

Commissioner of Income-Tax, Kanpur

Vs

Dr. R. S. Gupta

Civil Appeal No. 1713 (Nt) of 1973

(Sabyasachi Mukharji, S. Natarajan JJ)

03.02.1987

JUDGMENT

SABYASACHI MUKHARJI, J. -

This appeal under Section 29(1) of the Wealth-Tax Act, 1957 (hereinafter called the Act) is directed against the judgment and order of the High Court of Allahabad dated January 6, 1971. The questions involved before the Allahabad High Court in the reference under Section 27(1) of the Act were as follows :

- (1) Whether, on the facts and in the circumstances of the case, the Tribunal rightly held that the assessee did not make valid gifts aggregating Rs. 1,50,000 on January 1, 1957 ?
- (2) Whether on the facts and in the circumstances of the case, the Tribunal rightly held that the assessee did not validly assign Rs. 1,50,000 in favour of his sons and grandsons by his letter dated January 1, 1957 ?
- (3) Whether, on the facts and in the circumstances of the case, the tribunal rightly held that the sum of Rs. 1,50,000 was properly included in the assessee's net wealth ?
- (4) Whether, on the facts and in the circumstances of the case, the Tribunal rightly held that the assessee did not make valid gifts aggregating Rs. 67,560/12/- ?
- (5) Whether, on the facts and in the circumstances of the case, the Tribunal rightly held that the sum of Rs. 67,560/12/- was rightly included in the net wealth of the assessee ?

2. The case relates to the assessment year 1957-58 and the relevant date of valuation was March 31, 1957. The assessee, Dr. R. S. Gupta, had maintained an account in the books of Messrs. Tika Ram and Sons Pvt. Ltd. On January 1, 1957, the account showed a credit of Rs. 1,50,740. On that day, the assessee had addressed a letter to the company stating that he had decided to gift away for love and affection various sums to the following persons :

#Ved Prakash Gupta Rs. 25,000Om Prakash Gupta Rs. 25,000Hari
Prakash Gupta Rs. 50,000Pravin Kumar Gupta Rs. 50,000##

By that letter the assessee had directed the company to debit his account to the extent of Rs. 1,50,000 and credit the respective amounts in the names of the aforesaid persons. It appears further

that copies of this letter were sent to one Om Prakash Gupta and Ved Prakash Gupta. There was no dispute that instructions of the assessee were carried out by the company and relevant debit and credit entries were made in the respective accounts. On the same day, i.e. on January 1, 1957, Om Prakash Gupta wrote to the assessee, his father, thanking him for the gift of Rs. 25,000 made in his favour and the gift of Rs. 50,000 in favour of his son Pravin. A similar letter was written by Ved Prakash thanking the assessee, his father, for the gift of Rs. 25,000 made to him and Rs. 50,000 gifted to his son. It must be mentioned, however, that the company i.e. Messrs. Tika Ram and Sons. Pvt. Ltd. was stated to be running an oil mill and carrying on business as grain tillers, contractors and brick-kiln owners. It was also stated to be carrying on business of advancing money and taking money on loan when necessary. But it appears that it was admitted position that Tika Ram and Sons had a cash balance of Rs. 4000 only on January 1, 1957 and it did not have any overdraft facilities with any bank. The respective donees were stated to have later on withdrawn amounts from the amounts so transferred to their accounts. The assessee contended that a total sum of Rs. 1,50,000 was validly gifted by him to his sons and grandsons and hence the amounts had been wrongly included in his net wealth by the Income-tax Officer and the Appellate Assistant Commissioner. It was his contention that Tika Ram and Sons carried on the business of banking and hence the gifts were valid. But there was no evidence that Tika Ram and Sons were carrying on any banking business.

3. The Tribunal held that they were not carrying on banking business. The main question therefore that falls for consideration is whether gifts in question made by the transfer entries in the books of the debtor company were valid gifts even though the debtor company was not carrying on the business of banking and had no cash in hand for the amount in question on that date. Gift is defined in Section 122 of the Transfer of Property Act, 1882 as transfer of certain existing movable or immovable property made voluntarily and without consideration by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Section 123 of the said Act deals with how transfers are effected and stipulates, inter alia, that for the purpose of making a gift of movable property as in this case, the transfer must be effected either by a registered instrument signed by the donor and attested or by delivery. Such delivery may be made in the same way as goods sold may be delivered.

4. The next contention was regarding the inclusion of (sic in) net wealth of a sum of Rs. 67,560/12/- standing to the credit of the assessee in the books of M/s. Pearls and Beads. The assessee claimed to have gifted the said amounts by transfer entries in the books of M/s. Pearls and Beads on March 30, 1957. No letter as in the previous case was addressed by the assessee but only oral instructions were said to have been given. The Tribunal held that there were no valid gift. There was no evidence, it appears, that the said sum was available with the said firm of M/s. Pearls and Beads.

