

(1973) 04 KL CK 0010

In the High Court Of Kerala

Case No : Income-tax Reference No. 96 of 1971

Commissioner of Gift-tax

APPELLANT

Vs

R. Kesavan Nair

RESPONDENT

Date of Decision : 06-04-1973

Acts Referred:

Gift Tax Act, 1958 — Section 2, 29, 4(1)

Citation : (1974) 96 ITR 365

Hon'ble Judges : T.C. Raghavan, C.J; George Vadakkal, J

Bench : Division Bench

Advocate : P.A. Francis and Raveendranatha Menon, for the Appellant; P. Sukumaran Nair and P.K. Cherian, for the Respondent

Judgement

George Vadakkal, J.—The Income Tax Appellate Tribunal, Cochin Bench, has referred under Section 26(1) of the Gift-tax Act, 1958, for our opinion the question:

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is correct in law in holding that the transaction evidenced by the deed dated May 7, 1963, was not a gift and that there is no liability to gift-tax ?"

2. The short facts leading to the reference as disclosed by the statement of the case and the annexures are as follows: The assessee executed a registered document (annexure "A") on May 7, 1963, which, according to the revenue, is a gift deed. When called upon u/s 13(2) of the Gift-tax Act to file the return the assessee contended that the deed did not effect any gift, and that it evidenced only a family arrangement; according to the assessee, title to the properties had not passed to his wife and children, who figure as executors in the document, and possession and enjoyment of the properties also remained with him. The Gift-tax Officer, refusing to accept the assessee's contention, proceeded to value the properties and levy gift-tax as per his order dated July 29, 1966 (annexure "B"). The assessee filed an appeal before the Appellate Assistant Commissioner, who, by his order dated January 17, 1968 (annexure "D"), confirmed the Gift-tax

Officer's order. There was a further appeal to the Tribunal, who, as per order dated July 10, 1968 (annexure "C"), sent the case back to the Appellate Assistant Commissioner directing to decide the case de novo. The Tribunal was of the view that the material questions arising in the case such as whether the document purported to and did in fact convey title, whether the title deeds still stood in the name of the assessee or of the alleged donees, whether pattas were transferred and if so, when and to whose names, whether the income from the properties continued to be enjoyed by the assessee, whether, notwithstanding the execution of the document, the assessee continued to be in possession and enjoyment of the properties and whether the document was not in fact acted upon, required to be examined. The Appellate Assistant Commissioner, thereafter, by his order dated November 7, 1969 (annexure "E"), found that the properties still stood in the name of the assessee, and that the pattas were at no time transferred to the donees. He also found that the properties continued to be enjoyed by the assessee. On the question whether the document purported to and did in fact convey title, the Appellate Assistant Commissioner held that the properties were transferred to the donees. According to him, Section 4(1)(b) of the Gift-tax Act, 1958, governed the case. The assessee again preferred an appeal before the Tribunal. The Tribunal, by order dated February 11, 1971, held that Section 4(1)(b) has no application to the facts of the case, since that section governs only transfers for consideration, but the consideration has either not passed or is not intended to pass in full or in part from the transferee to the transferor. The Tribunal was of the view that the document was not intended to be either a gift or settlement, and that it was merely intended to be a family arrangement. The appeal was, therefore, allowed. The revenue applied for referring the question extracted above, which was allowed by the Tribunal. Thus, the matter has come before us.

3. The relevant portions of annexure "A" document which styles itself as a "deed of settlement" are as follows :

"5. Though you as my wife and children are the legal heirs and successors to all my assets after my lifetime I have come to the conclusion that I should effect an arrangement during my lifetime itself and hence this Doc. is being registered.

6. The properties have been divided by me and included in 5 schedules as A to E, and A Schedule to my wife, Bhargavi Amma, and minor, Ambika Devi, and B schedule to my son, Govindan Nair, and C schedule to my daughter, Rajalekshmi Amma, and E schedule to my minor son, Madhavan Nair, called Revi have been set apart.

