

(1975) 01 MAD CK 0023

In the Madras High Court

Case No : Tax Case No. 81 of 1969 (Reference No. 2 of 1969)

S. Balan

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 31-01-1975

Acts Referred:

Estate Duty Act, 1953 — Section 15, 5, 6

Citation : (1975) ILR (Mad) 540 : (1975) 101 ITR 357

Hon'ble Judges : V. Sethuraman, J; V. Ramaswami, J

Bench : Division Bench

Advocate : S. Swaminathan, for M. Ranganatha Sastri and M.V. Ganapathi, for the Appellant; V. Balasubrahmanyam and J. Jayaraman, for the Respondent

Judgement

Sethuraman, J.—This reference arose out of the estate duty proceedings consequent on the demise of R. M. Suadaram on May 14, 1960. The deceased was a member of the Indian Civil Service. There were certain special regulations relating to the provident fund of the non-European members thereof. The said non-European members of the Indian Civil Service had to subscribe either to the Indian Civil Service Family Pension Fund or to the Indian Civil Service (Non-European Members) Provident Fund. The deceased subscribed to the Indian Civil Service (Non-European Members) Provident Fund and at the time of his death the amount, which was to his credit, was Rs. 1,04,794. He had nominated his wife as the person entitled to receive the amount in the event of his death before retirement. Accordingly, the amount was paid to her.

2. The Assistant Controller of Estate Duty brought this amount to tax u/s 15 of the Estate Duty Act on his death. The Appellate Controller confirmed the assessment. In the appeal to the Appellate Tribunal it was contended that the amount did not form part of the estate of the deceased, since it was payable to the nominee direct and that the deceased had no disposable right over the amount. The restriction in the matter of nomination being confined to the members of the family of the subscriber was relied on in this context. The further

submission was that the beneficiary had a vested right in the fund and that the amount did not form part of the estate of the deceased. Several decisions were relied on before the Tribunal. After considering all of them, the Tribunal also confirmed the assessment.

3. At the instance of the accountable person the following question of law has been referred to this court:

"Whether, on the facts and in the circumstances of the case, the amount of Rs. 1,04,794 paid to the widow of the deceased from the I.C.S. (Non-European Members) Provident Fund is liable to estate duty in the hands of the accountable person ?"

4. Mr. Swaminathan, the learned counsel for the accountable person, who is the son of the deceased, submitted that the deceased had no interest in the fund, that the ownership of the fund vested in the person, who was in charge thereof, until the event requiring the payment arose, that on the subscriber's death it had to be paid to the nominee and that in the present case the sum of Rs. 1,04,794 was not, therefore, liable to tax. For the Controller of Estate Duty, the submission was that the deceased was throughout the owner of the fund, that the nomination that he made was only in the nature of a testamentary disposition taking effect after his death and that the property clearly passed on the death of the deceased.

5. The assessment was sought to be supported by reference to Sections 5, 6 and 15 of the Estate Duty Act.

6. At the outset, we have first to find out the provisions under which the provident fund is created and held so as to examine its liability to estate duty. Under Sections 247(1) and 250(1) of the Government of India Act, 1935, the Secretary of State for India notified the Indian Civil Service (Non-European members) Provident Funds Rules, 1943. These Rules came into effect on March 29, 1943. Under Rule 3, every non-European member of the Indian Civil Service, who was not a subscriber under the Indian Civil Service Family Pension Rules, had to subscribe monthly to the fund an amount which had to be a minimum sum of whole rupees at the rate of 6% of the monthly emoluments and could not exceed the whole the emoluments for the preceding month. Rule 4 of those Rules provides for crediting interest on the credit balance in the fund on 31st March of each year. Rule 5 requires every subscriber as soon as he joined the Fund to send a nomination conferring on one or more persons the right to receive the amount that might stand to his credit in the Fund in the event of his death. If, at the time of making the nomination the subscriber had a family, the nomination had to be in favour of the members of the family. Family is defined in Rule 2(4) as meaning the wife or wives and children of a subscriber and the widow or widows and children of a deceased son of a subscriber. If more than one person was nominated, the subscriber had to specify in the nomination the amount or share payable to each of the nominees in such manner as to cover the

