George Da Costa

Vs

Controller f Estate Duty In Mysore, Bangalore

Civil Appeal No. 1098 of 1965

(J. C. Shah, V. Ramaswami-I, V. Bhargava JJ)

28.10.1966

JUDGMENT

RAMASWAMI, J.

This appeal is brought, by special leave, from the judgment of the Mysore High Court dated November 17, 1964 in Tax Referred Case No. 1 of 1964.

The property in question is house No. 34, Mahatma Gandhi Road, Bangalore. It had been purchased by the appellant's father Dr. C.F. Da Costa (hereinafter called the 'deceased') in the joint names of himself and his wife on February 14, 1940. They made a gift of the house to their two sons on October 20, 1954. The document recites that the donees had accepted the gift and they had been put in possession. But the parents continued to be in possession of the house though the municipal tax was paid thereafter in the names of the sons. The deceased died on September 30, 1959 more than 4 years after the gift. The appellant, the accountable person, then filed a return showing the value of the estate left by his father as Rs. 93,750/- excluding the value of the house No. 34, Mahatma Gandhi Road, Bangalore. The Assistant Controller of Estate Duty however included the sum of Rs. 1,50,000/- as the value thereof and determined the aggregate value of the estate at Rs. 2,57,249/- and assessed the estate duty payable at Rs 15,751.54 P by his order dated November 30, 1959. The appellant thereupon preferred an appeal to the Central Board of Revenue (hereinafter referred to as the 'Board') which dismissed the appeal and affirmed the view taken by the Assistant Controller of Estate Duty. At the instance of the appellant, the Board referred the following question of law for the determination of the High Court.

> "Whether on the facts and in the circumstances of the case, the property at No. 34, Mahatma Gandhi Road, Bangalore, was correctly included in the estate of the deceased as property passing of deemed to pass on his death under section 10 of the Act ?"

The High Court answered the question in the affirmative, holding that the appellant was liable to pay estate duty with regard to the house.

Under s. 5 of the Estate Duty Act, 1953 (Act No. 34 of 1953) (hereinafter called the 'Act'), estate duty is payable on the principal value of the estate of every person dying after the commencement of the Act. Section 2(16) of the Act defines the expression "property passing on death" and is to the following effect :

"2. In this Act, unless the context otherwise requires, -

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> (16) "property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and 'on the death' includes 'at a period ascertainable only by reference to the death";

Section 10 of the Act included in the expression "passing on death" even gifts made by a deceased in certain circumstances. The section reads 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 :
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> Provided that the property shall not be deemed to pass by reason only that it was, not, as from the date of the gift, exclusively retained as aforesaid, if, by means of the surrender of the reserved benefit of otherwise, it is subsequently enjoyed to the entire exclusion of the donor or of any benefit to him for at least two years before the death."

In the present case, the Board has found that though the deceased had gifted the house in question to his children four years before the date of his death, he still continued to stay in the house till his death as the head of the family and also was looking after the affairs of the house. It was contended on behalf of the appellant that upon these facts the High Court erred in holding that s. 10 of the Act was attracted to the case and there was no exclusion of the donor from the bona fide possession and enjoyment of the gifted property. It was said that the appellant's father did not have any right of possession or enjoyment of the gifted property either in law or in equity and as the deceased had no enforceable right the High Court should have held that estate duty was not leviable under s. 10 of the Act and there was "entire exclusion of the donor" within the meaning of that section. In support of his submission, Counsel for the appellant relied upon the decision of Hamilton, J. in Attorney General v. Seccombe [[1911] 2 K.B. 688].

The question involved in this appeal depends upon the proper interpretation of s. 10 of the Act. The intention of the legislature in enacting s. 10 of the Act was to exclude from liability to estate duty certain categories of gifts. A gift of immovable property under s. 10 will, however, be dutiable unless the donee assumes immediately exclusive and bona fide possession and enjoyment of the subject-matter of the gift, and there is no beneficial interest reserved to the donor by contract or otherwise. The section must be grammatically construed as follows : "Property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and of which property bona fide possession and enjoyment shall not have been thenceforward retained by the donee to the entire exclusion of the donor from such possession and enjoyment, or of any benefit to him by contract or otherwise". The crux or the section 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. As a matter of construction we are of opinion that both these conditions are cumulative. Unless each of these

conditions is satisfied, the property would be liable to estate duty under s. 10 of the Act. This view is borne out by the decision of the Court of Appeal in Attorney General v. Earl Grey [[1898] 2 Q.B.D. 534, 541] with regard to an analogous provision under s. 38(2) of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889.

