(1981) 03 GUJ CK 0015

Gujarat High Court

Case No: Income-tax Reference No. 28 of 1980

Apoorva Shantilal Shah		APPELLANT
	Vs	
Commissioner of Income Tax, Gujarat-I		RESPONDENT

Date of Decision: March 9, 1981

Acts Referred:

- Income Tax Act, 1961 - Section 10, 143, 144, 171, 171(2)

Citation: (1982) 27 CTR 84 : (1983) 1 GLR 799 : (1982) 135 ITR 158

Hon'ble Judges: R.C. Mankad, J; M.P. Thakkar, J

Bench: Division Bench

Advocate: J.M. Thakore and M.G. Doshit, for the Appellant; B.R. Shah and R.P. Bhatt, of R.P. Bhatt and Co., for the Respondent

Judgement

Thakkar, J.

A very vital question which was res integra till the Division Bench of the Madhya Pradesh High Court consisting of A. P. Sen C.J. (as he then was) and J. S. Verma J., rendered their decision in Commissioner of Income Tax Vs. Seth Gopaldas (H.U.F.), has given rise to the present reference at the instance of the assessee. The question is as to whether a Hindu father by virtue of his overriding powers as patria potestas recongnised by traditional Hindu law can effect a partial partition (in the sense of partion in respect of only some of the assets as contradistinguished from all the assets) at his own volition in respect of an HUF, consisting only of himself and his minor sons. By the aforesaid decision, which is the only decision on the point, the Madhya Pradesh High Court has taken the view that a Hindu father does not have any such power to effect a partial partition in the sense of division only of a part of HUF assets whilst maintaining or continuing the status of HUF in respect of the undivided assets. The view is taken that such a partial partition is not permissible in law and that it cannot be regarded as a valid partial partition by the ITO in exercise of his power under s. 171(3) of the I.T. Act, 1961 (hereinafter referred to as "the

Act"). Section 171 of the Act, in so far as is material, reads as under : "171. (1) A Hindu family hitherto assessed as undivided shall be deemed for the purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the Hindu undivided family.

(2) where at the time of making an assessment u/s 143 or section 144, it is claimed by or on behalf on any member of a Hindu family assessed as undivided that a partition, whether total or partial, has taken place among the members of such family, the Income Tax Officer shall make an inquiry thereinto after giving notice of the inquiry to all the members of the family.

(3) On the completion of the inquiry, the Income Tax Officer shall record a finding as to whether there has been a total or partial partition of the joint family property, and, if there has been such a partition, the date on which it has taken place.

(4) Where a finding of total or partial partition has been recorded by the Income Tax Officer under this section, and the partition took place during the previous year, -

(a) the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place; and (b) each member or group of members shall, in addition to any tax for which he or it may be separately liable and notwithstanding anything contained in clause (2) of section 10, be jointly and severally liable for the tax on the income so assessed.....

Explanation. - In this section - (a) ''partition'' means -

(i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or

(ii) where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition;

(b) ''partial partition'' means a partition which is partial as regards the persons constituting the Hindu undivided family, or the properties belonging to the Hindu undivided family, or both."

2. The Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") has followed the aforesaid decision of the Madhya Pradesh High Court and has decided the matter agains the assessee. Thereupon as many as six questions have been referred to us at the instance of the assessee. We will advert to the questions as framed by the Tribunal at a later stage. Suffice it to say for the purpose of the present discussion that the central issue is as to whether a partial partition in the aforesaid sense of division of a part of the assets can be effected by a father in his capacity as patria potestas.

