

(1968) 04 CAL CK 0008
In the Calcutta High Court
Case No : Matter No. 19 of 1965

MRS. SHAMSUN NEHAR MANSUR

APPELLANT

Vs

CONTROLLER OF ESTATE DUTY, WEST BENGAL I.

RESPONDENT

Date of Decision : 03-04-1968

Acts Referred:

Estate Duty Act, 1953 — Section 10, 2(15), 6, 64(1)

Citation : (1969) 71 ITR 301

Hon'ble Judges : P. B. Mukherji, J; K. L. Roy, J

Bench : Full Bench

Judgement

P. B. MUKHERJI J. - This is a problem in estate duty, under the Estate Duty Act. The reference is made u/s 64(1) of the Estate Duty Act by the Central Board of Direct Taxes and raises the following question to be answered by the court :

"Whether, on the facts and in the circumstances of the case, the value of the house property No. 33, Apcar Garden, was correctly included in the principal value of the estate of the deceased, as property passing or deemed to pass on his death ?"

The property is a house property No. 33, Apcar Garden, Asansol. The title deed of this property, a copy of which has been produced by the revenue authorities and which is directed to be kept as part of the records of this proceeding, is an indenture of conveyance dated the 21st February, 1947. At the outset, it must be said, this is not at all or by any means or by the document of sale where the vendor, Henry Earnest Cecil Grant of Asansol, was selling this property to Begum Shamsun Nehar Mansur. This deed of sale recites the consideration to be Rs. 20,000. It also states clearly that the whole of this money or consideration of Rs. 20,000 was paid "with her own money and for her own benefit and enjoyment". The husband, Abul Mansur, had nothing to do with this document, either its purchase or its execution or as an attesting witness or even as any confirming or other party to this deed.

The whole question or controversy in this case is, did this property form part of the estate of the deceased, Abul Mansur, the husband, or the wife. Abul Mansur, the husband, died on the 11th April, 1959, that is, a period of twelve years after this conveyance.

The accountable person in these proceedings was his wife, Mrs. Shamsun Nehar Mansur, widow of Abul Mansur.

Looking at this deed of conveyance, the only material document for this purpose, one should have thought that the simple answer to the question asked would be in the negative because such a property could not be regarded as property passing or deemed to pass on the death of Abul Mansur on a plain reference to section 6 of the Estate Duty Act which provides, "property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death". Obviously the property under this not pass on the death of Abul Mansur because he could not dispose of this property as such, the registered title deed being in favour of Mrs. Shamsun Nehar.

But this simple question has been beset with many circumstances of difficulty, both factual and legal in this case. We, therefore, will have to consider these problems. The Assistant Controller of Estate Duty makes the following observations in his assessment order dated the 7th March, 1960 :

"The title deed of the property was produced. It is seen that the property was purchased on February 21, 1947, for Rs. 20,000 in the name of the deceaseds wife. On enquiry, it is found that the property was used as his dwelling house by the deceased till the date of death. I am, therefore, unable to accept the accountable persons contention that the deceased had no beneficial interest in the property. It is also not denied that the deceased provided the purchase consideration. Thus, it is clear that the deceased was the real owner and only the conveyance was taken in the name of his wife. Even though it is assumed that the deceased made a gift of purchase consideration, it is evident that he was not entirely excluded from bona fide possession and enjoyment of the property or benefit therefrom. Hence, I include this property within the estate of the deceased."

Two points are clear from this order. One is that the titled deed did not show that the purchase was "in the name of deceaseds wife". The title deed did not show that it was a name-lending transaction at all. It is, therefore, not appropriate to consider the title deed and say that it was in the name of the wife in the sense that it was benami. There is no such evidence to prove benami. The second point about this order is that some kind of enquiry was supposed to have revealed that the property was used as the dwelling house of the deceased on the date of his death. There is really no legal evidence to support this. There is no evidence to show that this property was used as "his" dwelling house. There is no beneficial interest in the title deed itself. The husband had no interest, direct or indirect, of any kind so far as the deed of conveyance is concerned. It reserved no "benefit"

by contract or otherwise" within the meaning of section 10 of the Estate Duty Act.

