
(1993) 04 RAJ CK 0016

In the Rajasthan High Court

Case No : .C.E.D. Reference No. 24 of 1982

Controller of Estate Duty

APPELLANT

Vs

Sagarmal Daga (Late)

RESPONDENT

Date of Decision : 27-04-1993

Acts Referred:

Estate Duty Act, 1953 — Section 2, 2(15), 9

Citation : (1994) 3 WLC 183

Hon'ble Judges : K.C. Agrawal, C.J;V.K. Singhal, J

Bench : Division Bench

Advocate : G.S. Bafna, for the Appellant; T.C. Jain, for the Respondent

Judgement

V.K. Singhal J.

1. The Income Tax Appellate Tribunal, Calcutta Bench "E", Camp Jaipur, has referred the following questions of law arising out of its order dated March 10, 1981 :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the value of the goodwill did not pass on the death of the deceased u/s 9 of the Estate Duty Act, 1953 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in directing the Assistant Controller of Estate Duty to work out the deceased's share in the smaller Hindu undivided family after allowing deduction of Rs. 50,000 being provision for the marriage of daughters of the deceased ?"

2. The brief facts of the case are that Sagarmal Daga expired on October 15, 1974. He was a partner in the firm, Messrs. Sagarmal Daga and Company. In the course of the assessment proceedings of the accountable persons, it was pointed out that the deceased had retired from the firm on October 9, 1974, i.e., a few days prior to his death, and on this ground it was submitted that no share in the goodwill of the said firm can be added as he was no longer a partner therein. The

Assistant Controller of Estate Duty held that in accordance with the provisions of Section 9 of the Estate Duty Act, the deceased person should be treated as having made a disposition of his share in the goodwill of the firm. Since the disposition was within a period of two years of death, the value of the goodwill was includible u/s 9 of the Estate Duty Act. The value of the goodwill was accordingly determined on the basis of the income of the firm for the last five years. It was also observed that the provisions of Section 2(15) of the Estate Duty Act, 1953, defines "property", according to which "property" includes any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale and also includes any property converted from one species into another by any method. Explanation 2 to this section further provided that "the extinguishment at the expense of the deceased of a debt or other right shall be deemed to have been a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished, and in relation to such a disposition the expression "property" shall include the benefit conferred by the extinguishment of the debt or right." In view of the Explanation to Section 2(15) of the Act, it was considered to be a deemed disposition and since the deceased at the time of retirement had relinquished his right of goodwill in favour of other partners without any adequate consideration and since this relinquishment had been made by the deceased within two years of death, it was held that it is includible being property deemed to pass on death u/s 9 read with Section 2(15) of the Estate Duty Act.

3. In the appeal preferred to the Appellate Controller of Estate Duty, it was submitted that the retirement deed was executed a few days before the death and, therefore, there was no question of any deemed gift. The Appellate Controller of Estate Duty rejected the contention of the accountable persons and accordingly a second appeal was preferred to the Income Tax Appellate Tribunal, where this fact was taken into consideration that in the partnership deed dated October 21, 1974, the fact of retirement from October 9, 1974, leaving the concern with all its assets and liabilities with the surviving partners was clearly mentioned and, therefore, the provisions of Section 9 are not applicable in view of the decision given by the Bombay High Court in the case of Smt. Urmila v. CED [1980] 122 ITR 1958.

4. Learned counsel for the Department has submitted that in accordance with the Full Bench judgment of the Punjab and Haryana High Court in the case of State Vs. Prem Nath, the share of goodwill of a partner in the assets of the firm is property which passes on his death and can be included in computing the principal value of the estate of deceased. It was held in this case that u/s 14 of the Partnership Act, the goodwill of a firm being an asset of a firm, the share of a partner in the goodwill along with his share in the other assets of the firm devolves, on his death, upon his legal representatives notwithstanding any clause in the deed of partnership to the effect that the surviving partners are entitled to carry on the business on the death of the partner. A term

extinguishing the right of a deceased partner to a share in the assets is not to be implied merely because the deed provides for continuance of business by the surviving partners.

