A COMMISSIONER OF GIFT TAX, ERNAKULAM

v.

ABDUL KARIM MOHD. (DEAD) BY LRS.

JULY 10, 1991

B [K. JAGANNATHA SHETTY AND YOGESHWAR DAYAL, JJ.]

Gift Tax Act, 1958/Indian Succession Act, 1925: Section 5(1)(xi)/ Section 191—Gift in contemplation of death—Essential requirements of—Gift of movable property—Donor seriously ill at the time of execution of deed and died shortly thereafter—Delivery of possession of gifted property effected—No indication in the document specifically or impliedly that gift would be effective only if donor died or liable to be revoked in case donor recovered—Whether gift valid—Whether entitled to exemption.

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Mohammedan Law: Marz-ul-maut (deatn-bed illness)—What is—Gift made during marz-ul-maut—Whether entitled to exemption under Gift Tax Act—Section 191, Indian Succession Act—Applicability of.

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Gift of certain movable assets was made to the respondent-assessee by a Muslim businessman, when he was seriously ill, and died of the illness after six weeks of the execution of the document. In gift-tax assessment proceedings, the assessee claimed exemption for this gift under Section 5(1)(xi) of the Gift Tax Act, 1958, on the ground that the gift was made in contemplation of death. The Gift Tax Officer rejected the claim. But, on appeal, the Appellate Assistant Commissioner allowed the exemption relying on the circumstances under which the gift was made and the events followed thereafter and the evidence of the Sub-Registrar, who was brought to residence for effecting registration, and the doctor, who was treating the donor.

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On appeal by the Gift-Tax Officer, the Tribunal affirmed the finding of the Appellate Assistant Commissioner regarding the donor's illness but did not allow the exemption on the ground that, though there was delivery of possession of the gifted movables, the gift was unconditional and absolute, since it had not been specifically expressed or impliedly present in the deed that the gift must revert back in the event of the donor recovering from illness and that the gifted property had to be kept as a gift in case the donor died of his illness. However, on a reference made at the instance of the assessee for opinion, the High Court held that such a condition need not be mentioned in the deed and

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it could be inferred from the attending circumstances of the gift, and since the donor was actually sick at the time of execution of the deed and died of the same illness without recovery, after a short period, the gift in question was made in contemplation of death and therefore, entitled to exemption from tax under Section 5(1)(xi) of the Act.

In the appeal before this Court, on behalf of the Department it was contended that the gift in contemplation of death should be conditional, and in the absence of indications in the document to the effect that if the donor did not die, he should be entitled to remain in complete dominion of the gifted property, the gift would become *inter vivos* and absolute, and that the exemption under Section 5(1)(xi) of the Gift Tax Act was not available to the assessee, since Section 191 of the Indian Succession Act was not applicable to marz-ul-maut gift.

Dismissing the appeal by the Department, this Court

HELD: 1.1 Explanation (d) to sub-section (2) of Section 5 of the Gift Tax Act, 1958 states that a gift made in contemplation of death has the same meaning as in Section 191 of the Indian Succession Act, 1925. The requirements of a gift in contemplation of death as laid down by Section 191 are: (i) the gift must be of movable property; (ii) it must be made in contemplation of death; (iii) the donor must be ill and he expects to die shortly of the illness; (iv) possession of the property should be delivered to the donee; and (v) the gift does not effect if the donor recovers from the illness or the donee predeceases the donor. These requirements are similar to the constituent elements of a valid donatio mortis causa. [853C-E]

Cain v. *Moon*, [1896] 2 Q.B. 283 @ 286, referred to.

