
(1958) 11 BOM CK 0032
In the Bombay High Court

Khatizabai Mohomed Ibrahim

APPELLANT

Vs

Controller of Estate Duty, Bombay

RESPONDENT

Date of Decision : 03-11-1958

Acts Referred:

Estate Duty Act, 1953 — Section 10, 12, 3(3), 5

Citation : (1959) 61 BOMLR 719 : (1959) 37 ITR 53

Hon'ble Judges : S.T. Desai, J;K.T. Desai, J

Bench : Division Bench

Advocate : N.A. Palkhivala, for the Appellant; G.N. Joshi, for the Respondent

Judgement

S.T. Desai, J.—This reference under the Estate Duty Act raises a question of considerable importance and interest affecting the levy of estate duty on property which may be the subject of a wakf-al-ulad. The settlement, we have to consider, was created by Aishabai, a wealthy Memon lady who was a Hanifa Mohammedan. The facts are simple and we shall only give a broad outline of the relevant facts supplementing it if occasion demands. The deed of wakf, which we shall presently examine, was made on 31st March, 1951. It accords with the requirements of the statute on the subject. There is permanent dedication of property for the benefit of the poor and other purposes recognized by the Musalman law a religious, pious or a charitable purpose of a permanent character. The ultimate benefit to the charity is postponed until the extinction of the descendants of the wakif. There is the usual provision relating to maintenance and support of the settlor during her lifetime and for the maintenance and support of her family consisting of her daughter and the children of that daughter from generation to generation. Mutavalis were appointed, the settlor herself being one, and the property was conveyed and transferred to them. The property settled by the wakifnama consisted of 12 Immovable properties of large value and a sum of Rs. 1 lakh. It is the provisions for maintenance contained in the deed that have given rise to the dispute between the Revenue and those who represent the estate of Aishabai. The settlor reserved for her maintenance during her lifetime 62 1/2% of the net income, 3

1/8% of the income was given to her daughter Khatizabai for her maintenance and the remaining 34 3/8% was given of the maintenance of Khatizabai's children, the share of each male child being double that of each female child. Clauses 5 and 6 of the deed are material and relate to reservation and dispositions after the demise of the settlor :

"5. From and after the demise of the wakif, the mutavalis shall out of the said 62 1/2% of the net income hereinabove directed to be paid to the wakif set apart 9 3/8 per cent. and add the same to the said 3 1/8 per cent. of the income hereinabove directed to be paid to the said Khatizabai and shall add the remaining 53 1/8 per cent. to the said 34 3/8 per cent.... to be distributed among the children of the said Khatizabai and their descendants so that after the death of the wakif, 12 1/2 per cent. of the net income shall be paid to the said Khatizabai and the remaining 87 1/2 per cent. of the net income shall be distributed among the children and descendants of the said Khatizabai in the same manner and to the same extent as hereinabove mentioned in clauses 4(b) and 4(c) hereof for the benefit of the said Khatizabai and her children and their descendants respectively.

6. From and after the death of the survivor of them the wakif and the said Khatizabai, the whole of the net income shall be dealt with and distributed among the children of the said Khatizabai and their descendants in the same manner and to the same extent and in accordance with the same proportion and method of distribution as hereinabove mentioned in clause 4(c) hereof."

2. Reference may briefly be made to the sum of Rs. 1 lakh settled by the deed. The mutavalis were directed to credit that sum of Rs. 1 lakh to an account called "extraordinary heavy repair fund account" and invest the moneys so credited in such security or securities as they may think fit. The mutavalis would be at liberty to make use of and apply the moneys to the credit of the said account as may be required.

3. Aishabai, the settlor died on 2nd August, 1954. The Collector of Estate Duty included all the properties in the estate duty assessment u/s 12 of the Act. With regard to the sum of Rs. 1 lakh also, he took the view that the sum was credited to an account as directed and the moneys had been invested in Government paper, but the income from the investment had been enjoyed by the deceased and her daughter and grandchildren in the same proportion in which they enjoyed the income from the settled properties. Being of that view, he assessed that sum of Rs. 1 lakh also to duty u/s 12 of the Act. The matter was carried in appeal to the Central Board of Revenue. The contentions which are presently before us were raised by the parties before the Board and we shall presently examine them. The Board rejected the appeal and the applicant has come before us on this reference.

The question we are asked to determine is :

"Whether in the facts and circumstances of the case, the entire wakf property

(including the sum of Rs. 1 lakh) or only 62 1/2 per cent. of the wakf property (including 62 1/2 per cent. of Rs. 1 lakh) is chargeable to estate duty ?"

4. On this question, numerous points arise for discussion. To state it without refinement, the principal and the crucial question is what property passed on the death of the settlor ? The contention in the forefront of the argument of Mr. Palkhivala, learned counsel for the applicant, has been that there was actual passing of the interest of Aishabai, the settlor, on her death. That interest being 62 1/2 per cent. of the income, the property that can be brought to death duty can only be 62 1/2 per cent. of the corpus and not the whole of it as held by the Board. Reliance has been placed on section 5 of the Act and the main argument is that section 12 on which the Revenue has taken its stand - and which is one of the provisions relating to "property which is deemed to pass" - has been erroneously applied by the Board. The archstone of the contention is that the law on the subject laid down in sections 1 and 2(b) of the English Finance Act, 1894, which deals with estate duty is the same as laid down in the relevant provisions of our Estate Duty Act and in support of the contention counsel has relied on certain decisions of courts in England and particularly on the case of Earl Cowley, a decision of the House of Lords. The contention of the Revenue is that the whole corpus passed on the demise of Aishabai. It is urged that the decision of courts in England on the question are on sections which are not wholly similar and what is stressed is that though a number of provisions of the English enactment have been adopted in the Estate Duty Act, the scheme of the latter enactment is different. It will facilitate the appreciation of the rival contentions if we start with an examination of the scheme of our Act. Before turning to the decision of courts in England very strongly relied on by Mr. Palkhivala, it seems convenient and indeed necessary to gather the meaning and effect of the relevant provisions of our Act read in their proper context and having regard to the scheme of the Act. The material language of the sections has always in these matters to be borne in mind before seeking aid and guidance from observations made in the course of interpretation of analogous provisions even though they are in *pari materia*. Of this more hereafter.

5. To turn to the scheme of the Act and the provisions with which we are mainly concerned on this reference. The estate duty is imposed by section 5, which is the charging section and the relevant part of it is in following terms :

"(5). (1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the States specified in the First Schedule to this Act, which passes on the death of such person, a duty called "estate duty" at the rates fixed in accordance with section 35."

6. The section applies to the case of every person dying after the Act came into operation. It speaks of the imposition of levy and payment of the same which is to be upon the principal value of property to be ascertained in accordance with

certain other provisions of the Act. It embraces property settled as well as not settled and it touches property on the death of a person. The expression "property" is defined in section 2(15) as including "any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale and also includes and property converted from one species into another by any method." The expression "settled property" is defined in section 2(19) to mean :

"Property which stands limited to, or in trust for, any persons, natural or juridical, by way of succession, whether the settlement took effect before or after the commencement of this Act."

7. The expression "property passing on the death" has been defined in section 2(16) which is as under :

"Property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and "on the death" includes "at a period ascertainable only by reference to the death".

8. It will be noticed that the word "passing" has not been defined in the Act, and what is the meaning of the word "passing" is perhaps the only point about which there is no controversy in this reference. Learned counsel for the applicant and learned counsel for the Revenue are agreed that the meaning of the expression "passing" in the Indian enactment is the same as has been given to that word in decisions of courts in England. It is clear that the expression "passing" is not used in the Act in any technical sense. It has been held that the very general words "passes" is not a technical word but one capable of the widest possible meaning and has been used as language to be understood by ordinary people and not in a technical sense. Again it has been said that the expression "passing on death" which is not further defined is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. It has also been said that changing of hands may convey the meaning of passing of property. The oft-quoted meaning of this expression is this : To ascertain whether a property has passed, the comparison must be made between the persons beneficially interested the moment before the death, and the persons so interested the moment after the death. This definition by Lord Russell in a House of Lords case has not been improved upon by any Judge and with respect, the identical expression in our enactment has the same meaning.

9. The purpose and object of Parliament was to impose a levy on property passing on death of a person and Parliament being fully conscious of human ingenuity and devices that might be adopted to avoid the operation of the imposition has proceeded to lay down a catena of rules headed "property which is deemed to pass". This has been done in sections which immediately follow section 5. It will suffice at this stage to state some of those sections 6 to 16 to gather an idea of the scheme of the Act and while doing so we shall set out

sections 9, 10 and 12 on which certain arguments have been advanced before us.

"6. Property within disposing capacity. - Property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death.

7. (1) Subject to the provisions of this section, 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, including, in particular, a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Alyasantana law.

8. Gifts mortis causa. - Property taken as a gift made in contemplation of death shall be deemed to pass on the donor's death.

9. Gifts within a certain period before death. - (1) Property taken under a disposition made by the deceased purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust, settlement upon persons in succession, or otherwise, which shall not have been bona fide made two years or more before the death of the deceased shall be deemed to pass on the death :...

(2) the provisions of sub-section (1) shall not apply to gifts made in consideration of marriage or which are proved to the satisfaction of the Controller to have been part of the normal expenditure of the deceased, but not exceeding rupees five thousand in the aggregate.

10. Gifts whenever made where donor not entirely excluded. - Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

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.

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.

(2) Notwithstanding anything contained in sub-section (1), where property is settled by a person on one or more other persons of their respective lives and after their death, on the settlor for life and thereafter on other persons and the settlor dies before his interest in the property becomes an interest in possession, the property shall not be deemed to pass on the settlor's death within the meaning of this section.

