The Second Gift Tax Officer, Mangalore Etc.

Vs

D. H. Nazareth Etc.

Civil Appeal Nos. 664 to 669 of 1967

(CJI M. Hidayatullah, J. C. Shah, A. N. Grover, A. N. Ray, I. D. Dua, JJ)

02.04. 1970

JUDGMENT

HIDAYATULLAH, C.J. -

These six appeals by certificate under Article 132(1) of the Constitution are filed against the decision of High Court of Mysore, declaring that Parliament had no power to legislate with respect to taxes on gifts of lands and buildings. The High Court passes a detailed judgment on two of the petitions by which the competence of Parliament was challenged and followed its own decision in the other four cases. It is not necessary to give the facts of the six petitions in the High Court. As illustrative of the facts involved we may mention W.P. No. 1077 of 1959. In that case a certain D. H. Nazareth, owner of a coffee plantation, made a gift by registered deed, on January 22, 1958, of a coffee plantation and other properties in favour of his four sons. The market value of the property was Rs. 3,74,080 and the coffee plantation accounted for Rs. 3,24,700, gift-tax Rs. 35,612/- was demanded. If the coffee plantation was left out of consideration the tax was liable to be reduced by Rs. 34,036. The authority to charge gift-tax on the gift of the coffee plantation was challenged and the right of Parliament to imposed a gift-tax on lands and buildings questioned. In some of the other cases agricultural or paddy lands or buildings questioned. In some of the other cases agricultural or paddy lands or buildings were the subjects of gifts and they were similarly taxed and the tax questioned.

2. The High Court held that Entry 49 of the State List read with entry 18 of the same list reserved the power to tax lands and buildings to the Legislatures of the States and parliament could not, therefore, use the residuary power conferred by entry 97 of the Union List. This decision is challenged before us.

3. The Gift Tax Act was passed in 1958 and subjected gifts made in the year ending on March 31, 1958 to tax. The Act contained the usual exempted limits and other exemptions. We need not concern ourselves with them here. We are only concerned with the validity of parliamentary legislation imposing gift tax at all.

4. To consider the objection to the Gift-tax Act which was sustained by the High Court a few general principles may be borne in mind. Under article 245, Parliament makes laws for the whole or any part of the territory of India and the Legislatures of the States for the whole or part of their respective States. The subject-matter of laws are set out in three lists in the Seventh Schedule. List I (usually referred to as the Union List) enumerates i topics of legislation in respect to which Parliament has exclusive power to make laws and List II (usually referred to as the State List) enumerates topics of legislation in respect to which the State Legislatures have exclusive power to

make laws. List III (usually referred to as the Concurrent List) contains topics in respect to which both Parliament and Legislature of a State have power to make laws. In consistency between laws made by Parliament and those made by the Legislatures of the States, both acting under the Concurrent List, is resolved by making parliamentary law to prevail over the law made by the State Legislature. So long as the parliamentary law continues, the State law remains in operative but becomes operative once the parliamentary law, throwing it into shadow, is removed. The there is the declaration in Article 248 of the residuary powers of legislation. Parliament has exclusive power to make any law in respect to any matter not enumerated in the Concurrent List or State List and this power includes the power of making any law imposing a tax not mentioned in either of those lists. For this purpose, and to avoid any doubts, an entry has also been included in the Union List to the following effect :

> "97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists."

5. It will, therefore, be seen that the sovereignty of Parliament and the legislatures is a sovereignty of enumerated entries, but within the ambit of an entry, the exercise of power is as plenary as any legislature can possess, subject, of course, to the limitations arising from the fundamental Rights. The entries themselves do not follow any logical classification or dichotomy. As was said in State of Rajasthan v. S. Chawla and Another ((1959) Supp 1 SCR 904) the entries in the lists must be regarded as enumeration simplex of broad categories. Since they are likely to overlap occasionally, it is usual to examine the pith and substances of legislation with a view to determining to which entry they can be substantially related, a slight connection with another entry in another list notwithstanding. Therefore, to find out whether a piece of legislation falls within any entry its true nature and character must be in respect to that particular entry. The entries must of course receive a large and liberal interpretation because the few words of the entry are intended to confer vast and plenary powers. If, however, no entry in any of the three lists covers, it then it must be regarded as a matter not enumerated in any of the three lists. Then it belongs as matter not enumerated in any of the three lists. Then it belongs exclusively to Parliament under Entry 97 of the Union List as a topic of legislation.