3. A subsidiary question as to whether the above transactions of partial partition of the aforesaid character effected by the assessed were valid of otherwise by reason of the fact that the minors were given smaller shares (instead of giving them equal shares) in effecting such partition has arisen in the present reference. This question will, however, recede to the back ground in case we concur with the view taken by the Madhya Pradesh High Court (saying so with respect) and hold against the assessee on the first point as we are inclined to do for reasons which we shall presently articulate. We will, all the same, deal with this question as well, because the ITO has recorded a finding against the assessee and refused to record the aforesaid transaction as a valid partial partion within the meaning of s. 171 on the ground that each of the minors was not allotted an equal share. It may be mentioned that the share allotted to each of the minors is very small and the transaction is unjust and unequal (in one of the two transactions each of the two minors has been allotted 39 and 38 shares out of a total number of 1,977 equity shares in a company). The AAC has reversed the ITO on this point and has taken the view that if regard be had to the allotment of the shares made in favour of the minors concerned on an earlier occasion, some two years back, it could not be said that the minors had not been allotted equal shares. The Tribunal has endorsed the view of the AAC, on this point without any elaborate discussion, almost taking it for granted that the allotment made in the course of previous transactions effected some two years back could be taken into consideration. We will have to examine the dimension as well later on though it may lose relevance if we are right in taking the view which commends itself to us in regard to the first dimension. We, however, propose to deal with the second aspect as well, for, in our opinion, the ITO was right and the AAC and the Tribunal were wrong in the view that they took on the second aspect and the revenue was entitled to succeed on both counts.

4. Can a father in his capacity as patria potestas in relation to an HUF consisting of himself and his minor sons effect partition at his own volition only of some of assets of the HUF and continue the status of the HUF for the rest of the properties ?

5. We do not propose to advert to the ancient texts reproduced in the case of Commissioner of Income Tax Vs. Seth Gopaldas (H.U.F.), , as also various decisions from which relevant extracts have been reproduced therein, for the sake of avoiding repetition. The Madhya Pradesh High Court has quoted in extenso relevant passages from :

(1) Colebrook''s Translation of Mitakshara (by Sarkar).

(2) S. S. Setlur''s Translation of Hindu Law on Inheritance.

(3) J. C. Ghose''s Commentaries on Principles of Hindu Law, 1st Edn.,

Vol. II.

(4) Gupta''s Hindu Law, 2nd Edn., p. 259.

(5) Hindu Law by Raghavachariar (6th Edn., p. 388).

(6) Mayne''s Treatise on Hindu Law and Usage (11th Edn.).

(7) Mulla''s Principles of Hindu Law (14th Edn.).

(8) Raymond West''s Hindu Law (3rd Edn., Vol. I).

(9) Kandasami v. Doraisami Ayyar [1880] ILR 2 Mad 317, 321.

(10) Girja Bai v. Sadashiv Dhundiraj [1916] LR 43 IA 151 (PC).

(11) Appovier''s case [1886] 11 MIA 75 (PC) and

(12) Alluri Venkatapathi Raju v. Dantuluri Venkatanarasimha Raju, AIR

1936 PC 264.

6. Having done so, the Madhya Pradesh High Court has fashioned its conclusion in the following words (p. 586) :

"From the above-quoted extracts taken from ancient texts as also the decisions wherein they were relied on and construed, it would appear that the meaning of ''partition'' as defined in the text did not include within its ambit a ''partial partition'' also and that the ''partition'' contemplated by the text referred only to a complete or total partition of the whole property belonging to the joint family so that a partial partition at least in respect of properties of the joint family was not intended. In this background, the father''s overriding power to effect a partition between himself and his sons without the consent of his sons, which power flows from the ancient texts, cannot, therefore, be ordinarily understood as conferring that power to effect also a partial partition in respect of the family properties. Even though partial partitions have been taking place for a long time, the law relating to the same is practically judge-made law since the Hindu law texts do not contemplate cases of partial partition ; Raghavachariar''s Hindu Law, 6th Edn., page 433. Since the ancient text, did not contemplate a partial partition in respect of property and, therefore, did not provide for it, it is reasonable to assume that the father''s overriding power to make a partition without the consent of his sons cannot be held to include a power to make a partial partition in respect of properties, at least on the basis of power flowing from the ancient texts. As earlier stated, no decided case recognising such a power in the father to effect a partial partition of the family properties without the consent of his sons has been brought to our notice. Thus, even case law is not available to support that view.

