

(1983) 09 MAD CK 0043
In the Madras High Court
Case No : Tax Case No. 467 of 1978

Sivagnana Vadivu Nachiar

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 28-09-1983

Acts Referred:

Estate Duty Act, 1953 — Section 10, 5

Citation : (1983) 09 MAD CK 0043

Hon'ble Judges : V. Ratnam, J;G. Ramanujam, J

Bench : Division Bench

Advocate : S.V. Subramaniam, for the Appellant; J. Jayaraman, for the Respondent

Judgement

Ramanujam, J.—The following question has been referred to this court by the Income Tax Appellate Tribunal under s. 64(1) of the E.D. Act, 1953, at the instance of the accountable person :

"Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the provisions of section 10 of the Estate Duty Act, 1953, are attracted to the gifts made by the deceased on December 3, 1959 ?"

2. One Siva Pandian, who died on January 9, 1966, had executed gift deeds in favour of his minor sons and daughters conveying a total extent of 85.07 acres of wet lands and 106.94 acres of dry lands. For the sake of convenience, the details of gifts made by the deceased to his children are given below :

Relationship	of	Total extent	gifted	gift	donee	Name of the donor
						3-11-1959
Padmavathy	Minor daughter	9.69 acres of wet lands	11.40 acres of dry lands			
3-12-1959	Shanmuganandan	Minor Son	17.46 acres of wet lands	20.16 acres of dry lands		
3-12-1959	Rajasimhan	Minor Son	16.43 acres of wet lands	20.14 acres of dry lands		
3-12-1959	Mahendra Varma	Minor Son	17.04 acres of wet			

lands 22.74 acres of dry lands 3-12-1959 Krishnakanthan Minor Son 17.07
acres of wet lands 23.44 acres of dry lands 3-12-1959 Viswakumari Daughter
3.63 acres of wet lands 4.10 acres of dry land 3-12-1959 Sundarathai
Daughter 3.75 acres of wet lands 4.96 acres of dry lands

3. The recitals in all these gift deeds are to the effect that the deceased would be in possession and enjoyment of the gifted properties and hand over the same to the minors after they have attained majority. Before the Assistant Controller of Estate Duty, it was contended by the accountable person that the deceased continued to hold the gifted properties only as guardian of his minor children and, therefore, possession and enjoyment by the deceased as guardian should be considered as possession and enjoyment by the donees and, therefore, the gifted properties should not be included in the estate of the deceased by invoking s. 9 or s. 10 of the E.D. Act, hereinafter referred to as "the Act". This claim of the accountable person was not accepted by the Assistant Controller of Estate Duty who took the view that as the deceased was never excluded from possession and enjoyment of the gifted properties, and as there is nothing to suggest that the income from the gifted properties was separately kept for the benefit of the minors, the gifts fall squarely within the mischief of s. 10 of the Act, So far as the deceased's daughter, Sundarathai, is concerned, since she attained majority beyond two years before the death of the deceased, the Assistant Controller excluded her properties from the principal value of the deceased.

4. The accountable person took the matter in appeal and the Appellate Controller of Estate Duty held that under the gift deeds, the deceased should retain possession and enjoyment of the properties till the donees attain majority and in view of the retention of the beneficial interest which covered the entire property donated, the property should be included in the principal estate of the deceased either under s. 5 or under s. 10 of the Act.

5. The matter was taken to the Tribunal by the accountable person and their main contention was that the deceased was in possession and enjoyment of the lands donated in his capacity as guardian to the minor children and, therefore, such possession and enjoyment would not bring the gifted properties within the ambit of s. 10. The accountable person, however, did not question the finding of the Appellate Controller of Estate Duty that, on the facts and circumstances of this case, even under s. 5, the gifted properties have to be included in the estate of the deceased. The Tribunal did not accept the accountable person's contention and held that, on the facts and circumstances of this case, s. 10 of the Act stood attracted. Aggrieved by the view taken by the Tribunal, the accountable person has sought and obtained this reference on the question set out above.

6. The relevant portion of the document under which the deceased gifted property to his children is extracted below :

Since the gift deeds executed by the deceased in favour of all the children were

identical, it is not necessary to consider them separately. Under the document, which has been set out above, the deceased donor has executed the settlement in favour of his minor son, Shanmuganandan. The deceased described himself as guardian of his minor son, Shanmuganandan, and has stated that he is giving away the properties worth about Rs. 10,000 to his son as a gift but that the properties will be enjoyed without any power of alienation by the deceased till the donee attains majority and that after the donee becomes a major, he will get the property absolutely with powers of alienation. The question is whether the retention of possession and enjoyment of the properties by the donor till the donee attains majority will attract s. 10 of the Act.

