
(1979) 09 BOM CK 0008

In the Bombay High Court

Case No : Estate Duty Reference No. 1 of 1970

Khatijabai Abdulla Soomar

APPELLANT

Vs

Controller of Estate Duty, Bombay

RESPONDENT

Date of Decision : 13-09-1979

Acts Referred:

Estate Duty Act, 1953 — Section 10

Citation : (1980) 15 CTR 126 : (1980) 124 ITR 160 : (1979) 3 TAXMAN 137

Hon'ble Judges : Madon, J;Kania, J

Bench : Division Bench

Advocate : I.M. Munim, for the Appellant; R.J. Joshi, for the Respondent

Judgement

Madon, J.—This case has been stated under s. 64(1) of the E.D. Act, 1953, and two questions have been referred to this court by the Income Tax Appellate Tribunal at the instance of the accountable person, namely, the applicant. These two questions are :

"(1) Whether, on the facts and in the circumstances of the case, the sum of Rs. 32,079, being the amounts due on insurance policies assigned by the deceased to his wife, had been rightly included in the principal value of the estate of the deceased ?

(2) Whether, on the facts and in the circumstances of the case, the provisions of section 10 of the Estate Duty Act, 1953, apply in respect of the sum of Rs. 1,50,000 gifted by the deceased to his two grandchildren ?"

2. So far as question No. 1 is concerned, when this reference reached hearing before us, Mr.Munim, learned advocate for the applicant, stated that the applicant did not desire this court to give any answer to this question. Accordingly, we refrain from expressing any opinion with respect to question No. 1.

3. For an understanding of how question No. 2 came to be referred to us, it is

necessary to set out the material facts. The deceased, Abdulla Soomar Shivji, gave a gift of two sums of Rs. 75,000 each to his grandson, Hassan Jafferli Shivji, and grand-daughter, Aminabai Jafferli Shivji, both minors, on May 11, 1955, and July 23, 1956, respectively. These gifts were accepted on behalf of the minors by their father. The deceased was a partner in the firm of M/s. Soomar Shivji and Company. The first sum of Rs. 75,000, gifted as aforesaid, was deposited by the guardian of the minors in the said firm on July 10, 1955. The second sum of Rs. 75,000 was similarly deposited in the said firm on August 12, 1955. The deceased retired from the said firm on November 12, 1958. He died on March 25, 1960. Until his death the said two sums remained deposited with the said firm. As he had died within two years of his retirement from the said firm, the Assistant CED included these two sums in the estate of the deceased as property which was deemed to pass on the death of the deceased under s. 10 of the E.D. Act. This view was upheld by the Appellate CED as also by the Tribunal. It is against this finding that the second question is directed.

4. At the hearing of this reference several decisions were relied upon by both the learned counsel. Before we turn to consider these authorities it will be convenient to set out at this stage the material provisions of s. 10 of the said Act, which are as follows :

"10. Gifts whenever made where donor not entirely excluded. - Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise :

Provided that 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 :"

5. There is a further proviso to this section with which we are not concerned.

6. Section 10 fell to be considered by the Supreme Court in the case of George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore, . The Supreme Court observed (p. 501) :

"The crux of the section lies in two parts : (1) The donee must bona fide have assumed possession and enjoyment of the property, which is the subject-matter of the gift, to the exclusion of the donor, immediately upon the gift, and (2) the donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him, by contract or otherwise. 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....

The second part of the section has two limbs : the deceased must be entirely excluded, (i) from the property, and (ii) from any benefit by contract or otherwise. It was argued for the appellant that the expression "by contract or otherwise" should be construed ejusdem generis and reference was made to the decision of Hamilton J. in *Attorney-General v. Seccombe* [1911] 2 KB 688; 1EDC 589 . On this aspect of the case, we think the argument of the appellant is justified. In the context of the section, the word "otherwise" should, in our opinion, be construed ejusdem generis and it must be interpreted to mean some kind of legal obligation or some transaction enforceable at law or in equity which, though not in the form of a contract, may confer a benefit on the donor."

