

(1975) 03 MAD CK 0019

In the Madras High Court

Case No : Tax Case No. 117 of 1969 (Reference No. 30 of 1969)

Controller of Estate Duty

APPELLANT

Vs

Mrs. Kamala Pandalai

RESPONDENT

Date of Decision : 14-03-1975

Acts Referred:

Estate Duty Act, 1953 — Section 10

Citation : (1976) ILR (Mad) 500 : (1976) 105 ITR 531

Hon'ble Judges : V. Sethuraman, J; V. Ramaswami, J

Bench : Division Bench

Advocate : J. Jayaraman, Special, for the Appellant; N. Srinivasan, for R. Venkataraman, for the Respondent

Judgement

Sethuraman, J.—Lt. Col. K. G. Pandalai, a famous surgeon of his time, died on 5th February, 1960, leaving behind him only his wife,

Kamala Pandalai, who is the accountable person for the estate duty proceedings that commenced on his death. By an indenture dated 18th of

June, 1940, he gifted the three house properties named Vijaya, Vasantha and Ashoka together with a vacant site in Teynampet to his wife. In

1941, he constructed a house named Vanaja on the vacant site. From 1941 onwards Mrs. Kamala Pandalai was collecting the rents from these

houses and leasing them as and when they fell vacant. In 1958, one of the buildings was leased out by her to the American Consulate with the lease

deed in her name. Similarly, another building was leased out to Lloyds Bank, where also the lease deed was in her name.

2. The deceased had acquired shares of the value of Rs. 3,520 in Bala-madies Plantations Ltd., in the name of his wife, as early as 1943. The

source for the investment had been provided by him.

3. The rents from the immovable properties and the dividends were being credited to a bank account of the deceased in his sole name in the

Lloyds Bank till 12th March, 1958. From that date a joint account was opened in the name of the deceased and his wife, into which the rents and

the dividends were being credited. Into this joint account there were credits as follows:

Rs.

Cash and cheque deposits 10,000.00

Pension of Lt. Col. Pandalai 21,200.00

Amount realised by sale of the lands and shares 30,900.00

Income from the property 38,100.00

Dividends from the aforesaid shares 9,600.00

1,09,800.00

4. The withdrawals from this account have been analysed as follows :

Rs.

Drawings by Mrs. Pandalai 41,200.00

Repairs to the property 32,800.00

Drawings by Lt. Col. Pandalai 5,400.00

Household and miscellaneous expenses 29,900.00

Sundries 100.00

Cash with bank 400.00

1,09,800.00

5. The Assistant Controller of Estate Duty came to consider the applicability of Section 10 of the Estate Duty Act on the above facts in respect of

the properties in Teynampet and the shares in Balamadies Plantations Limited. He held that the deceased's account with the Lloyds Bank showed

that right up to the date of his death, the rents from all the houses had been credited in this bank account. According to him, this was a case where

the donee had not enjoyed the properties gifted to her by the deceased to the entire exclusion of any benefit to the donor. It was claimed before

him that the association of Lt. Col. Pandalai in the bank account was only out of sentiment and that the withdrawals were only at the instance of

and for the benefit of Mrs. Pandalai. The Assistant Controller pointed out that the withdrawals showed that they were for payment of taxes,

household expenses, etc. Inasmuch as the rents from the properties gifted by the deceased had been credited to the bank account, which was in

the name of the deceased and operated by him up to a period within two years of his death, the value of the properties gifted was held to be

includible u/s 10. The conversion of this account into a joint account would not, in any manner, it was held, prevent the application of Section 10.

He added a sum of Rs. 3,77,000 with reference to the house properties and Rs. 3,250 with reference to the shares in the assessment.

6. The accountable person appealed to the Appellate Controller disputing the valuation of the properties and also the validity of the application of

Section 10. The Appellate Controller also held that Section 10 was clearly attracted and he, therefore, confirmed the assessments, but reduced the valuation.

