

K.E. Abdul Hameed Vs. Controller of Estate Duty, Kerala

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Court : Kerala

Decided On : Aug-22-1967

Reported in : AIR1968Ker203

Judge : M.S. Menon, C.J. and; S. Velu Pillai, J.

Acts : [Estate Duty Act, 1953](#) - Sections 2(19), 10 and 27

Appeal No. : Income-tax Referred Case No. 18 of 1966

Appellant : K.E. Abdul Hameed

Respondent : Controller of Estate Duty, Kerala

Advocate for Def. : C.T. Peter, Adv.

Advocate for Pet/Ap. : T.V. George and; Baby George, Adv.

Judgement :

1. This is a reference under Section 64 (1) of the [Estate Duty Act, 1953](#). The question referred reads as follows:--

'Whether on the facts and in the circum-stances's of the case, the entire property in respect of which the deed dated the 7th March 1953 was executed by the deceased, was liable to inclusion in the estate of the deceased, having regard to the provisions of Sections 10 and 12 of the [Estate Duty Act, 1953](#) '

2. The deed styles itself as a 'settlement deed'. It forms Annexure C to the Statement of the Case. The original, we are told, is in Malayalam and is entitled an'

3. The deed was executed by one Ismail Kunju in favour of his three sons and four daughters. It was executed, as stated in the question, on the 7th March 1953. Ismail Kunju died only on the 39th July 1955, that is. beyond the period of time specified in Section 9 of the [Estate Duty Act, 1953](#). It follows that there can be no question of any liability to estate duty except on the basis of Section 10 or Section 12 of that enactment.

4. Section 12 of the Act deals with settlements with reservations. It is difficult to hold that Annexure C constitutes a 'settlement' at all as defined in Section 2 (19) of the Act. That definition is:

' 'settled property means property which stands limited to or in trust for, any persons, natural or juridical, by way of succession, whether the settlement took effect before or after the commencement of this Act; and 'settlement' means any disposition, including a dedication or endowment, whereby property is settled '

5. According to Storied 'a conveyancer might describe A settlement as an instrument providing for the disposition of property, real or personal, for the purpose of ensuring that the same shall be enjoyed by persons in succession'. And according to Halsbury 'settlement' means 'any disposition of property, of whatever nature, by any instrument or number of intruments, whereby trusts are constituted for the purpose of regulating the enjoyment of the settled property successively among the persons or classes of persons nominated by the settler' (Third Edi Hon. Volume 34 Page 428).

6. A settlement of property, in essence, is only a sophisticated form of a gift. Sub-section (1) of Section 27 of the Estate Duty Act. 1953, reads as follows:

'Any disposition made by the deceased in favour of a relative of his shall be treated for the purposes of this Act as a gift unless--

(a) the disposition was made on the part of the deceased for full consideration in money or money's worth paid to him for his own use or benefit; or

(b) the deceased was concerned in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only; and references to a gift in this Act shall be construed accordingly:

Provided (that where the disposition was made on the part of the deceased for partial consideration in money or money's worth paid to him for his own as or benefit, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty.'

The expression 'relative' is defined in Sub-section (7) of that section, and according to that definition it includes the wife and children of the deceased.

7. The words 'this Act' in Sub-section (1) of Section 27 were substituted for the words 'Section 9' by the Estate Duty (Amendment) Act. 1958, The 'Notes on Clauses' appended to the Estate Duty (Amendment) Bill, 1958, which became the Estate Duty (Amendment) Act. 1958, shows that the amendment was only clarificatory in character and that it did not effect any change in the law.

8. We have already indicated that we are of the opinion that Annexure C is not a deed of settlement. In view of the statutory presumption embodied in section 27 also, Annexure E cannot but be considered as a deed of gift in favour of the three sons and four daughters of Ismail Kunju..

9. Section 10 of the [Estate Duty Act, 1953](#), 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 (henceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise:

Provided that the property shall not be deemed to pass by reason only that it was not, as from the date of the gift, exclusively retained as aforesaid, if, by means of the surrender of the reserved benefit or otherwise, it is subsequently enjoyed to

the entire exclusion of the donor or of any benefit to him for at least two years before the death.

Provided further that a house or part there-of taken under any gift made to the spouse, son, daughter, brother or sister shall not be deemed to pass on the donor's death by reason only of (he residence therein of the donor except where a right of residence therein is reserved or secured directly or indirectly to the donor under the relevant disposition or under any collateral disposition. '

The section came up for consideration before the Supreme Court in a recent case: *George Da Costa v. Controller of Estate Duty* : [1967]63ITR497(SC) .

