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Family Settlement & Wills

1} Except where there is a specific provision of the IT Act which derogates from any other statutory law or personal law, the provision will have to be considered in the light of the relevant branches of law.- ***CIT V/s. Bhagyalakshmi & Co. 55 ITR 660 (SC***).

2} The Hon'ble Supreme Court in ***Sahu Madho Das V/s. Pandit Mukand Ram AIR 1955 SC 481*** has laid down the principles of family settlement and the requirement of registration of a document of family settlement. The Hon'ble Apex Court observed as under:

" *It is well settled that a compromise or family settlement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what*

that title is, each party relinquishing all claims to property other than that falling to his share and recognizing the right of others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his share is concerned and therefore no conveyance is necessary. But, in our opinion, the principle can be carried further and so strongly do the courts lean in favour of family arrangements that bring about harmony in a family and do justice to its' various members and avoid in anticipation, future disputes which might ruin them all, and we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all

the properties resides in only one of their number and are content to take such properties as are assigned to their shares as gifts pure and simple from ……..".

A family arrangement does not result into a transfer or a conveyance ***Ramcharan Das V/s. Girija Devi AIR 1966 SC 323***. In this case, the Hon'ble Apex Court held that a.

3} That apprehended conflict can also be a ground for such settlement - AIR 1932 Cal 600, AIR 1932 Cal 664.

4) Even the parties to family settlement need not belong to the same family. The word 'family' in this context is quite flexible. The family is not to be taken in its rigid connotation in common parlance. It is enough if the parties are relations. Even collaterals having a remote common ancestor may join in an arrangement and can have relinquished or altered even their interest in expectancy. - **Krishna Baharilal vs. Gulab Chand & Ors**. ***AIR***

1971 SC 104. The court, in that case, encountered by the question whether the want of direct family bond amongst the parties to the settlement detracts from the family character of the settlement. The answer is in the negative. Even though the parties were nothing but mere relations and not members of the same family, the dispute between the parties was in respect of certain property which was originally owned by their common ancestors, that was considered sufficient for a family settlement or arrangement. Thus, the family for the purpose of such settlement has a broad sense to embrace parties not belonging to the family.

THE STAMP ACT.

5) ***Cohen and Moore v. Commissioners of Inland Revenue 1933(2) KB 126,*** the court held that the Stamp Act deals only with documents.

6) **Section 35** of the Stamp Act, *inter alia*, states that no instrument chargeable with duty shall be admitted in evidence for any purpose or shall be acted upon, registered

or authenticated by any such person or by any public officer, unless such instrument is duly stamped. The proviso to this section, however, permits an unstamped/insufficiently stamped instrument to be admitted in evidence, in case the document is stamped and the penalty provided by law is paid. Consequently, an instrument that is unstamped or insufficiently stamped does not suffer from a fatal defect, and it is not rendered inadmissible in evidence altogether. If the stamp duty along with the requisite penalty is paid, the document would become admissible in evidence.

Registration of the family deed.

7) Section 17 of the Registration Act, 1908 enlists the documents which shall be got registered under the Act. Clause (b) of Section 17(1) reads:

—other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

Section 17(2), inter alia, provides that nothing in clause(b) of Section(1) of Section 17 applies to:

(v) any document other than the documents specified in sub-section(1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject- matter of the suit or proceeding].

8) Section 49 of the Registration Act provides that no documents required by Section 17, inter alia, to be registered shall affect any immovable property comprised therein; confer any power to adopt; or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. Consequently, unlike under Section 35 of the Stamp Act, an instrument/document that is compulsorily registrable, but is not so registered, is denuded of its efficacy and it is not receivable in evidence, and the law does not enable the party relying upon the instrument/document to unilaterally get the same subsequently registered.

9) It is settled position that a family settlement does not require registration- *Kale V/s. Dy. Director AIR 1976 SC 807; Shahu Madho das v/s. Mukand Ram AIR 1955 SC 804*. Hence no registration is required since there is no conveyance involved in this family settlement; the right/title/interest of the all the family members already existed in the property.

10) In ***Tek Bahadur Bhujil v. Debi Singh Bhujil AIR 1966 SC 292*** to submit that where the document was drawn up only to serve the purpose of proof or evidence of what had been decided by the parties, and not to form the basis of their rights in any form over the property, the same constitutes a mere memorandum recording something that has already taken place, and such a document would not require registration or stamping. Same view in ***Roshan Singh V. Zile Singh AIR 1988 SC 881*** .

11) In ***K. Panchpagesa Ayyar & Anr. V. Kalyansundaram Ayyar & Ors. AIR 1957 Madras 472***, it was observed:

If the parties elect to reduce the transaction of partition into writing with the intention that the document itself should constitute the sole repository and the only appropriate evidence of the partition and to serve, so to speak, as a document of title, the writing must be regarded as the formal and operative deed of partition and as such requiring registration under Section 17, Cl. (b), provided the property affected is of the value of over Rs. 100. It is not the less a partition deed because its terms and contents were previously discussed and decided upon and then alone put into writing. But if the document is drawn up only with the intention of reciting an already completed oral partition and is merely in the minutes or incidental recital of a fait-accompli it is not compulsorily registrable.

