
(1978) 11 MAD CK 0027
In the Madras High Court
Case No : T.C. No. 330 of 1974

Controller of estate Duty, Madras

APPELLANT

Vs

Leelavathi Devi, Madras

RESPONDENT

Date of Decision : 21-11-1978

Acts Referred:

Estate Duty Act, 1953 — Section 10, 64(1)

Citation : AIR 1979 Mad 177 : (1979) ILR (Mad) 1 : (1979) 117 ITR 97

Hon'ble Judges : Sethuraman, J; Ratnavel Pandian, J; Ismail, J

Bench : Full Bench

Judgement

Ismail, J.—One Shri Govindram Shivaldas was carrying on a proprietary business. On 24-10-1965 he debited his capital account in the

business with Rs. 15,000/- and opened an account in the name of his son Kailash and credited the said amount of Rs. 15,000/ to that account. The

business was conducted as a proprietary concern till 8-11-1966. An amount of Rs. 1906/- was credited to the account of Kailash as interest.

Thus, on 8-11-1966 the amount standing to the credit of Kailash in the books of the proprietary concern of Shri Govindram Shivaldas was Rs.

16,906/-. The proprietary concern of Shri Govindram Shivaldas was converted into a partnership concern with effect from 9-11-1966 by the son

Kailash becoming a partner along with the father. The credit balance of Rs. 16,906/- in the account of Kailash was transferred to the books of the

firm and was credited in the name of Kailash as his capital contribution to the business of the firm. The credit balance in the account of Kailash in

the firm's books as on 15-9-1969, when Shri Govindram Shivaldas died, was Rs. 37,268/-. In the assessment to the estate duty, after the death

of Shri Govindram Shivaldas, the Assistant Controller held that out of the said

sum of Rs. 37,268/- the amount of Rs. 15,000/- originally gifted by the deceased to Kailash was includible in the principal value of the estate of the deceased. According to the Assistant Controller, the mere passing of entries in his books of account did not have the effect of divesting the deceased of the domain over the amount in question. Against the order of the Assistant Controller, the accountable person preferred an appeal to the Appellate Controller, who confirmed the conclusion of the Controller.

Against the order of the Appellate Controller, the accountable person took the matter on further appeal to the Tribunal and before the Tribunal, on behalf of the accountable person, reliance was placed on the decisions of the Supreme Court in *Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder*, and the *Commissioner of Income Tax and Controller of Estate Duty, Madras Vs. N.R. Ramarathnam and Others*, , and it was contended that Section 10 of the Estate Duty Act was inapplicable. This contention of the accountable person was resisted by the Department. However the Tribunal held that Sec. 10 did not apply to the amount in question. In paragraph 6 of its order, the Tribunal pointed out:

The Supreme Court has observed in *Ramachandra Gounder's* case that the possession which the donor can give is the legal possession which the circumstances and the nature of the property would admit. In this case the gift was not of cash simpliciter. It was part of the capital of the business which was being carried on by the deceased as a proprietary concern. In our opinion, such a possession, as stated by the Supreme Court, was given by the donor to the donee in this case. Merely because the donee thought it wiser to allow the fund to remain in the business from which he was earning interest just as he might have done had he lent it to someone else, it would not meant that he was in any way deprived of his absolute right, title and interest in the fund. This of course is on the supposition that there was a valid gift on 24-10-1965, if there was no such gift as stated earlier, the gift was effective on 9-11-1966 and there would be no doubt that *Ramarathnam's* case would apply in that event.

In view of the statement occurring in the penultimate sentence of the above paragraph, namely, ""this of course is on the supposition that there was a valid gift on 24-10-1965"", it is necessary to refer to what the Tribunal records in paragraph 6 of its order. In that paragraph the Tribunal states:

Although one of the stands taken by the Assistant Controller is that there was no valid gift effected by means of entries passed in the books of the proprietary business of the deceased, the learned Departmental Representative specifically stated that he was not urging that there was no valid gift effected on 24-10-1965. This, however, was not by way of any concession because evidently the learned Departmental Representative realised that if the view is taken that there was no valid gift on 24-10-1965 then there would be a valid gift by the deceased to Kailash on 9-11-1966 when the amount was credited in the account of Kailash in the books of the firm and the decision of the Supreme Court in the case of Ramachandra Gounder as well as in the case of Ramarathnam would equally apply. Thus it will be seen that the Tribunal proceeded on the basis that there was a valid gift on 24-10-1965 and that in spite of that the gift will not be hit by Section 10 of the Estate Duty Act.