The Board perhaps realised the unsatisfactory position regarding these facts. The present appellant who appealed to the Board on this point did not succeed. By its order dated November 26, 1960, the Board decided as follows :

"The only contention is against the inclusion and valuation of house property No. 33, Apcar Garden, Asansol, valued at Rs. 40,000 by the Assistant Controller. This property was purchased on February 21, 1947, for Rs. 20,000 in the name of the deceaseds wife with funds provided by the deceased. The deceased was living in this property all the time since its purchase till the date of death. Even if the property was not benami purchase of the deceased and belonged to the wife as a result of the gift by the deceased, section 10 would be applicable inasmuch as the donor was not entirely excluded from possession and enjoyment of the property till the date of the death. Whether or not he had a legal right to residence is immaterial. As such, the Assistant Controller was correct in including the value of the property in the estate of the deceased."

Now, here again there are certain features of the appellate order which require careful consideration. The alleged fact that the wife purchased this property with the funds provided by the husband appears to have been almost assumed without any legal evidence or legal materials to support it. The title deed or the deed of conveyance does not say that the husband advanced this money through the wife to purchase this property. This must be clearly understood. In fact, the deed, already quoted, expressly used the words "with her own money and for her own benefit and enjoyment".

Reference in this connection was made by Mr. Balai Pal, learned counsel for the revenue, to the correspondence that passed between the appellants lawyer, Mr. S. D. Ghosh, and the taxing authorities. Two such letters, one dated February 22, 1960, and the other dated March 7, 1960, were referred to. They are printed in the paper-book. We do not find that the learned advocate, Mr. Ghosh, for the appellant, in these two letters anywhere conceded the fact that the money for purchasing this property was provided by the husband for the wife. Incidentally, it should be mentioned here that in the wealth-tax proceedings and the order made therein, it appears that this property was excluded from computation of the net wealth of the deceased in the wealth-tax assessment. No doubt that was largely on the ground that this document was executed prior to April 1, 1956, and it was only on that ground of date that the exclusion was allowed from the wealth-tax assessment of the husband. It will thus appears that neither the two letters of Mr. S. D. Ghosh, learned advocate for the appellant, before the taxing authorities nor the wealth-tax proceedings nor the document of title of the conveyance shows that this property was purchased by the wife the money provided by her husband.

It is, therefore, difficult to see what legal evidence or what legal material there is to support such a statement, unless, of course, it is said that in the grounds of

appeal before the taxing authorities, this point was not challenged and the statement of the case does not indicate it. But that does not prove a fact of such crucial nature in a proceeding for which this fact is so material. To hold a document really to be a benami, for that is the purpose of this connection that the money was provided by the husband, legal evidence is required. It was pointed out by the Andhra Pradesh High Court in *Smt. Shanta Bai Jadhav v. Controller of Estate Duty* that :

"..... even if the purchase money had come from the husband, it did not follow that the beneficial interest in the property vested in the deceased; at any rate, so long as the title deed stood in the name of the wife, it was not competent for the deceased to dispose of the property and u/s 6 of the Estate Duty Act such property cannot, therefore, be deemed to pass on his death, and estate duty was not leviable on the value of such property."

Because the Board in its appellate order was not sure of the fact that the husband provided the funds to the wife to purchase the property, that is perhaps the reason why the appellate order went on to consider the case u/s 10 of the Estate Duty Act after observing that "even if the property was not benami purchase of the deceased and belonged to the wife as a result of the gift by the deceased".

We, therefore, hold that there is no legal evidence or legal material to support the statement in the order, either of the Board or of the Assistant Controller, that the money was provided by the husband to the wife to purchase the property in this case.