7. There is no dispute in this case that bona fide possession and enjoyment of the amounts gifted were immediately assumed by the donee and that the first condition of s. 10 of the E.D. Act was satisfied. There is equally no dispute that no benefit was reserved to the donor by contract or otherwise and that the second limb of the second condition was also satisfied. The controversy has ranged round whether the first limb of the second condition has been satisfied, that is, whether the possession and enjoyment of the amounts gifted were after assumption of possession and enjoyment of the donees retained by the donees to the entire exclusion of the donor.

8. The first authority relied upon by Mr. Munim was a decision of the Judicial Committee of the Privy Council in *H. R. Munro v. Commissioner of Stamp Duties* [1934] AC 61; 2 EDC 462. In that case a father, who was the owner of a large plot of land on which he carried on the business of a grazier, entered into partnership with his six children to carry on the said business. The partnership business was to be managed solely by the father, and each partner was to receive a specified share of the profits. Subsequently, he transferred, by way of gift by separate registered transfer deeds, all his right, title and interest in separate portions of his land to each of his four sons and the trustee of each of his two daughters and their children. This transfer was subject to the partnership agreement and was on the understanding that any of the partners could withdraw and work the portion of the land gifted to him separately. This partnership was an oral one, and about six years after these deeds of gifts were executed, a written partnership agreement was drawn up under which during the lifetime of the father no partner was entitled to withdraw from the partnership. On the death of the father, the land which he had transferred by way of gift to his six children was included in assessing his estate to death duties under the Stamp Duties Act, 1920-31, which contained a provision in pari materia E.D. Act. On appeal, the Judicial Committee held that the property comprised in the transfers was the land shorn of the rights therein belonging to the partnership and was excluded from being dutiable, because the donees had assumed and retained possession thereof, and any benefit remaining in the donor was referable to the partnership agreement entered into earlier than the gifts and not to the gifts.

9. Before we turn to the other authorities relied upon by Mr. Munim, it will be

convenient to refer to another decision of the Privy Council upon which considerable reliance was placed by Mr. Joshi, learned counsel for the respondent, namely, *Clifford John Chick v. Commissioner of Stamp Duties* [1958] AC 435; [1959] 37 ITR 89; 3 EDC 915. The same section namely, s. 102 of the New South Wales Stamp Duties Act, 1920-56, which fell for consideration in *Munro's case* [1934] AC 61; 2 EDC 462, also came up for consideration in this case. In *Chick's case* a father had transferred, by way of gift, to one of his sons a pastoral property, the gift being made without reservation or qualification or condition. About seventeen months after the date of gift the father, the son to whom the gift was made and another son of the donor entered into an agreement to carry on in partnership the business of graziers and stock dealers. The agreement, inter alia, provided that the father should be the manager of the business and that his decision should be final and conclusive in connection with all matters relating to its conduct. The agreement further provided that the capital of the business should consist of the livestock and plant then owned by the respective partners and that the business should be conducted on the respective holding of the partners and such holdings should be used for the purposes of the partnership only and that all lands held by any of the partners at the date of the agreement should remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership, and any such partner should have the sole and free right to deal with it as he might think fit. Each of the three partners owned their own property. The property owned by the son, to whom the father had made a gift of land as aforesaid, was the very land which was gifted to him. Each partner brought into the partnership livestock and plant, and their combined properties were thenceforth used for the depasturing of the partnership stock. On the death of the father, the land gifted to his son was sought to be assessed to death duty as forming part of his estate. The judicial Committee held that the value of the land gifted to the son was to be included in computing the value of the father's estate for the purpose of death duty and that though the son had assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the father, he had not, on the facts, thenceforth retained the property to the father's entire exclusion, for, under the partnership agreement, the partners and each of them were in possession and enjoyment of the property as long as the partnership subsisted, whatever force and effect might be given to that part of the partnership agreement which gave a partner the sole and free right to deal with his own property. The Judicial Committee further held that where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact which has to be determined, and if he has not been so excluded, the eye need not look any further to see whether his non-exclusion has been advantageous or otherwise to the donee. As pointed out by the Supreme Court in *Controller of Estate Duty, Madras Vs. Parvathi Ammal*, , the following six points emerge from *Chick's case* [1959] 37 ITR 89; 3 EDC 915 .