whole of the amount standing to his credit in the Fund at any time. The subscriber could cancel the nomination by sending a notice in writing to the accounts officer, provided that he sent, along with such notice, a fresh nomination in accordance with the provisions of Rule 5. If the nominee died and if there was no special provision as to what should happen on the death of such nominee, the subscriber had to send to the accounts officer a notice in writing cancelling the nomination together with a fresh nomination made in accordance with the provisions the Rules. Under Rule 6A the amount standing to his credit in the Fund was liable to be withdrawn (a) for building a residence, (b) for meeting the cost of higher education of any child of the subscriber dependent upon him, (c) for meeting the expenditure in connection with the marriage of his daughter or other female dependant and (d) for meeting the expenditure in connection with the marriage of his sons. Rules 6B to 6F limit the amount to be withdrawn in such cases and prescribe the conditions to be satisfied in the case of such withdrawal. Rule 7 provides that subject to the conditions contained therein, the subscription to the Family Pension Fund may, at the option of a subscriber, be substituted for the whole or part of the subscription to the Fund and that any amount standing to the credit of a subscriber in the Fund may be withdrawn, also, to meet payments towards (a) an insurance policy, (b) purchase of a single payment insurance policy, or (c) payment of a single premium or subscription to a family pension fund approved in this behalf by the Secretary of State. Rule 8(2) requires the subscriber to continue to pay to the fund the subscriptions payable notwithstanding the withdrawal of any amount. Rule 15 provides that, except as provided in Rule 7, the amount standing to the credit of a subscriber in the Fund should not be withdrawn until he left the service or died. On the death of a subscriber, Rule 16 provides for the payment to the nominee or to the members of the family if there was no subsisting nomination.

7. In Appendix A to the Rules, forms of nomination are provided. In the case of a person who has a family there are two forms. The first form is for nomination of only one person thereof and the second of more than one person thereof. In the first case the nomination, so far as it is relevant, runs as follows :

"I hereby nominate the person mentioned below who is a member of my family..... to receive the amount that may stand to my credit in the Fund in the event of my death before that amount has become payable, or having become payable, has not been paid..."

8. There is a table below the above extract, which has been omitted here as it is not relevant for our purpose. In the case of a subscriber wishing to nominate more than one member of the family, the form is identical except for material changes because of the plurality of the nominees.

9. The summary of the Rules given above would go to show that the subscriber had (1) a power to nominate the person who was entitled to the fund at the time of his demise, (2) to withdraw the amount to the credit of the fund at any given time in accordance with the Rules, (3) to make changes of nomination as and

when he considered necessary, subject of course to the nominee being a member of the family, and (4) to substitute the provident fund by the pension fund. There is nothing in the Rules given above to show that anyone else has title to the Fund during the lifetime of the subscriber. Throughout the Rules the amounts are referred to as being to his credit. The power of disposal as shown above is consistent with his ownership of the Fund subject to certain restrictions imposed by the Rules. This is thus a peculiar kind of property where the owner is put under some discipline so as not to fritter away the fund to his credit. If he were not the owner, he would not be in a position to deal with the Fund without reference to the nominee or in accordance with his own wishes within the field open to him. He is not required to take anybody's consent before he makes a change in the nomination.

10. The learned counsel for the accountable person referred us to the Provident Funds Act, 1925. For the Controller of Estate Duty, the submission was that this Act had no application, as the entire law relating to this Fund was to be gathered from the Rules framed by the Secretary of State under the Government of India Act, 1935.