By its very nature, the extraordinary right of a father as patria potestas to make a partition of the joint family properties without the consent of his sons, so as to also divide them inter se, is of ancient vintage and merely a surviving relic of the past patriarchal family which has for long changed into the joint family giving equal right to the sons with their father, The origin of that power and the object for which it was

given to the father, i.e., ''when he was about to sever his connection with the family as its head either by becoming a religious anchorite or a resigned recluse'' in the words of that great Judge, Muttusami Ayyar J., is also now most often not the reason for its exercise. These are also factors which indicate that there is no justification for enlargement of this extraordinary right of the father as patria potestas so as to include within it something which was originally not within its ambit. A partial partition of the properties which leaves some properties for subsequent division, wherein the father also would have a share, is obviously inconsistent with the avowed object for which this extraordinary power was given to the father. The view that a complete partition of the properties and a total severance of the father''s shares therefrom is alone permitted in this manner, is more consistent and in conformity with the origin and object of this extraordinary power given to the father."

7. While we do not propose to reproduce the same quotations extracted from the various sources, we consider it necessary to capsulize the propositions which emerge from the aforesaid source of material. The following are the propositions :

1. From the standpoint of ancient Hindu law, what was recongnised was only a partition in respect of all the properties of the HUF, upon disruption of the status of the HUF regardless of whether the properties were actually divided by metes and bounds or whether these were thereafter (after disruption of joint status) held as tenants-in-common.

2. Partial partition in the sense of division in respect of a part of the assets whilst continuing the status of HUF in respect of the rest of the assets was not known to the ancient Hindu law and was not recongnised by the ancient Hindu law.

3. Partial partition in the sense of division of some of the properties whilst continuing the status of HUF in respect of other items of property originally belonging to the HUF came to be recognised only later on by evolution of custom and by judge-made law.

4. Such a partial partition was so recognised only if it was made by the consent of all the coparceners. In other words partial partition in respect of only some items of property whilst continuing the status of HUF in respect of the rest of the items of property could be effected only with the consent of all the coparceners. When there was a disruption of the status of the HUF only one or only some of the coparceners could not insist on a division of some items of the property without effecting division in respect of all the items of properties except by consent of all the coparceners.

5. In respect of a joint family consisting of a father and his sons the traditional Hindu law recognised the right of a father in his capacity as patria potestas to exercise his extraordinary power to disrupt the status of an HUF and to divide his sons inter se without their consent subject to the rider that "all" the assets of the HUF were subjected to partition.

6. The aforesaid extraordinary power is subject to the qualification that he gives to his sons an equal share and the division is not unfair (vide Gupte''s Hindu Law, 2nd Edn., p. 239). "The power of the father to sever the sons inter se is a survival of the patria potestas and may be exercised by him without the consent of his sons ....." Again, "in all cases his power must be exercised by him bona fide and in accordance with law; the division must not be unfair and the allotment must be equal. He must give his sons equal shares with himself."

7. There is nothing in (1) either ancient Hindu law, or (2) customary or judge-made law which authorises the father, in exercise of his extraordinary power, to effect a partial partition of HUF consisting of him self and his minor sons dividing some items of properties whilst continuing the joint status in respect of the rest of the properties.

8. The validity of the aforesaid propositions is incapable of being disputed and has not been disputed. What has been contended on behalf of the assessee is that whilst there is no express provision in so many words, either in the ancient Hindu texts or judge-made law, that the power of a Hindu father to effect a partition of an HUG consisting of himself and his sons including minor sons in exercise of his power as patria potestas extends even to partition in respect of only some items of property, it is required to be inferred by implication. In other words, it is argued that though there is no express reference to the power to effect a partial partition in the sense of a division of some items of property whilst continuing the status of an HUF in respect of the rest and though such power is not recognised in terms, it follows as a necessary corollary. In the case of Commissioner of Income Tax Vs. Seth Gopaldas (H.U.F.), this contention has in terms been negatived. We are of the opinion that the view taken in the case of Gopaldas (saying so with respect) is correct though a part of our reasoning is somewhat different. In our opinion, when we consider the question of the extraordinary power of a Hindu father in the context of ancient Hindu law in terms must be strictly construed and cannot be enlarged by implication. When we have to deal with the law which has its source in ancient texts, customs and judge-made law, we cannot read into the extraordinary power which has been recognised only to a limited extent, something more than what has been recognised. Merely because the power of a Hindu father to effect a partition of an HUF in exercise of his extraordinary power as patria potestas has been recognised in respect of a total partition, we are not prepared to say that it follows as a corollary that such powers extend to effecting of a partial partition in respect of some items of property whilst continuing the status of HUF in respect of other items. It cannot and does not follow as necessary corollary. Extraordinary powers by the very nature of such powers must be strictly construed and interpreted. If we do otherwise, we will be enlarging the powers. It cannot be done by way of interpretation of the existing law. Besides, there are cogent, valid and strong reasons for taking the view that it would be hazardous to recognise by implication a power to effect a partial partition or to spell out a power to effect partial partition merely because the

