

Controller of Estate Duty Vs. Estate of Late Shree E.M. Gopalakrishna Kone

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Court : Chennai

Decided On : Aug-10-1979

Reported in : (1980)16CTR(Mad)297; [1981]129ITR738(Mad)

Judge : Sethuraman and ;Balasubrahmanyam, JJ.

Acts : [Estate Duty Act, 1953](#) - Sections 10, 12, 46(1) and 65; [Constitution of India](#) - Article 134A

Appeal No. : Tax Case Nos. 706 of 1975 and 62 of 1976 (Reference Nos 509 of 1975 and 39 of 1976)

Appellant : Controller of Estate Duty

Respondent : Estate of Late Shree E.M. Gopalakrishna Kone

Advocate for Def. : T.V. Ramanathan, Adv.

Advocate for Pet/Ap. : J. Jayaraman and ;Nalini Chidambaram, Adv.

Judgement :

Sethuraman, J.

1. The Appellate Tribunal has referred, under Section 64(1) of the E.D. Act, 1953, the following question at the instance of the Controller of Estate Duty:

'Whether, on the facts and in the circumstances of the case, it has been rightly held that Rs. 11,05,387, being the value as on the date of death of the deceased, of the properties dedicated by the deceased to the trust cannot be included in the estate duty assessment and that only the value of the right of the deceased to get remuneration from the trust for three years prior to his death amounting to Rs. 27,000 alone can be included under Section 10 of the Estate Duty Act '

2. E.M. Gopalakrishna Kone was a well-known publisher of Tamil books and school text books. He carried on his business in Madurai. He owned a printing press called ' Excelsior Press '. It appears that he was charitably disposed and he was rendering help to the poor and indigent school children even prior to 1943. On April 1, 1943, he executed a document styled as ' gift settlement deed ' under which he created a trust known as ' Madurai E. M. Gopalakrishna Kone Trust' and dedicated to it 36 acres and 32 cents of agricultural lands in a village in Madurai Taluk, and his entire interest in his business, printing press, publication, copyright, etc. The object of the trust was to establish and maintain an educational institution for girls. He contemplated also another institution for imparting training in handicrafts to poor boys, who were also to be given free food. The trust envisaged the granting of scholarships and free supply of books to deserving students. He constituted himself as the sole trustee for his life and provided in the trust deed that he could take Rs. 4,000 per annum from and out of the income of the trust properties as ' remuneration '.

3. After this document, he kept separate accounts for the income and expenses of the trust. A school was established only in 1957, Till then, scholarships to the poor children were being granted. On 30th May, 1947, he purchased from the Govt. of Tamil Nadu 241 acres and 21 cents of land in Karisalkulam and Vannakulam villages in Tirupuvanam Taluk in Madurai District for the trust already founded by him. He executed an additional gift deed on 7th March, 1956. He opened for himself a current account in the books of the trust and drew large sums of money from time to time for his own purposes and debited himself with interest at 3% per annum on such drawings. The debit to his account started with Rs. 39,836 during the accounting year 1944-45 and it increased to Rs. 4,63,344 in the year 1955-56. He constructed a cinema theatre known as 'Meenakshi Talkies' at Madurai Town

at a cost of Rs. 3,00,000 apparently out of these drawings. In the ' additional gift settlement deed ', this Meenakshi Talkies and certain other properties were also added to the trust. In the deed of 7th March, 1956, it was provided that he could take Rs. 5,000 per annum out of the income from the trust properties for his ' personal expenditure '. As on the date of his death, i.e., 17th March, 1960, the debits to his account came to Rs. 7,00,644. He had deposited the title deeds relating to his properties as security for the repayment of the amount due by him to the trust.

4. Subsequent to the document of 7th March, 1956, he adopted as his son, one Sundararajan on November 1, 1957. On the same day, he executed another document appointing the adopted son as his successor-trustee and enjoining upon him the obligation of performing the trust specified in the two documents.

