ANDHRA PRADESH HIGH COURT

G.V. Krishna Rao

Vs.

First Addl. Gift Tax Officer

Writ Petn. No. 26 of 1963

(Seshachalapati and Sambasiva Rao, JJ.)

26.02.1968

JUDGMENT

Seshachalapati J.

1. This is a petition under Article 226 of the Constitution of India for the issue of a writ of certiorari or any other appropriate writ or order to quash the notice dated 30-11-1962 issued to the petitioners by the respondent, the Additional Gift Tax Officer, Guntur. The Petitioners 1, 2, 5 and 6 are the sons and Petitioners 3 and 4, the daughters of late G. V. Srinivasarao, who was a leading Advocate in Guntur. Sri Srinivasa Rao acquired considerable properties. On 4-3-1958 Sri Srinivasa Rao gifted certain properties to his daughters, Petitioners 3 and 4 of the value of Rs. 10,000. By an affidavit dated 26-3-1958, he declared his intention to treat his self-acquired properties referred to in the affidavit as properties belonging to the family consisting of himself and his four sons. On 27-3-1958, he effected a partition of the said properties between himself and his sons by a registered instrument.

2. On information received of certain dispositions by late Srinivasarao the gift tax officer having appropriate jurisdiction, issued a notice under Section 13 (2) of the Gift Tax Act to late Srinivasa Rao to furnish a return for the assessment year 1959-60. With respect to that notice late Srinivasa Rao filed a return declaring only the gifts made by him to his daughters on 4-3-1958 and cash gift to his purohit. The properties referred to in the affidavit dated 26-3-1958 of late Srinivasa Rao were claimed as joint family properties which were already partitioned and therefore not liable for the gift tax.

3. Sri Srinivasa Rao died on 9-1-1962. On 31-10-1962 the First Addl. Gift Tax Officer, Guntur passed an order under Section 15 (3) of the Act holding that the properties gifted by Srinivasa Rao to his daughters and Purohit on 4-3-1958 and the self acquisitions converted into joint family properties on 26-3-1958 and partitioned on 27-3-1958 less the 1/5 the share of Srinivasa Rao were liable to the payments of Gift Tax. He determined that the total value of the gifts were in the order of Rs. 2,16,915 and directed the payment of Rs. 15,629.50 ps. as tax.

4. It would appear that the demand notice was served on the 2nd petitioner Sri Brahmanandarao

on 11-11-1962 who signed the acknowledgment for G. V. Srinivasa Rao. By a letter dated 19-11-1962, Mr. Brahmanandarao informed the respondent that his father had died on 9-1-1962 and that he had made certain dispositions of properties that fell to his share in partition and therefore fresh demand may be made on the parties regarding the gift tax. The respondent thereupon raised a fresh demand on the donees on 30-11-1962. On 6-12-1962, the 1st petitioner Sri G. V. Krishnarao informed the respondent that an appeal was being preferred to the Appellate Assistant Commissioner under Section 22 of the Gift Tax Act and that therefore the collection of the tax may be kept in abeyance till the disposal of the appeal. Similar letters were filed by the Petitioners 2, 4 and 6. On 29-12-1962, Sri G. V. Chelapatirao, the 5th petitioner, wrote to the respondent to let him know how much portion of the gift tax he had to pay on his share and suggesting that the gift tax payable may be divided between all the parties concerned and demands made and that he would pay his portion of the tax before 15-2-1963. On 9-1-1963, the respondent issued notices to the petitioners and the Purohit after discussing the matter with their Chartered Accountant apportioning the tax payable between the parties and calling upon them to pay the proportionate tax on or before 10-2-1963. This writ petition was filed on 7-1-1963 and was admitted on 9-1-1963. In C. M. P. No. 235 of 1963 interim stay was directed against the operation of the notice dated 30-11-1962.

5. In the course of a full and able argument, Mr. Y. G. Krishnamurthy, the learned counsel for the petitioners has raised several contentions. The first contention is that the Gift Tax Act so far as it deals with taxes on lands and buildings falls within the scope of item 49 of State List (List II) to Schedule VII to the Constitution and that Parliament has no legislative competence to enact a law providing for the taxation of gifts on lands and buildings. In support of this contention, reliance was placed on the decision of the Mysore High Court, In *D. H. Nazareth v. 2nd Gift Tax Officer*[1], In that case the learned Judges held that the power conferred on the State Legislature by entry 49 of list II of the VIIth schedule to the Constitution to make laws with respect to taxes on lands and buildings includes the power to tax gifts of lands and buildings and therefore within the exclusive power of the State Legislature. The Gift Tax Act, 1958 in so far as it purports to provide for taxes on lands and buildings was held to be ultra vires the powers of Parliament. The learned Judges in the above case proceeded on the footing that an entry in the lists to the VIIth Schedule to the Constitution should be given its widest possible amplitude and that the aforesaid principle refers not only to the general items but also to entries relating to taxation. It was observed that the residuary entry 97 in list I should not ordinarily be invoked and should be invoked only as a last resort and that the power to tax property necessarily includes the power to tax a right or incidence of ownership.