ancient Hindu law recognises the extraordinary powers of a father in respect of total disruption of an HUF and division of all the items of property. To read into the extraordinary power (by recourse to the doctrine of implication) of a father to bring about disruption of the HUF in respect of some items of property and to continue the status of an HUF in respect of the rest of the properties and to bring about a partial partition in this sense, would be contrary to first principles. The court would be slow to do so as it will be contrary to law, equity and justice as also against the interest of the minors. Our reasons for saying so will become evident shortly in the course of the discussion which follows :

Traditional Hindu law did not recognise partial partition. It recognised division in respect of all the properties of the HUF consequent upon disruption of the status of an HUF. Subsequently, by custom and by judge made law, partial partition has come to be accepted with the rider that no coparcener can seek partial partition except with the consent of the other coparceners. The "why" behind the rule is obvious. So long as the status remains joint, there cannot be any question of division of the properties belonging to the HUF. It is only upon the disruption of the joint status of an HUF that the question of division of the properties either by specification of shares or by division by metes and bounds would arise. In the case of partial partition also such a question can arise only consequent upon disruption of the status. After disruption of the status, partition may be effected by metes and bounds in respect of only some properties. In respect of the remaining properties, the coparceners may by common consent agree to treat them as properties belonging to the HUF. Even if there is no express agreement to reunite, in theory it means that the coparceners have agreed to reunity in respect of the remaining property and to continue the status of HUF vis-a-vis those properties which were not subjected to actual partition by metes and bounds. That is the reason why there is a consensus of legal opinion that partial partition in the sense of division of only some of the properties can be effected only with the consent of all the coparceners. It would in the eye of law by necessary implication mean that after disruption of the status the coparceners agreed to reunite and to treat some of the properties as continuing to belong to the reunited HUF. When coparceners are able to take care of their self-interest and are capable of taking an informed and intelligent decision, law authenticates agreement by necessary implication. In the case of an HUF consisting of a father and minor sons such reunion by implication is inconceivable. It is inconceivable because after the disruption of the status of the HUF, reunion can take place only by consent of all the erstwhile coparceners. And consent on behalf of minors will have to be given by the father to himself on behalf of the minors. Be it realised that the aforesaid extraordinary power has been conferred on the father presumably on the ground that the father would not be ordinarily expected to act against the interest of his minor sons. But then this power is recognised to the limited extend of bringing about a disruption of the joint status in respect of all items of properties. When the father does so and brings about a disruption, the

reunion in respect of some of the properties can be brought about only by consent between the father and the son. And when the consent required is that of a minor, who can give consent on his behalf ? How can the father give consent to himself in his dual capacity ? It is not inconceivable that there may be a conflict of interest between the interest of the father on the one hand and the interest of the minor son on the other hand in respect of division of the items of the properties and in respect of the share to be allotted (the father may be contemplating a second marriage or may have children by the second wife - the first wife having died). The father cannot be allowed to agree with himself in his individual capacity as also in his capacity as natural guardian of the minor son on the premise that it would be in the interest of the minor to bring about reunion. That is why partial partition cannot be effected by the father in respect of an HUF consisting of himself and his minor son. It is not necessary for the present purpose to examine, whether this can be achieved by instituting a suit, wherein the court may appoint a guardian ad litem for the protection of the interest of the minor and wherein after considering the interest of the minor the court may grant a permission for effecting partial partition by effecting division of some properties whilst consenting to reunion and recreation of the status of an HUF by consent in respect of the rest of the properties. But without the intervention of the court, the father, in exercise of his power, as patria potestas cannot do so, for, it would involve giving consent to himself even when there is a conflict between self-interest and duty. No doubt the reasoning will not apply to an HUF consisting of a father and his major sons. But then in the case of major sons partial partition cannot be made unilaterally by the father because, (1) no such power has been recognised by the ancient texts or customary law, and (2) because partial partition in reality involves not only a decision to disrupt the status and divide the assets but also a contemporaneous decision (by necessary implication) to reunite in respect of the items of property to be treated as continuing to belong to the reunited HUF. In respect of major sons the father has no unilateral right to give consent to himself to reunite. But this can be achieved only by the consent of the major sons. There is not one single decision which upholds the right of the father to effect such a partial partition. The only decision on the point is of the Madhya Pradesh High Court, which has refused to recognise such a right. We are also of the same opinion.