1.2 In the instant case, all the conditions prescribed, except perhaps the last one are found present by the fact finding authorities. [853G]

1.3 The recitals in the deed of gift are not conclusive to determine the nature and validity of the gift. The party may produce evidence aliunde to prove that the donor gifted the property when he was seriously ill and contemplating his death with no hope of recovery. These factors in conjunction with the factum of death of the donor may be sufficient to infer that the gift was made in contemplation of death. It is implicit in such circumstances that the donee becomes the owner of the gifted property only if the donor dies of the illness and if the donor recovers from the illness, the recovery itself operates as a revocation of the gift. [854B-C]

A **1.4 It is not necessary to state in the gift deed that donee becomes owner of the property only upon the death of the donor. Nor it is necessary to specify that the gift is liable to be revoked upon the donor's recovery from the illness. The law acknowledges these conditions from the circumstances under which the gift is made. [854C-D]**

B *Halsbury's Laws of England,* **4th Edn. Vol. 20 p. 41 para 67;** *Jerman on Wills,* **8th Edn. Vol. 1 p. 46-47;** *Williams on "Executors and Administrators",* **14th Edn. p. 315, and** *Corpus Juris Secundum,* **vol. 38 p. 782 and p. 917 para 110, referred to.**

1.5 In the light of this and in view of the findings recorded by the Tribunal about the serious sickness of the donor and his state of mind at C **the time of making the gift in question, it can be reasonably concluded that the gift was not absolute and irrevocable. On the contrary, it would be legitimate to infer that the gift was in contemplation of death. Any other view would be inappropriate. [856A-B]**

D **2.1 Marz-ul-maut is also entitled to exemption from gift tax under Section 5(1)(xi) of the Gift Tax Act, 1958. [856B]**

2.2 The exemption to gift in contemplation of death is provided under Section 5(1)(xi) of the Gift Tax Act, and not under Section 191 of the Indian Succession Act, Section 191 furnishes only the meaning or E **requirements of gift in contemplation of death. If a gift in contemplation of death is recognised by the personl law of parties satisfying the conditions contemplated under Section 191 of the Indian Succession Act, it cannot be denied exemption under Section 5(1)(xi) of the Act, even assuming that Section 191 as such will not be applicable to the parties. [856C-D]**

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2.3 Under Mohammedan Law gift made during marz-ul-maut (death-bed-illness) is subject to very strict scrutiny and subject to all other conditions necessary for the validity of a hiba or gift, including delivery of possession of the donor to the donee. [856D]

G *Mulla's Mohammedan Law,* **pp. 109, 111 Sections 135 & 136, referred to.**

2.4 Marz-ul-maut is a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death. There are three tests laid down to determine whether illness is to H **be regarded as marz-ul-maut. They are; (i) Proximate danger of death**

so that there is preponderance of khauf or apprehension that at the given time death must be more probable than life. (2) There must be some degree of subjective apprehension of death in the mind of the sick person. (3) There must be external indicia chief among which would be the inability to attend to ordinary avocations. [856E-F] A

Rashid Karmalli and anr. **v.** *Sherbanoo,* **[1907] 31 ILR Bombay 2641, referred to.** B

2.5 Therefore, under the Principles of Mohammedan Law, the gift made in marz-ul-maut could be regarded as gift made in contemplation of death, since it has all the requisites prescribed under Section 191 of the Indian Succession Act, 1925. The only limitation is that the disposition is restricted to a third on account of the right of the heirs. [857C-D] C

Syed Ameer Ali: Mohammedan Law, **Vol. 1, 4th Edn. 1985 p. 59-60, referred to.**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 526 (NT) of 1979. D

From the Judgment dated 16.12.1976 of the Kerala High Court in I.T.R. No. 101 of 1974.

Dr. V. Gauri Shankar, S. Rajappa and Ms. A. Subhashini for the Appellant. E

Santosh N. Hegde, E.M.S. Anam and K.L. Mehta for the Respondents.

