

(1987) 06 RAJ CK 0006
In the Rajasthan High Court
Case No : Gift-tax Reference No. 17 of 1976

Smt. Vidyawati Devi Rathi

APPELLANT

Vs

Commissioner of Gift-tax

RESPONDENT

Date of Decision : 30-06-1987

Acts Referred:

Gift Tax Act, 1958 — Section 2

Hindu Succession Act, 1956 — Section 14, 4

Hindu Womens Right to Property Act, 1937 — Section 3, 3(1), 3(2), 3(3)

Citation : (1987) 64 CTR 241 : (1988) 169 ITR 708

Hon'ble Judges : V.S. Dave, J; S.C. Agrawal, J

Bench : Division Bench

Advocate : N.M. Ranka and J.K. Singhi, for the Appellant; R.N. Surolia, for the Respondent

Judgement

V.S. Dave, J.—This reference has been sent by the Income Tax Appellate Tribunal along with the statement of the case, dated November 25, 1975, u/s 26(1) of the Gift-tax Act, 1958 (hereinafter referred to as "the Act"). The Tribunal has referred the following questions to this court for its opinion :

"1. Whether, on the facts and circumstances of this case and on a correct reading and interpretation of the agreement dated October 21, 1957, and the partnership deed dated November 1, 1957, Smt. Vidyawati Rathi was possessed of any property within the meaning of Section 14 of the Hindu Succession Act, 1956?

2. Whether, on a correct interpretation of the provisions of Section 3(2) and (3) of the Hindu Women's Rights to Property Act, XVIII of 1937 (as amended by XI of 1938) and Sections 4 and 14 of the Hindu Succession Act, the Tribunal was right in holding that on the death of Seth Vithal Das, husband of Smt. Vidyawati Rathi, in the year 1951, the share of Smt. Vidyawati Rathi became fixed, i.e., 1/3rd of the estate left by Seth Vithal Das, and this 1/3rd share was possessed by Smt. Vidyawati Rathi on the date of passing of the Hindu Succession Act, i.e., on June 17, 1956, and this 1/3rd share became her absolute property ?

3. Whether the Tribunal was right in holding that Smt. Ganga Devi, the grandmother, was not entitled to any share either on the death of Seth Vithal Das or on the passing of the Hindu Succession Act, 1956?

4. If the answer to question No. 3 is in the affirmative, what was the share of Smt. Ganga Devi ?

5. Whether, on the facts and circumstances of this case, in determining the share possessed by Smt. Vidyawati Rathi on the coming into force of the Hindu Succession Act, all liabilities including book debts and the properties allotted to Smt. Vidyawati Rathi and Smt. Ganga Devi had to be taken into consideration ?

6. Whether, on the facts arid in the circumstances of the case, the Tribunal was right in holding that the assessee by giving up her share or interest in the joint family property in favour of her two sons transferred the property within the meaning of Section 2(xxiv) of the Gift-tax Act, 1958, and thus made a gift as defined by Section 2(xii) of the Act?

7. Whether, on the facts and in the circumstances of the case, the Tribunal was right in giving a finding in the alternative that the act of the assessee amounts to a deemed gift within the meaning of Section 4(c) of the Act ?

8. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the gift was liable to be assessed in the assessment year 1958-59 and not in 1959-60 ?

9. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the notice dated February 12, 1965, issued by the Gift-tax Officer u/s 16(1)(a) of the Gift-tax Act. 1958, was within time?

10. Whether, on the facts and in the circumstances of the case and also in view of the provisions of the Hindu law, the Hindu Women's Rights to Property Act and the Hindu Succession Act, Smt. Vidyawati Rathi made a gift of the property valued at Rs. 8,01,074 and the same is liable to gift-tax under the Gift-tax Act, 1958 ?"

2. This reference has been made at the instance of the assessee, Smt. Vidyawati Rathi, and pertains to the assessment year 1958-59. The assessee was assessed under the Gift-tax Act where she was taxed on a sum of Rs. 7,92,074 considering the value of the gift as Rs. 8,01,074.

3. The assessee filed the return of gift as an "individual". The assessee is the widow of Seth Vithaldas Rathi who died in the year 1951. She is the widowed mother of Sarv/Sh. Seth Mukunddas Rathi and Seth Gokuldas Rathi, coparceners of the Hindu undivided family, styled as M/s. Thakurdas Khinvraj, Beawar, which owns movable and immovable properties. After the death of her husband, she inherited the same rights in the Hindu undivided family properties which were possessed by her late husband, namely, Seth Vithaldas Rathi, at the time of his death by virtue of Section 3(2) of the Hindu Women's Rights to Property Act,

1937. It would be pertinent to mention the genealogical table which is given below :

Damodardas (deceased) Widow Sethani | Gangabai Vithaldas (deceased) Widow Smt. Vidyawati _____|_____ (assessee) | | Mukunddas Gokuldas 1 son and 1 son and 1 daughter 3 daughters.

