Controller of Estate Duty Madras

Vs

Smt Parvati Ammal

Civil Appeal No. 1395 Of 1970

(A . C. Gupta, . R. Khanna, P. N. Bhagwati, N. L. Untwalia JJ)

11.11.1974

JUDGMENT

KHANNA J. -

This appeal by the Controller of Estate Duty on certificate is against the judgment of the Madras High Court whereby that court answered the following question referred to it under section 64 (1) of the Estate Duty Act, 1953 (34 of 1953) (hereinafter referred to as "the Act"), partly in favour of the assessee and partly in favour of the revenue :

> "Whether, on the facts and in the circumstances of the case, the entire value of the property known as 'Mayavaram Lodge' or any portion of its value is liable to be included in the principal value of the estate of the deceased as property deemed to have passed on his death?"

The matter arises out of the estate duty cased of Shri R. Venkateswara Iyer who died on April 6, 1957. The respondent, Smt. Parvathi Ammal, who is the widow of the deceased and is an accountable person in the case, filed statement relating to the estate of the deceased before the Assistant Controller of Estate Duty. The Assistant Controller determined the principal value of the estate to be Rs. 2,50,374. In computing the principal value the Assistant Controller took into account a sum of Rs. 1,50,000 on account of the value of property known as 'Mayavaram Lodge".

The Assistant Controller found that till March 11, 1955, the deceased, who was a self-made man, owned two buildings, including Mayavaram Lodge, besides some agricultural land. The deceased was carrying on the business of boarding and lodging in Mayavaram Lodge. He had also a small chit business. On March 11, 1955, the deceased executed a document described as a partition deed, whereby he gave "Mayavaram Lodge" to his five sons in equal shares and retained for himself the other house and agricultural land. On June 25, 1955, the deceased entered into an agreement with his sons by which they leased to the deceased Mayavaram Lodge wherein as before he continued to carry on his boarding and lodging business. In the profit and loss account a sum of Rs. 15,000 was mentioned for payment of rent of Mayavaram Lodge. Later on, the deceased gave the boarding house on sub-lease to a third party.

The respondent claimed that Mayavaram Lodge should be excluded from the estate duty assessment of the deceased on the ground that the said property was transferred on March 11, 1955, more than two years before his death. It was urged that the fact that the sons let out the building to the deceased should not be taken to be a special benefit derived by the deceased. The respondent also pointed out that Mayavaram Lodge was taken on lease long after the original transfer and the lease

and the transfer could not be treated as associated transactions. Plea was also taken that the document of March 11, 1955, constituted deed of partition of joint family properties.

The Assistant Controller rejected these contentions. He found that the property referred to in the deed dated March 11, 1955, was the self- acquired property of the deceased and that there was no evidence to show that the deceased treated it as joint family property. He accordingly held that the deed, though described as a partition deed, should be treated as a settlement. Although the settlement was found to have been made by the deceased more than two years before his death, the fact that the deceased took back the property from his sons shortly thereafter to continue his business therein showed, in the opinion of the Assistant Controller, that the deceased got a direct benefit in the property. The Assistant Controller in this context referred to the fact there was not much interval of time between the settlement and lease and that the payment of rent was not in cash but by book entries. The Assistant Controller accordingly held that Mayavaram Lodge was liable to be taken into account for assessing the estate duty. He accordingly included a sum of Rs. 1,50,000 on that account.

The respondent preferred an appeal to the Board of Direct Taxes against the order of the Assistant Controller. The only ground which was pressed before the Board related to the inclusion of the value of Mayavaram Lodge. It was urged on behalf of the respondent that the property owned by the deceased became the joint family property and that the deed of March 11, 1955, was a partition deed. In the alternative, it was urged on behalf of the respondent that even if the deed of March 11, 1955, was a deed of settlement and not one of partition, the value of Mayavaram Lodge ought not to have been included inasmuch as the deceased had transferred his right, title and interest in the above property more than two years prior to his death. The Board found that the deed, though executed on March 11, 1955, more than two years prior to the death of the deceased, was registered only on June 29, 1955. According to the Board, the gift of Mayavaram Lodge became effective only on June 29, 1955, viz., the date or registration. As that date fell within the statutory period of two years before the death of the deceased, the Assistant Controller was held to be justified in view of section 9 of the Act in including the value of Mayavaram Lodge in the principal value of the estate of the deceased. In the alternative, the Board found that the deceased continued to be in undisputed possession of Mayavaram Lodge. It was held that the donor had not been excluded from the enjoyment and possession of the property and, therefore, estate duty was payable in respect of that property under section 10 of the Act. The Board rejected the contention that the document of March 11, 1955, constituted a partition deed. The appeal of the respondent was accordingly dismissed. On being moved by the respondent the Board referred the question reproduced above to the High Court.