13. Joint investments. - Where a person, having been absolutely entitled to any property or to the funds with which any property was purchased, has caused it to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, either by himself alone, or in concert, or by arrangement, with any other person so that the beneficial interest in some part of that property passes or accrues by survivorship on his death to the other person, the whole of that property shall be deemed to pass on the death."

10. Section 11 deals with limited interest disposed of within a certain period before death. Section 14 deals with policies kept up for a donee. Section 15 relates to annuity or other interest purchased or provided out of property derived from the deceased. Section 16 brings within the fold of taxation property transferred to a controlled company. Although, the sections 6 to 16 were headed "property which is deemed to pass" and proceeded to embrace all types of property and interest in property, there was no express provisions in the Act when enacted in 1953, that duty was leviable on property deemed to pass. A plain reading of section 5 would have meant that the section only touched property which would ordinarily pass on the death of a person under the general law. In a taxing statute this was a serious lacuna and that was amended by the Finance Act of 1954, by adding sub-section (3) to section 3 :

"For the avoidance of doubt, it is hereby declared that references in this Act to property passing on the death of a person shall be construed as including references to property deemed to pass on the death of such person."

11. We have examined the scheme of the English enactment and it will be convenient here to dispose of the argument urged on behalf of the Revenue that the scheme of our Estate Duty Act is different from that of the English Finance Act of 1894. Section 5 of the Estate Duty Act is in material with section 1 of the English statute. Section 2 of that enactment deals with what property is deemed to pass and the initial words are : "property passing on the death of the deceased shall be deemed to include the property following, that is to say..." Then follow a series of clauses the language of which has been substantially adopted in similar provisions relating to "property which is deemed to pass" enacted in sections 6 to 16 of our Act. The reason for enacting section 3(3) becomes manifest when it is noticed that in the English enactment the initial words of section 2 clearly brought out the operation of the provisions relating to property deemed to pass. It is not necessary to go into a detailed comparison of

all the relevant provisions of the enactments and it will suffice to observe that the scheme of the two enactments is substantially the same. Certain provisions of the two enactments particularly those to which reference has been made in the argument before us and with which we are here concerned are also substantially the same. They are in *pari materia*. Section 9 of our Act corresponds to section 38(2)(a) of the Customs and Inland Revenue Act of 1881. Certain provisions of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act of 1889 were incorporated by reference in section 2(1)(c) of the Finance Act of 1894. Section 10 of our enactment also has a corresponding provision in the English Act. Section 12 of our Act corresponds with section 38(2)(c) of the Customs and Inland Revenue Act of 1881 as amended by section 11 of the Customs and Inland Revenue Act, 1889. Section 13 of our Act corresponds to certain provisions in the Customs and Inland Revenue Act mentioned above. The wording of the relevant sections in the English enactment has been freely and in most cases bodily adopted in the Estate Duty Act. On analogous provisions of the Indian law unaffected by the specialities of the English law and on fundamental concepts and on broad general principles, decisions of courts in England can, therefore, be useful and of considerable guidance if utilised with due care and caution. While we do not accede to the argument of Mr. Joshi that the scheme of the two Acts is different, we agree that the provisions of our Act must be understood in their background and setting and in interpreting them regard must be had to the conditions, customs and religious beliefs of those affected by the provisions. In a branch of the law, rules of which are inspired by the broad general principles of the English law on the subject and are so adopted as to be in *pari materia*, reference to the decisions under that law can be of great importance. Danger, however, lies in phrases used aptly enough, no doubt, in a particular context and opinions weighty and useful in their own sphere and context being treated as expressing doctrines of universal application or adopting those principles as riders to the actual statutory language. The rule of construction relating to provisions of enactments in *pari materia* is one of great convenience and aid from outside may legitimately be derived when any doubtful point of interpretation of any provision has to be solved. But reference to it simply on the ground of similarity has to be avoided. Rigid adherence to any of those decisions must be deprecated and particularly when they have some bearing on the English law of property when it is highly technical and over-refined rules affecting realty which operated when the English enactment came into force.

12. It is well settled that it is incumbent on the Revenue to establish that its claim comes within the very words used and the subject cannot be taxed unless there are words clear enough to impose taxation. The presumption is that the Parliament has granted precisely that tax to the Revenue which it has described and no more. The burden is upon the Revenue to bring the subject within a charge. This does not mean that there has to be any discrimination against the Revenue or deliberate weighing in favour of the subject. The observations of

Rowlatt, J., so often quoted in Income Tax matters are appropriate to the subject of death duty and have been cited with approval by the House of Lords in England as equally applicable in estate duty cases :

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used."

13. Nor is there anything like an equitable construction of a statute. It has often been said and this court also has often said that in a taxing statute we have no governing principles to look at. We have simply to go on the Act itself and see whether the levy claimed under it is that which Parliament has enacted. It is not for us to approach the case with considerations of what is fair and what is equitable or permissible. Of course, the court will not readily accept that any glaring injustice could have been intended by the law-maker. One safe guide is to see what is the meaning of the words used in the statute when they are plain and unambiguous and do not lead to ambiguity or repugnance. The safest and infallible guide to the interpretation of any legislation is to gather all the Legislature itself has thought necessary to say about the matter or subject.

14. It is in the light of these observations that we shall in the first instance proceed to read the vital clauses of the statute relevant to our enquiry and see if we can ascertain the intention of the law-maker in enacting sections 5 and 12 uninfluenced by any extrinsic evidence. Now, we have already set out section 3(3) and sections 5 and 12 of the act and it is evident that for the purpose of the present reference, they must be read together. It will be convenient to write out the material part of section 5 with the rule of interpretation enacted in sub-section (3) of section 3 and then consider it with section 12. In that way the material part of section 5 would read as under :

"In the case of every person dying after the commencement of this Act, there shall,... be levied and paid upon the principal value ascertained... of all property, settled or not settled,... which passes on the death of such person - including property deemed to pass on the death of that person - a duty called "estate duty" at the rates fixed in accordance with section 35."

15. Section 5 to 17 are in Part II of the Act and that Part is headed "imposition of estate duty." The heading of section 5 is "extent of charge" and the heading of section 6 to 16 is "property which is deemed to pass". One thing is clear from the incorporation of sub-section (3) of section 3 by the amendment made in 1954 that any of the provisions relating to property which is deemed to pass have to be read along with section 5, and not in any manner divorced from section 5 or in water-tight compartments. So read, section 12, to our mind, is plain legislation. There is no ambiguity about it; there is no repugnance about it and there is no expression in it which can be said to cause any difficulty of interpretation or any doubt about the intention of the law-maker. Read in the

context of section 5, the only meaning that can be given to the art of it relevant for the purpose of this reference seems to us to be this : In case of any settlement made by the deceased by a non-testamentary instrument in respect of any property if the settlor has reserved any interest in such property for life, his absolute interest in such property would be deemed to pass on his death. It is clear that the Legislature has in enacting this section ruled that where in case of settlement of any property made by the settlor he has reserved, but the whole of such property in which that interest was reserved shall be deemed to pass on his death. We put this to learned counsel for the applicant and the answer was that the language of the corresponding provisions in the English enactment is in *pari materia* and the general proposition which he has advanced for our acceptances is equally applicable to the provisions of section 12. It said that if that general proposition is right, then section 12 would not govern this case. We shall presently examine that general proposition which is to the effect that if a case falls directly u/s 5 and there is actual passing there is no scope for applying any of the "deeming" provisions. In the absence of any overriding principle or compelling authority the conclusion would be irresistible that the Legislature has laid down in section 12 the special rule that in case of settlement of any property with reservation although less may pass by application of the general rule laid down in section 5 (only the interest which was reserved) the whole of such property of the settlor the subject-matter of the settlement in which he has reserved any interest, for life, shall none the less be deemed to pass. The language of the section and the plain, fair and literal meaning of it does not present any doubt or difficulty. We have, therefore, to see if there is any overriding principle which requires that we should depart from the cardinal rule of interpretation according to which the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or some inconsistency with the rest of the enactment.

16. The principal contention pressed before us by Mr. Palkhivala, learned counsel for the applicant, is that distinction has to be drawn between "actual passing" of property or any interest in such property and "deemed passing of property". In the former case, it is said, section 5 must be applied to the exclusion of any of the provisions relating to all property which is deemed to pass under any of the sections 6 to 16; and this must be so even if the case falls wholly within the ambit of any such provision contained in any of those sections. If the property or any part of the property passes on death, it is not permissible to refer to any of those sections - no matter what they say - because they speak only of what is deemed to have passed. The argument is that in the Act there are two categories of rules; one the provisions in section 5; the other, the provisions of sections 6 to 16; and the two categories it is emphasized are mutually exclusive. It has been urged that where under a settlement like the one before us, a specific percentages of income - an aliquot share of the income - of the property is reserved to the settlor under a settlement made by him, what can be brought to charge is not the absolute interest which the settlor had in that property but only

a proportionate part of the corpus. Here, the specific percentage of the income reserved was 62 1/2 per cent. of the property can be brought to charge u/s 5. The fact that the case is wholly covered by the language and scope of section 12 which expressly deals with such a settlement and such reservation of interest, it is said, is of no consequence.

