
(1998) 01 MAD CK 0030
In the Madras High Court
Case No : Tax Case No. 27 of 1981

S.C.M. Mohammed

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 06-01-1998

Acts Referred:

Citation : (1999) 235 ITR 75

Hon'ble Judges : P. Thangavel, J; N.V. Balasubramanian, J

Bench : Division Bench

Advocate : R. Janakiraman, for the Appellant; C.V. Rajan, for the Respondent

Judgement

N.V. Balasubramanian, J.—The Income Tax Appellate Tribunal, at the instance of the assessee, has stated a case and referred the following

questions of law u/s 26(1) of the Gift-tax Act, 1958 (hereinafter referred to as ""the Act""), for our consideration :

1. Whether the Appellate Tribunal was right in its interpretation of the deed dated August 5, 1953, that what was gifted to the applicant was

corpus of the properties and not life interest in the properties ?

2. Whether, on the facts and circumstances of the case, the Appellate Tribunal was right in holding that the intention of the donor (applicant's

father) was clearly not to give any property at the time of execution of the deed to the children of the applicant ?

3. Whether, on the facts and circumstances of the case, the sum of Rs. 1,81,800 was rightly brought to tax under the Gift-tax Act ?

2. The assessee, for the assessment year 1969-70, filed the gift-tax return on February 25, 1970, admitting the taxable value of the gift-tax

amounting to Rs. 77,788. The assessee filed a letter along with the return stating

that the assessee owned life interest in certain properties at Tirunelveli, and all those properties were settled by him in favour of his children by two registered deeds dated January 4, 1969. The Gift-tax Officer accepted the return filed by the assessee and completed the assessment by computing the value of the life interest at Rs. 89,241 and levied the gift-tax thereon. The assessee filed an appeal to the Appellate Assistant Commissioner against the order of assessment contending that the surrender of life interest would not amount to gift. The Appellate Assistant Commissioner did not agree with the submissions made by the assessee and dismissed the appeal filed by the assessee.

3. The assessee carried the matter by way of filing a further appeal before the Income Tax Appellate Tribunal. When the matter came up initially before the Appellate Tribunal, it was stated before the Appellate Tribunal that the original assessment itself was reopened u/s 15(3) of the Act and the reassessment under the Act was made on May 11, 1973. The Tribunal, therefore, thought fit to hear both the appeals together and in this view of the matter, the Tribunal set aside the order of the Appellate Assistant Commissioner and restored the appeal to his file with a direction that the Appellate Assistant Commissioner should hear the appeal along with the appeal arising out of the reassessment and dispose of both the appeals in accordance with law.

4. The Gift-tax Officer in the reassessment proceedings, brought to gift-tax the value of the entire properties which amounted to Rs. 1,81,800 and the value of another property covered under another settlement valued at Rs. 10,000 and the total amount of gift was determined at Rs. 1,91,800.

5. The assessee filed an appeal before the Appellate Assistant Commissioner against the order of reassessment challenging the order of reassessment both on the question of the jurisdiction of the Assessing Officer to reopen the assessment as well as on the merits of the case. The Appellate Assistant Commissioner upheld the jurisdiction of the Gift-tax Officer in reopening the assessment and that finding has become final. In so far as the merits of the case are concerned, the Appellate Assistant Commissioner found that the assessee got the properties by way of settlement made by his father, and under the settlement the assessee was given only life interest without any power of alienation. The Appellate

Assistant Commissioner held that there cannot be any settlement with regard to life interest in Mohamedan law, and hence there was no gift by the assessee in favour of his children. He, however, held that since the assessee himself has admitted the value of the taxable gift at Rs. 77,788, the same was liable to be assessed along with a sum of Rs. 10,000 which was omitted in the original assessment. The Appellate Assistant Commissioner hence directed the Gift-tax Officer to assess the value of gifts at Rs. 87,788 and directed the reduction in the assessment accordingly.