The High Court held that the subject-matter of allotment to the sons by the deed of March 11, 1955, was the entirety of Mayavaram Lodge with all the rights that could possibly go into it and that the allotment was not subject to any claim to or right in that property. It was also held that on the execution of the deed the sons had assumed possession and enjoyment of the entirety of the house. The High Court then referred to its earlier decision in V. S. Mani v. Controller of Estate Duty wherein it had held that to the extent to which the donor retains an interest in the entirety of the property given away by him as gift, there will be pro tanto liability to estate duty. It was further observed by the High Court as under :

> "Mayavaram Lodge was certainly a bundle of rights of which possession and enjoyment formed a part which, as we have observed, were not subsequent to their assumption retained by the sons of the deceased. To that extent, there was non-exclusion of the deceased. So far as the ownership of the property is concerned, there

> can be no question that the donees exclusively retained it. It follows that it is only the value of the right to possession and enjoyment in the hands of the deceased as a lessee that would pass on his death and would attract duty. For the revenue it is urged that the entire premises being in the occupation and enjoyment of the deceased until his death, its entire value would pass. We are unable to accede to this view because it does not take note of the value of the other rights of the donees including the ownership of the property, which they retained to the exclusion of the deceased. Since we have held that only to the extent of the non-exclusion mentioned the proportionate property referable to it would pass, it would be necessary for the revenue to apportion its value taking all the facts into account and revise the assessment.
>
> That is sufficient to dispose of the reference. In view of this, we do not think it necessary to deal with the other point as to whether the transaction of March 11, 1955, amounted to a gift. We have proceeded on the basis that it was a gift.
>
> The question is answered partly in favour of the revenue and partly in favour of the assessee. This is because, on the view we have expressed, the revenue cannot charge estate duty on the entire value of the property, while at the same time the accountable person cannot escape duty to the extent of the non-exclusion we have indicated."

In the appeal before us Mr. Ahuja on behalf of the appellant has assailed the judgment and reasoning of the High Court and has contended that as subsequent to the deed of March 11, 1955, which as observed by the High Court would have to be assumed to be a deed of gift, the donor took the gifted property on lease, the donees cannot be said to have retained possession of that property "to the entire exclusion of the donor or of any benefit to him by contract or otherwise". As against that Mr. Swaminathan on behalf of the respondent has canvassed for the correctness of the view taken by the High Court.

Before dealing with the contention of the parties, we may refer to the relevant provisions of the Act. According to section 2 (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. Section 5 contains the charging provision, and provides that :

> "In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided, of all property, settled or not settled, including agricultural land.... which passes on the death of such person, a duty called 'estate duty' at the rates fixed in accordance with section 35."

According to section 6, property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death. Sub-section (1) of section 7 of the Act provides that subject to the provisions of that section, property in which the deceased or any other person had an interest ceasing on the death of the deceased shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cesser of such interest, including, in particular, a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasantana law. According to section 9, 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 persons 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. Section 10 of the Act reads as under :

> "10. 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 :
>
> 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, it, by means of the surrender of the reserved benefit or 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 :
>
> 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 may be mentioned that the period "two years" in sub-section (1) of section 9 and the first proviso to section 10 was substituted for "one year" by the Finance Act, 1966 (13 of 1966). The second proviso to section 10 was inserted by the Finance Act, 1965 (10 of 1965).

The amendment brought about by the Finance Act, 1965, by inserting the second proviso to section 10, as observed by this court in the case of George da Costa v. Controller of Estate Duty, was not retrospective. The said section would consequently have to be construed for the purpose of this case which relates to the estate of the deceased who died on April 6, 1957, as it stood before the amendment.

The intention of the legislature in enacting section 10 of the Act was to exclude from liability to estate duty certain categories of gifts. A gift of immovable property under section 10 will, however, be dutiable unless the donee assumes immediate exclusive and bona fide possession and enjoyment of the subject-matter of the gift, and three 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 of 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.

