

(1980) 09 BOM CK 0006

In the Bombay High Court

Case No : Estate Duty Reference No. 7 of 1971

Controller of Estate Duty

APPELLANT

Vs

V. Melnikoff

RESPONDENT

Date of Decision : 09-09-1980

Acts Referred:

Estate Duty Act, 1953 — Section 21(1)
Succession Act, 1925 — Section 15, 16

Citation : (1981) 22 CTR 271 : (1982) 134 ITR 583 : (1981) 7 TAXMAN 63

Hon'ble Judges : Madon, J;Kania, J

Bench : Division Bench

Judgement

Kania, J.—This is a reference under s. 64(1) of the E.D. Act, 1953 hereinafter referred to as "the said Act"), made at the instance of the Controller of Estate Duty, Bombay City II. The question referred to us for our determination is as follows:

"Whether, on the facts and in the circumstances of the case, the deceased was domiciled in India at the time of her death ?"

2. The facts giving rise to this reference, as they emerge from the statement of the case, are as follows: The deceased, Mrs. Margaret Melnikoff, was born in Bombay on March 15, 1910. The first passport obtained by her is dated July 9, 1924, and that passport was issued by the Czechoslovakian Republic. In this passport the domicile of the said deceased is shown as in Vienna. On February 1, 1929, the deceased arrived in India, and in May, 1929, she married George Melnikoff. The second passport obtained by the deceased is dated January 18, 1932. That passport has been issued at Bombay by the passport officer to the Govt. of Bombay. In this passport the domicile of the deceased is shown as in Bombay. The national status of the said deceased is shown as follows:

"British subject by birth, wife of a British subject by naturalisation of Russian origin. Imperial certificate granted by the Government of India on November 17, 1926."

3. The entries in this passport show that the said deceased travelled abroad extensively in Europe in 1932 and returned to India in December, 1932. Further, the entries show that she travelled abroad in 1936, and in the course of these travels entered Austria more than once, and returned to India in 1936. On expiry, this passport was renewed up to January 18, 1941. The next passport obtained by the said deceased was dated June 28, 1956. That passport is a British passport. It does not contain any reference to the domicile of the deceased at all, but states India as the place of her residence. It may be noted here that in the earlier passport of 1932 there was no column to show the residence of the passport holder. The passport dated June 28, 1956, was revalidated up to June 28, 1966. There are no entries on this passport showing that the deceased travelled on the said passport. On September 27, 1954, George Melnikoff died in Bombay, and in the estate duty return filed in respect of his estate by the accountable person, who is also the accountable person and the respondent herein, the domicile of the said George Melnikoff was shown as in India. In the application made by the said deceased for a foreign liquor permit on March 7, 1964, there are statements showing that the said deceased was residing in India temporarily and had a fixed and settled purpose of making her sole and permanent home in Austria. Further, statements in that application are to the effect that the foreign liquor was being generally used or consumed in Austria where the said deceased was born and brought up or domiciled. On 9th October, 1965, the said deceased died in Bombay. The respondent made an enquiry with the police authorities as to whether the said deceased was liable to get herself registered under the "Registration of Foreigners" Act, 1946. On February 18, 1967, the police authorities concerned replied that the said deceased was liable for registration as a foreigner under that Act. It appears that in the estate duty return filed by the respondent in respect of the estate of the said deceased were included foreign bonds and stocks of the value of over rupees four lakhs and a further sum of Rs. 69,791 being the rupee equivalent of the moneys held in the foreign bank accounts of the said deceased in London, Sydney and South Africa. It may be mentioned that the main assets of the said deceased in India comprised of her share in the partnership firm of G. Melnikoff, which was valued at about Rs. 3,00,000 inclusive of the share of the said deceased in the goodwill. The question arose as to whether the said foreign movable property worth Rs. 4,33,066 owned by the said deceased was liable to estate duty under the said Act. The Third Asst. Controller of Estate Duty, Bombay, who made the assessment, held that the said deceased was domiciled in India at the time of her death and, hence, the said foreign movables were liable to the charge of the estate duty. The Appellate Controller before whom the respondent preferred an appeal came to the same conclusion. The respondent then filed an appeal before the Tribunal. The Tribunal came to the conclusion that the said deceased was not domiciled in India at the time of her death and, hence, the value of the said foreign movables was not liable to be included in the estate of the said deceased liable to the charge of the estate duty. It is this finding of the Tribunal which has given rise to the question set out above.

