

# CALCUTTA HIGH COURT

Controller of Estate Duty

Vs.

Kapadia

Matter No. 71 of 1964

(S.C. Deb and D.K. Sen, JJ.)

09.10.11. or 16/17.02.1976. 04.04.1976

## JUDGMENT

**S.C. Deb, J.**

1. The following question is involved in this reference under section 64(1) of the Estate Duty Act, 1953:

"Whether, on the facts and in the circumstances of the case, a sum of Rs. 75,000 would be deemed to pass within the meaning of section 10 of the Estate Duty Act, 1953?"

2. The facts stated in the statement of the case are as follows : The deceased was a partner of Messrs. B. A. Brothers, Calcutta. On November 7, 1953, he made a gift of Rs. 1 lakh to his daughter by making entries in the books of the said firm; the donee received the gifted amount on November 7, 1953, and on the same day became a partner of the said firm by contributing Rs. 75,000 as her capital out of the gifted amount; the donor had 0-4-0 share and the donee had 0-3-0 share in the said firm with effect from that date; and the donor died on October 18, 1960, while he was a partner of the said firm.

3. Rs. 75,000 was included in the valuation of the estate of the deceased under section 10 of the Estate Duty Act, 1953, hereinafter referred to as "the Act" by the Assistant Controller of Estate Duty whose order was sustained by the Appellate Controller of Estate Duty by following the decision of the Privy Council in the case of *Clifford John Chick v. Commissioner of Stamp Duties*<sup>1</sup>,

4. A further appeal was filed by the accountable person before the Appellate Tribunal. It was contended before the Tribunal on his behalf that Rs. 75,000 did not pass on the death of the donor under section 10 of the Act, for according to him, the donor had no right to pass or enjoy this amount and that Chicks case [1959] 37 ITR 89 had no application to the facts and

circumstances of the case. It was also contended on his behalf that the said capital contributed by the donee could not in any way be the property of the firm and, therefore, the deceased could neither derive any benefit out of it nor could he exercise any control over it as a partner of the firm. The Tribunal, after discussing the law of

<sup>1</sup>[1959] 37 ITR 89: 3 EDC 915

partnership, quoting Lindley on Partnership, 11th edition at page 406, citing section 10 of the Act and distinguishing Chicks case [1959] 37 ITR 89, accepted those contentions and allowed the appeal in the following terms :

"It is clear on a plain reading of the section itself that only such portion of a gifted property is deemed to pass on the donor's death on which he had retained possession and benefit to himself even after making the gift. In the instant case, there could be no possession of the donor over the donee's capital even if he was a partner along with the donee in the firm in which the capital was invested by the latter, because capital, as we have stated above, was not at all the property of the partnership. Nor could the donor derive any benefit out of the capital, because whatever interest or benefit accrued upon this capital went wholly and exclusively to the donee. Thus, the donor having neither got possession over the sum of Rs. 75,000 nor having retained for himself any benefit therein, no part of the property, namely, the capital invested in the partnership firm, Messrs. B. A. Brothers, Calcutta, could be deemed to pass on the death of the donor. The inclusion of the said amount of Rs. 75,000 in the dutiable assets of the deceased is, therefore, erroneous and must be deleted."

Section 10 of the Act reads as follows :

"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."

5. The submissions of the learned counsel, Mr. Ajit Sengupta, appearing for the revenue, before us, are as follows : Though it was valid and an out-right gift, the enjoyment of Rs. 75,000 was not immediately assumed by the donee because it was immediately contributed by the donee as the capital of the firm in which she became a partner with the donor. In any event, the donee did not thenceforward retain this amount to the entire exclusion of the donor or of any benefit to him by contract or otherwise within the meaning of this section inasmuch as the capital contributed by the donee because the property of the firm and this amount, therefore, belonged to all the partners of the firm and, accordingly, the donor was in possession of this amount and had also enjoyed its benefit at the time of his death; and, accordingly, this amount should be deemed to have passed on the death of the donor in terms of section 10 of the Act.

