
(1975) 01 AHC CK 0019

Allahabad High Court

Case No: Misc. Estate Duty Reference No. 358 of 1971

K.C. Srivastava

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision: Jan. 3, 1975

Acts Referred:

- Estate Duty Act, 1953 - Section 22

Citation: (1979) 117 ITR 221

Hon'ble Judges: M.N. Shukla, J; K.C. Agrawal, J

Bench: Division Bench

Advocate: Benarsi Dass and Shanti Bhushan, for the Appellant; R.R. Misra, for the Respondent

Final Decision: Dismissed

Judgement

K.C. Agrawal, J.

This is a reference u/s 64(1) of the E.D. Act, 1953 (Act 34 of 1953) (hereinafter referred to as "the Act"), made by the Income Tax Appellate Tribunal, Delhi Bench "C". The following question has been referred by it for our opinion ;

"Whether, on the facts and in the circumstances of the case, properties settled on trust at the time of the execution of trust by the deceased could be deemed to have passed on her death ?"

2. The matter arises out of the estate duty case of Miss H.S. Oliphant, who died on September 26, 1962. Sri K.S. Srivastava, who is one of the trustees under the trust created by Miss Oliphant, is the accountable person. He filed a statement regarding the estate of the deceased before the Asst. CED. Miss Oliphant founded a preparatory school for Indian boys called Welham Preparatory School in 1937. She acquired more properties thereafter. On September 29, 1956, having realised that she being 73 years of age was sufficiently old, executed a trust deed settling all the properties in favour of the school. This trust deed was executed by her to ensure the

continuity and efficient management of the school so that it could render service to the Indian nation. She constituted a board of trustees consisting of herself and six others. The properties, which were assigned and transferred to the trustees, were mentioned in schedule "A" of the trust deed. The value of these properties was estimated at Rs. 2,62,503-15-9 in the trust deed. The immovable properties included buildings at Nos. 7, 7-A and 11-B, Circular Road, Dehra Dun. Apart from these buildings, there were two vacant plots of land at Nos. 5 and 9, Circular Road, Dehra Dun. All these properties were adjacent to each other. Movable properties included furniture and fittings, electric installations, refrigerator and security deposit. The relevant clauses of the trust deed which deserve to be mentioned for the purposes of deciding this reference are the following I

" Clause 2:

That I shall continue to manage and run the school as trustee till such time as suitable arrangements can be made to appoint a principal.

Clause 3 :

That I shall receive a sum of Rs. 1,000 per month out of the funds of the school and shall have the right to live in the cottage at present occupied by me at No. 7, Circular Road, Dehra Dun, during my lifetime."

3. Miss Oliphant continued to be in charge of the school until a short time before her death, which took place on September 26, 1962. On her death, Sri K.S. Srivastava filed a statement regarding the estate of the deceased disclosing movable properties of Rs. 2,674 only. Consequently, it will be found that the properties of the trust created by the deceased were not shown. On being questioned by the Asst. CED about these properties, Sri K.S. Srivastava claimed that a trust settling them having already been created in 1956, and their possession having been delivered to the trust, these properties could not and did not pass on the death of Miss Oliphant to the trust. On this assertion, his claim was that these properties being not the properties of the deceased at the time of her death, were not dutiable. The Asst. CED, however, did not accept the case of the accountable person. He found that Miss Oliphant was receiving Rs. 1,000 per month towards her maintenance from the income of the trust properties and was also in possession and enjoyment of a residential house throughout her life and, therefore, the whole of the trust property settled on trust by Miss Oliphant passed on her death. The Asst. CED, accordingly, held that all the properties settled by Miss Oliphant were liable to be taken into account for assessing the estate duty.

4. The accountable person preferred an appeal to the Zonal Appellate Controller. The Appellate Controller also agreed with the Assistant Controller that the properties comprised in the trust created by the deceased passed on her death. Being aggrieved, the accountable person challenged the order of the Appellate Controller by means of an appeal u/s 63 of the Act to the Income Tax Appellate

Tribunal. The Tribunal also did not find any substance in the appeal and, consequently, dismissed the same. The accountable person, therefore, filed an application u/s 64(1) of the Act to the Tribunal requiring it to refer to the High Court the question involved in the case for its opinion. The Tribunal accepted the application made by the accountable person and referred the question mentioned above.

