
(1969) 05 GUJ CK 0004
In the Gujarat High Court
Case No : Gift-tax Reference No. 1 of 1965

A.R. Shukla

APPELLANT

Vs

Commissioner of Gift Tax, Gujarat

RESPONDENT

Date of Decision : 02-05-1969

Acts Referred:

Gift Tax Act, 1958 — Section 2, 3, 4, 5, 6

Citation : (1969) 74 ITR 167

Hon'ble Judges : P.N. Bhagwati, C.J;B.J. Divan, J;A.R. Bakshi, J

Bench : Full Bench

Advocate : K.H. Kogi, for the Appellant; J.M. Thakore, for the Respondent

Judgement

Bhagwati, C.J.—This reference raises a rather important but difficult question of law under the Gift-tax Act, 1958. The question is whether there is any gift within the meaning of that Act when a member of a Hindu undivided family by his unilateral act throws his separate property into the common hotchpot of the joint family and impresses it with the character of joint family property. The reference arises out of an assessment to gift-tax made on the assessee as an individual for the assessment year 1962-63, the relevant account year being 1961-62. The assessee was at all material times the manager and karta of a Hindu undivided family consisting of himself, his wife, his widowed mother, his two minor sons and three unmarried daughters. On 30th March, 1962, a day before the close of the relevant year of account, the assessee threw into the common hotchpot of the family certain shares which belonged to him till then as his separate property and impressed them with the character of joint family property and executed a deed of declaration on the same day recording the said fact and declaring that the said shares would thereafter be held as assets of the Hindu undivided family. It was common ground between the parties that by this unilateral declaration on the part of the assessee, the said shares were impressed with the character of joint family property and they became the property of the Hindu undivided family. On these facts the question arose whether there was a gift of the said

shares by the assessee to the Hindu undivided family so as to attract the liability to gift-tax under the Act. The Gift-tax Officer held that there was a gift and he assessed the assessee to gift-tax on the value of the said shares. The Appellate Assistant Commissioner, on appeal, took a different view and held that there was no valid gift of the said shares by the assessee to the Hindu undivided family and the said shares continued to be the separate property of the assessee. This view taken by the Appellate Assistant Commissioner was challenged in appeal by the revenue and, in appeal, the Tribunal came to the conclusion that there was a gift of the said shares by the assessee to the Hindu undivided family and gift-tax was, therefore, chargeable on the assessee. The Tribunal also held, rejecting the contention of the assessee, that in computing the value of the gift, the share or interest of the assessee as a member of the Hindu undivided family in the said shares was not liable to be excluded and gift-tax was exigible on the entire value of the said shares. The assessee, being dissatisfied with the decision of the Tribunal applied for a reference and, on the application of the assessee, the following two question of law were referred by the Tribunal for our opinion :

"(1) Whether, on the facts and in the circumstances of the case, there was any gift with in the meaning of section 2(xii) of the Gift-tax Act, as a result of annexure "A" ?

(2) Whether, on the facts and in the circumstance of the case, the assessee's claim that he could not be taxed with reference to his interest as a member of the Hindu undivided family in the said properties covered by annexure "A" is right in law ?"

2. This reference originally came up for hearing before a Division Bench of this court but, having regard to the importance of the question involved, the Division Bench referred it to a Full Bench and that is how it has now come up for hearing before this Full Bench. We may point out straightaway that, out of the two question referred to us for our opinion, the second need not be answered as it has not been pressed on behalf of the assessee. The only question which therefore remains to be considered is the first question.

3. Before we examine the arguments advanced on behalf of the parties, it would be convenient at this stage to refer to a few relevant provisions of the Act having a bearing on the determination of the controversy between the parties. Section 2(viii) defines a "donee" to mean any person who acquires any property under a gift, and, where a gift is made to a trustee for the benefit of another person, includes both the trustee and the beneficiary. "Donor" is defined in section 2(ix) to mean any person who makes a gift. "Gift" is defined in section 2(xii) and according to that definition :

""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 u/s 4".

