

Rupchand Mullick and anr. Vs. Controller of Estate Duty

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Court : Kolkata

Decided On : Mar-15-1982

Reported in : (1982)30CTR(Cal)106,[1983]143ITR103(Cal)

Judge : Sabyasachi Mukharji and ;Suhas Chandra Sen, JJ.

Acts : [Estate Duty Act, 1953](#) - Sections 53, 56, 59, 63, 63(3), 63(4), 64(2) and 73A; ;Central Board of Direct Taxes Act, 1963 - Section 6; ;Companies Act - Section 434; ;Code of Criminal Procedure (CrPC) - Section 540; ;Evidence Act - Section 165

Appeal No. : Matter No. 557 of 1966

Appellant : Rupchand Mullick and anr.

Respondent : Controller of Estate Duty

Advocate for Def. : B.L. Pal and ;Ajit Sengupta, Advs.

Advocate for Pet/Ap. : N. Mukherji and ;A.S.C. Chari, Advs.

Judgement :

Sabyasachi Mukharji, J.

1. Kumar Kartick Churan Mullick died at Calcutta on 17th November, 1955. By his last will and testament the deceased had appointed the accountable persons,

being two of his sons, as the executors and also trustees in respect of certain trusts created by the said will which was proved, and probate whereof was granted to the said accountable persons by the Hon'ble High Court at Calcutta on or about 20th March, 1958, in probate proceedings No. 242 of 1957. In the premises the accountable persons filed return under the E.D. Act, 1953, in (Form) E.D.-1 on 8th October, 1956, and subsequent rectifications made therein from time to time by the accountable persons. The Dy. Controller of Estate Duty, Eastern Zone, Calcutta, made an assessment on the 22nd July, 1958, under the E.D. Act, 1953, determining the principal value of the estate of the deceased at Rs. 24,85,971 and the duty payable thereon was fixed at Rs. 5,47,041.31. It appears from the said estate duty assessment order that one of the items shown was the face value of 500 shares worth Rs. 50,000 of Raja D.N. Mullick & Sons (P.) Ltd. These shares were shown in the return at Rs. 1,42,160. The Dy. Controller by his order of assessment valued the same at Rs. 3,64,140. Another item shown was the shares of the face value of Rs. 2,19,500. This item was shown as of nil value. The Dy. Controller accepted this position and did not alter the valuation in respect of the same. Another item which was entered in the computation was the debt due from K.C. Mullick & Sons Ltd. The value shown in the return was nil but in the assessment order the valuation had been determined at Rs. 6,84,448. It may incidentally be mentioned that among the immovable properties included was premises No. 17/1A, E, F, G, H, K and L, Marquis Lane, Calcutta, and the value and was given in the estate duty return at Rs. 31,300. The Dy. Controller estimated the fair market value of the same at Rs. 1,60,000, He thus arrived at the total value of the movables at Rs. 13,00,950 and immovables at Rs. 13,85,359 totalling a sum of Rs. 26,86,309. He allowed deduction of liabilities of Rs. 2,00,338 and computed the principal value of the estate at Rs. 24,85,971. In the said assessment order the value of the debt of Rs. 6,84,448, from M/s. K.C. Mullick & Sons Pvt. Ltd. which subsequently went into liquidation and the value whereof as contended by the accountable persons to be nil was included in the value of the estate. Similarly, the value of 500 shares of the face value of Rs. 50,000 of the company of Raja D.N. Mullick & Sons Ltd. belonging to the deceased and contended by the accountable persons to be valued at Rs. 1,42,160 was found to be worth Rs. 3,64,140 by the Dy. Controller and as such he included the said

amount in the value of the estate. A sum of Rs. 1,50,000 was due against an overdraft agreement from one K. C. Mullick & Sons Ltd. to the United Bank of India Ltd. The deceased had guaranteed the repayment of the said debt and had executed in favour of the creditor-bank a personal letter of guarantee and mortgage of premises No. 17/1 A, E, F, G, H, K & L, Marquis Lane, Calcutta, by deposit of title deeds as an additional security for due repayment thereof. It was contended that at the death of the deceased the amount due to the creditor-bank was about Rs. 2,60,000 and subsequently the creditor-bank instituted a suit for Rs. 2,95,089 stated to be due against the said overdraft and a receiver was appointed over the said premises in Marquis Lane, Calcutta. No portion of this debt was allowed as deduction by the Dy. Controller in the order of assessment. It must be mentioned that in the estate duty return in schedule No. 3 which appears at p. 24 of the supplementary paper book the amount of debt sought to be claimed as deduction was Rs. 2,52,252 on account of the debt due to the United Bank of India Ltd.