5. We may now refer to some of the provisions of the Act which would need consideration for deciding the question referred for the opinion of the High Court. Section 2(16) defines "property passing on the death", which includes property passing either immediately on the death or after any interval, either certainly or contingently. Section 5 is a charging provision. It provides:

"(1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the territories which immediately before the 1st November, 1956, were comprised in the States specified in the First Schedule to this Act, and in the Union territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry which passes on the death of such person, a duty called "estate duty" at the rates fixed in accordance with Section 35.

(2) The Central Government may, by notification in the Official Gazette, add the names of any other States to the First Schedule in respect whereof resolutions have been passed by the legislatures of those States adopting this Act under Clause (1) of Article 252 of the Constitution in respect of estate duty on agricultural lands situate in those States, and on the issue of any such notification the States so added shall be deemed to be States specified in the First Schedule within the meaning of Sub-section (1)."

6. Section 22 of the Act is the next important provision for the purpose of the present case. It provides as under :

"Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person under a disposition not made by the deceased or under a "disposition made by the deceased where (whether by virtue of the original disposition or of a subsequent surrender of any benefit originally reserved to the deceased or otherwise) possession and enjoyment of the property was bona fide assumed by the beneficiary at least two years before the death and thenceforward retained by him to the entire exclusion of the deceased or of any benefit to the deceased by contract or otherwise :

Provided that in the case of property held by the deceased as sole trustee for another person under a disposition made by himself, the period shall be five years."

7. Estate duty is leviable on the principal value of all property which passes on the death of a person. Section 22 of the Act, however, incorporates an exception to the general rule by providing that property which was held by the deceased as a trustee shall not be deemed to pass on the death of the trustee. The reason is that the trustee did not have any personal interest in the property which could be deemed to have passed on his death. The word "passing" has not been defined in the Act. A thing, however, is said to pass on when it changes hands from one to another. In the case of a trust such a situation does not arise as the death of a trustee does not result in passing of his property to another. Property belonged to the trust before his death and would continue to belong to it even after his death. The benefit of Section 22 of the Act is, however, available to a trustee with regard to the properties settled by him for the benefit of a trust of which he may even be a trustee, provided-

(1) possession and enjoyment of the property was bona fide assumed by the beneficiary at least two years before the death of the trustee.

(2) after obtaining possession of the trust property the same is retained and enjoyed by the beneficiary to the entire exclusion of the deceased trustee.

8. In the event of either of these two conditions missing, the property shall be deemed to have passed on the death of the settlor and thus will be liable to estate duty.

9. Adverting to the facts of the present case the question is whether Miss Oliphant reserved benefit or interest in her favour under the trust deed executed by her which could make her properties dutiable under the Act. We have already mentioned the findings arrived at against the accountable person. The counsel for the accountable person, however, submitted that Miss Oliphant did not reserve anything for herself in the trust deed which could create any charge in her favour. The trust deed only stipulated monthly payment of Rs. 1,000 towards her services which she was required to render as principal. Place for her residence was also reserved by her in the capacity of a principal or a managing trustee for rendering certain service and not in her capacity as a settlor.

10. We have considered the above submission but are unable to accept the same. A reading of Clauses 2 and 3 shows that she was, in fact, assigned the work of the principal of the school for the limited duration, viz., as long as another person was not found to replace her. But the liability of the trust to pay her Rs. 1,000 as salary was not restricted to this period. This payment had to be made to her irrespective of the fact that she ceased to manage the school and function as a principal. The payment was to be made during the lifetime of the deceased. The counsel for the accountable person contended that these clauses should be read together and by applying the rule of liberal interpretation the court should find that Miss Oliphant was entitled to Rs. 1,000 as salary till such time that she worked as principal.

11. The principle of interpretation applicable to such deeds requires that the document in question should be read as a whole for the purpose of finding its true and correct meaning. Applying the said principle to the present deed it is not possible to come to the conclusion desired by the accountable person. The right to receive Rs. 1,000 per month coupled with her right to live in the cottage at 7, Circular Road, Dehra Dun, during her lifetime, conclusively establish that she made these reservations in her favour so that no one could deny them to her till she was alive.