10. The Supreme Court said.

'The intention of the legislature in enacting Section 10 of the Act was to exclude from liability to estate duty certain categories of gift. A gift of immovable property under Section 10 will, however, be dutiable unless the donee assumes immediately exclusive and bona fide possession and enjoyment of the subject-matter of the gift, and there is no beneficial interest reserved to the donor by contract or otherwise. The section must be grammatically construed as follows: 'Property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and of which property bona fide possession and enjoyment shall not have been (henceforward retained by the donee to the entire exclusion of the donor from such possession and enjoyment, or of any benefit to him, by contract or otherwise'.

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 those conditions is satisfied, the property would be liable to estate duty under Section 10 of the Act. This view is borne out by the decision of the

Court of Appeal in *Attorney-General v. Earl Grey* (1898) 2 QB 534, with regard to an analogous provision under Section 38 (2) of the Customs and Inland Revenue Act, 1881, as amended by Section 11 of the Customs and Inland Revenue Act, 1889.

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 *eiusdem 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. 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. Even if the donor is content to rely upon the mere filial affection of his sons with a view to enable him to continue to reside in the house, it cannot be said that he was 'entirely excluded from possession and enjoyment' within the meaning of the first limb of the section, and, therefore, the property will be deemed to have passed on the death of the donor and will be subject to levy of estate duty.'

11. The appellate order from which the reference arises said:

'In this agreement there were certain clauses of reservation under which it was laid down:

(a) that it was the duty of the first three beneficiaries namely the sons - Abdul Hameed Mohamed Ebrahim, Mohamed Basheer - to maintain the deceased and his wife in an appropriate manner, and

(b) that the settlor and his wife had the right to reside in any of the buildings settled under the agreement.

Further clauses of the agreement show that if there was any default on the part of the sons, in fulfilling this obligation, the settlor would be entitled to take back and enjoy the income from the whole or part of the properties settled in favour of the first three beneficiaries, namely the sons, and utilise the income in any manner the settlor and his wife liked. It was also laid down in the agreement that the SONS will have to pay Rs. 15/- each per month to the settlor from the date of the agreement for the maintenance of himself and his wife and after his death to his wife. The Assistant Controller also pointed out that as a matter of fact the deceased accounted for in his books the income for the entire year ended 16th August 1953 from all the properties settled by this agreement even after the date of the settlement, and further that the deceased also disclosed in his income-tax return for the accounting year ended 16th August 1953, the income from all these properties. In view of these facts these properties were included by the Assistant Controller in the estate of the deceased and charged to estate duty.

and agreed with the conclusion that the properties were liable to state duty. We have been taken through Annexure C, and after perusing the document we too are of the same opinion.

12. The three questions that arise are

- (1) Did the donees assume bona fide possession and enjoyment immediately upon the gift?
- (2) Did they assume it and thenceforward retain to the entire exclusion of the donor and
- (3) Did the donees retain possession and enjoyment to the entire exclusion of any benefit to the settlor of whatsoever kind or in any way whatsoever ?

In the light of the provisions of Annexure C we cannot but answer these questions in the manner they have been answered by the Assistant Controller of Estate Duty and the General Board of Revenue.

13. One aspect of Section 10 did not arise for consideration in the decision of the Supreme Court mentioned above; the fact that the words 'to the extent' in that

section is a conscious departure from the English provision. In *Rash Mohan Chatterjee v. Controller of Estate Duty* : [1964]52ITR1(Cal) the Calcutta High Court had occasion to deal with those words. It said:

'Section 10 of the Estate Duty Act. 1953, provides, as we have already seen, that 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.

The expression 'to the extent' introduced into the Indian statute is a departure from the provisions in the British and Australian Acts. So far as this aspect of the question is, therefore, concerned no assistance can be derived from decisions in other countries.' The effect of the words is clearly summed up in the statement of Objects and Reasons. The Statement with respect to Section 10 is as follows:

This clause brings under charge property given in gift, but in which the donor retains some interests by contract or otherwise. Where the donor retains such interests in a part of the property only, estate duty is payable on that part only.'

14. No contention was urged on the basis of the words 'to the extent' either before the Assistant Controller of Estate Duty or before the Central Board of Revenue. Such a contention, therefore cannot also arise for consideration in a reference, like the one before us.

15. In the light of what is stated above the question referred has to be answered in the affirmative, that is, against the person accountable and in favour of the Department. We do so; 'but in the circumstances of the case without any order as to costs.

Reference answered in favour of the Department.