4. There are two expression in this definition which are material : one is "person" and the other is "transfer of property"."Person" is defined in section 2(xviii) to include a Hindu undivided family and "transfer of property", according to section 2(xxiv),

"means any disposition, covariance, 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 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

(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."

5. Section 3 is the charging section and it provides that, subject to the other provisions contained in the Act, there shall be charged for every assessment year commencing on and from 1st April, 1958, a tax in respect of gifts made by a person during the previous year. Section 4, by a legal fiction, brings within the ambit of the taxing provisions certain transfers which are not gifts within the meaning of section 2(xii) by deeming them to be gifts for the purpose of the Act. Clauses (c) and (d) of section 4 are relevant and they run as follows :

"4. For the purposes of this Act, -.....

(c) where there is a release, discharge, surrender, forfeiture or abandonment of any debt, contract or other actionable claim or of any interest in property by any person, the value of the release, discharge, surrender, forfeiture or abandonment, to the extent to which it has to be found to the satisfaction of the Gift-tax Officer to have been bona fide shall be deemed to be a gift made by the person responsible for the release, discharge, surrender, forfeiture or abandonment;

(d) where a person absolutely entitled to property causes or has caused the same to be vested in whatever manner in himself and any other person jointly without adequate consideration and such other person makes an appropriation from or out of the said property the amount of the appropriation used for the benefit of the person making the appropriation or for the benefit of any other person shall be deemed to be a gift made in his favour by the person who causes or has caused the property to be so vested."

6. Section 5 provides for exemption in respect of certain gifts and section 6 lays down the mode of determination of value of gift liable to be taxed : these

sections are however not material and it is not necessary to make any detailed reference to the same.

7. Going back to the definition of "gift" we find that four elements must be present in a gift : (1) there must be a transfer of property within the meaning of section 2(xxiv), (2) there must be a transfer by one person to another, (3) it must be made voluntarily, and (4) it must be without consideration of money or money's worth. Now, of these four elements, the last two do not present any difficulty, for, it throwing by the assessee of his separate property into the common hotchpot of the joint family, constitutes transfer of property into the common hotchpot of the joint family, constitutes transfer of property within the meaning of section 2(xxiv) by the assessee to the Hindu undivided family, it cannot seriously be contested that it is a transfer made by the assessee voluntarily without consideration in money or money's worth. But the question is whether the first two elements exist in the present case. When a coparcenary by a unilateral action throws his separate property into the common hotchpot of the joint family and impresses it with the character of joint family property does it involve any transfer of property within the meaning of section 2(xxiv) by the coparcener of the Hindu undivided family ? The question is not free from difficulty and has not unnaturally led to divergence of judicial opinion. The difficulty arises chiefly from the fact that the doctrine of blending of separate property with joint family property is a peculiar doctrine of Hindu law unknown to the British system of jurisprudence on which our judicial concepts are mainly based and it is therefore not easy to assimilate this doctrine to any known juridical concept or categorize it in terms of any known judicial relationship.

8. Now, in order to determine whether there is any transfer of property by a coparcener to the Hindu undivided family when he blends his separate property with joint family property and impresses it with the character of joint family property, it is necessary first to appreciate the true nature of the doctrines of blending. The doctrine of blending, as pointed out by the Supreme Court in *Mallesappa v. Mallappa* is not founded on any text of Hindu law but is a product of evolution by judicial decisions. The Supreme Court in this case had occasion to consider the nature of the doctrine of blending and Gajendragadkar J., speaking on behalf of the Supreme Court, explained this doctrine in the following terms :

"The rule of blending postulates that a coparcener who is interested in the coparcenary property and who owns separate property of his own may by deliberate and intentional conduct treat his separate property as forming part of the coparcenary property. If it appears that property which is separately acquired has been deliberately and voluntarily thrown by the owner into the joint stock with the clear intention of abandoning his claim not he said property and with the object of assimilating it to the joint family property, then the said property of a coparcener loses its separate character by reason of the owner's conduct and get thrown into the common stock of which it becomes a part..... There can be no doubt that the conduct on which a plea of blending is based must clearly and

unequivocally show the intention of the owner of the separate property to convert his property into an item of joint family property."

