**(1982) 08 MAD CK 0024**

**In the Madras High Court**

**Case No :** Tax Case No. 51 of 1977

A.M.A. SP. Narayanan Chettiar APPELLANT

Vs

Controller of Estate Duty RESPONDENT

**Date of Decision :** 20-08-1982

**Acts Referred:**
Estate Duty Act, 1953 — Section 2(15), 21, 27, 39, 5

**Citation :** (1985) 156 ITR 758

**Hon'ble Judges :** R. Sengottuvelan, J;G. Ramanujam, J

**Bench :** Division Bench

## Judgement

Ramanujam, J.—The following two questions have been referred to this court u/s 64(1) of the Estate Duty Act, 1953, at the instance of the

accountable person for its opinion :

(1) Whether the inclusion of the sum of Rs. 92,243 in the principal value of the estate of the deceased u/s 9(1) read with section 27 and

Explanation 2 to section 2(15) of Estate Duty Act, 1953, is proper and valid ?

(2) Whether the inclusion of the sum of Rs. 10,000 u/s 9 of the Estate Duty Act, 1953, is valid in law ?

2. The deceased with reference to whose estate proceedings had been initiated under the Estate Duty Act, 1953, hereinafter referred to as ""the

Act"", was the karta of a Hindu undivided family, consisting of himself and his only son. There was a partial partition in the family on October 17,

1972. The credit balance in favour of the family in the pawn-broking business as on the date of partition was Rs. 2,76,727. In the partial partition,

a sum of Rs. 46,121 was allotted to the share of the deceased and the balance of Rs. 2,30,606 was allotted to the share of the deceased''s son.

Against the assessee''s rightful half share of Rs. 1,38,364, he was actually allotted in the partition only a sum of Rs. 46,121 and the difference

amounting to Rs. 92,243 was included in the principal value of the estate of the deceased u/s 9 read with Explanation 2 to section 2(15) of the Act.

3. This inclusion was questioned by the accountable person before the Appellate Controller of Estate Duty who, however, deleted the addition of

Rs. 92,243, holding (1) that there is no question of extinguishment at the expense of the deceased of a debt or other right so as to deem it as a

disposition to attract Explanation 2 to section 2(15) of the Act; (2) if in a partial partition, one member takes a lesser share, it is always open to the

members of the family to make good the difference at the time of final partition and as such it will be presumptuous on the part of the Assistance

Controller to conclude that had been a surrender or waiver of interest by the deceased in a case where there are still joint family assets left open

for final partition at a later date; and (3) in view of the decision of the Supreme Court in The Controller of Estate Duty, Andhra Pradesh

Hyderabad Vs. Kancharla Kesava Rao, , in a partition, there is no disposition and unless the transaction amounts to a disposition, the fact that one

member got property less than what he would have got if the partition was made equal, has no significance.

4. The Revenue took the matter in appeal to the Income Tax Appellate Tribunal and it disagreed with the view of the Appellate Controller of

Estate Duty and held that so long as there is an extinguishment of a right by the deceased and creation of a benefit thereby in favour of his son, it

matter little whether the extinguishment of the right or the creation of the benefit is brought about by a partial partition or a total partition. Thus, the

Tribunal sustained the addition of Rs. 92,243 made by the Assistant Controller of Estate Duty.

5. The Assistant Controller of Estate duty also brought to duty a sum of Rs. 10,000 being a cash gift made by the deceased in favour of his

grandson on August 30, 1972. But, on appeal, the Appellate Controller held that the gift is out of the funds belonging to the Hindu undivided family

and not to the deceased and that therefore, the inclusion of this amount in the principal estate of the deceased is erroneous. On further appeal, the

Tribunal held that the inclusion of the said sum of Rs. 10,000 on the ground that a disposition to attract estate duty u/s 9 as a gift need not be of property to which the deceased was the absolute owner, but can be of any property which he is competent to dispose of and that u/s 3(1)(b) of

the Act, a disposition taking effect out of the interest of the deceased is deemed to have been made by him and the concurrence of any other

person is not required. In this view, the Tribunal sustained the any other person is not required. In this view, the Tribunal sustained the inclusion of

Rs. 10,000 in the principal value of the estate of the deceased.

