

(1979) 10 MAD CK 0021

In the Madras High Court

Case No : Tax Case No. 24 of 1976 (Reference No. 5 of 1976)

Controller of Estate Duty

APPELLANT

Vs

S.M. Kamaluddin Fakri and Others

RESPONDENT

Date of Decision : 10-10-1979

Acts Referred:

Estate Duty Act, 1953 — Section 22, 40, 5, 58, 6

Citation : (1980) 124 ITR 98

Hon'ble Judges : Sethuraman, J; Balasubrahmanyam, J

Bench : Division Bench

Advocate : J. Jayaraman and Nalini Chidambaram, for the Appellant; P.M. Jummakhan, for the Respondent

Judgement

Sethuraman, J.—u/s 64(2) of the E.D. Act, at the instance of the Controller of Estate Duty, Madras, the following question has been

referred:

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the deceased was obliged to maintain all his male

descendants from out of the income of the property that remained after defraying the expenses for the maintenance of the mosque and

consequently it could not be said that the interest of the deceased extended to the whole income of the property?

2. The estate duty assessment came to be made on the death of one Abdul Khader Fakhri on 4th October, 1964. He left behind him his wife, 3

sons and 4 daughters. They did not file any account under the E.D. Act as, according to them, the property in respect of which the estate duty

proceedings were relevant, was a wakf property, and the deceased was only a mutawalli and hence no property could be said to have passed on

his death either u/s 5 or s. 6 or s. 22 of the Act. The Assistant Controller of Estate Duty tried to impress upon them the position of their liability

under the E.D. Act in the light of certain proceedings in the City Civil Court, Madras, to which reference will be made presently. In spite of it, there

was no return and, therefore, he made the assessment on 30th July, 1963, u/s 58(4) of the Act. In doing so, he rejected the claim of the

accountable persons that the entire property constituted a wakf. In his view, the finding of the principal judge, City Civil Court, Madras, was that

only a part of the property constituted a wakf. The property was of an extent of 95 grounds and 1,748 sq. ft. There was a mosque and a grave

yard thereon occupying an extent of 5 grounds and 1,748 sq. ft. The Assistant Controller excluded the same as constituting a wakf property

vesting in God Almighty. He determined the value of the remaining property, and took roughly about 1/3rd of the income as being utilised for the

maintenance of the mosque and other charity with remaining frds as having been utilised by the deceased for his maintenance. He determined the

value of the property passing on the death of the deceased at Rs. 8,00,000, that being frds of the total value of the property of Rs. 12,00,000 as

determined by him, and he levied estate duty accordingly.

3. The accountable persons appealed to the Appellate Controller and he confirmed the assessment. Thereafter, there was an appeal to the

Tribunal. The Tribunal, after elaborately considering the contentions, held that it was to be ascertained as to who all were entitled to be maintained

from out of the income of the property at the time of death of the deceased and that the value of the benefit of the deceased would have to be

evaluated accordingly. In the view of the Tribunal, if there were six persons other than the deceased, who were entitled to be maintained out of the

income of the property, then 1/7th of the value of the property would have to be taken as assessable to estate duty. The Assistant Controller was,

therefore, directed to make a fresh assessment in accordance with the findings of the Tribunal. It is as against this order of the Tribunal, the

Controller has obtained the reference of the question already extracted.

4. The proceedings before the City Civil Court, Madras, were commenced by the deceased filing a suit O.S. No. 1538 of 1960. The suit was for

a declaration that the entire suit property was not wakf property and that,

therefore, the State Wakf Board, Madras, was not entitled to notify the suit property as wakf property. The relevant facts, which led to the suit, are that the suit land with a small building thereon was gifted to an ancestor of the deceased, by the then Nawab of the Carnatic for his residence and maintenance in recognition of his piety and learning. The ancestor, by name Abdul Quadir, built a house and named it ""Farul Manzil"". He resided therein with his family and used it also as a place for private worship. There was also a prayer hall and a portion of the property was utilised as a burial ground for burying the members of the family who passed away. The rest of the property was cultivated and the income thereof was utilised for the maintenance of the family members and also for the maintenance of the prayer hall. Some improvements were effected to this property in the years 1919 and 1934. The property was notified as wakf property on 20th May, 1959, by the State Wakf Board. The suit was, therefore, brought for declaration that the property was not a wakf property.