6. It is a well-settled principle that the entries in the legislative lists should not be interpreted in a narrow and pedantic sense and that the language of the entries must be held to comprehend ancillary and subsidiary matters. The power to enact incidental or ancillary legislation is included in the grant of a substantive power and follows without express provision therefor, (vide *Attorney General of Ontario v. Attorney General for Dominion of Canada*[2], and *Small v. Smith*[3],). Even construing the entries liberally it cannot be said that the tax on gifts is comprehended by entry 49 of the State list. In *Sesharatnam v. Gift Tax Officer*[4], a Bench of this Court consisting of

[1]1962-45 ITR 194 : AIR 1962 Mys 269
[2]1894 AC 189
[3](1884) 10 AC 119 at p. 129
[4]1960 (1) Andh WR 153 : AIR 1960 And Pra 115

Chandra Reddy, Chief Justice and Ansari, J., after a close and detailed examination of the relevant heads of enumerated powers in the lists in the context of decided cases observed thus :-

> "We find it difficult to import transfer and alienation of agricultural land into "lands" in entry 49. The latter item concerns itself with an altogether different head of litigation that is tax on the ownership of property. The object of this item is the levy of a tax on the ownership of property as such while gift tax is a tax on a particular use of the property or the exercise of a single power subsidiary to ownership. The owner of a property may put it to several uses. A gift inter vivos is one of the several rights a person may have in a property. This form of tax attaches itself to a transfer of property while the tax envisaged in entry 49 is incidental to the ownership irrespective of any use to which it may be put."

We are in respectful agreement with this view.

7. If, therefore, the Gift Tax is not comprehended within the scope and ambit of item 49 of List II of the VII Schedule to the Constitution, the source of power must be sought in Article 248 read with item 97 of List I of the Constitution. In this connection, it is necessary to bear in mind the following observations of Venkatarama Ayyar, J. speaking for the majority opinion of the Supreme Court in *Sundararamier and Co. v. State of Andhra Pradesh*[5]*,*

> "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 a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248 Clauses (1) and (2) and of Entry 97 in List I of the Constitution.

Article 248 is in these terms:

> "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." Item 97 is in these terms :-
> "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists."

8. Having regard to the pattern of the Indian Constitution it requires, no demonstration that Parliament has exclusive power to make laws with respect to any subject or matter which is not expressly within the scope of the heads of power enumerated in the lists. We are of opinion that the gift tax does not entrench upon the exclusive legislative power of the State Legislature as indicated in item 49 of list II. The manifest object of the Gift Tax Act and its pith and substance is not to tax lands or buildings as such but to impose tax on gifts inter vivos. The scope of the gift tax, therefore is referable to Article 248 read with item 97.

[5]1958 SCJ 459 at p. 488 : (AIR 1958 SC 468 at p. 494)

9. In *M. T. Joseph v. Gift Tax Officer*[6]*,* a Bench of the Kerala High Court has held that inasmuch as the levy of tax on gifts of agricultural lands is not expressly provided for either in the State List or in the Concurrent lists, the Act necessarily falls under and is referable to the residuary

power vested in Parliament under clause (2) of Article 248 read with item 97 of the Union list. In *Dandapani v. Additional Gift Tax Officer, Cuddalore*[7], the Madras High Court has taken a similar view that the Gift Tax Act falls within the legislative competence of Parliament under item 97 of List I read with Article 248(1) of the Constitution. To the same effect are the conclusions of the Punjab High Court in *Mst. Gaindi v. Union of India*[8], In ***Shamsunder Choudhari v. Gift Tax Officer Allahabad, (1967) 66 ITR 74 : AIR 1967 Allahabad 19*** a Bench of the Allahabad High Court has also taken the same view.

10. In the light of such preponderance of judicial authority we are unable with respect, to follow the decision of the Mysore High Court so strenuously pressed upon our attention by Mr. Krishna Murthy. We hold that the objection as to legislative competence of Parliament for enacting the Gift Tax Act is not correct and must be rejected.

11. The next contention strenuously pressed upon us by the petitioner's learned counsel is that the properties obtained by the petitioners 1, 2, 5 and 6 are not gifts within the meaning of Section 2 (xii) of the Gift Tax Act as there is no transfer of property within the meaning of Section 2 (xxiv). The word 'Gift' is defined as follows :-

> "gift" means the transfer by one person to another of any existing moveable or immoveable property made voluntarily and without consideration in money or money's worth, and includes the transfer of any property deemed to be gift under Section 4. The word 'transfer' of property is defined as follows -
> " '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-
> (a) the creation of a trust in property;
> (b) the grant or creation of any lease, mortgage charge, easement, licence, power, partnership or interest in property;
> (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 done of the power;
> (d) any 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;"

12. The learned counsel has contended that these provisions should be construed in the context of the relevant principles of Hindu Law and he has relied on a passage in the judgment of the Supreme Court in *Commissioner of Income-tax, Madras v. Bagyalaksmi and Co., Udamalpet*[9], where Subba Rao J. (as he then was) observed :

> "Except where there is a specific provision of the Income Tax Act which derogates from any other statutory law or personal law, the provision will have to be

[6]1962-45 ITR 66 : AIR 1962 Ker 97
[7]1963-2 Mad LJ 192
[8](1964) 54 ITR 632 : AIR 1965 Pun 65
[9]1965-55 ITR 660

considered in the light of the relevant branches of law."

