

(1967) 03 AP CK 0002

In the Andhra Pradesh High Court

Case No : Case Referred No. 48 of 1964

MOHAMMED BHAI AND ANOTHER

APPELLANT

Vs

CONTROLLER OF ESTATE DUTY, A.P.

RESPONDENT

Date of Decision : 06-03-1967

Acts Referred:

Estate Duty Act, 1953 — Section 10, 63

Citation : (1968) 69 ITR 770

Hon'ble Judges : P. Jaganmohan Reddy, C.J

Bench : Division Bench

Judgement

P. JAGANMOHAN REDDY C.J. - The Central Board of Direct Taxes has referred for our opinion the following three questions, viz. :

"(1) Whether, on the facts and in the circumstances of the case, the Board were justified in holding that the provisions of section 10 of the Act were attracted in respect of the stationery business and house properties gifted by the deceased to his sons, Messrs. Mohammed Bhai and Fazal Hussain ?

"(2) Whether, on the facts and in the circumstances of the case, the Board were justified in holding that the provisions of the said section were also attracted in respect of the house properties and household goods gifted by the deceased to his wife, Smt. Atikabai ?

"(3) If the answer to either of the above stated questions is in the affirmative, whether the Board were justified in holding that on a proper interpretation of the said section 10, the gifted properties, to which the section applies, should be included in the estate of the deceased in entirety ?"

It appears from the statement of the case that one Fida Ali Mohammed Ali died on the 12th May, 1958. On 1st March, 1952, before the Estate Duty Act was passed, he had by and under an unregistered deed gifted to his sons his business in stationery goods which was run as a partnership concern between himself and his son, Fazal Hussain, the latter having a right only to share in the profits and

loses and not having any interest in the assets of the firm. He also gifted by a registered deed dated the 1st March, 1952, certain house properties to his sons. Ever since the above gifts, the donees were making payments to the deceased almost regularly, at the rate of about Rs. 200 per month. They maintained a personal account in the name of the deceased in the books of the firm wherein the payments thus made by them were debited. The donees also gave an amount of Rs. 16,902 to the deceased for the marriage expenses of his daughters. The donees in their letters dated the 22nd May, 1958, addressed to the Assistant Controller admitted that these payments were made to the deceased as a result of their oral promises to him at the time when he made these gifts. On these facts, the Assistant Controller held that the deceased was deriving benefits from properties gifted by him to his two sons. The accountable person, however, contended that the payments made to the deceased were only out of filial love; that even if the payments were taken as benefits derived by the deceased, they were not such as were legally enforceable, and therefore, the provisions of section 10 of the Act could not be invoked. It is further stated that it was also contended that the gift of the business and the gift of the immovable properties were two separate gifts and, if any infirmity was attached to the gift of business and the provisions of section 10 of the Act were sought to be applied thereto, the same could not be done as regards the other gift of immovable properties. The Assistant Controller, however, held that the benefits enjoyed by the deceased were referable not only to the gift of the business, but also to the gift of house properties and that the gift should be included in the estate in terms of section 10 of the Act. It was also found that he had gifted to his wife the house in which he was residing and continued to reside therein. The Assistant Controller held that the provisions of section 10 applied to those properties also, inasmuch as he continued to be in possession. The sons as well as the widow preferred an appeal to the Board u/s 63 of the Act against the orders of the Assistant Controller. The widow also filed a separate appeal. It was contended before the Board that the Assistant Controller erred in including in the principal value of the estate, the value of the house and household goods gifted by the deceased to his wife; that he was not also justified in applying the provisions of section 10 of the Act, with a view to bring under assessment the stationery business and the immovable properties gifted by the deceased to his two sons. The Board held that the donees had promised to their father that they would maintain him and followed it up by making recurring periodical payments commencing from the date of the gift amounting to about Rs. 15,000, and in addition, they gave the deceased a sum of Rs. 16,902. These payments were debited to the business accounts, because no regular accounts were maintained for the income from the property. In this view, the deceased, according to the Board, had in fact divided up all his possessions into two portions, one of which he gave to his sons and the other to his second wife, and, therefore, the deceased as donor was not excluded from all benefits referable to the gifts and that the said benefits were referable to the aggregate of the gifts taken by the donees and not only to one of such gifts. Accordingly, it held that the business