The next question is, what was the character and nature of the alleged use by the husband of this property. Apparently, the Board is in conflict with the Assistant Controller on this point. The Assistant Controller appeared to think that the husband used this property as "his" dwelling house. The Board did not say so or hold so. The Board says that the deceased was living in this property all the time since its purchase. The question then is : what is the legal character and incident when the husband goes to the wife who lives in the property or making or using or enjoying the property ? The question sounds of but that in substance is the effect of the argument advanced by Mr. B. Pal on behalf of the revenue on the strength of the leading decision of the Supreme Court in *George Da Costa v. Controller of Estate Duty*.

It will be necessary to analyse in detail the principles laid down by the Supreme Court in that case in the light of the facts which were presented before the Supreme Court. The Supreme Court decided that the crux of section 10 of the Estate Duty Act lies in two parts, viz., (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.

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 : see the observations of Ramaswami J., who delivered the judgment of the Supreme Court at page 501 of that report. The Supreme Court further lays down the principle of construction of section 10 of the Estate Duty Act by observing that the second part of section 10 has two limbs. The deceased must be entirely excluded (1) from the property, and (2) from any benefit by contract or otherwise. The words "by contract or otherwise" in the second limb of the section will not control the words "to be exclusion of the donor" in the first limb. The first limb may be infringed if the donor occupies or enjoys the property or income even though he has no right to do so which he could legally in force against the donee. In other words, in order to attract the section, it is not necessary that the possession and enjoyment of the gift must be referable to some contractual or other enjoyment enforceable in law or in equity. Even if the donor is content to rely upon the mere filial affection of his sons with a view to enable him to continue to reside in the house which he has given to them, it cannot be said that he was "entirely excluded from possession and enjoyment" within the meaning of the first limb of the section and, therefore, the property will be deemed to have passed on the death of the donor and will be subject to levy of estate duty. The Supreme Court construed the word "otherwise" ejusdem generis and held that 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 : see the observations of Ramaswami J., at pages 501-3.

Apart from these principles of construction of section 10 of the Estate Duty Act which are binding, the facts on which this construction was rendered would be relevant for our present purposes. There the property was purchased by the father in the joint names of himself and his wife and the parents made a gift of the house to their two sons. The document recited that the donees had accepted the gift and had been put in possession. But the parents continued to be in names of the sons. The deceased died more than four years after the gift.

The distinguishing features of the Supreme Court decision in *George Da Costa v. Controller of Estate Duty* from the present reference before us can be stated outright and broadly. The Supreme Court case was a father and son case and not a husband and wife case. Filial love might not make joint residence between the parents and the children in the house essential or necessary. Marital love might make that not only essential and fundamental but sensible, reasonable and practical. No construction should be put on the Estate Duty Act so as to be against the public policy to the extent that whenever a husband makes a gift of a property to his wife he should lose both the property and the wife. In such circumstances the fundamental point for consideration is that a husband's going to the wife for consortium or coverture is not a proprietary right in respect of the house gifted.

It will be appropriate here to keep the actual language of the statute in front of us. The language of section 10 of the Estate Duty Act is in these words :

"Property taken under any gift, whenever made, shall be deemed to pass on the donors 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."

It is followed by a proviso with which we are not concerned. A plain look at the section indicates that what will be deemed to pass would be (1) property whose bona fide possession and enjoyment were not immediately assumed by the donee, and (2) whose retention thenceforward was not to the entire exclusion of the donor or of any benefit to him by contract or otherwise. We shall avoid using the word "limb" in case it crates any confusion. That is the main structure of this section. The idea is plain. First, the bona fide possession and enjoyment must be immediately assumed by the donee; the second is that the retention of the possession and enjoyment of the property must be to the entire exclusion of the donor or of any benefit to him by contract or otherwise. But the significant point for decision in the present reference before us is, does this involve or affect the marital right of a husband for coverture and consortium with the wife of a house where she lives ? The plain contention of the counsel for the revenue is that once a husband has made a gift of a house to his wire, he cannot go to hat house any more for any purpose. We feel it a little difficult to accept such an unqualified submission. The language and the words of section 10 of the Estate Duty Act quoted above indicate that it is the possession and enjoyment of the property which are the target. If they are not immediately assumed by the donee and if the donor is not entirely excluded from them, it is then that the property will be deemed to pass on the death of the donor within the meaning of section 10 of the Estate Duty Act. But then it is the proprietary right. We have already stated as a fact in this case that the title deed or the deed of conveyance reserves no right for the husband and not even mentions his name. There is in fact no contractual or other right in law or in equity in respect of the property, or its use and enjoyment in favour of the husband. When a husband does to his wife for coverture or consortium, he does not go to the property but goes to the wife. In such a case the husbands going to the house is not making use of or enjoying the property in question. It is this proprietary element in respect of the house gifted which must be emphasised and borne in mind in applying the principles laid down by the Supreme Court in Da Costas case. These considerations are more vitally germane to the case of a husband and wife than normally to a case of parents and their sons.