4. Seth Damodardas died in the year 1920 leaving behind his wife, Sethani Gangabai, and son, Seth Vithaldas. After the death of Seth Vithaldas in the year 1951, the family jewellery was divided amongst the members of the family on or about April 9, 1952. On October 21, 1957, an agreement was made between Seth Mukunddas, Seth Gokuldas and Sethani Gangabai and the assessee whereby an arrangement was made in respect of the assets of the family. A copy of this agreement is annexure "A" to the statement of the case. Under this agreement, it was decided that during the lifetime of Sethani Gangabai and the assessee, Seth Mukunddas and Seth Gokuldas shall keep a joint mess and shall divide the expenses between themselves every year in equal proportions irrespective of any disparity in the number of the members of the family of either of them. By the said agreement, it was also agreed that Seth Mukunddas and Seth Gokuldas shall divide between themselves the net assets of each of the businesses hitherto carried on by the family determined after taking into account all the back debts due to or by each such business and the assets including stock-in-trade, cash balances at bank and at hand but excluding the immovable properties comprised in the assets thereof and after division of the assets as aforesaid, both the parties named above may carry on the respective business in partnership under the existing or any other names or styles as they may agree. The existing businesses of the family are enumerated in annexure "A" to the said agreement. The said agreement also provided for division in equal proportion between Seth Mukunddas and Seth Gokuldas of the shares and securities mentioned in annexure "B" to the said agreement. As regards the immovable properties belonging to the family, which were mentioned in annexure "C" to the agreement, it was provided that the same shall continue to be the assets of the family so long as Seth Mukunddas and Seth Gokuldas do not agree to partition the same and if and when they decide to partition the same, they may do so and divide the same between themselves in equal proportion. The said agreement further provided that if Seth Mukunddas and Seth Gokuldas abide by the advice tendered in the agreement, the assessee and Sethani Gangabai would not claim any share in the said immovable properties upon such partition or division, nor would they claim any share in the division of the businesses and their assets made in pursuance of the advice and guidance given in the agreement as they were contented with whatever assets they already had.

5. In accordance with the aforesaid agreement dated October 21, 1957, an entry was made in the books of M/s. Thakurdas Khinvraj on October 24, 1957, wherein it was mentioned that after excluding the immovable properties and liabilities to the extent of Rs. 9,93,107.37, the assets of the joint family are Rs. 24,03,221.11

which amount has been divided in equal shares as per agreement dated October 21, 1957, and on that basis Rs. 12,01,610.55 was credited in the name of Seth Mukunddas and Rs. 12,01,610.56 was credited in the name of Seth Gokuldas. A copy of the aforesaid entry in the books of M/s, Thakurdas Khinvraj is annexure "B" to the statement of the case.

6. Seth Mukunddas and Seth Gokuldas entered into partnership to carry on the business in the name of Seth Thakurdas Khinvraj with effect from October 24, 1957. The terms and conditions of the partnership were set out in a partnership deed executed by them on November 1, 1957, a copy of which is annexure "F" to the statement of the case. A copy of the partnership deed was submitted before the Income Tax Officer-cum-Gift-tax Officer on April 18, 1958.

7. The Gift-tax Officer, Beawar, issued a notice dated February 12, 1965, u/s 16(1) of the Act to the assessee wherein it was stated that on partition of the joint family properties, whether partial or complete, the assessee, as a member, was entitled to a share equal to that of her: son and that the assessee was entitled to 1/3rd share, viz., Rs. 8,01,073.70 in the assets worth Rs. 24 lakhs odd in respect of which partition was done and since the assessee has not taken her aforesaid share, she has gifted her share to her sons, Seth Mukunddas and Seth Gokuldas.

8. In response to the aforesaid notice, the assessee submitted a return stating that the provisions of the Act were not attracted as she has not made any gift taxable under the Act. The assessee came out with a case of partial partition and submitted that in the agreement itself a decision was taken regarding business assets of the family, jewellery and household belongings having been already divided and that the immovable properties of the family continued to be owned and possessed by the joint family. It was submitted that the family is governed by Mitakshara branch of Hindu law and the object and purpose of the family arrangement was to ensure the maintenance of good relations between the several members of the family. It was further submitted that this was all done with mutual consideration.

9. The Gift-tax Officer, however, did not agree with the contention of the assessee that the provisions of the Gift-tax Act are not applicable and by his order dated December 16, 1965, he held that the only documentary evidence of partition is an entry in the account books of the family whereby Rs. 24,03,221.11 have been equally divided between Seth Mukunddas and Gokuldas and since the assessee was entitled to 1/3rd share in this amount, it shall be considered as if the assessee has relinquished, surrendered, forfeited or abandoned her 1/3rd share valued at Rs. 8,01,073.70 in favour of her two sons which amounts to a gift and hence the provisions of Section 2(xxiv)(d) of the Gift-tax Act read with Section 4(1)(c) of the Act are attracted.

10. Aggrieved by this order of the Gift-tax Officer, the assessee appealed to the Appellate Assistant Commissioner of Gift-tax, Ajmer Range, Ajmer. In the said

appeal, it was contended on behalf of the assessee that the notice issued u/s 16(1) of the Act was barred by limitation because after the partial partition, Seth Mukunddas and Seth Gokuldas formed a partnership and the deed of partnership was submitted to the Income Tax Officer-cum-Gift-tax Officer on April 18, 1958. On that date, the Gift-tax Officer was fully aware that a partial partition had taken place and recourse should have been taken to the provisions of Section 16(1) of the Act within a period of four years from that date and that notice dated February 12, 1965, was barred by limitation. It was also contended by the assessee that the partial partition took place on October 24, 1957, and the relevant assessment year was 1959-60 and that the assessment to gift-tax had been wrongly made in the assessment year 1958-59 on the basis that the gift was made on October 21, 1957. Apart from these objections, the assessee made submissions on merits and contended that the Gift-tax Officer had erred in holding that a deemed gift had been made u/s 4(c) of the Act. It was also submitted that even if it was treated to be a deemed gift, since there were four coparceners comprising Gokuldas, Mukunddas, Sethani Gangabai and the assessee, the assessee was in fact entitled to 1/4th share and not 1/3rd share and that value of the deemed gift would work out to Rs. 6,00,000 and not Rs. 8,00,000.

