
(1991) 02 CAL CK 0030
In the Calcutta High Court
Case No : Matter (Gift-tax) No. 2779 of 1989

Ashok Kumar Poddar

APPELLANT

Vs

Commissioner of Gift Tax

RESPONDENT

Date of Decision : 12-02-1991

Acts Referred:

Citation : (1993) 199 ITR 132 : (1995) 81 TAXMAN 14

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : S.K. Roy, R.N. Saha and Alope Pal, for the Appellant;

Judgement

Ajit K. Sengupta, J.—In this reference u/s 26(1) of the Gift-tax Act, 1958, for the assessment year 1973-74, the following questions have been referred to this court :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that by his order dated May 22, 1980, the Appellate Assistant Commissioner determined the value of the gifted property at Rs. 5,45,700 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in upholding the valuation made by the Gift-tax Officer by capitalising the income by the multiplier 13,414?"

2. Shortly stated, the facts are that the assessee bequeathed his one-sixth share in certain leasehold land and structures thereon subject to the mortgage in favour of the United Bank of India to Smt. Shradha Poddar, a minor. This gift was made under a deed of gift dated June 26, 1972. The assessee filed a return declaring the value of the gift at Rs. 8,549 only. The Gift-tax Officer, however, determined the value of the gift at Rs. 1,75,000 by his order dated March 28, 1979. The assessee appealed to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner was of the view that the assessment required enhancement and accordingly, he issued a notice to the assessee intimating, inter alia, that the value of the leasehold interest in the above property as on the

date of gift would work out to Rs. 5,45,700, which will be the value of the taxable gift for the assessment year in question, i.e., 1973-74, as against the value of the taxable gift of Rs. 1,75,000, determined by the Gift-tax Officer. The assessee replied to the proposed enhancement contending that it was much too excessive. The Appellate Assistant Commissioner dealt with the contentions of the assessee and he came to the finding that the yield rate of 5.5 per cent. was justified in the facts and circumstances of this case and he has given elaborate reasons therefore.

3. At the time of hearing before the Appellate Assistant Commissioner a contention was raised that the gifted property consisted of two leasehold properties and the unexpired period of lease varied in the two cases. The Appellate Assistant Commissioner dealt with this contention in the manner following :

"At the time of hearing, it was stated that the property gifted were two leasehold properties, (i) the first one was for thirty years beginning from January 2, 1958. As on the date of gift, the unexpired period was for fifteen years, (ii) the second property was for a lease of thirty-five years from June 26, 1963, and the unexpired period of the lease as on the date of gift was twenty-four years. The assessee's representative was unable to give the amount of rent attributable to each of the properties separately. The value of each of the properties as on the date of the gift has to be determined, keeping in view (i) the net income of the property, and (ii) the unexpired period of the lease. As the net income attributable to each leased property has not been furnished by the assessee's representative, I have to set aside the assessment to enable the Gift-tax Officer with a direction to determine the net income of the two leased properties and to determine the value of the assessee's leasehold interest keeping in view the unexpired period of lease. It is found that the unexpired period of lease has been taken at twenty-four years by the Gift-tax Officer whereas as per the assessee's contention it is fifteen years in respect of one property and twenty-four years in respect of the other property."

4. The Appellate Assistant Commissioner also noted that certain details were called for and the same were not furnished by the assessee's representative. The Appellate Assistant Commissioner enumerated the said details as follows :

"(i) The value of leasehold rights in respect of the property was included in the wealth-tax return of Shri Ashok Kumar Poddar for the assessment year 1972-73, It was stated that the property was received by the assessee on dissolution of a partnership firm, i.e., Badriprosad Bimalkumar, on October 30, 1971. This property was gifted on June 26, 1972. This property remained the property of the assessee as on March 31, 1972, and, accordingly, the value of this asset should have been included in the net wealth of the assessee as the lease was for more than six years.

(ii) The value of construction as per the books of account and the amount of

unpaid loan as on October 30, 1971 (the date of dissolution of the firm) as on March 31, 1972 (valuation date for wealth-tax assessment for the assessment year 1972-73) and as on June 26, 1972 (the date of making the gift).

(iii) The computation showing the basis on which the return of gift was filed showing the value of gift at Rs. 8,549.

(iv) The value of the property shown in the wealth-tax return of Miss Shradha Poddar."

5. Another contention was raised before the Appellate Assistant Commissioner that there was a restriction as to the transfer of the lease without the prior consent in writing of the Commissioner. The Appellate Assistant Commissioner also recorded as follows :

"Apart from the valuation of gifted property there is another question which cropped up during the course of hearing, i.e., that there was a restriction on the transferability of the property. It was stated that Clause (5) of the lease deed of January 2, 1958, states as under :

"5. And will not assign, transfer (transfer of lease) underlet or part with the possession of the demised land or any part thereof without the prior consent in writing of the Commissioner."

