
(1966) 06 BOM CK 0004

In the Bombay High Court

Case No : Estate Duty Reference No. 1 of 1965

Manohar Vithal Velankiwar

APPELLANT

Vs

Controller of Estate Duty, Poona

RESPONDENT

Date of Decision : 22-06-1966

Acts Referred:

Citation : (1967) 63 ITR 379 : (1968) MhLj 456

Hon'ble Judges : Y.S. Tambe, C.J.;Patel, J

Bench : Division Bench

Advocate : C.J. Thakar, for the Appellant; G.N. Joshi, for the Respondent

Judgement

Tambe, C.J.—The following two questions have been referred to us by the Central Board of Direct Taxes under sub-section (1) of section 65 of the Estate Duty Act, 1953 (34 of 1953), hereinafter referred to as the Act :

"(1) Whether, on the facts and in the circumstances of the case, the deceased was the owner of the entire property valued at Rs. 2,47,79 ?

(2) If the answer to question No. 1 is in the affirmative then, whether the assets owned by the deceased were subject to a charge of maintenance of his wife and whether the Assistant Controller should have made any allowable in respect of the such a charge ?"

2. These two questions arise thus. Deceased Vithal Ganesh Velankiwar was a karta of a joint Hindu family consisting of his wife, Girjabai, and his three sons, Pandurang, Manohar and Sudhakar. There was a partition in the family on 4th September, 1947, as a result of which one of the sons, Pandurang Ganesh Velankiwar, separated from the family under a deed of partition after taking his 1/5th share which was valued at Rs. 35,000. Subsequently, on 18th November, 1953, the second son, Manohar, also separated from the family under a deed of partition by taking his share in the joint family property valued at Rs. 35,000, and on 8th November, 1954, the third son, Sudhakar, also separated from the family under a deed described as a deed of relinquishment. To this last deed,

only Sudhakar and deceased Vithal have been shown as parties. The deed shows that the property was divided into three shares and $\frac{1}{3}$ share was taken by Sudhakar who, on taking his share, relinquished his interest in the remaining property. A notice under the Act was issued to Manohar who, according to the revenue, was the accountable person within the meaning of the Act. It was contended on behalf of Manohar that after separation of the three sons by taking away their respective shares in the joint family property, the remaining property belonged to the deceased Vithal and his wife, Girjabai. Thus, the property that passed on the death of Vithal was only a half share in the property that remained after separation of three sons. This contention was overruled by the Assistant Controller of Estate Duty. He held that, since all the other coparceners had separated from the family, the deceased held the remaining property of the joint family in the capacity of a sole surviving coparcener. As such he held that the entire value of the property was chargeable to estate duty. Against this order of the Assistant Controller an appeal was preferred before the Central Board of Revenue. In this appeal it was contended that it should have been held that there was a partition in the family and the property that remained after execution of the deed dated 8th November, 1954, was the property belonging to the deceased and his wife in equal shares as tenants-in-common. In the alternative, it was contended that at any rate the assets owned by the deceased were subject to a charge of maintenance of his wife, Girjabai, and that maintenance charge ought to have been taken into account and allowance given therefore. Both these contentions were overruled by the Central Board, and the appeal was dismissed.

3. At the instance of Manohar, the Board has now referred to us the aforesaid two questions. The second question is not pressed before us.

4. Mr. Thakkar, learned counsel appearing for Manohar, contends that the Board erred in holding that deceased Vithal alone was the owner of the property that was left after the three sons had separated and had taken away their respective shares. It is his argument that on partition between the sons and the father, the mother has a right to claim partition and have a share in the property equal to the share of a son. Thus, on separation of the three sons, Pandurang, Manohar and Sudhakar from the deceased Vithal, Girjabai had a right to claim partition and have a share equal to that of a son. The family consisted of the deceased Vithal, his wife, Girjabai, and three sons, Pandurang, Manohar and Sudhakar. Pandurang and Manohar had taken $\frac{1}{5}$ th share each in the total property. Even the last deed dated 8th November, 1954, under which Sudhakar separated, shows that the property was divided into three shares, one share was given to Sudhakar and the remaining $\frac{2}{3}$ rd share thus was held jointly by Vithal and Girjabai as tenants-in-common. Thus, on the separation of the third son, Sudhakar, on 8th November, 1954, Vithal was the owner of half share only of the property and the other half belonged to Girjabai. The property left by Vithal on his death was to the extent of half share only in the said property. The Board was in error in holding that Vithal was the owner of the entire remaining property.

