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(1993) 07 CAL CK 0009

In the Calcutta High Court

Case No : ED Reference No. 200 of 1983

Controller of Estate Duty APPELLANT

Vs

Sailendra Nath De RESPONDENT

Date of Decision : 09-07-1993

Acts Referred:

Estate Duty Act, 1953 — Section 10, 12, 12(1), 27, 64(1)

Citation : (1994) 73 TAXMAN 590

Hon'ble Judges : Bhagabati Prasad Banerjee, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : S.K. Mitra, for the Appellant; K. Roy and R.N. Dutta, for the Respondent

Judgement

Ajit K. Sengupta, J.—This reference u/s 64(1) of the Estate Duty Act, 1953 (''the Act'') has been made by the Tribunal at the instance of the revenue. Briefly stated, the facts are that the deceased who died on 30-8-1974 was the owner of a house property at 73A, Ganesh Chandra Avenue, Calcutta. In respect of this property, he had executed a settlement deed on 27-3-1953 in which he had declared that the top floor in the six-storeyed building or fifth floor should not be given on tenancy and should be reserved for the residence of his wife, two sons and unmarried daughter. According to the Assistant Controller, the deceased himself used to reside in the said premises free of rent with his family members and expired there. He was also maintaining his Chamber for practice in the ground floor. Further, the deed was executed before the enactment of Act. Therefore, section 12 of the Act came into operation. The Assistant Controller discussed the provisions of that section at length and also referring to Chamber''s Twentieth Century Dictionary for the purpose of explaining the word ''residence'', he was of the opinion that the value of the entire settled property was includible in his net principal value.

2. The assessee opposed the view taken by the Assistant Controller and filed a letter on 15-7-1977. It was contended that the trust created by the settlor had,

extinguished in 1964 and referred to - Controller of Estate Duty Vs. R. Kanakasabai and Others, for the proposition that the value of the settled property should not be included in the principal value. The Assistant Controller, however, rejected the contention of the assessee with the following observations:

(a) The fact of the case of R. Kanakasabai is quite different from that of present case. There the testator expressed his pious wish that the beneficiaries should pay a certain amount per annum for his maintenance and livelihood due to old age of the testator. Here there was no such thing in the deed itself. On the contrary, the testator without mentioning or reserving right of residence and chamber space in the settled property, in fact, resided in the property till his death and maintained his chamber as place of profit in the said premises.

(b) In fact, in my opinion, section 12 would apply if there be a reservation of interest (however small it may be) in the settled property. The reservation may be expressed or implied but it would be of an interest in the property which is subject-matter of settlement.

(c) The extinguishment of trust in 1964 as alleged on the attainment of 21 years of Sri Samar De will not put an end to this matter because the testator even before and after 1964 maintained a chamber and practised from the ground floor room of the said premises and by the word ''implication'' in the section he got himself entangled in the matter.

3. Aggrieved, the assessee went up in appeal before the Controller (Appeals). The Controller (Appeals) referred to the Gujarat High Court decision in the case of Kikabhai Samsuddin Vs. Collector of Estate Duty, Gujarat, Ahmedabad, and held that the benefit reserved was not referable to any specified part or portion of the property but the entire property was subject to a charge for the payment of the sums to the deceased''s wife and unmarried daughter and, thus, the property would pass u/s 10 of the Act and not u/s 12 as held by the Assistant Controller. The Controller (Appeals) further held that the case of R. Kanakasabai and Others Vs. The Controller of Estate Duty, Madras, and others is different from the facts of the present case. In that case the Supreme Court has held that the property does not pass u/s 10 as the benefit to the donor by contract or otherwise is not referable to the gifted property and the provision for annual payment and maintenance was not charged on the property settled. In the present case, the provision for payment to the wife and the unmarried daughter has been made a charge on the gifted properties and, therefore, even according to the Supreme Court decision in the case of R. Kanakasabai (supra), the properties would pass u/s 10.

4. Not satisfied with the order of the Controller (Appeals) the assessee went up in appeal before the Tribunal. The Tribunal following the decision of the Madras High Court in the case of R. Kanakasabai (supra) and this Court''s decisions in the case of Rash Mohan Chatterjee v. CED (52 Suppl. containing Estate Duty cases, page 1) and also in the case of Shamsun Nehar Mansur v. CED [1969] 71

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ITR 301 (Cal.) was of the opinion that the entire value of the property cannot be included in the net principal value of the estate for the purpose of levy of duty but the value and the interest reserved for the settlor, if any, his wife and daughter shall be computed in accordance with the observation of the Madras High Court in R. Kanakasabai''s case (supra).