4. Before going into the contentions advanced by the respective counsel, it will be in order to refer to the relevant provisions of law. Part III of the said Act deals with exceptions from the charge of duty. Sub-section (1) of s. 21 of the said Act runs as follows:

"(1) There shall not be included in the property passing on the death of the deceased-

(a) immovable property situated outside India; (b) movable property situated outside India at the time of the death, unless -

(i) in the case of any property, whether settled or not, the deceased was domiciled in India at the time of his death; or

(ii) in the case of settled property of which the deceased was a life tenant, the settlor was domiciled in India at the date the settlement took effect."

Clause (d) of sub-s. (1) of s. 3 of the said Act, being the interpretation section, provides as follows:

"(d) the domicile of a person shall be determined as if the provisions of the Indian Succession Act, 1925 (XXXIX of 1925), on the subject applied to him and as if the Union territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry had always been part of India."

5. Part II of the Indian Succession Act deals with domicile. Section 6 of that Act provides that a person can have only one domicile for the purpose of succession to his movable property. Section 7 of that Act runs as follows:

"The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled... at the time of the father's death."

6. Section 9 of that Act provides that the domicile of origin prevails until a new domicile has been acquired. Section 10 provides that a man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin. There is an Explanation to s. 10 which states that a man is not to be deemed to have taken up his fixed habitation in India merely by reason of his residing there in the civil, military, naval or air force service of Government, or in the exercise of any profession or calling. Section 13 of that Act provides that a new domicile continues until the former domicile has been resumed or another has been acquired. Section 15 of that Act lays down that by marriage a woman acquires the domicile of her husband, if she had not the same domicile before. Section 16 of that Act provides that a wife's domicile during her marriage follows the domicile of her husband. There is an exception to this section which is not material for the purposes of this case.

7. The submission of Mr. Kotwal, the learned counsel for the department, in brief, is that, on marriage, the said deceased acquired by law the domicile of her husband, George, and during marriage her domicile followed that of George. It

was submitted by him that George resided in India and carried on business in India which showed that he had made India his permanent home and had his domicile in this country. It was contended by Mr. Kotwal that George had a long and uninterrupted stay in India which would lead to the inference that he intended to make India his permanent home. Mr. Kotwal further relied on the passport issued to the said deceased in 1932 which showed India as the place of domicile of the said deceased, and on the statement made by the respondent herein in the estate duty return of the said George which shows George's place of domicile as being India. It was contended by Mr. Kotwal that the entire approach of the Tribunal was incorrect as it had proceeded on the assumption that the said George was not domiciled in India, and was domiciled in the United Kingdom, although there was no finding to that effect. Mr. Kotwal placed strong reliance on the entry in the said passport of 1932 issued to the said deceased to the effect that she was the wife of George, a British subject by naturalisation and of Russian origin and the reference in the said entry to the certificate granted by the Govt. of India. It was urged by Mr. Kotwal that the provisions of the British nationality and Status of Aliens Act, 1914 (4 and 5 Geo. 5 c. 17) (hereinafter referred to as "the Naturalisation Act"), show that the said George who obtained a certificate of naturalisation under the Naturalisation Act must have stayed in India continuously for a number of years prior to the time when he made the application for naturalisation. As far as the said deceased is concerned, we must point out that it is quite clear from the record that her domicile of origin was not in India, although she was born in India. The first passport obtained by her in 1924, to which we have already referred, shows that her place of domicile was Vienna. The said passport has been issued by the Czechoslovakian Republic. The entries on p. 5 of the said passport show that the holder of the said passport, viz., the said deceased, belonged to the town of Bucovice in the district of Vyskov-clearly a place outside India. It must, however, be noticed at once that the crucial question in this case is as to what was the domicile of the said George at the time when he died, because the provisions of the Indian Succession Act, to which we have already referred, make it quite clear that on marriage the said deceased acquired the domicile of the said George if she had not the same domicile before, and during marriage her domicile followed that of the said George. Now, as far as George is concerned, it is clear from the entries in the said passport of the deceased obtained in 1932 that the said George was a person of Russian origin and had obtained a naturalisation certificate from the Govt. of India in 1926. This would clearly show that the domicile of origin of the said George was not in India. It is further the settled position in law that the ties which bind a person to the country of his domicile of origin are extremely strong and there must be cogent and reliable evidence that he intended to settle in some other country before he could be said to have given up his domicile of origin. What we have, therefore, to consider is, whether there is enough evidence in this case on which one could come to the conclusion that the said George had acquired a domicile of choice in India. The only circumstance in this connection which Mr. Kotwal was able to point out to us was that the said George