Both these conditions are cumulative. Unless each of these conditions is satisfied, the property would be liable to estate duty under section 10 of the Act (see George da Costa v. Controller of Estate Duty).

The second part of the section, as observed in the above mentioned case, has two limbs : the deceased must be entirely excluded, (i) from the property, and (ii) from any benefit by contract or otherwise. The word "otherwise" should be construed ejusdem generis and should 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. The words "by contract or otherwise" in the second limb of the section do not control the words "to the entire exclusion of the donor" in the first limb. In order to attract this section, it is consequently not necessary that the possession of the donor of the gifted property 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 pass on the death of the donor and will be subject to levy of estate duty.

The object underlying a provision like section 10 of the Act was explained by Isaacs J. in the case of John Lang v. Thomas Prout Webb decided by the High Court of Australia in 1912 in the following words :

> "The owner of property desiring to make a gift of it to another may do so in any manner known to the law. Apparent gifts may be genuine or colourable, and experience has shown that frequently the process of ascertaining their genuineness is attended with delay, expense and uncertainty - all of which are extremely embarrassing from a public revenue standpoint.
>
> With a view to avoiding this inconvenience, the legislature has fixed two standards, both of them consistent with actual genuineness, but prima facie indicating a colourable attempt to escape probate duty. One is the standard of time. A gift, however, real and bona fide, if made within twelve months before the donor's death is for the purpose of duty regarded as not made. The other is conduct which at first sight and in the absence of explanation is inconsistent with the gift. The prima facie view is made by the legislature conclusive. If the parties to the transaction choose to act so as to be in apparent conflict with its purport, they are to be held to their conduct.
>
> The validity of the transaction itself is left untouched, because it concerns themselves alone. But they are not to embarrass the public treasury by equivocal acts."

The court in that case was concerned with the construction of section 11 of the Administration and Probate Act, 1903, which reads as under :

> "Every conveyance or assignment, gift, delivery or transfer of any estate real or personal and whether made before or after the commencement of this Act, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise shall -

> (a) if made within twelve months immediately preceding the death of the person so dying; or
>
> (b) if made at any time relating to any property of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise;
>
> be deemed to have been made the property to which the same relates chargeable with the payment of the duty payable under the Administration and Probate Acts as though part of the estate of the donor."

In that case a testatrix was the owner in fee of land in her actual possession and enjoyment, which she worked as a single property. More than twelve months before her death she gave to her three sons blocks of this land each of which was surrounded by other land of the testatrix. The gift was made by conveyances of so much of the land as was under the general law, and by transfers of so much of it as was under the Transfer of Land Acts. On the same day upon which the conveyances and transfers were executed, each of the sons executed a lease for five years of the land given to him to the testatrix at a fair and reasonable rent. After the gifts the lands given continued to be in the actual physical occupation of the testatrix and to be worked by her with her other land in the same way as before the gifts. The testatrix died before expiration of the leases. It was held that the land so given was chargeable with the payment of the duty payable under the Administration and Probate Acts as though part of the estate of the testatrix. Isaacs J. in this context observed :

> "The lease, however, gave to the donor possession and enjoyment of the land itself, which is a simple negation of exclusion, and brings the case within the statutory liability. It was argued that as the rent was full value, the lessee's possession and occupation were not a benefit. The argument is unimportant because the lease, at whatsoever rent, prevents the entire exclusion of the donor."

The above reasoning of Isaacs J. was approved by the Judicial Committee in the case of Clifford John Chick v. Commissioner of Stamp Duties wherein the Judicial Committee dealt with a case under section 102 of the New South Wales Stamp Duties Act, 1920 - 56. The aforesaid section provided that :

> "For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property -... (2) (d). Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