11. The Appellate Assistant Commissioner by his order dated April 15, 1971, allowed the said appeal of the assessee. The Appellate Assistant Commissioner rejected the contention of the assessee that the notice dated February 12, 1965, issued u/s 16(1) of the Act was barred by limitation because there is no evidence to establish that the income tax Officer/Gift-tax Officer had gone into the details of the partnership deed on April 18, 1958, and that the orders accepting the partial partition were passed at a much later stage and that it was only at that stage that the Income Tax Officer became aware that the assessee would be liable to gift-tax. The Appellate Assistant Commissioner accepted the contention of the assessee that the material date on which the gift can be said to have been completed by virtue of surrender and relinquishment was October 24, 1957, and not October 21, 1957, and the said date October 24, 1957, does not fall in the assessment year 1958-59 but it falls in the assessment year 1959-60 and that the Gift-tax Officer should have assessed the deemed gift, if at all, in the assessment year 1959-60. The Appellate Assistant Commissioner also held that the provisions of Section 4 read with Section 2(xxiv)(d) of the Act are not applicable to the case of the assessee and no deemed gift can be said to have been made. In this connection, the Appellate Assistant Commissioner has held that the partition of the property of a Hindu undivided family does not amount to a transfer in the legal sense and it does not attract Section 2(xii) read with Section 2(xxiv)(d) of the Act. As regards the applicability of Section 4(c), he held that it would not apply if the partition is genuine and bona fide. He also held that no complete partition had taken place and there still remained in fact the immovable property to which, at the time of final partition, the assessee can claim her full share and there cannot be said to have been any release,

discharge, surrender or forfeiture or abandonment of her rights in the joint family properties within the scope of Section 4. On that view, the Appellate Assistant Commissioner did not deal with the contentions of the assessee regarding the improper allocations of shares at the time of partial partition as determined by the Gift-tax Officer.

12. The Revenue went up in appeal before the Income Tax Appellate Tribunal. The Tribunal accepted the appeal of the Revenue and set aside the order of the Appellate Assistant Commissioner and restored the order of the Gift-tax Officer. The Income Tax Appellate Tribunal considered the various aspects of the matter and its findings are summarised as under :

1. Smt. Gangabai would not get any right, interest or share in the Hindu undivided family property as her husband had expired prior to the commencement of the Hindu Women's Rights to Property Act, 1937.

2. The assessee acquired the same interest in the Hindu undivided family property which her husband had by virtue of Section 3(ii) of the aforesaid Act and this share, unlike the shares of coparceners, was defined and unfluctuating and in view of Section 14 of the Hindu Succession Act, 1956, she became the absolute owner of the property left by her husband in 1951 and she had every right to transfer, give up, surrender or abandon her share.

3. The share of the assessee in the property in question was 1/3rd and not 1/4th as claimed by the assessee.

4. The assessee had a share to the extent of Rs. 8,01,073.70 in the property of the Hindu undivided family worth Rs. 24,41,221.11 which was partitioned on October 24, 1957, and on that date she had a definite and transferable share in the property and she had full right of disposition of the same and instead of taking it on partition, she had transferred or abandoned or given away the same in favour of her two sons, Mukunddas and Gokuldas. This transfer was either disposition, conveyance or assignment or delivery or alienation within the meaning of Section 2(xxiv) of the Act. By transferring her right or interest in favour of her two sons, the assessee had gifted her property in favour of her two sons and the case was covered by Section 2(xii) read with Section 2(xxiv) of the Act.

5. The case was also covered by Section 4 of the Act because the assessee has given up the ownership of her share in respect of Rs. 24 lakhs odd in favour of her two sons without consideration in money or money's worth and there is no convincing evidence on record to show that the transaction in question was bona fide.

6. The notice issued by the Gift-tax Officer u/s 16(1)(a) of the Act is valid. There is nothing on record to show that the Gift-tax Officer applied his mind on April 18, 1958, to ascertain that there took place partial partition and in consequence thereof, there was any gift u/s 2(xxiv) or Section 4(c) of the Act. It is common

ground that in the assessment year 1958-59, the assessee did not disclose any taxable gift which had escaped assessment and under the circumstances, the Gift-tax Officer was within his rights to start proceedings u/s 16(1)(a) of the Act within eight years.

7. In the income tax assessment for the assessment year 1958-59, two different previous years have been determined and the second previous year expired on December 31, 1957. In view of Section 2(xx)(b) of the Act and Section 3 of the Income Tax Act, 1961, the assessee was rightly assessed on the gift in question in the assessment year 1958-59.

13. Thereafter, the assessee moved an application u/s 26(1) of the Act which has given rise to this reference.

14. At the outset, we may mention that during the course of his arguments before us, Shri N.M. Ranka, learned counsel for the assessee, did not assail the findings recorded by the Tribunal in relation to questions Nos. 8 and 9. We have also perused the said findings of the Tribunal and we find no infirmity in the same. The said questions must, therefore, be answered against the assessee and in favour of the Revenue. ,

15. As regards questions Nos. 3 and 4 which relate to the share of Smt. Gangabai in the joint family properties, Shri Ranka has not disputed that Shri Damodardas, the husband of Smt. Gangabai, died in the year 1920, i.e., before the enactment of the Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as "the Act of 1937"), and the rights of Smt. Gangabai are governed by the Mitakshara law that was applicable prior to the enactment of the Act of 1937. Under the Mitakshara law, as it stood prior to the Act of 1937, a widow does not succeed to the estate of her husband as his heir and she is entitled only to maintenance out of her husband's separate property and out of property in which he was a coparcener at the time of his death. Under the said law, the widow has also the right to reside in the family dwelling house in which she lived with her husband. The claim of a widow for maintenance is not a charge upon the estate of her deceased husband, whether joint or separate. This may be done by the widow getting her maintenance determined and specifically charged on the joint family property either by agreement or decree or order of the court. Since the right of the widow to be maintained does not give her any interest in the joint family property, the said right is not a "jus in rem", i.e., right in property, but it is "jus ad rem", i.e., a right against the joint family property. If a specific property is allotted to the widow in lieu of her claim to maintenance under an agreement or a decree or order of a court and she was in possession of the same on the date of coming into force of the Hindu Succession Act, 1956 (hereinafter referred to as "the 1956 Act"), then by virtue of the provisions contained in Sub-section (1) of Section 14 and the Explanation thereto, the widow would become the absolute owner of the said property with effect from the date of coming into force of the 1956 Act (See *Vaddeboyina Tulasamma v. Vaddeboyina Sesha Reddi* AIR 1977 SC 1944).

