

Sunil Roy, Calcutta Vs. Controller of Estate Duty, Calcutta

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Court : Kolkata

Decided On : May-23-1969

Reported in : AIR1970Cal542,[1970]77ITR668(Cal)

Judge : Sankar Prasad Mitra and ;Sabyasachi Mukharji, JJ.

Acts : [Estate Duty Act, 1953](#) - Section 10

Appeal No. : Matter No. 122 of 1969

Appellant : Sunil Roy, Calcutta

Respondent : Controller of Estate Duty, Calcutta

Advocate for Def. : B.L. Pal and ;Suhas Sen, Adv.

Advocate for Pet/Ap. : Sambidananda Das, Adv.

Judgement :

Sankar Prasad Mitra, J.

1. This is a reference under Section 64 (1) of the [Estate Duty Act, 1953](#). On the 1st May, 1955, one Probodh Chandra Ray executed a Deed of Trust in which he was referred to as a settlor. There were two trustees under this Deed viz., Usharanjan Ghosh and Sunil Hoy, the only son of the settlor, The subject-matter of the trust was premises No. 38, Southern Avenue, Calcutta, where the settlor used to

reside. The Trustees were directed to pay the rates and taxes and out of the balance of the income of the property they were to pay in any proportion whatsoever to Sm. Jyotirmoyee Ray, the settlor's wife, Sunil Roy, the settlor's son, Uma Mitra, the settlor's daughter, any children of Sunil Roy and any children of Uma Mitra by her existing marriage. None of these beneficiaries had any power of anticipation. At the end of a period of ten years, the trustees were to transfer the property to Sunil Roy or to any major child of Sunil Roy or Uma Mitra or to Uma Mitra's children born of her the then existing marriage. In the absence of any of the beneficiaries aforementioned the property was to go to the Sudharan Brahmo Samaj, On the 14th August, 1955, the settlor executed another document in respect of a property at Regent Park with which we are not concerned in this reference. The Deed of the 14th August, 1955, is, however, relevant to us to this extent that in this Deed executed a few months after the first Deed the settlor states that he was residing not at premises No. 38, Southern Avenue in Calcutta, but at premises No. 78/1, Sardar Sankar Road, in Calcutta.

2. Even before that only two days after the execution of the first Deed on the 1st of May, 1955, the settlor on the 3rd May, 1955, wrote to the Post-master, Calcutta-19, to redirect his letters to premises No. 78/1, Sardar Sankar Road. Then on the 26th August, 1955, the settlor wrote to the Insurance Company about his change of address. In September, 1955, he wrote to the State Bank of India intimating the change of address. In the same month he asked the Calcutta Electric Supply Corporation Ltd. to refund his security deposit with respect to premises No. 38, Southern Avenue, Calcutta, and to terminate his contract with the said Corporation in view of the change of ownership.

3. The trustees under the Deed of the 1st May, 1955, applied on the 6th September, 1955, to the Municipal Corporation for mutation of ownership. The trustees were also assessed to income-tax on income from premises No. 38, Southern Avenue.

4. A little over four years later, however, on the 8th May, 1959 the settlor executed a document in which he stated that the indenture dated May 1, 1955 created what would appear to be a deed of trust and that he executed the deed 'himself knowing

and also the persons in whose favour the deed was so executed knowing it to be an out and out benami transaction with the view of avoiding payment of estate duty.' He stated in this document of the 8th May, 1959, that he never divested himself of his proprietary interest and actual physical possession and that he had at all times been and was still living in premises No. 38, Southern Avenue in his own right as the exclusive owner thereof with his wife, daughter and son-in-law. He stated that he cancelled and determined the transfer by way of benami i.e., the trust created by the indenture dated the 1st May, 1955. It was stated further that he had to execute the document of the 8th May, 1959, because the relationship between Sunil Roy and Uma Mitra was not quite happy. The settlor also on the same day viz., the 8th May, 1959, executed a Will under which he bequeathed the property at 38, Southern Avenue to Sunil Roy subject only to the condition that his wife should have the right of residence exclusively in a portion of the said premises. In this Will he also declared that Sunil Roy would have no claim whatsoever to the property No. 10, Regent Park gifted to his daughter. He appointed his son Sunil Roy and his wife Jyotirmoyee Roy as executor and executrix. In the Will the son is stated to be residing at premises No. 38, Southern Avenue, Calcutta. None of these documents of the 8th May, 1959, has been registered. The will has also not been probated.