6. Aggrieved by the decision of the Tribunal, the accountable person has obtained a reference to this court on the questions set out above.

7. On behalf of the accountable person, it is contended that the view taken by the Appellate Controller of Estate Duty on both the questions should

be accepted as correct by this court, that in a partition there is no disposition and, therefore, the fact that one member got properly less than what

he would have got if the partition was made equal had no significance and that in this case, the partition being partial, if the deceased had taken a

lesser share, it is always open to have the difference adjusted at the time of the final partition and, therefore, it cannot be taken that there has been

a surrender or waiver of an interest by the deceased or extinguishment of any right at the instance of the deceased. In support of the above

contention, reference has been made to the decisions in The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar, and The Controller of

Estate Duty, Andhra Pradesh Hyderabad Vs. Kancharla Kesava Rao, .

8. However, we are of the view that those decisions are not applicable to the facts of this case and the decisions of this court in Ranganayaki

Ammal and Others Vs. Controller of Estate Duty, , which has been approved by the Supreme Court in Controller of Estate Duty, Gujarat Vs.

Kantilal Trikamlal, , squarely applies to the facts of this case.

9. In The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar, the question that arose before the Supreme Court was whether a partition

between the members of a joint family will consitute a disposition of the property for purposes of the Gift-tax Act and the Supreme Court treated

the word ""disposition"" occurring in the Gift-tax Act as not comprehending as partition between the members of a Hindu joint family as a partition

among the members of a Hindu undivided family cannot be taken to be a transfer in the normal sense. In The Controller of Estate Duty, Andhra

Pradesh Hyderabad Vs. Kancharla Kesava Rao, , the question that arose was whether the property allotted to the widow, who had a right in her

husband''s share in the non-agriculture properties passed on her death u/s 7 of the Act or whether the arrangement under the partition deed was a

disposition"" within the meaning of section 24. It was held by the Supreme Court that on her death, her interest in the land ceased and it passed to

the other members of the joint family, and that the partition in the Hindu undivided family did not amount to a ""disposition"" within the meaning of

section 24 as there was merely and adjustment of rights between the various members of the family. We are not concerned here with the question

as to whether a partial partition between the deceased and his son is a disposition or not.

10. Here we are concerned with an unequal partition and difference in value between the shares allotted to the father and the son will amount to an

extinguishment of the right of the deceased and the creation of a benefit thereby in favour of the son amounts to a disposition as contemplated by

Explanation 2 to section 2(15). This question came up for consideration before this court in Ranganayaki Ammal and Others Vs. Controller of

Estate Duty, before this court held after recognising the well-established principle that a partition among the members of a Hindu undivided family

would not amount to a transfer in the normal sense having regard to the peculiar definition of ""disposition"" in Explanation 2 to section 2(15)

deeming the extinguishment of a right and creation of a benefit thereby to be a disposition in the nature of a transfer and in so far as section 27

makes any disposition by the deceased in favour of his relative to be treated for purposes of section 9 as a gift subject to a certain in exceptions,

the difference in the value has to be treated as a gift under a section 9 of the Gift-tax Act. The said decision of this court has been approved by the

Supreme Court in Controller of Estate Duty, Gujarat Vs. Kantilal Trikamlal, . In that case, the question as to whether a relinquishment by the

deceased of a slice of his share on partition of the joint family by taking a share less than what is due effected within two years of his death with a

view to relieve himself of a part of his wealth and to benefit a near relation, is chargeable to estate duty under the Estate Duty Act, 1953, arose.