13. We are of opinion that the Gift Tax Act is a self-contained enactment and the definitions of gift and transfer of property are exhaustive in their scope and the two statutory definitions have to be construed strictly without importing any conceptions not strictly derivable from the expressions employed.

14. The learned counsel has however strongly pressed upon our attention a decision of the Madras High Court in *M. K. Stremann v. Commissioner of Income Tax, Madras*[10], In that case a question arose as to whether, when a father merged the self-acquisitions with his ancestral property and effected a partition, there was a transfer of assets within the meaning of Section 16 (3) (a) (iv) of the Income Tax Act. The learned Judges held that neither in the merger of the self-acquired properties nor in the subsequent partition was there any transfer of assets direct or indirect within the meaning of Section 16 (3) (a) (iv). The following passage in the judgment of the learned Judges may be usefully extracted :-

> "Severance in status with the resulting change in the nature of the ownership of the property is one of the incidents of a coparcenary. The property held by the coparcenary vests in the separated members as tenants-in-common after the severance in status. That result can be brought about by the unilateral exercise of the volition of the separating member or members of the family. At that point of time the property which had up to then been impressed with the character of joint family or coparcenary property, becomes impressed with the character of property held in severally by the tenants-in-common. The change does not itself constitute a transfer. Nor even does it result from any transfer of assets.

Similarly when the separate property of a coparcener ceases to be his separate property and becomes impressed with the character of coparcenary property there is no transfer of that property from the coparcener to the coparcenery. It becomes joint family property because the coparcener, who owned it up to then as his separate property, has by the exercise of his volition impressed it with the character of joint family or coparcenery property, to be held by him thereafter along with the other members of the joint family. It is by his unilateral action that the property has become joint family property. Coparcenary property ceasing to be joint family property of the coparceners on a division in status between them and becoming thereafter the property held in severally by the divided members, and the property of a coparcener ceasing to be his and becoming the property of the coparcenary of which he continues to be a member, are both incidents of a coparcenary governed by the Mitakshara School. Either can be brought about by the Unilateral action of the coparcener concerned. Neither transaction amounts to a transfer of property from one juristic entity to another. A transfer is essentially a contract, a bilateral transaction. The transaction by which a property ceases to be the property of a coparcener and becomes impressed with the character of coparcenary property does not itself amount to a transfer. No transfer need precede the change. No transfer ensues either".

15. So far as the partition of the joint family property is concerned, it is clear that there is no transfer as such. In a Hindu family governed by the Mitakshara School so long as it

[10](1961) 41 ITR 297 at page 310 : (AIR 1962 Mad 26 at p. 30)
remains joint and undivided, there is joint ownership and no particular member of the family can predicate that he has any definite or ascertained share. When there is a partition between members of such family, there is a severance in status accompanied by a definition and ascertainment of shares of the respective members. The word "Vibhaga" which is used in the Mitakshara and which is generally translated as partition, is nothing more than the adjustment of diverse rights regarding the whole, by distributing them in particular portions of the aggregate. In *Mst. Girja Bai v. Sadashiv Dhundiraj*[11], the Privy Council cited with approval Sarkar's translation of a passage in Viromitrodaya to the effect that "for partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed what is effected by partition is only the adjustment of the proprietary right into specific shares". When a member of a family obtains on partition property in which he had already a proprietary right it cannot be said that there is a transfer. With respect we agree with the learned Judges of the Madras High Court that partition as such does not involve a transfer of any property or right to or interest therein.

16. In this case, however, it must be remembered that a day prior to the partition, Srinivasarao had declared his intention to convert the self-acquired property into joint family property by means of an affidavit in these terms : I, Govindaraju Venkata Srinivasa Rao, son of Venkata Krishnarya Garu, Brahmin Aged 84 years, retired Advocate, resident of Arundalpet Guntur do hereby solemnly affirm and state as follows :

> 1. The properties I now own and possess are (a) my dwelling house known as Dattatreya vilas, situated in 4th line, Arundalpet Guntur, (b) 24 terraced shop rooms in Srinivasa Buildings situated between 2nd and 3rd road lines, Arundalpet Guntur, (c) Ac 14-72 Cents of Seri Wet land in Zampani Village, Tenali Taluk (d) Rs. 7,505 cash.
> 2. All these properties are my self-acquisitions.
> 3. In view of the facts that I am an old man aged 84 years and that my 4 sons are all elderly persons each having a number of children, I have decided to treat the properties mentioned in Para. 1 above as properties belonging to the joint family consisting of myself and my four sons, and am accordingly treating them as joint family properties from this moment onwards.
> 4. In exercise of my inherent right to do so, I hereby declare that my properties mentioned in Para. 1 above are the joint family properties of myself and my sons.