5. In support of his contention, Mr. Thakkar read to us paragraph 315 of Mulla's Hindu Law, thirteenth edition, and placed reliance on decisions in Radhabai v. Pandarinath Bapu and Nanuram v. Radhabai.

6. Mr. Joshi, learned counsel appearing for the revenue, on the other hand, contends that separation of three sons from the father may give rise to a right in favour of Girjabai to claim partition and obtain a share on partition equal to that of a son; but till she had exercised this right and obtained actual possession of that share on partition by metes and bounds, she had acquired no right in the property nor had she half share therein. On the separation of the three sons, the remaining property belonged to Vithal alone inasmuch as Girjabai did not claim any partition and get her share separated. Vithal alone thus remained the sole owner of that the property. Duty has rightly been charged on the value of the said entire property. In support of his contention, Mr. Joshi placed reliance on Raoji Bhikaji Kondkar v. Anant Laxman Kondkar, Pratapmull Agarwalla v. Dhanbati Bibi, Bhiwra v. Renuka and Munnalal v. Rajkumar.

7. The question thus that arises for consideration is whether as a result of partition of a joint Hindu family between the father and sons, the mother automatically becomes owner of the share in the joint family property equal to that of a son.

8. Portion of paragraph 315 from Mulla's Hindu Law, which was read to us by Mr. Thakkar, is in the following terms :

"A wife cannot herself demand a partition, but if a partition does take place between her husband and his sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. Where at a partition between a father and his three sons, the wife was not allotted a share, it was held that she was entitled to reopen the partition, there being no waiver merely by her not asking for a share but that in the partition the value of the ornaments taken by her must be taken into account."

9. The said paragraph is not sufficient to support the contention of Mr. Thakkar that, on a partition between the sons and the father, the wife automatically becomes an owner of a share in the joint family property equal to the share of a son. All that is said is that she becomes entitled to receive a share equal to that of a son. In other words, the effect of a partition between the father and his sons is creation of a right in favour of the wife to claim partition. It is also clear from the aforesaid paragraph that the nature of the right is something different from the nature of the right of a son to claim a partition from this father in respect of joint family property. The distinction is that a wife cannot herself demand a partition. It is only when a partition is effected between her husband and his sons, the wife gets a right to demand a partition, while a son by reason of birth in the family has got a share in the joint family property and it is his ownership in the joint family property that gives him a right to claim a partition. There is thus a distinction between the origin of a right to claim a partition by a son and a