The second significant fact in the Supreme Court case was that there the father purchased the house with his own money and then both the parents made a gift of the house to their two sons. Such is not the fact in the present reference before us. It is not a fact established in this reference that the husband in this case advanced any money to the wife for purchase of the property. In any case it

is not a fact and it is not the present case that the husband made a gift of this house itself to the wife. If anything was at all a gift, the best that could be said was that the money or the sum of Rs. 20,000 was gifted by the husband to the wife, a fact which was attempted to be proved by the revenue but which, as we have shown, has not been established by any legal evidence or legal material.

This leads to a major difference between the Supreme Court decision in *George Da Costas* case and the present reference. The gift in the Supreme Court case was a gift of the house itself. The gift in the present case is not of the house. Mr. Balai Pal for the revenue realized this difficulty and, therefore, he tried to meet this objection by drawing our attention to section 2(15) of the Estate Duty Act which provides :

"Unless the context otherwise requires, property includes any interest in property, movable or immovable, the proceeds of sale thereof and any money of investment for the time being representing the proceeds of sale and also includes any property converted from one species into another by any method."

The foundation of this argument is that the money was the husband's and the husband's money has been converted into this house. This argument really is no longer available to Mr. Pal for the revenue on the ground that we have held that there is no legal evidence or material to support that the husband advanced his money. But even assuming that it is so, Mr. Pal for the revenue contends that this means that the property could be converted from one species into another even by the donee after the gift is made.

We are unable to accept this interpretation without any qualification. What is being defined in section 2(15) of the Estate Duty Act is the property of the deceased. Change of title or ownership cannot be covered by this extended meaning of conversion in section 2(15) of the Estate Duty Act. The conversion intended u/s 2(15) of the Act is conversion by the donor or the deceased himself during his lifetime or by such well-known processes as by the courts during the process of administration by executors or administrators or otherwise. But if before the conversion takes place a gift had already been made, then the donee's utilization of the gift to transform it to some other property will not come within the definition of section 2 (15) of the Estate Duty Act. It is possible to contemplate a kind of conversion in the case of a gift where the donor hands over a specific sum of money with a specific direction and obligation that the donee must buy a house in which case the conversion really is being made by the donor or the deceased although through the agency of the donee. But such is not the case and such is not the conversion on the facts of this reference.

The next part of the Supreme Court decision in *George Da Costas* case to which attention has to be drawn is where it dealt with the case of *Attorney-General v. Secombe* and *Clifford John Chick v. Commissioner of Stamp Duties* a decision of the Privy Council. The Supreme Court observed at page 502 of the report already quoted that the view taken by Hamilton J. in *Attorney-General v. Secombe* was

not consistent with the opinion of the Judicial Committee in *Chick v. Commissioner of Stamp Duties*. It will be, therefore, essential to have a look at these two decisions.

We can take up the Privy Council decision in *Clifford John Chick v. Commissioner of Stamp Duties*. The statute which fell to be construed by the Privy Council was section 102 of the New South Wales Stamp Duties Act, 1920- 56, which was in these terms :

"For the purposes of the assessment and payment of death duty.... 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,..... 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,....."

