(1996) 134 CTR 258

High Court Of Kerala

Case No: IT Ref. No. 9 of 1992, 26th March, 1996

COMMISSIONER OF GIFT TAX		APPELLANT
	Vs	
K. R. KUMARAN.		RESPONDENT

Date of Decision: May 1, 1996

Acts Referred:

- Contract Act, 1872 - Section 10

Citation: (1996) 134 CTR 258

Hon'ble Judges: V. V. Kamat, J

Bench: Division Bench

Judgement

V. V. KAMAT, J. :

At the instance of the CGT, Ernakulam under s. 26(1) of the GT Act, 1958, answer to the following question is expected.

"Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that "a father could lend money to his minor child and that the transaction made by the father in dual capacity is valid in law" ?"

In other words the situation is as to whether father can lend money to his minor child, both as a contracting party for the loan and accepting party as the guardian - a dual capacity.

2. It arises under the following circumstances. The assessee Shri K. R. Kumaran on 26th April, 1981 purchased a property in three names - his wife showing consideration of Rs. 30,000 his two minor sons showing consideration of Rs. 40,000 each. There is no dispute that the entire amount is assessees own money.

3. It is his case that he gave a loan to each of his minor sons to purchase the property in their names.

4. The GTO, Palghat dealing with the situation of assessment for the year 1982-83 considered the situation. He observed that the transaction of a loan implies an agreement to repay the money borrowed and its essence is a contract. He also observed that there can be no loan from a father to minor sons because such a transaction is clearly unenforceable. The officer observed that there cannot be any lawful agreement between the assessee father and his minor children as the children cannot be found to repay the amount borrowed from their father. The officer also observed that the transaction of loan by the father both in his individual capacity as the father as well as in his capacity as the guardian of the minor children would be incomprehensible. He observed that legal capacity cannot be equated with the legal personality, as a contract of loan requires two persons whereas the situation represents loan by a person to himself. He accordingly held that the transaction would have to be termed as a gift. Accordingly the GTO proceeded to value the gift for the purposes of levy of gift-tax.

5. In appeal the first appellate authority, - the AAC -the order was confirmed as it held that the provisions of s. 4(1)(c) r/w s. 2(xii) covered the case of purchase of property in the names of minors for the purpose of levy of gift-tax. He agreed that the GTO was correct in treating the loan as a gift.

6. The question was taken up by the assessee before Tribunal, Cochin Bench.

7. What was argued before the Tribunal was that a father could represent in a transaction in two capacities and that the loan made to each of the minor children would have to be considered as quite valid in law. Reliance was placed on a Tribunal decision of the Bangalore Bench holding against the Revenue finding any difficulty in regard thereto. The Tribunal observed that the assessee had advanced money to his minor children then it would not be a case of gift at all, placed/reliance on the decision of the Bangalore Bench of the Tribunal in the case of ITO vs. Mangalore Ganesh Beedi Works (1986) 50 CTR (Ban) 45. The Tribunal observed that a father could lend money to his minor child and that the transaction made by the father in his dual capacity is valid in law. It is observed that the question as regards the situation of lending would be a question of law. The Tribunal found that the record is not full and complete and the GTO on verification of the facts should have come to a definite conclusion as to whether there was advance of money by the father to the two minor children. The Tribunal found that the record is not full and complete and consequently remitted the matter to the GTO for verification of the factual position and consequently recording of a fresh finding to the factual situation whether there was an advance of money by the father to the two minor children for purchasing the properties.

8. It is in this background that the Revenue has brought the matters before us, emphasising the legal requirement and its satisfaction for consequence as to whether the

father could have acted in dual capacity, one as the party proposing advancement of loan and at the other end the party as a guardian accepting the amount for and on behalf of the minor sons. Certain basic features of the position of law need mention as floating on the surface. It is really elementary that every promise or a set thereof forming consideration for each other would be an agreement. If such an agreement is not enforceable at law it is void and if enforceable at law it is a contract. All such agreements enforceable at law are required to be made by the free consent of the parties competent to contract for a lawful consideration and with a lawful object and such agreements are not expressly declared to be void. An agreement enforceable at law as a contract, for the purpose in question, require persons competent to contract. There is no doubt that a person by reason of infancy is incompetent to contract and thus cannot make a contract within the meaning of the Act. The situation is beyond doubt that an infant falls within the class of persons understood as incapable of entering into a contract and therefore, would not be liable as to consequences thereof even for necessaries and demands in regard thereto could not be contemplated for enforcement against them.

9. The factual situation before us presents a situation of an anomalous character. It is the father who has acted at both the points of the transaction under consideration. He has offered the amount as the proposer of the promise at the starting and at the other end he accepts them in his capacity as the legal guardian of the minor children. This situation has to be understood in consequence in the light of the fundamental proposition that it is essential that all contracting parties should be competent to contract and as such if they are not competent he cannot be understood to make a contract within the meaning of the Act in question.

10. As a flow from the factual situation what really comes for examination is the role played by the father and its legal character. As stated above, in his personal capacity he offered the amount of loan to the minors. If it is an advancement of the amount of loan given to the minors by its very nature an enforceable liability is created on the part of the minors thereunder. This is entered on the part of the minors thereunder. This is entered into none other than the same individual - the father in his capacity as their guardian. Of course it is more than elementary that when the very advancement of loan implies an obligation to repay the amount covered thereby, its essence cannot be understood otherwise than a contract between the two parties. It is obvious that there is no question of the father who has advanced the loan to them all enforcing it as it is an advancement to a party who is admittedly not competent.

11. Additionally, the very nature of the transaction represents a bilateral process, which is embodied in the instant case in the same individual, - the father - in his individual capacity as advancing the loan amount and in his legal capacity as the guardian of the minor sons at the other end.

12. In the process of proceeding further in the analysis, the question is whether there can be a transaction by a person virtually with himself.

13. With advantage these jurisprudential aspect is relied upon by the Delhi High Court in Commissioner of Income Tax Vs. Mirdu Hari Dalmia, leading to the conclusion that two or more capacities of a person would not enable and empower him to enter into a legal transaction almost with himself at both the ends. It would be of benefit to quote the same paragraph which is as follows :

"In this context the following passage from Salmonds Jurisprudence (12th Edn., p. 304, para 65) is quite instructive :

English law recognises many different capacities in which a man may act. Often he has power to do an act in an official or representative capacity when he would have no power to do the act in his private capacity or on his own account. All sorts of difficult questions arise out of these distinctions : for instance, whether a person on a particular occasion was acting as trustee for fund A or as trustee for B; whether a director has the powers and duties of a trustee; whether an executor has turned into a trustee and so on. These troubles need not concern us here; the only point to be noticed is that the mere fact that a man has two or more capacities does not give him the power to enter into a legal transaction with himself. Double capacity does not connote double personality. For instance, at common law, a man could not sue himself or contract with himself, or convey property to himself; and it made no difference that he was acting on each side in a different capacity. So rigorous was the rule that, if the same party appeared on both sides of a contract, even though accompanied by different parties in each case, the whole contract was void. In many cases the rule worked hardship, and its consequences had to be mitigated."

This is the question as is expected to be answered, whether the father can lend money to his minor children in his dual capacity. In our judgment, apart from the situation created by the statutory provision of s. 10 of the Contract Act as succinctly elucidated by the age old judgment of the privy council in Mohori Bibee vs. Dhurmodas Ghose 30 IA 114 as well as the jurisprudential position preventing any person to act simultaneously in dual capacity at both the ends of contract for advancement of money, the transaction would not be valid in law. For the above reasons we answer the question in the negative, i.e., in favour of the Revenue and against the assessee.