

(1972) 02 MAD CK 0033

In the Madras High Court

Case No : Tax Case No. 209 of 1966 (Reference No. 55 of 1966)

Godavari Bai

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 29-02-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 9
Estate Duty Act, 1953 — Section 10
Partnership Act, 1932 — Section 13, 48, 69(1)
Transfer of Property Act, 1882 — Section 130, 137

Citation : (1972) ILR (Mad) 497 : (1972) 86 ITR 533

Hon'ble Judges : V. Ramaswami, J;Ramanujam, J

Bench : Division Bench

Advocate : K. Srinivasan, D. Meenakshisundram and K.C. Rajappa, for the Appellant; V. Balasubrahmanyam and J. Jayaraman, for the Respondent

Judgement

V. Ramaswami, J.—The following question has been referred to this court u/s 64(1) of the Estate Duty Act, 1953 :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the amount of Rs. 3 lakhs transferred by the deceased to his grand-nephews was includible in the estate of the deceased that passed on his death ?"

2. The deceased, Bankatlal Lahoti, was a partner in the firm of M/s. Dayaram Surajmal, which was carrying on business as bankers. On October 4, 1952, he transferred a sum of Rs. 1 lakh each to the three minor grandsons of his deceased brother. The procedure adopted for the transfer was as follows: The deceased drew a cheque for Rs. 3 lakhs against his account with M/s. Dayaram Surajmal. The cheque was in favour of M/s. Dayaram Surajmal. The account of the deceased with the said firm was debited with the sum of Rs, 3 lakhs" and on the same day simultaneously the three accounts with the said firm of the minor donees were credited with a sum of Rs. 1 lakh each. The Tribunal had presumed

that the transfer was effected in the name of the minor donees as a result of the oral instructions given by the deceased to the firm.

3. The sum of Rs. 3 lakhs thus transferred to the grandsons continued to stand in their names in the accounts of M/s. Dayaram Surajmal till the date of dissolution of the firm on July 4, 1960. Thereafter, some of the assets were allotted to the grandsons in lieu of the amounts standing to their credit.

4. Bankatlal Lahoti died on December 21, 1956. His widow, as the accountable person, filed an account of the deceased's estate declaring , the value thereof at Rs. 2,60,702. This did not include the amount of Rs. 3 lakhs transferred by the deceased to the three minors on October 4, 1952. The Deputy Controller of Estate Duty held that, since the transaction was a transfer of an actionable claim, the transfer could be effected only under an instrument in writing signed by the transferor as contemplated u/s 130 of the Transfer of Property Act and that since there was no such instrument in writing the transfer was ineffective or invalid as a transfer of an actionable claim. He, therefore, included the amount of Rs. 3 lakhs in the value of the estate of the deceased that passed on his death, In the appeal preferred by the accountable person, the Appellate Controller of Estate Duty held that there was no effective transfer of the actionable claim as contemplated u/s 130 of the Transfer of Property Act and that in any case the amount is includible in the estate of the deceased u/s 10 of the Estate Duty Act. The accountable person preferred a further appeal to the Appellate Tribunal which held that the cheque issued by the deceased in favour of the firm only authorised the firm to pay to itself the sum of Rs. 3 lakhs from out of the amounts standing to the credit of the deceased in its account, but it did not itself authorise the transfer of the amount to anybody else, that such a transfer could be authorised by a separate letter of instructions by the deceased, but such an instrument in writing not being present, oral instructions could not take the place of such an instrument in writing and that, therefore, the transfer of Rs. 3 lakhs in favour of the minor donees was not in accordance with the provisions of Section 130 of the Transfer of Property Act. The Tribunal also held that the said sum of Rs. 3 lakhs was includible in the estate of the deceased u/s 10 of the Estate Duty Act even if it were to be assumed that the transfer became complete and effective on the date of the transfer. On an application by the accountable person, the above question has been referred u/s 64(1) of the Estate Duty Act.

5. Though the accountable person was all along urging before the estate duty authorities and the Tribunal that there" was a valid gift of ah actionable claim, the learned counsel for the accountable person argued in this reference that the transaction amounted to a mere gift of money and it did not involve any transfer of an actionable claim. He contended that a partner is not a creditor of the firm in which he is a partner in respect of the amount standing to his credit and there is no jural relationship of a creditor and debtor between the partner and the firm. In support of his contention the learned counsel relied strongly on the decision in K.A. Mohammed Kassim Vs. The Controller of Estate Duty, Kerala, Ernakulam, .

