
(1987) 03 CAL CK 0016
In the Calcutta High Court
Case No : Matter No. 1321 of 1979

Controller of Estate Duty

APPELLANT

Vs

Smt. Smriti Banerjee and Others

RESPONDENT

Date of Decision : 02-03-1987

Acts Referred:

Estate Duty Act, 1953 — Section 10, 64(3)

Citation : (1987) 65 CTR 175 : (1987) 166 ITR 814 : (1987) 34 TAXMAN 138

Hon'ble Judges : Shyamal Kumar Sen, J; Dipak Kumar Sen, J

Bench : Division Bench

Advocate : M.L. Bhattacharyya, R.N. Dutta, Amicus Curiae, for the Appellant;

Judgement

Dipak Kumar Sen, J.—The facts found or admitted as on record are, inter alia, that one Raghunath Banerjee died on June 4, 1963. After his death, his estate was assessed to estate duty in the hands of the accountable person. The initial assessment was made on February 2, 1968, which was subsequently revised on July 29, 1970, and January 10, 1972.

2. During his lifetime, the deceased by a deed dated March 25, 1959, made a gift of five immovable properties which were all let out, viz., premises Nos. 11A, 11/1A, 11B, 11/1B and 10/1, Radha Mohan Saha Lane Calcutta, to his son, Benoy Kumar Banerjee, absolutely and for ever and delivered possession of the same to the latter. It was declared in the said deed that there would be a charge upon the said properties given in the gift of Rs. 50 per month for payment of tax and cost of repairs of premises No. 25, Chorebagan Lane, Calcutta, during the lifetime of the deceased and his wife. It has been found that the deceased, during his lifetime, used the said premises No. 25, Chorebagan Lane, Calcutta, as his residence. The donee accepted the gift.

3. The Assistant Controller of Estate Duty reopened the assessment of estate duty and an order was passed on reassessment on August 2, 1972. It was held that as the deceased had reserved some benefit for himself in the said

immovable properties given in gift by him to his son, the said properties and the possession and enjoyment thereof were not retained by the donee to the entire exclusion of the donor and as such the said gift came within the mischief of Section 10 of the Estate Duty Act, 1953, and that the said properties should be deemed to pass on the death of the deceased. It was noted that in the original assessment, the value of the said properties given in gift had not been included in the estate and, therefore, escaped assessment. It was directed that a sum of Rs. 43,344 being the market value of the said five properties be included in the principal value of the estate which was enhanced accordingly.

4. Being aggrieved, the accountable person preferred an appeal against the order of the Assistant Controller of Estate Duty before the Appellate Controller. It was submitted before the Appellate Controller on behalf of the accountable person, inter alia, that only the value of the properties to the extent of the benefit reserved by the deceased for himself and not the entire value of the properties should have been included in the principal value of the estate. In support of such contention, a decision of this court in the case of Rajputana Textiles (Agencies) Private Ltd. Vs. Das Gupta, Income Tax Officer/excess Profits Tax Office and Another, was cited.

5. The Appellate Controller accepted the contention of the assessee and following the decision in the case of Rash Mohan Chatterjee and Others Vs. The Controller of Estate Duty, W. Bengal, , as also another decision of the Andhra Pradesh High Court in the case of MOHAMMED BHAI AND ANOTHER Vs. CONTROLLER OF ESTATE DUTY, A.P., , held that only the value of the properties to the extent of the benefit reserved by the deceased for himself should be included in the principal value of the estate. As the deceased was entitled to receive Rs. 600 per year out of the net income from the properties given in gift, the benefit should be computed by multiplying the said assessment by a factor of 16. The addition to the estate was computed at Rs. 9,600.

6. Against the order of the Appellate Controller, the Revenue filed an appeal before the Income Tax Appellate Tribunal. It was contended on behalf of the Revenue before the Tribunal that there was no dispute that Section 10 of the Estate Duty Act, 1953, was applicable in the facts and, therefore, the entire value of the said properties given in gift should have been included in the principal value of the estate. The decision in the case of MOHAMMED BHAI AND ANOTHER Vs. CONTROLLER OF ESTATE DUTY, A.P., , was sought to be distinguished and reliance was placed on a decision of the Allahabad High Court in Shrimati Sarwari Kahtoon Vs. Controller of Estate Duty, . The Revenue also cited and relied on two decisions of the Supreme Court, viz., George da Costa v. CED [1961] 63 ITR 497 and Controller of Estate Duty, Madras Vs. Parvathi Ammal, .

