

Additional Income-Tax Officer, Cuddapah

Vs

A. Thimmayya and Others

Civil Appeals Nos. 1019-1020 of 1963

(K. Subha Rao, J. C. Shah, S. M. Sikri JJ)

09.11.1964

JUDGMENT

SHAH, J. –

Krishnappa and his two sons - Thimmayya and Venkatanarsu - constituted a Hindu undivided family. They carried on business in mining in the name and style of Krishnappa and Sons. The family was disrupted in 1946, and all its properties were divided among the members of the family. The business of Krishnappa and Sons was taken over by a firm which the partners were Krishnappa and his two sons. A private limited Company styled "Krishnappa Asbestos and Barytes (Private) Ltd." took over the business of the firm on May 21, 1947 for Rs. 2,04,000. Thimmayya obtained employment under the Company as mines superintendent at a monthly salary of Rs. 400 and Venkatanarsu as General Manager at a monthly salary of Rs. 500.

Proceedings for assessment of tax due by the Hindu undivided family for the years 1941-42, 1942-43, 1944-45, 1945-46 and 1946-47 were pending at the time when the Hindu undivided family was disrupted. On May 20, 1946, Venkatanarsu claimed before the Additional Income-tax Officer, Cuddapah that the property of the Hindu undivided family had been partitioned among the members in definite portions. For reasons which do not appear from the record, this claim was not disposed of till June 30, 1952. In the meanwhile assessments for the five years in question were made by the Income-tax Officer on diverse dates between September 30, 1948 and November 30, 1950, resulting in a tax liability of Rs. 65,750 in the aggregate for the five years. Appeals preferred against the orders of assessment to the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal proved unsuccessful. It is common ground that it was not contended in the appeals that in making the orders of assessment, without disposing of the claim that the family was disrupted in 1946, the Income-tax Officer had acted illegally.

On June 30, 1952 the Income-tax Officer, Special Circle, Madras, made an order under section 25-A recording that the property of the Hindu undivided family of Krishnappa and his sons was partitioned on November 2, 1946. As the tax due was not paid the Income-tax Officer made an order under section 46(5) of the Indian Income-tax Act, 1922 on June 25, 1958 calling upon the Managing Director to withhold the amount of tax due from the salaries payable to the defaulters Thimmayya and Venkatanarsu and to show the same to the credit of the Government of India.

Thimmayya and Venkatanarsu then lodged petitions under Art. 226 of the Constitution in the High Court of Andhra Pradesh at Hyderabad, praying that writs of certiorari or other appropriate writs be issued quashing the order dated June 25, 1958 of the Income-tax Officer under section 46(5). They founded their petitions on two grounds - (i) that after the Income-tax Officer recorded an order on

June 30, 1952 under section 25-A(1) that the family has disrupted "with effect from November 2, 1946", steps taken for recovery of the amount of tax assessed without an appropriate order under section 25-A(2) were invalid; and (ii) arrears of tax due by the erstwhile Hindu undivided family could not be recovered from remuneration earned by them as employees of the Company. The petitions were decided by Seshachelapati J., in favour of the two petitioners, and the decision was confirmed in appeal by a Division Bench of the High Court of Andhra Pradesh. The High Court held that the order on the claim made under section 25-A(1) on June 30, 1952 was given "a clear retrospective operation", and the Income-tax Officer was bound "to give effect to that order recognising the partition and to follow up the consequences which flowed from the order". In the view of the High Court the petitioners were entitled to insist upon an order for apportionment under section 25-A(2) and without such an order, proceedings for collection of tax could not be commenced against them under the proviso to sub-section (2) of section 25-A. Against the order of the High Court, with certificate of fitness, these two appeals have been preferred by the Income-tax Officer, Cuddapah.

Under the Indian Income-tax Act, 1922, as it originally stood, a Hindu undivided family was regarded by section 3 as a unit of assessment, but no machinery was set up for levying tax or for enforcing liability to tax on the members of the family, if before the order of assessment the family was divided. Absence of this machinery was more acutely felt because of section 14(1), which provided that tax shall not be payable by an assessee in respect of any sum which he received as a member of a Hindu undivided family. Income received by a Hindu undivided family could not therefore be assessed and collected from the members of the family, if at the time of making the assessment the family was divided. To rectify what was obviously a lacuna, the Legislature incorporated section 25-A for assessment and enforcement of liability to tax income received by a Hindu undivided family, which was no longer in existence at the date of assessment. But the new section went very much beyond rectifying the defect in the statute which necessitated the amendment. Section 25-A incorporated by the Indian Income-tax Amendment Act 3 of 1928 at the material time read as follows :

"(1) Where, at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that the joint family property has been partitioned among various members or groups of members in definite portions he shall record an order to that effect.

