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**(1981) 01 BOM CK 0045**

**In the Bombay High Court**

**Case No : Estate Duty Reference No. 2 of 1965**

Controller of Estate Duty, Nagpur

APPELLANT

Vs

Imranali Hassanali

RESPONDENT

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**Date of Decision : 16-01-1981**

**Acts Referred:**

Estate Duty Act, 1953 — Section 10

**Citation : (1984) 150 ITR 557 : (1985) 22 TAXMAN 473**

**Hon'ble Judges : M.N. Chandurkar, J;M.H. Mohta, J**

**Bench : Division Bench**

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## **Judgement**

Mohta, J.

"Whether, on the facts and in the circumstances of the case, the provisions of section 10 of the Estate Duty Act, 1953, were applicable to (a) the sum of Rs. 88,789 gifted to the son and grandsons, (b) the house properties valued at Rs. 35,000 and gifted to the son and grandson, and (c) 11/16th share of the goodwill in the firm ?"

1. The aforesaid question referred under s. 64(1) of the E.D. Act 1953 (for short "the Act") at the instance of the Revenue arises in the following factual backdrop.

2. One Shri Hassanali Mohammadali dies on December 21, 1960. Estate duty assessment arises consequent on his death. Deceased carried on business along with his son, Shri Imranali, in the name and style of M/s. Hassanali Mohammadali up to the year 1951. Up to and including the assessment year 1952-53, this business was assessed in the status of an AOP. On October 30, 1951, a partnership deed was executed to which the deceased his son, Imranali, and two of his grandsons, Shri Abdullabhai and Mohammadbhai were parties. Share of the deceased was to the extent of five annas. On that day, which was a Diwali day, the deceased had a credit balance of Rs. 1,29,147 in his capital account. He gifted a sum of Rs. 88,789 out of the same to his son and grandsons by debit to his capital account and credit to the respective accounts of the

donees. These amounts remained in the books of the firm as capital contributed by the respective parties till the time of his death. In addition to the gifts of money mentioned above, the deceased gifted a house property under a registered deed in favour of Imranali in 1954. It was in his house that the business of the partnership was being carried and continued to be carried on. No rent was payable by the firm either before or after the gift. The value of this property was taken at Rs. 20,000 in the estate duty assessment. Similarly, there was a gift of a residential house to Shri Abdullabhai under a registered document executed again in the year 1954. The donor and the donee were residing in the said house together and the deceased continued to live there even after the gift till his demise. This property was valued at Rs. 15,000. There is no dispute regarding valuation. Value of goodwill of the firm was assessed at Rs. 40,000. In a letter dated December 30, 1961, the Assistant Controller of Estate Duty set out his proposal for making the assessment and invited objections from the accountable persons. Reply was given, After considering the objections, the value of all these items was added relying on s. 10 of the Act, holding that the donees had not assumed possession and enjoyment to the entire exclusion of the donor in all the cases. The items so added were of the value of Rs. 1,63,789 made by as follows :

Rs. (1) Gift to son and two grandsons of amounts transferred from his capital account 88,789 (2) Goodwill of the firm 40,000 (3) House property gifted to Imranali 20,000 (4) House property gifted to Abdullabhai and used as residential house 15,000 ----- 1,63,789 -----

3. In an appeal carried at the instance of an accountable person, the Appellate Controller confirmed the assessment, but in the second appeal, the Income Tax Appellate Tribunal took different view of the matter and reversed both the decisions. It was held that the sum of Rs. 88,789 gifted to the son and grandsons was not includible as belonging to the estate of the deceased and could not be deemed to have passed on the death of the deceased by application of s. 10. Similar view regarding gift of the house properties was taken. As regards the goodwill, it was held that the whole of its value was not includible in the estate duty assessment. What was held includible under this head was only the extent of the deceased's share to the firm. The Controller applied for a reference. It was granted. But the question was reframed.

4. We may at the very outset refer to the stand taken by the accountable person. According to him the son and the grandsons of the deceased were actively helping him in the business and were working without any salary or remuneration. The deceased was a very old person and out of filial love and affection he gifted the properties and delivered possession. The deceased did not reserve any benefit for himself in the basis gifted properties which the donees started enjoying to the entire exclusion of donor. The income accruing to his son and grandsons, who were partners in the business, were appropriated by them for their own use, and the deceased was entirely excluded from any use thereof.

The whole of goodwill under the circumstances set out above could not belong to the deceased only. As regards immovable properties, it was contended that after the transfer, the properties were mutated in the respective names of the donees and even the taxes were paid by them. In the house property gifted to Imranali partnership business was being carried on much before the gift. Partnership was not paying any consideration to the deceased and this arrangement or licence was continued as before by the donee even after the gift. The deceased occupied the residential house at the instance and with the grace of the donee. We may notice that the findings recorded by the Tribunal are in consonance with the stand taken by the accountable person. These established facts are thus the basis for examining the points of law raised.

