

(1968) 10 GUJ CK 0007
In the Gujarat High Court
Case No : Estate Duty Reference No. 1 of 1967

Sakarchand Chhaganlal

APPELLANT

Vs

Controller of Estate Duty, Gujarat

RESPONDENT

Date of Decision : 04-10-1968

Acts Referred:

Transfer of Property Act, 1882 — Section 108(h)

Citation : (1969) 73 ITR 555

Hon'ble Judges : P.N. Bhagwati, C.J.;B.J. Divan, J

Bench : Division Bench

Advocate : M.M. Thakore, for the Appellant; J.M. Thakore, for the Respondent

Judgement

Bhagwati, C.J.—This reference under the Estate Duty Act raises a question of considerable importance affecting transactions relating to

buildings constructed by members of co-operative housing societies. The society with which we are concerned in this reference is Jain Merchants

Co-operative Housing Society Ltd. One Chhaganlal Laxmichand (hereinafter referred to as the deceased) was member of this society and he held

certain shares in its share capital. Plot No. 1 was allotted to his as a member out of the land owned by the society and on the plot so allotted to

him, he constructed a superstructure at his own cost. He had two sons by the name of Sakarchand and Ramanlal. On 8th March, 1951, and

thereafter, he took certain steps in regard to the plot and the superstructure on it and the question is as to the true legal effect of what he did. First,

on 8th March, 1951, he divided the plot into two parts, one marked plot No. 1 and the other marked plots Nos. 1-A and 1-B. It appear that the

latter part was given two plot numbers as there was a private Jain temple on a portion of it and that portion was given plot No. 1-B. He ""gifted

plot No. 1 to Sakarchand and plots Nos. 1-A and 1-B to Ramanlal. Since under the bye-laws of the society no plot could be held by a person

who was not a member of the society, Sakarchand agreed to subscribe to the necessary shares from the society and so far as Ramanlal was

concerned, the deceased agreed to transfer his shares to Ramanlal. The deceased also handed over possession of the respective plots to

Sakarchand and Ramanlal. These facts were recorded by the deceased in a declaration made by him on the same day, namely, 8th May, 1951.

The deceased then made an application dated 27th May, 1951, to the secretary to the society stating that he had divided his plot into two plots,

plot No. 1 admeasuring about 1109 square yards and plots Nos. 1-A and 1-B admeasuring about 1341 square yards and ""made a gift"" of plot

No. 1 to Sakarchand and plots Nos. 1-A and 1-B to Ramanlal and adding :

I request you to have the said plot partitioned as above in the society records. Plot No. 1 had been gifted to my son, Sakarchand Chhaganlal.

Both of them are well advanced in years and each of them is the absolute owner of the plot coming to his share.

I request you therefore to place this matter before the members and to have my two sons accepted as members of the society in their individual

capacity in my place. My two sons are to be accepted as members of the society separately each as absolute owner of the plot which may be

separately numbered by the society as per the plan annexed herewith.

2. On the application of the deceased the society passed a resolution dated 27th May, 1951, transferring plot No. 1 admeasuring 1109 square

yards to the name of Sakarchand and plots Nos. 1-A and 1-B admeasuring 1341 square yards to the name of Ramanlal, and necessary entries to

that effect were made in the register of the society, annexure IV to the statement of the case. The shares held by the deceased were also

transferred to the name of Ramanlal, and Sakarchand and Ramanlal remained in possession and enjoyment of the respective plots Nos. 1 and 1-A

and 1-B as their own properties.

3. The deceased died on 2nd July, 1957, and on his death a question arose as to what was the principal value of his estate on which estate duty

was chargeable under the provisions of the Estate Duty Act. The Assistant Controller took the view that, though the original plot No. 1 (now made

up of new plot No. 1 and plots Nos. 1-A and 1-B) was owned by the society, the superstructure constructed upon it belonged to the deceased

and since the superstructure was immovable property, it could not be transferred except by an instrument duly registered and stamped and

therefore there was no valid gift of the portions of the superstructure to Sakarchand and Ramanlal as claimed by the accountable person. The

Assistant Controller accordingly included the value of the superstructure in the estate of the deceased. This view was affirmed by the Central

Board of Revenue on appeal and hence the present reference at the instance of the accountable person.

4. The question we are asked to determine is; whether the value of the superstructure built by the deceased on the land of the society was rightly

included in the principal value of the estate of the deceased ? The only ground on which the revenue claimed to include it was that there was no

valid gift of the superstructure to Sakarchand and Ramanlal and the superstructure therefore continued to belong to the deceased and was at the

time of his death his property which passed on his death u/s 5. The point which therefore arises for determination is whether the superstructure

came to be owned by Sakarchand and Ramanlal as claimed by the accountable person or continued to belong to the deceased at the time of his

death as contended by the revenue. To determine this point it is necessary to analyse the true nature of the transaction entered into by the

deceased. We must ask ourselves the question : What was the interest of the deceased in the land ? What was his interest in the superstructure and

what change in judicial relationship was brought about as a result of the steps taken by the deceased ? The question is one of great importance

having far-reaching consequences, as it is a matter of common knowledge that in this city where co-operative housing societies have flourished to

an extent unknown and unprecedented in other parts of India, hundreds of transactions of sales and gifts of plots with superstructures have taken

place without any registered documents, merely by transfers of plots being recognised and transfers being entered as holders of plots by the

societies and if the contention of the revenue were correct that the ownership of the superstructures cannot pass in such cases except by registered

instrument, all such transactions would be invalidated. That is a consideration which we cannot totally banish from our mind and if the law permits,

we should certainly strive to avoid such a consequence.

