ALLAHABAD HIGH COURT

Shyam Sunder Chowdhary

Vs.

Gift Tax Officer

Civil Misc. Writ No. 1291 of 1959 connected with Writ No. 566 of 1961
(Jagdish Sahai and W. Broome, JJ.)

13.12.1965

JUDGMENT

Jagdish Sahai, J.

1. In these two writ petitions, the vires of the Gift Tax Act (No. 18 of 1958) (hereinafter referred to as the Act) has been challenged. In writ petition No. 566 of 1961, however, the order of the Gift Tax Officer also has been assailed on the ground that no finding has been recorded to the effect that the impugned transaction was mala fide and could not for that reason be a gift.

2. As the main question raised in the two writ petitions is a common one, we proceed to dispose them of by means of this common judgment.

3. We would first deal with the submission made by the learned counsel for the petitioner in the two petitions that the Act is ultra vires of the Parliament. Mr. Gopi Nath Kunzru, who has appeared for the petitioner in writ petition No. 1291 of 1959, has contended that neither the Central Legislature nor the State Legislature could pass the impugned law. Mr. S. P. Gupta who has appeared in writ petition No. 566 of 1961 has however submitted that the impugned legislation is bad so far as it includes in its ambit the imposition of tax even on gifts of land and buildings. Relying upon Entry 49 of List II of the Seventh Schedule of the Constitution he has contended that all legislation relating to tax on land and buildings, including a tax on the gift of land and buildings fell in the sphere of the State Legislature and the Central Parliament was incompetent to have made the impugned Act applicable to gifts of lands and buildings also.

4. On behalf of the State the submission is that the Parliament has legislative competence to enact the impugned statute by virtue of Article 248 read with Entry No. 97 of the Seventh Schedule of the Constitution. Article 248 of the Constitution reads :

> "248. (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in Concurrent List or State List.
> (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

Entry 97 of List I of the Seventh Schedule reads :

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

The language of the two provisions is so exhaustive as to include legislation in respect of any matter not specifically provided for in any of the Entries given in the three Lists of the Seventh Schedule. It is admitted that there is no specific entry relating to tax on gifts.

5. The argument of Mr. Kunzru, the learned counsel for the petitioner, that a gift tax cannot be imposed either under an Act of Parliament, or under an Act of a State Legislature is in the teeth of the express provision of Article 248 and the clear language of Entry 97 of List I of the Seventh Schedule of the Constitution. Mr. Kunzru has not been able to point out to us how a legislation like the impugned Act can escape the wide sweep of Article 248 and Entry 97. It is trite that an Entry must be read in its widest amplitude.

6. Mr. Kunzru cited *M. P. V. Sundararamier and Co. v. State of Andhra Pradesh,* [1] and placed reliance upon the following words in paragraph 51 of that judgment :

> "The above analysis - and it is not exhaustive of the Entries in the List - leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence." In our judgment this passage cannot be read so as to restrict the amplitude of Article

248 of the Constitution and Entry 97 of List I of the Seventh Schedule. Those provisions are so comprehensive as to include even taxation not specifically provided for in an independent entry.

7. It is not possible to accept that in a written Constitution of a Sovereign Republic like India, the power to tax gifts is withheld both from the Parliament and the State legislatures. In our judgment, all the authority on the subject is directly against the contention of Mr. Kunzru. In Attorney General for *Ontario v. Attorney General for Canada,* [2] the Privy Council while interpreting the Canadian Constitution, observed :

> " In the interpretation of a completely self-governing Constitution founded upon a written organic instrument.....if the tax is explicit, the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the powers altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act."

The submission that there can be a subject of legislation in respect of which neither the Central Parliament nor the State legislatures can enact laws was rejected by two Full Benches of this Court, of both of which one of us, (Jagdish Sahai J.), was a member : (See *Oudh Sugar Mills Ltd., Hargan v. State of U. P.* [3] and *Jugal Kishore v. Wealth Tax Officer,* [4] This Court has consistently taken the view that in view of the clear language of Article 248 read with Entry No. 97 in List I of the Seventh Schedule of the Constitution, any subject in respect of which there is no independent entry in any of the three lists can be legislated upon by the Central Parliament.