"(1) The deceased was not in fact excluded from the property, but as a partner enjoyed right over it.

(2) There was an initial outright gift of the property - not of the property shorn of certain rights.

(3) It was immaterial that the partnership agreement was later than the gift, since the section required that possession and enjoyment should "henceforth" be retained to the exclusion of the donor.

(4) It was also immaterial that the partnership was "an independent commercial transaction" and that the donor gave full consideration for his rights. If a donor gives the donee a freehold and the donee gives the donor a lease, even at a full rent, the donor is not excluded from the property.

(5) The question whether the partnership agreement was "related" or "referable" to the gift did not arise : the question is relevant only to the second limb of the clause.

It was immaterial that the donee could make no better use of the property. "Where the question is whether the donor has been entirely excluded from the subject matter of the gift, that is the single fact to be determined. If he has not been so excluded the eye need look no further to see whether this non-exclusion has been advantageous or otherwise to the donee." (See page 276 of Dymond's Death Duties, 14th edition).

10. Mr. Munim, for the applicant, submitted before us that whatever might be the position on these two authorities of the Privy Council, the Supreme Court had in the case of Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, , taken a view which supported the applicant's case. Two different types of property were gifted in Gounder's case. The first type of property was the gift of a house which the deceased owned and which was let to the firm in which the deceased was a partner as a tenant-at-will. After the deed of gift the firm paid the rent not to the deceased but to the donees by crediting the amount in the "donees" accounts in equal shares. The second type of property consisted of gifts of money effected by the deceased directing the firm in which he was a partner to transfer from his account a sum of Rs. 20,000 to the credit of each of his five sons in the firm's books of accounts with effect from a particular date. He also gave intimation to his sons about this transfer. In pursuance of the directions given by the deceased, a sum of Rs. 20,000 was credited in each of the son's account with the said firm. None of the sons withdrew any amount from their accounts with the firm, and the amounts remained invested with the firm for which the firm paid them interest. The deceased continued as a partner of the firm until its dissolution. Within less than a month of the dissolution of the firm the deceased died. The question that arose in the estate duty assessment of the deceased was whether the value of the house property and the sum of Rs. 1,00,000 could be included in the principal value of the estate of the deceased as property deemed to pass under s. 10 of the E.D. Act, 1953. The Supreme Court

held that neither the house property nor the sum of Rs. 1,00,000 could be deemed to pass under s. 10. The reasons for coming to this conclusion were stated by Jaganmohan Reddy J., who spoke for the court, in these words (at p. 452) :

"There is no doubt, on the facts of this case, the first two conditions are satisfied because there is an unequivocal transfer of the property and also of the money, in the one case by a settlement deed, and in the other by crediting the amount of Rs. 20,000 in each of the sons' accounts with the firm which thenceforward became liable to the sons for the payment of the said amount and the interest at 7 1/2% per annum thereon. In these circumstances, the revenue has failed to establish that the donees had not retained possession and enjoyment of the property or the amount and that the deceased was not entirely excluded from the possession and enjoyment thereof. The last limb of the condition relating to any benefit to the donor by contract or otherwise is inapplicable in this case. 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 thenceforward 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 the possession in any other manner unless he was required to effectuate the gift for the purpose of s. 10 of the Act (i.e., the E.D. Act, 1953) by getting the firm to vacate the premises and handing over possession of the same to the donees leaving the donees thereafter to lease it out to the firm. Even then the objection of 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 has as a member of the partnership was not a benefit referable in any way to the gift but is unconnected therewith." (The emphasis has been supplied by us.)