The question is whether in converting admittedly the self-acquired properties into joint family properties there is not a transfer and therefore a gift within the meaning of the relevant definitions of the Gift Tax Act. Mr. Krishnamurthy contended that, when a father governed by the Mitakshara converts his self-acquired property into joint family property of himself and his sons, there is no transfer as the sons have a right by birth in their father's self-acquired property. It is true that the son's interest even in their father's self-acquired property is 'Aprathibandhadaya' but whether or not the conversion of self-acquired property into joint family property amounts to a transfer of right to property will have to be viewed in the context of the father's powers in relation to his self-acquired properties.
[11]43 Ind App 151 at p. 159 : (AIR 1916 PC 104 at p. 107)

17. In *Viravan Chettiar v. Srinivasa Chariar*[12], a Full Bench of the Madras High Court, dissenting from the decision in *Mana Tawker v. Ramchandra Tawker*[13], held that an undivided Hindu son acquires the self-acquired properties of his deceased father by inheritance and not by survivorship. Kumaraswami Sastri, J. observed thus :

> "It is difficult to see how there can be any coparcenary between the father and the sons as regards self-acquired property over which the sons have no legal claim or enforceable rights. Coparcenary and survivorship imply the existence of co-ownership and of rights of partition enforceable at law, and a mere moral injunction can hardly be the foundation of a legal right. As observed by the Privy Council in *Sartaj Kuari v. Deoraj Kuari*[14], the property in the paternal or ancestral estate acquired by birth under the Mitakshara law is so connected with a right to partition that it does not exist where there is no right to it. A contention was raised during the course of the argument before the Privy Council in *Raja Chelikani Venkataramanayyamma v. R. C. Venkayyamma Garu*[15], that sons acquire a right by birth in the father's self-acquired property. Lord MacNaghten stated that he did not quite understand what that right was and observed:
> 'He is his father's son, and if his father does not dispose of it, it will come to him but is it anything more than a spes?' So far as a father's self-acquisitions are concerned the son, though undivided has only a spes successions and he stands in relation to that property in the same position as an heir under Hindu law. The very essence of the distinction between apratibandha and sapratibandhadaya is the existence of an interest in the son in respect of properties got by his father".

18. Though the son of a Hindu father governed by the Mitakshara School may have a right by birth even in the self-acquired properties of the father, it is settled law that that right such as it is, is subject to the plenary control and power of the father. In *Balwant Singh v. Rani Kishori*[16], the Privy Council, after a close examination of the relevant passages in the Mitakshara which obviously were inconsistent with one another, held that a father governed by the Mitakshara School, even though he is a member of an undivided family, can exercise full power of disposition, at his own discretion of the properties which he has himself acquired as distinguished from ancestral properties. In *Arunachala Mudaliar v. Muruganatha Mudaliar*[17], the Supreme Court referred to the two contradictory passages in the Mitakshara. Placitum 27, Chapter I Section 1 of Mitakshara would seem to suggest that, though a person has himself acquired immovable or other properties, he cannot make a gift or sell them without convening all the sons, as it is the religious duty of a man not to leave his family without means of support. Their Lordships observed that quite at variance with this precept suggesting a limited right of the father in respect of disposition of his self-acquired property, there were other texts in the commentary which deny any right of interference by the sons with the father's power of alienation over his self-acquired property. Summing up the position, their Lordships observed thus :

> "Clearly the latter passages are in flat contradiction with the previous ones and in an early Calcutta case, *Muddun Gopal v. Ram Buksh*[18], a

[12] ILR 44 Mad 499 (FB)
[13](1909) ILR 32 Mad 377
[14](1888) ILR 10 All 272 (PC)
[15](1902) 12 Mad LT 299 (PC)
[16](1898) ILR 20 All 267 (PC)
[17]1953 SCJ 707

[18](1863) 6 Suth WR 71

> reconciliation was attempted at by taking the view that the right of the sons in the self-acquired property of their father was an imperfect right incapable of being enforced at law. The question came pointedly for consideration before the Judicial Committee in the case of (1898) ILR 20 All 267 (PC) and Lord Hobhouse, who delivered the judgment of the Board, observed in course of his judgment that in the text-books and commentaries on Hindu Law, religious and moral considerations are often mingled with rules of positive law. It was held that the passages in Chapter I, Section 1, Verse 27 of Mitakshara contained only moral or religious precepts while those in Section 5 Verses 9 and 10 embodied rules of positive law. The latter consequently would override the former. It was held, therefore, that the father of a joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way. This statement of the law has never been challenged since then and it has been held by the various High Courts in India, and in our opinion, rightly, that Mitakshara father is not only competent to sell his self-acquired immovable property to a stranger without the concurrence of his sons, but he can make a gift of such property to one of his own sons to the detriment of another; and he can make even an unequal distribution amongst his heirs."