2. On the 10th October, 1958, the accountable persons preferred an appeal against the said order of assessment dated 22nd July, 1958, before the then CBR under Section 63 of the E.D. Act, 1953. It may incidentally be mentioned that by virtue of Section 6 of the Central Board of Direct Taxes Act, 1963, all appeals pending before the then CBR stood transferred to the CBDT.

3. Section 59 of the E.D. Act, 1953, as amended by the E.D. (Amend.) Act, 1958, provides, inter alia, as follows :

' 59. Property escaping assessment.--If the Controller,--

(a) has reason to believe that by reason of the omission or failure on the part of the person accountable to submit an account of the estate of the deceased under Section 53 or Section 56 or to disclose fully and truly all material facts necessary for assessment, any property chargeable to estate duty has escaped assessment by reason of undervaluation of the property included in the account or of omission to include therein any property which ought to have been included or of assessment at too low a rate or otherwise, or

(b) has, in consequence of any information in his possession, reason to believe notwithstanding that there has not been such omission or failure as is referred to in Clause (a) that any property chargeable to estate duty has escaped assessment, whether by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included, or of assessment at too low a rate or otherwise,

he may at any time, subject to the provisions of Section 73A, require the person accountable to submit an account as required under Section 53 and may proceed to assess or reassess such property as if the provisions of Section 58 applied thereto.'

4. In the appeal before the Board it was contended on behalf of the accountable persons that in respect of the valuation of the said debt of RS. 6,84,448 due from the said M/s. K. C. Mullick & Sons Ltd. as follows:

(a) That the financial position of the said company was far from sound and it was heavily indebted to the managing agents as well as the United Bank of India Ltd.

(b) That on the 18th December, 1950, The Industrial Finance Corporation had advised the said company that their application for financial assistance from the Corporation was not likely to succeed.

(c) That suits had been filed against the said company by the United Bank of India and a receiver had been appointed over the properties secured by the Hon'ble High Court at Calcutta.

(d) That on the 25th June, 1958, the Hon'ble High Court at Calcutta, made an order for winding up of the said company.

(e) The value of the stock-in-trade of the said company as shown in the balance-sheet as on 31st March, 1955, was highly inflated.

5. The Board noted that the Dy. Controller found that the deceased had held 21,950 ordinary shares of Rs. 10 each, face value Rs. 2,19,500, in the said company and that the deceased had also advanced a sum of Rs. 6,84,448 to the

company through the managing agency firm of which the deceased was a partner. The Dy. Controller took the value of the shares at nil but he included the entire amount of the advance made by the deceased as a debt due to him from the company. According to the Board the balance-sheet of the company as on 31st March, 1955, the book value of the net tangible assets of the company excluding the intangible assets such as goodwill, profit & loss a/c., debit balance, etc., was Rs. 12,61,397 against which the total liabilities excluding the paid up capital and reserve fund came to Rs. 11,13,107. Therefore, according to the Board, the tangible assets and the liabilities were almost equal. Therefore, the Dy. Controller had presumed that on the realisation of the assets the creditors would be paid in full. It was on this basis that the Dy. Controller included the amount of Rs. 6,84,448 as being fully realisable in the event of the company going into liquidation. It was pointed out before the Board that the financial position of the company was far from sound and that even as far back as on December 18, 1950, the Industrial Finance Corporation of India had advised the company that their application for financial assistance from the Corporation was not likely to meet with success. The original letter from the Corporation dated 18th December, 1950, was filed. It was then pointed out that the balance-sheet of the company for the year ended 31st March, 1950, was also filed. It was argued with reference to the balance-sheet ended 31st March, 1955, that the company was heavily indebted to the managing agents as well as to the United Bank of India. Copies of the plaints in civil suits filed by the United Bank against the company as a result of which the Calcutta High Court passed an order on 28th January, 1959, appointing Shri Lalchand Mullick, a son of the deceased and one of the executors of his will, as a receiver for the rents of the premises No. 17/1A, Marquis Lane, Calcutta, which had been given as a security to the bank, were also produced. Other executors also issued a notice under Section 434 of the Companies Act demanding Rs. 64,448 from the company and thereupon moved the High Court for the liquidation of the said company. On 25th June, 1958, the Calcutta High Court had passed orders for the winding-up of the company and those papers were produced before the Board. It was also pointed out before the Board that the defunct company had been in arrears of rents and various decrees had been passed by the Small Causes Court against the company for comparatively small sums due to the

