Dilharshankar C. Bhachecha vs The Controller Of Estate Duty, ... on 8 January, 1986

Equivalent citations: 1986 AIR 1707, 1986 SCR (1) 94, AIR 1986 SUPREME COURT 1707, 1986 (1) SCC 701, 1986 TAX. L. R. 916, 1986 SCC (TAX) 268, 1986 UPTC 818, (1986) 24 TAXMAN 318, (1987) 1 GUJ LR 122, (1988) 1 GUJ LH 6, 1986 TAXATION 80 (2) 1, (1986) 158 ITR 238, (1986) 1 SCJ 210, (1986) 50 CURTAXREP 321

Author: Sabyasachi Mukharji

Bench: Sabyasachi Mukharji, V.D. Tulzapurkar

PETITIONER:
DILHARSHANKAR C. BHACHECHA

Vs.

RESPONDENT:
THE CONTROLLER OF ESTATE DUTY, AHMEDABAD

DATE OF JUDGMENT08/01/1986

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
TULZAPURKAR, V.D.

CITATION:
1986 AIR 1707 1986 SCR (1) 94
1986 SCC (1) 701 1986 SCALE (1)6

ACT:
Estate Duty Act, 1953 sections 2(15), 2(16), 2(19), 6 and 29 - Interpretation of the words "paid" and "since" in section 29 - Joint will and mutual will - Conditions necessary to render mutual will irrevocable - The theory of contemporaneous exposition and construction of the will in question.

HEADNOTE:
The appellant Dilharshankar C. Bhachech being one of the grand-sons of the deceased Kamlashankar Gopalshankar and a legatee under a joint will of his grand parents is the

accountable person under the Estate Duty Act, 1953. The deceased and his wife Mahendraba each possessed certain properties which were of their own individual ownership. They were also jointly possessed of certain properties including a bungalow known as "Dilhar Dwar" - situated in the Ellisbridge area of Ahmedabad. On 24th December, 1950 the deceased and his wife had made a joint will in respect of the said bungalow. Mahendraba, one of the executants of the joint will died on 3rd January, 1954. On the death of Mahendraba, estate duty on her share of the property which passed on her death to her husband Kamlashankar has been duly paid. Kamlashankar the other executant to the joint will died, thereafter on 25th October, 1964. Upon his death, the appellant-cum-accountable person-cum-sole executor and trustee paid estate duty to the remaining extent of 50% on the properties as mentioned in the joint will of the deceased Mahendraba and Kamlashankar. The appellant accountable persons in the returns filed contended; (i) since the property in question was settled by the joint will in favour of the grandsons and since duty had been paid on the death of one of the joint executants to the will, duty on the second death of the deceased was not payable on the whole estate by virtue of the provisions of section 29 of the Estate Duty Act; (ii) that on a true construction of the will, the deceased was neither at the time of his death nor any time during the continuance of the settlement, the full owner of the share of the property of Mahendraba because he had only a
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life interest therein to receive rents and profits from that share, and therefore, exemption contemplated by section 29 of the Act came into force and hence no etate duty with regard to the share of Mahendraba on the death of the deceased Kamlashankar arose for the second time. The Revenue was of the opinion that on the death of Mahendraba, the wife, her husband had become the sole owner of the property in question, as is evident from the wealth tax returns filed by him and therefore, exemptions under section 29 of the Act cannot be claimed.

Both the Assistant Controller of Estate Duty Ahmedabad as well as the Appellate Controller held against the accountable person, taking the view that section 29 of the Estate Duty Act was not applicable. Full amount of the Estate Duty was collected from the accountable person. In an appeal before the Tribunal, the Tribunal on the construction of the will held in favour of the accountable person, for the reason that Kamlashankar did not become the full owner of the share of the property of Mahendraba on her death.

At the instance of the Revenue the Tribunal referred the matter to the High Court of Gujarat. While refusing to interpret the word "since" narrowly as contended by the Revenue, the High Court, however, answered on the construction of the will in its favour holding that "there

was no agreement of irrevocability and the survivor took an absolute interest in the whole of the property and as such section 29 would have no application to the facts of the case. Hence the appeal by certificate.

Allowing the appeal by certificate.

Allowing the appeal, the Court.

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HELD: 1 The interpretation sought for by the Revenue was highly artificial and against the spirit of section 29. Looking at the language and the spirit of section 29 of the Estate Duty Act, 1953, it was clear that the expression "If the estate duty has already been paid --- since the date of the settlement", occurring in the first part thereof, meant "if the estate duty has become payable or has been paid either simultaneously with the creation of the settlement or at any time thereafter." The dictionary meaning of the word "since" is wide enough. Section 29 comes into operation only on the death of the surviving spouse, the obvious intention of

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the Legislature in framing the section being to avoid double duty. Even if the word "paid" was used in wider context and not in the literal sense, it could not be interpreted as excluding its literal meaning, namely, the actual fact of payment having already been made. Here, on the facts, the duty had been "paid" since the date of the settlement. [104 A-E]

Coutts & Co. v. Inland Revenue Commissioner [1962] 2 All E.R. 521 at 527 quoted with approval.

