
AIR 1965 Guw 1

Gauhati High Court

Case No: Estate Duty Ref. No. 1 of 1963

Controller of Estate
Duty

APPELLANT

Vs

Shri Birendra Kumar
Sen

RESPONDENT

Date of Decision: Jan. 22, 1964

Acts Referred:

- Constitution of India, 1950 - Article 252
- Estate Duty Act, 1953 - Section 10, 2(16), 35, 5, 64(1)

Citation: AIR 1965 Guw 1

Hon'ble Judges: G. Mehrotra, C.J; S.K. Dutta, J

Bench: Division Bench

Advocate: P. Choudhuri, for the Appellant; S.K. Ghose and J.P. Bhattacharjee, for the Respondent

Judgement

G. Mehrotra, C.J.

The following question of law has been referred to this Court by the Income Tax Appellate Tribunal. Calcutta Bench A. Calcutta u/s 64(1) of the Estate Duty Act, 1953 (hereinafter called "the Act") for opinion:

Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the donor was entirely excluded from the possession and enjoyment of the subject-matter of gift i.e. the half share of the partnership business known as Upper Assam Pharmacy and accordingly, the provisions of Section 10 of the Estate Duty Act were not attracted to the property so gifted?

The case has been seated to this Court on an application made by the Controller of Estate Duty Assam, Tripirra and Manipur.

2. The relevant facts are that the deceased, "Shri Jaanendra Mohan Sen was the sole proprietor of a pharmacy business at Dibrugarh known as upper Assam Pharmacy. On the 21st January 1957 he made an absolute gift to his eldest son, Shri Birendra Kumar Sen of.

proprietary interest in the said business in the shape of a half partner, i. e. eight annas in the rupee.

On the same date he entered into a partnership agreement with the donee in respect of the said (business, under a registered deed of partnership dated 21.1.1957 sharing profits and loss in the- said business equally. The entire business was valued at Rs. 60,000/- and each of the partners was credited with Rs. 30,000/- in the partnership books. On the 15th August, 1960 Shri Jaanendra Mohan Sen died, i, e. more than two years after the date of the gift. The question arose about the estate duty assessable on the chargeable estate of the deceased Shri Jnanendra Mohan Sen. The Assistant Controller of Estate Duty held that Section 10 of the Estate Duty Act applied to the facts of the case and thus the property which was the subject matter of the gift was liable to estate duty. He thus included the son's share in the partnership in the dutiable estate of the deceased. On appeal the Appellate Controller held that the property gifted was a half share in the business and the mere fact of carrying on of the business in partnership does not amount to the retention of the possession and enjoyment of the property by the donor. The Appellate Controller thus excluded the afore-said inclusion from the principal value of the estate. An appeal was preferred by the Department before the Appellate Tribunal. The Tribunal upheld the decision of the Appellate Controller and rejected the contention of the Department. An application was then made by the Department for reference to this Court.

3. The contention of the counsel for the Department is that on the plain language of Section 10 of the Act the capital investment of the son in the partnership which he got as a gift from the father formed part of the dutiable estate. "Section 2(16) of the Act define "property passing on the death as follows:

Property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and on the death includes "at a period ascertainable only by reference to the death.

Section 5 of the Act provides as follows:

5. (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 States specified in the First Schedule to this Act, 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).

Section 9 of the Act reads as follows:

9. (1) Property taken under a disposition made by the deceased purporting to operate as at immediate gift inter vires whether by way of transfer, delivery, declaration of trust, settlement upon persons in succession, or otherwise, which shall not have been bona fide made two years or more before the death of the deceased shall be deemed to pass on the death.

Provided that in the case of gift made for public charitable purposes the period shall be six months.

2. The provisions of Sub-section (1) shall not apply to gifts made in consideration of marriage or which are proved to the satisfaction of the Controller to have been part of the normal expenditure of the deceased, but not exceeding rupees five thousand in the aggregate.

Section 10 runs 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.