6. The Revenue as well as the assessee preferred separate appeals before the Income Tax Appellate Tribunal against the order of the Appellate

Assistant Commissioner. The Appellate Tribunal heard both the appeals together and after considering the settlement made by the assessee's

father in 1953, it held that the deed could not be construed as a deed whereby the donor gifted only the income of the properties to the assessee

and the corpus to the children who were existing on the date of settlement. The Tribunal found that the deed did not mention anything about the

children of the assessee who were available on the date of settlement, and the deed provided that after the lifetime of the assessee, the properties

should go to the children that may be born to the assessee. According to the Tribunal, the intention of the assessee's father/donor was not to give

the properties to the children of the assessee available at the time of the execution of the deed and what was gifted to the assessee was the corpus

of the properties, and not the income of the properties. The Tribunal, therefore, held that the deed operated as an absolute gift in favour of the

assessee and the conditions imposed in the deed were void in nature. The Tribunal also held that the gift made in the year 1953 was an absolute

gift in favour of the assessee and the gifts made by the assessee in 1969 to his children were liable to be taxed under the Act. In this view of the

matter, the Appellate Tribunal allowed the appeal preferred by the Revenue and dismissed the appeal preferred by the assessee.

7. It is against the order passed by the Appellate Tribunal in the appeal preferred by the Revenue, the assessee sought for and obtained a reference

on the questions of law set out above. In so far as the order passed by the Tribunal on the appeal preferred by the assessee confirming the levy of

gift-tax to the extent of the value of gift returned by the assessee is concerned, that order has become final.

8. Mr. R. Janakiraman, learned counsel for the assessee, strenuously contended that under the Mohamedan law there can be a valid gift of life

estate and with the absolute interest in favour of another person. According to him, a fair reading of the document of the year 1953 clearly shows

that the absolute interest was given to the children of the assessee and the properties vested with the children of the assessee even in the year

1953. According to learned counsel for the assessee, all the heirs of the assessee would get the properties and the delivery of the property was

made and was accepted by the assessee on behalf of the legal heirs, and the possession was also given. He referred to Section 2(xii) of the Gift-

tax Act and submitted that in the light of the provisions of the Gift-tax Act, there was a transfer of properties in favour of the assessee's children in

the year 1953, and, therefore, the properties vested with the children of the assessee on the date of the deed in 1953 and the children became the

owners of the properties in the year 1953. He submitted that the Tribunal was not correct in holding that what was gifted to the assessee was not

the income of the properties, but the corpus. According to learned counsel for the assessee, the document should be construed in such a manner

that the intention of the donor should be given effect to and the intention of the father of the assessee was that the assessee should enjoy only the

usufruct of the properties during his lifetime and the properties vested with the assessee's sons and daughters even on the date of settlement made

by the father of the assessee in 1953. He strongly placed reliance on a decision of this court in the case of Controller of Estate Duty Vs. Jameela

Begum, which was confirmed by the Supreme Court in Jameela Begum Vs. The Controller of Estate Duty, Madras, . According to him, under the

Mohamedan law, creation of life interest over the usufruct of the property is valid and, hence, the deed of 1953 should be construed only as

conferring a right in favour of the assessee to enjoy the income from the properties during his lifetime and cannot be construed as a life estate

known under the English law. He also placed reliance on a decision of this court in C.M.S. Abdus Salam Vs. Commissioner of Wealth-tax,

Madras, and a decision of the Rajasthan High Court in Sirehmal Nawalkha Vs. Commissioner of Income Tax, . He further submitted that under

Sections 13 and 15 of the Transfer of Property Act, even if the transfer has been construed to mean that the gift to some who were in existence

and some who were not in existence at the time of execution, but born in future, the gift would be valid in so far as the persons found in existence

on the date of deed. For that purpose, he relied upon a decision of the Supreme Court in the case of Raj Bajrang Bahadur Singh Vs. Thakurain

