

(1970) 01 AHC CK 0006

In the Allahabad High Court

Case No : Wealth-tax Reference No. 603 of 1964

Gopal Raj Swarup

APPELLANT

Vs

Commissioner of Wealth Tax

RESPONDENT

Date of Decision : 29-01-1970

Acts Referred:

Income Tax Act, 1922 — Section 66(1)
Transfer of Property Act, 1882 — Section 130(1), 133
Trusts Act, 1882 — Section 5, 6

Citation : (1970) 77 ITR 912

Hon'ble Judges : T.P. Mukerjee, J; R.S. Pathak, J

Bench : Division Bench

Advocate : S.N. Verma, for the Appellant; R.R. Misra and B.L. Gupta, for the Respondent

Judgement

T.P. Mukerjee, J.—This is a case stated by the Appellate Tribunal, Delhi Bench "B", u/s 66(1) of the Income Tax Act, 1922, hereafter referred to as the Act. The statement of the case relates to the assessment year 1958-59, the relevant valuation date being March 31, 1958. The material facts are these. The assessee is the karta of a Hindu undivided family styled M/s Gopal Raj Swarup & Sons. On November 20, 1956, the assessee purported to transfer a sum of Rs. 50,000 from his account to the account of his son, Keshav Kumar Swarup, the donee. The transfer was effected by debiting the assessee's personal account in the books of the Hindu undivided family by the sum of Rs. 50,000 and crediting the same amount in the personal account of his son, Keshav Kumar Swarup. It is relevant to mention in this connection that on November 20, 1956, the date of the gift, the assessee had a substantial credit balance far exceeding the sum of Rs. 50,000 which he purported to give to his son. The adjustment of entries made as aforesaid in the books of the Hindu undivided family was in pursuance of a letter written by the assessee to the said Hindu undivided family on the same date. The letter, which is annexure "A" to the statement of the case, runs as follows:

" Gopal Swarup, M.A.,

Telephone No. 85 Muzaffarnagar Dated Nov. 20, 1956.

M/S. GOPALRAJ SWARUP & SONS,

MUZAFFARNAGAR.

Dear Sirs,

I have decided to give, out of my free will, a sum of Rs. 50,000 (Rupees Fifty thousand only) to my son, Keshav Kumar. Please pay to the said gentleman this amount. From to day I have no right, title or interest in the aforesaid amount.

Yours faithfully, Sd/- (Gopalraj Swarup)"

2. The first assessment for wealth-tax after this gift was in respect of the year 1957-58. In the assessment for that year the assessee claimed that the sum of Rs. 50,000 no longer formed a part of his assets and should not, therefore, be included in his net wealth assessable to wealth-tax, but the Wealth-tax Officer rejected the claim of the assessee on the ground that there was no valid gift and that the transaction in question was made by the assessee with the only object of escaping the incidence of wealth-tax on that amount. The assessee carried the matter in appeal to the Appellate Assistant Commissioner who dismissed the appeal holding that the gift alleged to have been made by the assessee in favour of his son was not a genuine gift, and, there fore, the Wealth-tax Officer was justified in including the sum of Rs. 50,000 in the net wealth of the assessee. The assessee does not appear to have carried the matter further in second appeal to the Tribunal for that year.

3. In the assessment for the year 1958-59 the assessee again made the same claim, i.e., for the exclusion of the sum of Rs. 50,000 from his net wealth. The assessee's claim was again rejected successively by the Wealth-tax Officer and the Appellate Assistant Commissioner of Wealth-tax. The assessee then preferred a second appeal to the Tribunal but with no better result. The Tribunal in its short order dated 18th September, 1961, discussed only three cases, one of them being COMMISSIONER OF Income Tax, AHMEDABAD Vs. NEW DIGVIJAYSINHJI TIN FACTORY., . This was a decision of the Bombay High Court in which the facts in short were that there was a firm of two partners one of whom was Vithaldas, and the other his son, Harjivandas. Apparently, Vithaldas was a widower in the relevant year and his son apprehended that his father might remarry. To allay such apprehension on the part of his son, Vithaldas executed an instrument in writing stating that out of his own share of profits of the firm he would give 1/4th to his daughter-in-law and grandson. Thereupon entries were made in the books of the firm debiting Vithaldas by the sum representing his accumulated amount of capital and profits and similar amounts were credited to the accounts of his daughter-in-law and his grandson who was a minor. Subsequently, Vithaldas executed an instrument on a stamp paper addressed to his daughter-in-law in which he affirmed the gift which he had made in her favour and in favour of his