4. As the present gift admittedly has been made more than two years before the death of Shri Jaanendra Mohan Sen. Section 9 of the Act will not be attracted. The only question referred to us is whether in the circumstances of the case Section 10 is attracted. Section 10 in effect lays down that the gifts which have not been perfected will not be regarded as divesting the donor of his right in the property for the purposes of assessing the estate duty. It only lays down that even though the donor has purported to part with the ownership of the property, it will be deemed to pass on the donor's death to the donee for the purposes of the payment of the estate duty. Before however, this section can be excluded, three things are essential, firstly that the donee has resumed immediate possession and enjoyment of the gifted property, secondly that having assumed such

possession the donee has retained possession and enjoyment to the entire exclusion of the donor and thirdly that the donee has retained possession and enjoyment of the property to the exclusion of any benefit conferred on the donor under the gift. In the present case it is not contended by the Department that the donee did not assume bona fide possession or enjoyment of the gifted property immediately after the gift. It is further urged by the Department that no benefit was conferred under the gift on the donor and thus the question of excluding the donor from benefit does not arise in the present case. The only contention of the Department is that from the circumstances of the present case and the materials on the record it is evidently clear that the donee has not retained bona fide possession and enjoyment of the gifted property to the entire exclusion of the donor. The question which the court has to ask in considering the applicability of section 25 is whether it can be said in the circumstances of the present case that the donee, namely Shri Birendra Kumar Sen retained to the entire exclusion of his father Janendra Mohan Sen the half share which he got under the gift in the business, when on the same date the gift was executed, he entered into, a partnership with his father to carry on a similar business and as a capital for the new business, he subscribed his half share in the old business which was gifted to him.

5. The Tribunal found as a fact that the subject matter of the gift in this case was the half share in the partnership business and thus the finding is to be accepted by this Court and the question referred to is to be answered on the finding of fact arrived at by the Tribunal.

6. The deed of gift which forms part of the statement of the case sets out that the donee Birendra Kumar Sen who is a Bachelor of Science, has been actively associated with the said pharmacy business and has been faithfully devoting his labour and skill in the development of the said business, which has materially contributed towards its present position which is fairly valued at Rs. 60,000/- more or less as on the 31st day of December 1956 and the donor by reason of his advanced age cannot take proper and effective interest in the said business for about last ten years and it was thought expedient in the interest of the said business that the donee who had been working on a monthly salary basis, should get further inducement by conferring on him proprietary interest in the said business in the shape of a half partner i.e., eight annas in the rupee and in pursuance of the said intention and for natural love and affection the donor out of his full will and pleasure and in full possession of his senses doth hereby give, grant, transfer and confirm unto the said donee for ever, half of his right, title and interest in the said Pharmacy business including its stock-in-trade, furniture and goodwill and benefits of all licenses as also tenancy right of the premises which according to calculation set forth above is valued at Rs. 30,000/-. On the same date, that is on the 21st January 1957 the partnership deed which forms part of the statement of the case, sets out the terms and conditions of the partnership. Though the deed was executed on the 21st January, 1957 still by virtue of Clause 2. of the partnership deed, the partnership was to be deemed to have commenced from 1st day of January 1957 and the said deed of gift also was executed and registered simultaneously.

In the partnership deed it is set out that the first party, that is, the donor has by a separate deed, of gift absolutely parted with his half right, title and interest in the pharmacy business known as "the Upper Assam. Pharmacy" of Dibrugarh, so long carried on as his sole personal property in favour of the second party. Clause 1 of the deed states that the business of the partnership shall be that of stocking medicines, drugs and toilet requisites of all varieties and other articles allied with the business for sale and to serve prescription of all authorised Medical Practitioners when tendered and, that the business will continue to be known and styled as "the Upper Assam Pharmacy and the place of business will be Dibrugarh Town as before, and it may be extended in such other name or names or place or places as may be decided by the partners. Clause 4 of the partnership deed sets out that the capital of the partnership shall for the time being be the present stock-in-trade, furniture, goodwill and cash: balance in hand and cash balance with Bankers as on 31-12-50 as per books of accounts and assessed for the present for a round sum of Rs. 60,000/- divided equally between both the partners. Besides this capital, the partners may contribute further sums of money as loan to the firm. The capital and loan so taken from the partners shall bear uniform rate of interest at three per cent per annum. Clause 5 of the partnership deed sets out that the first party shall remain liable for all taxes and liabilities due and payable by and from the business till 31-12-56 and shall have the right to recover and appropriate all outstanding from the customers due up to that date as may be exhibited by the books. Clause 6 states that the profit and loss of the partnership shall be divided equally and borne by the partners likewise. Clause 7 states that all accounts of the partnership business shall be taken on 31st December each year. Clause 8 then states that every partner shall have a right to take part in the conduct of the partnership business. The other clauses of the partnership deed are not relevant for the inquiry before us.

