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Satyanarayan Saraf Vs. Assistant Controller, a-ward

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Court : Kolkata

Decided On : Jun-16-1976

Reported in : 80CWN813,[1978]111ITR432(Cal)

Judge : M.M. Dutt, J.

Acts : Hindu Law; ;Estate Duty Act, 1953 - Sections 7(1), 34(1), 39 and 64; ; Constitution of India - Article 226

Appeal No. : C.R. No. 4545(W) of 1968

Appellant : Satyanarayan Saraf

Respondent : Assistant Controller, "a"-ward

Advocate for Def. : B.L. Pal, ;Nanda Lal Pal and ;Rupendra Nath Mitra, Advs.

Advocate for Pet/Ap. : A.C. Bhabra and ;Paramanand Jalan, Advs.

Judgement :

M.M. Dutt, J.

1. This rule involves the construction of Section 34(1)(c) of the Estate Duty Act, 1953, hereinafter referred to as 'the Act'.

2. One Hanuman Prasad Saraf, who was governed by the Mitakshara school of Hindu law and was the karta of the Hindu undivided family, died on January 21,

1961. He was survived by the following members of his family :

HANUMAN PRASAD SARAF

(deceased)

|

Durga Debi (widow)

____

| | |

Satyanarayan Saraf Gyan Bai Sushila Bai

| (daughter) (daughter)

Narbada Debi(wife)

__________|___________________________

| |

Bhagawati Prasad (Son) Sudha (daughter)

3. The petitioner, Satyanarayan Saraf, who is the son of Hanuman Prasad, is the accountable person in respect of the estate of the deceased within the meaning of the Act. The respondent No. 1, Assistant Controller, 'A' Ward, Estate Duty-cum-Income-tax Circle, by his order dated August 31, 1964, assessed the principal value of the estate of the deceased, Hanuman Prasad, at Rs. 3,00,416 in respect of his l/3rcl interest ceasing on his death in the joint family property of the said Hindu undivided family including a gift of Rs. 12,540 and determined Rs. 2,01,952.26 as the amount payable on account of estate duty. Against the said order, the petitioner preferred an appeal to the Appellate Controller of Estate Duty, Calcutta. During the pendency of the appeal, the respondent No. 1 served a notice upon the petitioner proposing to rectify a mistake apparent from the record. It was alleged that in assessing the duty payable in respect of the estate of the

deceased, Hanuman Prasad, his 1/3rd interest in the undivided family had been taken into consideration but for the purpose of aggregation under Section 34(1)(c), the interest of the lineal descendants of the deceased in the joint family property had not been considered. Thereafter, the respondent No. 1, by his order dated January 7, 1965, aggregated the 2/3rds share of Satyanarayan and his son, Bhagawati Prasad, with the 1/3rd interest of the deceased and enhanced the duty, overruling the contention of the petitioner that the 1/9th share of the son's wife of the deceased, that is, the wife of Satyanarayan, who was not a lineal descendant, should have been excluded for the purpose of aggregation. The relevant portion of the order of respondent No. 1 under Section 61 is as follows:

'Shri A. Chatterjee, authorised representative of the accountable person, appears and states that he has no objection to the inclusion of the value of properties falling to the lot of lineal descendants of the deceased, provided that 1/9th of the entire joint properties which, in the event of a partition, would have been allotted to the wife of the son, would not form part of the estate even for aggregation, as she is not the lineal descendant of the deceased. This contention of the authorised representative of the accountable person cannot be accepted. What we are concerned with here is a notional partition amongst the members of the family of which the deceased was a coparcener. We need go no further to effect such partition in sub-coparcenaries. The value of the estate falling to the lot of the deceased's son has to be taken for aggregation purpose without allowing him for any deduction for the share of the daughter-in-law of the deceased.'

4. As the appeal against the original order of assessment was pending before the Appellate Controller when the order of rectification was passed by the respondent No. 1, the petitioner took certain additional grounds before the Appellate Controller challenging the propriety of the order of the respondent No. 1 passed under Section 61 of the Act. The Appellate Controller, however, took the view that an order under Section 61 was not an appealable order. In that view of the matter, he did not entertain the contentions made on behalf of the petitioner. The appeal was allowed in part on merits in respect of the original assessment. Against the said order of the Appellate Controller, the petitioner preferred an appeal to the Appellate Tribunal. Before the Tribunal, the petitioner, inter alia, challenged the

legality of the said order of the respondent No. 1 passed under Section 61 of the Act. The Appellate Tribunal, by its order dated December 12, 1967, however, took the same view as that, of the Appellate Controller that the order of rectification under Section 61 was not an appealable order as it does not come under any of the clauses of Section 62(1) of the Act. It was observed by the Appellate Tribunal that if the order under Section 61 was not properly passed, the accountable person would have all other remedies other than those under Section 62. The petitioner, thereafter, moved this court under Article 226 of the Constitution against the said order of rectification of the respondent No. 1 and obtained the present rule on April 29, 1968.

