CONTROLLER OF ESTATE DUTY, GUJARAT

v.

KANTILAL TRIKAMLAL

July 19, 1976

[H. R. KHANNA, V. R. KRISHNA IYER AND P. K. GOSWAMI, JJ.]

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Estate Duty Act (34 *of* 1953), *ss.* 2(15), 5, 9 *and* 27—*Scope of.*

'Other rights', in Explanation 2 *to s.* 2(15), *meaning of.*

Interpretation of statutes—Estate Duty Act and other taxing statutes—Principles.

Practice—Costs in tax matters when there is conflict among High Courts.

C

Section 5 of the Estate Duty Act, 1953, authorises the levy of duty upon all *property which passes* on the death of a person. Section 9 provides that property taken under a disposition made by the deceased purporting to operate as an immediate gift whether by way of transfer, delivery etc., 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. Explanation 2 to s. 2(15), which defines 'property', provides that the extinguishment at the expense of the deceased of a debt or *other rights* shall be deemed to have been a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished and in relation to such a disposition the expression 'property' shall include the benefit conferred by the extinguishment of a debt or right. Section 27 deems all dispositions made by the deceased person in favour of his relations as gifts, for the purposes of the Act, unless such disposition was made for full consideration or the deceased was concerned in a fiduciary capacity with the property.

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A member of a joint Hindu family, within two years before his death entered into a partition of family properties *bona fide,* not as a colourable or sham transaction, whereby, he received towards his share an allotment substantially lower in value than would be his legal entitlement, with a view to relieve himself of a part of his wealth and *pro tanto* to benefit the other member of the joint family, who is a relative within the meaning of the Act.

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HELD : The relative, as the accountable person under the Act, is liable to pay estate duty, on the difference between the share that the deceased was legally entitled to and the share that the deceased actually took, that is, to the extent of the benefit received by the accountable person. [14 G, 12 A]

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(1) Death duties are imposed on richer estates, the fiscal policy being, (a) collection of revenue, and (b) reduction of the quantum of inheritance on a progressive basis towards equalisation by diminishing glaring disparities of wealth. Therefore, the Act uses words of the widest import, legal fictions and deeming devices to rope in all kinds of dealings with property for inadequate or no consideration within the statutory proximity of death. If the words, however cannot apply to a particular species of property, courts cannot supply words to fulfil the unexpressed wishes of the legislature. In a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. [13 D]

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(2) The definition of 'property' in s. 2(15) has to inform and must be read along with ss. 9 and 27. It is not a substantive rule of law operative by itself. Similarly, the expression 'disposition' in s. 9 must be read with the definition in Explanation 2 to s. 2(15) since that is the whole purpose of a 'deeming provision' is the shape of a definition. [17 B-C]

A (3) The definition of 'property' in s. 2(15) is not exhaustive but only inclusive and the supplementary operation of Explanation 2 takes in what is not conventionally regarded as 'disposition'. The expression "other right" in the Explanation is of the widest import and cannot be read *ejusdem generis* with 'debt'. The process of extinguishment of a right and the creation of a benefit thereby is statutorily deemed to be a disposition in the nature of a transfer. Therefore, the definition of 'disposition' covers the diminution in the share taken by one coparcener and augmentation of the share taken by the B other and impresses the stamp of property on this process by the deeming provision. [18 F-G; 19 C]

(4) The case of *Getti Chettiar* [(1971) 82 ITR 599] dealt with the expression 'transfer of property' in s. 2(xxiv) of the Gift Tax Act, 1958. This Court held that 'transaction' in s. (xxiv) (d) must take its colour from the main clause and it must be a 'transfer' of property; and that since a partition is not a transfer in the ordinary sense of law, a mere partition with unequal allotments cannot be covered by s. 2(xxiv). But the language of Explanation 2 to s. 2(15) C of the Estate Duty Act is different and wider and so the reasoning of this case cannot control its amplitude. [20 C]

(5) This Court in *Kancharla Kesava Rao* [(1973) 89 ITR 261] placed on 'disposition' in s. 24 of the Estate Duty Act the same interpretation as was put in the case of *Getti Chettiar*. But, whatever might be the interpretation of 'disposition' in s. 24, under s. 27, a disposition in favour of a relative not for full consideration, shall be treated as a gift and under s. 9 if the disposition made by the deceased is more than 2 years before death, the property covered D thereby shall not pass on the death unless it shall not have been *bona fide* to say, even if the transaction were more than 2 years before the death, if it were entered into in bad faith, estate duty may still attach to that property. But so far as dispositions made *within* two years of the death of the deceased are concerned there is no question of *mala fides* or *bona fides*, and all such transactions would be liable to estate duty. [22 G; 23 F-G]

Valliammi Achi [1969] 73 ITR 806, approved.

E *In re. Stration's Disclaimer* [1958] 34 ITR 27 applied. *Grimwade* v. *Federal Commissioner of Taxation* [1949] 78 C.L.R. 199 referred to.

[Principles for awarding costs in matters of general public importance where there is conflict in the High Courts on a question of Law, reiterated.]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1095 of 1970. and 1677 of 1973.

