
(1977) 12 BOM CK 0010

In the Bombay High Court

Case No : Estate Duty Reference No. 3 of 1968

Controller of Estate Duty, Bombay City-I

APPELLANT

Vs

Sultan Alam Khan

RESPONDENT

Date of Decision : 09-12-1977

Acts Referred:

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

Citation : (1979) 116 ITR 360

Hon'ble Judges : M.N. Chandurkar, J;Desai, J

Bench : Division Bench

Advocate : R.J. Joshi, for the Appellant; S.E. Dastur, for the Respondent

Judgement

Chandurkar, J.—At the instance of the revenue, the following question has been referred to this court under s. 64(1) of the E.D. Act, 1953 :

"Whether, on the facts and in the circumstances of the case, the property under consideration would pass on the death of the settlor under s. 12 of the Estate Duty Act ?"

2. One Mahumuden Nissa Begum died on 28th October, 1961. She along with her husband had created a waqf-alal-aulad by a deed dated 21st February, 1938, constituting the settlors as the trustees and the waqf was for the benefit of their children. The material clause, on the construction of which the decision of the question referred depends, reads as follows :

"Provided always that the settlors during their joint lives and after the death of either of them, their survivors shall be the sole managing trustees or trustee of these presents and the said third trustees Nawabzada Meer Sultan Alam Khan Saheb or any other person or persons shall not be entitled to interfere with the management of the trust premises or in the execution of the trusts created by these presents until the deaths of the settlors and further that it shall be lawful for the present trustees, during their respective lives and after the death of the last survivor of them, for such of the lineal descendants in the direct line of the

present trustees as shall be appointed the trustee or trustees of these presents to occupy one of the flats of the trust premises and one motor garage free of rent during their respective lives, so as to enable such trustee or trustees to better manage the trust premises."

3. The trust property consisted of a building known as "Belha Court" and the flat which the deceased was entitled to occupy as a managing trustee was only a part of the trust property. The effect of this trust was that 17% of the net income was to be carried to a reserve fund for carrying out repairs to the trust property and the remaining 83% of the income was to be paid the settlors during their joint lives for their absolute use and benefit and in case of prior death of the deceased's husband such balance was to be paid to the deceased for her absolute use and benefit, and the trustees under the terms of the deed could occupy one on the flats of the trust premises and one motor garage free of rent. One of the settlors, i.e., the husband of the deceased, died on 18th May, 1943, and thereafter the deceased was entitled to receive 83% of the income and as a trustee she was entitled to occupy a flat and to use a garage in the settled premises.

4. The deceased by a document dated 2nd February, 1954, relinquished all her right, title and interest in the balance of the income of the trust property payable to her during her lifetime as provided by the waqf dated 21st February, 1938. The effect of this deed was that though she relinquished all her right, title and interest in the balance of the income or produce of the trust property during her life for her own absolute use and benefit the other provisions contained in the deed of waqf were not in any way affected and they were to remain in full force and operation and the deceased was during her lifetime to be the sole managing trustee of the waqf deed with the same powers of management and supervision as were contained in the original indenture of settlement. It was expressly provided in the document that except for what was stated in the said release deed, all the provisions contained in the said indenture of waqf shall remain unaffected and binding on the trustees for the time being of the said indenture of settlement.

5. After the death of the husband, the deceased was occupying as a trustee the second floor of the property called "Belha Court". In proceedings relating to the assessment of estate duty, the Asst. CED invoked the provisions of s. 11 of the E.D. Act and held that since the deceased resided in "Belha Court" rent-free and her household expenses were met by her son, who was one of the releasors, after the release deed, the deceased derived some benefit referable to the trust property and s. 11(2)(a) was, therefore, infringed. He took the view that if the deceased had taken another residence of similar type, the rent of such a flat would have clearly exceeded Rs. 150 per month. Consequently, the Asst. CED added the value of the property of Rs. 3,10,297 to the estate of the deceased under s. 11(1) of the E.D. Act.

6. Apart from the challenge made to the order of the Assistant Controller

invoking s. 11(1) of the Act in appeal a further contention was raised that funeral expenses of the deceased were not allowed. The appellate authority, however, took the view that s. 12(1) of the E.D. Act was attracted in the instant case inasmuch as the deceased, who was the managing trustee during her lifetime and a settlor, had reserved to herself the right to reside in one of the settled premises free of rent during her lifetime and even under the release deed dated 2nd February, 1954, the right to occupy one of the flats free of rent was specifically reserved by one of the settlors. He took the view that the interest as reserved was not surrendered or terminated till the date of her death and, therefore, the whole value of the property known as "Belha Court" was dutiable under s. 12 and not under s. 11 of the E.D. Act.