2. It is with reference to this order of the Tribunal alone that the Controller of Estate Duty Madras, applied for and obtained u/s 64(1) of the Estate Duty Act the reference of the following question for the opinion of this Court. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the sum of Rs. 15,000/- included in terms of Section 10 of the Estate Duty Act, is not includible to the principle value of the estate of the deceased?

This reference came before the Hon''ble the Chief Justice and Ramanujam, J. the learned Judges referred the case to a Full Bench. While doing so, the learned Judges observed:

It would have been easier for us to render an independent opinion ourselves but for the apparent disagreement in the treatment of the subject by

the Supreme Court and by our own High Court. In Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, ; Commissioner of

Income Tax and Controller of Estate Duty, Madras Vs. N.R. Ramarathnam and Others, ; Controller of Estate Duty, Kerala Vs. R.V. Viswanathan

and Others, the Supreme Court expressed the view that the benefit which a donor might have as a member of a partnership, in circumstances more

or less similar to those of the present case, was not a benefit referable in any way to a gift, but was unconnected therewith. But, in similar

circumstances, this Court in Radhabai Ramchand Vs. Controller Of Estate Duty,

Madras, (to which one of us was a party), after referring to Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, held that such sums gifted by the donor to a donee should still be deemed to be a benefit reversed by the donor, as by his involvement in the partnership concern he had the benefit of the user of the money which was the subject-matter of the earlier gift. This opinion expressed in Radhabai Ramchand Vs. Controller Of Estate Duty, Madras, was followed in Controller of Estate Duty Vs. S.M.M. Subramanian Chettiar, . As, in our view, there is at least scope for a contention one way or the other, which would lead to a leaning towards the accountable person, if the Supreme Court decisions are accepted according to their tenor, or a leaning towards the Department, if we are inclined to apply the ratio of Radhabai Ramchand Vs. Controller Of Estate Duty, Madras, et seq. it is conducive in the interests of justice and uniformity, that this reference is answered by a Full Bench. The matter will therefore be placed before a Bench of three Judges for final decision.

3. If we may say so with respect, the learned Judges have very carefully used the expression ""apparent disagreement"" because really there is no disagreement between the decisions of the Supreme Court and those of this Court. The learned Judges themselves have referred to three decisions of the Supreme Court and we shall first consider those decisions.

4. The facts in Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, are as follows: One Ramaiah Gounder was a partner in the firm called N. Desai Gounder & Co., Coimbatore. He owned property which the firm was occupying as tenant-at-will. In August, 1953, he executed a deed of settlement under which he transferred the property leased out to the firm to his two sons. Lingiah and Krishnan, absolutely and irrevocably. After this transfer, the firm continued to be in occupation of the premises paying rent thereof at Rs. 300/- p. m. to the two donees by crediting each of their accounts in the account books of the firm in equal shares. In addition, the deceased Ramaiah had also an account with the firm, Desai Gounder & Co., and on March 30, 1953, he requested the firm by a letter to transfer from his account five sums of Rs. 20,000/- each with effect from 1st April, 1953, to the credit of his five sons in the firm's books. He also wrote to the five sons informing them of the transfer.

Though the sons did not withdraw any amount from their accounts in the firm, the amounts continued to be invested in the firm for which interest at

7½% per annum was paid to them. Ramaiah died on 5th May, 1957. In the assessment to estate duty of his estate, the question that came to be

considered was whether the value of the house and the sum of Rs. One lakh credited in the names of the five sons would be includible in the

assessment of estate duty of the estate of the deceased by application of Section 10 of the Act. We are concerned in the present case only with the

treatment given to the sum of rupees one lakh because the settlement of the house property will stand on a different footing altogether. The

Supreme Court at p. 452 (of ITR): (at p. 843 of Tax LR) of the report stated:

There is no doubt, on the facts of this case, the first conditions are satisfied because there is an unequivocal transfer of the property and also of the

money, in the one case by a settlement deed, and in the other by crediting the amount of Rs. 20,000/- in each of the sons' account with the firm

which thenceforward became liable to the sons for the payment of the said amount and the interest at 7½% per annum thereon. In these

circumstances, the revenue has failed to establish that the donees had not retained possession and enjoyment of the property or the amount and

that the deceased was not entirely excluded from the possession and enjoyment thereof.