F From the Judgment and Order dated 26/27-9-1968 of the Gujarat High Court in Estate Duty Reference No. 3/67.

S. C. Manchanda and *R. N. Sachthey*, for the Appellant (In CA 1095/70).

K. B. Kazi and *I. N. Shroff*, for the Respondents in CA 1095/70.

S. T. Desai and *J. Ramamurthi*, for the Intervener.

G *S. T. Desai* and *J. Ramamurthi*, for the Appellants in CA 1677/73.

S. P. Nayar, for the Respondent in CA 1677/73.

The Judgment of the Court was delivered by

KRISHNA IYER, J. Is it permissible for judges to speculate on the philosophical edge of a human problem hidden by the litigative screen H before settling down to examine its forensic facet? If it is, we may make an observation about the question posed in this case without pejorative implications. For many men in advancing age arrives a stage in life when 'to be or not to be' stampedes them into doing things

dubious before God and evasive before Caesar—and we have a hunch both the appeals before us smack of such a disposition as will be evident when the narration of facts and discussion of law unfold the story.

A brief statement of the circumstances leading to the single critical legal issue, proliferating into a plurality of points, may now be made. We begin with the facts in the Gujarat Appeal [*Kantilal Trikamlal*(1)] since the Madras Appeal [*Ranganayaki Ammal*(2)] raises virtually the same question, is plainer on the facts and may conveniently be narrated immediately after. To appreciate the complex of facts we choose to enunciate the principal proposition of law canvassed before us by the Revenue in the two appeals. Does a relinquishment by a decedent of a slice of a share or a partition of joint property in such manner that he takes less than his due effected within two years of his death with a view to relieve himself of a part of his wealth and *pro tanto* to benefit the accountable person, a near relation have to suffer estate duty under the Estate Duty Act, 1953 (for brevity, the Act) ?

One Trikamlal Vadilal (hereinafter referred to as the deceased) and his son Kantilal (referred to later as the accountable person) constituted a Hindu undivided family. They continued as members of a joint and undivided Hindu family until November 16, 1953 when an instrument styled 'release deed' was executed by and between the deceased and Kantilal. Considerable controversy between the parties turns on the interpretation of this instrument and it will therefore be necessary for us to refer to its terms briefly later. Suffice it to state for the present that, under this instrument, a sum of rupees one lakh out of the joint family properties was taken by the deceased in lieu of his share in the joint family properties and he relinquished his interest in the remaining properties of the joint family which were declared to belong to Kantilal as his sole and absolute properties and Kantilal also, in his turn, relinquished his interest in the amount of rupees one lakh given to the deceased and declared that the deceased was the sole and absolute owner of the said amount. Within two years from the date of this instrument, on June 3, 1955 the deceased died and on his death the question arose as to what was the estate duty chargeable on his estate. Kantilal, who is the accountable person before us, filed a return showing the status of the deceased as individual and the principal value of the estate as Rs. 1,06,724. The Assistant Controller was, however, of the view that the instrument dated November 16, 1953 operated as relinquishment by the deceased of his interest in the joint properties in favour of Kantilal and that the consideration of rupees one lakh for which the one-half share of the deceased in the joint family properties at the date of the said instrument was Rs. 3,44,058 and there was, therefore, a disposition by the deceased in favour of a relative for partial consideration and it was, accordingly by reason of s. 27, sub-s. (1), liable to be treated as a gift for the purpose of s. 9, sub-s. (1), and its value, viz., Rs. 3,44,058 after deducting Rs. 1,06,724 (being the amount received by the deceased together with interest) was includible in the principal value of the estate of the

(1) (1969) I.T.R. 353.

(2) (1973) 88 I.T.R. 96.

A deceased. The Assistant Controller, accordingly, included a sum of Rs. 2,37,334/- being the difference between Rs. 3,44,058/- and Rs. 1,06,724/- in the principal value of the estate of the deceased.

On appeal by the accountable person, the assessment made by the Assistant Controller was confirmed by the Central Board of Revenue. Though the main ground on which the Central Board based its decision was the same as that which found favour with the Assistant Controller, viz., that under the instrument there was a disposition by the deceased of his interest in the joint family properties in favour of Kantilal for partial consideration and it was therefore by reason of s. 27, sub-s. (1), liable to be treated as a gift for the purpose of s. 9, sub-s. (1). Another argument also appealed to the Central Board and that was one based on s. 2(15), Explanation 2. The Board held that, in any event, under the instrument there was extinguishment at the expense of the deceased of his interest in the joint family properties and there was therefore a deemed disposition by the deceased of the benefit which accrued to Kantilal as a result of such extinguishment and the charge to estate duty was accordingly attracted under s. 9, sub-s. (1), read with s. 27, sub-s. (1).

On reference, the High Court held in favour of the assessee and the Revenue has appealed hopefully, relying on a ruling of the Madras High Court which itself is the subject matter of the sister appeal. Here the tables were turned but the assessee has contested the argument of the High Court as contrary to the ratio of this Court's pronouncements. Were it so, it were bad; but judgments, even of the summit court, are not scriptural absolutes but relative reasonings and there is in them, read as a human whole, more than meets the legal eye which looks at helpful lines here and there. We will examine them closely, especially because several High Courts are split on the construction of 'disposition' in the Act, and seek to resolve the conflict of views and values. Behind everyone's attitude to tax is an unspoken value judgment!