wife. The right of a son to claim a partition originates in his ownership in the joint family property; the origin of the right of a wife to claim a partition is in the factum of separation between the father and the sons. What exactly is the nature of the right was considered by their Lordships of the Privy Council in *Pratapmull Agarwalla v. Dhanbati Bibi*. Their Lordships held that, under the Mitakshara law, when the family estate is divided, a wife or mother is entitled to a share, but is not recognised as the owner of such share until the division of the property is actually made, as she has no pre-existing right in the estate except a right of maintenance. It would be noticed that the origin of the right of a wife to claim a partition on there being a partition between her husband and his sons is her right of maintenance. But this right does not crystallise into ownership until division of property is actually made. Mr. Thakkar had placed strong reliance on the decision of Mr. Justice Grille in *Nanuram v. Radhabai*. Facts of the case in brief were : One Kisan had two wives, Radhabai and Gopikabai, and he had a son by each of them by name Pundlik and Namdeo. On 21st of May, 1924, there was a partition in the family at the instance of the sons. In that partition, the property was divided into five shares and the sons each took their one-fifth share and enjoyed it separately, the plaintiffs (two widows) received each a fifth share in lieu of maintenance and they continued to live with their husband. Their shares were not separated by metes and bounds from their husband. In other words, though the shares of the widows were separated, 3/5th share in the property remained in possession of Kisan. Kisan, before his death, had disposed of some of the properties and in disposing of the properties he had not only disposed of some of the property that fell to his share but he also disposed of certain properties which had fallen to the share of the two wives, Radhabai and Gopikabai. The question that arose for consideration in the suit instituted by the two ladies, Radhabai and Gopikabai, was whether the alienations made by Kisan without their authority were binding on them. The learned judge held that the alienations were not binding on the share of these two ladies, Radhabai and Gopikabai. On the facts of this case, it was clear that in the partition deed it is mentioned that the property was divided into five shares, the sons have been allotted their shares which was taken away by each of them, but there was no inter se division by metes and bounds as regards the shares of the father and the two wives. Considering the nature of the right of a wife to obtain a share in the joint family property, the learned judge, following the aforesaid decision of the Privy Council, held that the nature of the right was the right of maintenance, and it is the disappearance of the joint family or coparcenary property as such on partition between a father and his son that gives a right to a wife to claim a separate share in the property for her maintenance. The learned judge further held that if the intention was that a wife should have a share on the partition of the property between coparceners, the wife became the owner of the property. It appears from certain observations in the judgment that actual delivery of possession to the wives on separation of their shares by metes and bounds was not necessary in the view of the learned judge. Relying on this decision, it has been argued by Mr. Thakkar that the last deed dated 8th November, 1954, clearly mentions that

the parties had divided the property in three shares and 1/3rd share was given in possession of Sudhakar who separated. Thus, the ownership of Girjabai over 1/3rd share crystallised on execution of this deed dated 8th November, 1954. We have not been able to read anything in this deed of partition that the parties intended to divide the property into three shares as such. The argument of Mr. Thakkar is only founded on the fact that the property that had been handed over to Sudhakar had been valued at Rs. 15,000 while the remaining property had been valued at Rs. 30,000. It only means that at the time of effecting partition the property that was given in possession of Sudhakar was 1/3rd of the property which had then remained with the family. That is altogether a different thing from saying that at the time of partition the parties intended to divide the property in three equal shares.

10. However, the view taken by Mr. Justice Grille does not appear to have been accepted by a Division Bench of the Nagpur High Court in *Bhiwra v. Renuka*. Considering the position, the Division Bench at page 404 of the Report observed :

"According to their Lordships of the Privy Council the "share" which is allotted to the mother on partition is not a "share" in the true sense but only a provision for maintenance..... Accordingly, she gets no "ownership" in it till it is actually handed over to her and she is placed in a position to maintain herself out of it, and then her ownership is the limited ownership of a Hindu female holding for maintenance.... Therefore, she cannot question dealings with the estate till she receives actual possession."

11. This appears to be the true position of the ratio of the decision of their Lordships in *Pratapmull Agarwalla v. Dhanbati Bibi*. Thus, unless a wife obtains actual possession on separation of her share, her title to the property does not get crystallised.

12. The facts in *Raoji Bhikaji Kondkar v. Anant Laxman Kondkar* : One B died leaving a widow Y, a son R, and a grandson A. A brought a suit for partition and possession of his one-half share in B's estate, joining Y and R as defendants. A preliminary decree was passed holding that Y was entitled to one-third share and decreeing to the plaintiff a third share in the estate. Before any final decree could be passed, however, Y died and an application was made by A praying that, owing to the removal of Y by death, his share should be held to have increased to one moiety and the decree should be amended accordingly. The question that fell for consideration was whether on the passing of the preliminary decree declaring that Y was entitled to a share in the property, Y had acquired the right of ownership in respect of 1/3rd share. It was held by the Division Bench of this court that, until actual partition was effected, no share in B's estate passed to the ownership of Y and, therefore, the share assigned to her remained an integral part of estate available for division among the heirs of her husband. It may be mentioned that this decision is cited with approval by their Lordships in *Pratapmull Agarwalla v. Dhanbati Bibi*. At this stage it may be stated that the position however after the Hindu Succession Act came into force on 17th June,