7. The accountable person appealed to the Tribunal contesting the application of Section 10. The Assistant Controller of Estate Duty, Madras,

appealed against the reduction given by the Appellate Controller in regard to the valuation of the property taxed u/s 10 of the Act. Both these

appeals came to be heard by the Tribunal together. In more than one place the Tribunal in its order referred to the admission that the rents from the

houses were being collected by Mrs. Pandalai. Two contentions were mainly taken before it, viz., (1) the amount deposited by the donor by way

of his pension and dividends from shares was much more than his drawings so that the donor had no benefit from the income of the gifted

properties, and (2) even though the amounts collected were deposited in a joint account, the amounts still belonged to the depositor, since there

was no presumption of advancement in India. The Tribunal agreed with both these contentions. In paragraph 6 of its order, it observed that definite

evidence available was that the rents were collected by the donee and deposited by her in the joint account. It was further observed that the

deceased was completely excluded from the properties since they had been leased out by the donee and the rents collected by her and deposited

by her into a bank. The inference was that there was no benefit under a contract or under some legal obligation referable to the gifted property. In

the result, the Tribunal held that Section 10 did not apply; in this view, it did not think it necessary to go into the question of valuation.

8. At the instance of the Controller of Estate Duty, the following question has been referred to this court:

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the value of the four houses,

Vijaya, Vanaja, Vasantha and Ashoka, and the dividends referable to the shares in the Balamadies Plantations Limited could not be included in the

principal value of the estate of the deceased u/s 10 ?

9. There is an obvious mistake in the question as set out above, as the dispute is not with reference to the dividends referable to the shares of

Balamadies Plantations Limited, but with reference to the shares themselves. As both the parties agreed that this was a mistake and that the

question could be reframed by us, we would reframe the question as follows :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the value of the four houses and

the shares in Balamadies Plantations Limited could not be included in the principal value of the estate of the deceased u/s 10 of the Estate Duty Act

?

10. This provision, viz., Section 10, has come in for consideration in a number of cases. The provision in so far as it is material runs as follows:

10. Gifts whenever made where donor not entirely excluded.--Property taken under any gift, whenever made, shall be deemed to pass on the

donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained

to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

There are two provisos to the section. It is unnecessary to reproduce them. As pointed out by the Supreme Court in *George Da Costa Vs.*

Controller of Estate Duty in Mysore, Bangalore, the crux of Section 10 of the Estate Duty Act, 1953, lies in two parts: (i) the donee must bona

fide have assumed possession and enjoyment of the property, which is the subject-matter of the gift, to the exclusion of the donor, immediately

upon the gift; and (ii) the donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any

benefit to him by contract or otherwise. The first part is of universal application to this type of cases, as, if possession continued with the donor,

then the provision would be attracted. Nothing further need be looked into. Where possession and enjoyment were taken over by the donee

immediately after the gift, then we have to see if the second part is also satisfied. The second part contains two alternatives and they are referred to

in the decision as the two limbs. The first limb may be set out as follows:

The donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor.

and the second limb is as follows :

The donee must have retained such possession and enjoyment of the property to the entire exclusion of any benefit to the donor by contract or

otherwise.

11. These two limbs are alternative. Though the two conditions set out in the two parts are cumulative, as far as the second part is concerned, it

would be enough if the transaction satisfied one of the two limbs.

12. In the present case we have first to see whether the donee has assumed possession and enjoyment of the property, which was the subject-

matter of the gift to the exclusion of the donor immediately upon the gift. With reference to the immovable properties, as seen already, they were

gifted in 1940 or 1941. Thereafter, the donee has been arranging for the leases of the property. In the stated case, it has been mentioned that the

donee was collecting the rent. This is based on an admission by the authorised representative of the department before the Appellate Tribunal. The

learned counsel for the Controller suggested that this admission has been wrongly recorded. If there was such mistake in what the Tribunal took as

an admission then the matter should have been taken up with the Tribunal itself for, at any rate, the matter should have been appropriately

challenged at the time when the reference application was made to the Tribunal. This was not done. As the admission finds a place in more than