grand-children. The daughter-in-law of Vithaldas, in her turn, made an endorsement at the face of the instrument stating that she had accepted the gift on her part as well as on behalf of her minor children. There was also evidence in that case that the transaction was subsequently acted upon and the donees had withdrawn part of the amount standing to their respective credits. The amount of the gift, however, continued to remain invested in the firm which paid interest to the donees on their credit balance in the books. On these facts the Bombay High Court held that, although mere book entries could not result in a valid gift or trust, as, in this case, the gifts were accepted by the donees, and the firm had accepted the transaction, there was ample material to satisfy the legal requirements of a completed and valid gift. The Tribunal held that the decision of the Bombay High Court in the aforesaid case was distinguishable on facts. The Tribunal, however, did not indicate in its order the grounds of distinction. The Tribunal was of the view that the instant case was fully covered by the decision of the Privy Council in AIR 1944 78 (Privy Council) and of the Madras High Court in E. M. Vs. MUTHAPPA CHETTIAR v. COMMISSIONER OF Income Tax, MADRAS., . Holding as above, the Tribunal confirmed the assessment made by the departmental authorities and dismissed the assessee's appeal.

4. At the instance of the assessee the Tribunal has referred the following question for the opinion of this court:

"Whether, on the facts and in the circumstances of the case, the assessee had made a valid gift of the value of Rs. 50,000 to his son, Keshav Kumar Swarup, on November 20, 1956 ? "

5. At the hearing of the appeal reliance was placed by the learned counsel for the assessee on several decisions which we shall discuss presently. The first case is the decision of the Bombay High Court in Commissioner of Income Tax v. New Digvijaysinghji Tin Factory, to which we have adverted above. As already stated, the Tribunal has not indicated how that case is distinguishable from the instant case. It will be noticed that in that case entries were made in the books of the firm debiting the accounts of the partner, who was the donor and crediting the accounts of the donees by the amount of the gift. This was subsequently followed by a declaration of the gift and, as it appears, the gift was accepted by the donees. In the circumstances, the Bombay High Court held that the case was taken out of the rule that mere entries in the books of accounts are not sufficient to constitute a valid gift. It should be pointed out at this stage that-on the date on which Vithaldas purported to make the gift in favour of his daughter-in-law and his grand-children the firm did not have sufficient cash in hand and it was contended on behalf of the revenue that the entries in the books of account could not, in law, constitute a valid gift inasmuch as the firm was not in a position to deliver the amount gifted to the donees if they had so wanted. Repelling the contention the learned judges observed that actual physical delivery is not the sine qua non for validity of the gift. They pointed out that delivery could be symbolical and they agreed with an earlier decision of the same court in

Chimanbhai Lalbhai Vs. Commissioner of Income Tax (Central), Bombay, , in which a similar question was dealt with. The facts in the instant case are on a stronger footing inasmuch as we have found that on the relevant date the donor had ample funds to his credit to make good the gift which he had made in favour of his son. The department did not either file the accounts of the Hindu undivided family nor contend that on the date of the gift (November 20, 1956) the Hindu undivided family was not in possession of sufficient funds and was not in a position to deliver the amount gifted to the donees if they had so liked.

