of deceased Sarmeal has no right or interest ion the properties. On a true construction of the partition deed, we are of the opinion that para. 3 of the said deed provides for the allotment of the properties between each of the two sons on the one hand and the deceased saremal and his wife on the other. The provision made in para. 4 is merely elucidator about the management of the business of the joint family firms of Saremal Bhimraj and the liabilities thereof. The statement in para. 4 that the liabilities will be of Saremal alone meant, in effect and substance, that the two sons would not be responsible to contribute anything towards that liability. The right of management naturally vested in Saremal backed he happened to be the only male member of the truncated family. Para. 11 also, in our opinion, would not set at naught what has been provided by way of a basic arrangement in para. 3 where the remaining properties of the family were allotted to Saremal and Bai Varju and the words "sole owner" would qualify both the deceased Saremal and his wife. The attempt to read "sole owner" as the adjective of the deceased, Saremal, is in, our opinion, reading out of context. The emphasis is that Saremal and his wife were

the sole owner of the properties in question. In that view of the matter, therefore, we do not think that para. 11 would justify is in reading, as the Tribunal has read, that the remaining properties has been allotted to Saremal alone. It could not have been done so legally because when a partition takes place between father and sons the wife is also entitled to a share equal to that of a son. The learned counsel for the revenue urged that is is always open to a member of the joint family to renounce his share when a partition takes place. In other words the submission is that relinquishment of his right by one of the members in the joint family properties does not result in a general partition. It is no doubt true that the relinquishment by one of the members of his rights in the joint family properties would not necessarily result in a general partition in the family (vide Chaudhuri Raghubans Narain Singh Vs. The State of U.P. and Others,). However, in the first instance, it is nobody's case that the two sons of deceased Saremal; relinquished thier shares only and the remaining members of the family continued as joint. Even if such a contention may be open in a given case, the revenue cannot urge that contention here having regard to the fact that the ITO concerned had recognised the partition by an order under s. 25A of the Indian I.T. Act, 1922. In that view of the matter, therefore, we must uphold on behalf of the accountable person that the deceased Saremal and his wife, after the deed of partition held the deceased Saremal and his wife, after the deed of partition, held the remaining properties of the family as tenants-in-common having 1/2 share therein. The necessary consequence of this finding is that the Tribunal was in error in confirming the order of both the authorities below that the entire properties passed on the death of Saremal and were liable to estate entire properties passed on the death of Saremal and were liable to estate duty as properties passing on the death. It is only the interest and the share of Saremal, which is, in our opinion, half, that would pass on the death of Saremal and can be subjected to estate duty.

10. The result is that we answer the question referred to us in the negative, that is in, favour of the accountable person and against the revenue. The Controller of Estate Duty shall pay the costs of this reference the accountable person.