1965

Rulon R. West v. Terry R. West and Flora E. West : Appellant's Petition for Rehearing and Supporting Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RULON R. WEST,
Plaintiff and Appellant,

vs.

TERRY R. WEST and FLORA E. WEST,
Defendants and Respondents.

Case No. 10251

APPELLANT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

Appeal From the Judgment of the Third District Court
For Salt Lake County
Honorable Joseph G. Jeppson

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PETITION FOR REHEARING

Rulon R. West, plaintiff and appellant, respectfully petitions the court for a rehearing on the following grounds:

1. The opinion of the court was based upon a mis-

taken assumption that the trial court had found that plaintiff made a gift to the defendants on April 2, 1960.

2. The issue of whether a gift was made by the suppelmental agreement of April 2, 1960, was decided on the prior appeal and was not tried in the court below.

SUPPORTING BRIEF

ARGUMENT

I

THE OPINION OF THE COURT WAS BASED UPON A MISTAKEN ASSUMPTION THAT THE TRIAL COURT HAD FOUND THAT PLAINTIFF MADE A GIFT TO THE DEFENDANTS ON APRIL 2, 1960.

In its opinion this court proceeded on the assumption that the trial court had found a gift on April 2, 1960, saying:

> " * * * there is a reasonable basis in the evidence upon which the trial court could fairly regard it as constituting the required clear and convincing proof that Rulon West had given 40% of the entire enterprise, including his capital contributions, to his son, Terry, and 20% thereof to his wife, Flora, *at the time of dissolution.*" (Emphasis added.)

The trial court, however, did not so find. What it did find (if all of the findings are considered) was that in the original articles of partnership Rulon R. West

agreed to contribute capital to the enterprise with the understanding that each contribution would be a gift to the partnership and that on dissolution such contributed capital would be distributed on the 40-40-20 basis. This agreement, insofar as it was executory, was unenforceable for lack of consideration, and the trial court found that on December 3, 1958, Rulon sent a letter to Terry renouncing an intention to "give" any more money to the partnership. The trial court implicitly found that on and after December 3, 1958, the donative intention did not exist. There is ample evidence to support that finding.

The original "Minute Entry of Decision" of the trial court (R. 59) does not once mention a gift; its lead sentence is, "The Articles of Partnership are binding upon the parties." Its second sentence refers to the intentions of the parties *in the articles,* and the court goes on to find:

> "The following items were not contributed for capital credit and an eventual possible 40-40-20 distribution:
>
> (a) All contributions of Rulon R. West on and after the date of December 3, 1958, including the $2,000.00 check dated February 26, 1960, and the $350.00 check of March 21, 1960."

The first mention of gift occurs in findings prepared by the defendants and respondents on their counsel's stationery, and even they do not find a gift on April 2, 1960. After reciting in Paragraph 5 that all amounts paid in to and including December 2, 1958,

were contributions to capital, the formal findings go on to find (R. 69) that:

> "The several payments totaling $29,645.39 paid into the partnership by Rulon on and after December 3, 1958, were not intended to be paid in as contributions to capital, and were not intended to be distributed to partners in the proportion 40-40-20 upon dissolution as hereinafter set forth."

The only finding with respect to a gift was in paragraph 10 (R. 70-71) which reads as follows:

> "That the parties and particularly plaintiff, *Rulon, and defendant, Terry, intended and understood that the effect of the agreements* whereby Terry and Flora would receive, upon dissolution, forty (40) percent and twenty (20) percent respectively of the amounts paid into capital by Rulon as finally adjusted and determined herein, *was that such receipt was by way of gift* from Rulon to Terry and Flora."

In his brief to the court on this appeal, appellant pointed out at page 20 that:

> "The court refused to find that the 'Supplemental Agreement' (Exhibit 16) (found by this court insufficient to constitute a gift) had operative effect, taking the position that it was unenforceable for lack of consideration. The express negative finding is not included in the formal findings of fact, but may be implicit in the fact that it is not mentioned in Conclusion of Law No. 1."

This statement of fact in appellant's brief was not controverted by respondents—as this court's rules re-

quire it to be in event of disagreement—and it may be assumed that respondents had no objection to the statement.