Bakhtraj Kuer, . He also placed reliance on a decision of this court in Mrs. Hazara Bai Vs. Mohammed Adam Sait and Others, , wherein a

learned judge of this court held that there is no warrant to construe a document conferring life estate in favour of the settlee as one creating an

absolute estate on the theory that life estates by way of gift is unknown to Mohamedan law. He, therefore, submitted that the assessee cannot be

construed as an absolute owner of the properties and the decision of this court in Chandma Bibi v. Sheik Mohamed Sahib [1997] 1 LW 391,

wherein a learned judge of this court has held that ownership was retained by the owner when the life interest could not be gifted under Muslim law

has no application to this case. He therefore submitted that the finding of the Appellate Tribunal that the gift would take effect as if no conditions

were attached to it is clearly erroneous in law and according to him what was transferred to the assessee was only a right to enjoy the usufruct of

the properties.

9. Mr. C.V. Rajan, learned counsel for the Revenue, on the other hand, submitted that all the authorities have accepted that gift of a life estate

under Mohamedan law is invalid in law. He referred to the relevant clauses in the deed of the year 1953 made by the assessee's father and

submitted that there was a settlement of the corpus in favour of the assessee and after his lifetime, the properties would go to the children of the

assessee. He referred to certain passages in the book Principles of Mohamedan Law by Mulla (19th edition), at page 132, Section 164 and

submitted that under illustration (a) given u/s 164, it is clearly established that if a house is given to A for life and after his death to B, the legal effect

of the gift is that A takes the house absolutely and B takes nothing. According to him, the same rule would apply to the present case. He also

referred to the passages found in Section 55 in Mulla's Principles of Mohamedan Law under the heading, ""Life estate and vested remainder"". He

strongly placed reliance on a decision of this court in the case of C.M.S. Mohammed Jaffar v. C.M.S. Mohammed Ibrahim (Died) [1992] 1 MLJ

405, and submitted that the concept of life interest is unknown to Mohamedan law and a person, if given such a life interest, would take the

property absolutely. He strongly placed reliance on a decision of this court in the case of Chandma Bibi v. Sheik Mohamed Sahib [1997] 1 LW

391 and submitted that under the Mohamedan law, life interest cannot be created. He submitted that the intention of the donor as seen in the 1953

document was that all his sons should be given an absolute interest and their children did not get any interest. He, therefore, submitted that the

document executed by the assessee in 1969 would amount to the settlement of the assessee's absolute interest in favour of the children attracting

the Gift-tax Act. He also placed reliance on certain clauses in the document executed by the assessee in the year 1969 to show that that was the

intention of the parties, even when the deed was executed in favour of the assessee in 1953 in his favour. He submitted that the clauses imposing a

restraint on alienation and vesting of the properties in favour of the children are invalid. He also submitted that there was no vesting in favour of the

children of the assessee in the 1953 document on the date of the execution of the document. He submitted that the act of the assessee coupled with

the execution of the subsequent document would clearly show that what was given under the 1953 document was the absolute interest in favour of

the assessee. He submitted that the deed transferring properties in favour of unborn persons is void under Mohamedan law. He submitted that

there was no vesting of the properties in favour of the sons or daughters of the assessee in the 1953 deed and if the properties had vested with the

children of the assessee in 1953 itself by virtue of the settlement, the donor would not have stipulated that in the absence of sons or daughters, the

properties would go to the legal heirs of the assessee and the said clause cannot be construed as a contingency clause. According to him, the

clause that properties would go after the lifetime of the assessee to the sons and daughters existing on the date of death of the assessee would

clearly establish that the intention of the donor at the time of execution of the 1953 document was not to give to the sons and daughters of the

assessee who were existing on the date of settlement but to those heirs who were in existence on the date of death of the assessee. He, therefore,

submitted that the Tribunal has come to a correct conclusion in holding that what was gifted by the assessee's father in favour of the assessee was

the corpus of the properties and the deed cannot be construed as if the donor gifted only the right to enjoy the usufruct of the properties. He

strongly placed reliance on a decision of the Privy Council in the case of AIR 1948 134 (Privy Council) , and submitted that there was a gift of the

corpus in, favour of the assessee and any condition imposed in the said deed that the assessee should not alienate the properties is repugnant and

the assessee was the absolute owner of the properties.

