
(1972) 12 MAD CK 0020

In the Madras High Court

Case No : Tax Case No. 296 of 1967 (Reference No. 102 of 1967)

Controller of Estate Duty

APPELLANT

Vs

K.A. Kader and Others

RESPONDENT

Date of Decision : 22-12-1972

Acts Referred:

Estate Duty Act, 1953 — Section 12, 12(1)

Citation : (1973) ILR (Mad) 620 : (1974) 96 ITR 289

Hon'ble Judges : V. Ramaswami, J;G. Ramanujam, J

Bench : Division Bench

Advocate : K.R. Ramamani and J. Jayaraman, for the Appellant; M.R.M. Abdul Karim and S.M. Amjad Nainar, for the Respondent

Judgement

Ramaswami, J.—The following question has been referred u/s 64(1) of the Estate Duty Act, 1953 (hereinafter called "" the Act"").

Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the properties comprised in the

Khajaminan Wakf cannot be included in the dutiable estate u/s 12 of the Estate Duty Act, 1953 ?

2. One N.M. Khajamian Rowther died on November 9, 1954. Prior to his death he executed on May 29, 1945, a wakfnama in respect of certain

properties. The four sons and four daughters of the wakif were nominated as mutawallis of the trust properties and the properties themselves were

transferred in the name of Khajamian Wakf Estate. The wakfnama provided for the utilisation of the income of the trust properties, firstly, for

payment of taxes and other expenses, secondly, for meeting the expenses of certain charitable and religious objects mentioned in Schedule A to the

wakfnama, thirdly, for setting aside 25 per cent. of the surplus as a reserve fund,

and fourthly, for the maintenance and support of the "family, children and descendants of the wakif".

3. The wakfnama also provided that the ultimate benefit shall go to the poor. By Clause 19 of the wakfnama, the wakif reserved for himself the

right of control and supervision over the mutawallis with a power to alter, cancel or modify any of the proposals or resolutions of the mutawallis.

4. In the return submitted in the estate duty proceedings, the accountable person did not include the value of these trust properties in the estate of

the deceased. The Deputy Controller of Estate Duty was of the view that, in view of Clause 19 of the wakfnama, Section 12 of the Estate Duty

Act was applicable and the entire properties comprised in the wakf were liable to be included in determining the principal value of the estate of the

deceased. He was also of the view that there are reasonable grounds for drawing an inference that as a matter of fact the deceased had derived

benefit from the trust properties even subsequent to the creation of the wakf. While dealing with the applicability of Section 12 of the Act to the

instant case, the Deputy Controller of Estate Duty observed that, according to the interpretation of statutes, the word "and" could be read as "or" in

certain circumstances and he would read the conjunction in the Explanation to Section 12(1) as "or" and so read even a settlement of properties for

the maintenance of any of the settlor's relations would come within Section 12. In the appeal preferred by the accountable person, the Appellate

Controller of Estate Duty, New Delhi, agreed with the accountable person that the Explanation to Section 12(1) could not be read in the manner

done by the Deputy Controller but did not agree with him on the scope of Clause 19 of the wakfnama.. The Appellate Controller was of the view

that Clause 19 amounted to a reservation of an interest in the settled properties for life within the meaning of Section 12 and, therefore, the

properties are liable to estate duty. On a further appeal, the Tribunal agreed with the contention of the accountable person that Clause 19 of the

wakfnama did not reserve any interest in the settled properties within the meaning of Section 12 and that, therefore, those properties could not be

included in ascertaining the principal value of the estate passing on the death of Khajamian Rowther. At the instance of the revenue the above

question has been referred.

