

CONTROLLER OF ESTATE DUTY, GUJARAT

v.

HUSSAINBHAI MOHMEDBHAI BADRI

April 30, 1973

[K. S. HEGDE AND H. R. KHANNA, JJ.]

Estate Duty Act—Sections 5(1), 2(15), (16) Settlement by trust—Settlor, his wife and eldest son appointed trustees—Settlor entitled to net income of trust properties—On his death, and of said income to be appropriated by wife—On wife's death 1/3 share of trust to be given eldest son—Whether whole of trust to be included in assessment or only a portion thereof—"Property passing on death"—Scope of—Change in the beneficial interest and not title, is the real test.

The settlor in the instant case settled upon trust certain immovable properties and lease-hold lands by an indenture dated 15-7-1938. Under that deed the settlor, his wife and their eldest son (the respondent) were appointed trustees. Under the terms of the trust deed, the settlor was entitled to the net income of the trust properties during his lifetime. After his death, the income of those properties was to be divided into three equal shares; 1/3rd of the income was to be appropriated by the wife during her lifetime. Out of the remaining 2/3rd, 1/3rd was to be paid to the respondent and the remaining 1/3rd was to be entrusted to the respondent for being utilised for the maintenance of the two wives and the children of the settlor's youngest son, who had died before the trust deed was executed. On the death of settlor's wife, the trustees were to divide the trust properties into two equal shares of which one share would go to the respondent.

The settlor's wife died on 6-10-1955. The value of the estate left by her was determined by the Assistant Controller at Rs. 4,15,000/- on the basis that the estate consisted of two items. (a) her individual properties and (b) 1/3rd of the trust properties. He overruled the objection of the respondent, the accountable person, to the inclusion of the value of the 1/3rd share in the trust properties in the computation of the value of the estate that "passed" on the death of the wife. On appeal, the Appellate Controller considered the entire trust property as the property that "passed" on the death of deceased and consequently enhanced the valuation made by the Assistant Controller. The Tribunal set aside the order of the Appellate Controller and restored that of the Assistant Controller holding that only 1/3rd of the trust estate "passed" on the death of the deceased. At the instance of the appellant, the Tribunal referred to the High Court for its opinion the question as to whether the whole of the trust estate was to be included in the assessment or only a portion thereof and if so what portion. The High Court answered that question in favour of the respondent assessee holding that under s. 5 of the Act only the beneficial interest of the deceased in the trust estate "passed" on her death and the passing of the legal title to the estate from the trustees to the beneficiaries after the death of the deceased was not a material circumstance.

On appeal by certificate to this Court, the appellant contended that : (i) the title to the trust properties vested in the trustees till the death of the deceased; (ii) that title "passed" to the beneficiaries immediately the deceased died; (iii) the title that "passed on the death of the deceased was the title in respect of the entire trust property and therefore it must be held that the entire trust property "passed" on the death of the deceased and (iv) hence, the value of the entire trust property should be taken into consideration in computing the value of the estate that passed on the death of the deceased. The respondent contended that : (i) the deceased had only 1/3rd interest in the trust property and that alone "passed" on her death : and (ii) the deceased's position as trustee, which came to an end on her death be considered as property passing on her death.

Dismissing the appeal,

- A **HELD :** (i) Ever since the death of the settlor, beneficial interest in 2/3rd of the income of the trust property vested in persons other than the deceased. The deceased was entitled to only 1/3rd share in the income of the trust property. In substance, only 1/3rd interest in the trust property passed on her death. It is true that after the death of the deceased, the respondent as well as the other heirs of the settlor who had only a beneficial interest in the income of trust property became the legal owners of the trust property. This change in the nature of the rights possessed by some of the beneficiaries under the trust deed does not enlarge either the extent or value of the property that "passed" on the death of the deceased. [127C]

(ii) The expression "property passing on death" (as found in Ss. 5(1) and 2(16) of the Act) is not a technical expression. In other words, it is not a term of law. The word "passed" means "changes hands". To ascertain whether property has passed, a comparison must be made between the persons beneficially interested at the moment before the death and the persons so interested after the death. [126E]

- C What is relevant in determining the scope of the expression "property passing on the death of the deceased" is the change in the beneficial interest and not title. In determining whether a particular property "passed" on the death of a deceased what has to be seen is whether that deceased had any beneficial interest in that property and whether that interest "passed" to someone on his death. [129D-E]

- D *Scott and Coutts and Co. v. Inland Revenue Commissioners*, [1937] A.C. 174
Green's Death Duties: referred to.