5. One fact which stands out prominently is that the land of original plot No. 1 belonged to the society and it was merely allotted to the deceased.

No lease of the plot was executed by the society in favour of the deceased and the deceased had therefore no interest in the plot. What then, it

may be asked, was the nature of the right of the deceased in respect of the plot ? To answer this question we must turn to the bye-laws of the

society. Schedule A to the bye-laws is the application for registration and it shows that the society was of the type known as tenant ownership

society as distinguished from co-partnership tenancy society. In a tenant ownership society, land belongs to the society and each plot is allotted

and given on lease by the society to the member and on the plot so allotted, the member builds his own house either with his own moneys or with

moneys borrowed from the society so that the house belongs to him while the plot belongs to the society and is held by him on lease. Bye-law 11

requires that every member must hold at least one share in the society and according to bye-law 12, a person all of whose shares have been

transferred, repaid, forfeited or cancelled shall cease to be a member. Bye-law 14 provides for expulsion of a member in certain circumstances. The

next relevant bye-law is bye-law 66 which empowers a member to nominate a person to whom his share or interest in the society shall be

transferred at his death. That takes us to bye-law 66 which says that no member shall be a tenant of the society unless he holds at least five shares.

Then at the end of the bye-laws, there are two Forms, A and B. We are not concerned with Form A for that relates to a co-partnership tenancy

society but Form B is relevant. The heading of this form indicates that it concerned only with regulations relating to leases to be granted by the

society to members desiring to purchase their houses but in fact, as clause (1A) of that form shows, the regulations relate also to leases to be

granted by the society to members desiring to construct their own houses. The scheme of the bye-laws, therefore, clearly is that out of the land

belonging to the society a plot may be allotted and given by the society on lease to a member who holds at least five shares and the member may

build his own house upon it; the plot would continue to be held by the member so long as he is a member; if he ceases to be a member for any

reason, by expulsion or otherwise, the society can determine the lease and take back the plot and if it does so, the building built by the member on

the plot would also go to the society with the plot and the society would be bound to pay the value of the member's interest in the house : vide

clause 8 of Form B. Now, in the present case, the deceased was member of the society holding at least five shares and out of the land of the

society, a plot, being plot No. 1, was allotted to the deceased but no lease as contemplated by the bye-law was yet executed by the society in

favour of the deceased. The deceased was lawfully in possession of the plot under an implied agreement to be gathered from the bye-laws for

execution of a lease by the society in terms of the regulations set out in Form B and being lawfully in possession of the plot, he constructed a

superstructure upon it. Now having regard to the observations of the Privy Council in *Narayan Das v. Jatindra Nath and Vallabhdas Naranji v.*

Development Officer, Bandra, and the decision of the Supreme Court in *Dr. K. A. Dhairyawan v. J. R. Thakur*, it must be taken as well settled

that the doctrine of English law embodied in the maxim *quicquid plantatur solo, solo credit*, that is, what is annexed to the soil goes with the soil,

has no application in this country. Unlike the English law, the law in India recognizes dual ownership, the land belonging to one person and the

structure upon it belonging to another. There can, therefore, be little doubt that, whilst the deceased was lawfully in possession of the plot, though

the land of the plot was owned by the society, the superstructure upon it belonged to the deceased.

6. The argument of the revenue was that, since the superstructure was immovable property, it could not be transferred by the deceased to

Sakarchand and Ramanlal except by a registered instrument and, in the absence of a registered instrument, the ownership of the superstructure

continued to remain in the deceased. Now, it can hardly be disputed that the superstructure, being embedded in the earth, was immovable property

and it is elementary that a transfer of an immovable property by one person to another can be effected only by a registered instrument. But there

was in this case no transfer of the superstructure by the deceased to Sakarchand and Ramanlal. As a matter of fact, the deceased could not

transfer the superstructure to anyone without having transferable interest in the land. His only right was to remove the superstructure as and when

his possession of the plot came to an end. As far back as 1866, on a reference to a Full Bench, Sir Barnes Peacock C.J. and in Thakoor Chunder

Poramanick v. Ram Dhone Bhattacharjee :

..... We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession

under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the

improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, -

the option of taking to the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building

is not taken down by the builder during the continuance of any estate he may passes.

7. The statement of the law was quoted with approval by the Judicial Committee of the Privy Council in Vallabhdas Naranji v. Development

Officer, Bandra. The Privy Council also referred with approval to the following observations of Couch C.J. in Narayan v. Bholagir :

We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, viz., that they should belong to the owner of the

land. The only doctrine which we can apply is the doctrine established in India that the party so building on another's land should be allowed to

remove the materials.

