(1982) 03 BOM CK 0085

In the Bombay High Court

Case No : Estate Duty Reference No. 15 of 1973

Miss A.N. Khan — APPELLANT

Vs

First Asst. Controller of Estate Duty — RESPONDENT

Date of Decision : 20-03-1982

Acts Referred:
Estate Duty Act, 1953 — Section 33(1), 40

Citation : (1983) 32 CTR 107 : (1983) 140 ITR 293 : (1983) 12 TAXMAN 167

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

Bench : Division Bench

Judgement

Candurkar, J.—One Pestonji Dinshawjee Khan had executed a trust deed dated November 3, 1919, in respect of his properties, one of which was house property situated at 103, Walkeshwar Road, Bomaby. The deceased, Banoobai Nusserwanji Khan, was the daughter-in-law of the said Pestonji. Banoobai died on April 16, 1966.

2. Clause 2 of the trust deed of 1919 provided that the trustees were to hold the trust property upon trust to permit the said settlor, Pestonji, to reside and occupy the same free of rent during his lifetime. After the death of the settler the trustees were required to permit the decease,Banoobai, and her three daughter to reside in any occupy the said house free of rent during the lifetime of Banoobai. After the death of the survivor of the said Pestonji and Banoobai, the trustees were to permit Banoobai''s daughters, namely, Armaiti, Meherbai and Gulbai, or any one or more of them to reside free of rent in the said house until the same was sold for the purpose of distribution. In the event of remarriage of Banoobai, there was a discretion given to the trustees to permit her to continue to reside in any occupy the said house or not. If the trustees declined to permit Banoobai on her remarriage to reside in the said house, the trustees could even thereafter in their discretion again as allow her to occupy the said house for such period and upon such terms as they thought fit.

3. The trust deed further provide that after the death of the sai settlor and the

said Banoobai, the trustees should, as soon as convenient, sell the said property. Half the net sale proceeds were to be held by the trustees on trust to divide the same amongst such one or more or of the said three daughters of Banoobai as shall attain the age 21 years or marry under that age in equal shares. The remaining half of the proceeds were to be invested and the investments were to be held upon trust to divide the net income thereof in thereof in three equal parts and pay come such part to each of the said Armaiti, Meherbai and Gulbai upon attaining the age of 21 years or marrying under that age for their lives. The other provisions of the trust deed are not relevant.

4. In assessment proceeding under the E.D. Act, the Asst. Controller took the view that the entire corpus of the said property passed under extent of Rs. 1 lakh was allowable in respect of the value of the house on Walkeshwar Road, under s. 33(1)(n) of the E.D. Act. The Appellate Controller took the view that the deduction under s. 33(1)(n) was not admissible as the property was not owned by deceased Banoobai. He also held that though the trust deed reserved the right of residence in both the Walkeshwar Road properties, one of them and a part of the other were in fact let out and the assessor would have found it difficult to exclude the value of the portion of the property used for the beneficiaries''s residence. The Appellate Controller, however, took the view that only 25% of the trust assets could be subjected to duty.

5. In the appeal filed by the accountable person before the Appellate Tribunal, two questions seem to have been raised. The first question related to the valuation of three properties, namely, one at Samuel Street, Bombay, and the other two at Walkeshwar Road. The assessee succeeded to a certain extent inasmuch as in place of the valuation of Rs. 23,5+,937 made by the Appellate Controller, the value of the house properties was determined at Rs. 5,88,000. The only other contention raised before the Tribunal was with regard to the exemption under s. 33(1)(n) of the E.D. Act. The Tribunal found that all that the deceased Banoobai had was a right of free residence during her lifetime and that it could not be said that the house at 103, Walkeshwar Road, was property belonging to the deceased. The Tribunal held that the house property in question vested in the trustees and since the property did not belong to the deceased, the requirements of s. 33(1)(n) were not fulfilled. The accountable person was not satisfied with this view of the Tribunal and at her instance, the following to questions have been referred to this court under s. 64(1) of the E.D. Act:

"(1) Whether, on the facts and in the circumstances of the case, the house at 103, Walkeshwar Road, Bombay, or any part thereof was property belonging to the deceased as contemplated u/s 33(1)(n) of the E.D. Act, 1953 ?