Before we move into the arena of argument we may silhouette the facts of the Madras case. The deceased, Bheema Naidu, and his predeceased son's widow and children constituted a Hindu undivided family. A little within the two-year pre-mortem line drawn by the Act he effected a partition and turnnig abnegator took a smaller share instead of his legal half, benefiting the others to the extent of the difference. This difference was taxed as disposition of property under the Act and fiscal hierarchy was upheld by the High Court. The assessees assail that decision before us.

The forensic focus has been rightly turned on the interpretation of the critical provisions in the Act bearing on this controversy. The social design, the legislative intent and the grammar of statutory construction *vis a vis* the Act may have to be briefly surveyed while studying the language of the text and the impact of the context.

The scheme and spirit of the Act need to be understood first, for every social legislation has a personality and taxing statute a fiscal

philosophy without a feel of which a correct perspective to gather the intent and effect of the separate clauses cannot be gained. Over four centuries ago Plowden said : "Each law consists of two parts viz., of body and soul; the letter of the law is the body of the law and the sense and reason of the law is the soul of the law." It is well known that death duties imposed on richer estates have a socialistic savour being motivated by the State's policy of paring of unearned accumulation of inheritances and of diminishing glaring disparities of wealth. This comprehensive but slow egalitarian purpose fulfils itself fully only when it operates on property at death and near death; nor is there any rational ground to save some types of disposition or subtle transference of wealth from exigibility, having due regard to the plain language of estate duty measures. The broad object also includes inhibition of dispositions, unsupported by reasonable consideration, made on the eve of death or within the pragmatic line of nearness to death, such transactions or manoeuvres, though sincere, being manifestly likely to defeat death duties posthumously flowing from properties covered thereby. The fiscal policy is dual : (i) the collection of revenue; and (ii) reduction of the quantum of inheritance on a progressive basis directed towards a gentle process of equalisation. The draftsman's efforts have been exerted to use words of the widest import and, where the traditional use of words is likely to limit, to use legal fictions, by deeming devices, to expand the semantics thereof and to rope in all kinds of dealings with property for inadequate or no consideration within the statutory proximity of death. The sweep of the sections which will be presently set out must therefore be informed by the language actually used by the legislature. Of course, if the words cannot apply to any recondite species of property, courts cannot supply new logos or invent unnatural sense to words to fulfil the unexpressed and unsatiated wishes of the legislature. Law, to a large extent, lives in the language even if it expands with the spirit of the statute.

It is good to remember that the Indian Act has some English genetic touch, being largely based on the English Finance Acts of 1854 onwards. This historical factor has current relevance for one reason. We may usefully refer to, although we may not be blindly bound by, Engilsh authorities under the corresponding statute and both sides have sought trans-Atlantic light on this footing.

A skletal projection of the Act to the extent that concerns us here may now be made. This Act exacts estate duty. The charging section (s. 5) authorizes the levy of a duty upon all property which passes on the death of a person dying after the commencement of the Act. Two questions immediately arise. What is property as envisaged in the charging section ? When does property *pass on the death of a person ?* The answer to the first question is furnished in an inclusive definition of 'property' in s. 2(15). It is a wide-ranging definition supplemented by two expansive definitions. Of immediate moment is Explanation 2 which reads :

> "*Explanation* 2.—The extinguishment at the expense of the deceased of a debt or other rights shall be deemed to have been a disposition made by the deceased in favour of the

A person for whose benefit the debt or right was extinguished, and in relation to such a disposition the expression 'property' shall include the benefit conferred by the extinguishment of a debt or right."

What property passes on the death of a person is indicated in an inclusive definition set out in s. 2(15). It covers property passing either B immediately on the death or after any interval and 'on the death' includes 'at a period ascertainable only by reference to the death'. A glance at ss. 9 and 27 gives more comprehension. Section 9, among other provisions, introduces a legal fiction and since the meaning and implication of this section has been the subject of some disputation we had better allow the provision, in the first instance, to speak for itself :

C "9. *Gifts within a certain period before death* :—

(1) 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, settlement upon persons in succession, or otherwise, which shall not have been *bona fide* made two years or more D before the death of the deceased shall be deemed to pass on the death."