6. According to Mr. N. C. Mukherjee, the learned counsel for the respondent, the statements quoted above from the order of the Tribunal are the facts found by the Tribunal and, therefore, this reference is incompetent, for the revenue has not questioned those findings on the grounds of perversity. He cited the following observation from Chicks case [1959] 37 ITR 89 of the report :

"Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined. If he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee."

7. Though the question as to whether the donor was excluded by the donee from the subject-matter of the gift is primarily a question of fact, the Tribunal is to ascertain the primary facts and then to apply the legal principles involved in the expression "thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise", used in the second part of section 10 of the Act. Therefore, that would make the question and its decision one of mixed law and fact. Further, where the donee becomes a partner with the donor by ploughing back the gifted amount as his capital in the firm the question as to whether the donee thenceforward retained the gifted amount to the entire exclusion of the donor or of any benefit to him by contract or otherwise must be determined on the law of partnership and, therefore, that would also make it mixed question of law and fact. And these are exactly the question with which we are concerned in this reference. Hence, the preliminary objection of Mr. Mukherjee must fail.

8. There is also no merit in the contention of Mr. Mukherjee that those statements of the Tribunal are its pure findings of fact, for the Tribunal has earlier said : "Now, in this case what has been deemed to pass is the capital invested by the donee in the partnership, which, according to law, could not be the partnership property", and "the matter for our consideration is whether in terms of section 10 of the Estate Duty Act, 1953, the donor retained possession over any part of the gifted money or reserved any benefit to himself by contract or otherwise so as to make the sum of Rs. 75,000 leviable with the estate duty. Admittedly, the investment of the said sum of Rs. 75,000 in the firm is out of the gifted amount of Rs. 1,00,000. In that firm the donor was a partner and continued as such until his death. Does this, therefore, mean that the donor acquired a right over the capital invested by the donee ?"

9. It is abundantly clear that the concluding portion of the order of the Tribunal, on which reliance was placed by Mr. Mukherjee, was the conclusion arrived at by the Tribunal on the basis of the law of partnership and section 10 of the Act as understood by the Tribunal and, therefore, the contention of Mr. Mukherjee must be rejected.

10. It was then contended by Mr. Mukherjee that the capital contributed by the donee as her capital in the firm did not become the property of the firm but remained as the exclusive property of the donee. He cited the following observation relied on by the Tribunal from Lindleys book :

"By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business, and intended to be risked by them in that business. The capital of a partnership is not, therefore, the same as its property."

11. But we reject his contention by following the law laid down by the Supreme Court on the Partnership Act, 1932, in the case of *Addanki Narayanappa v. Bhaskara Krishnappa*<sup>2</sup>, in the following terms :

"From a perusal of these provisions of the Partnership Act it would be abundantly clear whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of

<sup>1</sup>(1966) 3 SCR 400 : AIR 1966 SC 1300

the business of the partnership it becomes the property of the firm... No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone....

The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership."

12. It is to be noted here that Mr. Mukherjee has accepted the contention of Mr. Sengupta that this gift is an outright and a valid gift. Now, it is the submission of Mr. Mukherjee that the donee had immediately assumed bona fide possession and enjoyment of the gifted amount and, therefore, this gift is not hit by the first part of section 10 of the Act. It is also his contention that this gift is not hit by the second part of the section and, therefore, we should answer the question in favor of the respondent by following the decision of the Mysore High Court in the case of *Controller of Estate Duty v. S. Aswathanarayana Setty*<sup>2</sup>, and the decisions of the Supreme Court in the cases of *Controller of Estate Duty v. C. R. Ramachandra Gounder*<sup>3</sup>, and *Commissioner of Income Tax v. N. R. Ramarathnam*<sup>4</sup>,

13. Mr. Mukherjee has, however, rightly conceded before us that the principles laid down by the Privy Council in the case of *H. R. Munro v. Commissioner of Stamp Duties*<sup>5</sup>, do not apply to the

present case before us, inasmuch as in Munros case [1934] AC 61 the subject-matter of the gift was the property shorn of certain rights belonging to a pre-existing partnership in which the donor and the donee were partners and the gift was solely referable to the said partnership.

