

(1968) 10 KL CK 0020

In the High Court Of Kerala

Case No : Income-tax Refd. Case No. 36 of 1967

L. Jose Kannampilly

APPELLANT

Vs

Controller of Estate Duty, Kerala, Ernakulam

RESPONDENT

Date of Decision : 04-10-1968

Acts Referred:

Estate Duty Act, 1953 — Section 10

Citation : AIR 1970 Ker 36 : (1969) 72 ITR 572

Hon'ble Judges : P. Narayana Pillai, J;M.U. Isaac, J

Bench : Division Bench

Advocate : C.K. Viswanatha Iyer and M.A.T. Pai, for the Appellant; C.T. Peter, for the Respondent

Judgement

Isaac, J.—This is a reference made by the Madras Bench of the Income Tax Appellate Tribunal u/s 64(1) of the Estate Duty Act, 1953, on the application of the Assesses. The questions referred are:

(1) Whether on the facts and in the circumstances of the case, the sum of Rs. 25,000/- deposited by the assessee in the Bank in the name of his minor son K. L. Baby on 2-1-1957 is includible in the estate of the deceased u/s 10 of the Estate Duty Act?

(2) Whether on the facts and In the circumstances of the case, the value of the agricultural properties gifted by the deceased to his sons under the gift deed dated 14-12-1956 is includible in the estate of the deceased u/s 10 of the Estate Duty Act?

2. Kannampilly Lonappan Lonakunju died on 14-12-1962. On 2-1-1957 he deposited a sum of Rs. 25,000/- in the Catholic Syrian Bank, Ltd., in the name of his minor son, K. L. Baby. The deceased was the guardian; and in that capacity, he drew the interest from the bank. He did not maintain any accounts regarding the amounts so withdrawn. On 14-12-1956, he executed a deed of gift in respect of some immovable properties in favour of his seven sons, of whom there were

three minors. He took powers-of-attorney from the major sons, and he was managing these properties till his death as attorney of the major sons and guardian of the minors. On 2-9-1962, he executed his last will, which stated, among other things, that the income of the gifted properties was utilised by him to the extent of Rs. 49,000 and that the said sum can be recovered by the donee from his Estate. The Appellate Tribunal and the subordinate authorities held that the aforesaid sum of Rs. 25,000/- and the properties gifted by the deceased to his sons would be deemed to be properties passing on the death of the donor by virtue of Section 10 of the Act.

3. Section 10 reads:

"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."

Dealing with the deposit of Rs. 25,000/- in the name of the minor son of the deceased, the Appellate Tribunal stated:

"The mere deposit of a sum of money in the Bank in the name of another person does not, by itself, constitute a valid gift of that amount in favour of that person. There must be some other evidence to show that the donor intended to permanently part with his absolute rights over the gifted properties in favour of the donee and that the donee also accepted the gift. There is no such evidence in this case. There was nothing to prevent the deceased from withdrawing this amount from the bank at any time he liked. Admittedly, the deceased had received the interest that had accrued on the deposited amount. The deceased did not maintain any account to show that he had credited the interest income in the name of his minor son. There was no need for the deceased to have withdrawn the interest from the Bank and he could have allowed it to lie in the Bank itself to the credit of the minor if it was his intention that the interest income should also go to benefit of the minor. The deceased, therefore, not only retained possession of this amount but also enjoyed the benefit arising from the gifted properties in the shape of interest income. Therefore, this amount of Rs. 25,000 also has been rightly included in the estate of the deceased and such inclusion is hereby confirmed."

4. The learned counsel for the assessee contended that the Appellate Tribunal went wrong in holding that the deposit of the amount made by the deceased in the name of his minor son did not constitute a valid gift, that it was on the basis of such a finding that the Tribunal held this amount was rightly included in the estate of the deceased, and that, in so far as the said finding was untenable, the inclusion of the said amount as part of the deceased's estate was also wrong. We think that there is considerable force in the contention that the Tribunal's finding that there was no valid gift cannot be sustained. The amount was

admittedly deposited in the name of his minor son. The deceased drew the interest accrued thereon only in his capacity as guardian. Possession of the deposit receipt and dealing with the deposited amount as guardian amount to acceptance of the gift. This constitutes under law a valid gift of the amount in favour of the son.

Still the question arises whether by virtue of Section 10 of the Act, this amount would be deemed property passing on the death of the donor. The learned counsel for the assessee submitted that the donor was drawing the interest on the deposit only as guardian, that he was liable to account for all amounts of the minor which came into his hands, that, if the guardian used the amount for his own purposes, it would be misappropriation, and that it would not affect the character of the gift. The learned counsel may be right in the above submission; but the question is whether Section 10 of the Act would be attracted as the donor was having control of the donated property as guardian of the donee, and he was drawing the interest thereon and using it for his own purposes, without keeping it separate from his own funds. The learned counsel for the Revenue submitted that this was sufficient to attract Section 10.

5. The scope and ambit of the above section came up for consideration before the Supreme Court in *George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore*, The Supreme Court said:

"A gift of immovable property u/s 10 will, however, be dutiable unless the donee assumes immediately exclusive and bona fide possession and enjoyment of the subject-matter of the gift and there is no beneficial interest reserved to the donor by contract or otherwise. The section must be grammatically construed as follows: "Property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and of which property bona fide possession and enjoyment shall not have been thenceforward retained by the donee to the entire exclusion of the donor from such possession and enjoyment, or of any benefit to him, by contract or otherwise. 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. This view is borne out by the decision of the Court of Appeal in *Attorney-General v. Earl Grey* (1898) 2 Q. B. 534, with regard to an analogous provision under.