6. Section 3 of the Transfer of Property Act defines an "actionable claim" to mean a claim to any debt, which the civil courts recognise as affording the grounds for relief, whether such debt be existent, accruing, conditional or contingent. Therefore, the question is whether, in respect of the amount standing to the credit of a partner, he has any claim to recover the money which the civil courts recognise as affording the ground for relief. In *Mohamad Kassim v. Controller of Estate Duty*, the donor, who was a partner in a partnership firm consisting of himself and his three sons, gifted to his three sons a total sum of Rs. 2,25,000 by debiting his account with the partnership and crediting the accounts of his three sons in the same partnership. It was held in that case on those facts that there was no transfer of an actionable claim. Relying on certain passages of *Lindley on Partnership*, the learned judges observed that:

"A partner, however, is not a debtor to or creditor of his firm in any legal sense of that term."

7. In support of their view, in particular, they relied on the following passage in *Lindley on Partnership* :

"Accountants are quite right in debiting each partner in his account with the firm with the whole of whatever he draws out, and in crediting him with the whole of whatever he brings in. "But", as observed by Lord Cottenham, "though these terms "debtor" and "creditor" are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of partnership, than to consider the situation of either party as in any degree resembling" the situation of those whose appellation has been so borrowed. The supposed creditor has no means of obtaining payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity--assuming always that no separate security has been taken or given. The supposed creditor's debt is due from the firm of which he is a partner; and the supposed debtor owes the money to himself in common with his partners"." (12th edition, page 427).

8. But, we are afraid that this is not the full statement of the law. Section 13(d) of the Partnership Act specifically provides that, subject to contract between the partners, a partner making for the purpose of the business any payment or advance beyond the amount of capital he has agreed to subscribe is entitled to interest thereon at the rate of six per cent, per annum. Section 48, dealing with the mode of settlement of accounts between the partners, states that the assets of the firm shall be applied in paying to each partner rateably what is due to him from the firm for advance as distinct from capital, before the distribution of the assets among themselves. Section 69(1), by providing that no suit to enforce a right arising from a contract shall be instituted in any court by a partner in a firm against the firm, unless the firm is registered, suggests that if the firm is registered, a suit by a partner against the firm would be maintainable. Order 30, Rule 9, of the CPC provides that a suit between a firm and one of its members may be instituted and Order 30 shall apply to such suits. All these provisions, in

our opinion, suggest that, though, in law the firm as such has no legal entity, a partner would be entitled to claim repayment of the money advanced by him to the firm and such a claim could also be enforced in a court of law.

9. In *Karri Venkata Reddi v. Kollu Narasayya*, ILR [1908] Mad. 76; in a suit by one of the partners against the other partner for recovery of a sum of money, a Division Bench of this court held as follows :

"It may be taken generally that if the account sought is in respect of a matter which though arising out of the partnership business or connected with it, does not involve the taking of general accounts the court will as a rule give the relief asked for, and will now-a-days refuse to interfere only in those cases in which a partial account would work injustice to the other partner."

10. Thus, unless great injustice will be caused to the defendant-partner, courts will not refuse to recognise a claim for payment of the amount advanced by a partner to the firm. Even if no partial accounting could be ordered, the creditor-partner could file a suit for dissolution and general accounting and claim to be paid before the division of the assets as provided u/s 48 of the Partnership Act. Thus, in either case, a partner has a right of action. The passage from Lindley on Partnership extracted in *Mohammed Kassim v. Controller of Estate Duty*, is only a historical general statement of the law. In another place in Lindley on Partnership (12th edition, page 306), we find the following passage :

"Again, there appears to be no reason why an action should not now be maintained for the recovery of a debt due from one partner to the firm ; nor why, if two firms have a common partner, an action should not be maintained by one firm against the other."

11. Therefore, it is not fully correct to state that the partner has no means of obtaining the payment of his debt. He is entitled to file a suit for recovery of the amount due to him from the firm, but, whether the court will grant a decree for the amount or require the partner to pray for a dissolution or general account will depend on the fact whether the claim could properly be adjusted without taking a general account.