Both the appeals deal with deceased persons who are members of joint Hindu families and the subject matter of the dispositon was linked up with their share in the HUF (acronymically speaking). For this reason our attention has to be rivetted to ss. 7 and 39 which resolve a E likely difficulty in ascertaining the interest in property which passes on the death of a deceassed coparcener in the joint family property the pristine rule of Hindu law being his share lapses in favour of the survivors and is not a descendible estate or a predictable fraction. Sections 7 and 39, by a deeming process, circumvent this contretemps and crystallize a clear share in the coparcener at the point immediately before death. Had the properties of the coparcener been partitioned imme-F diately before the death what share in the joint family property would have been allowed to the deceased represents the principal value of such share for the purposes of computation of death duty. Section 27 is a strategic provision which deems as a gift all dispositions made by the deceased person in favour of his relations unless such disposition was made for full consideration or the deceased was concerned in a fiduciary capacity with the property. 'Relative' means, in this con-G text, near relations set out in s. 27(2) and it is sufficient, for our purpose, to know that in both the appeals the accounting persons are relatives falling within the statutory compass. One more provision is pertinent to our enquiry and that deals with gifts within a certain period before death. While there are other provisions dealing with gifts before death, we are directly concerned with s. 9 only. It has already been read and will later be explained.

H Now to the boxing ring. The bout has been fought over the import and amplitude of 'property' as widened by s. 2(15), especially Explanation 2 thereto. Sri S. T. Desai, appearing for the accountable per-

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son in the Madras case, and Shri Manchanda, arguing for the Exchequer in the Gujarat case, have levelled multi-pointed attacks, but the crucial issue which is decisive of both cases is the same. What is 'property' for the purpose of this fiscal law ?

Is it a misfortune for any legal system that a battle of semantics, where able judges and erudite advocates fundamentally disagree on meanings of words pivotal to the very levy, should be a bonanza of the draftsman ? Simplicity and certainty is basic to the rule of law but is a consummation devoutly to be wished in our *corpus juris*. Here we find ranged on both sides more than one High Court taking contrary but scholarly views. A radically new legislative art is the urgent contemporary need if comprehensibility to the laity is to be a democratic virtue of law.

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We will first unlock Explanation 2 to s. 2(15), discover the signification of 'property' expanded by the deeming clause and then read it in that wider sense along with the comprehensive provisions of ss. 9, 27 and 5. The key concept that underlies this fasciculus of sections is property, the tax being charged on property passing on death. Considerable controversy has raged not only on the boundaries of the notion of 'disposition' as specially defined, by importing a legal fiction, but on the slightly ticklish and tricky placement in s. 9 of the expression '*bona fide* made two years or more before the death of the deceased'.

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If we surmount these constructional difficulties, the answer to the core question arising in these appeals follows without much ado.

In fairness to counsel we must, at the threshold, set out the seven propositions formulated by Shri Desai for pin-pointing the discussion. They are :

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"1. Partition is merely a process in and by which joint enjoyment is transferred into an enjoyment in severalty. Since in such a case each one of the coparceners had an antecedent title which extended to the whole of the joint family properties and had therefore full interest in the specific property which ultimately went to his share, no creation of right or interest in such specific property takes place in his favour nor does any extinguishment of any right or interest in the other property take place to his detriment.

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2. Sections 9(1) and 27(1) form part of a single scheme. The word 'disposition' in section 27(1) cannot be treated in isolation and must take its colour and meaning from the sense in which the word has been used in sec. 9(1).

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3. 'Disposition' means 'giving away or giving up by a person of something which was his own (82 ITR 599, 606 SC). No meaning howsoever wide and comprehensive of the expression 'disposition' can possibly take in its ambit or coverage, partition (89 ITR 261, SC).

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4. The mere fact that on a partition a coparcener takes a lesser share than he could have demanded does not mean

A that there is 'disposition' as contemplated in Explanation 2 to s. 2(15) which defines 'property'. In such a partition, there is no extinguishment, at the expense of such coparcener of any 'debt' or 'other right'. In a partition whether equal or unequal, there is no disposition by a coparcener in favour of any relative nor can it be said that there is any purported gift nor can it be treated as a gift. Of course, the partition B must be *bona fide* and not to evade duty.

5. The scope and ambit of Explanation 2 to s. 2(15) becomes more clear when it is read in juxtaposition with Explanation 1. The 'extinguishment' contemplated in Explanation 2 can be only in respect of any debt or other right which could have been created by the deceased and could C have been enforced against him. In a partition, no such thing takes place.

6. A definition is not a substantive rule of law operative by itself. The definition of 'property' in section 2(15) has to be read along with sections 9 and 27 and not in isolation.

7. Disposition, in s. 9, even if read along with Explanation D 2 to s. 2(15), can only be of something the disponer had as his own at the time of the alleged extinguishment. If it is of any interest in property it must be of an interest which was already vested in the disponer at the time of the disposition. If of any other right, it must be of a right which had vested in him even when he gives it up."

E This 7-point programme of submission really brings out all the issues and sub-issues, legal and factual, and the last two, over-lapping in some respects, deserve first attention. Before that, we must state, in precis form, the facts with reference to which the statute must speak. The life of the law is not idle abstraction or transcendental meditation but fitment to concrete facts to yield jural results—a synergetic action, not isolated operation. Our discussion will therefore be conditioned F by the material facts found in the two cases. They are, tersely, though simplistically put, that the deceased person, being a member of a joint Hindu family, within two years before his death, entered into a partition of family properties *bona fide,* not as colourable or sham transaction, whereby he received towards his share an allotment substantially lower in value than would be his legal entitlement thus gladly suffering a diminution which would to that extent benefit the account- G able person by giving him a larger slice of the joint cake than was his due.