The reference to two conditions is necessarily relatable to Section 10 of the Estate Duty Act. Section 10 of the Estate Duty Act, 1953, reads as

follows:--

Property taken under any gift, whenever, made, shall be deemed to pass on the donor's death to the extent that bona fide possession and

enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him

by contract or otherwise.

It is unnecessary to refer to the two provisos to this Section.

5. With reference to this section, the Supreme Court in Controller of Estate Duty, Kerala Vs. R.V. Viswanathan and Others, stated that the section

must be grammatically construed and pointed out:

The crux of the Section lies in two parts:

(1) the donee must bona fide have assumed possession and enjoyment of the property, which is the subject-matter of the gift, to the exclusion of the donor, immediately upon the gift, and (2) the donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him, by contract or otherwise. Both these conditions are cumulative. Unless each of these conditions is satisfied, the property would be liable to estate duty u/s 10 of the Act." From what we have pointed out above, it is clear that the facts of the case before the Supreme Court are different from those of the case before us and there is no general principle laid down by the Supreme Court in that case applicable to the facts of the present case.

6. The second decision of the Supreme Court is Commissioner of Income Tax and Controller of Estate Duty, Madras Vs. N.R. Ramarathnam

and Others, . That judgment is comparatively a short one. In that case, the deceased, his three sons and a daughter were partners in a firm which

carried on money-lending business. On 31st March, 1953 and 1st April, 1956 the deceased transferred to his sons and daughter amounts totaling

Rs. 1,29,924 by adjustment entries 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 17th October, 1960. The question was

whether the sum of Rs. 1,29,924 could be included in the property passing on his death u/s 10 of the Estate Duty Act. The Supreme Court

concurring with the High Court held that Section 10 did not apply to that case. At p. 3 (of ITR): (at p. 1452 of Tax LR) of the report the Supreme

Court extracted the following passage from the statement of the case submitted by the Tribunal:

They contended that after the amounts were transferred by the deceased to his daughter and sons, the amounts were in the absolute control and

powers of the donees who were partners in the firm and that the mere fact that they thought it wiser to allow the said funds to remain in the

partnership business as their own capital would not deprive them of their absolute right, title and interest in the funds. It was further contended that

the possession and control retained by the deceased over the funds gifted to them were not referable to the gifts themselves, but to the partnership

which was already in existence prior to the date of the gifts, and that, therefore, Section 10 was not applicable. The accountable persons relied

upon the decision in the case of *Munro v. Commr. of Stamp Duties* 1934 AC 61. On the other hand, the contentions of the department were that

as the deceased continued to be in effective management of the business of the partnership even after the gift, and he was thus exercising effective

control over the funds of the partnership, including the amounts gifted by him to the donees, the deceased cannot be deemed to have been entirely

excluded from the possession and enjoyment of the amounts gifted or from the benefits therefrom. The department relied upon the decision in the

case of *Clifford John Chick v. Commr. of Stamp Duties* 1958 AC 435.

After extracting another portion from the statement of the case, the Supreme Court indicated its conclusion in the following terms:

The question of law arising for decision is completely covered by our decision in the *Controller of Estate Duty, Madras Vs. C.R. Ramachandra*

Gounder, . Mr. Karkhanis, the learned counsel for the department, sought to satisfy us that that decision requires reconsideration. We have not

permitted him to reargue the question of law which has already been concluded by our decision. Following that decision we affirm the decision of

the High Court and dismiss the appeal with costs.

Thus, it will be seen that the Supreme Court has not laid down any new principle in the *Commissioner of Income Tax and Controller of Estate*

Duty, Madras Vs. N.R. Ramarathnam and Others, and merely followed its earlier decision in *Controller of Estate Duty, Madras Vs. C.R.*

Ramachandra Gounder, and therefore what we have observed with regard to the former case will apply to the latter case also.