The second part of the section has two limbs : the deceased must be entirely excluded (i) from the property and (ii) from any benefit by contract or otherwise. It was argued for the appellant that the expression, "by contract or otherwise" should be construed ejusdem generis and reference was made to the decision of Hamilton, J. in Attorney General v. Seccombe [[1911] 2 K.B. 688]. On this aspect of the case we think that the argument of the appellant is justified. 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. But it was contended by Mr. Sen for the respondent that the case of the Revenue does not rest upon the second limb of the section but upon the first limb which requires that the donor must have been entirely excluded from possession and enjoyment of the property. It was pointed out that there was no such exclusion in the present case and the finding of the Board is that the deceased continued to stay in the house till his death as the head of the family and was looking after the affairs of the household. It was contended therefore, that the first limb of the section is not satisfied in this case and the property must be held to pass on the death of the deceased under that section. In our opinion, the contention of the respondent must be accepted as correct. As a matter of construction we hold that the words "by contract or otherwise" in the second limb of the section will not control the words "to the entire exclusion of the donor" in the first limb. In other words, in order to attract the section it is not necessary that the possession of the donor of the gift must be referable to some contractual or other arrangement enforceable in law or in equity. 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, 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.

On behalf of the appellant strong reliance was placed upon the decision of the Court of Appeal in Attorney General v. Seccombe [[1911] 2 K.B. 688] which has already been referred to. In that case, the deceased made an absolute gift of a house and furniture to a relative, without any stipulation, but continued to live there as the donee's guest until his death more than five years later. Upon the death of the donor the Crown claimed estate duty upon the value of the property upon the ground that bona fide possession and enjoyment of the property were not assumed by the donor and thenceforward retained 'to the entire exclusion of the donor, or of any benefit to him by contract or otherwise'. 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 [[1958] A.C. 435] which is a decision on a similarly worded clause of a New South Wales Statute. In that case, the deceased gave his son a farming property, "Mia Mia," in 1934; in 1935 the deceased, the son and another son entered into a partnership agreement as graziers and stock dealers, on the terms, inter alia, that the deceased should be the

manager and that his decision should be final in all matters relating to the conduct of the business; that the capital should consist of the livestock and plant owned by the partners; that the business should be conducted on their respective holdings (including "Mia Mia"); and that the land held by each partner should be his sole property and he should have the sole and free right to deal with it as he might think fit. The partnership continued till the death of the deceased in 1952, and the property "Mia Mia" was held dutiable as a gift not to his entire exclusion. There is a decision to a similar effect in Commissioner of Stamp Duties of New South Wales v. Owens [88 C.L.R. 67], which was a case under the New South Wales statute. It appears that there was a verbal partnership between the deceased and his son under which they farmed two properties, owned by the deceased, the profits being shared as to two-thirds to the deceased and one-third to the son. Some years later the deceased transferred one of the properties to the son expressly free of all conditions, so that the son could have farmed it independently; in fact they farmed it and shared the profits equally for some eleven years up to the date of death. The Australian Court found that "there was a gift of an estate in fee simple, carrying the fullest right known to the law of exclusive possession and enjoyment"; but that the farming and profit sharing were inconsistent with the deceased's "exclusion", and that duty was therefore chargeable. In an earlier case - O'Connor v. Commissioner of Stamp Duties (South Australia) [47 C.L.R. 601] which was a decision under a South Australian enactment couched in a similar language, the deceased was given a power of attorney by the donee and continued to farm the donated lands and was not in fact required to account for the profits, though he could evidently have been required to do so. But it was again held that duty was chargeable on the donated lands. 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 [[1958] A.C. 435].

It was then pointed out on behalf of the appellant that the Finance Act of 1965 has amended s. 10 of the Estate Duty Act, 1953 by introducing the following 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 donor's 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."

It was argued that this proviso must be taken as legislative interpretation of the section as it stood previous to the amendment and since no right if residence was reserved or secured to the donor under the deed of gift or under any collateral disposition, the imposition of estate duty was not justified. We are unable to accept this argument as correct. The amendment brought about by the Finance Act, 1965 was effective only from April 1, 1965 and was not retrospective. We think that the insertion of the second proviso to the section must be taken to have been made deliberately by Parliament to be effective from the date of the amendment. We therefore see no reason for holding that the earlier provision in s. 10 should be interpreted with reference to the language of the amendment brought about by the Finance Act of 1965. We accordingly reject the argument of Mr. Srinivasan on this point.

It was lastly contended for the appellant that in any event the property in question belonged jointly

to the mother and father of the appellant and the whole property could not be deemed to have passed upon the death of the father under s. 5 of the Act. The question was examined by the Board which found that the property was purchased entirely out of the funds of the deceased that for the purpose of income-tax the deceased had declared the entire property as his own, and that the income therefrom was exclusively assessed in his hands. On these facts the Board held that though the property stood in the joint names of the deceased and his wife, she was merely a name-lender and the entire property belonged to the deceased and was rightly included in his estate for the purpose of estate duty. In view of this finding of fact it is not possible to accept the argument of the appellant that only half the share of the property should be taken for the purpose of estate duty assessment.

For the reasons expressed, we hold that the decision of the High Court is correct and this appeal must be dismissed with costs.

G.C.

Appeal dismissed.

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