The Judgment of the Court was delivered by F

K. JAGANNATHA SHETTY, J. This appeal by special leave is against the decision of the High Court of Kerala in Income-Tax Reference No. 101/1974 and it raises an important issue concerning the requirements of a gift made "in contemplation of death" within the meaning of Section 5(1)(xi) of Gift Tax Act, 1958 ('The Act'). That G reference was made under Section 26(1) of the Gift Tax Act, 1958 by the Income-Tax Appellate Tribunal Cochin Bench. The Tribunal referred to the High Court two questions for its opinion, out of which we are concerned only with the first question which reads:

"Whether on the facts and circumstances of the case the H

A Tribunal was right in holding that the gift of movables valued at Rs.67,578 is not a gift made in contemplation of death within the meaning of section 5(1)(xi) of Gift-Tax Act, 1958?"

The facts of the case as found by the Tribunal are simple and not B unusual. Abdul Karim Mohammed a businessman in Cochin executed a document styled as "settlement will" gifting certain movables to the assessee respondent in the shape of business assets valued by the Gift-Tax Officer at Rs.67,578. The document was executed on 24 April 1964 and at the time of execution, the donor was seriously ill. He died of the illness after about six weeks. In gift-tax assessment proceedings the assessee claimed exemption for this gift under section 5(1)(xi) of C the Act which provides that a gift shall not be charged under the Gift-Tax Act in respect of a gift made by any person in contemplation of death.

The Gift-Tax Officer rejected the claim of the assessee and D brought the said amount to tax. But on appeal the Appellate Assistant Commissioner held to the contrary. He allowed the exemption sought for on the ground that the gift was in contemplation of death. He has relied upon the circumstances under which the gift was made and the events followed thereafter to reach his conclusion. He has described the facts and circumstances as follows: "Now I agree with Sri Karunaka- E ran, that the absence of any reference in the deed of settlement to the illness from which the donor was suffering does not lead to the conclusion that there was no illness, or that the donor was not apprehensive of death resulting from the same. There is ample evidence to show that he was seriously ill at the time when he made the gift. He was aged about 72 at the time and he was also suffering from paralysis, diabetes, F hernia etc. In fact, in view of the seriousness of the condition he could not proceed to the Sub-Registrar's office for registration of the document; on the other hand the sub-registrar was brought to his residence for the purpose of effecting the registration. in an affidavit filed by him before the Gift-Tax Officer on the 3rd August, 1969, the sub-registrar has affirmed that at the time of execution of the document the settlor G was in sick bed and was unable to move out of the same. He has also stated that the settlor as well as his children showed anxiety and haste in the matter of registration on account of the serious nature of the illness. At that time, according to the sub-registrar the settlor was in his proper sense, but soon after the execution of the deed, further complications set in and his power of speech and movements became H impaired. Dr. V.B. Mohammed who was treating him has certified that

on 4th June 1964 patient was unable to recognise the surroundings properly, and that his mental condition was impaired to a great degree. On 9th June, 1964 i.e. within about six weeks from the date of the settlement he died. In these circumstances, I am satisfied that the donor, an aged gentleman who was seriously ill at the time of the settlement entertained no hope of recovery, and that it was in such a state of mind, that he made the settlement. Hence the gifts must be taken to have been made in contemplation of death."

The Gift-Tax Officer appealed to the Tribunal against the decision of the Appellate Assistant Commissioner. The Tribunal has affirmed the finding of the Appellate Assistant Commissioner that the donor at the time of gift was ill and expected to die shortly of his illness. The Tribunal observed "But we are satisfied that the Appellate Assistant Commissioner was on the facts and circumstances of the case right in his conclusion that the donor, an aged gentleman, who was seriously ill at the time of the settlement entertained no hope of recovery and that it was in such a state of mind that he made the settlement. The materials referred, relied on and discussed by the Appellate Assistant Commissioner in the appellate order are sufficient enough to lead to a reasonable conclusion that the donor was, at the time of execution of the document, ill and that he expected to die shortly of his illness." The Tribunal however, did not agree with the exemption allowed to the assessee. It has stated that the finding recorded by the Assistant Commissioner that the donor was ill at the time of gift and he died thereafter out of the illness alone is not sufficient to hold that the gift was made in contemplation of gift death. In order to satisfy the requirements of gift in contemplation of death there must be two other conditions to be satisfied; (i) There must be delivery of possession of the gifted movables to the donee; (ii) that a gift is entitled to take effect only in the event of the donor's death and that if the donor recovers from the illness the property should revert back. On the first condition the Tribunal found on facts that there was delivery of possession of the gifted movables. On the second condition, the Tribunal observed that the gift was unconditional and it was in nature of settlement deed, pure and simple. It was executed to settle absolutely forever the property of the donor without any condition. It is just like any other settlement executed by a person without the contemplation of death. It has not been expressly specified or impliedly present in the deed that the gift must revert back in the event of the donor recovering from illness. The gifted property has to be kept as a gift in case the donor shall die of his illness has also not been satisfied in the case. With these findings, the Tribunal allowed the appeal of the Gift-Tax Officer.