5. Reliance was also placed on the decision of the Madras High Court in *Controller of Estate Duty Vs. Ibrahim Gulam Hussain Currimbhoy*, where in accordance with a clause in the partnership deed, the retiring partner or legal representatives of the deceased partner were not entitled to any goodwill. It was held that the goodwill being assets of the firm belonged to the firm, that means, to all the partners, and the death of the deceased did not extinguish his share in the goodwill but resulted in augmenting the interest of the surviving partners in the goodwill in view of Clause 14 of the partnership deed and hence there is a passing of the deceased's share in the goodwill even if there is no devolution of the deceased's interest in the goodwill on the legal representatives.

6. The decision of the Madras High Court in *Smt. Surumbayi Animal v. CED* [1976] 105 ITR 358 was also relied upon, wherein it was held that though the accountable person factually did not get any share in the goodwill, the fact that the deceased was entitled to a share was sufficient to hold that the share in the goodwill passed on his death for purposes of estate duty.

7. Learned counsel for the accountable person has submitted that the deceased was a partner and retired from the firm before his death and all assets including goodwill and liabilities were taken over by the continuing partners. Reliance was placed on the decision of the Bombay High Court in *Urmila Vs. Controller of Estate Duty, Bombay*, . In this case, Clause 13 of the partnership deed provided, inter alia, that (at page 963) :

"If a partner wants to retire from the partnership he can do so by giving to the others not less than three months" notice in writing of his intention to retire from the partnership. Death, retirement or insolvency of any of the partners shall not dissolve the partnership firm as to the surviving or continuing partners. The share of the partner dying, retiring or becoming insolvent or otherwise ceasing to be a partner shall accrue to the surviving partners or continuing partners in proportion to their respective shares subject only to payment to the legal representatives of the deceased partner or to the retiring partner or the assignee of the estate of the insolvent partner his share and interest at death or on the date of retirement or the day preceding the date on which he is declared insolvent as ascertained by a general account to be made as on date of death or retirement or the day preceding the insolvency with all proper valuation but without valuation or allowance or payment for goodwill. In case of death or retirement of a partner the surviving partner or the continuing partners as the case may be shall be entitled to the goodwill of the partnership business without making any payment or compensation to the legal representatives of the deceased partner or to the retiring partner in respect of goodwill and the intention is that the goodwill shall accrue to and belong to the surviving or continuing partners without any valuation of or allowance for goodwill."

8. On an interpretation of the above clause it was held that there was no cesser of the right of the share of the deceased in the goodwill of the said firm on his death. This was a matter in respect of two firms, namely, Kantilal Manilal and Company and Pannalal Bros. In the case of the former firm, Clause 2 of the deed of retirement provides that all the assets of the said firm including the goodwill, rights and privileges and outstandings together with all its liabilities will be taken over by the continuing partners. Clause 4 provided that the continuing partners shall pay and discharge all the debts, liabilities and obligations of the partnership and shall indemnify or keep indemnified the retiring partner against all costs, claims and demands in respect thereof. In respect of retirement of Pannalal Bros., the provisions were more or less identical. It was submitted that if a benefit had been secured by the provision to the continuing partners, viz., the obtaining of the share of the retiring partners in the assets including the goodwill this was accompanied by taking over of an obligation, viz., the entire liabilities of the firm and the further obligation to indemnify or keep indemnified the retiring partners against the claims made in respect of such liabilities. In these circumstances, it was held by the court that it is a clear case of simultaneous taking over of rights and obligations ; the benefit secured by each group was to be supported by the consideration, viz., giving up of its claim. If the retiring partners have given up their share in the assets, they have been relieved of their share in the liabilities. Similarly, if the continuing partners have secured the retiring partners' share in the assets, they have at the same time taken over the retiring partners' share of the liabilities.

9. In the above case it was further held that the share of assets in general or in any asset in particular had been given up without consideration.

10. In the aforesaid circumstances, the provisions of Section 9 of the Estate Duty Act were held to be not attracted in the case.

11. We have considered the matter, Section 9 of the Estate Duty Act, 1953, reads as under :

"9. Gifts within a certain period before death.--(1) Property taken under a disposition made by the deceased purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust, settlement upon persons in succession, or otherwise, which shall not have been bona fide made two years or more before the death of the deceased shall be deemed to pass on the death :

Provided that in the case of gifts made for public charitable purposes the period shall be six months.