Re. Thomas Townsend, Deceased [1901] 2 K.B. 331, applied.

Mahendra Rambhai Patel v. Controller of Estate Duty, Gujarat, 63 I.T.R. 645, relied on.

- E (iii) The deceased's wife had only 1/3rd share in the income of the trust property. That interest undoubtedly passed on her death. In the remaining 2/3rd income, she had no interest and the same did not pass on her death. Her title to the property as a trustee was purely a personal right. It had no value in terms of money. It conferred no right on her. It only imposed some duties. Such a right cannot be considered as "property". [129E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1096 of 1970.

Appeal by certificate from the judgment and order dated October 3 and 4, 1968 of the Gujarat High Court at Ahmedabad in Estate Duty Tax Reference No. 1 of 1968.

- F *N. D. Karkhanis, P. L. Juneja, S. P. Nayar and R. N. Sachthey*,
for the appellant.

S. T. Desai, H. S. Parihar, for the respondent.

The Judgment of the Court was delivered by

- G **HEGDE, J.**—The appeal by certificate arises from the decision of the High Court of Gujarat in a Reference under s. 64(1) of the Estate Duty Act (to be hereinafter referred to as the Act). Therein the Tribunal referred partly at the instance of the Department and partly at the instance of the accountable person three questions of law said to arise from its order, for the decision of the High Court. The accountable person at whose instance the last question was referred informed the High Court that he does not desire to have any answer to that question; consequently the High Court did not answer that question. The High Court answered the first question in favour of the accountable person. In view of that answer, it thought it
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unnecessary to answer the second question. The only question calling for decision is question No. 1, which reads :

“Whether on the facts and in the circumstances of the case, the whole of the Trust estate was to be included in the assessment or only a portion thereof and if so what portion ?”

Herein we are concerned with the estate of Bai Safiabai (the widow of Eusufalli Badri) who died on 6-10-1955. The High Court opined that only 1/3rd of the trust estate of which the deceased was one of the trustees ‘passed’ on her death. The correctness of that conclusion is challenged by the Department. According to the Department, the entire Trust estate ‘passed’ on the death of the deceased.

The material facts of the case may now be stated. One Eusufalli Ebrahimji settled upon trust certain immovable properties and leasehold lands by an indenture date 15-7-1938. Under that deed three trustees were appointed. They were Eusufalli (the settlor), his wife Bai Safiabai (the deceased) and their eldest son Mohamedbhai, the accountable person. Under the terms of the trust deed, the settlor was entitled to the net income of the trust properties during his life time. After his death, the income of those properties was to be divided into three equal shares; 1/3rd of the income was to be appropriated by Bai Safiabai during her life time. Out of the remaining 2/3rd, 1/3rd was to be paid to Mohamedbhai and the remaining 1/3rd was to be entrusted to Mohamedbhai for being utilised for the maintenance of the two wives and the children of the settlor’s youngest son Salebhai, who had died before the trust deed was executed. The settlor prescribed in the trust deed that after the death of Safiabai :

“The trustees divide the trust properties in such a manner that one equal share i.e. half share shall be given to my eldest son, Mohamedbhai, and if he has died before that then, that share shall be given to his children and wife and that division shall be made according to dictates of my religion and the other half share shall be given to the wife and children of Salebhai in such manner that the two anna share shall be given to each of his two wives and the remaining twelve annas shall be distributed amongst his (Salebhai’s) children according to the dictates of my religion and after doing so this trust shall come to an end.”

(The remaining clauses in the trust deed are not relevant).

Safiabai, as mentioned earlier, died on 6-10-1955. The value of the estate left by her was determined by the Assistant Controller at Rs. 4.15.000/-. According to the Assistant Controller the estate left by the deceased consisted of two times (a) of her individual properties and (b) 1/3rd of the trust properties.

A The accountable person objected to the inclusion of the value of the 1/3rd share in the trust properties in the computation of the value of the estate that 'passed' on the death of Safiabai. But that objection was overruled by the Assistant Controller.

B Aggrieved by that decision, the accountable person went up in appeal to the Appellate Controller. But, later on the accountable person sought to withdraw the appeal. The Appellate Controller refused to give him permission to withdraw the appeal. Further, he gave him notice requiring him to show cause why the entire value of the trust estate should not be included in the computation of the value of the estate that 'passed' on the death of Safiabai. The accountable person contended that the trust property did not belong to the deceased and as such the same cannot be said to have 'passed' on her death. That contention was rejected and the entire trust property was considered as the property that 'passed' on the death of the deceased. Consequently the valuation made by the Assistant Controller was enhanced by Rs. 5,73,000/-.