What happened in that case was that a father transferred by way of gift to one of his sons a pastoral property, the gift being made without reservation or qualification or condition. Within 17 months after the gift, the father, the donee son and another son and another son entered into an agreement to carry on in partnership the business of graziers and stock dealers. This agreement provided, inter alia, 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, that the capital of the business should consist of the livestock and plant then owned by the respective partners, that the business should be conducted with the respective holdings of the partners and such holdings should be used for the purposes of partnership only, that all lands held by any of the partners on the date of the agreement should remain the sole property of such partner and no 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.

Now each of the three partners owned a property, that of the donee son being that property which had been given to him by his father and each partner brought into the partnership livestock and plant and their three properties were thenceforth used for the depasturing of the partnership stock. This continued till the death of the father. It was held by the Privy Council that on those facts the value of the property given to the son was to be included in computing the value of the fathers estate for the purposes of death duty on the strength of the section quoted above. While it was not disputed that the son had assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the father, yet he had not on the facts thenceforth retained it to the fathers entire exclusion, for under the partnership agreement, and whatever force and effect might be given to that part of it which gave a partner the sole and free right to deal with his own property, the partners and each one

of them were in possession and enjoyment of the property so long as the partnership subsisted. The Privy Council observed that where the question was whether the donor had been entirely excluded from the subject-matter of the gift, that was the single fact to be determined and if he had not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee. Mr. Balai Pal for the revenue has been anxious to remind us and he himself has tried in his own way to shade our eyes as completely as possible so that our eyes did not look beyond and observe the limits enjoined by the Privy Council. Here, however, there was no question of the non-exclusion being advantageous or otherwise to the donee in the present case before us.

The Privy Council facts were so entirely different. The father who made a gift of his house to his son came in again to the use and enjoyment of this very property itself by way of a partnership agreement. There could be no further difficulty at all on the section itself. Obviously this could not bring the father within the entire exclusion clause mentioned in the section of the statute. Here we are not concerned in this reference whether the donor is coming back to the use and enjoyment of the property by means of a partnership arrangement under the Partnership Act. Here is a case of marital relationship between husband and wife, who no doubt can be called loosely partners but it is their partnership in life and not under the Partnership Act. It is not a proprietary right which is involved here. It is marital rights that come up for consideration. On the construction that we have put on section 10 of the Estate Duty Act, the exclusion under it has to be exclusion from the proprietary right in respect of use and enjoyment and retention of the gifted house and not exclusion from the marital rights between husband and wife. Viscount Simonds at page 97 of the tax report in *Clifford John Chick v. Commissioner of Stamp Duties* noticed the decision in *St. Aubyn v. Attorney-General*, and after doing so observed :

"But the question may arise and, having arisen, may lead to a difference of opinion as to what is the subject-matter of the gift."

What is the subject-matter of the gift is certainly a very important and crucial question. The house and the wife both or the one and not the other. Viscount Simonds at page 98 of that report negatived the argument put forward on the basis of commercial transaction and for full consideration and observed : "Their Lordships see no reason why a gloss should be putt upon the plain words of the sub-section by excluding from its operation such transactions" : see also the further observations of Viscount Simonds at pages 99 and 100.

The Supreme Court in *George Da Costas* case at page 502 stated as follows :

"It was observed by Hamilton J. that there was no legally enforceable arrangement permitting the deceased to reside in the house and the deceased was simply the guest of the donee and was fully content to rely upon the affection which the donee bore towards him. It was, therefore, held in that case

that estate duty was not payable. It was stated by Hamilton J., in the course of his judgment, 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), be achieved unless he had 'some enforceable right. The view taken by Hamilton J. on this particular point is, however, not consistent with the opinion of the Judicial Committee in *Chick v. Commissioner of Stamp Duties of New South Wales*".

It may be noticed here that the observation of Hamilton J. in *Attorney-General v. Secombe* was not discussed by the Privy Council nor was that case referred to by the Privy Council.