16. It is not the case of the assessee that Smt. Gangabai had got her maintenance determined and specifically charged on the joint family property by agreement or decree or order of a court or that any specific property was allotted to her in lieu of her maintenance under an agreement or decree or order of a court and she was in the possession of the same on the date of coming into force of the 1956 Act. In the circumstances, Smt. Gangabai had only the right to claim maintenance out of the joint family property but she did not have any interest in the joint family property and she did not acquire any share in the joint family property under the provisions of the 1956 Act. The Tribunal was, therefore, right in holding that Smt. Gangabai was not entitled to any share in the joint family property either on the death of Seth Vithal Das or on the passing of the Hindu Succession Act, 1956. Question No. 3 must, therefore, be answered in the affirmative. In view of the answer to question No. 3 that Smt. Gangabai was not entitled to any share in the joint family property, question No. 4 does not arise.

17. We may now consider the remaining questions. Out of them, questions Nos. 1, 2 and 5 relate to the rights acquired by the assessee in the joint family properties under the Act of 1937 and the 1956 Act. Questions Nos. 6 and 7 relate to the interpretation of the provisions of Sections 2(xii), 2(xxiv) and 4(c) of the Act. Question No. 10 is general in nature and it will have to be answered in the light of the answers given to questions Nos. 1, 2, 5, 6 and 7. Since questions Nos. 1, 2 and 5 are interdependent, they will be dealt with together. Before we consider the submissions of learned counsel for the assessee and learned counsel for the Revenue, we may refer to the relevant provisions of the Act of 1937 and the 1956 Act.

18. As the family of the assessee is governed by the Mitakshara law, the relevant provisions of the Act of 1937 are Section 3(2) and (3) which read as under:

"Section 3. (2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of Sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Women's estate, provided however that she shall have the same right of claiming partition as a male owner."

19. The relevant provisions of the 1956 Act are contained in Section 14 which reads as under :

"Section 14(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.--In this Sub-section, "property" includes both movable and

immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as "stridhana" immediately before the commencement of this Act.

(2) Nothing contained in Sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

20. Shri N.M. Ranka, learned counsel for the assessee, has urged that prior to the enactment of the Act of 1937, a Hindu widow was not given any interest in the property of her husband at the time of his death and she was only entitled to maintenance. By Section 3(2) of the Act of 1937, a Hindu widow was given interest in the property of her husband and her rights were the same which were with her husband at the time of his death. By Section 3(3) of the Act of 1937, she was given the right to claim partition of the interest devolving on her u/s 3(2) of the Act. Learned counsel has submitted that as a result of the aforesaid provisions, a Hindu widow, though not a coparcener is introduced into the coparcenary. According to Shri Ranka, a Hindu widow does not take in the joint family property, a denned and divided share as if the husband had separated from the joint family at the time of his death, but she takes an undefined and fluctuating interest in the joint family which the husband himself had till the moment of his death and that the share of the Hindu widow gets denned and fixed when she claims partition. The said interest which was given to a Hindu widow under the Act of 1937 was a limited interest in the sense that on the death of the widow her interest would pass by survivorship to the coparceners if the widow died without any partition having taken place and it would devolve on the heirs of her husband if she died after partition. Shri Ranka has also submitted that this position of the Hindu widow continued till the 1956 Act came into force and thereafter by the enactment of the 1956 Act, the limited interest of a Hindu widow in the joint family property was converted into her absolute property with full powers of disposal and the restrictions and limitations that were imposed on her in the matter of disposal of the property ceased to exist. In support of his aforesaid submissions, Shri Ranka has placed reliance on the decision of the Privy Council in Attorney-General of Ceylon v. A.R. Arunachalam Chettiar [1958] 34 ITR 20 and the decisions of the Supreme Court in Potti Lakshmi Perumallu Vs. Potti Krishnavenamma, , Satrugan Isser Vs. Smt. Subujpari and Others, , Controller of Estate Duty, Madras Vs. Alladi Kuppuswamy, and S.S. Munna Lal Vs. S.S. Rajkumar and Others, . Shri Ranka has also urged that it is fully borne out from the record that complete partition did not take place in the family of the assessee and, therefore, the share of the assessee in the joint family property could not be said to have been fixed or crystallised and

that it remained fluctuating. The submission of Shri Ranka is that the partition which took place on October 24, 1957, was only partial and not complete , and that the share of the assessee in the joint family property would be ascertainable only when a complete partition takes place.

21. Shri R.N. Surolia, learned counsel for the Revenue, has supported the findings recorded by the Tribunal and has submitted that on the death of her husband, Seth Vithal Das, in 1951, the assessee acquired an interest to the extent of the share of her husband on the date of his death in the joint family property under the Act of 1937 and that the said share was fixed and was not fluctuating and that after the enactment of the 1956 Act the assessee became the absolute owner of that share in the joint family property. Shri Surolia has urged that a demand for partition is not essential for the purpose of crystallisation of the rights that had accrued to the assessee under the Act of 1937. In support of his aforesaid submission, Shri Surolia has placed reliance on the decisions of the Supreme Court in Sukhram and Another Vs. Gauri Shankar and Another, , State of Maharashtra Vs. Narayan Rao Sham Rao Deshmukh and Others, , Smt. Raj Rani Vs. Chief Settlement Commissioner, Delhi and Others, and Gummalapura Taggina Matada Kotturuswami Vs. Setra Veeravva and Others, .