7. The contention of the Department is that the partnership deed gives a right to every partner to take part in the conduct of the partnership business and thus the donor was not entirely excluded from the possession of the share in the business gifted by him to his son. Every partner has the right as a partner to possess and deal with every item of the partnership capital and thus the donor could possess and enjoy as a partner the share gifted to his son as his share of the capital of the partnership. The argument of the donee is two fold Firstly he contends that as the gift was not of the entire property in species but a half share in the business, the donor retained for himself half share in the business and the enjoyment of the possession of the donor even without partnership could have continued as the owner of the half share and thus after the partnership the possession and enjoyment of the donor does not change its character. It continued if at all, as before, as a co-owner and so far as the share which was gifted by the father was concerned, the donee was in possession and enjoyment to the exclusion of the father. The possession and enjoyment of the father as a co-owner cannot be held to be incompatible with his exclusion from the share which he had gifted to his son, merely because the son has brought in that share as a capital of the partnership. Secondly it is urged that having regard to the nature of the two transactions it appears that the son, the donee, was

managing the business and had" taken major part in building up the business. The father thus wanted to take him in as a partner in the business and not to retain him only on salary basis. With that end in view the partnership deed (though executed on the 21st January 1957) was given effect to from the 1st January 1957 and further the capital of the partnership was stated to be the stock-in-trade, furniture, goodwill and cash balance in hand and cash balance with bankers as on 31-12-56 and not on the 21st January, 1957. The accounts of the partnership were to be also taken on 31st December every year and thus when the father executed the gift deed, he gifted his not share in the business subject to his own right in the "half business as a partner and if he continued to exercise that right as a partner, it was by virtue of the fact that his right as a partner in the half share gifted was retained by him and was not gifted at all. In other words the gift was of the half share in the business shorn of the right which belonged to the partnership. It was not a gift of an absolute right to the son in half share of the business but was a gift of half share of business subject to the donor's, own right as a partner over it.

8. Before examining the respective arguments of the counsel advanced in the case, it will be convenient at this stage to refer to the authorities cited by the parties. It should be pointed out that the contention of the Department is that the case is covered by the principles enunciated and laid down by their Lordships of the Privy Council in the case of *Clifford John Chick v. Commissioner of Stamp Duties of New South Wales* 1959 37 ITR 89: 1958 (2) All E. R. 623, while the case of the donee is that this case is not applicable and the principles which apply to the facts of the case are those laid down by their Lordships of the Privy Council in the case of *H.R. Munro v. Commissioner of Stamp Duties* 1934 A. C. 61. The Tribunal has "accepted the contention of the donee that the principles of Munro's case 1934 AC 61 are attracted to the present case and not of Chick's case 1959 37 ITR 89 : 1958 2 All ER 623. It is. Therefore, essential to examine in details these two authorities.

9. The facts of Munro's case 1934 AC 61 are that one A. G. F. Munro who died on November 4, 1929 had six children four sons and two, daughters, and was possessed of three holdings of an area of 33,501 acres. One of his sons attained majority in April, 1909 and shortly thereafter the father with this six- children entered into a verbal agreement by which it was agreed that the business of graziers should thenceforward be carried on by the father and his six children as partners under a partnership at will. The partnership business was carried on in three of the holdings. On May 1, 1913 by four deeds of transfer the father transferred by way of gift to each of his four sons all his right, title and interest in portions of his three holdings. On the same date by two other documents, the father transferred certain other areas on trust in favour of his two daughters and their children. Thus the father was left with 8020 acres out of the total of 33,501. On the 23rd June 1919 a formal partnership deed was entered into between (he father and his children, which was substantially the same: as the earlier partnership which was being carried on till then. The business was carried on till the death of the father in November 1929. On these facts on the death of the father the death. duty was assessed

on the estate of the deceased so as to include the lands comprised in the six transfers made by the deceased in the year 1913 by virtue of Section 102(2)(d) of the Stamp Duties Act of the New South Wales. The relevant portion of Section 102(2)(d) is as follows:

102 For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property: (2) (d). Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way what-sever whether enforceable at law or in equity or not and whenever the deceased died.