7. The Tribunal, while dealing with appeal, has recorded a finding that the deceased personally had no interest either in the trust property or in the income therefrom after the execution of the release deed dated 2nd February, 1954, and after the release, all that she was entitled to, was to occupy a flat as a trustee so that the property could be managed properly and efficiently. The Tribunal further recorded a finding that the deceased had a right to reside in the flat as a trustee and not as a settlor and that the persons who derived the benefit, because of the surrender, had immediately acquired a right as provided for under the deed of trust and they had also assumed bona fide possession and enjoyment of the same. On the construction of the trust deed, the Tribunal took the view that what was done by the original waqf deed was that a direction was given that the trustees, whoever may be the trustees for the time being, would be entitled to occupy a flat and a garage and, therefore, no benefit accrued to the deceased out of the property or interest which she had given up because the capacity of the settlor is different from the capacity as a trustee and the settlor had not, therefore, reserved to herself, as a settlor, any interest in the property. The Tribunal, while considering whether the provisions of s. 12 were attracted, took the view that what was to be examined was really the capacity in which the deceased lady was in possession of the property and further recorded a finding that she was in possession of the property as a trustee and not as a settlor as such and that the beneficiaries were not excluded from the possession or enjoyment of the property. In this view of the matter, the Tribunal held that there was no property which would pass on the death of the settlor as contemplated by s. 12 of the E.D. Act. On these facts, the question reproduced above has been referred to us.

8. It was argued by Mr. Joshi appearing for the revenue that on the finding that the deceased was in possession of the flat and that by the terms of the original waqf deed it was intended that the settlors were to have a right to occupy one of the flats in the trust property, it must be held that an interest in the flat was reserved expressly by the settlors and that on the death of the deceased settlor that interest had ceased and, therefore, at least the value of the flat was liable to be included as a part of the assets for the purposes of the assessment of the estate duty. This contention will have to be negated, firstly, on the findings

recorded by the Tribunal and, secondly, on the terms of the original waqf deed. The material part of s. 12(1) of the E.D. Act, which alone is relevant for the purposes of this case, reads as follows :

"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."

9. Now, quite clearly, it is only the first part of s. 12(1) which is material for the purposes of the present case. Unless it is possible for the revenue to establish that an interest in a part of the "Belha Court" property was reserved by the settlor for himself for life or any other period determinable by reference to the death of the settlor, the revenue would not be able to invoke s. 12(1) of the Act. If we go to the original waqf deed, the material clause of which has already been reproduced earlier, the intention of the settlors, having regard to the nature and the concept of the waqf under the Mohamedan law, is clear that the waqf is made in respect of the entire property called "Belha Court". The effect of the clause reproduced earlier, in our view, is that provision was made by the settlors to the effect that a trustee was entitled to occupy a part of the trust property and the purpose of making this provision, on the terms of the waqf deed, was that it would enable the trustee or trustees to better manage the trust premises.

10. So far as the waqf deed is concerned, there can be no doubt that the settlement has been effected in respect of the entire trust property, viz., the "Belha Court". The clause relating to the trustee being able to occupy one of the flats in order to manage the trust property is in fact a part of the arrangement relating to the management of the trust property itself. If the property, which was immovable property, had to be managed, it cannot be said that the settlors were unjustified in making provision for a trustee to reside in the trust premises, and it cannot be disputed that such an arrangement was clearly conducive to the better administration and management of the trust property. Merely because the settlors were themselves the trustees, it did not affect the fact that the flat was to be made available to a person who held the office of the trustee and occupation of the flat was incidental to holding the office of the trustee under the waqf deed. This is not a case where the right to occupy the flat was created in favour of the settlors themselves, but that right could be availed of by any person who occupied the office of the trustee. Such a provision cannot be read as amounting to reservation of any interest by the settlors in the property settled by the settlors. The Tribunal has, in our judgment, rightly taken the view that the deceased was in possession of the trust property in her capacity as a trustee and not as a settlor as such. It, therefore, appears to us that an error can be found in the approach made by the Tribunal so far as the provisions of s. 12 were

concerned.

11. In this view of the matter, the Tribunal must be held to be justified in holding that s. 12 of the E.D. Act was not attracted in the instant case and the question referred to us is, therefore, answered in the negative and against the revenue. The revenue to pay the costs of the this reference.