12. In *C. T. NARAYANAN CHETTIAR Vs. COMMISSIONER OF Income Tax, MADRAS.*, this court held that a partner has a right to be treated as a creditor of the firm in respect of his advance in view of Sections 13(d) and 48 of the Partnership Act. Though the learned judges have observed, "While it may well be that in respect of such advances made to a firm, a partner may have no separate right of suit except to have his claim in that regard settled as part of the winding-up or dissolution, his right to be treated as a creditor of the firm is not denied", it was not necessary for them to consider in that case the question whether the partner had a right of suit against the firm. Further, the decision in *Karri Venkata Reddi v. Kollu Narasayya* had not been cited to them.

13. We are, therefore, of opinion that the transaction involved in this case is a

transfer of an actionable claim. Our view also finds support in the decision of the Andhra Pradesh High Court in KASAMSETTY RADHAKRISHANIAH CHETTY Vs. COMMISSIONER OF Income Tax A. P., wherein, after setting out" the provisions of the Partnership Act, the learned judges stated :

"Thus, the Act recognises a partner advancing moneys to the firm and being entitled to interest at 6 per cent. per annum. We do not consider it necessary to elaborate the point any further. It is sufficient to state that we cannot accept the view of the Tribunal that in no event can a partner who advances money to a firm of which he is a partner occupy the position of a creditor or be said to carry on the business of money-lending."

14. This now takes us to the next question as to whether there was a valid transfer of an actionable claim. Section 130 of the Transfer of Property Act requires that the transfer of an actionable claim, whether with or without consideration, shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent and shall be complete and effectual upon execution of such an instrument. The learned counsel for the accountable person, relying on the decisions in Chimanbhai Lalbhai Vs. Commissioner of Income Tax (Central), Bombay, COMMISSIONER OF Income Tax, AHMEDABAD Vs. NEW DIGVIJAYSINHJI TIN FACTORY., , E. S. Hajee Abdul Kareem and Son Vs. Commissioner of Income Tax, Madras, , A.M. Abdul Rahman Rowther and Co. Vs. The Commissioner of Income Tax, Madras, and R.M. Chidambaram Pillai and Another Vs. Commissioner of Income Tax, Madras, contended that there was a valid transfer of the actionable claim. In all these cases the question for consideration was whether the entries in the account books evidenced a gift of money. In none of these cases it was argued or considered whether the transfer- was a transfer of money or an actionable claim and whether as an actionable claim the transfer was complete and valid. On the other hand, the learned counsel for the revenue contended, relying on the decision in Paliram Mathuradas (By his Legal Heir, Madanlal Paliram) Vs. Commissioner of Income Tax, Bombay City-II, that mere entries in the account books were not sufficient to constitute a valid gift of an actionable claim nor would it amount to a valid assignment of the actionable claim. But, we are of opinion that the interposition of a cheque distinguishes the present case from all other cases.

15. As already noticed, the transfer was effected in this case by issuing a cheque in favour of the firm and the firm debited the account of the deceased and credited the accounts of the minors. When the cheque was issued, oral instruction also should have been given to the firm and it is only with reference to this oral instruction the accounts of the minors should have been credited with the amount. Therefore, in effect, the cheque was issued in favour of the firm but for the benefit of the minors. In such a situation, the firm shall be treated as a trustee or an agent holding the money, for the benefit of the minors. Since that transfer was by cheque, by virtue of Section 137 of the Transfer of Property Act,

the provisions of Section 130 of that Act was not applicable. We are, therefore, of opinion that there was a valid gift of an actionable claim of the value of Rs. 3 lakhs by the deceased in favour of the three minors.

16. The next point for consideration is whether Section 10 of the Estate Duty Act is applicable to the facts and circumstances of this case. As already stated, the amount did not go out of the firm but was transferred from the account of the deceased to the account of the minor donees. The partnership was in possession of the amount for a long time after the death of the donor till the firm was dissolved. In those circumstances, the question for consideration is whether the bona fide possession and enjoyment of the property which was the subject-matter of the gift was assumed by the donee and retained thereafter to the entire exclusion of the donor.

17. The scope of Section 10 of the Estate Duty Act has come up for consideration in a number of decisions. In *Chick v. Commissioner of Stamp Duties, New South Wales*, [1958] A.C. 495 : [1959] 37 ITR 89 : 3 E.D.C. 915 (P.C.). their Lordships of the Judicial Committee of the Privy Council, while considering a similarly worded clause of the New South Wales statute, held that the donee must not only enjoy possession but entirely exclude the donor from association. Their Lordships distinguished the decision in *Munro v. Commissioner of Stamp Duties*, [1934] A.C. 61 : 2 E.D.C. 462 (P.C.) on the ground that in that case the gift was of a property shorn of certain of the rights which appertain to complete ownership and that, therefore, the donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the Section not to be excluded from possession and enjoyment of that which he has given.