8. The provisions of Chapter 22-A of the Income Tax Act, 1961, relating to Annuity Deposits were challenged before the Supreme Court by Hari Krishna Bhargava by means of petition No. 17 of 1965 , on the grounds that (a) the Parliament had no

competence to incorporate in the Indian Income-tax Act a provision which was substantially one relating to borrowings by the Central Government from a class of tax-payers; (b) the provisions contained in Ch. 22-A are enacted in colorable exercise of legislative power and that in any event they are so harsh and unconscionable that they may be regarded as expropriatary and on that account not within the legislative competence of the Parliament and (c) the provisions of Section 280 and Sch. II are discriminatory and infringe the fundamental freedom, under Article 14, of equality before the law. The Supreme Court held that the impugned provisions could be made with the help of Article 248 read with Entry 97 of List I of the Seventh Schedule.

9. For the reasons mentioned above, we are unable to accept the submission of Mr. Kunzru that neither the Parliament nor the State Legislatures were competent to pass a law taxing gifts and, in our opinion, the impugned legislation is fully protected by Article 248 read with Entry 97.

10. We now proceed to consider the submission made by Mr. S. P. Gupta. Entry 49 in List II of the Seventh Schedule reads:

> "Taxes on Lands and Buildings."

Mr. Gupta's submission is that to gift away land or buildings or to transfer the same is an incident of ownership in the same. According to him, so far as gift-tax on land and buildings is concerned, it is a tax on lands and buildings and a law in respect of the same could only be enacted with the aid of Entry 49 in List II of the Seventh Schedule. In support of his contention he places reliance upon *D. H. Nazareth v. IInd Gift-tax Officer,* [5] where it was observed :

> "The Gift-tax Act, in so far as it purports to reach gifts of 'lands' and buildings', is ultra vires the power of Parliament and to that extent unconstitutional."

In our judgment there is a clear difference between a tax on lands and buildings and a tax on gifts of lands and buildings. What Entry 40 in List II of the Seventh Schedule contemplates is a tax on ownership or enjoyment of land and buildings and not on the transfer of the same.

11. We find some support from the view we are taking from *Ralla Ram v. Province of*

East Punjab, [6] In that case Entry 42 in List II of the Seventh Schedule of the Government of India Act, 1935 (hereinafter referred to as the 1935 Act) was considered by their Lordships. That entry is the same as Entry 49 and reads.

> "Taxes on lands and buildings, hearths and windows."

In *Rajahmundry Electric Supply Corporation Ltd., v. State of Andhra Pradesh,* [7] the question that their Lordships had to consider was whether in view of there being no express. Entry in any of the Lists in the Seventh Schedule of the 1935 Act relating to compulsory acquisition of an Electric Company, it was possible for the Provincial Legislature to enact a law for the purpose of acquiring the Electric Companies. In the concurrent list of the 1935 Act there was an Entry permitting legislation on "compulsory acquisition of land" and another permitting legislation on "electricity" thus enabling the Madras legislature to enact in respect of those subjects. There was, however, no entry permitting compulsory acquisition of a commercial undertaking or of an electrical undertaking and Madras legislature had not obtained the permission of the Governor-General under section 104 of the 1935 Act. The Supreme Court held that even though Item 9 of the Concurrent List permitted the Provincial Legislature to enact laws for compulsory acquisition and Item 31 of the same List permitted it to legislate in respect of electricity the impugned legislation neither related to electricity nor to compulsory acquisition of land, being an Act for compulsory acquisition of a commercial or industrial undertaking which had not been provided for in any of the three Lists and consequently fell in the residuary power which could be exercised only subject to the provisions of section 104 of the 1935 Act. The Madras High Court in *Narasaraopeta Electric Corporation Ltd., v. State of Madras,* [8] had observed as follows :