1.2 Whether a person in "competent to dispose of" of the property and within the meaning of section 6 of the Estate Duty Act, 1953, would naturally depend on the terms and conditions under which the property is either acquired or inherited. The expression "competent to dispose of" must bear the ordinary meaning in the English language. A person shall be deemed to be competent to dispose of the property if he has every power or authority enabling the donee or other holder thereof to appoint or dispose of the property as he thinks fit. [118 D]

1.3 The question of strict construction of the taxing statute and the principle that one who claims exemption must strictly come within the purview is not relevant in the instant case because the exemption follows on the interpretation of the will. In the instant case whether the deceased Kamlashankar had the disposing power over the share of the property of Mahendraba, his wife, acquired by him would depend not on how he has treated it but the true effect of the will. There is no question of contemporaneous conduct because the conduct of one of the parties subsequent to the death of one of the executants long after the execution of the will cannot be described as contemporaneous conduct. The question of "contemporaneous exposition" by conduct of the parties in the facts of this case does not

arise. [119 E; 116 B-C]

2.1 A joint will is a single testamentary instrument containing the wills of two or more persons and jointly executed by them, while mutual wills are separate wills of two or more persons which are reciprocal in their provisions and executed in pursuance of contract or agreement between two or more persons to dispose of their property to each other or to third persons in particular mode or manner. Mutual wills as distinguished from joint wills are sometimes described as reciprocal wills. In order to render mutual will irrevocable,

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both the conditions must be concurrently satisfied: (a) that the surviving testator must have received benefits from the deceased under the mutual will; (b) the mutual wills should have been executed in pursuance of an agreement that the testator shall not revoke the mutual wills. Such an agreement not to revoke the wills may either appear from the wills themselves or may be proved outside the wills, but that is not established by the mere fact that the wills are in identical terms. If such an agreement is shown, each party remain bound. [113 D-F; 114 A-C]

A different and separate agreement must be spelled out not to revoke the will after the death of one of the executants. That agreement must be clear, though need not be by a separate writing but must follow as a necessary implication which would tantamount to an express agreement. [118 H; 119 A]

2.2 In the instant case it is clear;

(a) The will in question was a mutual will; [108 B]

(b) Reading the different clauses of the said will it was manifest that the intention was to keep the property as it was at the time of execution of the will so that the ultimate beneficiaries and the grandsons might enjoy the property with such modifications as the contingencies of time and situation might require; [108 A-B]

(c) Before the death of the first of the executants, the agreement remained contractual one in consideration of mutual promises. It could have been at that stage revoked by mutual agreement or even by unilateral breach, giving rise at the most to an action for damages. But after the death of first one without revoking his or her own will makes the joint will irrevocable by the survivor. But there must be an agreement that the wills would not be revoked after the death of one of the executants or disposition will not be made contrary to the will after the death of one of the executants; [109 C-D, E]

(d) The predominant intention of the executants at the time of the execution, after the acceptance of the benefit of the execution makes the will in this case irrevocable by the survivor of the executants; [119 A-B]

(e) In the facts and circumstances of this case, because of the specific clause that it was intended that the

grandsons
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would receive the benefit in species and there being no provision for making up the deficiency or diminution if any, it must follow that there was mutuality and Kamlashankar was not competent to dispose of the property in any manner contrary to the ultimate disposition; [119 B-C]

(f) The fact that estate duty was paid is non sequitur; [119 D]

(g) The payment of wealth-tax by Kamlashankar Gopalshankar on the whole estate after the death of Mahendraba is no relevant; and [119 D]

(h) The husband Kamalshankar received the benefit under the will after the death of Mahendraba. It became irrevocable by him after her death with the result that he had no disposing power over the share of Mahendraba in the property. In the premises being a "settled property" estate duty having been paid on the death of one of the parties, the accountable person was entitled to exemption under section 29 of the Act. [119 F-G]

Dufour v. Pereira, [1769] 21 E.R. 332; In re: Oldham, 1925 Ch.75; Gray v. Perpetual Trustee Co. Ltd. [1928] A.C. 391 at 399 & 400; Re Parsons, Parsons v. Attorney-General, [1942] 2 All E.R. 496; and Bhawani Prasad v. Smt. Surendra Bala W/o Subodh Chandra and Anr. A.I.R. 1960 Allahabad 126 discussed and distinguished.

Kuppuswami Raja v. Perumal Raja A.I.R. 1964 Madras 291 approved.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 679 (NT) of 1974.

From the Judgment and order dated 19/20-12-73 of the Gujarat High Court in Estate Duty Reference No.2 of 1972.

V.S. Desai, Dilhar C. Bhachech, Naunit Lal, Kailash Vasudev and Mrs. Vinod Arya for the Appellant.

S.C. Manchanda, C.M. Lodha and Miss. A. Subhashini for the Respondent.

The Judgment of the Court was delivered by SABYASACHI MUKHARJI, J. In this appeal by certificate by the High Court under article 133(1) of the Constitution against the judgment and order of the High Court of Gujarat dated 19/20th December, 1973 in Estate Duty Reference No. 2 of 1972, the question involved is regarding exemption from estate duty under section 29 of the Estate Duty Act, 1953 (hereinafter called the `Act'),which contemplates exemption from duty in cases where estate duty has been paid on settled property on the death of one of the parties to a marriage.

The appellant is the accountable person and he is related to the deceased Shri Kamlashankar Gopalshankar Bhachech as one of his grand sons. Deceaed Kamlashankar Gopalshankar died on 25th October, 1964. The deceased had a wife named Mahendraba Kamlashankar Bhachech. The deceased and a his wife each possessed certain properties which were of their own individual ownership. They were also jointly possessed of certain properties including a bungalow known as 'Dilhar Dwar' - situated in the Ellisbridge area of Ahmedabad. The dispute in the reference out of which this appeal arose was with regard to estate duty leviable on 1/2 share of the wife of the deceased in the said bungalow and the land appertaining thereto.

On 24th December, 1950, the deceased and his wife had made a joint will in respect of the said bungalow. They also made separate wills with regard to their individually owned properties on the same date with which this appeal is not concerned.