11. The Provident Funds Act, 1925, is a consolidating enactment relating to Government and other provident funds. "Government Provident Fund" has been defined in Section 2(d) of the Act as meaning "provident fund, other than a Railway Provident Fund, constituted by the authority of the Secretary of State, the Central Government, the Crown Representative or any State Government for any class or classes of persons in the service of the Government". So even the Fund constituted by the Secretary of State comes within the scope of the Government Provident Fund and the Provident Funds Act, 1925, is thus ex facie applicable to the Fund here. Section 3 of the said Act enacts a bar against the assignment or charge of a "compulsory deposit" in any Government Provident Fund. It cannot also be attached by any decree of a court. "Compulsory deposit" is defined in Section 2(a) as meaning a subscription to, or deposit in, a Provident Fund which, under the rules of the Fund is not, until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premia in respect of a policy of life insurance, etc. Section 3(2) provides that any sum standing to the credit of a subscriber at the time of his death and payable under the Rules of the Fund to any dependant of the subscriber would vest in the dependant. It is free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber. Section 4 provides that when the sum standing to the credit of any subscriber after the making of any deduction authorised by the said Act becomes payable, the officer whose duty it is to make the payment should pay the sum to the subscriber, or, if he is dead, to his dependant or his nominees, as the case may be. u/s 5 where any nomination was duly made in accordance with the Rules of the Fund, the nominee would become entitled, to the exclusion of all other persons, to receive such sum or part thereof, as the case may be, unless the nomination has been varied by another nomination or unless such

nomination had become invalid by reason of some contingency. If the nominee pre-deceased the subscriber, the nomination would become void and of no effect. The rights of the nominee override any testamentary disposition by the subscriber during his lifetime. Section 6 provides for the deductions to be made at the time of payment. The Provident Funds Act would supplement the provisions in the Rules of the Indian Civil Service (Non-European Members) Provident Fund to the extent to which the rules are silent on any matter.

12. The purpose of referring us to the provisions of this Act was to show that the nominee had title to the Fund, so that no property in the Fund passed on the death of the subscriber. The title spoken of in Section 5 of the Act is defeasible by change in the nomination, or the nomination becoming invalid by reason of certain happenings. The object of Section 5 is only to dispense with the requirements of a succession certificate or a similar authority to get the amount on the death of the subscriber. In other words, the nominee would be entitled to be paid on the death of the subscriber so long as the nomination is not varied or had not become invalid by reason of the happening of any contingency. Section 4 provides for the payment of the amount to the subscriber if he was alive on the date of the retirement. It is only in the event of the death of the subscriber that the nominee gets a title to the Fund. Thus during the lifetime of the subscriber the nominee's interest is only a contingent interest. The power to dispose of the fund, subject to the restrictions imposed by the Rules, is available to the subscriber till his death. The property in the Fund continues to be his till he dies. In fact, the language of Section 5 of the Provident Funds Act is consistent (a) with the interest of a nominee being a future one, so that it is not available during the lifetime of the subscriber, and (b) with his emergence as an enforceable right on his death. In so far as it is material, the rule runs as follows :

"5. (1) Notwithstanding anything contained in any law for the time being in force or in any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government Provident Fund of the sum standing to his credit in the Fund with the rules of the Fund, purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber occurring before the sum has become payable or before the sum having become payable, has been paid, the person shall, on the death as aforesaid of the subscriber become entitled, to the exclusion of all other persons, to receive such sum" (Underlined by us).

13. The provision is couched in such a manner as to show that the right of the nominee emerges only on the death of the subscriber. There is nothing inconsistent with the above provision in the Provident Funds Act.

14. Thus, taking both the Provident Funds Act and also the Indian Civil Service (Non-European Members) Provident Funds Rules, the position is that the subscriber has property in the Fund till his death. It passes to the nominee only on his death. The restrictions imposed on the subscriber to nominate persons of his family do not, in any way, detract from his ownership of the Fund. Learned

counsel for the accountable person tried to equate the Fund as a kind of compulsory alienation from the salary of the subscriber returnable on his death to certain persons so that during his lifetime he had absolutely no title to the amount. This contention has no force, as the subscriber has powers to change the nomination, to withdraw the amount for certain purposes or to be paid the amount if he survives during the period of his employment. There was some discussion before us as to whether the Indian Civil Service (Non-European Members) Provident Funds Rules contained some provisions, which were not consistent with the provisions of the statute. There is no need to go into this controversy in the present case, as the slight difference between the statute and the Rules does not affect the question of ownership of the Fund during the lifetime of the subscriber. Whether we take the Provident Funds Act or only the Indian Civil Service (Non-European Members) Provident Funds Rules into account, or both of them, the subscriber had a property in the Fund which passed on his death. The provisions of Section 5 of the Estate Duty Act would, therefore, apply as property in the amount passed on his death. Section 6 would also apply, because the subscriber had power to change the nomination during his lifetime. He was, to that extent, competent to dispose of the Fund and there would be a deemed passing on his death in accordance with Section 6 of the Act.