5. The High Court in view of the decision of the Division Bench of the Allahabad High Court in the case of Gopal Raj Swarup v. CWT, (1970) 77 ITR 912 (All)) answered the first question in the negative and so far as the second question was concerned, it declined to answer as it did not arise in view of the answer given to the first question and questions 3, 4 and 5 were answered in the negative. Aggrieved by the said decision, the revenue has come up in appeal.

6. In order to constitute a valid gift there must be an existing property. In the case of entries in the books of account by credit and debit, the sums should be available on the date of gift in the account of the firm whose accounts are said to be credited or debited. In the case of banking companies or other firms and companies who have overdraft facilities, even if the sums are not in credit of the donor and are not with such companies or firms, gifts might be possible by adjustment of book

entries. But in the case of non-banking companies or firms, if those companies or firms do not have overdraft facilities, it is not possible to make valid gift if sums or funds are not available. This question has been examined by the various High Courts.

7. It is possible in certain circumstances for a donor to make a valid gift by instructing a firm or a company or a Hindu Undivided Family in which the donor has an account to give effect to the gift by debiting his account and crediting the account in the name of the donee. But in such cases merely book entries would not suffice. The circumstances must be such as to make it clear that there were sufficient funds at the disposal of the donor by reason of which he could make the gift by such book entries. The firm in which the donor may have account may or may not have sufficient cash balance but it must have sufficient provision for overdraft with the bank on the basis of which it could honour instructions given by the assessee. This position of law has been referred to and reiterated by the bench decision of the Delhi High Court in the case of *Indian Glass Agency v. CIT.* ((1982) 137 ITR 245 (Del)) Justice Ranganathan of the Delhi High Court after referring to several authorities has observed that book entries may be sufficient only when circumstances make it clear that the gift was genuine and the firms where accounts transfers are effected must have sufficient cash in hand or sufficient provision for overdraft facility upon the basis of which it would honour the instructions given by the assessee. The assessee must also have sufficient credit balance to enable him to make the gift. Reference may also be made for this proposition to the decision of the Delhi High Court in *New India Colour Co. v. CIT.* (80 ITR 206)

8. The effect of the two aforesaid decisions of the learned judges of the Delhi High Court indicates that in case there was not sufficient cash balance from out of which the amount gifted could be physically given to the donee, mere entries in the books of account in the form would not constitute delivery of possession over the gifted property to the donee and a gift in such case will not be valid. The position, however, might be different if such firms or companies or Hindu Undivided Family in whose accounts gifts are effected have overdraft facilities.

9. The Calcutta High Court had occasion to discuss this aspect in the case of *CIT v. Ashok Glass Works.* ((1976) 103 ITR 379 (Cal)) There it was held that the fact that the entries which had been made contemporaneously showed that the transaction was genuine and there was no suggestion that the interests which was credited in the accounts of the minor donees by the firm which carried on money-lending business also was fictitious. The Tribunal therefore, it was found, rightly held that the gifts were valid and the interest paid in respect of the accounts standing in the names of the donees was allowable as a deduction in the hands of the assessee firm.

10. The Calcutta High Court had to consider this in the case of *CGT v. Tarachand Meghraj.* ((1977) 109 ITR 775 (Cal)) There the High Court after discussing various decisions including certain decisions of the Allahabad High Court which we shall presently note and the provisions of Section 122 of the Transfer of Property Act, 1882, and the Sale of Goods Act, held that under Section 123 of the Transfer of Property Act, in the case of a gift of movable property, the transfer may be effected by delivery. Such delivery may be in the same way as goods sold may be delivered. Section 33 of the Sale of Goods Act permitted the parties to deliver by any manner or method which the parties agreed would be treated as delivery or which had the effect of putting the goods in the possession of the buyer. In that case, it was found that the effect of the transaction in that case was to put the amounts in the possession of the assessee who was authorised to hold the amounts on behalf of the donees which resulted in a delivery of the amounts within the meaning of the Sale of Goods Act. The court, however, pointer out that if it was held that there was no valid gift on the date of the entries, then it could not beheld that, subsequently, when the money was transferred by

further entries in the same books, it resulted in a valid gift.

11. In the instant case before us and as we have noted and we reiterate the only a sum which could be taken by the donees was Rs. 4000 in Messrs. Tika Ram & Sons Pvt. Ltd. and there was no overdraft facility for Tika Ram & Sons with any bank. In that view of the matter, there were no existing goods to be parted with.