In that case a father transferred in 1934, by way of gift, to one of his sons pastoral property. The gift was made without reservation or qualification or condition. In 1953, some 17 months after the gift, the father, the donee-son and another son entered into an agreement to carry on in partnership the business of graziers and stock dealers. The agreement provided, inter alia, that the father should be the manager of the business and that his decision should be final and conclusive in connection with

all matters relating to its conduct; that the capital of the business should consist of the livestock and plant then owned by the respective partners; that the business should be conducted on the respective holdings of the partners and such holdings should be used for the purposes of the partnership only; that all lands held by any of the partners on the date of the agreement should 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 of the three partners owned a property, that of the donee-son being that which had been given to him by his father in 1934. Each partner brought into the partnership, livestock and plant, and their three properties were thenceforth used for the de-pasturing of the partnership stock. This arrangement continued up to the death of the father in 1952. It was 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 purposes of death duty. While it was not disputed that the son had assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the father, it was found that 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 Judicial Committee held that 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, and, it 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. In the opinion of the Judicial Committee, it was irrelevant that the father gave full consideration for his rights as a member of the partnership to possession and enjoyment of the property that he had given to his son. Sir Garfield Barwick (as he then was), who was the counsel for the appellant in that case, pointed out that on the respondent's construction, if a father gave a house to his son, and later the son turned it into a hospital, and the father, having been taken ill, went into it as a paying patient, liability to duty would arise-although it may be the only hospital in the area. The case, however, in view of the language of the statute was decided in favour of the Commissioner of Stamp Duties, who was the respondent in the case. The following six points emerged from Chick's case :

> (1) The deceased was not in fact excluded from the property, but as a partner enjoyed rights over it.
>
> (2) There was an initial outright gift of the property - not of the property shorn of certain rights.
>
> (3) It was immaterial that the partnership agreement was later than the gift, since the section required that possession and enjoyment should "thenceforth" be retained to the exclusion of the donor.
>
> (4) It was also immaterial that the partnership was "an independent commercial transaction", and that the donor gave full consideration for his rights. If a donor gives a donee a freehold and the donee gives the donor a lease, even at a full rent, the donor is not excluded from the property.
>
> (5) The question whether the partnership agreement was "related" or "referable" to the gift did not arise : the question is relevant only to the second limb of the clause.

It was immaterial that the donee could make no better use of the property. "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

this non-exclusion has been advantageous or otherwise to the donee" (See page 276 of Dymond's Death Duties, 14th edition).

So far as point No. (4) is concerned, the law was subsequently amended by section 35 (2) of the Finance Act, 1959. Under that clause, the donor's actual occupation of the land, enjoyment of an incorporeal right over the land or possession of the chattels is to be disregarded if for full consideration, e.g., if he paid a full rent to the donee or occupied it under a lease for which he gave full value.

There is one other principle and that relates to gift of property shorn of certain rights belonging to the partnership in which the donor is a partner. In such a case the benefit remaining in the donor is referable to the partnership agreement and not to the gift. This principle can be illustrated by reference to two cases, one decided by the Judicial Committee's decision is in the case of H. R. Munro v. Commissioner of Stamp Duties while that of this court is in the case of Controller of Estate Duty v. C. R. Ramachandra Gounder.

In the case of H. R. Munro M who was the owner of 35,000 acres of land in New South Wales on which he carried on the business of a grazier, verbally agreed with his six children that thereafter the business should be carried on by him and them as partners under a partnership at will. The business was to be managed solely by M and each partner was to receive a specified share of the profits. In 1913, M transferred by way of gift by means of six registered deeds all his right, title and interest in the portions of his land to each of his four sons and to trustees for each of his two daughters and their children. The transfers were taken subject to the partnership agreement, and on the understanding that any partner could withdraw and work his land separately. In 1919, M and his children entered into a formal partnership agreement, which provided that during the lifetime of M no partner should withdraw from the partnership. On the death of M in 1929, the land transferred in 1913 was included in assessing his estate to death duties under the Stamp Duties Act on the ground that they were gifts dutiable under section 102 of the New South Wales Stamp Duties Act, 1920. It was held that the property comprised in the transfers was the land separated from the rights therein belonging to the partnership and was excluded by the terms of section 102, sub-section 2 (a), from being dutiable, because the donees had assumed and retained possession thereof, and any benefit remaining in the donor was referable to the partnership agreement of 1909 and not to the gifts. In the case of Ramachandra Gounder the deceased who was a partner in a firm owned a house property let to the firm as a tenant-at-will. In August, 1953, he executed a deed of settlement under which he transferred the property let to the firm to his two sons absolutely and irrevocably and, thereafter, the firm paid the rent to the donees by crediting the amount in their accounts in equal share. The deceased further directed the firm to transfer from his account a sum of Rs. 20,000 to the credit of each of his five sons in the firm's books with effect from April 1, 1953, and he also informed them of this transfer. An amount of Rs. 20,000 was credited in each of the sons' accounts with the firm. The sons did not withdraw any amount from their accounts in the firm and the amounts remained invested with the firm for which interest at 7 1/2 per cent. was paid to them. The deceased continued to be a partner of the firm till April 13, 1957, when the firm was dissolved and thereafter he died on May 5, 1957. The question was whether the value of the house property and the sum of Rs. one lakh could be included in the principal value of the estate of the deceased as property deemed to pass under section 10 of the Estate Duty Act 1953. This court held that neither the house property nor the sum of Rs. one lakh could be deemed to pass under section 10. The first two conditions of the section were satisfied because there was an unequivocal transfer of the property by a settlement deed and of the sum of Rs. one lakh by crediting the amount in each of the sons' accounts with the firm which thenceforward became liable to the sons for payment of that amount and the interest