22. While dealing with questions Nos. 3 and 4, we have indicated that under the Mitakshara law, as it stood prior to the enactment of the Act of 1937, a widow did not succeed to the estate of her husband as his heir and she was only entitled to maintenance out of her husband's separate property and not out of property in which he was a coparcener at the time of his death and the claim of the widow for maintenance was not a charge upon the estate of her deceased husband, whether joint or separate. The Act of 1937 is a measure of social reform which was enacted to redress disabilities and to give better rights to women by recognising their claim to fair and equitable treatment in certain matters of succession. Section 3 of the said Act makes provision for devolution of the property of a Hindu who dies intestate. Sub-section (1) of Section 3 relates to the devolution of the property of a Hindu governed by the Dayabhaga school of law as well as the separate property of a Hindu governed by any other school of law or by customary law and it provides that in the said property, the widow would be entitled to the same share as a son. In respect of the interest of a Hindu governed by a school of Hindu law other than the Dayabhaga school or by customary law in a Hindu joint family property, provision is made in Sub-section (2) of Section 3 which provides that the widow of such a person shall have in the joint family property the same interest as her husband himself had. Sub-section (3) of Section 3 declares that the interest devolving on a Hindu widow under the provisions of this section shall be a limited interest known as a Hindu women's estate and it confers a right on her to claim partition as a male owner.

23. The provisions of Sub-sections (2) and (3) of Section 3 of the Act of 1937 came up for consideration before the Supreme Court in Potti Lakshmi Perumallu

Vs. Potti Krishnavenamma, . Till then there was a certain amount of conflict in the decisions of the various High Courts. One view was that the quantum of interest to which a Hindu widow is entitled u/s 3(2) of the Act of 1937 is to be determined as on the date on which she seeks to enforce a partition under Sub-section (3) of Section 3. The other view was that it has to be determined as on the date on which her husband died, that is to say, that it was not a fluctuating interest increasing or decreasing as a result of deaths or births in the family. The Supreme Court, after considering the decisions of the various High Courts, approved the first view and have observed (at page 829):

"The various decisions to which we have adverted rest on the view that the interest which the law has conferred upon the widow is a new kind of interest though in character it is what is commonly known as the Hindu widow's estate. This interest is in substitution of her right under the pre-existing Hindu law to claim maintenance. The decisions also recognise that though the widow does not, by virtue of the interest given to her by the new law, become a coparcener, she being entitled to claim partition of the joint family property, is in the same position in which her deceased husband would have been in the matter of exercise of that right. That is to say, according to those decisions her interest is a fluctuating one and is liable to increase or decrease according as there are deaths in or additions to the members of the family or according as there are accretions to or diminutions of the property. In our opinion, these decisions lay down the law correctly."

24. The learned judges have further observed (at p. 830):

"When the Act says that she will have the same right as her husband had, it clearly means that she would be entitled to be allotted the same share as her husband would have been entitled to had he lived on the date on which she claimed partition."

25. The same view has been reiterated by the Supreme Court in *Satrughan Isser Vs. Smt. Subujpari and Others*, wherein it has been held that the interest acquired by a Hindu widow u/s 3(2) of the Act of 1937 gets defined as soon as an unequivocal demand for partition is made by her. In that case, it has been laid down that if a Hindu widow dies before seeking a partition, the interest acquired by her would merge into the coparcenary property but if she dies after partition, the, interest in the coparasnary property which has vested in her will devolve upon the heirs of her husband.

26. In *Controller of Estate Duty, Madras Vs. Alladi Kuppuswamy*, the Supreme Court has reaffirmed the law laid down in the abovementioned cases and it has been observed (headnote):

"In other words, after her husband's death the Hindu widow under the Act of 1937 has got the right to demand partition, she cannot predicate the exact share which she might receive until partition is made, her dominion extends to the entire property conjointly with the other members of the coparcenary, her

possession and enjoyment is common, the property cannot be alienated without the concurrence of all the members of the family, except for legal necessity, and like other coparceners she has a fluctuating interest in the property which may be increased or decreased by deaths or additions in the family."

27. In view of the decisions of the Supreme Court referred to above, it must be held that a Hindu widow who acquires the interest of her husband in a Hindu coparcenary by virtue of Section 3(2) of the Act of 1937, though not a coparcener, is a member of the Hindu coparcenary. Her exact share in the joint family property cannot be predicated until partition is made and till then, like other coparceners, she has a fluctuating interest in the property which may be increased or decreased by deaths or additions in the family.

28. We have looked into the decisions on which reliance has been placed by learned counsel for the Revenue and we are of the view that the said decisions have no bearing on the question in issue, viz., the nature of rights conferred on a Hindu widow by Sections 3(2) and 3(3) of the Act of 1937. In *State of Maharashtra v. Narayan Rao Sham Rao Deshmukh* [1983] 163 ITR 31 and *Smt. Raj Rani Vs. Chief Settlement Commissioner, Delhi and Others*, the husband had died after the coming into force of the 1956 Act and the rights of the widow were governed by the provisions of the 1956 Act and not by the Act of 1937. In *Sukhram and Another Vs. Gauri Shankar and Another*, and *Gummalapura Taggina Matada Kotturuswami Vs. Setra Veeravva and Others*, the court has construed the provisions of Section 14 of the 1956 Act.