9. Whether the father in exercise of his power as patria potestas can effect a patently unequal partition ? What are the consequences if he does so ?

10. Having regard to the view we take on the first point the assessee must fail in any event. And the dimension of the matter as regards unequal distribution may lose its relevance. However, since the question has been debated fully and raises a question of considerable importance we propose to deal with this aspect as well.

11. The source of the power of the father to effect partition in respect of a joint family consisting of himself and his minor son is to be located in ancient Hindu law

(and nowhere else) which has recognised the right only subject to a rider, namely, that he gives equal shares to his minor son. This is evident from the following passages extracted from authoritative text books quoted in Commissioner of Income Tax Vs. Seth Gopaldas (H.U.F.), :

"Gupte''s Hindu Law, 2nd Edn. at p. 259 :

''The power of the father to sever the sons inter se is a survival of the patria potestas and may be exercised by him without the consent of his sons''....''again, in all cases, this power must be exercised by him bona fide and in accordance with law, the division must not be unfair and the allotments must be equal. He must give his sons equal shares with himself''."

"Hindu Law by Raghavachariar, 6th Edn., p. 388 :

''According to Hindu Law it is competent to a father to make a partition during his life, and the partition so made by him binds his sons, not because the sons are consenting parties to the arrangement, but because it is the result of a power conferred on him, though subject to certain restrictions imposed in the interest of the family..... Thus, the father is in his lifetime competent to effect a separation in the family even without the consent of his sons provided the shares allotted to himself and the sons are equal....'""

12. The texts, therefore, make it abundantly clear that the power is hedged in by the limitation enjoining the father to give equal share to the minor son. On principle the rider prescribing the limitation requires to be construed as a mandatory condition and a condition precedent to the exercise of the power. The reasons are obvious.

(1) The father is allowed to exercise at his own volition extraordinary powers even in a situation where there is a conflict between his personal interest on the one hand and the interest of the minors on the other when the sons are minors.

(2) In such a case minors are unable to protect their own interest and no one is acting as their guardian to protect their interest.

(3) Power conferred on an individual where there is a conflict between self-interest and duty is by its very nature liable to be misused in one''s own favour.

(4) While the father would not ordinarily be expected to be unmindful of the interest of his own minor sons, one can visualise several situations wherein he cannot be trusted. For instance (1) the mother of the minor sons might have died and he might be contemplating a second marriage, (2) he might have already remarried and might have sons by his new wife and the second wife may be in a position to influence the father to favour her sons vis-a-vis their step-brothers.

13. The rider to give equal shares must, therefore, be construed as a man-datory condition, non-compliance with which would vitiate the transaction of partition itself. For the purpose of the present matter it is not necessary to consider the