one part of the order of the Tribunal and as there was no dispute about any such admission at any stage till now, we are not persuaded to accept

the suggestion from the Bar as if the admission was wrongly recorded. We thus proceed on the basis of the correctness of the statement made in

the stated case that the properties in Teynampet were gifted in 1940-41 and that

the donee was in possession thereof by arranging for the leases and enjoyment thereof by perception of the rents and profits from them. Similarly, in the case of shares, as they stood in her name, the dividends could only have been received by her in her name. Thus, the donee had assumed such possession and enjoyment of the properties as was possible in the circumstances. We, therefore, proceed to hold that the first part was satisfied on the facts herein.

13. We have now to consider the question whether the donee retained possession and enjoyment of the property to the entire exclusion of the donor. The case of the department is that the donor was not excluded from enjoyment because the rents and dividends were being credited to his

bank account till 12th March, 1968, and thereafter into a joint account with him till his death. The point to be seen is whether the crediting of these

amounts into his bank account up to 12th March, 1958, or into the joint account thereafter satisfied the second of the two requirements of the

provision. There have been several cases before this court in which the donee was the wife and in which the question was whether Section 10 was

attracted. The first of these cases is reported in *M. Ranganatha Sastri and Another (Executors to the Estate of the Late Dewan Bahadur R.*

Subbaiah Naidu) Vs. Controller of Estate Duty, Madras, . One Subbiah Naidu purchased in the name of his wife certain sites and constructed

buildings thereon by 1941. The entire money for the purchase of the sites as well as the construction came from him. The houses were let out and

the tenancy agreements were entered into between the wife and the tenants. In his will he recited that he had already made a gift of two houses

together with the sites to her and that they belonged to her absolutely. The rents received by cheques drawn in favour of the deceased were

credited to his current account in the State Bank. This current account was converted into a joint account of the deceased and his wife from 1942-

43 to 1957-58. The question was whether the collection of rent by the deceased attracted Section 10. At page 787 it was observed as follows :

There is.....some force in the contention..... that the deceased, when he collected the rents and remitted the same into his current account, acted as

a trustee or an agent of his wife.....We are of the view that, from that circumstance alone, it cannot be said that the wife did not have exclusive

possession and enjoyment of the property.

It was further observed that if nothing more happened, then the husband receiving the rents and putting them in his current account, would not be inconsistent with the donee having taken exclusive possession of the subject-matter of the gift. In view of the fact that there was a finding that the deceased had utilised the rental income for his own purposes, it was held that he had not been entirely excluded from the possession and enjoyment of the houses.

14. The same problem arose in the case of V.N. Krishnaswamy Vs. Collector of Estate Duty, Madras, . One Natesan purchased in the name of his wife a site out of his own funds and put up a construction. The deceased was living with his wife in that house. This property was shown in a wealth statement filed by him subsequently and he had also borrowed money on the mortgage of this property. The applicability of Section 10 on his death was considered by this court. At page 336 it was observed as follows :
It only contemplates assumption by the donee of such possession, as the circumstances would permit, and no more, and if on account of those circumstances the donor has no option but to continue in the house as before because of the relationship it cannot, in our opinion, be said that he has not divested himself of possession and enjoyment.

It was pointed out that the law could not fail to take note of the personal relationship of the parties and demand a literal application of the provisions so as to require the husband to live away from his wife, The borrowal was found to be a collateral benefit unconnected with or dissociated from the gift so as not to attract Section 10.

15. Subsequent to these two decisions the Supreme Court came to consider the question of the applicability of Section 10 in the case reported in George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore, to which we have already made a reference. That was a case where one Dr. Da Costa and his wife purchased a property and they jointly made a gift of the house to their two sons. The parents continued to remain in the house with the donees. Before the Supreme Court the contention was that the residence of the parents in the said premises was attributable to the filial relationship between the parties and that the deceased should be held to have been excluded from the possession and enjoyment of the gifted

property. The Supreme Court did not accept this submission and adopted the dictum of the Privy Council in *Clifford John Chick v. Commissioner*

of Stamp Duties, [1959] 37 ITR 89 ; [1958] AC 435 ; 3 EDC 915 which is as follows :

Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is a single fact to be determined. If he has not been so excluded, the eye need look no further...