The aforesaid bungalow is situated on Plot Nos. 825 and appertaining to its main structure there are blocks bearing Nos. 48/2 to 48/6. In addition to the blocks, there is a garage, a bath room and two latrines as also some open compound land appertaining to the main structure. All these properties were disposed of by the joint will executed by the deceased and his wife. The relevant portion of the joint will is as under:-

> "During our life time we shall continue to be joint owners of the land bungalow and blocks with their common bath room and two privies including the garage bearing No. 48/1 and shall be jointly entitled to the rents and income of the said land and blocks and the user and rent of the bungalow. After the death of one of us, the survivor shall become the owner of the said land bungalow and blocks including the garage No. 48/1 with the said bath room and privies and shall become entitled to the rents and income and user of the said land bungalow and blocks including garage No. 48/1 and the bath room and privies. The provisions hereinafter contained shall become effective after the death of the survivor of us. After the death of the survivor of us, hereby devise and bequeath our said furnished Bungalow including all things, articles, furniture, utensils, fixtures etc. together with the portion of the land and compound walls delineated on the plan hereto annexed and coloured red and marked 'B' to our grandson Dilhar shankar Chintanvanshankar Bhachech. We hereby devise the bequeath our block Nos. 48/2 to 48/6 including garage bearing No. 48/1 with the said bath room and privies together with the portion of the land and compound walls delineated on the plan hereto annexed and coloured blue and marked 'C' to our Grandson Snehitshankar Chintavanshankar Bhachech. We hereby devise and bequeath the portion of the open land and the compound walls delineated on the plan hereto annexed and coloured green and marked 'A' to our grandson Hasitshankar Drupad shankar Bhachech.".

Mahendraba Kamlashankar Bhachech one of the executants of the Joint Will died on 3rd January, 1954. On the death of Mahendraba, estate duty on her share of the property which passed on her death to Kamlashankar Gopalshankar has been duly paid. This is an admitted position. Kamlashankar Gopalshankar died, thereafter, on 25th October, 1964. Upon his death, the appellant

cum accountable person cum sole executor and trustee paid estate duty to the remaining extent of 50% on the properties mentioned in the above mentioned joint will of the husband and the wife. The case of the revenue was that on the death of Mahendraba, the wife, the deceased Kamlashankar Gopalshankar, the husband, had become the sole owner of the property in question and that he had filed his wealth tax returns accordingly. The case of the appellant-accountable person was that since the property in question was settled by the joint will in favour of the grandsons and since duty had been paid on the death of one of the joint executants to the will, duty on the second death of the deceased was not payable on the whole estate by virtue of the provisions of section 29 of the Act. It was further contended that on a true construction of the will, the deceased was neither at the time of his death nor any time during the continuance of the settlement, the full owner of the share of the property of Mahendraba because he had only a life interest therein to receive rents and profits from that share, and, therefore, exemption contemplated by section 29 of the Act came into force and the revenue was not entitled to levy any estate duty with regard to the share of Mahendraba on the death of the deceased, Kamlashankar Gopalshankar. The question, therefore, that arose before the revenue authorities as well as the High Court, was, whether the appellant herein was liable to pay estate duty on 1/2 share which the deceased possessed or on the whole including the share which the wife of the deceased had in the property.

Both the Assistant Controller of Estate Duty, Ahmedabad as well as the Appellate Controller held against the accountable person and further held that section 29 of the Act was not applicable. Full amount of the estate duty was collected from the accountable person. There was an appeal before the Tribunal. The Tribunal on the construction of the will held in favour of the accountable person. The Tribunal held that the deceased Kamlashankar Gopalshankar did not become the full owner of the share of the property of Mahendraba on her death.

At the instance the revenue, the Tribunal referred the following question of law to the High Court:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the respondent is entitled to the full benefit conferred by section 29 and that as such no estate duty in respect of the half share in the joint property which originally belonged to late Mahendraba, the wife of the deceased is payable by the respondent?"

The aforesaid reference was answered by the High Court in favour of the respondent by its judgment and order dated 19/20th December, 1973 and gave a certificate of fitness of appeal to this Court.

It is necessary in this connection to refer to section 29 of the Act which reads as follows:

> "Settled property in respect of which since the date of the settlement estate duty has been paid on the death of the deceased's spouse.
>
> 29. If estate duty has already been paid in respect of any settled property since the date of the settlement, on the death of one of the parties to a marriage, the estate duty shall not be payable in respect thereof on the death of the other party, to the

> marriage, unless the latter was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property, and, if on his death subsequent limitations under the settlement take effect in respect of such property, was sui juris at the time of his death, or had been sui juris at any time while so competent to dispose of the property."

'Settled property' has been defined in section 2(19) of the Act as follows:-

> "2. In this Act, unless the context otherwise requires,-
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> x x x x x x x x x x (19) "settled property" means property which stands limited to, or in trust for, any persons, natural or juridical, by way of succession, whether the settlement took effect before or after the commencement of this Act; and "settlement"

means any disposition, including a dedication or endowment, whereby property is settled." Section 2(15) states:

> "'Property' includes any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale and also species into another by any methos."

Section 2(16) states:

> "'Property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and "on the death" includes "at a period ascertainable only by reference to the death."

Section 5 provides for levy of the estate duty in the case of every person dying after the commencement of the Act upon the principal value ascertained in the manner stipulated therein. Section 6 states that the property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death. Section 6 is important in this connection because in order to attract the levy of the estate duty, the deceased should have been competent to dispose of the property. Therefore what law requires is that the deceased whose death attracts the duty must have had disposing power at the time of his death. One of the important questions involved in this appeal is whether the deceased Kamlashankar Gopalshankar had disposing power over the entirety of the property which was the subject matter of the will by the joint executants.