had a business in India and resided in India. We are afraid, this circumstance cannot lead to the conclusion that the said George had acquired the domicile of choice in India. There is nothing to indicate that he was residing continuously in India or that the residence which he had in Bombay for the purpose of his business was of such quality and character as would lead to an inference that he intended to settle down in India. As far as the circumstance that the said George had obtained a naturalisation certificate under the Naturalisation Act is concerned, a circumstance on which great reliance was placed by Mr. Kotwal, we find that this does not in any way indicate that the said George must have resided in India continuously for a number of years as suggested by Mr. Kotwal. Section 2 of the Naturalisation Act deals with the certificate of naturalisation to be issued by the Secretary of State. Section 3 thereof deals with the effect of a certificate of naturalisation, and s. 8 deals with the power of Governments of British possessions to grant certificates of imperial naturalisation. It is unnecessary to set out or discuss these provisions in detail, because it is accepted by both the counsel before us that under these provisions all that was required of a person for obtaining a certificate of naturalisation in India was that such person must have resided in India for one year immediately prior to the making of his application for such certificate, and during the period of seven years prior to that year he must have resided in any British possession for a period of four years. In view of this, all that can be inferred from George having obtained such a certificate of naturalisation is that he must have resided in India continuously for a period of one year prior to the making of the application for that certificate. Such continuous residence for a period of mere one year would in no way suggest that the said George intended to make India his permanent home. Similarly, the mere fact that the said George had a business in India would in no way suggest that he intended to settle down in India, because it is well known, as pointed out by this court in *Michael Anthony Rodrigues Vs. State of Bombay and Others*, that a large number of foreigners are known to have carried on business and still carry on business in India for a number of years without adopting Indian domicile.

8. It was next contended by Mr. Kotwal that in view of s. 2 of the Naturalisation Act, the said George must have made a declaration in his application for a certificate of naturalisation that he intended, if his application was granted, to reside in His Majesty's dominions. In the first place, such a declaration would in no way show an intention to reside in India, if the application was granted, but would merely show an intention to reside in some British dominion, it being well known that such dominions at that time extended all over the world. Secondly, as pointed out by the House of Lords in *Wahl v. Attorney-General* [1932] All ER Rep. 922; 147 LT 382 (HL), the declaration made for naturalisation that the applicant intended to reside permanently within the United Kingdom of Great Britain and Ireland would not be conclusive proof of the acquisition of a new domicile of choice. That was a case where the domicile of origin of the person concerned was in Germany. It has been observed by Lord Atkin in that case that

the learned trial judge appeared to have thought that the declaration, made for naturalisation, "to the aforesaid effect "meant that the applicant intended to continue to reside permanently within the United Kingdom of Great Britain and Ireland and had no intention of permanently leaving the United Kingdom was conclusive proof of the acquisition of a new domicile of choice. It was pointed out by Lord Atkin that the words" to the aforesaid effect "which occurred in the printed form of that application for naturalisation did not appear to have been prescribed by any regulations and went beyond the requirements of the statute. There are similar observations in the speech of Lord Warrington which show that the form of the declaration did not appear to have been issued with any official authority and it went beyond the requirements of the statute, which did not include any intention to "permanently" reside in the United Kingdom.