At page 502 it was observed as follows :

Even if the donor is content to rely upon the mere filial affection of his sons with a view to enable him to continue to reside in the house, it cannot be said that he was entirely excluded from "possession and enjoyment" within the meaning of the first limb of the Section, and, therefore, the property will be deemed to have passed on the death of the donor and will be subject to levy of estate duty".

It may be seen that there was a case where the donees were the sons.

16. The contention on behalf of the Controller was that the two decisions of the Madras High Court to which we have made a reference would no

longer be good law after the decision in *George Da Costa v. Controller of Estate Duty* and another decision reported in *Satyanarayana Modi Vs.*

Controller of Estate Duty Delhi and Rajasthan, New Delhi, which we shall notice a little later. But there are decisions rendered after *George Da*

Costa's case, which have considered the question of the applicability of Section 10 in the case of a gift of property to the wife and which still are in

line with the Madras view. The Andhra Pradesh High Court in *MOHAMMED BHAI AND ANOTHER Vs. CONTROLLER OF ESTATE*

DUTY, A.P., had to deal with a case on the following facts. One Fida Alt Mohammed made certain gifts to his sons and to his wife in or about

1952. For our present purpose it is enough to refer to the gift in favour of the wife. In the gifted house property he was residing along with his wife.

The applicability of Section 10 was put in issue in the estate duty proceedings commencing on his death. At page 777 *Jaganmohan .Reddy C.J.*, as

he then was, observed that possession and enjoyment had been taken by the wife immediately on the gift and added as follows :

There was no other way in which the donor even from the department's point of view, could have given possession of the residential house to his

wife in order to make an effective gift, unless it is stated that he should leave his wife and go into some other house, or that they should both move

out of the house and lease it so that the wife will thenceforth receive the rents..... We do not think there is anything in Section 10 which requires a

break in the marital relationship or separation from the husband to make an effective gift of the residential house to the wife or the wife to the

husband.

On behalf of the Controller of Estate Duty, reliance had been placed on the decision of the Supreme Court in *George Da Costa Vs. Controller of*

Estate Duty in Mysore, Bangalore, . It was held that the said decision did not apply. The learned Chief Justice referred to the decisions of the

Madras High Court on this point, which we have earlier referred to and applied them.

17. The same question came up before the Calcutta High Court in *MRS. SHAMSUN NEHAR MANSUR Vs. CONTROLLER OF ESTATE*

DUTY, WEST BENGAL I., . There also a house property was gifted to the wife. The attempt of the estate duty authorities to include this house

property in the assessment by reference to Section 10 was based on the ground that the deceased was living in his house till his death. It was held

as follows:

Even assuming there was a gift by the deceased to the wife, no construction should be put on Section 10 of the Estate Duty Act so as to be

against public policy to the extent that whenever a husband makes a gift of a property to his wife, he should lose both the property and the wife. In

such circumstances, the fundamental point for consideration is that a husband's going to the wife for consortium or coverture is not a proprietary

right in respect of the house gifted, and Section 10 was not applicable to the case.

18. The Allahabad High Court had occasion to consider the same point in *Bibi Ahmadi Begum Vs. Controller of Estate Duty*, where a house

property was gifted to the wife in 1918 and the deceased continued to live there till his death. The application of Section 10 was upheld by the

Allahabad High Court and the learned judges dissented from the decision of the Andhra Pradesh and Calcutta High Courts cited above.

