BOMBAY HIGH COURT

Virji Devshi

Vs

Commissioner of Income-Tax

(Kotwal, C.J. V.s. Desai, J.)

20.02.1967

JUDGMENT

V.S. Desai, J.

1. This is a consolidated reference arising out of the income-tax assessment for the assessment for the assessment year 1958-59 and the wealth-tax assessments for the assessment years 1957-58 and 1958-59, and involves mainly a question relating to the validity of a gift alleged to have been made by the assessee in favour of his minor son on the last day of the account year S. Y. 2008.

2. The assessee was a partner in several registered partnership firms, one of which was M/s. Jethalal Gopalji & Co. At the end of S. Y. 2008 there was to the credits of the assessee's account in the books of the partnership an amount of nearly Rs. 2,60,000. On the last day of the said year, which was October 18, 1952, certain further additions were made to the said account bringing the total to about Rs. 3,16,000 and then that account was debited by an amount of Rs. 3,00,000 and an identical amount was credited to a new account opened in the name of his minor son, Madhu Kant, on the same day. Six days later, on October 24, 1952, the assessee made a declaration on a stamp paper of Rs. 3 before the Presidency Magistrate, Esplanade, Bombay, stating therein that he had made a gift of Rs. 3,00,000 to his minor son, Madhu Kant, out of nature love and affection on October 18, 1952, by debiting his account in the partnership firm of M/s. Jethalal Gopalji & Co. and crediting the account of the son, Madhu Kant, in the books of account of the said firm. The declaration further stated that in respect of the said sum of Rs. 3,00,000, gifted by him to his son, Shri Jadavji Pragji, the other partner of the firm would act as a trustee and guardian of his son and he alone would deal with the amount so gifted by him to his son and all the income in any wise arising therefrom. In subsequent years, the account of the said Madhu Kant was continued in the said partnership firm and interest on the amount was credited in the said account at the end of each account year. In the assessment of the firm for the year 1955-56,

the firm claimed the interest paid on the amount as a deduction under section 10(2)(iii) on the ground that it was interest paid on borrowed capital. The claim was disallowed on the ground that there was no valid gift of the amount in favour of the son and, consequently, the amount of interest was paid to the partner and not capable of being claimed as a deduction under section 10(2) (iii) of the Indian Income-tax Act.

3. In the wealth-tax of the assessee for the assessment years 1957-58 and 1958-59, the Wealth-tax Officer included the amount of Rs. 3,00,000 together with the accumulated interest thereon which came to Rs. 3,80,887 for the first year and Rs. 4,03,418 for the second year in the computation of the net wealth of the assessee. In the income-tax assessment of the assessee for the assessment for the year 1958-59, the Income-tax Officer included an amount of Rs. 52,049 as representing the assessee's share of income in the registered firm of M/s. Jethalal Gopalgi & Co. This amount of Rs. 52,049 included a sum of Rs. 22,531 which represented the amount of interest paid by the partnership firm on the amount which stood the credit of Madhu Kant in the books of account of the partnership for the year S. Y. 2013. In addition to the said amount, some more interest was also received by the assessee on the money standing to his account also and the total of the interest amount received by the assessee came to Rs. 24,444. The Income-tax Officer showed the whole amount of Rs. 24,444 as interest received by the assessee from the registered firm of M/s. Jethalal Gopalji & Co. The assessee's contention was that the entire amount of Rs. 24,444 was not interest received by him from the partnership firm but an amount of Rs. 22,531 out of the said amount was the interest which was received by his son on the amount, which he had gifted over to him. According to the assessee, therefore, this position should have been clarified by the Income-tax Officer, although did not dispute that the amount of Rs. 22,531 was capable of being included in his account under the provisions of section 16(3). This contention of the assessee was negatived by the Appellate Assistant Commissioner as well as by the Income-tax Appellate Tribunal, both the aforesaid authorities having taken the view that there was not a valid gift of the sum of Rs. 3,00,000 by the assessee in favour of his son, Madhu Kant, and, consequently, the said amount remained as the assessee's own money and the interest paid on it was, therefore, rightly treated as interest received by the assessee. The same view was also taken by the appellate authorities in the wealth-tax assessments for the assessment years 1957-58 and 1958-59. Thereafter, on applications made by the assessee under the Income-tax Act for a reference in the income-tax assessment and under the Wealth-tax Act in the wealth-tax assessments, the Tribunal has made a consolidated reference and referred to this court the questions of law which arise on its orders in the said matters. The two questions relating to the income-tax assessment are as follows :

> "1. Whether, on the facts and circumstances of the case, the gift of Rs. 3,00,000 by the applicant to his son, Madhu Kant, has been rightly treated as invali ? and

2. Whether, on the facts and circumstances of the case, the Tribunal was justified in coming to the conclusion that Rs. 22,531 represented the income of the applicant and not that of the minor son of the applican ?"