Two contentions were urged before the High Court. The first contention was on the correct interpretation of section 29 of the Act and the second contention was on the true construction of the joint will made by the deceased Kamlashankar Gopalshankar and his wife Mahendraba in the year 1950. On the first point, the provision of section 29 of the Act has been noticed. It was submitted on behalf of the revenue before the High Court that section 29 came into operation only where the estate duty had become payable "since the date of the settlement". It was contended that the

expression "Since the date of the settlement" clearly indicated that the settlement in question should first come into existence and duty should have become payable subsequent to the coming into existence of the settlement. The revenue pointed out that in the instant case it was contended by the accountable person that the settlement in favour of the grandsons came into existence on the death of Mahendraba, then it was not possible to accept the position that liability to pay estate duty came into existence subsequent to the settlement because any liability to pay the estate duty would also come into existence exactly at the moment of the death of the deceased.

It was pointed out on behalf of the revenue that "settlement" and "liability to pay estate duty" both had come into existence simultaneously on the death of Mahendraba and if that was so, section 29 had no application to the facts of this case. It was urged on behalf of the revenue before the High Court that the word "paid" should be read as "payable" while construing section 29 of the Act. This interpretation which the revenue wanted to place on the section was confined only to the first part thereof which stated that 'the estate duty has already been paid' in respect of settled property since the date of the settlement on the death of one of the parties to the marriage, then the estate duty shall not be payable in respect thereof on the death of the other party to the marriage. This argument was, however, not accepted by the High Court. The High Court observed that looking at the language and the spirit of the section, it was clear that the expression "if the estate duty has already been paid....since the date of the settlement" meant" if the estate duty had become payable or has been paid either simultaneously with the creation of the settlement or at any time thereafter". So the High Court emphasised that the dictionary meaning of the word "since" is wide and the fact is that section comes into operation only on the death of the surviving spouse and the obvious intention of the legislature in framing the section was to avoid double duty. That intention, the court observed, would be frustrated if the word "since" was interpreted narrowly as contended for by the revenue. Even if the word "paid" was used in wider context and not in the literal sense, it could not be interpreted as excluding its literal meaning, namely the actual fact of payment having already been made. The High Court was of the view that interpretation sought for by the revenue was highly artificial and against the spirit of the section. We are in agreement with the High Court on this point. The High Court referred to the analogous provision of section 5(2) of the English Statute and followed the observations of Upjohn L.J. in Coutts & Co. v. Inland Revenue Commissioner, [1962] 2 All E.R. 521 at 527. We are also in respectful agreement with the said observations referred to by the High Court and on the facts, it must be held that the duty had been "paid" since the date of the settlement. No submission to the contrary was made before us.

The second contention was on the construction of the will. Construing the will in the surrounding circumstances and in the light of the language used the High Court was of the view that there was no agreement that the survivor shall not revoke the will or do anything to diminish the quantum of the property going into the hands of the subsequent legatees.

Therefore the deceased as survivor took absolute interest in the property and section 29 of the Act would have no application to this case. The question was accordingly, answered in favour of the revenue and in the negative.

The construction of the will is the main question in this appeal. Whether the accountable person is liable to pay estate duty on full value of the whole property i.e. the share belonging to Mahendraba as well as Kamlashankar Gopalshankar would depend upon the construction of the will in question read in the light of section 29 of the Act. The section to be applied requires payment of estate duty, in respect of the 'settled property' on the death of one of the parties to the marriage. Whether property in question here was settled property or not would depend upon the construction of the will.

The question that fell for consideration by the High Court and also falls for consideration in this Court is whether the deceased Kamlashankar Gopalshankar who survived his wife, one of the joint executants to the will, was competent to dispose of the share of Mahendraba which he had inherited under the said will. Therefore, the question is what is the true meaning and effect of the will? Did the deceased Kamlashankar Gopalshankar have any 'disposing power' over the property which is the subject matter of the will?

On behalf of the accountable person, it was contended that the Will in question was not merely a joint Will but a Will which was joint as well as mutual containing reciprocal agreements between the parties making the Will and therefore the deceased Kamlashankar Gopalshankar had no power in his life time to revoke or alter the disposition made in the Will or to do anything inter vivos after the death of Mahendraba which would have gone against the ultimate disposition indicated in the Will. It was submitted that there was an implicit agreement between the deceased and his wife, that on the consideration of each other agreeing to bequeath his or her share in the property in favour of the survivors each undertook not to do anything which would render the subsequent and ultimate bequest in favour of grandsons ineffective. And if such was the agreement, it must follow that what the deceased received as a legatee was not full ownership right of disposal but only a limited interest in the share of the wife and this would be so even when both executants and the survivor were described in the Will as "owner".

It was submitted that if this construction of the Will was accepted, there came into existence a resulting settlement in favour of the grandsons on the death of the wife and hence the property became 'settled property' within the meaning of section 2(19) of the Act. It was pointed out that if it was accepted as a'settled property', the accountable person was entitled to exemption under section 29 of the Act because admittedly duty was once paid on it on the death of Mahendraba in the year 1954. Reliance was placed before the High Court on behalf of the accountable person on the decision in the case of Dufour v. Pereire, [1769] 21 E.R. 332, as well as Kuppuswami Raja v. Perumal Rama, A.I.R. 1964 Madras 291.

According to the revenue on the other hand, the Will was joint one pure and simple and there was no evidence of any mutuality. It was contended that there was enough evidence in the language of the will itself to show that the survivor was to acquire full ownership rights over the property and was therefore competent at all times on the first death to revoke the Will or dispose of the property inter vivos.