5. On his death on March 17, 1960, the adopted son filed an account for estate duty purposes disclosing the principal value of the estate of which the deceased was the karta as Rs. 1,64,352. The value of the share of the deceased therein was stated to be one-half amounting to Rs. 82,176. In arriving at Rs. 1,64,352, Rs. 7,21,823 was deducted as a liability due from the estate. This amount of Rs. 7,21,823 included Rs. 7,00,644 due to the trust.

6. The Asst. Controller determined the principal value of the estate at Rs. 16,59,047 and levied Rs. 3,16,569.64 as estate duty. He levied also Rs. 15,730.31 as interest for the belated filing of the return. In the assessment order the Asst. Controller held that the value of the properties transferred by the deceased to the trust founded by him was liable to be included as property deemed to have passed on his death, either under Section 12 or under Section 10 of the E.D. Act. According to the Asst. Controller, the provisions in the two trust deeds enabling him to take certain sums from out of the income from the trust properties was a reservation of interest in those properties under the trust deeds. The deceased had not drawn any remuneration during all these years. The contention for the accountable person was that there was a surrender of the benefit of the remuneration. This contention was rejected. In support of the application of Section 10, the withdrawal of large sums of money from the trust at a concessional

rate of interest was considered to be a benefit, which had attracted the operation of that provision. The value of the trust properties was assessed at Rs. 11,05,387. The liability of Rs. 7,00,644 was not also deducted on the ground that Section 46(1) of the Act stood in the way of its deduction.

7. The accountable person appealed to the Appellate Controller, who held that the right of remuneration reserved to the deceased under the trust deeds did not amount to a reservation of interest in the properties held under the trust and that, therefore, Section 12 was not applicable. He further held that the value of the trust properties could be included under Section 10, as the deceased had not been excluded from the gifted properties by virtue of his having the benefit of large sums of money from the estate at concessional rate of interest. The provision in the trust deed for payment of remuneration was also relied on by the Appellate Controller as supporting the assessment under Section 10. The disallowance of the liabilities under Section 46(1) was also upheld by him.

8. The accountable person appealed to the Tribunal. There was no appeal or cross-objection on behalf of the revenue contesting the conclusion of the Appellate Controller as regards the applicability of Section 12 of the Act. In the view of the Tribunal, the provisions of Section 10 were not satisfied because they required a lawful possession and lawful enjoyment of the gifted properties, and in the present case, the borrowings were not lawful and were acts of breach of trust on the part of the trustee. The Tribunal, however, sustained the assessment to the extent of Rs. 27,000 taking the view that under the two trust deeds the total sum of Rs. 9,000 was receivable by the deceased and that at the time of his death he could have claimed three years' remuneration, which would amount to Rs. 27,000. This amount was, therefore, brought to tax. The Tribunal upheld the orders of the E.D. authorities as regards the claim for deduction of Rs. 7,00,744. The Controller has brought the matter on reference and the only point that requires to be considered is whether Section 10 would apply to the properties held under the trust.

9. Section 10, in so far as it is material, runs as follows :

' 10. 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..... '

10. There are two provisos to this provision. Under the first proviso the property is not to be deemed to pass by reason of the fact that it was not exclusively retained with the donee, if the property was subsequently enjoyed to the entire exclusion of the donor or any benefit to him for at least two years prior to his death. The second proviso deals with a house property given to the nearest relation. As we are not dealing with any such property in the present case, it is unnecessary to refer to the second proviso.

11. As pointed out by the Supreme Court in *George Da Costa v. CED* : [1967] 63 ITR 497 (SC) , the crux of Section 10 lies in the following : (i) 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 (ii) 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. If the possession of the gifted property continued with the donor, then without any further investigation of what happened subsequent to the gift, the provision would have to be applied. Where possession and enjoyment were taken over by the donee immediately after the gift, then we have to see if one of the following conditions are satisfied, viz., (1) has the donee retained such possession and enjoyment of the property to the entire exclusion of the donor ; or (2) has the donee retained such possession and enjoyment of the property to the entire exclusion of any benefit to the donor by contract or otherwise ?