14. Whereas in our case the subject-matter of the gift was not the property shorn of any right belonging to any pre-existing partnership agreement between the donor and the donee and also the gifted amount is not at all referable to any such partnership agreement inasmuch as there was no such partnership between them when the gift was made as in Chicks case , which was followed by this court in the case of *Rash Mohan Chatterjee v. Controller of Estate Duty*<sup>6</sup>, and by the Supreme Court in the case of *Controller of Estate Duty v. Smt. Parvati Ammal*<sup>7</sup>, cited by Mr. Sengupta.

15. Section 10 of the Act came up for consideration before the Supreme Court in the case of *George Da Costa v. Controller of Estate Duty*<sup>8</sup>, of the report their Lordships observed :

"The crux of the section lies in two parts :

<sup>2</sup>(1969) 72 ITR 29 (KAR)

<sup>4</sup>(1973) 91 ITR 1(SC)

<sup>6</sup>(1964) 52 ITR 1 (Bom)

<sup>3</sup>(1973) 88 ITR 448 (SC) : 72 ITR 29

<sup>5</sup>(1934) AC 61 : 2 EDC 462

<sup>7</sup>(1974) 97 ITR 621 (SC)

<sup>8</sup>(1967) 63 ITR 497 (SC)

(1) the done 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 done must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him, by contract or otherwise. As a matter of construction we are of opinion that both these condition are cumulative. Unless each of these conditions is satisfied, the property would be liable to estate duty under section 10 of the Act."

16. It has been found by the Tribunal that the done had contributed Rs. 75,000 as her capital in the firm out of the gifted amount after it was received by her. Hence, there is no merit in the contention of Mr. Sengupta that the done did not immediately assume bona fide possession and enjoyment of the gifted amount. Accordingly, it must be held that this gift does not come within the mischief of the first part of section 10 of the Act as right contended by Mr. Mukherjee. Now, on the second part of this section it has been stated in *George Da Costas case*, [1967]63ITR497(SC) of the report, as follows :

"The second part of the section has two limbs : the deceased must be entirely excluded, (i) from the property, and (ii) from any benefit by contract or otherwise..... In the context of the section, the word otherwise should, in our opinion, be construed ejusdem generis and it must be interpreted to mean some kind of legal obligation or some transaction enforceable at law or in equity which, though not in the form of a contract, may confer a benefit on the donor..... As a matter of construction we hold that the words by contract or

otherwise in the second limb of the section will not control the words to the entire exclusion of the donor in the first limb."

17. In this state of the law the question now is whether the instant case before us is cover by the decisions relied on by Mr. Mukherjee or by the cases cited by Mr. Sengupta.

18. In S. Aswathanarayana Settys case, [1969]72ITR29(KAR) the subject-matter of the gift were the shares in an existing firm and the profits accruing from those shares were paid to the donees, who were also in the management of the firm as pointed out by Mr. Justice Hegde at page 32 of the report. And because of the nature of those gifts, it was held that after the shares were gifted the donees thenceforward retained those shares to the entire exclusion of the donor or of any benefit to him. Further, the donors shares in the partnership and not his money in the firm were the subject-matter of the said gifts and, therefore, the donor could neither derive any benefit out of the shares gifted nor could he exercise any control over them inasmuch as those shares were not the properties of the firm but the properties of the donees who were exclusively entitled to receive the profits of the firm in accordance with their own shares out of which no benefit could at all accrue to the donor nor could he possess any right over them. Hence, the Mysore case does not apply to the present case, because the subject-matter of this gift was not the share of the deceased in the firm but the money which belonged to him absolutely.