17. The whole argument has rested on the decision of the House of Lords in Earl Cowley's case on which counsel has heavily leaned and we shall now turn to examine the facts of that case and state the ratio decidendi of it. In that case, father and son tenant for life and tenant in tail respectively, executed a disentailing deed by which they granted the estate to a trustee to hold freed from the estate tail to such uses as they should jointly appoint. In exercise of that power father and son, mortgaged the estate in fee simple to a company to secure a loan part of which was advanced for the benefit of the father and part for the benefit of the son. With part of the loan prior incumbrances on the father's life estate were paid off, and the company took an assignment of the debts and all the assignor's rights and powers of recovery as further security for the loan. Father and son then executed a deed of resettlement by which the estates were charged with an annuity to the son payable during the father's life and subject thereto were declared to be held in trust for the father for life and after his death for the son for life with remainders over. Upon the father's death in 1895, the Crown claimed from the son under the Finance Act, 1894, estate duty upon the gross value of the estates without allowing any deduction in respect either of the mortgage to the company or of the annuity which ceased with the father's life. It was held that the settlement which passed to the son on the father's death was not the entire estate but only the equity of redemption and the estate duty was, therefore, payable only on the equity of redemption. The ratio decidendi of that case evidently is that in case of a deed of settlement of the nature which was under consideration, if there were prior encumbrances and an annuity reserved what would pass on the death of the annuitant cannot be the whole estate but only the equity of redemption. In the course of this speech in that case Lord Macnaghten, however, made certain observations which dicta have been considered thereafter in a number of cases. Since so much reliance has been placed on the dicta of Lord Macnaghten in that case, we shall first turn to the observations made by that eminent Law Lord at pages 212-213 of the report :

"But section 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section. For property in the lifetime of the deceased subject to a charge or interest which ceased on the death must of course pass free from that charge or interest. And, so passing, it must of course be valued accordingly. That is section 1. You do not want section 2 for that. You cannot resort to section 2. For that would be giving the duty twice over. The Crown cannot have it both ways. Double duty is forbidden by the Act."

18. Lord Davey agreed in that case with the views expressed by Lord Macnaghten as to the construction of the Act. The Lord Chancellor, Lord Halsbury observed at page 207 :

"I see no ground for dealing with section 2, since, for the reasons I have given, I think it is section 1 to which you must look to see what property real or personal, settled or not settled, passed upon the death of the second to the third Earl; but if I were compelled to give a construction to section 2 sub-section 1(b), I should come to the same conclusion in respect of the liability to duty, since I think the benefit accruing or arising to the third Earl was only to the extent of the value of the equity of redemption. But, as I have said, the question must be determined on section 1 alone."

19. It will be seen that the Lord Chancellor did not express any view as to the dicta of Lord Macnaghten and confined his opinion strictly to the question whether the duty could be imposed on the whole estate or only to the equity of redemption. Lord Morris also in his speech confined his opinion to the question of equity of redemption passing on the death of the father. Lord Shand also in that case confined his opinion to the same point. It is the dicta of Lord Macnaghten that have been relied upon by Mr. Palkhivala. Now, the history of those dicta of Lord Macnaghten is very interesting and requires to be noted. But before we do so, it will be convenient if we refer to some other cases to which our attention was drawn by learned counsel on either side.

20. Section 1 and sub-section (1)(b) of section 2 of the English enactment also came up for consideration in *Christie and Others v. Lord Advocate*. In *Earl Cowley's* case also the sections under consideration were section 1 and sub-section (1)(b) of section 2. At page 576 of the report, Lord Russell of Killowen referred to the dicta of Lord Macnaghten in *Cowley's* case and observed that the property which had passed on death in that case fell within the ambit of section 1 of the Act. This decision was also cited for the purpose of showing that a percentage of income of a property, the subject-matter of the settlement, can be reserved by a settlor and it is not necessary that he should reserve to himself any specific parcel of the property, the subject-matter of the trust deed, to invite the operation of section 1.

21. In *re Northcliffe* was another decision cited before us. That case also was cited for the purpose of showing that a specific percentage of income as residuary may be reserved by a settlor in the subject-matter of the trust and it was not necessary that any specific parcel of the property should be reserved.

22. Another case to which our attention was drawn by Mr. Palkhivala was *In re Duke of Norfolk*. The facts of this case were somewhat peculiar. One continuing annuity was given to two or more persons in succession and charged on that property on the death of the annuitant. The dicta of Lord Macnaghten were considered in that case by the Court of Appeal. It was held that an annuity charged on property is not, nor is it equivalent to, an interest in proportion of the

capital of the property charged sufficient to produce its yearly amount on the death of the annuitant and the Crown is not entitled to charge duty u/s 1 on a slice of capital ascertained by means of calculations on the lines prescribed by section 7, sub-section (7). Our attention has been drawn by counsel to observations in the judgment of the learned Lord Justices and particularly of Jenkins, L. J., but those observations do not carry the matter any further. We shall presently point out what Dymond in his treatise on Death Duties has to say about the application of the dicta of Lord Macnaghten to cases of joint continuing annuities and other provisions where property is deemed to pass.

23. Before reverting to Cowley's case we may refer to certain observations from Green's work on Death Duties at page 127 which were relied on by counsel :

"If the property actually passes on the settlor's death, duty is payable u/s 1 and section 38(2)(c) is not in point. Thus in *Inland Revenue v. Angus's Trustees* a husband settled property on trust during his life to pay an annuity to his wife and the surplus income to himself; and after his death, in the events that happened, to pay the whole income to the wife for life. It was held that the whole of the settled property passed u/s 1."

24. There is nothing in those observations of Green which support the argument of Mr. Palkhivala. It is true that the dicta of Lord Macnaghten were followed in England in some cases where question arose of the application of section 1 and sub-section (1)(b) of section 2. But the application of the dichotomy of Lord Macnaghten has not been carried farther than that.

25. There are observations of Lord Dunedin in *Attorney-General v. Milne*, which are very instructive on the question before us and we may set them out in extenso :

"The paramount enacting section of the Act is undoubtedly to be found in section 1.... The duty which it is the object of the Act to levy is imposed on property real and personal, settled or not settled, which "passes" on the death of any person dying after the commencement of the Act. Now, although the word "passes" is what I may call a neutral or vague word, it is so naturally associated with the ideal of "from" and "to" "and on the death", so directs attention to the death of a person who leaves property behind him, that had that section stood alone it is reasonably clear that much property would have escaped which the framers of the Act wished to tax. Accordingly we have section 2. That section was authoritatively discussed in your Lordships' House in the case of *Earl Cowley*. Whether Lord Macnaghten was strictly correct or not in saying that the two sections were mutually exclusive seems to me to matter little. At any rate - and that is all that is material - section 2 sweeps into the net various things which section 1 would have failed to secure, or, as Lord Watson put it in the case of *Attorney-General v. Beech*, "it extends it to all cases where a survivor of the deceased takes a succession, or I should say rather, derives a benefit by reason of the death of the deceased dependent upon and emerging upon the death of

the deceased."

How does section 2 do thi ? It does not do it by being conceived in the words of a taxing section imposing the duty on certain specified kinds of property. It does it by saying that property passing on the death of the deceased - which is already taxed by virtue of section 1 - shall be deemed to include the property following, that is to say - and then follow the various sub-sections.

It seems to me that that is as much as to say that the words, "property passing on the death", in the first section, are to be read as if the words, "including the property following, that is to say" - (and then all the sub-sections) - had been there inserted. In other words, I do not think that any one can criticize Lord Macnaghten because in Cowley's case he talks of property being "deemed to pass", although that expression is not actually used. The net result is that the expression, "property which passes", in the first section, must include property which is deemed to pass by virtue of the second section - for section 1 is the only taxing section."

26. We have already made some observations on section 3(3) of our Act and the effect of that section. We have also pointed that section 5 is to be read as if sections 6 to 16 had been inserted in it. The observations of Lord Dunedin, though extremely guarded, are pertinent to the question before us and this much is clear that Lord Dunedin for himself was not prepared to subscribe to the view that sections 1 and 2 of the English enactment were mutually exclusive.

27. In a number of other cases observations were made about the dicta of Lord Macnaghten, but it is not necessary to burden this judgment with all those observations. We shall refer to only some of those observations.

28. In the case of Sanderson v. Inland Revenue Commissioners, Lord Radcliffe struck a discordant note and found himself unable to agree with the dicta of Lord Macnaghten. He also quoted there certain observations of Lord Haldane in another case to the following effect :

"The principles is contained in section 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in section 1 to certain cases which are not in reality cases of changing hands on death at all..."

29. He also quoted an observation of Lord Haldane, L. C., in Attorney-General v. Milne. The observation of Lord Haldane was :

"Section 2 is thus not a definition section, but an independent section operating outside the filed of section 1."

30. Lord Radcliffe wound up his observations on the dicta of lord Macnaghten by observing :

"I think that we may safely resign these passages to the list of the many minor mysteries of the law."

31. The passage referred to by Lord Radcliffe are the passages which we have quoted. But the suggestion is that the observations made in those passages were not in harmony with the dicta of Lord Macnaghten and those dicta may desirably be forgotten.

32. The question cropped up once again in a very recent case before the Court of Appeal in *Public Trustee v. Inland Revenue Commissioners*. That also we may point out was a case not under clause (1)(a) of section 2 or clause (1)(c) or clause (1)(d) of section 2 but clause (1)(b) of section 2. Lord Evershed M. R. it seems was considerably impressed with the arguments which went counter to the dicta of Lord Macnaghten. He observes at page 722 of the report :

"It cannot, I think, be disputed that the argument of counsel for the trustee has formidable and attractive points in its support."