9. The blending by a coparcener of his separate property with joint family property does not require compliance with any particular legal device or procedural formality. What is necessary is that the property must be voluntarily thrown by the coparcener into the common stock with the deliberate intention of abandoning his separate claim upon it and impressing upon it the character of the joint family property. The question is one of intention of the coparcener to be gathered from the facts of the case. Such intention may appear from a declaration made by the coparcener or a recital in a deed of partition or some other act or conduct of the coparcener or it may even be gathered from a continuous course of dealing with the property by the coparcener. Where a coparcener clearly manifests his intention to abandon his separate claim upon the property and impresses it with the character of joint family property, the character of the property changes and it becomes joint family property irrespective of the volition of the other members of the joint family. The other members of the joint family cannot resist the blending by a coparcener of his separate property with joint family property just as they cannot avoid disruption of the joint status if a coparcener wants to bring about such disruption. Any single coparcener, can by his unilateral action, disrupt joint status and so also can a single coparcener by his unilateral action blend his separate property with joint family property. Both are incidents of the coparcenary as known to Hindu law.

10. Now, the first question which arises for consideration is when an individual coparcener, by a unilateral action, of the intention converts his separate property into joint family property, does a transfer of that property take place from one person to another ? The argument urged on behalf of the revenue was that the property is transferred : formerly, it belonged to the individual coparcener and now it belongs to the Hindu undivided family : the ownership has passed from one person namely the individual coparcener to another namely, the Hindu undivided family and therefore there is transfer of property by the individual coparcener to the Hindu undivided family. This argument, attractive though it may seem at first blush, is defective in that it suffers from the fault of over simplification and rests too much upon a mechanical and artificial approach to the question ignoring the true nature of the charge of juridical relationship resulting from the act of blending. It is no doubt true that the definition of "person" in section 2(xviii) includes a Hindu undivided family and, therefore, if there is a transfer of property by a Hindu undivided family to a third party or by a third party to a Hindu undivided family it would be covered by the definition of "gift". But when we are considering a case where an individual coparcener impresses his separate property with the character of joint family property it would not be correct to make an artificial dichotomy between the individual coparcener and the Hindu undivided family and treat the two as distinct and separate entities, one wholly different from and standing apart from the other.

We cannot shut our eyes to the reality and blindly and mechanically work out the fiction to its strictly logical. That would be nothing short of submitting to the tyranny of the fiction ignoring the true nature of juridical change which takes place when there is blending. We must remember that no juridical concept inherently commands procrustean application : to try to make strict and logical deductions from it is impermissible. We cannot ignore the basic fact that the Hindu undivided family though regarded as "person" for the purpose of the Gift-tax Act, is not a corporate entity distinct from the coparceners : it is composed of the coparceners : each coparcener is a part of it. When separate property of an individual coparcener is impressed by him with the character of joint family property, he does not cease to have interest in the property : his interest in the property continues to subsist and it extended to the whole of the property though, of course, by reason of the property becoming joint family property, the other coparceners also have an interest in it. It is precisely because every coparcener has interest in the coparcenary property and such interest extends to the whole of the coparcenary property that it is held that partition does not involve any transfer of property. Subba Rao J., then a judge of the Madras High Court, pointed out in Gutta Radhakrishnayya v. Gutta Sarasamma, that "partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severally. Each one of the shares had an antecedent title and therefore no conveyance is involved in the process as a conferment of new title is not necessary. " The observations were approved by the Supreme Court in Commissioner of Income Tax v. Keshavlal Lallubhai Patel. Every coparcener has an antecedent title to the whole of the coparcenary property and therefore when there is partition and a particular property is allotted to a coparcener, there is no transfer of any interest passing the title from one in who it resides to another without title. The title to the whole of the property allotted on partition was always there in the coparcener. It must therefore follow that when the separate property of an individual coparcener is impressed with the character of joint family property - which is the converse process - the title of the individual coparcener is not extinguished; he continues to have title extending to the whole of the property with only this difference that the other coparceners also have now similar title to the whole of the property. Now when we say that property is transferred by A to B -and property would include any interest in property - it clearly connotes that the property transferred originally belonged to A but now it belongs to B : Where A continues to have a title or interest in the property, how can it be said that the property is transferred by A to B ? We must, therefore hold that when an individual coparcener impresses his separate property with the character of joint family property there is no transfer of the property by the individual coparcener, for he continues to have title or interest extending to the whole of that property even when it is impressed with the character of joint family property. If the view contended for on behalf of the revenue were accepted namely that when separate property is impressed with the character of joint family property it is transferred by the individual coparcener to the Hindu undivided family the inevitable result would be that the whole of the property