19. We may now notice the decision of the Supreme Court in *Satyanarayan S.*

Mody v. Controller of Estate Duty, [1970] 70 ITR 382. That was not a case between a husband and wife but between a grandmother and a grandson. The grandmother had a number of fixed deposits. She adopted one Satyanara-yana who had a natural son by name Suryakant. Suryakant at the relevant time was a minor. She executed a gift deed in which it was declared that the fixed deposits as mentioned therein were gifted to Suryakant and that the gift had been accepted by the natural guardian of Suryakant. However, till her death the fixed deposits were getting renewed in her name and she without reference to the guardian of the minor was dealing with the interest and the corpus. One of the contentions was that the bank had notice of the gift and that the bank could not have allowed her to act inconsistently with her fiduciary character and duty. The Supreme Court pointed out that it was unnecessary to consider whether the renewal of the investment for a purpose which the bank knew was inconsistent with her fiduciary capacity, character and duty. It was pointed out at page 387 as follows:

The conduct of Purnabai clearly indicates that she had no intention to part with control over the property; the deposit receipts were obtained in joint names, and Purnabai had authority to withdraw the amount from the bank, without consulting the guardian of Suryakant. The deposit receipts were renewed on several occasions even after the execution of the deed of gift in the joint names of Purnabai and Suryakant. Purnabai alone presented the fixed deposit receipts for renewal. She could under the terms of the receipts receive the moneys to the entire exclusion of Suryakant.

We are unable to hold, in the circumstances, that bona fide possession and enjoyment of the property gifted was immediately assumed by

Suryakant and thenceforward retained by him to the entire exclusion of Purnabai.

20. Section 10 is designed to see that the donor has nothing to do with the gifted property after he has made a gift. The gift between husband and

wife have to be considered in the light of the rights and obligations flowing from the marital status which is the basis of a civilised or ordered

society. The decisions of this court dealing with gifts between husband and wife have been considered in the light of the decision of George Da

Costa Vs. Controller of Estate Duty in Mysore, Bangalore, of the Supreme Court and the Andhra Pradesh and Calcutta High Courts with whom

we agree have taken into account the peculiarity of the relationship between husband and wife in the application of Section 10. We are in this view

unable to agree with the decision in *Bibi Ahmadi Begum Vs. Controller of Estate Duty*, which takes a contrary view.

21. The question now to be considered is whether, in the light of these decisions, the donee in this case has retained possession and enjoyment of

the property to the entire exclusion of the donor, which is the first limb of the second part of Section 10. The learned counsel for the Controller

submitted that this part of the provision was not satisfied in the present case, because the amounts of rent and dividends went into the individual

account of the deceased in the Lloyds Bank till 12th March, 1958, and thereafter, into the joint account. For the accountable person the

submission was that as soon as the amounts were received by the donee, they ceased to be referable to the property, as such, and that she was

free to do what she liked with her own income. Whether she utilised it for deposits in the bank account of the deceased or whether she dealt with it

in any other manner would not bring her application of the income within the scope of the first limb of the second part of Section 10.

22. The learned counsel for the department referred us in this context to the decision of the Privy Council in *SIR PADAMPAT SINGHANIA Vs.*

COMMISSIONER OF Income Tax., . That was a case where a testator settled on trust certain investments to apply the whole or such part of the

income as the trustee thought fit for the maintenance, education and general support of his daughter until she should attain the age of 30 and on her

attaining that age to pay over to her the balance of the trust fund with all accumulations of income for her sole and separate use. The daughter

married in 1938 and attained the age of 30 in February, 1940. In December, 1938, she wrote to the trustees authorising them to take instructions

from her father in all matters regarding her trust and a new account which he was opening in a bank in her name; on December 29, 1938, she

wrote to the bank authorising her father to operate on her account in the fullest possible manner. The testator had authority to withdraw the money

from that account without obtaining his daughter's approval. The trustees had instructions to pay into her account at the bank any money paid by

them under the obligation of the trust. The testator died in 1946. It was found that the amounts taken by the testator were repayable out of his

estate on his death. One of the contentions was that it was essential to distinguish the right to the income from the money which was the income.

This contention was not accepted by the Privy Council and it held at page 45 as follows :

For here the design and the result of the arrangement were that the daughter's possession and enjoyment were reduced and impaired precisely by the measure of the testator's use and enjoyment of her income.