We assume, for the purpose of argument, that the division in status and the partition made by metes and bounds have taken place simultaneously on the execution of the deed in question. We also take it that the release, relinquishment or division in the cases on hand has H been *bona fide* made in the sense that one sharer has not over-reached the other or played fraud or together the sharers have not gone through a mere simulacrum of a partition or exercise in colourable division. We proceed on the further footing—and that is law well-established

now—that 'partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty. Each one of the sharers had an antecedent title and, therefore, no conveyance is involved in the process, as a conferment of a new title is not necessary'.

Now to the 7 points of Shri Desai. The 6th point is a shade platitudinous and the other side does not dispute its soundness. Certainly the definition of 'property' in s. 2(15) has to inform and must be read along with s. 9 and s. 27 and cannot be functional in isolation. It is not a substantive rule of law operative by itself. Similarly, point no. 7, stated the way it has been, may not be and has not been disputed before us, for the expression 'disposition' in s. 9 must be read with the definition in Explanation 2 to s. 2(15) since that is the whole purpose of a "deeming provision' in the shape of a definition. Granting that, the disponer cannot extinguish or part with what is not his—rather a trite statement though—since A can give or give up only what he has at the time of alienation or abnegation. Shri Desai contends, and rightly, that the deceased could not dispose of any interest in property which did not earlier vest in him or at least at the time of the disposition. No right can be given up without its being vested in him when he gives up. This hypothesis in law turns the searchlight on the existence, at the time of the release or partition, of what has been disposed of under that deed. What then was disposed of? And did the deceased own at the time of disposition what he thus made over or extinguished? An answer to these twin questions may be readily given, once we clear the confusion that has crept in at certain stages of the argument, by a process of inept importation and imperfect understanding of the rule of Hindu law regarding coparcenary.

The proposition is trite that in an undivided Hindu family coparceners have no predictable or defined shares but each has an antecedent title in every parcel of property and is jointly the owner and in enjoyment with the others. But surely it is well-established that at the very moment members decide upon a partition *eo instanti,* a division in status takes place whereupon the share of the demanding members gets crystallised into a definite fraction and if there is division by metes and bounds the allotment of properties vivifies and specifies such shares in separate ownership. These two processes or stages may often get telescoped when by consensus the coparceners jointly divide the properties. Unequal divisions of properties knowingly made may not spell invalidity and mathematical equality may not be maintained always in a partition while, ordinarily, substantial fairness in division is shown. Granting these legal positions, the more serious question which has been agitated before us is as to whether a willing, albeit *bona fide,* arrangement whereby a substantially reduced share is taken by the decedent consequentially vesting a proportionately larger estate in the recipient is a disposition falling within Explanation 2 to s. 2(15) and therefore 'property' within the substantive definition. In this context we may have to read ss. 9 and 27 for property taken under a disposition made by the deceased may be deemed to be a gift in favour of the accounting person in the circumstances mentioned in s. 9. Similarly, s. 27 also tracks down certain dispositions made by deceased

A persons in favour of relatives by treating them as 'gifts'. The basic concept of disposition looms important in such circumstances.

This introductory statement of the law takes us to the other points of Shri Desai which we will tackle together, guided by the text of the sections aforesaid read in the light of the citations, aplenty, of cases—Indian and English. We may compendiously state, forgetting for a moment the complication in the Gujarat Case of the release deed executed by the decedent being either a relinquishment or a partition that in both the appeals, the decedents and the recipients were members of an undivided Hindu family and within the two years proximity of death the partition arrangement was effected whereunder a lesser share than due was allotted to the latter. And indeed, it is this difference between what was due to the right of the deceased and what was actually taken that was treated as a 'gift' by the Revenue based on the definition in s. 2(15), Explanation 2, *plus* ss. 9 and 27. The cornerstone of the whole case of the Revenue is thus the concept of 'disposition' which we may point out, right at the outset, is not a term of art not legalese but plain English with wide import. What is more, this word has acquired, beyond its normal ambit, an abnormal semantic expansion on account of a special definition with an Explanation superadded. In short, 'disposition' in the Estate Duty law of India enjoys an extended meaning. Even so, does it go so far as to cover a mere taking of a less-than-equal share by the deceased, the benefit on account of which has gone to the accountable person ?

Before we enter the thicket of judicial conflict regarding the meaning of 'property' as extended by Explanation 2 to s. 2(15), we may remind ourselves as courts that in a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. While the rulings on the point in the Act and in the allied Gift Tax Act will be adverted to presently, we may begin an incisive understanding of the Explanation 2 aforesaid. The spirit thereof is obvious. The framers of the Act desired by a deeming provision regarding 'disposition' to cover extinguishments of debts and all other rights at the expense of and made by the deceased in favour of the beneficiary. The substantive definition of 'property' in s. 2(15) is not exhaustive but only inclusive and the supplementary operation of Explanation 2 takes in what is not conventionally regarded as 'disposition'. Indeed, 'disposition', even according to law dictionaries, embraces 'the parting with, alienation of, or giving up property...a destruction of property' (Black's Legal Dictionary). The short question before us is whether the dispositive fact of giving up by a coparcener of a good part of what is due to him at the time of division to his own detriment and to benefit of another coparcener, can be called 'disposition' in law. Undoubtedly this operation, to use a neutral expression, is made up of simple jural facts that modify and extinguish jural relations and create in their place new rights whereby one gives or gives up and another gains. This legal result, produced by voluntary action, is 'disposition' within the scope of Explanation 2 to s. 2(15).

