CIVIL MISCELLANEOUS

Before A. N. Grover and H. R. Khanna, JJ.

MST. GAINDI,—*Petitioner*

versus

THE UNION OF INDIA AND ANOTHER—*Respondents*

Civil Writ No. 1528 of 1962.

1964

July, 20th.

Gift Tax Act (XVIII of 1958)—Whether valid qua gifts of lands and buildings—Constitution of India (1950)—Art. 248 and Schedule VII, List I Entry 97 and List II Entries 18 and 49—Scope of—Parliament—Whether competent to enact law imposing tax on gifts of lands and buildings—Entries in the Lists—How to be interpreted.

Held, that the Gift Tax Act, 1958, is valid in its operation on transfer of agricultural lands and buildings. By enacting this Act the Parliament has not encroached on the field of the legislative competence of the State Legislatures as this Act, in pith and substance, does not fall within the ambit of Entry 49 of List II of Seventh Schedule to the Constitution of India. The power to enact laws like the Gift Tax Act is covered by Entry 97 of List I (Union List) of the Seventh Schedule read with Article 248 of the Constitution which give the residuary powers of legislation to the Parliament.

Held, that the mere fact that a subject is mentioned in the State List does not go to show that it is the State legislature which is competent to make law for imposing tax with respect to that subject. The power of making law for taxation about a certain subject is something quite distinct and separate from the power to make law with regard to that subject, and the Courts would not be justified in inferring the powers of taxation with respect to a subject from the mere fact that a legislature has been empowered to make laws with respect to that subject. A close scrutiny of Lists I and II of the Seventh Schedule to the Constitution reveals that the Constitution has treated the powers of legislation with respect to a subejct and that of levying a tax with respect to that subject, separately for purposes of legislative competence.

Held, that from the mere mention of the subject of transfer and alienation of agricultural land in Entry 18 of List 11 it cannnot be inferred that it is the State legislature alone which can make law for levying tax on transfers and alienations of agricultural land.

Held, that Entry 49 relates to taxes on lands and buildings simpliciter and not to taxes on transactions of transfers relating to lands and buildings. Gift-tax is a tax not on property but on transactions relating to property and as such does not fall within the ambit of Entry 49. The occasion for the imposition of gift-tax arises not because of the simple existence of the property, but because of a gift having been made of that property. It is the transaction of the gift which attracts the levy of the tax and in the absence of such a transaction the question of the imposition of the above tax does not arise. The power of imposing a tax on land and buildings does not include the power to impose tax on gifts of land and buildings. Nor can the power to tax gifts of land be deemed to be ancillary or subsidiary to the power to tax land and buildings. The two subjects are distinct and separate because one relates to tax on land and buildings while the other relates to tax on the individual act of making a gift of the property.

Petition under Article 226 of the Constitution of India praying that an appropriate writ, order or direction be issued quashing the notice No. 5/G.T. under Section 13(2), dated 19th December, 1960 and under Section 15(2), dated 31st August, 1961.

G. C. MITTAL, ADVOCATE, for the Petitioner.

D. N. AWASTHY AND H. R. MAHAJAN, ADVOCATES, for the Respondents.

ORDER

KHANNA, J.—Shrimati Gaindi, petitioner, by means of this petition under Article 226 of the Constitution of India Khanna, J.

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seeks to challenge the vires of the Gift-Tax Act No. 18 of 1958 (hereinafter referred to as the Act).

According to the allegations of the petitioner she made a gift of agricultural land measuring 1335 Bighas and 11 Biswas situated in village Muana, district Karnal, in favour of her relatives as per registered gift deed, dated the 14th April, 1959. A notice dated the 19th December, 1960 was received by the petitioner from the Gift-Tax Officer, Karnal, for filing of return of the gifts made by her under section 13(2) of the Act. The petitioner submitted a return giving the necessary details of the gift. Various dates thereafter were given to the petitioner for giving proof of the valuation of the gifted property. A further notice under section 15(2) of the Act was received by the petitioner on the 31st August, 1961, from the Gift-tax Officer with respect to the return filed by her. The case of the petitioner is that the Gift-tax Officer had no jurisdiction to issue notices under sections 13(2) and 15(2) of the Act, and the above-mentioned notices are illegal, *ultra vires* and without jurisdiction. It is asserted that the Parliament had no power to legislate with respect to agricultural land and it is only the State legislature which is empowered to make a law with respect to tax on agricultural land.