11. Two things are pertinent to note in the passage quoted above. The first is that the Supreme Court equated the gift made to the sons by making entries in the books of account of the firm as gifts of money. In express words the Supreme Court has said, "there is no doubt, on the facts of this case, the first two conditions are satisfied because there is an unequivocal transfer of the property and also of the money, in the one case by a settlement deed, and in the

other by crediting the amount of Rs. 20,000 in each of the sons' account with the firm which thenceforward became liable to the sons for the payments of the said amount and the interest at 7 1/2% per annum thereon". The second is that, accounting to the Supreme Court the benefit which a donor has as a member of a partnership firm is an altogether different thing from a benefit which he has in his individual capacity. As the Supreme Court said, "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". In the case of Commissioner of Income Tax and Controller of Estate Duty, Madras Vs. N.R. Ramarathnam and Others, , also the gift was by a partner in a firm to his children by making adjustment entries in the books of account of the firm against the balance to the donor's credit in his current account with the firm. The amounts continued to remain with the firm and were utilised in the partnership business, the donor continuing as a partner till his death. Following the decision in Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, , the Supreme Court held that the amounts were not liable to be included in the estate of the deceased.

12. Mr. Munim also relied upon the decision of a Full Bench of the Allahabad High Court in Controller of Estate Duty Vs. Thanwar Dass, , in which once again amounts were gifted by making adjustment entries in the books of account of the firm in which the donor was a partner. A part of the amount so gifted were withdrawn by some donees and subsequently again invested in the firm. A distinction was sought to be drawn before the Full Bench between gifts of cash made to a donee and subsequently brought in and invested in the firm and gifts made by making transfer entries in the books of account of the firm. The full Bench held that there was no material distinction between the two types of cases and that the judgments of the Supreme Court in Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, and Commissioner of Income Tax and Controller of Estate Duty, Madras Vs. N.R. Ramarathnam and Others, covered both these cases and the question referred to its must be answered in favour on the accountable person.

13. Mr. Joshi, learned counsel for the respondent, however, submitted before us the ratio of Gounder's case did not cover the questions which we have to decide. He further submitted that the judgment of the Allahabad High Court was wrongly decided on an incorrect understanding of what the Supreme Court had held in Gounder's case. In Mr. Joshi's submissions the ratio of Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, was correctly appreciated, explained and applied by the Gujarat High Court in the case of Sakarlal Chunilal and Others Vs. Controller of Estate Duty, Gujarat, . The decision was a common judgment delivered in two references which were heard together by that High Court. Briefly stated, the facts of the first reference with which the Gujarat High Court had to deal with were that the father made gifts of varying amounts to his five sons, two grandsons and daughter in the aggregate sum of Rs. 1,20,000. The gifts were made by cheques handed over to the donees. The donees cashed the cheques and deposited the amounts in the partnership firm in which the father