The assessee's contention, effectively presented by counsel, takes a legalistic course, ignoring the purpose, language and amplitude of

Explanation 2. Argues Shri Desai, in a partition, equal or unequal, there is no element whatsoever of consideration, partial or full, since in a partition there is only an adjustment of rights and substitution of joint enjoyment by enjoyment in severalty. In his view it is a confusion to mix up unequal partition with inadequate consideration and it is a worse confusion to talk in terms of *bona fide* and *mala fide* partition where the shares are merely unequal by choice. What is forgotten in this chain of reasoning is the office of Explanation 2 which is deliberately designed to take into its embrace what otherwise may not be 'disposition'. Once we reconcile ourselves to the enlargement of sense imported by the Explanation, we part company with the traditional concept. We have also to stress the expression 'other right' in the Explanation which is of the widest import and cannot be constricted by reading it *ejusdem generis* and 'debt'. 'Other right', in the context, is expressly meant considerably to widen the concept and therefore suggests a somewhat contrary intention to the application of the *ejusdem generis* rule. We may derive instruction from Green's construction of the identical expression in the English Act [s. 45(2)]. The learned author writes :

> "A disclaimer is an extinguishment of a right for this purpose. Although in the event the person disclaiming never has any right in the property, he has the right to obtain it, this inchoate right is a 'right' for the purposes of s. 45(2). The *ejusdem generis* rule does not apply to the words 'a debt or other right' and the word 'right' is a word of the widest import. Moreover, the expression 'at the expense of the deceased' is used in an ordinary and natural manner; and is apt to cover not only cases where the extinguishment involves a loss to the deceased of a benefit he already enjoyed, but also those where it prevents him from acquiring the benefit.
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> The words 'the person for whose benefit the debt or other right was extinguished' do *not* necessitate a conscious intention to benefit some person; it is sufficient that some person was in fact benefited. 'The motive or purpose of the deceased appears to me to be immaterial', provided the transaction was gratuitous and did in fact benefit the other person concerned.
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> The extinguishment of a right may also cover the release of his interest by one joint tenant in favour of another."
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> (Green's Death Duties, 7th Ed., Butterworths, p. 149)

Shri Desai and also Shri Kazi, appearing for the 'accounting persons' in the respective cases, urged that this expansive interpretation taking liberties with traditional jural concepts is contrary to this Court's pronouncement in *Getti Chettiar*(1). That was a case under the Gift Tax Act, 1958 and the construction of s. 2(xxiv) fell for decision. Certainly, many of the observations there, read *de hors* the particular statute, might reinforce the assessee's stand. This Court interpreted the expression 'transfer of property' in s. 2(xxiv) and held that the expression 'disposition' used in that provision should be read in the

(1) [1971] 82 I.T.R. 599.

A context and setting of the given statute. The very fact that 'disposition' is treated as a mode of transfer takes the legal concept along a different street, if one may use such a phrase, from the one along which that word in the Estate Duty Act is travelling. Mr. Justice Hegde rightly observed, if we may say so with respect, that

B 'Words in the section of a statute are not to be interpreted by having those words in one hand and the dictionary in the other. In spelling out the meaning of the words in a section, one must take into consideration the setting in which those terms are used and the purpose that they are intended to serve."

(p. 605-606)

C The word 'transaction' in s. 2(xxiv) of the Gift Tax Act takes its colour from the main clause, that is, it must be a 'transfer' of property in some way. Since a partition is not a 'transfer' in the ordinary sense of law, the Court reached the conclusion that a mere partition with unequal allotments not being a transfer, cannot be covered by s. 2(xxiv). A close reading of that provision and the judgment will dissolve the mist of misunderstanding and discloses the danger of D reading observations from that case for application in the instant case. The language of s. 2(15), Explanation 2, is different and wider and the reasoning of *Getti Chettiar* (supra) cannot therefore control its amplitude. It is perfectly true that in ordinary Hindu law a partition involves no conveyance and no question of transfer arises when all that happens is a severance in status and the common holding of property by the coparcener is converted into separate title of each coparcener as E tenant-in-common. Nor does subsequent partition by metes and bounds amount to a transfer. The controlling distinction consists in the difference in definition between the Gift Tax Act [s. 2(xxvi)] and the Estate Duty Act [s. 2(15)].

