

(1991) 01 MAD CK 0027
In the Madras High Court
Case No : Tax Case No. 454 of 1980

Dr. S.D. Kulasekharan

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 21-01-1991

Acts Referred:

Estate Duty Act, 1953 — Section 10, 34(1)

Citation : (1991) 192 ITR 27

Hon'ble Judges : V. Ratnam, J;T. Somasundaram, J

Bench : Division Bench

Advocate : P.P.S. Janardhana Raja, for the Appellant; C.V. Rajan, for the Respondent

Judgement

Ratnam, J.—In this combined reference u/s 64(1) of the Estate Duty Act, 1953 (hereinafter referred to as "the Act"), at the instance of the

accountable person as well as the Controller of Estate Duty, the following questions of law have been referred to this court for its opinion :

2. At the instance of the accountable person :

1. Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the provisions of section 10 of the Estate Duty Act are attracted ?

2. Whether, on the facts and circumstances of the case, the Tribunal was right in refusing to give relief applying the proviso to section 16 read with sections 46(1) and 46(2) of the Estate Duty Act ?

3. At the instance of the Controller of Estate Duty :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the inclusion of the lineal descendants"

share of Rs. 3,08,687 in the principal value of XXB the estate u/s 34(1)(c) was not proper and, therefore, should be excluded ?

4. Briefly stated, the facts giving rise to this reference are as follows : One Munuswamy Chettiar had two sons, viz., Doraiswamy Chettiar (the

deceased, who died on September 8, 1968) and Krishnaswamy Chettiar. Doraiswamy Chettiar was adopted by one Senganna Chettiar and he,

along with his natural brother, Krishnaswamy Chettiar, went to Gudiyatham, where they carried on business jointly till 1936 and also acquired

certain properties from out of that business. Subsequently, Doraiswamy Chettiar and one Kannayya Chettiar. The son of Krishnaswamy Chettiar,

the natural brother of Doraiswamy Chettiar, carried on business in partnership. Later, on February 29, 1948, there was a partition between

Doraiswamy Chettiar on the one hand and Kannayya Chettiar and his younger brother, Govindaswamy Chettiar on the other, of the properties

which had been acquired from the income derived from the business carried on. Under the partition deed, the properties set out in "A" Schedule

thereunder fell to the share of Doraiswamy Chettiar. On May 3, 1941, Doraiswamy Chettiar executed a settlement deed in favour of Rukmani

Ammal, the daughter of his natural brother, Krishnaswamy Chettiar, in relation to a house property in Acharappan Street, George Town, Madras,

then valued at Rs. 6,300. On June 4, 1966, Doraiswamy Chettiar executed another settlement deed in favour of Rukmani Ammal settling on her

5.29 acres of wet lands and a house in Thazhayatham village, to be enjoyed by her for life without powers of alienation and, thereafter, to be taken

by her sons, except one Kulasekaran, whom the settlor, Doraiswamy Chettiar, had decided to adopt. On the same day, Doraiswamy Chettiar

executed a deed of settlement in favour of one Chinnaaswamy Chettiar in respect of 4.09 acres of wet lands in the same village with a pumpset to

be taken by him absolutely. Yet another deed of settlement was executed by Doraiswamy Chettiar on the same date in favour of Jayalakshmi, the

grand-daughter of Krishnaswamy Chettiar and daughter of Rukmani Ammal, settling on her two houses in the same village to be enjoyed by her for

her life without powers of alienation and, thereafter, to be taken by her children absolutely. On June 17, 1956, Doraiswamy Chettiar adopted