Inasmuch as the findings of fact and conclusions of law were prepared by respondents' experienced and learned counsel, one would think there would have been an express finding of gift on April 2, 1960, if this had been what either trial court or counsel had in mind.

But there was no such finding. Even the respondents have not taken the position that the gift had been made by the supplemental agreement of April 2, 1960. The following is quoted from page 20 of the respondents' brief to this court:

> "The court did *not* award by way of gift. Let us be clear on this. The court said ***Rulon and Terry 'intended and understood*** that the *effect of the agreements' was that* ***Terry and Flora received by way of gift.*** This distinction is real and not technical. This is an entirely different matter than the court making its award on the theory of gift.
>
> While the parties clearly intended and believed that a gift had been made it is completely academic in the affirmance of the judgment whether a gift was made or not. The judgment does not rise or fall on gift. The total import of the findings, conclusions and judgment is that the parties agreed that Rulon was to put up capital, Terry was to change his life's course and operate the venture, that the losses were to be proportionately taken and borne by the parties, the parties were to receive interest on

> the invested capital, and upon dissolution, net assets or capital was to be distributed in the proportions herein repeatedly stated. These intentions were expressly written in the articles, and in the dissolution agreement as amplified by the supplemental agreement.
>
> This result is a result of rights and obligations arising from basic *contract* law. Ambiguity was originally thought by this court to obtain in regard to whether Rulon's money was loan or capital. That ambiguity has been removed by a scholarly and arduous search on the part of the trial court.
>
> Evidence of tax talk and of *gift talk* by the parties *has here been adduced by the writer to show the basic contract intent, not to show gift intent* per se, although it is clear that a gift had in fact been made as a result of the operation of all agreements. Rulon agreed to file a return to implement this concept." (Emphasis added.)

The trial court found that the amounts paid into the partnership by Rulon R. West prior to his letter of December 3, 1958, were meant to be gifts to the partnership, but the amounts paid into the partnership on and after December 3, 1958, were meant to be repaid, whether classified as "loans" or something else. This court erred in construing the findings of fact to mean that Rulon had made a gift on April 2, 1960, by the terms of the supplemental agreement.

Even if it is assumed that the evidence would *justify* such a finding, the evidence does not *require* it.

Inasmuch as the supposed finding was not in fact

made, the findings are perfectly consistent, one with the other. Their theory was that an intention to make a gift existed at the time the original partnership was entered into and that it was presumed to continue until Rulon renounced that intention.

Whether the court made its finding with respect to the supplemental agreement makes all the difference in the world to this case. This court, in analyzing the findings, held that the trial court's finding of a gift on April 2, 1960, was inconsistent with the finding that the contributions made after December 3, 1958, were intended to be returned:

> "The making of the gift at the time the dissolution being established, no matter what plaintiff may have done or said prior to that time inconsistent with the theory for gift, and no matter how completely or absolutely he had retained ownership or control of the property prior to that time, would make no difference. Inasmuch as he clearly indicated his intent to make the proportionate gifts to the defendants of the entire enterprise after that date and stated no exception or limitation in doing so, we can see no basis upon which to sustain the finding which excepts those advancements from the judgment."

II

THE ISSUE OF WHETHER A GIFT WAS MADE BY THE SUPPLEMENTAL AGREEMENT OF APRIL 2, 1960, WAS DECIDED ON

THE PRIOR APPEAL AND WAS NOT TRIED IN THE COURT BELOW.

When this case was here before the question of gift was argued in the brief and ruled upon by the court. At page 15 of appellant's brief in the first case (No. 9870) it was pointed out that if the defendants were relying upon the agreement of April 2, 1960, the appellant would be prepared to show that there was undue influence in obtaining the gift, the influence arising out of the fact that great pressure was put on a susceptible Rulon West when Rulon was concerned about an imminent departure for South America. The need for such evidence appeared to vanish when this court handed down its opinion, for the court had the following to say about the supplemental agreement of April 2, 1960:

> "A careful perusal of this latter instrument will show that it does not indicate clearly a donative intent as it must do to make a gift. It simply purports to be an acknowledgment that the interests that Terry R. West and Flora E. West had theretofore acquired were by gift. It is not any more definitive as to what those interests were in relation to partnership 'assets to be distributed' in event of dissolution than were the other documents."

