
(1972) 04 MAD CK 0010

In the Madras High Court

Case No : Tax Case No"s. 312 of 1966 and 217 of 1968 (Reference No"s. 77 of 1966 and 62 of 1968)

Commissioner of Gift-tax

APPELLANT

Vs

Shah Mohanraj

RESPONDENT

Date of Decision : 21-04-1972

Acts Referred:

Gift Tax Act, 1958 — Section 13(2), 15(4), 2

Citation : (1972) ILR (Mad) 297 : (1973) 89 ITR 129

Hon'ble Judges : V. Ramaswami, J;G. Ramanujam, J

Bench : Division Bench

Advocate : V. Balasubrahmanyam and J. Jayaraman, for the Appellant; A.R. Ramanathan and P. Vedavalli, for the Respondent

Judgement

Ramanujam, J.—One Shah Pukharaj hailing from . Northern India came to Coimbatore 30 years ago and started a business in handloom

sarees, yarn, lace, etc., in the name of Shah Pukharaj Mohanraj which is the name of his son. Shah Pukharaj, and his son, Mohanraj constituted a

joint family. Admittedly, the son also was taking active part in the said business along with his father. However, the income from the business was

being assessed in the hands of the father in the status of an individual. But in the assessment year 1956-57 he claimed to be assessed in the status

of a Hindu undivided family in respect of the income from the above business, but this claim was turned down by the revenue and he was assessed

as an individual as in the earlier years. Pukharaj and his son, the assessee, effected a partition of the joint family properties on February 25, 1959.

But, the business did not form part of the subject-matter of the said partition. But by a partnership deed dated March 27, 1959, the business was

converted into a partnership business between Pukharaj, and Mohanraj with effect from April 1, 1959. On that date Pukharaj transferred a sum of

Rs. 61,311 from his capital account to his son's account as representing his son's share capital in the partnership business.

2. The Gift-tax Officer took the view that by converting his individual business into a partnership business and by admitting his son as a partner,

Pukharaj had made a gift of not only the said sum of Rs. 61,311 but also the half share in the goodwill of the business. He therefore issued a notice

u/s 13(2) of the Gift-tax Act (hereinafter referred to as "the Act") calling upon Pukharaj to file a gift-tax return. But, Pukharaj died on May 3,

1961, without filing the return. On a further notice u/s 15(4) of the Act to his son, Mohanraj, he stated that the business run in the name of Shah

Pukharaj Mohanraj was a joint family business, that by converting this joint family business into a partnership business, Pukharaj cannot be said to

have made any gift in his favour and that, therefore, Pukharaj was not liable to pay any gift-tax on the value of the share allotted to him. The Gift-

tax Officer did not, however, accept this contention, and held that there was no evidence to prove that the business in question was a joint family

business, and the main reasons given by him were :

(1) In the partition deed dated February 25, 1959, there was no reference to the business being run by the joint family, (2) Pukharaj was doing

business before 1954 in partnership with one stranger, K. Subramaniam Chetty, and there was no mention in that partnership deed that Pukharaj

was representing the Hindu undivided family in that partnership, and (3) after 1954 the income from the business was all along assessed in the

hands of the assessee as an individual and his claim for being assessed as a Hindu undivided family business had been turned down. In that view

the Gift-tax Officer determined the total value of the gift at Rs. 93,024, Rs. 61,311 being the amount of capital provided by the father towards his

son's share and Rs. 31,713 being the value of the half share in the goodwill of the business.

3. There was an appeal to the Appellate Assistant Commissioner by the assessee, Mohanraj. The Appellate Assistant Commissioner also did not

accept the contention of the assessee and held that there was no evidence to prove that the business had begun from the joint family nucleus or that