19. The facts in Ramachandra Gounders case, [1973]88ITR448(SC) were briefly as follows : The deceased granted a tenancy-at-will of his house property to a firm in which he was a partner; thereafter, he transferred the said property to his two sons; he also directed the firm to transfer Rs. 1,00,000 from his account to his five sons by making credit entries in their names in the firms book and it was done by the firm; and the donor died after the firm was dissolved.

20. With regard to the house property, it was held by the Supreme Court at page 452 of the report, that the benefit that the donor had as a partner of the firm was not a benefit referable to the said gift and was wholly unconnected with it. Thereafter, at page 454, by following Settys case, [1969]72ITR29(KAR), it was held by the Supreme Court that "neither the property gifted to the donees, nor the amount of Rs. 1,00,000 gifted to the five sons, could be included in the estate of the deceased."

21. The donees did not become the partners of the firm in Ramachandra Gounder case, [1973]88ITR448(SC) . The gifted house property was subject to a tenancy-at-will granted to the firm and the benefit that the donor had derived out of it was wholly unconnected with the said gift which was also not at all referable to it. With regard to Rs. 1,00,000, the sons were the creditors of the firm and the donor, as a partner of the firm, was also indebted in that sum to his sons at the time of his death. Hence, this case does not apply to the instant case before us.

22. The facts in Ramarathnams case, were as follows : The donor and the donees were the partners in a firm; the donor transferred certain amounts to the donee by making adjustment

entries in the books of the firm against his credit balance in the firm; the gifted amounts remained in the firm and were utilised in the business; and the donor died while he was a partner of the firm. Now, at page 4 of the report, their Lordships observed as follows :

"The attention of the Tribunal was also drawn to the decision in the case of *Rash Mohan Chatterjee v. Controller of Estate Duty*<sup>9</sup>, in which the distinguishing feature between Chicks case [1959] 37 ITR 89 and Munros case [1934] AC 61 was pointed out, viz., that whereas in Munros case [1934] AC 61 the subject-matter of the gift was property shorn of the rights of the pre-existing partnership of Munro and his sons, in Chicks case [1959] 37 ITR 89 there was an initial outright gift of the property without its having shorn of any rights. The Tribunal was of the view that the facts of the case under appeal were similar to the facts of Munros case [1934] AC 61 and dissimilar to the facts of Chicks case [1959] 37 ITR 89 and that, therefore, the decision in Munros case [1934] AC 61 governed the instant case."

23. Accordingly, the appeal was dismissed by the Supreme Court by following its earlier decision in Ramchandra Gounders case, [1973]88ITR448(SC) . In Ramarathnams case, [1973]91ITR1(SC) there was a pre-existing partnership between the donor and the donees and the gift was referable to the said partnership, whereas in our case there was no such pre-existing partnership between the donor and the donee, as already stated. Further, Ramarathnams case, [1973]91ITR1(SC) was directly covered by the ratio in Munros case [1934] AC 61 and, therefore, reliance on this decision was also misplaced by Mr. Mukherjee.

<sup>9</sup>(1964) 52 ITR 1 (Bom)

24. The facts in Chicks case [1959] 37 ITR 89 were briefly as follows : A father made a gift of his pastoral property to one of his sons; thereafter, they and another son of the donor entered into a partnership agreement to carry on the business of graziers and stock dealers; and the partnership agreement provided that the father was to manage the business which was to be carried on in their respective holding including the property gifted but the lands were to remain their own properties and they were entitled to deal freely with their own lands.