thereon. The possession which the donor could give was the legal possession which the circumstances and the nature of the property would admit and this the donor had given. The benefit the donor had as a member of the partnership was not a benefit referable in any way to the gift but was unconnected therewith.

The present case, in our opinion, clearly falls within the purview of the dictum laid down by the High Court of Australia in the case of John Lang and of the Judicial Committee in the case of John Chick. As already mentioned the High Court has found that the property which was the subject-matter of the gift under the deed of March 11, 1955, was the entirety of Mayavaram Lodge with all the rights and that the gift was not subject to any claim or reservation. It has also been found that on the execution of the aforesaid deed the donees assumed possession and enjoyment of the entirety of the house. On June 25, 1955, the donor took the aforesaid house on lease from the donees. These facts would show that the possession and enjoyment of Mayavaram Lodge was not subsequent to the gift retained by the donees "to the entire exclusion of the donor or of any benefit to him by contract or otherwise". Mayavaram Lodge as such shall be deemed to pass on the death of the deceased under section 10 of the Act. The case of Ramachandra Gounder upon which great reliance has been placed by Mr. Swaminathan can hardly be of much assistance to him because in that case the gifted property was subject to the tenancy-at-will granted to the firm. Ramachandra Gounder's case was thus covered by the principle laid down in Munro's case. The question of invoking that principle does not arise in the present case because the property which is the subject-matter of the gift was the entirety of Mayavaram Lodge with all the rights and the same were not subject to any right in favour of a partnership. The principle to be kept in view in such cases is to examine the deed of gift and find out as to what is the subject-matter of the gift. If the gift comprises the full ownership of the property not shorn of any right including tenancy right in favour of third parties, in such an event in order to prevent the incidence of estate duty immediate bona fide physical possession and enjoyment of the gifted property must ordinarily be assumed by the donee and retained thereafter to the exclusion of the donor. In case, however, the subject-matter of the gift is property shorn of certain rights, in that case the residue of the rights in that property would be the subject-matter of the gift. In such an event it may not sometimes in the very nature of things be possible for the donee to assume physical possession and enjoyment of the property. In such cases the possession and enjoyment of the gifted property which may be assumed by the donee would only be such as is possible under the circumstances.

We may mention some of the other cases to which reference has been made by Mr. Swaminathan during the course of arguments. The case of Commissioner for Stamp Duties of New South Wales v. Perpetual Trustee Co. Ltd. related to an indenture of settlement made between the settlor and five trustees, of whom the settlor himself was one. It was declared in that settlement that the trustees should hold certain company shares of which the settlor was the owner and registered holder, and which were transferred to and registered in the names of the trustees, in trust, to apply during the minority of his son the whole or any part of the income or corpus as the trustees should think fit for the maintenance, advancement or benefit of the son. The shares and the accumulations of income were transferred to the son on his attaining the age of 21 years as his absolute property. From the date of settlement the settlor never exercised any voting power in respect of the shares. The son attained the age of 21 years in 1931 when the assets comprised in the settlement were transferred to him. On a claim by the revenue authorities that on the death in 1921 of the settlor the subject of the settlement had formed part of the settlor's dutiable estate by virtue of section 102 of the New South Wales Stamp Duties Act, the Judicial Committee held that the interest of the son under the settlement in the shares and accumulations of income was not an absolute vested interest, but was contingent on his attaining the age of 21 years. It was further held that the property comprised in the