landlord. Large arrears of tax were also stated to be due to the Corporation. It was also pointed out that the decree-holders in execution of the said decrees have attached the movable property of the company which had already been hypothecated to the bank. It was also stated that the value of the stock-in-trade shown at Rs. 10,36,424 in the balance-sheet as on 31st March, 1955, was a highly inflated figure. It was argued that if there had been such valuable assets, the company would not have allowed its movables to be attached for small sums like Rs. 1,826 and Rs. 1,215. It was further claimed that not only were the chances of the deceased's estate receiving any portion of the amount due to it very doubtful but that the estate would also have to bear the liability on account of the deceased having stood as a personal surety for the loan advanced by the United Bank to the company.

6. The Board, however, observed that having regard to the various submissions made by the learned advocates appearing, the Board thought it necessary to ascertain the latest position from the official liquidator. Therefore, the Board caused further enquiries to be made. It was found that the machinery and the stock of goods at the factory premises of the company were sold by the official liquidator by public auction on the 10th April, 1961, pursuant to an order of the High Court for Rs. 1,52,000. It was further manifest to the Board after these enquiries that the only assets remaining consisted of book debts and the sewing machines sold on hire-purchase basis and that all the said assets were claimed as charged in favour of the United Bank which had filed a suit against the company which was pending. It was reported that until and unless the said suit was disposed of, it was not possible to say whether any asset would be available to the liquidator of the company at all for distribution to the general body of creditors'. The Board noted that the company went into liquidation in June, 1958. For the purpose of valuation of the debt in the case of the present deceased, what was considered to be necessary by the Board was the company's financial position as on the date of the death of the deceased, i.e., 17th November, 1955. According to the balance-sheets of the company immediately before and after the said date there was no reason to consider any portion of the debts as being doubtful of recovery. The correspondence between the company, and the Industrial Finance Corporation to which attention was drawn took place as far back as 1950. The

letter dated the 18th December, 1950, from the Corporation merely stated that the company was unlikely to obtain any financial assistance from the Corporation in view of the fact that according to its balance-sheet dated the 31st March, 1950, the company was heavily indebted to the banks and for working capital and the settling of old indebtedness of this nature was not one of the purposes for which the Corporation ordinarily gave financial assistance. Another reason was given for refusal of the Corporation to give financial assistance. The Board also considered the statement that the balance-sheet was highly inflated. The Board took into consideration that in the schedule of assets accompanying the petition for probate filed on 6th September, 1957, the accountable persons had estimated the recoverable portion of this debt at Rs. 1,50,000. Taking into account all these factors the Board concluded on this aspect as follows :

' In all the above circumstances in valuing this debt as on the date of death of the deceased some consideration may be given to the fact that the stocks of machines were probably overvalued to some extent. Any estimate of the quantum of such overvaluation is of course bound to be a rough estimate and for this purpose it is permissible to take note of the fact that some 8 years later the sale of the stock of machines whose book value amounted to about Rs. 3 lakhs fetched a sum of only Rs. 1 1/2 lakhs. I would, therefore, estimate the extent of over-valuation of the stocks on 31st March, 1955, at Rs. 3 1/2 lakhs. On the basis the value of the debts due to the deceased from the company would be worked out as under :

RsRs. Gross assets as per balance-sheet at 31st March, 1955 15,55,491
Deduct :
Goodwill 2,92,772 Debit balance in P & L a/c. 1,323

2,94,095

12,61,396
Deduct : Estimated inflation of the valuation of stock of machines as above 3,50,000

Net assets 9,11,396
Deduct : Debt to the United Bank of India secured by hypothecation of stock 2,48,736

Hence assets available for unsecured creditors 6,62,660 The unsecured debts are the following according to the same balance-sheet : Advance by managing agents (in which is included the loan of Rs. 6,86,448 due to the deceased himself) 7,08,679 Loan on interest 50,198 Guarantee fund 15,141 Liability for goods 22,545 Liability for expenses 54,667 Liability for other finance 12,588 Unpaid dividend 416

8,64,234

As the net assets will be utilised pro-rata for satisfaction of unsecured creditors, the amount payable to the deceased towards his debt of Rs. 6,84,448 would be worked as under :

6,84,448

$8,64,234 \times \frac{6,84,448}{6,62,660} = \text{Rs. } 8,84,800$ I would, therefore, value the debt due from M/s. K.C. Mullick and Sons Ltd. at Rs. 8,84,800. This will mean a reduction of Rs. 1,59,648.'