Kulasekaran, the grandson of his natural brother, Krishnaswamy Chettiar, and son of Rukmani Ammal, and executed a deed of adoption wherein

it was mentioned that Kulasekaran would succeed to all his properties absolutely after his lifetime. It may also be mentioned that from 1958-59

onwards, the assessments under the Income Tax Act were made on the deceased in the status of a Hindu undivided family, he having claimed such

a status in the returns filed. On the death of Doraiswamy Chettiar on September 8, 1968, his adopted son, Kulasekaran filed the estate duty

account. In the course of considering the account so filed, the Assistant Controller of Estate Duty found that the deceased had been cultivating the

lands gifted to Rukmani Ammal and Chinnaswamy Chettiar as the lessee and those properties were in his possession and enjoyment till his death. It

was also noticed from the account books that the rents from the houses settled upon Rukmani Ammal and Jayalakshmi had been collected by the

deceased and credited in his account to their respective accounts and debiting that account with outgoings like taxes, repairs, etc., the Assistant

Controller of Estate Duty, therefore, came to the conclusion that the donees had not assumed possession and enjoyment of the properties settled

immediately and to the exclusion of the deceased and, therefore, section 10 of the Act stood attracted. Accordingly, applying section 10 of the

Act, he included in the dutiable estate a sum of Rs. 1,35,220 made up of Rs. 35,640 being the value of the lands gifted to Chinnaswamy Chettiar,

Rs. 43,320 representing the value of the lands settled on Rukmani Ammal, Rs. 40,000 towards the value of the house property in Acharappan

Street, George Town, Madras, settled on Rukmani Ammal and Rs. 15,260 being the value of the houses in Thazhayatham village gifted to

Jayalakshmi. The Assistant Controller of Estate Duty also abated the debts to the tune of Rs. 10,023 and Rs. 4,191 due to Jayalakshmi and

Rukmani Ammal, respectively, and applying section 46(2) of the Act, disallowed the payments made to the aforesaid persons to the extent of Rs.

9,936 and Rs. 276, respectively. The dutiable value of the estate was fixed at Rs. 6,11,374 and the lineal descendants' share was also subjected

to duty and the properties passing u/s 10 of the Act were taken as part of the joint family estate. A sum of Rs. 5,000 was also included being the

amount of gift to Rukmani Ammal u/s 9 of the Act. On appeal by the accountable person before the Appellate Controller contending that section

10 could not be applied as the gifts were made by the deceased while he was to sole owner of the properties which were later converted into joint

family properties and as he was in possession and enjoyment of the gifted properties in his capacity as the karta and, consequently, it could not be said that the deceased donor had not been excluded, the claim of the accountable person was rejected upholding the view of the Assistant Controller of Estate Duty that the deceased was in possession and enjoyment of the settled properties and the income therefrom till his demise and there was no change in the possession and control of the properties. However, the value of the properties was redetermined. The application of sections 46(1) and 46(2) of the Act was confirmed and the claim of the accountable person for exclusion of Rs. 5,000 u/s 9 of the Act and the value of the lineal descendants' share was also negatived, on further appeal by the accountable person to the Tribunal, it found that the entries in the accounts of the deceased relating to Rukmani Ammal and Chinnaswamy Chettiar Crediting them with lease amounts clearly showed that the deceased had been cultivating the gifted lands as lessee. The Tribunal also observed that no attempt was made by the accountable person to challenge that finding and it, therefore, concluded that the deceased was cultivating the lands in question till his death. Referring to similar entries in the books of account of the deceased relating to the other donees, the Tribunal noted that the credit and debit entries had been made clearly indicating that the deceased had been utilising the rental income from the gifted properties and there was nothing to show that the deceased could not, at any point of time, have utilised the income from the gifted properties for his own purposes. In that view, the Tribunal concluded that it cannot be said that the donees had assumed and retained possession of the gifted properties to the complete exclusion of the deceased from possession and enjoyment. Dealing with the stand of the accountable person that Doraiswamy Chettiar, as the karta of the family, was in possession and enjoyment of the income from the gifted properties and, that therefore, section 10 of the Act would not be applicable, the Tribunal found that the properties had been acquired with the income derived from business carried on by the deceased along with his natural brother and later his son and those properties belonged to the deceased as his separate properties and the adoption of Kulasekaran only in June, 1956, showed that the deceased had not converted the properties into joint family properties, but only later the deceased had impressed the properties