The High Court on an exhaustive consideration of all the relevant judgments and authorities came to the conclusion that there was no evidence to prove any agreement not to revoke the Will after the death of one of the executants. The High Court was of the view that there was no external evidence and so far as the internal evidence was concerned, it appeared to the High Court that each of the executants might have thought that it was quite safe to trust the other and to believe that having regard to their ages and their affection for the grand children who were the ultimate beneficiaries, nothing was likely to occur in the near future which would substantially diminish the property taken by the survivor who can be trusted to give effect to the wishes of the deceased. Therefore, according to the High Court, there was no agreement of irrevocability and the survivor took an absolute interest in the whole of the property and as such section 29 would have no application to the facts of this case. In that view of the matter, the High Court answered the question in the negative and in favour of the revenue.

It is the correctness of that decision which is under challenge in this appeal. The sole question in the background of the provisions of the relevant sections namely section 29 read with other sections that have been referred to herein-

before, is, whether it was merely a joint Will or it was a joint and mutual Will or in other words there was agreement implied between the parties namely the executants of the Will not to revoke the Will after the death of one of the executants. It is, therefore, appropriate to refer to the relevant provisions of the Will. The Will was jointly executed by Kamlashankar Gopalshankar and Mahendraba on 24th December, 1950 and described as "last joint Will and testament". They appointed the accountable person the apppellant herein, as 'our Executor'. The Will thereafter goes on to say:

> "We are that joint owners of a Bungalow known as 'Dilhar Dwar' situate at Ellis Bridge, Pritam Nagar bearing Plot No. 825, Bungalow No. 48/A. In addition to the main bungalow there are certain other blocks bearing Nos. 48/2 to 48/6 and one garage bearing No. 48/1 which is below Block No. 48/2 and a common bath room and two privies for blocks No. 48/2 to 48/6. We have been in possession of the land, the bungalow and the blocks for many years past. We are in actual occupation of the main bungalow. The other blocks except the garage bearing No. 48/1 and Block No. 48/5 are rented to tenants. The garage bearing No. 48/1 is for the present allowed by us to be used by our permission and leave and licence by our son Chintvanshankar Kamlashankar Bhachech without payment of any sum."

Then the will goes on to make the bequest in favour of the three grandsons in terms set our hereinbefore.

The will thereafter goes on to provide in detail for the contingencies that might happen in case where either by the rules of the Town Planning Scheme or the Municipal Laws the portions of the property need and require alterations. The will further stipulates in detail about the payment of the house taxes in respect of the properties coming to the shares of each of their grandsons, and even in respect of the areas built by them. The will further stipulates that for the purpose of partitioning the

land as demarcated on the plan there to annexed and referred to above if there was any obstruction on the land going to the share of each of their grandsons which encroached upon the portion or portions coming to the share of other grandson or grandsons the same should be removed by the person or persons whose encroachment or obstruction, it may be.

Reading the different clauses of the said joint will it was manifest that the intention was to keep the property, as it was at the time of execution of the will so that the ultimate beneficiaries and the grandsons may enjoy the property in full with such modifications as the contingencies of time and situation might require.

In this background it is necessary to find out whether the Will in question was a joint will only or a joint and mutual Will.

Theobald on 'Wills', Twelfth Edition, pages 28 & 29 at paras 79 & 80 describes the difference thus:

> "Joint wills. Persons may make joint wills, which are, however, revocable at any time by either of them or by the survivor. A joint will is looked upon as the will of each testator, and may be proved on the death of one. But the survivor will be treated in equity as a trustee of the joint property if there is a contract not to revoke the will; but the mere fact of the execution of a joint will is not sufficient to establish a contract not to revoke. So a legacy to a legatee who survived the first testator, but predeceased the second, did not lapse. Where a joint will is followed by a separate will which is conditional on a condition that fails, the joint will is not revoked even though the subsequent separate will contains a revocation clause.
>
> Mutual wills. The term "mutual wills" is used to describe separate documents of a testamentary character made as the result of an agreement between the parties to create irrevocable interests in favour of ascertainable beneficiaries. The revocable nature of the wills under which the interests are created is fully recognised by the Court of Probate; but in certain circumstances the Court of Equity will protect and enforce the interests created by the agreement despite the revocation of the will by one party after the death of the other without having revoked his will.
>
> The Court of Equity will not protect the beneficiary under mutual wills merely because they have been made in almost identical terms. There must be evidence of an agreement to create interests under the mutual wills which are intended to be irrevocable after the death of the first to die. Where there is no such evidence the fact that the survivor takes an absolute interest is a factor against the implication of such agreement. Where, however, the evidence is clear, as, for example, where it is contained in recitals in the wills themselves, the fact that each testator gave the other an absolute interest with a substitutional gift in the event of the other's prior death does not prevent the Court of Equity from affording its protection to the beneficiary under the mutual wills. The agreement must also be sufficiently precise to be enforced by the Court.

> Before the death of the first to die, the agreement is a contractual one made in consideration of mutual promises. It can, therefore, at this stage be revoked by mutual agreement and even by unilateral breach, giving rise to an action for damages at least where the revoking party gives such notice to the other as may enable him to alter his will also. But on general principles only the parties to the agreement can sue for damages for unilateral breach."

Earl Jowitt in the Dictionary of English Law, 1st Edn. Second Impression 1965 at page 1283, referes to the definition of 'owner' under Public Health 1936 and the Factories Act, 1937 as a person for the time being receiving the rack-rent of the premises in connection with which the word is used, whether on his own account or as agent or trustee. Jowitt also defines 'ownership' as the most extensive right allowed by law to a person, of dealing with a thing to the exclusion of all other persons, or of all except one or more specified persons. It is therefore a right in rem.

Stroud's Judicial Dictionary 4th Edn. Vol.3 page 1907 deals with the concept of 'owner' and 'ownership' in different statutes of England.