5. Before proceedings to deal with the question, it will be appropriate to keep the actual language of s. 10 of the Act before us. It reads thus :

"10. 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 henceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

Provided that the property shall not be deemed to pass by reason only that it was not, as from the date of the gift, exclusively retained as aforesaid if by means of the surrender of the reserved benefit or otherwise it is subsequently enjoyed to the entire exclusion of the donor or of any benefit to him for at least (two years) before the death :

Provided further that a house or part thereof taken under any gift made to the spouse, son, daughter, brother or sister shall not be deemed to pass on the donor's death by reason only of the residence therein of the donor except where a right of residence therein is reserved or secured directly or indirectly to the donor under the relevant disposition or under any collateral disposition."

"The second proviso to the section has been added by the Central Act 10 of 1965, and the same is made applicable with effect from April 1, 1965. This amendment has also replaced the period of one year in the first proviso by two years. In the present matter, the amendment cannot have any direct bearing and, hence, we have to examine the provisions as they originally stood before the amendment. In *George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore*, it has been held that the crux of s. 10 lies in two parts : (i) 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 (ii) 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. The second part has two limbs; the donee must have retained possession and enjoyment to the entire exclusion of (i) the donor of the property or (ii) any benefit by contract or otherwise. These two limbs of the second condition are alternative though the conditions set out in the two parts are

cumulative. The word "otherwise" has been held to be ejusdem generis in the context and must be interpreted to mean some kind of obligation enforceable under either law or equity which may confer a benefit on the donor though not in the form of a contract. Having laid down the ratio, the Supreme Court held on facts that it was a case of a gift of the house property by the head of the family. He continued to live in the house as head of the family and was looking after the affairs of the house as before even after the gift. It was held on the basis of these established facts that though no benefit was reserved by contract or otherwise, reliance on mere filial affection could not repel attraction of s. 10 under the circumstances.

In *Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder*, , the deceased had leased his house to a firm in which he was a partner. He made gift of the said property to his two sons. A sum of Rs. 1 lakh was transferred from his account to the account of his five sons in the firm. Those sons were partners in the firm. The sons did not withdraw any amount which remained invested with the firm for which they got interest. The deceased continued to be a partner till the firm was dissolved and thereafter he died. The question arose as to whether under the circumstances the value of the house property and the sum of Rs. 1 lakh was includible in the principal value of the estate of the deceased as the property was deemed to have passed under s. 10 of the Act. negating the contention raised on behalf of the Department, the Supreme Court observed thus (p. 452) :

The donor on the date when he gifted the property to his sons which was leased out to the firm, had two rights, namely, of ownership in the property and the right to terminate the tenancy and obtain the possession thereof. There is no dispute that the ownership has been transferred subject to the tenancy at will granted to the firm to the donor's two sons because the firm from henceforward had attorned to the donees as their tenant by crediting the rent of Rs. 300 to the respective accounts in equal moiety. The donor could, therefore, only transfer possession of the property which the nature of that property was capable of, which in this case is subject to the tenancy. He could do nothing else to transfer possession in any manner unless he was required to effectuate the gift for the purpose of section 10 of the Act by getting the firm to vacate the premises and handing over possession of the same to the donees leaving the learned advocate that since the donor was a partner in the firm which had taken the property on lease, he derived benefit therefrom and was, therefore, not entirely excluded from the possession and enjoyment thereof, will nevertheless remain unsatisfied. To get over such an objection, the donees will have to lease out the property after getting possession from the firm to some other person totally unconnected with the donor. Such an unreasonable requirement the law does not postulate. The possession which the donor can give is the legal possession which the circumstances and the nature of the property would admit. This he has given. The benefit the donor had as a member of the partnership was not a benefit referable in any way to the gift but is unconnected therewith."

6. Thus, it was held that whenever possession is given in the manner which the circumstances and the nature of the property permit and the benefit which the donor has it not a benefit referable to the gift in anyway, but is unconnected therewith, the provisions of s. 10 are not attracted. Close observation of the ratio of Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, will indicate that there has been a slight departure from the view taken by the Privy Council in the of-quoted leading case, Clifford John Chick v. Commissioner of Stamp Duties [1958] AC 435; [1959] 37 ITR 89; 3 EDC 915 , in which the principle in another leading case H. R. Munro v. Commissioner of Stamp Duties [1934] AC 61; 2 EDC 462, was considered while interpreting the analogous provisions. The departure lies in the view that the benefit which the donor had as a member of the partnership was not a benefit referable in any way to the gift but was unconnected therewith. Though the factual position in Chick's case [1958] AC 435; [1959] 37 ITR 89; 3 EDC 915, Munro's case [1934] AC 61; 2 EDC 462 and so also in Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, , bears fine distinctions, the fact remains that there has been a departure also in laying down a ration, when it was pointed out that the benefit in the property which the donor was enjoying as a partner was not sufficient to bring the case within the ambit of s. 10 irrespective of the question, whether that benefit was referable or not to the gift. To put it differently, it is held that if the benefit is referable only to the gift, then the property is covered by s. 10 but not otherwise. In he case of Controller of Estate Duty, Punjab, Haryana, J. and K., U.P., Chandigarh and Patiala Vs. Smt. Kamlavati and Shri Jai Gopal Mehra, , once again, a review of these matters by the Supreme Court was made and the position of law was reiterated thus (headnote) :