10. We have carefully considered the submissions of learned counsel for the assessee and learned counsel for the Revenue. For a proper

appreciation of the submissions made by the parties, it is necessary to refer to some of the essential terms of the deed of settlement made by the

assessee's father on August 5, 1953. The deed of settlement dated August 5, 1953, was executed by one S.A. Hajee Sayeed Cassim

Marakkayar, aged 59 years, in favour of his five sons, one of them being the assessee. The document states that the properties were his self-

acquired properties and he also executed the deed in favour of five sons in respect of the properties in Tirunelveli. The deed also states that the

donor had five sons and two daughters and the two daughters were married and living with their husbands. The deed mentions about the death of

the donor's wife on March 17, 1953. The deed further states that the donor already executed a document on September 3, 1945, registered as

document No. 2849 of 1945 in Tiruchendur Sub-Registrar's office and he has stipulated certain conditions in the deed dated September 3, 1945,

but according to him, they were invalid and so he was executing the document to remove the defects. The document dated September 3, 1945 has

no relevancy to decide the issue that had arisen out of the document dated August 5, 1953, executed by the settlor. The deed dated August 5,

1953, deals with the properties in Tirunelveli Junction and the deed is in favour of five sons of the donor. The first schedule property was gifted to

the assessee who is the eldest son of the donor. The relevant clause of the deed reads as under :

[* * * *** **]

11. The deed provides that the first schedule properties were settled in favour of

the eldest son, the assessee herein and that he should during his lifetime enjoy the properties without the power of alienation and after his lifetime, the first schedule properties would go to the sons and daughters of the assessee who will take the property according to the share prescribed under the Mohamedan law and they would enjoy the properties absolutely. The deed also provides that if the assessee dies without leaving any son or daughter, the properties would go to the legal heirs of the assessee according to the Mohamedan law and they would enjoy the properties absolutely. Similar recitals are also provided in the deed in respect of the four other sons and one of them was a minor. A perusal of the abovesaid document would disclose that the settlor had given the assessee only a life estate and the vested remainder to his children to take in accordance with Mohamedan law.

12. In C.M.S. Abdus Salam Vs. Commissioner of Wealth-tax, Madras, , this court dealt with the principles of Muslim law regarding the gifts and

held that there are three essential conditions to be complied with for a valid gift under the Mohamedan law, viz., (1) a declaration of the gift by the

donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by

the donor to the donee. This court further held that if these conditions are satisfied, the gift would be complete and the delivery of possession of the

subject-matter of the gift is one of the essential conditions to be complied with to validate the gift.

Mulla's Principles of Mohamedan Law (19th edition), Chapter XI deals with gift. u/s 149, the learned author has stated that the three essential

requisites for a valid gift are (1) the offer of the gift, (2) acceptance thereof, and (3) delivery of possession in pursuance thereof. It is no doubt true

that the delivery of the possession need not be actual, but it can be constructive. However, there must be delivery of the properties to the donee.

On August 5, 1953, when the donor executed the document, he has clearly and expressly stated that the properties were given to the assessee and

the son and daughters of the assessee would take the property after his lifetime according to the share specified in Mohamedan law. A fair reading

of the document clearly shows that the donor provided that the properties would go to all the children of the assessee existing on the date of the

execution of the deed as well as children to be born, but they must exist on the date of the death of the assessee.

