
(1980) 10 GUJ CK 0017

In the Gujarat High Court

Case No : Estate Duty Reference No. 8 of 1975

Controller of Estate Duty, Gujarat

APPELLANT

Vs

Babubhai T. Panchal

RESPONDENT

Date of Decision : 07-10-1980

Acts Referred:

Estate Duty Act, 1953 — Section 2(15), 39(1)

Citation : (1981) 21 CTR 229 : (1982) 133 ITR 455

Hon'ble Judges : S.B. Majmudar, J; B.J. Diwan, J

Bench : Division Bench

Advocate : N.U. Raval, for the Appellant; J.P. Shah, for the Respondent

Judgement

Divan, C.J.—In this case, at the instance of the revenue, the following question has been referred to us for our opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the provisions of Explanation 2 of section 2(15) were not attracted in this case with regard to release by the deceased and, accordingly, deleting the inclusion of the sum of Rs. 72,668 as 1/3rd share of the deceased in the HUF movable property ?"

2. The facts are that the deceased in this case was one Trikamlal P. Panchal who died on March 3, 1964. The deceased, Trikamlal, was a member of an HUF consisting of himself, his wife and his son. The HUF owned both movable and immovable properties. The deceased executed a deed of release on January 29, 1964, and by this deed he released his interest in the movable property only out of the total property belonging to the HUF. He released this interest in movable property in favour of other members of the HUF without any consideration whatsoever. In the document he made it clear that he had not released his interest so far as the immovable properties of the joint family were concerned. In the recitals, he made it clear that he was desirous of releasing his rights, title and interest and all other interest in the movable property of the said joint family

including the business of B. Trikamlal & Company and goodwill thereof and the persons in whose favour the interest was being released were to keep all movable properties and the said business subject to the payment of debts and liabilities of the said joint family including that of the business. In the operative part, the document mentioned :

"..... releasor hereby without any consideration whatsoever, releases, relinquishes and assigns unto the said releases, their executors, administrators all the rights, titles and interest, claims and demands of him in all the movable properties including business belonging to the said joint family to the intent that all the movable properties including the business of the said joint family shall belong to the releases as members of the family subject to the payment of debts and liabilities of the joint family and freed and discharged from all rights, title and interest of the releasor."

3. On these facts, in the assessment for estate duty, the Asst. Controller held that the release deed in question was not an instrument of partition but a release deed simpliciter and thereby there was relinquishment or renunciation by the deceased of his one-third share of the movable properties of the joint family and as such as the relinquishment or release amounted to extinguishment at the expense of the deceased of his right in the HUF, it had to be deemed to be a disposition in favour of his wife and son within the meaning of Expln. 2 to s. 2(15). As the release deed was executed within a period of two years before his death, one-third share of the HUF in the movable property was held liable to estate duty under s. 9 read with Expln. 2 to s. 2(15) of the Act. This one-third share of the movable property was value at Rs. 72,668. The Asst. Controller included this amount in the principal value of the estate of the deceased.

4. On appeal by the accountable person, the Appellate Controller confirmed the order of the Asst. Controller.

5. The matter was carried in further appeal by the accountable person to the Income Tax Appellate Tribunal and the Tribunal held that there was no partition and since it could not predicated of the right of a Hindu coparcener as to what his share in the joint family property would be, Expln. 2 to s. 2(15) of the Act was not attracted. The Tribunal, therefore, deleted the inclusion of Rs. 72,668 as one-third share of the deceased in the movable property of the HUF. Thereafter, at the instance of the revenue, the question hereinabove set out has been referred to us for our opinion :

Before proceeding further with the discussion of facts and authorities, we would refer to some of the relevant provisions of the E. D. Act, 1953. Under sub-s. (15) of s. 2, "property" has been defined to include 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 sub-s. (15) of s. 2 is material for the purposes of this judgment and is in these words :

"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."

6. Under s. 27(1) of the Act :

"Any disposition made by the deceased in favour of a relative of his shall be treated for the purposes of this Act as a gift unless -

(a) the disposition was made on the part of the deceased for full consideration in money or money's worth paid to him for his own use or benefit; or

(b) 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;

and references to a gift in this Act shall be construed accordingly....."