Lower down in the same page it was added :

Gift or loan, he for his own advantage used her money, paying no interest for it, and by so much reduced her enjoyment of what was her trust income and nothing else. The obligation to repay affected the quantum of the benefit obtained by him ; it did no more.

The point to be noticed is that in the said Privy Council decision the right obtained by the donor was available at the source. As and when the income grew in the hands of the trustees the father was the master of the situation so as to direct the trustees to do what he liked with the income and so as to direct the bank also to honour whatever obligations he chose to discharge. The donee there had practically surrendered all her rights in the income to the donor and had ceased to enjoy the income.

23. The position here is wholly different. As found by the Tribunal, it is she who was in perception of the rents, profits, and dividends. Her

choosing voluntarily and out of her own free will to keep the amounts in deposit in the deceased's bank account would not bring the present case

within the scope of the first limb of the second part of Section 10. It is also necessary to notice that the case before the Privy Council showed a

consistent attempt on the part of the deceased to reduce the tax obligations. In the present case there was no such attempt on the part of Lt. Col.

Pandalai. He could not have had any estate duty in mind when he made these gifts, as in those years, i.e., in 1940 and 1943, the enactment of

estate duty was not even contemplated. It came into force 10 years later.

24. The bank account up to 12th March, 1958, is not available before us. The summary of the bank account available to us relates to the period

subsequent to 12th March, 1958. We do not, therefore, know as to what happened to the income earned out of the gifted properties by the donee

prior to 12th March, 1958. The mere existence of the bank account of the

deceased and the deposits made therein do not, in our opinion, show that the donee had not retained possession and enjoyment of the properties gifted to the entire exclusion of the deceased. If the revenue authority has to succeed on this aspect, some materials should have been placed before us to show that the deceased enjoyed the said income. The Delhi High Court in a Full Bench decision in *Controller of Estate Duty Vs. Prahlad Rai*, examined the consequences u/s 10 of the Estate Duty Act of the deposit of the income in a firm in which the donor was a partner. It held that accretion to the gifted property did not form part of the bundle of rights in the gifted property as it stood at the time of gift and that once the possession and enjoyment of the gifted property was taken over by the donee, he could invest the income in the partnership or elsewhere. This part of the decision of the Delhi High Court is not affected by the decision of the Supreme Court in *Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder*, case. The deposit of the income into the individual account of the donor or in a joint account with him without the donee evincing any intention to make them over to the donor absolutely would not lead to the inference that she did not intend to retain the possession and enjoyment of the gifted properties exclusively to herself. The first limb of the second part of Section 10 is not satisfied on the facts here.

25. We have now to see whether the second part of the second limb of Section 10 is satisfied on the facts herein. That would require examination as to whether possession and enjoyment was not retained by the donee to the entire exclusion of any benefit to the donor by contract or otherwise. It is now settled by the decision of the Supreme Court in *George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore*, that the words "'or otherwise'" have to be understood ejusdem generis. There has to be either a contract or some kind of legal obligation or some transaction enforceable at law or in equity, which though not in the form of a contract, may confer a benefit on the donor. The revenue authorities were not relying on any contract, as such, with reference to the income up to 12th March, 1958. We do not have any material to hold that there was any kind of legal obligation enforceable at law or in equity conferring a benefit on the donor. The donor, to the extent that certain amounts were deposited in his accounts was either in the nature of a banker to his wife or had

a fiduciary capacity with reference to the said amounts. There was no benefit, as such, which he had contracted for so as to bring it within the scope of the second limb of the second part of Section 10.