and the immovable properties gifted to the sons were rightly included in the estate of deceased u/s 10 of the Act. In so far as the house gifted to his wife, Atikabai, is concerned, it was argued by a reference to Mulla's Mohammedan Law that the gift of a house by a Mohammedan to his wife is not invalid by reason of the fact that he lives in that house, nor would it detract from the factum of possession and enjoyment. It was further contended that, inasmuch as the words "gift" and "possession" were not defined in the Estate Duty Act, they should be interpreted in accordance with the general law. The Board was, however, of the opinion that section 127A of Mulla's Mohammedan Law only described when a gift of property by a husband to his wife may be said to be complete. It was not the department's case that the gift in question was incomplete, but whether the entire exclusion of the donor as required by section 10 had been achieved and maintained till the donor's death. The Board, however, held that the provisions of section 10 of the Act applied to this gift also.

Section 10, upon which the determination of this question depends, is as follows :

"10. 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 the 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 at least two years before the death."

This section provides for the circumstances in which a property is included in the estate of the deceased, notwithstanding that it was gifted by him. The section, as drafted, assumes that any property, the bona fide possession of which was not immediately assumed by the donee, does not pass and on that basis provides that a gift of property, to the extent that bona fide possession and enjoyment of it was not (sic) immediately assumed by the donee, passes. The words "or otherwise" in the condition of "any benefit to him by contract or otherwise" has to be read ejusdem generis, as held by their Lordships of the Supreme Court in *George da Costa v. Controller of Estate Duty*. In that case it was pointed out that the crux of section 10 of the Estate Duty Act, 1953, lies in two parts : (i) 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 (ii) 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, that both these conditions are cumulative, and unless each of these conditions is satisfied, the property would be liable to estate duty u/s 10 of the Act. It was further held that the second part of section 10 has two limbs : the deceased must be entirely excluded, (i) from the property, and (ii) from any benefit by contract or otherwise; that the words "by contract or

otherwise" in the second limb of the section will not control the words "to the entire exclusion of the donor" in the first limb; but the first limb may be infringed if the donor occupies or enjoys the property or its income, even though he has no right to do so which he could legally enforce against the donee; and that in the context of the section, the words "otherwise" should 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. Three questions arise for determination in this reference : (1) Whether the donor had not made over bona fide possession; or in other words, whether the donee has not immediately assumed bona fide possession and enjoyment of the property gifted to him; (2) whether the donor was not enjoying any benefit; or in other words, whether the donee, since the date of the gift, retained possession to the entire exclusion of the donor or of any benefit to him for at least two years before the death, by contract or otherwise; and (3) if any benefit is enjoyed by the donor, would it justify the department in not excluding from the estate of the deceased that portion of the property in respect of which no benefit is enjoyed by the donor.

It is contended by the learned advocate for the assessee that the Board was wrong in holding that merely because the deceased resided in the same house after the gift was made to the wife, the gift of that house ought not to be excluded from the estate of the deceased. Secondly, he contends that Rs. 200 paid by the sons to the father or Rs. 16,000 and odd paid to him subsequently for their sisters wedding, are not benefits referable to the gift; nor can the oral terms be said to be a contract or any enforceable obligation within the meaning of section 10, and, consequently, the Board was wrong in including the properties gifted to the sons in their entirety. In the alternative, it is contended that only that extent of the property should be included for which Rs. 200 was being paid, namely, the shop, and not the other properties gifted to the sons.

It may be stated at once that the Assistant Controller of Estate Duty as also the Board had found as a fact that ever since the gifts were made, the donees maintained a personal account in the name of the deceased in the books of the firm wherein payments made by them to the deceased almost regularly at the rate of about Rs. 200 p.m. were debited and these payments and subsequently other moneys which were so debited to the business accounts amounted to Rs. 32,000. Great reliance was placed on the letter written by the sons father death of the deceased that they had promised their father to support him. But the terms of that letter have not been given. In any case, the fact that from the date of gift of the interest in the firm, the deceased was paid regularly amounts of Rs. 200 p.m. and subsequently some amounts were advanced for his daughters wedding would, it is contended by the department, justify it in drawing a conclusion that the deceased was receiving benefit from the gift of that property. The question would be whether the benefit was received under a contract or otherwise. Even if it is so, and we would examine this question a little latter, there is no warrant for the further conclusion that these payments were benefits