A Thereafter, at the instance of the assessee the question set out earlier was referred to the High Court for its opinion. The High Court has answered the question in the negative and in favour of the assessee. The High Court expressed the view that it is not necessary that there must be recital in the deed stating that the property would revert to the donor in the event of his recovery from the illness, or the donor B surviving the donee. Such a condition could be inferred from the attending circumstances of the gift. The High Court has referred to the affidavits filed by the sub-registrar who registered the document and the Doctor who treated the donor to come to the conclusion that the donor was seriously ill at the time of execution of the deed and expected to die shortly of that illness. The factum of delivery of the gifted assets to the donee at a time when the donor was seriously sick C and the donor's death shortly thereafter were also relied upon. It was then stated that in as much as the donor was actually sick at the time of execution of the deed and died of the same illness without recovery, after a short period, the gift in question was made in contemplation of death and therefore, entitled to exemption from tax under Section D 5(1)(xi) of the Act.

The legality of the view expressed by the High Court is under challenge in this appeal. First, we may refer to the relevant statutory provisions bearing on the question. Section 3 of the Act is the charging section and it provides that in respect of gifts there shall be charged tax E referred to as the gift-tax at the rate specified in the schedule. Section 5 provides exemption in respect of certain gifts. Section 5 sub-section (1)(xi) provides that gift tax shall not be charged under the Act in respect of gifts made by any person in contemplation of death. Explanation (d) to sub-section (2) of Section 5 states "that gifts made in contemplation of death" has the same meaning as in Section 191 of the F Indian Succession Act, 1925. Section 191 of the Indian Succession Act deals with the requirements of gifts made in contemplation of death. It reads as follows:

> "191. Property transferable by gift made in contemplation of death.
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> (1) A man may dispose, by gift made in contemplation of death, of any movable property which he could dispose of by will.
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> (2) A gift said to be made in contemplation of death where H a man, who is ill and expects to die shortly his illness,

delivers to another the possession of any movable property to keep as a gift in case the donor shall die of that illness. A

(3) Such a gift may be resumed by the giver; and shall not take effect if he recovers from the illness during which it was made; nor if he survives the person to whom it was made." B

The requirements of a gift in contemplation of death as laid down by Section 191 of the Indian Succession Act are: (i) the gift must be of movable property; (ii) it must be made in contemplation of death; (iii) the donor must be ill and he expects to die shortly of the illness; (iv) possession of the property should be delivered to the donee; and (v) the gift does not take effect if the donor recovers from the illnes or the donee predeceases the donor. C

There is nothing new in the requirements provided under Section 191 of the Succession Act. They are similar to the constituent elements of a valid donatio mortis causa. The essential conditions of a donatio mortis causa may be summarised thus: "For an effectual donatio mortis causa three things must combine: first, the gift or donation must have been made in contemplation, though not necessarily in expectation of death; secondly, there must have been delivery to the donee of the subject matter of the gift; and thirdly. the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover. This last requirement is sometimes put somewhat differently, and it is said that the gift must be made under circumstances shewing that it is to take effect only if the death of donor follows; it is not necessary to say which way of putting it is the better." (See *Cain* v. *Moon*, [1896] 2 Q.B. 283 at 286). D E F