5. Section 12(1) of the Act reads :

12. (1) Property passing under any settlement made by the deceased by deed or any other instrument not taking effect as a will whereby an

interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor

or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself or to re-claim the absolute interest

in such property shall be deemed to pass on the settlor's death :

Provided that the property shall not be deemed to pass on the settlor's death by reason only that any such interest or right was so reserved if by

means of the surrender of such interest or right the property is subsequently enjoyed to the entire exclusion of the settlor and of any benefit to him

by contract or otherwise, for at least two years before his death :

Provided further that a house or part thereof comprised in such settlement made in favour of the spouse, son, daughter, brother or sister, shall not

be deemed to pass on the settlor's death by reason only of the residence therein of the settlor except where a right of residence is reserved or

secured directly or indirectly to the settlor under the settlement or under any collateral disposition.

Explanation.--A settlor reserving an interest in the settled property for the maintenance of himself and any of his relatives (as defined in Section 27)

shall be deemed to reserve an interest for himself within the meaning of this section.

6. Section 2(19) defines ""settled property"" as meaning ""property which stands limited to, or in trust for, any person, natural or juridical, by way of

succession whether the settlement took effect before or after the commencement of this Act"" ; and ""settlement"" means ""any disposition including a

dedication or endowment whereby property is settled."" There is no dispute in this case that the wakfnama in question is a ""settlement"" and the

dedicated properties are ""settled properties"" within the meaning of this definition.

7. The learned counsel for the revenue raised three contentions. Firstly, that Clause 19 of the wakfnama amounts to a reservation of an interest for

life in the settled property and, therefore, Section 12 is attracted. Secondly, to the extent the wakfnama relieved the obligation of the settlor to

maintain his family, the settlor shall be deemed to have reserved an interest for life in the settled properties. Thirdly, even construing the document as one settling the properties in favour of the relations alone, still in view of the Explanation to Section 12(1), the settled properties are liable to be included in the estate deemed to pass on the death of the settlor. For this submission the learned counsel wanted to read in the Explanation the conjunction ""and"" as ""or"".

8. Clause 19 of the wakfnama reads :

During the lifetime of the founder he shall have rights of control and supervision over the mutawallis and may alter, cancel or modify any of the proposals or resolutions of the mutawallis.

9. The learned counsel for the revenue submitted that by exercising this power the settlor can enrich himself, so to say, by directing the mutawallis

from time to time to pay the income from the settled properties to himself. It seems to us that this contention is unsustainable. Under the wakfnama

the settlor had made a permanent dedication of the properties for the maintenance and support of his family, children and descendants with the

ultimate benefit to the poor. It further provides in detail as to how the income has to be distributed among the beneficiaries. Under the Mohamedan

law, the moment a wakf is created all rights on the property pass out of the wakif and vest in the Almighty. The mutawalli has no right in the

property belonging to the wakf. The property is not vested in him and he is not a trustee in the technical sense. He is merely a superintendent or

manager. The mutawalli could not legally spend the income of the wakf property for objects other than that provided under the wakfnama--vide

Mulla's Mohamedan Law (16th edition, Section 202) and Hafiz Mohammad Zafar Ahmad Vs. U.P. Sunni Central Board of Waqf and Another, .

10. Under Clause 19, the settlor is given a right to see that the mutawallis manage the properties in terms of the wakfnama. It may be that any of

the acts of management contrary to the terms of the wakfnama could be set right under the power retained under this clause to alter, cancel or

modify any of the proposals or resolutions of the mutawallis. There is no specific power reserved under this document for alteration of the

beneficiaries or the objects for which the income is to be spent or for changing personnel of the mutawallis. In the absence of such a reservation, it

is settled law that the settlor cannot alter the terms of the wakfnama nor can he make a change in the personnel of the mutawallis. On a plain

reading of the provisions of the wakfnama, we have no doubt that the wakfnama has not reserved any interest in the settled properties to the

settlor. It only now remains to notice the two decisions relied on by the learned counsel for the revenue in support of this part of the argument,

namely, in Hamid Hussain Vs. Controller of Estate Duty, and Ravindra Gunvantlal Vs. Controller of Estate Duty, Gujarat, .

