

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Popatlal Mulji

(J Vimadalal, C.J. S Desai, J.)

29.11.1974

JUDGMENT

Vimadalal, J.

1. Two questions have been referred to us on this reference, one at the instance of the department which is set out in the concluding part of paragraph 11 of the statement of the case, and the other at the instance of the assessee which is set out in paragraph 12 of the statement of the case. A notice of motion was taken out by the revenue for certain additional questions which we have dismissed today by a separate order. We are, therefore, concerned only with the questions referred to us which are set out in paragraphs 11 and 12 of the statement of the case.

2. As far as the question set out in paragraph 12 of the statement of the case is concerned, the learned counsel have stated that in view of our judgment dated 4th December, 1973, in Income-tax Reference No. 44 of 1964 [*New Kaiser-i-Hind Spg. & Mfg. Co. Ltd. v. Commissioner of Income-tax*¹] the said question must, by consent, be answered in the affirmative and in favour of the revenue.

3. As far as the question set out in paragraph 11 of the statement of the case is concerned, a few facts need be stated. The business of M/s. Popatlal Mulji & Co. was originally said to belong to the Hindu undivided family consisting of the assessee and his son. It may, however, be stated that it was subsequently conceded that the said business belonged to the assessee as his sole proprietary concern and not to the Hindu undivided family. The capital of that business stood at the end of Samvat year 2009 (the assessment year 1954-55) at Rs. 1,32,186. On the closing day of Samvat year 2009, the assessee got an entry made crediting half of the capital, viz., Rs. 66,093, to the name of his son, Mansukhlal. The said Mansukhlal thereafter became a partner with his father in the said business of Popatlal Mulji & Co. with effect from the 7th of November, 1963, and the said amount stood credited as his capital to an account standing in the name of the

said Mansukhlal in the books of the partnership of Popatlal Mulji & Co. On those facts, the question which arose before the taxing authorities was, whether the making of the relevant entries by the assessee effected a valid gift in favour of his son, Mansukhlal, in respect of the said sum of Rs. 66,093.

4. The findings of fact arrived at by the Tribunal are set out in paragraph 9 of its order dated 9th October, 1964. Those findings, briefly stated, are that since the business of Popatlal Mulji & Co. was initially a proprietary business, the donor must be taken to have consented to the gift of the said sum of Rs. 66,093 to his son, and that the donee who was also a major had accepted that gift by utilising it in the partnership as his capital. The Tribunal has also accepted the statement made before them that the capital that was so credited to the assessee's son in the partnership books was solely operated upon by the assessee's son and not by the assessee himself. The question that has been referred to us in paragraph 11 of the statement of the case must be answered on the basis of these findings of fact arrived at by the Tribunal.

5. In my opinion, the decision of this court in the case of *Chimanbhai Lalbhai v. Commissioner of Income-tax*² lays down, once and for all, at any rate as far as this court is concerned, that there can be a valid gift effectuated by making entries in the books of account, if there is evidence to show that the gift was made by the donor and accepted by the donee, and was acted upon by both of them. The facts of that case were that the assessee had made a gift of Rs. 5 lakhs to his son, S, and Rs. 2 lakhs to his daughter, P, by making the necessary entries in his books of account, and had instructed the joint family firm, which acted as his banker and with which he had an account, to debit him with the two sums and interest earned up to that date, and credit the amounts to his son and daughter with the corresponding amounts. That firm carried out the instructions and submitted a voucher which the assessee signed. The Tribunal had in that case held that the gift had not been effectuated because, (i) that there was no transfer of possession, (ii) that the assessee did not have sufficient amount in credit with the firm on the relevant date, and (iii) that the firm itself did not have sufficient cash on that date to carry out the directions of the assessee. On a reference to this court, it was held that it was not necessary for the assessee to have drawn the cash amounts from the banker and handed them over to his son and daughter, and that the gift was complete by the issue of the directions by the assessee, and the firm making the transfers in its account books. It was further held that the fact that there was not much enough money in the assessee's account was not relevant and did not affect the validity of the gift. It was also held that the fact that the firm itself did not have sufficient funds in its account to carry out the directions of the assessee was also not relevant. This court, therefore, took the view that the gift was complete and valid, and that the interest on the amounts transferred by the assessee to his son and daughter could not be included in the income of the assessee. In my opinion, this is a very strong

case in favour of the assessee before us. Mr. Joshi, however, sought to rely on two other decisions of this court, one in the case of *Virji Devshi v. Commissioner of Income-tax*³ in which the mere making of debit entries in the assessee's account or in the accounts of a firm of which he is a partner and opening of another account in the name of a minor son to which the amount was transferred was held not to amount to a valid gift. The earlier decision of this court in Chimambhai Lalbhai's case [1958] 34 ITR 259 (Bom)(Supra), which I have already discussed above, was considered and distinguished by the court in Virji Devshi's case [1967] 65 ITR 291 (Bom)(Supra). The view taken in Virji Devshi's case [1967] 65 ITR 291 (Bom)(supra) was that in Chimambhai Lalbhai's case [1958] 34 ITR 259 (Bom)(supra) and in the other cases that were cited before the court the facts were clearly distinguishable in so far as there was ample evidence in those cases of a gift having been made and acted upon, and the only question was whether the gift should fail for non-compliance with the actual delivery of movables. In Virji Devshi's case [1967] 65 ITR 291 (Bom) it was held that there was no evidence of the gift having been made, or its having been acted upon, or of the acceptance of the gift by or on behalf of the donee. In fact, there was nothing excepting the entries in books of account, and it was on those facts that the validity of the gift was negatived. In my opinion, there is nothing in Virji Devshi's case [1967] 65 ITR 291 (Bom)(supra) that can affect the principle laid down by this court in Chimambhai Lalbhai's case [1958] 34 ITR 259 (Bom)(Supra) which has been reiterated in several other cases to which it is unnecessary to refer. Mr. Joshi also relied upon another decision of this court and that was in the case of *Paliram Mathuradas v. Commissioner of Income-tax* [1966] 59 ITR 278 (Bom)(supra), but that decision is clearly distinguishable on facts, for the simple reason that there was in that case a finding by the Tribunal that the entry in question had not been made in the regular course of business and was not a bona fide entry. It was on those facts that the gift was negatived. Under those circumstances, in my opinion, the decision in *Paliram Mathuradas's* case [1966] 59 ITR 278 (Bom) can be of no avail to the revenue in the present case.

6. On the facts as found by the Tribunal to which I have already referred, and following the decision of this court in Chimambhai Lalbhai's case [1958] 34 ITR 259 (Bom)(Supra), which has been cited above, I hold that there was a valid gift in the present case, and I would, therefore, answer the question set out in paragraph 11 of the statement of the case in the affirmative and against the revenue.

S.K. Desai, J.

7. I agree.

BY THE COURT :

Question in paragraph 11 of the statement of the case answered in the affirmative.

Question in paragraph 12 of the statement of the case also answered in the affirmative.

8. No order as to costs.

Cases Referred.

1[1977] 107 ITR 760 (Bom)

2[1958] 34 ITR 259 (Bom)

3[1967] 65 ITR 291 (Bom)