

(1997) 11 KL CK 0038

In the High Court Of Kerala

Case No : Income-tax Reference No. 109 of 1991

Controller of Estate Duty

APPELLANT

Vs

K. Radhakrishnan

RESPONDENT

Date of Decision : 13-11-1997

Acts Referred:

Succession Act, 1925 — Section 82

Citation : (1998) 1 ILR (Ker) 818 : (1998) 232 ITR 879

Hon'ble Judges : P.A. Mohammed, J; P. Shanmugam, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; C. Kochunni Nair, for the Respondent

Judgement

P.A. Mohammed, J.—This estate duty reference case is coming up for decision before us at the instance of the Controller of Estate Duty, Kerala. The respondent herein is the accountable person. The question referred to us for decision is as follows :

"Whether, on the facts and in the circumstances of the case, the property which passed on the death of the deceased belonged to the joint family or whether it belonged to the individual ?"

The short facts leading to the present reference are as follows : The deceased, S. Kumaraswamy Reddiar, had left a will dated September 22, 1967, the original of which was framed in Tamil. Till the execution of the will, the properties were treated as self-acquisitions of the deceased. In the said will, the deceased stated that he with his two sons were members of the joint Hindu undivided family and the properties were being treated as the properties of the Hindu undivided family. The will further provides that the deceased would be the manager of the joint properties, that his daughters would not have any share over those assets and that he was giving certain bequests to his daughters-in-law and granddaughter. After the execution of the will, Kumaraswamy Reddiar died on June 10, 1968. Subsequently, the will was probated. The respondent claimed

that by virtue of the declaration contained in the will, the properties belonged to the Hindu undivided family and, therefore, one-third of the properties alone would pass on the death. However, the above claim was rejected by the Assistant Controller of Estate Duty. According to him, till the death of Kumaraswamy Reddiar, he was treating his properties as his individual properties. On appeal, the Appellate Controller of Estate Duty placing reliance on the decision of the Madras High Court in Commissioner of Income Tax/Wealth-Tax, Madras-I Vs. A.R. Sahasranamam., accepted the claim of the accountable person. He held that a declaration that the individual property belonged to the Hindu undivided family and impressing the property with the Hindu undivided family character could be made in a will. As against this order both the Department and the accountable person filed appeals before the Tribunal. After detailed consideration, both the appeals were dismissed by the Tribunal. In the appeal filed by the Department, the Tribunal confirmed the order of the Appellate Controller and thus agreed with the claim of the accountable person. At the instance of the Department, the question of law now raised came up for consideration before this court in I. T. R. No. 203 of 1987. However, at that stage, this court refused to answer the question and directed the Tribunal to forward a proper statement of the case annexing a copy of the original will (Tamil) and also a true translation thereof in English. In compliance with the direction, the Tribunal forwarded a fresh statement of case on May 30, 1991. Along with the present statement of the case though the copy of the will dated September 22, 1967, executed in Tamil is shown as annexure-A, it is not seen annexed with it. Therefore, this court by order dated July 14, 1997, directed the Tribunal to forward the original file along with the original of annexure-A in Tamil. Accordingly, the original case file is made available before this court for our examination.

2. Annexure-B produced along with the statement of facts is the copy of the will translated in English. The relevant portion of the said will is extracted below :

"I am writing this will as I am frequently indisposed. With the blessings and help of my elder sister, P. K. Muthammal, I started a piece-goods business at Alleppey and on account of the prosperity and profits and due to my own efforts and industry I had acquired assets including immovable properties, have constructed therein buildings and I am enjoying the income therefrom as well. I have bequeathed by registered document on the 15th day of September One thousand nine hundred and sixty six the building at Alwaye to Kamalam, daughter of Kizhoor Achuthan Nair, who is residing with me. Myself and my sons, K. Radhakrishnan and K. Muthukrishnan, have constituted a joint Hindu undivided family. For the benefit of the family, I hereby throw into the common hotchpot all my properties including the business into the joint Hindu undivided family mentioned earlier and I am managing the same. I wish these assets will be held by them also as being held now after my lifetime. My daughters or Kamalam mentioned earlier or any one else shall not have any right or interest over any of the assets. Although during my lifetime I have given in marriage my daughters, Nagbai Visalak-shi, Rajeswari and Maya, and have given them sufficient ornaments and

other assets, my sons should give Rs. 30,000 to each of my daughters after my lifetime. My sons have no male issue till date but I have already given and passed entries in Alleppey books relating to the year 1142 M.E. a sum of Rs. 50,000 to my daughter-in-law, Dhanalakshmi, wife of Muthukrishnan, my second son, and Rs. 25,000 each to the two daughters of my eldest son, K. Radhakrishnan, which shall be wholly enjoyed by " them. As the granddaughters are minors their father K. Radhakrishnan shall be the guardian till they attain majority. I hereby reserve my absolute right to alter or cancel the provisions of this will. My sons shall continue to perform without default those acts of charity which I am performing. Thus, I have executed this will out of my free will."