1956, is different and the difference has been pointed out by their Lordships in *Munnalal v. Rajkumar*. The question that fell for consideration in this case was whether the share of a Jain widow, declared by a preliminary decree passed in a suit for partition of joint family property before the commencement of the Hindu Succession Act was a share possessed by her within the meaning of section 14 of the Act and if the widow dies before actual division of the estate, the interest declared in her favour devolved upon her son to the exclusion of her grandson. It would be noticed that the ratio of *Pratapmull Agarwalla v. Dhanbati Bibi* was that mere declaration of a share of a widow in a suit for partition between the coparceners would not crystallise into her ownership over her share till there had been actual partition and delivery of possession of that share to her. Considering the change brought about by the Hindu Succession Act, in paragraph 16 of the report, their Lordships observed :

"By section 14(1) the legislature sought to convert the interest of a Hindu female which under the Sastric Hindu law would have been regarded as a limited interest into an absolute interest and by the Explanation thereto gave to the expression "property" the widest connotation. The expression includes property acquired by a Hindu female by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever. By section 14(1) manifestly it is intended to convert the interest which a Hindu female has in property, however restricted the nature of that interest under the Sastric Hindu law may be, into an absolute estate. *Pratapmull's* case undoubtedly laid down that till actual division of the share declared in her favour by a preliminary decree for partition of the joint family estate, a Hindu wife or mother was not recognised as owner, but that rule cannot, in our judgment, apply after the enactment of the Hindu Succession Act."

13. It is clear beyond doubt by this pronouncement of their Lordships that prior to the enactment of the Hindu succession Act, actual division of the share of a wife or mother was a condition precedent to her acquiring ownership right over that share. We are here concerned with the point of time which is prior to the coming into force of the Hindu Succession Act. The Hindu Succession Act came into force on 17th June, 1956. We are concerned here as to the position that was obtaining on 13th July, 1955, the date on which Vithal died. It is not in dispute that, on the property that passed on Vithal's death, duty was leviable. The question is whether that duty was leviable on the entire property of the family that was left after the third son, Sudhakar, had separated or was leviable only on the moiety of it. The contention of Manohar before us is that the duty was not payable on the half share of Girjabai, she having been given the share at the time of partition under which Sudhakar separated. On the aforesaid pronouncement of law, Girjabai would become owner only if it is established that her share had been separated on partition and she had been give possession of her separated share. It has also been argued by Mr. Thakkar that her share had

been separated and that she had been put in possession. On the other hand, it is Mr. Joshi's contention that, after partition, Sudhakar separated taking away his share in the property, the remaining property remained in possession of Vithal and had not been divided, nor had Girjabai been given possession her share. In support of his contention that Girjabai had been put in possession of her share, Mr. Thakkar has placed reliance on the following sentence in paragraph 3 of the statement of the case :

"In this last deed (deed under which Sudhakar separated) the father and the son (S. V. Velankiwar) divided the property in three equal shares, only one-third share being allotted to the son and the remaining two-thirds beings kept with the deceased and his wife, Smt. Girjabai."

14. Mr. Thakkar also relies on the following sentence in paragraph 2 of the appellate order :

"After the signing of this deed on the 8th November, 1954, the remaining property was left with the deceased and his wife, Shrimati Girjabai."

15. On the basis of these two sentences, it is the argument of Mr. Thakkar that at the time Sudhakar separated the property was divided into three shares and Girjabai had been put in possession of her share. We are unable to accept this argument of Mr. Thakkar. The aforesaid sentence with is reproduced from paragraph 3 of the statement of the case relates to the construction put on the deed. The aforesaid sentence from the appellate order also, in our opinion, states the view taken on construction of the deed by the appellate authority. It is indeed true that 1/3rd share was given to Sudhakar under this deed of 8th November, 1954. The valuation of the property given to Sudhakar is shown as Rs. 15,000. The valuation of the property that remained after Sudhakar had been given his share is shown as Rs, 30,000, but the deed nowhere shows or mentions that the property that was left behind after Sudhakar had been given his share was given in possession of Vithal and Girjabai. To this deed Girjabai is not a party. Parties to this deed are only Sudhakar and Vithal. The deed is described as a deed of relinquishment. In the preamble of the deed, it is mentioned :

"Therefore, I have taken the undermentioned immovable property in full settlement of my share and have become separate from you and I have relinquished all my right, title and interest in the balance of the joint immovable property that continues to remain in your possession."