6. The next case relied upon by the learned counsel for the assessee is a decision of this court in JUGGILAL KAMLAPAT (A FIRM) Vs. COMMISSIONER OF Income Tax, U.P. and V.P., . In that case it was held that it cannot be laid down as a general legal proposition that because a person has not with him ready cash he cannot create a trust in excess-of the amount. The trust in that case was created by one Kamlapat a couple of days before his death. Shri Kamlapat gave an information to an employee of the assessee-firm, which was a banking concern, to the effect that he had donated two specific sums of money, one amount of Rs. 5 lacs for charitable purposes and the other amount of Rs. 2,46,500 to some of his needy relations. On the same date the employee of the assessee-firm, to which such information was given by the donor, Shri Kamlapat, opened an account styled "Kamlapat Ji Dharamkhata" crediting the same by the sum of Rs. 5 lacs. On the date on which the alleged trust was created, Shri Kamlapat had a sum of Rs. three lacs and odd only to his credit in the assessee-firm and it was not obviously possible for him to create a trust of Rs. 5 lacs and also to pay a sum of Rs. 2,46,500 to his relations. This court, however, held that a legal and valid trust was created by the deceased donor when the assessee-firm not only opened an account in the name of the trust, Kamlapat Ji Dharamkhata, but also credited it with a sum of Rs. 5 lacs.

7. It is pertinent in this connection to refer to another decision of this court in the case of Commissioner of Income Tax Vs. Smt. Shyamo Bibi, , which was cited by Dr. Misra appearing on behalf of the revenue. In that case the assessee purported to make a gift of Rs. 1 lakh to her only grandson. The gift was effected by transfer entries by debiting her personal account by the sum of Rs. one lakh and crediting the same amount in an account opened in the name of her grandson. The donor also signed a memorandum reciting that she had orally given Rs 1 lakh to her grandson and delivered the amount to him by transfer entries made in her account and placed him in possession and control of the sum. It was also recited that the donee had accepted the gift and taken possession and control of the money. The account of the donor showed a cash balance of Rs. 15,000 and a few annas on the date of the alleged gift. In these circumstances, a Bench of this court held that there was no valid gift as there was no delivery of possession of the amount. It was observed that the execution of the memorandum and the adjustment entries made in the accounts were not sufficient to put the donee in possession of the amount gifted and that making transfer entries in the personal accounts did not constitute constructive delivery.

In this case, it will be noticed, the donor herself purported to make a gift to her grandson. In fact, she had no money for the purpose. It is not a case in which a donee had an account with a firm or with an undivided family which undertook to give the donee credit for the amount of the gift. The instant case is, as we have pointed out, based on entirely dissimilar facts. Here the assessee had a substantial credit balance in his personal account and was in a position to make good the gift by actual delivery if the donee had so desired. We have also observed that it has not been shown that the firm, of which the assessee was a partner, did not possess the necessary cash in hand on the date of the gift. The facts of the present case are, therefore, clearly distinguishable from those in Smt. Shyamo Bibi's case referred to above. It may be pointed out that Smt. Shyamo Bibi's case came up for consideration before the Punjab High Court in *BALIMAL NAWAL KISHORE Vs. COMMISSIONER OF Income Tax, PUNJAB.*, In that case a Bench of the Punjab High Court presided over by Falshaw C.J., Mahajan J. sitting with him, after reviewing the facts of the Allahabad case observed as follows :

"What the learned judges (of the Allahabad High Court) was considering in that case was whether the original entry by the assessee in her own account books, together with the execution of some kind of unregistered document, legally amounted to a gift or not. . . .

It would certainly appear to be a permissible inference . . . that if the assessee had made the transfer through the accounts of the firm it might have been held to be a valid gift."

8. The decision in the Punjab case cited above entirely supports the gift of the assessee in the instant reference. It was laid down in that case that the validity of a gift made by way of debit and credit entries in the account books of a firm of which the donor is a partner must depend entirely on whether, in the circumstances, this is the natural method of transfer, and it is certainly not necessary for the donor to withdraw sums in cash from the firm to be reinvested by the donor or donees in the firm.