> "The matter enumerated in item 33 of the Federal Legislative List, List I of the VII Schedule to the Government of India Act, is "Corporations, that is to say the incorporation, regulation and winding up of trading corporation etc." The subject-matter, therefore, is "corporations" in item 33 of List I and "Electricity" in item 31 of the Concurrent List and these are the legislative subject-matters with which we are concerned . . . . In the light of the decisions already referred to it cannot be said that the subject-matter of the impugned Act is " Corporations" within item 33 of List I of the Second Schedule. On the other hand, it comes within the purview of "electricity" in the Concurrent List".

As stated earlier, this view was reversed by the Supreme Court in AIR 1954 Supreme Court 251 (supra).

12. In *Tan Bug Taim v. Collector of Bombay,* [9] it was held that requisition of land is not included in Item 9 in List II of the Seventh Schedule of the 1935 Act and for that reason a compulsory acquisition of land would not include the requisitioning of land and the legislation relating to the requisitioning of land did not form the subject-matter of any of the Entries in the Legislative Lists.

13. In *Basudeva v. Rex* [10] the provisions of U. P. Act No. XXII of 1948 were challenged on the ground that the impugned legislation could not fall under Entry No. 1 of the Second Schedule of the 1935 Act. The main provision in the U. P. Act No. XXII of 1948 reads :

> "An Act to provide, during a limited period, for powers to prevent black marketing." The provision was struck down on the finding that even though the Provincial Legislature had the power to pass laws for preventive detention with the object of preventing disturbances of law and order, it was not competent to enact a law of preventive detention in order to prevent black-marketing and that for that purpose action could only be taken under the residuary clause (section 104 of the 1935 Act).

14. It is true that an entry must be so read as to include all ancillary and incidental matters but that does not mean that matters not strictly covered by the entry should also be included in its purview. The three cases that we have mentioned above clearly illustrate the legal proposition that even though an entry in a list is to be read in its widest amplitude, including legislation in respect of ancillary matters, it cannot be so widely read as to include something which cannot be comprehended within it and if that something is not specifically provided for in an independent entry recourse must be had to the residuary clause. In the Madras case matters relating to acquisition of land as also relating to electricity could be enacted upon by the Provincial Legislature, but the acquisition of a commercial undertaking was held to be beyond its purview. Similarly, even though under Entry I of the Seventh Schedule to the 1935 Act, the U. P. Legislature could pass a law with the object of preventing disturbance of law and order, it was not competent to enact a law of preventive detention in order to prevent black-marketing.

15. In our judgment, a tax on lands and buildings is distinctly different from a tax on gift of lands and buildings, with the result that legislation in respect of the latter cannot fall Under Entry 49 in List II of the Seventh Schedule of the Constitution, and that the impugned Act was validly passed by the Parliament by virtue of Article 248 of the Constitution read with Entry 97 in List I of the Seventh Schedule. The view that we are taking finds support from *Mst. Gaindi v. Union of India.* [11] and *Sesharatnam v. Gift-tax Officer. Palacole* [12] *M. T. Joseph v. Gift-tax Officer.* [13] and *Dandapani v. Additional Gift-tax Officer, Cuddalore.* [14]

16. It was also contended by Sri S. P. Gupta that there is a difference between a "levy" and a "tax" and that the impugned Act provides for a levy and not a tax Article 366 (28) of the Constitution defines tax and reads :

> " 'taxation' includes the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly".

In the first place, we are satisfied that a "levy" is also a kind of a "tax" and the Constitution does not make any distinction between the two. Secondly, the definition of tax is so comprehensive so as to include any levy.

17. Mr. Gupta placed reliance upon Charles I. *Dawson v. Kentucky Distilleries and Ware-house Co.,*[15] That case is clearly distinguishable. Next reliance was placed upon *Megh Raj v. Allah Rakhia.*[16] In that case the validity of the Punjab Restitution of Mortgaged Lands Act was challenged Reliance was placed on Entry 21 in List II of the Seventh Schedule of the 1935 Act. That Entry reads.