Now, all the conditions of a valid gift in contemplation of death except perhaps the last condition prescribed under section 191 of the Indian Succession Act are found present in this case by the fact finding authorities. The gift was made when the donor was seriously ill and apprehending his death. The donor died within six weeks after the execution of the deed. The possession of the property gifted has been delivered to the donee before the death. But it is said that there is nothing to show in the document expressly or impliedly that the gift was made under such circumstances that the thing was to revert to the donor in case he should recover. Dr. Gauri Shankar learned counsel for the Revenue contends that the gift in contemplation of death should be conditional that is, on the term that if the donor would not G H

A die he should be entitled to remain complete dominion of the property, the subject matter of the gift. There should be indications in the document to that effect without which, counsel states that the gift becomes *inter-vivos* and absolute.

It seems to us that the recitals in the deed of gift are not conclu-
B sive to determine the nature and validity of the gift. The party may produce evidence aliunde to prove that the donor gifted the property when he was seriously ill and contemplating his death with no hope of recovery. These factors in conjunction with the factum of death of the donor may be sufficient to infer that the gift was made in contemplation of death. It is implicit in such circumstances that the donee becomes the owner of the gifted property only if the donor dies of the
C illness and if the donor recovers from the illness, the recovery itself operates as a revocation of the gift. It is not necessary to state that in the gift deed that the donee becomes the owner of the property only upon the death of the donor. Nor it is necessary to specify that the gift is liable to be revoked upon the donor's recovery from the illness. The
D law acknowledges these conditions from the circumstances under which the gift is made. Reference may be made to the following passage from Halsbury's Laws of England (4th ed. vol. 20 p. 41 para 67):

> "There is an implied condition that the gift is to be retained only in the event of death, even though the donor does not
E expressly say so. The death may take place some time afterwards, or the donor may actually die from some other illness, but if the donor recovers from illness, during which the gift is made the donee has no title, and can only hold what was delivered to him in trust for the donor."

F Jerman on Wills (8th ed. vol. 1 p. 46-47) also lends light on this aspect:

> "The conditional nature of the gift need not be expressed: It is implied in the absence of evidence to the contrary. And even if the transaction is such as would in the case of a
G gift *inter vivos* confers a complete legal title, if the circumstances authorise the supposition that the gift was made in contemplation of death, mortis causa is presumed. It is immaterial that the donor in that dies from some disorder not contemplated by him at the time he made the gift."

H Similar is the statement of law in Williams on "Executors and

Administrators" (14 ed. p. 315):

> "542. Conditional on death:
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> "The gift must be conditioned to take effect only on the death of the donor. But it is not essential that the donor should expressly attach this condition to the gift; for if a gift is made during the donor's last illness and in contemplation of death, the law infers the condition that the donee is to hold the donation only in case the donor dies."

The principles in the Corpus Juris Secundum (vol. 38 p. 782) are not quite different:

> ".....A gift causa mortis differs from a gift *inter vivos* in that it is made in view of expected or impending death, as appears infra $$ 75, 78. The vital distinction between a gift *inter vivos* and a gift causa mortis is that the former is irrevocable, while the latter may be revoked at any time before the donor's death, and may be defeated by the recovery or survival of the donor. More fully, a gift causa mortis is liable to revocation by the donor and does not pass an irrevocable title until the death of the donor, while a gift *inter vivos* vests an irrevocable title on delivery; in the case of a gift *inter vivos* the title is not only transferred and vested in the donee at once, but the gift is immediately completed and is absolute and irrevocable, while in the case of a gift causa mortis the transfer is subject to be defeated by the happening of any one of the conditions implied by the law."

It is further stated (at p. 917 para 110):

> "A gift causa mortis is revoked by the recovery of the donor, from the particular illness, or his survival of the peril, which existed at the time of the gift and in contemplation of which the gift was made.
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> The recovery of the donor from the particular illness, or his survival of the peril, which existed at the time of the gift and in contemplation of which the gift was made will of itself operate as a revocation of the gift."