12. The above discussion takes us to the next point regarding the effect of these reservations on the liability of the payment of estate duty. Reservation of right to continue to reside in the school certainly resulted in depriving the beneficiary of obtaining its possession and enjoyment. Section 22 of the Act, as discussed above, requires bona fide possession to be assumed by the beneficiary and thenceforward retained to the entire exclusion of the settlor. Under the trust deed, Miss Oliphant was entitled to live in the school in the same way as before. This obviously means that there was no change in her possession, which would amount to negation of exclusion as required by Section 22 of the Act. It is also not correct that since the proprietary possession was assumed by the trust immediately after the settlement, its inability to obtain physical or actual possession of the cottage was inconsequential. There is nothing in Section 22 of the Act to indicate that if the beneficiary does not immediately on the execution of the trust deed obtain possession and enjoyment of the property and thenceforward retain it, it is only the right to possession or enjoyment that passes on the death of the settlor. From the mere fact that Miss Oliphant had a right to live in the cottage during her lifetime alone and that the same had to revert to the trust on her death, it cannot be said that:

"...possession and enjoyment was bona fide assumed by the beneficiary at least two years before the death and thenceforward retained by him to the entire exclusion of the deceased..."

13. Dealing with a similar controversy arising out of a case u/s 102 of the New South Wales Stamp Duties Act, 1920, the Judicial Committee observed in *Clifford John Chick v. Commissioner of Stamp Duties* [1958] AC 435; [1959] 37 ITR 89; 3 EDC 915, as under (p. 449):

"Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined. If he has not been so excluded, the eye need look no further to see whether this non-exclusion has been advantageous or otherwise to the donee."

14. The provision of Section 22 of the Act having been enacted with the same object and purpose, the law laid down in the above case frilly applies to the instant case. The court is only required to find about the exclusion of the settlor and if it is found

that he is in possession despite the settlement, the property becomes dutiable.

15. The interpretation of Section 10 of the Act, which is very near to Section 22 in its object, purpose and language, has been the subject-matter of decision in a number of cases. Before referring to those decisions, we may quote the section itself. It reads as under :

"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 :

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."

16. The first case of the Supreme Court, which has been followed by it in subsequent decisions, is [George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore](#) . In this case, one Dr. C.F. Da Costa purchased a house in the joint names of himself and his wife on February 13, 1940. They subsequently made a gift of the house to their two sons. Although the document recited that the donee had accepted possession, yet the parents factually continued in possession of the house. On the death of the donor, the Asst. CED included the value of this property in the principal value of the estate that passed on the donor's death. Ultimately, the Supreme Court held that the value of the house was correctly included in the estate of the donor. Dealing with the question of "possession and enjoyment" it stated (p. 501):

"It was pointed out that there was no such exclusion in the present case and the finding of the Board is that the deceased continued to stay in the house till his death as the head of the family and was looking after the affairs of the household. It was contended therefore, that the first limb of the section is not satisfied in this case and the property must be held to pass on the death of the deceased under that section. In our opinion, the contention of the respondent must be accepted as correct. 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."

17. This decision has been recently followed by the Supreme Court in [Controller of Estate Duty, Madras Vs. Parvathi Ammal](#), . This appeal arose out of the estate duty case of one R. Venkateswara Iyer. He executed a document describing it as a partition deed on March 11, 1955. Under this document, he gave one of the houses, which was known as "Mayavaram Lodge", to his five sons in equal shares. On June 25, 1955, he entered into an agreement with his sons under which they leased out this house to the deceased, who continued to carry on his boarding and lodging business. On his death, the accountable person claimed that this house should be excluded from being taken into account for payment of estate duty as the same had been given to the sons more than two years before his death. The accountable person claimed that, as the house was taken on lease after the original transfer, the said transaction of lease could not be taken to be a special benefit derived by the deceased. The revenue lost the case before the Tribunal. The appeal lodged in the Supreme Court by the CED thereafter was accepted. The observations helpful for our, purpose are as under (p. 634):

"The principle to be kept in view in such cases is to examine the deed of gift and find out as to what is the subject-matter of the gift. If the gift comprises the full ownership of the property not shorn of any right including tenancy right in favour of the third parties, in such an event in order to prevent the incidence of estate duty immediate bona fide physical possession and enjoyment of the gifted property must ordinarily be assumed by the donee and retained thereafter to the exclusion of the donor. In case, however, the subject-matter of the gift is property shorn of certain rights, in that case the residue of the rights in that property would be the subject-matter of the gift. In such an event it may not sometimes in the very nature of things be possible for the donee to assume physical possession and enjoyment of the gifted property. In such cases, the possession and enjoyment of the gifted property which may be assumed by the donee would only be such as is possible under the circumstances."