7. The next decision of the Supreme Court is *Controller of Estate Duty, Kerala Vs. R.V. Viswanathan and Others*, . In that case the deceased was

the sole proprietor of two business concerns. With a view to converting the business of the two concerns into a partnership with his four major

sons, the deceased transferred a sum of Rs. 45,000/- from his personal account to the credit of each of the four sons of September 12, 1955. A

partnership deed was executed on September 17, 1955, by the deceased and his four sons the sum of Rs. 45,000/- transferred to each of them

being treated as their share capital. On September 18, 1955, two minor sons

were also admitted to the benefits of the partnership and the deceased similarly transferred a sum of Rs. 45,000/- from his personal account in the firm to each of his minor sons. Upon the death of the deceased on November, 18, 1960, the question arose whether the sum of Rs. 2,70,000/- being the aggregate of the amounts transferred by the deceased from his personal account to the credit of his six sons could be included in the estate passing on his death u/s 10 of the Estate Duty Act, 1953. The Supreme Court affirming the decision of the High Court took the view that the transfer of Rs. 45,000/- by book entries in favour of each of the four major sons on September 12, 1955, and in favour of each of the minor sons on September 18, 1955, the execution of the partnership deed on September 17, 1955, and of the other agreement on September 18, 1955, were all parts of one integrated transaction the object of which was to bring about transfer of six-sevenths share of the deceased in his business in favour of his sons so that he and his sons might have each one-seventh share therein. At p. 665 (of ITR): (at p. 213 of Tax LR) of the report the Supreme Court stated:

The Tribunal also expressed its full agreement with the following observations made by the Assistant Controller:

From the facts of the case it is clear that the gift in favour of the sons represented amounts transferred by book entries to the account of each of the sons who were admitted to the partnership and that it does not actually represent cash sums of Rs. 45,000 as such. By virtue of these transfer entries the sons of the deceased got a share in the business. Thus the gift cannot be construed as a gift of cash but it only represented a gift of a share in the business. By virtue of this gift, the sons had necessarily to become partners. The subject matter of the gift is the investment in the business and such investment was compulsory or, in other words, gift was for the specific purpose of admission into the business as partners and for no other purpose."

The above finding of the Tribunal has been arrived at upon the material facts and relevant circumstances of the case and in answering the question referred to by the Tribunal, we must proceed upon the basis of the correctness of the above findings. Although Mr. Mehta has tried to assail that finding, nothing cogent has been brought to our notice as might indicate any

infirmity in that finding. The circumstances of the case indeed point to the conclusion that the said finding is well founded.

In the light of the finding that the deceased transferred six-sevenths share in the business in favour of the sons and retained only one-seventh share,

no question can possibly arise for the inclusion of the said six-sevenths share or of the amount of Rs. 2,70,000 in the estate of the deceased. The

transfer of Rs. 2,70,000 by the deceased in favour of his sons was not in cash but was by means of book entries. The transfer of that amount was

a part of the scheme, as stated above, to transfer six-sevenths in the business in favour of the sons. There was no absolute transfer of Rs. 2,70,000

in favour of the sons but the transfer was made subject to the condition that the sons would use it as capital, not for any benefit of the deceased

donor but for each of them becoming entitled to one-seventh share in the business. No benefit of any kind was enjoyed by way of possession or

otherwise by the deceased under the gift or the subject-matter of the gift. Whatever benefit was enjoyed by the deceased subsequent to the date of

the gift was on account of the fact that he held one-seventh share in the business, which share he retained throughout and never parted with. No

extra benefit was also conferred under the deed of partnership upon the deceased although some extra benefit as conferred upon two of the major

sons in the form of remuneration because of their active and full participation in the business. Keeping in view the position of law discussed earlier,

it is plain that the facts of the case would not fall within the ambit of Section 10 of the Act.

8. We have extracted fairly in extenso portions from the aforesaid three decisions of the Supreme Court only of the purpose of showing that the

facts of those cases are do different from the facts of the present case that the ratio of the decision in those cases can have no application to the

facts of the present case.