Similar provision is contained in Clause (6) of the lease deed of June 26, 1983. The Gift-tax Officer should verify whether such permission was obtained before transfer of the lease as a gift to the donee. He should also find out if such transfer makes this transfer a void transfer.

Apart from this, it is found that the transfer of the lease interest is to a minor. A minor is not competent to contract and, therefore, cannot be even a lessee. By this transfer, Miss Shradha Poddar became a virtual lessee and a lessee cannot be a minor. Section 107 of the Transfer of Property Act, 1882, specially excludes the words " or on behalf" clarifying thereby that the lease cannot be entered into by minor or on behalf of a minor. In the case of a lease, if either of the parties is a minor, the transfer is void. A void transfer cannot make a valid gift.

I find that the Gift-tax Officer has not gone into this aspect of the transfer. The order of the Gift-tax Officer is, therefore, set aside with a direction to consider all these facts afresh."

6. The Appellate Assistant Commissioner, therefore, directed the Gift-tax Officer to look into the contentions of the assessee as mentioned hereinbefore in the fresh assessment to be made by him in accordance with his direction. It may be mentioned at this stage that there was no direction with regard to the determination made by him as to the return rate of 5.5 per cent. The assessee did not prefer any appeal before the Tribunal against the said order of the Appellate Assistant Commissioner.

7. The Gift-tax Officer in pursuance of the said order of the Appellate Assistant

Commissioner dated May 22, 1980, completed the assessment afresh. In his fresh assessment order, he has, inter alia, stated as follows :

"The matter was disputed by the assessee in appeal. The learned Appellate Assistant Commissioner after considering the various submissions made by counsel of the assessee, directed to determine the value of the gift on the basis of income method by applying the method of year of purchase and taking the return rate of 5.5 per cent., he determined the value of gift at Rs. 5,45,700. The assessment order was, however, set aside to consider the claim of the assessee that there were two leasehold properties with different unexpired periods of lease details about which had not been furnished before the learned Appellate Assistant Commissioner. Before me also, the assessee has not submitted any such details. Instead, a claim has been made that the value of gift should be taken as the same as has been accepted in the case of the other co-owner, Shri Bimal Kumar Poddar. In view of the clear direction of the learned Appellate Assistant Commissioner regarding the value of the taxable gift, I have no alternative but to accept the value of gifted property determined by the learned Appellate Assistant Commissioner. The gift-tax liability is, therefore, computed as under :

Rs.

The value of gift determined by the learned Appellate Assistant Commissioner

5,45,700

Less : Deduction 5,000

Taxable gift 5,40,700

8. Thereafter, the assessee took up the matter before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) considered the facts and circumstances of this case in detail and he observed as follows :

"In short, the Appellate Assistant Commissioner has given a categorical finding that the rate of return for the purpose of capitalisation of the property should be taken at 5.5 per cent. The only two points on which the assessment was set aside and required further determination by the Gift-tax Officer pertained to the ascertainment of net income attributable to the two gifted properties and the period of the unexpired lease in respect of both the properties. There is also another aspect on which the Appellate Assistant Commissioner required the Gift-tax Officer to examine that is whether the transfer of the leasehold interest of the appellant to his minor niece (i.e., Miss Shradha Poddar) was valid to which I shall revert later."

9. The Commissioner of Income Tax (Appeals) has considered the contention of the assessee regarding the restrictive clauses as well as the notice, in particular, a clause in the lease-deed that the Port Commissioners may resume possession of the demised properties for port purposes with six months notice which,

according to the assessee, affects the value of the leasehold interest.

10. Considering the contention of the appellant, the Commissioner of Income Tax (Appeals) observed as follows :

"It appears that in arriving at the rental income at Rs. 50,000 in respect of these two properties accruing to the share of the appellant, the Gift-tax Officer in the original assessment adopted the average of the last three years" rental income (i.e., 1970-71 to 1972-73). As a matter of fact, the one-sixth share of the donor-appellant to the rental income of the property for these three years in fact amounts to Rs. 55,378, whereas for convenience perhaps, the Gift-tax Officer took it at a round figure of Rs. 50,000. This being so, the net rental income adopted for the purpose of capitalisation could not be assailed. Since the period of lease in respect of both plots is for all practical purposes more than twenty-five years, as indicated above, it is not necessary to ascertain separately the rental income attributable to each property.

