

[A.F.R.]

[Reserved]

Court No. - 3

Case :- WRIT - C No. - 1000800 of 2000

Petitioner :- Azad Ahmad Khan

Respondent :- Income Tax Appellate Tribunal

Counsel for Petitioner :- Z.Zillani,Amar Mani Tiwari,Nazam Zafar,Pradeep Agrawal,Rafat Siddiqui,Z. Jilani

Counsel for Respondent :- S.C.Misra,Manish Mishra

Hon'ble Vivek Chaudhary,J.

1. By the present writ petition, the petitioner is challenging the assessment order dated 31.01.1989, passed by respondent No. 3; order dated 16.09.1991 whereby Appellate Authority partly allowed petitioner's appeal against the assessment order and; order dated 30.11.1999, passed by the Income Tax Appellate Tribunal whereby it dismissed petitioner's appeal.

2. Brief facts of the case are that one Gulam Ahmad Khan was running a engineering workshop in the name and style M/s. General Engineering Works. On 25.08.1951, he claims to have created a waqf-alal-aulad under the provisions of the Mussalman Waqf Validating Act, 1913 (hereinafter referred to as the Act of 1913) through a registered deed and transferred his business to the waqf and became its first mutwalli. Gulam Ahmad Khan was issueless and claims to have adopted his nephew Sardar Abdullah Khan alias Azad Ahmad Khan, the petitioner, as his son. As per the terms of the Waqf deed, an amount of Rs. 100 out of the total proceeds of the M/s. General Engineering Works was to be spent towards almighty and rest of the proceeds were to be utilised as per the wishes of the waqif Gulam Ahmad Khan during his lifetime. Gulam Ahmad Khan also reserved to himself right to effect titamma of the original waqf deed and sell off

the assets entrusted to the waqf including M/s. General Engineering Works. With regard to succession of mutwalli, it provided that one Mst. Hasina Khatun would be the next mutwalli and after her demise, her children and their descendants were to succeed her as mutwalli. In case, Mst. Hasina Khatun was to die issueless, then Inam Ahmad Khan, who is the brother of waqif Gulam Ahmad Khan and after him his son Azad Ahmad Khan and his descendants would succeed as Mutwalli of the Waqf. As per clause C (jim) of the waqf-deed, after death of Gulam Ahmad Khan, Rs. 100 were to be continued to spent towards charitable purposes and with regard to rest of the proceeds from the waqf property, Rs. 400 was to be paid to Inam Ahmad Khan for helping Mst. Hasina in managing the waqf property and the remaining amount was to be divided amongst Inam Ahmad Khan, Azad Ahmad Khan and Mst. Hasina Khatun. It is an admitted fact that even after creating the waqf, Gulam Ahmad Khan continued to mention the waqf property as his personal property while filing his income tax returns. Waqif Gulam Ahmad Khan amended the original waqf-deed by a titamma dated 22.01.1980. As per the relevant amendments effected by the titamma, the waqf now excludes Inam Ahmad Khan from ever becoming a mutwalli and he was also ousted from receiving any benefits out of the waqf property. Since, Mst. Hasina Khatun died issueless, therefore, two-third of share would now go to Azad Ahmad Khan and one-third was to be utilised for charitable purposes. It is also disclosed in the titamma that a portion of the property of the workshop was rented out and machineries lying in the workshop were sold to pay off personal debts of the waqif Gulam Ahmad Khan.

3. Gulam Ahmad Khan died issueless on 02.12.1980, and as per the terms of the amended deed, petitioner Azad Ahmad Khan, became mutwalli of the waqf. The petitioner filed returns under Estate Duty Act, 1953 (hereinafter referred to as the Act of 1953) with regard to the properties of the waqf and claimed immunity from paying estate duty on the same. However, a show cause notice was issued to the petitioner on 24.11.1988 seeking explanation for the exemption claimed by him from paying estate duty. Petitioner submitted his reply on 29.12.1988

and on the basis of the same impugned assessment order dated 31.01.1989 is passed. Petitioner challenged the assessment order before the Appellate controller of Estate Duty, which upheld the assessment order by its order dated 16.09.1991. Against the same, petitioner preferred an appeal before the Income Tax Appellate Tribunal, which was dismissed by order dated 30.11.1999.