9. We shall now refer to the decisions of this Court which had been mentioned in the order of reference. The first of them is Radhabai Ramchand

Vs. Controller Of Estate Duty, Madras, . In that case, the deceased gifted a sum of Rs. 15000 to each of his four sons on April 1, 1955, totaling

Rs. 60,000/-. The gifted amounts were originally invested elsewhere by later they were invested in the firm in which the deceased was a partner.

The deceased also gifted further sums totaling Rs. 25,000/- to three his sons by making appropriate entries in the books of the firm in which he

was a partner. The amounts continued to stand to the credit of the sons in the books of the firm till the death of the deceased on 28th July, 1963.

This sum of Rs. 85,000/- was subjected to estate duty by reason of the provisions of Section 10 of the Estate Duty Act, 1953, and that was

confirmed by the Tribunal. The correctness of the conclusion of the Tribunal came up for consideration before this Court on a reference. This

Court made a distinction between the two sums, viz. Rs. 60,000/- and Rs. 25,000/-. With regard to the sum of Rs. 60,000/- this Court held that

when that amount was invested in the firm in which the deceased was a partner, it ceased to be held by the donees to the entire exclusion of the

deceased and was, therefore, liable to be included in the principal value of the estate of the deceased u/s 10 of the Act and with regard to the sum

of Rs. 25,000/- this Court, after expressing its opinion that the said sum also can be included, if they were cash gifts, but, if they were made in the

form of book entries, the same was not includible, directed the Tribunal to determine the factual position. After referring to certain decisions and

the provisions contained in Section 10 of the Estate Duty Act, 1953, this Court stated (at pp. 935, 936 of Tax LR):--

Having considered the scope of Section 10, let us now consider as to whether the donees in this case have assumed bona fide possession and

enjoyment of the monies gifted immediately on gifts and retained possession and enjoyment of the same to the exclusion of the donor or of any

benefit to him. So far as the sum of Rs. 60,000 is concerned, admittedly the donees were recipients of the cash gifts from the deceased and the

amounts were invested by them with a third party. Therefore, the donees should be taken to have assumed possession and enjoyment of the gifted

amounts immediately after the gifts are made. It is not the case of the revenue that any benefit has been created in favour of the donor by contract

or otherwise. Therefore, the only question is whether the donees continued to retain possession and enjoyment of the gifted amounts to the entire

exclusion of the donor. As already pointed out, though the amounts gifted were invested at the first instance with a third party for some time, later

they came to be invested in the firm of which the deceased was partner. Can it be said that the deceased has been excluded from possession and

enjoyment of the monies?

After examining the decided cases, this Court held that it could not be said that the deceased had been excluded from possession and enjoyment of

the monies and therefore the said amount was includible in the dutiable estate of the deceased. We may point out that except for one difference,

the facts of the above case are very near to our present case, the difference being that in that case the donee had originally invested the money with

third party and thereafter brought it into the firm of which the donor had been a partner and in the present case the money was invested in the

business of the donor himself and subsequently it was brought into the partnership of which the donor and the donee became partners, as capital

contribution of the partners.

10. The next decision of this Court is *Controller of Estate Duty Vs. S.M.M. Subramanian Chettiar*, . In that case one Muthukaruppan Chettiar

who was a partner of Messrs. S.M. Firm died on 19th October, 1961. He made gifts during his lifetime to his married daughter, grandsons and

son. Later he executed deeds evidencing the transaction. The amounts continued to remain with the firm and the interest and other receipts from

time to time were also credited to the said account, the drawings by the parties being debited to that account. The daughter purchased a house in

1937, the consideration being debited to her account in the books of the firm. As a result of the credit of the amount gifted to her, her account

showed a credit balance. The amount standing to the credit of each of the persons in the books of the firm were included in the estate duty

assessment of the deceased by the application of S. 10 of the Estate Duty Act. The said inclusion was confirmed on appeal, but the Tribunal on

further appeal held that S. 10 was not applicable. It was that decision of the Tribunal which came up to this Court on reference. This Court held

that if the Subject matter of the gift, namely, the balance at credit was in the shape of an actionable claim to which the provisions of the Transfer of