On these facts their Lordships of the Privy Council held that the partnership formed in 1909 continued without interruption until 1919 and the transfers made in 1913 were intended to be subject to the partnership right. It was observed in this case as follows:

It is unnecessary to determine the precise nature of the right of the partnership at the time of "the transfers. It was either a "tenancy during the term of the partnership of a licence coupled with an interest. In either view what was comprised in the gift was, in the case of each of the gifts to the children and the trustees, the property shorn of the right" which belonged to the partner-ship, and upon this footing it is in their Lordships opinion plain that the donee in each case assumed bona fide possession and enjoyment of the gift immediately upon the gift and thenceforward retained it to the exclusion of the donor. Further, the benefit which the donor had as a member of the partnership in the right to which the gift was subject was not .in their Lordships" opinion a benefit referable in any way to the gift. It was referable to the agreement of 1909 and nothing else, and was not therefore such a benefit as is contemplated by Section 102 Sub-Section 2 (d).

On this finding it was held that the subject matter of the transfers could not be included in the estate of the deceased for the purposes of the death duty.

10. Munro's case 1934 AC 61 was considered in Chicks case 1959 37 ITR 89: 1958 2 All ER 623. The facts of Chick's case 1959 37 ITR 89: 19582 All ER 623 are that John Chick transferred by way of gift to his son a pastoral property. The gift was made without reservation or qualification or condition. The son was then living in a home-stead erected on the property and continued to do so until John Chick's death, in 1935 John Chick, his son and another son entered into an agreement to carry on in partnership the business of graziers and stock dealers. Under the agreement Chick was to be manager of the business and his decision was to be final and conclusive in connection with all the matters relating to its conduct. The business was to be conducted on the respective holdings of the partners which were to be used for the purposes of the partnership only. Any and all lands held by any of the partners at the date of the agreement or acquired

afterwards were to be and remain the the sole property of such partner and were not, on any consideration, to be taken into account as or deemed to be an asset of the partnership, and any partner holding any such land was to have and retain the sole and free right to deal with it as he might think fit. Each of the partners owned a property and these were thenceforth used for the depicting of the partnership stock. then Chick died in April, 1952, and, in assessing the death duty payable in respect of his estate the Commissioner of Stamp Duties included the value of the property given to John Chick's son by way of gift, by virtue of the New South Wales Stamp Duties Act, 1920-1956, Section 102(2)(d) The Privy Council held that it was rightly included in the dutiable estate of the deceased. The Privy Council held that although the son assumed bona fide possession and enjoyment of the property immediately on the gift, to the entire exclusion of the deceased or of any benefit to him u/s 102(2)(d), but as since 1935 onwards the partners and each of them were in possession and. enjoyment of the property so long as the partnership subsisted, the son had not retained the bona fide possession and enjoyment of the property to the entire exclusion of the deceased or any benefit to him within section 102 (2)(d). While dealing with the Munro's case 1934 AC 61 it was observed as follows by Viscount Simonds:

In the first place, it is not disputed that the property was given outright by the deceased to the Appellant Clifford John Chick. As was said by Dixon, C.J., in Commr. of Stamp Duties (N. S. W.) v. Owens, (1953) 88 C. L. R. 67 at P. 88.

If ever there was a gift of an estate in fee simple carrying the fullest right known to the law of exclusive possession-and enjoyment, surely this was such a gift.

It follows that the decision of this Board in (1934) A. C. 61, on which the Appellants relied, has no application to the present case. It must often be a matter of fine distinction what is the subject-matter of a gift. If, as in Munro's case 1934 AC 61 the gift is of a property shorn of certain of the rights which appertain to complete ownership, that donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the section not to be excluded from possession and enjoyment of that which he has given. This view of the Section, which was reaffirmed in *St. Aubyn v. Attend.* (1951) 2 All ER 473 at P. 478, on a consideration of a similar section in a British statute, need not be further elaborated. But the question may arise and, having arisen, may lead to a difference of opinion what is the subject; matter of the gift. It was, as it appears to their Lordships, for this reason that, in *Owens's case* 1953 88 CLR 67 Williams, J., and Taylor, J., dissented from the majority of the court. In the present case, there is no room for any such difference."

11. Their Lordships then dealt with the other argument advanced by counsel for the Appellant namely that the partnership agreement was an in-dependent commercial transaction for full consideration later than, and in no way related to, the gift, and was a mode of enjoyment by the done of his property and an exercise by him of the possession of it and thus para (d) had no operation. This contention was repelled and it was held that

paragraph (d) says nothing about independent transactions and the sole question is one of fact was that donor excluded if he was not excluded, it is not relevant to ask why he was not excluded. Equally with regard to the transaction being commercial and for full consideration". The next argument that the transaction was.

