
(1962) 12 MAD CK 0028
In the Madras High Court
Case No : Tax Case No. 93 of 1961

A. Basaviah Gowder By L. R. B. Krishnan APPELLANT
Vs
Commissioner of Gift Madras RESPONDENT

Date of Decision : 19-12-1962

Acts Referred:

Income Tax Act, 1961 — Section 16(3)

Citation : (1963) ILR (Mad) 1082 : (1963) 49 ITR 817

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Judgement

Srinivasan, J.—One Basaviah Gowder was the karta of Hindu undivided family consisting of himself and his two sons. He had a divided brother, one Nanjunda Gowder. A partition had taken place between them on June 14, 1951, and the properties which Basaviah Gowder had were properties which fell to his share at this partition. On October 10, 1957, Basaviah Gowder executed a gift deed whereby he made a gift of certain properties to his two sons, to his divided brother and to a daughter. Basaviah Gowder died on March 23, 1959. A return under the Gift-tax Act was duly made by his son, Krishnan, as his legal representative. The value of the gift was given as Rs. 38,377 and after deducting the exempted limit of Rs. 10,000 the balance of Rs. 28,377 was offered as the taxable amount of the gifts. The Gift-tax Officer however declined to accept this value and proceeded to estimate the value of the gift at Rs. 1,82,000 and arrived at the net taxable value of the gift Rs. 1,72,000. Against this assessment, an appeal was taken and before the appellate authority the contention was advanced that as Basaviah Gowder was the sole owner of the properties, he had no capacity to make a gift of the joint family properties. It was claimed that the gift being invalid, no gift-tax was leviable. This contention however was rejected. A further appeal was taken to the appellate Tribunal before whom the same contention was pressed. The Tribunal did not accept these contentions. It stated :

Merely because a gift is voidable or void, it does not follow that gift tax is not

leviable. In this case, the fact remains that the donees had assented to the gift and acquiesced in the transaction. The avoidance or revocation of a gift is only a means to resume control over the subject matter of the gift. In this case, the donor had died and the donees have acquiesced in the gift. The gift is therefore operative and would be chargeable to gift-tax.

On the appeal failing and on the application of the assessee, the following questions were referred for the decision of this court u/s 26(2) of the Indian Gift-tax Act.

(1) Whether the properties owned by Basaviah Gowder as a member of the Hindu undivided family could validly be gifted by him to his brother two sons and daughter ?

(2) If such a gift was void initially, whether other circumstances could make the legal representatives of the donee liable to the payment of gift-tax ?

2. Section 3 of the Gift-tax Act brings levy of tax gifts made by persons during the previous year. "Gift" is defined u/s 2(xii) as :

The transfer by one person to another person of any existing movable or immovable property made voluntarily and without consideration in money or moneys worth and includes the transfer of any property deemed to be a gift u/s 4.

3. Sub-clause (xxiv) of section 2 itself defines the transfer of property to mean any disposition, conveyance, assignment, settlement delivery payment or other alienation of property. The other parts of the definition are not relevant. Reading the two together, a gift in order to come within the scope of the Act must mean that the transfer by one of the means referred to of movable or immovable property by one person to another is made voluntarily and without consideration. It is inherent in the section that the person so transferred was the owner of the property and the person to whom it is transferred was not previously the owner of the property. It is no doubt possible for a person having joint ownership of the other or to any other person. That would apply to cases of either joint tenancy or tenancy in-common. The question in the present case is however different in that Basaviah Gowder occupied a special position under the law as the karta of a joint Hindu family, the ownership of properties of which is governed by the rules of Hindu law. In so far as Basaviah Gowder and his two sons, who constituted the members of the Hindu undivided family with Basaviah Gowder as the karta thereof are concerned, it is obvious that the sons had an interest in the property by reason of birth, with the rights of survivorship as among the members of the family. It does not therefore appear to be open to the karta or any other coparcener to make a gift of any portion of the joint family property to an other member of the family. In each and every item of property all the coparcener in the family were equally entitled and so long as the family continued to be joint, no one can predicate the extent of any such interest. It would no doubt be otherwise if there was a division in status of the members of the family at any

particular time. But as a member of a joint Hindu family the law is undoubtedly that that member could not validly convey by means of a gift any property. It is really unnecessary to refer to decisions. We may however refer to *Palwanna Nadar v. Annamalai Ammal*, where the learned judges, on a review of the case law, observed thus :

The special powers of a father do not extend beyond proposes warranted by special texts. It is settled law that a father has special powers over the movable properties for indispensable acts of duty and over immovable properties for pious. Since indispensable acts of duty mean and include pious purposes a father has no larger power over movable properties than over immovable properties except in the matter of gifts through affection, in spite of the difference in the terminology used by the texts. A gift to a daughter or any other relation is not for pious purposes; and though a gift through affection may be made of movable property, the gift of immovable property cannot be supported as one made through affection. But it has been held by this court that a father can make a gift of a small portion of his immovable property to his daughter at or after marriage, such gift being customary in this Presidency. Therefore looked at as a gift of immovable property in favour of the second wife and as a marriage portion for her daughter the settlement is invalid.

4. The question that arose for decision in that case is clear from the extract above. It was whether a gift of immovable property in favour of the wife and her daughter, the latter towards her marriage portion, would be valid. It was held that the father had no such power to make the gifts. In another decision of this court, *Kulasekhara Perumal v. Pathakutty*, it was held by one of us that while a Hindu coparcener may dispose of his undivided share in the ancestral estate by contract and conveyance, a gift or devise by such a coparcener of his undivided interest is wholly invalid subject to certain exceptions. In that case, a coparcener purported to make a gift of his undivided share. It was observed :

... it is equally well settled that a gift or devise by a coparcener in a Mitakshara family of his undivided interest is wholly invalid, subject to certain exceptions. There is a long catena of decisions of this court commencing from *Baba v. Timma*, holding that a gift by a member of a joint family of his interest in the joint family property in favour of a stranger or a relative is invalid so as not to bind even the coparcener who made the gift.