gift was the equitable interest in the shares, and that bona fide possession and enjoyment of the property comprised in the gift was assumed by the donee, viz, the son, immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him. The shares were accordingly held not to form part of the settlor's dutiable estate. The above decision can hardly be of any assistance to the respondent. Lord Russell of Killowen in the above cited case after referring to the clauses of the settlement came to the conclusion that there was no gift of corpus to the son except in the direction to the trustees to transfer the shares to him on his attaining the age of 21 years. Until he attained that age, the shares, it was held, were not the absolute property of the son and that he had only a contingent interest therein. He was entitled to the corpus of the shares if and when he attained the age of 21 years. The Judicial Committee accordingly affirmed the decision of the High Court of Australia that the subject-matter of the gift in favour of the son under the deed of settlement was only the equitable interest in the shares. As against that the subject-matter of the gift in the present case was the full ownership right in a house without any diminution.

The case of St. Aubyn v. Attorney-General related to certain properties held on trusts and their dispositions. It is not necessary to set out the long chain of facts of that case; suffice it to say that there is nothing in that case which runs counter to the view we are taking in the matter.

In Controller of Estate Duty v. R. Kanakasabai the deceased executed in June, 1951, separate deeds in favour of his sons, grandsons, daughter and wife, settling properties thereby severally in favour of the respective beneficiaries absolutely and with full power of alienation. The deeds in favour of the sons and grandsons provided for payment of Rs. 1,000 per annum to the settlor, while the deed in favour of the daughter provided for maintenance of the settlor and his wife during their lifetime. In the deed in favour of the wife the settlor expressed the hope that she would maintain him during his lifetime. No charge was, however, created in respect of the amounts made payable by the sons and grandsons or in respect of the daughter's liability to maintain the settlor and his wife. The deceased died on February 5, 1959, and the question which arose for determination was whether the whole or any part of the properties comprised in the deeds passed on the death of the deceased under section 10 of the Act. It was held that no interest in the properties settled was reserved to the deceased during his lifetime or for any period after the properties were settled. The deed in favour of the wife merely expressed a hope or expectation and no enforceable right was created thereby. It was further held that in order to attract section 10 the benefit to the donor by contract or otherwise must be referable to the property gifted and it was not sufficient that the donor derived a benefit arising from the transaction resulting in the gift. As the provision for annual payments and maintenance made in the deeds were not charged on the properties settled, the donor could not be said to have retained any interest or any benefit either in the property settled or in respect of their possession. Neither the whole nor any part of the properties comprised in those deeds was consequently liable to be included in computing the value of the estate that passed on the death of the deceased. This case can equally be of no assistance to the respondent because the question which arose for determination in that case was wholly different from that which arises in the present case.

Mr. Swaminathan has then pointed out that section 10 of the Act contains the words "to the extent" which are not there in the statutory provisions with which the High Court of Australia and the Judicial Committee were concerned in the cases of John Lang and Chick respectively. It is urged that the words "to the extend" indicate that if possession and enjoyment of the gifted property is not assumed by the donee and thenceforward retained to the entire exclusion of the donor, it would be the right of possession and enjoyment of the gifted property which shall be taken to pass on the death of the donor. The learned counsel accordingly concludes that what is to be taken into account in determining the principal value of the estate is the value of the right to possession and enjoyment