25. In Chicks case [1959] 37 ITR 89 the Privy Council was concerned with the second part of section 102 of the New South Wales Stamp Duties Act, 1920-36. Which is substantially in the same terms with our section 10 of the Act. At page 97 of the report, it was held by their Lordships that "the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted". Viscount Simonds, speaking for the Board, also says this at pages 97, 98 of report :

"In the first place, it is not disputed that the property was given outright by the deceased to his son. As was said by Dixon C.J. in *Commissioner of Stamp Duties v. Owens*<sup>10</sup>, if ever there was a gift of an estate in fee simple, carrying the fullest right known to the law of exclusive possession and enjoyment, surely this was such a gift. It follows that the

decision of this *Board in Munro v. Commissioner of Stamp Duties*<sup>11</sup> on which the appellants relied, has no application to the present case. It must often be a matter of fine distinction what is the subject-matter of a gift. If as in Munros case [1934] AC 61, the gift is of a property shorn of certain of the rights which appertain to complete ownership, the donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the section not to be excluded from possession and enjoyment of that which he has given. This view of the section, which was reaffirmed in *St. Aubyn v. Attorney-General*<sup>12</sup>, upon a consideration of a similar section in a British statute, need not be further elaborated...Then it was contended that the sub-section had no operation because the partnership agreement was an independent commercial transaction for full consideration later than and in no way related to the gift, and was a mode of enjoyment by the donee of his property and an exercise by him of the possession of it. (These are the words of the appellants second formal reason). In this reason there are several elements. The partnership agreement was later than the gift. This point was not pressed by counsel for the appellants. If possession and enjoyment are thenceforth to be retained by the donee, it is clearly irrelevant that there is an interval between the dates when the donor is excluded and ceases to be excluded."

26. There was an outright gift of the property in Chicks case [1959] 37 ITR 89 and not the property shorn of certain rights belonging to the partnership in which the donor was a partner and, therefore, it was not covered by Munros case [1934] AC 61, where the gift was referable to a pre-existing partnership agreement, and that in Chicks case [1959] 37 ITR 89 there was no such pre-existing partnership agreement between the donor and the donees and the gifted property became an asset of the firm after the partnership was formed. Therefore, Munros case [1934] AC 61 was not affected by the vice of the section,

<sup>10</sup>(1953) 88 CLR 67      <sup>12</sup>(1952) AC 15 : 3 EDC 292

<sup>11</sup>(1934) AC 61

whereas Chicks case [1959] 37 ITR 89 came directly within the mischief of the second part of the section inasmuch as the donor was not "thenceforth" entirely excluded from possession and enjoyment of the property gifted. This distinction between Munros case [1934] AC 61 and Chicks case [1959] 37 ITR 89 has also been pointed out by the Supreme Court in Parvatis case, [1974]97ITR621(SC) .

27. In Parvatis case, [1974]97ITR621(SC), the facts were as follows : The deceased made an outright gift to his five sons in equal shares of his house property in which he was carrying on a business of boarding and lodging; then he took the said property on lease from the sons and carried on the business as before, therefore, he granted a sub-lease of the boarding house to a third party and after that he died. And it was held that the entire value of the property was liable to be included in the principal value of the estate of the deceased as the property deemed to have been passed on his death under section 10 of the Act. The principles emerging from Chicks case [1959] 37 ITR 89 were also stated by their Lordships of the Supreme Court at pages 631-632 of

the report in the following terms :

- "(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 be 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..... 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."

28. Mr. Sengupta also cited the cases of *Controller of Estate Duty v. Jai Gopal Mehra*, a decision of the Full Bench of the Punjab and Haryana High Court reported in, *Controller of Estate Duty v. Thanwar Dass*<sup>13</sup>, a decision of the Full Bench of the Allahabad High Court reported in<sup>14</sup>, *Controller of Estate Duty v. N. K. Sanghi*, decision of the Rajasthan High Court reported in, *Sakarlal Chunilal v. Controller of Estate Duty*, a decision of the Gujarat High Court reported in, [1975]98ITR610(Guj), a decision of the Madras High Court reported in, *Controller of Estate Duty v. S. M. M. Subramanian Chettiar*<sup>15</sup>, a decision of the Madras High Court reported in, [1975]99ITR400(Mad) and *Controller of Estate Duty v. Ibrahim Gulam Hussain Currimbhoy*, a decision of the Madras High Court

<sup>13</sup>85 LTR 175

<sup>15</sup>(1975) 98 ITR 660 (Mad)

<sup>14</sup>(1974) 94 ITR 101 (All)

reported in, [1975]100ITR320(Mad) .