7. This was one aspect of the claim which is before us.

8. The second aspect of the first question is regarding 500 shares in Raja D.N. Mullick and Sons Ltd. of the face value of Rs. 1,000 each which was valued at Rs. 3,45,500 as we have mentioned before. The Asst. Controller in his order did not give specific reasons but this question was gone into by the Board and the Board noted on this aspect as follows :

' The next point raised by the appellant's advocate and argued at considerable length relates to the valuation of 500 shares of the face value of Rs. 50,000 in Raja D.N. Mullick and Sons Ltd. under voluntary liquidation. This company was a private limited company in which only the members of the family of Raja D.N. Mullick had shares and the business was only of letting out the properties belong to the company. Here again, the properties had been valued by Shri S. K. Dutta, who has made the usual remarks about the cheapness and poor quality of material used in construction. It was stated that originally the value of each share was Rs. 1,000 but there was a reduction in the capital in 1948, as a result of an

order passed by the Calcutta High Court directing that the value of each share of Rs. 1,000 should be reduced to Rs. 100 and the balance of Rs. 900 should be returned to each shareholder. This company is stated to be in voluntary liquidation and the properties are to be sold and the capital is to be distributed. According to the balance-sheet as at 30th September, 1955, the total assets were Rs. 19,33,577. Deducting from this income-tax advance of Rs. 1,25,388 and liabilities amounting to Rs. 28,341, the value of the net assets as per balance-sheet come to Rs. 17,99,848. The assets included 5% loan of the face value of Rs. 79,560 for which the market value was Rs. 54,301 as on the date of death of the deceased, showing a deficit of Rs. 15,259 which has to be deducted. The net figure thus comes to Rs. 17,84,589. This includes a sum of Rs. 13,11,344 shown in the balance-sheet as the value of immovable properties of the company. I find that the Deputy Controller has valued these properties at only Rs. 7,12,000, thus allowing a deduction of Rs. 5,99,344 from the balance-sheet figure. He thus took the net value of the assets at Rs. 11,65,245 and on this basis, worked out the value of the deceased's 500 shares at Rs. 3,65,140

(that is, 500

1,000X 11,65,245). As I have already observed, the basis of the valuation made by Shri S. K. Dutta is unacceptable. On the other hand, the Deputy Controller's valuation cannot at all be said to be excessive. However, I find that in the case of another deceased shareholder, Shri H. C. Mullick, who died on November 6, 1955, the value of each share was fixed at Rs. 691 in round figure and this was accepted by all the parties in that case. On this basis, the value of the 500 shares held by the deceased would come to Rs. 3,45,500. I would, therefore, adopt this figure in place of the amount of Rs. 3,65,140 taken by the Deputy Controller. Hence, the principal value of the estate will be reduced by Rs. 19,460.'

9. The next question related to the disallowance of certain debts due from the deceased to the United Bank of India. This point was held against the accountable persons by the Board. We shall deal with the reasons in detail given by the Board. Upon this an application was made for reference of certain questions which the Board refused to refer. Thereupon an application was made to this court under

Section 64(2) of the E.D. Act, 1953. Two questions have been referred to this court pursuant to the order of the court. The two questions are as follows :

'1. Whether, on the facts and in the circumstances of the case, the valuation of the undermentioned assets by the Central Board of Direct Taxes at the respective sums shown against each are in accordance with law ?

AssetsValuation arrived at by the Central Board of Direct Taxes

Rs.(i)Debt (Unsecured) of Rs. 6,84,448 odd due to the estate from K. C. Mullick & Sons Ltd. (since in liquidation)

5,24,800(ii)Five hundred shares in Raja D. N. Mullick and Sons Private Ltd. (in liquidation) of the face value of Rs. 1,000 each

3,45,500

2. Whether, on the facts and in the circumstances of the case, the non-allowance of the secured debt of Rs. 2,95,089 odd, due by the deceased to the secured creditor, United Bank of India Ltd., and of the encumbrances created by the deceased in favour of the said secured creditor over premises No. 17/1A to 17/1L, Marquis Lane, Calcutta, to secure payment of the same in determining the chargeable value of the estate, was made in accordance with correct principles of law '