12. Before the Bombay High Court, in the case of *Chimanbhai Lalbhai v. CIT*, ((1958] 34 ITR 259 (Bom)) there were entries in the i books of a banking company and the gifts were held to be valid. In the case of *CIT v. Digvijaysinghji Tin Factory*, (36 ITR 72 (Bom)) on the contrary it was held that the gifts were valid though not sufficient cash with firm was available but proper book entries were made. See also the case of *CIT v. Popatlal Mulji*, ((1977) 108 ITR 4 (Bom)) and also the case of *Addl. CIT v. Dharsey Keshavji*, ((1983] 143 ITR 509 (Bom)) and *CIT v. Devichand Uttamchand*. ((1984] 140 ITR 530 (Bom)) In the background of the facts of those cases the Bombay High Court held that the gifts were valid. In the case of *Baliram Mathuradas v. CIT*, (59 ITR 278) the Bombay High Court had occasion to consider this question and held that there was no evidence of acceptance. It was held by the Bombay High Court that there was no valid gift. Similarly, in the case of *Virji Devshi v. CIT*, ((1967) 65 ITR 291 (Bom)) the Bombay High Court held : "Just as the entries in his own accounts by a person would not constitute a valid transfer, even the entries in the accounts of the firm would not be sufficient"

13. The Madras High Court had also taken divergent views. It may be noted that in *E. M. V. Muthappa Chettiar v. CIT*, ((1945) 13 ITR 311 (Mad)) the Madras High Court held that mere entries were not enough to constitute valid gifts particularly when gift of funds continues to be used in the donors' business.

14. The Madras High Court in the case of *Mrs. Ida L. Chambers v. Kelland Huxford Chambers*, (ILR 1941 Mad 232) was dealing with a case where C, the proprietor of a business who had invested a large amount of capital in it, caused entries to be made in his account books crediting his wife and certain other members of his family with sums which were debited to his capital account. Separate accounts in their names were opened in the books and in their accounts the credits were entered. The entries were followed up by letters to the effect, inter alia, that the sums were entirely in the nature of personal gifts from C and would bear interest payable half-yearly. C was not in a position to make gifts in cash of the amounts credited in favour of his wife and relatives. He had large assets but these were represented by land, buildings, plant, machinery and stock-in-trade. Interest on the amounts was also credited in the accounts regularly for some time, until a bank from which C had obtained an overdraft objected to such crediting of interest. C's wife withdrew various sums of money from time to time from the interest account and whenever C desired to re-transfer amounts to his capital account he obtained letters of consent from her. The principal amounts credited were shown as "deposits" in the balance sheets of the business for some years and were thereafter referred to as "unsecured loans". On a question arising whether there was a valid gift or trust in respect of the said amounts, it was held by the Division Bench of the Madras High Court that there was no completed gift of the principal amounts as there was no registered deed and as there was no delivery of property. Though C had the intention of making gifts, the entries in the books did not complete the gift. It was further held that there was no trust either and that there was nothing in the acts or conduct of C to show that he intended to create a trust or to constitute himself a trustee. Where moneys were actually paid by way of interest on the alleged gifts, those became completed gifts. This decision went up to the Privy Council but on the aspect of gift, no opinion was expressed by the Judicial Committee. The decision of the Privy Council is reported in *Chambers v.*

Chambers (ILR 1944 Mad 617).

15. The Punjab and Haryana High Court in *Balimal Nawal Kishore v. CIT*, ((1966) 62 ITR 669 (Punj)) held that the credit balance of the donor was Rs. 81,000 and cash balance with firm was only Rs. 4,299 but the unutilised overdraft of the firm was Rs. 1,27,088. The gift was held to be valid.

16. In *Sukhlal Sheo Narain v. CWT*, ((1973) 89 ITR 157 (P&H)) the Punjab and Haryana High Court had dealt with a case where the father had gifted Rs. 84,000, i.e. Rs. 28,000 to each of his sons. The father had complete control and dominion over that amount. There was no evidence that gifts were accepted on behalf of minors. It was held by the High Court that gifts were invalid.

17. Rangoon High Court in *Abba Dada and Company v. CIT*, ((1938) 6 ITR 470 (Rang)) held that the mere book entries were not sufficient in that case to constitute valid gift.

18. The Rajasthan High Court in *K. P. Brothers v. CIT*, ((1961) 42 ITR 650 (Raj)) held that there was a valid gift but in that case it was a banking company.

19. The Allahabad High Court in the case of *CIT v. Smt. Shyamo Bibi*, ((1966) 59 ITR 1 (All)) had to deal with a case where the credit balance of Rs. 2 1/2 lakhs was with the firm. Balance of the firm was only Rs. 15. Memo of gift was recorded on stamp paper. It was held that the gift was not valid.