5. Section 5 of the Act is the charging section. Sub-section (1) of Section 5, inter alia, provides that in the case of every person dying after the commencement of the Act there shall be levied and paid upon the principal value a duty called 'estate duty' at the rate fixed in accordance with Section 35. Section 7(1) provides, inter alia, that property in which the deceased or any other person had an interest ceasing on the death of thedeceased shall he 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 law. Section 39(1) lays down that the value of the benefit accruing or arising from the cesser of a coparcenary interest in any joint family property governed by the Mitakshara school of Hindu law which ceases on the death of a member thereof shall be the principal value of the share in the joint family property which would have been allotted to the deceased had there been a partition immediately before his death. Now I may refer to Section 34(1)(c):

'34. (1) For the purpose of determining the rate of the estate duty to be paid on any property passing on the death of the deaceased, --... (c) in the case of property so passing which consists of a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasantana law, also the interests in the joint family property of all the lineal descendants of the deceased member ;

shall be aggregated so as to form one estate and estate duty shall be levied thereon at the rate or rates applicable in respect of the principal value thereof.'

6. For the purpose of aggregation under Section 34(1)(c), there can be no doubt that the principal value has to be ascertained first. Section 39 lays down that the principal value is the value of the share of the deceased in the joint family property which would have been allotted to him had there been a partition immediately before his death. It is, therefore, clear that Section 39 contemplates a notional partition of the joint family property immediately before the death of the deceased in order to ascertain the principal value. Under the Hindu law a wife cannot herself demand a partition but if a partition takes 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 (Article 315 of Mulla's Hindu Law, 13th edition, page 365). If immediately before the death of Hanuman Prasad a partition had taken place between him and his sons, his wife, Durga Debi, would have been entitled to a share equal to that of a son's share. The shares of Hanuman Prasad, his son, Satyanarnyan, and his wife, Durga Debi, would be l/3rd each. The l/3rd share of Hanuman Prasad obtained by such notional partition passed on his death. Now I may consider the question of aggregation under Section 34(1)(c) of the Act. Under the provision of that section the interests in the joint family property of all the lineal descendants of the deceased shall be aggregated with the property passing on the death of the deceased so as to form one estate and estate duty shall be levied thereon at the rate or rates applicable inrespect of the principal value thereof. The lineal descendants of Hanuman Prasad are his son, Satyanarayan, and his grandson, Bhagawati Prasad. Satyanarayan, his son and his daughter constituted the smaller Hindu undivided family. According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he--that particular member---has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property ; in other words, it consists in defining the shares of the coparceners in the joint property ; an actual division of the property by metes and bounds is not necessary (Appovier v. Rama Subba Aiyan [1866] 11 MIA 75 . In order to ascertain the shares of the lineal descendants of Hanuman. Prasad a

notional partition of the smaller Hindu undivided family is also contemplated between Satyanarayan and his son, Bhagawati Prasad. Such a partition being one between the father and the son, the wife of Satyanarayan will be entitled to receive a share equal to that of her son, Bhagawati. In view of the well-settled principle of Hindu law as stated in Article 315 of Mulla's Hindu Law referred to above, on such a partition Satyanarayan, his wife and his son would each be entitled to l/9th share in the joint family property. The shares of the lineal descendants, namely, that of Satyanarayan and Bhagawati, which will be taken for the purpose of aggregation are 1/9th + 1/9th = 2/9ths.