(2) Whether, on the facts and in the circumstances of the case, the accountable person was entitled to the exemption u/s 33(1)(n) of the E.D. Act, 1953 ?"

6. It is obvious from the manner in which the two questions have been framed that the answer to the second question will depend on the view which we take in

respect of the first question posed. Mr. Mukherjee, heavy reliance on a decision of the Andhra Pradesh High Court in Controller of Estate Duty Vs. Estate of Late Sanka Simhachalam (by accountable person), , in which a Division Bench of the Andhra Pradesh High Court has taken the view that the words "belonging to" in s. 33(1) of the E.D. Act, though no doubt they denote absolute ownership, signify even possession of an interest less than that of full ownership, it the context so requires. It was held that the word "property" is s. 33(1)(n) of the E.D. Act read with s. 2(15) includes in the corpus of any property but also any interest in the property. In that case, the deceased had executed a settlement retaining life interest in the residential house and conveyed the vested remainder to his son, the accountable person. Since the deceased had only a life interest in the house, the estate duty authorities took view that the house did not belong to the deceased and consequently s. 33(1) did not apply to exempt the house from duty. Having regard to the view which was taken by the Andhra Pradesh High Court with regard to the meaning of the words "belonging to", it was held that the house property in which the deceased had a life interest and in which he resided at the time of his death is not liable to be included in the estate of the deceased for estate duty. Relying on this decision the learned counsel for the accountable person contended that the interest which Banoobai had was identical to the interest which was the subject-matter of the decision in the Andhra Pradesh case because Banoobai had a right of free residence and by parity of reasoning, Banoobai must be said to have interest in the house belonging to her, with the result that the property to the extent of Rs. 1 lakh was liable to be excluded from the computation for the purposes of estate duty. It was vehemently urged before us that what has been brought to tax by the E.D. authorities was the house and since the right of free residence was property, the requirements of s. 33(1)(n) were satisfied.

7. It has to be noticed that the validity of the assessment in respect of one-fourth value of Walkeshwar Road house being included in the computation of property that passed on the death of the deceased, Banoobai, is not the subject-matter of this reference. As a matter of fact at no stage in the assessment proceedings it seems to have been contended by the accountable person that all that the deceased Banoobai had was a right of free residence and cesser of that kind of interest of Banoobai could not be taken into account for the purposes of evaluating property which would pass or which would be deemed to pass for the purpose of assessment under the E.D. Act. All that we are concerned with for the purposes of the present reference is whether, on the facts of the present case, the requirements of s. 33(1)(n) are satisfied.

8. Section 33(1)(n) of the E.D. Act so far as it is relevant provides as follows:

"To the extent specified against each of the clauses in this sub-section, no estate duty shall be payable in respect of property of any of the following kinds belonging to the deceased which passes on his death - ......

9. (n) one house or part thereof exclusively used by the deceased for his

residence, to the extent the principal value thereof does not exceed rupees one lakh if such house is situate in a place with a population exceeding ten thousand, and the full requirements of s. 33(1)(n), it requires to be pointed out that the only correct provision under which the consequences of the interest which Banoobai had, namely, the right of free residence could be taken into account for the purposes of estate duty would be s. 7(1) of the E.D. Act. That section provides as follows:

"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 Aliaysatana law."

10. Under s. 7(1) where an interest ceases on the death of the deceased, the property in which the deceased had an interest is deemed to pass, but the extent to which a benefit accrues or arises by the cesser of such "the extent to which a benefit accrues or arises by the cesser of such interest". For the purposes of valuation, therefore, in a case where an interest in a property ceased on the death of the deceased, what has to be computed is the benefit which accrues or arises by the cesser of such interest.