From these authorities, it is clear that the father has a plenary dominion over his self-acquired properties. He can dispose of them by transfers inter vivos, such as sale or gift, or he can dispose them of by testamentary devise. His powers are, therefore unrestricted. The sons have no power to intervene in the full enjoyment of the father in his self-acquired properties or seek the interdiction of his dispositions thereof. It follows therefore, that the sons have no right in present in the self-acquired properties of their father though, on his death intestate the properties may devolve upon them as unobstructed heritage.

18-A. It is in the context of the aforesaid legal position that the conversion of the self-acquired property into joint family property has to be viewed. It cannot be said that in such a process a transfer of right is not involved. We are, therefore, unable to agree with the view of the Madras High Court in *M. K. Stremann v. Commissioner of Income Tax, Madras*[19], that there is no element of transfer in the merging of the self-acquired property with the joint family property. Nor are we able to agree with the reasoning of the Madras High Court in *M. P. K. Kandaswami Chettiar v. Commissioner of Agricultural Income Tax*[20], It must be remembered that these cases arose under Income-tax Act as to whether or not a merger of the self-acquired property with joint family property and a subsequent partition thereof would attract the provisions of Section 16 (3) (a) (iv). In those decisions, the question was whether a partition of the joint family properties came within the scope of Section 16 (3) (a) (iv). The effect of conversion of self-acquired property into joint family property did not directly fall to be decided, though that question was also dealt with. Further in the Income Tax Act there are no provisions analogous to Section 2 (xii) or 2 (xxiv) or Section 4 (d) with which we are concerned in this case. Even so, the High Court of Gujarat in *Keshavlal Lallubhai v. Commissioner of Income Tax, Gujarat*[21], held as follows :

[19](1961) 41 ITR 297

[20](1967) 66 ITR 169 (Mad)

[21](1962) 44 ITR 266

> "We are inclined to accept the view urged before us by the learned Advocate General that

> by reason of operation of law a transfer of property takes place when a member of a joint family throws his separate property into the hotchpot of the joint family. The real question which we have to consider is whether there has been a transfer of assets directly or indirectly by the assessee to his wife and minor son. The assessee, while throwing the property into the hotchpot, has effected a change of ownership of the property. The same may be said to be transferred from the assessee, the individual, to the Hindu Undivided family."

The decision of the Madras High Court in (1961) 41 ITR 297 and the decision of the Gujarat High Court in (1962) 44 ITR 266 , were taken in appeal to the Supreme Court (vide *Commissioner of Income Tax, Madras v. M. K. Stremann*[22], and *Commissioner of Income Tax, Gujarat v. Keshavlal Lallubhai Patel*[23]). Their Lordships of the Supreme Court affirmed the decisions of the two High Courts. In (1965) 55 ITR 637 , Sikri J., speaking for the Court observed :

> "There is some difference of opinion whether act of throwing self-acquired property into the hotchpot is a transfer or not. We need not settle this controversy in this case. Let us assume that it is. But is a partition of Joint Hindu family property a transfer in the strict sense? We are of the opinion that it is not".

The aforesaid decisions do not lend support to the contention of Mr. Krishna Murthy that, when a father converts his self-acquired property into the joint family property, there is no element of transfer. We are of opinion that, in the process of converting the self-acquired property into joint family property, there is an element of transfer of rights to property. It also involves the diminution of the father's right and the conferment and enlargement of rights to others.

19. Mr. T. Anantababu, the learned counsel for the department has cited before us a decision of this Court in *Commissioner of Gifts Tax Andhra Pradesh, Hyderabad v. Satyanarayana Murthy*[24], The facts in that case are almost identical with the facts of the present case. In that case a leading lawyer of Nellore who acquired properties, made a declaration on 1st of May 1957 of his intention to convert all the properties owned by him into joint family properties to be held by him and by his five undivided sons, each of them having l/6th share. The question arose whether the declaration by the father converting his self-acquired properties into joint family properties amounted to a transfer so as to attract the provisions of the Gift Tax Act. On a close scrutiny of the authorities bearing on the question Chandra Reddy, Chief Justice, held that such a transaction would fall within the ambit of clause (d) of Section 2 (xxiv). The learned Chief Justice observed thus :

> "This definition is of wider import than that contained in the Transfer of Property Act. The only requirement of this clause is that, the transaction which seeks to accomplish certain results should have the effect of diminishing directly or indirectly the value of his own property and to enhance the value of the property of any other person. Inconstestably, by the declaration made by Sri Malakondaiah, by the conversion of his self-acquired properties into joint family properties there

[22](1965) 56 ITR 62 [24](1965) I Andh WR 69 : AIR 1965 And Prad 95
[23] (1965) 55 ITR 637

was a decrease in the value of the property of Shri Malakondaiah and it enhanced the value of the property of the joint family. That joint Hindu family answers the description of any other person is seen by clause (xviii) of Section 2 which says that a person includes a Hindu undivided family or a company or an association or a body of individuals or persons whether incorporated or not. Since the conversion in this case has the effect of diminishing the value of the declarant's property and raising the value of the property of joint Hindu family, it falls within the purview of clause (d). The transfer contemplated by this clause is a transfer as a result of which the income accrues to the joint family from the properties, the subject-matter of the declaration. There can be little doubt that by this transaction the owner of the property has divested himself of it and vested it completely in the joint Hindu family. He has thus effected a change of ownership of the property. If it is a transfer of property within the terms of clause (xxiv) (d) it is a gift as envisaged in clause (xii) and Section 4 (a)."