29. Mr. Sengupta relied on some of these decisions in support of his contentions on the second part of section 10 of the Act and the other cases for distinguishing them from the present case before us. But the above cases do not call for any discussion, for Chicks case [1959], 37 ITR 89 was followed in some of these cases and Munros case [1934] AC 61 was followed in the other cases and, moreover, the law on the second part of section 10 of this Act is well-settled by the decision of this court in Rash Mohans case, [1964]52ITR1(Bom) of the report, in the following terms :

"(a) In order to avoid the mischief of section 10 of the Estate Duty Act, 1953, it must be established that the donee not only assumed bona fide possession and enjoyment of the property taken under the gift but also thenceforward retained the said property to the entire exclusion of the donor or any benefit to him by contract or otherwise.

(b) The single factor to be considered is whether the donor has been entirely excluded from the subject-matter of the gift.

(c) If the donor has not been entirely excluded then it is not at all relevant to consider whether the non-exclusion of the donor has been advantageous to the donee or not. In other words, it is immaterial that the donee was receiving full consideration for what the donor was enjoying or possessing.

(d) Possession and enjoyment by the donor have to be judged in the light of the factual position alone.

(e) The benefit to him by contract or otherwise must, however, be based on enforceable rights."

30. In Parvatis case, [1974]97ITR621(SC) the Supreme Court has approved the above principles laid down by this court and those two cases were decided by following Chicks case [1959] 37 ITR 89 . The case before us is stronger than Chicks case [1959] 37 ITR 89, Parvatis case, [1974]97ITR621(SC) and Rash Mohans case, [1964]52ITR1(Cal), for in Chicks case [1959] 37 ITR 89 the donees were entitled to deal with the gifted property freely, and in Parvatis case, [1974]97ITR621(SC) and Rash Mohans case, [1964]52ITR1(Bom) the donors took the gifted properties on lease from the donees, whereas in our case Rs. 75,000 not only become the property of the firm but also the donor, as one of the partners of the firm remained in joint possession of the said amount along with the donee and had also derived benefit out of it till his death, because that amount was the trading asset and the property of the firm in view of the law laid down by the Supreme Court in Addanki Narayanappas case, [1966]3SCR400 .

31. Now to summaries : There was no partnership agreement between the donor and the donee at the time the gift of Rs. 1,00,000 was made; prior to this gift, this amount was the exclusive property of the donor, on which there is no dispute before us; it is an outright and a valid gift; after receiving this amount, Rs. 75,000 was contributed by the donee out of it as her capital in the firm and, therefore, Rs. 75,000 ceased to be her exclusive property and she could not and did not exercise any exclusive right over it inasmuch as this amount became the property of the firm and also formed part of its trading asset and, therefore, the donor, as a partner of the firm, was in possession of and retained its control and had also derived benefit out of it.

32. In the premises, it must be held that the donee did not thenceforward retain possession and enjoyment of Rs. 75,000 to the entire exclusion of the donor or of any benefit to him by contract or otherwise. Hence, it must be held that Rs. 75,000 was liable to be included in the principal value of the estate of the deceased as property deemed to have been passed under section 10 of

the Act and accordingly we return our answer in the affirmative and in favor of the revenue.

33. The parties shall pay and bear their own costs of this reference.

Dipak Kumar Sen J. –

34. I agree with the conclusions in the judgment just now delivered by my learned brother. I wish to emphasise the following reasons on which I base my conclusions.

35. Section 10 of the Estate Duty Act, 1953, with which we are concerned in the instant case has come up for consideration in the courts in India on numerous occasions. The material part of the section reads as follows :

"The property taken under any gift, whenever made, shall be deemed to pass on the donors 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....."