of the gifted property and not the value of the property in its entirety. We are unable to accede to this submission. It is, no doubt, true that the words "to the extent" do not find a mention in the statutory provisions which were construed in the cases of John Lang and Chick, but that fact would not materially affect our conclusion. The words "to the extent" connote that if the donee does not assume immediate bona fide possession and enjoyment of a part or fraction of the gifted property and thenceforward retain it to the entire exclusion of the donor or of any benefit to him, by contract or otherwise, it shall be that part or fraction of the gifted property which shall be deemed to pass on the death of the donor. Those words thus seek to restrict the liability to pay estate duty in respect of only the aforesaid part or fraction of the property. They underline the intention of the legislature that in the event of the donee not assuming bona fide possession and enjoyment of a part or fraction of the gifted property and thenceforward retaining it to the entire exclusion of the donor or of any benefit to him by contract or otherwise, the estate duty shall be payable not in respect of the whole of the gifted property but only in respect of that part or fraction of the gifted property of which the donee did not assume bona fide possession and enjoyment and thenceforward retain it to the entire exclusion of the donor or of any benefit to him by contract or otherwise. An illustration of this is furnished by the case of Rash Mohan Chatterjee v. Controller of Estate Duty. In that case the deceased settled on July 1, 1954, certain premises in trust for the absolute use and benefit of his two sons in equal shares during their lives and upon the death of one or both the sons for the use of the wife or wives of such son or sons with remainder to the male children of the two sons in equal shares per stripes. The upper portion of the premises was leased to the deceased himself on a rent of Rs. 150 per month for a term of five years with effect from the date of settlement. The lease expired on June 30, 1959, but the deceased continued to occupy that part of the premises for a few days thereafter, until his death on July 11, 1959. The question which arose for determination was whether and to what extent estate duty was chargeable in regard to those premises under section 10 of the Act. It was held that the lease gave to the donor possession and enjoyment of the property itself and the case fell within the statutory charge under section 10. As, however, section 10 provided that such property was chargeable only to the extent that the deceased was not excluded, estate duty was payable by the accountable persons only on that portion of the premises which was in the occupation of the deceased as a lessee.

The High Court in the judgment under appeal mentioned that Mayavaram Lodge was a bundle of rights of which possession and enjoyment formed a part. We may in this context observe that it was the ownership of the above property which constituted the bundle of rights. The view urged on behalf of the respondent and accepted by the High Court that the estate duty is payable only in respect of the value of the right to possession and enjoyment in the hands of the deceased as a lessee of Mayavaram Lodge runs, in our opinion, counter to the plain language of section 10 of the Act. What the section contemplates is that it would be the property taken under the gift which shall be deemed to pass on the donor's death if the bona fide possession and enjoyment thereof 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. There is nothing in the section to indicate that if the donee does not immediately assume bona fide possession and enjoyment of the gifted property and thenceforward retain it to the entire exclusion of the donor, in such an event the right only to possession or enjoyment of the property shall be deemed to pass on the death of the donor. Apart from the case of Rash Mohan Chatterjee, to which we have already made a reference, the stand taken on behalf of the respondent cannot be accepted in the face of the decision of this court in the case of George da Costa. The deceased in that case had purchased a house in the joint names of himself and his wife in 1940. They made a gift of the house to their sons in October, 1954. The document recited that the donees had accepted the gift and that they had been put in possession. The

deceased died on September 30, 1959. The Controller included the value of that house in the principal value of the estate that passed on the deceased's death under section 10 of the Estate Duty Act, 1953. The Board found that, though the deceased had gifted the house four years before his death, he still continued to stay in the house till his death as the head of the family and was also looking after the affairs of the house. It was further found that the property was purchased entirely out of the funds of the deceased, and though the property stood in the joint names of the deceased and his wife, the wife was merely a name-lender and the entire property belonged to the deceased. It was held by this court that the value of the property was correctly included in the estate of the deceased as property deemed to pass on his death under section 10. If the view propounded on behalf of the respondent were to be accepted, in that case the property which passed on the death of the deceased in the case of George da Costa could only be the value of the right to possession. In our opinion, the stand taken on behalf of the respondent in this respect is clearly untenable.

Lastly, it has been argued on behalf of the respondent that we should remand the case to find as to whether the deed of March 11, 1955, constituted a deed of partition. We are unable to accede to this submission. The High Court has proceeded upon the basis that the property in question was gifted by the deceased in favour of his sons as a result of that deed. The Board of Direct Taxes found on reference to the aforesaid deed that all the properties mentioned therein were the self-acquired properties of the deceased and there was nothing in any part of the deed to show an intention on the part of the deceased to treat them as properties belonging to the joint family. It was also found that there was no evidence of any clear intention of the deceased to waive his separate rights. Accordingly, the Board came to the conclusion that the said document was not a partition deed relating to the joint family property. In the circumstances, we find no sufficient ground for remanding the case.

As a result of the above we accept the appeal, discharge the answer given by the High Court to the question referred to it and answer that question in favour of the revenue and against the accountable person. Our answer is that on the facts and in the circumstances of the case the entire value of the property known as "Mayavaram Lodge" is liable to be included in the principal value of the estate of the deceased as property deemed to have passed on his death. The appellant shall be entitled to the costs of the appeal.

Appeal allowed.

</html