18. In *George Da Costa v. Controller of Estate Duty*, the Supreme Court held that:

"The crux of Section 10 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. As a matter of construction, we are of opinion that 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."

19. We have already held that the subject-matter of the gift was an actionable claim. In almost an identical case, in *George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore*, a Division Bench of this court held that, when an actionable claim was gifted, the subject-matter, of the gift being the donor's interest as a whole in the money lent by him to the firm, it cannot be said that, by reason of the fact that the firm of which the donor was the partner continued to be in possession and enjoyment of the property gifted away, there was non-exclusion of the donor to any extent. In another case, in *Controller of Estate*

Duty Vs. N.R. Ramarathanam and Others, , where a partner in a firm of money-lending business transferred by means of book adjustment in the accounts of the firm certain sums of money to his sons and daughter as and by way of gift without a physical handing over of the cash and retaining the money in the partnership firm, it was held as follows :

"At the time of making the gift, having regard to the facts, it has to be taken that the two sums transferred by book entries were still available for purposes of the business of the firm, which mean that their user for that purpose would be controlled by the managing partner. In the very nature of things, therefore, the transfer of the two sums by way of gift should be taken subject to the rights of the firm and in the words of the Privy Council in *Munro v. Commissioner of Stamp Duties* the two sums were transferred to the donees shorn of the rights which belonged to their partnership. On that view, there can be no question that immediately on the making of the gift, the donees assumed such possession and enjoyment of the subject-matter of the gifts as it was capable of at the time and also that they retained that to the exclusion of the donor. If the donor continued to have control over the two sums, that was not because of any reservation in him while making the gift but because the gift itself was made subject to the condition that the funds would be available for the use of the partnership business and, as such, they would be subject also to the control and management by the donor in his capacity as managing partner."

20. These two decisions of this court directly cover the point at issue. In the case on hand, the donor had advanced money to the partnership. He had only a right to claim that money subject to the rights of the partnership. The donor was also alive to the fact that the amount in the partnership firm would continue to be available to the firm and would be subject to the rights of the other partners. Therefore, when the gift was made, the gift should be deemed to have been made only subject to the rights of the partnership to utilise those funds. The gift in such a case was shorn of those rights which belonged to the partnership. It, therefore, follows that Section 10 of the Estate Duty Act has no application to the present case.

21. The learned counsel for the revenue strongly relied on two decisions of the Gujarat High Court-- *Shantaben S. Kapadia Vs. Controller of Estate Duty, Gujarat*, and *Controller of Estate Duty, Gujarat Vs. Chandravadan Amratlal Bhatt*, and a recent Full Bench decision of the Delhi High Court in *Controller of Estate Duty v. Prahlad Rai*. In *Shantaben S. Kapadia v. Controller of Estate Duty* the Gujarat High Court did not consider the question as to whether the subject-matter of the gift was an actionable claim or a gift of money. It proceeded to decide the issue on the basis that the gift was of a sum. of money by a partner to a third party and, when the amount was kept as a deposit with the partnership firm in the name of the third party, it was held that Section 10 could be applicable on the ground that the deceased who was a partner shall be deemed to be in possession and enjoyment of the property gifted. The decision in

Controller of Estate Duty v. Chandravadan Amratlal Bhatt followed the decision in Smt. Shantaben S. Kapadia v. Controller of Estate Duty. The decision of the Delhi High Court in Controller of Estate Duty Vs. Prahlad Rai, of course, considered all these cases. The decisions of this court above referred to were also cited before it. But, the learned judges did not rely on the decisions of this court on the ground that the facts were not clear.

22. As already stated, in our opinion, the subject-matter of the gift was an actionable claim. If the subject-matter was an actionable claim, the gift in favour of the donees was complete and the donor was completely excluded from it, Therefore, Section 10 is not applicable. We respectfully follow the decisions of this court in Controller of Estate Duty v. C. R. Rama-chandra Gounder and Controller of Estate Duty v. N. R. Ramarathanam in preference to the view expressed by the Delhi High Court in Controller of Estate Duty v. Prahlad Rai.

23. For the foregoing reasons, we answer the reference in the negative and in favour of the assessee with costs. Counsel's fee Rs. 250.