it was ever treated as a joint family business. There was a further appeal to the Tribunal contending that, (1) from its inception the business carried on by Pukharaj was joint family business (2) that even if it was his exclusive business it had been converted into a joint family property even prior to the constitution of the partnership, dated March 27, 1959, and that therefore on the date of partnership there was no gift by Pukharaj to his son. The Tribunal took note of the following facts, namely, that there was a Hindu undivided family consisting of Pukharaj and his son in existence at the time when the business in question was started, that this Hindu undivided family did possess certain properties which were subsequently partitioned under a partition deed, dated February 25, 1959, that the income from the properties partitioned on February 25, 1959, would have been sufficient for starting the business 30 years ago, that his son, Mohanraj, was also actively associated with the business in question for a long time, and that the proximity of time between the partition of the joint family properties and the constitution of the partnership indicated that the constitution of the partnership was part and parcel of the partition arrangement of the joint family properties. From these facts, it proceeded to draw a presumption that the business in question was in fact started by Pukharaj from and out of the joint family nucleus and that the business would therefore partake the character of a joint family property and that the only evidence by which the revenue seeks to rebut this presumption that the income from the business had all along been assessed in the hands of Pukharaj in his individual capacity was not sufficient, especially as Pukharaj himself did not object to his being assessed in the status of an individual as regards the income from the said business and sought to be assessed in the status of an undivided Hindu family in respect of the same. The Tribunal ultimately held that the business in question was the joint family concern of Pukharaj and his son, and that by converting the business into a partnership and by allotting a half share in the business to his son, Pukharaj did not make any gift to his son. The Tribunal also upheld the alternative contention put forward by the assessee that even if the business in question was exclusively owned by Pukharaj, there was a conversion of such self-acquired property into a joint family property on March 27, 1959, the date of the partnership deed, and that, therefore, even if such a conversion is treated as a gift, it cannot be assessed in the assessment

year 1960-61. At the instance of the revenue the following questions have been referred to us :

4. In T.C. No. 312 of 1966 the question referred is :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the assessee was not liable to

gift-tax for the assessment year 1960-61 in respect of the creation of a partnership business under the partnership deed dated March 27, 1959 ?

5. In T. C. No. 21-7 of 1568 the question referred is ;

Whether there is any material for the Tribunal's finding that the business of the assessee was that of the Hindu undivided family before being

converted into a partnership business ?

6. Having regard to the nature of the questions referred, it is necessary to deal with the question referred in T. C. No. 217 of 1968 first, as the

answer to the other question has to depend on our answer to this question. The learned counsel for the revenue very vehemently contends that the

Tribunal has wrongly thrown the onus on the department and that the onus lay on the assessee to establish that the business in question was the

joint family business. It is pointed out that there is always a difference between a business and other assets and that the courts have consistently

taken the view that in respect of business the onus is always on the person who asserts that it is a joint family business. For this purpose the learned

counsel refers to the following passage in Mayne's Treatise on Hindu Law and Usage, at pages 359 and 363 :

The burden of proving that any particular property is joint family property, is in the first instance upon the person who claims it as coparcenary

property. Where the possession of a nucleus of joint family property is either admitted or proved, an acquisition made by a member of the family is

presumed to be joint family, property. But, this is subject to the limitation that the joint family property must be such as with its aid the property in

question could have been acquired. And, it is only after the possession of an adequate nucleus is shown, the onus shifts on to the person who

claims the property as self-acquisition affirmatively to make out that the property was acquired without any aid from the family estate.

7. At page 363 :

Whether, in the case of a joint family possessed of some joint property, there is

or is not a presumption that any property in the hands of an individual member is not his separate individual property, but joint property, no such presumption can be applied to a business. Unless the business of a coparcener grew up from joint family property, or that the earnings were blended with joint family estate, they remain free and separate. The question whether the business was begun or carried on with the assistance of joint family property or as a family business is a question of fact upon which the initial burden of proof lies upon those who claim a share in the business.

8. Reference is also made to *Annamalai v. Subramanian* AIR 1929 P.C. 1 where the Judicial Committee has stated :

A member of a joint undivided family can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate.

9. In *Bhuru Mat v. Jagannath* [1943] 1 M.L.J. 70 : AIR 1942 P.C. 13 the Privy Council has stated :

Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint joint property, no such presumption can be applied to a business.

10. In *Chattanatha Karayalar Vs. Ramachandra Iyer and Another*, the Supreme Court had expressed thus :

Under the Hindu law, there is no presumption that a business standing in the name of any member is a joint family one even when that member is the manager of the family, and it makes no difference in this respect that the manager is the father of the coparceners.