There was some controversy with regard to the correctness of the English translation of the following sentence in the will written in Tamil :

"Myself and my sons, K. Radhakrishnan and K. Muthukrishnan, have constituted a joint Hindu undivided family."

The case of the accountable person is that the above translation does not convey the true meaning of the corresponding sentence in the original will in Tamil. In this situation, the disputed sentence in Tamil was got verified by this court as well as by standing counsel for the Department and counsel for the respondent. After such verification we found the true translation of the said sentence in English to be like this :

"Myself and my sons, K. Radhakrishnan and K. Muthukrishnan, have been living as undivided Hindu family."

Both the sides agreed that the above sentence represents the true and correct translation of the sentence in the original will written in Tamil. The Appellate Tribunal in its annexure F order also found thus :

"We have looked into the original. The original says that the deceased and his two sons were living as a joint family. So it is not a case of any existing member of the joint family not being allowed any rights in the property."

Under Section 5(1) of the Estate Duty Act, 1953, estate duty is levied on the principal value of all property of the deceased at the rate fixed in accordance with Section 35. u/s 7 the property in which the deceased had an interest ceasing on the death of the deceased, shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cesser of such interest. The claim of the accountable person is that by virtue of the declaration made in the will the property belongs to the Hindu undivided family and therefore only 1/3rd thereof would pass on the death. On the other hand, the Controller of Estate Duty pointed out that till the date of death, the deceased was treating the property as his own. Let us examine in this context what the Madras High Court said in Commissioner of Income Tax/Wealth-Tax, Madras-I Vs. A.R. Sahasranamam., , upon which reliance was placed by the Appellate Controller as well as the Appellate Tribunal. That was a case where an assessee executed a will

in which he treated a house property belonging to him as joint family property and made a disposition thereof stating that he has no separate interest in the property except as that of a Hindu undivided family.

3. There the court said (page 514) :

"The mere fact that the statement or declaration of the assessee is contained in a document styled as a will, the effect of the statement or declaration cannot be ignored or overlooked for finding out the actual intention of the assessee. If the intention of the assessee is to treat his property as joint family property in future which is clear from the statements made by the assessee, it has to be given effect to and the property has to be treated as having been impressed with the character of joint family property."

No doubt, the intention of the deceased in executing the will has to be gathered by reading the whole recitals contained in the will. Section 82 of the Indian Succession Act, 1925, provided that the meaning of any Clause in a will is to be collected from the entire instrument and all its parts are to be considered with reference to each other. Lord Davey in *N.E. Railway v. Hastings* [1900] AC 260 said thus :

"The deed must be read as a whole in order to ascertain the true meaning of its several Clause s, and the words of each Clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible."

While reading the document as a whole, the court must supply efficacy to all the recitals in entirety and in fullest extent. It cannot ignore or efface one Clause to preserve the other. Such a reading really contravenes the principles of construction.

"There are two modes of reading an instrument : where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall), that you should rather lean towards that construction which preserves, than towards that which destroys."

(See : *Langston v. Langston* [1834] 2 CL 194. The principle is in consonance with the maxim "*ut res magis valeat quam pereat*" (It is better for a thing-to have effect than to be made void.). This principle is also recognised in Section 84 of the Indian Succession Act.

4. Let us now examine the recitals contained in the will and find out the intention reflected from them. In the process of examining the intention of the deceased we are actually called upon to apply the test what a reasonable man reading the recitals would understand them to mean, The reason is that the intention is always a mental process which has no character of definiteness. We cannot rule out the possibility of supplying materials to establish the intention of the

executant of a document in a manner as one may desire to have done. Lord Devlin in *Davies v. Elsby Brothers Ltd.* [1961] 1 WLR 170 said (page 176) :

"In English law as a general principle the question is not what the writer of the document intended or meant but what a reasonable man reading the document would understand it to mean."

The Supreme Court in *Chunchun Jha v. Ebadat Ali* [1954] AIR 1954 , observed that the real question in such a case is "not what the parties intended or meant but what is the legal effect of the words they used". The inevitable conclusion is that the court must apply the test what a reasonable man reading the recitals would understand them to mean and not what the parties would have intended or meant.