(2) The provisions of Sub-section (1) shall not apply to-

(a) gifts made in consideration of marriage, subject to a maximum of rupees ten thousand in value ;

(b) gifts which are proved to the satisfaction of the Controller to have been part

of the normal expenditure of the deceased, subject to a maximum of rupees ten thousand in value."

12. The matter with regard to passing of property u/s 9 of the Estate Duty Act, 1953, in a case where the deceased has retired from the partnership of a firm before his death, was considered by this court in CED v. Shyamlal Sangaria (D. B. Income Tax Reference No. 1 of 1984) and this court, relying upon various decisions, has held as under :

"In Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another, the Supreme Court has observed that the goodwill of the firm is expressly declared to be the property of the firm. At pages 1149 and 1150, it was observed by the Supreme Court :

"The goodwill of a firm is an asset. In interpreting the deed of partnership, the court will insist upon some indication that the right to a share in the assets is, by virtue of the agreement, that the surviving partners are entitled to carry on the business on the death of the partner, to be extinguished. In the absence of a provision expressly made or clearly implied, the normal rule that the share of a partner in the assets devolves upon his legal representatives will apply to the goodwill as well as to other assets."

In Commissioner of Gift Tax, Gujarat Vs. Chhotalal Mohanlal, their Lordships of the Supreme Court have held that reconstitution of a partnership firm by reducing the share of the partner and admitting his two minor sons to the benefit of the firm in respect of the remaining share, amounts to gift. Following the principle laid down by the apex court, the retirement of the deceased has to be considered as a gift as the shares of the other partners have increased thereby and, therefore, it is a gift."

13. The Supreme Court in Controller of Estate Duty, Gujarat-I, Ahmedabad Vs. Smt. Mrudula Nareshchandra, has held that a partner has a marketable interest in all assets of the firm including the goodwill and the said interest is property within the meaning of Section 2(15) of the Estate Duty Act, 1953. It was held in this case that the goodwill of the firm is an asset in which the deceased had a share and on his death, his interest therein did not vanish or get extinguished, but passed to the surviving partners. In the present case, at the time of death of the deceased he was not a partner but had retired 35 days earlier to his death and, therefore, it will be deemed to be a gift at the time of his retirement and the said period being within two years before the death of the deceased, it shall be deemed to pass on the death of the deceased.

14. In Controller of Estate Duty Vs. Smt. Shanta Ben Manilal Patel, it was held that the Tribunal was right in holding that the share of the goodwill of the deceased in the firm was to be assessed on the basis of two years' purchase of super profit. That was also a case where the deceased was a partner of the firm at the time of his death.

15. Section 9 of the Act contemplated one other condition that such gifts which have not been made bona fide are to be included. The Tribunal has not gone into the point as to whether the gift was bona fide or not. It would be proper for the Tribunal now to give a finding on this point as to whether the gift was bona fide or not.

16. In view of the above discussion, it is held that the Tribunal was not justified in coming to the conclusion that the value of the goodwill from the partnership firm from which the deceased had retired just 35 days before his death, did not pass on his death within the meaning of Section 9 of the Estate Duty Act, 1953. It is held that the retirement of the deceased 35 days before his death from the partnership firm amounts to a gift and the said gift was within the period of two years before the death of the deceased and, therefore, the provisions of Section 9 of the Act are applicable. Since no finding has been given on the point whether the gift was bona fide or not, the Income Tax Appellate Tribunal shall now consider this point and shall give a finding thereon after hearing the parties.

17. The above case is the direct authority on the point and in view of the said decision, we are of the view that the Tribunal was not justified in holding that the value of the goodwill did not pass on the death of deceased u/s 9 of the Estate Duty Act. Since no finding has been given on the point as to whether the gift was bona fide or not, the Income Tax Appellate Tribunal shall now consider this point and shall give its finding after hearing the parties.

18. In respect of the second point, the facts are that the accountable person has claimed deduction of Rs. 50,000 being provision for the marriage of daughters of the deceased, in the smaller Hindu undivided family. No documentary evidence in support thereof was filed to justify the claim and it was only in the will of the deceased that such provision was provided, but the Assistant Controller of Estate Duty came to the conclusion that the "will" will be operative only after the death and, therefore, it cannot be said that the deceased had made a settlement for the purpose before death and the claim was rejected.