was a partner. The amounts so deposited were credited in the individual account of the respective donees opened in the books of accounts in the said firm. Each of the sons was a partner in the firm. Both the Department and the Tribunal took the view that s. 10 of the E.D. Act applied the amounts gifted were part of the estate of the donor-father and were exigible to estate duty. The facts of the other reference were that a father made gifts of Rs. 2,00,000 each in favour of his two minor sons. The father in this case was also a partner in a firm, and these gifts were made by debiting the aggregate sum of Rs. 4,00,000 in the account of the father in crediting the sum of Rs. 2,00,000 each in the respective accounts of two minor sons in the books of accounts of the firm. Subsequently, the father made another gift of a sum of Rs. 2,00,000 in favour of his minor grand son by withdrawing the said sum from the said firm and handing it over to his grand son. Out of this amount a sum of Rs. 1,99,500 was deposited on behalf of the minor grand son in the said firm. The firm was dissolved, and within a few months of the dissolution of the firm the father died. Here too the revenue authorities and the Tribunal took the view that the amounts formed part of the estate of the father and were exigible to estate duty. There were thus two types of gifts in these two references which came up for consideration before the Gujarat High Court; the first was a gift made by debiting the account of the donor-father in the books of account of the partnership firm in which he was a partner and by crediting the amounts gifted to the accounts of donees, who were not partners, in the books of account of the partnership firm, and the second was a gift of moneys given by cheque or cash to the donees and which moneys were subsequently deposited by the donees with the partnership firm. In the second type of cases there were two classes of donees, (1) where the donees were already partners of that partnership firm, and (2) where the donees were not partners of the partnership firm. The Gujarat High Court drew a distinction between these two types of cases, viz., that in the case where a gift was by making entries in the books of account of the partnership firm, the gift was of property shorn of certain right which appertained to the complete ownership of the donor and the donor cannot, merely because he remained in possession and enjoyment of those rights which were not gifted, be said, within the meaning of s. 10 of the E.D. Act, not to be entirely excluded from the possession and enjoyment of that which he had given. According to the Gujarat High Court, the principle laid in *Munro's case* [1934] AC 61; 2 EDC 462 applied because the gift in such a case was subject to the right of the partnership firm which it possessed to make use of the amount gifted for the purpose of the partnership business and this right of the partnership firm did not form the subject-matter of the gift. With respect to the second type of cases, namely, where the gift was a sum of money received by the donee and the amount gifted was thereafter deposited with the partnership firm in which the donor was a partner, the Gujarat High Court held that the gift was of all the rights of ownership of the donor in the property gifted, and when it was deposited or invested in the firm in which the donor was a partner, it could not be said that the donor was entirely excluded from the possession and enjoyment of the property gifted. According to the

Gujarat High Court, in *Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder*, the Supreme Court has accepted and followed the principles laid down by the Judicial Committee in *Munro's case* [1934] AC 61 and *Chick's case* [1958] AC 435; [1959] 37 ITR 89; 3 EDC 915 and had applied those principles in deciding the case before it. This, however, is not correct. It is undoubtedly true that in *Gounder's case* the Supreme court referred to *Munro's case* with approval and it also referred to *Chicks' case*. It, however, made a certain departure from the principle laid down in *Munro's case*. To see what this departure was and what the correct ratio of the decision in *Gounder's case* is, we must now turn to the latest decision of the Supreme Court. This was a common judgment delivered on August 5, 1979, in two civil appeals, namely, Civil Appeal No. 2527 of 1972 *CED v. Smt. Kamlavati* and Civil Appeal No. 2528 of 1972 *Controller of Estate Duty, Punjab, Haryana, J. and K., U.P., Chandigarh and Patiala Vs. Smt. Kamlavati and Shri Jai Gopal Mehra*. Both the appeals were the judgments of the Punjab and Haryana High Court and involved the interpretation and applicability of s. 10 of the E.D. Act. In *Kamlavati's appeal*, that is, Civil Appeal No. 2527 of 1972, *Maharaj Mal*, the deceased, was a partner in a firm which carried on business under the firm name and style of *M/s. Maharaj Mal Mana Raj*, *Maharaj Mal* having a one-half share in the partnership, the other two partners having a one-fourth share each. *Maharaj Mal* made a gift of Rs. 1,00,000 to his son, *Lalit Kumar*, and of Rs. 1,00,000 to his son, *Lalit Kumar*, and of Rs. 50,000 to his wife, *Kamlavati*. In the books of account of the firm the sums of Rs. 1,00,000 and Rs. 50,000 were debited to the account of *Maharaj Mal* and credited to the accounts of the son and wife. Almost simultaneously the son was taken as a partner in the said firm by giving him one-fourth share out of the one-half share of *Maharaj Mal* of the different partners the firm was reconstituted and some other partners admitted. The question of the applicability of s. 10 of the said Act arose on the death of *Maharaj Mal*. The facts of the other appeal, namely, Civil Appeal No. 2528 of 1972, were that the deceased donor made gifts of Rs. 20,000 each in favour of his son and four daughters-in-law. Thereafter, the donees invested the sums gifted to them in the partnership firm nor were they taken as partners after gifts were made in their favour. This case came up in a reference before a Full Bench of the Punjab and Haryana High Court *Controller of Estate Duty Vs. Jai Gopal Mehra*, and it answered the questions referred to it in favour of the accountable person, namely, *Jai Gopal Mehra*. The decision in *Kamlavati's case* merely followed the Full Bench decision in *Controller of Estate Duty Vs. Jai Gopal Mehra*. In its judgment, the Supreme Court first dealt with the appeal of *Kamlavati*. After referring with approval to the analysis of s. 10 of the E.D. Act, given by the Supreme Court in *George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore*, it referred to the decisions of the Privy Council in *Chicks case* [1959] 37 ITR 89 and *Munro's case* [1934] AC 61. It then turned to the earlier decision of the Supreme Court in *Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder*. After setting out the latter part of the passage from the judgment of the Supreme Court in that case, which has been quoted by us earlier, the Supreme Court said (p. 462 of 120 ITR).