26. In this context the learned counsel for the Controller relied on the withdrawals from the joint bank accounts of the period 12th March, 1958, to

5th February, 1960. He pointed out that if the donor had not been excluded from possession and enjoyment at any time after the gift, it would

bring within the scope of Section 10 and that he was not so excluded during this period at any rate. He further submitted that the Tribunal was not

justified in proceeding as if a sum of Rs. 5,400 alone had been drawn by the deceased. It may be mentioned here that the Tribunal has referred to

the deposit of Rs. 21,200 being pension drawn by the deceased and to his having utilised by way of withdrawals only a sum of Rs. 5,400. The

Tribunal proceeded on the basis that so long as the deceased withdrew his own amounts, there could be no question of any benefit coming within

the scope of the provisions of Section 10. The attempt of the learned counsel for the Controller was to show that a sum of Rs. 29,900 had been

withdrawn as and for household and miscellaneous expenses, out of which the deceased donor should certainly have had some benefit. He drew

our attention to the order of the Assistant Controller in which the withdrawal of monies for household expenses has been adverted to in support of

the application of Section 10.

27. There are two answers to this submission. The first is that having regard to the limited jurisdiction of an advisory character we have in the

matter of these references it would not be possible for us to go behind findings of fact. The Tribunal had referred only to the sum of Rs. 5,400 as

withdrawn by the deceased for his own purposes. It has found as a fact that he had deposited Rs. 21,200 and that the withdrawals were thus

much below what he could have withdrawn out of his own resources. If the revenue authorities were aggrieved by this conclusion of the Tribunal,

then they should have asked for a reference of a separate question on this point. This has not been done. If we proceed on the basis of the facts

found in the Tribunal's order, then the sum of Rs. 5,400 being much below the amount referable to his own resources, there could be no question

of any benefit out of the gifted properties derived by him. We have already

referred to the fiduciary character and we cannot presume that he wanted to misappropriate any fund belonging to his ward. In other words, there could be no presumption leading to any illegality or breach of law on the part of the donor. On the facts as found by the Tribunal the case of the department that any other sum has to be taken into account as benefit derived by the deceased has to fail.

28. Secondly, assuming that we have got to examine this aspect in the light of the withdrawals for household expenses adverted to by the Assistant

Controller, even then we are not satisfied that the deceased had any benefit contemplated by Section 10. In taking the food, etc., provided by his

wife, the donor was not taking any benefit out of the income as such. At any rate, he had not contracted to get any such benefit. There is no

evidence of any such contract or any obligation in the nature of any contract to get such a benefit. Any benefit to the donor is not enough to attract

the provision. The benefit conceived by the provision is one arising out of the contractual or other legally enforceable obligation flowing from the

donee to the donor. There is no such benefit here. We would, therefore, hold that even assuming that the sum of Rs. 29,900 is to be looked into in

this connection, then also there is no benefit which comes within the scope of Section 10 of the Act.

29. In a recent case the Supreme Court had occasion to interpret the second limb of the second part of Section 10 in *Controller of Estate Duty*

Vs. R. Kanakasabai and Others, . That was a case where the deceased transferred a number of properties being agricultural lands in favour of his

sons, grandsons, daughter and wife. In the gift deeds in favour of the sons there was a provision saying that they had to pay during his lifetime a

sum of Rs. 1,000 per year for his domestic expenses. In the gift deed in favour of the wife he had expressed the hope that she would support him

during his lifetime. The estate duty authorities sought to apply Section 10 and Section 10. The Supreme Court found that Section 12 was not

applicable. We are not concerned here with that question. As regards the application of Section 10 and the requirements thereof, the Supreme

Court observed at page 257 as follows :

The provisions for annual payments and maintenance made in the deeds as seen earlier are not charged on the properties settled. Hence, the

deceased cannot be said to have retained any interest in the properties settled. Therefore, it cannot be said that he retained any benefit either in the properties settled or in respect of their possession.

30. The result of this decision of the Supreme Court is that there must be some kind of charge on the properties which would bring into operation

the second limb of the second part of Section 10. There is no such charge here. Further, as submitted by the learned counsel for the respondent,

the characteristic of a benefit is that it is real and not notional, concrete and not abstract, certain and not conjectural: See *Manickavasagam Chettiar*

Vs. Commissioner of Income Tax., . In the present case, there is no proof of any real or concrete benefit accruing to the deceased-donor.

31. For the above reasons, we answer the question as reframed by us in the affirmative and against the Controller. The respondent will have her

costs. Counsel's fee Rs. 250.