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, or where any person had succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place, and each member or group of members shall, in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 15, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; and the Income-tax Officer shall make assessments

accordingly on the various members and groups of members in accordance with the provisions of section 23 :

Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family."

The Section makes two substantive provisions - (i) that a Hindu undivided family which has been assessed to tax shall be deemed for the purposes of the Act, to continue to be treated as undivided and therefore liable to be taxed in that status unless an order is passed in respect of that family recording partition of its property as contemplated by sub-section (1); and (ii) if at the time of making an assessment it is claimed by or on behalf of the members of the family that the property of the joint family has been partitioned among the members or groups of members in definite portions, i.e. a complete partition of the entire estate is made, resulting in such physical division of the estate as it is capable of being made, the Income-tax Officer shall hold an inquiry, and if he is satisfied that the partition had taken place, he shall record an order to that effect. Where an order has been passed, the Income-tax Officer must still make an assessment of the total income received by or on behalf of the undivided family as if no partition had taken place, and shall thereafter apportion the income-tax assessed on the total income received by the family and assess each member or group of members in accordance with the provisions of section 23 by adding to the income-tax for which such member or group of members may be separately liable, tax proportionate to the portion of the undivided family property allotted to him or to the group. This apportionment and fresh assessment operate notwithstanding anything contained in sub-section (1) of section 14. The proviso to sub-section (2) makes a departure of a vital character. Whereas in the case of an assessment of the income of the joint family, the tax liability is charged upon the assets of the family, when upon a partition an order under sub-section (1) has been recorded all members and groups of members are expressly declared by the proviso to be jointly and severally liable for the tax assessed on the total income received by or on behalf of the joint family. Liability which so long as an order was not recorded under section 25-A(1) was restricted to the assets of the Hindu undivided family is by virtue of the proviso to sub-section (2) transformed when the order is recorded, into personal liability of the members for the amount of tax due by the family.

An order under sub-section (1) can only be made if certain conditions co-exist - the family in question has been made hitherto assessed as undivided and a claim is made at the time of making an assessment that partition of the family property has been made between the members or groups in definite portions. Sub-section (2) of section 25-A becomes effective only if an order under section 25-A(1) is made and not otherwise. In terms the sub-section enacts that the Income-tax Officer shall assess the total income received by or on behalf of the joint family and apportion it in the manner provided by sub-section (2) where an order is passed under sub-section (1).

The scheme of section 25-A is therefore clear : a Hindu undivided family hitherto assessed in respect of its income will continue to be assessed in that status notwithstanding partition of the property among its members. If a claim is raised at the time of making an assessment that a partition has been effected, the Income-tax Officer must make an inquiry after notice to all the members of the family and make an order that the family property has been partitioned in definite portions, if he

is satisfied in that behalf. The Income-tax Officer is by law required still to make the assessment of the income of the Hindu undivided family, as if no partition has taken place and then to apportion the total tax liability and to add to the separate income of the members or groups of members the tax proportionate to the portion of the joint family property allotted to such members or groups of members and to make under section 23 assessment on the members accordingly. If no claim for recording partition is made, or if a claim is made and it is disallowed or the claim is not considered by the Income-tax Officer, the assessment of the Hindu undivided family which has hitherto been assessed as undivided will continue to be made as if the Hindu undivided family has received the income and is liable to be assessed.

Failure to make an order on the claim made does not affect the jurisdiction of the Income-tax Officer to make an assessment of the Hindu family which had hitherto been assessed as undivided. The Income-tax Officer may assess the income of the Hindu family hitherto assessed as undivided notwithstanding partition, if no claim in that behalf has been made to him or if he is not satisfied about the truth of the claim that the joint family property has been partitioned in definite portions, or if on account of some error or inadvertence he fails to dispose of the claim. In all these cases his jurisdiction to assess the income of the family hitherto assessed as undivided remains unaffected, for the procedure for making assessment of tax is statutory. Any error or irregularity in the assessment may be rectified in the manner provided by the statute alone, and the assessment is not liable to be challenged collaterally.