9. Dr. Misra, learned counsel for the department, relied in the first instance on *Chambers v. Chambers* , which forms the basis of the order of the Tribunal against the assessee. The facts of that case were, however, entirely different. In that case one Mr. G. A. Chambers was the sole proprietor of a firm and with a view to make provision for his wife and children and other relations directed that they should be credited with sums varying from Rs. 2 lacs to Rs. 7,500 together with interest thereon at 6% per annum. It was stated that the sums so gifted were, to be regarded as personal gifts made by Mr. G. A. Chambers to the persons whose accounts were credited, but no realisation of any amount was permitted in one year exceeding 10% of the amount credited in the firm's books. The main question formulated for decision was whether, on the facts and circumstances, there was a valid and completed gift of the sum of Rs. 2 lacs to Mrs. Chambers by Mr. G. A. Chambers or, in the alternative, whether there was a

valid declaration of trust in respect of the said sum of Rs. two lacs in her favour. The courts in India held that the legal requirements of a "gift had not been satisfied and the point was pursued in appeal to the Judicial Committee of the Privy Council. The only question, which arose for consideration of the Judicial Committee in the appeal, was whether a valid trust was created by the declaration made by Mr. G. A. Chambers. It was held that the requisites for the constitution of a valid trust, as prescribed by sections 5 and 6 of the Indian Trusts Act, 1882, had not been complied with and that the subject-matter of the alleged trust was not ascertainable. A peculiar feature of that case was that, as pointed out by the Privy Council, no sum was ever set apart or appropriated by Mr. Chambers for the purpose of the transfer to Mrs. Chambers of which he was to be a trustee with all the consequential obligations of such a position, In the circumstances, their Lordships observed:

" At the most it was an attempt to give Mrs. Chambers an interest in the capital of his business to be measured on the basis of her having contributed two lacs. The entire business, including the share in it which he had purported to credit to Mrs. Chambers, remained entirely under the unfettered control of Mr. Chambers. There was never any trust estate which the courts could administer."

10. It will be noticed that in that case the question of the validity of the so-called gift was not at all in issue before the Privy Council, evidently because the appellant did not dispute the decision of the Indian courts that there was no valid gift in the circumstances of that case, one of which was that the so-called donees were not permitted, in any one year, to withdraw any sum exceeding 10% of the amount credited to them in the books of the firm. As the question regarding the validity or otherwise of the so-called gift was not in issue before the Privy Council we fail to see how the case could be cited as a binding authority for the view taken by the Tribunal that the facts in the present case were completely governed by that decision. In our opinion, the decision has no application to the facts of the instant case and the Tribunal was not light in relying thereupon to dismiss the appeal of the assessee.

11. The next case cited by Dr. Misra is a decision of the Bombay High Court in *Paliram Mathuradas (By his Legal Heir, Madanlal Paliram) Vs. Commissioner of Income Tax, Bombay City-II*, . In that case an assessee purported to make a gift of a part of a sum standing to his credit in the books of a firm by making appropriate entries in the accounts of the firm. It was held that the amount owed by the firm to the assessee being a debt was an actionable claim and mere entries in the account books were not sufficient to constitute a valid gift of the actionable claim nor would it amount to a valid assignment of the actionable claim. In that case, the assessee was an ex-partner of a firm and a sum of Rs. 1,13,000 was due to him from the firm in the relevant year of account. The assessee purported to give a sum of Rs. 50,000 to his two grandsons in equal moieties. Accordingly, the account of the assessee was debited by a sum of Rs. 50,000 and the accounts of his two grandsons were credited with Rs. 25,000

each. One of the grandsons was a minor at the material time. In the account, which was opened in the name of the minor grandson, nobody was shown as his guardian. On these facts it was held by the Bombay High Court that the debt owed by the firm to the assessee was in the nature of an actionable claim and if the assessee wanted to transfer ownership of a part of the amount he should have effected the transfer by a deed in writing as required by Section 133 of the Transfer of Property Act. No such deed having been executed by the assessee, the court held that there was no valid transfer of the amount in question by the assessee in favour of his two grandsons. It would be convenient at this stage to refer to the terms of Section 130(1) of the Transfer of Property Act, 1882. Section 130(1) runs as follows :

"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 the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:....."