18. We have already noticed in the instant case that Miss Oliphant reserved her right of residence in the school at 7, Circular Road, Dehra Dun, and did not hand over its possession. Consequently, this property was liable to estate duty u/s 22 of the Act.

19. Dr. R.R. Misra, counsel appearing on behalf of the revenue, contended that the fact that possession of one of the properties was not handed over to the trust, made all the properties settled under the trust deed liable to estate duty. This submission of the counsel for the revenue, in our opinion, runs counter to Section 22 of the Act. It provides that the property whose possession and enjoyment was not assumed within two years of the death, of the settlor, that alone shall be deemed to pass on his death. But where there are a number of properties settled under a trust deed, all of them cannot be deemed to pass on the death of the settlor merely because possession and enjoyment of one of the properties passed on the death of the settlor. For applying Section 22 of the Act, all the properties settled under a trust will

have to be taken separately. We, therefore, find that the value of the school at 7, Circular Road, Dehra Dun, alone shall be liable to estate duty u/s 22 of the Act on this ground.

20. The next question for determination is regarding the effect of reservation of maintenance made by Miss Oliphant in her favour on properties settled under the trust deed other than the residential cottage. The relevant part of this reservation mentioned in Clause 3 was : "That I shall receive a sum of Rs. 1,000 per month out of the funds of the School". This reservation made by her does not specify the property from the income of which this amount had to be received by her. The right to receive money spreads over the entire "funds of the school". Funds of the school in the instant case meant tuition fees, hostel fees, game charges, etc. It has to be remembered that the trust in question was educational and charitable, created for the promotion and encouragement of education at the Welham Preparatory School. The properties settled under the trust deed were:

1. 7 and 7A, Circular Road buildings, consisting of hostel building and class rooms and residential cottage.
2. 11-B, Circular Road bungalow used as residence of staff.
3. 5, Circular Road, vacant land used as games field.
4. 9, Circular Road, vacant land used as games field.
5. Furniture and fittings.
6. Electric installations.
7. Refrigerator.
8. Security deposits with the city, (sic)

21. The details given above would indicate that tuition fees, hostel fees and games fees received from students could alone constitute "funds of the school". All the properties given in trust were in the use and occupation of the school. To call the moneys received from the students as income from the trust properties would have appeared a little odd. It is in this background that it was thought proper to describe it as "school funds". In fact, "funds of the school" is another name for the income from the trust properties. Counsel for the accountable person admitted that in case the trust deed had used the words "the income of the trust properties" instead of "the funds of the school", the estate of the deceased might have been liable to pay duty. But, as the settlor desired her maintenance out of the funds of the school, which was something different from the income of the trust properties, therefore, the view of the Tribunal is erroneous. We are unable to find any tenability in this submission. As observed above, "the funds of the school" in the instant case were the most appropriate words used in the deed. The fund was comprised of the income of the trust properties and, therefore, the mere use of these words in the

deed would not help the accountable person. The school was not even receiving any grant from the Government or any donation from the public and, therefore, this circumstance also goes against the contention, mentioned above.

22. The counsel for the accountable person referred to a decision in [Controller of Estate Duty Vs. R. Kanakasabai and Others](#), and urged that as the provision of monthly maintenance made in the deed in favour of the school was not charged on the properties settled, the settlor could not be said to have retained any benefit or interest in the properties settled and, accordingly, his estate could not be said to pass on his death. In the case noted above, the material words used in the gift deed executed by the donor in favour of his sons and grandsons were :

"You have to pay me during my lifetime a sum of Rs. 1,000 per year for my domestic expenses."

