

(1978) 06 BOM CK 0009

In the Bombay High Court

Case No : Gift-tax Reference No. 1 of 1968

Commissioner of Gift-tax, Bombay

APPELLANT

Vs

Ebrahim Haji Usuf Botawala

RESPONDENT

Date of Decision : 20-06-1978

Acts Referred:

Gift Tax Act, 1958 — Section 2, 3, 4, 4(1)

Citation : (1980) 122 ITR 62

Hon'ble Judges : R.M. Kantawala, C.J.;S.K. Desai, J

Bench : Division Bench

Advocate : R.J. Joshi, for the Appellant; I.M. Munim, for the Respondent

Judgement

Kantawala, C.J.—At the instance of the revenue, the following question has been referred to us for our determination

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the provisions of section 2(xxiv)(d) and/or section 4(1) (c) of the Gift-tax Act (hereinafter referred to as "the Act") were not attracted ?"

2. By an indenture of wakf executed on March 4, 1941, the assessee created a wakf and constituted himself as a sole trustee. By the said indenture, the assessee assigned and transferred to the trustee the properties mentioned in the schedule thereto. After making provision for collection of rents and profits, payment of taxes and incurring of expenditure, by clause (3) of the indenture the gross income was to be paid to the settlor for and during his lifetime and down to his death, and after his death the same was to be paid to the children of the settlor living at the time in certain proportions mentioned in the said clause. Clause (19) of the indenture of wakf gave power to the assessee to alter the beneficiaries of the trust either by adding to their number or by excluding some of them. The provisions of clause (19) are as under :

"The settlor may at any time or times during his lifetime by any deed or deeds with or without power of revocation and new appointment alter the provisions

and/or the beneficiaries of the trusts hereby created by adding to their number or excluding some of them or to increase or reduce their interest or remove any trustee or Mutawalli from his or their office."

3. During the years 1941 to 1964, the assessee treated the wakf properties as his own without disclosing to the tax authorities that the same belonged to him in his capacity as a Mutawalli. Even for the assessment years 1957-58 to 1962-63, in his W. T. returns, the assessee showed the trust properties as belonging to him absolutely.

4. In view of the power reserved to him under the original indenture of wakf, by a document executed on March 30, 1964, the assessee in his capacity as settlor revoked, determined and made void all the trust powers and provisions contained in cls. 3(a), 4, 10(a) and 17 of the said indenture of wakf and also revoked sub-clause (b) of clause 3 and cls. 6, 8, 9, 10(b) and 18 of the said indenture of wakf and in lieu thereof made the following provisions

5. Clause 3(b)(i) of the said document was as under :

"The trustees shall pay the gross income to the settlor's son Mahomed Usuf Botawala for and during his life and down to his death, and from and after his death to his lineal descendants both male and female during their lives and from generation to generation until the total extinction of such lineal descendants both male and female subject nevertheless to and in accordance with the rules set out in clause 7 of the deed of wakf-alal-aulad...."

6. The document concluded by saying;

"And these presents lastly witness that in order to effectuate the said desire the settlor doth hereby release and disclaim the powers of revocation and new appointment and of altering the provisions and/or the beneficiaries of the trusts and all other powers reserved to the settlor by clause 19 by the said recited deed of wakf-alal-aulad to the intent that the said powers hereby released may henceforth be extinguished and that the settlor may be henceforth precluded from exercising the said powers of revocation and new appointment and of altering the provisions and/or beneficiaries of the trusts of the said recited deed of wakf-alal-aulad and also other powers reserved to the settlor by the said clause 19 of the said recited deed of wakf-alal-aulad and to the intent that the said recited deed of wakf-alal-aulad and these presents shall be irrevocable as from the date hereof."

7. The result of the execution of this document was that the beneficiaries under the original indenture of wakf got altered and by the new document dated March 30, 1964, the settlor's son became entitled to receive the income from the trustees. For the assessment year 1964-65, the GTO took the view that the assessee never dedicated the trust premises to the trust. According to him, the dedication was not complete at all and it became complete only on March 30, 1964. In view of this finding, according to him, the value of the trust property as

on March 30, 1964, should be treated as a gift by the assessee under s. 2(xii) of the Act. He further held that he was not taxing the assessee as surrendering his interest in the trust deed but as making an original trust. Even on the assumption that it was a case of surrender, he took the view that the assessee was still taxable under the G.T. Act. According to him, in the light of the provisions of s. 2(xii) read with s. 2(xxiv), s. 3 was attracted in the case.

8. In an appeal preferred by the assessee, the AAC rejected all the contentions urged on his behalf. He confirmed the finding of the GTO that the assessee was the owner of the trust property up to March 30, 1964, on which date it was gifted by him. He further held that as a result of the document dated March 30, 1964, his relinquishment of life interest in favour of his heirs would clearly come within the meaning of transfer of property as defined in the Act. So far as s. 4(1)(c) of the Act was concerned, he did not consider it necessary to go into the provisions of the said section.