11. In Hamid Hussain v. Controller of Estate Duty, the clause in the wakfnama in question reserved to the wakif during his lifetime a right of making

amendments, alterations, cancellations and additions of conditions in the wakfnama as warranted by the prevailing conditions and in particular the

power to make amendments in the rights of the grantees, to include some stranger among them and to exclude anybody and to increase or

decrease the amount of their shares. With reference to this power reserved, the learned judges held :

The power reserved by this clause is expressed in the widest terms. While perhaps it does not extend to the power of revoking the wakf, it

enables the settlor to travel over a wide field, curtailing interests presently enjoyed on the one hand, and in creating or enlarging them in other

directions. In so far as the power is exercised for the purpose of including some one not already a beneficiary, it could extend to including the

settlor himself. The wide amplitude of the power in the clause supports such a conclusion. If that be so, the settlor has reserved to himself the right

to benefit from the wakf property for life by the simple device of including himself in the list of beneficiaries or grantees.

12. In Ravindra Gunvantlal v. Controller of Estate Duty, the deed provided that the income of the settled properties shall be applied for the

maintenance and personal support of all or such one or more exclusively of other or others of the deceased, his wife, his children and the widow

and issues, if any, of any of his sons. The trustees were given a discretion in regard to the application of the net income and in exercise of that

discretion they could pay the whole of the net income or such part of it as they thought fit to the deceased. The settlor himself was constituted, the

managing trustee and there was a further clause which obliged the other trustees to exercise the powers in accordance with the opinion of the

deceased. The trustees shall also, at the request of the deceased, pay out of the income or if necessary out of the corpus of the settled property

such sums as the deceased may direct for meeting the expenses of illness, medical treatment, education and other heavy expenses which cannot be

met from any other source for the benefit of the deceased, his wife or any child or remoter issue of the deceased. Having regard to these provisions

in the deed, it was rightly, if we may say so with great respect to the learned judges, held that the settlor had reserved an interest in the settled

properties for life within the meaning of Section 12(1) of the Act. In the present case, as has already been noticed, the wakif reserved no such

rights, as found in the above two decisions, in the settlor and, therefore, these decisions do not in any way help the revenue.

13. In support of the second contention that to the extent the wakfnama provided for the maintenance of the settlor's family, children and

descendants, the settlor is relieved of the legal obligation to maintain and that would amount to a reservation of an interest for life to the settlor

within the meaning of Section 12(1) of the Act, the learned counsel relied on the decisions in *Kikabhai Samsuddin Vs. Collector of Estate Duty*,

Gujarat, Ahmedabad, and *In re Cochrane*, [1945] 1 Ch. 285 ; 2E.D.C. 836 (C.A.). In the first of these cases, the settlor had executed five gift

deeds settling different immovable properties mentioned in the relevant deed to each one of his five sons with certain conditions. There was no

reservation of any right for life in favour of the settlor. The Central Board of Revenue held that the deceased had continued to derive the benefits

directly attributable to the five gift deeds by reason of the fact that he was relieved of his liability to bear the maintenance and other expenses

because of the conditions laid down in the gift deeds and, therefore it would come u/s 10 of the Act. The Board also held that in the circumstances

the provisions of Section 12 were also attracted. At the instance of the accountable person, the question whether the property settled could be

included in the principal value of the estate of the deceased under the provisions of Sections 10 and 12 of the Act was referred to the High Court

for decision. The learned judges noticed that under the provisions of Mohamedan law the settlor was under an obligation to maintain his wife and

daughters ; the gift deeds directed two of the minor sons to bear the maintenance expenses of the settlor's wife and the other minor sons to bear