23. Dealing with the facts of the above case and considering the scope of Section 10 of the Act, the Supreme Court held that the benefit received by the settlor should be referable to the property gifted and as the provisions for annual payments and maintenance made in the deeds were not charged on the properties settled under the gift deed, therefore, the deceased donor could not be said to have retained anything for his benefit either in the properties settled or in respect of their possession.

24. For the purpose of applying the principle laid down in the above case by the Supreme Court, it has to be observed that the creation of a charge does not require the use of any particular form or some technical words. All that the law requires is clear indication of the intention to make a particular property a security for payment of money. In [Nathan Lal and Others Vs. Durga Das](#), this court, dealing with the requirements of a charge, observed that (p. 64):

"A charge does not involve the transfer of the interest in the property subject thereto and arises from the circumstance that certain property, movable or immovable, or any interest in such property, is indicated with certainty as the fund out of which a certain claim is to be met or satisfied, the fund so indicated being the security for the claim."

25. It is, therefore, the intention which has to be ascertained for finding out the true character, and if a sum of money is payable out of the fund or profits of a particular property, that will constitute a charge upon that property. Examining the facts of the present case in the light of the above, it is found that Miss Oliphant definitely and in the most unequivocal terms stated in the deed that she would receive her maintenance out of the funds of the school. The intention, therefore, obviously was to realise this sum of Rs. 1,000 per month from this fund solely and exclusively. So, the obligation of the payment of the maintenance dischargeable from the income of the trust properties constituted a security.

26. On the facts of the present case, it is established that the deceased had retained an interest in the trust properties settled and, consequently, the provision of maintenance was directly referable to the transaction of settlement of the properties in favour of the trust. The submission of the counsel for the accountable person that the facts of the present case were in pari materia with those of the Supreme Court case in [Controller of Estate Duty Vs. R. Kanakasabai and Others](#), is not correct. In this reported case, the deceased did not mention the property or the source from which the maintenance was payable to him. In those circumstances, he could not lay his hands on the properties settled to enforce his claim of receiving maintenance. But here the position is completely different as the reservation puts an obligation for the maintenance from the fund of the school. This creates in Miss Oliphant a legally enforceable right against the trust properties. We, therefore, find that the above submission is devoid of merit.

27. The counsel for the accountable person thereafter urged that the profits earned by the school by charging tuition fees, hostel fees and games fees, etc., could not be treated as income from the trust properties as education is not imparted by this institution for making income. Therefore, the reservation for maintenance from school funds by Miss Oliphant could not be considered as a charge created on the income of the trust properties. According to his submission, this circumstance excluded the operation of Section 22 of the Act, relied upon by the revenue. A reading of the trust deed shows that it was a charitable trust created for expansion of education. It is not a necessary element of a trust being charitable that it should deal in charity without charging anything from the persons who are benefited by it. Poverty is also not a necessary element in a charitable trust and, therefore, it need not be meant for the benefit of the poor alone. Dealing with a similar argument, it was observed in *Verge v. Somerville* [1924] AC 496

".....a valid charitable trust may exist notwithstanding the fact that in its administration the benefit is not confined by the donor to the poor to the exclusion of the rich."

28. It is thus clear that a trust created for advancement of education is charitable despite the fact that it is meant for the benefit of the rich and poor alike. It is also not correct to argue that merely because various types of fees were being charged, therefore, the funds collected could not be recognised as income from trust properties, as it is not a necessary element in a charitable trust that it should provide benefit for nothing or less than its costs. We may refer to [Commissioner of Income Tax, Bombay City Vs. Breach Candy Swimming Bath Trust, Bombay](#), in support of the above proposition. We, accordingly, find no merit in this submission as well, of the counsel for the accountable person. Reservation of the right to receive monthly maintenance having not been confined to the income of one or some of the trust properties, it cannot be said that some particular property is subject to the obligation for payment of maintenance. In the result, all the

properties are subject to the obligation of providing maintenance. Hence, we find that all the properties settled on trust on the date of execution of the trust by Miss Oliphant would be deemed to have passed on her death.

29. For the reasons given above, we answer the question referred to the High Court in favour of the revenue and against the accountable person. The revenue will be entitled to receive Rs. 300 as costs of this reference.