IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :14.11.2017

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.13031 of 2004

Smt.Radha Gajapathi Raju ... Petitioner

Vs.

The Assistant Controller of Estate Duty,
No.121, Nungambakkam High Road,
Chennai - 600 034. ... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records in file No.GI 964-G dated 06.04.2004 of the respondent.

For Petitioner : Mr.M.P.Senthilkumar

For Respondent : Mr.A.P.Srinivas
Senior Panel Counsel

ORDER

Heard Mr.M.P.Senthilkumar, learned counsel for the petitioner and Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondent.

2.The petitioner has filed this writ petition challenging an order passed by the respondent dated 06.04.2004. The proceedings arise under the provisions of the Estate Duty Act, 1953 and by the impugned order, the respondent has fixed the date of death of the petitioner's husband as “25.03.1982”, pursuant to a direction issued by this Court in an earlier writ petition being W.P.No.4616 of 1988.

3.The following facts would be necessary for disposal of the writ petition.

(i) The petitioner's husband P.V.Gajapathi Raju was an assessee under the Income Tax Act and Wealth Tax Act. On 2nd August 1975, the petitioner's husband went to Thiruvanmiyur Beach for a swim and did not return and was missing ever since. The petitioner's earnest efforts to trace him were futile. The Police were also unable to help and secure any information about the petitioner's husband's whereabouts. Till date, the petitioner has no information about her husband and she states on affidavit that she hopes that he might return if he is alive.

(ii) The dispute in the present proceedings commenced with the issuance of a notice by the respondent dated 25.03.1982 under Section 55 of the Estate Duty Act, 1953 [hereinafter referred to as "Act"] stating that he has come to understand that P.V.Gajapathi Raju died on or about 2nd August 1975 and it appears to him that estate duty is leviable under the Act on the property which has passed on to the petitioner on the demise of the assessee. The petitioner was required to inform the respondent as to whether she has moved the High Court in the matter and whether Gajapathi Raju had been pronounced as dead by a Court of law and to also inform that in such an event, the petitioner will be liable for rendering accounts as "Person Accountable" under Section 53 of the Act.

(iii) In reply to the notice, the petitioner informed the respondent that Gajapathi Raju had not been pronounced dead by the Court and also stated that she is not aware of the procedure in that regard.

(iv) On advise being given to the petitioner, she appears to have filed return of estate duty in respect of the estate of her husband and sought for clearance. According to the petitioner, this return was filed by way of abundant caution as that was the advise given to her. Based on the return filed by the petitioner, a provisional assessment was drawn by the respondent. It is only thereafter the petitioner obtained legal advise and she was informed that the filing of estate duty return was not in accordance with law and that a person could be declared as dead only by an order passed by an appropriate Court and the return filed by the petitioner should be treated as non est in law.

(v) Subsequently, the respondent, by letter dated 14.09.1983, called upon the petitioner to furnish various information and also furnish a copy of the order pronouncing Gajapathi Raju as dead. The petitioner sent a reply stating that the estate duty return was filed on the basis that Gajapathi Raju is missing from 2nd August 1975 and that under Section 108 of the Evidence Act, he was presumed to be dead, since he had not been heard of ever since. Subsequent to the said letter, no action appears to have been initiated. However, the petitioner received a notice dated 19.12.1984 under Section 58(2) of the Act calling upon her to appear before the respondent on 10.01.1985 in connection with the estate duty proceedings. The petitioner informed that the circumstances referred above and stated that there is no valid proceedings under the Estate Duty Act and not satisfied with the same, another notice dated 07.07.1985 was issued requiring the attendance of the petitioner. This correspondence between the petitioner and the Department was going on and at that stage, the petitioner moved the Original Side of this Court in Application No.378 of 1987 under Section 108 of the Evidence Act seeking for a declaration that P.V.Gajapathi Raju had not been heard of or seen subsequent to 2nd August 1975, he had to be pronounced as dead. An order was passed by this Court on the said application dated 30.01.1987 though not as prayed for by the petitioner. Once again the respondent called upon the petitioner to appear before him and at that stage, the petitioner filed W.P.No.4616 of 1988 challenging a letter dated 03.02.1988 proposing to make an assessment on the petitioner. The writ petition was disposed of issuing a direction to the respondent to fix the date of death. The writ appeal filed against the judgment was pending and ultimately, the writ appeal was disposed of, by judgment dated 13.11.2003 giving the respondent four months' time to determine the date of death by giving liberty to the petitioner to raise all points of law. Pursuant to the said direction, the impugned order has been passed determining the date of death of P.V.Gajapathi Raju as 25.03.1982.