(4 (a) is presumably a misprint for 4 (d).)

20. This case directly deals with the question we have to determine and we are in respectful agreement with the conclusion of the Chief Justice.

21. A decision of the Mysore High Court in *Smt. Laxmibai Narayana Rao v. Commissioner of Gift Tax*[25], has been relied upon by the learned counsel for the petitioners where the learned Judges took the view that even where a father blends his self-acquired property with joint family properties, it would be an act of 'pitru prasada' and that there was no creation of any new right in the son or transference of a new right by the father to the son. The learned Judges dissented from the view of this High Court in 1965-1 Andh WR 69 : AIR 1965 Andhra Pradesh 95. With great respect, we are unable to agree with the view of the Mysore High Court in the decision aforesaid.

22. We are, therefore, of opinion that by means of his declaration contained in the affidavit dated 26-3-1958 late Srinivasa Rao was diminishing his rights to property and increasing the rights or others within the meaning of Section 2 (xxiv) (d) and therefore would fall within the meaning of the gift as defined in Section 2 (xii) and Section 4 (d) of the Act.

23. It is then contended that even though the conversion of self-acquired property into joint family property is a transfer within the meaning of Section 2 (xxiv) (d) and Section 4 (d) inasmuch as there is no instrument duly stamped and registered it is not a valid gift in law. Section 123 of the Transfer of Property Act requires that for the purpose of making a gift of immoveable property, the transfer must be effected by registered instrument signed by or on behalf of the donor and attested, by at least two witnesses. There is no such limitation or condition imposed upon the gift as defined in Section 2 (xii) or 2 (xxiv) of the Gift Tax Act. In construing the terms of 'gift' and 'transfer' one should look into the provisions of this Act only. There is no warrant for the importation of considerations arising from the definition of gift or transfer in the Transfer of Property Act. The definitions of gift and transfer in the Gift Tax Act, are exhaustive and it is those terms that we should look into.

[25](1967) 65 ITR 19 (Mys)

24. In this connection we may observe that there is no provision under the Hindu law that the conversion of separate property into joint family property requires a formal registered instrument. All that is required is that there should be a clear intention on the part of the member of the joint family to waive his separate rights in the properties in question and to impress them with the character of joint family properties.

25. It is next contended that the transfer in the instant case is not to a person referred to in Sections 2 (xii), 2 (xxiv) and 4 (d). We are unable to assent to this contention. The word 'person' is defined in clause (xviii) of Section 2 as follows :

> " 'Person' includes a Hindu undivided family or a company or an association or a body of individuals or persons whether incorporated or not."

The definition is an inclusive one and will certainly take in the transferees in the instant case.

26. It is contended that where a co-parcener of a Hindu joint family converts his self-acquisitions into joint family property he does not enter into any transaction within the meaning of Section 2 (xxiv) (d). The argument is that the expression any transaction entered into postulates a bilateral act and inasmuch as the conversion of self-acquired property into joint family property is wholly a unilateral act, such a conversion would not be a transaction. In support of this contention, reference has been made to a decision of the Kerala High Court in *P. K. Subrahmania Iyer v. Commissioner of Gift Tax, Kerala*[26], and to *Grimwade v. Federal Commissioner of Taxation*[27], The word "transaction" is not used either in Section 2 (xii) or Section 4 (d). The word 'transaction' must be given its ordinary grammatical meaning. In the Oxford Dictionary Volume XI at page" 251, 'transaction' is defined as meaning 'the action of passing or making over a thing from one person to another, transference, and the action of dealing with or handling a subject; treatment." The conversion of self-acquired property of the father into the joint family property means the abridgment of the father's absolute rights therein and the transference of right in the property to sons who had no such right in praesenti. In our opinion, such a process would fall within the normal meaning of the ex-pression 'transaction'. The Australian case referred to above is not of much assistance as the question there was whether, on the facts of that case, there was an intention on the part of the so-called donor, to dispose of his property by gifts. It was held, that as the formation of a holding company though amounting to a transaction on the part of the donor had no connection between the donor and the donee or any of the donees, it was held to be not a gift within the meaning of Section 4 (f) of the Gift Duty Assessment Act, 1941-42.