29. We may now examine the impact of the 1956 Act on the rights which accrue to a Hindu widow under the Act of 1937. The 1956 Act, by amending and codifying the law of intestate succession amongst Hindus, brings about some fundamental and radical changes in the law of succession. An important feature of the 1956 Act is enlarging of the Hindu women's limited estate into full ownership u/s 14. In cases where a Hindu widow has acquired Hindu women's estate under Sections 3(2) and 3(3) of the Act of 1937, the said limited interest of the widow is converted into full ownership with effect from the date of the commencement of the 1956 Act u/s 14 of the 1956 Act. If the widow has claimed partition of her interest and her share in the coparcenary property has been defined prior to the commencement of the 1956 Act and she is in possession of the said share on the date of the commencement of the 1956 Act, she becomes full owner of the property falling to her share with effect from the date of the commencement of the 1956 Act. If the widow has not claimed partition prior to the commencement of the 1956 Act, she becomes full owner of the undefined interest of her husband in the joint family property which has devolved on her u/s 3(1) of the Act of 1937. As a result of the conferment of the right of full ownership in respect of the Hindu women's estate which devolved on her under Sections 3(2) and 3(3) of the Act of 1937, the Hindu widow acquires unrestricted power of disposition and, after her death, it would devolve on her heirs. We have not been able to find any provision in the 1956 Act which has the effect of

crystallising the share of a Hindu widow which had remained undefined on the date of the coming into force of the 1956 Act on account of the widow not having claimed partition of her share of the joint family property and, therefore, it cannot be said that the provisions of the 1956 Act have the effect of crystallising the share of the Hindu widow in the joint family property which has devolved on her under Sections 3(2) and 3(3) of the Act of 1937 and making definite what was fluctuating on the date of the coming into force of the 1956 Act.

30. In the present case, the agreement dated October 21, 1957, shows that after the death of Seth Vithal Das and till the date of the agreement dated October 21, 1957, only the family jewellery was divided amongst the members of the family on or about April 9, 1952, and the other properties of the joint family, namely, the businesses carried on by the family as well as the immovable properties continued to remain joint and by agreement dated October 21, 1957, an arrangement was made whereunder the businesses hitherto carried on by the family were divided between Seth Mukunddas and Seth Gokuldas but the immovable properties belonging to the joint family were not divided. This would show that till October 21, 1957, the assessee had not claimed partition of her interest in the joint family property and even under the agreement dated October 21, 1957, only partial partition of some other properties, viz., businesses, was effected but the immovable properties of the joint family were not partitioned. In these circumstances, it is not possible to hold that the interest of the assessee in the joint family properties which had devolved on her under the provisions of Sections 3(2) and 3(3) of the Act of 1937 had been defined either on the death of her husband Seth Vithal Das in 1951 or on the date of the coming into force of the 1956 Act and it cannot, therefore, be said that on the date of the execution of the agreement dated October 21, 1957, the assessee was the absolute owner of a defined share in the joint family properties.

31. The Tribunal has found that in pursuance of the provisions of the Act of 1937, the rights of the assessee in the properties of her husband were statutorily defined and unfluctuating and her interest was limited to life alone and that after the coming into force of the 1956 Act and in view of Sections 4 and 14 of the said Act, her limited interest in the property was converted into absolute right. In our opinion, the said finding recorded by the Tribunal is not in consonance with the law laid down by the Supreme Court in *Potti Lakshmi Perumallu Vs. Potti Krishnavenamma*, , *Satrughan Isser Vs. Smt. Subujpari and Others*, and *Controller of Estate Duty, Madras Vs. Alladi Kuppuswamy*, , to which reference has already been made by us, wherein it has been held that the interest of a Hindu widow which devolves on her under Sections 3(2) and 3(3) of the Act of 1937 remains fluctuating till the widow claims partition and only then it becomes fixed and definite. Although there is a reference by the Tribunal to the decision of the Supreme Court in *Potti Lakshmi Perumallu Vs. Potti Krishnavenamma*, the Tribunal appears to have failed to take note of the aforesaid principle laid down in the said decision.

32. In view of the aforesaid discussion, we are of the opinion that with reference to question No. 1, it must be held that on the facts and circumstances of the case and on a correct reading and interpretation of the agreement dated October 21, 1957, and partnership dated November 1, 1957, the assessee was possessed of the undefined interest of her husband, Seth Vithal Das, in the joint family property on the date of the coming into force of the 1956 Act and the said undefined interest was property which was possessed by the assessee within the meaning of Section 14 of 1956 Act. As regards question No. 2, we are of the view that on a correct interpretation of the provisions of Section 3(2) and (3) of the Act of 1937, as amended by Act XI of 1938, and Sections 4 and 14 of the 1956 Act, the Tribunal was not right in holding that on the death of Seth Vithal Das, the husband of the assessee, in the year 1951, the share of the assessee became fixed, i.e., 1/3rd of the estate left by Seth Vithal Das and this one-third share was possessed by the assessee on the date of passing of the 1956 Act on June 17, 1956, and that 1/3rd share became her absolute property. In our opinion, on the date of passing of the 1956 Act, the assessee was possessed of the undefined interest of her husband, Seth Vithal Das, in the joint family property and after the coming into force of the 1956 Act, she became the absolute owner of that undefined interest by virtue of Section 14 of the 1956 Act. With regard to question No. 5, we are of the opinion that the said question does not arise in view of our finding with regard to questions Nos. 1 and 2 that the share possessed by the assessee on the date of coming into force of the 1956 Act was undefined and fluctuating.

33. We may now deal with questions Nos. 6 and 7, Question No. 6 is as to whether the assessee, by giving up her share or interest in the joint family property in favour of her two sons, transferred the property within the meaning of Section 2(xxiv) of the Act and thus made a gift as defined by Section 2(xii) of the Act. The said question involves the interpretation of the provisions of Sections 2(xii) and 2(xxiv) of the Act which may be reproduced as under :

"2. (xii) "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 or conversion of any property referred to in Section 4, deemed to be a gift under that section."

"2. (xxiv) "transfer of property" means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes-

- (a) the creation of a trust in property ;
- (b) the grant or creation of any lease, mortgage, charge, easement, license, power, partnership or interest in property ;
- (c) the exercise of a power of appointment of property vested in any person, not the owner of the property, to determine its disposition in favour of any person other than the 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."