19. In the appeal before the Appellate Controller of Estate Duty, the claim was held not allowable and it was held by the Appellate Controller that after the coming into force of the Hindu Succession Act every female heir is entitled to a share in the deceased's interest in the Hindu undivided family property and, therefore, the question of allowability with regard to the marriage expenses of the family after the death of the deceased does not arise. It was further observed that the estimated expenditure on the marriage cannot be considered to be a debt or an encumbrance created by the deceased so as to qualify for deduction u/s 44 of the Act.

20. The matter was taken up before the Income Tax Appellate Tribunal and it was held that the deduction cannot be made on the basis of the will of the deceased but a reasonable provision for marriage of daughters is allowable expenditure while computing the assessee's share in the smaller Hindu undivided family

consisting of himself and his son. This deduction will have to be allowed at the time of computing the property at the hands of the smaller Hindu undivided family which is available for partition.

21. The submission of Mr. Bafna, on behalf of the Department, is that it is not a permissible deduction and since it is not a liability or encumbrance, the amount cannot be allowed as a deduction.

22. The submission of Mr. Jain, on behalf of the accountable person, is that the principal value of the estate has to be reduced by the amount of the obligations which such estate has and, therefore, in respect of the estate of the deceased which is from the share of the Hindu undivided family, it was an obligation of the estate and, therefore, the value has to be reduced to that extent. Reliance has been placed on the decision of the Calcutta High Court in Commissioner of Gift Tax, Central-I Vs. Basant Kumar Aditya Vikram Birla, wherein it was held that the legal as well as moral obligation under the Hindu law of a Hindu undivided family to incur expenses on the occasion of the marriage of an unmarried daughter is recognised by the courts. A daughter has a right, as long as the family remained joint and had properties, to have her marriage expenses met out of the family fund. The legitimate marriage expenses of the daughter will have to be met out of the funds of the joint Hindu family and the amount spent cannot be described as a transfer or gift in terms of Section 2(xii) of the Gift-tax Act, 1958. In this case, it was also considered that the traditional concept of Hindu law has not only not been altered but has been recognised by the Hindu Adoptions and Maintenance Act, 1956, which, inter alia, defines "maintenance" under Sub-section (3)(b) as in the case of unmarried daughter, also the reasonable expenses of and incidental to her marriage." The judgment of the Supreme Court in Venkatesh Dhonddev Deshpande Vs. Sou. Kusum Dattatraya Kulkarni and Others, was also relied upon wherein it was observed that where a father was the karta of a joint Hindu family and the debts were contracted by the father in his capacity as manager and head of the family for family purposes, the sons as members of the joint family were bound to pay the debts to the extent of their interest in the coparcenary property. It was further observed that as the loan was borrowed for the purpose improving joint family lands, the loan would ipso facto be for legal necessity.

23. Reliance was also placed on the decision of the Madras High Court in CGT v. M. Radhakrishna Gade Rao [1983] 143 ITR 260 wherein it was held that it is a legal obligation which has to be discharged by it for the marriage of the daughter and if a settlement has been effected for making appropriate provision for the marriage of the daughter in accordance with the custom and usage prevalent in the family, the settlement cannot be considered to be a gift.

24. Another decision of the Andhra Pradesh High Court in Commissioner of Gift-tax Vs. Bandi Subba Rao, was also relied upon, in which the provisions of the Hindu Adoptions and Maintenance Act, 1956, as well as under the general Hindu law in respect of the obligation of the father to maintain an unmarried as well as

married daughter so long as she is unable to maintain herself from the family to which she was given, was considered and it was held that it is a legal obligation.

25. We have considered the matter in accordance with the principles of Hindu law and the various judgments cited before us. It is settled that it is an obligation of the karta of the family to incur reasonable expenses on the marriage of the daughters, but this obligation is of the karta and out of the assets of the family. On the death of the karta, the family is not disrupted and the elder son, as in the present case (or any other eldest male member) assumes the role of karta. The property of the family remains intact and it is by virtue of the deeming provisions under the Estate Duty Act that the share of the deceased is calculated for the purposes of liability to estate duty, which passes on his death. Once it is taken that it is an obligation of the family (which never dies and only disrupts) the question of any deduction in respect of the obligation from the property of the family could be considered while determining the share of the deceased from the property of the Hindu undivided family. The various authorities cited by learned counsel for the accountable person are in respect of the Gift-tax Act and the amount was already taken out of the assets of the family by giving a gift or spending it or by creating a settlement or trust and in these circumstances it was held that on account of the obligation of the family to marry the daughters it will not be deemed to be a gift.