4. Of the two questions framed in connection with the Wealth-tax assessments, the first is the same as in the income-tax assessment. The second question is as follows :

"2. Whether, on the facts and circumstances of the case, Rs. 3,80,887 and Rs. 4,03,418 have been rightly included in the net wealth of the applicant for the years 1957-58 and 1958-59 respectivel ?"

5. The answer to the second question must follow the answer to the first question, since there is no dispute with regard to the figures mentioned therein. The main and substantial question, therefore, is whether the gift of Rs. 3,00,000 alleged to have been made by the assessee in favour of his minor son, Madhu Kant, was a valid gift.

6. Now, gift is a transfer of 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. For a valid gift of a movable proper there must be a transfer or the giving of the property by the donor and acceptance of the transferred or given property by or on behalf of the donee. The mere intention on the part of the donor to give or even his setting apart for the purpose of giving the property will not constitute a gift unless there is an acceptance of the property by or on behalf of the donee. The mode in which the transfer by way of gift can be made in respect of movable is, as stated in section 123 of the Transfer of Property Act, either by a registered instrument or by the delivery of the movable to the donee. The departmental authorities and the Tribunal have held that the requirements of a valid gift are not satisfied in the present case, because the acceptance of the alleged fight by or on behalf of the donee has not been established and also because there is neither a registered instrument nor delivery of the movables to the donee and, consequently, there is no transfer of the amount from the donor to the donee. According to the Tribunal, all that has been done in the present case is that the assessee has merely made debit and credit entries in the books of account and, since mere book entries will not suffice to constitute a valid gift, there could not be a valid gift in the present case. The Tribunal has pointed out that on the day on which the gift is alleged to have been made, the assessee did not even have total credits of Rs. 3,00,000 in his capital accounts; that the amount alleged to have been gifted to the son still continues to be invested in the business in the same manner as before as that there is no evidence on record from which the acceptance of the gift either by his son or guardian could be inferred. The declaration, which the assessee made before the Presidency Magistrate, Esplanade, Bombay, on October 24, 1952, purported to state that Jadavji Pragji was to act as the trustee and guardian of the minor, but the Tribunal pointed out

that there is no evidence on record showing that the said Jadavji had acknowledge even the fact of the gift. In these circumstances, according to the Tribunal, there being nothing beyond the book entries made in the accounts of the partnership and the declaration made by the assessee before the Presidency Magistrate which did not advance the matter any further, it could not be held that a valid gift in favour of the case of Commissioner of Income-tad v. New Digvijaysinhji Tin Factory, but the Tribunal found that the facts of the said case were clearly distinguishable from the facts of the present case and the said case, therefore, could not help the assessee.

7. Mr. S. P. Mehta, learned counsel who appears for the assessee, has urged before us that the Tribunal has erred in taking the view that there is no valid gift made by the assessee in favour of his minor son. He points out that the view of the Tribunal does not proceed on the basis of want of bona fides on the part of the assessee but ground that the legal requirements of a valid gift are not established. His argument is that, in the absence of lack of bona fides on the part of the assessee, on the facts and circumstances of the case, the legal requirements of a valid gift could be said to have been well established. It is true, he says, that for the purpose of a valid gift, transfer of the movable property by the donor and the acceptance of the same by or on behalf of the donee are necessary and it is also true that in order to effect a transfer by way of a gift, delivery of the movable is necessary unless it is effected by a registered instrument. He points out, however, that neither for the purpose of satisfying the requirements of acceptance nor for the purpose of satisfying the requirement of delivery, is it necessary that there should be an actual physical act of giving the movable by the donor to the donee and an actual or physical act of acceptance of the same by or on behalf of the donee. Mr. Mehta says that the acceptance may neither be actual and physical or it may be implied. Similarly, delivery may be either factual and physical or symbolical; whether there is an acceptance or not or whether there has been a delivery as required by law or not are matters to be considered in the light of the facts and circumstances of each case and it would not do to insist on technical subtleties of law.