12. In the present case having regard to the terms of the document, it is clear that the deceased constituted himself as the sole trustee during his lifetime. In such a case, the question arises whether the continuance of the possession and enjoyment in the hands of the donor as trustee attracts the operation of Section 10. The character of the trustee's possession in the context of the applicability of this kind of provision has been considered by the Privy Council in *Commissioner of Stamp Duties of New South Wales v. Perpetual Trustee Co. Ltd.* [1943] AC 425 ; 2 EDC 788. The deceased created a trust of certain shares for the benefit of his

infant son, of which he appointed himself to be one of the trustees. The trusts, briefly, were that the income of the shares was to go to the son until he attained the age of 21 years, and on his attaining that age the corpus was to be passed on to him absolutely. On the son having attained the age of 21 years, the corpus was in fact transferred to him. But before he attained that age, the deceased died. There was a claim for estate duty on the ground that the deceased had not been excluded from possession and enjoyment of the property given, because, in the interval of time between the gift and his death, he was a trustee receiving and disposing of the income of the trust estate. At page 440 (p. 803 of 2 EDC) their Lordships explained as follows:

'The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. '

13. This decision has been followed by the Privy Council in *Norman Clyde Oakes v. Commissioner of Stamp Duties of New South Wales* [1954] 26 ITR (ED) 1; 3 EDC 553. Therefore, the possession of the trustee must be taken to be beneficial possession on behalf of the beneficiary, and the beneficiary is to be taken to have been put in such bona fide possession and enjoyment of the property comprising the gift, as the nature of the gift and the circumstances permitted. The continuance of possession in the hands of Gopalakrishna Kone during his lifetime, without more, cannot, therefore, attract the operation of Section 10. . We have thus to proceed on the basis that the donee had assumed bona fide possession and enjoyment of the trust property.

14. We have now to examine whether this possession and enjoyment has been retained to the entire exclusion of the donor or whether there was any benefit to him by contract or otherwise. It is in this context that we have to clear certain misconceptions in the order of the Tribunal. This very document came up for consideration by this court in *CIT v. E. M. Gopalakrishna Kone* : [1965]57ITR569(Mad) . The question that arose at that time was whether the inference of the Tribunal that the trust was genuine and not revocable within the meaning of Section 16(1)(c) was legal? Originally, the trust deed, after some

contest, was accepted as creating a genuine trust. Subsequently, in 1958, the ITO thought that he had reason to suspect the reality of the trust and accordingly he issued a notice under Section 34 of the Indian I.T. Act, 1922, for the purpose of reopening the assessment for the year 1949-50. He reassessed the income in the hands of Gopalakrishna Kone. This change in the stand of the department arose by reason of Gopalakrishna Kone executing another settlement deed on 7th March, 1956, making over fresh properties to the trust already founded. It is not necessary for us to discuss more about the applicability of Section 16(1)(c), as the point is not of real relevance to the question in issue here. It is enough to mention that it was held that the trust was not revocable within the meaning of Section 16(1)(c), that the charities were performed in accordance with the terms of the trust and that the deed was genuine. In the course of the judgment, after referring to the second document of 7th March, 1956, the learned judges observed at page 572 as follows:

'The latter document (dated March 7, 1956), purported to be a comprehensive one, by including in it not merely the new properties but also the old ones which were covered by the document dated April 1, 1943. Under the earlier document, the trustee was allowed a sum of Rs. 4,000 per year as remuneration. This was increased in the later document to Rs. 5,000.'

15. As regards the large amounts returned by him, this court, at page 572, observed as follows:

' But, at the same time, he did certain things which could not be regarded as wholly consistent with his position as a trustee. Although the entire business had been transferred to the trust, the assessee retained the selling agency of the concern. This, by itself, might not amount to much, inasmuch as the selling agency had not been expressly included in the trust. But the assessee opened for himself a current account with the trust and was drawing large sums of money from time to time, for his own purposes, and debiting himself with interest at 3 per cent. per annum on such drawings. During the account year 1944-45, he had drawn a sum of Rs. 39,836. This practice steadily developed from year to year till the drawings amounted to Rs. 4,63,344 during the year 1955-56. In one of the intervening

years, the drawings amounted to as much as 80 per cent. of the total assets of the trust. But all these drawings were made in his capacity as a debtor to the trust.'