Section 38(2) of the Customs and Inland Revenue Act, 1881, as amended by Section 11 of the Customs and Inland Revenue Act 1889."

The above decision was referred to by this Court in *K.E. Abdul Hameed Vs.*

Controller of Estate Duty, Kerala, and M. S. Menon, C. J., stated:

"One aspect of Section 10 did not arise for consideration in the decision of the Supreme Court mentioned above; the fact that the words "to the extent" in that section is a conscious departure from the English provision."

The learned Chief Justice then referred to the decision of the Calcutta High Court In *Rash Mohan Chatterjee and Others Vs. The Controller of Estate Duty*, W. Bengal, wherein the above aspect was considered; he quoted the following passage from the Statement of Objects and Reasons, which would show the legislative intent of the above departure from the English Statute:

"This clause brings under charge property given in gift, but in which the donor retains some interests by contract or otherwise. Where the donor retains such interests in a part of the property only, estate duty is payable on that part only."

6. In support of the contention that the fact that the donor acted as guardian of the donee and drew the interest accrued thereon and made use of it, without keeping it separate, was sufficient to bring the case u/s 10 of the Act, the learned counsel for the Revenue cited the decision of the Privy Council in *SIR PADAMPAT SINGHANIA Vs. COMMISSIONER OF Income Tax.*, . In that case the testator created a trust over certain fund in favour of his minor daughter and transferred the same to the trustees. Several years after that, when the daughter attained majority, she opened an account in a bank as instructed by her father, to which the trustees transferred the income from the trust fund as directed by the daughter. The father was also given authority by the daughter, as desired by him, to withdraw from the account as much as he wanted for being used by him, subject to an obligation on his part to repay to her the amounts not applied for her benefit or at her request Section 102(2)(d) of the Stamp Duties Act, 1920-1940, of New South Wales is similar in terms to Section 10 of the Estate Duty Act, 1953; and it reads as follows:

"102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property:-- (2) (d) Any property comprised in any gift made by the deceased at any time whether before or after the passing of this Act of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

7. The question which arose in the above case was whether by virtue of the above statutory provision, the estate of the deceased would be deemed to include the fund settled by the testator in trust for his daughter. Dealing with this question, Viscount Simonds delivering the judgment of the Judicial Committee, stated:

"Section 102 (2) (d) of the Stamp Duties Act has been the subject of much judicial discussion, as have been the corresponding provisions of the United Kingdom Finance Acts, but in the present case the difference of opinion in the High Court is due not to any difficulty in ascertaining the law but to that of correctly appreciating the facts to which the law is to be applied, a difficulty which, as has on more than one occasion been pointed out in the High Court, is not diminished by the transparent defects of the procedure by way of case stated. But whatever limitations this procedure may impose upon an investigation of the facts, it appears to their Lordships that the inference is not only open but inevitable that from 1939 onward the testator was (to use the words of the Chief Justice) "master of the income as it was paid over by the trustee". He was, too, in a position to ensure that it was so paid over. His dual authority from his daughter, which enabled him on the one hand to direct the trustee how her money should be disposed of and on the other to deal with it when it reached the bank, placed him in a position of unchallengeable control unless and until it was revoked. And it was not revoked. In these circumstances, the conclusion is irresistible that the daughter, who at material times was the sole beneficiary under the settlement, did not retain bona fide possession and enjoyment of the trust property to the entire exclusion other father or of any benefit to him. Here it does not seem that any nice question arises whether it was from the subject matter of the gift that the donor (the testator) was excluded or, alternatively, from any benefit, nor whether it is necessary that the benefit taken by the donor should impair the possession and enjoyment by the donee of the subject matter of the gift. For here the design and the result of the arrangement were that the daughter's possession and enjoyment were reduced and impaired precisely by the measure of the testator's use and enjoyment of her income."

8. The above decision was quoted with approval by the Privy Council in *Clifford John Chick v. Commissioner of Stamp Duties* (1959) 37 ITR 89 . Dealing with an argument, that Section 102 (2) (d) of the New South Wales Statute had no application to a case, where the donor happened to enjoy a benefit out of the gifted properties under a transaction which was not related to the gift, the Privy Council stated:

"Their Lordships see no reason why a gloss should be put upon the plain words of the sub-section by excluding from its operation such transactions. As long ago as in 1912 in *Lang v. Webb* (1912) 13 C. L. R. 503 (a case where a testatrix gave certain blocks of land to her sons and on the same day took leases from them of the same land) Isaac J. said: "the lease, however, gave to the donor possession and enjoyment of the land itself, which is a simple negation of exclusion, and brings the case within the statutory liability. It was argued that as the rent was full value, the lessee's possession and occupation were not a benefit. The argument is unimportant because the lease, at whatsoever rent, prevents the entire exclusion of the donor." This view of the sub-section has never been departed from and their Lordships respectfully adopt the words of Isaac J. in the

present case. It is irrelevant that the donor gave (if he did give) full consideration for his right as a member of the partnership to possession and enjoyment of the land that he had given to his son."

9. These authorities fully support the contention of the learned counsel for the Revenue; and accordingly we hold that the gift of Rs. 25,000/- made by the deceased in favour of his son would be deemed property passing on the death of the deceased u/s 10 of the Act.

10. The position regarding the gift of the Agricultural properties is similar, if not stronger for the Revenue. Admittedly, these properties were managed by the donor as attorney of the major sons and guardian of the minor sons; and their income was taken and utilised by the donor. Section 10 of the Act is clearly attracted.

11. In the result, we answer both the questions in the affirmative and against the assessee. The Controller of Estate Duty will get the costs from the assessee, the applicant in this reference. A copy of the judgment will be forwarded to the Appellate Tribunal as required by Section 64(6) of the Act.