7. The respective sharers have been allowed by me to improve the properties and to construct buildings and to get pattas in their names, but the possession and enjoyment of the entire properties will continue to be exclusively with me during my lifetime and after my lifetime my wife the said Bhargavi Amma is to take possession and enjoy all the properties and nobody has any right to object to her taking and enjoying the said properties and after her death the respective

sharers in B to E; the rest have to take possession and enjoy the properties with complete right of alienation.

8. If any document is to be executed during my lifetime only the documents executed by myself and the respective sharers would be valid and after my death if any document is to be executed in respect of A schedule property my wife, Bhargavi Amma, has got full and exclusive right to do so and the consent of Ambika Devi is not necessary and after the lifetime of Bhargavi Amma the entire properties comprised in A schedule will devolve on Ambika Devi. "

4. The learned counsel for the revenue urged before us the following points:

(1) that Section 4(1)(b) of the Gift-tax Act, 1958, governs the transaction ; and

(2) that the document in question in any event evidences a gift as defined in Section 2(xii) of the Act.

5. Taking up the first point, we are of the opinion that a mere reading of Section 4(1)(b) is sufficient to see that the transaction does not fall within the purview of that provision. Section 4(1)(b) is as follows:

"4. (1) For the purposes of this Act,--.....

(b) where property is transferred for a consideration which, having regard to the circumstances of the case, has not passed or is not intended to pass either in full or in part from the transferee to the transferor, the amount of the consideration which has not passed or is not intended to pass shall be deemed to be a gift made by the transferor."

6. It is obvious that this provision is attracted only when there is a transfer stated in the document to be for consideration ; but the consideration has not passed and is not intended to be passed either in full or in part from the transferee. In other words, when there is a false statement in the document as regards the whole or part of the consideration, i.e., when the recitals are mere blinds, but the title is transferred, nevertheless the section is attracted. Where no consideration at all is recited, but nevertheless there is transfer of title, the case will come within the ambit of Section 2(xii), and not of Section 4(1)(b). The document in question in this case does not purport to be for consideration, and, therefore, we are of opinion that Section 4(1)(b) is not attracted to the instant case.

7. The second and main argument of the learned counsel for the revenue is that the document (annexure "A") evidences a gift as defined in Section 2(xii) of the Gift-tax Act. The learned counsel took us through the document, clause by clause, and submitted that the transaction is a gift under the Gift-tax Act. He invited our attention to Section 2(xii) and Section 2(xxiv) of the Gift-tax Act and also to Section 122 of the Transfer of Property Act, 1882. According to the learned counsel, there is a material difference in the definition given to the word "gift" in Section 2(xii) of the Gift-tax Act on the one hand, and in Section 122 of

