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(2001) 09 GUJ CK 0011

In the Gujarat High Court

Case No : Gift Tax Reference No. 2 of 1986

Late Anarkali Sarabhai APPELLANT

Vs

Commissioner of Gift Tax RESPONDENT

Date of Decision : 04-09-2001

Acts Referred:

Citation : (2001) 09 GUJ CK 0011

Hon'ble Judges : M.S. Shah, J;D.A. Mehta, J

Bench : Division Bench

Advocate : R.K. Patel, for K.C. Patel, for the Appellant; B.B. Nayak, for R.P. Bhatt, for the Respondent

Judgement

M.S. Shah, J.—At the instance of the assessee as well at the instance of the revenue, the following questions of law are referred to us for our decision in respect of the assessment year 1976-77 :

At the instance of the assessee :

(1) "Whether, on the facts and in the circumstances of the case, exercise of power of appointment by the assessee was a transfer of the assessee''s interest in the property u/s 2(xxiv)(c) of the Gift-tax Act making the assessee liable to tax under the Gift-tax Act ?"

(2) "If the answer to question No.1 is in the affirmative whether the assessee by exercising the power of appointment regarding his interest in the property and naming the persons to whom the trustees of the original trust should transfer the property at a future date became liable to gift-tax in this assessment year?"

(3) "Whether the expression "in such manner" in clause (1)(iii) of the Trust Deed did not empower the trustees to make a direct transfer of appointee trusts. If it did so empower, whether there had been such a direct transfer for which no tax is leviable as it had already been paid at the time of the first transfer?"

At the instance of the revenue :

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(4) Whether, the Appellate Tribunal has been right in law in holding that the G.T.O. was not justified in levying gift tax on the value of the entire corpus on the ground that it was only the assessee''s interest in the property which was transferred and it was that which was required to be considered for the purpose of gift-tax?"

2. In Second Appeal before the Tribunal the Tribunal held that since the power of appointment had been exercised in favour of a person other than donee of the power there was a transfer which must have been taken place in the accounting year when the power was exercised. On the question of valuation of the gift there was some ambiguity in the order dated 10/6/1985 which came to be clarified by the Tribunal in Misc.Civil Application filed by the assessee. We will refer to the said aspect when we will discuss question no.4 which is referred to us at the instance of the revenue.

3. Before dealing with the question nos. 1 to 3 referred to us at the instance of the assessee, it is necessary to set out the following clause in the trust deed dated 30/3/1960.

"(iii) Notwithstanding anything hereinabove contained, the Trustees shall have full power and absolute authority to divide, distribute, hand over and transfer absolutely the corpus of the Trust Funds or any part or parts thereof at any time or times after the date hereof and during the periods mentioned in this clause to and amongst the persons hereinafter mentioned or to anyone or more of them to the exclusion of others or other of them in such proportions and in such manner and at such time or times as the Trustees may in their absolute discretion think fit."

(b) "From and after 1st January 1967 amongst Gira, Geeta, Vikram and Settlor''s daughter Anarkali or the survivors or survivor of them"

Bhartidevi Sarabhai (Settlor) settled the shares and investment as specified in Schedule being 10 shares in Karamchand Premchand Private Limited, 25 shares in Sarabhai Merck Private Limited and 2 shares in Cotton & Cloth Private Limited (ordinary shares), which were then valued at Rs.78,000/-. The trustees for the purpose and subject to the powers provided in the deed of settlement were given the discretion either to accumulate or pay the net income of the trust funds or any part or parts thereof at any time or times amongst the persons hereinafter referred to or to anyone or more of them. Different beneficiaries were specified for different period in clause (i). For the period from and after 1.1.1967 to 24.3.1978, beneficiaries were to be settlor''s sister Gira and Gita and settlor''s daughter Anarkali. After 25/3/1978, the beneficiaries were to be Gira and Gita, Anarkali and settlor''s brother Vikram. Clause (b) reads as under :

"(b) From and after 1st January 1967 amongst Gira, Geeta, Vikram and Settlor''s daughter Anarkali or the survivors or survivor of them".

4. On 24/1/1976 the trustees passed a resolution (Annexure "F"), making the

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following provision for 1512 shares in Shahibaug Entrepreneurs Pvt.Ltd. and 143 shares in Sercon Pvt.Ltd., (hereinafter referred to as the ''shares in question or "Slice "A" of the trust funds, (which was carved out from the entire corpus).

