and special reasons would result in placing restriction on the discretion which rests with the Court while deciding whether the accused is to be detained in custody or directed to be released, which restriction is neither warranted by the language of section 427 nor by any other consideration relevant to the issue.

(38) Viewing the facts of the present case in the light of the principles enunciated above, I find that the fatal blow was alleged to have been given by Puran Singh accused. The injury attributed to him was found sufficient to cause death in the ordinary course of nature while no other injury was found to be of such a nature. Moreover, it is the prosecution case itself that the occurrence had taken place because of the quarrel as to when the turn of the complainant party to take water from canal would end. It would be open to the accused other than Puran Singh to canvass at the hearing that section 149 of the Indian Penal Code was not attracted in this case so far as the fatal injury to the deceased was concerned. Without expressing any opinion on the merits of this argument, suffice it to say that as this argument would ultimately be available only to the accused other than Puran Singh, the case of these accused is distinguishable. Having regard to this and other circumstances, I find that whereas Puran Singh is not entitled to bail, I allow bail to the other accused which may be furnished to the satisfaction of the Chief Judicial Magistrate, Sangrur.

ORDER OF THE COURT

(39) In view of the majority decision, the petition succeeds and it is hereby directed that all the six petitioners be released on bail on their furnishing adequate security to the satisfaction of the Chief Judicial Magistrate at Sangrur.

K. S. K.

FULL BENCH

Before D. K. Mahajan, H. R. Sodhi and Bal Raj Tuli, JJ.

THE COMMISSIONER OF GIFT TAX, PATIALA,—*Applicant.*

Versus.

TEJ NATH,—*Respondent.*

Income Tax Reference No. 10 of 1970

November 9, 1971.

Gift Tax Act (XVIII of 1958)—Sections 2(viii), 2(xii) and 2(xxiv)—Gift by a Karta of Hindu undivided family in favour of coparceners and

non-coparceners—Whether void ab initio—*Such gift—Whether taxable under the Gift Tax Act.*

Held, that the position in Hindu law is that whereas the father has the power to gift ancestral movables within reasonable limits, he has no such power with regard to ancestral immovable property or coparcenary property. He can, however, make a gift within reasonable limits of ancestral immovable property for pious purposes. A gift of ancestral immovable property to a daughter is also valid if it is to reasonable extent. But the rule is firmly settled that a father has no power to make a gift of ancestral immovable property to his wife to the prejudice of his minor sons. So also is the rule that a gift to a stranger is equally invalid and the other members of the family need not sue to set it aside. Where a Karta of Hindu undivided family makes a gift in favour of the strangers, the gift is void because Karta has no authority to make such a gift. So far as the gift in favour of coparceners is concerned, there will be no transfer of ownership from the donor to the donee because the donees are themselves also owners of the property. In the case of coparceners, therefore, there will be no gift within the meaning of sections 2(viii), 2(xii) and 2(xxiv), Gift Tax Act. If there is no gift, the jurisdiction of the Gift-tax Officer to tax the same does not arise. Hence a gift by a Karta of Hindu undivided family in favour of coparceners and non-coparceners is void *ab initio* and is not taxable under the Gift Tax Act. **(Para 18)**

Case referred by the Division Bench consisting of Hon'ble Mr. Justice D. K. Mahajan and Hon'ble Mr. Justice Gopal Singh on 1st *March* 1971 *to a larger Bench for deciding on important question of law. The Full Bench consisting of Hon'ble Mr. Justice D. K. Mahajan, Hon'ble Mr. Justice H. R. Sodhi and Hon'ble Mr. Justice Bal Raj Tuli finally decided the case on 9th November,* 1971.

Reference under section 26(1) *of the Gift Tax Act* 1958 *made by the Income Tax Appellate Tribunal (Delhi Bench) on* 19*th December,* 1969 *to this Hon'ble Court for Opnion on the following question of law in R. A. No.* 4 *of* 1969-70 *arising out of G.T.A. No.* 123 *of* 1967-68 *during the assessment year* 1964-65.

"Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that the gifts made by the assessee who is also Karta of the Hindu undivided family, were void ab initio *and therefore these gifts could not be brought to tax under the Gift Tax Act,* 1958?"

D. N. Awasthy and B. S. Gupta, Advocates, for the applicant.

Ashok Bhan and N. K. Sud Advocates, for the respondent.