with joint family character. In that view, the Tribunal held that though, in a manner of speaking, the Hindu undivided family of which the deceased was the karta was in possession of the gifted properties as lease and was also in enjoyment of the rental income from the other gifted properties, the deceased, as the karta, was in possession of such properties and the income therefrom and section 10 of the Act contemplated only physical possession and not the character of the capacity in which the deceased donor was in such possession. It was also further pointed out by the Tribunal that that was the true position and the fact that the Hindu undivided family, of which the deceased was the karta, was in possession of the gifted properties and was in enjoyment of the rental income from the other gifted properties, would not make any difference and upheld the applicability of section 10 of the Act. The substitution of the value of the gifted properties by the Appellate Controller was held to be not justified. In addition, the Tribunal also held that the value of the properties passing u/s 10 of the Act could not form part of the value of the estate of the Hindu undivided family. Regarding the application of section 46(1) and 46(2) read with the proviso to section 16(1) of the Act, the Tribunal held that no material was placed before it to show that the proviso to section 16(1) of the Act stood attracted and, consequently, no abatement could have been made u/s 46(1) and 46(2) of the Act. Considering the correctness of the inclusion of the value of the lineal descendants' share, the Tribunal upheld the claim of the accountable person in view of the decision in V. Devaki Ammal Vs. Assistant Controller of Estate Duty, . Ultimately, the Tribunal allowed the appeal in part and directed the modification of the assessment. That is how the questions of law set out earlier have arisen.

5. Learned counsel for the accountable person, while accepting the conclusion of the Tribunal based on the entries in the books of account of the deceased that the gifted properties continued to remain in the possession of the deceased till his death, contended that section 10 of the Act would not apply and that there was no connection whatever between the gifts and the leasing out of the gifted properties and the receipt of rents therefrom by the deceased donor. Reference was made in this connection to Controller of Estate Duty, Punjab, Haryana, J. and K., U.P.,

Chandigarh and Patiala Vs. Smt. Kamlavati and Shri Jai Gopal Mehra, . On the other hand, learned counsel for the Revenue pointed out that, on

the finding recorded by the Tribunal that the deceased had continued to remain in possession of the gifted properties till his death, there is no

escape from the application of section 10 of the Act, even if he had remained in such possession as a lessee, as that would not amount to exclusion

of the donor from possession and enjoyment as contemplated u/s 10 of the Act. Reliance in this connection was placed by learned counsel upon

the decision of the Supreme Court in Controller of Estate Duty, Madras Vs. Parvathi Ammal, , which arose out of the decision of this court in Smt.

Parvathi Ammal Vs. Controller of Estate Duty, Madras, .

6. Before embarking upon a consideration of the submissions so made, it would be necessary to refer to the crux of section 10 of the Act, which

consists of two parts : (1) that the donee must bona fide have assumed possession and enjoyment of the property, which is the subject-matter of

the gift; and (2) that 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 conditions are cumulative and unless each of these conditions is satisfied, the property would be liable

to duty as per section 10 of the Act. On the available materials, there is nothing to indicate that the donees assumed possession and enjoyment of

the properties forming the subject-matter of the gifts. Equally, there is total absence of materials to show that the donees had retained possession

and enjoyment of the gifted properties to the entire exclusion of the donor or of any benefit to him, by contract or otherwise. Indeed, the Tribunal,

on a appreciation of the entries in the books of account of the deceased relating to the donees, found that the deceased had continued to remain in

possession and enjoyment of the gifted properties till his death. That conclusion of the Tribunal was not, in any manner, questioned before us. We,

therefore, find that the requirement to take the case out of the purview of section 10 of the Act has not been satisfied. The argument that there was

no connection between the gifts and the possession of the gifted properties by the donor is difficult to accept, for, it is not the case of the There is