The petition has been resisted by the Union of India and the Gift-tax Officer, who have been impleaded as respondents, and it is averred on their behalf that the impugned notices are legal and *intra vires*. According further to the respondents the Parliament had the power to enact the Act by virtue of the residuary powers of taxation mentioned in Article 248(2) and Entry 97 in list I of the Seventh Schedule to the Constitution.

Before dealing with the respective contentions advanced before us, it would be useful to refer to the relevant provisions of the Act. Section 2 contains the definition clauses, and according to clause (xii) gift means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration for money or money's worth, and includes the transfer of any property deemed to be a gift under section 4. Section 3 contains the charging provision and enacts that subject to the other provisions contained in the Act,

there shall be charged for every financial year commencing on and from the 1st day of April, 1958, a gift-tax in respect of gifts made by a person during the previous year (other than gifts made before the 1st day of April, 1957) at the rates specified in the Schedule. The effect of section 4 is to include certain types of transfers within the definition of gift. Section 13 requires every person, who has made a taxable gift during the previous year, to furnish to the Gift-tax Officer, a return in the prescribed form, while sub-section (2) of that section gives a power to the Gift-tax Officer to serve a notice upon such person requiring him to furnish the return within the prescribed time. Section 15 deals with the assessment of gift-tax, while section 19 makes provisions for the payment of gift-tax by the legal representatives of a person from his estate in case he dies before the payment of such tax. Section 29 enacts that gift-tax shall be payable by the donor, but where in the opinion of the Gift-tax Officer it cannot be recovered from the donor, it may be recovered from the donee. Section 30 makes the gift-tax to be a charge on the property gifted.

Mr. Mittal, learned counsel for the petitioner, has at the outset made a feeable attempt to challenge the *vires* of the Act by relying on Entry No. 18 of list II of the Seventh Schedule to the Constitution of India according to which it is the State legislature which is competent to make laws with respect to the following subject:—

> "Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

It is urged by Mr. Mittal, that as it is the State legislature which is competent to legislate with regard to "transfer and alienation of agricultural land", it is only that legislature which can make a law with respect to tax on gift of agricultural land which is a form of transfer and alienation of that land. This contention, in my opinion, is wholly devoid of force. The mere fact that a subject is mentioned in a State List would not go to show that it is the State legislature which is competent to make law for imposing tax with respect to that subject. The power of

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making law for taxation about a certain subject is something quite distinct and separate from the power to make law with regard to that subject, and the Courts would not be justified in inferring the powers of taxation with respect to a subject from the mere fact that a legislature has been empowered to make laws with respect to that subject. Close scrutiny of Lists I and II of the Seventh Schedule to the Constitution reveals that the Constitution has treated the powers of legislation with respect to a subject and that of levying a tax with respect to that subject separately for purposes of legislative competence. In List I entries 1 to 81 contain the several matters over which Parliament has authority to legislate, while entries 82 to 92 enumerate the taxes which can be imposed by a law of Parliament. Examination of these two groups of entries reveals that while the main subject of legislation is specified in the first group, tax in respect thereof is dealt with separately in the second group. For example, Entry 22 in List I deals with "railways" and Entry 89 with "terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights". If Entry 22 is to be construed as involving taxes to be imposed in relation to the subjects mentioned in that Entry, then Entry 89 would be superfluous. Adverting to list II one finds that Entries 1 to 44 form one group of subjects on which the State legislatures can make laws, while Entries 45 to 63 in that list constitute another group dealing with the taxes which can be imposed by the States. After referring to the various entries in Lists I and II of the Seventh Schedule to the Constitution, Venkatarama Aiyar, J., who spoke for the majority, observed in *M.P.V. Sundaramier and Co.* v. *The State of Andhra Pradesh and another* (1):—

> "The above analysis—and it is not exhaustive of the Entries in the Lists—leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as distinct matter for purposes of legislative competence."

I would, therefore, hold that from the mere mention of the subject of transfer and alienation of agricultural land

(1) 1958 S.C.R. 1422.

in Entry 18 of List II, it cannot be inferred that it is the State legislature which can make law for levying tax on transfers and alienations of agricultural land.

The main contention of Mr. Mittal, however, is based upon Entry 49 of List II according to which it is the State legislature which is competent to make laws with respect to taxes on lands and buildings. It is urged that a tax on gift of land is a tax on land, and as such it is only the State legislature which can levy it.