question whether such a transaction would be abinitio void or whether it would be merely voidable. It is not necessary to do so as the questions raised herein are capable of being resolved without expressing any final opinion on this aspect of course, having regard to the view that we are taking, namely, that it is a condition precedent to the exercise of the power and there is an inherent risk that the interest of the minor may be endangered, there are weighty reasons for holding that the transaction should be treated as void. If it were to be treated as voidable, what would happen in a given case where the father after effecting a partial partition in exercise of his extraordinary power as patria potestas, alienates the properties, and the very properties disappear ? In that event, the minor on attaining majority will only have a notional right to have the transaction declared as void, for he cannot claim readjustment from his father who does not possess the property any more. The court would, therefore, be tempted to take the view that in such circumstances the transaction is void. No doubt in M.S.M.M. Meyyappa Chettiar Vs. Commissioner of Income Tax, , the view has been taken that such a transaction is voidable at the instance of the minor on his attaining majority and that it is not ab initio void. This view has been reiterated in P.N. Venkatasubramania Iyer and Others Vs. P.N. Easwara Iyer and Others, . The Orissa High Court has concurred with this view in Gadadhar Panda and Another Vs. Gangadhar Panda and Others, . One point needs to be stressed in regard to these decisions. In none of these cases the question arose in the context of the extraordinary power of the father as patria potestas vis-a-vis his minor sons. We, however, need not express our final opinion on this question, for, it is not necessary to do so for the present purpose. In so far as the power of the ITO under s. 171 of the Act is concerned, there is no manner of doubt that he does have the power to treat the transaction as invalid for the purpose of s. 171 if it is not in accordance with law. The ITO has to take into account all the circumstances pertaining to the transaction as enjoined by the relevant statutory provision and examine its genuineness and validity from all standpoints before according recognition to it in exercise of his statutory power under s. 171 which casts a duty on him to do so after holding the necessary inquiry for reasons to be recorded in writing. Surely this is not a superfluous exercise to be undertaken as a matter of form or as a matter of rubber stamp function irrespective of the fact situation. He has to make an enquiry. As enjoined by law he has to "inform" himself about the circumstances. He has to satisfy himself about the genuineness and legality. And he has thereafter to record a finding as enjoined by the relevant provision. It is the statutory duty cast on him. In exercising his statutory duty he can certainly take stock of the situation and refuse to recognise the partial partition where it is patently unequal and contrary to law. In other words, when it is a transaction which ordinarily a court of law would not recognise having regard to the fact that the court is required by law to apply its mind to the question whether or not it is in the interest of the minor, and to not only satisfy on this score, but to certify, that the transaction is valid. And when it is not equal it would be obviously against the interest of the minor and in no circumstances the court can uphold it. If

that is so, one would expect the ITO to do likewise. Reliance is placed by counsel for the assessee on the observations made in M.S.M.M. Meyyappa Chettiar Vs. Commissioner of Income Tax, , wherein the view has been taken that the unequal partition can be challenged by the minor and not by the ITO, who need not act as a self-appointed guardian of the minor. The following passage from p. 610 of the report is placed in focus in this context :

"For these reasons, I hold that the revenue authority has no right to constitute itself as the self-appointed guardian of minor coparceners and in that assumed rule, avoid a partition arrangement effected by their father in the exercise of his powers under the Hindu law, on the ground of an inequality in the partition and the resultant prejudice to the interests of the minors."

14. We are, however, unable to agree with this proposition. In our opinion, it is very essential dimension of the duty case on him by the statute which confers powers with a definite design and purpose. He cannot, therefore, be said to be an outsider or stranger or an onlooker who is not concerned with the validity of the transaction. To do so would be to hold that the ITO must wait till the minor attains majority, say after 15 years, by which time the power conferred by the relevant provision in respect of the reopening of the assessment would have become unexercisable by reason of the bar of limitation. We, therefore, unhesitatingly hold that such an unequal partition would not be valid in law and the ITO has the power to refuse to recognise it on that ground as he did in the present matter. we may add that in a way the question is not whether it is valid or void but the question is whether it is in accordance with law. And for the reasons discussed earlier we have no doubt that it is not in accordance with law and invalid on that account, inasmuch as the condition precedent is violated. Since, in our opinion, the condition is a condition precedent for the exercise of the power, the transaction is invalid in the eye of the law and the ITO who has to discharge his statutory function cannot lawfully record such unequal partition and place his seal of approval thereto.