5. The State Wakf Board, the defendant in the suit, resisted it contending that the entire suit property was only a wakf property, as it had been wholly dedicated for the maintenance of the mosque and the burial ground and for religious, pious or charitable purposes recognised by the Muslim law. The learned trial judge found that only the burial ground and the public mosque was wakf property and that the rest of the suit property was a private property. The State Wakf Board, therefore, filed an appeal, which came before the learned principal judge, City Civil Court, Madras. He went, into the question whether the suit property or any portion thereof was wakf property as contemplated by the Wakf Act, 1954, and whether the notification issued by the Wakf Board was illegal and void. He was not prepared to accept either the case of the Wakf Board or of the plaintiff (deceased) who took the extreme positions, one stating that the whole was wakf property and the other contending that the whole was private property. In the course of his judgment, the learned judge observed as follows:

It is true that there is no deed of dedication, but the evidence, the circumstances and probabilities of the case lead to the only conclusion that the entire property had been concurrently dedicated for the maintenance of the male descendants of the respondent's first ancestor and also for the maintenance of the mosque.....The respondent (the deceased) has sworn that he

and his ancestors have been maintaining the mosque and paying the mousin and pesh imam and have been maintaining themselves and their families only from out of the income of the suit property.

6. After finding that the dedication was for the maintenance of only the male descendants of the original founder, the learned judge observed in

para. 30 of his judgment as follows :

To sum up : The evidence clearly establishes that the suit property had been dedicated concurrently by the original founder, Shah Abdul Quadir,

for the maintenance of male descendants of his family and that the respondent (the deceased) and his ancestor had been in charge of the property

only as mutavalli. The net result is that the respondent has to maintain the mosque from out of the income of the suit property and is entitled to use

the balance of the income for the maintenance of himself and the members of his family. The suit property will be wakf-alal-aulad to the extent to

which it is dedicated for the maintenance of the mosque in the suit property.

7. It, therefore, followed that the notification issued by the Wakf Board in respect of the suit property to the extent to which it was inconsistent with

the above view was void. This judgment of the learned principal judge, City Civil Court, Madras, has become final.

8. The result of the finding of the City Civil Court about which there is no dispute, is that there is a partial dedication for charity and that the income

from the other part is to be utilised for the maintenance of the male descendants of the original grantee, Shah Abdul Quadir. The exact number of

male descendants eligible for the maintenance as on the date of death is not quite clear from the order of the Tribunal. However, this will be a

matter for being ascertained at the enquiry by the Assistant Controller.

9. The learned counsel for the revenue contended that the deceased was the mutawalli, that he was entitled to receive the whole of the income and

that, therefore, the estate duty assessment would have to cover the whole of the property remaining after exclusion of the wakf property.

10. Section 5 of the E.D. Act refers to the levy of estate duty on a property passing or deemed to pass on the death of a deceased person. Section

7 provides that property in which the deceased or any other person 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. Section 40 provides for the valuation of the benefits from interests ceasing on death. Under that section the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased should, if the interest extended to the whole income of the property, be the principal value of that property ; and if the interest extended to less than the whole income of the property, be the principal value of that part of the property equal to the income to which the interest extended. In the present case, the contention for the revenue is that this is a case where the deceased was entitled to the whole income after meeting the obligation of the charity and that, therefore, the whole of the remaining property would have to be taxed on the basis that the property passed on the death of the deceased. This submission, in our opinion, militates against the nature of the right which the deceased had in the property.