33. The argument put forward on behalf of the trustees was characterised by the Master of the Rolls as a forceful contention. He also referred to the opinion expressed by Lord Radcliffe in the case to which we have already referred, but ultimately agreed with the view of Jenkins, L. J., in *In re Duke of Norfolk* that it was not open to the court to depart from the construction placed on section 1 and section 2 over fifty years ago by the House of Lords in *Earl Cowley's* case. The Master of the Rolls has also observed in this most recent case that on well recognised principles, it would not be right for the Court of Appeal to treat the matter as thrown open by Lord Radcliffe's observation since Lord Macnaghten's speech has been hallowed by those who practiced in this branch of the law. He also added that the Court of Appeal was bound by the view expressed in the speech of Lord Macnaghten.

34. To go back to *Cowley's* case. Dymond in the 12th Edition of his well-known treatise observes at page 58 :

"Usually, property of which the deceased was competent to dispose actually passes on his death within the meaning of section 1 of the Finance Act, 1894, and it has been laid down by the House of Lords that in such cases estate duty is payable u/s 1 and not u/s 2(1)(a) of the Act, the latter sub-section only applying to property of which the deceased was competent to dispose but which does not actually pass on his death. This is not of much practical importance since the charge for duty u/s 1 and section 2(1)(A) is normally the same, and as regards accountability, the executor is accountable under the Finance Act, 1894...."

35. At page 53 there are some pertinent observations made by Dymond. After referring to the principle in *Cowley's* case, he states : "They principle has been applied to cases of continuing annuities, where the liability to duty of the annuity itself u/s 1 was held to preclude liability to duty u/s 2(1)(b) of the property on which it was charged.... It is not altogether clear how far the repercussions of this principle extend." Dymond observation at page 94 :

"Except where annuities subsisted during the life of a deceased life-tenant, the

distinction between section 1, and section 2(1)(b) rarely of practical importance, for the combined effect of section 2(1)(b) and section 7(7) of the Act is that the property or "slice" of property, to which the ceasing interest extended, is not only deemed to pass but is taxed on the same basis as if it actually passed."

36. It is to be noted that the practical importance of the distinction drawn between section 1 and section 2(1)(b) is regarded in England as of little practical importance. It is now treated as of theoretical rather than practical importance. Again at page 104, Dymond observes in examining the distinction between section 1 and section 2(1)(b) :

"It is not entirely clear how far this principle goes, but it does not apply to a life interest in an aliquot share of income..."

37. There is a case to which we have so far not made any reference and that is the case of Attorney-General v. Grey. Mr. Palkhivala himself drew our attention to this case and observed that presumably the Department would strongly rely on the same. In that case section 38(2)(c) of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889 (and which corresponds to section 12 of our Act) came up for consideration and at page 325 of the report Chancel, J., said that any reservation of interest however small was sufficient to bring the property within the ambit of section 38(2)(c) provided the interest issued out of that property. Much has been said about Grey's case in some later decisions in England, but it is not necessary for us to go in any detail over the matter.

38. At page 185 Dymond refers to the case of *In re Cochrane, Cochrane and Another v. Turner*. In that case the deceased on his marriage settled property on trust to pay the income to his wife for life and on her death for himself for life with an ultimate trust for his children and it was provided that the income paid to the wife was to be used for household expenses and management. The marriage lasted fifty-seven years and the whole income was in fact applied by the wife for her personal purposes. The Court of Appeal confirmed the decision of the court of first instance and held that on the facts the husband had reserved an interest for his life and estate duty was payable u/s 2(1)(c) of the Finance Act, 1894. We have already mentioned that section 2(1)(c) incorporates in section 2 inter alia the provisions of section 38(1)(c) of the earlier Customs and Inland Revenue Act and substantially corresponds to our section 12.

39. There is considerable force in the argument tersely and ably pressed for our acceptance by Mr. Joshi, learned counsel for the revenue, that there is no warrant for introducing in the relevant provisions of our Act, particularly in view of section 3(3), the concept of mutually exclusive categories as stated in the dicta in *Earl Cowley's* case and that on a proper construction of sections 5 and 12 read together that which is national passing of property must be treated for all purposes as actual passing of property on death of the settlor. We agree with counsel that the correct approach to the whole matter should be to "look at the

deed of wake; look at the disposition; and see under what section the case falls".

40. Even the obiter dicta of such an eminent Judge and legal luminary as Lord Macnaghten are entitled to very great respect. In this court we have read the speeches of Lord Macnaghten with very great respect for the exposition of jurisprudential concepts by that great Judge. But in the case before us we must read his dicta in Lord Cowley's case in the light of all that has been said about them in subsequent years and without in any manner digressing from the language of our enactment.

41. Now, the ratio disdained of Cowley's case is that in case of a settlement made by a tenant for life and a tenant in tail of property on which prior incumbrances exist what passes on the death of the tenant for life is not the entire estate but only the equity of redemption and estate duty is payable only on the equity of redemption u/s 1 of the Finance Act, 1894. The celebrated dichotomy between section 1 and section 2(1), it is true, is "enshrined" in the speech of Lord Macnaghten. But the dicta should be confined to a case u/s 1 and section 2(1)(b) of the English enactment. They were certainly not made in considering or in the context of the other sub-clauses in section 2. But that is how Mr. Palkhivala wants us to read the English decisions. It has been observed that there are formidable considerations which support the other view that section 1 and section 2(1)(b) are not mutually exclusive. In the case reported in Public Trustee v. Inland Revenue Commissioners Lord Evershed speaks of the well-recognised principle of finality for feeling compelled to reach the conclusion that the applicability of the dicta should not be disturbed. The concept is akin to the doctrine of stare decisis.

42. In this state of the law on the point in England we do not think we would be justified in constraining ourselves to adhere to the binary classification of Lord Macnaghten. It seems impermissible to us to accept that dicta as applicable to all cases of property deemed to pass. In any case there is no warrant for extending that dichotomy, even assuming it is to be introduced in interpreting the Finance Act - in our opinion, respectfully, that should not be done - to cases of settlements with reservations which evidently fall u/s 12 of the Act. It is not for us to express any opinion on what is in England a debatable matter nor is it necessary for us to prefer one view or the other as between the celebrated dicta of Lord Macnaghten on the one hand and on the other hand the contrary view expressed by Lord Radcliffe - to some lawyers in England that view may perhaps seem somewhat radical - when he observed that the time honoured dicta must be resigned "to the list of many minor mysteries of the law". The observations of Lord Dunedin, which we have quoted in extenso, seem to us to be a surer foundation for cases which fall for determination u/s 12 of our enactment. Section 12, as we read it with the Explanation to it, sweeps wholly into the net of section 5 property the subject-matter of settlements with reservation there indicated and particularly wakes of the nature before us.

43. There is another and an important aspect of the same matter. The argument

of Mr. Palkhivala, when analysed, comes to this : (1) the provisions of the two Acts are in pari material : It is now accepted law in England that section 1 and section 2(1)(b) are mutually exclusive; (2) section 2(1)(b) is a provision relating to property to be deemed to pass on death; (3) the other provisions of sections 2(1)(a), 2(1)(c) and 2(1)(d) are also provisions relating to property to be deemed to pass on death. Therefore, the moment it is shown that in a given case there is actual passing of the property, none of the provisions relating to property to be deemed to pass can have any application. They must be excluded from consideration because section 1 and 2(1)(b) are mutually exclusive. There can be many answers to this syllogism of which the premises themselves are highly debatable. We shall only mention one or two answers since we are only concerned with the interpretation of section 12 of our Act read with section 5 of it. Firstly, no such analogy is really permissible in interpretation of statutes. Secondly, the argument assumes many points. Section 12 speaks of property to be deemed to pass and it is of vital importance to note what is it that is to be deemed to pass. The expression "deemed" is used a great deal in many modern statutes and for many purposes. It is at times used to give a special glossary or paraphrase to an expression or artificial construction to a word or a phrase. It is at times used to introduce artificial conceptions which are intended to go beyond settled legal principles. It is at times used to remove uncertainty or leave no scope for doubts and debates which may involve refined and ingenuous points. At times it is used to give extended or restricted operation to a rule which cannot be given to it if it be read as enacted. This last is of considerable importance when the Legislature lays down a rule the extent and operation of which according to ordinary canons of construction would be confined - we shall take an illustration close to the case before us - to property or interest in property of a particular nature or type or class and the intention is that the rule should have wider extent and embrace more than what it states. In such a case the Legislature may well lay down and add that more than what is stated in the rule shall be deemed to be included in the meaning and concept of the words or phrase used in the rule. In such a case the language of the rule notwithstanding the operation and extent of it is widened by the "deeming" provision. This is precisely what the Legislature has done by enacting section 12 and the ambit of section 5, the charging section, has been expressly extended by section 3(3) to include what is stated in section 12. We may quote the following observations of the Supreme Court although they are made in a different context in *State of Bombay v. Pandurang Vinayak Chaphalkar* :

"When a statute enacts that something shall be deemed to have been done which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

44. Their Lordships of the Supreme Court went on to quote a passage from a judgment of Lord Asquith which has already become locus classicus. It is not

necessary in the present context to reproduce that passage.

45. There is no overriding principle to be spelt out from the decisions of courts in England under the analogous legislation and section 12 of the Estate Duty Act read with section 5 must lead to the inescapable conclusion that the statutory fiction laid down in it must be resorted to and full effect must be given to the language employed. The language does not point to any binary classification. There is no reason why we should deliberately impose upon ourselves any construction of the nature pressed for our acceptance by Mr. Palkhivala. In the course of the arguments before us we put it to Mr. Palkhivala that if his contention were accepted no case of a settlement of the nature before us would invite the operation of section 12 however large or however small the interest reserved for life by the settlor may be and the answer was that such would be the position wherever there was any actual passing of interest howsoever slight it may be. We do not think that the contention is sound. Nor do we think that the decisions so strongly relied on point to any such broad general principle applicable to all the intention of the law-maker has been expressed in language of sufficient clarity and precision and effect must be given to it. There is neither principle nor authority for departing from the fundamental rule of interpretation and we see no reason for doing so and launching into a sea of difficulties not easy to fathom. The sure conclusion seems to us to be that section 12 wholly governs the case before us.