4.The following dates and events would be relevant:

Date	Event
(i)02.08.1975	(i) P.V.Gajapathi Raju is stated to have drowned in Thiruvanmiyur beach, his body was not traceable.
(ii) 25.03.1982	(ii) The respondent issued notice under Section 55 of the Act.
(iii)18.04.1983 & 20.04.1983	(iii) The petitioner filed returns under the Act.
(iv) 02.08.1982	(iv) Expiry of 7 years period from the date on which P.V.Gajapathi Raju went missing.
(v) 19.10.1983	(v) The respondent issued notice to the petitioner.
(vi) 16.03.1985	(vi) Estate Duty Act was repealed.
(vii) 13.01.1987	(vii) Order passed in Application No.378 of 1987 filed under Section 108 of the Evidence Act.
(viii) 03.02.1988	(viii) Notice issued by the respondent for making assessment under the Estate Duty Act.
(ix)12.06.1998	(ix) Order passed in W.P.No.4616/1988 filed before High Court to quash the notice dated 03.02.1988.
(x) 06.04.2004	(x) Impugned order passed fixing the date of death as 25.03.1982.

5.Before I examine the facts of the case and the correctness of the impugned order, it would be necessary for this Court to take into consideration the directions issued by this Court in the earlier Writ Petition filed by the petitioner in W.P.No.4616 of 1988 [Radha Gajapathi Raju V. Assistant Contorller of Estate Duty, (1999) 239 ITR 620 (Madras)]. The said writ petition was filed to quash the proceedings issued by the respondent dated 03.02.1988 and to forbear the respondent from making assessment under the Estate Duty Act, in respect of the estate of P.V.Gajapathi Raju.

6.The contention advanced before the writ Court was that there was no presumption as to the death of P.V.Gajapathi Raju and Section 108 of the Evidence Act deals with presumption of death and it is only from the orders of the Court, the date of death can be fixed and if that date is taken into account, the Estate Duty Act, as repealed, is inapplicable to deaths occurring after 16.03.1985. Therefore, the proceedings dated 03.02.1988 are illegal. Further, it was contended that Section 5 of the Estate Duty Act is not applicable in case of death arising on the presumption under Section 108 of the Evidence Act and it would apply only in the case of natural death.

7.The Revenue resisted the writ petition stating that the provisions of the Estate Duty Act would equally apply to the case of civil death and they are not limited to the case of natural death alone. Further, the respondent has drawn a presumption as to the factum of death and when he initiated and continued with the estate duty assessment proceedings, he has drawn a presumption as to the date of death also. That the order of the Court passed at the time of obtaining letters of administration is not conclusive and it is not established that the death had occurred after the Estate Duty Act was amended.

8.On the above contentions, the Court considered the matter elaborately and it would be beneficial to refer to a few paragraphs of the findings recorded by the Court, which reads as under:

> ".... Therefore, the contention of learned senior counsel for the petitioner that the provisions of the Act are not applicable in cases where the presumptions are drawn under Section 108 of the Evidence Act is bereft of force and is rejected.
>
> The next question that arises is whether the respondent has jurisdiction to proceed with the estate duty as per proceedings. The submission is that under Section 108 of the Evidence Act there is only a presumption of death and there is no presumption of the date of death.
>
> The law is well settled that under Section 108 of the Evidence Act, there is a presumption of the fact of death after the expiry of seven years, but there is no presumption as to the exact time of death. The exact time of death is not a matter of presumption and the burden of proof is on the person who claims a right to the

establishment of the fact that the death took place at a particular time.

.... The proceedings for the estate duty are quasi-judicial proceedings and if the Assistant Controller of Estate Duty has drawn the presumption of factum of death, it is open to him to determine the date of death as the seven year-period had expired and it is open to the petitioner to establish by evidence or to dispute the factum of death on the expiry of seven years. In the proceeding for estate duty, the death is a relevant and material factor on the basis of which alone the proceedings for the estate duty could be initiated and levy of estate duty can be enforced. Once the presumption has been drawn by the respondent on the expiry of seven years as to the factum of death, if the petitioner desires to rebut the same, it is open to the petitioner to disprove the same. In other words, once the presumption as to the factum of death was drawn by the Assistant Controller of Estate Duty, that would be sufficient for him to clothe him with jurisdiction to initiate the estate duty assessment proceedings and once the proceedings under the Estate Duty Act commence, it is open to the respondent to determine the date of death on the date of initiation of the estate duty assessment proceedings and it will be open to the petitioner to rebut the presumption drawn by the respondent both as to the factum of death and to disprove the materials on the basis of which the date of death was determined by letting in relevant evidence to that effect. Therefore, it cannot be said that the Assistant Controller of Estate Duty has lacked jurisdiction to initiate the proceedings for levy of estate duty. We have seen that the case laws have held that there is no presumption as to the exact date of death and it is a matter of evidence.

