

(1979) 07 AHC CK 0058

In the Allahabad High Court

Case No : Estate Duty Reference No. 67 of 1974

Kr. Harish Chandra

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 17-07-1979

Acts Referred:

Estate Duty Act, 1953 — Section 7, 7(1)
Transfer of Property Act, 1882 — Section 100

Citation : (1980) 123 ITR 118

Hon'ble Judges : R.R. Rastogi, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : Triloki Nath, for the Appellant; R.K. Gulati and R.S. Dhawan, for the Respondent

Final Decision : Disposed Of

Judgement

C.S.P. Singh, J.—The Income Tax Appellate Tribunal, Allahabad, has referred the following question of law for the opinion of this court:

" Whether, on the facts and circumstances of the case and a true and correct interpretation of the deed of partition and relevant provisions of the Estate Duty Act, the finding of the Tribunal that the deceased had an interest in the property which terminated on her death and benefit accrued/ arose and passed by the termination of such interest within the meaning of section 7 of the Estate Duty Act is correct ? "

2. The assessee, the accountable person, is the son of one Raja Lalta Prasad, who died in the year 1924, leaving behind his widow, Rani Kalawati, and five sons, one of whom is the accountable person, and his brother, Rai Bahadur Sahu Har Prasad, and his son, Sahu Jagdish Prasad. The family was joint at the time of the death of Raja Lalta Prasad. On April 10, 1933, a partial partition took place, which was followed by a final partition on December 18, 1941. In that, Rani Kalawati relinquished all her claim to the property in consideration of a monthly payment of Rs. 125 to her during her lifetime by each of her four sons. The sons

undertook personal liability to pay the amount, and, further, under the terms of the deed, the properties held by them were expressly charged for the payment of the amount. We will refer to the relevant clause of the deed a little later. Rani Kalawati died on December 16, 1955, and Kr. Harish Chandra filed a return. In the return filed, the value of the annuity of Rs. 6,000, which the deceased was receiving, was omitted. The Asst. CED, taking the view that the deceased had an interest in the properties to the extent of Rs. 6,000, added the like amount to the value of the estate of the deceased assessable under Sections 7 and 40 of the Act. The order was confirmed in appeal both by the Zonal Appellate Controller and the Tribunal. Counsel for the assessee contended that Section 7 was not attracted as the deceased did not have any interest in any property, and further that no benefit accrued or arose by cessation of her interest. It was further urged that the interest of the deceased was not capable of valuation u/s 40 of the Act, and so even in case Section 7 was attracted, the addition could not be made. To begin with, it will be convenient to dispose of the contentions based on Section 40 of the Act.

3. The question referred has already been set out earlier. It is apparent from the frame of the question that it does not include within its ambit the question relating to Section 40 of the Act. Further, from the order of the Tribunal, it is clear that no contention based on Section 40 of the Act was either raised or canvassed before it. This being so, it is not possible to allow counsel to raise a plea based on Section 40 of the Act.

4. Turning now to the dispute regarding the applicability of Section 7. The relevant part of the provision may be extracted :

" 7. (1) Subject to the provisions of this section, property in which the deceased, or any other person had an interest ceasing on the death of the deceased, shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cesser of such interest, including, in particular, a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasantana law."

5. In order that Section 7(1) should be attracted, it is necessary that the deceased should have had an interest in some property, and as a result of the interest ceasing or coming to an end on account of the death, some benefit should have accrued or arisen to some other person. Before discussing the applicability of this provision, it will be useful to refer to the partition deed under which Rani Kalawati became entitled to this annuity. Paragraph 18 of the preamble recites :