6. The Gift Tax Act was enacted by Parliament and it is admitted that no entry in the Union List or the Concurrent List mentions such a tax. Therefore, Parliament purported to use its powers derived from Entry 97 of the Union List read with Article 248 of the Constitution. This power admittedly could not be invoked if the subject of taxes on gifts could be said to be comprehended in any entry in the State List. The High Court has accepted the contention of the taxpayers that it is so comprehended in entries 18 and 49 of the State List. Those entries read :

> "18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land; land improvement and agricultural loans; colonization."
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> "49. Taxes on lands and buildings."

The argument is that by entry 18, 'land' of all description is made subject to legislation in the States and by Entry 49 taxes of whatever description on lands in that large sense and buildings generally fall also in the jurisdiction of the State. Reference is made to entries 45, 46, 47 and 48 of the State List in which certain taxes are to be imposed on land and agricultural land or income from agriculture exclusively by the States in contrast with entries 82, 86, 87 and 88 where the taxes are

imposed on properties other than agricultural land or income from agriculture. It is submitted, therefore, that the general scheme of division of taxing and other entries by which land, particularly agricultural land, and income therefrom is reserved for the States shows that taxes on lands and buildings read liberally must also cover taxes in respect of gifts of land, particularly agricultural land and buildings. If the entry so read can be reasonably said to include the tax, then there can be no question of recourse to the residuary powers of Parliament.

7. The matter is not res integra and, however attractive the argument, it cannot be accepted. Many High Courts in India have considered this matter before the Supreme Court decided it. The Mysore view was not followed in S. Dhandapani v. Addl. Gift Tax Officer, Cuddalore ((1963) 49 ITR 712) (Madras High Court); Shyam Sunder v. Gift Tax Officer (AIR 1967 All 19), (disapproved on another point in the Supreme Court). A contrary view was earlier also expressed in Jupadi Sesharatnam v. Gift Tax Officer, Palacole ((1960) 38 ITR 93) (Andhra Pradesh High Court), and Joseph v. Gift Tax Officer ((1964) 45 ITR 66) (Kerala High Court). In fact the judgment under appeal stands alone.

8. The subject of Entry 49 of the State List in relation to imposition of Wealth Tax came up for consideration in Sudhir Chandra Nawan v. Wealth Tax Officer, Calcutta and Others ((1968) 69 ITR 897 (SC)) and the view of the High Court on the construction of this entry was affirmed. Although the judgment under appeal was not referred to expressly the result is that it must be taken to be impliedly overruled. In view of the decision of this court it is not necessary to deal with the matter except briefly.

9. The Constitution divides the topics of legislation into three broad categories : (a) entries enabling laws to be made, (b) entries enabling taxes to be imposed, and (c) entries enabling fees and stamp duties to be collected. It is not intended that every entry gives a right to levy a tax. The taxes are separately mentioned and in fact contain the whole of the power of taxation. Unless a tax is specifically mentioned it cannot be imposed except by Parliament in the exercise of its residuary powers already mentioned. Therefore, entry 18 of the State List does not confer additional power of taxation. At the most fees can be levied in respect of the items mentioned. Therefore, entry 18 of the State List does not confer additional power of taxation. At the most fees can be levied in respect of the items mentioned in that entry, vide entry 66 of the same List. Nor is it possible to read a clear-cut division of agricultural land in favour of the States although the intention is to put land in most of its aspects in the State List. But however wide that entry, it cannot still authorise a tax not expressly mentioned. Therefore, either the pith and substance of the Gift-tax falls within entry 49 of the State List or it does not. If it does, then Parliament will have no power to levy the tax even under the residuary powers. If it does not, then Parliament must undoubtedly possess that power under article 248 and entry 97 of the Union List.

The pith and substance of the Gift-tax on the gift of property which may include lands and buildings. It is not a tax imposed directly upon lands and buildings but is a tax upon the value of the total gifts made in a year which is above the exempted limit. There is no tax upon lands or buildings as units of taxation. Indeed, the lands and building are valued to find out the total amount of the gift and what is taxed is the gift. The value of the lands and buildings is only the measure of the value of the gift. A gift-tax is thus not a tax on lands and buildings as such (which is a tax resting upon general ownership of lands and buildings) but is a levy upon a particular use, which is transmission of title by gift. The two are not the same thing and the incidence of the tax is not the same. Since entry 49 of the State contemplates a tax directly levied by reason of the general ownership of lands and buildings, it cannot include the gift-tax as levied by Parliament. There being no other entry

which covers a gift tax, the residuary powers of Parliament could be exercised to enact a law. The appeals must, therefore, be allowed but there shall be no order about costs throughout. The appeal 666 of 1967 however abates as the sole respondent died.

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