7. The respondent No. 1, however, has ignored the share that would have been allotted to the wife of Satyanarayan for the reasons which have been already stated above. Mr. Pal, learned advocate for the respondents, has strenuously urged that for the purpose of ascertaining the shares of the lineal descendants of Hanuman Prasad, the son's wife should not be brought into the picture, but the shares should be allotted only between Satyanarayan and his son. In other words, it is contended by him that the whole of 1/3rd share that would have been allotted to Satyanarayan on a partition between him and his deceased father should be aggregated. I am unable to accept this contention. The provision of Section 34(1)(c) does not override the principles of Hindu law relating to partition of property belonging to a Hindu undivided family governed by the Mitakshara law. In my opinion, as notional partition has to betaken resort to for the purpose of working out the shares of the deceased and his lineal descendants, full effect should be given to the principles of Hindu law relating to partition of property belonging to a Hindu undivided family governed by the Mitakshara law. If any person other than a lineal descendant is entitled to a share, such share should be allotted to him and after such allotment the shares of the lineal descendants will be ascertained. The decision of the Madras High Court in Ramanathan Chettiar v. Assistant Controller ofEstate Duty : [1970]76ITR402(Mad) and that of the Andhra Pradesh High Court in H. V. Somaraju v. Govt. of India : [1974]97ITR97(AP) do not militate against the view which I have taken, nor have they any bearing on the point with which we are concerned. I am, therefore, of the view that the respondent No. 1 was not justified in not taking into consideration the 1/9th share of Satyanarayan's wife for the purpose of aggregation under Section 34(1)(c). The

shares of the lineal descendants which are to be aggregated with the shares of the deceased in the joint family property are 1/9th + 1/9th = 2/9ths, as stated already.

8. Before I part with this case, 1 may dispose of one technical objection raised on behalf of the respondents. It is contended that there was an alternative remedy for challenging the propriety of the order of the respondent No. 1 under Section 64 of the Act, and as the petitioner has not availed himself of that remedy, the writ petition was not maintainable at his instance. It is now well settled that though the existence of an alternative remedy is a bar to the granting of reliefs under Article 226 of the Constitution, yet it is not an absolute bar. It depends on the facts and circumstances of each case whether this court should exercise its jurisdiction under Article 226 when there is an alternative remedy available to the petitioner. In the instant case, the petitioner admittedly challenged the propriety of the order of the respondent No. 1 passed under Section 61 before the Appellate Controller and thereafter before the Appellate Tribunal, but he failed on the ground that no appeal lay against such an order. It is said on behalf of the respondents that the petitioner could make an application to the Appellate Tribunal requiring it to refer to this court the point of law, namely, whether an appeal lay from an order under Section 61. In my opinion, the provision for reference to the High Court under Section 64 of the Act is not an alternative remedy which could give to the petitioner the same relief as he may have in a proceeding under Article 226. In the case of such a reference the High Court might or might not have decided the point in favour of the petitioner. If the point had been decided against the petitioner, he would have to move this court under Article 226 challenging the order of the respondent No. 1 under Section 61. The point involved is a point of law simpliciter. The petitioner, as stated before, made his best endeavour to assail the order of the respondent No. 1. There was no negligence on the part of the petitioner and he came to this court within a reasonable time. In those circumstances, I am of the view that there is no substance in the contention of the respondents that the existence of the alternative remedy is a bar to the present writ petition under Article 226 of the Constitution. The facts and circumstances of the decision1 of the Supreme Court in Gita Devi Aggarwal v. Commissioner of Income-tax : [1970]76ITR496(SC) , relied on by Mr. Pal, are differentfrom those in the present case. The petitioner in that case, instead of preferring an appeal against, an order under Section 33B of the Indian

Income-tax Act, 1922, took recourse to the special jurisdiction under Article 226 of the Constitution without any explanation justifying the same. In the present case, both the Tribunals held that no appeal lay against an order passed under Section 61 and that is also the contention of the respondents. The said decision, in my opinion, is not applicable to the present case. The contention of the respondent is accordingly, rejected.

9. It may be recorded that Mr. Bhabra, appearing for the petitioner, has expressly abandoned the additional grounds taken by the petitioner by an amendment of the writ petition challenging the vires and constitutionality of Section 34(1)(c).

10. For the foregoing reasons, the rule must succeed. It is, accordingly, directed that a writ in the nature of certiorari issue quashing the impugned order of the respondent No. 1 dated January 7, 1965 (annexure 'C' to the writ petition) only in so far as he has taken into consideration the 1/9th share of the wife of the petitioner for the purpose of aggregation under section '34(1)(c) of the Act. Further, it is directed that a writ in the nature of mandamus issue commanding the respondent No, 1 to take into consideration only 1/9th + 1/9ths = 2/9th shares of Satyanarayan and his son for the purpose of aggregation and reassess the estate duty accordingly, and refund such sum to the petitioner as may be found due to him on such reassessment.

11. The rule is made absolute to the extent indicated above. There will be no order as to costs.

12. As prayed for on behalf of the opposite parties, let the operation of this judgment remain stayed for a period of four weeks from date so as to enable them to prefer an appeal against the same.

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