Property Act applied, the transfer would be subject to the rights of the partnership; but if the amounts were gifted in cash, then there will be nothing

to show that the gifts are subject to any particular condition of user in the partnership in which the deceased was a partner. Accordingly this Court

pointed out that the Tribunal would have to decide whether the subject-matter of

the gift was an actionable claim or cash and if it was an actionable claim S. 10 would not apply. While in the case of a cash gift the section would be applicable. In this case this court also made a distinction between a current account and a capital account, which a partner may be having with the firm, and the debt entries being made in the capital account and the current account and pointed that when a debit entry is made in the current account, it is tantamount to withdrawal of cash and paying it over to the donee, while in the case of capital account when a debit entry is made, that will constitute only an actionable claim as if it is a debt due, which was recognised by the partners as payable on demand and its recovery could be enforced against the firm without recourse to a suit for dissolution.

11. In the course of the judgment, this Court observed:

The above discussion would go to show that we have to first ascertain the subject-matter of the gift. We have to see whether it was merely an existing balance in the shape of an actionable claim in which event the provisions of the Transfer of Property Act should have been adhered to.

Then the transfer would be subject to the rights of the partnership. If, however, the amounts were gifted in cash, then, there will be nothing to show

that the gifts are subject to any particular condition of user in the partnership in which the deceased was a partner. The question as to whether the

relevant debits were made in the account of the deceased at the time when he was a partner so that what he had could be treated as an "actionable

claim" has not been specifically gone into. If the debit was made in the books of the individual there would be no question of any "actionable claim".

Therefore, the Tribunal would have first to ascertain in the proceedings to follow under S. 64(6) the nature of or the subject-matter of the gift to

see if it is an "actionable claim" or if it is a gift of cash. If it is a gift of cash, no further consideration is likely to arise as the authorities are clear on

the point that the amount is liable to be taxed by applying S. 10. If it was a transfer of "actionable claim", S. 10 would not apply. This question has

to be considered as at the point of time when the gifts were made.

12. The last decision which was not referred to in the referring order is again a decision of this Court in CONTROLLER OF ESTATE DUTY,

MADRAS Vs. V. S. SURYANARAYAN., In that case the deceased who was carrying

on a proprietary business credited his two sons and the widow and son of a predeceased brother with a sum of Rupees 10,950/- each on October 1, 1957, by debiting his account for the total amount.

This amount was treated as their capital contribution in the firm in which the deceased was also a partner, which took over the said proprietary business from that date. The deceased subsequently on October 25, 1957, executed a settlement deed by which he settled on his minor son, who had been admitted to the benefits of the partnership, among others, the house and ground in which the partnership business was being carried on.

The Assistant Controller of Estate Duty considered that the Gifts of Rs. 10,950/- to each of the four donees totaling Rs. 43,800/- and the value of the house estimated at Rs. 65,000/- gifted to the minor son were includible in the estate of the deceased by reason of S. 10 of the Estate Duty Act, 1953, in the view that though there were gifts of these amounts and the house to the respective donees, they did not retain possession of the same to the exclusion of the donor subsequent to the gift. This order was confirmed by the Appellate Controller. The Tribunal, however, on further appeal held that there was a cash gift of Rs. 10,950/- on October 1, 1957, to each of the donees, who became entitled to these amounts absolutely, and when the partnership was formed, the donees contributed this amount as their capital and hence S. 10 was not attracted. The Tribunal further held that even in regard to the settlement of the house, there was a genuine gift, though the business of the firm in which is the deceased was a partner continued to be carried on in the same premises, the firm paying rent to the donee and hence S. 10 was not applicable. On reference to this Court, at the instance of the Department, this Court held that there was a completed gift of money by making the credit and debit entries in the proprietary concern of the donor and since the amount was available in the proprietary concern, there was no restriction on the donor in the matter of disposal of the money and there was no dispute about the acceptance of the gifts by the donees and hence the gifts was of the money which was absolute and not shorn of any rights over the same. This Court also held that in respect of the capital account of a donor in a proprietary concern, it could not be said that he had only an actionable claim which he could have gifted; that the right of a donor in respect of his

money in a proprietary concern is unrestricted and when an entry is made crediting the depositor, it cannot be assumed that any right was retained

by the donor with respect to the amount gifted as the right of the proprietor in a proprietary concern will not come within the definition of