In the present case claim was undoubtedly made at the time of making an assessment, that the property of the family was partitioned. The claim was not disposed of before making the assessment, and the Income-tax Officer proceeded to assess the income of the family as if the property of the family had not been partitioned. It is true that by order date June 30, 1952 the Income-tax Officer held that the property of the family was partitioned on November 2, 1946. But the Act contains no machinery authorising an Income-tax Officer to re-open an assessment of a Hindu undivided family, relying upon an order made by him under section 25-A(1) after the order of assessment is made. In the present case appeals were filed and it is common ground that no objection was raised as to the regularity or legality of the procedure followed by the Income-tax Officer. The assessment proceedings were taken to the Income-tax Appellate Tribunal and the orders of assessment were confirmed. Thereafter it was not open to the Income-tax Officer to re-open the orders of assessment, relying upon the order recording the partition, and to seek to subvert orders which had become final under the seal of the Income-tax Appellate Tribunal. The High Court was, in our judgment, in error in holding that an order of assessment which has become final is liable to be re-opened under section 25-A(2) by the Income-tax Officer, when an order under section 25-A(1) is passed by him subsequent to the order of assessment.

But the appeals filed by the Income-tax Officer must still fail. Order recording the partition subsequent to the date on which the order of assessment was made must for reasons aforementioned be ignored and tax levied as if no such order was made. The effect of that step however is that in the absence of an order under section 25-A(1) and the consequential proceedings under sub-section (2) liability to pay tax must rest upon the property of the Hindu undivided family : it cannot be enforced against the members of the family personally. The Income-tax Officer has sought by resorting to section 46(5) to attach the remuneration earned by Thimmayya and Venkatanarsu as employees of Krishnappa Asbestos & Barytes (Private) Ltd. this he was incompetent to do. So long as the assessment is made of income of the Hindu undivided family, liability to satisfy the tax must be restricted to the estate of the family : after an order of partition is recorded and assessment is made under sub-section (2) of section 25-A but not till then, the proviso to that sub-section will operate.

The Solicitor-General contended that the second paragraph of sub-section (2) which is in the form of a proviso, is in substance a substantive provision imposing joint and several liability for tax assessed on the total income received by or on behalf of the joint family against all members of the family. The contention is that by the proviso the Legislature intended that in respect of the income of a Hindu undivided family, once partition is effected, whether the partition is recorded or not under sub-section (1), all members of the family will be jointly and severally liable for the tax assessed on the total income received by or on behalf of the family. But howsoever read the proviso yields no such meaning. The scheme of the section is that so long as there is an assessment of the Hindu undivided family, the liability for payment of the tax is on the property of the family and not personally on the members. Where an order that the property of the family has been partitioned is recorded, the liability of the members has to be apportioned in the manner set out in the sub-section, but one of the incidents of assessment after apportionment of tax liability is that the members of the family stand jointly and severally liable for the entire amount of tax assessed against the family.

In the present case no orders were recorded by the Income-tax Officer at the time of making assessments in respect of the five years, and therefore no personal liability of the members of the family arose under the proviso to sub-section (2). The Income-tax Officer does not seek to reach in the hands of Thimmayya and Venkatanarsu the property which was once the property of the Hindu undivided family; he seeks to reach the personal income of the two respondents. That the Income-tax Officer could do only if by virtue of the proviso to sub-section (2) a personal liability has arisen against them. In the absence of an order under sub-section (1), however, such a liability does not arise against the members of the Hindu undivided family, even if the family is disrupted.

We are, therefore of the view, but not for the reasons mentioned by the High Court, that because there has been before the orders of assessment no order recording that the property of the family has been partitioned among the members, the two respondents are not personally liable to satisfy the tax due by the joint family. The remedy of the income-tax authorities in the circumstances of the case, was to proceed against the property, if any, of the Hindu undivided family. That admittedly they have not done.

The order of the High Court must, therefore, be confirmed and the appeals dismissed with costs. There will be one hearing fee.

Appeals dismissed.

</html