36. In the case of *George Da Costa v. Controller of Estate Duty*<sup>16</sup>, the Supreme Court analysed and interpreted this section. The observation of the Supreme Court at pages 501 and 502 of the report may be noted :

"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. As a matter of construction we are of opinion that both these conditions are cumulative. Unless each of these conditions is satisfied, the property would be liable to estate duty under section 10 of the Act.....

The second part of the section has two limbs : the donee must be entirely excluded,

(i) from the property, and

(ii) from any benefit by contract or otherwise.....

In the context of the section the word otherwise should, in our opinion, be construed ejusdem generis and it must be interpreted to mean some kind of legal obligation or some transaction enforceable at law or in equity which, though not in the form of a contract, may confer a benefit on the donor.....

As a matter of construction we hold that the words by contract or otherwise in the second limb of the section will not control the words to the entire exclusion of the

<sup>16</sup>(1967) 63 ITR 497 (SC)

donor in the first limb. In other words, in order to attract the section it is not necessary that the possession of the donor of the gift must be referable to some contractual or other

arrangement enforceable in law or in equity."

37. The subsequent decision of the Supreme Court in the case of *Controller of Estate Duty v. C. R. Ramachandra Gounder*<sup>17</sup>, reiterates the above analysis of the section.

There was a further observation in this case as follows (page 503) :

"The first limb may be infringed if the donor occupies or enjoys the property or its income, even though he has no right to do so which he could legally enforce against the donee."

38. The same construction has again been reiterated in the latest Supreme Court decision in the case of *Controller of Estate duty v. Smt. Parvati Ammal*<sup>18</sup>,

39. In applying the said section 10 in cases where possession or enjoyment or benefit arising from property gifted have been either initially retained by the donor or where such properties has found its way back from the donee to the donor directly or through a partnership, courts in India have drawn inspiration from two imported decision of the Privy Council, respectively, in the cases of *H. R. Munro v. Commissioner of Stamp Duties*<sup>19</sup> and *Clifford John Chick v. Commissioner of Stamp Duties*<sup>20</sup>,

40. In the earlier case, i.e., Munros case [1934] AC 61; 2 EDC 462, the donor entered into a partnership at will with his children in respect of a business carried on by him as a grazier in vast areas of land owned by him in New South Wales. Subsequently, the land was transferred in specific portions by the donor to his said children subject to the partnership agreement and on the understanding that any partner could withdraw and work his land separately. Later, there was a formal partnership agreement between the parties which, inter alia, provided that during the lifetime of the donor, none of his children would withdraw from the partnership. On the death of the donor the question arose whether the grazing land transferred by the donor to his children should be deemed to pass on his death.

41. The statute involved in this case was the Stamp Duties Act, 1920-1931 (New South Wales), the relevant section whereof was in pari materia with section 10 of the Estate Duty Act, 1953.

42. The Judicial Committee based their decision on the finding of fact that the partnership at will continued uninterrupted till the formal agreement of partnership was executed and held that the partnership was entitled to the use of the land during its subsistence and transfer of the land by the donor to the donee was subject to this right. In his judgment Lord Tomlin observed as follows (2 EDC 462, 467, 468 (PC)) :

"It is unnecessary to determine the precise nature of the right of the partnership at the time of the transfers. It was either a tenancy during the tenure of the

<sup>17</sup>(1973) 88 ITR 448 (SC)

<sup>19</sup>(1934) AC 61

<sup>18</sup>[1974] 97 ITR 621 (SC)

<sup>20</sup>(1959) 37 ITR 89

partnership or a license coupled with an interest. In either view, what was comprised in the gift was,..... the property shorn of the right which belonged to be partnership, and upon this footing it is in their Lordships opinion plain that the donee in each case assumed bona fide possession and enjoyment of the gift immediately upon the gift and thenceforward retained it to the exclusion of the donor. Further, the benefit which the donor had as a member of the partnership in the right to which the gift was subject was not..... a benefit referable in any way to the gift. It was referable to the agreement of 1909 and nothing else, and was not, therefore, such a benefit as is contemplated by the section in question."