15. Section 15 of the Estate Duty Act, 1953, contemplates a deemed passing where any annuity or other interest was purchased or provided by the deceased. The deeming is of the beneficial interest accruing or arising by survivorship or otherwise on his death. There was some discussion before the estate duty authorities on the question as to whether the words "other interest" in Section 15 following the words "any annuity" were used in the ejusdem generis sense or not. In view of the fact that we are confirming the assessment by reference to Sections 5 and 6, it is not necessary to go into this aspect in the present case.

16. We may now consider some of the decisions to which our attention was drawn by the learned counsel for the accountable person. The first case is reported as *Korlam Sitaramaswamy Vs. Korlam Venkatarama Rao*, In that decision Section 5 of the Provident Funds Act came in for consideration. A person employed by the Railways had nominated his wife for receiving the fund on his death. The nominee pre-deceased him. There was no variation in the nomination thereafter. The amount in deposit was held to have vested in the nominee absolutely so as to be inherited by her heir to the exclusion of any other heir of the deceased subscriber. This case does not bear on the question as to who is entitled to the fund during the lifetime of the subscriber. That was a case of a contest between the heirs of the deceased subscriber claiming a share therein and the heir of the nominee claiming the whole of it. Similarly, the decision of the Allahabad High Court in *The Administrator General Vs. The General Manager, E.I. Railway*, does not also touch the point in issue. The Administrator-General administering the estate of the deceased claimed a right to receive the provident fund and gratuity payable to the deceased. It was held that u/s 4(1)(a) of the Provident Funds Act, the amount in the provident fund had vested in the

dependants and that the Administrator-General had no right therein. Our attention was drawn to the following passage in that decision :

"This mandatory provision makes it clear that, while a dependant of a subscriber to a provident fund is alive, there can be no nomination or succession to the fund. It passes to the dependant by vesting in the dependant and not by succession. It can only form part of the estate of the subscriber if the subscriber retires from service and the amount becomes payable to him before his death. In case he dies before the amount becomes payable to him, it passes.....by vesting in the dependant. In the present case, therefore, the provident fund obviously vested in the minor dependant..... "

17. This passage has to be understood in the context of the facts therein. In that case, as stated already, the Administrator-General claimed the fund in disregard of the provisions of Section 3(2) of the Provident Funds Act. Section 3(2) of that Act provides for vesting in the dependant of the amount to the credit of the subscriber on his death. He had no power to deal with it under any will, though he could have changed the nomination. When once it was statutorily vested, the Administrator-General could not, it was held, claim the fund. In the case of persons belonging to the Indian Civil Service it is doubtful if Section 3(2) would have any application because there is an obligation under the rules to make an alternative nomination in case the nominee pre-deceased him or to make a fresh nomination on the death of the original nominee. What vests u/s 3(2), even if it is taken to apply, is the amount that is to the credit of the deceased at the time of his death. In other words, the vesting is not at any earlier point of time. The learned judges of the Allahabad High Court had no occasion to consider the application of the provisions of the Estate Duty Act and, therefore, the observations cannot be taken as throwing light on the question before us.

18. In *Syed Abdul Azeez Khan v. W.J. Fowler*, [1967] 2 MLJ 324 the immunity from attachment was held to be available even though the amount had become due to the subscriber and had also been directed to be paid to him, but had not actually been paid. The principle is that the amount continues to retain the character of a provident fund until actual payment to the subscriber.

19. That is not the point which is in issue before us. Therefore, this case is also of no assistance.

20. Similarly, in *Union of India v. Radha Kissen Agarwalla*, the Supreme Court was concerned with the question of the liability to attachment of the amount due to a subscriber in a provident fund. The subscriber had retired and left for the United Kingdom, He had requested payment in sterling, which had been agreed to. The Railway administration under which he served drew cheques in favour of the Reserve Bank with instructions to convert them into sterling and transmit the amount to the subscriber's banking account. These cheques while they were in the custody of the Reserve Bank were sought to be attached by the creditor of the subscriber. It was held that it could not be attached. The principle laid down

was that so long as the money had not reached the subscriber, it was provident fund money. The character of it had not been changed by the request of the Railway administration to the Reserve Bank to transmit, the money to the United Kingdom in sterling. That is not the point in issue before us.