7. As already stated, the Appellate Controller of Estate Duty held that since the donor has retained the beneficial interest of possession and enjoyment of the property till the minor attains majority, such retention of beneficial interest which covers the entire property gifted will attract s. 5 of the Act. That finding has not been challenged before the Tribunal and that has become final. Therefore, even if s. 10 does not apply, the position appears to be that on the terms of the document under which there is reservation of a beneficial interest by the donor which covers the entire property donated, s. 5 will stand attracted. However, having regard to the question referred to us, we have to see whether s. 10 of the Act applies to the facts of the case.

8. Section 10 of the Act, so far as it is relevant, is as follows :

"Gifts whenever made where donor not entirely excluded. - Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise....."

Section 10 has introduced a fiction and says that the property will be deemed to pass on the donor's death if the donee has not taken bona fide possession and enjoyment of it immediately on the execution of the gift deed and thereafter retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. The said section seems to contemplate that wherever the donor retains possession and enjoyment even after the execution of the gift deed or if the donee does not take possession and enjoyment of the property to the entire exclusion of the donor, the property gifted should be taken to pass on the death of the donor. The question is whether the conditions set out in s. 10 have been satisfied in this case.

9. Under the gift deed set out above, the donor admittedly retains possession and enjoyment till the donee attains majority. But, according to the accountable person, such possession and enjoyment is not in his individual capacity but in his capacity as the guardian of the donee and, therefore, the donee should be taken to have been in possession and enjoyment immediately after the execution of the gift deed to the exclusion of the donor in which case the document will not

attract s. 10. This contention of the accountable person calls for a closer scrutiny of the terms of the gift deed. The relevant clause is :

No doubt, the provision contemplates the donor paying the kist and enjoying the properties without power of alienation till the donee attains majority in his capacity as a guardian. But a closer scrutiny of the various terms in the document will indicate that he has been described as guardian. The expression appears to be used only as a descriptive term. As a matter of fact, even in the preamble, the donor is stated to be executing the gift deed only in his capacity as guardian. From the use of the expression we cannot construe document as one executed by donor in his capacity as a guardian. As a matter of fact the property covered by the document is his self-acquired property and the minors have not acquired any interest therein so as to show that the executant of the document is executing the gift deed in his capacity as guardian. This shows that the expression "guardian" has been used in the document indiscriminately. Further, if the donor is to possess and enjoy the property till the donee attains majority, naturally there would be a specific provision either for accumulation of the income or for the guardian's accounting for the income to the minor on attaining majority. As per the document, the only obligation on the part of the donor is to hand over the property to the donee on his attaining majority and the donee will have to then take up the same with absolute rights of powers of alienation. Thus, under the document, the donee gets the property absolutely only after he attains majority. If the donor is to be taken to be in enjoyment of the property as guardian of the minor donee, then the donor as guardian will have to hand over not only the property gifted but also the accumulated income from the date of the gift deed till the minor attains majority. Since there is no provision either for accumulation of the income or for accounting when the donor is in possession and enjoyment of the property, the donor should be taken to be in possession in his individual capacity and not as a guardian. Though the earlier portion of the document says :

this is subject to the latter clause wherein the donor is to continue in possession and enjoyment of the property till the donee attains majority and the donee will become the absolute owner of the property only after he attains majority. Therefore, though the property is gifted to the donee that is subject to the right retained by the donor of possession and enjoyment of the property gifted till the donee attains majority. Thus, on a conjoint reading of the various clauses in the gift deed and especially in the absence of a provision for accumulation or for accounting of the income from the property from the date of the gift deed till the donee attains majority, the donor should be taken to have retained the right of possession and enjoyment of the property from the date of the document till the donee attains majority. The retention of such an interest which covers the entire gifted property will straightway attract s. 10, for the donee has not taken possession and enjoyment immediately on the date of the gift deed and thereafter retained the same to the exclusion of the donor. We are, therefore inclined to agree with the view taken by the Tribunal in this case. As a matter of