would be liable to be regarded as forming the subject-matter of the gift and the individual coparcener would have to pay gift-tax on the value of the whole of the property even though he continues to have title or interest in the whole of the property as a coparcener. We do not think that the legislature could have intended to bring about such a strange our conclusion, let us consider what would be the position where A transfers his property jointly to himself and B. A and B taking the property jointly would be a body of individuals or persons and would as such fall within the definition of "person" in section 2(xviii) but, on that account can it be said that there is transfer of property by one person namely, A, to another namely A and B jointly, so as to constitute a gift of the property by A and B ? That would be ignoring the objective and outward fact that A continues to have title or interest in the property even after it is transferred to himself and B.

11. But even of conversion by an individual coparcener of his separate property into joint family property does not involve transfer of the property by the individual coparcener to the Hindu undivided family, the question still remains whether any interest in the property is transferred by the individual coparcener to the other coparceners when he impresses his separate property with the character of joint family property. The definition of "transfer of property" in section 2(xxiv) is very comprehensive and it says that, "transfer of property" means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property. The word "conveyance", "assignment", "settlement", "delivery", "payment" and "other alienation of property", though undoubtedly wide, are referable only to those cases where there is passing of ownership of property or interest in property from one person to another and they can have no application where separate property is converted into joint family property for, in such a case, as already discussed, no interest in the property passes from the ownership of the individual coparcener to the ownership of the other coparceners. The only word which therefore require to be considered is the word "disposition". Now, there can be doubt that the word "disposition" is a word of wide import and as pointed out by the court of Chancery in England in *Carter v. Carter* while examining the meaning of that word in the Fines and Recoveries Act "it is sufficient to extend to all acts by which a new interest (legal or equitable) in the property is effectually created". If therefore any interest in the property is created by one person in favour of another it would be a disposition of property and therefore within the meaning of the expression "transfer of property" in section 2(xxiv); as a matter of fact, clause (b) of section (xxiv) also makes it clear that grant or creation of any interest in property such as is contemplated in section 2(xxiv) is created by an individual coparcener in favour of other coparceners when he throws his property into the common stock with the intention of converting it into joint family property.

12. Now what is the true nature of the interest of a coparcener in the joint family property is well settled and does not present any doubt or difficulty. It is not

possible to define with any exactitude the precise nature of the interest but there are several pronouncements of high judicial authority which indicate with sufficient clarity what is the real nature of that interest. We need not for this purpose go further beyond than the year 1957, for in that year we find that there is a decision of the Privy Council in *Attorney General of Ceylon v. Ar. Arunachalam Chettiar*, given in an appeal from Ceylon where this question has been fully discussed. It was a case under the Estate Duty Ordinance of Ceylon which came up in appeal before the Privy Council and the question was whether on the death of a son who was a coparcener with his father in the Hindu joint family the one half share in the joint family assets in Ceylon said to belong to the son was subject to estate duty as being either "property passing on the death of the deceased" within the meaning of section 7 of the Ordinance or "property of which the deceased was at the time of his death competent to dispose" within section 8 (1) (a) of the Ordinance. To answer this question the Privy Council was called upon to consider what is the nature of the interest of a coparcener in joint family property. Viscount Simonds, giving the opinion of the Privy Council, observed :

"First, then, did any and what property "pass" on the death of the son ? An attempt was made at the hearing before their Lordships to argue that the whole of the property in Ceylon of the Hindu undivided family so "passed",..... but "Their Lordship considered this argument to be in admissible"..... and "Counsel was therefore limited to the argument that the son's share..... was one-half."

