

1955

Present: Gratiaen, J., and Pulle, J.

P. H. S. FERNANDO, Appellant, and THE ATTORNEY-GENERAL,
Respondent

S. C. 313—D. C. Colombo, 77/T (Special)

*Estate Duty Ordinance (Cap. 187)—Section 6 (d)—“Property passing on death”—
Transfer of property by A to C—Consideration furnished by B—Death of B—
“Disposition purporting to operate as gift inter vivos”.*

A contracted with B to sell to B or to B's nominee or nominees the entirety of a property for a consideration of Rs. 505,000. B thereafter called upon A to convey the property to himself and to certain members of his family (including C) in certain agreed shares. Accordingly A transferred an undivided one-fifth share to C in exchange for the consideration of Rs. 101,000 which was furnished by B. Within three years of the date of the execution of the conveyance B died. The value of the share at the time of B's death was higher than it had been at the time of the transfer.

Held, that the conveyance executed by A in favour of C was a disposition by B by way of gift within the meaning of section 6 (d) of the Estate Duty Ordinance and that the subject-matter of the gift was the share which C received and not the sum of Rs. 101,000 provided by B as purchase price.

¹ 50 N. L. R. 265; 40 C. L. W. 10.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *N. M. de Silva*, for the petitioner-appellant.

V. Tennekoon, Crown Counsel, for the respondent.

Cur. adv. vult.

March 10, 1955. GRATIAEN, J.—

This is an appeal under Section 43 of the Estate Duty Ordinance against a decision of the District Court of Colombo upholding an assessment of estate duty in respect of the estate of the appellant's father, Peter Solomon Fernando (hereinafter called the "deceased"). The dispute relates to the effect of a conveyance P1 dated 28th April 1944 whereby, in exchange for consideration admittedly furnished by the deceased out of his own funds, the Lunawa (Ceylon) Tea and Rubber Estates Limited transferred an undivided 1/5 share of Arampola Estate to the appellant. The deceased died on 8th July 1946, that is to say, within three years of the date of execution of P1. The learned trial Judge upheld the contention of the Crown that the appellant's 1/5 share of Arampola Estate constituted "property taken under a *disposition made by (the deceased)* purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise" within the meaning of Section 6 (d) of the Ordinance. He rejected the argument that only the consideration of Rs. 101,000 provided by the deceased (but not the property itself) constituted a disposition by way of gift within the meaning of Section 6 (d). The practical importance of the dispute lies in the fact that the value of Arampola Estate at the date of the deceased's death was higher than it had been at the time of the transfer.

There is no controversy as to the circumstances in which the appellant became the owner of a share in Arampola Estate on 28th April 1944. An earlier notarial agreement R1 had been entered into between the deceased and the Lunawa (Ceylon) Tea and Rubber Estates Company Limited whereby the deceased agreed to purchase, and the Company to sell, the entire property for a consideration of Rs. 505,000. The transaction was to be completed on or before 30th April 1944, and, on the deceased paying the agreed purchase price and complying with certain other conditions, the Company was to execute a conveyance "*in favour of the purchaser or his nominee or nominees*".

The conveyance P1 dated 28th April 1944, was executed in implementation of this earlier agreement. P1 recites that the deceased "had called upon the Company in terms of (R1) to transfer and convey the said Arampola Estate" to himself and to certain other members of his

family (including the appellant) in certain agreed shares. With regard to the $\frac{1}{5}$ share conveyed to the appellant the deceased had out of his own funds entrusted the proportionate consideration to the attesting notary for payment to the Company.

It is now our duty to give a "juristic interpretation" to this simple transaction. That the father intended his son to receive a "disposition" by way of gift is clear enough. But what precisely was the subject matter of the gift—was it the money, or was it the share in Arampola Estate which the Company conveyed to him in exchange for the payment of the money provided by the deceased?

There can be no doubt that, if the father had placed the money at the absolute disposal of his son, and the son had, on his own initiative, utilised it to purchase a share of the property direct from the former owner, the money would have been the subject matter of the gift. It is equally clear that, if the father had purchased the property directly in his own name from the Company, and then proceeded to donate a share of it to his son, the property would have been the subject matter of the gift. But on which side of the dividing line does the present transaction stand?