16. After referring to the construction of Meenakshi Talkies and subsequent dedication of the said property also, the objectionable nature of the borrowings were alluded to.

17. The above passages from the decision of this court clearly established that the second deed can only be taken as a more comprehensive one than the first deed, and the deceased was entitled to remuneration of Rs. 4,000 under the first deed and Rs. 5,000 under the second deed, making a total sum of Rs. 9,000 per annum. The specific point decided by this court is that there was only one sura of Rs. 5,000 to be drawn by him. As far as this sum of Rs. 5,000 is concerned, it has to be pointed out that in Clause 19 of the deed dated March 7, 1956, it is stated :

' Out of the income from the properties given away by me, I have the right to take up to the extent of Rs. 5,000 per year for my personal expenditure. '

18. This sum of Rs. 5,000 was only the ceiling for his withdrawals for personal purposes. The Tribunal was clearly wrong in proceeding as if he was entitled to Rs. 9,000 as remuneration. However, as the accountable person has not taken this point by raising a proper question in reference, we need not deal more about it.

19. The loan was found to be an objectionable transaction. The Tribunal has taken the view that such a loan made by the trust to the trustee would be illegal and that such a loan could not bring the case within the second part of Section 10. The Tribunal's conclusion on this part of the case can be set out in its own words as found in para. 11 of its order :

' The question for consideration is whether by reason of so borrowing moneys belonging to the trust, it could be said that there was no entire exclusion of the deceased. The possession and enjoyment contemplated by the first limb of Section 10 is lawful possession and lawful enjoyment of the gifted properties. Can it be said in the instant case that the deceased had such lawful possession and

enjoyment of the gifted properties merely because he had borrowed large sums of moneys belonging to the trust at concessional rate of interest In our opinion, the answer has to be in the negative.....Such borrowings were clearly acts of breach of trust on his part and cannot be considered as lawful acts. Such being the position, we think the principle laid down by the Privy Council in *Commr. of Stamp Duties of New South Wales v. Permanent Trustee Co. of New South Wales* [1956] AC 512; [1957] 32 ITR (ED) 33; 3 EDC 738 , and by the Supreme Court in *George Da Costa v. Controller of Estate Duty* : [1967] 63 ITR 497 (SC) , is not applicable. '

20. Even on a prima facie view the conclusion of the Tribunal that because the borrowings constituted breach of trust, they could not be taken for the purpose of consideration of Section 10 cannot be accepted as correct. If only lawful transactions with the trust estate are to be taken into account for the purpose of examining the assumption of possession and enjoyment by the donee or the retention thereof to the entire exclusion of the donor, then it would be easy for any donor to make the donee assume possession and enjoyment of the property immediately on the gift and to take over possession unlawfully, so that Section 10 is not at all brought into operation. Such a view would promote illegality, apart from evasion of tax by Section 10 being put out of operation in such cases. It is an elementary principle that a person cannot rely on his own wrong as a defence. The conclusion of the Tribunal would in effect result in condonation of the wrong, at any rate, so far as the estate duty assessment is concerned. As pointed out by the Privy Council in *Clifford John Chick v. Commissioner of Stamp Duties* [1959] 37 ITR (ED) 89 ; 3 EDC 915, the question is whether, as a fact, the donor has been excluded. If as a fact the donor is not excluded, whether the exclusion is traceable to any lawful or unlawful transaction, then to that extent the section would be brought into operation. In an earlier case in *Commissioner of Stamp Duties of New South Wales v. Permanent Trustee Co. of New South Wales* [1956] AC 512; [1957] 32 ITR (ED) 33, the Privy Council pointed out that the sole question was one of fact, i.e., was the donor excluded and that, if he was not excluded, it was not relevant to ask why he was not excluded. Therefore, whatever be the reason for his non-exclusion, so long as he was not excluded from possession and enjoyment of the trust properties, the properties are deemed to pass on his death.