9. It was next urged by Mr. Kotwal that sufficient importance had not been attached by the Tribunal to the fact that in the passport obtained by the said deceased in 1932, as aforesaid, her domicile was mentioned as Bombay. It was submitted by him that this entry in the said passport showed that according to the deceased her husband, George, had formed a permanent intention to settle down in India when the application for the said passport was made. It was also urged by Mr. Kotwal that the Tribunal did not take into account the fact that in the estate duty return filed by the respondent in respect of the estate of the said George the domicile of the said George was mentioned as in India. We find, however, that in regard to these two circumstances certain explanations have been given on behalf of the respondent before the Tribunal. After taking the total evidence into account the Tribunal accepted these explanations and found that not much reliance could be placed on the aforesaid entry in the said passport of the said deceased obtained in 1932 or the statement to the effect that the said George was domiciled in India made by the respondent in the estate duty return filed by him in respect of the estate of the said George. Whether these explanations should have been accepted or not, as has been done by the Tribunal, is a matter of weighing and appreciating evidence, and it is not open to us, in a reference, to question the correctness of the Tribunal having accepted the explanations. In fact, this position is not disputed by Mr. Kotwal. In view of this, we fail to see how any importance can be attached to those circumstances. The result is that the only facts found by the Tribunal were that the said George had his domicile of origin outside India and that he resided in India for some time. Further, it is found that the said George had a business in India and resided in India to the extent required for the purpose of that business. Thus, in our view, there is nothing on the record to show that the residence of the said George in India was of such a character or quality as would lead to an inference that he intended to settle permanently in India or acquire a domicile of choice in India. The result of this would be that, on the material on record, it must be held that the said George retained his domicile of origin which was outside India till the time of his death in 1954. The domicile of the said deceased, being his wife, followed his domicile, and hence when he died in September, 1954, the domicile

of the said deceased must also be held to be outside India.

10. The question which has now to be considered is as to whether the said deceased acquired a domicile of choice in India after 1954. In this regard, the only contention of Mr. Kotwal was that by reason of her continuous stay in India from 1954 till she died on October 9, 1965, it must be held that she clearly had an intention to settle down in India, and acquire a domicile of choice in India. In this regard also, an explanation has been given, on behalf of the respondent, before the Tribunal, as to the reasons which prevented the said deceased from travelling outside India. These reasons have been accepted by the Tribunal on the appreciation and weighing of evidence, and it is not for us to consider whether the said explanation has been rightly accepted by the Tribunal or otherwise. That would be a question of appreciation of evidence and purely a question of fact. Moreover, the Tribunal has placed reliance on the declaration made by the said deceased in her application for a foreign liquor permit to the effect that she had a fixed and settled purpose of making her sole and permanent home in Austria. It is true, as urged by Mr. Kotwal, that this by itself would not give the deceased a domicile in Austria, if she did not have that domicile before, because it is common ground that after the death of her husband, the said George, the said deceased had not gone to Austria. The aforesaid statement made by the said deceased in her application does, however, show that it was not her intention to make India her permanent home. Considerable reliance has been placed by the Tribunal on this statement. In our view, therefore, there is no such evidence on record as would establish that the deceased had an intention of making India her permanent home after the death of the said George, and in view of this it cannot be said that after the death of the said George the said deceased acquired her domicile of choice in India. It may be noted here that it was submitted by Mr. Kolah that the domicile of origin of the said deceased was in Austria and that on the death of the said George that domicile automatically revived. Speaking for ourselves, we have some doubt regarding the correctness of this contention. However, it is not necessary for us to go into the same as we have held that even at the time when the said George died the domicile of the said deceased was outside India.

11. In the result, the question referred to us for our opinion is answered in the negative. The applicant must pay to the respondent the costs of this reference.