21. The learned counsel drew our attention to two decisions in *M. Ct. Muthiah and Another Vs. Controller of Estate Duty*, and *Controller of Estate Duty v. Smt. Motia Rani Malhotra*. These two cases arose under the Estate Duty Act. In the first case, to which one of us was a party, a policy of personal accident insurance had been taken up in the name of the deceased, who died in an air crash. The money received by the heirs of the deceased under the policy was the subject of consideration for levy of estate duty. This court held that there was passing u/s 6 of the Act but that it was not liable to be aggregated. That decision would support the assessment u/s 6 here. In the other decision in *Controller of Estate Duty Vs. Smt. Motia Rani Malhotra*, on the death of a passenger in an aircraft which crashed, an amount was awarded as compensation under the Indian Carriage by Air Act. This amount was held to be not liable for estate duty. The substance of the decision was that the amount of compensation came into being only after the death and that there was no property in existence during the lifetime of the deceased so as to pass on the death. There was no contractual right to the amount there. The amount was as ad hoc compensation emerging because of the death. This is not the position here. The provident fund was very much in existence during the lifetime of the deceased. This case also has no application.

22. The learned counsel for the accountable person attempted to argue that the sum of Rs. 1,04,794 should be treated as a separate estate which is not aggregatable. Section 34(3) of the Estate Duty Act provides that any property in which the deceased never had an interest is not to be aggregated with any property, but should be taken as an estate by itself. In such cases the estate duty is to be levied at the rate or rates applicable in respect of the principal value thereof. This point had been taken before the Assistant Controller who held that in the present case the deceased had an interest in the Fund during his lifetime so that it would not be a case of the deceased never having an interest in the Fund to which Section 34(3) applied. In the appeal before the Assistant Controller, this point was not obviously raised, as we do not find any discussion thereof in his order. The Tribunal also has not discussed this point because it was not raised before it. However, in the reference application the accountable person sought to raise this point. In paragraph 6 of the statement of the case the Tribunal pointed out as follows :

"We find that such a contention was not raised before the Tribunal either in the grounds of appeal or at the time of the argument. This question has, therefore, not been considered by the Tribunal in its order. It follows that the question does not arise from the order of the Tribunal and we, therefore, decline to refer this question to the High Court."

23. The accountable person did not file any petition to this court as contemplated by Section 64(3) of the Act. The attempt to raise the question at this stage is thus belated. We cannot also go into this question as it does not arise out of the Tribunal's order. The learned counsel for the accountable person submitted that the Supreme Court had permitted a wholly new question being raised in *Bhanji Bagawandas Vs. Commissioner of Income Tax, Madras*, and that similarly we should do so. In the case before the Supreme Court the question that had been referred was whether the assessment was saved from the bar of limitation under the proviso to Section 34(3) of the Indian Income Tax Act, 1922, The contention of the department was that in answering this question the effect of Section 2 of the Income Tax (Amendment) Act, 1959, must be taken into consideration. The Supreme Court held that this contention was within the framework of the question referred to the High Court and that it was competent to the Supreme Court to allow that new contention to be raised. It may be seen that the Supreme Court had merely permitted a new contention to be taken on the same question. Further, there was no difficulty there arising from the failure to take up the matter under the corresponding provision to Section 64(3) of the Act when the question, which was sought to be raised, was not referred by the High Court. The question raised here relates to the assessability of the amount and not its aggregation. The liability to tax and the liability to aggregation are so wholly different that this cannot be taken as a contention bearing on the same question. Learned counsel for the accountable person submitted that we could, if necessary, reframe the question. The power to reframe the question cannot be extended so as to raise a new question which was not in controversy between the parties at the stage of the Tribunal. On the particular facts herein, we do not think it possible to permit the accountable person to raise this question at this stage.

24. In the result, the question referred is answered in the affirmative and against the assessee. The Controller of Estate Duty will have his costs. Counsel's fee Rs. 250.