fact, the learned counsel for the Revenue has put forward a contention that even if the donor is taken to have been in possession and enjoyment of the property as guardian of the minor donee, still s. 10 will be applicable. According to him, the question is not in what capacity the donor has retained possession and enjoyment. But the question is whether the donor is in actual possession and enjoyment of the property even after the execution of the gift deed. The learned counsel for the Revenue refers to the following decisions in support of his submission that even where the donor is in enjoyment of the property as a guardian or otherwise, s. 10 will stand attracted : Clifford John Chick v. Commissioner of Stamp Duties [1959] 37 ITR (Suppl.) 89 (PC) is the decision of the Privy Council interpreting s. 102 of the New South Wales Stamp Duty Act, 1920. Section 102(2)(d) of that Act corresponds to s. 10 of our Act. In that case, a father executed a gift deed in favour of his son. Later, the father entered into an agreement with him and another son to carry on partnership business in livestock. Under the agreement, all lands held by any of the partners on the date of the agreement shall remain the sole property of such partner and should not 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. Each partner, however, brought into the partnership the properties for the depasturing of the partnership stock. That continued up to the death of the father in 1952. On his death, the question arose whether the lands which he had gifted to one of his sons and which were used for the depasturing the partnership stock could be taken to have passed on the death of the deceased under s. 102(2)(d) of the New South Wales Stamp Duty Act. Their Lordships of the Judicial Committee held that the value of the property given to the son in 1934 was to be included in computing the value of the father's estate for the purpose of death duty, that though the donee assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the father, he had not thenceforth retained it to the father's entire exclusion for, under the partnership agreement, the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted. The learned counsel for the Revenue relied on this decision in support of his plea that if the donor is found to be in possession of the property gifted factually immediately upon the gift, in what capacity he possesses and enjoys the property is not material for the purpose of application of s. 10. Reference also has been made to the decision of the Supreme Court in George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore, wherein the Supreme Court referred to the decision in Clifford John Chick v. Commissioner of Stamp Duties of New South Wales [1959] 37 ITR (Suppl.) 89 and followed the same. In that case, while construing the scope and ambit of s. 10 of the E.D. Act, 1953, the Supreme Court pointed out that crux of s. 10 lies in two parts : (1) the donee must bona fide have assumed possession and enjoyment of the property which is the subject-matter of the gift to the exclusion of the donor, immediately upon the gift, and (2) the donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by

contract or otherwise and that both these conditions are cumulative and that unless each of these conditions is satisfied, the property would be liable to estate duty under s. 10. In that case, the donor, after executing the gift deed in favour of his sons, happened to reside with them in the property gifted. The question arose whether such residence by the donor after execution of the gift deed in the property gifted could attract s. 10. It was contended before the Supreme Court that the residence of the donor was not referable to any term in the gift deed but such residence is referable only to the family affection of his sons and, therefore, his residence in the property donated not being under any contract or otherwise cannot be taken into account for purposes s. 10. The Supreme Court, while rejecting the said contention, pointed out that the condition that the deceased must be entirely excluded from the property 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, that 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, that 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 s. 10, and that, therefore, the property will be deemed to have passed on the death of the donor and will be subject to levy of estate duty. Referring to Chick's case [1959] 37 ITR (Suppl.) 89, the Supreme Court has observed (p. 503 of 63 ITR) :

"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 eye 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 [1959] 37 ITR 89).

10. In *Controller of Estate Duty Vs. Estate of Late Shree E.M. Gopalakrishna Kone*, , the deceased had created a trust and dedicated to it certain agricultural lands and his entire interest in the business of printing press, publication, copyright, etc., in order to establish and maintain various charities. He constituted himself as the sole trustee for his life and provided in the trust deed that he could take a sum of Rs. 4,600 per annum from and out of the income of the trust as his remuneration. Additional gifts were made by the deceased to this trust from time to time. The deceased had overdrawn from the trust a sum of Rs. 7,00,644. In the estate duty return filed after the death of the deceased, the amount due to the trust was claimed as a liability of the deceased. The Assistant Controller held that the value of the properties gifted by the deceased to the trust was liable to be included as property deemed to have passed on the death of the deceased either under s. 10 or s. 12 of the Act. When the matter reached

the Tribunal, it held that the provisions of s. 10 were not satisfied because while s. 10 required lawful possession and lawful enjoyment, the borrowings in the present case were unlawful and were acts amounting to breach of trust on the part of the trustee. When the matter came to this court it was held that as the deceased had enjoyed the loans which came out of the income of the trust properties, the donor was clearly in enjoyment of income of the trust properties and was not entirely excluded from possession and enjoyment after the gift, that as the deceased had not surrendered his right to receive remuneration under the trust deed, the benefit under the document was available to the deceased and that the deceased having been in enjoyment of the income from the entire trust properties by taking a substantial portion thereof for his own enjoyment though by way of loan, the rule of taking only a slice of the property could not be applied and, therefore, the entire trust property would have to be included for the levy of duty. In that case, though the donor was in enjoyment of the income from the property contrary to and in breach of the terms of the deed, the case was taken as attracting s. 10.

11. The decisions referred to above clearly support the stand taken by the Revenue that in whatever capacity the deceased has been in possession and enjoyment of the properties donated, such possession and enjoyment by the donor is sufficient to attract s. 10. The learned counsel for the Revenue appears to be right when he says that as the donor is factually found to be in possession and enjoyment of the properties gifted, that is sufficient to attract s. 10 and it is unnecessary to go into the question in what capacity or under what right the donor was in possession and enjoyment of the gifted property. We have to, therefore, hold that the view taken by the Tribunal in this case is correct.

12. The question is, therefore, answered in the affirmative and against the accountable person. The accountable person will pay the costs of the Revenue Rs. 500.