
(1967) 06 AP CK 0014

In the Andhra Pradesh High Court

Case No : Case Referred No. 33 of 1964

SMT. CHERUKURI ESWARAMMA

APPELLANT

Vs

CONTROLLER OF ESTATE DUTY.

RESPONDENT

Date of Decision : 28-06-1967

Acts Referred:

Estate Duty Act, 1953 — Section 10, 27, 9

Citation : (1968) 69 ITR 109

Hon'ble Judges : Jaganmohan Reddy, C.J

Bench : Division Bench

Judgement

JAGANMOHAN REDDY C.J. - The Income Tax Appellate Tribunal, Hyderabad, has referred the following question for our decision :

"Whether, on the facts and in the circumstances of the case, the difference between the value of the one-fourth share of the properties to which the deceased was entitled on family partition and the share, which he actually received, is a gift includible under the provisions of section 9 read with section 27 of the Act ?"

Cherukury Kutumbaiah died on October 26, 1958, leaving his widow, Smt. Cherukury Eswaramma, and three sons. The deceased and his three sons constituted a Hindu undivided family which was partitioned by and under a registered partition deed dated November 17, 1957, and in that partition, the net value of the estate which fell to the share of the deceased was Rs. 98,103 out of a total wealth of Rs. 8,26,774. The accountable person, viz., Smt. Cherukury Eswaramma, filed a statement of account showing the principal value of the estate on the date of the death of the deceased as Rs. 95,550. The Assistant Controller of Estate Duty made various adjustments and arrived at the principal value as Rs. 3,75,376 on which estate duty was levied. Out of the various adjustments made, the only one relevant for the purposes of this reference was the item of Rs. 1,08,591 which was included as a gift in terms of section 9 read with section 27 of the estate Duty Act, which item is the difference between the

one-fourth share of the net value of the family properties, because of the difference due to unequal allotment of the shares to the deceased in partition. The deceased, it was stated, was entitled to receive on partition a share of the value of Rs. 2,06,694 : but, in fact, was allotted only a share of Rs. 98,103 the difference being Rs. 1,08,591 which was treated as a gift u/s 9 of the Estate Duty Act. An appeal was filed (among other grounds) challenging this inclusion, and the Appellate Controller held that "what is required for purposes of section 9 of the Estate Duty Act is a disposition made by the deceased purporting to operate as a gift. Section 3(1)(b) of the Act lays down that, a disposition taking effect out of the interest of the deceased shall be deemed to have been made by him..... Section 27 of the Act further lays down that any disposition made by the deceased in favour of a relation of his shall be treated as a gift. It is clear from the foregoing provisions of the Act, that when a member of a joint family takes on partition a lesser share in the family properties than what he is entitled to and if such partition takes place within two years of his death, the result would be a gift in terms of section 9 read with section 27 of the Act." Before the Tribunal in appeal, it was contended that no transfer of property was involved; as such, there is no question of any gift. The Tribunal held that if the deceased has taken his full share and later parted with a part of it to his sons leaving himself only with what was allotted to him, that would certainly be a gift in favour of the three sons. Inasmuch as the unequal partition has secured the same effect, the net result being that a part of the property which was due to the father had indirectly been transferred to the sons, it may be described as a constructive disposition which falls within the mischief of section 27.

In our view, the Tribunal has grievously erred in spelling out a disposition where there was none, on an unwarranted assumption that the transaction was similar in nature and contrary to what actually happened, that is that there was an equal partition between the four coparceners and thereafter the deceased returned a portion thereof retaining only a share of the value of Rs. 98,103. It is not permissible in interpreting any statute, much less a taxing statute, to presume a state of things to have happened, which in fact did not happen. If this process of reasoning is permitted to arrive at a conclusion, it would lead to dangerous results. What we have to consider, is whether what in fact took place at the time of the partition, would amount to a gift within the meaning of section 9 of the Act. If so, section 27 is attracted; otherwise not.