21. Before the Tribunal the decision in *George Da Costa v. CED* : [1967]63ITR497(SC) was cited, but it was distinguished on the ground that the distinction between the lawful nature of the occupation and the unlawful nature of the subsequent transaction did not arise for consideration in that case. We have already pointed out that the unlawful nature of the transaction has nothing to do with the determination of the question as to whether the deceased was excluded from possession and enjoyment of the property. As pointed out at page 503 of *George Da Costa v. CED* : [1967]63ITR497(SC) :

' It appears from all these cases that the first limb of the section 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.'

22. This passage, in our opinion, is also a complete answer to the decision of the Tribunal to the contrary. It has been pointed out in this passage that if the donor enjoyed the income, even though he had no right to do so, then the first limb of the section would be infringed. In the present case the loans have been found to be in breach of trust. But the loans, it is common ground, came out of the income of the trust properties. This is clearly a case of enjoyment of the income of the trust properties, so that the principle of the decision in *George Da Costa v. CED* : [1967]63ITR497(SC) would clearly apply. Thus, the first limb is not satisfied in the sense that the donor was not entirely excluded from possession and enjoyment after the gift.

23. Even assuming that the first limb of the second part of the provision is not satisfied, still the second limb (absence of benefit) would appear to be negated on the facts herein. In *Norman Clyde Oakes v. Commissioner of Stamp Duties of New South Wales* [1954] 26 ITR (ED) 1; 3 EDC 352 , the testator owned a grazing property. He executed a document under which he held the property upon trust for himself and his four children as tenants-in-common in equal shares. The deed gave him wide powers of management, and, in particular, provided that he was entitled to remuneration for all work done by him in managing the trust property. He continued to manage the trust property until his death, receiving varying sums annually as remuneration. The question was whether the corresponding provision

of New South Wales Stamp Duties Act was attracted. Lord Reid, speaking on behalf of the Privy Council, held that the right of the testator to take remuneration for his services in managing the trust property constituted expenditure of the trust property and diminished the amount available for division among the tenants-in-common, and being clearly a benefit to the testator, the case fell within the section and death duty was payable on the whole of the trust estate. An argument advanced in that case was that there was no contract with the other beneficiaries for this purpose and that the remuneration came out of the terms of the document itself. In dealing with that part of the argument, at pages 21 and 22, it was stated as follows :

'It is true that the deceased did not exact from his children his power to take benefits and that the benefits which he took were benefits which they neither permitted him to derive nor had any power to deny him. But in their Lordships' judgment the question is not whether the donees permitted the donor to take benefits. It is whether the donor took benefit out of that which was given. If a benefit arises by way of reservation out of interests which were given then no doubt the donees' interests are inherently insusceptible of being so possessed and enjoyed as to preclude the donor from taking that benefit, but the section applies because there is not entire exclusion of the donor or of benefit to him from the interests comprised in the gift. The contrast is between reserving a beneficial interest and only giving such interests as remain on the one hand, and on the other hand reserving power to take benefit out of, or at the expense of, interests which are given, and for reasons already stated, their Lordships are of opinion that the present case is within the latter class.'

24. There was also another contention that two other powers had been reserved by the deceased, viz., power to appropriate and partition the trust property, and power to purchase it. It was held that it may be that the deceased could legitimately have used those powers to his own advantage, but in fact he made no use of them at all. They were considered to be potential benefits. But as their Lordships had already decided that taking remuneration was a benefit within the scope of the section, they found it unnecessary to deal with these matters.

25. In the present case, it was vehemently argued by Mr. T.V. Ramanathan, the learned counsel for the accountable person, that the deceased had not taken any remuneration during the entire period of existence of the trust and that this had been found to be the factual position by the Tribunal in its order. His submission was that a potential benefit was of absolutely no use in considering the question as a fact.

