

(1980) 03 AHC CK 0040

In the Allahabad High Court

Case No : Estate Duty Reference No. 156 of 1976

Controller of Estate Duty

APPELLANT

Vs

Smt. Laxmi Bai

RESPONDENT

Date of Decision : 28-03-1980

Acts Referred:

Estate Duty Act, 1953 — Section 10, 27, 27(1), 9, 9(1)

Citation : (1980) 17 CTR 84 : (1980) 126 ITR 73 : (1981) 5 TAXMAN 105

Hon'ble Judges : R.R. Rastogi, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : A. Gupta, for the Appellant; R.K. Gulati, for the Respondent

Final Decision : Disposed Of

Judgement

R.R. Rastogi, J.—This is a reference u/s 64(1) of the E.D. Act, 1953 (hereinafter referred to as " the Act "), arising out of proceedings for assessment of estate duty on the estate left by Sri Vasanda Ram who expired intestate on May 8, 1971. The respondent-accountable person, Smt. Laxmi Bai, is his widow. The deceased was a partner in M/s. Kala Ram Vasanda Ram (hereinafter referred to as " the firm ") having one-third share therein. He had a capital account in that firm and on August 28, 1970, he debited that account by Rs. 82,702.54 and in pursuance of a declaration made on August 20, 1970, impressed the same with HUF, character. Out of that amount he deposited Rs. 48,103 in the account of M/s. Vasanda Ram and Sons in the name of Vasanda Ram and Sons, HUF in the firm and further deposited Rs. 16,748 with M/s. Jamuna Lal Asan & Company, Bombay, Rs. 10,650 with M/s. Mohan Lal Hakim Chand, Ahmedabad, and Rs. 10,918 with M/s. Laxman Dass Kashi Ram, Surat, in the name of his joint family. In regard to the deposit of Rs. 48,103, the Asst. Controller took the view that the deposit amounted to a gift u/s 10 of the Act and since the deceased had not entirely excluded himself from benefits arising as a result of that deposit, the entire amount was liable to be added in the estate of the deceased under that section. He was further of the opinion that the throwing of this entire amount of

Rs. 82,703 into the common hotch-potch would amount to a disposition made without any consideration within the meaning of Section 27 of the Act and would be taken to pass on the death of the deceased. Thus, this entire amount was included by the Asst. Controller in the estate of the deceased.

2. Another item with which we are concerned in this reference was the value of the goodwill of the firm. In the opinion of the Asst. Controller each business has a goodwill and the same is a property passing on the death. In so far as the determination of the value of the goodwill was concerned he took into consideration the capital and profits for five years preceding the death of the deceased, the average of which came to Rs. 22,102 and 34,574, respectively. Allowing interest on capital at 10 per cent. and Rs. 6,000 by way of salary to the partners, the super profit came to Rs. 6,364 which when capitalised at three years" purchase price came to Rs. 10,092 and to the extent of the share of the deceased this value came to Rs. 6,364 and that was included in the principal value of the estate.

3. The accountable person appealed and disputed the inclusion of the aforesaid amounts in the principal value. The Appellate Controller took the view that Section 10 would not apply to the deposit of the amount of Rs. 48,103 but u/s 27 of the Act, the entire amount of Rs. 82,703 would be deemed to pass on the death of the deceased. As for the value of goodwill also the authority agreed with the Asst. Controller and thus the inclusion of both these amounts was confirmed. There was a further appeal taken by the accountable person before the Income Tax Appellate Tribunal. The Tribunal, disagreeing with the authorities below, took the view that throwing of one's own property into the common hotch-potch does not result in disposition, conveyance, assignment or settlement of the property and Section 27 was not attracted. In respect of the other item as well, the Tribunal took the view that no estate duty is leviable on such alleged share in goodwill, following the decision of the Punjab and Haryana High Court in Controller of Estate Duty Vs. Shri Ved Parkash Jain, and of the Gujarat High Court in Mrudula Nareshchandra Vs. Controller Estate of Duty, .

4. Now, at the instance of the Controller, the following two questions have been referred by the Income Tax Appellate Tribunal, Delhi Bench-D, for the opinion of this court :

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal was legally justified in excluding the sum of Rs. 82,702 added by the Assistant Controller u/s 10 and u/s 27 of the Estate Duty Act ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting an addition of Rs. 6,364 added by the Assistant Controller as deceased"s share of goodwill of the firm in which he was a partner ? "