4. Shri Pradeep Agarwal, learned counsel for the petitioner challenges the judgment and order of the Tribunal on the ground that the Tribunal was wrong in holding that the waqf created by late Gulam Ahmad Khan was not a valid waqf as he never intended to give effect to the waqf deed. He submits that it is a settled law that once a waqf is created the waqif stands divested of his title to the waqf properties. In support of his argument learned counsel for the petitioner relies upon the judgment of the Supreme Court in the case of '**Chhedil Lal Misra v. Civil Judge, Lucknow**'; (2007) 4 SCC 632. The second ground of challenge is that the Tribunal erred in holding that section 5 and 12 of the Act of 1953 are applicable in the present case. He submits that the Tribunal has misinterpreted the explanation to Section 12(1) of the Act of 1953 and wrongly held that since waqif has reserved to himself the right to modify the deed therefore, it amounts to reservation in the property for life. Whereas as per the explanation reservation of interest must be for settler himself as well as for any of his relatives. Unless the interest is reserved for both, the waqif as well as any of his relatives, such reservation would not amount to passing of the property upon settler's death. In support of his contention counsel for the petitioner relies upon a Division Bench Judgment of the Bombay High Court in the case of '**Controller of Estate Duty v. B.B. Nigudkar**' reported as (1988) 170 ITR 578. Relevant paragraph of the same reads,

"...We have considered the Explanation to section 12(1) carefully. In our view, the word "and" used in the Explanation to section 12(1) cannot be read as "or" as held by the Gujarat and the Madras High Court decisions: Kikabhai Samsuddin v. CED, [1969] 73 ITR 241 (Guj) and CED v. K.A. Kader, [1974] 96 ITR 289 (Mad). It may be true that if there was any reservation of interest in favour of the settlor/deceased, the provisions of

subsection (1) of section 12 would have applied. The Explanation is, however, to our mind, enacted to meet a situation where reservation of interest is for the settlor as well as his relatives and an argument might be advanced that the reservation of interest being not for the settlor himself alone, sub-section (1) would not apply. Any decision where a contrary view may have been taken has not been brought to our notice.”

5. Learned counsel for the respondent, Shri Manish Mishra opposes the submissions made by the counsel for the petitioner. He submits that there is no perversity in the judgment of the Appellate Tribunal. He further submits that Gulam Ahmad Khan created the waqf only to avoid tax liabilities. Gulam Ahmad Khan never intended to give effect to the waqf since he kept including the waqf property and income from M/s General Engineering Works in his annual income tax returns. Counsel for the respondent even questions the validity of the waqf and submits that as per the waqfnama, it was a waqf-alal-aulad, created under Section 3(a) of the Act of 1913. However, including Mst. Hasina Khatun as one of the beneficiaries, who did not have any blood or family relations with Gulam Ahmad Khan, is against the objectives of waqf-alal-aulad. He further submits that Gulam Ahmad Khan also throughout treated the waqf property as his personal and never actually delivered/dedicated it to the waqf and instead sold certain machineries without seeking any permission from a Court. Since there was no such action taken on the part of Gulam Ahmad Khan which would amount to creation of a valid waqf, therefore it has been rightly held in the impugned order that the waqf was never created and therefore this petition is liable to be dismissed.

6. I have perused the record with the assistance of counsels and considered their submissions.

7. As per the waqf-deed, a waqf-alal-aulad was created under the provisions of the Act of 1913. As per Section 3(a) of the Act of 1913, a waqf could be created for maintenance and support, wholly or partially, of waqif's family, children or descendants. Inclusion of Mst. Hasina Khatun as one of the beneficiary of the