For a determination of the question referred to us, it is necessary to examine relevant provisions of sections 9 and 27 as in force on the date.

"9. Gifts within a certain period before death. - (1) Property taken under a disposition made by the deceased purporting to operate as an immediate gift inter-vivos whether by way of transfer, delivery, declaration of trust, settlement upon person in succession, or otherwise, which shall not have been bona fide made two years or more before the death of the deceased shall be deemed to pass on the death :

Provided that in the case of gifts made for public charitable purposes the period shall be six months.

(2) The provisions of sub-section (1) shall not apply to gifts made in consideration of marriage or which are proved to the satisfaction of the Controller to have been part of the normal expenditure of the deceased, but not exceeding rupees five thousand in the aggregate.

27. Dispositions in favour of relatives. - (1) Any disposition made by the deceased in favour of a relative of his shall be treated for the purposes of section 9 as a gift unless -

(a) the disposition was made on the part of the deceased for full consideration in money or moneys worth paid to him for his own use or benefit; or

(b) the deceased was concerned in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only; and references to a gift in this Act shall be construed accordingly;

Provided that where the disposition was made on the part of the deceased for partial consideration in money or moneys worth paid to him for his own use or benefit, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty....."

It may be observed that there is no definition of gift in the Estate Duty Act, except that section 9 itself gives the manner in which it can be effected; that is, that a disposition by way of transfer, delivery, declaration of trust, settlement upon person in succession, or otherwise, of any property effect inter-vivos, will be deemed to pass on the death, if it is not made bona fide two years or more before the death of the deceased. In other words, three conditions must be satisfied, viz. (1) property must be disposed of inter-vivos; (2) it should be either by way of transfer, delivery, declaration of trust, settlement upon person in succession or otherwise; and (3) it should be made bona fide two years or more before the death of the person. If these three conditions are fulfilled. the property is taken out of the estate of the deceased, and if any one of these conditions is not satisfied, the property will still be considered to be part of the estate of the deceased. Section 27 makes the provisions of section 9 applicable to treat gifts in favour of relatives as part of the estate of the deceased, even though the transfer may have been effected more than two years prior to the death, unless the conditions specified in clauses (a) and (b) of section 27 are satisfied.

The crucial question to be determined for the applicability of sections 9 and 27 is whether the disposition is effected inter-vivos and whether it is by way of transfer, delivery, declaration of trust, settlement upon person in succession, or otherwise. The word "otherwise" in the context, in our view, has to be read ejusdem generis. We are fortified in this view by a decision of the Supreme Court in *George Da Costa v. Controller of Estate Duty*, in which the Supreme Court was

dealing with section 10 of the Estate Duty Act. Section 10 is as follows :

"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."

The words "or otherwise" in the above section have been construed by Ramaswami J. delivering the judgment of their Lordships, by reference to the Attorney-General v. Secombe to be ejusdem generis. He observed :

"In the context of the section the word otherwise should, in our opinion, 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."

We have next to consider whether partition of a Hindu joint family property is a transfer. The basic notion of a Hindu joint family property is that it is property which is held jointly by all the coparceners and that till partition, no part or particle of the property can be said to be owned by any one of the coparceners, but by all. What happens at the time of partition when properties are allotted to the coparceners in accordance with or in satisfaction of their respective shares is that the joint enjoyment of the property is transferred into enjoyment in severalty. Each one of the sharers, it may be stated, had an antecedent title to the property and, therefore, there can be no transfer of property in favour of a person who was already the owner thereof. Subba Rao J. (as he then was) in Radhakrishnayya v. Sarasamma observed :

"Partition, therefore, is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty. Each one of the sharers had an antecedent title, and, therefore, no conveyance is involved in the process and a conferment of a new title is not necessary."