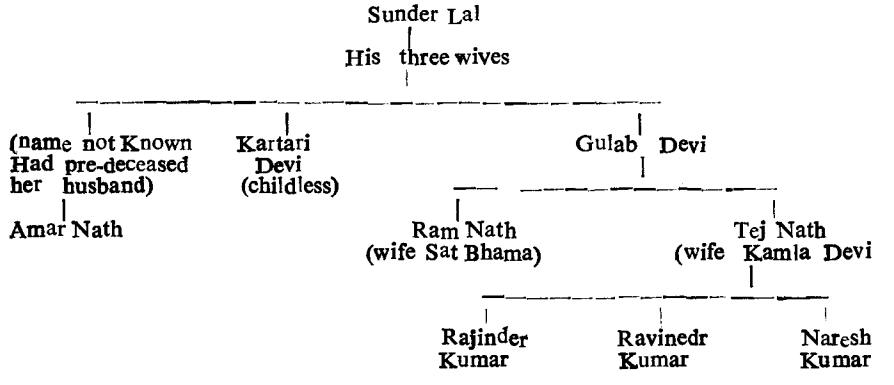
JUDGMENT

D. K. MAHAJAN, J.—The Income-tax Appellate Tribunal, Delhi Bench 'C' referred the following question of law for the opinion of this Court :—

> "Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that the gifts made by the assessee, who is also Karta of the Hindu undivided family, were void *ab initio* and, therefore, these gifts could not be brought to tax under the Gift Tax Act, 1958 ?"

(2) This reference was posted before me and Gopal Singh J., for hearing. In view of the conflict of judicial opinion on the question whether the gift by a Karta of a Hindu undivided family to coparceners and non-coparceners is void *ab initio,* we directed that this reference should be heard and decided by a larger Bench. That is how this reference has been placed before the Full Bench.

(3) The assessment year in question is 1964-65. The previous year ended on 31st March, 1964. Shri Tej Nath is the assessee—He was assessed as an individual in the year in question (1964-65). The relationship of the donor and the donees is indicated by the following pedigree-table:—



(4) Sunder Lal, died sometime in 1934. His first wife had predeceased him. He had one son from the first wife, Amar Nath. His second wife Smt. Kartari Devi was childless. From the third wife Gulab Devi, he had two sons, Ram Nath and Tej Nath. Ram Nath

is dead. His widow is Satya Bhama. Tej Nath was married to Kamla Devi and has three sons, Rajinder Kumar, Ravinder Kumar and Naresh Kumar. All of them were minors at the time when the gift in question was made. It appears that the rule of *chundawand* governed this family. Sunder Lal's property devolved according to the number of his wives. Smt. Kartari Devi relinquished her share in favour of the descendants of the two remaining widows. The property inherited by her was divided into two equal shares. One share each was to go to the descendants of each of her co-widows. The property mainly consisted of agricultural lands. Out of the land which had come to the share of Tej Nath on the death of his father Sunder Lal and by reason of relinquishment of her share by Kartari Devi, he gifted land measuring 652 *kanals* in equal shares to:—

(1) Smt. Satya Bhama, wife of his brother Ram Nath ;

(2) Smt. Gulab Devi, his mother;

(3) Smt. Kartari Devi, his step-mother ;

(4) Naresh Kumar ;

(5) Ravinder Kumar ; and

(6) Rajinder Kumar, his three minor sons.

(5) This gift was considered for gift tax by the Gift Tax Officer. The plea raised by the assessee was that the gift was invalid because by the gift, ancestral immovable property, which was joint Hindu family property, had been transferred, and that the assessee as a Karta of the family could not transfer the same including his own interest, according to the well-settled rule of Hindu Law, and therefore, there was no valid gift. In other words, the transaction of gift was void. This plea did not prevail with the Gift Tax Officer. The Gift Tax Officer valued the gifted land at Rs. 65,000 and levied gift tax thereon.

(6) The assessee was aggrieved by the order of the Gift Tax Officer and he preferred an appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner accepted the contention of the assessee. The appeal was allowed and it was held that the gift in question was invalid and there being no legal gift no gift-tax could be levied.