8. Now, we may agree with Mr. Mehta that acceptance need not necessarily be by the actual or physical act of receiving from the donor the movables given over by him and that it is possible to arrive at an affirmative conclusion as to the acceptance of the gift by the donee as a result of an inference drawn from certain acts and conduct both on the part of the donor and the donee. We may also agree with him that, for the satisfaction of the requirement of delivery, one need not insist upon the actual physical act of delivery of the movable and even a symbolic or constructive delivery or such other acts as having regard to the nature of the movable and the course of everyday dealings and practice can be regarded as constituting delivery may be sufficient. It is, however, clear that the mere making of entries in his own accounts by the donor or even in the accounts of a partnership of which he is a partner by opening another account in the name of the donee and transferring amounts to that account would not constitute either giving of the movable

by the donor to the donee or the acceptance of the same by the latter. Mr. Mehta says that the donor in the present case was the father of the donee, who was a minor and of whom the donor himself was the natural guardian. A gift by a father in favour of his minor son was incapable of being accepted by him on behalf of the son and in such a case all that was necessary to be done by the farther was to take out or set apart the amount from his minor son and as belonging to him. He did that by giving instructions to the partnership firm to made entries accordingly and teat the new account opened in the name of his son as belonging to him. He did that by giving instructions to the partnership firm to make entries accordingly and treat the new account opened in the name of his son a s separate account of the minor son. The conduct of the father in giving these instructions and having the entries made accordingly would supply further evidence in additions to the mere book entires in respect of the gift. The further conduct on the part of the father, says Mr. Mehta, which shows that he has made a solemn declaration before a Presidency Magistrate of his other partner the trustee and guardian of his son in respect of the said amount is clearly indicative of his intention to divest himself of the said amount and vest it in the son. Having regard to these circumstances and having regard to the further fact that the bona files of the assessee are not questioned, Mr. Mehta says, it should have been held that there has been a valid gift.

9. We do not find it possible to accept the submissions urged by Mr. Mehta. We do not think that making of the entires in the accounts of hew partner ship firm would constitute the transfer of the amount from the father to the son or the acceptance of the said amount by or on behalf of the son. The mere opening of new account in the name of a minor son by the father would not be sufficient to constitute either a transfer to the amount of the son or to make the son owner of the sum so transferred. 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 partnership firm of which the person is a partner would not be sufficient to constitute a valid transfer. It is not unusual that a man may have more than one account and that too in different names. The arguments that the amount could be treated as having been accepted by the father on behalf of the son, since the son was a minor, is not again available in the present case in view of the declaration which the farther has purported to make, in which he speaks of the other partner, Jadavji, being the trustee and guardian of the minor in respect of the sum. It is important to note that the declaration is inconsistent to a certain extent with the entires made in the partnership accounts. If Jadavji was a trustee in whom the money was to vest for the benefit of the minor, then the account in the partnership firm should normally be expected to be in the name of the trustee on behalf of the minor. Secondly, as the Tribunal has pointed out, threes is nothing on record to show whether Jadavji has accepted the trust or whether he is even away of the fact that he has been made a trustee and a guardian of the minor son in respect of the same. It will thus be seen that there is nothing in the present case excepting the entries and the unilateral declaration made by the

assessee before the Presidency Magistrate. The said declaration is a private document and does not be itself create any rights in favour of the donee. In our opinion, therefore, the Tribunal was right in the view that it took that there was no valid gift of the amount by the assessee in favour of his minor son.

10. Mr. Mehta has referred to us some decisions in support of his submissions that the requirements of a valid gift can be established on the fact and circumstances of the case even in the acceptance of the same by the latter. The cases referred to by him are *: Chimanbhai Lalbhai v. Commissioner of Income-tax, Commissioner of Income-tax v. New Digvijaysinghji Tin Factory, K. P. Brothers v. Commissioner of Income-tax and E. S. Hajee Abdul Kareem and Son v. Commissioner of Income-tax.* All these cases related to the question of delivery of the movable and it has been held that, in the circumstances of the case, there was enough compliance with the requirement of delivery necessary for effecting the transfer of the property by ways of a gift. It is not necessary to go into those cases because, in our opinion, they are clearly distinguishable on facts. In each of those cases there was ample evidence of a gift having been made and even acted upon. The only question that was agitated in those cases was whether the gifts must fail for non-compliance of the actual delivery of the movable. In the case before us there is no evidence of the gift having been made or its having been acted upon. As has been pointed out by the Tribunal, there is no evidence whatsoever about the acceptance of the gift by or on behalf of the donee. So far as the amount purported to have been made in the accounts of the partnership. The amount remains invested in the business of the partnership and has in no way been dealt with by and on behalf of the minor. In our opinion, therefore, the Tribunal was right in the view that it has taken and the result, therefore, is that the questions referred to us must be answered in favour of the department and against the assessee.

11. We accordingly answer each of the two sets of questions referred to us in connection with the income-tax assessment and the wealth-tax assessment in the affirmative. The assessee will pay the costs of the department.

12. Questions answered in the affirmative.