13. Before considering the decisions, it must be borne in mind that it is the duty of the court to construe the deed and the decision arrived at with

reference to the construction of some other deed would not be binding on the court in the construction of another deed. The law as to gift under

Muslim law is well-settled by the decision of the Privy Council in the case of AIR 1948 134 (Privy Council) , and in that case the House of Lords

held as under (page 138) :

In general, Muslim law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim

law, whether the Hedaya or Baillie or more modern works, and no decision of this Board which affirms that Muslim law recognises the splitting up

of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in

tail, for life, or in remainder. What Muslim law does recognise and insist upon, is the distinction between the corpus of the property itself (ayn) and

the usufruct in the property (manafi). Over the corpus of property the law recognises only absolute dominion, heritable and unrestricted in point of

time ; and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant ;

but interests limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such

limited interests.

14. After laying down the law as regards the Muslim law the Privy Council held that in dealing with the gift under Mohamedan law, the first duty of

the court is to construe the deed of gift. The appropriate test is whether it is a gift of corpus, then any condition which derogates from the absolute

dominion over the subject-matter of the gift will be rejected as repugnant. On the other hand, if on the construction of the gift deed, the gift is held

to be one of a limited interest, the gift can take effect out of the usufruct leaving the ownership of the corpus unaffected except to the extent to

which its enjoyment is postponed during the duration of limited interest. The test affords a means to find out whether there was an immediate

vesting of the property gifted with the donee, with the right of enjoyment of the

usufruct for a fixed term to some intermediary. It is in the light of the above principle of law laid down by the Privy Council, the case-laws have to be studied and the principles have to be evolved.

15. Mr. C.V. Rajan, learned counsel for the Revenue, relied upon a decision of this court in the case of C.M.S. Mohammed Jaffar v. C.M.S.

Mohammed Ibrahim [1992] 1 MLJ 405, wherein a learned judge of this court has held that the concept of life interest with gift over to another is

not known to Mohamedan law and a person who is given such a life estate would take the properties absolutely, the gift over being void. The other

decision relied upon by Mr. C.V. Rajan, learned counsel for the Revenue, in Chandma Bibi v. Sheik Mohamed Sahib [1997] 1 LW 391 would

squarely support the case of the Revenue. In that case, the persons on whom the property was settled were the daughter and son-in-law of the

donor and they would be the legal heirs on his death under the document. The daughter and the son-in-law were to enjoy the property during the

lifetime of the settlor and they had no power of alienation. The document also provided that after the death of the settlor and his wife, the property

would be taken by the children whether male or female born to the daughter and they would deal with the property as absolute owners, In that

case also the document provided that the possession was handed over to the daughter and her husband. This court held that there was a creation

of life interest or a limited interest in favour of the daughter and son-in-law and the ownership was retained by the owner himself. This court,

therefore, held that life interest cannot be created under Mohamedan law and the daughter did not get anything and if the intention of the donor was

to provide the vested right over the corpus in favour of the plaintiff, nothing prevented the donor from executing the document in her favour

postponing the right of enjoyment during the lifetime in favour of the daughter and her husband. This court, therefore, held such a gift is not valid

under the Muslim law. We are of the view that the ratio laid down by this court in Chandma Bibi's case [1997] 1 LW 391, would also be

applicable to the facts of the case.

16. It is also necessary to notice some observations made in Mulla's Principles of Mohamedan Law (19th edition), at page 134, Section 164, the

learned author says as under :

. . . if a house is given to A for life, and after his death to B, the legal effect of the gift is that A takes the house absolutely, and B takes nothing.

The same rule applies to a testamentary gift.

17. In *Abdul Karim Khan v. Abdul Qayum Khan* ILR [1906] All 342 one Muhammed Azim made a will whereby after making provision for his

widow and daughters, he divided his property between his three sons and the will also provided that the sons had no right of alienation and on the

death of one of the sons without issues, his share would go to the surviving brother or brothers or their heirs. A Division Bench of the Allahabad

High Court held that the condition and limitation were void on the ground that life interest and contingent interest are not recognised by Muslim law

and the gift in favour of the son was an absolute gift and the provisions that none of the sons should have a right to alienate the property devised to

him and that on the death of one of the devisees without issue, his share should go to the surviving brother or brothers or his or their heirs are void.