also no material to establish whether the donees immediately entered upon possession of the gifted properties, but, however, it was accepted that

the gifted properties were leased out to the donor and the donor had been receiving the rents from the houses as well as the income from the lands

till his death, as found in the books of account. Thus, the possession of the donor of the gifted properties and the receipt of income therefrom till his

death is referable to the deed of gifts as well as the leases by the donees. In other words, the possession of the gifted properties and the receipt of

income therefrom by the deceased till his death are attributable to the deeds of gift and the leases. We may, in this connection, refer to Controller

of Estate Duty, Madras Vs. Parvathi Ammal, , on appeal from Smt. Parvathi Ammal Vs. Controller of Estate Duty, Madras, . In that case, the

deceased executed a deed giving away the property where he was carrying on the business of boarding and lodging absolutely to his five sons in

equal shares and, subsequently, he took the property on lease from the sons and carried on the business, as before, and later died. The question

was whether the entire value of the property was liable to be included in the principal value of the estate of the deceased u/s 10 of the Act. A

Division Bench of this court took the view that only the value of the right to possession and enjoyment in the hands of the deceased as a lessee

would pass on his death attracting duty, negating the contention of the Revenue that, as the entire premises were in his occupation and enjoyment

until his death, their entire value would pass. This view was mainly based upon the use of the words ""to the extent"" found in section 10 of the Act.

However, the Supreme Court did not accept this view as correct and held that, u/s 10 of the Act, the value of the entirety of the property would

pass as the gift was of the property and of all the rights therein. It was also pointed out that if the gift comprises the full ownership of the property

not shorn of any right, in order to prevent the incidence of estate duty, immediate bona fide physical possession and enjoyment of the gifted

property must ordinarily be assumed by the donee and retained thereafter to the entire exclusion of the donor. The principle of this decision of the

Supreme Court laid down in connection with the rights of a lessee from the donee in relation to the applicability of section 10 of the Act would, in

our view, apply in this case also. We may now refer to Controller of Estate Duty, Punjab, Haryana, J. and K., U.P., Chandigarh and Patiala Vs.

Smt. Kamlavati and Shri Jai Gopal Mehra, , to which our attention was drawn by learned counsel for the accountable person. In that case, cash

gifts were made by the deceased in favour of his sons, wife and daughters-in-law. One of the donees in one case was taken in as a partner in the firm of which the donor was a partner, after the gifted amounts were debited in the accounts of the firm, and in the other case, the donees were neither partners before or even after the gifts. In considering the question whether the gifted amounts could be subjected to duty u/s 10 of the Act, the Supreme Court pointed out that, when a property is gifted by a donor the possession and enjoyment of which is allowed to 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 section 10 of the Act, until and unless such enjoyment or benefit is clearly referable to the gift and that, 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, then, it cannot be said that the donee had not retained possession and enjoyment of the property to the entire exclusion of the donor and it would not make any difference whether the donee is a partner in the firm from before or is taken as such at the time of the gift or he becomes a creditor of the partnership firm by allowing it to make use of the gifted property for purposes of the partnership. We are of the view that the principle of this decision should be understood as being applicable to cases of gifts by partners in a firm to others and the donees either investing the amounts in the firm of which the donor was a partner or even becoming partners in the firm in which the donor was already a partner. From the facts found by the Tribunal in this case, which have not been challenged, that the deceased had continued to remain in possession and enjoyment of the gifted properties and the income therefrom till his death, it follows that the donor had not, in any manner, been excluded by the donees by their immediately taking possession of the gifted properties and maintaining their possession to the exclusion of the donor or of any benefit to him, by contract or otherwise. We are, therefore, unable to accept the contention put forward by learned counsel for the accountable person.