12. The rest of the section is not material for our purpose. On a reading of the terms of Section 130(1) of the Transfer of Property Act, quoted above, it would appear that the conditions necessary for the validity of the transfer of an actionable claim is that the transferor should execute an instrument in writing signed by him or by his duly authorised agent conveying all his rights and remedies in such actionable claim in favour of the transferee. In the Bombay case referred to above, there was no such instrument and it was, therefore, held that there was no valid transfer of the debt owed by the firm to the assessee in favour of the two grand-children of the latter. In the present case, however, there was a contemporaneous instrument (annexure "A") duly signed by the assessee transferring Rs. 50,000 to his son, Keshav Kumar, and directing the firm to pay the amount to the transferee. This was, in our opinion, sufficient compliance with the terms of Section 130(1) of the Transfer of Property Act and the decision of the Bombay High Court in the above case must be distinguished on that ground.

13. The last case on which Dr. Misra relied is another decision of the Bombay High Court in *Virji Devshi Vs. Commissioner of Income Tax, Bombay*, . In that case the assessee was a partner in several firms and he purported to give away a sum of rupees three lacs to his minor son in whose name a new account was opened. The new account was credited with rupees three lacs and the assessee's account was debited by that sum. The assessee had, on the date of the purported gift, more than rupees three lacs to his credit in the registered firm. The assessee also made a declaration stating therein that he had made a gift of rupees three lacs to his minor son out of natural love and affection, by the transfer entries made in the books of the firm and by opening a new account in the name of his minor son. The declaration further stated that in respect of the

sum of rupees three lacs gifted by the assessee to his son, Sri Jadavji Pragji, the other partner of the firm would act as a trustee and guardian of his son and he alone was competent to deal with the amount so gifted by the assessee to his son. The Bombay High Court doubted the genuineness of the transaction. The leading judgment in the case was delivered by Desai J. who pointed out that the declaration made by the assessee was inconsistent to a certain extent with the entries made in the partnership accounts. It was observed that if Shri Jadavji Pragji was a trustee in whom the money was to vest for the benefit of the minor then the account in the partnership firm should normally be expected to be in the name of the trustee on behalf of the minor. Actually, however, in the accounts maintained in the firm there was no reference to Shri Jadavji Pragji. It was also found that there was nothing to show that the amount of gift was accepted by Jadavji Pragji as a trustee or guardian on behalf of the minor. The court repelled the contention that the amount could be treated as having been accepted by the assessee on behalf of his minor son because Jadavji had been really appointed the trustee and guardian of the minor. It was he alone who could accept the gift on behalf of the latter. In the case before us, we are dealing with an assessee who made a gift in favour of his adult son, namely, Keshav Kumar. The account of Keshav Kumar was also not a new account. It was a pro-existing account which had been operated upon in the past. It could not, therefore, be contended that by the transfer of the sum of Rs. 50,000 from his account, the assessee purported to open a new account in the benami of his son. At all events, the Tribunal has never doubted that the transaction in question was bona fide. The only ground on which the Tribunal dismissed the appeal of the assessee was that the transfer evidenced by the entries in the books of account and by the declaration, annexure "A", did not operate to bring into existence a valid gift. We are unable to sustain the view taken by the Tribunal.

14. We would, therefore, answer the question referred to us in the affirmative. The assessee will get Rs. 200 as costs of this reference from the Commissioner of Wealth-tax. Counsel's fee is assessed in the same figure.