46. Another contention urged before us by learned counsel for the applicant was that section 10 and not section 12 should apply to the settlement before us. The argument here was rather feeble and somewhat involved. It was said that section 9 in dealing with gifts includes any category of gifts inter vivos actual gifts as well as those made through the instrumentality of trusts and settlements. Now, section 9 cannot possibly be relied upon as foundation for any argument of the nature before us. That section clubs under one heading gifts and settlements which are not made bona fide and settlements which are made two years or more before the death of the deceased. Section 10, which we have already set out in the earlier part of our judgment, deals with gifts whenever made where donor is not entirely excluded. It is true that to an extent section 10 and 12 may be overlapping. But in the case before us as we shall presently point out, reference to section 10 is impermissible. The argument has proceeded in this way : In section 9 declarations of trusts and settlement upon persons in succession are dealt with under the head of gifts inter vivos. Therefore, in section 10 gifts must be read in the same manner that is as including settlements and, therefore, section 10 must be read as applicable both to gifts and settlements with reservation.

47. The next step of this chain of argument is that since section 10 must be read as dealing with settlements and since section 12 also deals with settlements, sections 10 and 12 apply to all cases of settlements and on those premises the ultimate argument is that the general principle of lighter burden should be

applied to the present case. In England the view has been expressed that when on the same facts a case falls under two provisions, the option lies with the Crown to exclude benefit under the provisions imposing lighter duty and proceed under the provision which imposes a larger levy. Mr. Palkhivala has, however, relied on the principle favoured in decisions under the Indian Income Tax Act where it has been laid down that where on the same facts an assessee is liable to be taxed under two separate provisions, tax to be imposed upon him should be under the provisions which impose a lighter tax. In the case before us it is not necessary for us to express any opinion on this question in the context of estate duty since the view we take is that the whole argument is untenable. The argument wholly ignores the position that we are dealing in this case with a wakf-al-ulad and it is impossible to see how a wakf-al-ulad can be cased a gift. It is true that under Mussalman law there can be a gift through the medium of a trust and the same conditions are necessary for the validity of such a gift as those for a gift to the done direct with this difference that the gift should be accepted by the trustees and the possession also should be delivered to the trustees. Life interest and vested remainders are unknown to Muslim law but life interest can be construed as an interest in the usufruct. Successive life interests, however, may be created both under the Sunni and the Shia law in favour of even unborn persons by means of a wakf. Wakfs are a speciality of Muslim law. There is no element of gift in a wakf. The primary concept is that it is a permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religion, pious or charitable. The concept of retention or detention is not wholly absent and is even permissible. A wakf extinguishes the right of the wakif and transfers ownership to God. The mutavali is the manager of the wakf, but the property does not vest in him as it would in a trustee in the case of an ordinary settlement. Of course, as we have already mentioned in the case before us, there is the vesting of the property in the trustees. When we refer to the basic principles of the law of wakf and the provisions of the relevant statute validating certain wakes, it is extremely difficult to see how it can be said that there is any gift in case of a wakf which gift can be brought within the ambit of section 10 of the Estate Duty Act. A wakf of the nature before us must necessarily fall within the scope of section 12 read with the Explanation to the same and that is the only section in the enactment which can apply to a wakf-al-ulad. In the view we take of the matter it is unnecessary to discuss the point in any detail.

48. It is lastly urged by Mr. Palkhivala that even if it be held that the provisions of section 12 govern the case before us and the broad general principle enunciated by him is not applicable to it we must hold that in this case there is both actual passing and deemed passing of property. It is said that there is nothing in the Act to prevent any such principle being accepted by the court. The argument has been that we must first give effect to what is described as "actual passing of property", viz., 62 1/2 per cent. interest of Aishabai and then after carving it out we should take the view that the remaining 37 1/2 per cent.

passed on the death of Aishabai by operation of the legal fiction enacted in section 12. It has been stressed in support of this argument that there is no difference between section 10 and 12. Here also we may observe that the argument ignores the real nature of the wakf before us. But furthermore, the argument goes counter to the express language of section 12. Section 12 states in terms express and explicit that in any case within its purview, it is the absolute interest of the settlor which was the subject-matter of the settlement that is to be deemed to pass on the settlor's death and not only the reserved interest. It is very difficult for us to see how we can introduce in the relevant provisions of the Act any idea of splitting up of the entire absolute interest of the settlor, the subject-matter of the trust, which in its entirety is deemed to pass on the settlor's death. There is no room for any such division. Learned counsel has not been able to point out to us any such procedure having been adopted in any case in England. There is no precedent and we see no principle or reason why there should be any such arbitrary division of the nature now suggested by learned counsel between actual passing and deemed passing in a case which falls u/s 12. This contention also must, therefore, be negatived. No separate argument has been urged in respect of the sum of Rs. 1 lakh mentioned in the deed.

49. In the result, our answer to the question will be that the entire wakf property including the sum of Rs. 1 lakh is chargeable to estate duty.

50. Applicant to pay the costs.

K.T. Desai, J.

51. This reference u/s 64(1) of the Estate Duty Act, 1953, raises an interesting question concerning the application of section 12 of the Estate Duty Act, 1953. One Aishabai, widow of the Mahomed Saleh Haji Jackeria Petel, a Sunni Hanafi Mahomedan, died on 12th August, 1954. Prior to her death, on 31 March, 1951, she executed a deed of wakf. By that deed of wakf she appointed herself and two other persons as the mutavalis and transferred to them 12 immovable properties and a sum of Rs. one lakh. By the said deed of wakf she provided that after making all disbursements and meeting all out goings in connection with the properties, 10% of the net income of the said 12 immovable properties was to be set apart every year for repairs that may be required to be done to the wakf properties and was to be credited in an account to be called the "repairs fund account". In connection with the balance of the income, she provided by clause 4 as under :

"For and during the lifetime of the wakif (Aishabai) the mutavalis shall distribute and pay the balance of the income which remains after providing for the expenses mentioned in the above clauses hereinafter referred to as "the net income" amongst and to the following persons for their respective maintenance, support and benefit in the manner following, that is to say :

(a) 62 1/2 per cent. of the net income shall be paid to the wakif (Aishabai) for and during her lifetime.

(b) 3 1/2 per cent. of the net income shall be paid to the said Khatizabai, the daughter of the wakif for and during her lifetime.

(c) The remaining 34 3/8 per cent. of the net income shall be divided into as many parts as there may be children of the said Khatizabai so that the share of each male child shall be double that of each female and two such parts shall be given to each male child of the said Khatizabai or shall be applied for his maintenance, education, advancement and benefit and one such part shall be given to each female child of the said Khatizabai or shall be applied for her maintenance, education, advancement or benefit. From and after the death of each child of the said Khatizabai the part of the net income which such child was receiving in his or her lifetime shall be paid to his or her children or remoter descendants in the same degree of propinquity so that each male child shall receive double the share of each female child for and during his or her lifetime and such payment shall be continued to be made in the same manner as aforesaid from generation to generation."

52. There is an ultimate provision made for the benefit of the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. It is a wakf-al-ulad. Under the said deed of wakf the said sum of Rs. 1 lakh is directed to be set apart and credited to an account called "extraordinary heavy repair fund account". The moneys to the credit of that account are required to be applied for effecting and making alterations in and additions to the wakf properties, to meet expenses of constructing a structure or structures on any vacant plot or plots of land forming part of the wakf properties and to effect heavy repairs involving an expenditure exceeding Rs. 10,000. The income of this sum of Rs. 1 lakh and of the investments representing the same has been utilised in the same manner as the income of the immovable properties settled upon trust. It is not disputed before us that for the purpose of estate duty the said sum of Rs. one lakh stands on the same footing as the said 12 immovable properties settled upon trust.

53. The Central Board of Revenue considered that all the properties settled upon trust, viz., the 12 immovable properties and the sum of Rs. one lakh, passed on the death of the said Aishabai and that estate duty was payable thereon. The applicant being the accountable person within the meaning of sub-section (1) of section 53 of the Estate Duty Act, 1953, contends that only 62 1/2% thereof passed upon Aishabai's death and that estate duty is payable only in respect thereof. Mr. Palkhivala, the learned counsel for the applicant, very ably urged before us all that could possibly be urged in support of the contention that only 62 1/2% of the corpus of the trust properties existing at the date of death of Aishabai passed on her death and said that it would be inequitable to hold that all the trust properties held under the said deed of wakf should be deemed to have passed on the death of Aishabai and that estate duty was livable thereon. Now, it is well-known that there is no equity about a tax. The only thing we have to consider is whether the Legislature has used clear language having regard to

which we can fairly say that all the properties settled upon trust are deemed to have passed on the death of Aishabai. As has been observed by Lord Cairns in *Partington v. Attorney-General* :

"If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the word of the statute."

54. It will be necessary to examine some of the provisions of the Estate duty Act, 1953, in order to appreciate the rival contentions that have been advanced in this case. Section 5(1) of the Act, which is termed as the life and soul of the Act or which is sometimes said to constitute the pith and substance of the enactment runs as follows :

"5. (1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the States specified in the First Schedule to this Act, which passes on the death of such person, a duty called "estate duty" at the rates fixed in accordance with section 35."

55. Section 12 of the Estate Duty Act, 1953, on which reliance has been placed by the Controller of Estate Duty provides as follows :

"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.