the Transfer of Property Act, on the other. He points out that the element of acceptance of the gift by the donee is lacking in the definition contained in Section 2(xii) of the Gift-tax Act, whereas u/s 122 of the Transfer of Property Act that element is also present. The learned counsel argues on that footing that, in order to constitute a gift under the Gift-tax Act, it is not essential that the donee should have accepted the gift. In support of this proposition, the learned counsel for the revenue relies on Sam path Iyengar's comments on Section 2(xii) contained in his book, *Three New Taxes*, volume 2, 1972, 3rd edition, paragraph 16, at page 51. The learned author says therein that, under the English law, to constitute a valid gift, communication of the gift by the donor to the donee is not necessary, whereas, u/s 122 of the Transfer of Property Act, the position is different, in that that section requires acceptance by the donee for constituting a valid gift. The learned author further says that "under the Gift-tax Act, however, the language of the definition of "gift" approximates the English view that neither communication to, nor knowledge of, the donee is necessary,.....So, the imposition of gift-tax would operate as from the date of the donor having perfected the gift on his part". The learned author does not rely on any decision. We feel considerable doubt about the aforesaid view especially in view of the definition of "donee" (section 2(viii)) "as a person who acquires any property under a gift ". The meaning of the word "acquire" as given in Chamber's Twentieth Century Dictionary is "to gain; to attain to"; Shorter Oxford English Dictionary gives the meaning as: "acquire: 1. To gain, to get as one's own (by one's own exertions or qualities). 2. To receive, to come into possession." This connotes that the person concerned should have a positive mental attitude "to gain", "to get as one's own, to receive or to come into possession of". Moreover, u/s 29 of the Gift-tax Act, the donee can be called upon to pay the tax if the Gift-tax Officer is of the opinion that the same cannot be recovered from the donor. It does not seem to us that the intention of the legislature was to make a person liable for tax in respect of a transaction which he does not agree to or even repudiates. If the argument of the learned counsel for the revenue is accepted, the result will be that the donee can be made liable for tax even in cases where he repudiates the gift, for the taxable event arises on the donor executing the gift deed. The question of acceptance of the gift by the donee is closely related to the question whether the donor has perfected the gift on his part. It is a well-accepted principle of law that a conveyance takes effect only if the interest created thereby vests in the transferee, and such vesting can never take place without the transferee's consent and concurrence. In English law assent by a donee is presumed until and unless he disclaims. *Xenos v. Wickham* [1867] LR 2 HL Cas. 296 and *London and County Banking Co. v. London and River Plate Bank* [1888] 21 QBD 535 (C.A.) and *Sarba Mohan Banerjee Vs. Manmohan Banerjee and Others*, .

8. "Transfer of property" is defined in the Gift-tax Act as follows :

""transfer of property" means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without

limiting the generality of the foregoing, includes-

- (a) the creation of a trust in property;
- (b) the grant or creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property ;
- (c) the exercise of a power of appointment of property vested in any person, not the owner of the property, to determine its disposition in favour of any person other than the donee of the power ; and
- (d) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person."

9. In Transfer of Property Act, the definition is :

"Section 5 : In the following sections " transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and " to transfer property" is to perform such act."

10. The body of Section 2(xxiv) of the Gift-tax Act says that any disposition, conveyance, assignment, settlement, delivery or other alienation of property is a transfer of property. The words "or other alienation of property" is a clear indication that the transactions indicated by the words "conveyance, assignment, settlement and delivery" preceding the words "or other alienation of property" are also "alienations". This means that all the transactions enumerated in the body of Section 2(xxiv) are alienations and, therefore, at least bilateral transactions.

11. The Supreme Court had occasion to consider this provision in Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, . In that case the karta of a joint family executed a deed whereby he threw into the common stock some of his self-acquisitions. The Tribunal held that this did not amount to transfer within the meaning of Section 2(xxiv) of the Gift-tax Act. On a reference to the High Court, it was held, following an earlier decision of that court in COMMISSIONER OF GIFT-TAX Vs. C. SATYANARAYANAMURTHY., P that the transaction was a transfer within the meaning of Section 2(xxiv). The Supreme Court held that:

"When a coparcener throws his separate property into the common stock, he makes no gift under Chapter VII of the Transfer of Property Act. In such a case there is no donor or donee. Further, no question of acceptance of the property thrown into the common stock arises."

12. This decision indicates that there is no distinction made by the Gift-tax Act and the Transfer of Property Act as regards the legal elements required to make a transaction a gift. The Supreme Court decision also considered the word "disposition" in Section 2(xxiv) of the Gift-tax Act. Their Lordships held :

"In Section 2(xxiv) the word "disposition" is used along with the words "conveyance, assignment, settlement, delivery, payment or other alienation, of property". Hence it is clear from the context that the word "disposition " therein refers to a bilateral or a multilateral act."

13. It, therefore, follows that there cannot be a gift in law without vesting of the property gifted in the transferee, and such vesting cannot take place without the consent or the concurrence of the donee.