.... Therefore, it cannot be said that the respondent lacked jurisdiction when he initiated the proceedings for estate duty assessment and it is open to him to rely upon the presumption under Section 108 of the Evidence Act as to the factum of death, and it is equally open to him to determine the date of death on the date when he initiated the estate duty assessment proceedings as the question of death was raised in the said proceedings. Further, the petitioner herself has filed the estate duty accounts and it can only be on the basis that, even according to the petitioner, P.V. Gajapathy Raju was dead, and it is permissible for the respondent to determine the date of the death depending upon the facts, materials and circumstances of the case and the admission by the petitioner that P.V. Gajapathy Raju was dead.

.... I am of the view that the order of this court is only a piece of evidence and this court has not declared that P.V. Gajapathy Raju died only on the date of passing of the order. It is not an order passed in a suit for declaration, and the order was passed in an application filed under the provisions of the Indian Succession Act for the grant of letters of administration. The court has not declared in that proceeding that P.V. Gajapathy Raju died only on the date of passing of the order. This court held that he is presumed to be dead under Section 108 of the Evidence Act, and therefore, the order of this court in Application No. 378 of 1987 would not preclude the EDO/ respondent from drawing necessary presumption under Section 108 of the Evidence Act. I am of the opinion that it cannot be said that the respondent had lacked jurisdiction and the respondent should be prohibited from proceeding further with the assessment proceedings under the provisions of the Estate Duty Act.

However, before passing the final order, it has to be mentioned that on the basis of the orders of this court in W. M. P. No. 6784 of 1988, this court permitted the respondent to proceed with the assessment proceedings and it is not clear whether he has passed any final order. However, even if the final order has been passed, I hold, it will have no effect. In the view I have taken, it is open to the respondent

> to draw a presumption as to the factum of death on the expiry of seven years and it is for him to determine the date of death. It is open to the petitioner to establish the fact that P.V. Gajapathy Raju was alive subsequently, if the petitioner desires to avail of the opportunity and it is open to the petitioner to avail of the same within thirty days from the date of this order. If the petitioner does not avail of the opportunity, it is open to the respondent to rely upon the presumption under Section 108 of the Evidence Act that would operate against the petitioner as to the fact of death and determine the exact date of death on materials or draw suitable presumption as to the date of death as he has initiated and continue the estate duty assessment proceedings before the Act was made inapplicable to deaths occurring after March 16, 1985. Needless to mention, if the respondent determines the date of death, subsequent to March 16, 1985, he will have no jurisdiction to proceed."

9.Though appeal was preferred as against the above decision, the Hon'ble Division Bench in W.A.No.472 of 1999 dated 13.11.2003 directed the exercise as directed by the writ Court to be completed within a time frame.

10.In the light of the above finding in the Writ Petition, the petitioner would not be justified in contending that the date of death can be presumed to be the date on which the orders were passed in Application No.378 of 1987 filed under Section 108 of the Evidence Act as the said contention was rejected.

11.The next aspect to be considered is as to when the presumption as to the death of Gajapathi Raju could be drawn. The respondent has fixed the date of death as 25.03.1982 i.e. the date on which he issued a notice under Section 55 of the Act. It has to be seen as to whether this fixation is proper.

12.In L.I.C. of India V. Anuradha, 2004(3) SCR 629, the question of law centered around Sections 107 and 108 of the Evidence Act. While deciding the date of presumption, it was held that 'the presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it.'

13.In Saroop Singh V. Banto and others, [Appeal (Civil)

No.4426 of 1999 dated 07.10.2005], the Hon'ble Supreme Court held that 'If a person has not been heard of for seven years, there is a presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.'

14.Recently, the Hon'ble Division Bench of the Andhra Pradesh High Court in Union of India represented by its Secretary, New Delhi V. Polimetla Mary Sarojini and another [W.P.No.34859 of 2016 dated 31.01.2017] considered all the decisions on the point and held that 'it is impermissible to think that a person can be presumed to be dead from the date on which he went missing. Unless a period of seven years expire from the date of his missing, the very occasion for the raising of the presumption does not arise'.

15.By applying the above decisions to the case on hand, the only conclusion that can be arrived at is to hold that the respondent could not have fixed the date of death as 25.03.1982 under Section 108 of the Evidence Act, as such, date falls well within the period of seven years from the date on which Gajapathi Raju went missing. Thus, the respondent could not have drawn a presumption before the expiry of seven years from the date on which Gajapathi Raju was not traceable. This is sufficient to hold that the impugned order is not sustainable.