A In the light of these principles and in view of the findings recorded by the Tribunal about the serious sickness of the donor and his state of mind at the time of making the gift in question, it can be reasonably concluded that the gift was not absolute and irrevocable. On the contrary, it will be legitimate to infer that the gift was in contemplation of death. Any other view in this case would be B inappropriate.

No account in this regard would be complete unless it is held that marz-ul-maut gift with which we are concerned is also entitled to exemption from gift tax under Section 5(1)(xi) of the Act. Counsel for the Revenue argues that the exemption provided under Section 5(1)(xi) of the Act is not available to the assessee since Section 191 of C the Indian Succession Act is not applicable to marz-ul-maut gift. We do not find much substance in this submission. The exemption to gift in contemplation of death is provided under Section 5(1)(xi) of the Act and not under Section 191 of the Indian Succession Act. Section 191 furnishes only the meaning or requirements of gift in contemplation of D death. If a gift in contemplation of death is recognised by the personal law of parties satisfying the conditions contemplated under Section 191 of the Indian Succession Act, it cannot be denied exemption under Section 5(1)(xi) of the Act even assuming that Section 191 as such will not be applicable to the parties. Under Mohammedan Law gift made during marz-ul-maut (death-bed illness) is subject to very strict E scrutiny for its validity. Marz-ul-maut is a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death. There are three tests laid down to determine whether illness is to be regarded as marz-ul-maut. They are: (1) Proximate danger of death so that there is a preponderance of Khauf or apprehension that at the given time death must be more F probable than life. (2) There must be some degree of subjective apprehension of death in the mind of the sick person. (3) There must be external indicia chief among which would be the inability to attend to ordinary avocations. (See: *Rashid Karmalli and Anr.* v. *Sherbanoo,* [1907] 31 ILR Bom 264. The gift made during marz-ul-maut is subject to all other conditions necessary for the validity of a hiba or gift, G including delivery of possession by the donor to the donee. (See: Mulla's Mohammedan Law pp. 109, 111 Sections 135 & 136). Syed Ameer Ali in his book on "Mohammedan Law" throws some more light on the principles of 'gift of the sick'. It is stated: "In the chapter in the *"Fatawai Alamgiri"* dealing with "the gift of the sick" the principles are set forth at some length. In the first place it is stated from the *Asal* H that neither a gift nor a *sadakah* by a mariz a person suffering from

marz-ul-maut of which the definition is given later on is effective without possession: and if possession is taken, it is valid in respect of a third. If the donor were to die before delivery (taslim) the whole disposition would be invalid. It is, therefore, necessary to understand that a gift by a mariz is a contract and not a wasiat, and the right of disposition is restricted to a third on account of the right of the heirs which attaches to the property of the mariz. And as it is an act of bounty it is effective so far only as the law allows and that is a third. And being a contractual disposition it is subject to the conditions relating to gifts, among them the taking of possession by the donee before the death of the donor." (Vol. 14th ed. 1985 p. 59-60).

From these principles of Mohammedan Law it will be clear that the gift made in marz-ul-maut could be regarded as gift made in contemplation of death since it has all the requisites prescribed under Section 191 of the Indian Succession Act. The only limitation under Mohammedan Law is that the disposition is restricted to a third on account of the right of the heirs. Marz-ul-maut gift cannot therefore take effect beyond a third of the estate of the donor after payment of funeral expenses and debt unless heirs give their consent after the death of the donor, to the excess taking effect. Whether there is any such consent given in this case by his heirs is the subject matter of enquiry to be made by the Tribunal. It may be stated that the second question referred to the High Court relates to the validity of the gift beyond a third of the estates of the donor. On that question the High Court has not expressed any view and it has directed the Tribunal to consider that issue afresh. We, therefore, refrain from expressing any views on that matter.

From the foregoing discussion, the view taken by the High Court is correct and it does not call for interference. We accordingly dismiss the appeal with costs.

N.P.V. Appeal dismissed.