derived by him in respect of the aggregate of the properties gifted beyond the advantage derived and treat the value of the properties in excess of this advantage as properties from which the deceased derived a benefit so as to include them in the estate of the deceased. The words of the section are clear, namely, that the benefit must be confined only to the extent of the property in respect of the which the benefit is derived, and the other property in respect of which no benefit is directly referable has to be excluded from the estate of the estate of the donor. The department, in our view, is not justified in including the whole of the business or the other house properties gifted to the sons, on the ground that the donor received benefit from the gift of the estate.

It may be stated that section 10 has two parts : (1) that 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 (ii) 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 pointed out by their Lordships of the Supreme Court in *George da Costa v. Controller of Estate Duty*, both these conditions are cumulative and unless each of the conditions is satisfied, the property would be liable to estate duty u/s 10 of the Act. As explained by Ramaswami J. in the above case, the second part of section 10 has two limbs; the deceased must be entirely excluded (i) from the property, and (ii) from any benefit by contract or otherwise. The words "by contract or otherwise" to the entire exclusion of the donor" in the first limb. The first limb may be infringed if the donor occupies or enjoys the property or its income even though he has no right to do so, which he could legally enforce against the donee. In other words, in order to attract the section, it is not necessary that the possession of the donor of the gift must be referable to some contractual or other arrangement enforceable in law or in equity.

The basis of section 10 is that the right of enjoyment is still retained by donor; as such, the property does not wholly pass to the donee. The object of this rule is to avoid attempts at evasion by making sham gifts while the enjoyment still remains that of the donor. In every case, where a court is called upon to decide as to whether the donee has assumed possession to the entire exclusion of the donor, or not, it has to consider all the facts and circumstances of the particular case. The shop and the house property gifted to the sons were gifts made unconditionally and the donees were in possession of the same. So far as the house property gifted to the sons is concerned, there is absolutely no proof that the donor was not totally and completely excluded. There is nothing on the record to show that the income from these properties or any part thereof was used for the benefit of the donor. Only in respect of the shop the sons were paying some amounts regularly to him for maintenance in discharge of their filial duties. The question is, does this amount to their exclusion from possession or enjoyment; or does it amount to conferring any beneficial interest on the donor by contract or under any legally enforceable right. In so far as the payment of

any amounts for the wedding of the donors daughter is concerned, it is a subsequent act and is not at all referable to the gift. What they have paid has been paid due to the natural love and affection which they have for their sister, be she a step-sister. None has less, that moral duty was considered to be sufficient for the payment of the amount. In view of the observations of their Lordships of the Supreme Court, the enjoyment of part of the income by the donor who was content to rely on the filial affections of the sons, would have the effect of making the gift of the shop to the extent of the enjoyment which the donor derived by receiving regularly Rs. 200 per month (or Rs. 2,400 per year), deemed to pass to the estate of the deceased. The value of the gift of the stationery shop is said to be Rs. 2,40,571. Even an income at 6% on the value of the property would amount to Rs. 14,400 per year, but the exclusion is only in respect of the value of that asset which will earn an income of Rs. 2,400 or say of the value of about Rs. 40,000. This is the value of the property which will be deemed to pass to the estate. The facts of the Supreme Court case cannot be a guide in deciding that the whole of the stationery business will pass to the estate, as in that case it was held that the donor was not excluded from possession and benefit of the entire house. We are, therefore, of the view that so much of the value of the stationery business from which the deceased was not excluded will pass to the estate of the deceased. The estate duty authorities will have to fix the extent of the valuation of the part which would pass to the estate of the deceased.