10. On behalf of the accountable persons it was submitted that we should reframe these questions by saying whether the valuation of assetsmade in respect of these two items was vitiated by reason of the fact that the estate duty authority concerned did not follow the requirements of law. It was submitted that this was not done in accordance with law. So far as question No. 2 is concerned, it appears to us from the order passed by this court and the schedule indicated therein that the court directed on this aspect the following question to be referred :

'Whether, on the facts and in the circumstances of the case, the non-allowance of the secured debt of Rs. 2,95,089 odd due by the deceased to the secured creditor, United Bank of India Ltd., and of the encumbrance created by the deceased in

favour of the said secured creditor over premises No. 17/1A to 17/1L, Marquis Lane, Calcutta, to secure payment of the same, in determining the chargeable value of the estate, is not perverse and wholly unjustified '

12. So far as the first question is concerned, in our opinion, the first question is sufficiently clear enough to bring out the controversy in this case and it does not require any refraining by us. So far as the second question is concerned, firstly, there is one error which has not been referred in terms of the order of the court and, secondly, it appears to us that the figure has been wrongly mentioned. From the estate duty return which is at p. 24, Pt. II of this paper-book, it appears that there was a claim of the accountable persons for a sum of Rs. 2,52,252 as deduction on account of the debt owed by the deceased. Therefore, we reframe the question as follows :

'Whether, on the facts and in the circumstances of the case, the non-allowance of the secured debt of Rs. 2,52,252 owed to the United Bank of India was not perverse and wholly unjustified '

13. This will bring out the true controversy between the parties.

14. So far as the first question is concerned, it was contended before us that so far as the valuation of the debt (unsecured) to the estate of K.C. Mullick & Sons Ltd. is concerned, the same was under the requirements of law. It was contended that the Asst. Controller had either to accept the valuation given by the accountable persons or if he was not satisfied with that, then he had to call upon the accountable persons to amend the said valuation and in doing so he had to determine for himself the said valuation taking all these factors into consideration. In this connection our attention was drawn to the relevant provisions of the E.D. Act, 1953, as it was then. It was contended that in any event the Board had arbitrarily valued the said assets and our attention was drawn to Section 63 of the E.D. Act, as it stood at the relevant time. The same provided that if any person had objected to the valuation of the Controller or to any order made by the Controller determining the estate duty payable, then he might appeal, inter alia within certain time and certain conditions and, thereafter, it provided for the Board as follows :

'(2) The Board may admit an appeal after the expiry of ninety days referred to in Sub-section (1) if it is satisfied that there was sufficient cause for not presenting it within that period.

(3) The Board may, in disposing of any appeal, hold or cause to be held such further inquiry as it thinks fit; and, after giving the appellant an opportunity of being heard, pass, subject to the provisions of Sub-section (4), such orders thereon as it thinks fit and shall send a copy of such orders to the appellant and the Controller.

(4) Where the dispute pertains to any valuation of property, the Board may, and if the appellant so requires, it shall, refer the question of disputed value to the arbitration of two valuers, one of whom shall be nominated by the Board and the other by the appellant, and the costs of any such arbitration shall be borne by the Board or the appellant, as the case may be, at whose instance the matter was referred to the valuers: Provided that where the appellant has been wholly or partially successful in any reference made at his instance, the extent to which costs should be borne by the appellant shall be at the discretion of the Board :

Provided further that if there is a difference of opinion between the two valuers, the matter shall be referred to a third valuer nominated by agreement, or failing agreement, by the Central Government, and his decision on the question of valuation shall be final. '

15. It was contended that in this case the question of valuation should have been referred to two valuers which was mandatory in Sub-section (4) of Section 63 and the power under Sub-section (3) of Section 63 was dependent upon exercise of the jurisdiction under Sub-section (4) of Section 63. It was pointed out that, in any event, on this aspect all the questions were not agitated before the Board and it had no occasion to deal with these questions. On this aspect our attention was drawn to several decisions which we will briefly note though these are not relevant for the present case.