Again, the learned judge as a judge of the Supreme Court, speaking for himself and Sikri J., Shah J. dissenting, in Kalooram Govindram v. Commissioner of Income Tax, while considering the nature of the title which one of the coparceners obtains on partition, observed at page 339 :

"Coparcenary is a creature of Hindu law. The concept involves community of interest, unity of possession and common enjoyment. Each coparcener's right extends to the whole joint family property; though each one of them has interest in the whole family property, he has no definite share therein. Partitioning is the ascertainment of individual shares and it can be brought about by an unambiguous declaration of their intention to divide, i.e., by a conscious alteration of their status. Such a declaration brings about a division in status. At that stage the members of an erstwhile joint family become tenants-in-common. The next step is the division by metes and bounds whereunder separate properties are allotted towards the said definite shares of the individuals."

Whether the said process involves transfer or not within the meaning of the Transfer of Property Act, it certainly confers on a divided member an absolute title to a specified property, whereas before the partition he had only some interest in the entire joint family property. Though in one sense his interest in the property of the larger joint family has become crystallized into a specific property, in substance he acquires a title to a specific property."

Earlier, in *Commissioner of Income Tax v. Keshavlal Lallubhai Patel Sikri J.*, speaking for the Bench consisting of himself, Subba Rao J. (as he then was) and Shah J., while considering the interpretation of the words "transfer directly or indirectly" in section 16(3)(a)(iii) of the Income Tax Act, 1922, in relation to property allotted on a partition of a Hindu joint family property, held that when joint family property was partitioned, there was no transfer of assets within the meaning of section 16(3)(a)(iii). In arriving at this conclusion, reliance was placed on the observations of Subba Rao J. (as he then was) in *Radhakristnayya v. Sarasamma* and of the decision of Punjab High Court in *Jagan Nath v. State of Punjab* and the Madras High Court in *M. K. Stremann v. Commission of Income Tax* (which was subsequently confirmed by the Supreme Court in *Commissioner of Income Tax v. M. K. Stremann*). Recently again, a Bench of the Madras High Court in *Commissioner of Gift-tax v. Getti Chettiar* considered this question under sections 2(xxiv) and 4(b) of the Gift-tax Act, and came to a similar conclusion, viz., that even under that Act, partition does not involve transfer of property. In that case, it was contended on behalf of the revenue that the Supreme Court has not decided the question whether the process of division by metes and bounds is a transfer or not and that that question was left open. Kailasam J. at page 459 dealing with this argument, observed :

"It was not necessary for the Supreme Court in the case to decide the question but in the decisions of the Supreme Court cited already it has been clearly laid down that the process of division by metes and bounds, whereunder separate properties are allotted towards the definite shares of individuals, is not a transfer of property."

Referring to the particular definition in the Gift-tax Act u/s 2(xxiv) it was again contended that under the extended meaning of the term "transfer of property" in clause (d) of section 2(xxiv) of the Gift-tax Act, a transaction by which a coparcener after division in status relinquishes a portion of his interest in his ascertained share would be a gift. It may be noted that section 2(xxiv) of the Gift-tax Act defines the words "transfer of property" as follows :

"Transfer of property means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the forgoing, includes -

(a) the creation of a trust in property;

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

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

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

On the terms of the above definition, the question was whether an unequal division of Hindu joint family property between the coparceners would amount to a gift in respect of that portion of a coparceners share which was given up in favour of the other coparceners. It may be stated that for the applicability of clause (d) there should be three ingredients, which are (a) that the transaction must be entered into by a person; (b) that it must be with intent to diminish the value of his own property; (c) that it must also be to increase the value of property of another. The very first ingredient involves the question whether partition by metes and bounds amounts to a transaction entered into by a person.