18. In *Ma Hmyin v. P. L S. A. R. S. Chettiyar Firm*, AIR 1935 Rang 318, the Rangoon High Court held that a life estate with a vested remainder

over is unknown to Mohomedan law and if there was a creation of interest by such a will, it would be construed subject to a condition that the first

legatee should take the property absolutely and the remainderman would get nothing. The Rangoon High Court placed reliance on decisions in the

cases of (i) *Prince Suleman v. Darab Ali Khan* [1882] 8 IA 117 ; (ii) *Abdul Gafur v. Nizamudin* [1893] 17 Bom 1 ; 19 IA 170 ; (iii) *Abdul Karim*

Khan v. Abdul Qayum Khan ILR [1906] (All) 342 ; [1906] AWN 25 and (iv) *Babu Lal Vs. Ghansham Das and Another*, . Applying the

principles laid down by the above decisions if the document dated August 5, 1953, is construed, it is clear that the assessee got an absolute interest

over the properties. Furthermore, the possession of the properties was given to him and patta was also transferred in his favour and the original

document and the plan of the properties were also handed over to the assessee. The assessee was a party to the document and he also understood

that he was given absolute possession and he was in absolute enjoyment of the properties. It is because of that, the assessee has stated in the

deeds dated January 4, 1969, executed in favour of his sons and daughters with regard to these properties that he was in possession and

enjoyment of the same as an absolute owner and he got absolute ownership of the properties. Therefore, we are of the opinion that the subsequent condition restraining the assessee from alienating the properties and the other condition that after his lifetime the properties should go to the sons and daughters of the assessee existing on the date of his death are all void. We are also of the opinion that the corpus of the properties was given to the assessee absolutely in view of the decisions referred to above.

19. Mr. Janakiraman, learned counsel for the assessee, relied on the decision in *Controller of Estate Duty Vs. Jameela Begum*, in support of the case of the assessee. In that case, the corpus was settled in favour of the settlor's daughter with absolute right subject to a condition that the settlor during his lifetime and after his death, his second wife during her lifetime, shall be entitled to the income derived from the property. This court, therefore, held that there was a reservation of usufruct in favour of the donor and absolute and valid gift of the corpus was granted in favour of the daughter of the settlor and, therefore, it was held that there was a valid gift. The above decision was confirmed by the Supreme Court in the case of *Jameela Begum Vs. The Controller of Estate Duty, Madras*, wherein the Supreme Court held that the Mohamedan law makes a difference between the corpus of the gift (ayn) and the usufruct (manafi) and a reservation of rights in manafi so long as the ayn is transferred does not render the gift bad. The Supreme Court held that under the settlement, an absolute right, title and interest over the property was conferred on the beneficiary and he was obliged only to pay the income from the property to the settlor during his lifetime and after his death to his wife, mother of the beneficiary during her lifetime. The Supreme Court, therefore, held that the settlement with the condition is valid. But the decision has no application to the facts of the case as there was to be no vesting of the property in favour of the grandchildren by the original settlor in 1953.

20. In *Mrs. Hazara Bai Vs. Mohammed Adam Sait and Others*, this court has taken a view that the document cannot be construed as conferring an absolute interest on the plaintiff. As is apparent from the said decision, the donor there intended to give only a life interest to the plaintiff and absolute interest in favour of the children of the plaintiff. It will be recalled that under the document dated August 5, 1953, the original settlor settled

the entire property absolutely in favour of the assessee and, therefore, the further condition that he should not alienate the properties or after his lifetime, the properties should go to his legal heirs are not valid in law.

21. The other decision relied upon by Mr. R. Janakiraman, learned counsel for the assessee, is the decision of the Rajasthan High Court in the case

of Sirehmal Nawalkha Vs. Commissioner of Income Tax, and the Rajasthan High Court has held that a gift which would become invalid and void

under the Transfer of Property Act, may be valid for the purpose of gift-tax and it would fall under the definition of gift in the Gift-tax Act. There

can be no quarrel on the proposition of law laid down by the Rajasthan High Court, but the question that has to be considered in the instant case is

whether there was a valid transfer and in whose favour and what was the nature of the gift under the Mohamedan law. Therefore, when an

absolute interest was given in favour of the assessee by the 1953 document, it cannot be construed to have a different meaning under the Gift-tax

Act.