5. We have hereinbefore found as reflected from the recitals that the deceased and his two sons, K, Radhakrishnan and K. Muthukrishnan, were living as members of a joint Hindu family. That presupposes the existence of joint Hindu family. For the benefit of this family, the deceased declared that all his properties including the business are being thrown into the common hotchpotch of the joint family. No doubt, there must be an unequivocal declaration in order to impress the individual properties with the Hindu undivided family. In this context it may be recalled that in view of the decision of the Madras High Court in *Commissioner of Income Tax/Wealth-Tax, Madras-I Vs. A.R. Sahasranamam.*, , this declaration can be made in a will even though it takes effect after the death of the executant. Therefore, by virtue of the declaration contained in the will, the individual properties of the deceased had become impressed with the character of the Hindu undivided family properties. After having so declared, the deceased further stated that his daughters who were already married and who were not members of the Hindu undivided family will have no further rights therein. This, of course, is in consonance with law. We need not go further into this question inasmuch as the Appellate Tribunal has construed the recitals contained in the will within the legal framework. What we are persuaded to say is that a reasonable man reading the recitals contained in the will would have definitely come to the same conclusion as arrived at by the Tribunal.

6. Senior standing counsel for the Revenue, however, advanced an argument that in order to blend the self-acquired property of the deceased with that of the Hindu undivided family there must be Hindu undivided family properties in existence. He pointed out that when the Hindu undivided family has no property there is no question of blending individual property with that of the coparcener's property. In support of this proposition, learned counsel relied on the decision of the Supreme Court in *Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others*, . Particular emphasis is made on the following sentence contained in paragraph 11 of the above decision (page 1272) ;

"A mere intention to benefit the members of the family by allowing them the use of the income coming from the said property may not necessarily be enough to

justify an inference of blending, but the basis of the doctrine is the existence of a coparcenary and coparcenary property as well as the existence of the separate property of a coparcener."

We have no quarrel with the proposition advanced by counsel on the basis of the above decision. However, as far as the present case is concerned, it is an admitted fact that the Department had no case at any point of time that the Hindu undivided family had no property at all. Of course, counsel submits that without the existence of the property blending cannot take place and the burden is on the accountable person to establish the said point. The case of the accountable person is that a Hindu undivided family is in existence and the individual properties of the deceased have therefore become the properties of the Hindu undivided family. If the Department had a case that Hindu undivided family had no properties it would have been placed before any of the authorities below. That has not admittedly been done.

7. Notwithstanding the above, we will examine the contention advanced on behalf of the Revenue on the merits. In this context, counsel for the respondent brings to our notice the following passage contained in Maine's Hindu Law and Usages 14th edition.

"Possession of property is not under the Mitakshara law a necessary requisite for the constitution of a joint family though where persons live together, joint in food and worship, it is difficult to conceive of their possessing no property whatever, such as ordinary household articles which they would enjoy in common, Hindu law does not require that properties of a joint family should be immovable properties or that they should be of appreciable value."

Kumarasami Sastri J. as early as in the year 1925, while speaking on behalf of the Division Bench of the Madras High Court in Janakiram Chetty v. G. C. Nagamony Mudaliar, AIR 1926 273 ; ILR [1926] Mad 98, said thus, (page 279) :

"The possession of joint property is no doubt a normal incident of a joint Hindu family, but it is not in my opinion a prerequisite for its constitution."

The Division Bench further said (page 274) :

"There is nothing in Hindu law which states that the properties should be immovable properties or that there should be any minimum value which is required to constitute a joint family. It is, therefore, very difficult to say of any persons that live together, unless they are a number of ascetics owning no properties at all in the world, that there is no property in common of any sort or kind. Nor is there anything in Hindu law which says that possession of property is a necessary requisite for the constitution of a joint family."

The Privy Council in AIR 1933 85 (Privy Council) observed (headnote) :

"There is no presumption that a family, because it is joint, possesses joint property ..."

The Karnataka High Court in T. Ramdas M. Pai Vs. Commissioner of Income Tax, Karnataka (No. 1), .

"The second reason given by the Tribunal that in order to impress the self-acquired property of a coparcener with the character of joint family property by throwing it voluntarily into the common stock of the family, there must be in existence some joint family property belonging to the joint family, is also clearly untenable. The law is also clear that a joint family need not own or possess any joint family property."

As the law stands firmly settled we do not attach any worthiness to the contention urged by the Revenue in this behalf.

8. In view of the discussion hereinabove, we hold that the property which passed on the death of the deceased belonged to the joint family and did not belong to the individual. The question referred to us is answered in favour of the accountable person and against the Revenue.

9. A copy of this judgment under the seal of this court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.