7. It was contended on behalf of the assessee that the words "to the extent" as appearing in Section 10 of the Estate Duty Act, 1953, had to be given effect to.

8. The Tribunal noted that the properties given in gift had been let out and the market value of the said properties was computed by capitalising the net income from the properties by 16 times. The Tribunal noted that by the deed of gift, a limited charge to the extent of Rs. 50 per month had been created on the said properties. By applying the decisions of Controller of Estate Duty, Madras Vs. Parvathi Ammal, and Rajputana Textiles (Agencies) Private Ltd. Vs. Das Gupta, Income Tax Officer/excess Profits Tax Office and Another, , the Tribunal upheld the order of the Appellate Controller and dismissed the appeal of the Revenue.

9. On an application by the Revenue u/s 64(3) of the Estate Duty Act, 1953, the Tribunal, as directed, has referred the following questions as questions of law arising out of its order for the opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case, and on a proper interpretation of the deed of gift dated twenty-fourth day of March one thousand nine hundred and fifty-nine, the Tribunal was right in law in holding that only a sum of Rs. 9,600 (rupees nine thousand six hundred) being the capitalised value of the charge on the properties gifted by the deceased to the extent of Rs. 50 (rupees fifty) per month will pass on the death of the deceased and it is includible in the estate for the purpose of Estate Duty Act, 1953 ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal misdirected itself in law in holding that the reservation did not extend to the entire extent of the benefit reserved by the deceased for the purpose of Section 10 of the Estate Duty Act, 1953 ?

(3) Whether, on the facts and in the circumstances of the case and in view of the fact that the deceased had created a charge of Rs. 50 (Rupees fifty) per month on all the five house properties gifted by him, the Tribunal was right in law in holding that the aggregate value of the properties did not pass on the death of the deceased u/s 10 of the Estate Duty Act but only the capitalised value of the benefit could be included in the estate for the purpose of the Estate Duty Act, 1953 ?"

10. At the hearing of this reference, no one has appeared on behalf of the assessee. We invited learned advocate Mr. R.N. Dutt to act as amicus curiae.

11. Learned advocate for the Revenue contended that in the instant case, the deceased had intended to give in gift the said five immovable properties to his son absolutely. By reason of the charge created on the said properties, the donee was unable to assume immediate benefit, possession and enjoyment of the properties and could not retain such possession to the entire exclusion of the deceased person or to the exclusion of the benefit reserved in favour of the deceased person by the contract. It was submitted that Section 10 of the Act of 1953 was clearly applicable to the facts and the Tribunal ought to have held that the full value of the immovable properties should be deemed to pass on the death of the deceased.

12. Mr. R.N. Dutt drew our attention to the subsequent decisions of the Supreme Court and other courts on the question. The decisions cited at the Bar are noted hereafter :

(a) Rajputana Textiles (Agencies) Private Ltd. Vs. Das Gupta, Income Tax Officer/ excess Profits Tax Office and Another, . In this case, the deceased during his lifetime made a gift of certain house properties by way of a settlement on trust for the benefit of his sons, their wives and grandsons. On the day after the settlement was executed, the trustees executed a lease of a portion of the property to the deceased on a monthly rent for a period of five years. After the expiry of the lease, the demised portion continued to be occupied by the deceased as a tenant till his death after eleven days. On these facts, it was held by a Division Bench of this court that only that portion of the property which was occupied by the deceased under the lease would be deemed to pass on his death and the value of only that portion should be included in the principal value of the estate.

(b) George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore, . In this case the deceased made a gift of a house purchased in the joint names of the deceased and his wife out of the funds of the deceased to their sons. It was recorded in the deed that the donees had accepted the gift and had been put in possession. It was found that the deceased continued to reside in the house even after the gift was made and looked after the affairs of the house. On these facts the Supreme Court by applying the decision of the Privy Council in the case of Clifford John Chick v. Commissioner of Stamp Duties [1959] 37 ITR 89 and the decision of the Australian court in the case of Commissioner of Stamp Duties v. Owens, 88 CLR 67, held that the said property would be deemed to pass on the death of the deceased u/s 10 of the Act of 1953 and the entire value of the property was Correctly included in the estate of the deceased.