5. We shall first take up question No. 2. We have already set out the facts relating to this question and there are two aspects of it which have to be considered. The first aspect is as to whether on the death of a partner the

goodwill passes when the firm continues as before and, secondly, whether the passing of the goodwill alone would be sufficient for the inclusion thereof in the estate of the deceased. So far as the first aspect is concerned, the matter stands squarely covered by a decision of the Supreme Court and another of this court. In *Smt. Kamlawati Raizada Vs. Controller of Estate Duty*, , it has been held that goodwill is an advantage which a trade or business develops by virtue of an action like the standing of the business, the personalities who are engaged in the business, its location and the like. These are qualities which a person who is carrying on the business develops by the method of doing business to attract customers. In *Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another*, , the Supreme Court has held that unless it was established that the right, to a share in the assets of a partnership firm, of a deceased partner has been extinguished on his death, the normal position is that the share of a partner in the assets devolves on his legal representatives and that this principle will apply to the goodwill and other assets of the partnership. It is thus established that the share of a partner in a partnership firm will devolve on the legal representatives of the deceased partner in the absence of anything in the partnership deed to suggest that on such death the heirs will not get any share in any particular asset including the goodwill. There is no material in the instant case to show that there is anything in the partnership deed to suggest that on the death of a partner his heirs will not get his share in the goodwill.

6. The same view has been taken by some other High Courts. In *Smt. Surumbayi Ammal Vs. Controller of Estate Duty*, , the view taken was that the existence of a goodwill depends on a number of considerations and merely because a person was only buying and selling common type of goods it could not be stated that there could be no goodwill at all in respect of that business. Another proposition laid down in that case was 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. The Punjab and Haryana High Court had in *Controller of Estate Duty Vs. Shri Ved Parkash Jain*, taken a contrary view that the share of goodwill of a deceased person in the assets of a firm does not pass on his death and hence it cannot be taken into account in the determination of the principal value of the estate of the deceased. That decision has been overruled by a Full Bench of that court in *State Vs. Prem Nath*, and it has been laid down that the goodwill of a firm is an asset of the firm, the share of the deceased partner in which, along with his shares in the other assets of the firm, devolves, for purposes of estate duty, on his death, upon his legal representatives notwithstanding any clause in the deed of partnership to the effect that the death of a partner shall not dissolve the firm and that the surviving partners are entitled to carry on the business on the death of the partner. Also see *Mahabir Prasad Poddar Vs. Controller of Estate Duty*, .

8. Therefore, in so far as the first aspect is concerned, the view taken by the

Appellate Tribunal is wholly erroneous and it has to be held that the goodwill of a firm is an asset and on the death of a partner his share in the goodwill passes to his legal representatives.

9. As for the other aspect, our attention was invited by Sri R. K. Gulati, learned counsel for the respondent-accountable person to a decision of the Gujarat High Court in *Mrudula Nareshchandra Vs. Controller Estate of Duty*, in which it has been held that a partner in a firm has a marketable interest in all the capital assets of the firm including the goodwill even during the substance of the partnership. Interest in the goodwill is property within the meaning of Section 2(15) of the Act but the goodwill of the firm standing by itself cannot earn any income. In a case, where it is specifically stipulated between the partners of a firm that on the death of any of the partners, the partnership shall not stand dissolved and that the heirs of the deceased partner shall have no right whatsoever to claim any share in the goodwill of the firm, the benefit arising to the other partners on the cessor of interest in the goodwill, on the death of one of the partners, cannot be measured in terms of Section 40, Therefore, such benefit is not liable to estate duty u/s 7.

10. Sri Gulati also relied upon a decision of the Calcutta High Court in *Controller of Estate Duty Vs. Annaraj Mehta and Deoraj Mehta*, , where it has been held that the entirety of the interest of the deceased partner that would pass, which necessarily includes goodwill, would be includible in the estate. The valuation of such entire interest had to be determined as required u/s 36 of the Act read with Rule 7(c) of the E.D. Rules. Goodwill as such cannot be valued for inclusion in the estate of the deceased for purposes of estate duty.

11. In our opinion these decisions have proceeded on their own facts. Goodwill may sometimes exist as an asset in the balance-sheet of a business but often it does not so exist and has to be brought into account by proper valuation. For the purpose of estate duty the goodwill of a business has to be valued at the date of the death and included in the valuation of the estate passing. This is, however, subject to an important rider.

12. Goodwill goes with the business and has no existence apart from the business itself. If goodwill is to be included as an asset of the business passing on the death by valuing it, it can be done only by the valuing of the assets and liabilities of the business and working out the net assets valued. Alternatively, even though goodwill may have a positive value worked out for it, based on the annual income of the business, if the overall assets of the business have for some reason been completely depleted in value, no prudent person will purchase the business merely because its goodwill has been worked out at a positive figure. As a general rule, therefore, goodwill as an asset can be included in the estate passing either when all the assets and liabilities of the business have been evaluated or when prima-facie they are proved to have a good positive value even without the goodwill. In the instant case no such controversy is involved for there is nothing to show that there was any stipulation between the partners of

the firm that on the death of any of the partners, the partnership shall not stand dissolved and the heirs of the deceased partner shall have no right to claim any share in the goodwill of the firm. There is also nothing on the record to show that the overall assets of the business have been completely depleted so that even for the positive value of the goodwill no prudent person will purchase the business. Goodwill being an asset and property within the meaning of Section 2(15) of the Act, in the normal course will devolve upon the legal representatives and its value as calculated on established commercial principles will be included in the principal value of the estate of the deceased.