7. The rest of the provisions of s. 27 are not material for the purposes of this judgment. Section 9 is one of the group of sections which deal with property which is deemed to pass on the death of the deceased. Under s. 9 :

"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....."

8. Under s. 5 :

"In the case of the every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate..... which passes on the death of such person, a duty called "estate duty" at the rates fixed in accordance with section 35....."

9. Therefore, either the property which passes on the death or property which is deemed to pass on the death of the deceased has to be included in the principal value of the estate of the deceased and on that principal value, estate duty at the rates fixed in accordance with s. 35 has to be paid.

10. So far as the operation of s. 2(15) and Explan. 2 to S. 2(15) are concerned, there has been a recent decision of the Supreme Court in *Controller of Estate Duty, Gujarat Vs. Kantilal Trikamlal*, where the entire legal position regarding this aspect of the law has been clearly explained by the Supreme Court. It must be pointed out that, on the facts of that case, there was a partition of the joint Hindu family property and at the time of that partition, the "karta" who was the deceased in that case, had taken an amount of rupees one lakh. On November

16, 1953, an instrument, styled release deed, was executed by and between the deceased, Trikamlal, and his son, Kantilal, and by this release deed the deceased released all rights, title and interest in the properties of the HUF except to the extent of rupees one lakh and the son, Kantilal, released his right, title and interest in that amount of rupees one lakh. It was ascertained that the share of the deceased on partition was worth Rs. 3,44,058 whereas the amount of rupees one lakh had become worth Rs. 1,06,724 by virtue of the addition of interest to the amount of rupees one lakh and the question was whether the amount of Rs. 2,37,334, being the difference between Rs. 3,44,058 and Rs. 1,06,724, could be included in the principle value of the estate of the deceased. On these facts, the Supreme Court held that the difference was includible in the principle value of the estate of the deceased in view of Explan. 2 to s. 2(15) and ss. 9 and 27 of the E. d. Act, 1953. The death had taken place in that case within two years of the execution of the release deed. The Supreme Court there held that the term "disposition" was not a term of art nor legalise but a plain English word of wide import. What was more, the word had acquired, beyond its normal ambit, an extended meaning on account of the special definition in s. 2(15) with Explan. 2 super added. Explanation 2 was deliberately designed to take into its embrace what otherwise might not be disposition or conform to its traditional concept, and the expression "other right" in Explan. 2 to s. 2(15) was of the widest import and could not be constricted by reading it ejusdem generis with "debt". The Supreme Court has pointed out at p. 99 :

"We will first unlock Explanation 2 to section 2(15), discover the signification of 'property' expanded by the comprehensive provisions of section 9, 27, and 5. The key concept that underlies this fascicles of sections is property, the tax being charged on property passing on death. Considerable controversy has raged not only on the boundaries of the notion of 'disposition' as specially defined, by importing a legal fiction, but on the slightly ticklish and tricky placement in section 9 of the expression 'bona fide made two years or more before the death of the deceased'."

11. Again at p. 101, it is observed :

"Shri Desai (learned counsel for the accountable person) contends, and rightly, that the deceased could not dispose of any interest in property which did not earlier vest in him or at least at the time of the disposition. No right can be given up without its being vested in him when he gives up. This hypothesis in law turns the searchlight on the existence, at the time of the release or partition, of what has been disposed of under that deed. What then was disposed of ? And did the deceased own at the time of disposition what he thus made over or extinguish ? An answer to these twin questions may be readily given, once we clear the confusion that has crept in at certain stages of the argument, by a process of inept importation and imperfect understanding of the rule of Hindu law regarding coparcenary.