Therefore, the finding given by the Appellate Assistant Commissioner which preceded the impugned assessment order held good, more so, when such finding was not disputed by the appellant in further appeal. As pointed out earlier, the two points on which the Appellate Assistant Commissioner set aside the order rested on the determination of the unexpired period of both the leases and of rental income from such leasehold properties. Again, as indicated earlier, the unexpired period of lease in both the cases as on the date of transfer exceeds twenty-five years and the net rental income adopted for the purpose of capitalisation is the average of the last three years" assessed income in the appellant's share. Although, as a matter of fact, the Gift-tax Officer has not said so specifically in the impugned assessment order, the Appellate Assistant Commissioner's earlier direction in this behalf remains undisturbed as the facts indicated above support his finding. In that view of the matter, the Gift-tax Officer was justified in adopting the valuation suggested by the Appellate Assistant Commissioner and to that extent I find no reason to interfere.

Before parting with the appeal, it is, however, necessary to say that the Appellate Assistant Commissioner's observation that "a minor is not competent to contract and, therefore, cannot even be a lessee" is erroneous. The gifts were accepted by her father and natural guardian, Sri Saroj Kumar Poddar, on her behalf and, therefore, there is no infirmity in effecting such gifts of leasehold interest. The fact that the Gift-tax Officer has not given a finding to this effect in the impugned order does not make any difference."

11. A contention was also raised before the Commissioner of Income Tax (Appeals) that a similar gift in respect of another property was valued at a much lower rate. The Commissioner of Income tax (Appeals) observed that the order of B.K. Poddar was passed at a much later date on May 19, 1983, and his attention was not drawn to the earlier order of the Appellate Assistant Commissioner which was passed on May 22, 1980. The Commissioner of Income

Tax (Appeals) observed as follows :

"I have a lurking suspicion that the earlier order of the Appellate Assistant Commissioner covering the present appellant was not perhaps brought to the notice of the other Appellate Assistant Commissioner adjudicating the appeal of Sri B.K. Poddar. If the Appellate Assistant Commissioner adjudicating the appeal of Sri B.K. Poddar was aware of the earlier order in the case of the appellant there is no doubt the order that he passed would have been different."

12. The Commissioner of Income Tax (Appeals) also held, following the decision of the Punjab and Haryana High Court in the case of Jaswant Rai Vs. Commissioner of Wealth-tax, that if one has to go by the ratio of the aforesaid decision, it is the order of the subsequent Appellate Assistant Commissioner in the case of Sri B.K. Poddar which should suffer from infirmity, if any.

13. Against the said order of the Commissioner of Income Tax (Appeals), the assessee preferred an appeal before the Tribunal. Before the Tribunal, the decision of the Supreme Court reported in Special Land Acquisition Officer, Davangere Vs. P. Veerabhadarappa and Others, was relied on by the assessee. The Tribunal dismissed the appeal by observing as follows :

"We have considered the rival submissions. The order of the Appellate Assistant Commissioner dated May 22, 1980, determining the value of the gift at Rs. 5,45,700 and the rate of return to be adopted at 5.5% has become final as the assessee did not carry this order in appeal before the Appellate Tribunal. Hence, we have to proceed only on the basis of the order of the Appellate Assistant Commissioner which is final. The Gift-tax Officer has only followed the said order. The Commissioner of Income Tax (Appeals) has examined the case elaborately and we agree with his finding. So far as the hypothecation is concerned, Rs. 1,25,000 has been deducted. The other restrictions which the assessee relied on do not very much diminish the value of the gift. The observations relied on by the assessee in Parks Valuation do not actually apply to the facts in the instant case. The decision of the Supreme Court in Special Land Acquisition Officer, Davangere Vs. P. Veerabhadarappa and Others, does not help the assessee in any way. In fact, at page 200, it was observed that the "investment in housing involves certainty of labour and effort such as maintenance, collection of rent, payment of taxes, etc., and the rate of return expected, therefore, was 11/2 per cent. to 21/2 per cent. more than what was expected from gilt-edged securities". This observation actually goes against the assessee. On the leasehold land, the assessee has constructed superstructures and derived income and so much income would be more than the rate of interest on gilt-edged securities. Taking all these factors into consideration, the rate of return adopted at 5.5 per cent. is quite reasonable. Taking the entire facts into consideration, we hold that the value determined is quite justified."

14. On these facts, seven questions were raised by the assessee u/s 26(1) of the Gift-tax Act, 1958, but only two questions have been referred. The Tribunal did

not refer the other questions as either those questions did not arise out of the order of the Tribunal or the same were well-settled.