13. So far as the determination of the value of the goodwill is concerned there is no dispute before us.

14. Now, coming to question No. 1, the facts have already been set out above and two aspects fall for our consideration. Firstly, whether the throwing of this amount by the deceased into the common stock of the family would attract the application of Section 27 of the Act and, secondly, whether the deposit of Rs. 48/103 out of that amount in the account of the HUF of the deceased would be deemed to pass on the death of the deceased for the reason that the deceased had not excluded himself from the benefit of the gifted property.

15. So far as the second aspect is concerned it may readily be disposed of since it is covered by a Full Bench decision of our own court rendered in *Controller of Estate Duty Vs. Thanwar Dass*, . What has been laid down in that case is that where a person makes a gift by adjustment entries in the books of account of a firm in which he is a partner and the money so gifted is not withdrawn by the donee but is allowed to remain with the firm, the donor must be deemed to have excluded himself from the benefit of the gifted property for the purpose of Section 10 of the Act as any benefit which the donee derived as a partner from the firm which held the money arose from the agreement of partnership and not from any agreement referable to the gift. There is a decision of the Supreme Court also on this point in the case of *Commissioner of Income Tax and Controller of Estate Duty, Madras Vs. N.R. Ramarathnam and Others*, . The facts of that case were that the deceased, his three sons and one daughter were partners in a firm which carried on money-lending business. On March 31, 1953 and April , 1956, the deceased transferred to his sons and daughter amounts totalling Rs. 1,29,924 by adjustment entry in the books of the firm against the balance to his credit in the firm. The amounts continued to remain with the firm and were utilised in the business and the deceased continued to be a partner of the firm till his death on October 17, 1960. A question arose in estate duty proceedings whether the sum of Rs. 1,29,924 could be included in the property passing on his death u/s 10 of the Act. The Appellate Tribunal took the view that the subject-matter of the gifts did not come within the purview of Section 10 and was not subject to estate duty. On a reference, the High Court of Madras as well took the view that the aforesaid amount was not liable to estate duty as property deemed to pass on the death of the deceased u/s 10. On further appeal, that

view was affirmed by the Supreme Court.

16. It would appear, therefore, that in respect of this amount of Rs. 48,103 it could not be treated as a property deemed to pass on the donor's death.

17. Coming to the main aspect of this question, Sub-section (1) of Section 27 provides that any disposition made by the deceased in favour of a relative shall be treated for the purposes of Section 9 of the Act as a gift unless either of two conditions are satisfied, viz., (1) the disposition was made on the part of deceased for full consideration in money or moneys worth paid to him for his own use and benefit; (2) the deceased was concerned, in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only. The expression " disposition " has not been defined in the Act. It can be by any of the modes stated in Section 9. Sub- Section (1) of Section 9 reads :

" 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. "

18. In the case of gifts made for public charitable purposes this period is six months. Further Sub-section (1) does not apply to gift made in consideration of marriage subject to a maximum of Rs. 10,000 in value as also 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 Rs. 10,000 in value. The expression *inter vivos* occurring in Sub-section (1) provides a key to its interpretation, In the Random House Dictionary of English Language (College Edn.) (Reprint 1976 at p. 699) one of the senses in which this expression can be used is : " *Inter vivos*: (Especially of gift or trust) taking effect during the lifetime of the parties involved. [Literally among (the) living]. " According to this definition, therefore, the expression *inter vivos* refers to a transaction between two or more living persons, that is to say, bilateral or multilateral transactions and not to a unilateral transaction .

19. Now what does " throwing into the common stock " imply ? A Hindu joint family is not a creature of contract. The existence of a coparcenary is absolutely necessary before a coparcener can throw into a common stock his self-acquired properties. The doctrine " throwing into the common stock ", in short, blending, thus postulates that the owner of the separate property is a coparcener and desires to blend his separate property with the coparcenary property. A separate property can be impressed with the character of joint family property if it is voluntarily thrown by him into common stock with the intention of abandoning, waiving or surrendering his separate right or exclusive right therein. Such impression is shown by a unilateral act. There is no question of either the family rejecting or objecting to it. It would thus be seen that there are only two

essential requisites for conversion of separate property into joint family property I (1) the existence of a coparcenary, and (2) a deliberate intention formed by the coparcener owning the separate property to treat the same as joint family property. For the expression of such intention of the coparcener concerned no particular form or formality is required. This question has been considered in a number of decided cases both of the High Courts and the Supreme Court and reference may be made to Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, , Alladi Kuppuswami Vs. Controller of Estate Duty, , CGT v. P. Rangasami Naidu, another Full Bench decision of the Madras High Court, reported at page 315 in the same volume. There is another decision of that High Court in A.N.K. Rajamani Ammal Vs. Controller of Estate Duty, .