15. Is the transaction in question invalid on the facts and circumstances of the case ?

16. Then the question arises as to whether the transaction in question, namely, the transaction which came up before the ITO for the purpose of recording his finding as to whether that particular partition was such as could be recorded by him. Admittedly, in regard to one transaction, a block of 1977 equity shares in a company has been subjected to division and each of the minors has been allotted only 39 and 38 shares, respectively, while the father has retained 1,700 shares for himself. It is obviously unequal, unfair and unconscionable inasmuch as a grossly enequal division has been made. It was, however, argued before the Tribunal that notwithstanding this position the transaction can be sustained if a division which took place some two years earlier is also taken into account and both transactions are viewed cumulatively. We are afraid this cannot be done. That would be beyond the scope of the inquiry. A finding has to be recorded by the ITO in the context of

the transaction in respect of which recognition is sought and in respect of which he has to record his approval for the purpose of the relevant assessment year. Admittedly this transaction brings about a patently unequal distribution in the sense that each minor has been given only 2 per cent. of the property instead of being given 33.35 per cent. of it (taking into consideration the fact in the present matter, the mother does not claim a share for herself). Even if the mother ha claimed a share the minor would have been entitled to 25 per cent. of the property. But in the instant case, he gets only 2 per cent. of the property. He got only 39 out of 1,977 shares. Even the learned counsel for the assessee could not contend that this particular transaction presents equal distribution as enjoined by shastrik law with regard to partial partition, assuming that partial partition were permissible under the traditional Hindu law or judge-made law as it was evolved by custom or by usage. The argument urged by the learned counsel that the validity of this transaction must be tested with reference to some event which happened years back has merely to be stated to be rejected. One test would be sufficient to express the hollowness of the argument. Suppossing there was no partial partition in the past, would this transaction have been considered to be a valid transaction ? The answer is clearly "no". Does it then become a valid transaction because in the past the minor had been treated more favourably ? Having regard to the true interpretation of s. 171 each transaction has to be judged separately and the ITO has to record his finding in respect of that particular transaction which took place in the relevant previous year without reference to what might have taken place some years back. Under the circumstances, it is not necessary to embark upon the enquiry whether in the past the minor had been treated in a more favourable manner so that inequality in the present transaction can be treated as having been neutralized and such as the ITO ought to have shut his eyes to. It was not even urged before the ITO that the past transaction could be looked into. The ITO rightly addressed himself to the limited question which he was fully competent to decide under s. 171(2) when dealing with the assessment of the particular year in the context of the transaction which took place in the relevant previous year. The Tribunal failed to realise that the issue was being befogged by the thoroughly misconceived plea of the assessee advanced in the context of what happened some years back. Thus, instead of addressing itself to the transaction of the relevant assessment year, the Tribunal has proceeded to examine the transaction in question by bracketing it along with a transaction which took place some years back. The Tribunal has concluded that having regard to the number of the shares allotted in the past (two years back) though only 38 and 39 out of 1,977 shares were allotted to the two minors by way of the impugned transaction it can be said to be an equal partition. This conclusion is formed in view of the allotment made in the following manner during the course of the previous and current partial partitions.

Name	23-3-71	19-8-71	24-12-73	29-12-73	Total

Shri Apoorva S.Shah (Indl.)	2,900	930	-----	-----	2,930
Smt. Karuna A.Shah	1,000	439	----	-----	1,439
Chintan A.Shah	2,662	690	50	39	3,441
Tejal A.Shah	2,663	690	50	38	3,441
Apoorva S.Shah (HUF II)	----	----	100	1,700	1,800
	8,325	2,749	200	1,777	13,051

17. It will be seen that the two transactions with which we are concerned, viz., transactions dated December 24, 1973, and December 29, 1973, are patently unequal, taken individually. Even if the cumulative effect of the block of transactions were to be considered, the partition is unequal, because the mother has stated that she has not obtained any share for herself in the partition. Apart from the reasons already discussed, there is another reason why the transactions of the previous year (1971) cannot be taken into account. It is not the quantity of the share which matters but the value of the shares which really matters. If more shares were allotted to the minors in the past, say when the value was Rs. 100 per share and less shares were allotted in the course of the impugned transaction, say when the value of the shares was Rs. 1,000 per share, can any one rationally reach the conclusion that the partition is equal because the number of shares distributed is equal ? Distribution in terms of money would be grossly unequal though in terms of number of shares it may be equal. And from this angle the assessee has not produced any material on record and the Tribunal has not examined the question at all. The measure adopted by the Tribunal is a patently erroneous measure. It is thus obvious that the validity of this particular transaction can be judged in the context of the division which takes place in the course of this particular transaction only and the method adopted by the Tribunal is basically fallacious. There is, therefore, no manner of doubt that the impugned transaction is invalid and the ITO who has reached this conclusion by a very able, well reasoned and well considered judgment was right in forming the opinion that the distribution was unequal. The Tribunal has, without considering these vital factors, almost taken it for granted that there was no inequality if the past transactions were taken into account.