It appears to their Lordships that this contention is refuted by the most elementary considered of the Mitakshara law. The district judge observed that "to describe the deceased as a coparcener in relation to the joint property is but to adopt a convenient term in the process of attempting to analyse a legal concept which has no precise equivalent in this country". And he added, "the problem before us cannot satisfactorily be solved by the mere selection of appropriate words." But, whatever else may be said of coparcener, it is clear that it would be a misuse of language to say that he had a "half share" or any "share" of the family property. The numerous passages to which their Lordships were referred in Mulla's Principles of Hindu Law and Mayne's Hindu law and Usage illustrate and expand the statement made by Lord Westbury in delivering the opinion of this Board in *Appovier v. Rama Subba Aiyan* : "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share." A little earlier in *Katama Natchiar v. Rajah of Shivagunga*, Turner L. J. had referred to the property as "the common property of a united family." "There is", he said, "community of interest and unity of possession between all the ("coparceners"), members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession".

These two passages, capable as they may be of qualification and refinement, state the essential nature of a coparcener's interest. It is true that he has other rights which appear to enlarge that interest. He can separate from the family and ask for partition of the family property : he can in certain circumstances alienate his interest (a later and not universal development of the Mitakshara law) and, if he does so, the court will, if necessary, protect the alienee's right by decreeing the partition for which he might himself have asked. So also the court may intervene for the benefit of an execution creditor. These incidents give colour to the view that a coparcener has what may be called "a share". But against them may be set the fact that the disposition of the income of the family property is in the discretion of the karta, usually the senior male member of the family, whose right and duty it is to maintain out of it not only the coparceners but also the female members of the family, the wives, widows and unmarried daughters of living or dead coparceners, and further to devote such money as may be necessary for such family purposes as the education, marriage, and religious ceremonies of the coparceners and of the members of their respective families (see Mulla, section 237)."

13. The interest of a coparcener in any particular property belonging to the Hindu undivided family is thus not a specific defined interest with a definite ascertainable content. It is a peculiar interest known only to Hindu law. It has a shifting and variable content in that it is liable to be diminished by the birth of a coparcener and augmented by the death of a coparcener. It does not entitle the coparcener to any particular part of the income of the property; the disposition of the income is in the discretion of the karta and the income is liable to be applied in a maintenance of the coparceners and the female members of the family as also for such family purpose as education, marriage and religious ceremonies of the coparceners and their respective families and face in may so happen that, in a given case, no part of the income of the particular property may be spent on him. It is no doubt true that according to Mitakshara law as applied in Bombay, Madras and Madhya Pradesh, a coparcener can alienate for value his interest in the joint family property but that is not a universal rule and in other parts of the country where Mitakshara law prevails, such an alienation is not permissible even for value and it is elementary that the Gift-tax Act being an all-India legislation, we must so construe it that it fits in with the law prevailing in all parts of the country. Moreover, even if the interest of a coparcener in a particular property belonging to the joint family is alienated for value where it is permissible to do so, there is no knowing that if the alienee applies to the court to work out the equities in his favour the particular joint family property or any part of it would fall to his share. The only way in which a coparcener can secure separation of his interest in any particular property belonging to the Hindu undivided family is by demanding partition of the joint family properties unless of course the coparceners agree to partial partition it would not be right to assume that he would take the step of separating from his family, "a step which for economic,