14. The learned counsel relying on the inclusion clauses, particularly Clause (b) (sic) of Section 2(xxiv), urged before us that concurrence or consent of the donee is not necessary :

"A definition which first tells us what a thing means and then goes on to say what it includes, can use the inclusive device for three entirely different purposes. First, by way of illustration, or of enumeration of the forms the thing defined commonly assumes, by naming things that clearly come within the meaning given. Secondly, for roping in things that, either partly or in whole, would not come within the meaning. Thirdly, by way of abundant caution, so as to put it beyond doubt that certain things do come within the meaning."

15. So said Raman Nayar, Actg. C.J. (as he then was), in *Krishnan Nair v. Sivaraman Nambudiri* ATR 1967 Ker 270 In *Dilworth v. Commissioner for Land and Income Tax* [1999] A.C. 99 Lord Watson said :

"The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, much invariably be attached to these words or expressions."

16. We are of the view that Section 2(xxiv) of the Gift-tax Act uses the inclusive device for the third purpose enumerated by Raman Nayar, Actg. C.J., viz. only by way of abundant caution, so as to put beyond doubt that the transactions listed in Sub-clauses (a) to (d) do come within the definition of "transfer". In other words, the word "includes" in Section 2(xxiv) is equivalent to "mean and include", the second meaning given to the word by Lord Watson. Looking at these sub-clauses, it will be seen that the transactions enumerated are all bilateral transactions. Besides, the phrase "without limiting the generality of the foregoing " clearly shows that the scope of the sub-clauses themselves is not wider than the main clause. Even if the inclusive device is used in Section 2(xxiv)

for roping in transactions which are not transfers as defined in the main clause, we are of the view that the same will not help the revenue, unless it is shown that the transaction in question falls within one or the other of the sub-clauses.

17. Our view is supported by the Full Bench decision in *The Commissioner of Gift Tax, Madras Vs. P. Rangasami Naidu*, . The Madras decision says that Parliament here intended not to restrict the scope of the expression "transfer of property" by using the words "means and includes" and that this is apparent from the main part of the definition and what is meant to include in the sub-clauses. In other words, the word "include" in Section 2(xxiv) has been interpreted by the Madras decision as "mean and include". Their Lordships also advert to the words "without limiting the generality of the foregoing" contained in Section 2(xxiv) and these words, according to the Madras decision, brings out clearly that the definition in Section 2(xxiv) is not intended to be restricted. According to that decision, the effect of the phrase is that the different transactions, which are included under the sub-clauses, do not, by any implication, limit the generality of the words used in the main part of the definition. However, this is not to widen the scope of the sub-clauses themselves, for by the sub-clauses Parliament seeks only to include within the definition of "transfer of property" all dealings with property which are not covered by the wider definition of transfer of property. Therefore, according to that decision, the special clauses should not be given any wider meaning than what they literally carry. The decision proceeds to say that subjects, which are made transfers of property by fiction, cannot under any rule of statutory interpretation be given a liberal coverage. The scope of the fiction cannot be enlarged by interpretation beyond its purpose. We are in full agreement with what is stated above. The argument rested on the inclusion clauses cannot, therefore, be countenanced. The revenue has no case that the transaction in question falls within one or the other of the sub-clauses.

18. We were also referred to a Full Bench decision of the Gujarat High Court reported in *A.R. Shukla Vs. Commissioner of Gift Tax, Gujarat*, . In that decision also Section 2(xxiv) of the Act came up for consideration. It is said in that decision that the words, conveyance, etc., mentioned in Section 2(xxiv) "though undoubtedly wide, are referable only to those cases where there is passing of ownership of property or interest in property from one person to another,..... " From this passage also it is clear that, unless ownership of property or interest in property passes from one person to another, there can be no transfer of property as contemplated in Section 2(xxiv) of the Act.