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.

(2) Notwithstanding anything contained in sub-section (1) where property is settled by a person on one or more other persons for their respective lives and

after their death, on the settlor for life and thereafter on other persons and the settlor dies before his interest in the property becomes an interest in possession, the property shall not be deemed to pass on the settlor's death within the meaning of this section."

56. In view of the fact that the Indian legislature has followed the pattern of the legislation in England on the subject and of the fact that a large number of authorities that have been cited at the Bar relate to the provisions of the law prevailing in England, it would not be out of place to consider the corresponding provisions of the law in England on the subject. Section 1 of the Finance Act, 1894, which corresponds to section 5 of the Estate Duty Act, 1953, provides inter alia as under :

"1. Grant of Estate duty. - In the case of every person dying after the commencement of this Part of this Act, there shall, save as herein-after expressly provided, be levied and paid, upon the principal value ascertained as herein-after provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called "Estate duty", at the graduated rates herein-after mentioned,..."

57. The expression "property" appearing in section 5 of the Estate Duty Act, 1953, has been defined by section 2(15) of the Act to include "any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale and also includes any property converted from one species into another by any method." The section corresponding thereto in the English enactment is section 22(f) which runs as under :

"22. (f) The expression "property" includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale."

58. The expression "passes" in connection with property has been defined either in England or India. That expression has been used sometimes to denote some actual change in the title or possession of the property as a whole which takes place at the death. In general, the word "passes" may be taken to mean "changes hands". In the case like the present where the property is the subject-matter of a wakf, it would not be out of place to refer to the observations of Lord Russell of Killowen in the case of *Scott and Coutts and Co. v. Commissioner of Inland Revenue* where in connection with the question what property "passes" the learned Law Lord observes as follow :

"To answer that question a comparison must be made between the persons beneficially interested in that fund the moment before the death, and the persons so interested the moment after the death."

59. This view of the matter has not been the subject of any controversy before us. The expression "property passing on the death" has been defined by section

2(16) of the Estate Duty Act, 1953, which runs as under :

"2. (16) "Property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and "on the death" includes "at a period ascertainable only by reference to the death"."

60. The corresponding provision in England is contained in section 22(1) of the Finance Act, 1894, which runs as follows :

"22. (1) The expression "property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and the expression "on the death" includes "at a period ascertainable only by reference to death"."

61. The properties in question are settled upon the trusts mentioned in the deed of wakf. The expression "settled property" has been defined by section 2(19) of the Estate Duty Act, 1953, as follows :

"2. (19) "Settled property" means property which stands limited to, or in trust for, any persons, 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."

62. So far as the English enactment is concerned, section 22(h) and 22(i) deal with the matter and provide as follows :

"22. (h) The expression "settled property" means property comprised in a settlement :

(i) The expression "settlement" means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of section two of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust."

63. There is no dispute that the properties covered by the wakf before us are settled properties within the meaning of the Indian enactment.

64. Section 5 of the Estate Duty Act, 1953, is followed by section 6 to 16 which deal with property which is deemed to pass on death. Section 2 of the English Finance Act, 1894, deals with property deemed to pass on death. The provisions in England which correspond to section 6 of the Estate Duty Act, 1953, are those contained in section 2(1)(a) of the English Finance Act, 1894; those which correspond to section 7 of the Indian enactment with some variations are those contained in section 2(1)(b) of the Finance Act, 1894; those corresponding to section 10 of the Indian enactment are those contained in section 38(2)(a) of the Customs and Inland Revenue Act, 1881, as amended by section 11(1) of the

Customs and Inland Revenue Act, 1889, read with section 2(1)(c) of the Finance Act, 1894, and those corresponding to section 12 of the Indian enactment are those contained in section 38(2)(c) of the Inland Revenue Act, 1881, as amended by section 11(1) of the Customs and Inland Revenue Act, 1989, read with section 2(1)(c) of the Finance Act 1894. By section 4 of the Indian Finance Act, 1954, the Legislature has added section 3(3) to the Estate Duty Act, 1953, which runs as under :

"3. (3) For the avoidance of doubt, it is hereby declared that references in this Act to property passing on the death of a person shall be construed as including references to property deemed to pass on the death of such person."

65. There is no such provision in the English enactment. Under the Estate Duty Act, 1953, section 5 is the charging section. Under it duty is leviable in respect of all property passing and deemed to pass on the death of a person. As Aishabai had reserved 62 1/2% of the net income of the wakf properties for herself during her lifetime, 62 1/2% of the corpus of the wakf properties passed on her death within the ordinary natural meaning of the words "property.... which passes on the death of such person" appearing in section 5(1) of the Act. It is urged on behalf of the respondent that as Aishabai had reserved for herself an interest in all the properties settled upon trust under the said deed of wakf for life, all the wakf properties are deemed to pass on the death of Aishabai u/s 12 of the Act and that estate duty is payable in respect thereof under the provision of section 5(1).

66. The Principal argument advanced by Mr. Palkhivala is that as 62 1/2% of the corpus of the wakf properties passed on the death of Aishabai within the ordinary natural meaning of the words "property settled.... which passes on the death of such person" appearing in section 5(1) of the Estate Duty Act, 1953, it is not permissible to invoke any other provisions of the Act under which properties are deemed to pass on death for the purpose of the levy of estate duty and he relied upon several English cases. Mr. Palkhivala cited two authorities to show that where a share of the income of a property has been reserved for life by a person, on the death of such person the corpus of the property corresponding to that portion of the income would pass on his death. He referred to the case of *Christie v. Lord Advocate*, and to the case of *In re Northcliffe : Arnholz v. Hudson*. It is not necessary to refer to these cases as it is not disputed that under the ordinary natural meaning of the words contained in section 5(1) of the Estate Duty Act, 1953, 62 1/2% of the corpus of the wakf properties would pass.

67. The bone of contention is that not merely 62 1/2% but the whole : of the corpus of the trust properties would pass on the death of Aishabai. Mr. Palkhivala's argument has mainly been based upon a decision of the House of Lords in *Earl Cowley v. Commissioners of Inland Revenue*. Mr. Palkhivala has relied upon the observations of Lord Macnaghten in that case which have been the subject-matter of discussion in various cases referred to at the bar. In that case a deed of re-settlement was executed by father and son. Under that deed of

resettlement, the estates were charged with an annuity to the son payable during the father's life, and subject thereto were declared to be held in trust for the father for life and after his death for the son for life with remainders over. Upon the father's death the Crown claimed from the son under the Finance Act, 1894, estate duty upon the gross value of the estates. In that case the whole of the property settled upon trust was held to pass under the provisions of section 1 of the Finance Act, 1894. In that case, the provisions of section 2 of that Act were sought to be invoked. At page 212 of the report appear the following celebrated dicta of Lord Macnaghten :

"Now, if the case falls within section 1 it cannot also come within section 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed "with regard to property passing on death, be it enacted as follows." Section 2 might with equal propriety be headed, "And with regard to property not passing on death, be it enacted as follows." I cannot, therefore, agree with Rigby L. J. when he says that section 2 is a provision "explanatory" of section 1. In my opinion, the two sections are quite distinct, and section 2 throws no light on section 1. But, then, no doubt section 2 speaks of "property in which the deceased.... had an interest ceasing on the death of the deceased." And that, it may be said, was just the position of the second Earl with regard to the Mornington settled estates. So it was. But section 2 does not apply to an interest in property which passes on the death of the of the deceased. That is already dealt with in the earlier section. For property in the lifetime of the deceased subject to a charge or interest. And, so passing, it must of course be valued accordingly. That is section 1. You do not want section 2 for that. You cannot resort to section 2. For that would be giving the duty twice over."

He further observes at page 213 :

"It is quite plain I think, that the provisions of section 2, sub-section (1)(b), of the Finance Act, 1894, have been borrowed and adapted from that section. But they do not, as I said just now, refer to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass."

68. These observations draw a line between section 1 and section 2 of the Finance Act, 1894, and the two are considered to be mutually exclusive. Mr. Palkhivala strongly relies upon the observations quoted above and says that in the present case 62 1/2% of the corpus of the wakf properties passes u/s 5(1) of the Estate Duty Act, 1953, and that it is not open to the respondent to invoke the deeming provisions contained in section 12 of the Act. In Earl Cowley's case the whole of the property resettled upon trust passed u/s 1 of the Finance Act, 1894, without invoking the aid of the deeming provisions. In a case where the whole property passes under the ordinary natural meaning of the words used in a section, it would not be necessary or proper to invoke the deeming provisions in order to bring about the same result. Mr. Palkhivala's contention, however, is that even if the result be different, even if as a result of the deeming provisions greater estate is roped in, it is not proper to invoke the deeming provisions when

the case to any extent falls within the ordinary natural meaning of the words used by the Legislature. Earl Cowley's case does not lay down that where a larger slice of property or more properties are roped in as a result in as a result of the deeming provisions, you cannot invoke them.

69. Mr. Palkhivala, in support of his contention, has relied upon another case *In re Duke of Norfolk : Public Trustee v. Inland Revenue Commissioners*. That was a case of a single annuity bequeathed to several persons in succession. Upon the death of any annuitant other than the last to die, it was held that estate duty was payable u/s 1 of the Finance Act, 1894, on the footing that it is the annuity which passes on the annuitant's death. On the death of an annuitant, other than the last to die, no benefit accrues or arises by the cesser of his interest within section 2, sub-section 1(b). In that case the Master of the Rolls, after dealing with some of the earlier cases in England observes at page 475 as follows :

"But they are, in my judgment and for reasons which I will later give, no authority for the view that on the death of the first taker of a continuing annuity there is a passing of any part of the corpus of the property out of which the annuity is raised or on which it may be charged."