"It should be noticed that, though not explicitly but implicitly, some departure was made from the ratio of the Privy Council in Chick's case [1959] 37 ITR 89; 3 EDC 915, when the principle of Munro's case [1934] AC 61; 2 EDC 462 was applied, it was on the basis that what was gifted by the donor was the whole of the property minus the rights of the partnership which were shared and enjoyed by the donor also; the donor enjoying the same bundle of rights in the partnership which he was enjoying before the gift did not bring the case within the ambit of s. 10. But the implicit departure from Chick's case was when it was said that the benefit the donor has as a member of the partnership was not a benefit referable in any way to the gift but is unconnected therewith. The departure can be attributed to the very subtle distinction in the facts of the two cases and it is necessary to highlight them. In Chick's case, the donor as a partner came to share the possession and enjoyment of the property by the partnership firm long after the gift, while in Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, the benefit which the donor was enjoying as a partner in the property gifted was existing at the time of the gift itself and continued to exist even thereafter. It was not exactly on the basis of Munro's case that it was said so."

14. Their Lordships then referred with approval to an earlier decision of the Supreme Court, namely, Controller of Estate Duty, Kerala Vs. R.V. Viswanathan and Others, . In that case the deceased was the sole proprietor of a business. He gifted Rs. 45,000 to each of his four major sons on September 12, 1955. These gifts were effected by making transfer entries in the books of account of the proprietary business. A few days later, namely, on September 17, 1955, the deceased and his four sons entered into a partnership agreement and the said sum of Rs. 45,000 transferred in the books of accounts of the partnership to the credit of each of the four sons, was treated as their capital brought into the partnership. On September 18, 1955, the two minor sons of the deceased were also admitted to the benefits of the partnership, and the deceased similarly transferred to them a sum of Rs. 45,000 each from his personal account in the firm. The Supreme Court, affirming the decision of the Kerala High Court, held that there was no absolute transfer of this aggregate sum of Rs. 2,70,000 but it was a part of the scheme to transfer six-sevenths share in the business in favour of the four major and two minor sons and the transfer was made subject to the condition that the sons would use it as capital not for any benefit of the deceased donor but for each of them becoming entitled to one-seventh share in the partnership business. Their Lordships thus explained the ratio in Controller of Estate Duty, Kerala Vs. R.V. Viswanathan and Others,

"In other words, the mere fact that the partnership may make use of the sums of money gifted in which the donor also was a partner did not mean that he was allowed to enjoy or derive any benefit in the money gifted, which could be referable to the gift itself."

15. Their Lordships of the Supreme Court then thought it advisable to set out the

correct legal position in order to avoid conflict in the application of the ratio of the various Supreme Court cases, as had been by some of the High Court in the judgments delivered by them. This clarification and elucidation was given by their Lordships of the Supreme Court in the following terms *Controller of Estate Duty, Punjab, Haryana, J. and K., U.P., Chandigarh and Patiala Vs. Smt. Kamlavati and Shri Jai Gopal Mehra*,

"To avoid the conflict in the application of the ratio of the various Supreme Court cases as seems to have been done by some of the High Courts, we would like to clarify and elucidate some of the aspects and facets of the matter a bit further. 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 Act 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 other 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 the possession and enjoyment of the property to the entire exclusion of the donor, or, to the entire exclusion of the donor is any benefit to him by contract or otherwise. It makes no 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 the purpose of the partnership. It should be remembered as pointed out by Lindley on Partnership, Twelfth Edition, at page 178 :

"If a firm borrows money so as to be itself liable for it to the lender, the capital of the firm is no more increased than is the capital of an ordinary individual increased by his getting into debt."