Having disposed of that document, the court went on to analyze the meaning of the partnership articles and the dissolution agreement and sent the case back to the trial court to take evidence as to the intent of the parties in executing them. Thereafter the parties

proceeded as if the supplemental agreement of April 2, 1960, was not an operative agreement, certainly not a deed of gift. The subsequent pre-trial order provided that the primary issues to be tried were the meanings of the contracts entered into by the parties. The whole tenor of the pre-trial order and amendment to it so indicate, and the parties did not in fact litigate the question of whether the supplemental agreement was a gift.

If the decision as handed down by this court is allowed to stand, the plaintiff will have been deprived of the opportunity to try the question of the validity of a gift on April 2, 1960—largely because of reliance on this court's statements in the prior opinion. That the plaintiff regarded the question of gift as being out of the case is apparent in excerpts from proceedings at the trial. The following appears at page 254 of the record:

> "MR. ROE: The plaintiff rests.
>
> In connection with the defendant's case for yesterday, there is one statement I would like to make for the record. In reading the deposition of Ruth West Francis reference was made to the statement made by the plaintiff with respect to the gift to Terry and Flora on about April 2.
>
> I did not object to this testimony because it does relate to some of the issues as to the construction of the other agreements. However, I want to state for the record I do not consent, either expressly or impliedly, to including as an issue in this case, whether a gift was made on April 2, 1960.

I think that has been resolved by a decision of the Supreme Court, by the concessions made in Chambers by the defendant on Monday, and by the opening statement of Mr. Ronnow.

I just want to make the record clear I do not consent to trying that issue.

MR. RONNOW: The issue of that gift was made on April 2?

MR. ROE: Yes.

MR. RONNOW: You do not repudiate the theory the gift was implicit in the lawsuit? *You have some gift questions at some other times.*

MR. ROE: I am making my objection and my statement with respect to the operative effect of that supplemental agreement of April 2, 1960.

MR. RONNOW: I understand." (Emphasis added.)

Again, at page 291 of the record, objection was made:

"Q. I now hand you what has been marked as proposed exhibit 16, which is an original typewritten document bearing two signatures, and ask you what that document is?

A. It is a Supplemental Agreement to the Dissolution Agreement signed April 2, 1960. * * *

MR. RONNOW: I offer 16.

MR. ROE: I object to 16 on the ground, your Honor, first it purports to be supplemental to a Dissolution Agreement which was never finally executed by the parties, and, second that insofar as it purports to be a gift, it is outside the issues of this case, and already been determined."

A similar objection was made to testimony of E. L. Schoenhals (R. 337).

Even Terry West did not take the position that the supplemental agreement was an operative document (R. 292):

> "Q. State, briefly, what in your mind gave rise to the need of amplification.
>
> A. Well, as I read the dissolution agreement, in my attorney's office this morning—well, I read it the day before, but as of the morning we went out to Murray, I read it, the question come to my mind, 'as of today' I receive 40% of what we sell that business for, whatever the net assets of the business are, as of that day. I am liable to give half of it back to Uncle Sam.'
>
> Q. Explain that. What do you mean by give half to Uncle Sam?
>
> A. I knew this would have to be shown as ordinary income, or gain upon sale of the business. I knew that.
>
> I didn't know the amount, but I felt the greater portion would be paid as income taxes, to ordinary income or capital gains tax. * * * What I was concerned with, the Internal Revenue would consider it income. That is what led me to have my attorney, Ed Schoenhals, draw up the supplemental agreement *to show that this was a gift, tax free.*" (Emphasis added.)

Terry's understanding as to the effect and purpose of the supplemental agreement was confirmed by the testimony of E. L. Schoenhals (R. 342):

" * * * Mr. Wunderli wanted to have this exhibit No. 2 signed before Rulon left. Rulon did not want to sign it until he understood that Terry was going to take some action to get him out of there, and get his money for him—40% of what he had put in this, he wanted back, and Mr. Wunderli wanted this signed, and I told Mr. Wunderli that along with this—so there wouldn't be any question about it, this other agreement should be signed, in which Mr. West would agree to file a gift tax return.

Mr. Wunderli made no objection to that, and told me to go ahead on it * * * The thing I was involved in, and the thing I had been requested to do, was to arrange this matter, to give assurance that Rulon West would give a gift tax return in connection with this matter.