26. This contention was countered by the citation of the decision of the Bombay High Court in CIT v. Sir Kikabhai Premchand [1948] 16 ITR 207. In that case under a trust deed executed for the purpose of establishing a sanatorium, the settlor had appointed trustees other than himself. But he practically retained all the powers in his own hands. The clause in the deed dealing with investments gave power to the settlor to make loans to any person including himself with or without security. The question was whether the settlor derived an indirect benefit in the income of the trust for the purpose of applying Section 16 of the Indian I.T. Act, 1922. Section 16(1)(c) provided, inter alia, that all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be the income of the transferor. The expression 'revocable transfer' was defined as including a transfer, (a) containing any provision for the re-transfer directly or indirectly of the income or assets to the settlor or transferor, or (b) in any way giving the settlor or transferor a right to reassume power directly or indirectly over the income or assets. The question was whether the power to make a loan to the transferor or settlor could be considered to be an indirect benefit so as to constitute the transaction a revocable settlement. In that case he had not taken any loan from the trust. The contention was that till such a loan was made, in fact, no benefit, direct or indirect, had been derived by the settlor. In dealing with this aspect, Chagla C. J. pointed out at p. 213 (of 16 ITR) as follows:

' Now in this case the very fact that the settlor is to be at liberty to loan a part of the income to himself without security and without interest undoubtedly leads one to the conclusion that he does derive at least an indirect benefit. It would be an absurd construction to put upon this clause to wait till the benefit is actually derived before the court would say that the trust so made is not irrevocable for a period of six years. According to Sir Jamshedji, so long as the settlor does not lend to

himself, he does not derive any benefit, but as soon as he does so, then the court must hold that the third proviso does not apply and, therefore, the income is liable to tax. But the proper construction of the trust deed cannot depend upon what the settlor actually does or what he refrains from doing. It can only depend upon the court coming to the conclusion that as the trust deed stands he is entitled to certain benefits whether they are direct or indirect in nature and there can be no doubt looking at this clause that the settlor is entitled to a benefit under the provisions of the trust deed and that thereby he does derive an indirect benefit in the income of the trust. ' (Underlined by us)

27. This passage, in our opinion, is apposite to rebut the contention of the learned counsel for the accountable person about there being only a potential benefit by way of salary, as distinct from an actual benefit. The question is to be considered in the light of the facts. In this case, apparently having drawn large sums of money as loan, the deceased did not think it necessary or possible to draw any further amount under Clause 19 of the second trust deed for his personal expenditure. There is nothing to show that he surrendered his benefit. He could have intimated the trust that he did not propose to avail himself of the benefit of the payment for his personal expenditure. He did not do so. So long as the benefit was available under the document, it cannot be stated that he was entirely excluded from possession and enjoyment of the trust property.

28. The only other contention that requires to be considered is whether the entire estate held under trust is liable to be included under Section 10 or only that part proportionate to the benefit derived by the deceased. In the section, which, has already been extracted, it is provided that the property taken under any gift 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 shall be deemed to pass on the donor's death. It was pointed out that, even assuming that there was any benefit derived by the deceased, still the entire estate could not have been brought to tax as was done by the E.D. authorities. The expression ' to the extent ' is not to be found in the estate duty legislation of other countries. In fact, in the Bill, the words ' to the extent ' did not appear. They were subsequently added during the

course of the passage of the Bill. However, no light was available in the form of literature preceding the passage of the Bill as to what was intended by the expression 'to the extent'. It was pointed out in *Attorney-General v. Secombe* [1911] 2 KB 688 ; 1 EDC 589 , that the words 'property taken under any gift' indicated that if the section applied, what was deemed to pass was the property itself, which was the subject-matter of the gift; so that if duty attached at all, it attached to the whole of the property gifted. The expression 'to the extent' has obviously been used to soften the rigour of the provision. This part of the provision came up for consideration by this court in *V. S. Mani v. CED* : [1966]60ITR810(Mad) . In that case, it was pointed out at p. 811 as follows:

'The words 'to the extent' employed in Section 10 are not to be found either in the English or Australian Acts relating to estate duty. Though the phraseology of Section 10 in the Indian Act would appear to have been substantially borrowed from the English Act, we fail to understand why the Indian legislature introduced those words in the section unless its intention was to bring to tax only that value of property gifted which is still retained by the donor. The section, in case of partial gift, so to state, in the context of Section 10, charges only the part covered by the non-exclusion and non-retention clauses in the section. To the extent to which the donor retains an interest in the entirety of the property given away by him as gift, there will be pro tanto liability to estate duty.