"When a property is gifted by a donor the possession and enjoyment of which is allowed to a partnership firm in which the donor is a partner, then the mere fact of the donor sharing the enjoyment or the benefit in the property is not sufficient for the application of s. 10 of the E.D. Act, 1953, until and unless such enjoyment or benefit is clearly referable to the gift, i.e., to the parting with such enjoyment or benefit by the donee or permitting the donor to share them out of the bundle of rights gifted in the property. If the possession, enjoyment or benefit of the donor in the property is consistent with the facts and circumstances of the case other than those of the factum of gift, it cannot be said that the donee had not retained the possession and enjoyment of the property to the entire exclusion of the donor, or to the entire exclusion of the donor in any benefit to him by contract or otherwise."

7. It seems that the swing of view has gone closer to the view taken in Attorney-General v. Seccombe [1911] 2 KB 688; 1 EDC 589 , on which specific reliance was placed by the accountable persons even in his reply to the notice. In that case, the owner of a farm and a dwelling house thereon by a deed of gift in consideration of natural love and affection, conveyed and assigned the said property to his great nephew, who resided with him, and who had in the preceding year taken over the management of the farm. The donor had no

property other than that included in the deed except an annuity chargeable upon certain land belonging to him. Even after the execution of the deed, the donor continued to reside in the house until his death and indeed was maintained by the donee. There was no agreement or understanding between the donor and the donee that the former should be permitted to the house or be maintained. However, the donee of his own volition permitted the donor to occupy the house and the question arose under those circumstances as to whether the analogous provisions relating to charging of estate duty were attracted. It was held that if occupation was related or was itself was not sufficient to bring the case within the mischief of the terminology "entire exclusion of the donor". It was also held that exclusion does not mean physical exclusion in every case. The donor from the date of the gift had placed himself entirely at the mercy of the donee who bona fide assumed and retained possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by contract or otherwise, but permitted the donor to occupy out of his sheer will. As the physical occupation of the property by the donor was not a benefit referable in any way to the gift but was unconnected therewith, it was held that the property was not includible in the estate of deceased. That is what J. Hamilton observed in the case [Headnote of [1911] 2 KB 688 :

"Though the donor was permitted by the donee to, and did in fact, reside in the house from the date of the deed until his death, there was an entire exclusion of the donor from the possession and enjoyment of the property or of any benefit to him by contract or otherwise, within the meaning of the section, and that therefore, estate duty was not payable."

8. We may, at this stage, refer to the decision given by the Supreme Court in *The Controller of Estate Duty, Karnataka Vs. Umesh Rudra*, . This was a case of a husband making a gift of his residential property to his wife and continuing to live there for number of years till his death even after the gift. Considering the argument the donee did not acquire possession and enjoyment of the gifted property, to the entire exclusion of the donor and, therefore, s. 10 was attracted, it was observed (p. 580) :

"But we do not see how in the present case it can at all be said that the wife did not retain possession and enjoyment of the residential house to the exclusion of the deceased, merely because the deceased in his capacity as husband continued to reside with the wife. Section 10 cannot possibly be construed in a manner which would require the husband who has gifted residential house to the wife to live separately from her, if he wants to escape from the mischief of that section. Such an interpretation would subvert family life and social order and would be contrary to morality and good sense. When the residential house is gifted to the wife and she obtains possession and remains in enjoyment of it, it cannot be said that the husband who resides with the wife, as in a happy family life every husband would be expected to do, is, on that account, in possession of the residential house or in enjoyment of it. It is wife who is in possession and

enjoyment of the reside with the wife. We do not think that section 10 would at all be attracted in such a case,".

9. In MOHAMMED BHAIR AND ANOTHER Vs. CONTROLLER OF ESTATE DUTY, A.P., , was also a case of a gift by a husband to his wife of a house in which they also staying together. After the transfer, the property was mutated in the municipal register in the name of his wife. There was no evidence that the husband was managing the property or in any way deriving benefit therefrom except to reside with his wife as before. The only way in by vesting legal title in that person. It was held that for repelling the attraction of s. 10, it was not necessary that the husband should have left the wife and gone to some other house or both of them should move out so that the wife thereafter would receive the rent herself. The adoption of such a device would itself be the exact antithesis of love and affection and the motivating basis for the gift. The argument that though the donor may not have reserved to himself any right to possession or enjoyment of the property or any part thereof, the is on "entire exclusion" within the meaning of the clause if he has in fact access to the place which is the subject-matter of the gift and enjoys an advantage given by the donee, was repelled as not maintainable. There are a few more cases taking the same view as far as spouses are concerned.