(c) MOHAMMED BHAI AND ANOTHER Vs. CONTROLLER OF ESTATE DUTY, A.P., . In this case, the deceased had made a gift of his business in stationery goods and certain house properties to his sons. After the gifts were made, the sons made payments to the deceased regularly at the rate of Rs. 200 per month and also paid to the deceased a sum of Rs. 16,902 towards the marriage expenses of the daughter of the deceased. The question arose whether on the death of the deceased, the value of the said business and the house properties given in gift should be included in the estate. It was held by a Division Bench of the Andhra Pradesh High Court on these facts that the payments made on account of marriage expenses of the daughter of the deceased were subsequent acts and not referable to the gifts and, therefore, the same did not attract Section 10 of the Estate Duty Act, 1953. So far as the business was concerned, it was held that only that part of its value which was relatable to the monthly payment of Rs. 200 by the donees should be deemed to pass on the death of the deceased and was includible in the principal value of the estate.

(d) Shrimati Sarwari Kahtoon Vs. Controller of Estate Duty, . In this case, the

deceased had transferred two properties to his son reserving to himself an annuity of Rs. 10,000 for his life. It was held by a Division Bench of the Allahabad High Court that the transaction amounted to a gift with a condition reserving a benefit retained by the donor and as such the transaction would fall within the mischief of Section 10 of the Estate Duty Act, 1953.

(e) *Controller of Estate Duty Vs. R. Kanakasabai and Others*, . In this case, the deceased made several gifts of properties in favour of his sons, grandsons, daughters and wife absolutely. The deeds in favour of the sons and grandsons provided for a payment of Rs. 1,000 per annum to the settlor, the deed in favour of the daughter provided for maintenance of the settlor and his wife during their lifetime and in the deed in favour of the wife it was only recorded that the settlor expressed a hope that the wife will maintain him during his lifetime. No charge was created on the properties gifted for the aforesaid payment or maintenance. On these facts, it was held by the Supreme Court that in order to attract Section 10, the benefit to the donor by contract or otherwise must be referable to the properties gifted. It was not sufficient that the donor derived benefit arising from the transactions resulting in the gifts. In the absence of any charge on the properties, it could not be said that the donor had retained any interest or benefit in the properties or possession thereof by the donees. None of the properties which were gifted was liable to be included in computing the principal value of the estate. In this case, the Supreme Court did not find it necessary to consider the meaning of the words "to the extent" occurring in Section 10 of the Act of 1953.

(f) *CED v. Smt. Parvati Ammal* [1914] 97 ITR 621. In this case, the deceased by a deed made a gift of a property where he was carrying on business absolutely to his five sons in equal shares. Thereafter, the deceased took the same properties on a lease from the sons and carried on his business therein as before. Subsequently, the deceased executed a sub-lease of the said business including the premises to a third party. On these facts, it was held that the entire value of the property and not merely the value of the right to possession and enjoyment in the hands of the deceased as a lessee, was liable to be included in the principal value of the estate. The Supreme Court noted that the subject-matter of the gift was full ownership in the property without any diminution. The Supreme Court noted the decision of this court in *Rajputana Textiles (Agencies) Private Ltd. Vs. Das Gupta*, Income Tax Officer/excess Profits Tax Office and Another, and held that the words "to the extent" in Section 10 of the Estate Duty Act, 1953, would mean that if the donee did not assume beneficial possession and enjoyment of a part of the gifted property and retained it to the entire exclusion of the donor or of any benefit to him by contract or otherwise, estate duty shall be payable only in respect of that part or fraction of the property given in gift.

(g) *Controller of Estate Duty, Kerala Vs. R.V. Viswanathan and Others*, . In this case, the deceased was the sole proprietor of a business. With the intention of

converting the business into a partnership with his four sons, he transferred in the books of the business a sum of Rs. 45,000 to the credit of each of the four sons. A partnership was thereafter constituted. Subsequently two other minor sons of the deceased were admitted to the benefits of the partnership when the deceased similarly transferred a sum of Rs. 45,000 to the credit of each of them from his personal account in the partnership.

The question arose whether the said amounts transferred in favour of the sons and continued to be used in the partnership business where the deceased was a partner would be included in the principal value of the estate on the death of the deceased. It was held by the Supreme Court on the above facts that the deceased had transferred 6/7ths shares in the business and retained 1/7th share therein. There was no question of inclusion either of the 6/7ths shares or of the amounts transferred to the credit of the sons in the estate of the deceased. The transfer of the money was made in favour of the sons subject to the condition that the same would be used as capital in the partnership business and not for any benefit to the deceased. No benefit was conferred in the deed of partnership to the deceased.