The proposition is trite that in an undivided Hindu family, coparceners have no

predictable or defined shares but each has an antecedent title in every parcel of property and is jointly the owner and in enjoyment with the others. But surely it is well established that at the very moment members decide upon a partition eo instanti, a division in status takes place whereupon the share of the demanding member gets crystallised into a definite fraction and if there is division by metes and bounds the allotment of properties vivifies and specifies such shares in separate ownership. These two processes or stages may often get telescoped when by consensus the coparceners jointly divide the properties. Unequal divisions of properties knowingly made may not spell invalidity and mathematical equality may not be maintained always in a partition while, ordinarily, substantial fairness in division is shown. Granting these legal positions, the more serious question which has been agitated before us is as to whether a willing, albeit bona fide, arrangement whereby a substantially reduced share is taken by the decedent, consequently vesting a proportionately larger estate in the recipient, is a disposition falling within Explanation 2 to section 2(15)....."

12. The Supreme Court in the case of Controller of Estate Duty, Gujarat Vs. Kantilal Trikamlal, overruled the decision of the Gujarat High Court Kantilal Trikamlal Vs. Controller of Estate Duty, Gujarat, and confirmed the decision of the Madras High Court in Ranganayaki Ammal and Others Vs. Controller of Estate Duty, . The Supreme Court also distinguished the cases of The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar, and The Controller of Estate Duty, Andhra Pradesh Hyderabad Vs. Kancharla Kesava Rao, , both being decisions of the Supreme Court. But the principal point which the Supreme court laid down in Controller of Estate Duty, Gujarat Vs. Kantilal Trikamlal, was that though ordinarily no transfer of property takes place under the principles of Hindu law when a partition is effected between coparceners, yet, from the point of view of estate duty, by virtue of the special definition set out in s. 2(15) read with ss. 27 and 9, there was a disposition within the meaning of the E. d. Act so as to attract the provisions of s. 27(1) and s. 9 if other conditions were satisfied, in case one of the coparceners received a lesser share than what was due to him at the time of partition. The Supreme Court also approved the decision of the Full Bench of the Punjab and Haryana High Court in Controller of Estate Duty Vs. Jai Gopal Mehra, . In each of the three cases, namely, in the cases of Kantilal Trikamlal Vs. Controller of Estate Duty, Gujarat, , in the Madras case of Ranganayaki Ammal and Others Vs. Controller of Estate Duty, _ and in Controller of Estate Duty Vs. Jai Gopal Mehra, , there was an actual partition and what happened was that, on that partition, either by the release deed or by the terms of the partition deed itself, one of the coparceners had received a lesser share than what was strictly due to him. Similar was the case in the SMT. CHERUKURI ESWARAMMA Vs. CONTROLLER OF ESTATE DUTY., . It is easily understood that when there is partition but on partition one of the coparceners receives or disclaims his share for a lesser amount or completely, there will be a disposition in the light of the share for a lesser amount or completely, there will be a disposition in the light of the Supreme Court decision in Controller of Estate Duty, Gujarat Vs. Kantilal

Trikamlal, as the provisions of ss. 9, 27(1) and s. 2(15), Explan. 2, of the E. d. Act would come into play.

13. However, the facts before us are quite different. There was in fact no partition either notional or severance of status or partition by metes and bounds. All that the deceased did by this release deed was to extinguish his right in the movable property of the HUF. It is a trite saying that the principles of Hindu law or personal law will continue to apply unless they are displaced by specific provisions of the E. d. Act. Section 39(1) of the E. D. Act can be cited as a specific instance where the Legislature has departed from the provisions of Hindu law regarding coparcenary property. Under the provisions of Hindu law on the death of a coparcener his interest in the joint family property passes to his survivors and other coparceners and not to his heirs who would be heirs on testate or intestate succession. This was the position prior to the enactment of the Hindu Succession Act, 1956. However, even prior to the enactment of the Hindu Succession Act, s. 39(1) of the E. d. Act has provided that a notional partition is deemed to have been effected a short while before the death of the deceased and whatever the deceased would have got as on that notional partition is to be added to the principal amount of his estate as part of the property which passes on his death. Therefore, it is clear that unless there is a specific provision in E. d. Act, like s. 39(1), making a departure from the general principles of Hindu law, the principles of Hindu law would continue to apply.