D Against the order of the Appellate Controller, the accountable person went up in appeal to the Appellate Tribunal. The Tribunal set aside the order of the Appellate Controller and restored that of the Assistant Controller. It held that only 1/3rd of the trust estate 'passed' on the death of the deceased. Thereafter at the instance of the Department, the question set out earlier was submitted to the High Court seeking its opinion thereon. The High Court, as mentioned earlier, answered that question in favour of the assessee. The High Court opined that under s. 5 of the Act only the beneficial interest of the deceased in the trust estate 'passed' on her death.

F It rejected the contention of the Department that the entire trust estate passed on her death. It further held that the circumstance that the legal title to the estate passed from the trustees to the beneficiaries after the death of the deceased was not a material circumstance. Before us it was contended on behalf of the Department that the title to the trust properties vested in the trustees till the death of the deceased. That title 'passed' to the beneficiaries immediately the deceased died. The title that 'passed' on the death of the deceased was the title in respect of the entire trust property and therefore we must hold that the entire trust property 'passed' on the death of the deceased. Hence, the value of the entire trust property should be taken into consideration in computing the value of the estate that passed on the death of the deceased. On the other hand it was contended on behalf of the accountable person that the deceased had only 1/3rd interest in the trust property and that alone 'passed' on her death. According to him, the deceased's position as a trustee, which came to an end on her death cannot be considered as property passing on her death.

H To decide the controversy between the parties, it is necessary to find the scope of s. 5(1) of the Act. That section reads :

"In the case of every person dying after the commencement of this Act, there shall, save as herein after 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 territories which immediately before the 1st November, 1956, were comprised 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."

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(The remaining portion of the section is not relevant).

At this stage we may refer to ss. 2(15) and 2(16) of the Act. Section 2(15) says :

" "property" includes 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".

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(The explanations to this section are not relevant).

Section 2(16) defines the expression "property passing on the death". That provision runs thus :

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" "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" :

This definition is only an inclusive definition. It does not bring out the meaning of the expression "property passing on the death".

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The expression "property passing on death" is not a technical expression. In other words, it is not a term of law. The word "passes" means "changes hands". To ascertain whether property has passed, a comparison must be made between the persons beneficially interested the moment before the death and the persons so interested the moment after the death—see the observations of Lord Russel of Killowen in *Scott and Coutts and Co. v. Inland Revenue Commissioner*⁽¹⁾. It is observed in Green's "Death Duties" at p. 34:

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"If, after much a comparison, it appears that the beneficial enjoyment of the property (a definable part thereof) was, in substance and in events, unaffected by the death, the property (or that part thereof) did not pass on the death merely because, as a matter of terminology, one set of limitations then ceased to have effect and another became operative".

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It is further observed therein :

"...to the extent that there is no change or beneficial enjoyment de facto, property does not pass merely because the exact nature or extent of the beneficial inte-

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(1) [1937] A. C. 174.

- A rests after the death was not ascertainable until that event occurred; or because the beneficiary was entitled to income only before the death and to capital thereafter."

Proceeding further, the learned author says :

- B "Moreover Estate duty is not payable under s. 1 (corresponding to our s. 5) by reason only of a change of title, where the same person was entitled as of right to the possession or income of the property both before and after the death, without interruption. This is so, even if before the death he had only a defeasible right to the income and after the death he has an indefeasible right to the capital."

- C From the facts mentioned earlier, it is seen that ever since the death of the settlor, beneficial interest in 2/3rd of the income of the trust property vested on persons other than the deceased. The deceased was entitled only to on 1/3rd share in the income of the trust property. In substance, only 1/3rd interest in the trust property passed on her death. It is true, that after the death of the deceased, the accountable person as well as the other heirs of the settlor who had only a beneficial interest in the income of the trust property became the legal owners of the trust property. This change in the nature of the rights possessed by some of the beneficiaries under the trust deed does not enlarge either the extent or value of the property that 'passed' on the death of the deceased.