Halsbury's Laws of England, 4th Edn., Vol. 50 at pages 95 & 96, paras 207 & 208 deals more or less in the same manner about joint will and mutual will. But at page 108, para 221 it states the law thus:

> "221. Restrictions by taking a benefit under a mutual will. Mutual wills may be made, either by a joint will or by separate wills, in pursuance of an agreement that they are not to be revoked. Such an agreement may appear from the wills, or may be proved outside the wills, but it is not established by the mere fact that the wills are in identical terms. If no such agreement is shown, each party remains free to revoke his will, if there are separate wills, or to revoke the joint will, so far as it disposes of his property, and the fact that one party has died without revoking the disposition of his property does not prevent the survivor from revoking the disposition which he has made notwithstanding that he has received benefits out of the estate of the deceased party. Even when there is such an agreement and one party has died after departing from it by revoking or altering the will, the survivor having notice of the breach cannot claim to have the later will set aside, since the notice gives him the chance of altering the will as regards his own property; and the death of the deceased party is itself sufficient notice for this purpose. It, however, the deceased has stood by the agreement and not revoked or altered his will, the survivor is bound by it, and although probate will be granted of a later will made by him in breach of the agreement, since a court of probate is only concerned with the last will, the personal representatives of the survivor nevertheless hold his estate in trust to give effect to the provisions of the joint will or mutual wills."

Jarman on Wills in 8th Edn. at page 42 states the position of mutual wills thus:

> "The fact that a husband and wife have simultaneously made mutual wills, giving each to the other a life interest with similar provisions in remainder, is not in itself

evidence of an agreement not to revoke the wills; in the absence of a definite agreement to that effect there is no implied trust precluding the wife from making a fresh will inconsistent with her former will, even though her husband has died and she has taken the benefits conferred by his will. Although by the mutual wills the wife expressly has refrained from exercising a power of appointment, which her husband had only in default of her exercising it, and he has appointed, the wife can both take the benefit of her husband's will and exercise her power of appointment, unless the language of his will either puts her to her election, or place her in the position of seeking at the same time to approbate and reprobate its provisions. The joint executants have been described as joint owners. Again the said clause goes on to use the expression 'during our life time we shall continue to be the joint owners' 'and shall be jointly entitled to the rents and income of the said land and blocks and the user and rent of the bungalow. The Will goes on to say that after the death of one of them 'survivor shall become the "owner" of the said land bungalow and blocks including the garage with the said bath room and privies and shall become entitled to the rents and income and user of the said land bungalow and block's. The provisions contained in the said will were stipulated to be effective after the death of the survivor of them. After the death of the survivor the will went on to use the expression "we hereby devise and bequeath our said furnished bungalow....." Then the will made detailed provisions for the enjoyment of the property in specific species.

In re Oldham, 1925 Ch. 75, the husband and wife had made mutual wills in the same form in pursuance of an agreement so as to make them but there was no evidence of any further agreement in the matter. Each gave his or her property to the other absolutely with the same alternative provisions in case of lapse. The wife having survived and accepted her husband's property under the mutual will subsequently married again, and made a fresh will ignoring the alternative provisions of her own mutual will. The plaintiff in that case contended that from the agreement to make mutual wills in the form in which they were made, the survivor who had accepted the benefit under the mutual agreements became thereby subject to alternative trusts mentioned in the mutual wills. Reliance was placed on Dufour v. Pereira (supra). Reference was made to the observations of Astbury J. in that where the learned judge observed that in order to enforce the trust, the judge must be satisfied that there was a term irrevocable and in such circumstances he was to give effect to the same. But the learned judge was unable having read the will to find any mutuality in that form in the will in question. This decision found favour with the Gujarat High Court. In the instant case before us, it has to be noted that the will in question was in one document and furthermore the desire to give properties in species to the grandsons was manifest from the entirety of the will.

It would be evident from the said will that the joint properties of the deceased husband and the wife were delineated into three parts and each of the parts were bequeathed to three grandsons in species i.e. in specific demarcated areas. One other significant fact to be borne in mind, in view of the contentions involved in this

appeal, is the fact that there was no provision in the will whereby if one of the properties or one of the parts of the said properties was parted away or diminished before the death of both the executants (this is important because the will was to take effect on the death of both the executants), there was no provision that any part which got diminished during the life time of one of the executants, he should be compensated other-wise from any other part of the said properties or any other assets of the estate of the executants which were the subject matter of the will.

Reliance was placed in Gray v. Perpetual Trustee Co. Ltd.,[1928] A.C. 391 at 399 & 400. In that case it was held that the fact that husband and wife simultaneously made mutual wills giving life interest with similar provisions in the remainder was not in itself evidence to an agreement not to revoke the wills.

The use of the expression 'owner' is really not the solution of the problem before us in this appeal. In one context the expression 'owner' has been used to indicate the limited ownership to be enjoyed by the survivor of the joint executants and in another context to the ultimate legatees or the beneficiaries.

Clause 5 of the will is suggestive that it was in the contemplation of the executants as to what would happen to certain amounts lying to their credit at the time of the death of the survivor in the event of the death of the grandson before the death of the survivor of the executants. It provided that in that event the amounts would go to the heirs according to law of the grandson named therein. These properties were again in clause 7 described as 'joint properties'.

It would be material to refer, apart from the clauses which have been set out hereinbefore, to certain other clauses namely clause 2 of the will, the relevant portion of which has been set out hereinbefore in its entirety. Clause 3 deals with the situation when if any of the grandsons or the heirs wanted to sell his or their portion of building at any time. Clause 4 also dealt with the situation if one of the grandsons died during their life time and before the death of the survivor what would happen? Clause 5 has been referred to hereinbefore. Clause 6 deals with certain movable properties. Clause 7 dealt with separate properties.