5. At the hearing before us learned counsel for the Revenue placed considerable reliance on these two documents of the 8th May, 1959, in support of his contention that the property viz., premises No. 38, Southern Avenue, Calcutta, cannot escape the levy of estate duty. These documents may have created complications for the assessee at the initial stages of this case before the tax authorities but, in view of the findings they have arrived at, this Court, dealing with a reference under Section 64 (1) of the [Estate Duty Act, 1953](#), cannot be invited to attach any importance to them. In paragraph 11 at page 43 of his order the Appellate Controller of Estate Duty, Eastern Zone, Calcutta, has stated:--'In my opinion the document dated 8th May, 1959, is only an evidence of the anger displayed by the father as a result of the various family quarrels which culminated in the filing of a complaint by his son Sunil Roy on 4th July, 1958, against the husband of his sister i. e. the son-in-law of the deceased. It is not necessary to recapitulate the entire course of the history of the litigation between the brother and the sister which has

taken them to the Alipur Court and the Appellate Court to the District Judge and later on to the Calcutta High Court also. The position as it appears to me is that in his anger the father attempted to execute a document seeking a declaration of the cancellation of the trust. In my opinion this document is of no legal validity and has not served the purpose of cancellation of the trust which in any case was not in his power once he created an irrevocable trust and handed over the property to the trustees.' We have gone through the order of the Appellate Tribunal dated the 25th May, 1968. The Tribunal has not in this order disturbed the findings of the Appellate Controller of Estate Duty so far as this aspect of the case is concerned. On the contrary at page 54 in paragraph 17 the Tribunal says:-- 'Before closing, we may clear up one aspect. The Departmental Representative appeared to suggest that the deceased was throughout in the premises right from 1-5-1955. The Appellate Controller has accepted the accountable person's case that the deceased soon after executing the document moved out of the premises and we do not find any reason to differ from him as there are no materials to show that the Appellate Controller did not properly come to the said conclusion. Our finding on this aspect is that the deceased moved out of this premises soon after the execution of the document: but subsequently came into it, at any rate, a few days before his death.'

6. These observations of the Appellate Controller and the Tribunal have finally set at rest the controversy that was sought to be raised before us on the basis of the two documents of the 8th May, 1959.

7. In the course of the estate duty proceedings, however, the Assistant Controller of Estate Duty held that the property gifted to the son, was enjoyed by the deceased right up to the date of his death inasmuch as he seemed to have lived and died in that place. The Assistant Controller was of opinion that the property had passed under Section 10 of the [Estate Duty Act, 1953](#).

8. The Appellate Controller's verdict was in favour of the applicant. The Tribunal, however, came to the following findings:--

(1) It is not proper to proceed on the assumption that the several provisions in the Estate Duty Act dealt with mutually exclusive situations;

(2) the Appellate Controller is not correct in proceeding on the assumption that Section 10 is excluded from the present case merely because there was a document creating a trust settlement;

(3) Section 10 covers the situation of a gift through the medium of trust or settlement;

(4) the Appellate Controller's inference was that the trustees assumed possession of the property. The only aspect that remained for investigation, therefore, was whether the deceased was entirely excluded from the enjoyment of the property by the trustees;

(5) On the facts of this case, the deceased remained in the premises admittedly for a few days after the document of the 1st May, 1955, and he died in the premises. During the period of his lifetime he was thus not really excluded from the possession and enjoyment of the premises. The provisions of Section 10 are, therefore, attracted to this case; and

(6) the deceased moved out of 38, Southern Avenue soon after the execution of the document of the 1st May, 1955 but subsequently came into it a few days before his death.

9. The Tribunal has confirmed the assessment based on the application of Section 10. And the following question of law has been referred to this Court:--

'Whether, on the facts and in the circumstances of the case, the provisions of Section 10 were attracted so as to justify the inclusion of the value of 38, Southern Avenue in the assessment.'

10. Now, Section 10 of the [Estate Duty Act, 1953](#), as it stood at the material time was, inter alia, 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

11. The Supreme Court in *George Da Costa v. Controller of Estate Duty, Mysore* : [1967]63ITR497(SC) , has construed these provisions. Their Lordships are of the view that the crux of Section 10 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. According to their Lordships, as a matter of construction both these conditions are cumulative and unless each of these conditions is satisfied, the property would be liable to estate duty under Section 10 of the Act. The Supreme Court has said further that 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 the opinion of their Lordships, be construed *eiusdem generis* and it must be interpreted to mean some kind of legal obligation or some transactions enforceable at law or in equity, which, though not in the form of a contract, may confer a benefit on the donor. Their Lordships held that as a matter of construction 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. The first limb of the section may be infringed if the donor occupies or enjoys property or income even though he has no right to do so which he could legally enforce against the donee; 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 the donee 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 would be deemed to have passed on the death of the donor and will be subject to levy of estate duty.

12. Learned Counsel for the department submitted to us that this was a fit case for applying the first part of Section 10. We cannot uphold this contention in the face of the overwhelming evidence on record which we have already discussed. In this case the donee had assumed possession of the property immediately after the gift,

the donee had also retained possession and enjoyment throughout. No benefit had been conferred on the donor by contract or otherwise, as explained by the Supreme Court in the aforesaid decision. After possession and enjoyment had been bona fide assumed by the donee, and retained by him, mere presence or stay of the donor for a few days prior to his death, on the facts and circumstances of this ease, without any benefit being given to the donor by contract or otherwise, would not prevent retention of the possession and enjoyment of the property by the donor (sic) to the exclusion of the donee (sic) as contemplated by the Section. In these premises, we are unable to agree with the Tribunal's view and our answer to the question in this reference is in the negative. The Controller will pay to the applicant the costs of this reference.

Sabyasachi Mukharji, J.

13. I agree.

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