Surjit Lal Chhabda

Vs

Commissioner of Income-Tax, Bombay

Civil Appeals Nos. 1819 and 1821 of 1970

(Y. V. Chandrachud, R. C. Sarkaria, A. C. Gupta JJ)

06.10.1975

JUDGMENT

CHANDRACHUD J. -

1. The appellant, Surjit Lal Chhabda, had three sources of income. He had a share in the profits of two partnership firms, he received interest from bank accounts and he received rent from an immovable property called Kathoke Lodge. These were his self acquired properties and until the assessment year 1956-57, he used to be assessed as an individual in respect of the income thereof. On January 26, 1956, he made a sworn declaration before a Presidency Magistrate in Bombay, that he had thrown the property, Kathoke Lodge, into the "family hotchpot" in order to impress that property with the character of joint family property and that he would be holding that property as the Karta of the Joint family consisting of himself, his wife and one child. That child was an unmarried daughter.

In the assessment proceedings for 1957-58, the appellant contended that since he had abandoned all separate claims to Kathoke Lodge, the income which he received from that property should be assessed in the status of Hindu undivided family. The income tax authorities and the Income-tax Appellate Tribunal rejected that contention for varying reasons. The Income-tax Officer held that in the absence of a nucleus of joint family property, there was nothing with which the appellant could mingle his separate property and, secondly, that there could not be a Hindu undivided family without there being undivided family property. The appellant carried the matter in appeal to the Appellate Assistant Commissioner who differed from the Income-tax Officer on both the points but dismissed the appeal on two other grounds. The Appellate Assistant Commissioner held that even after the declaration, the appellant was dealing with the income of Kathoke Lodge in the same way as before which showed that the declaration was not acted upon and, secondly, that even assuming that the property, the income from that property could still be taxed in the appellant's hands as he was the sole male member of the family. The Tribunal accepted the declaration as genuine and differed from the Appellate Assistant Commission er's finding that it was not acted upon. The appellant, according to the Tribunal was the karta of the joint family income. The Tribunal however, held that though the appellant had invested his separate property with the character of joint family property, he being a sole surviving coparcener continued to have the same absolute and unrestricted interest in the property as before and, therefore, in law, the property had to be treated as his separate property.

The appellant moved the Tribunal for referring five questions to the High court while the respondent applied for the reference of one other question. The Tribunal referred the following question only for the opinion of the Bombay High Court under section 66(1) of the Indian Income-tax Act, 1922 :

> "Whether, on the facts and in the circumstances of the case, the income from property known as 'Kathoke Lodge' was to be assessed separately as the income of the Hindu undivided family of which the assessee was the karta ?"

In the High Court, it was contended on behalf of the appellant that it is open to a male member of a joint Hindu family to convert his self- acquired property into joint family property by throwing it into the common hotchpot; that for effectuating this purpose it is neither necessary that there should be an ancestral or joint family nucleus nor that there should be more than one male in the joint family; and since Kathoke Lodge was impressed with the character of joint family property, its income belonged to the joint Hindu family of which the appellant was the karta, the other members being his wife and unmarried daughter.

On the other hand, the department contended that it was contrary to the basic concept of a Hindu undivided family; that a single male along with females could form a joint Hindu family; that though a joint Hindu family could include a wife and unmarried daughters, a sole male member could not constitute a joint Hindu family along with females; and that it was necessary for the formation of a joint Hindu family that there should be more than one male capable of claiming partition of the joint family property. In the alternative, it was urged by the department that a single male could form a joint Hindu family along with a coparcener's widow who is capable of making an adoption to her deceased husband but not with his own wife and unmarried daughter. The argument that the existence of ancestral or joint family property was an essential prerequisite to throwing the self-acquired property into the common stock was raised but was not pressed in the High Court.

On these contentions, the real controversy before the High Court was whether a single male can form a joint Hindu family with his wife and unmarried daughter; if yes, whether the karta of such a family can impress his self-acquired property with the character of joint family property by throwing it into the family hotchpot; and, lastly, whether the income of such property can be assessed as the income of the joint family. The High Court did not enter into these questions and made its task simple by saying :

> "Several authorities were referred to on either side in support of their respective contentions. We do not, however, propose in deciding this reference to go into the larger question as to whether the property of the assessee, which was originally self-acquired property, assumed the character of a Hindu undivided family property, as to what are the incidents of a Hindu undivided family property, and under what circumstances can separate property become Hindu undivided family property. Some of these questions have been directly answered in the authorities which were cited before us.
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> The question referred is confined to the "income" from Kathoke Lodge. We would, therefore, without going into these larger questions, prefer to rest our decision on the short point whether the income from the property known as Kathoke Lodge after the declaration was the income of a Hindu undivided family and in this respect whether the principle laid down by the Privy Council in Kalyanji's case was correctly applied."