27. The next contention of the learned counsel is that, in any event, the petitioners are not the persons liable to pay the gift tax within the meaning of Section 31 of the Act and that they were not given any notice of such proceedings before raising the demand. It is contended that the demand now made on the donees is not in conformity with Section 29 of the Act. It is also contended that Section 29 of the Act in so far as it authorises the recovery of the gift tax from the donee, is violative of Article 19 (1) (f) of the Constitution and therefore unconstitutional. Sections 29 and 31 are as follows :

[26](1988) 67 ITR (SN) 36: AIR 1968 Ker 190

[27](1949) 78 CIR 199

> "29. Gift tax by whom payable: Subject to the provisions of this Act, gift tax shall be payable by the donor. But when in the opinion of the Gift Tax Officer the tax cannot be

recovered from the donor, it may be recovered from the done :

Provided that where the dones are more than one, they shall be jointly and severally liable for the amount of tax determined to be payable by the donor :

Provided further that the amount of tax which may be recovered from each donee shall not exceed the value of the gift made to him as on the date of the gift."

"31. Notice of demand: When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Gift Tax Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable."

28. In this case, originally G. V. Srinivasa Rao filed a return of gift on 7-7-1959 declaring his gifts valued at only Rs. 11,225. During the course of the enquiry a claim was made that the transfer of his property to the Hindu undivided family did not amount to a gift. At the enquiry the assessee was represented by a Chartered Accountant and the respondent completed the assessment on 31-10-1962. A sum of Rs. 15,629-80 P. was directed to be payable as tax before 5-12-1962. The demand notice was acknowledged by the second petitioner, Brahmananda Rao, who signed for G. V. Srinivasa Rao. By that time, Srinivasa Rao was dead. On 19-11-1962 the second petitioner wrote to the respondent a letter stating that his father died on 9-1-1962 and that fresh demands on the donees in respect of the gift tax may be made. Accordingly the respondent raised fresh demands on the donees on 30-11-1962. The first petitioner Krishna Rao, wrote to the respondent acknowledging the notice of demand and stating that they were filing an appeal to the Appellate Assistant Commissioner under Section 22 of the Gift Tax Act and asking in the meanwhile that the collection of the tax may be kept in abeyance. On 29-12-1962, Chalapatirao, the 5th petitioner wrote to the respondent stating that it will not be difficult for the respondent to divide the tax payable and demand the same separately from all the parties concerned and that he may be informed as to what portion of the tax he has to pay. He further stated that he will pay his portion of the tax on or before 15-2-1963 and prayed for time till then. By an order dated 9-1-1963, the respondent apportioned the tax payable between the Petitioners 1 to 6 in this petition and two others specifying the amount due from each one of them and directing them to pay their proportionate tax specified on or before 10-2-1963.

29. From the statement of the above Facts which are on record and which have not been disputed before us, there is no substance in the contention that the petitioners have had no notice of the proceedings in respect of the demand under Section 31 of the Act. Nor is there any substance in the contention that the demand under Section 31 issued to the dones is not in conformity with Section 29. The terms of Section 29 have been extracted supra. The present section substituted for the old section under Gift Tax (Amendment) Act, 53 of 1962 and came into force on 1-4-1963. This section contemplates that normally the gift tax is payable by the donor. That is what the charging section - Section 3 - provides for. But where in the opinion of the Gift Tax Officer, the tax cannot be recovered from the donor, it may be recovered from the done. It also indicates that in such a situation if there are more dones than one, they are liable jointly and severally for the amount of the tax and further it is provided that the amount of tax due from which done shall not exceed the value of the gift made to him as on the date of the gift. The recourse to the donees can be had only when the Gift Tax Officer is of opinion that the tax cannot be recovered from the donor. In coming to that opinion the Gift Tax Officer must not act arbitrarily. He should apply his mind to all the relevant circumstances of the case to find out whether he can collect the money

from the donor or not and only on coming to a conclusion that the money cannot be recovered from the donor, can he start the proceedings for recovery of the tax against the donees.

30. In this case, one of the donees, Brahmanandarao, has expressly written to the respondent on 19-11-1962 that his father, Srinivasa Rao, had died on 9-1-1962, and that as such he was no more to meet the above demand. He further stated that out of the properties he acquired on the partition he gifted away the rooms in Srinivasa Buildings during his lifetime. He willed away the agricultural land of 3.72 acres as on the date of his death to his daughters and cash for the obsequies and other expenses. The purport of that communication is that there were no assets available in the name of Srinivasa Rao from which the tax could be collected. It is on the information so supplied by one of the petitioners and after a discussion with their Chartered Accountant that the apportionment of the tax was made between the donees by the respondent in his order dated 9-1-1963. In these circumstances, it is not correct to say that the proceedings for the recovery of the tax from the donees were sought to be taken without the formation of the opinion by the Gift Tax Officer that tax cannot be collected from the donor.

31. It is then contended that, quite apart altogether whether or not the procedure laid down in Section 29 had been complied with the section itself in so far as it seeks to fasten the tax liability on the donees is violative of the donees' right to hold and acquire property.