5. Reference was also made in the decision to *Ranganatham Chetti v. Ramasami Chetti*, where it was laid down that an alienation by way of gift by an individual member of a Hindu family of his undivided share or any portion thereof is void in toto.

6. The decisions referred to above would certainly apply to the gift that was made to the divided brother of Basaviah Gowder and to the daughter of Basaviah Gowder. In the case of the gift to the daughter it is not contended that the gift was at or about the time of her marriage. Learned counsel for the assessee

concedes that on the date of the gift the daughter was minor of about 9 years of age. The gift to the daughter cannot therefore be regarded as valid, as having been made for a purpose countenanced by the Hindu law. In the case of the gift to the brother a divided brother he stands in no better position than a stranger. It follows on the basis of the above decisions that gift in so far as these persons are concerned is wholly void.

7. The gift in favour of the two sons of Basaviah Gowder is certainly not a transaction which can be regarded as a gift as defined under the Act. The property that was covered by the document in favour of the two sons was as much their own property as it was that of Basaviah Gowder and there was no incident of the property which Basaviah Gowder could transfer as his interest to the two sons. There cannot possibly be a gift within the eye of law where a person purports to transfer a property which in reality belongs to the transferee. The special incidents of Hindu law makes such a gift even by the karta in favour of the other coparceners, his own sons, singularly meaningless. There is in such a transaction no transfer of property at all involved.

8. On behalf of the department, it was suggested that the transaction might be regarded as a surrender of the interest of the karta of his rights in the coparceners property and in favour of the sons and that, therefore, to that extent there could be a gift. Even assuming that such a surrender was effected by the father, under the principles of Hindu law, he only renounces his interest but does not thereby convey any interest to the other coparceners. The other coparceners acquire that interest by reason of the Hindu law and not by any volitional act of the person transferring his interest. It seems to us that this argument which purports to attract section 41 which specifies transaction which are deemed to be gifts, has really no application.

9. In our view, the gift in favour of the sons did not involve any transfer of the property and cannot be regarded as a gift at all. In so far as the gifts to the divided brother and the daughter are concerned, those transactions are void, and void transactions cannot have the effect of transferring property.

10. The view taken by the Tribunal that the sons had acquiesced in the transaction is untenable. There can be no acquiescence in a void transaction and that has been explained in the decision in *Kulasekharaperumal v. Pathakutty*.

11. It must accordingly follow from the above discussion that the transaction by Basaviah Gowder did not result in a taxable gift. Nor did the circumstances that the legal representatives did not protest or even acquiesced make any difference to that conclusion.

12. Learned counsel for the department has referred to a comment by Sri Sampath Ayyangar in his commentary upon the Gift-tax Act :

Merely because a gift is voidable or void, it does not follow that gift tax is not leviable. The avoidance or revocation of a gift is only a means to resume control

over the subject-matter of the gift.

13. This passage has been extracted by the Tribunal in its appellate judgment without giving it the appearance of a quotation. We do not agree with the learned author that a void gift can give rise to a taxable transaction under the Gift-tax Act. The distinction between a void and voidable transaction is substantial. In the former case the transaction is non est in the eye of law and in the latter while there may no doubt be the incident of a transfer of property made voluntarily and without consideration, the transaction is liable to be set aside. But till that is done, the gift is good in the eye of law. To equate a voidable transaction with a void transaction seems to us to offend against the foundations of the principles of jurisprudence.

14. Mr. Ranganathan, learned counsel for the department, has referred to Commissioner of Income Tax v. Braham Dutt Bhargava. There the question that arose was u/s 16(3) of the Income Tax Act. One of two adult male members of a Hindu undivided family settled on trust certain shares belonging to the assessee family in favour of the sons of both the members who were brothers. The other adult member was a consenting party thereto. The question that arose was whether the dividend income from the shares so settled on trust was assessable in the hands of the assessee family. The learned judges observed that a gift by the manager of a joint Hindu family of family property, at any rate, to a member or members thereof, is voidable and not void ab initio. Whether this is a correct statement of the law or not, in the case that the learned judges had before them, both the members, adult male members of the joint Hindu family, entered into the transaction and purported to transfer the assets to the trust. It was not a case of a single coparcener dealing with his undivided interest in the family properties that was in question. In fact, the ratio of the decision is contained in the following passage :

We also wish to point out that we cannot be oblivious of the fact that what the managing member or the karta of the Hindu undivided family did in this case with the consent of the only other adult male member of the family was to set apart a portion of the family assets for the education of their respective sons existing or to be born, and the savings, if any, were to be accumulated as a reserve, eventually to be distributed among all the beneficiaries on the youngest of them attaining majority. Ex facie this is an arrangement which is entirely for the benefit of the minors and we are not at all satisfied on any authority or principle that such a transaction should be held to be necessarily void ab initio.

15. They also referred to the fact that it was not the case of the department that the transaction was a sham or fictitious one. This decision hardly gives any help in the present case.

16. In our view, there was no gift involving a transfer of property in the manner required by the definitions contained in the Gift-tax Act. It should follow that no taxable transaction comes into existence. The question are accordingly answered

in favour of the assessee and against the department. The assessee will get his costs. Counsels fee Rs. 250. Questions answered accordingly.