the maintenance, education and marriage expenses of one of the settlor's daughters. Two of the major sons who were beneficiaries under the gift deed were required to bear the maintenance, education and marriage expenses of two other daughters of the settlor. By directing the donees to maintain the wife and daughters the settlor was passing on his own obligation to them. The learned judges were, therefore, of the view that by making this provision the donor ""reserved to himself a benefit so far as the property gifted by him was concerned, in each of the given cases, inasmuch as he got rid of the obligation to provide maintenance for his wife and unmarried daughters"". But, though the learned judges were of this view, they held that since the condition or obligation for maintenance of the wife and unmarried daughters which the settlor has passed on to the donees concerned is not for the life of the settlor or is not for any other period determinable by the death of the settlor, but in each of the cases the beneficiary concerned is entitled to maintenance until marriage in the case of unmarried daughters and till her death in the case of the wife of the settlor, Section 12(1) is not applicable. Far from supporting the argument of the learned counsel for the revenue, it is clearly against them in so far as the applicability of Section 12(1) is concerned. Of course, the learned judges held that to the extent the obligation of the settlor to maintain his wife and daughters is passed on to the donees concerned, it would attract the provisions of Section 10. We are not concerned in this case with the applicability of Section 10. It is therefore not necessary for us to consider that aspect. But we would like to add that, in addition to the obligation to maintain his wife, children and descendants which shall be deemed to have been passed on to the donees in this case being not for the life of the settlor or is not for any other period determinable by the death of the settlor and, therefore, Section 12(1) is not attracted, the Act itself does not contemplate any enquiry into the complex personal law of the parties and the determination of the rights and obligations of the settlor in the matter of maintenance of his wife and children.

14. In *In re Cockrane* the marriage settlement in question provided that the trustees of the fund settled by the husband should hold the fund in trust to pay the income to the wife for life and after her death to the husband for life and after the death of the survivor in trust for children. It was also

provided that the income so payable to the wife during her life ""shall be expended by her in current household expenses and management"". It was held that the effect of the income provision was to make the wife a trustee of each sum that was paid to her by trustees and when she received it the provision imposed a trust upon her to expend the whole of such sum in current household expenses and management. This, in the view of the learned judges, had given a right to the husband to require that the wife should apply the income of the trust fund for the purpose wholly or partly to relieve the husband of a liability, namely, the liability to pay the household expenses and management. Since this right which created an interest in the income of the property was determinable at his death the provisions of Section 38(2)(c) of the Customs and Inland Revenue Act, 1881, and Section 2(1)(c) of Finance Act, 1894, were attracted. It is seen from the statement of facts that the deed is a marriage settlement deed. It recited (1) [1945] 1 Ch. 285 ; 2 E.D.C. 836 (C.A.). the intended marriage and that upon the treaty for the intended marriage it was agreed that certain investment should be settled by the husband and that this investment had been transferred to the joint names of the trustees. It further stated that after the intended marriage the trustees should hold the trust fund upon trust, pay the income thereof to the wife during her lifetime and after her death to pay the income thereof to the husband, if he survived the wife for his life, and that after the death of the wife and husband the trust fund should be held in trust for all the children of the husband whether of the intended marriage or any other marriage, but being a son or sons should attain the age of 21 years or being a daughter or daughters should attain that age or married under that age in certain proportion. The deed contained certain powers of maintenance and advancement and an ultimate trust of the capital for the husband in a fund which did not happen. These clauses to a certain extent relieved the husband of his duty to maintain his sons and daughters but the Court of Appeal did not rely on these clauses in support of its view that the marriage settlement deed had reserved an interest in the settled property for life or determinable at the death of the settlor. The court specifically relied only on the clause which made the wife a trustee in respect of the amount received with a duty to spend the money for current household expenses and management and a right on the husband to require that the wife should apply the income for a

purpose which would wholly or partly relieve the husband of his liability to pay the household expenses and management. In the present case there

is no clause similar to the one which was considered by the court in *In re Cochrane*. We, therefore, overrule this contention of the revenue.