9. In a further appeal before the Tribunal it took the view that by reason of the execution of the document dated March 30, 1964, gift-tax was not attracted. It held that the gift, if at all, was taxable in the year 1941. It also held that the transaction was not capable of falling within the scope of s. 2(xxiv)(d) of the Act.

10. So far as the provisions of s. 4(1)(c) were concerned, the same were not applicable to the facts of the case, as it was neither contended nor held that the surrender of life interest by the assessee was other than a bona fide one. In view of this finding, according to the Tribunal, no provisions of the G.T. Act were attracted in the present case.

11. It is from this order of the Tribunal that the above question has been referred to us for our determination.

12. At the outset it may be stated that in view of the decision of the Supreme Court in the case of Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, it is not even possible for the revenue to contend that the document executed on March 30, 1964, was a transfer of property within the meaning of s. 2(xxiv)(d) of the Act.

13. The provisions of s. 3 of that Act provide that

"Subject to the other provisions contained in this Act, there shall be charged for every assessment year commencing on and from the April 1, 1958, a tax (hereinafter referred to as gift-tax) in respect of the gifts, if any, made by a person during the previous year (other than gifts made before the April 1, 1957), at the rate or rates specified in the Schedule."

14. The word "gift" is defined in s. 2(xii) of the Act as under :

"gift" means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money's worth, and includes the transfer or conversion of any property referred to in

section 4, deemed to be a gift under that section."

15. The expression "transfer of property" is defined in s. 2(xxiv) of the Act and the relevant part of the definition for our purpose is as under

"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 -....

(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."

16. The contention, on behalf of the revenue, before the taxing authorities was that by the execution of the document then executed fell within the provisions of s. 2(xxiv)(d) of the Act. Before such a contention can be considered and accepted, it is necessary, on behalf of the revenue, to satisfy the court that it is a transaction. There is no controversy before us that the document in view of the powers reserved under the earlier indenture of wakf. In Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, referred to above, the Supreme Court has taken the view that the expression "transaction entered into" by one person with another, contemplated by clause (d) of s.(xxiv) of the Act, could not apply to a unilateral act. The act must be one to which two or more person are parties. On the facts of that case, the Supreme Court held that the declaration by a coparcener was barred whereby he impressed the character of joint family property on his self-acquired property which did not fall within clause (d) of s. 2(xxiv) of the Act.

17. The above decision, therefore, clearly lays down that a mere unilateral act on the part of a person cannot be regarded as a transaction within the meaning of s. 2(xxiv)(d) of the Act. Before even the provisions of that section can be considered, the act must be one to which two or more persons are a unilateral document to which the assessee alone is a party, nobody else is a party thereto. Thus, in view of this clear pronouncement by the Supreme Court, mere execution of this document cannot be regarded as a transaction and it will not, therefore, fall within the definition of "transfer of property" under s. 2(xxiv)(d) of the Act and cannot be regarded as gift within the meaning of s. 2(xii) thereof.

18. That takes us to the question whether the execution of the document dated March 30, 1964, can be regarded as gift within the meaning of s. 4(1)(c) of the Act. That section, provides as under :

"Gift to include certain transfers - (1) For the purposes of this Act, - ...

(c) Where there is a release, discharge, surrender, forfeiture or abandonment of any debt, contract or other actionable claim or of any interest in property by any person, the value of the release, discharge, surrender, forfeiture or abandonment, to the extent to which it has not been found to the satisfaction of the Gift-tax Officer to have been bona fide, shall be deemed to be a gift made by

the person responsible for the release, discharge, surrender, forfeiture or abandonment."

19. It is undoubtedly true that under the original indenture of wakf life interest was reserved to the assessee. But the said indenture also contained the power of revocation upon the assessee and also conferred power to alter the beneficiaries. It is in exercise of that power that the subsequent document was executed on March 30, 1964. It has not been held by any of the taxing authorities or even by the Tribunal that the execution of the document on March 30, 1964, was not bona fide so far as the assessee was concerned. Actually the Tribunal in its order has pointed out as under

"In our opinion, the term "bona fide" means done in good faith. Unless a surrender can be said to be done in bad faith or with some ulterior or objectionable motive, it cannot be said to be not a bona fide surrender or release. In the present case it can hardly be contended, neither it has been contended, that the surrender of life interest by the assessee was other than a bona fide one. No reasons have been adduced for our holding that the surrender is not bona fide. The officers have not held the surrender not to be bona fide....."

20. These observations make it quite clear that it was not even contended by the revenue before any of the tax authorities that the execution of the document dated March 30, 1964, was not bona fide. When such is the case, there is no possibility of attracting the provisions of s. 4(1)(c) of the Act.

21. Accordingly, the question referred to us is answered in the affirmative in favour of the assessee. The revenue shall pay the costs of the assessee.