"The Trustees shall pay the net income of the Slice A of the Trust Funds arising or accruing during the period from 1st April,1976 and upto and including 31st March,1978 to Anarkali Sarabhai for her absolute use and benefit and the Trustees shall subject to the interest of the said Anarkali Sarabhai and Gira Sarabhai in the net income of the Slice A of the Trust Funds in terms of paragraphs 1(a) & (b) hereof hold with effect from 1st April 2001 or upto the death of the last survivor of Gira Sarabhai, Geeta Mayor and Anarkali Sarabhai whichever date is earlier the corpus of the Slice A of the Trust Funds for such person or persons including the said Anarkali Sarabhai and for such object or objects, purpose or purposes either absolutely or in trust or trusts and upon such terms and conditions including grant of further power of appoint as the said Anarkali Sarabhai may by Deed or Deeds appoint at any time before 1st April,2001 without transferring the provisions of Sections 13 and 14 of the Transfer of Property Act PROVIDED HOWEVER that the Trustees shall have full power and absolute authority to direct that the Power of Appointment exercised by the said Anarkali Sarabhai shall come into force at any earlier date before 31st March,2001 and thereupon the interest the said Anarkali Sarabhai and Gira Sarabhai in the net income of the slice A of the Trust Funds shall cease and the Trustees shall act accordingly".

5. By virtue of the aforesaid power of appointment Anarkali Sarabhai exercised power of appointment in favour of four other trusts being Anarkali Sarabhai (GS) T.26,Anarkali Sarabhai (GS) T.27, Anarkali Sarabhai (J) T. 28 and Anarkali Sarabhai (JP) T. 29. Anarkali Sarabhai had settled all these trusts on 8/3/1976 and the document is at Annexure "E" by which the power of appointment was exercised by Anarkali Sarabhai. The controversy centers around the definition of "transfer of property" as contained in Section 2(xxiv) which is relevant for the assessment year 1976-77 reads as under :

(xxiv) "transfer of property" means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes -

(a) the creation of a trust in property;

(b) the grant or creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property;

(c) the exercise of power of appointment of property vested in any person, not the owner of the property, to determine its disposition in favour of any person other than the donee of the power; and

(d) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of

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the property of any other person; "

Since the argument also turned on the subsequent amendment to the said definition the amended definition which came into force with effect from 1/4/1980 is also set out hereunder :

xxxx xxx xxx

(c) "the exercise of a power of appointment [(whether general, special or subject to any restrictions as to the persons in whose favour the appointment may be made)] of property vested in any person, not the owner of the property, to determine its disposition in favour of any person other than the donee of the power; and"

6. The contention of the assessee was that Anarkali had exercised the power of appointment which was capable of being exercised in favour of the donee of the power also and therefore the exercise of such power did not fall within the definition of transfer of property as contained in Section 2(xxiv) of the Act. It was further contended that this provision came to be interpreted by Bombay High Court in C.G.T. vs. Mrs.Jer Mavis Lubimoft, 114 G.T.R.90 and that as interpreted by the Bombay High Court the scope of power has to be considered for ascertaining whether any transfer has taken place. Alternatively, it is contended that the legislative amendment to the definition of "transfer of property" applied prospectively with effect from 1/4/1980 as has been stated in the circular No.281 dated 22.9.1980. Hence, the tax authorities could not have applied the amended definition of transfer of property to the transaction in question which had taken place in a year relevant to the assessment year 1976-77.

7. On the other hand Mr.B.B.Nayak, learned Counsel for the revenue has submitted that the transactions in question clearly fell within the definition of "transfer of property". The power of appointment was exercised by Anarkali in favour of certain other trusts which were not beneficiaries covered by original deed of settlement dated 30/3/1960. Hence, the transfer of property/corpus of the trust either by trustees or by Anarkali in the guise of exercise of power of appointment to those other trusts clearly amounted to transfer under the general definition of transfer of property. It was further contended by Mr.Nayak in the alternative that, in any view of the matter the transaction was also covered by section 2(xxiv) prior to its amendment because the power was exercised by Anarkali in favour of a person other than herself and therefore, there is no question of any retrospective operation of the amendment made with effect from 1.4.1980. It was further submitted that the Bombay High Court dealt with a case where the assessee was granted power of appointment which could be exercised only in favour of any person other than the donee of the power. The Bombay High Court held that the provisions of Section 2(xxiv) (as it stood prior to amendment) covered the general power of appointment. A resolution dated 24/1/1976 passed by the trustees also conferred such general power of appointment on Anarkali and therefore, even applying the test laid down by the

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Bombay High Court in C.G.T. vs. Mrs.Jer Mavis Lubimoft (supra) the case fell within the definition of transfer of property.