15. It is next contended by the learned counsel for the revenue that since the wakfnama is a settlement and provides for maintenance of the

settlor's family and children it comes within the Explanation to Section 12(1) of the Act. He submitted that the words "'for the maintenance of

himself and any of his relatives'" should be read disjunctively as if for the word "'and'" the word "'or'" is used. According to the learned counsel,

normally, property escapes from the levy of estate duty through relations only. Having regard to the natural human conduct one need not expect

such escapement through third parties unrelated to the deceased. It is to prevent such escapement and plug the hole, the deeming provision in the

Explanation is made. If the Explanation were to be read otherwise it would cut down the operation of the main provision by introducing a further

condition of a provision for maintenance of the relations also in the document. The expression "'shall be deemed'" in the Explanation shows that

Parliament intended to include something more than what will normally come within the scope of the main provision and not to cut down its scope.

Per contra, the learned counsel for the accountable person contended that the Explanation is intended to cut down the scope of the main provision

and exclude from its operation where only a portion of the interest in the settled property is reserved for life to the settlor and the remaining

portions are settled on third parties who are not relations. He also contended that if "'and'" were to be read as "'or'" then the first part of the

Explanation will become otiose as those cases will be covered under the main part of the section itself. The learned counsel for the revenue replied

stating that if "'and'" is not read as "'or'", the entire Explanation will become otiose because reservation of an interest in the settled property for

maintenance of the settlor and any of his relations would come under the main part of the section itself. We are of the view that none of the

contentions are acceptable and the arguments proceeded on a wrong understanding of the scope of the Explanation in Section 12(1).

16. A reading through the section shows that the property comprised in the settlement or subject to trust shall be deemed to pass on the death of

the settlor when under the deed interest in such property for life or any other period determinable by reference to the death is reserved expressly or by implication to the settlor. It is not necessary to deal with the latter half of Section 12(1). The life or death with reference to which an interest is reserved must be the life or death of the settlor. The words "'an interest in such property for life or any other period determinable by reference to death'" do not suggest any limitation on the quantum of interest to be reserved in order to attract the provision. But it speaks of the duration for which it should have been reserved under the document. Any interest, however small, will be enough to attract this provision provided it is to enure for life or determinable on the death of the settlor. Thus, even if a partial interest in settled property is reserved in the deed and it is to enure for the life of the settlor, it would come within the scope of the section and in such a case the entire property comprised in the settlement shall be deemed to pass on the death of the settlor. It is immaterial for whom the balance of the interest in the settled property is given or settled. It could be in favour of any relative or a third party. This view of ours finds support in certain decided cases also. In *Khatizabai Mohomed Ibrahim Vs. Controller of Estate Duty, Bombay*, the Bombay High Court held that in the case of settlement of property in which the settlor has reserved to himself for life any interest, however small it may be, by virtue of Section 12, the whole of such property of the settlor, which was the subject-matter of the settlement and not merely the interest so reserved, shall be deemed to pass. The words "'an interest'" in the context of Section 12 mean "'any interest however small'". It may be an aliquot share in the income of the property settled. This view of the Bombay High Court was quoted with approval by the Gujarat High Court in *Ravindra Gunvatlal v. Controller of Estate Duty*. After quoting from *Attorney-General v. Earl Grey*, [1898] 1 Q.B. 318, where Justice Channell said with reference to the corresponding provision in Section 38(2)(c) of the Customs and Inland Revenue Act, 1881, that "'any interest however small will do, provided it issues out of such property, that is, out of the properties sought to be taxed'", the Gujarat High Court observed :

There are no words which define or delimit the quality or quantity of "interest" which must be reserved to the settlor. If some "interest" is reserved

to the settlor in the property settled upon trust, Section 12(1) would apply even though such interest may be small or indefinite in extent.

17. It is on the ground that the life or death with reference to which an interest is reserved must be the life or death of the settlor, the Gujarat High

Court in *Kikabhai Samsuddin v. Controller of Estate Duty*, held that though the obligation for maintenance of wife and children of the settlor

passed on under the deeds of settlement to the donees it would not come within Section 12(1) as the obligations on the donees under the deeds

were to maintain until marriage in the case of unmarried daughters and till her death in the case of the wife of the donor, but was not dependent on

the life of the settlor.