sentimental and traditional reasons might be utterly repugnant to him", and even if such step is taken by him it is quite possible that no part of the particular joint family property may come to his share. If we may repeat the words of Lord Westbury delivering the opinion of the Privy Council in *Appovier v. Rama Subba Aiyan*, no individual member of the Hindu joint family, "whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share" in it and his interest in any particular property of the Hindu undivided family is therefore clearly not susceptible of valuation. When we say that a coparcener has an interest in any particular property belonging to the joint family, we merely use a convenient term to describe a peculiar legal concept unknown to any other system of law and such an interest, we do not think, is within the ambit of section 2(xxiv).

14. There is also the other circumstance which clearly indicates that conversion of separate property by an individual coparcener into joint family property is not intended to be hit the Gift-tax Act. We have already pointed out above while discussing the doctrine of blending that the act of blending is a unilateral act on the part of an individual coparcener and where an individual coparcener clearly manifests his intention to blend his separate property with joint family property, the character of the property changes and it becomes joint family property irrespective of the volition of the other members of the joint family. The other members of the family have no choice in the matter : they cannot avoid the conversion of the separate property into joint family property even if they do not want it. Can there be a gift of property in invitum against the will of the donee ? It is no doubt true that, unlike the definition of "gift" in the Transfer of Property Act, the definition in section 2(xii) of the Gift tax Act does not specifically bring in the element of acceptance on the part of the donee but as under the English law the element of acceptance on the part of the donee but as under the English law the element of acceptance on the part of donee is always implicit in the concept of a gift. The law in England does not insist on acceptance by the donee as a condition of making the gift but even so it is always open to the donee to refuse to accept the gift, in which event the gift becomes inoperative. It is difficult to conceive of a gift which can be imposed upon a donee who is not willing to accept it. We must remember that what is being defined as a "gift" and that is the context in which the definition has to be considered and we would be divorcing the expression altogether from its context if we hold that there can be a gift in invitum by a mere unilateral action on the part of the donor without the donee having any choice or volition whether to accept it or not and even if the donee having any choice or volition whether to accept it or not and even if the donee does not want it as might well happen in a case where a karta or manager impresses his separate business - which may be risky or hazardous - with the character of joint family property. It is true that an artificial definition of a word may include a meaning different from or in excess of the ordinary acceptance of the word, but then there must be compelling words to show that such a meaning different from or in excess of the ordinary meaning was intended. When we turn

to the expression "transfer of property", we find that the definition in section 2(xxiv) gives a wide and extended meaning to that expression by including within it every conceivable type of transaction by which property may be transferred from the person to another. But so far as the element of consent on the part of the donee is concerned, which is an element inherent in the concept of a gift as ordinarily understood, there are no clear or compelling words to suggest that this element need not be present to constitute a "gift" within the meaning of the Gift-tax Act. Every clause of the definition of "transfer of property" is consistent with the ordinary concept of a gift being a bilateral transaction - a transaction postulating the assets of the donee. As a matter of fact, as well shall presently show, even clause (d) of section 2(xxiv) which seeks to enlarge the net of taxation by bringing within the scope of the taxing statute transactions which do not consist in actual transfer of property from a donor to a donee refers only to bilateral transaction, that is, transactions entered into by a donor with a donee. It would not, therefore, be right, in the absence of clear and explicit words, to read the definition of "gift" as destroying the essential element of consent of the donee basic to the concept of a "gift" as known to general law. Moreover, it must be noted that, though gift-tax is payable by the donor, it may be recovered from the donee where it cannot be recovered from the donor (vide section 29) and it can hardly be believed that the legislature could have intended to impose liability to gift-tax on the donee, if the donee could have no choice whether to accept the gift or not and the gift could be imposed on the donee. We are fortified in this view by the decision of the Supreme Court in *Hariprasad Shivshankar Shukla v. A. D. Divikar*, where we find that a similar approach was adopted by the Supreme Court in construing the definition of "retrenchment" in section 2(00) of the Industrial Disputes Act, 1947. On this view, the conversion by an individual coparcener of his separate property into joint family property would clearly not be comprehended within the term "gift" as defined in the Gift-tax Act.