14. In *Attorney-General of Ceylon v. A. R. Arunachalam Chettiar* [1958] 34 ITR 20, the Privy Council dealt with the basic principles of Hindu law regarding coparcenary property. In that case, a father and son, who died domiciled in India on February 23, 1938, and July 9, 1934, respectively, were immediately before the son's death, the only living coparceners of a Hindu joint family, governed by the Mitakshara system of Hindu law, which had extensive trading and other interests in India, Ceylon, and other far eastern countries. The father, on the son's death, became the sole surviving coparcener, but there were also female members of the HUF who were entitled to maintenance out of the joint family property. Moreover, it was competent for the surviving widow of the son to adopt a son who would thus become a coparcener with the father and the father himself, and, after his death, his surviving widow had a similar power of adoption. On a claim by the revenue that the son's "half share" of the assets of the business carried on by the family in Ceylon was subject to estate duty as being either "property passing on the death of the deceased", within the meaning of s. 7 of the Ceylon Estate Duty Ordinance, 1919, or "property of which the deceased was at the time of his death competent to dispose" or in which he had an interest "ceasing on his death" to the extent to which a benefit accrued or arose by the cesser of such interest within ss. 8(1)(a) and 8(1)(b), respectively, of the Ordinance, it was held by the Privy Council that it was a misuse of language to say that a coparcener had a "half share" or any "share" of the family property; the essential nature of his interest was that whilst the family remained undivided he could not predicate that he had a certain definite share. Ad

although a coparcener had rights such as those of partition and alienation-which gave colour to the view that he had what might be called a "share"-as against that the karta (head) of the family had the duty, inter alia, to maintain out of the family property not only the coparceners but the female members of the family, and to provide for such family purposes as education, marriage and religious ceremonies. In such circumstances, it could not be said that the son had a "share" of the property which "passed" on his death within s. 7 of the E. d. Ordinance of Ceylon. It was further held that although the son could at any time during his lifetime have obtained his share of the family property by partition, it would be little less than absurd to stretch "competency to dispose" in s. 8(1)(a) to the extent of assuming that the son would take the necessary preliminary step of separating from his family-a step which for economic, sentimental and traditional reasons might be utterly repugnant to him. Further, if and in so far as far as "competency to dispose" rest upon a right to obtain partition, the family property included interests outside Ceylon, and it could not be assumed in favour of the appellant that, had there been a partition, any part of the property in Ceylon would have fallen to the share of the son. It could not be said, therefore, that the son was at or immediately before his death "competent to dispose" of the "half share" of the Ceylon property of the undivided family. It was further held by the Privy Council that for s. 8(1)(b) to be applicable there must be not only a cesser of interest in property, but also a benefit arising by such cesser; and, further, the benefit as provided by s. 17(6) of the Ordinance, must be capable of valuation by reference to the income of the property which the deceased had enjoyed. In that particular case, the son merely had a right to be maintained by the karta out of the common fund to an extent in the karta's absolute discretion, and there was no basis of valuation which in relation to such an "interest" would conform to the scheme prescribed by s. 17(6). Nor upon a cesser of that "interest" could a "benefit" of any value be said to have accrued to the surviving coparcener when the son's interest lapsed. It may be pointed out that in the second case of Attorney-General of Ceylon v. AR. Arunachalam Chettiar (No. 2) [1958] 34 ITR 42, the earlier decision in AR. Arunachalam Chettiar (No. 1) 's case [1958] 34 ITR 20 was approved and the second case of Ar. Arunachalam Chettiar [1958] 34 ITR 42 was approved by the Supreme Court Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore, . It is true that in Controller of Estate Duty, Gujarat Vs. Kantilal Trikamlal, , the Supreme Court approved of the following passage from Green's Book on Estate Duty, at p. 103 of the report (105 ITR) :

"` A disclaimer is an extinguishment of a right for this purpose. Although in the event the person disclaiming never has any right in the property, he has the right to obtain it : this inchoate right is a "right" for the purposes of section 45(2). The ejusdem generis rule does not apply to the words "a debt or other right" and the word "right" is a word of the widest import. Moreover, the expression "at the expense of the deceased" is used in an ordinary and natural manner; and is apt to cover not only cases where the extinguishment involves a loss to the deceased

of a benefit he already enjoyed, but also those where it prevents him from acquiring the benefit.