16. Our attention was drawn to a decision in the case of United Commercial Bank Ltd. v. CIT : [1957]32ITR688(SC) , and reliance was placed at,p. 703 of the report in aid of the proposition that different aspects of aquestion might be gone into in

appropriate cases by the court in answering a reference. Similarly, our attention was drawn to a decision of the Supreme Court in the case, of Indore-Malwa United Mills Ltd. v. CIT : [1966]59ITR738(SC) . Reliance was also placed in the case of CIT v. Metal Corporation of India Ltd. : [1982]133ITR130(Cal) . Reliance was placed on the observations at page 136 of the report. Similarly, our attention was drawn to a decision in the case of Mahamaya Dassi v. CIT : [1980]126ITR748(Cal) . In the view we have taken on the merits of this case it is not necessary for us to discuss these decisions in detail. The essential parts of the controversy were that different aspects of the question can be gone into. This controversy, in our opinion, does not really arise in the facts and circumstances of this case.

17. On behalf of the accountable persons it was contended that there was no speaking order made by the Asst. Controller increasing the valuation. Therefore, this order was bad and cannot be remedied later on. In aid of this proposition reliance was placed on certain observations of the Allahabad High Court in the case of CIT v. Sunder Lal : [1974]96ITR310(All) and our attention was drawn to the observation of the court appearing at p. 314 of the report. It is true that in the order of the Asst. Controller no detailed reasons were given. But it does not appear from the order of the Board that this contention was raised before the Board and if this contention had been raised before the Board, the Board might have remanded the matter to the Asst. Controller. In any event, this aspect was gone into in detail. Whatever is the reason, the Board had discussed these contentions and it had given reasons, the validity of which we could examine later on. In any event, the order cannot be impugned at this stage on that ground. Referring to the scheme of the Act it was contended that if the Asst. Controller was not satisfied with the valuation or return submitted by the accountable persons, then it was the first duty of the Asst. Controller to call upon the accountable persons to amend the said return and thereupon on the failure of the accountable persons to amend the same, then and then only he could assume the jurisdiction of determining the valuation himself. This contention was not raised before the Board. Had it been raised before the Board, the Board might have directed the Asst. Controller to give the accountable persons an opportunity. Furthermore, it appears to us, inasmuch as the whole controversy with the reasons was gone into by the Board and the accountable persons were given opportunity to adduce their

submissions and evidence in support of . the return originally made before the Board, this controversy at this stage is of academic interest. The order does not suffer from any infirmity on this account any more.

18. So it is not necessary for us to embark upon this controversy.

19. One of the main contentions that was urged, as we noted before, was that in this case the Board had no jurisdiction to value itself in the manner it had done, because if there was a dispute as to the valuation of the property, then according to the accountable persons the Board was bound to refer to two valuers as enjoined by Sub-section (4) of Section 63. It was contended that the power given to the Board by Sub-section (5) of Section 63 of the E.D. Act, 1953, as it stood at the relevant time, could be exercised only if the condition stipulated in Sub-section (4) of Section 63 of the said Act at the relevant time had been fulfilled. It was submitted that the expression ' may ', though it had been used, and the expression 'shall' in Sub-section (4), in respect of two different contingencies, must be construed as mandatory and, therefore, the Board having not referred to two valuers, the order was bad. In aid of this proposition reliance was placed on Craies on Statute Law, 7th Edn., at p. 266. But we must also note that at pp. 286, 287, the learned editor of the book had referred that in respect of the same statute if two expressions 'may' and 'shall' were used, one imperative and another permissive, then, unless the circumstances so warranted, it was not correct to read both the expressions as mandatory. Our attention was also drawn to certain observations of the Supreme Court in the case of Bhagat Raja v. Union of India, : [1967]3SCR302 , and reliance was placed on the observations appearing at p. 1616 of the report. Similarly, great reliance was placed on the observations of the Supreme Court in the case of Jamatraj Kewalji Govani v. State of Maharashtra, : 1968 CriLJ231 . Our attention was drawn to the observation of Mr. Justice Hidayatullah, as the learned Chief Justice then was, at p. 180 of the report to the following effect:

' The question falls to be considered under Section 540 of the Code of Criminal Procedure. That section is to be found in Chapter 46 of the Code among several others which have been appropriately described in the heading to the chapter as '

miscellaneous '. It provides:

' Section 540: Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.'