18. As discussed earlier even if this aspect is not taken into account, the assessee must fail having regard to our decision on the first point upholding the view taken by the Tribunal that a Hindu father has no legal authority to effect a partial partition vis-a-vis his minor sons as held in the case of Commissioner of Income Tax Vs. Seth Gopaldas (H.U.F.), by the Madhya Pradesh High Court with which we respectfully concur. For the reasons indicated earlier, in the course of the judgment, we are also of the opinion that unless the partition amongst the father and two sons was equal

and the sons have been given equal shares the transaction is invalid, even assuming that partial partition is permissible. The ITO, therefore, was right and the AAC and the Tribunal were wrong in so far as this aspect was concerned. We may mention that since the Tribunal had decided the main issue against the assessee, it is open to the revenue to support the ultimate conclusion that the ITO was justified in refusing to record the partial partition in the exercise of his powers under s. 171 of the Act on this ground as well. In the result, we uphold the ultimate reached by the Tribunal.

19. The only point required to be dealt with is projected in question No. 5. It is argued that in any case the invalid partial partition can be treated as a family arrangement. The argument is thoroughly misconceived and altogether untenable. The powers conferred on the ITO by s. 171 are in the context of a partition of a HUF for the purpose of assessment under the I.T. Act. The only question before the ITO is whether a partition has been validly effected. If he finds that there is no valid partition of the HUF he cannot say that it is valid by treating the transaction as a family arrangement. Invalid partition cannot be validated by giving the transaction a different name. Besides, there is neither authority nor principle to support the proposition that a Hindu father can unilaterally bring about a family arrangement binding on his sons. Or that such authority extends to the length of empowering him to allot a patently unequal (in the sense of being small) share to his sons. The Tribunal was, therefore, justified in negativing this contention.

20. For the sake of record we may mention that the following decisions were cited before us in support of the propositions indicated hereinbelow but we do not propose to discuss these decisions at length because the basis of our decision is not affected thereby :

Citation	Proposition emerging from the decision
(1951) 2 SCR 548	Minor can avoid an unfair
AIR1926Bom160	partition on attaining majority do.
AIR 1943 All 197	do.
AIR 1957 Hyd 29	Minor can avoid an unfair partition on atta
AIR 1951 SC 38	Partition brought about by fraud is v
AIR1 972 SC 1279	Document in operation as a will may opera
AIR 1935 Mad 775	Even if actual allotment of shares turns ou

21. In view of the foregoing discussion we answer the questions referred to us as under :

Questions	Answers

1. Whether, on the facts and in the circumstances of the case, the the Tribunal was right in holding that Shri Apoorva Shantilal could not himself have given consent on behalf of his minor sons to the partitions proposed by him in his individual capacity as father ?	In the affirmative and against assessee.
2. Whether,on the facts and in the circumstances of the case, the Tribunal was right in holding that the partial partitions were out side the framework of Hindu law ?	In the affirmative and againstthe assessee.
3. Whether,on the facts and in the circumstances of the case, the Tribunal was right in holding that the partial partition could not be recognised as valid for the purpose of section 171 of the I.T.Act, 1961 ?	In the affirmative and against the assessee.
4. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that partial partitions made by a Hindu father in exercise of his patria potestas cannot be recorded as a valid partition under s. 171 of the I.T.Act, 1961 ?	In the affirmative and against the assessee.
5. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the partial partition did not amount to a family arrangement in which the father acted as a natural guardian of the two minor sons after he had exercised his patria potestas ?	In the affirmative and against the assessee.
6. Whether the Income Tax department is competent to challenge the exercise of powers as patria potestas by a Hindu father in respect of coparcenary property, making a partial partition.	In the affirmative and against the assessee.

22. Reference answered accordingly with no order as to costs.