(7) The Revenue being dissatisfied with the decision of the Appellate Assistant Commissioner, preferred an appeal to the Income-tax Appellate Tribunal. The Tribunal rejected the appeal of the Revenue on the short ground that it was not open to and legal for Tej Nath, the Karta of the joint Hindu family, to make a gift of any part of the ancestral immovable property. The Tribunal noticed the decision of this Court in *Raghbir Singh Sandhawalia* v. *Commissioner of Income-tax, Punjab* (1), and distinguished the same. For the view that the gift in question was void, the Tribunal relied on *Commissioner of Income-tax, New Delhi,* v. *Braham Dutt Bhargava* (2), and *A. Basaviah Gowder* v. *Commissioner of Gift Tax, Madras* (3).

(8) The Revenue, then moved the Income-tax Appellate Tribunal under section 26(1) of the Gift Tax Act, 1958, for referring the question of law, already set out in the opening part of this order, for the opinion of this Court.

(9) Mr. Awasthy, learned counsel for the Revenue, contends that the gift in question is voidable and not void. So long as the gift is not avoided, it will hold the field and would be a good gift so far as the Gift Tax Act is concerned. The learned counsel places his reliance mainly on the decisions of the Supreme Court in *Raghubanchmani Prasad Narain Singh* v. *Ambica Prasad Singh* (4), *Guramma* v. *Mallappa* (5), *Raghbir Singh Sandhawalia* v. *Commissioner of Income-tax, Punjab* (1), *Jugal Kishore, Jai Prakash* v. *Commissioner to Income-tax, Lucknow* (6), and *Subba Goundan* v. *Krishnamachari* (7). The learned counsel, however, concedes that if we come to the conclusion that the gift is void *ab initio,* he would not be able to take any exception to the decision of the Tribunal, but his principal contention is that the gift is valid till it is avoided and as no steps had been taken to avoid the gift in a Court of law, the Tribunal was in error in holding the gift to be void.

(10) Before we proceed to deal with the contention of the learned counsel, it will be proper to set out the definition of 'gift' and other relevant provisions of the Act.

(1) 34 I.T.R. 719.
(2) 45 I.T.R. 387.
(3) 49 I.T.R. 817.
(4) A.I.R. 1971 S.C. 776.
(5) A.I.R. 1964 S.C. 510.
(6) 79 I.T.R. 598.
(7) I.L.R. 45 Mad. 449=A.I.R. 1922 Mad. 112.

'Gift' in section 2(xii) is defined as follows:—

" 'gift' means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer of any property deemed to be a gift under section 4."

(11) It will appear from the definition that before there can be a gift which can be brought to tax, the following conditions have to be satisfied :—

(1) There has to be a transfer by one person to another.

(2) The transfer has to be of existing movable or immovable property.

(3) The transfer has to be made voluntarily.

(4) The transfer has to be without consideration in money or money's worth.

(12) Section 2(viii) defines a 'donee' in the following terms :—

" 'donee' means any person, who acquires any property under a gift, and, where a gift is made to a trustee for the benefit of another person, includes both the trustee and the beneficiary."

(13) Section 2(xxiv) defines 'transfer of property' and is in the following terms :—

" 'transfer of property' means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes—

(a) the creation of a trust in property ;

(b) the grant or creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property ;

(c) the exercise of a power of appointment of property vested in any person, not the owner of the property to determine its disposition in favour of any person other than the 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 persons ;"

(14) Section 14 provides that the assessee can revise the return filed by him in case he discovers any omission or a wrong statement therein. Section 15 provides the procedure for assessment. This section gives the Gift Tax Officer ample power to determine all questions necessary for the purpose of making the assessment. Section 22 is the appeal section and the assessee can in appeal raise a question that the gift in question is not a taxable gift [section 22(c)].

(15) It will appear from these provisions that a complete machinery has ben provided to determine whether a gift is a taxable gift? This determination has necessarily to be made by the Gift-tax Officer. To repeat, there must be a donor, i.e., a person who owns property which is the subject-matter of gift. There must be a donee, i.e., a person to whom the donor transfers the ownership of the property. There must of course be property which is the subject-matter of transfer. It will be obvious that if the donor does not own the property, there would be no gift. It would also be obvious that if there is no donee, there would be no gift.

