Goli Eswariah

Vs

Commissioner of Gift Tax, Andhra Pradesh

Civil Appeal No. 695 of 1968

(J. C. Shah, K. S. Hegde JJ)

05.05.1970

JUDGMENT

HEGDE, J. -

1. This appeal by certificate arises from the judgment of the Andhra Pradesh High Court rendered in its advisory jurisdiction on a case stated by the Income-tax Appellate Tribunal, Hyderabad Bench under Section 26(1) of the Gift-tax Act, 1958 (to be hereinafter referred to as the 'Act'). The question referred for the opinion of the High Court was :

> "Whether the declaration by which the assessee has impressed the character of Joint Hindu Family property on the self-acquired properties owned by him amounts to a transfer so as to attract the provisions of the Gift-tax Act."

2. The High Court following its earlier decision in Commissioner of Income-tax, Hyderabad v. C. Satyanarayanamurthy, (56 ITR 353) answered that question in the affirmative.

3. The material facts as could be gathered from the statement of the case submitted to the High Court are as follows :

> "The assessee is the Karta of his joint family. The assessment year with which we are concerned in this case is 1959-60, for which the "previous year" is the year commencing on 23-10-1957 add ending on 10-11-1958. The assessee owned movable and immovable properties which were his self-acquisitions. By a deed, dated December 9, 1957, he threw into the common stock his houses bearing Nos. 6658-59 and 2731 situate at Imambavidi, Secunderabad and a cash deposit of Rs. 1,50,000/- in the firm of M/s. Goli Eswariah, Paper Merchants, Secunderabad. In the books of account of the firm, necessary entries were made transferring the amount to the account of the family. The Gift-tax Officer treated that portion of the value of the properties so blended in which the assessee ceased to have a right on partition of the family as having been gifted by him to the family. He rejected the contention of the assessee that his act of throwing his self-acquired properties into the common stock did not amount to a gift under the Act. In appeal, the Appellate Assistant Commissioner took the view that since the deed in question was not registered, there was no transfer of the immovable properties to the family and as such there was no gift of the two houses mentioned earlier but with regard to the sum of Rs. 1,50,000/-, he considered it as a gift and accordingly held that 3/4th of it was liable to be taxed under the provisions of the Act. Thereafter the matter was taken up in appeal to the

> tribunal. The tribunal by its order, dated November 17, 1961, held that the act by which the assessee threw his self-acquired properties to the family hotchpot did not amount to a transfer and hence it need not have been effected by a registered document. It further held that where the coparcener threw his self-acquired properties into the hotchpot of the joint family, there was no element of transfer within the meaning of Section 2, clause (xxiv) sub-clause (d) of the Act. At the instance of the Commissioner, Gift-tax, Andhra-Pradesh, the tribunal stated a case for the opinion of the High Court and submitted the aforementioned question for its opinion. The High court did not examine the question of law arising for decision afresh as it was bound by the earlier decision of that High Court in Commissioner of Income-tax, Hyderabad v. C. Satyanarayanamurthy (supra) wherein that court had held that where a Hindu by a declaration has impressed on his self-acquired property the character of joint family property, the same would amount to a transfer of property within the terms of Section 2 (xxiv) (d) and as such is a gift as envisaged in Section 2(xii) and Section 4(a) of the Act. The view taken in that case was that an act similar to the one we are called upon to consider in this case would amount to a "transaction" entered into by any person with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person."

4. On the question of law that we are required to decide in this case, there is a sharp cleavage of judicial opinion. The Andhra Pradesh High Court in the case referred to earlier as well as in G. V. Krishna Rao and Others v. First Additional Gift-tax officer, Guntur (70 ITR 812) and the Allahabad High Court in Commissioner of Gift-tax v. Jagdish Saran, (75 ITR 529) have taken the view that when a coparcener in a Hindu undivided family governed by Mitakshara School throws his self-acquired properties into common stock, the same amounts to a 'gift' under the Act. On the other hand, a full bench of Madras High Court in commissioner of Gift-tax, Madras v. P. Bangaswami Naidu (Tax Case No. 10 of 1966) and V. R. S. R. M. Ramaswami Chettiar v. The Commissioner of Gift-tax, Madras, (Tax Case No. 10 of 1966) a full bench of the Gujarat high Court in Dr. A. R. Shukla v. Commissioner of Gift-tax, Gujarat, (74 ITR 167) a division bench of the Kerala High Court in P. K. Subramania Iyer v. Commissioner of Gift-tax, Kerala (67 ITR 612) and a division bench of the Mysore high Court in Smt. Laxmibai Narayan Rao Nerlekar v. Commissioner of Gift-tax, (65 ITR 19) have taken a contrary view.

5. To pronounce on the question of law presented for out decision, we must first examine what is the true scope of the doctrine of throwing into the 'common stock' or 'common hotchpot'. It must be remembered that a Hindu family is not a creature of a contract. As observed by this Court in Mallesappa Bendeppa Desai and Others v. Desai Mallappa and Others, ((1961) 3 SCR 779) that the doctrine of throwing into common stock inevitably postulates that the owner of a separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property. The existence of a coparcenary is absolutely necessary before a coparcener can throw into the common stock his self-acquired properties. The separate property of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The separate property of a Hindu ceases to be a separate property and acquires the characteristic of a joint family or ancestral property not by any physical mixing with his joint family or his ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act by which the coparcener throws his separate property to the common stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition he renounces his individual right in that

property and treats it as a property of the family. No longer the declares his intention to treat his self acquired property as that of the joint family property, the property assumes the character of joint family property. The doctrine of throwing to the common stock is a doctrine peculiar to the Mitakshara School of Hindu law. When a coparcener throws his separate property into the common stock, he makes no gift under Chapter VII of the Transfer of Property Act. In such a case there is no donor or donee. Further no question of acceptance of the property thrown into the common stock arises.