Section 6 (*d*) of the Estate Duty Ordinance has been taken over from Section 38 (2) of the Customs and Inland Revenue Act, 1881 of England as amended by two later enactments. We have not been able to discover any decisions of the English Courts which throw any light directly on the present problem. In *Hanson on Death Duties* (9th ed.) at page 80, however, there is a passage to the following effect:

"A case frequently occurring in practice is that of the purchase of a house for the donee. If B contracts to buy a house upon a promise by A to pay for it, the house is his under the contract. The gift is a gift of money, completed only when actually paid. *On the other hand, if A contracts to buy a house and directs the conveyance to be made to B, this is a gift of the house, completed when the conveyance is executed, up to which time A remains the owner.*"

The Crown relies strongly on that part of the quotation which is italicised. Mr. Perera points out, however, that in England a person to whom the owner of property has undertaken to sell it immediately becomes, apparently, its equitable owner—so that in the hypothetical case discussed in the test-book, A has in truth "disposed" of the equitable estate to B by way of gift. In Ceylon, on the other hand, A would not enjoy real rights of any kind until the agreement of sale is actually implemented; he has only a *right in personam*, so that (Mr. Perera submits) there can be no effective disposition by him of the property itself to the donee. *Dias v. Alahakoon*¹.

In my opinion, the particular problem before us calls for a realistic approach, by analysing the transaction with reference (1) to the result which the deceased intended to achieve (2) to the practical means by which he

¹ (1938) 40 N. L. R. 153.

procured its achievement. At the outset, I remind myself that, while the agreement R1 was still in operation, the deceased was the only person in a position to control the destination of the future title to Arampola Estate. If he exercised his rights under the agreement, the entire property had to be purchased for the agreed price stipulated, as the Company was under no obligation to sell only a share for a proportionate sum. The appellant, on the other hand, did not enjoy any contractual right to purchase the property or any part of it.

The deceased decided to claim, as against the Company, performance of the Company's obligation under R1. At the same time, he formed an intention to take the steps required to divert a share in the property to his son's ownership. This result could have been achieved in one of two ways. The *direct* solution would have been to purchase the entire property from the Company and thereafter to convey a share to the appellant. The alternative solution (which was more economical) was to achieve the same object *indirectly* by appointing the appellant his "nominee" under R1 to the extent of a 1/5 share and, having himself paid the full consideration stipulated, to call upon the Company to convey that share directly to the appellant. Either process was calculated to bring about the same result, namely, that the appellant would become vested with title which he did not possess before by reason (1) the deceased's generosity and (2) of the exercise by the deceased of his power to nominate the transferee in terms of R1. It seems to me that the selection of the indirect method of achieving the desired result does not preclude us from regarding the conveyance executed by the Company as a "disposition made by the deceased" within the meaning of Section 6 (d) of the Ordinance. I would respectfully adopt the observations made by Stirling J. in *Carter v. Carter*¹ where he said :

"The words *dispose* and *disposition* (in the Fines and Recoveries Act) are not technical words, but ordinary English words of wide meaning; and where not limited by the context, those words are sufficient to extend to *all acts by which a new interest (legal or equitable) in the property is effectually created.*"

Similarly, in *Parr v. Attorney-General*², Lord Carson observed :

"In my opinion in all the relevant sections (of the Finance Acts, 1894 and 1900) *disposition* means the same thing—namely, the effective disposition under which the property passes."

The significance of the words "*or otherwise*" in Section 6 (d) now becomes apparent. In this context they are not *eiusdem generis* with the forms of "disposition" previously enumerated; they indicate that a donor may also be regarded as having personally made a disposition of property by way of gift whenever the property effectually passes to the "donee" by an indirect process which was controlled at every stage by the "donor" himself. The purchase price was not intended to pass into the ownership of the appellant, so that it never became his

¹ (1896) 1 Ch. 62 at 67.

² (1926) A. C. 239.

to do with as he wished ; the property, on the other hand, did so pass in accordance with the deceased's intentions and in consequence of the arrangements which the latter had made to achieve the desired result.

I would dismiss the appeal with costs.

PULLE, J.—I agree.

Appeal dismissed.