10. Keeping in view these principals and applying them to the present matter, it seems to us that on part of the gifted property attracts s. 10. Business premises were used by the firm in which the donor and the donee were partners. They were used as licensee. This old arrangement was continued by the donee even after gift. Property was mutated and taxes were paid by the donee, subsequently. Possession as was possible under the circumstances was given. Even gifted cash was transferred and dealt with as property of the donees, though it was utilized by the firm in which even the donor was a partner. These situations are directly covered by the ration in many cases cited supra. This court in Khatijabai Abdulla Soomar Vs. Controller of Estate Duty, Bombay, has also taken the same view. Thus, this part of the reference, viz., relating to cash and business premises presents on difficulty. Before dealing with the case of the residential house, which was dealt with more seriously and vehemently, we would dispose off the question of good-will. In this case, the deceased was an old man other partners were not only major, but were actively participating in the business. On these consideration of good-will. In this case, the deceased was an old man the partners were not only major, but were actively participating in the business. On these considerations, if the Tribunal has held that not the whole of its value but five annas share of the deceased only could be taxed as an estate of the deceased, the conclusion has to be upheld and this part of question had also to be answered against the Revenue.

11. In the residential house, the donor and the donee old grandfather and major grandson-were staying together since long before the gift. After the gift by a registered document, property was mutated in the name of the donee who

started paying taxes. He asked the grandfather to continue to stay with him even after the gift. On account of that grace and/or permission, the grandfather did not vacate the premises. Property was neither managed by the donor subsequently, nor was his occupation related to his status as a head of the family. Thus, it is clear that way circumstances admitted. Now, "physical occupation" and "enjoyment" are not necessarily the same concept. Where a grandson allows the grandfather to reside with him in the house gifted to the grandson, the grandfather cannot be said to be in possession of the house. Such residence does not, in our view, amount to possession and enjoyment as contemplated by s. 10. Will the absolute right of ownership vested in the donee exclude his right to grant specific permission of his own volition ? After all, voluntary gift is made only to a loved one and that too in an atmosphere of mutuality of sentiments. We have already noticed cases dealing with a gift between spouses. That view was not possible on the basis of the stand taken on behalf of the Revenue, on the language of s. 10. Shri Joshi, the learned counsel for the Revenue, contended that the Supreme Court as well as other High Court were dealing with cases of spouses only, when the donor continued to reside with the donee, and it would not be possible to extend those considerations of special relationship between a husband and wife to any other relationship. Having given our serious thought to this aspect, it is not possible for us to accept this submission. If the motivating force behind this view has been the peculiarity of relationship and not the language used in s. 10, we see no reason to arrest the application of these considerations to other relationships, of course, depending upon facts and with the duty of appreciating facts are satisfied that the stand taken is correct and bona fide and successfully put up as a facade. We may notice here that the donee had successfully put up a case of gift at his volition. He also had placed specific reliance on *Secombe's case* [1911] 2 KB 688; 1 EDC 589. In *The Controller of Estate Duty, Karnataka Vs. Umesh Rudra*, reference has been made to social morality and good sense. Not that relationship between spouses is not special. In Indian society, there are still many who consider other relationships also as sacred as between spouses. Instances of son and grandsons permitting—in some cases even insisting upon—their parents or grandparents to live with them are not uncommon. If, therefore, out of a sense of duty, consideration for old age, etc., and/or affection, such donors are permitted to continue to reside as before despite the gift, we fail to see how such "occupation" will be incompatible with the concept of "possession and enjoyment" with the donee as contemplated in law, provided, of course, it is consistent with other facts and circumstances and is unconnected with the gift.

12. *Da Costa's case* [1967] 63 ITR 495 was heavily relied upon on behalf of the Revenue. It was a case of a gift by the head of a family. Even after the gift, he lived there as the head and managed the property in that capacity as before. "Mere filial affection without anything more" was considered insufficient to take out the case from the clutches of s. 10. In view of crystal clear distinguishing features existing in the present matter which need not feel that the said decision

assist the Revenue in this matter. After all, we are interpreting a taxing statute whose only object is and could be to plug the holes and prevent the persons liable to pay duty putting forth gifts as a facade and not intended to be acted upon. In our judgment, therefore, s. 10 does not take within its sweep even the residential house.

13. In the view that we have taken, we answer all the three parts of the question in the negative and against the Revenue. The Revenue to bear to the costs of this reference.