It is evident from the aforesaid that property in species, in specific proportion, was intended to be preserved and enjoyed by the ultimate legatee on the death of the survivors.

In Kuppuswamy Raja v. Perumal Raja (supra), it was observed that a joint will is by a single testamentary instrument containing the wills of two or more persons and jointly executed by them, while mutual wills, are separate wills of two or more persons which are reciprocal in their provisions and executed in pursuance of contract or agreement between two or more persons to dispose of their property to each other to third person in particular mode or manner. Mutual wills as

distinguished from joint wills are sometimes described as reciprocal wills. In describing a will, the adjective mutual or reciprocal is used to denote the contractual element which distinguished from a joint will. It was stated therein by the Division Bench of the Madras High Court that joint will would become irrevocable on the death of one of the testators if the survivor received benefit under the will. The Court emphasised referring into certain decisions of this court that a joint will would become irrevocable on the death of one of the testators if the survivor has received benefit under the mutual will. There need not be any specific contract prohibiting evocation when the agreement took the form of not two simultaneous mutual wills but one single document. If one single document was executed using the expression 'our property', 'our present wishes', and 'as will' and such similar expressions, it was strong cogent evidence of the intention that there was no power to revoke except by mutual consent.

In order to render mutual will irrevocable, both, according to the said decision, the conditions must be concurrently satisfied:

(a) that the surviving testator must have received benefits from the deceased under the mutual will; (b) the mutual wills should have been executed in pursuance of an agreement that the testators shall not revoke the mutual wills. Such an agreement not to revoke the wills may either appear from the wills themselves or may be proved outside the wills. This judgment was dissented from by the judgment under appeal.

Reliance was placed on the decision of the Allahabad High Court in Bhawani Prasad v. Smt. Surendra Bala W/o Subodh Chandra and another, A.I.R. 1960 Allahabad 126. In that case, by the will both the executants, husband and wife were devising the property of which each was the owner, in the first instance to whoever survived, and thereafter both of them devised the property 'belonging to us' to the petitioners. There was an assertion of absolute ownership in the house made by the wife, and an assertion made by both executants that the deposits in the bank constituted money 'belonging to us the executants'. The items aforesaid, according to the will, were to remain in the absolute possession and enjoyment of the executants during their life time and thereafter to be disposed of in the manner indicated in the will. The last clause, clause (4) of the will indicated that the executants would have the right to amend or cancel the will, but nobody else would have that right. It was found that the exercise of the right of the power reserved by clause (4) was not made dependent by this clause on the co-existence of both the executants. It was held on the construction of reading of the will that after the death of the husband, the wife could revoke the part of the will by gifting away the house to another during her life time. The fact that the wife had benefitted from the will of the husband would not destroy her power of revoking her will because her will was quite an independent transaction. The deed of gift could not be taken to have revoked the will of the husband but only the will of the wife. The case was really decided in terms of the facts and circumstances of that case and wordings of the will.

In the case of Re Parsons, Parsons v. Attorney General, [1942] (2) All E.R. 496, the testatrix gave a legacy of L- 10,000 to her husband absolutely, and she also gave the income of her residuary estate

on trust for her huaband for life and after his death on trust for her son absolutely. The husband disclaimed the legacy by a formal deed of disclaimer and the legacy fell into residue. On the husband's death the revenue authorities claimed estate duty in respect of the legacy on the ground that although the husband had disclaimed the legacy, he was competent to dispose of it and the liability to duty was not, therefore, excluded by the Finance Act, 1948. It was held that during the period between the death of the testatrix and the date of the disclaimer the husband was 'competent to dispose' of the legacy within the meaning of the Act. Whether a person is competent to dispose of naturally would depend on the terms and conditions under which the property is either acquired or inherited. The expression 'competent to dispose of' must bear the ordinary meaning in the English language. A person shall be deemed to be competent to dispose of the property if he has every power or authority enabling the donee or other holder thereof to appoint or dispose of the property as he thinks fit.

A contention was raised in this connection whether this being an exemption provision from duty, it should be so read as to lean in favour of the assessee.

The questions whether such a clause should be construed in favour of the assessee or in favour of the revenue in case of doubt or the question whether section 29 being exemption clause in respect of payment of duty on settled property, the onus is on the assessee to come strictly within the purview of that clause or the question how should such a provision be construed really do not arise. There is not much difficulty or ambiguity on the construction of section 29 of the Act. The question involved in this case is the construction of the will in question. Was it only a joint will executed jointly by two of the executants or was it a joint and a mutual will? In aid of the submissions that an exemption clause must be strictly construed in favour of the State cases were cited which need not therefore be noticed.

Reference was made to Cross 'Statutory Interpretation' on construction on the theory of contemporaneous exposition reliance being placed on the conduct of the parties i.e. the deceased and treated the half share of the wife in the property in question as his own and had filed wealth tax returns on the same basis.

These principles are also well settled. But these principles will not strictly be applicable in the instant case because this appeal is concerned with the construction of the will in question and the will in question must be construed in such a manner as to find out the true intention of the executants or the testator and testatrix. For that it is well settled that will must be read as a whole. Secondly the expression must be read consistently.

One has to bear in mind that we are concerned with the construction of the will and the true effect of the provisions thereof. Whether the deceased Kamlashankar Gopalshankar had the disposing power over the share of the property of Mahendraba, his wife, acquired by him would depend not on how he has treated it but the true effect of the will. Furthermore there is no question of contemporaneous conduct because the conduct of one of the parties subsequent to the death of one of the executants long after the execution of the will cannot be described as 'contemporaneous conduct'. We need not, therefore, detain ourselves on the question of 'contemporaneous exposition' by conduct of the

parties in the facts of this case.