The section gives a power to the Court to summon a material witness or to examine a person present in court or to recall a witness already examined. It confers a wide discretion on the court to act as to exigencies of justice require. Another aspect of this power and complementary to it is to be found in Section 165 of the Indian Evidence Act, which provides:

' Section 165 : The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant, and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make, any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question :..... '

These two sections between them confer jurisdiction on the Judge to act in aid of justice. '

20. But the learned judge observed at p. 18! as follows :

' Section 540 is intended to be wide as the repeated use of the word ' any ' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word ' may ' in the first part and of the word ' shall' in the second firmly establishes this difference. Under the first part, which is permissive, the court may act in one of three ways : (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness

already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. '

21. In this case, as we find in Sub-section (4) of Section 63 of the E.D. Act, 1953, as it stood at the relevant time, different kinds of expressions have been used in two different contingencies, one, in the case where the appellant requires, it was mandatory to refer to two valuers and the other case is, i. e., if the Board thought it necessary, it was permissive to refer to two valuers, it cannot be stated that in all of these cases it was mandatory on the part of the Board to refer to two valuers. It would, however, depend upon the facts and circumstances whether in a particular case the Board should consider, in the interest of justice and in view of the controversy raised, to refer to any valuer or not. But, it cannot be said that in a case, where, in the background of the particular case, the valuation was such that it did not require reference as such, it was still mandatory on the part of the Board to refer to two valuers. In that view of the matter we are unable to accept this contention, as urged on behalf of the accountable persons. But, this controversy, in our opinion, does not really touch the question which we have to answer in this case. As we have mentioned hereinbefore, the first question is regarding the valuation of the debt, unsecured debts owed to the deceased person, on his death, by K.C. Mullick & Sons Ltd. We have set out the relevant facts as found by the Board, We have found from the facts, as set out, that the Board took into account the subsequent events that there was no likelihood of realisation of this debt owed to the deceased person. We have also found that, as a matter of fact, there was the evidence, though the balance-sheet figure showed that there was an excess of assets over the liabilities in the books but at. the relevant time, for small sums of Rs. 1,826 and Rs. 1,215, the movable assets and stocks of the company were under attachment because the company was unable to pay its debts. We have also found that this is a private limited company and the Board has taken into consideration the subsequent events and given deduction of an ad hoc sum of Rs.

1,29,000 on this score. But the Board has not taken into account the essential fact which was required to be taken into account, that is to say, what was the market price, and if it was sold, what price would it have fetched. This is a relevant factor, having regard to the peculiar features of this company, that is to say, the company being a private limited company, the company was unable to meet its debts for very small sums of Rs. 1,826 and Rs. 1,215 for which attachments had to be levied and there were suits pending ; by not giving proper weight to those features, only the calculation was sought to be made from the book value or the assets and liabilities. The valuation of a debt of a private limited company of this nature cannot, in our opinion, be done in this fashion. The valuation is always a difficult task, as was observed by Viscount Simon, in the case of *Gold Coast Selection Trust Ltd. v. Humphrey* [1949] 17 ITR (Suppl.) 19 (HL) at p. 26, that if the asset was difficult to value, the best possible valuation should be made, and that valuation was an art and not an exact science. Viscount Simon observed at pp. 26, 27 of the said decision as follows:

' If the asset is difficult to value but is none the less of a money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor is it possible, it is for the Commissioners to express in the money value attributed by them to the asset from estimate, and this is a conclusion of fact to be drawn from the evidence before them.'

22. In considering this aspect, it appears to us, that one of the most material and relevant aspect to which the attention of the Board should have been directed was, in view of the nature of this company, viz., the company being a private limited company, what would be the valuation of the debt as also the book value of the debt, what was the asset and the financial position of the company, as was evidenced from the evidence on record at that time as also the subsequent events that had happened. These aspects the Board did not take into account. Another significant and relevant factor which, though noted, yet was not given full weight, was that the Dy. Controller had valued the shares of this very private limited company as ' Nil '. That is a relevant piece of evidence and that piece of evidence does not seem to have been taken into consideration or given any weight by the

Board, though that fact was noted by the Board. Taking all these factors into consideration, in our opinion, it cannot be said that the valuation of unsecured debt at Rs. 6,84,000 and Rs. 24,800 was done properly and in accordance with law. We cannot, therefore, sustain this valuation. The Board would be at liberty to review the valuation in the light of the observations made herein. This disposes of item No. (i) of question No. 1.

23. Item No. (ii) of question No. 1 deals with the valuation of 500 shares of Raja D.N. Mullick. We have set out the facts, as found by the Board. It was contended at one time, by the accountable persons, that the valuation made in the case of another co-sharer, who died a few days after the death of the deceased in this case, is not binding as such on the accountable persons. That is true. But this was a piece of evidence available to the Board and of this evidence, the accountable persons had notice. But the accountable persons chose not to adduce any evidence either contrary to or to rebut this piece of evidence on record. If, in these circumstances, the Board has acted on this evidence available with it, then it could not be said, in view of the nature of evidence on record to the knowledge of the accountable persons, that the Board had acted arbitrarily and not in accordance with law. In that view of the matter we cannot interfere with the finding of the Board. We may also in this connection refer to another aspect of the matter which the accountable persons have agitated before us, that is to say, no opportunity was given. But, we have dealt with this aspect generally hereinbefore.