> "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, alienation and devolution of agricultural land; land improvement and agricultural loans, colonization; Courts of Wards; encumbered and attached estates; treasure-trove."

Their Lordships observed as follows :

> "Item 21 is part of a constitution and would on ordinary principles receive the widest construction, unless for some reason it is cut down either by the terms of

> item 21 itself or by other parts of the Constitution which has to be read as a whole. As to item 21, 'land', the governing word is followed by the rest of the item, which goes on to say 'that is to say'. These words introduce the most general concept 'rights in or over land' 'Rights in land' must include general rights like full ownership or lease-hold or all such rights. 'Rights over land' would include easements or other collateral rights, whatever form they might take
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> .....Their Lordships cannot accept the view that so important a subject as mortgages was left out of the Constitution and merely left to the Governor General's powers under Section 104, Constitution Act as a residual subject. So far as land at least is concerned, item 21 would include mortgages as an incidental and ancillary subject."

Entry 21 was clearly comprehensive enough to include mortgages of land as an incidental and ancillary subject, because creating a mortgage was nothing but the transfer of proprietary right in land. The case is, therefore, clearly distinguishable.

18. For the reasons mentioned above we reject the submission of Shri Gupta also with regard to the vires of the Act.

19. We now proceed to deal with the second submission of Sri Gupta. Section 4 (c) of the Act reads :

> "4 (c) Where there is a release, discharge, surrender, forfeiture or abandonment of any debt, contract or other actionable claim or of any interest in property by any person, the value of the release, discharge, surrender, forfeiture or abandonment, to the extent to which it has not been found to the satisfaction of the Gift-tax Officer to have been bona fide, shall be deemed to be a gift made by the person responsible for the release, discharge, surrender, forfeiture or abandonment."

The transaction in question could be treated to be a gift only if the Gift-tax Officer had been satisfied bona fide that in fact it was such. The learned counsel submits that the petitioner was only a life owner of the properties mentioned in the deed dated 20-1-1958 and that by means of that deed she had relinquished her life interest in the property. It was certainly open to the Gift-tax Officer to go closely into the matter and

not to accept what was contained in the so called deed of relinquishment on its face value and to find out whether in reality it did not amount to a gift. After going into the matter deeply, it was open to him to treat it as a gift, but the condition precedent in doing so was that he must be bona fide satisfied that it was a deed of gift and not a deed of relinquishment. Clearly there is no such finding in the present case. The appellate authority also did not look into this aspect of the matter. We are, therefore, of the opinion that the case should be remanded to the appellate authority for rehearing the matter and deciding it in accordance with the provisions of section 4 (c) of the Act, keeping in view the observations made by us above.

20. The result, therefore, is that we dismiss writ Petn. No. 1291 of 1959 with costs, but allow writ petn. No. 566 of 1961, quash the orders passed by the appellate authority and in exercise of our powers under Article 227 of the Constitution of India direct the appellate authority to restore the appeal of Smt. Bhagwan Devi to its original number and rehear it in accordance with law, after giving proper notice to the parties. In the circumstances of the case costs in writ petition No. 566 of 1961 shall be on the parties.

Order accordingly.

Cases Referred.

1. AIR 1958 SC 468
2. 1912 AC 571 (583-584)
3. AIR 1960 All 136 (FB)
4. AIR 1961 All 487 (FB)
5. AIR 1962 Mys 269
6. AIR 1949 FC 81
7. AIR 1954 SC 251
8. AIR 1951 Mad 979
9. AIR 1946 Bom 216
10. AIR 1949 All 513
11. AIR 1965 Pun 65
12. AIR 1960 And Pra 115
13. AIR 1962 Ker 97
14. AIR 1963 Mad 419

15. (1921) 65 Law Ed 638
16. AIR 1947 PC 72