8. Having heard learned Counsel for the parties, we are of the view that the Tribunal was right in holding that the provision of Section 2(xxiv) even prior to its amendment, referred to the exercise of power of appointment and the words " in favour of any person other than donee of the power" qualifies words "exercise of power" and not words "power of appointment" to determine its disposition.

9. In C.G.T. vs. Mrs.Jer Maris Lubimoft (supra) the Bombay High Court examined the concept of "power of appointment" and observed as under :

" xxx xxx The expression ''power of appointment'' has not been defined in the Act, but what that expression means is very clear if regard be had to the provisions in the statutes. The Explanation to section 69 of the Succession Act, 1925, provides that where a man is invested with power to determine the disposition of property of which he is not the owner he is said to have power to appoint such property. That this is not a special definition for the purposes of the Act but it merely enunciates the general meaning of the expression ''power of appointment'' is evident even if we refer to the definition of that expression as given in section 2(13) of the Estate Duty Act,1953. Section 2(13) of the Estate Duty Act,1953, defines that expression as under :

''Power to appoint property'' means power to determine the disposition of property of which the person invested with the power is not the owner''.

That this is the correct meaning of that expression is also evident from Halsbury''s Laws of England, Volume 30, 3rd edition, paragraph 367, wherein it is, inter alia, stated that dispositive powers, more commonly known as powers of appointment, are powers authorising a person to create or dispose of beneficial interests in property. Such powers are usually sub-divided into general powers and special powers. Paragraph 368 provides that a general power is a power that the donee can exercise in favour of such person or persons as he pleases, including himself or his executors and administrators. A special power can be exercised only in favour of certain specified persons or classes such as children or relations and friends of the donee

xxx xxx xxx"

10. The contention before the Bombay High Court was that the word ''general'' was not used before the expression ''power of appointment'' and that therefore exercise of all powers of appointment would fall within section 2(xxiv). It was while repelling this contention that the Bombay High Court observed that - " It is quite implicit in the language of clause (c) that the exercise of power of appointment of property therein referred to must determine its disposition in favour of any person other than the donee of the power. The words ''any person other than the donee of the power clearly indicate that whenever such power is exercised it should be capable of being exercised in favour of anybody except the

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donee of the power. Such an ingredient can only be fulfilled if the power conferred is a general power of appointment. In case of a special power of appointment it can only be exercised amongst members of a specified class". It was in view of the said interpretation on the facts of that case the Bombay High Court held that since power of appointment in that case could not be exercised in favour of the donee, that it was a special power of appointment and therefore the power could not have been exercised in favour of anybody (other than donee of the power) but it was confined only to a specified class and therefore not being general power of appointment it fell outside the scope of section 2(xxiv) of the Act.

11. From the extract of the deed dated 30/3/1960 as well as power of appointment as granted in resolution dated 24/1/19976, it is clear that Anarkali was vested with the power to transfer the slice "A" funds of the trust without any limitation of her power and the power was capable of being exercised in favour of Anarkali herself also. In this view of the matter, the requirement of section 2(xxiv) that the exercise of power of appointment to determine its disposition in favour of any person other than the donee of the power very much covered the transaction in question by which Anarkali exercised power of appointment in favour of four other trusts who were not beneficiaries as per the trust deed dated 30/3/1960. They were certainly the persons other than donee of the power. Therefore the ingredients of section 2(xxiv) were clearly fulfilled.

12. In view of the above discussion, the question about prospective or retrospective operation of amendment in Section 2(xxiv) does not arise for our consideration.

13. It is true that learned Counsel for the assessee Mr.R.K.Patel heavily relied on following sentence of the circular No.281 dated 22/9/1980

" xxx xxx no gift-tax was attracted in a case where a beneficiary of a trust exercised the power of appointment conferred on him under the trust deed and released his or her life interest in the trust in favour of other persons."

It is vehemently submitted by Mr.Patel that the revenue itself interpreted the judgment of the Bombay High Court in the case of Commissioner of Gift-tax, Bombay City-I Vs. Jer Mavis Lubimoff, to mean that no gift-tax was attracted in a case where a beneficiary of a trust exercised the power of appointment conferred on him under the trust deed and released his or her life interest in the trust in favour of other persons. Mr.Patel submitted that the revenue did not make any distinction between the general power of appointment or special power of appointment and therefore even if the power of appointment in the instant case is held to be a general power of appointment, the pre amendment provision of section 2(xxiv) was not attracted as the power of appointment was not exercised in favour of the donee of the power herself.