"(18) AND WHEREAS the said RANI KALAWATI the party hereto of the SEVENTH part, has, out of love and affection for her sons, namely, the parties hereto of the THIRD, FOURTH, FIFTH and the SIXTH parts, agreed to waive and release all her claims, demands and rights in and unto the said entire estate which is the subject matter of these presents whether by way of maintenance, residence, or

on account of her share on partition of the said estate by her sons and in consideration thereof EACH of the said parties hereto of the THIRD, FOURTH, FIFTH and the SIXTH parts agree and undertakes, jointly and severally to pay to her, the said RANI KALAWATI, their mother, a sum of Rs. 125 (Rupees one Hundred and Twenty-Five) per month during her lifetime. PROVIDED that the right to receive the said sum of Rs. 125 (Rupees one Hundred and Twenty-Five) per month from EACH of her sons, namely, the parties hereto of the THIRD, FOURTH, FIFTH and the SIXTH parts is personal to the said Rani Kalawati, the party hereto of the SEVENTH part, and is not transferable and upon her death the said right to receive the said amount from the aforesaid parties would terminate. "

6. This is followed by Clause 3 of the substantive part of the agreement, which is to the following effect:

" Clause 3.--THAT IN CONSIDERATION OF THE AGREEMENT AFORESAID and in consideration of monthly payment of a sum of Rs. 125 (Rupees one hundred and twenty-five only) to the said Rani Kalawati the party hereto of the SEVENTH part, during her lifetime by EACH of her four sons, namely, the parties hereto of the THIRD, FOURTH, FIFTH and the SIXTH parts, the said Rani Kalawati the party hereto of the SEVENTH part doth hereby relinquish all her claims whether by way of maintenance or residence and all her right to claim a share in the said joint family estate on partition among her sons, IT BEING DISTINCTLY PROVIDED that the parties hereto of the THIRD, FOURTH, FIFTH and the SIXTH parts shall be jointly and severally responsible for the payment of the full sum of Rs. 6,000 (Rupees six thousand) per annum which shall be paid by each of her sons at the rate of Rs. 125 (Rupees one Hundred and Twenty-five only) per month and all the properties and estate held by the parties hereto from the THIRD to the SIXTH part, namely, the said Raja Radha Raman, the said Kr. Harish Chandra the said Kr. Krishna Chandra, the said Kr. Jyoti Swaroop, are hereby charged and shall remain charged with the payment of the full sum of Rs. 6,000 (Rupees Six Thousand) at the end of any year, i.e., by Dasehra or Asouj Sudi 10 (Dasmi) of each year, it shall be open to the said Rani Kalawati to realise the sum or sums due to her, jointly or severally, from any or all the parties hereto of the THIRD, FOURTH, FIFTH and the SIXTH parts and from the properties charged hereunder, namely, those mentioned in the respective lots detailed in the SCHEDULES numbered SECOND, THIRD, FOURTH and FIFTH appended hereto and also from other properties belonging to the said parties, namely, the parties hereto of the THIRD, FOURTH, FIFTH and the SIXTH parts."

7. Mr. Mehrotra, appearing for the assessee, urged that Clause 3 of the deed detailed above created a floating charge, and thus the case did not fall u/s 7 of the Act. It was urged that before Section 7 could apply, the deceased should have held an interest in some specific property, and as in a floating charge the property varies from time to time, Section 7 is inapplicable. He drew our attention to the case of *In re Indus Film Corporation (In liquidation)* [1939] 9

Comp Cas 166 (Sind), where the nature of a floating charge is explained. It was pointed out in that case that a floating charge is one where no restraint is made on the conduct of business of the debtor, the debtor being free to deal with the property charged. It was held that in such a case the charge does not crystallize into a fixed security. It is not necessary on the facts of this case to decide whether Section 7 takes care of a floating charge also, for, in the present case, we find that, apart from the charge being created in respect of the personal properties of the sons, a charge was also created -in respect of the ancestral properties, which the sons received on partition. These properties are set out in the Schedules to the partition deed. This contention, thus, cannot be accepted. It may be pointed out that the Sind decision relied upon is in consonance with the view that we have taken, for, in that case too, a charge had been created in respect of existing assets and there was a further stipulation that other assets which may come into existence in future will stand for the charge for the loan. It was held that an immediate charge came into existence in respect of the properties, which were held by the debtor on the date of the agreement. It was then urged that as the sons had never committed any default in the payment of the annuity, the occasion for applicability of Clause 3 of the deed never arose, and as such the charge, if any, remained contingent or inchoate. This contention is based upon a misconception of Section 100 of the Transfer of Property Act. The relevant part of Section 100 of the Transfer of Property Act runs as under:

" 100, Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property ; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

8. A perusal of this provision indicates that all that is required for creating a charge is that immovable properties of a person should be made security for the payment of money to another. Thus, as soon as a property is given in security Section 100 is attracted. It is true that the creditor will enforce his charge on default, but that by itself does not postpone the creation of an immediate charge. The decision in the case of Harjas Rai v. Naurang [1906] Cri LJ 220 is clearly a distinguishable one. In that case the deed recited:

" If in the future any person appears as a claimant of the property sold and makes claim, in consequence of which there is an injury to the property sold or we do not give possession then the purchaser may recover money from our persons or sold property."

9. The covenant did not create a charge in present but in future, as the charge was to come into existence only in case some person in future makes a claim to the property, which had been sold. In the present case, the deed does not postpone the charge and make it contingent on the non-payment of the stipulated annuity, for it recites " are hereby charged and shall remain charged....." Neither in the Orissa decision in the case of Vyasyaraju

Venkataratanam Raju Vs. Damodar Sahu and Others, , of any avail, for, in that case, it was held that no specific property was made the subject-matter of the charge. Here, the matter is otherwise, as the properties received by the sons on partition have been specifically charged along with their personal properties.

10. It was then urged that a charge does not create an interest in the property, and this consideration, therefore, excluded the applicability of Section 7. Reliance is placed on a decision of this court in the case of Syed Mohd. Ahmad Rizvi v. Asst. Custodian (Judicial), Lucknow [1965] ALJ 1104. Dwivedi J. extracted a number of principles deducible from cases decided by various courts illustrating the difference between a charge and a mortgage. The relevant proposition laid down were these. While a mortgage amounts to the transfer of an interest in properties, a charge creates a right to receive payment out of some specified properties. A mortgage is *jus in rem* while a charge is *jus ad rem*. Now, Section 7 does not require that there should be a transfer of an interest in the property like that in the case of a mortgage. It rests satisfied in case the deceased had an interest in property. When a charge is created, a right which is something more than personal obligation comes into existence, that being a right to receive payment out of the specified property. There is, in principle, very little difference between a charge and a simple mortgage, the main difference being that while in a mortgage the right is good against subsequent transfers, in the case of a charge, it is good only against subsequent transfers with notice or volunteers with or without notice. As Rani Kalawati Devi had a right to receive payment out of the property specified in the deed, we are of the view that she had an interest in the property to the extent of the annuity payable to her, for, she could look upon that property for realisation of the annuity. On the death of Rani Kalawati the properties which were charged were absolved and a benefit accrued to the sons in so far as the charge created earlier came to an end.

11. The matter may be approached from another aspect. The annuity, which the deceased was getting, and the right to receive constituted her property within the meaning of Section 2(15) of the Act. For, even if it be assumed that she had no interest in any immovable property, her right to receive Rs. 6,000 annually created an interest in that sum of money. On her death, this interest came to an end and the sons were benefited by being absolved of the liability of the payment of this amount. Discharge of liability would be a benefit, for, it is not necessary that before a person can be said to be benefited, there must be an accretion to his coffers or enlargement of immovable properties otherwise. Till such time that the liability of payment persisted, the sons were poorer to that extent.

12. No useful purpose would be served by referring to the decision of the Privy Council in the case of Attorney-General of Ceylon v. Arunachalam Chettiar [1958] 34 ITR 20 , for, in that case, it was held that a coparcener had no definable share in the joint family property, and his interest did not pass on his death, for, Section 8 of the Act specifically includes such share. The decision of the Madras High Court in the case of Alladi Kuppuswami Vs. Controller of Estate Duty, also

does not resolve the problem in favour of the assessee. That case turns on the fact that the widow's interest was not quantified. Here, under the terms of the partition deed, Rani Kalawati was granted a definite amount of money as an annuity and specific property was charged for its payment.

13. We, accordingly, answer the question in the affirmative, in favour of the department and against the assessee. The department is entitled to its costs, which we assess at Rs. 200.