It will be good to recall the facts in the case of *Attorney General v. Secombe*, which again was not a case of husband and wife. There, the owner of a farm and dwelling-house by a deed of gift, in consideration of natural love and affection, conveyed and assigned the farm, with the dwelling-house and other buildings to the defendant, his great-nephew, who resided with him and who had in the preceding year taken over the management of the farm. The donor in that case had no property other than that included in the deed except an annuity of Pound 15. After the execution of the deed the donor continued to reside in the house until his death and was maintained by the defendant out of the annuity which was sufficient to meet the cost of his maintenance. There was no agreement or understanding, however, between the donor and the defendant that the former should be permitted to remain in the house or be maintained by the defendant. Upon the death of the donor, the Crown there claimed estate duty on the value of the property comprised in the deed upon the ground that bona fide possession and enjoyment of the property were not assumed by the donee and thenceforward retained "to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." The court there decided that :

"Though the donor was permitted by the donee to, and did in fact, reside in the house from the date of the deed until his death, there was an entire exclusion of the donor from the possession and enjoyment of the property or of any benefit to him by contract or otherwise, within the meaning of the section, and that therefore estate duty was not payable."

It was also decided by the court that :

"The words or otherwise in the sentence or of any benefit to him by contract or otherwise must be read as meaning some arrangement ejusdem generis with contract, that is to say, an enforceable arrangement."

Lastly, this case is different from the case decided by the Supreme Court in *George Da Costa v. Controller of Estate Duty* on one more significant point. All these cases which we have been considering were cases where there was some kind of previous right, possessory or otherwise, of the donor in respect of the property gifted. In *Da Costa's* case, for instance, the property had already been purchased by the father both in his name and in the wife's name and the

parents ultimately making gift of the house to the sons. Again, in Attorney-General v. Seccombes case the grand-uncle was formerly living in the very house which he made a gift of to his grand-nephew. Also in Clifford John Chicks case, the father was making a gift of the house where he had possessory and legal rights too his son before he made a gift of it. It is in such a context, a meaning has to be given to the expression, "entire exclusion of the donee". Normally, therefore, it means to exclude a pre-existing right which was otherwise included or would have been included but for the gift. But here in respect of this property, No. 33 Apcar Garden, the Asansol husband had no pre-existing right at all. At the moment when title begins in this case in 33 Apcar Garden, it is a sole title by Mrs. Shamsun Nehar Mansur. The whole context of such expressions as "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" u/s 10 of the Estate Duty Act appears to exclude a person whose right is already there to the use and enjoyment of the property but here there is no such right of the husband either to the use or enjoyment of the property, No. 33 Apcar Garden, in the present reference. Therefore, we are unable to hold that the doctrine of "exclusion" as laid down in section 10 of the Estate duty Act and as interpreted by the Supreme Court has any application to the facts of this reference.

In conclusion, we need only refer to the fact that our attention has been drawn to the amendment of section 10 in 1965 by introduction of the proviso :

"Provided further that a house or part thereof taken under any gift made to the spouse, son, daughter, brother or sister, shall not be deemed to pass on the donors death by reason only of the residence therein of the donor except where a right of residence therein is reserved or secured directly or indirectly to the donor under the relevant disposition or under any collateral disposition."

The Supreme Court in Da Costas case held that this amendment was not retrospective and further we are not concerned with this amendment and its scope. The amendment only means that such problems would not arise in future. The Finance Ministers observations in introducing this amendment has been placed before us to say that it was "on the ground of causing hardship" : see the observations reported in 55 ITR 129.

For the reasons discussed above and on the authorities, we hold that, in the facts and circumstances of the case, the value of the house property, No. 33 Apcar Garden, Asansol, cannot be included in the principal value of the estate of the deceased as property passing or deemed to pass on his death, first, because it was not a part of his estate and on the title deed and, secondly, because that even if section 10 of the Estate Duty Act applies, the facts in this case are such that they do not permit the inclusion of this property in the estate of the deceased.

We, therefore, answer the question asked in the negative. Having regard to the

decisions and the state of law, there will be no order as to costs.

K. L. ROY, J. - I agree.