11. It is now settled law that this benefit is to be computed in accordance with the provisions of s. 40 of the E.D. Act. Section 40 provides for valuation of benefit from interest ceasing on death. Section 7(1) and s. 40 have, therefore, to be read together. We had occasion to consider the nature of the property which passes in a case where there is a right of free residence in Estate Duty Reference No. 2 of 1969 decided on 12th January, 1982 D.J. Gazdar Vs. Controller of Estate Duty, . Construing s. 7(1) and s. 40 together, we have taken the view in that case that if the right of free residence cannot be treated as interest in income of the property, then the value of the benefit accruing or arising out of the cesser of such interest cannot be computed in accordance with the manner prescribed under s. 40 of the E.D. Act and we have pointed out in the case that (p. 616):

"....even though for the purposes of sub-s. (1) (of s. 7) there may be a cesser of interest and a benefit and a benefit accruing or arising from such the cesser, if the benefit cannot be valued in the manner prescribed by s. 40 the E.D. Act."

12. We have referred to this decision in order to point out the correct nature of the interest which ceases and the effect of such cesser for the purposes of valuation for the purposes of estate duty.

13. The right which the deceased had was only a right of free residence. It is doubtful whether such a right can really fall within the extended scope of s. 33(1)(n) as laid down by the Andhra Pradesh High Court. If we consider the provisions of s. 33(1)(n) in the light of the fact that all that the deceased, Banoobai, had was the right of free residence, it will be clear that she had neither a right to the

house nor a right to any part thereof. If s. 33(1)(n) is properly read, the main part of s. 33(1) highlights the fact that the property in respect of which no estate duty is made payable is the property of the kind property in respect of which a claim for exemption under relevant clause. In so far as cl. (n) is concerned, the requirement is that the property must be a house or a part thereof and it must be exclusively then requirement is that the house or the part thereof must belong to the deceased. Strictly speaking, the question as to whether the house or the part thereof belonged to the deceased in the instant case does not really arise for consideration because it can hardly be disputed that the house was not exclusively used by the deceased for her residence. There is no finding that Banoobai was alone in occupation of the entire house. Indeed, on the trust deed, Banoobai and her daughters in their own right were entitled to occupy the premises. Therefore, the essential ingredient of s. 33(1)(n) is not satisfied at all and on that short ground, in our view, the claim for exemption under s. 33(1)(n) must be negatived. It is no doubt true the property in respect of which the exemption is provided 3(1)(n) must be the property which must pass on the death of the deceased. In the instant case, as we have already pointed out, the legal position was that there was merely a cesser of interest on the death of Banoobai by virtue of her right of free, residence coming to an he value of that right could not be estimated in terms of s. 40 and that was therefore, wholly irrelevant for the purposes of estate duty. as the house in which Banoobai was residing was, therefore, concerned it could not bc described as property which passed on her death,though that part of the order of the Tribunal or the Tribunal or the E.D. authorities ,is not now open to challenge.

14. It is no doubt true that in the Andhra Pradesh case, a view has been that the exemption would be permissible even in the case of a death of a person who had a life interest. It is not possible to say whether on facts nature of the interest reserved by the settlor in that case was the same as the nature of interest of Banoobai, namely, a mere right of residence. It is also true that, in that case, the Andhra Pradesh High Court has referred to the wide meaning of the word " property " in s. 2(15) of D. Act and the Division Bench has really reframed the opening of s. 33(1) to read as follows: " No estate duty shall be payable in respect of property, which includes any interest in property belonging to the deceased which passed on his death. " Whether such a reading of s. 33(1) would be permissible having regard to the specific use of the words "property of any of the following kinds belonging to the deceased " is a matter which is open to debate but in which, having regard to the view which we have taken, it is not necessary to go in the present case.

15. In the view which we have taken, it is not possible to find any fault with the conclusion reached by the Tribunal that the accountable person is not entitled to claim exemption under s. 33(1)(n) of the E.D. Act.

16. Question No.1 is, therefore, answered in the negative and against the accountable person. Consequently question No. 2 is also answered in the

negative and against the accountable person. In the circumstances of the case, there will be no other as to costs.