Q. Your primary concern at that time was to get Rulon to sign the supplemental agreement?

A. *My primary concern was to make sure Rulon understood that Rulon was going to file a gift tax return* in connection with this matter." (Emphasis added.)

As pointed out above, even respondents tried and argued this case as if the issue being tried was the question of interpretation of other contract documents, and the effect of the supplemental agreement on them:

"Evidence of tax talk and gift talk by the parties has here been adduced by the writer to show the basic contract intent, not to show gift intent per se. * * *" (Respondents' brief Page 21).

It would be a denial of due process of law (under both the Utah and United States Constitutions) for

this court to enter a finding with respect to an issue that was not litigated in the trial court. cf. *U. S. v. Ahtanum Irr. Dist.* (D.C. Wash., 1954) 124 F. Supp. 818.

Under the provisions of Rule 15(b) Utah Rules of Civil Procedure, amendment to pleadings are freely allowed. But the rule contemplates that when evidence is offered at the trial which is objected to as being outside the issues, something should be done to expand the issues. The rule contemplates that if the pleadings or pre-trial order are amended to include additional issues, the other party, if he would be prejudiced by it, is entitled to a continuance. This court has held that the rule does not permit the entry of a finding on an issue was actually tried. As Justice Crockett said in *National Farmer's Union Property & Casualty Co v. Thompson,* 4 Utah 2d 7, 286 P.2d 249:

> "Plaintiff urges that inasmuch as the evidence of value just referred to was voluntarily introduced by defendant, the court could pass on the issue, citing Rule 15(b) to the effect that, though an issue is not raised by the pleadings, liberal amendment should be allowed 'even after judgment'; and further that the judge could modify the judgment as he did, under the authority of Rule 54(c):
>
> > ' * * * Every final judgment shall grant the relief to which party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'
>
> Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must

not lose sight of the cardinal principal that under our system of justice, *if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it. This is recognized* in Rule 15(b) which recites that such liberal amendment shall be allowed if the issue is tried 'by express or implied consent of the parties.' It does not appear that there was any such consent to try the issue of the value of this building." (Emphasis added.)

If respondents' counsel genuinely intended that the supplemental agreement of April 2, 1960, constituted a gift, he had an obligation to say something about it when objection was made to that line of questioning. The comments he actually made show an acquiescence in the view that this was not an issue in the case. His brief takes the same view; and appellant did not consent, expressly or impliedly to try the issue. Had it been added as an issue appellant would have been entitled to a continuance to obtain testimony relating the reality of Rulon's consent.

CONCLUSION

If the court's decision remains as written, respondents will have been allowed to profit by an apparent inconsistency they created themselves in preparing findings of fact for the court, and to recover on a theory that they themselves had abandoned.

Had plaintiff been put on notice that the issue of "gift by supplemental agreement" was being tried, the

case could have been presented in a different way. Evidence might have been presented as to the susceptibility of Rulon West to suggestions of learned and experienced counsel in E. L. Schoenhals, and as to the pressure placed upon him at the Murray meeting. Earl M. Wunderli—who represented plaintiff—would have been asked to return to Utah from his home in New York to testify about the purpose of the supplemental agreement as explained to him by Mr. Schoenhals.

But even if the court finds that the matter was "tried", there is a more serious objection to the decision: This court has taken over the role of fact finder; created an inconsistency in the findings of fact; and rejected a consequent inconsistent finding.

The findings must be read as a whole; so read they make it clear that the trial court found the "gifts" to have been made pro tanto as sums of money were paid into the partnership; and that the requisite intention was no longer there after Rulon West's letter of December 3, 1958. So construed, there is no inconsistency.

If, as pointed out by the court in its opinion, "findings which are at variance with the claims of both parties" should be "closely scrutinized," an opinion of an appellate court similarly at variance should be similarly scrutinized. And the court's opinion here rejects not only the positions of all parties, but that of a trial judge as well.

The case should be reheard and reconsidered, and

the question of the validity of the gifts to the partnership prior to December 3, 1958, decided on the basis of authorities cited in appellant's prior briefs.

That portion of the decision denying the credit to Rulon of $29,645.39, being based upon an erroneous assumption, should be reversed and the credit reinstated.

Respectfully submitted,

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