Although as pointed out at page 357 "the capital of a partnership is not therefore the same as its property" even treating it as the partnership property, the partnership does not belong to a co-partner in the sense of his being a co-owner. The partnership firm is not a legal entity in the sense of having a legal personality of its own different from that of the partners. But no partner can claim a share in the partnership property according to his share in the partnership. A creditor of the partnership is entitled to get back the whole of his property on dissolution of the firm or otherwise, while a partner is entitled to get a share in the net assets of the property realised on the winding up of the partnership."

16. In these Civil Appeals the case strongly relied upon by the revenue was the decision of the Gujarat High Court in *Sakarlal Chunilal and Others Vs. Controller of Estate Duty, Gujarat*, After setting out what had been decided in that case their Lordships of the Supreme Court proceeded to state (at p. 464) :

"In the enunciation of the principle of law there is no appreciable, as there could not be any, difference between what was said in Gounder's case by this court and what has been said by the learned Chief Justice in the Sakarlal Chunilal and Others Vs. Controller of Estate Duty, Gujarat, But in the application of the principle to the facts of the two aggregate sums of money, it was possible to take a different view. In relation to the gifts of Rs. 1,20,000 it was possible to take a view that it was a part and parcel of the same transaction, namely, the receipt of the money by the donees by gift and their investing the same in the partnership firm. So was it possible in regard to the sum of Rs. 1,99,500. However, a different view was taken by the High Court."

17. Their Lordships, after mentioning the decisions of several High Courts cited before them, said that it was not necessary for them to enter into the fine distinction drawn by the High Courts in each of the said cases. They further observed (at p. 465) :

"But we want to emphasise that the principles of law laid down by this court in several decisions which we have reviewed in this judgment with some further clarification and elucidation should be carefully and broadly applied to the facts of each case without doing too much of dichotomy and hair splitting of facts so as not to easily apply or not to apply the provisions of law contained in s. 10 of the Act."

18. They accordingly decided Kamlavati's appeal in her favour. With reference to Jai Gopal Mehra's appeal, they pointed out that that was a case on a stronger footing than Controller of Estate Duty, Punjab, Haryana, J. and K., U.P., Chandigarh and Patiala Vs. Smt. Kamlavati and Shri Jai Gopal Mehra, and upheld the decision of the Punjab and Haryana High Court that the sums of money gifted were not exigible to estate duty. Mr. Joshi, learned counsel for the respondent, however, urged that the Supreme Court had not expressly overruled the decision of the Gujarat High Court, and, therefore, that decision none the less continued to be good law. We are not able to accept this submission of Mr. Joshi. It is true that in express words the decision of the Gujarat High Court has not been overruled, but when we read the whole judgment of the Supreme Court and see what has been said with reference to that case, it is clear that the Supreme Court has not approved the decision of the Gujarat High Court so far as it related to gifts of moneys which were received by the donees and subsequently invested or deposited in the firm. The Supreme Court, while referring to Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, has pointed out that it made a departure from the ratio laid down by the Privy Council in Chick's case [1959] 37 ITR 89 . This departure had not been noticed or appreciated by the Gujarat High Court. It was also not noticed by the Gujarat High Court that in Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, the Supreme Court equated a gift by means of making transfer entries in the books of account with a gift of money. We may also point out, as emphasised by us earlier while referring to Gounder's case, that in that case the Supreme Court equated or