The High Court assumed for the purposes of argument that there need not be more than one male member for forming a joint Hindu family as a taxable unit and that a joint Hindu family could lawfully consist of a single male member, his wife and unmarried daughter. On these assumptions

the High Court concluded that Kathoke Lodge, from the date of the declaration by which it was thrown into the common stock, was the property of the Hindu undivided family. It, however, held :

> "But the assessee has no son and, therefore, no undivided family. His ownership of the property and its income in fact remains the same as before. The fact of the existence of a wife or of a wife and daughter would make no difference to his ownership of that property..... His position as a member of the joint family after the declaration would be the same as that of a sole surviving coparcener, but it is now settled law a person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property s if it were his separate property.
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> That is the position which the assessee held so far as this property is concerned. So far as the income is concerned, he has the complete power of disposal over the income and, even assuming that he is the karta of a joint Hindu family, there is no one who can question his spending, i.e., whether or not it is for legal necessity or other justifiable purpose. If then, his right to the income remains under his personal law the same as it was before the made the declaration, the question arises whether under the Income-tax Act it must be held to be the income of the karta of the Hindu undivided family. That is precisely the question which the Privy Council answered against the assessee in Kalyanji's case .... In our opinion, therefore, the assessee's case would fall squarely within the principle enunciated by their Lordships of the Privy Council in Kalyanji's casel and upon that view the income in the hands of the assessee would be liable to be assessed as his individual income."

The Privy Council decision on which the High Court relies is Kalyanji Vithaldas v. Commissioner of Income-tax. The judgment of the High Court is reported in [1970] 75 ITR 458.

Before examining the validity of the high Court's reliance on Kalyanji's case and the correctness of its conclusion that the instant case falls within the ratio of that decision, it is necessary to have regard to the principles of Hindu law governing joint families. The High Court did not examine those principles, calling them "larger questions", and preferred wholly to rely on, so to say, the magic touch of Kalyanji's case. It assumed that a joint family may consist of a single male, a wife and daughter which means that it assumed that the appellant was a member of joint Hindu family consisting of himself, his wife and daughter. However, in the very next breath, the High Court concluded : "But the assessee has no son and, therefore, no undivided family". an examination of fundamentals might have saved the High Court from the inconsistency that a single male can constitute a "joint family" with his wife and daughter but if that male has no son, there can be no "undivided family". In the first place, joint family and undivided family are synonymous terms. Secondly, when one says that a joint Hindu family consists of a single male, his wife and daughter, one implies necessarily that there is no son. If there were a son, there would be two males.

For our limited purpose, fundamentals do not any more require a study of streak texts, digests and commentaries because judicial decisions rendered over the last century and more have given a legalistic form to what was in a large measure a mingling of religious and moral edicts with rules of positive law. Hindu law today, apart from the piecemeal codification of some of its branches like the laws of marriage, succession, minority, guardianship, adoption and maintenance is judge-made law, though that does not detract from the juristic weight of Smritis like the Yajnavalkya Smriti nor from the profundity of Vijnaneshwara's commentary on it, the critique bearing the humble titled of "Mitakshara".

The appellant is governed by the Mitakshara school of Hindu law but that is not of any particular consequences for the purposes of this appeal. The differences between the Mitakshara and Dayabhaga schools on the birth-right of coparcener and the rules of inheritance have no bearing on the issues arising in this appeal, particularly on the question whether a single male constitute a joint or undivided family with his wife and unmarried daughter. A joint Hindu family under the Dayabhaga is, like a Mitakshara family, normally joint in food, worship and estate. In both systems, the property of the joint family may consist of ancestral property, joint acquisitions and of self-acquisitions thrown into the common stock Mayne's Hindu Law and Usage, eleventh edition, pages 364-365, paragraph 297; Mulla's Hindu Law, fourteenth edition, page 277, paragraph 227(3). In fact, whatever be the school of Hindu law by which a person is governed the basic concept of a Hindu undivided family in the sense of who can be its members is just the same.