15. The words "the person for whose benefit the debt or other right was extinguished" do not necessitate a conscious intention to benefit some person; it is sufficient that some person was in fact benefited. The motive or purposes of the deceased appears to me to be immaterial, provided the transaction was gratuitous and did in fact benefit the other person concerned.

16. The extinguishment of a right may also cover the release of his interest by one joint tenant in favour of another.'" (Green's death Duties, 7th Edn., Butterworths, p. 149).

17. It has been pointed out by the Supreme Court that Expln. 2 to s. 2(15) of the E. d. Act, 1953, is similar to s. 45(2) of the provisions in the English statute, and on that basis these principles have been made applicable.

18. In the light of this passage from Green's Book on Death Duties, it has been held by the Supreme Court that the right of a coparcener to demand a partition and on such demand to obtain his legitimate share in the joint family property is an inchoate right and the words "debt or other right" occurring in Expln. 2 to S. 2(15) would cover such an inchoate right. But the question still remains whether it is possible to say of such an inchoate right, that by the release or extinguishment of such an inchoate right extinguishment has taken place at the expense of the deceased and a benefit has been passed to other coparceners. When an actual partition take place, it is clear that the share of the disponer in the property becomes known and vested and the value of that share can be very easily ascertained as at the date of disclaimer or release. But when it comes to an inchoate right of the type with which we are concerned in the present case, namely, the right of a Hindu coparcener in the movable property of the HUF, the question that we have to ask ourselves is, how can such a right be valued at all? As the Privy Council has pointed out in Arunachalam Chettiar's case, it is a misuse of the language to say that the coparcener had any such right or share in the HUF property. His right is to demand partition and on such demand to obtain his due share. Until such a demand is made, it is not possible for anyone to predicate what his exact share is or what the value of his share in a Hindu coparcenary property is. There is no notional partition provided for in Expln. 2 to s. 2(15) as has been provided in s. 39(1) of the E. d. Act. In the absence of any provision enacting either expressly or by necessary implication such notional partition, it must be held that though there is a release of an inchoate right inasmuch as it cannot be predicated that the disclaimer or the release was at the expense of the deceased or that there was corresponding benefit to the other coparceners, there cannot be said to be a disposition of property within the meaning of Expln. 2 to s. 2(15). It is only the difference between the correct value of the share of a coparcener and the reduced amount which he obtains on partition that is said to constitute property within the meaning of Expln. 2 to s. 2(15). If for some reason the value cannot be fixed, then, as pointed out by the

Privy Council in Arunachalam Chettiar's case, in the context of the Ceylon Ordinance and as has been observed by a Division Bench of this High court in Mrudula Nareshchandra Vs. Controller Estate of Duty, , the provisions of estate duty will fail because of the impossibility of correct evaluation. The Division Bench in Mrudula Nareshchandra Vs. Controller Estate of Duty, has pointed out (head note) :

"Every taxing statute contemplates the levy of a tax or duty on the valuation which is arrived at on the principles enunciated in the statute itself. If the valuation principles stated in the statute cannot be worked out with any precision in respect of any property it would follow as a necessary corollary that that property is not one which is intended to be subject to the tax or duty contemplated by the statute."

19. Thus, it is obvious that so far as the release of the type before us is concerned, though it is a disclaimer of an inchoate right, yet it is not "disposition of property" because from the very nature of things and the basic principle of Hindu coparcenary property which has not been dislodged in the instant case, it is not possible to predicate as to what would have been the correct value of the share of the deceased coparcener in the movable property of the HUF at the time of the release. Unless it is possible to arrive at the valuation of that right which was being released or disclaimed by the deceased, it is not possible to say that it was property which was being disposed of looking to the provisions of Explan. 2 to s. 2(15). In our opinion, not attracted to the facts of this case.

20. Under these circumstances, we answer the question referred to us in the affirmative, that is, in favour of the accountable person and against the Controller of Estate Duty. The Controller will pay the costs of this reference to the accountable person.