15. That leaves for consideration only the last question, namely, whether any "transfer of property" can be said to take place within the meaning of section 2(xxiv), clause (d), when an individual coparcener impresses his separate property with the character of joint family property. Section 2(xxiv), clause (d), includes within the category of "transfer of property" any transaction entered into by any person with intent thereby to diminish the value of his own property and to increase the value of the property of another person. This clause applies to any transaction entered into with the specified intent. Of course, on its plain language, it covers cases where there is a transfer of property from one person to another; but as pointed out by Latham C.J., while construing an identical provision in paragraph (f) of section 4 of the Australian Gift Duty Assessment Act, 1941-42, in *Grimwade v. Federal Commissioner of Taxation*, it is really "intended to include within the scope of the Act transactions which do not consist in an actual transfer of property from a donor to a donee". It is not necessary in order that clause (d) should apply "that property should pass from the donor

himself directly or indirectly to the donee so long as there are to be found in the transaction the intent and the effect specified", namely, to diminish the value of the property of the donor and to increase the value of the property of the donee. Therefore, even if the act of throwing separate property into the common stock with a view to impressing it with the character of joint family property does not involve passing of ownership of any title or interest in the property from the individual coparcener to the Hindu undivided family, it still becomes necessary to consider whether it is a transaction caught by the extended definition of "transfer of property" given in clause (d). The question which, therefore, arises for consideration is : when an individual coparcener by a clear expression of his intention converts his separate property into joint family property, does he enter into any transaction 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 ?

16. Now, the words used in clause (d) are "any transaction entered into by any person". These words clearly contemplate a bilateral transaction a transaction entered into by the donor with some other person. The word "transaction", standing by itself, is sufficient as pointed out by Garth C.J. and Jackson J. in *Gujju Lall v. Fatteh Lall* to indicate, as its derivation shows, "something which has been concluded between persons by across or reciprocal action as it were" - "some business or dealing which had been carried on or transacted between two more persons" and this meaning is strengthened and reinforced by words "entered into by any person". What clause (d) requires is that the donor must "enter into a transaction" and that can only be with some person. We cannot equate the words "enter into a transaction" with "do an act or abstain from doing an act" and if we do so, it is clear that what clause (d) is intended to being within the net of taxation is not a unilateral act or omission of the donor but a bilateral transaction, a transaction between the donor and some other person.

17. This is the view which we are inclined to take on a plain natural construction of the word used but we find that it is amply supported by the decision of the High Court of Australia in *Grimwade v. Federal Commissioner of Taxation*. The question which arose in that case was whether E. N. Grimwade could be said to have entered into a transaction within the meaning of paragraph (f) of section 4 of the Australian Gift-tax Assessment Act, 1941-42, when he voted for a resolution reducing capital w7hich had the effect of diminishing the value of share held by him and increasing the value of shares held by his sons. Paragraph (f) was couched in identical language with clause (d) of our Act; in fact section 2(xxiv) of our Act is based substantially on section 4 of the Australian Act - it clearly follows section 4 almost word for word except for a few minor variations. Construing the expression "any transaction entered into by any person" in paragraph (f), Latham C.J. and Webb J. said :

"But when a shareholder makes up his mind to vote in a particular way and casts his vote accordingly he cannot be said to be "entering into a transactions". A

transaction by a person must be a transaction with some other person. In the circumstances mentioned there is no transaction with any person.... If a preference shareholder in a company voted in favour of reducing the rate of dividend upon preference shares in order to allow the company to pay some dividends to ordinary shareholders it would be an unreal description of what took place to say that fact showed that the preference shareholder had "entered into a transaction". The result of a contrary view would be that each of the preference shareholders or at least all who voted for the resolution, would (if the intent of improving the value of ordinary share were found to exist) be regarded as making a gift within the meaning of the Gift Duty Act to each of the ordinary shareholders. Presumably a dissenting minority would be held to be engaged in transaction of making a gift. If so, the majority of voting shareholders would be regarded as making the whole of the gift, which would be a remarkable result. It was suggested that even to abstain from voting against a resolution beneficial to a class of shareholder amounted to entering into a transaction within paragraph (f). All these contentions interpret the words "enter into a transaction" as if they had the same meaning as "do an act or abstain from doing an act". Such an interpretation given no real effect to the words "enter" and "transaction".