20. In Rajamani Ammal, it was submitted on behalf of the revenue that Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, was a case arising under the Gift-tax Act in which the word " disposition " came up for consideration and that the meaning given therein to this expression could not be extended to the word " disposition " occurring in Section 27(1). This contention was repelled and it was observed, referring to the fact that in Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, , the decision in The Commissioner of Gift Tax, Madras Vs. P. Rangasami Naidu,

" It is true that these decisions are under the Gift-tax Act. It is also ? true that the word " disposition" was considered in these decisions with particular reference to the definition of "transfer of property" under that Act. We are of the view that the word "disposition" in section 27(1) of the Estate Duty Act also refers to a bilateral or multilateral act. The section refers to a disposition by the deceased in favour of a relative and also speaks of partial failure of consideration. Section 9 also refers to property " taken under a disposition ". Therefore, in our opinion, the word " disposition " in section 27(1), however wide its ambit may be, would not include the unilateral act of a person by which he throws his self-acquired property into the common stock of the joint family. "

21. The Bombay and the Kerala High Courts as well have taken the view that Section 10 of the Act does not apply to blending (vide Commissioner of Income Tax, Bombay City I Vs. M.M. Khanna, and Controller of Estate Duty Vs. Arunachalam Chettiar, .

22. Section 2(xxiv) of the G.T. Act defines the expression " transfer of property " and uses the words disposition, conveyance, assignment, settlement, delivery and payment as some of the modes of transfer of property. In The Controller of Estate Duty, Andhra Pradesh Hyderabad Vs. Kancharla Kesava Rao, , the import of these words came up for consideration. The view taken was that: " in spelling out the meaning of words in a section, one must take into consideration the setting in which those terms are used and the purpose that they are intended to serve ". If so understood, it is clear that the word " disposition ", in the context, means giving away or giving up by a person of something which was his own. "Conveyance" means transfer of ownership, " assignment " means the transfer of

the claim, right or property to another, "settlement " means settling a property, right or claim--conveyance or disposition of property for the benefit of another, " delivery " contemplated therein is the delivery of one's property to another for no consideration and "payment" implies gift of money by someone to another. Though that was a case of partition in an HUF and the view taken was that such partition cannot be regarded as a transfer of property within the meaning of Section 2(xxiv), in our opinion, the meaning given to these words can be applied to the meaning of the similar words occurring, in Section 9, viz., by way of transfer, delivery, declaration of trust, settlement upon persons in succession or otherwise. These words are preceded by the expression "gift inter vivos", which, in our opinion, involves a bilateral or multilateral transaction and not a unilateral transaction. We are thus of the opinion that the throwing of property into the common stock of the family does not involve any transfer of property and is not a disposition covered by Section 27(1) read with Section 9 of the Act.

23. Sri Ashoke Gupta, learned counsel for the revenue, invited our attention to a later decision of the Supreme Court given in *Controller of Estate Duty, Gujarat Vs. Kantilal Trikamlal*, . In that case on the partition of a HUF property the allotment of an unequal share to a coparcener had been treated as a disposition within the meaning of Expln. II to Section 2(15) of the Act and the part of share so relinquished was treated as property deemed to pass u/s 9(1) read with Section 27(1) and Expln, II to Section 2(15) when his death occurred within two years of the partition. According to Sri Gupta, this decision was given on July 19, 1976, while the decisions given by the Kerala High Court in *Controller of Estate Duty Vs. Arunachalam Chettiar*, and by the Madras High Court in *A.N.K. Rajamani Ammal Vs. Controller of Estate Duty*, and in *Controller of Estate Duty Vs. Smt. Mookammal*, had been given earlier and cannot be taken help of We are not inclined to agree with this submission because the case in. *Controller of Estate Duty, Gujarat Vs. Kantilal Trikamlal*, was of unequal partition. In a partition two or more than two persons are involved while in throwing one's self-acquired property into the common stock of the family it is only a unilateral act of the coparcener doing so which is involved. It is not, therefore, possible to extend the view taken in regard to an unequal partition to the throwing into common stock. We are thus inclined to take the view that the throwing of a separate property by a coparcener into the common stock of the joint family does not amount to disposition and it would not be a property deemed to pass u/s 9(1) read with Section 27(1) of the Act. Section 10 also is not attracted to such a transaction.

24. We, therefore, answer question No. 1 in the affirmative, in favour of the accountable person and against the department and the second question in the negative, in favour of the department and against the accountable person. In view of the divided success, there shall be no order as to costs.