15. The assessee made an application in this court u/s 26(3) of the Gift tax Act, 1958, requiring the Tribunal to draw up a statement of case and refer the other five questions which have not been referred by the Tribunal. The said application in Matter No. 2882 of 1990 was also heard along with this reference. The five questions which the assessee wanted us to consider are as follows :

"(1) Whether the Tribunal was right in law in holding that the order of the learned Appellate Assistant Commissioner dated May 22, 1980 had become final as the assessee did not carry the appeal before the Tribunal ?

(2) Whether the Tribunal was justified in holding that the observations of the learned Appellate Assistant Commissioner in his order dated May 22, 1980 regarding the valuation of the gift amounted to directions given by him to the Gift-tax Officer and whether such observations and/ or directions were binding on the Gift-tax Officer while making a fresh assessment ?

(3) Whether on a correct interpretation of the order dated May 22, 1980, of the learned Appellate Assistant Commissioner setting aside the assessment order passed by the Gift-tax Officer, the Gift-tax Officer was legally bound to adopt the value of the gift at Rs, 5,45,700 following certain observations of the learned Appellate Assistant Commissioner in this regard ?

(4) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the restrictions regarding unilateral termination of the lease by the lessor by giving six months notice did not diminish the value of the gift?

(5) Whether the Tribunal was justified in not considering ground No. 3 in the grounds of appeal taken before it regarding the valuation of an identical gift of one-sixth share of the same leasehold property determined by the Appellate Assistant Commissioner in the case of another co-sharer?"

16. In the view that we have taken, it must be held that the Tribunal rightly refused to refer these questions.

17. Two questions which call for determination are firstly whether the order passed by the Appellate Assistant Commissioner on May 22, 1980 had become final or not as the assessee did not appeal therefrom before the Tribunal and, secondly, whether the Tribunal was justified in affirming the valuation made by the authorities below. We have already set out in detail the order of the first appellate authority, i.e., the Appellate Assistant Commissioner dated May 22, 1980. There the Appellate Assistant Commissioner came to a categorical finding after taking into account all the facts and circumstances relevant to the issue that the return rate of 5.5 per cent. was justified for the period under consideration. This having not been challenged, the assessee is precluded from challenging the same while the Gift-tax Officer gave effect to the order of the

said Appellate Assistant Commissioner.

18. A contention was raised before us that the Tribunal did not consider a restrictive covenant and the precarious lease and what would be the effect of such covenant and restriction on the valuation of the property. We have already set out in extenso the order of the second appellate authority, i.e., the Commissioner of Income Tax (Appeals) in this case. He has taken into account all the facts and circumstances of the case and, on the facts, he came to the conclusion that no such valuation for the restrictive clause was necessary. It cannot be said that the Commissioner of Income Tax (Appeals) did not take into account the contentions raised before him but since the valuation was determined by the Appellate Assistant Commissioner by his order dated May 22, 1980, the Commissioner of Income Tax (Appeals) could not have gone behind that order which at that stage remained final.

19. In our view, therefore, the Tribunal did not fall in error in affirming the determination made by the appellate authorities.

20. Mr. Roy has relied on the decisions of the Supreme Court, in support of his contention, in the case of Faridabad Complex Administration Vs. Yadu etc., . There, the question was whether tenancy from month to month is an interest which is available for a period not exceeding six years. In other words, whether it is an asset to be includible in the net wealth. There, the land was taken from the Government and the assessee erected the building thereon. Thereafter, the lease expired. The Government issued notice to hand over the vacant possession but the assessee continued in possession and was receiving rental income from the building. In that context, the Supreme Court held that the properties in respect of which leases had expired in 1958 and 1963 and notices had been received by the assessee to hand over possession were not "assets" within the meaning of Section 2(e)(2)(iii) of the Wealth-tax Act and their value was not liable to be included in the net wealth of the assessee.

21. It is submitted that although the period of respective lease did not expire on the relevant date, the lease could be terminated by serving six months' notice ; accordingly, it would not be an asset and the principles laid down by the Supreme Court in Faridabad Complex Administration Vs. Yadu etc., would be applicable. We are, however, unable to agree with this contention. In the case before the Supreme Court, the question was whether Section 2(e)(v) of the Wealth-tax Act, 1957, excluded from the concept of "asset" any interest in property where the interest was available for a period not exceeding six years. That is not the case here. In the instant case, the lease provided termination of the lease upon six months' notice. This is a usual condition in any lease that the lessee may be called upon to deliver up possession upon six months' notice if certain contingencies happen, but that will not make the lease precarious. In that case before the Supreme Court, the term of the lease expired and the assessee was continuing in possession after the notice of ejectment was served. This is not the case before us. The lessee in this case would have enjoyed the lease for a

number of years had it not been gifted away.