The next question is whether the residential property gifted in favour of the wife forms part of the estate of the deceased. It is not denied that the donor out of natural love and affection, transferred the property in favour of his wife and declared that he had given possession thereof to her. That the gift was a valid gift as far as legal requirements are concerned is not dispute. Thereafter, the name of his wife was entered in the municipal registers, after mutation. There is nothing to show that the husband, the deceased, was managing the property or in any other way deriving benefit therefrom, except to reside with his wife. The only way in which possession can be given to a person who is already in possession is by vesting legal title in that person. The erstwhile possession as a licensee or "lessee" under some legal right will be changed immediately when title is vested in that person. There was no other way in which the donor even from the departments point of view, could have given possession of the residential house to his wife in order to make an effective gift, unless it is stated that he should leave his wife and go into some other house, or that they should both move out of the house and lease it so that the wife will thenceforth receive the rents. The adoption of such a device would be the exact antithesis of love and affection, the motivating basis for the gift in favour of a spouse. We do not think there is anything in section 10 which requires a break in the marital relationship or separation from the husband to make an effective gift of the residential house to the wife or the wife to the husband. A similar case came up for consideration under the English Finance Act, 1894, in *Attorney-General v. Secombe*. The

arrangement there was that an aged donor, out of love and affection gave his property to his great-nephew and continued to reside in the house. Hamilton J. said :

"It may be that from such circumstances unexplained an inference might be drawn which would entitle the Crown to estate duty. But the inference would be that the transaction was not bona fide, and that possession and enjoyment so assumed were not bona fide assumed - in other words, that the arrangement was a sham. No such case, however, is made here." It may be observed that in that case the words of the section upon which the Crown relied were "shall include 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 thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise"

Which are in pari material with the wording of section 10 of the Estate Duty Act. It was argued on behalf of the Crown that, though the donor may not have reserved to himself any right to possession or enjoyment of the property or any part thereof, there is not "entire exclusion" of him within the meaning of the clause if he has in fact access to the place, that is, if he had in fact a considerable degree of presence in the place which is the subject-matter of the gift, and enjoys an advantage, whether sentimental or otherwise, by being there. This argument was rejected as not being maintainable. The learned judge quoted the decision in *Lord Advocate v. Stewart* which was against such a contention, and though it was not binding upon him, as it was a Scottish case - none the less was accepted as sound in principle. The principle laid down there was that the possession and enjoyment or benefit from which the Act contemplates that the cedent or donor must be entirely excluded must be derived from some enforceable right, a benefit, as the Lord President said at page 595, "which was part of his property before the cession, and, therefore, not merely a benefit which is derived from his being present for a greater or less time in the old house by leave and licence of the donee." Hamilton J. at page 700 said that was what the Lord President was referring to when he said that "any other reading would, I think, drive the clause mad; because it would mean that if the cedent was after the cession even allowed again to set foot on the ceded property, the whole transaction for the purpose of duty is held as non-existent". In the facts of *Secombe's* case it was held that there was no contract that in consideration of the gift the donor must be permitted to reside and must be maintained by the donee; nor was there any understanding to that effect in the sense of an arrangement, or as it is called an "honourable understanding which is not legally enforceable." Hamilton J. further observed at page :

"I have no doubt that neither the donor nor the donee contemplated for one moment that the former would under any circumstances be turned out of the house; but there was no discussion upon the point, and the donor before he executed the deed was fully aware of the fact that after executing the deed he

would be at the defendants mercy, and was fully content to rely upon the filial affection which the defendant bore towards his great-uncle and benefactor. Upon this affection, and not upon any contract or honourable understanding, the donor was content to rely for the advantage which he in fact enjoyed of being allowed to reside in his old house until his death. The transaction was free from any element of harshness or overreaching."

The burden of proof which was upon the Crown to bring the subject within the charge was held not to have been discharged, viz., that there was in that case any benefit to the donor by contract or any other enforceable arrangement. Dealing with the argument that the donor after the gift continued to live in the house and, therefore, had derived benefit, Hamilton J. said at page 704 :

"It was said that the benefit to him was not only his board and lodging, but also the fact that he was to continue to live in the old house where he had always lived. I do not see that that merely sentimental benefit is one which can be measured by money or reached by any tax or made the ground for attracting any duty."

And earlier at page 701 he said :

"I am satisfied therefore that the donor was entirely excluded from any possession and enjoyment of the property, except such as is involved in his being allowed to sit in his old chair and sleep in his old bed, and to walk round the garden."