At page 473, the Master of the Rolls has observed as follows :

"Wynn-Parry J. was of opinion that the simultaneous existence of a right to tax u/s 1 and 2 was inconsistent with the well-known statement of Lord Macnaghten in *Cowley (Earl) v. Inland Revenue Commissioners*, and could not, therefore, be sustained. I agree with him. It is true that the actual language used by Lord Macnaghten, and particularly his words "Section 2 does not apply to an interest in property which passes on the death of the deceased" was used in reference to a case in which only one possible subject-matter of taxation was under consideration; and that it is of the essence of the Crown's argument in the present case that there are two distinct proprietary interests. Mr. Stamp observed further that the celebrated pronouncement of Lord Macnaghten, which has constitute one of the most significant decisions on the interpretation of the Finance Act, 1894, did not in fact represent the determination of an issue argued in the Cowley case. Nevertheless, I think with Wynn-Parry, J., that Lord Macnaghten's opinion ought not to be regarded as subject to such refinement, and that the law (at any rate in the courts of first instance and in this court) must be taken to be that, as regards any such single benefaction as that with which we are concerned, the application of section 2 of the Act is necessarily excluded by the application to the annuity itself of section 1...."

70. In making these observations the Master of the Rolls felt himself bound to follow the observations of Lord Macnaghten in *Earl Cowley's* case.

71. In this context, it will not be out of place to refer to the following statement in *Dymond's Death Duties*, 12th Edition, at page 94 :

"The principle of *In re Duke of Norfolk's Will Trusts*,is not officially regarded

as involving the exclusion of the claim at (b) by the claim at (a)."

72. The claim at (b) is a claim u/s 2(1)(b) of the Finance Act, 1894, and the claim at (a) is the claim u/s 1 of the said Act.

73. Mr. Palkhivala referred us to *In re Longbourne's Marriage Settlement : Warren v. Inland Revenue Commissioners*. In that case there was an ante-nuptial settlement. The wife directed the trustees to stand possessed of the investments therein mentioned on trust after the intended marriage, to pay out of the annual income of the settled property a yearly sum to the husband during his life and subject thereto to pay the annual income of the settled property to the wife during her life and after the death of the wife and subject to the payment of the yearly sum to the husband for the children or child of the marriage who attained twenty-one. It was held that the whole settled property passed under the Finance Act, 1894, section 1 and for the purposes of duty a deduction could not be made from the value thereof for the "slice" required to produce the annuity which continued payable to the husband but, as was conceded, an allowance for the burden of the annuity could be taken equivalent to the actuarial value of the annuity. That again was a case where the whole settled property passed under the Finance Act, 1894, section 1. That case is not an authority of the proposition that where the whole settled property did not pass u/s 1, the deeming provisions cannot be invoked. In that case in connection with the deduction that had been allowed, Wynn-Parry, J., observes at page 937 as follows :

"As the Crown concedes that there should be a deduction, in my view, I can do nothing else but accept the effect of that concession and direct that the value of the deduction must be the value of annuity at the date of the death calculated on actuarial principles."

74. The deduction in that case based on a concession and was not the result of any judicial pronouncement on the subject.

75. The next case to which reference may be made is that of *Sanderson v. Inland Revenue Commissioners*. In that case, the settlor had voluntarily settled on trust for his son and daughter shares in a private company in which he held a controlling interest. It was admitted that on his death estate duty in respect of these shares was payable u/s 2(1)(c) of the Act of 1894. It was held that on its true construction, section 55(1) of the Finance act of 1940 was simply a valuation section applying equally to property which "passes on the death" within section 1 of the Finance Act, 1894, and property which is deemed by section 2 to be "included" in property passing on the death and that accordingly it applied to the shares in question. That case contains some interesting observations made by Lord Radcliffe. At page 498, he observes as follows :

"Estate duty is not charged by the Act upon two different kinds or classes of property, property which passes in the natural sense and property which is deemed to pass by virtue of special statutory provision. Strictly speaking, as has often been pointed out, no property at all is "deemed to pass" under the Act.

What section 1 provides is that estate duty is to be charged upon all property passing on death, whether real or personal, settled, or not settled. It offers no other clue as to the meaning to be attached to those words. What section 2 provides is that property passing on death is to be deemed to include certain kinds of property or, perhaps more accurately, certain property in certain situations, and is not to be deemed to include certain property in other situations. I have never known it disputed that the exclusion provision which is contained in section 2(3) applies to all property passing, whether it passes u/s 1 simpliciter or u/s 1 so enlarged or interpreted by section 2(1). But the result of this is that it is section 1 and no other section that imposes the charge of estate duty, that the charge so imposed is imposed upon property that passes on death and no other property, and that the effect of section 2(1) is to give the word "passes" in section 1 a meaning wider and, if you please, less natural than it would have had if section 2(1) had not been enacted. Personally, I find this approach to the general purport of the Act a more satisfactory method than that of dividing the property charged by the Act into two categories consisting in the one of property actually passing and in the other of property nationally passing, categories which the Act itself does not employ."

At page 500 he further observes as under :

"I do not see that our decision can be said in any way to conflict with those earlier cases. The most that can be said in that connection is that it will leave unexplained what exactly Lord Macnaghten meant in *Cowley* when he said of sections 1 and 2 "the two sections are mutually exclusive" or what Lord Haldane meant in *Milne* by the words "section 2 is thus not a definition section, but an independent section operating outside the field of section 1." But as Lord Macnaghten's words have been a matter of inquiry since the year 1900 (See *Attorney-General v. Dobree* per Channel J.), and since Lord Haldane himself gave a substantially different explanation of the relation of the two sections in *Nevill v. Inland Revenue Commissioners* when he said : "The principle is contained in section 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in section 1 to certain cases which are not in reality cases of changing hands on death at all...", I think we may safely resign these passages to the list of the many minor mysteries of the law."

76. Mr. Palkhivala cited the case of *Public Trustee v. Inland revenue Commissioners*. In that case, a testator appointed A to be one of his executors and trustees and directed that the income of his residuary estate be divided among a number of persons, of whom A was one, in specified shares and so that when one beneficiary died the total income was divided among the survivors or survivor. The income directed to be paid to A was expressed to be given to him in respect of his acting as executor and trustee and by way of remuneration for his so doing. At the date of his death, A was receiving 6/99 of the income of the residuary estate and estate duty was claimed on 6/99 of the capital of the fund under the Finance Act, 1894, section 1. It was not disputed that the relevant

charging provision was section 1 and not section 2(1)(b) of the Act of 1894, but the trustee contended that the claim was precluded by virtue of section 2(1)(b) which excluded "property the interest in which of the deceased... was only an interest as holder of an office" from property deemed by section 2(1)(b) to be included in property passing on the death of the deceased. It was held that since the relevant charging provision was section 1 and not section 2(1)(b) of the Act of 1894, the dichotomy between section 1 and section 2(1) of that act precluded the application of the words of exemption quoted above, which related only to a claim arising u/s 2(1)(b). This latest case of the Court of Appeal in England contains some interesting observations of Lord Evershed, Master of the Rolls. At page 723 Lord Evershed observes as follows :

"It is certainly a forceful contention to observe that "property of which the deceased was at the time of his death competent to dispose" according to the ordinary use of the language, would include the testator's own free estate no less than property over which he had but a general power of appointment. So it is Mr. Pennycuik's contention that notwithstanding Lord Macnaghten's dictum, section 2(1) cannot be regarded as dealing with property which is exclusive of property strictly within the first section; and that view is undoubtedly reflected in the speech of Lord Radcliffe (see especially *Sanderson v. Inland Revenue Commissioners*). I add further that Lord Radcliffe notices language used by a very learned judge, Channell J. in *Attorney-General v. Dobree* and also the differing views expressed by the House in a later case, that of *Attorney-General v. Milne*.

But notwithstanding the weight of those arguments, I feel myself compelled to the view that in those court, as before Danckwerts J., we cannot do other than treat Lord Macnaghten's dictum as still applicable."

77. In dealing with the case of *Sanderson v. Inland Revenue Commissioners*, he observes as follows :

"It may well be that this case has disclosed, perhaps for the first time, an anomaly which a strict application of the dichotomy has hitherto concealed, and there may be other anomalies - one being in relation to a corporation sole - which, if the views of the Crown, which have been indicated in argument, are right, may add some emphasis to the view that the matter is one which ought property to be considered by, and resolved only by, the House of Lords itself."

78. In this connection, reference may be made to the instructive observations of Lord Dunedin in his dissenting judgment in the case of *Attorney-General v. Milne*. At pages 774-775 he observed as follows :

"The paramount enacting section of the Act is undoubtedly to be found in section 1.... had that section stood alone its reasonably clear that much property would have escaped which the farmers of the Act wished to tax. Accordingly we have section 2. That section was authoritatively discussed in your Lordships' House in the case of *Eart Cowley*. Whether Lord Macnaghten was strictly correct or not in

saying that the two sections were mutually exclusive seems to me to matter little. At any rate - and that is all that is material - section 2 sweeps into the net various things which section 1 would have failed to secure,...

How does section 2 do thi ? It does not do it by being conceived in the words of a taxing section imposing the duty on certain specified kinds of property. It does it by saying that property passing on the death of the deceased - which is already taxed by virtue of section 1 - shall be deemed to include the property following, that is to say - and then follow the various sub-sections.... The net result is that the expression "property which passes," in the 1st section must include property which is deemed to pass by virtue of the 2nd section - for section 1 is the only taxing section."