"actionable claim" in Section 3 of the Transfer of Property Act and that the gifts by the donor were absolute and unrestricted. This Court further

held that on the investment of the amounts in the partnership the condition relating to the retention of possession and enjoyment to the entire

exclusion of the donor was not satisfied in that case and therefore S. 10 was clearly attracted in respect of the gifted monies. It is unnecessary to

refer to that decision dealing with the settlement of the house, as it is not relevant for the purpose of the present case. This case is partially similar to

the present case except for the minor difference, namely that in the present case there had been an interval of time between the making of the gift

and the formation of the partnership, while in the case considered in the above decision the gift was made and the partnership was formed

subsequently on the same date.

13. It is against the background of the above decision that we have to consider the question whether there is any disagreement between the three

decisions of the Supreme Court referred to above and the two decisions of this Court to which the referring Bench made reference in its order. We

are of the opinion that there is no disagreement at all. All that the Courts have done is to point out the difference between a partner debiting his

capital account in the partnership and crediting a third party with the amount in an account in the partnership business itself and the owner of a

proprietary concern debiting his capital account in the business and crediting a third party with that amount in an account opened in the said party's

name in his proprietary business. There is undoubtedly a fundamental difference between the two. In the case of proprietary concern, all the assets

and the liabilities of the business are exclusively those of the owner and he has absolute control over the same. In the case of a partnership, no

individual partner can be said to be the owner of even a part of the assets and similarly a partner cannot be said to be separately and exclusively

liable in respect of any specified item of the liabilities of the firm. Hence in the present case, when the father on 24th October, 1965 debited his

capital account in his proprietary concern and credited that amount in the name of his son in the account with his firm itself, it must be construed as

if the father drew the sum of Rs. 15,000/- from his own business and paid over the same to his son, who in turn deposited the amount in the

business of the father for the purpose of earning interest thereon. In a case where the transaction itself is not real, there will be no gift whatever and

there is no need to rely upon Section 10 of the Act, because the subject-matter of the alleged gift would continue to be property of the donor and

would remain so on the date of his death. Only when the transaction is a real transaction and there is a completed gift, there is scope for the

applicability of Section 10. As we have pointed out already, in this case, the Tribunal had stated that the gift was a completed gift and the donee

acquired full and exclusive right to the money in question. If so, it was certainly open to the donee to invest the money wherever he liked; but in this

case he chose to invest the money with his father himself in the business which he carried on. From this point of view, it cannot be stated that from

the moment of the donee, namely, the son, taking complete possession of the subject-matter of the gift, he continued to have that possession to the

total exclusion of the donor, namely, the father. On the other hand, the very subject matter of the gift which is cash in the present case, was utilised

by the father in the business run by him in consideration of his paying interest to his son on the amount invested by him. Therefore even though the

donee can be said to have assumed bona fide possession and enjoyment of the property gifted, he cannot be said to have retained the same to the

entire exclusion of the donor.

14. We may point out in this contest that it was not the case of the accountable person nor was it the finding of the Tribunal that at the time when

the father made the gift on 24th October, 1965, it was subject of the condition that the donee should invest the money in the business of the father.

If such a condition has been found, then it can be said that the subsequent enjoyment of the money by the father was not with reference to the

subject-matter of the gift, but with reference to the right observed at the time of making the gift itself. That not being the case, it was the subject-

matter of the gift that was enjoyed by the father subsequently.

15. Mr. Subramaniam, learned counsel for the accountable person, at one stage

of his argument sought to contend that the subject-matter of the gift in the present case was not cash, but only an actionable claim. We are unable to accept this argument. As we have pointed out already, in the case of a proprietary concern, the owner of the business is exclusively and wholly entitled to all the assets and liabilities of the business and therefore when he debits his capital account, it is not as if he is creating a liability as against him in favour of some other person, but he only draws his own money from the business and therefore, the conception of actionable claim will be foreign to such a situation.

16. Under these circumstances, we are of the opinion that the Tribunal committed an error and we answer the question referred to this Court in the negative and in favour of the Revenue. The Revenue will be entitled to its costs. Counsel's fee Rs. 500/- (Rupees Five hundred only).

17. Answer in the negative.