24. It now remains for us to deal with the second question as refrained by us. It appears to us that on this aspect the Board went on the rental basis. It is quite clear from the estate duty assessment that for premises No. 17/1A, E, F, G, H, N & L, Marquis Lane, Calcutta, the value given was Rs. 31,300. The fair market value was estimated by the Asst. Controller at Rs. 1,60,000. After taking into account the fact that the property was subject to a mortgage and after taking into consideration that they had valued the premises at Rs. 1,60,000, he had included the entirety of that amount in the assessment but the Board had deducted only a sum of Rs. 12,000. If this aspect was taken into consideration then in considering the debt, which was indisputably owed by the deceased to the United Bank of India, though as a guarantor, where the liability was several and joint this factor was wholly

irrelevant because that was secured by a property which was subject to mortgage and the debt was owed by the deceased for the amount claimed. The discussion of the Board on this aspect of the matter which appears at p. 44 at paras, 37-38 of the paper, book is as follows :

' 37. The next ground related to the mortgage loan of Rs. 1,50,000 stated to be due from K.C. Mullick & Sons Ltd. to the United Bank of India Ltd. for which the deceased was the guarantor. The deceased executed a mortgage in 1946 in favour of the bank of premises Nos. 17/1A to 17/1L, Marquis Lane, Calcutta, by way of deposit of title deeds, as additional security for the due repayment of the loan to the bank by the company. The amount due to the bank as on the date of death is said to be Rs. 2,60,000. The company having failed to repay the loan, the bank instituted a suit for a decree for Rs. 2,95,089, the amount of the overdraft from the bank. A receiver was appointed to take charge of the business of the company which has since stopped. A receiver has also been appointed in respect of the above mentioned premises in Marquis Lane. The deceased also executed a personal letter of guarantee in respect of any deficiency that may arise. It is estimated that the bank may not be able to realise more than Rs. 1 lakh from out of the assets of the company, the principal debtor. In respect of the balance of nearly 2 lakhs the premises in Marquis Lane would have to be brought to sale, the value of which according to the advocate would not fetch more than Rs. 59,000 and, therefore, there would still be a liability for nearly Rs. 1,50,000 against the estate of the deceased.

38. In view of what I have stated in paragraph 7 of this order where I have dealt with the valuation of the Marquis Lane property, I cannot agree that these properties cannot be sold for more than Rs. 59,000. In any case, in the light of the company's financial position as on the date of death of the deceased as brought out in para. 17 of this order, I am of the opinion that no part of the guarantee debt is admissible as a deduction from the estate of the deceased.'

25. In our opinion, it was a clear misdirection on the part of the Board. The debt was owed by the accountable persons. The accountable persons were liable and were entitled to deduction on this debt. It is true that the debt was secured by the

property. But that did not detract the liability, of accountable persons for the debt. That might have detracted from the value of the property, but that is irrelevant. The Board had taken these factors into consideration and valued the' property, as it thought fit and proper. But that is not under challenge before us. But the fact is that this aspect does not enter into the computation of the amount which was owed by the accountable persons.

26. Before we conclude we must mention that our attention was drawn to a decision in the case of Pingle Venkatarama Reddy v. CWT : [1972]85ITR132(AP) . In the view we have taken in this matter, it is not necessary for us to go into the details of this decision.

27. In the premises, we are of the opinion that the Board had applied a wrong yardstick which was not in accordance with the law. The decision of the Board is, therefore, perverse in law and not justified in law. Therefore in view' of what we have stated before, so far as item No. (i) of question No. 1 is concerned, we answer by saying that the Board did not act in accordance with law and would be at liberty to act in the light of the observations made hereinbefore.

28. So far as item No. (ii) of question No. 1 is concerned we are of the opinion that the Board acted in accordance with law and, therefore, this question is answered in the affirmative.

29. So far as the reframed question, being question No. 2 is concerned, we answer this question by saying that the finding of the Board was perverse and not in accordance with law.

30. In the facts and circumstances of the case, the parties will pay and bear the own costs.

Suhas Chandra Sen, J.

31. I agree.