It is strenuously urged for the revenue that if that was the meaning, the words 'entire exclusion' will have no sense or content. We are of the view that the word 'entirety' in the context refers only to the fractional part, the possession of which has not been taken or assumed by the donee and retained to the exclusion of the donor.'

29. Reference was made to the expression 'to the extent' occurring in Section 10 and it was pointed out that in the context of Section 40, those words clearly indicated the extent or quantum of interest. This court referred to the same construction having been placed by the Calcutta High Court in *Rash Mohan Chatterjee v. CED* [1964] 52 ITR (ED) 1.

30. In Smt. Parvathi Ammal v. CED : [1969]74ITR200(Mad) this aspect of the construction was reiterated by a Bench of this court. The last mentioned case was taken on appeal to the Supreme Court in CED v. Smt. Parvati Ammal : [1974]97ITR621(SC) . We may briefly notice the facts of that case in order to appreciate how the Supreme Court dealt with this point of construction.

31. The deceased executed a deed in 1955 giving the property in which he was carrying on the business of boarding and lodging absolutely to his five sons in equal shares. Three months after the execution of the document of gift, he took the property on lease from the sons and carried on the business as before. Later on, he gave the boarding house on sub-lease to a third party. On the donor's death the question was whether the entire value of the property was liable to be included in the principal value. The contention urged for the accountable person in that case was that only the right to possession and enjoyment in the hands of the deceased as a lessee had to be valued and included in the principal value of the estate as property deemed to pass on his death under Section 10. This contention was negatived. At pp. 97 ITR 636, it was stated as follows :

' The words ' to the extent' connote that if the donee does not assume immediate bona fide possession and enjoyment of a part or fraction of the gifted property and thenceforward retain it to the entire exclusion of the donor or of any benefit to him, by contract or otherwise, it shall be that part or fraction of the gifted property which shall be deemed to pass on the death of the donor. Those words thus seek to restrict the liability to pay estate duty in respect of only the aforesaid part or fraction of the property. They underline the intention of the legislature that in the event of the donee not assuming bona fide possession and enjoyment of a part or fraction of the gifted property and thenceforward retaining it to the entire exclusion of the donor or of any benefit to him by contract or otherwise, the estate duty shall be payable not in respect of the whole of the gifted property but only in respect of that part or fraction of the gifted property of which the donee did not assume bona fide possession and enjoyment and thenceforward retain it to the entire exclusion of the donor or of any benefit to him by contract or otherwise.'

32. It is in this connection that the decision of the Calcutta High Court in *Rash Mohan Chatterjee v. CED* [1964] 52 ITR (ED) 1 was considered and approved.

33. In the last-mentioned case the deceased settled on July 1, 1954, certain premises in trust in favour of his two sons in equal shares. The upper portion of the premises was leased to the deceased himself on a rent of Rs. 150 per month for a term of five years with effect from the date of settlement. The lease expired on June 30, 1959. The question was whether and to what extent estate duty was chargeable in regard to those premises under Section 10 of the Act. As, however, Section 10 provided that such property was chargeable only to the extent that the deceased was not excluded, estate duty was payable by the accountable person only on that portion of the premises which was in the occupation of the deceased as a lessee.

34. Thus, if the deceased was in enjoyment of only a part of the trust property and if the donee had assumed possession and enjoyment of the rest of the property and retained it to the exclusion of the donor, then estate duty would be leviable only to the extent of the property in the possession and enjoyment of the donor. The principle is clear. The section contemplates continued possession and enjoyment being assumed, by the donee. Bona fide possession and enjoyment, as indicated earlier, is such possession and enjoyment, as the property is capable of. With reference to a house property, possession and enjoyment may consist in the occupation thereof or in the leasing out of the property. To the extent that the lease was in favour of the donor, the donor would be in possession and enjoyment of the property to that extent. As regards possession and enjoyment of the rest of the property, the donor has nothing to do and, therefore, estate duty is confined to that part of the property in the possession, and enjoyment of the donor. The words 'to the extent' have to be understood in this manner. There is no scope for applying this rule to the present case, because the deceased had been in enjoyment of the income from the entire trust properties by taking substantially 70 to 80% thereof for his own enjoyment, though by way of loan. The rule of a slice of the property being taxed in such a case cannot be applied, as it is not possible to predicate with reference to the loan that it came from the income from any particular part of the property. Such contention of pro tanto liability is possible only

in the case of enjoyment of income from any particular part of the property under trust, isolated from the rest of the trust property. It is not, therefore, possible to accept this plea for proportionate taxation either.