16. Then, in the preamble, it is further recited :

"From today I have no right, title or interest of any sort in those properties which are left with you."

17. After the preamble, follows the description of the properties that have been allotted to the share of Sudhakar, i.e., Item A. Heading of item A is "Description of the property allotted to my share, i.e., (share of Sudhakar Vithalrao) and

taken possession on by me", and the heading of the properties mentioned in item B is, "Description of the properties on which I, Sudhakar Vithalrao Velankiwar, have relinquished my rights and which are in your possession." The deed in express terms stated that the property that is left after Sudhakar had taken away his share remained in the possession of Vithal. There is no mention anywhere in the deed that the remaining property was given in possession of Vithal and Girjabai. It is, therefore, difficult to accept that the position obtaining on the construction of this deed was that the remaining property was left in possession of Vithal and Girjabai.

18. Mr. Thakkar also had argued that it may be that on the true construction of the deed the remaining property were left behind only with Vithal but in the statement of the case as well as the appellate order it has been stated that the remaining property has been given in possession of Vithal and Girjabai. We must, therefore, accept as factual position that the remaining property had been given in possession of Vithal and Girjabai and it is not open to us to construe the deed. We are unable to accept this contention. The view taken either by the parties or by the appellate authority as to the construction of this deed is not a finding of fact. We have already stated that it is open to this court to ascertain the true position on the construction of the deed which is the basis of the title of the parties. However, we would examine the position even on the assumption that the remaining 2/3rd property was kept or given in possession of the deceased Vithal and his wife. Even on the assumption of that fact the position is that Girjabai's share had not been separated nor had she been given separate possession of her share. That being the position, the rule laid down by their Lordships of the Privy Council in Pratapmull Agarwalla's case is applicable and in the circumstances it can not be said that Girjabai had obtained any right of ownership over half the property left behind after Sudhakar had separated.

19. Mr. Thakkar then argued that there was other evidence led by parties and the material before the Tribunal was the deed and the evidence led about delivery of possession of her share to Girjabai. That evidence has not been accepted by the trial court. Having regard to the grounds urged before the appellate authority, it appears to us that the argument is only an after-thought, and is not the true position. We may in this context reproduce two grounds from the memorandum of appeal filed on behalf of Manohar before the Board. These grounds are grounds Nos. 2 and 4.

"Ground No. 2 : - That, while holding that the two sons of the deceased, namely, Shri Manohar and Shri Sudhakar, had separated and a partition had taken place in the family, then the assets held by Shri Vithal Ganesh, the deceased, should have been held as assets that fell to the share of two persons, namely, (1) the deceased, Vithal Ganesh, and (2) his wife, Smt. Girjabai. In that view the estate duty should have been levied on half of the value of the total value of the estate, as determined by the learned Assistant Controller of Estate Duty.

Ground No. 4 :- That the learned Assistant Controller of Estate Duty is in error

when he holds that the entire estate held by Shri Vithal Ganesh was his exclusive property and that his wife, Smt. Girjabai, had not got half share in those assets."

20. These two grounds leave no doubt that even according to Manohar the property was in the possession of Vithal but according to his the effect of execution of the partition deed was that half share in the property in possession of Vithal belonged to Girjabai and was of her ownership. Thus, the stand taken by Manohar was not that Girjabai had been given possession of her share in the property. That being the position, in our opinion, the Board was not in error in holding that the estate duty was payable on the entire property which was in the possession of Vithal at the time of his death.

21. In the result, we answer the first question in the affirmative. The second question is not pressed before us. Therefore no answer to that question is called for.

22. Manohar will pay the costs of the Controller of Estate Duty.