26. Mulla in Hindu Law has observed as under :

"Property available for partition.--(1) In order to determine what property is available for partition, provision must first be made for joint family debts which are payable out of the joint family property, personal debts of the father not tainted with immorality, maintenance of dependent female members and of disqualified heirs, and for the marriage expenses of unmarried daughters. Where a partition takes place between the sons, provision must also be made for the funeral ceremonies of widow and mother of the last male holder. After this is done, an account must be taken of the joint family property in the hands of the manager and other members of the family, according to the rule laid down in the next following section."

27. The matter with regard to the deduction for provision for the marriage expenses of an unmarried daughter of the deceased has to be considered in the light of the provisions of Section 44 of the Act. Section 44 refers to the deduction in respect of debt or encumbrance and it has to be examined as to whether the provision for the marriage of an unmarried daughter of a Hindu is an encumbrance on the property of the family which is enforceable. The position under the Hindu law is settled and has been enumerated by Mulla in his book mentioned above as well. An unmarried daughter who is born in a family is entitled to reasonable expenses for her marriage out of family property. The matter was also examined by the Full Bench of the Madras High Court in *Subbayya v. Ananda Ramayya*, AIR 1929 Mad 586.

28. The provisions of Section 6 of the Hindu Succession Act also contemplate devolution of the property. In accordance with the provisions of the Hindu Adoptions and Maintenance Act, 1956, it is the obligation of the father to spend money for the marriage of his unmarried daughter during his lifetime and according to the provisions of Section 23 of the said Act, the liability can be enforced against the father after his death. However, after his death, the asset is liable if a specific charge has been created under the will or decree of the court or agreement in this regard. Section 39 of the Act creates a deeming fiction but it has to be carried to its logical end and if there is an obligation on the karta of the family to defray the expenses of marriage of unmarried daughters then it has to be allowed. The deeming fiction under this section does not prohibit that such a liability would not to be reduced or that the share of the deceased would pass without taking into consideration the said liability. The provisions of Section 44 which allow the deduction for debts and encumbrances would cover the liability of the family property of a Hindu to pay the reasonable marriage expenses of unmarried daughters.

29. In *Devchand C. Shah Vs. Commissioner of Expenditure Tax, Mysore*, it was held that the expenses for the marriage of a daughter of a Hindu family is a legitimate charge on the family estate and the Hindu father is bound to meet the expenses of his daughter's marriage. The responsibility of the father has been statutorily recognised by Section 20 of the Hindu Adoptions and Maintenance Act, 1956.

30. In *T.S. Srinivasan Vs. Commissioner of Expenditure-tax*, it was held that the joint family has an independent obligation to maintain the members of the family even though there is a personal obligation on the part of the karta to maintain his wife and minor children arising from the existence of the relationship and quite independently of the possession of any property, ancestral or acquired. The maintenance of a wife by her husband or of a minor children by their father is a matter of personal obligation which attaches from the moment of marriage or birth as the case may be and both the Hindu undivided family as well as the karta are under an obligation to maintain his wife and minor children.

31. In *Controller of Estate Duty, Madras Vs. B. Kamalamma*, it was held that where the deceased is a Hindu, a provision for the marriage of an unmarried daughter of the family must be allowed either as a debt or as an encumbrance if the dutiable estate includes ancestral or coparcenary property to the extent that it can take in or absolve that liability.

32. In view of the Hindu law which has so far been followed uninterruptedly and recognised even by the courts, the position, therefore, emerges that a reasonable sum has to be allowed for the marriage of an unmarried daughter before ascertaining the share of the deceased in the family property as a liability of such property.

33. In these circumstances, we are of the view that the Income Tax Appellate

Tribunal was justified in directing the Assistant Controller of Estate Duty to work out the deceased's share in the smaller Hindu undivided family after allowing the sum of Rs. 50,000 being provision for the marriage of daughters of the deceased.

34. Accordingly, question No. 1 is answered in favour of the Revenue and the matter is remanded to the Income Tax Appellate Tribunal for deciding it in accordance with the directions given above and question No. 2 is answered in favour of the assessee and against the Revenue.

35. No order as to costs.