5. In this background, the Tribunal has referred for our opinion the following question:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that instead of the entire value of the house property only the value and the interest reserved for the settlor, if any, his wife and the daughter shall be included in the net principal value of the estate?

6. The gist of the settlement with regard to the subject property is that the same was settled in favour of his two sons subject to the absolute right of his wife till her death and of his unmarried daughter till her marriage to reside in and occupy, free of rent and charge, the top floor or the 5th floor of the property. There is a further stipulation that if the deceased-settlor during his lifetime discontinues or refuses to maintain his wife and unmarried daughter, they would be further entitled to the respective sums of Rs. 50 and Rs. 200 per month which could form the first charge on the property. The trust, however, came to an end during the lifetime of the settlor, the deceased, on 29-8-1968 on which date the trustees conveyed the property to the beneficiaries. The settlor, the deceased, whose estate is now the subject of duty died on 30-8-1974. The settlor pre-deceased the wife. The daughter also got married before his death. It is not the case of the department that the deceased had any time during his lifetime discontinued or refused to maintain his wife and unmarried daughter. The Assistant Controller invoked section 12(1) for the purpose of including the value of the entire property in the estate of the deceased-settlor. The provision of section 12(1) is in the following terms:

12. Settlements with reservation. -(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 reclaim 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

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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.

7. The Controller, however, made a departure in that he held that it is section 10 which is applicable in the case. However, this difference of opinion did not affect the ultimate conclusion as he upheld the inclusion of the entire value of the property in the estate of the deceased-settlor.

8. Now, the Tribunal held that the whole of the value of the property is not includible in the principal value of the dutiable estate. It is only the value of the interest reserved for the settlor, if any, and for his wife and daughter which have to be computed in the manner indicated by the Madras High Court in R. Kankasabai''s case (supra). If we analyse the question referred by the Tribunal, we find that the same has two parts -(1) whether the entire value of the house property is not includible, and (2) whether the value of the interest reserved for the settlor, if any, his wife and daughter is includible in the net principal value of the estate. It has to be recalled that the Controller invoked section 10 for the purpose of the inclusion of the entire value of the house property.

9. In this case the Tribunal relying on the principle laid down by the Supreme Court has concluded that unless the bona fide reserve was not referable to any specified portion of the property but the entire property was subject to a charge for the payment of the sums to the deceased''s wife and unmarried daughter, it is section 10 which attracts the case and not section 12. In the present case the provision for payment to the wife and unmarried daughter has been made a charge on the gifted properties. Therefore, following the decision of the Supreme Court it is section 10 which shall apply and if section 10 is applicable it is not correct to say that the entire value of the property should be part of the dutiable estate. Section 10 clearly indicates that only to the extent bona fide possession and enjoyment of the property or of any benefit to him by contract or otherwise is retained by the donor, the property shall pass on the donor''s death. Therefore, the Tribunal''s decision that the value of the entire property is not includible is correct. The position remains valid even though the benefit is of contingent nature as in this case, and such contingent benefit creates a contingent charge as the concomitant of the gift itself. This view has also the support of the Supreme Court in Controller of Estate Duty, Kerala Vs. R.V. Viswanathan and Others,

The other type of cases are those where the gift is subject to certain rights or the subject-matter of the gift is property shown of certain rights and the possession or enjoyment of some benefit in that property by the donor can be ascribed to those rights, i.e., rights subject to which the gift is made or rights shown of

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which the property is gifted; in such cases the subject-matter of the gift shall not be deemed to pass on the death of the deceased donor. To put it in other words, if the deceased owner delimits the interest he is parting with and possesses and enjoys some benefit in the property not on account of the interest parted with but because of the interest still retained by him, the interest parted with shall not be deemed to be part of the estate of the deceased donor passing on his death for the purpose of section 10 of the Act. The principle is that by retaining something which he has never given, a donor does not bring himself within the mischief of that section, nor would the provisions of the section be attracted because of some benefit accruing to the donor on account of what was retained by him. (p. 662)

10. Therefore, the conclusion which the Tribunal has arrived at is quite well-founded and gives no occasion for controversy. Accordingly, we answer the question in the affirmative and in favour of the assessee. The second part of the question as framed by the Tribunal is not affected by our answer even though the entire value of the property cannot be included in the net principal value of the estate. It remains open to the department to ascertain the value of the interest reserved for the settlor, if any, his wife and the daughter computable according to the observation of the Madras High Court in Kanakasabai''s case (supra). There will be no order as to costs.

Banerjee, J.

I agree.

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