18. It is significant to note that though this construction deprived the revenue of a large amount of gift-tax which it would otherwise have contained if paragraph (f) were held applicable, the Federal Commissioner of Taxation accepted the construction as correct and did not appeal to the Privy Council. No dissent was also expressed against it in the subsequent decision of the High Court of Australia in *Gorton v. Federal Commissioner of Taxation*, though on another point arising out of paragraph (f), namely the construction of the words "to diminish directly or indirectly the value of his own property and to increase the value of the property of any person", the majority judges in *Gorton's* case led by *Betwick C.J.* expressed dissent from the view taken by *Latham C.J.* *Webb J.* in *Grimwade's* case. Since the decision in *Grimwade's* case in 1948-49, this view as to the meaning of the words "any transaction entered into by any person" has always been regarded as good law by authors of all standard text books in Australia and we see no reason why we should differ from it.

19. It may also be noted that when the Gift-tax Act was enacted in 1958 containing section 2(xxiv), clause (d), the decision in *Grimwade's* was already given and it held the filed since 1948-49. The legislature, when it enacted clause (d), must be taken to have been aware of the decision in *Grimwade's* case interpreting the words "any transaction entered into by any person" and yet the legislature retained the same phraseology as in paragraph (f) of section 4 of the Australian Act. It may, therefore, be reasonably assumed that the legislature in clause (d), in the same sense in which they had been judicially interpreted in *Grimwade's* case. If that be the true meaning of the words "any transaction entered into by any person" in clause (d), we must hold that when an individual coparcener by a unilateral act manifests his intention to impress his separate property with the character of joint family property, he does not enter into a

transaction within the meaning of clause (d), and that clause has no application.

20. It will, therefore, be seen that the conversion by any individual coparcener of his separate property into joint family property does not fall within any of the clause of section 2(xxiv). It is not possible to being within the scope of a taxing Act couched in the language of the Australian Gift-tax Assessment Act, 1941-42, an interest originating in a wholly different system of law. The language of the Australian Gift-tax Assessment Act, 1941-42, may be appropriate to cover transfer or creation of interest known to English or Australian system of jurisprudence but it is singularly inappropriate to the legal concepts upon which the Hindu undivided family is based and we must insist as a first principle of taxing law that its scope. This is particularly to be observed where the matter which is the subject of claim is well known and susceptible to clear definition and taxation by appropriate words. Let us for a moment contemplate what would be the consequences if the view contended for on behalf of the revenue were accepted. There are hundreds and thousands of Hindu undivided families in this country where a coparcener, whether a brother or a son or a nephew, earning salary - which, when earned, is clearly his separate property - hands it over every month to the manager or karta with a view to throwing it into the common hotchpot of the Hindu undivided family. Would every such act of handing over of his salary by an individual coparcener to the manager to karta from month to month be a gift by him to the Hindu undivided family exigible to gift-tax ? That would affect the very fabric and structure of the joint family system as known to Hindu law. We do not think that the legislature could have intended to being about such a consequence. If the legislature at all intended to do so, we have no doubt that the legislature would have used clear and appropriate language to effectuate such intention.

21. We must, therefore, reach the conclusion that there is no "gift" with in the meaning of section 2(xii) of the Gift-tax Act when an individual coparcener impresses his separate property with the character of joint family property. Our answer to the first question referred to us for our opinion is, therefore, in the negative. The Commissioner will pay the costs of the reference to the assessee.