The Supreme Court held that where the gift was made without reservation or qualification or condition and carried the right of exclusive possession and enjoyment therein, subsequent enjoyment by the donor of the benefits in the property given in the gift by way of possession or otherwise would attract Section 10 of the Estate Duty Act, 1953. The Supreme Court, however, held that where the gift was subject to certain rights or the subject-matter of the gift was property shorn of certain rights and the possession or enjoyment of some benefit in that property by the donor, can be ascribed to the rights subject to which the gift is made or rights shorn of which the property is gifted, then in such case, the subject-matter of the gift would not be deemed to pass on the death of the deceased. The Supreme Court applied the decision of the Privy Council in the case of *H.R. Munro v. Commissioner of Stamp Duties* [1934] AC 61.

(h) *Controller of Estate Duty, A.P. Vs. Godavari Bai*, . In this case, the deceased who was a partner in a firm of bankers issued a cheque for Rs. 3 lakhs in favour of the firm against his account in the firm with the object of making a gift of Rs. 1 lakh each to his three minor grand-nephews. The account of the deceased was debited with the said amount and, on the same date, three accounts in the name of the minor donees were credited with the sum of Rs. 1 lakh each. The amount continued to stand in the name of the donees till the deceased died.

13. On these facts, the Supreme Court held that the transaction in question amounted to gifts of actionable claim of the value of Rs. 3 lakhs out of the entire right, title and interest of the deceased in the firm. The gift, however, was shorn of certain rights in favour of the partnership and the possession or enjoyment of the benefit retained by the deceased was referable to the partnership rights and had nothing to do with the gifted property. The Supreme Court applied the decision of the Privy Council in the case of *H.R. Munro* [1934] AC 61 and

observed as follows (head-note) :

"The question whether gifted property should be regarded as a part of the estate of the deceased donor passing on his death for the purpose of Section 10 of the Act would depend upon as to what precisely is the subject-matter of the gift and whether the gift is of absolute nature or whether it is subject to certain rights. If the gift is made without any reservation or qualification, that is to say, where the gift carries the fullest right known to law of exclusive possession and enjoyment, any subsequent enjoyment of the benefit of that property by way of possession or otherwise by the donor would bring the gift within the purview of Section 10 ; but where the gift is subject to some reservation or qualification, that is to say, if the subject-matter of the gift is property shorn of certain rights and the possession or enjoyment of some benefit in that property by the donor is referable to those rights, i.e., rights shorn of which the property is gifted, then in that case, the subject-matter of the gift will not be deemed to pass on the death of the deceased donor. In other words, if the deceased donor limits the interest he is parting with and possesses or enjoys some benefit in the property not on account of the interest parted with but because of the interest still retained by him, the interest parted with will not be deemed to be a part of the estate of the deceased donor passing on his death for the purpose of Section 10 of the Act."

14. On a consideration of the facts and circumstances of the instant case, it appears to us that the subject-matter of the gift by the deceased was not the said five immovable properties absolutely and in their entirety. By the deed under which the gift was made, the properties which were the subject-matter of the gift were shorn of certain rights in favour of the donor. What the donee received under the gift is not the said five immovable properties absolutely but the said properties subject to the charge of the said Rs. 50 payable per month for the benefit of the donor. This gift, therefore, was not made without any reservation or qualification. The deed of gift has to be read as a whole and on a proper construction, it would appear that the donee received the said gift subject to the aforesaid reservation or qualification in favour of the donor. The retention of the benefit in the property in favour of the donor is referable to the rights of which the property gifted was shorn of in favour of the donor. The donor in the instant case derived benefit which arose from the very transaction which resulted in the gift. This is not a case where after the donor had made an unqualified and unconditional gift, a subsequent contract or arrangement was entered into by and between the donor and the donee whereby the donor came to obtain benefit from the properties given in gift.

15. By reason of the aforesaid, it appears to us that the principle laid down by the Supreme Court in the cases of *Controller of Estate Duty Vs. R. Kanakasabai and Others*, , *Controller of Estate Duty, Kerala Vs. R.V. Viswanathan and Others*, and *Controller of Estate Duty, A.P. Vs. Godavari Bai*, will apply in the instant case and the property which would be deemed to pass on the death of the deceased owner would be the subject- matter of the gift, i.e., the property subject to the

charge.

16. The conclusion arrived at by the Tribunal appears to be correct and we see no reason to interfere with it. Accordingly, we answer question No. 1 in the affirmative, question No. 2 in the negative and question No. 3 in the affirmative, all in favour of the assessee.

17. There will be no order as to costs. We record our appreciation of the assistance rendered by the amicus curiae.

Shyamal Kumar Sen, J.

18. I agree.