32. Before we examine this contention, it is necessary to remember that Section 30 of the Act provides that gift tax payable in respect of any gift comprising immoveable property shall be a first charge on that property. It is a well-settled principle of law that the Government has a priority in respect of arrears of tax. The English common law doctrine of the priority of Crown debts has been given judicial recognition in India prior to 1950 and by virtue of Article 372 (1) of the Constitution, that doctrine continues to be in force, vide the decision in *Builders Supply Corporation v. Union of India*[28], In seeking therefore, to realise the arrears of tax from the immoveable property comprised in the gift, the department is proceeding well within its rights.

33. In support of his contention that Section 29 in so far as it provides a recourse against the donees is violative of Article 19 (1) (f) of the Constitution, the learned counsel for the petitioner placed very strong reliance on the decision of learned single Judge of the Calcutta High Court in *Rahaman Tea and Lands Co., (P.) Ltd. v. Gift Tax Officer*[29], Dealing with the invalidity of Section 29 in the contaxt of Article 19 (1) (f) of the Constitution, the learned Judge observed as follows :

> "I find that (i) no notice is required to be served on him, (ii) there is no procedure by which a donee can obtain rectification of mistakes committed by taxing authorities, (iii) there is no procedure prescribed for obtaining the opinion of a

[28](1965) 56 ITR 91

[29](1962) 45 ITR 528

> superior civil Court on questions of law, by application for reference or otherwise at the instance of the done and (iv) nor has he any right of appeal. Therefore the tax has been made recoverable from the done under Section 29 of the Act, without giving him any opportunity to contest the correctness of the demand and that makes the demand an unreasonable restriction on the done's right to hold property guaranteed by Article 19 (1) (f) of the Constitution."

34. In regard to the last of the reasons referred to by the learned Judge viz., failure to give the donee an opportunity to contest the correctness of the demand, we may straightway observe that, on the facts of this case, it is obvious that it is at the instance of one of the petitioners that the demand under Section 31 was raised on the donees and it is at their instance and after discussion with their representative that the tax was apportioned between all the dones.

35. Mr. Anantababu, the learned counsel for the department, has contended that the other reasons suggested by the learned Judge are not also sustainable. The word 'assessee' is defined in Section 2 (iii) as follows :

> 'Assessee' means a person by whom gift tax or any other sum of money is payable under this Act, and includes :
> (a) Every person in respect of whom any proceeding under this Act has been taken for the determination of gift tax payable by him or by any other person or the amount of refund due to him or such other person;
> (b) Every person who is deemed to be an assessee under this Act;
> (c) Every person who is deemed to be an assessee in default under this Act."

This definition of 'Assessee" in Section 2 (iii) is couched in very wide terms. It will take in every person in respect of whom proceedings have been taken under this Act including every person who is deemed to be an assessee. By reason of the notice of demand issued under Section 31 read with Section 29 of the Act, the petitioners must be deemed to be assessees within the meaning of Section 2 (iii) (a) of the Act. They are, therefore, entitled to take advantage of their remedies prescribed under the Act. Under Section 22 (b) of the Act any person objecting to the amount of gift tax determined as payable by him under the Act has a right of appeal to the Appellate Assistant Commissioner from the orders of the gift tax officer. He has a further right of appeal to the appellate tribunal under Section 23. There is also the right of applying to the Commissioner under Section 24 for revising the orders of his subordinates. Eventually, there is also a right to ask for a reference to the High Court under Section 26 of the Act. In this case, appeals have actually been filed before the Appellate Assistant Commissioner under Section 22 of the Act. Further, the absence of a provision for an appeal does not by itself constitute an infringement of property rights. An appeal does not rest upon an inherent right; but it is the creature of a statute. In *Rangoon Botatoung Co., Ltd. v. Collector of Rangoon*[30], Lord MacNaghten, speaking for the Privy Council, cited with approval the following passage of Bramwell, J., in Sandback Charity Trustees case, 1877-3 QBD 1.

> "An appeal does not exist in the nature of things: A right of appeal from any decision of any tribunal must be given by express enactment."

[30](1913) ILR 40 Cal 21 (PC)

In *Narayana Chetty v. Income Tax Officer, Nellore*[31], the Supreme Court observed that the validity of a rule cannot be challenged merely on the ground that no appeal has been provided against the order passed under the impugned rule.

36. We are of opinion therefore that even on the assumption that there is no right of appeal

expressly provided for donee called upon to pay the tax, that circumstance by itself will not invalidate Section 29.

37. With great respect to the learned Judge of the Calcutta High Court, we are unable to agree with his conclusion that Section 29 of the Act is violative of Article 19 (1) (f) of the Constitution.

38. We, therefore, hold that there are no merits in this writ petition. We understand that some appeals have been filed before the Appellate Assistant Commissioner by some of the petitioners. We should be understood as having expressed no opinion on the merits of those appeals.

39. The writ petition fails and is dismissed with costs. Advocate's fee Rs. 100.
Petition dismissed.
[31](1959) 35 ITR 388