6. Bearing in mind the true nature of the doctrine of throwing into the common hotchpot, we shall now proceed to examine the relevant provisions of the Act to ascertain whether the act of the assessee can be considered as a gift under the Act.

7. Section 3 is the charging section. It provides that subject to the other provisions contained in the Act, there shall be charged for every assessment year commencing on and from the 1st day of April, 1958, a tax known as Gift Tax in respect of the gifts, if any, made by a person during the previous year (other than gifts made before the 1st day of April, 1957) at the rate or rates specified in the Schedule. Gift is defined in Section 2(xii) as follows :

> "'Gift' means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer of any property deemed to be a gift under section 4."

In this case we are not dealing with a deemed gift. Therefore we need not consider the scope of Section 4. Before an act can be considered as a gift as defined, there must be a transfer of property by one person to another. "Person" is defined as including a Hindu undivided family in Section 2(xviii). Section 2(xxii) says that "property" includes any interest in property, movable and immovable. Section 22(iv) defines "transfers of property" thus :

> "'Transfer of property' means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing includes -
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> (a) the creation of a trust in property;
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> (b) the grant of creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property;
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> (c) the exercise of a power of appointment of property vested in any person, not the owner of the property, to determine its disposition in favour of any person other than the donee of the power; and
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> (d) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own proportioned to increase the value of the property of any other person."

8. The High Court relied on Section 2(xxiv)(d) in answering the question referred to it in favour of the Revenue. It came to the conclusion that the act of the assessee in throwing his self-acquired properties into the common stock amounted to "a transaction entered into by him with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the

property of any other person." It is true that the assessee by throwing his self-acquired property into the common stock gave up his exclusive right in that property and in its place he was content to own that property jointly with the other members of his family. We do not think that it is necessary in this case to consider whether the act to the assessee can be said to have "diminished directly or indirectly the value of his own property and increased the value of the property" of his joint family because in our opinion that act cannot be considered as a "transaction entered into". Clause (d) of Section 2(xxiv) contemplates a "transaction entered into" by one person with another. It cannot apply to a unilateral act. It must be an act to which two or more persons are parties. It is true that for the purpose of the Act, a Hindu undivided family can be considered as a "person". But the assessee did not enter into any transaction with his family. Therefore we are unable to agree with the High Court that the act of the assessee fell within the scope of Section 2(xxiv)(d) of the Act.

9. Section 2(xxiv)(d) is similar to paragraph (f) of Section 4 of the Australian Gift Duty Assessment Act, 1941-42. Interpreting that section in Grimwade and Others v. Federal Commissioner of Taxation, (78 CLR 199) the High Court of Australia observed that the transaction by a person referred to therein must be a transaction with some other person and that it cannot be a unilateral act.

10. Mr. B. Sen, learned Counsel for the department contended that the said act should be considered as a 'disposition' is not a term of law. Further it has no precise meaning. Its meaning has to be gathered from the context in which it is used. In the context in which that term is used in Section 2(xxiv), it cannot mean to 'dispose of'. Otherwise even if a man abandons or destroys his property, it would become a 'gift' under the Act. That could not have been the intention of the Legislature. In Section 2(xxiv), the word 'disposition' is used along with words "conveyance, assignment, settlement, delivery, payment or other alienation of property". Hence it is clear from the context that the word 'disposition' therein refers to a bilateral or a multi-lateral act. It does not refer to a unilateral act. In this connection reference may be usefully made to the decision of this Court in Commissioner of Income-tax, Madras v. M. K. Stremann (56 ITR 62). Therein the assessee first threw his private properties into the common stock and afterwards there was a partition amongst the members of the family which included his two minor sons and a minor daughter, represented by their mother. The question arose whether the partition in question amounted to a transfer of assets by the assessee to the three minor children so as to attract the provisions of Section 16(3)(a)(iv) of the Indian Income-tax Act, 1922. In that case, the Revenue did not content in this court that the act of the assessee throwing into common stock his self-acquired properties amounted to transfer of assets by the assessee to his three minor children. On the other hand, it contended that the partition that took place subsequently amounted to a transfer of assets of the assessee to his minor children. This Court overruled that contention. Therein the contention of the Revenue appeared to have proceeded on the basis that the antecedent act of the assessee, viz. throwing his self-acquired properties to the common stock may not amount to a transfer of his assets to his minor children but the partition that followed amounted to such a transfer. In that very case the Revenue appears to have contended before the High Court that the act of the assessee in throwing his self-acquired properties into common stock amounted to a transfer of his assets to his minor children. The high Court observed that when the separate property of a coparcener ceases to be his separate and become impressed with the character of coparcenary property, there is no transfer of that property from the coparcener to the coparcenary; it becomes joint family property because the coparcener who owned it uptil then as his separate property, has by the exercise of his volition, impressed it with the character of joint family or coparcenary property, to be held by him thereafter alongwith other members of the joint family; it is by his unilateral action that the property became joint family property; the transaction by which a property ceased to be the property of a coparcener and became

impressed with the character of coparcenary property, does not itself amount to a transfer; no transfer need precede the change and no transfer ensues either-see M. K. Stremann v. Commissioner of Income-tax, Madras. (41 ITR 297) We are in agreement with those findings.

11. For the reasons mentioned above, we allow this appeal, set aside the judgment of the High Court and answer the question referred to the High Court thus :

> "The declaration by which the assessee has impressed the character of joint Hindu Family property on the self-acquired properties owned by him did not amount to a transfer so as to attract the provisions of the Act."

12. The Revenue shall pay the costs of the appellant in this appeal.

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