usufruct of the waqf property, without establishing waqif Gulam Ahmad Khan's relationship with her, goes against the tenets of a waqf-alal-aulad. Further, no doubt creation of a waqf divests the waqif of the waqf property and dedicates it to the almighty, but, there should be actual dedication/delivery of possession of the waqf property to constitute a valid waqf. When the waqif is himself the first mutwalli of the waqf, it becomes difficult to establish actual dedication/delivery of possession, and thus, his subsequent conduct with regard to the waqf property becomes relevant to decide whether there was an actual dedication and creation of a waqf. In the present case even after dedicating M/s General Engineering Works to almighty, waqif Gulam Ahmad Khan continued to show the same as his own property in income tax returns filed by him. He even sold off some of the waqf property to pay off his personal debts without seeking necessary permission from appropriate authority. Furthermore, there is no evidence on record to prove that Gulam Ahmad Khan ever spent Rs. 100 towards any charitable purpose. Absence of any real dedication and subsequent treatment of the property by waqif Gulam Ahmad Khan as his personal property, thus, falls into the exception to the rule, once a waqf always a waqf, carved out by their Lordships in the case of *Chhedi Lal Mishra (supra)* relied upon by the counsel for the petitioners. Aforesaid judgment which is relied upon by the counsel for the petitioner also reads in para 7:

*“7. Having gone through and considered the judgment of the learned Single Judge of the Allahabad High Court, we see no reason to take a view different from those expressed therein. In our view, the law relating to the creation and continuation of wakfs has been correctly explained by the learned Judge in keeping with the well-established principles that once a wakf is created, the wakif stands divested of his title to the properties which after the creation of the wakf vests in the Almighty. **It is no doubt true that in a given case the creation of a wakf may be questioned if it is shown that the wakif had no intention to create a wakf but had done so to avoid a liability...**”(emphasis added)*

8. Privy Council in the case of ‘*Mohammad Ali Mohammad Khan v. Mt. Bismillah Begam*’; AIR 1930 PC 255 has held that when there is no intention to dedicate the waqf property to the almighty rather there were some ulterior

motives, the deed can not be treated to be a valid waqf. Relevant part of the judgment reads,

“On a careful consideration of the whole evidence, their Lordships have come to the conclusion that defendant No. 2 executed the deed of wakf but without any intention of divesting himself of his ownership of the property, and that his real intention was to utilise the document should it become necessary as a shield against any claims that the appellant might have against him either then or at any future time. Their Lordships are therefore of opinion that this appeal should be allowed and the decree of the Subordinate Judge should be restored and that the appellant should have his costs in the Chief Court and of this appeal. They will humbly advise His Majesty accordingly.”

9. Actions of the waqif Gulam Ahmad Khan shows that he has throughout treated the waqf property as his personal, therefore, it could rightly be held that there was no actual dedication of property and he had no intention to create a waqf and as such the deed can not be held to have constituted a valid waqf.

10. The second ground of challenge that the Appellate Tribunal has wrongly interpreted the explanation to Section 12(1) of the Act of 1953 and read the word ‘and’ as ‘or’ to reject petitioner’s claim for exemption from paying estate duty also does not hold good as waqif Gulam Ahmad Khan had, while executing the waqf deed made provisions for maintenance of himself, his brother and the petitioner, who himself claim to have been adopted as a son by the waqif Gulam Ahmad Khan. Therefore, the conditions laid down in the case of **B.B. Nigudkar (supra)** as relied upon by the counsel for the petitioner is already fulfilled. Furthermore, what is required to avail the exemptions from paying estate duty as provided under Section 12 of the Act of 1953 is that there should not be any reservation of interest in the settled property for life by the settler. For reference Section 12 of Act of 1953 reads,

“12. (1) Property passing under any settlement made by the deceased by deed or any other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor or whereby the settlor may have reserved to himself the right by the exercise of

any power, to restore to himself or to re-claim the absolute interest in such property shall be deemed to pass on the settlor's death:

Provided that the property shall not be deemed to pass on the settlor's death by reason only that any such interest or right was so reserved if by means of the surrender of such interest or right the property is subsequently enjoyed to the entire exclusion of the settlor and of any benefit to him by contract or otherwise, for at least two years before his death.

