

(1978) 04 MAD CK 0033

In the Madras High Court

Case No : Tax Case No. 229 of 1974 (Reference No. 105 of 1974)

Md. Hussain Sait

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 04-04-1978

Acts Referred:

Estate Duty Act, 1953 — Section 12

Citation : (1979) 117 ITR 654

Hon'ble Judges : P. Govindan Nair, C.J.; S. Ratnavel Pandian, J

Bench : Division Bench

Advocate : S.V. Subramaniam, for Subbaraya Aiyar, Padmanabhan and Ramamani, for the Appellant; Nalini Chidambaram, for the Respondent

Judgement

Govindan Nair, C.J.—u/s 64 of the E.D. Act, 1953, the following question has been referred to us for our opinion :

"Whether, on the facts and in the circumstances of the case, it has been rightly held that the inclusion of the sum of Rs. 4,55,000 to the estate of the deceased was valid on the ground that Section 5 read with section 12(1) together with the Explanation would apply to the instant case ?

2. By a document dated November 1, 1934, one (late) Mohamed Ismail created a wakf in favour of himself, his family and his descendants and ultimately for the benefit of the poor, of the properties belonging to him. This wakf was of a permanent character, He dedicated the immovable properties described in the schedule thereunder for his benefit and for the benefit of his family, children and descendants and ultimately for the benefit of the poor Muslims in accordance with the conditions and rules stipulated in the wakf deed. He also appointed his father, Mohamed Musa Sait, as the mutawalli of the aforesaid wakf. After the demise of the father, the office of mutawalli would be hereditary in the family. Clause 4 of the deed provided that the succession to the office of mutawalli would be from the deceased's lineal male descendants. Clause 9 provided that the mutawalli would be entitled to a remuneration of Rs. 40 a month in addition

to any actual expenses incurred in looking after the properties from the income of the said endowed properties. Clause 10 gave power to the mutawalli to reserve two months' rent of the endowed properties for the repair and maintenance of the said properties. Clause 13 which is important for the purpose of this case stipulates how the surplus of the income from the endowed properties should be utilised. That clause is in these terms:

"That after deducting the disbursements referred to above from the income of the endowed properties mentioned in the schedule hereunder written, the surplus be divided every month by the mutawalli for the time being among the members of my family including myself and my wife in the following manner, viz., two shares for a male, and one share for a female for ever so long as there are any and until my posterity lasts and should it become extinct, then the income shall be expended for the benefit of the poor and the Mahomedans, preference being given to the bringing up and maintenance of Muslim orphans and widows, female members including my wife also should she survive me. The mutawalli shall be entitled to his aforesaid share exclusive of or in addition to Rs. 40 or Rs. 20 a month paid to him as remuneration as stipulated above."

3. It is the case of the revenue that, on the facts of the case, on the death of the said Mohamed Ismail, Section 12 would be attracted, and estate duty on the whole value of the settled properties, namely, Rs. 4,55,000, will have to be paid by the accountable person. This was resisted by the accountable person. His contention was not accepted by the Asst. CED. His appeal before the Appellate Controller failed and, in the appeal, the Income Tax Appellate Tribunal, Madras Bench, also held against the accountable person.

4. Section 12 of the E.D. Act, 1953, may now be quoted:

"12. (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 ;

Provided further that a house or part thereof comprised in such settlement made in favour of the spouse, son, daughter, brother or sister, shall not be deemed to pass on the settlor's death by reason only of the residence therein of the settlor except where a right of residence is reserved or secured directly or indirectly to the settlor under the settlement or under any collateral disposition.

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."

5. The wording of the section is perfectly clear. Property passing under any settlement refers to the settled properties and the passing refers to the passing by the settlement. The words "shall be deemed to pass on the settlor's death" occurring at the end of Sub-section (1) of Section 12 of the Act refer again to the settled properties ; but the deeming provision makes that property pass on the settlor's death. In view of the provisions in Section 3(3) of the Act, property passing on the death of the person will have to be construed as including a property which is deemed to pass on the death of such person. Certain conditions have to be satisfied before the deeming provision in Section 12 can be applied. Those conditions are stated in the section itself.

6. The settlement may be made by a deed or any other instrument not taking effect as a will. By that instrument an interest in such property for life or any other period determinate by reference to death must have been reserved either expressly or by implication to the settlor. We are not adverting to the other circumstances under which the provision under the section can be satisfied, namely, where, by the instrument, the settlor had reserved in himself the right by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property, because that is not relevant for our consideration. We may now advert to the Explanation to Sub-section (1) of Section 12, which we have already quoted. By virtue of the Explanation, if a settlor reserves an interest in the settled property for the maintenance of himself and any of his relatives, the settlor must be deemed to have reserved an interest in himself within the meaning of the section. From the above analysis, it is clear that by the instrument an interest in such settled property for life or for any other period determinable by reference to death will have to be reserved to the settlor.

7. Clause 13 of the deed which we have extracted already clearly indicates that the surplus income from the settled properties will have to be divided every month by the mutawalli among the members of the family including the settlor and that a male was entitled to take two shares and a female to take one share. We are concerned with the reservation of interest in favour of the settlor. There is clearly a provision that a share must be given to the settlor. This has to come from out of the surplus monthly income of the settled properties. The question is whether such a reservation will amount to a reservation of interest in the settled properties. If such a reservation will amount to a reservation of interest in the property, Section 12 will be attracted. We consider that when a specific provision is made in the deed that from out of the surplus income of the settled properties, a specified share after meeting specified expenses should be paid to the settlor, there is a reservation of interest in the properties. This court in *Anantha Iyer v. Mittadar Ramaswami Iyer* [1914] MWN 891 has gone to the extent of holding that where by a document rents and profits of a certain land were to be received

by the creditor for a fixed term of years in lieu of the principal and interest, the document created a mortgage because there was a transfer of interest in specific immovable property within the meaning of Section 58(a) of the Transfer of Property Act. Section 12 of the E.D. Act does not speak of the transfer of interest in the immovable property. In order that the section might apply, all that is required is that there should be a reservation of interest in property. In this case, there is such a reservation in view of Clause 13 of the wakf deed. This view of ours is supported by the decision of this court in T. A. Devaki Ammal Vs. Controller Of Estate Duty, Madras., , the High Court of Bombay in Khatizabai Mohamed Ibrahim v. CED [1959] 37 ITR (ED) 53 and the Allahabad High Court in Hamid Hussain Vs. Controller of Estate Duty, . Our attention was also drawn to the decision of the Supreme Court in Controller of Estate Duty Vs. R. Kanakasabai and Others, and it was contended on behalf of the accountable person that Section 12(1) would not be attracted at all. We consider that the facts of the case decided by the Supreme Court are different from the facts of the present case. In that case, it was held that no interest in the properties settled was reserved to the deceased during his lifetime or for any period after the properties were settled, nor was there any provision in the deeds enabling the deceased to reclaim the property or its possession under any circumstances, and, in such circumstances, the Supreme Court held that Section 12 was wholly inapplicable to the facts of that case. This decision, we consider, may not be applicable to the facts of the present case.

8. In the light of the above discussion, we answer the question referred to us in the affirmative, that is, in favour of the revenue and against the accountable person. The revenue will have its costs of this reference including counsel's fee of Rs. 250.