I have given the matter, my consideration and am of the view that Entry 49 relates to taxes on lands and buildings simpliciter and not to taxes on transactions of transfers relating to lands and buildings. Gift-tax is a tax not on property, but on transactions relating to property and as such does not fall within the ambit of Entry 49. The occasion for the imposition of gift-tax arises not because of the simple existence of the property, but because of a gift having been made of that property. It is the transaction of the gift which attracts the levy of the tax and in the absence of such a transaction the question of the imposition of the above tax does not arise. I, therefore, am of the view that a power of imposing a tax on land and building would not include the power to impose tax on gifts of land and building. In para 315 of American Jurisprudence, Volume 28, it is observed while dealing with a gift-tax—

> "Such a tax is not a tax on property as such; its imposition does not rest on general ownership, but it is an excise upon the use made of property, upon the exertion of the privilege of transmitting title by gift."

The above observations, based upon the case *Joseph H. Bromley* v. *Blakely D. McCaughn* (2), although made in the context of the provisions of the American law, do have a bearing on the limited question as to whether a provision for tax on ownership of property would cover tax on the transfer of that property.

Mr. Mittal, has then argued that the language of Entry 49 of List II should receive a wide construction and

(2) 74 Lawyers' Edition 226.

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should be held to extend to all ancillary and subsidiary matters which can reasonably be said to be comprehended in it. He has in this connection referred to the decision of Federal Court in *United Provinces* v. *Mt. Atiqa Begum and others* (3), wherein Gwyer, C.J., observed:—

> "I think however, that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

The above observations were followed by their Lordships of the Supreme Court in *Navinchandra Mafatlal, Bombay* v. *Commissioner of Income-tax, Bombay City* (4), and *Chaturbhai M. Patel* v. *The Union of India and others* (5). In my opinion there can be no dispute so far as the proposition enunciated above, which has received imprimatur of the highest Court in the land, is concerned, but the petitioner cannot derive much advantage from it because the power to tax gift of land cannot be deemed to be ancillary or subsidiary to the power to tax land and building. The two subjects are distinct and separate because one relates to tax on land and building while the other relates to tax on the individual act of making a gift of that property.

Mr. Mittal has also referred to a Division Bench case of Mysore High Court *D. H. Hazareth* v. *Gift-tax Officer* (6), in which it was held that the power conferred on the State legislatures by Entry 49 of List II of the Seventh Schedule to the Constitution, to make laws in respect of "taxes on lands and buildings" included the power to tax gifts of land and buildings. The Gift-tax Act enacted by the Parliament was, accordingly, held to be *ultra vires* the powers of the Parliament and unconstitutional so far as it purported to impose tax on gifts of lands and buildings. The above authority was cited before a Division Bench of Madras High Court in *S. Dhandapani* v. *Additional Gift-tax Officre, Cuddalore* (7), and was not followed. It was held that the Gift-tax Act was valid in its operation on the

(3) A.I.R. 1941 Federal Court 16.
(4) 26 I.T.R. 758.
(5) 1960 S.C.R. 362.
(6) 45 I.T.R. 194.
(7) 49 I.T.R. 712.

transfer of agricultural land. A Division Bench of Andhra Pradesh High Court in *Jupudi Sesharatnam and others* v. *The Gift-tax Officer, Palacole, West Godawari District* (8) and a Division Bench of Kerala High Court in *Joseph* v. *Gift-tax Officer* (9), have also taken the view that the Gift-tax Act is valid in its operation on transfer of agricultural land. With respect I agree with the decisions of Andhra Pradesh, Kerala and Madras High Courts and hold that the contention that the Parliament in enacting the impugned Act made an encroachment on the field of the legislative competence of the State legislature is not well-founded. The impugned Act in pith and substance does not, in my view, fall within the ambit of Entry 49 of List II.

No other entry has been relied upon by the learned counsel for the parties, and in the circumstances I would hold that the power to make law with respect to Gift-tax Act is covered by Entry 97 of List I (Union List) of the Seventh Schedule read with Article 248 of the Constitution which give the residuary powers of legislation to the Parliament and read as under:—

> "*Entry* 97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.
>
> *Article* 248. (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent list or State List.
>
> (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

It would follow from the above that the Parliament was well within its power in enacting the Gift-tax Act.

The petition, accordingly, fails and is dismissed. In the circumstances of the case I leave the parties to bear their own costs.

A. N. GROVER, J.—I agree.

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R.S.

(8) A.I.R. 1960 Andh. Prad. 115.
(9) 45 I.T.R. 66.