20. In *CWT v. Gulab Rai Govind Prasad*, ((1972) 85 ITR 308 (All)) there was an alleged gift of Rs. 2 lakhs to minor son by book entries. Cash Balance was only Rs. 7626. No interest was credited to the donee's account. No acceptance was produced. Property purchased out of gift and income was used by the family. It was held that there was no valid gift. But the Allahabad High Court in the case of *Gopal Raj Swarup v. CWT*, ((1970) 77 ITR 912 (All)) had to deal with wealth tax. There the assessee was the karta of a Hindu Undivided Family. On November 20, 1956, the assessee purported to transfer Rs. 50,000 from his account to the account of his son. The transfer was effected by debiting the assessee's personal account in the books of the Hindu Undivided Family with Rs. 50,000 and crediting the same in the personal account of his son. On November 20, 1956, the assessee had a substantial credit balance exceeding the sum of Rs. 50,000 which he purported to give to his son. The adjustment entries made in the books of account was in pursuance of a letter written by the assessee to the said Hindu Undivided Family on the same date. The Wealth Tax Officer and the Income Tax Officer rejected the contention that he made a gift of Rs. 50,000 to his son and this amount should be excluded from his taxable net wealth. The Tribunal never doubted that the transaction in question was bona fide but dismissed the appeal of the assessee on the sole ground that the transfer evidenced by the entries in the books of account and by the declaration, did not operate to bring into existence a valid gift. It was held on the facts of that case that the assessee had made a valid gift of the value of Rs. 50,000. In the impugned judgment, the Allahabad High Court had followed the said decision. The said decision was also followed in *Bhau Ram Jawaharmal v. CIT*, ((1971) 82 ITR 772 (All)), in *Gopal Jalan v. CIT*, ((1972) 86 ITR 317 (All)) and in *Phool Chand Gajanand v. CIT* ((1973) 89 ITR 148 (All)).

22. We are of the opinion that each case must be decided on the facts of that case. Where the assessee has a credit account with firm or with family or with a banking company and that sum is available to that firm or the company or Hindu Undivided Family on the date of the gift, then a valid gift by book entries might be possible by where a sum was not available with the firm or the family or a company which was not a banking company or which had no overdraft facility, by mere book entries even though there was acceptance of that gift by the donee it would not effectuate a

valid gift.

22. The Court in *Controller of Estate Duty v. Kamlavati*, ((1979) 120 ITR 456 : (1979) 4 SCC 265 : 1979 SCC (Tax) 346) had to deal with gift by way of transfer in the account books. There this Court held that when the property was gifted by a donor the possession and enjoyment of which was allowed to a partnership firm in which the donor was a partner, then the mere fact of the donor sharing the enjoyment or the benefit in the property was not sufficient for the application of Section 10 of the Estate Duty Act, 1953, until and unless such enjoyment or benefit was clearly referable to the gift, i.e. to the parting with such enjoyment or benefit by the donee or permitting the donor to share them out of the bundle of rights gifted in the property. If the possession, enjoyment or benefit of the donor in the property was consistent with the facts and circumstances of the case other than those of the factum of gift, it could not be said that the donee had not retained the possession and enjoyment of the property to the entire exclusion of the donor, or, to the entire exclusion of the donor in any benefit to him by contract or otherwise. There, M, the deceased, was a partner in a firm having a half-share in the partnership. On March 27, 1957, M made a gift of Rs. 1 lakh to his son L, and of Rs. 50,000 to his wife, K, by making debit entries in his account in the firm and corresponding credits to the accounts of L and K. With effect from March 28, 1957, L was taken as a partner in the firm by giving one-fourth share out of the half-share of M. M died on January 9, 1962. The Tribunal held that Section 10 of the Estate Duty Act was not attracted and the sum of Rs. 1,50,000 could be included in the property passing on the death of M; and the High Court, on a reference, affirmed the views of the Tribunal. This Court held, affirming the decision of the High Court that Section 10 did not apply to the gifts of Rs. 1 lakh and Rs. 50,000 made by the deceased to his son and to his wife respectively. But, in that case, the question in the present form in which it arises before us in the instant case did not arise.

23. This Court in the case of *Badri Prasad Jagan Prasad v. CIT*, ((1985) 156 ITR 430 : (1985) 4 SCC 664 : 1986 SCC (Tax) 130) (judgment by one of us) had occasion to refer to the effect of book entries but this question which is present before us in the present appeal was not before this Court in that case. No useful purpose, therefore, will be served by reference to that case.

24. In that view of the matter, except to the extent indicated above, the entries in the books of account could not effectuate gifts. As we have discussed the facts on the principles, we are of the opinion that the High Court was in error in answering the questions in the manner it did. The order and judgment of the High Court are therefore set aside. All the questions are answered in the negative in favour of the revenue. As the respondent is not appearing, there will be no order as to costs.

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