35. It is true that the case before us is a very harsh case, as not only the trust properties are taxed in the hands of the accountable person, but there is also the exclusion of the liabilities or debts owed to the trust. But in the context of the provisions as they are in the Act, it is not possible to give any relief to the accountable person in the present reference.

36. The question referred is answered in the negative and in favour of the revenue. In the particular circumstances of the case, there will be no order as to costs.

37. Mr. T.V. Ramanathan, the learned counsel for the respondent, made an oral application asking for a certificate of fitness for appeal to the Supreme Court under Section 65 of the E.D. Act. During the hearing, the question as to the applicability of art, 134A, as introduced by the Constitution (Forty-fourth Amendment) Act, came in for consideration. Article 134A of the Constitution runs as follows :

' Every High Court passing or making a judgment, decree, final order or sentence referred to in Clause (1) of Article 132 or Clause (1) of Article 133 or Clause (1) of Article 134,--

(a) may, if it deems fit so to do, on its own motion ; and

(b) shall, if an oral application is made, by or on behalf of the party aggrieved immediately after the passing or making of such judgment, decree, final order or sentence.

determine, as soon as may be after such passing or making, the question whether a certificate of the nature referred to in Clause (1) of Article 132, or Clause (1) of Article 133 or, as the case may be, sub-clause (c) of Clause (1) of Article 134, may be given in respect of that case.'

38. This article would apply if there was a judgment, decree or final order.

39. In *S. A. L. Narayan Row v. Ishwarlal Bhagwandas* : [1965]57ITR149(SC) , the Supreme Court dealt with the question as to whether an appeal lay to the Supreme Court against a judgment rendered in a writ petition under Article 226 of the Constitution. The court has also considered the question whether there is a judgment or decree or final order in a reference under the provisions of the I.T. Act. The Supreme Court was of the opinion that there is no judgment, decree or final order in answering a reference, because the court is pronouncing only an advisory opinion. At p. 156, the following passage occurs:

' Section 261 of the Income-tax Act, 1961, under which an appeal lies to this court from any judgment delivered on a reference made under Section 256 in any case which the High Court certifies to be a fit one for appeal to this court is not an exception to that rule. It is not because the reference is not a civil proceeding that a certificate under Article 133 may not be granted; it is because of the advisory character of the jurisdiction exercised by the High Court under Section 256 that the opinion delivered by the High Court in a reference under Section 256 is not a judgment, order or decree within the meaning of Article 133. '

40. Again, at p 158, their Lordships observed thus :

' An advisory opinion in a tax reference may not be appealed from with certificate under Article 133, because the opinion is not a judgment, decree or final order..... '

41. In view of the clear pronouncement of the Supreme Court, it is not possible or necessary for any party to a reference to apply for a certificate under Article 134A of the [Constitution of India](#).

42. In the present case, the application has been made under Section 65 of the E.D. Act. That provision has been put into the statute in exercise of the powers conferred on Parliament under Article 138 of the Constitution. That article provides that the Supreme Court shall have such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer. Section 65 of the E.D. Act relates to a matter in the Union List, and Parliament has conferred powers of appeal on the Supreme Court subject to a certificate of

fitness. There is no requirement that under Section 65 of the E.D Act, it is necessary to have any application. It is enough, therefore, if there is an oral application. The language of Section 65 of the E.D. Act appears to be consistent with the view that, under the section, an oral application can also be made. Entertaining the oral application made in the present case, we consider that this is not a case in which certificate of fitness can be issued. We have decided the case more on the basis of facts, and applied only settled principles. The questions referred here do not require to be decided by the Supreme Court. The matters raised here have already been decided by the judgments of the Supreme Court. We reject the application for leave to appeal to the Supreme Court, as we do not consider this case to be fit for grant of leave under Section 65.

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