(16) This brings me to the question as to the rights of a Karta to transfer coparcenary property by gift. "A joint Hindu family consists of all persons lineally descended from a common ancestor, and include their wives and unmarried daughters. A daughter ceases to be a member of her father's family on marriage, and becomes a member of her husband's family." (Mulla's Hindu Law, para 212). "A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being." (Mulla's Hindu Law, para 213). A coparcenary purely is a creature of Hindu law; it cannot be created by act of parties, the only exception being by bringing a son into family by adoption. "The essence of a coparcenary under the Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that

family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family. It is only on a partition that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is 'undivided coparcenary interest' ". (Mulla's Hindu Law, para 216). Section 30 of the Hindu Succession Act has made an inroad into the coparcenary interest inasmuh as a coparcener has the power to make a testamentary disposition of his interest in coparcenary property. No such power has been given so far as his right to make a gift *inter vivos* is concerned.

(17) I now proceed to deal with the powers of the father or the managing member of the joint Hindu family *vis-a-vis* coparcenary property. In this connection, it will be useful to refer to the following paragraphs of the Mulla's Hindu law:—

> "225. Although sons acquire by birth rights equal to those of a father in ancestral property both movable and immovable, the father has the power of making within reasonable limits gifts of ancestral movable property without the consent of his sons or the purpose of performing 'indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress had so forth.'
>
> 226. A Hindu father or other managing member has power to make a gift within reasonable limits of ancestral immovable property for 'pious purposes'. But the alienation must be by an act *inter vivos*, and not by will. A member of a joint family cannot dispose of by will any portion of the property even for charitable purposes and even if the portion bears a small proportion to the entire estate. But now see section 30 of the Hindu Succession Act, 1956.
>
> 253. (1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal

bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners.

(2) As to disposition by will after the coming into operation of the Hindu Succession Act, 1956, *see* section 30 of the Act.....".

(18) It will appear from the combined reading of these paragraphs that the position in Hindu law is that whereas the father has the power to gift ancestral movables within reasonable limits, he has no such power with regard to ancestral immovable property or coparcenary property. He can, however, make a gift within reasonable limits of ancestral immovable property for pious purposes. The Supreme Court has extended, the rule in paragraph 226 to enable a gift of ancestral immovable property to a daughter if the gift is to a reasonable extent. [see *Guramma* v. *Mallappa* (5)]. But the rule seems to be firmly settled that a father has no power to make a gift of ancestral immovable property to his wife to the prejudice of his minor sons. So also is the rule that a gift to a stranger is equally invalid and the other members of the family need not sue to set it aside. This is what was observed by the Supreme Court in *Guramma's case* (5) :—

"The decisions of Hindu law sanctioned gifts to strangers by a manager of a joint Hindu family of a small extent of property for pious purposes. But no authority went so far, and none has been placed before us, to sustain such a gift to a stranger however much the donor was beholden to him on the ground that it was made out of charity. It must be remembered that the manager has no absolute power of disposal over joint Hindu family property. The Hindu law permits him to do so only within strict limits. We cannot extend the scope of the power on the basis of the wide interpretation given to the words 'pious purposes' in Hindu law in a different context. In the circumstances we hold that a gift to a stranger of a joint family property by the manager of the family is void." .

(19) Keeping in view the legal position under the Hindu law as to the powers of a father or a manager of a Hindu undivided

family in the matter of gifts of ancestral immovable property, the question whether the present gift is void or voidable has to be determined.

(20) Before I proceed to deal with the authorities bearing on the subject, I propose to examine the question with reference to the facts of the present case in the light of the provisions of the Gift Tax Act and the provisions of the Hindu law which have already been set out.

(21) The property admittedly is coparcenary property. The three sons of the donor had interest in it by birth. In other words, the donor and his three sons were the owners of every bit of property and none of them could say till there was a partition that anyone of them had a specific share in it. The other three donees, i.e., the brother's widow, the mother and the step-mother are not the members of the coparcenary and to all intents and purposes would be strangers. So far as the gift to the three females is concerned, the gift being to strangers of coparcenary property would be void. The rule of Hindu law on this matter is clear and no authority taking a contrary view has been brought to our notice. So far as the three sons are concerned, there would be no transfer of ownership from the donor to the donee, because the donees are themselves also owners of the property. They would not be acquiring any property under the gift. It is not a case where there has been a partition of the property and the father is transferring his share after the partition to the sons by gift. Therefore, in the case of sons, there would be no gift within the meaning of Gift Tax Act. And if there is no gift, the jurisdiction of the Gift-tax Officer to tax the same does not arise. It was conceded by Mr. Awasthy, learned counsel for the Department, that the factum of the gift has to be proved, i.e., there must be a gift within the meaning of the Gift Tax Act before the gift can be held to be taxable. If there is no gift, the Gift Tax Officer cannot bring it to tax. However, the text of Hindu law is very clear that a father cannot make a gift of the coparcenary property to his minor sons. If he does so, the gift would be void. It appears to me that in view of the provisions of the Gift Tax Act and the provisions of the Hindu law, the gift in question would be void.