"in no way related to the gift and was a mode of enjoyment by the donee of his property".

The words "related to the gift" are, no doubt, an echo of the words "referable to the gift", which are to be found in *Munro's case* 1934 AC 61.

They might become of importance if it was the second limb of para (d) which was under consideration and the question therefore, was whether the donor had been entirely excluded from any benefit of whatsoever kind. But it is difficult to see what bearing they have when the simple question is whether the donor has been excluded from the subject-matter of the gift, a pastoral property known as "Mia Mia and the clear answer is that he has not. Finally the words "was a mode of enjoyment by the donee of, his property, may be linked with the Appellants' contention that para. (d) was not applicable because (again to cite the formal reason).

neither the partnership agreement nor the use of the property pursuant thereto impaired or detracted from bona fide possession and enjoyment by the donee of the property, given.

12. Mr. Choudhuri who appears for that Department, has very strongly contended that *Manor's case* 1934 AC 61 considered, only the third limb, namely the exclusion of the donor from the benefits derived by him and not the second limb of the section, namely that the donee had enjoyed the possession to the entire exclusion of the donor. In our opinion this interpretation of *Munro's case* is not correct. As explained by their Lordships, in *John Chick's case*, in *Munro's case* 1934 AC 61 the Privy Council held that the gift was shorn of the right which belonged to the partnership, while in *Chick's case* 1959 37 I T R 89 : 1952 All E R 623 it was an absolute gift of the property. It may be difficult to find out as to what was the property gifted in each case. But if the finding is that the gift was shorn of the right of partnership in the gifted property, obviously the enjoyment of the donee must be held to be in exclusion of the donor's interest and the question of the donor's enjoying the property would not arise.

13. In the present case the Tribunal found as a fact as follows:

Even according to this section (section 102 (2) (d) of the New South Wales Stamp Duties Act, 1920-56) as analysed by the learned Counsel for the accountable person, there are four queries (vide p. 94 of the judgment in 1959 37 ITR 89 : 1958 All ER 23) for applying S. 10 of the Estate Duty Act, i.e., (i) What was the property given (2) Did the donee immediately assume bona fide possession and enjoyment of the given property? (3) Did the donee henceforth retain such possession and enjoyment to the entire exclusion of the deceased from such possession and enjoyment and (4) Did the donee henceforth retain

such possession and enjoyment to the entire exclusion of any benefit to the deceased of whatsoever kind In the present case, it is admitted by the Departmental Representative that the answer to the second question of the above four queries is in the affirmative. The dispute centres round the third and 4th queries and the answers to these, in our opinion, depend wholly on the answer to the first question what was the property given and it is on this point that the present case differs from that of Clifford John Chick. In Clifford John Chick's case, the gift was fee simple, carrying the fullest right known to law and it was given absolutely and without any reservation, restriction or qualification therefore; it was only subsequently that the donor acquired the benefits of partnership over the gifted property. But in the present case what was given was property (in the shape of half partner) that is subject to all the limitations of partnership property.

On this finding the principles laid down in Munro's case 1934 AC 61 are attracted and not Chick's case. As we have already pointed out, in Chick's case 1959 37 ITR 89: 1958 2 All ER 623 the Privy Council said that if the gift was an absolute one the question was whether the subsequent partnership was an independent transaction and a mode of enjoyment of his property by the donee will not affect the applicability of the section. But if the gift itself is of the property shorn of the rights of partnership, Section 10 will not be attracted. If the argument is advanced that the benefit of partnership was enjoyed by the donor and thus the third limb of the section is attracted, the answer is that the benefit is not referable to the gift itself. It is not necessary to deal with the other cases dealing with the gift of shares of a limited company or the execution of the deed of lease in favour of the donor by the donee or where the enjoyment of the donor is on account of his fiduciary relationship with the donee.

14. Mr. Choudhuri referred to a number of cases in support of his contention that a partner acquires an interest in the partnership property and has a right to enjoy and make use of the partnership property. In the view, however, which we have taken it is not necessary to deal with those cases. In the result, we answer the question-referred to us in the affirmative. In our opinion the Tribunal on the facts and in the circumstances of the case was justified in holding that the donor was entirely excluded from the possession and enjoyment of the subject-matter of the gift, that is, the half share of the partnership business known as "The Upper Assam Pharmacy" and accordingly the provisions of Section 10 of the Estate Duty Act were not attracted to the property so gifted. Parties will bear their own costs of this reference.