18. In the Explanation to the section, reserving of interest in the settled property has not been linked with the life or death of the settlor. It provides

for a ""deemed"" reservation of interest in the settlor within the meaning of the section even where the interest reserved under the document for the

settlor is not for life or terminable on the death of the settlor in cases where the deed reserves an interest in the settled property for the maintenance

of the settlor and any of his relatives. Any other construction, in our opinion, will make the Explanation otiose for, if the interest dealt within the

Explanation is an interest for the life of the settlor or any other period determinable by reference to the death of the settlor, it will come in the main

part of the section itself. The conjunction ""and"" could not also be read as ""or"" for another reason as well. If ""and"" is to be read as ""or"" in the

Explanation then the Explanation will have to be read as providing for two types of cases. Firstly, when the settlor has reserved an interest in the

settled property for maintenance of himself and if this reservation is for his life or any other period determinable by reference to the death of the

settlor, then it would come in the main part of the section itself making that portion of the Explanation otiose. Secondly, u/s 9 read with Section 21,

any settlement in favour of a relation shall be deemed to pass on the death of the settlor. Of course, the condition for such ""deeming operation"" u/s

9 is that the settlement shall not have been made bona fide two years or more before the death of the settlor. But, we do not find any reason why

Parliament should have excluded bona fide settlements made two years prior to the death of the settlor u/s 9 and include them through the

Explanation in Section 12(1).

19. The second proviso to Section 12(1) also, in our opinion, goes against the construction of the word "and" as "or" in the Explanation. Under the

second proviso, where the settlement related to a house or part thereof and was made in favour of the spouse, son, daughter, brother or sister, it

shall not be deemed to pass on the settlor's death by reason only of the residence therein of the settlor except where a right of residence is

reserved or secured directly or indirectly to the settlor under the settlement or under any collateral disposition. The relatives mentioned in this

proviso come within the definition of relatives in Section 27(7) of the Act. If, really, reserving an interest in the settled property for maintenance of

the settlor's relatives itself is enough to bring the property comprised thereon within the scope of Section 12(1), the requirement in the second

proviso as to the right of residence being reserved or secured directly or indirectly to the settlor under the settlement deed is totally unnecessary.

We are also supported in this view on the scope of the Explanation in a way by the adoption of a different language in the Act by Parliament from

that at the Bill stage. The Explanation to Section 12 found in the Estate Duty Bill, 1953 (as amended by the Select Committee), reads as follows;

Explanation.--A settlor reserving an interest in the settled property for the maintenance of any of his relatives (as defined in Section 26) or of

himself and any of his relatives shall be deemed to reserve an interest for himself within the meaning of this section.

20. But in the Explanation as adopted and passed by Parliament, the words "any of his relatives (as defined in Section 26)" occurring in the first

part were omitted and only the words "maintenance of himself and any of his relatives" were retained. If this omission were to be of any indication,

we are sure that "and" in the Explanation to Section 12(1) could not be read as "or". This construction was also favoured in *Kikabhai Samsuddin v.*

Controller of Estate Duty ". It was held therein :

The words "for the maintenance of himself and any of his relatives" cannot be read to mean " for the maintenance of himself or for the main-

tenance of any of his relatives" because if there is provision for the maintenance of the donor himself, there is no necessity to invoke the Explanation

to Section 12 and the word "and" occurring in this phrase cannot be read to

mean "or" because in that event there is no/necessity for the legislature to provide " for the maintenance of himself V In the context in which this phrase occurs in the Explanation to Section 12, it is clear that what the legislature intended to provide for and has in fact provided for is a clause whereby the settlor provides for the maintenance of himself and any of his relatives, i.e., there must be provision for the joint maintenance of the settlor himself and any of his relatives and not merely a provision for the maintenance of a relative alone.

21. For the forgoing reasons, we hold that the Explanation to Section 12(1) of the Estate Duty Act, 1953, is not attracted in the instant case.

Accordingly, we answer the reference in the affirmative and against the revenue with costs. Counsel's fee Rs. 250.