43. In the later case, i.e., Chicks case [1959] 37 ITR 89, the property in question was also pastoral land which was transferred by the donor to one of his sons, without any reservation or qualification. Subsequently, the donor entered into a partnership with the donee and another son of the donor. The business of this partnership was that of graziers and stock dealers. By agreement the donor became the manager and his decision was to be final and conclusive. Further, the agreement was that the business would be carried on in the holdings of the partners and lands held by the partners at the date of the agreement or acquired afterwards should be and remain the sole property of such partner and should not be taken into account or deemed to be an asset of the partnership. Any partner would have the right to deal with such land as he might think fit.

44. In terms of the above agreement the property which had been donated by the donor to his son was used by the partnership. On the death of the donor the question arose whether this land could be deemed to pass.

45. It was not disputed that in the facts there was an outright gift. But the Privy Council decided the case on the sole consideration, viz., was the donor excluded from the property? The other contention mooted before the Privy Council, namely, that the partnership agreement was an independent commercial transaction for other consideration, or that the partnership agreement was in no way related to the gift, or that it was a mode of enjoyment by the donee of his own property were held to be irrelevant.

Viscount Simonds in his judgment observed at page 100 :

"Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined. If he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee....."

It may be pertinent in some cases to inquire whether the benefit derived by the donor is one that impairs or detracts from the donee's enjoyment of the gift..... It is not a relevant

consideration where the question arises under the first limb of the sub-section and is whether the donor has been entirely excluded from the subject-matter of the gift....."

46. The principles laid down in Munros case [1934] AC 61 and Chicks case [1959] 37 ITR 89 have been applied by the Supreme Court in the following decisions where a partnership was involved. The first case is Gounders case, [1973]88ITR448(SC) . The facts in this case have been discussed in the judgment of my learned brother. It is to be noted that in this case the Supreme Court followed the principle laid down in Munros case [1934] AC 61 and held that there was unequivocal transfer of property and that the revenue could not establish that the deceased was not entirely excluded from the property. The Supreme Court further found and held in this case that the donor had only the rights in the house property, viz., ownership and right of termination of the firms tenancy and both these rights were transferred to the donee. The Supreme Court concluded that the benefit which the donor had received via the partnership which was a tenant was not referable to nor connected with the gift. In respect of the money transferred in this case the same principles were applied. It is to be noted that in Gounders case, [1973]88ITR448(SC) the donees, i.e., sons of the donor, never became partner of the firm.

47. The other case is *Commissioner of Income Tax and Controller of Estate Duty v. N. R. Ramarathnam*, reported in<sup>21</sup>, In this case the facts were that the deceased, his three sons and one daughter were partners in the firm which carried on business in money-lending. The deceased transferred to his sons and daughters various amounts by adjustment entries in the books of the firm against his credit balance. The amounts remained in the firm till the death of the deceased who remained a partner till that time. The Supreme Court held following Munros case [1934] AC 61 and Gounders case, [1973]88ITR448(SC) that these amounts could not be deemed to pass on death.

48. It seems that the subject-matter of the gift, namely, the amounts of money were considered to be already impressed with the rights of the partnership and those of the partners. Within the framework of the partnership the gifts were transferred unequivocally and no further control was retained or assumed by anybody apart from the control or benefit which was already there before the gift. Therefore, on such facts the principles in Munros case [1934] AC 61 was applied here.

49. In the instant case, the facts are more in line with Chicks case [1959] 37 ITR 89 than in Munros case [1934] AC 61 . In this case, the gift was outright and unequivocal, but then the donee chose to give up exclusive control over the subject-matter of the gift by bringing back the same into the partnership in which the donor retained his interest. This right the donor did not have at the time of the making of the gift. Therefore, by following the principle in Chicks case [1959] 37 ITR 89 as applied by the Supreme Court, the question has to be answered in favor of the revenue. Reference answered in the affirmative.

<sup>21</sup>(1973) 91 ITR 1 (SC)