12) Thus documents so drawn up may fall under two heads viz.,

(a) a document may be drawn up with the intention of reciting an already completed oral partition or

(b) with that of superseding the oral bargain and formally reducing the terms of the partition to the form of a document.

In the former case when the document itself does not effect any partition but which maintains a partition already effected, or which simply acknowledges, or makes an admission, as to a prior partition, or which merely gives a right to have a document of partition executed it is not an instrument of partition which is compulsorily registrable.

But when the document is not intended by the parties to be merely the minutes or incidental recital of a fait accompli, i.e., of a partition that had already taken place, perhaps by oral arrangement, and was complete when the document was executed but forms an integral and essential part of the partition transaction i.e., of the process of dividing the property and was intended to be the only evidence of and to be the formal instrument of partition superseding and embodying the oral

bargain and was intended to serve as the sole repository of the arrangement of partition arrived at by them, and to be the only evidence, the document would undoubtedly require registration. The question to be determined in effect is, does the document constitute a bargain between the parties i.e., is it a deed of partition effected in praesenti or is it merely the record of an already completed transaction, i.e., partition or to put it shortly is it a speaking partition instrument .

13) ***In The Chief Controlling Revenue Authority v. Rasikchandra Tulsidas Patel (1958) 50 Bom. L.R. 1379***, the Court broadly classified deeds pertaining to partitions as follows:

- When you have a joint Hindu family, you may have a partition effected, which partition may only result in a division of interest. Members of the joint family may not specifically divide the joint family property. The result of this

would be that the members of the joint family would cease to be coparceners and would become tenants-in-common and would hold the property as tenants-in-common. At a subsequent stage by a document the tenants-in-common may specifically divide the property. In such a case, although in one sense the partition has already taken place, still the fact that the tenants-in-common are specifically dividing the property would attract the application of Section 2(15).

- You may have another case where a partition may take place not only in interest but also a specific partition of property. The coparceners may by this partition divide the property which belongs to the joint family and then you may have a subsequent document which may recite the fact not only of partition in interest but the actual partition specifically of the property of the joint family. In such a case it is difficult to understand how the document which merely

admits and acknowledges a past event, which recites a partition which has already taken place, and which does not in any sense of the term bring about a partition, can be considered to be an instrument of partition under Section 2(15).

- The third case may be where the document itself may bring about both a division in interest and a partition with regard to specific property. That would be a clear case of an instrument of partition partitioning the joint family property. If these principles are understood and appreciated, then there is not much difficulty in deciding in which category the document we are considering falls.

The Court further emphasized on one of the tests which may be safely applied, that is :

—Has everything which is necessary to be done in order to bring about a partition been done before the document is executed? If everything has been done, then there is nothing which the

document brings about. If something is left to be done which is done by the document, then the document may be considered as an instrument of partition.

The court held that members of a joint family who have effected a partition, though not an actual physical partition by metes and bounds, cease to be coparceners but continue to be tenants in common. If, at a subsequent stage the tenants in common specifically divide the property, the document by which the property is partitioned would attract the application of Section 2 (15) of the Stamp Act as it would be an instrument of partition.

14) Where one of the brothers relinquishes all right/title/interest in an inherited property, in favour of another brother, in consideration of certain amount, ***Article 52 (a)*** Of the Stamp Act is applicable. Under this article, the stamp duty will be Rs.200/- .

15)Article 34-Amendment from April 2015- if residential & agricultural property is gifted to husband, wife, son, daughter, grand son, grand daughter, wife of deceased son, the duty would be Rs.200/-.

Provided further that, if the residential and agricultural property is gifted to husband, wife, son, daughter, grandson, grand-daughter, wife of decesed son, the amount of duty chargeable shall be rupees two hundred."

INCOME TAX ACT.

15} A reference may be made here to the decision of the Hon'ble Madras high Court in the case of ***KAY ARR Enterprises 299 ITR 348 (Mad***.). In this case there was a rearrangement of share holding between the family to avoid disputes. The Hon'ble Madras High Court held that this was not a case of 'transfer'. Also a reference may be made to the decision of the Hon'ble Apex Court in the case of ***Kale V/s. Dy. Director {1976} 3 SCC 119***- family arrangements

are governed by a special equity peculiar to themselves and that the Courts should endeavor to enforce such arrangements if made honestly. Also see: ***Sachin Ambulkar (Bom. HC***)- Does NOT amount to transfer and hence not exigible to capital gain- ***CIT V/s. Sachin Ambulkar ITXA/6975 of 2010 (decided on 23rd Oct 2012***); Ashwani Chopra 352 ITR 620 (P & H.)