34. From a perusal of Section 2(xii) of the Act, it is evident that in order that a transaction may be a gift under the Act, there must be transfer by one person to another of any existing movable or immovable property and the expression "transfer of property" is defined in Section 2(xxiv). As to whether the partition of the assets of a joint Hindu family constitutes transfer has come up for consideration before the Supreme Court in a number of cases. In *Commissioner of Income Tax, Gujarat Vs. Keshavlal Lallubhai Patel*, , the Supreme Court has held that a partition of joint Hindu family property is not a transfer in the strict sense. In that case, the Supreme Court has quoted with approval the following observations from the judgment of the Madras High Court in *Gutta Radhakristnayya v. Gutta Sarasamma* AIR 1951 Mad 213 (at page 641 of 55 ITR):

"Partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty. Each one of the sharers had an antecedent title and, therefore, no conveyance is involved in the process, as a conferment of a new title is not necessary."

35. In *The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar*, , the Supreme Court has considered the provisions of Sections 2(xii) and 2(xxiv) of the Act for the purpose of deciding as to whether a partition in the family could be considered as disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property within the meaning of those words in Section 2(xxiv) of the Act. The Supreme Court, placing reliance on its earlier judgment in *Commissioner of Income Tax, Gujarat Vs. Keshavlal Lallubhai Patel*, , has held that the partition in the family does not effect any transfer as generally understood in law and that it could not be considered to be a disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property within the meaning of these words u/s 2(xxiv) of the Act and, therefore, it does not constitute a gift u/s 2(xii) of the Act. In that case, the learned judges have also observed that the expression "transaction" referred to in Clause (d) of Section 2(xxiv) of the Act takes its colour from the main clause, namely, it must be a transfer of property in some way and that the said clause can have no application to a partition of the joint family property. In this context, the learned judges have observed that a member of a Hindu undivided family who has no definite share in the family property before division cannot be said to diminish directly or indirectly the value of his property or to increase the value of the property of any other coparcener by agreeing to take a share lesser than what he would have got if he had gone to enforce his claim, and that till partition his share in the family property is undetermined and he becomes entitled to a share in the family property only after the partition and, therefore, there is no question of his either diminishing directly or indirectly the value of his own property or of increasing the value of the property of anyone else. The same position was

reiterated by the Supreme Court in *The Controller of Estate Duty, Andhra Pradesh Hyderabad Vs. Kancharla Kesava Rao*, wherein the court was construing the provisions of Sections 7 and 24 of the Estate Duty Act, 1953.

36. We find that the Tribunal has referred to the case of *The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar*, but has held that the said decision would not be applicable to the case of the assessee because the assessee is not a coparcener in the Hindu undivided family and her rights are governed u/s 14 of the 1956 Act. The Tribunal, after referring to the terms of the agreement dated October 21, 1957, and the partnership deed executed by Seth Mukunddas and Seth Gokuldas in November, 1957, has observed that the assessee had a definite and transferable share in the property in question and she had full right of disposition of the same and that the assessee taking her share of Rs. 8,01,073.70 in the property which was partitioned on October 24, 1957, transferred or abandoned or gave up the same in favour of her sons. We have already considered this aspect of the matter while dealing with questions Nos. 1, 2 and 5 and we have held that on the date of the execution of the agreement dated October 21, 1957, the share of the assessee in the joint family property had not crystallised and it was not defined and although the assessee was not a coparcener in the Hindu undivided family, by virtue of the provisions of Sections 3(2) and 3(3) of the Act of 1937, she stood in the same position as her husband in the coparcenary and the interest of her husband that had devolved on her had remained undefined because the assessee had not claimed a partition of her said interest. We are, therefore, unable to agree with the Tribunal that the assessee had a definite share in the joint family property on the date of the execution of the agreement dated October 21, 1957. Since the share of the assessee in the joint family property was indeterminate, the present case is fully governed by the decision of the Supreme Court in *The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar*, and it cannot be said that by executing the agreement dated October 21, 1957, and by giving up her share or interest in the businesses of the joint family, the petitioner had transferred any property to her sons within the meaning of Section 2(xxiv) of the Act and had thus made a gift as defined in Section 2(xii) of the Act. The Tribunal was, in our opinion, not right in taking the said view.

37. Question No. 7 is as to whether the act of the assessee in executing the agreement dated October 21, 1957, amounts to a deemed gift within the meaning of Section 4(c) of the Act. It turns on the interpretation of Section 4(c) of the Act which reads as under :

"4. Gifts to include certain transfers.--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 not been 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."

38. In relation to the aforesaid provision, the Central Board of Revenue has issued a circular dated February 27, 1959, to the following effect:

"Transfer deemed to be gifts :

Section 4(c) has been inserted with the object of roping in so-called, business transactions which are really gifts in a camouflaged form. It is not, however, the intention to penalise cases where the release, discharge, surrender, forfeiture or abandonment has been made for bona fide reasons. For example, a debt may be abandoned because it is genuinely irrecoverable and the person may not have taken legal steps to , recover the amount, as it would mean only throwing good money after bad. Such an abandonment will not be treated as a gift. This provision could be invoked only in cases where the circumstances justify an inference of collusion between the person, who makes the discharge, surrender or abandonment, etc., and the person in whose favour the discharge, surrender or abandonment, etc., has been made." Circular No. 1(1)-59 GT dated February 27, 1959, issued by the Central Board of Revenue, New Delhi.