22. Mr. Janakiraman, learned counsel, next contended that u/s 13 of the Transfer of Property Act, when a property is transferred in favour of a

person not in existence on the date of the transfer, and if it is subject to the prior interest created by the same transfer, the interest created for the

benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property. He also relied

upon Section 15 of the Transfer of Property Act which reads as under :

15. Transfer to class some of whom come under Sections 13 and 14.--If, on a transfer of property, an interest therein is created for the benefit of

a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in Sections 13 and 14, such interest fails

in regard to those persons only and not in regard to the whole class.

23. He, therefore, submitted that since an absolute interest was created in favour of the existing sons and daughters of the assessee as well as the

children of the assessee to be born, an absolute interest was created in favour of sons and daughters existing on the date of the execution of the

deed and those children would take the property absolutely vested with them. For that purpose, he relied upon a decision of the Supreme Court in

the case of Raj Bajrang Bahadur Singh Vs. Thakurain Bakhtraj Kuer, . Paragraph

14 reads as under (page 10) :

Of course this by itself gives no comfort to the defendant ; she has to establish, in order that she may be able to resist the plaintiff's claim, that the will created an independent interest in her favour following the death of Dhuj Singh. As we have said already, the testator did intend to create successive life estates in favour of the successive heirs of Dhuj Singh. This, it is contended by the appellant, is not permissible in law and he relies on the, case of Tagore v. Tagore (18 W. R. 359). It is quite true that no interest could be created in favour of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety ; it is valid with regard to the persons who are in existence at the time of the testator's death and is invalid as to the rest. The widow, who is the next heir of Dhuj Singh, was in existence when the testator died and the life interest created in her favour should certainly take effect. She thus acquired under the will an interest in the suit properties after the death of her husband, commensurate with the period of her own natural life and the plaintiff consequently has no present right to possession. The result, therefore, is that the appeal fails and is dismissed with costs.

24. The proposition of law submitted by Mr. R. Janakiraman, learned counsel, is based on the decision of the apex court. But, it has to be seen whether under the deed dated August 5, 1953, there was a vesting of the property in favour of the children of the assessee on the date of the execution of the deed. We have already held that the properties settled under the document dated August 5, 1953, vested with the assessee absolutely and the vested remainder mentioned in the said document is void thereby creating no interest in the said properties in favour of the children of the assessee. Therefore, it cannot be stated that there was a vesting of the property in favour of the grandchildren of the original settlor on the date of execution of the 1953 document. Therefore, the decision of the Supreme Court on which reliance was placed by learned counsel for the assessee has no application to the facts of the case.

25. Therefore, we are of the opinion that there was an absolute gift of the properties in favour of the assessee. The subsequent narration in the deeds executed by the assessee in the year 1969 in favour of his sons and

daughters also clearly shows that the corpus was transferred to the assessee, and it cannot be construed that what was gifted to the assessee was only the right to enjoy the income of the properties during his lifetime. Therefore, the gift would take effect as if there were no condition attached to it and the assessee became the absolute owner of the properties. We, therefore, hold that there are no errors in the order of the Appellate Tribunal in holding that what was gifted to the assessee was the corpus of the properties and not the life interest of the properties. The Tribunal was also right in holding that the intention of the original settlor was not to give the properties to the children of the assessee existing at the time of the execution of the deed of the year 1953. Therefore, the Tribunal was correct in upholding the order of the Gift-tax Officer levying gift-tax.

26. In the result, we answer all the questions of law referred to us in the affirmative and against the assessee. However, in the circumstances of the case, there will be no order as to costs.