79. In connection with the dichotomy enshrined in the speech of Lord Macnaghten it would not be out of place to refer to the following statement in Dymond's Death Duties, 12th Edition, at page 94 :

"Where the deceased is both an annuitant and a life-tenant of an aliquot share of the surplus income of the settled funds, duty is charged : (a) u/s 1, on the aliquot share of the funds, with a deduction of the appropriate proportion of the actuarial value of the annuity, and (b) u/s 2(1)(b) on the "slice" of the funds required to produce the annuity, as far as attributable to the other share or shares of the funds."

80. This dichotomy, even though hallowed by time, has been assailed in England, Forceful arguments based on sound logic have been advanced against it.

81. Mr. Palkhivala now seems to establish in India a dichotomy between the provisions of section 5(1) and section 12 of the Estate Duty Act, 1953. u/s 12 it is provided that 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 shall be deemed to pass on the settlor's death. Now, the words "property passing under any settlement" in section 12 refer not top property passing on the death, but to property comprised in the settlement. It has been stated in Green's Death ? Duties, 4th Edition, page 127, that property "passing" under a settlement or trust in the context of the corresponding provisions in the English statute does not connote a passing on death, in the sense of section 1 of the Finance Act of 1894. Broadly speaking, it means merely property comprised in the settlement or subject to the trust. To a similar effect are the observations in Dymond's Death Duties, 12th Edition, at page 183. It is the property which is comprised in the settlement which is deemed to pass on the settlor's death on the conditions mentioned in section 12 being fulfilled. The property comprised in the settlement must be property in which "an interest in such property for life or any other period determinable by reference to death is reserved." The words "an interest" in the context mean any interest however small. It has been so considered under the

analogous provisions in England. It has been so stated in Green's Death Duties, 4th Edition, at page 129. There is a decision in Attorney-General v. Earl Grey, where a similar view is expressed. In that case by a deed made in 1885 the owner of certain estates gave them to his nephew in fee subject to the reservation of an annual rent charge payable to the donor and expressed to be issuing out of the estates so given. The annual income of the estates was considerably in excess of the rent charge. At page 325 of that report Channell, J., observes as follows :

"Any interest however small will do, provided it issues out of such property - that is, out of the property sought to be taxed. I agree that if several parcels of land be given by one and the same deed of gift, and an interest be reserved to the donor out of one of those parcels only, estate duty would not be payable upon the whole subject-matter of the gift, but only out of that specific portion in which the interest is expressed to be reserved."

82. There are no words which qualify the words "an interest" in section 12(1) provided it is for life or any other period determinable by reference to death. The interest may be an aliquot share in the income of the property settled upon trust. If Mr. Palkhivala's contention was to be accepted, it would mean that where an interest in property has been reserved by the settlor which constitutes an aliquot share of the income of the property, this section would not apply. I do not see any warrant for such a construction. Section 12 also refers to another set of circumstances under which the whole property may be deemed to pass on the settlor's death. It is where the settlor has reserved to himself the right by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property. If Mr. Palkhivala's contention is right, where a settlor reserves to himself the power to restore to himself also a very small, say a thousandth share in the income of that property for life, then to the extent of a thousandth share of the corpus it would pass u/s 5(1) of the Estate Duty Act, 1953, without the aid of any deeming provisions and the application of section 12 would be excluded. There is no reason to exclude the operation of section 12 in such cases. The Legislature has not laid down that where any interest in any property, however small, passes on the death of a person within the ordinary meaning of those words u/s 5(1), the deeming provisions contained in sections 6 to 16 of the Act cannot be invoked. There is no reason to add words to that effect. Where there is a deeming provision, it does not necessarily imply that what is sought to be included thereby must be necessity have otherwise been wholly excluded. In this connection, reference may be made to the following observations of Lord Radcliffe in the case of *St. Aubyn v. Attorney-General* :

"The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what

is uncertain and what is, in the ordinary sense, impossible."

83. It seems to me clear that the object of the Legislature in enacting section 12 was that where an interest, however small, is reserved by a settlor under any settlement not taking effect as a will for life or any other period determinable by reference to death, the whole of the property would be deemed to pass even though otherwise a lesser part thereof might pass, and that if he has reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property, the whole property would pass whether he has reserved any aliquot share in the income or any other interest in the property or not. Any other construction would not give full effect to the words used by the Legislature. The dichotomy of Lord Macnaghten has not in terms been extended even in England to a case like the one before us and I see no reason why, however, hallowed by time the dichotomy may be in England, it should be extended to the provisions contained in section 5 and section 12 of the Estate Duty Act, 1953. Section 3(3) of the Estate Duty Act, 1953, provides that all reference in the Act to property passing on the death of a person shall be construed as including references to property deemed to pass on the death of such person. Section 5 is the charging section within which all properties liable to estate duty have to fall before they may be charged to estate duty. By section 12 the legislature has cast a wide net and if it has hauled up in the catch the whole of the property settled upon trust by the wakf executed by Aishabai, there is no scope for escape by reference to the provisions of section 5. The clear language of section 12 embraces cases like the present and the whole of the property settled upon trust must be deemed to pass on the settlor's death.

84. Mr. Palkhivala has then advanced an alternative argument. Mr. Palkhivala says that even if the provisions of section 5 are not considered to exclude the application of section 12, both section 5 and section 12 should be applied, wherever they are applicable. He urges that under the provisions of section 5, 62 1/2% of the corpus of the wakf properties would pass on the death of Aishabai as Aishabai had reserved an interest in 62 1/2% of the net income for her life. Then he says that as regards the balance of 37 1/2%, it cannot be said that the settlor had reserved any interest therein and that as she had not reserved any interest therein, it does not fall within the ambit of section 12. There is a fallacy in this argument. What is reserved by the settlor is not the income of 62 1/2% of the corpus of the trust properties. She has reserved for herself 62 1/2% of the net income of every one of the properties settled upon trust. She has reserved an interest in every property. It is not possible to say that she has an interest reserved only in some properties and not in others. As the settlor has reserved an interest in each one of the properties settled upon trust, even though that interest may not extend to the whole of the net income thereof, it is sufficient for the purpose of attracting the provisions of section 12 so that all the properties settled under trust would pass on her death. On the basis of the alternative argument of Mr. Palkhivala all the properties settled upon trust are liable to pass on the death of Aishabai.

85. Mr. Palkhivala has lastly urged that even if section 12 applies in its entirety, effect should not be given thereto as section 10 can be said actually to apply. Section 10 is in terms following :

"Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise :

Provided that the property shall not be deemed to pass by reason only that it was not, as from the date of the gift, exclusively retained as aforesaid, if, by means of the surrender of the reserved benefit or otherwise, it is subsequently enjoyed to the entire exclusion of the donor or of any benefit to him for at least two years before the death."

86. He says that section 10 imposes a lighter burden and that he is entitled to the benefit thereof. In my view, section 12 is the specific section which governs the matter. It deals with settlements with reservation. Gifts may be made through the medium of a trust or a settlement. But when under the trust or settlement the settlor reserves for himself or herself an interest in the property so settled for life or any other period determinable by reference to death, section 12 will apply and the whole property will be deemed to pass on the settlor's death. We are dealing with the case of a wakf, which is a settlement within the meaning of section 2(19) of the Act where in the settlor has reserved 62 1/2% of the net income of the settled properties for herself for life. It is not necessary to set out here the difference in the provisions of law relating to gifts and wakfs as applicable to a Hanafi Sunni Mohomedan like the settlor. If the wakf in question was treated only as a disposition by way of gift, a large number of its provisions would have to be regarded as invalid under the Mahomedan law of gifts though they may be valid under the law applicable to wakfs.

87. Mr. Palkhivala has relied upon *Commissioner for Stamp Duties of New South Wales v. Perpetual Trustee Company Limited*. In that case, by an indenture of settlement made between the settlor and five trustees, of whom the settlor himself was one, it was declared that the trustees should hold certain company shares of which the settlor was the owner in trust, to apply during the minority of his son the whole or any part of the income or corpus as the trustees should think fit for the maintenance, advancement or benefit of the son, and on his attaining the age of twenty-one years to transfer to him as his absolute property all the assets and property whatsoever, including accumulations of income. At page 439 of the report the following observations have been made by the Privy Council :

"In their opinion the property comprised in the gift was the equitable interest in the eight hundred and fifty shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees, and declaring such

trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift; whether the son alone was the donee or whether the son and the body of trustees together constituted the donee seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty. Did the donee assume bona fide possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question, therefore, must be answered in the affirmative, because the son was (through the medium of the trustees) immediately put in such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted."

88. In that case, bona fide possession and enjoyment of the property comprised in the gift was assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him. That case is clearly distinguishable from the facts of the present case.

89. It is not necessary for the purpose of the present reference to decide whether in India, when there is a choice between two alternative provisions, the authorities are entitled to choose that which yields the higher duty as in England.

90. Mr. Joshi, the learned counsel for the respondent, has urged that the scheme of the Indian enactment is materially different from the scheme of the enactment in England. In our view, the scheme of both the enactments is substantially the same. Mr. Joshi has asked us to look at the provisions of section 12, to look at the settlement and to see if that section applies having regard to the terms of the settlement. He says that if that section applies, there is no reason why it should not be made applicable and the whole property should not be deemed to pass thereunder. We agree with Mr. Joshi. The section in terms applies, and if it in terms applies, there is no reason why effect should not be given to the provisions of that section.

91. In the result, I agree with my brother Justice S. T. Desai, J., as regards the answer to the question raised in this reference and the order for costs.

92. Reference answered accordingly.