39. In the present case, we find that by agreement dated October 21, 1957, only a partial partition has been effected in respect of the businesses hithertofore carried on by the joint family and the immovable properties of the joint family were not partitioned. On the basis of the agreement dated October 21, 1957, it cannot, therefore, be said that the assessee had released, discharged, surrendered or abandoned her interest in the joint family property in favour of her two sons and the question as to whether the assessee has surrendered or abandoned her interest in the joint family property can only be determined at the stage when the partition of the remaining properties takes place. Moreover, the circular of the Central Board of Revenue, referred to above, shows that the object underlying Section 4(c) of the Act is to rope in so-called business transactions which are really gifts in a camouflaged form and the said clause does not cover cases where release, discharge, surrender, forfeiture or abandonment has been made for bona fide reasons. In the present case, the Appellate Assistant Commissioner has observed that Section 4(c) cannot apply to a case of partition of a joint family because the transaction is bona fide and if the partition is not genuine, then it will not be accepted by the taxation authorities and that in the present case the partial partition effected by the agreement dated October 21, 1957, has been accepted by the Department as genuine. The Tribunal, while dealing with this aspect of the case, has held that the agreement and the partnership deed do not go to show that there was any bona fides in this transfer. The Tribunal has also observed that the fact that the partial partition had been accepted by the Department, by itself, would not go to prove that the transaction in question was bona fide. In the view of the Tribunal, there should be some evidence to show that on account of definite reasons, the assessee had given up her claim to the extent of Rs. 8 lakhs odd which was her share in the property in question and on this point there was no convincing evidence on

record. The aforesaid observations of the Tribunal show that the Tribunal has proceeded on the basis that it was for the assessee to establish the bona fides of the transactions and to adduce evidence in that regard. In our opinion, the Tribunal was not right in proceeding on that basis. In order to bring the case within the ambit of Section 4(c) of the Act, it was necessary for the Department to show that the agreement dated October 21, 1957, was not bona fide and it should have placed material on record to show that it suffers from lack of bona fides. In the present case, there is no material on record to show that the agreement dated October 21, 1957, suffers from lack of bona fides or is not genuine. On the other hand, we find that the said agreement dated October 21, 1957, and the partnership deed executed by Seth Mukunddas and Seth Gokuldas on November 1, 1957, in pursuance of the agreement dated October 21, 1957, have been accepted as genuine by the taxation authorities. In these circumstances, we are of the opinion that the Tribunal was not right in holding that the provisions of Section 4(c) were attracted to the present case and the act of the assessee in entering into the agreement dated October 21, 1957, amounts to a deemed gift within the meaning of Section 4(c) of the Act.

40. The answer to question No. 10 is dependent on the answers to questions Nos. 1, 2, 5, 6 and 7. In view of the findings recorded by us in relation to the said questions, it must be held that the assessee cannot be said to have made a gift of the property valued at Rs. 8,01,074 and the same is not liable to gift-tax under the Act.

41. The questions referred are, therefore, answered as under :

Question No. 1: On the facts and in the circumstances of this case and on a correct reading and interpretation of the agreement dated October 21, 1957, and partnership deed dated November 1, 1957, Smt. Vidyawati Devi Rathi was possessed of the undefined interest of her husband, Seth Vithal Das, in the joint family property within the meaning of Section 14 of the Hindu Succession Act, 1956.

Question No. 2 : On a correct interpretation of the provisions of Section 3(2) and (3) of the Hindu Women's Rights to Property Act, 1937 (XVIII of 1937), as amended by Act of 1938, and Sections 4 and 14 of the Hindu Succession Act, the Tribunal was not right in holding that on the death of Seth Vithal Das, husband of Smt. Vidyawati Devi Rathi, in the year 1951, the share of Smt. Vidyawati Devi Rathi became fixed, i.e., 1/3 of the estate left by Seth Vithal Das and that one-third share was possessed by Smt. Vidyawati Devi Rathi on the date of the passing of the Hindu Succession Act, i.e., June 17, 1956, and this one-third share became her absolute property. On the date of the passing of the Hindu Succession Act, i.e., on June 17, 1956, Smt. Vidyawati Devi Rathi was possessed of the undefined interest of her husband, Seth Vithal Das, in the joint family property and after the passing of the Hindu Succession Act, she became absolute owner of that undefined interest.

Question No. 3 : The Tribunal was right in holding that Smt. Gangabai, the grandmother, was not entitled to any share either on the death of Seth Vithal Das or on the date of the passing of the Hindu Succession Act, 1956, and that she was only entitled to a right of maintenance out of the joint family property.

Question No. 4 : In view of the answer to question No. 3, question No. 4 does not arise.

Question No. 5 : In view of the answers to questions Nos. 1 and 2 that on the date of coming into force of the Hindu Succession Act, 1956, the share of Smt. Vidyawati Devi Rathi was not definite and was fluctuating, this question does not arise.

Question No. 6 : On the facts and in the circumstances of the case, the Tribunal was not right in holding that the assessee, by giving up her share or interest in the joint family property in favour of her two sons, transferred the property within the meaning of Section 2(xxiv) of the Gift-tax Act, 1958, and thus made a gift as defined by Section 2(xii) of the Act.

Question No. 7 : On the facts and in the circumstances of the case, the Tribunal was not right in giving a finding in the alternative, that the act of the assessee amounts to a deemed gift within the meaning of Section 4(c) of the Act.

Question No. 8 : On the facts and in the circumstances of the case, the Tribunal was right in holding that the gift was liable to be assessed in the assessment year 1958-59 and not in 1959-60.

Question No. 9 : On the facts and in the circumstances of the case, the Tribunal was right in holding that the notice dated February 12, 1965, issued by the Gift-tax Officer u/s 16(1)(a) of the Gift-tax Act, 1958, was within time.

Question No. 10 : On the facts and in the circumstances of the case and also in view of the provisions of the Hindu law and the Hindu Women's Rights to Property Act and the Hindu Succession Act, Smt. Vidyawati Devi Rathi did not make a gift of the property valued at Rs. 8,01,074 and the same is not liable to gift-tax under the Gift-tax Act, 1958.

42. The parties are left to bear their own costs.