The word "transaction" came up for interpretation in *Grimwade v. Federal Commissioner of Taxation* with reference to section 4(f) of the Australian Gift Duty Assessment Act, 1941-42, which is in pari materia with the definition given in the Indian Gift-tax Act. In that case, Grimwade voted for a resolution of a company which had the effect of reducing the value of his shares and increasing the value of the other sharers, who happened to be his sons. Rich J. as well as Latham C.J. and Webb J. were all of the view that a transaction within the meaning of that definition involved two persons, namely, the donor and the donee. If this is the concept of a transaction, then certainly a division by metes and bounds of joint family property can never be said to be a "transaction", inasmuch as there is no donor and donee relationship. Secondly, the words "his own property" in sub-clause (d) are another impediment in the way of construing the process of partition as a transfer. It is pertinent to notice that Kailasam J. in the Madras case also expressed the said views at page 462 :

"The sharers by acknowledgment and relinquishment become entitled to specific properties. In the process each of the sharers relinquishes his right to the other property excepting that allotted to him in return for the other sharers relinquishing their right to the property allotted to him. A division by metes and bounds of a joint family property is different, in that all sharers have some antecedent title to all the properties and there is mutual acknowledgment and relinquishment. The process of division cannot, therefore, be termed as a transaction entered into by any person. This view is strengthened by the use of the words his own property in sub-clause (d). If a transaction concerning properties to which both the parties had title, was intended to be included, it is unnecessary to use the word own."

Mr. Kondaiah, just as the learned counsel for the revenue in the Madras case, has cited the Bench decision of this court in *Commissioner of Gift-tax v. C.*

Satyanarayanamurthy for a contrary proposition, viz., that a transaction as defined in section 2(xxiv) amounts to a transfer and is a gift as envisaged in section 4(a). It may be stated that in that case what was in fact held was that where an individual converts his self-acquired property into joint family property, there is a decrease in the value of the individual's property and enhancement of the value of the property of the Hindu undivided family, which is a different person. Such transaction, it was held, fell within the purview of section 2(xxiv) and would constitute a gift. This case certainly was not one dealing with the partition of the joint family property. The basis of the decision was stated by Chandra Reddi C.J., to be that the individual by conversion of his self-acquired properties into joint family properties (that is, in favour of the joint Hindu family which u/s 2(xxiv) is a person) has transferred the properties. In other words, there was a transaction which was between two persons, the individual on the one hand and the Hindu joint family on the other. At page 360, he said :

"There can be little doubt that by this transaction the owner of the property had divested himself of it and vested it completely in the joint Hindu family. He has thus effected a change of ownership of the property."

This decision can be of little assistance in a case which involves a partition of joint family properties and allotment of shares between the coparceners simpliciter. The position under the Estate Duty Act is much the same as under the Income Tax Act and the Gift-tax Act, because what is envisaged u/s 9 of the Estate Duty Act is a gift inter vivos, i.e., between two persons. If, as has been held, there is no transfer involved in the partition of the joint family properties, nor is it between two persons, then it cannot be a gift for the purposes of section 9.

Nor can it be said to be a disposition in favour of a relative within the meaning of section 27. The word "disposition" has, no doubt, not been defined under the Estate Duty Act, though in section 9 that word has been used as purporting to operate as an immediate gift by way of transfer, delivery, declaration of trust, settlement upon person in succession or otherwise. If these two sections are read together, disposition of property is by any of the modes stated in section 9. Even otherwise, in its ordinary meaning, disposition in relation to property would mean to alienate or direct the ownership of property by either will, deed or settlement, by which right to property is conveyed. Whether the word "disposition" is construed in its natural sense or in the technical sense, in the context of sections 9 and 27, it can only connote a transfer or conveyance and does not contemplate the peculiar characteristics involved in the process of allotment of properties on partition in a joint Hindu family. Further, it may be stated that Hindu law permits of unequal partitions and where once partitions are effected, it may be done on the ground of fraud or mistake or subsequent recovery of family property. We do not, therefore, think that the unequal partition in this case amounts to a gift or disposition of property within the meaning of either section 9 or 27 of the Estate Duty Act.

Our answer to the reference, therefore, is in the negative and in favour of the assessee. Advocates fee Rs. 250.