- E The meaning of the expression "property passing on the death of the deceased" found in the corresponding English Act was considered by the Kings Bench in *Re Thomas Townsend, Deceased*⁽¹⁾. In that case a testator who died before the commencement of the Finance Act, 1894, by his will, bequeathed his real and personal estate to trustees for sale and investment, and for payment out of the annual income thereof of an annuity to his wife, and, subject to the annuity, to his eight children equally, and after the death of his wife to divide the trust fund among the children in equal shares; but if the fund exceeded a certain specified sum, then to divide eight-ninths of such excess among the children, and to pay the remaining ninth to certain other persons. The wife died after the Finance Act, 1894, had come into operation.
- F The Court held that the estate duty was only payable on the one-ninth share of the excess of the trust fund over the specified sum and on the benefit which accrued to the children by the cessor of the annuity, since that was the only property passing on the death of the wife. Dealing with the question of law arising for decision Kennedy J. observed :

- H "There is no question that, looking to the substance of the disposition which is in question, as to 9600 £ the children took an interest on the death of testator which was

qua that sum a definite ascertained profit which vested in them, and as to which each of the eight children got his eighth share. Of course the whole estate was subject to the annuity, but the only uncertainty in case of the residue was as regards the amount of anything beyond 9600 £. It is not until the death of the widow that the residue over 9600 £ passes to the children and the grand-children in the way provided for by the will. Therefore, if it does not pass until then, it cannot be ascertained until then, for it cannot be known until then that there will, be any such residue. Otherwise the matter seems quite clear. The property as regards the 9600 £ was property which passed on the death of the testator, and not on the death of the testator's widow, and therefore is not liable to this claim to the extent of the eight-nineths."

A similar view was expressed by Phillimore J. He observed :

"It seems to me obvious that, as regards the legacies and as regards eight-nineths of the residue, or, as the legacies go to the same people, we may say as regards eight-nineths of the property, it passed at once to the children subject to the burden of the annuity; and if Mr. Thomas Townsend had died in the year of grace 1900 or 1901, and these had been, not children, but nephews or great-nephews liable to pay legacy duty, I do not think the Inland Revenue officials would willingly have accepted the suggestion that legacy duty would not become payable until after the death of his widow."

The rule laid down in Townsend's case is equally applicable to the facts of the present case. In our opinion what is relevant in determining the scope of the expression "property passing on the death of the deceased" is the change in the beneficial interest and not title. This conclusion of ours receives support from the decision of this Court in *Mahendra Rambhai Patel v. Controller of Estate Duty, Gujarat*⁽¹⁾. Therein by a deed of trust dated June 28, 1941 one Rambhai settled 160 fully paid up shares in a company in trust for the benefit of his sons Manubhai and Mahendra in equal shares. The trustees were to stand possessed of the shares until each of the beneficiaries completed the age of 25 years and apply in their discretion the whole or part of the profits arising therefrom for the maintenance and advancement of the beneficiaries and to invest the surplus. If and when each of the beneficiaries completed the age of 25 years the trustees were to transfer out of the 160 shares his portion of the shares and the accumulation or any other investment in lieu thereof to him absolutely. If any of the beneficiaries should die before completing the age of 25 years, the shares settled on him (but not the accumulated surplus income) were to devolve on certain persons. The beneficiaries had no right to mortgage or create any incumbrance or sell it until each of them completed the age of 25

(1) 63 I.T.R. 645;

A years. Manubhai died on June 7, 1954, a minor and unmarried; and the principal value of his interest in the settled property was brought to estate duty in the hands of his brother. The accountable person challenged the validity of the levy. He contended that no property passed on the death of his brother Manubhai. This contention was rejected both by the High Court and this Court. This Court held that though the shares were not to be delivered to Manubhai until B he attained the age of 25 years, the shares belonged to him since the execution of the trust deed and he was also beneficially entitled to the income from those shares. In the course of his Judgment Shah J. (as he then was) speaking for the Court observed at p. 649 :

C "The interest of Manubhai in the shares and in the accumulated income was 'property' within the meaning of section 2(15). That property did, as we have already pointed out, vest in ownership in Manubhai immediately on the execution of the deed of trust. On Manubhai dying unmarried, the property as to the shares under clause 7 of the deed and and as to the accumulated income under the law of inheritance devolved on his brother Mahender. On D Manubhai's death, there was under the deed of trust a change in the person who was beneficially interested in the shares.

This decision clearly lays down that in determining whether a particular property 'passed' on the death of a deceased what has to be seen is whether that deceased had any beneficial interest in that property and whether that interest 'passed' to someone on his death. The deceased Safiabai had only 1/3rd share in the income of the trust property. That interest undoubtedly passed on her death. In the remaining 2/3rd Income, she had no interest and the same did not pass E on her death. Her title to the property as a trustee was purely a personal right. It had no value in terms of money. It conferred no right on her. It only imposed some duties. Such a right cannot be considered as 'property'.

F For the reasons mentioned above, we entirely agree with the conclusions reached by the High Court.

In the result this appeal fails and it is dismissed with costs.

S.B.W.

Appeal dismissed.