(22) The only conclusion, therefore, to which one has to come on the facts of the present case is that the gift in question is void.

(23) The view that I have taken of the matter finds ample support from the decision of the Supreme Court in *Guramma* v. *Mallappa* (5), wherein it was held :—

> "We hold that a gift to a stranger of a joint family property by the manager of the family is void."

In *A. Perumalakkal* v. *Kumaresan Balakrishnan* (8), the suit was by the son to challenge the gift which had been made by the father of ancestral immovable property to his step-mother. This gift was held to be invalid and was not upheld. It is significant that in the suit no prayer was made for the cancellation of the gift.

(24) The matter was discussed at great length in *A. Basaviah Gowder* v. *Commissioner of Gift Tax, Madras* (3). In this case, the Karta of a joint Hindu family purported to transfer by gift ancestral properties to his sons, his divided brother and his minor daughter. This gift was sought to be taxed under the Gift Tax Act and it was held that it could not be taxed. Mr. Justice Srinivasan, who delivered the judgment, with which Mr. Justice Jagadisan agreed, observed as follows :—

> "Held, the gift to the sons could not be regarded as a gift as defined under the Act. The property that was covered by the document in favour of the two sons was an much their own property as it was that of their father, and there was no incident of the property which the Karta could transfer as his interest to the two sons. There cannot possibly be a gift within the eye of law where a person purports to transfer a property which in reality belongs to the transferee. The transaction could not be regarded as a surrender of interest by the Karta in favour of his sons and as such a gift deemed to be one under section 4. Even assuming that there was a surrender of interest by the Karta, under the principles of Hindu law, he only renounced his interest, and that interest was acquired by the sons by reason of Hindu law and not by any volitional act of the Karta transferring his interest.
>
> A father can make a gift of a small portion of his immovable property to his daughter at or after marriage, such gift

(8) A.I.R. 1967 S.C. 569.

being customary in this Presidency and countenanced by Hindu law. In the instant case the gift to the daughter was not made at or about the time of her marriage. A gift by a member of a joint family of his interest in the joint family property in favour of a stranger is invalid so as not to bind even the coparcener who made the gift. A divided brother stands in no better position than a stranger. The gifts to the daughter and the divided brother were wholly void. There can be no acquiescence in a void transaction and so the fact that the sons had acquiesced in the gifts made no difference to the validity of the gifts."

(25) The next decision, which has taken the same view, is *Smt. Valluri Janakamma, Commissioner of Gift-tax, A.P.* (9). In this case, a gift of joint family property of which the assessee was the Karta, was made by him. This gift was sought to be taxed under the Gift Tax Act : It was maintained by the assessee that the gift was void as no gift could be made of the joint family property: This contention was not accepted by the Gift-tax Officer, the Appellate Assistant Commissioner and the Tribunal. On a reference, P. Jaganmohan Reddy C.J., and Venkatesam J., held:—

"That under Hindu law, a gift by a father or manager or coparcener of an undivided joint family of family property was sold (except in regard to reasonable gift made to members of the family permitted by special texts), as such A (the donor) had no right to gift away the properties belonging to the joint family consisting of himself, his wife and daughter, and, hence, the first conveyance was void; it followed that the second conveyance was also void."

To a similar effect is the decision of the same High Court (Andhra Pradesh) in *Commissioner of Gift-tax, A.P.* v. *P. Hanumanthappa* (10). In *Kulasekaraperumal* v. *Pathakutty* (11), Madras 405, it was held that a gift or demise by a coparcener of his undivided interest is wholly invalid. The learned Judge for this relied on the Privy

(9) 66 I.T.R. 255.
(10) 68 I.T.R. 363.
(11) A.I.R. 1961 Mad. 405.