Therefore the will must be construed in its proper light and there must be definite agreement found from the tenor of the will or aliunde that either of the joint executants would not revoke the will after receiving the benefit under the will. Such definite agreement need not be express; it can be implied. The terms of the will have been set out exhaustively. It was undoubtedly a joint will. The property in question has been described as 'our property'. The expression 'owner' has also been used in the manner indicated in the sentence 'During our life time we shall continue to be the joint owners of the land bungalow and blocks with their common bath room and two privies....and shall be jointly entitled to the rents and income of the said land and blocks and the user and rent of the bungalow'. The will goes on further to say that on the death of one of them, the survivor shall become the 'owner of user of the said land bungalow and blocks including garage..... ' Therefore it is clear that the ownership which the joint executants contemplated was the user during the life time and entitlement to the rents and income of the same. It is this ownership which was to pass on the death of either of them to the survivor and the will thereafter goes on to say that 'the provisions hereinafter contained shall become effective after the death of the survivor of us'. And thereafter after the death it is provided "we hereby devise and bequeath our said furnished bungalow..... " The gift of the property to the three grand children as owners in full sense is to take effect on the death of the survivor of both the executants. It is clear that the property was intended to be kept in tact for the enjoyment of the ultimate legatees and during the life time of either of them the property would not in any way be parted with or diminished. This intention, expressed in the implied terms in the bargain in the will, in our opinion, would be fortified by devising the property to three grand children in species i.e. in specific form and not providing for any money or compensation for diminution of any part thereof before coming into effect of the will in question. If that is the position then, in our opinion, there is a definite agreement not to revoke the will by one of the executants after he or she has received the benefit under the will on the death of either of them.

Indubitably in the instant case the husband has received the benefit under the will of the wife. He could not have during his life time parted with the property i.e. he did not have the disposing power over the properties in question after the death of the wife.

It was emphasised that there was no evidence of mutuality. But there was enough evidence in the language of the will itself which have been set out hereinbefore that the property must remain in tact specially after receipt of benefit by one of the executants on the death of the other until the death of both of them to be able to be succeeded by the ultimate legatees. The dominant intention of the testators is evidenced from the language used. This must be judged in the facts and circumstances of each case. It was not only that on certain basis that the will was made but it was intended to remain intact to be enjoyed by the grand children. The fact that both the executants have described themselves 'joint owners' is not by itself conclusive on this point nor the use of the expression 'that the survivor shall become the owner' is conclusive. On the other hand the detailed provisions in species to be effective after the death of the survivor in different portions to be given to the different grand sons without any provision as to what was to happen in case of the diminution of the property within the life time of either of the survivor make the will 'mutual wills'.

In our opinion the dominant intention is clear i.e. the will may be revoked during the life time of both the executants but after the death of one of the executants and after benefit had been received by the survivor, the property in question must remain intact to be enjoyed by the grand children by the terms of the will which was to become effective on the death of both of the executants.

We are of the opinion that definite intention must be there but such intention need not be expressed in a separate document than the will itself. If from the will in question such a definite intention and a separate agreement can be spelled out then in our opinion it would be a case of joint and mutual will.

In view of the above discussion, the following propositions follows:

> 1. Whether estate duty was payable on the whole of the property or not would depend on whether the deceased Kamlashankar Gopalshankar had 'disposing power' over the share of Mahendraba inherited by him on her death or not?
>
> 2. The above question would depend on the construction of the joint will-did it create any mutuality among the executants of the joint will? Whether Kamlashankar Gopalshankar having accepted the benefit and after his wife's death, was competent to do anything contrary to the ultimate bequest? Before the death of the first of the executants, the agreement remained contractual one in consideration of mutual promises. It could have been at that stage revoked by mutual agreement or even by unilateral breach, giving rise at the most to an action for damages.

But after the death of the first one without revoking his or her own will makes the joint will irrevocable by the survivor (See Theobald (supra). But there must be an agreement that the wills would not be revoked after the death of one of the executants or disposition will not be made contrary to the will after the death of one of the executants. Such an agreement may appear from the will or may be proved outside the will but that is not established by the mere fact that the wills are in identical terms. If such an agreement is shown, each party remain bound.

3. A different and separate agreement must be spelled out not revoke the will after the death of one of the executants. That agreement must be clear though need not by a separate writing but must follow as a necessary implication which would tentamount to an express agreement.

4. The predominant intention of the executants at the time of the execution, after the acceptance of the benefit of the execution makes the will in this case irrevocable by the survivor of the executants.

5. Judged by the principles indicated above, in the facts and circumstances of this case, we are of the opinion because of the specific clause that it was intended that the grandsons would receive the benefit in species and there being no provision for making up the deficiency or diminution if any, it must follow that there was mutuality and Kamlashankar Gopalshankar was not competent to dispose of the property in any manner contrary to the ultimate disposition.

6. The fact that estate duty was paid is non sequitur.

7. The payment of wealth tax by Kamlashankar Gopalshankar on the whole estate after the death of Mahendraba is not relevant.

8. The question of strict construction of the taxing statute and the principle that one who claims exemption must strictly come within the purview is not relevant in this case because the exemption follows on the interpretation of the will.

In that view of the matter we are of the opinion that this was a mutual will. The husband Kamlashankar Gopalshankar received the benefit under the will after the death of Mahendraba. It became irrevocable by him after her death. Therefore he had no disposing power over the share of Mahendraba in the property. In the premises being a 'settled property', estate duty having been paid on the death of one of the parties, the accountable person was entitled to exemption under section 29 of the Act. In the premises the High Court was not right in its conclusion.

The appeal is accordingly allowed and the judgment under appeal is set aside and the question is answered in the affirmative and in favour of the accountable person. The accountable person is entitled to the costs of this appeal.

S.R. Appeal allowed.