19. We have had not the advantage of seeing the original document which is in Malayalam. The document describes itself as a deed of settlement. The learned counsel for the revenue invited our attention particularly to Clauses 5 to 8. Clause 5 says that the executant (assessee) has come to the conclusion that he should effect an arrangement during his life-time itself and hence the document is being registered. In Clause 6 he says that the properties have been divided by him and are included in five schedules as A to E; " A schedule to my wife,

Bhargavi Amma, and minor, Ambika Devi, and B schedule to my son, Govindan Nair, and C schedule to my daughter, Rajalekshmi Amma, and E schedule to my minor son, Madhavan Nair called Revi, have been set apart". In Clause 7 the executant says that the respective shares have been allowed by him to improve the properties and to construct buildings and to get pattas in their names, but the possession and enjoyment of the entire properties will continue to be exclusively with him during his lifetime and after his lifetime his wife, Bhargavi Amma, is to take possession and enjoy all properties and nobody has any right to object to her taking and enjoying the said properties. It is also provided in that clause that the respective sharers will take possession and enjoy the properties with complete rights of alienation after the death of the executant's wife. In Clause 8 the executant says that, if any document is to be executed during his lifetime, only such documents executed by himself and the respective sharers would be valid; that after his death if any document is to be executed in respect of the A schedule properties (properties allotted to Bhargavi Amma and minor, Ambika Devi), his wife, Bhargavi Amma, has full and exclusive right to do so and the consent of Ambika Devi is not necessary ; it is further provided that after the lifetime of Bhargavi Amma the entire properties comprised in the A schedule will devolve on Ambika Devi.

20. We are unable to find any provision for vesting the properties in the executees. In the provisions contained in Clause 6 dividing the properties into five schedules, the executant states that he is only setting apart those schedules of properties in favour of the respective sharers. That there is no vesting clause is also clear from Clause 8. That clause in the earlier portion says that during the executant's lifetime only such documents as are executed by himself and the respective sharer will be valid. However, in the latter portion it says, in respect of the A schedule properties, his wife, Bhargavi Amma, would have full and exclusive right of alienation after his death. Clause 8 further provides that the A schedule properties will devolve on Ambika Devi only after Bhargavi Amma's death. If, as is argued, the ultimate remainder in respect of the A schedule properties is, under Clause 6, gifted to Ambika Devi, the provision in Clause 8 that Ambika Devi's consent is not necessary (after the lifetime of the executant) for Bhargavi Amma to alienate the A schedule properties is meaningless. It is well settled that in construing a document all the provisions therein should be given due weight and the attempt should always be to harmonise the several provisions. This also, according to us, is a pointer that the executant did not intend to pass title to the executee. If the argument advanced by the learned counsel for the revenue is extended to its logical limit, Ambika Devi, even though she may or may not get the properties depending upon whether Bhargavi Amma does or does not alienate the properties during her lifetime, would be liable for gift-tax. In the light of what is stated above we will examine Clause 7 of the document. That clause says that the respective sharers have been allowed by the executant to improve the properties and construct buildings and get pattas in their names, but the possession and enjoyment of the entire properties will

continue to be exclusively with the executant during his lifetime, and that after his life-time his wife, Bhargavi Amma, is to be in possession and enjoyment of all properties. This clause permits the sharers to effect improvements and to construct buildings and to get pattas in their names. These by themselves will not vest the respective sharers in the sharers. In our view, but for the permission granted, the sharers would not be entitled to improve the properties and construct buildings. If properties have vested, usually no such permission is needed to get pattas or to effect improvements and to construct buildings.

21. Bearing in mind the several principles and facts discussed above, we are of opinion that there is no "transfer of property" as contemplated in Section 2(xxiv) of the Gift-tax Act as per the document in question. Our answer to the question referred is therefore that the Appellate Tribunal is correct in law in holding that the transaction evidenced by the deed dated May 7, 1963, was not a gift and that there is no liability to pay gift-tax.

22. And we pass no order regarding costs.

23. This answer will be sent to the Tribunal as required by law.