Council decision in *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (12), and the Full Bench decision of the Madras High Court in *Baba* v. *Timma* (13). It is not necessary to multiply authorities wherein this view has been taken.

(26) Mr. Awasthy, learned counsel for the Department strongly relied on the decision of the Supreme Court in *Raghubanchmani Prasad Narain Singh* v. *Ambica Prasad Singh* (4), for his contention that any alienation by the Karta of a joint Hindu family of the coparcenary property would be merely voidable and not void. The learned counsel also relied on a number of decisions wherein it has been held that an alienation by a father or a managing member of the joint Hindu family is not necessarily void and was voidable at the instance of the other members of the joint family.

(27) The principal decision on which reliance has been placed is that of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur* (14), wherein their Lordships observed :—

> "But their Lordships are inclined to think that the sale was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint-family."

The next case on which the learned counsel has placed his reliance is *imperial Bank* v. *Maya Devi* (15), wherein it was held that the gift by a manager of a joint Hindu family was voidable at the instance of the other coparceners only. It may be mentioned that in this case the gift was sought to be attacked by a stranger to the family and the observations that were made in this decision must be restricted to the facts of that case. This authority is no proposition for the view that *inter se* the members of a joint Hindu family the gift would be voidable.

(28) On the other hand, it was held in *Amulya Ratan Sircar* v. *Tarini Nath Dey* (16), that the rule of estoppel does not in every

(12) I.L.R. 5 Cal. 148.
(13) I.L.R. 7 Mad. 357 (F.B.).
(14) I.L.R. 19 Cal. 123.
(15) A.I.R. 1935 Lah. 867.
(16) I.L.R. 42 Cal. 254.

ase work as between the donor and the donee. The relevant obser-ations in this decision are :—

> "But, on the arguments addressed to us, we are not prepared at present to accept it as an invariable principle of law that, in every case of gift, the doctrine of estoppel may be applied as between donor and donee."

(29) The next decision relied upon is *Kalyanasundaram* v. *Karuppa* (17). This case has no applicability because it deals with the question that a completed gift cannot be revoked. The decision in *Subbe Goundan* v. *Krishnamachari* (18), does not deal with the question whether a gift by a member of a joint Hindu family is void or voidable. It is a case where the sale by the manager is attacked by the other member of the joint Hindu family. To the same effect is the decision in *Bhirgu Nath Chaube* v. *Narsingh Tiwari* (19).

(30) It will appear from a close study of these authorities that their Lordships of the Privy Council were very clear that all alienations are not necessarily void (*Hanuman Kamat* v. *Hanuman Mandar* (14). Moreover, cases of sale or exchange would stand on a totally different footing than the cases of gifts. In the case of an unauthorised sale or exchange the manager would be estopped from questioning the validity of his act because he has made the vendee alter his position by parting with money for the property or by parting property for property. Therefore, on the basis of the rule of estoppel the alienation by way of sale or exchange would be good and not open to attack by the vendor. In this situation, it has been rightly held that the said type of alienation would be voidable at the instance of the other members of the coparcenary. The reason is that they can own an invalid act of the manager and thereby validate it. In any case, by reason of the rule of estoppel working against the manager, he cannot attack the alienation on the ground of lack of authority in him. He being bound, the alienation stays so long as it is not avoided. But this rule does not come into play in the case of a gift *Amulya Ratan Sircar* v. *Tarini Nath Dey* (16). A donee does not alter his position in a gift. It is purely a gratuitous transaction. Totally different considerations arise while

(17) A.I.R. 1927 P.C. 42.
(18) A.I.R. 1922 Mad. 112.
(19) I.L.R. 39 All. 61.

dealing with a case of gift as compared to other types of alienations. Mr. Awasthy was unable to give us any authority where a donor was debarred from challenging the invalidity of a gift. It is in this situation that the observations of their Lordships of the Privy Council in *Hanuman Kamat's case* (14), assume greater importance and the observations of the Supreme Court in *Raghubanchmani Prasad's case* (4), will be of little assistance in the case of gift for those observations were made in the case of an alienation other than a gift.