After referring to section 5, the charging section, and section 2(15), defining property, and the Explanation thereto as also sections 9 and 27, the

 

Supreme Court held that though in a Hindu undivided family coparceners have no predictable or defined shares but each has an antecedent title in

every parcel of property and is jointly the owner and in enjoyment with the others, once a partition takes place, their shares become predictable

and definite and that in such a partition if one coparcener takes a lesser share than what is due to him and the difference in value produced by

voluntary relinquishment of a portion of his share and the benefit conferred by that section on the other coparceners will fall within the expression

disposition"" as per Explanation 2 to section 2(15) and, therefore, it will be caught within the coils of section 5 read with sections 9 and 27. The

Supreme Court has noted the divergent views taken by the Courts, the Madras and Punjab High Courts taking the view that it is a disposition

under the Explanation 2 to section 2(15) and the Gujarat High Court taking the contrary view and ultimately approved the view adopted in

Ranganayaki Ammal v. CED [1973] ITR 88 , and reversed the decision of the Gujarat High Court. In view of the Supreme Court decision, it is no

longer open to the assessee to contend that since a petition cannot be taken to be a disposition u/s 27, relinquishment of one''s share at a partition

cannot be taken as amounting to a disposition under the Explanation 2 to section 2(15).

11. Though a partition as such is not a disposition as has been held in The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar, and The

Controller of Estate Duty, Andhra Pradesh Hyderabad Vs. Kancharla Kesava Rao, , an unequal partition which involves the relinquishment of

one''s due share and the conferment of a corresponding benefit to the other coparceners who are relations will come within the wider definition

contained in Explanation 2 to section 2(15) and, therefore, it will come within the net of sections 5 read with sections 9 and 27.

12. Though the point that comes up for consideration before us covered by the decision of the Supreme Court in Controller of Estate Duty,

Gujarat Vs. Kantilal Trikamlal, , the learned counsel for the assessee contended that the decision of the Gujarat High Court in Controller of Estate

Duty, Gujarat Vs. Babubhai T. Panchal, supports him. In that case, even after the decision of the Supreme Court in Controller of Estate Duty,

Gujarat Vs. Kantilal Trikamlal, , the Gujarat High Court has held that a release by a coparcener of his right in a coparcenary property was not a disposition of property was not a disposition of property within the meaning of Explanation 2 to section 2(15) and, therefore, such a release cannot

be brought within the net of section 5 read with sections 9 and 27 of the Estate Duty Act. It is seen from the judgment of the Gujarat High Court in

the above case that it had distinguished the decision of his court in Ranganayaki Ammal and Others Vs. Controller of Estate Duty, and Controller

of Estate Duty, Gujarat Vs. Kantilal Trikamlal, , and held that the case of unequal partition stands on a different footing and that where a

coparcener releases before partition stands his share in a coparcenary property, the interest released cannot be predicted or defined, and it is

impossible to arrive at the valuation of the right which was being released or disclaimed by the deceased, as such, it cannot be taken to be a

disposition as contemplated by Explanation 2 to section 2(15). The decision in that case is based on the reasoning that a release before the actual

or a notional partition u/s 39 can only be taken of as being indefinite and indeterminate, a value which cannot be taken as disposition under

Explanation 2 to section 2(15). However, the said decision specifically proceeds on the basis that if there has been a partition and there is release

of a portion of one coparcener''s due share in favour of another coparcener, it will amount to a disposition under Explanation 2 section 2(15).

Therefore, the decision instead of helping the assessee supports the case of the Revenue in this case.

13. The learned counsel for the accountable person contends that any inequality in the shares in a partial partition can be adjusted in the final

partition and, therefore, there cannot be a waiver of interest by the deceased in this case where the joint family still continues and a final partition

yet to take place. It is also contended by the learned counsel for the accountable person that partial partition is unknown to Hindu law and even if a

partial partition takes place in a family in which there is no division in status, the inequality in the shares of the coparceners in the properties which

are the subject-matter of partial partition can be fully and finally adjusted in the final partition and, therefore, till the final partition takes place, there

is no question of any surrender or waiver of any interest of one coparcener in favour of another. We are not in a position to agree with the learned