It is no doubt true that with reference to a trade newly started there is this difference between the position of a father and a manager, that while the debts contracted therefore by the former would be binding on the sons on the theory of pious obligation, those incurred by a manager would not be binding on the members, unless at least there was necessity for the starting of the trade.

11. The main contention that has been urged by the assessee is that the joint family had sufficient nucleus and that the business was started 30 years

ago by his father from and out of that nucleus and that, therefore, the business was a joint family business. The Tribunal referred to the properties

situate in the native place of Pukharaj and which have been partitioned on February 2, 1959, and found that it was of a sufficient nucleus to enable

the assessee's father to start a business years ago. The Tribunal also has referred to the fact that admittedly the son was actively assisting the father

in the management of the business. The question is whether there are enough materials before the Tribunal to support its finding that there was

sufficient nucleus and that the business in question was a joint family business.

12. It is true that the initial onus to establish that there was sufficient nucleus in the joint family with which the business could have been started by

the father lies on the son who claims a share in the business. But, once the sufficiency of the nucleus is established, the onus shifts to the person

who claims that the business was exclusively owned by a coparcener. Whether the evidence adduced by the assessee was sufficient to shift the

burden which initially rested on him of establishing that there was sufficient nucleus out of which the business could have been started by his father,

Pukharaj, is one of fact depending on the nature and the extent of the nucleus. This is clear from the decision in Shrinivas Krishnarao Kango Vs.

Narayan Devji Kango and Others, . Therefore the important thing to consider here is the income which the joint family nucleus could have yielded.

Admittedly, Pukharaj, the assessee's father, came to Coimbatore 30 years ago and started the business. The properties divided under the partition

deed dated February 25, 1959, between the assessee and his father consisted of two houses and a shop building and a vacant site apart from gold

and silver ornaments. The Tribunal has considered these properties as forming sufficient nucleus to enable the assessee's father to start the

business, and we find that the inference drawn by the Tribunal as to the sufficiency of the nucleus cannot be said to be vitiated in any way.

Therefore, we are not inclined to differ from the finding arrived at by the Tribunal that there was sufficient nucleus. As a matter of fact no attempt

has been made by the revenue at any earlier stage to dispute that the joint family had sufficient nucleus. On the other hand the revenue merely relied

on two circumstances to prove that the business in question could not have been that of the joint family. One is that in the earlier years Pukharaj

was assessed as an individual in respect of this business, and (2) that the partition deed, dated February 25, 1959, is silent about the business in question, leading to the inference that the business was not a joint family asset. But, as pointed out by the Tribunal, the assessment of Pukharaj as an individual in the earlier years in respect of the business in question cannot be conclusive for the reason that he has asserted even then that the business was a joint family business, and that the absence of any reference to the business in question in the partition deed is innocuous and it cannot be taken to indicate that the business was not a joint family business but an individual business of the father. As already stated, the Tribunal has gone into the evidence adduced in the case and has not rested its decision on a mere presumption. Once the sufficiency of the nucleus is established, it is for the revenue to establish that Pukharaj had enough funds of his own to start the business in question.

13. Besides, the fact that the son was doing business along with his father all these years and the father was not maintaining a separate account for the income from the business apart from the family assets, leads to the inference that even if he had started the business with his own exclusive funds, he should have treated the business long ago as the joint family business by blending or throwing it in the hotchpot of the family. Such conversion of the separate family property into joint family property by the father cannot amount to a "transfer of property" as defined in Section 2(xxiv) of the Gift-tax Act has been held in *The Commissioner of Gift Tax, Madras Vs. P. Rangasami Naidu*, .

14. We, therefore, agree with the view taken by the Tribunal that the business in question belonged to the joint family consisting of Pukharaj and his son on the date of the partnership deed, dated March 27, 1959, and the conversion of that joint family business into a partnership business will not amount to a gift as defined in the Act.

15. Both the questions are, therefore, answered against the revenue. The assessee will have his costs in T. C, No. 312 of 1966 alone. Counsel's fee Rs. 250 (one set).