treated as one and the same a gift by making transfer entries in the books of account and the gift of a sum of money. The very fact that the Supreme Court had stated with respect to amounts gifted to and received by the donees and subsequently invested by the donees in the firm of which the donor was a partner that it was possible to take a different view, as also the fact that it enjoyed upon High Courts hence forth to apply carefully and broadly the principles laid down by them in their judgment in those two civil appeals, without doing too much of dichotomy and hairsplitting of facts, would show that they have not agreed with the view taken by the Gujarat High Court with respect to gifts of money subsequently invested in the partnership firm in which the donor was a partner, and if any further indication was necessary, the very fact that they decided Jai Gopal Mehra's appeal in favour of the accountable person, where the facts were very similar to the second type of gift in the Gujarat case, would show that that part of the judgment of the Gujarat High Court was not approved by the Supreme Court.

19. We see no material difference between the facts before us in this reference and the facts of Jai Controller of Estate Duty, Punjab, Haryana, J. and K., U.P., Chandigarh and Patiala Vs. Smt. Kamlavati and Shri Jai Gopal Mehra, which was decided by the Supreme Court in favour of the accountable person, and we are accordingly bound to decide the question relating to this part of the reference in favour of the accountable person.

20. Mr. Joshi next submitted that the question to be considered by the court is whether the receipt of the moneys by the donee and the investing of the same in the partnership was a part and parcel of the same transaction. In Mr. Joshi's submission, the time within which the moneys were invested by the donees in the partnership firm was a very material factor, and if the moneys were invested within a short period, it would be said that it was a part and parcel of the same transaction and the amounts gifted were not exigible to estate duty under s. 10 of the Estate Duty Act, but if the amounts were deposited or invested after a considerable length of time, it could not be said to be a part and parcel of the same transaction, and, therefore, the amount was liable to be included in the property of the deceased as passing on his death. We are unable to read the judgment of the Supreme Court in Civil Appeals Nos. 2527 of 1972 and 2528 of 1972 Controller of Estate Duty, Punjab, Haryana, J. and K., U.P., Chandigarh and Patiala Vs. Smt. Kamlavati and Shri Jai Gopal Mehra, in this light. This submission of Mr. Joshi is based upon what the Supreme Court said while dealing with the Gujarat High Court case when it pointed out how on the facts of that case a different view could have been taken, namely, that the amounts gifted in cash and subsequently invested in the partnership firm were really a part and parcel of the same transaction. From this it does not follow that the Supreme Court has laid down that if a donee invests or deposits a sum of money gifted to him with a firm in which the donor is a partner unless such investment is a part and parcel of the same transaction, the amount gifted has to be included in the property deemed to pass on the donor's death. The Supreme Court decided the

two appeals on the extended principle laid down in *Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder*, , which the Supreme Court explained and elucidated in its judgment in the said two appeals. What has been held by the Supreme Court is that the benefit which a donor has as a member of the partnership is not a benefit referable in any way to the gift but is inconsistent therewith. The Supreme Court has pointed out that the rights of a partner in the properties and assets of the firm are wholly different from the rights which a person has in moneys belonging to him alone. They have further pointed out that it makes no difference whether the donee is a partner in the firm before the date of the gift or was taken as a partner at the time of the gift or whether he was never taken as a partner and remained merely as a creditor of the partnership firm by allowing the firm to make use of the property gifted for the purposes of the partnership. Incidentally, we may point out that in the present reference the first sum of Rs. 75,000 gifted to the grand children was deposited with the firm within two months of the date of the gift, and the second sum of Rs. 75,000 was deposited with the firm within about nineteen days of the making of the gift.

21. In the result, so far as question No. 1 is concerned, in view of the statement made by Mr. Munim on behalf of the applicant, we decline to answer that question.

22. So far as question No. 2 is concerned, we answer it in the negative, that is, in favour of the accountable person and against the department.

23. As the entire hearing of this reference has been taken up by the arguments on the second question and in view of the length of time which the hearing of this reference has taken, the respondent will pay to the applicant the costs of the reference fixed at Rs. 600.