(31) The star case on which Mr. Awasthy, the learned counsel for the revenue, relies is *S. Raghbir Singh Sandhawalia* v. *Commissioner of Income-Tax, Punjab, etc.* (1). In this case, gift of shares was made by the Karta in presence of the other coparcener. In the return filed by the Karta declaring the income of the family, the divided of the gifted shares was excluded. The donee of the shares filed a separate return including the income of the gifted shares. The Income-tax Officer came to the conclusion that the assessee, i.e., the Karta, had transferred the shares to the donee without the consent of the other coparcener and therefore, the transfer was void. On this basis, the income from the gifted shares was treated as the income of the Karta, in other words, of the joint Hindu family. This order of the Income-tax Officer was upheld by the Appellate Assistant Commissioner and later by the Appellate Tribunal. On a reference to this Court, it was held that the gift was voidable and not void and that the Department was in error in bringing the income of the shares gifted to tax as the income of Hindu undivided family.

(32) It will appear from the facts of the aforesaid case that virtually the gift was assented to by the joint Hundu family inasmuch as the son was present when the father made the gift of the shares and he did not object to the said gift. The observations that in all cases where the other coparceners are not the consenting parties to the gift, the gift would merely be voidable, have to be treated as obiter. It appears to me that this decision is of no help to the learned counsel for the Department and is clearly distinguishable.

(33) The next decision, to which reference has been made *is Jugal Kishore Jai Prakash* v. *Commissioner of Income-tax, Lucknow* (6). This decision again is of no assistance to the learned counsel for the Department because all that was held in this case was that

a father or Karta of joint Hindu family has the power to make a gift within reasonable limits and that if the gift is excess of the reasonable limits, can only be challenged by the members of the joint Hindu family. However, it was observed that the gift is voidable and not void. This decision again is open to objection so far as the remarks that the gift is voidable and not void are concerned. However, no exception can be taken to the ultimate decsion inasmuch as the gift in this case was within reasonable limits.

(34) In *Baba* v. *Timma* (13), it was held that "a Hindu father while unseparated from his son has no power except for purposes warranted by special texts to alienate to a stranger his undivided share in the ancestral estate movable or immovable." This decision is no proposition for the view that the gift is voidable. On the other hand, this decision clearly indicates that the gift, would be void and not voidable because the donor lacked the power to make the gift.

(35) In *Rottala Runganatham Chetty* v. *Pulicat Ramasami Chetty* (20), an eminent Judge, Mr. Justice Bhashyam Ayyangar made the observaion that "it has now been definitely settled by judicial decisions that it is incompetent to an undivided member of a Hindu family, to alienate by way of gift his undivided share or any portion thereof and that such alienation is void *in toto*." It was, however, observed that with regard to sale of property by the manager of the Hindu undivided family for value, the conveyance would not be inoperative and void. In other words, it would be voidable. This decision definitely highlights the distinction I have made between the gifts and other alienations. This decision in fact goes contrary to the contention of the learned counsel for the Department.

(36) It is not necessary to multiply authorities. The line is sharply drawn between alienations by way of sale or exchange and gratuitous gifts. In the case of alienations other than gifts by a Karta of the Hindu undivided family, the alienation in the very nature of things would be voidable, because the Karta cannot avoid the alienation, whereas in the case of gifts the alienation would be void *per se* because even the Karta can avoid the gift. The rule in both cases is firmly established that an alienation of Hindu undivided family property not permitted by the texts of Hindu law does not even bind the share o the Karta; but in the application of this rule

(20) I.L.R. 27 Mad. 162 (F.B.).

estoppel prevents the Karta from avoiding the alienation. In other words, the alienation is treated as good as against the Karta, inasmuch as if the other members of the family do not question it, within the period of limitation prescribed, they would be deemed to have owned the unauthorised act of the Karta. But this does not hold good in the case of a gift.

(37) After giving the matter my careful consideration, I am clearly of the view that the Tribunal was right in holding the gift in the instant case as void and the contention of the learned counsel for the Department that the gift is voidable cannot be supported either on authority or on principle.

(38) In this situation, the question referred to us is answered in the affirmative, i.e., in favour of the assessee and against the Department. In the circumstances of the case, there will be no order as to costs.

H. R. SODHI, J.—I agree.

B. R. TULI, J.—I also agree and have nothing to add.

K. S. K.

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