16.Mr.A.P.Srinivas, learned Senior Standing Counsel for the Revenue sought to sustain the impugned order by contending that the respondent was justified in fixing the date as 25.03.1982 being the date on which he had issued the first notice under Section 55 of the Act and subsequently, after the expiry of seven years on 19.10.1983, another notice was issued, therefore, the proceedings are saved The said contention is not acceptable as the specific direction issued by the Court in the earlier writ petition is to fix the date of death. Therefore, the respondent having fixed a date well within the seven years period when he was specifically directed to draw a presumption under Section 108, the respondent cannot fall back on the notice dated 19.10.1983 and seek to justify the impugned order. Thus, the impugned proceedings have to be held to be unsustainable in law.

17.Under normal circumstances, if the Court finds that there has been an infraction or a non compliance of a direction in a proper perspective, the matter would be remanded to the authorities for fresh consideration. The question would be whether it should be done in the case on hand.

18.Mr.A.P.Srinivas, learned Senior Standing Counsel would vehemently contend that the proceedings commenced when the Act was in force, the petitioner filed returns in April 1983, the first notice was issued in 1982, when the Act was in force and the second notice was issued of in 1983 after the expiry of seven years and the Act was repealed only on 16.03.1985 and there was two year period in between and therefore, the proceedings should be remanded to the respondent for fresh consideration.

19.On the other hand, the learned counsel appearing for the petitioner would contend that considering the facts of the case, this Court should quash the proceedings particularly when the enactment itself has been repealed.

20.The case had a long drawn and chequered history. At the first instance, the petitioner contended that proceedings cannot be carried on under the provisions of the Act. Such contention was repelled in the earlier round of litigation and there was a pointed direction to the respondent by observing that it is open to the respondent to draw a presumption as to the factum of the death on the expiry of seven years and it is for the respondent to determine the date of death. Undoubtedly, the respondent failed to follow this direction and fixed the date of death well before the expiry of seven years. The Court gave a liberty to the petitioner to establish that Gajapathi Raju was alive even subsequently, however, the petitioner did not avail that opportunity. Anticipating such contingency, the Court observed that if the petitioner does not avail the opportunity, it is open to the respondent to rely upon the presumption under Section 108 of the Evidence Act that would operate against the petitioner as to the factum of death and determine the exact date of death on the available materials. Thus, the respondent ought to have determined the exact date of death on the materials, which obviously was not available with the respondent. In the alternative, he was entitled to draw suitable presumption as to the date of death and this presumption can be drawn under Section 108, which the Court has specifically pointed out, can be only on the expiry of seven years. Therefore, the respondent did not follow the directive issued by this Court in the earlier writ petition.

21.In Sona Builders V. Union of India and others, [2001] 251 ITR 197 (SC), the Hon'ble Supreme Court held that the Appropriate Authority having failed to act in conformity with the principles of natural justice, the matter cannot be remanded to the authority for fresh consideration.

22.The Division Bench of the Bombay High Court, in KSS Petron Private Limited V. The Assistant Commissioner of Income Tax [Income Tax Appeal No.224 of 2014 dated 03.10.2016], refused to remand the matter to the Assessing Officer in a proceedings initiated under Section 148 of the Income Tax Act as the Assessing Officer failed to follow the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Limited and the procedure having not been followed, the entire proceedings were held to be vitiated.

23.In the instant case, the petitioner's husband was missing since 02.08.1975. The notice under the Act was issued for the first time on 25.03.1982 when the whereabouts of the petitioner's husband were not known. He could have been presumed to be dead only after a period of seven years, despite specific direction with pointed observations made in the order passed by this Court in the earlier writ petition, the respondent failed to adhere to the directions in a proper prospective. The Estate Duty Act has been repealed with effect from 16.03.1985. Therefore, this is a fit case where the curtain has to be drawn and the matter should left to attain a finality.

24.For all the above reasons, the Writ Petition is allowed and the impugned proceedings are quashed. No costs.

14.11.2017

Speaking /Non Speaking Order

Index : Yes/No
Internet : Yes/No
Sgl

To

The Assistant Controller of Estate Duty,
No.121, Nungambakkam High Road,
Chennai - 600 034.

+ 1 cc to Ms. Mallika Srinivasan, Advocate SR.80830
+ 1 cc to Mr. A.P. Srinivas, Advocate SR.80797

W.P.No.13031 of 2004

(CS-VI)
EU(13/12/2017)