counsel for the accountable person that partial partition is unknown to Hindu law. As a matter of fact, Hindu law recognises a partial partition either as regards persons or as regards properties. It is no doubt true that a partial partition by private arrangement. Thus, one of the several coparceners

may separate from the others and take away his share while the others remain joint and hold the remaining properties in a coparcenary. Similarly,

co-owners may divide amongst themselves some of the joint properties and continue to enjoy the other properties in co-ownership. These

principles have been established in Kashinathsa Yamosa Kabadi, etc. Vs. Narsingsa Bhaskarsa Kabadi, etc., . It is also well established that a

valid and effective partial partition is binding on the parties and that in a subsequent suit for partition, the properties which had already been

amicably partitioned previously between the parties cannot be included and only the properties which are left out in the previous partition can be

brought for division. It is, therefore, clear that the partition of one of the assets between the deceased and his son is final and conclusive and

binding on the parties and the same asset cannot be the subject-matter of repartition at any subsequent partition. Therefore, the reasoning of the

Appellate Controller of Estate Duty that in a partial partition if one member takes a lesser share, it is always open to the other members of the

family to make good the difference at the time of the final partition cannot be accepted unless there is an agreement between the parties to the

partial partition to make good the difference at the time of the final partition. In this case, it is not alleged by the accountable person that the father

took a lesser share on the understanding that the difference in the value of the share will be made good at the time of the final partition.

14. Therefore, the application of section 9(1) read with section 27 and Explanation 2 to section 2(15) of the Act in this case are legally permissible.

15. Even assuming that the partial partition is only a tentative one sub-ject to the condition that the rights are to be adjusted finally at the final

partition, section 39 of the Act brings about a notional partition between the deceased and his son just before his death and the difference in share

value which, according to the accountable person, is to be adjusted at the time of final partition will have to be taken as such asset of the deceased

on the date of his death in which case section 7 will stand attracted. Thus, there is no escape from the position that the difference in value will have

to be added to the principal value of the estate of the deceased for estate duty purposes. Thus, the first question is answered in the affirmative and in favour of the Revenue.

16. Coming to the second question as to whether the sum of Rs. 10,000 is to be included u/s 9 of the Act, it is seen that the sum of Rs. 10,000 is a

cash gift made by the deceased in favour of the his grandson on August 30, 1972. The Appellate Controller of Estate Duty has found that the sum

of Rs. 10,000 has been given by the deceased out of the joint family funds and not of the deceased''s personal fund and, therefore, it is not

includible as a gift u/s 9. The Tribunal has, however, proceeded on the basis that a disposition to attract estate duty u/s 9 as a gift need not be

property to which the deceased was the absolute owner, but can be of any property which he is competent to dispose of that u/s 3(1)(b) of the

Act a disposition taking effect out of the interest of the deceased is deemed to have been made by him and the concurrence of any other person is

not required. It is in this view, the Tribunal upheld the inclusion of the sum of Rs. 10,000. It is not in dispute that the deceased is one of the two

coparceners in the joint family and that in the sum of Rs. 10,000, the deceased was entitled only to a half share, that is, a sum of Rs. 5,000, and,

therefore, the other half share belonged to the other sharer, that is, the accountable person. Even as karta of the family, the deceased has no power

to make a gift of the joint family property and, therefore, the gift can be taken to be valid only to the extent of his share of Rs. 5,000. In so far as

the deceased has relinquished his share of Rs. 5,000 in the joint family funds, it would attract section 9. Therefore, we cannot agree with the

Tribunal that the entire sum of Rs. 10,000 is liable to be included u/s 9 and we hold that the inclusion of only a sum of Rs. 5,000 u/s 9 is is justified.

Thus, as regards the second question, our answer is that the inclusion if a sum of Rs. 5,000 u/s 9 alone is valid in law. The second question is

answered accordingly. In view of the fact that both parties succeed in part, there will be no order as to costs.

 