The Madras High Court in *Valliammai Achi*[1] took the correct view when it said on similar facts :

F "The facts of this case, in our opinion, seem to square with the second Explanation to section 2(15). That, no doubt, is an Explanation to the inclusive definition of property. But the language of it seems to go further and coins a deemed disposition in the nature of a transfer. The mechanics of the transfer for the purposes of Explanation 2 G consist in the extinguishment at the expense of the deceased of a right and the accrual of a benefit in the form of the right so given up in favour of the person benefited. Transfer in a normal sense and as understood with reference to the Transfer of Property Act connotes a movement of property or interest or right therein or thereto from one person to another *in praesenti*. But in the kind of disposition contemplated by the second *Explanation*, one can hardly trace such a transfer H because of the mere fact of extinction of a certain right of the deceased which does not involve a movement, a benefit is

(1) [1969] 73 I.T.R. 806, 808.

> created in favour of the person benefited thereby. In the present case the son who was a quondam coparcener had a pre-existing right to every part of the coparcenary property, and if by a partition or a relinquishment on the part of one or more of the coparceners, the joint ownership is severed in favour of severalty, the process, having regard to the peculiar conception of a coparcenary, involves no transfer....But Explanation 2 is concerned not with that kind of situation, but an extinguishment of a right and creation of a benefit thereby and this process is statutorily deemed to be a disposition which is in the nature of a transfer."

This line of reasoning has our general approval.

From what we have said, the bold lines of opposing views emerge and they hinge on the connotation of 'disposition'. The High Courts, in their divergent stands, have lined up before both strands of reasoning. Madras, a Full Bench of the Punjab High Court, and the classic observations in *In re Stratton's Disclaimer*(1) support the point of view championed in *Ranganayaki Ammal.* The contrary thinking finds support in Andhra Pradesh and Punjab as well as in Gujarat (*Kantilal*). The sense of our statutes modelled as they are on a series of English Acts, is best expressed so far as the concept of 'disposition' is concerned, by Jenkins L.J., in *In re* : *Stratton's Disclaimer*(1) relating to s. 45 of the Finance Act, 1940 [which runs similar in strain to s.2(15)]. Noting the strength of the sweeping and unparticularized reference to 'a debt or other right', Jenkins L.J., repelled the application of the *ejusdem generis* rule and imparted to the word 'right' the widest import :

> "Mr. Russel did not seek to limit the effect of the words 'debt or other right 'by an application of the *ejusdem generis* rule, and, in my view, it would not be possible to do so. In the absence of any such restriction on its meaning the word 'right' is a word of the widest import, and if, in accordance with my view, Mrs. Stratton can properly be held to have had a right in respect of the specific bequest and devise pending disclaimer, I see no ground for holding that it was not a right within the meaning of section 45(2)."
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> * * * * *
>
> "I confess that I am disposed to deprecate recourse in revenue legislation to sweeping generalities of this kind, but the mere fact that an enactment is couched in general and comprehensive terms affords no ground for excluding from its operation transactions falling fairly within its provisions, general though they may be."

Roxburgh J., emphasized the impact of the legal fiction and observed :

> "A certain state of facts is to be deemed to be a different state of facts, and the line between fact and hypothesis seems to me to be drawn by the word 'deemed'. If this be

(1) [1958] 34 I.T.R. (Estate Duty) 47.

A so, only three actual facts are expressed to be necessary in order to involve the hypothetical situation, (1) the existence of a right, (2) its extinguishment, (3) its extinguishment at the expense of the deceased. When those three facts concur, the hypothesis goes into action, and the hypothesis is that these facts are equivalent to a disposition made by the deceased in favour of the person for whose B benefit the right was extinguished. These words, in my opinion, all form part of the hypothesis and the concluding words are necessary to define the hypothetical disponee."

The conventional construction of 'disposition' has to submit to the larger sweep of the hypothetical extension by definition.

C The Gujarat High Court has gravitated towards the narrower construction of 'disposition' and 'or right'. It makes no specific reference to *Stratton's Disclaimer* (supra) and the learned judges have insisted on *transfer* of interest as a necessary indicium of every disposition. Partition does not involve a transfer and therefore, cannot be a disposition, runs the logic of the Gujarat judgment. Likewise, 'other right', in Explanation (2), it is argued, cannot cover D the case of partition as in the learned Judges' view a transfer is a *sine qua non*. We cannot agree, for reasons already stated, with this approach which defeats the intendment of the Act and the express object of Explanation 2 to s. 2(15). The peculiar definition of 'disposition' injecting a triple hypothesis and fictional expansion covers the diminution in the share taken by the coparcener and augmentation of the share taken by the other and impresses the E stamp of property on this process by the "deeming' provision. Sections 9 and 27 strengthen this conclusion.

We were confronted by Shri Desai with *Kancharla Kesava Rao*(1) for contending that giving away or giving up could not in all cases be disposition where the transaction is a partition. This Court, in the above ruling, held that a partition in a coparcenary F was just an adjustment of rights, not a transfer in the strict sense. Shri Justice Hegde, speaking for the Court, placed on s. 24 of the Act more or less the same intepretation as was put in *Getti Chettiar* (supra) by this Court. Whatever might be the interpretation of 'disposition' in s. 24 of the Act, we are satisfied that the only straight-forward construction of that expression in s. 27 is as we have explained at length above. Section 9, dealing with gifts G takes in property under a disposition made by a deceased, throwing up the question 'What is a gift?'. Section 27 supplies the answer : 'any disposition made by the deceased in favour of a relative of his shall be treated *for the purposes of this Act* as a gift'. Unless, of course, it is made for full consideration. There is no limitation, environmental or by the society of words, warranting the whittling down of the unusually wide range of Explanation 2 to s. 2(15). H *Kesava Rao* (supra) cannot cut back on the liberality of s. 27. In the realm of legal fiction, law cannot be confined within traditional

(1) [1973] 89 I.T.R. 261.