Mr. Kondaiah placed great reliance on the decision of the Supreme Court in *George da Costa v. Controller of Estate Duty*. In that case, property, which was in the joint names of the deceased and his wife, was gifted to their sons in October, 1954, by a document, which recited that the donees had accepted the gift and that they had been put in possession. It appeared however that the parents continued to be in possession of the house though the municipal taxes were paid thereafter in the names of the sons. The deceased died on 30th September, 1959, more than four years after the gift. It was found by the Revenue Board that, in spite of the gift, the deceased from the date of the gift to his death, continued to stay in his house as the head of the family and also was looking after the affairs of the house. In those circumstances, while referring no doubt to *Attorney-General v. Secombe*, as already observed, in interpreting the word "otherwise", the Supreme Court held that the view taken by Hamilton J. that "the exclusion of the deceased from the property itself" (the first limb of the condition) would, like his exclusion "from any benefit by contract or otherwise" (the second limb) would be achieved unless he had "some enforceable right" was not consistent with the opinion of the Judicial Committee of the Privy Council in *Clifford John Chick v. Commissioner of Stamp Duties of New South Wales*, which is a decision on a similarly worded clause of a new South Wales statute. The facts as stated by their Lordships of the Supreme Court in *Chicks* case are also distinguishable on the ground that the donor had full control over

the property donated. So was also the case of Commissioner of Stamp Duties of New South Wales v. Owens, which was cited by their Lordships of the Supreme Court. After examining one other case, namely, O'Connor v. Commissioner of Stamp Duties (South Australia) Ramaswami J. summed up the principle as follows at page 503 :

"It appears from all these cases that the first limb of the section may be infringed if the donor occupies or enjoys the property or its income, even though he has no right to do so which he could legally enforce against the donee. 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 eyes need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee. (Viscount Simonds in *Chick v. Commissioner of stamp Duties of New South Wales*)."

We find it difficult for us to accept the contention of the learned counsel for the department, having regard to the above passage that the Supreme Court laid down a proposition that the word "otherwise" should not be given the meaning which their Lordships had stated earlier following the observations of Hamilton J. in *Attorney-General v. Seccombe*. As already referred to, Ramaswami J. had in categorical terms observed that :

"In the context of the section, the word otherwise should... 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."

The whole basis of this dicta is that there must be an enforceable right. Unlike in English law, there is no equitable right enforceable by a court of equity in India. That right, if enforceable, is at law only, and this requirement was only a condition of the second limb of section 10 and would not control the words "to the entire exclusion of the donor" in the first limb. In our view, the ratio decidendi, of the Supreme Court case rested on the question whether the donor was not entirely excluded from possession of the property as an infringement of the first limb of section 10 and having regard to the facts of the case it was held that it was. That is not to say that in this case also the facts and circumstances justify the conclusion that merely because the wife and husband resided in the house after he gifted the property to his wife, he derived a benefit therefrom. Husband and wife live together as long as they maintain their matrimonial residence. It was so held in *Ranganatha Sastri v. Controller of Estate Duty*, *V.N. Krishnaswamy v. Controller of Estate Duty* and *Controller of Estate Duty v. Estate of Janab S. Ibrahim Rowther*. In the first two cases, *Veeraswami* and *Kunhamed Kutti JJ.* and in the last case, *Veeraswami* and were dealing with cases where the husband and wife were living in a house which was gifted and the donor continued in it thereafter and they were decided on the particular facts and circumstances of each case. It may also be stated that all these cases were decided prior to the decision of their Lord ships of the Supreme Court which we

have considered. In the present case the fact that the husband did everything possible to vest the possession of the house in his wife showed that he wanted the gift to be effective and reserved no rights in himself. His residence along with his wife is a marital duty which he would have discharged even if the house belonged to his wife; nor is there anything to show that the husband was managing the house dealing with it in any way. In the absence of proof to the contra, the burden of which rests on the department, we must hold that the house property gifted to the wife does not become part of the estate of the deceased.

We accordingly answer the first question in the affirmative to the extent that so much of the property which is gifted as would yield an income of Rs. 200 per month would pass to the estate of the deceased. Our answer to the second and third questions is in the negative. The assessee will have costs. Advocates fee Rs. 250.