7. Learned counsel for the accountable person next contended that the capacity in which the deceased continued in possession of the gifted properties was as karta of the Hindu undivided family consisting of the deceased and his adopted son and, therefore, the provisions of section 10

of the Act cannot be invoked. Reference in this connection was also made to the decisions in Controller of Estate Duty, Madras Vs. R.K. Chettiar

(Decd.) by Lrs., and Controller of Estate Duty Vs. Susheela Mariappan, . It may be pointed out that the language employed in section 10 of the

Act refers to donor and donee under a gift and the deemed passing of the gifted properties on the death of the donor, subject to the fulfilment of

the other requirements. What is contemplate u/s 10 of the Act is a gift by the donor to a donee without any reference whatever to the capacity of

the donor making the gift. In other words, so long as a gift is made by a donor and if possession of the gifted properties is not taken by the donee

immediately and retained to the exclusion of the donor or of any benefit to him, by contract or otherwise, then, u/s 10 of the Act, the properties

gifted by the donor shall be deemed to pass on the donor's death. It would mean that the properties gifted by that donor who made the gift would

be deemed to pass on his death, unless it is taken out of section 10 of the Act by the fulfilment of the other requirements. In this case, the gifts were

made by the deceased Doraiswamy Chettiar and he was the donor for purposes of section 10 of the Act and he had not been excluded from

possession or enjoyment of the gifted properties in the manner contemplated u/s 10 of the Act, but he had continued to remain in possession as the

very donor who made the gifts for purposes of section 10 of the Act, till his death and, under those circumstances, the possession of the gifted

properties by the deceased Doraiswamy Chettiar cannot be anything other than by the donor under the gift and we are, therefore, unable to accept

the argument of learned counsel for the accountable person. We may make a brief reference to the two decisions to which our attention was drawn

by learned counsel for the accountable person. In Controller of Estate Duty, Madras Vs. R.K. Chettiar (Decd.) by Lrs., , gifts were made by the

deceased to his grand-daughters, grandson and a stranger and the pattas in respect of the lands were transferred and the properties were leased

out to the donor and the income was credited to the donees' accounts in the books of account of the donor, which was utilised in the money-

lending business of the donor. It was also found that the donees had taken possession and the pattas had been transferred in their favour. It was in

this context that it was held that the mere crediting of the income in the books of account of the donor would not attract section 10 of the Act. That

decision cannot have any application whatever to this case. Likewise, in Controller of Estate Duty Vs. Susheela Mariappan, , gifts were made in

favour of the daughter, son-in-law and grandchildren and the donor acted as the agent of the donees and it was in that context that it was held that

section 10 of the Act could not be invoked. Thus, in one case, it was found that pattas had been transferred and possession was also taken by the

donees, while, in the other, the possession of the donor was attributed to an agency and those considerations would be totally inapplicable in this

case and, therefore, the decisions do not, in any manner, assist the accountable person. We, therefore, answer the first question referred to us in

the affirmative and against the accountable person.

8. Regarding the second question referred at the instance of the accountable person, we find from paragraph 10 of the order of the Tribunal that no

material was placed before it to show that the proviso to section 16 would stand attracted and, consequently, no abatement could be made under

sections 46(1) and 46(2) of the Act. In the absence of the placing of materials before the Tribunal, the Tribunal cannot be stated to have

committed any error in declining to give relief by applying the proviso to section 16 read with sections 46(1) and 46(2) of the Act. We, therefore,

answer the second question referred to us in the affirmative and against the accountable person.

9. We may now take up the only question referred at the instance of the Controller of estate duty. That pertains to the inclusion of the value of the

share of the lineal descendants. In V. Devaki Ammal Vs. Assistant Controller of Estate Duty, , section 34(1)(c) of the Act was challenged as being

discriminatory and violative of article 14 of the Constitution of India and that was upheld on the ground that section 34(1)(c) goes far beyond the

charging section, making a discrimination between the coparceners who died leaving lineal descendants and others, in the imposition of tax burden

and providing for a higher incidence of tax on the property passing on the death of the former. In view of this, the question referred to us at the

instance of the Controller of Estate Duty is answered in the affirmative and against the Controller. There will be, however, no order as to costs.