A concepts. It is pertinent that as between the Gift Tax Act and the Estate Duty Act there is basic difference in that the tax effect in the first is on transaction *inter vivos* and in the second on the generating source of transmission by death. Comparisons in construction cannot therefore be pushed too far.

B Before winding up this part of the discussion, we may refer to *Grimwade* v. *Federal Commissioner of Taxation*(1) where Williams J., dealing with the expression 'disposition of property' defined somewhat in similar lines as in our Act, observed :

> "The whole emphasis of paragraph (f) is upon a transaction entered into by one person, which seems to me to mean that where there is an act done by one person with the requisite intent, and as a result there is a transfer of value from any property of that person to the property of another person, the conditions of liability are satisfied." C

Each statute has its own mint and the coinage of words bears a special stamp. That is our only comment when we depart semantically from other judicial annotations of the expression 'disposition'. If A is entitled to a moiety in property worth rupees five lakhs (or let us D assume that much of cash in the till belongs jointly to A and B) and by a partition relinquishment, disclaimer or otherwise A accepts something substantially less than his due, say rupees one lakh as against rupees two-and-a-half lakhs and the remainder goes to the benefit of B who gets four lakhs as against two-and-a-half lakhs, commonsense, concurrently with Explanation 2, draws the inference that A has made over at his expense and to the benefit of B a sum of rupees one-and-a-half lakhs which may be designated a 'disposition' by him in favour of E B.

Shri Desai rightly stressed in construing s. 9 we should not confess between a *mala fide* transaction and unequal partition. He is right. But the simple scheme of s. 9 may be stated to erase misapprehension. What the provision declares is that if the disposition made by the deceased F is more than two years before death, the property covered thereby shall not pass on the death unless it shall not have been *bona fide*. That is to say, even if the transaction were more than two years before the death, if it were entered into in bad faith, estate duty may still attach to that property. So far as dispositions made within two years of the death of the deceased are concerned, there is no question of *mala fides* or *bona fides*. All such transactions are caught within the coils of s. 5 G read with ss. 9 and 27. The requirement of 'bona fides' has nothing to do with dispositions within 2 years and has much to do with those *beyond* 2 years. The marginal obscurity in s. 9 is due perhaps to compressed draftsmanship.

Now to costs. We have already indicated how serious arguments have appealed in contrary ways to several judges of the High Courts and certain observations of this Court have themselves been capable H of different shade of sense from what we have read into them. Indeed the point involved in the case is of general public importance which,

(1) [1949] 78 C.L.R. 199.

A on account of the conflict in the High Courts, needs to be decided by the Supreme Court. One of the major functions of this Court is to declare the law for the country under Art. 141 of the Constitution, although under our adversary system it is only when litigation spirals up the Court acts and declares the law.

While dealing with a similar situation, this Court in *Trustees of* B *Port, Bombay*(1) observed :

> "Is it fair in these circumstances that one party, albeit the vanquished one, should bear the burden of costs throughout for providing the occasion—not provocation—for laying down the correct law in a controversial situation? Faced with a similar moral-legal issue, Lord Reid observed :
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> C "I think we must consider separately costs in this House and costs in the Court of Appeal. Cases can only come before this House with leave, and leave is generally given because some general question of law is involved. In this case it enabled the whole vexed matter of *non est factum* to be re-examined. This seems to be a typical case where the costs of the successful respondent should come out of public funds.
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> D The Evershed Committee on Supreme Court Practice and Procedure had suggested in England that the Attorney-General should be empowered to issue a certificate for the use of public funds in appeals to the House of Lords where issues of outstanding public importance are involved."
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> Maybe, a scheme for a suitors' fund to indemnify for E costs as recommended by a Sub-Committee of Justice is the answer, but these are matters for the consideration of the Legislature and the Executive. We mention them to show that the law in this branch cannot be rigid. We have to make a compromise between pragmatism and equity and modify the loser-pays-all doctrine by exercise of a flexible discretion. The respondent in this case need not be a martyr for the F cause of the certainty of law under section 87 of the Act, particularly when the appellant wins on a point of limitation. (The trial Court had even held the appellant guilty of negligence). In these circumstances we direct that the parties do bear their costs throughout."

We adopt the same course and while allowing Civil Appeal No. 1095 G of 1970 and dismissing Civil Appeal No. 1677 of 1973 the parties in both the appeals are directed to bear their respective costs throughout.

V.P.S.

CA. 1095 *of* 1970 *allowed.*
CA 1677 *of* 1973 *dismissed.*

(1) [1974] 4 S.C.C. 710, 738.