Explanation.—A settlor reserving an interest in the settled property for the maintenance of himself and any of his relatives (as defined in section 27) shall be deemed to reserve an interest for himself within the meaning of this section.

(2) Notwithstanding anything contained in sub-section (1), where property is settled by a person on one or more other persons for their respective lives and after their death, on the settlor for life and thereafter on other persons and the settlor dies before his interest in the property becomes an interest in possession, the property shall not be deemed to pass on the settlor's death within the meaning of this section.”

11. As Gulam Ahmad Khan reserved to himself the right to modify the terms of the waqf-deed and he actually effected a titamma not less than a year before his demise goes to show that he had reserved life interests in the property while settling it through the waqf deed. This issue has already been decided by a Division Bench of this Court in a reference by Central Board Direct Taxation in the case of '**Hamid Hussain v. Controller of Estate Duty**'; (1972) 83 ITR 309, relevant paragraphs of the same reads,

“17. It is next contended on behalf of the accountable person that the deceased had no interest in the property which could attract the provisions of section 12. It is pointed out that after vacating the office of mutawalli in 1950, he had no interest left in the wakf property. Now, section 12(1) speaks of property in which the deceased settlor has reserved to himself an interest in the property passing under the settlement for life or any other period determinable by reference to death. Upon analysing the terms and conditions of the wakf deed, as last amended, it appears that the settlor retained to himself the right to reside in certain specified house properties and the power to amend the terms of the wakf deed, the list of beneficiaries and the extent of their shares. Are these conditions sufficient to bring the property within the scope of section 12? The power to amend the terms of the settlement is couched in the following language:

“7. (e) In future also, I the wakif during my life-time, shall have the right of making amendments;

alterations, cancellations and additions of conditions in this wakf deed, as warranted by the prevailing conditions, which right I enjoy at present; and during my life-time I shall specially have the power to make amendments in the rights of the grantees, to include some stranger amongst them and to exclude any body and to increase or decrease the amount of their shares.”

18. The power reserved by this clause is expressed in the widest termst. While perhaps it does not extend to the power of revoking the wakf, it enables the settlor to travel over a wide field, curtailing interests presently enjoyed on the one hand, and in creating or enlarging them in other directions. In so far as the power is exercised for the purpose of including some one not already a beneficiary, it could extend to including the settlor himself. The wide amplitude of power in the clause supports such a conclusion. If that be so, the settlor has reserved to himself the right to benefit from the wakf property for life by the simple device of including himself in the list of beneficiaries or grantees.

.....

*23. In the instant case, it is true that the settlor had not included himself in the list of beneficiaries and that so long as he did not do so, he was not entitled to the benefits enjoyed by the other beneficiaries. But the power to do so vested in him absolutely. It was a power which he could exercise in his absolute discretion. We see little difference between a case where the settlor included himself among the beneficiaries and left it to the absolute discretion of the trustees to extend the benefit of the trust income to him and the instant case where the settlor had reserved to himself the right to include his name among the beneficiaries thereby automatically entitling himself to the benefit of the income of the wakf property. The power to amend the wakf deed so as to include himself among the beneficiaries is only an instance of the wide powers reserved by the settlor to himself. As we have said the powers under clause 7(e) are expressed in the widest termst. So long as the character of the wakf is maintained, it is open to the settlor to make any changes—and changes which may directly benefit him—in the terms and conditions of the deed. We are of opinion that the settlor reserved an interest in the wakf property for life and therefore the case falls within the scope of section 12. And that would mean, as was held by the Bombay High Court in *Khatizabai Mohomed Ibrahim v. Controller of Estate Duty* [[1959] 37 I.T.R. (E.D.) 53 (Bom.)], that not merely the interest so reserved but the whole of such property must be deemed to pass on the death of the settlor.”*

12. Since waqif Gulam Ahmad Khan reserved to himself the absolute right to

amend the waqf deed and made provisions therein for his maintenance out of the waqf property therefore it is held that petitioner cannot claim exemptions from paying estate duty.

13. In light of the above, this writ petition is **dismissed** accordingly.

Order Date :- 31.7.2023

Arti/-

[Vivek Chaudhary,J.]