8. The effect of these decisions was summarised by Venkatarama Aiyar J., speaking on behalf of the Supreme Court, in State of Madras v.

Gannon Dunkerley & Co., in these terms :

..... these decisions are concerned with rights of persons who, not being trespassers, bona fide put up constructions on lands belonging to

others, and as to such persons the authorities lay down that the maxim recognized in English law, quicquid plantatur solo, solo cedit has no

application, and that they have the right to remove the superstructures,.....

9. This principle also finds recognition in section 108(h) of the Transfer of Property Act, 1882. That section provides that, in the absence of a

contract to the contrary, the lessee may, even after the determination of the lease, remove at any time whilst he is in possession of the property

leased, but not afterwards, all things which he has attached to the earth;

provided he leaves the property in the state in which he received it. If the lessee has counteracted a building on the land leased to him, he is entitled to remove the building, on termination of the lease, at any time before he quits possession. It must therefore be held in accordance with this principle that since the deceased being lawfully in possession had constructed on the land belonging to the society, the only right which the deceased had in regard to the superstructure was to remove it, if for any reason his possession of the land came to an end.

10. Having said so much about the legal position, let us now turn to consider what the deceased did on 8th March, 1951, and thereafter. On 8th

March, 1951, the deceased purported to gift plot No. 1 to Sakarchand and plots Nos. 1-A and 1-B to Ramanlal and handed over possession of

the respective plots to them. Now, obviously this transaction had no legal consequence for the deceased had no interest in the plots which he could

transfer at his will, what happened thereafter on 27th May, 1952, is more important. The deceased was in lawful possession of the original plot

No. 1 under an agreement of lease from the society and he requested the society to recognize division of the plots into plot No. 1 and plots Nos.

1-A and 1-B and to transfer plot No. 1 to the name of Sakarchand and plots Nos. 1-A and 1-B to the name of Ramanlal. The society acceded to

the request of the deceased and, recognizing the division of the plot into plot No. 1 and plots Nos. 1-A and 1-B to the name of Ramanlal. The

result was that the right of the deceased to remain in possession of the original plot No. 1 under an agreement of lease from the society came to an

end and Sakarchand and Ramanlal instead became entitled to hold and retain possession of plot No. 1 and plots Nos. 1-A and 1-B respectively,

each under a distinct and separate-albeit implied-agreement of lease from the society. Now, as pointed out above, when the right of the deceased

to remain in possession of the original plot No. 1 came to an end and the deceased handed over possession of the reconstituted plots to

Sakarchand and Ramanlal along with the reconstituted plots. The question is, what is the effect of this transaction ?

11. It is now well settled that if a person who, whilst lawfully in possession, had constructed on the land of another, does not remove the

superstructure when parting with the possession of the land, he loses his right to

remove the superstructure. It was so held by the Judicial

Committee of the Privy Council in *Narayan Das v. Jatindra Nath*. One Satyendra Nath Roy who was the predecessor of the defendants was the

proprietor of a holding and he had constructed a house upon it. The holding was purchased by the plaintiff. Before possession of the holding could

be given to the plaintiff, the entire property was acquired and the question arose as to how the compensation should be apportioned. The Privy

Council held that what the revenue sold was only the holding and the ownership of the building did not pass to the plaintiff by reason of the revenue

sale and proceeded to consider whether, in the circumstances, "the defendants are entitled to the compensation money which was awarded in

respect of the building, or to what, if any portion of such money." The Privy Council said :

..... in order to arrive at a decision on this part of the case, it is necessary to consider what would have been the position and the respective

rights of the parties after the sale, if no acquisition had taken place under the Land Acquisition Act.

and added :

It is difficult to lay down any principle upon which the compensation money awarded in respect of the house should be apportioned, but the

position seems to their Lordships to involve certain matters which should be taken into consideration by the court what makes the apportionment.

After the sale the plaintiff would have been the owners of the land and the defendants would have been the owners of the house. The plaintiff

would have had the right to call upon the defendants to remove the houses. If the defendants did remove the house, the value to them would be

small, and in the ordinary course would be no more than what has been called "demolition value", viz., the value of the materials less the cost of

removal; and if the defendants did not remove the house they would lose it.

12. This statement of the law also holds good in case of lease where the lessee, on the determination of the lease, yields up possession without

removing the things attached by him to the earth. Says Sir Dinshaw Mulla in his well-known book on Transfer of Property Act (fifth edition) at

page 694 while commenting on section 108(h) :

If he (that is the lessee) one quits possession, he may not return and the fixtures

become the property of the lessor.

13. The decision of the Bombay High Court in *Khimjee Thakarsee v. Pioneer Fibre Co. Ltd.* is also to the same effect. It is, therefore, indisputable

that the deceased lost his right to the superstructure when his right to remain in possession of the original plot No. 1 came to an end and he handed

over possession of the reconstituted plots to Sakarchand and Ramanlal without removing the superstructure. He had thereafter no interest in the

superstructure and it was not liable to be included in the principal value of his estate.

14. Our answer to the question referred to us is, therefore, in the negative. The Controller will pay the costs of the reference to the accountable

person.

15. Question answered in the negative.