11. The Supreme Court in *Bibi Saddiqa Fatima Vs. Saiyed Mohammad Mahmood Hasan*, , set out the principles applicable to the ownership of wakf property, where part of it is to be utilised by the descendants of the original founder.

At page 1368, it is laid down as follows :

Strictly speaking, the ownership of the wakf property has no jural conception with any exactitude. The corpus is tied down and is made inalienable. Only the usufruct and the income from the corpus of the wakf property is available for carrying out the objects of the wakf.

At page 1369, it is stated as follows :

A mutawalli is like a manager rather than a trustee. The mutawalli, so far as the wakf property is concerned, has to see that the beneficiaries got the advantage of usufruct.

12. Their Lordships referred also with approval to Tyabji's Muslim law, 4th Edn., wherein it was pointed out that the mutawalli had no ownership right or estate in the wakf property and in that respect he was not a trustee in the technical sense. According to the learned author, the mutawalli held the property as a manager for fulfilling the purpose of the wakf. There was a contrary statement of law at page 202 of Mulla's Mohammadan Law, 17th Edn,, based on a decision of the Allahabad High Court to the effect that the mutawalli was not a mere superintendent or manager but

was, practically speaking, the owner. Their Lordships stated that it was not a correct statement of law. The relevant passage has been corrected in

the 18th Edn., in the light of a subsequent Full Bench decision of the same High Court.

13. The effect of the creation of a wakf as set out in Ahmed G.H. Ariff and Others Vs. Commissioner of Wealth Tax, Calcutta, , was quoted and

the quotation runs as follows :

As mentioned before, the moment a wakf is created, all rights of property pass out of the wakf and vest in the almighty. Therefore, the mutawalli

has no right in the property belonging to the wakf. He is not a trustee in the technical sense, his position being merely that of a superintendent or a manager.

14. Therefore, it is not possible to accept the contention that the entire income which the mutawalli realised from the property in so far as it related

to the non-charitable purposes, belonged to him and that he merely applied the income for the maintenance of the other male descendants of the

original grantee. The position of a mutawalli being merely to see that the beneficiaries got the advantage of usufruct, the income did not accrue to

him in any personal capacity. He was not in the position of a person who applied the income that was already his. The right to be maintained had

accrued to the male descendants of the original grantee as a result of the creation of the wakf. What the mutawalli did was merely to discharge his

obligation to see that the other members, who were entitled to be maintained, got their share of the amount due to them. In the light of the

indisputable legal position, the Tribunal was right in holding that the deceased was not liable to be taxed with reference to the entire portion of the

property remaining after excluding the wakf.

15. The further question that now arises is as to what is the value of the property which can be taken to have passed or deemed to have passed on

the death of the deceased. This would depend upon the number of persons, who would be entitled to be maintained out of the income from the

wakf property. Though in the absence of any document it was not possible to predicate that any particular share accrued to any particular

descendant and in the judgment rendered by the City Civil Court, Madras, also, there is no mention of any specific share accruing to any person, it,

would follow, as a matter of principle, that the entire income will have to be divided among the male descendants of the original grantee equally.

This principle also emerges from the pronouncement of the Supreme Court in the decision mentioned already at page 1369 of Bibi Saddiqa Fatima

Vs. Saiyed Mohammad Mahmood Hasan, . The Supreme Court quoted with approval a passage from Tyabji's Muslim Law, 4th Edn. The

relevant passage of the Supreme Court runs as follows (p. 1369):

Unless a different intention appears "the benefit of a wakf for a person's sons and his children and the children of his children for ever so long as

there are descendants, is taken per capita, males and females taking equally and the children of daughters being included".

16. In the present case, the female descendants are not entitled to be maintained from out of the property. In these circumstances, the number of

male descendants would have to be ascertained and the per capita rule would have to be applied.

17. The result is that the question referred has to be answered in the affirmative and in favour of the accountable persons. The accountable persons

will be entitled to their costs. Counsel's fee Rs. 500.