22. Our attention has been drawn by Mr. Roy to another decision of the Supreme Court in the case of Special Land Acquisition Officer, Davangere Vs. P. Veerabhadarappa and Others, . There the question was whether the method of valuation arrived at by the courts below in adopting "fifteen" to be the multiple for computation of capitalised value of certain agricultural lands acquired in the years 1971 and 1972 was correct or not. There the Supreme Court observed as follows (at page 200) :

"Some 20 to 30 years back, i.e., till the early 50's it was taken as a settled rule of practice, that the capitalized value of agricultural lands should be arrived at 20 years" purchase having regard to the rate of interest on gilt-edged securities at five per cent. That rule no longer can be adhered to in view of the changed economic situation. In the early '70s, people believed that investment in housing was more secure than other forms of Government securities in respect of safety of investment. Investment in housing involves certainty of labour and effect such as maintenance, collection of rent, payment of taxes, etc. The rate of return expected, therefore, was 11/2 to 21/2 more than what was expected from gilt-edged securities. A person investing his capital in agricultural lands would ordinarily expect a return of 2 per cent. to 3 per cent. more than what he could obtain from gilt-edged securities or other forms of safe investment such as fixed deposits in scheduled banks, National Savings Certificates, Unit Trusts, etc., or on blue chips, i.e., on stocks and shares in the public or private sector which yield a much greater return."

23. In regard to the investment in agricultural lands, there are many imponderables inasmuch as the investor runs a much greater risk than the risk that he runs in investment in housing which consists in vagaries of weather and other uncertainties. There is no security of principal, no liquidity of investment nor any certainty of income. The appreciation of principal or income is also uncertain. The reason for these is that agricultural lands are not readily transferable under the various land reform legislations, e.g., laws relating to ceiling on agricultural holdings under the existing State laws and tenancy laws which place restrictions on transfer of such lands with concomitant danger of effacement of the rights of the absentee-landlords and the creation of rights in the tillers of the soil. In evaluating the rate of return which would ordinarily satisfy an investor in such a property, the risk factor has further to be evaluated. There may be total or partial failure of crops either through failure of rain or drought or inadequate or excessive rainfall. There may be a failure of crops on account of locust invasion or insects or pests. The cost inputs as seeds, water, fertilizer, labour charges, etc., would vary from year to year. If the overall cost goes up, the income from agricultural produce would be comparatively less. The fluctuations in prices of agricultural produce introduce a great deal of uncertainty in regard to the income that can be expected from the sale of the produce. If the yield of the crop in other producing countries is large, or the market prices

prevailing in such countries are low, the prices of such agricultural produce in India would go down. In view of these considerations, an investor would expect a much higher rate of return so that the risk factor is properly discounted.

24. When the rate of return on investing was 8.25 per cent. in the years 1971 and 1972, a person investing his capital in agricultural lands would ordinarily expect 2 per cent. to 3 per cent. more than what he could obtain from gilt-edged securities or other forms of safe investment and, therefore, the proper multiplier to be applied for the purpose of capitalisation could not, in any event, exceed "ten". In the present case, the State Government, however, contends that the proper multiple to be applied should be 12½ in computation of the capitalised value of the lands in these cases having regard to the rate of return of 8 per cent. at the relevant time, i.e., on the date of the notification u/s 4(1) of the Act. In view of this, it must be held that the multiple of 12½ should be applied in the computation of the capitalised value of the lands."

25. The facts of this case before the Supreme Court are entirely different. In that case, the Court was concerned with the valuation of the agricultural lands where there are many imponderables as the investor runs a much greater risk like vagaries of weather and other uncertainties ; no security of principal, no liquidity of investment ; nor any certainty of income ; appreciation of principal and interest is uncertain ; lands are not easily transferable ; danger of effacement of the rights of absentee landlords and creation of rights in tillers of soil. None of these factors are present in this case. Here the return was certain as the assessee was getting an annual rent of more than Rs. 55,000. It may be pointed out that the Gift-tax Officer has taken one sixth share of the assessee in the rental income of the property a Rs. 50,000 as against Rs. 55,378 actually received by the assessee.

26. For the aforesaid reasons, we are of the view that there is no merit in the contentions raised by the learned advocate for the assessee.

27. We, therefore, answer both the questions in the reference in the affirmative and in favour of the Revenue.

28. In view of this judgment, the application u/s 26(3) of the Act will stand rejected.

29. There will be no order as to costs.

Shyamal Kumar Sen, J.

30. I agree.