14. We are afraid, this argument cannot be accepted. The circular in question merely purported to draw the conclusion from the judgment of the Bombay High

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Court Commissioner of Gift-tax, Bombay City-I Vs. Jer Mavis Lubimoff, . It was specifically stated in the circular that amendment was made to plug the lacunae as pointed out by the Bombay High Court to make amendment to the Gift Tax Act, particularly amendment in Section 2(xxiv)(c) to clarify that exercise of power of appointment would amount to transfer irrespective of whether such power is general or special or subject to any restrictions as to the persons in whose favour the appointment is made. The thrust of the circular was therefore, to indicate that lacuna pointed out by the Bombay High Court was removed from the provision and therefore when the power of appointment was to be exercised after 1/4/1980, such exercise would fall within the definition of transfer of property irrespective of the nature of the power of appointment, whether general or special or irrespective of any restriction as to whether the power could be exercised in favour of the donee or not. The circular therefore cannot be interpreted as laying down the law that even for the period prior to 1/4/1980, exercise of general power of appointment came to be exempted by the circular in question.

15. In view of the above discussion, it is not necessary to refer to the authorities cited by Mr.Patel on the proposition that the circular in question is binding on the revenue. Therefore, we answer the question No.1 in the affirmative i.e. in favour of the revenue and against the assessee.

16. The second question pertains to the date on which the property in question stood transferred. The contention of the assessee was that although the power of appointment was exercised on 31/3/1976, the actual transfer of the property was to take effect on 1/1/2001 which subsequently came to be preponed by resolution dated 1/12/1977 of the trustees accelerating the effective date of power of appointment. It was therefore submitted that the transfer did not take place in the year ended 31/3/1976.

In this regard the Tribunal has rightly come to the conclusion that since the taxable event is not just transfer of property but also transfer of property as covered by section 2(xxiv)(c) of the Act, it is the date of exercise of power of appointment which is the material date and not the date on which the consequences of the exercise of power would flow. Anarkali had interest in the corpus of the trust property and in exercise of power conferred upon her Anarkali on 31/3/1976 exercised power in favour of four other trusts of which Anarkali was settlor which resulted into transfer of the property which she held by virtue of the trust deed coupled with the resolution dated 24.1.1976. Hence, no fault can be found with decision of the Tribunal holding that transfer of property did take place in the year ended 31/3/1976 relevant to the assessment year 1976-77.

17. As far as question No.3 is concerned learned Counsel submitted that since clause (i) and (iii) of the trust deed conferred full power and absolute authority to divide, distribute, hand over and transfer absolutely the corpus of the trust funds or any part or parts thereof amongst the beneficiaries of the trust or to

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anyone it was open to the trustee to transfer the corpus of the trust in favour of the four trusts in question which was settled by Anarkali and that therefore there was no transfer of property exigible to Gift Tax Act and that swince the gift tax was already paid at the time when trust was settled in March,1960 there was no obligation to pay gift tax twice over when the income in question was transferred to the four trusts settled by Anarkali.

18. It is not possible to accept the above argument. The trust deed dated 30/3/1960 did not confer any right on the trustees to transfer corpus of the trust to any person other than beneficiaries named in the trust deed. The trustees were merely given discretion to transfer the corpus to any one or more of them to the exclusion of others or any one of them in such proportion and in such manner and at such time or times as the trustees may in their absolute discretion think fit. Admittedly, four trusts in whose favour the power of appointment was ultimately exercised were not beneficiaries covered by the trust deed dated 30/3/1960 because those four trusts came into existence on 8/3/1976. Hence this argument is not available to the assessee even on facts.

19. Coming to the last question which has been referred at the instance of the revenue it is required to be noted that by exercising power of appointment on 31/3/1976 no corpus of the trust fund was transferred but only right of Anarkali to receive the trust funds came to be transferred by her in favour of other four trusts of which she was settlor. It is true that corpus was transferred subsequently of which Anarkali was otherwise to receive income from slice ''A'' funds. Hence, there is no question of any gift having been made by Anarkali of the corpus of the trust and therefore the Tribunal was right in holding that the G.T.O. was not justified in levying gift tax on the value of the entire corpus since it was actually assessee''s interest in the property which was transferred.

20. In view of the above discussion we answer question Nos. 1 and 2 in the affirmative i.e. in favour of the revenue and against the assessee, while question No.3 is answered in negative i.e. in favour of the revenue and against the assessee. So far as question No.4 is concerned, we answer the same in affirmative i.e. in favour of the assessee and against the revenue.

21. The Reference is disposed of accordingly with no order as to costs.

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