Section 2(9) of the Indian Income-tax Act, 1922, defines a "person" to include, inter alia, a "Hindu undivided family". Under sections 3 and 55 of that Act, a Hindu undivided family is a taxable unit for the purposes of income-tax and super-tax. The expression "Hindu undivided family" finds reference in these and other provisions of the Act but that expression is not defined in the Act. The reason the the omission evidently is that the expression has a well-known connotation under the Hindu law and being aware of it, the legislature did not want to define the expression separately in the Act. Therefore, the expression "Hindu undivided family" must be construed in the sense in which it is understood under the Hindu law (Commissioner of Income-tax v. Gomedalli Lakshminarayan - See particularly the judgment of Rangnekar J. at page 244).

There is no substance in the contention of the respondent that in the absence of an antecedent history of jointness, the appellant cannot constitute a joint Hindu family with his wife and unmarried daughter. The lack of such history was never before pleaded and not only does it find no support from the record but such an assumption ignores the plain truth that the joint and undivided family is the normal condition of Hindu society. The presumption, therefore, is that the members of a Hindu family are living in a state of union, unless the contrary is established (Mayne's Hindu Law and Usage, eleventh edition, page 323; Mulla's Hindu Law, fourteenth edition, page 284). The strength of the presumption may vary from case to case depending upon the degree of relationship of the members and the father one goes from the founder of the family, the weaker may be the presumption. But, generally speaking, the normal state of every Hindu family is joint and in the absence of proof of division, such is the legal presumption. Thus, a man who separates from his father or brothers may, nevertheless, continue to be point with the members of his own branch. He becomes the head of a new joint family, if he has a family, and if he obtains property on partition with his father and brother, that property becomes the ancestral property of his branch quo him and his male issue.

It is true that the appellant cannot constitute a coparcenary with his wife and unmarried daughter but under the Income-tax Act a Hindu undivided family, not a coparcenary, is a taxable unit. 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 and these are the sons, grandsons and great- grandsons of the holder of the joint property for the time being, that is to say, the three generations next to the holder in unbroken male descent. Since under the Mitakshara law, the right to joint family property by birth is vested in the male issue only, females who come in only as heirs to obstructed heritage (sapratibandhadaya), cannot be coparcener. But we are concerned under the Income-tax Act with the question whether the appellant's wife and unmarried daughter can with him be members of a Hindu undivided family and not of a coparcenary. In the words of Sir George Rankin, who delivered the opinion of thee Judicial Committee in Kalyanji's case :

> "The phrase 'Hindu undivided family' is used in the statute with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words 'Hindu coparcenary', all the more that it is not possible to say on the face of the Act that no female can be a member."

Outside the limits of coparcenary, there is a fringe of persons, males and females, who constitute an undivided or joint family. There is no limit to the number of persons who can compose it nor to their remoteness from the common ancestor and to their relationship with one another. A joint Hindu family consists of persons lineally descended form a common ancestor and includes their wives and unmarried daughters. The daughter, on marriage, ceases to be a member of her father's family and becomes a member of her husband's family. The joint Hindu family is thus a larger body consisting of a group of persons who are united by the tie of sapindaship arising by birth, marriage or adoption."The fundamental principal of the Hindu joint family is the sapindaship. Without that it is impossible to form a joint Hindu family. With it as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the sapinda relation, which distinguishes the joint family, and is of its very essence." [(Karsondas Dharamsey v. Gangabai). See also Hindu Law in British India by S. V. Gupta, second edition, page 59].

The joint Hindu family, with all its incidents, is thus a creature of law and cannot be created by act of parties, except to the extent to which a stranger may be affiliated to the family by adoption. But the absence of an antecedent history of jointness between the appellant and his ancestors is no impediment to the appellant, his wife and unmarried daughter forming a joint Hindu family. The appellant's wife became his sapinda on her marriage with him. The daughter too, on her birth, became his sapinda and until she leaves the family by marriage, the tir of sapindaship will bind her to the family of her birth. As said by Golapchandra Sarkar Sastri in his "Hindu Law" (eighth edition, page 240), "those that are called by nature to live together, continue to do so" and form a joint Hindu family. The appellant is not by contract seeking to introduce in his family strangers not bound to the family by the tir of sapindaship. The wife and unmarried daughter are members of his family. He is not by stock of a fresh descent so as to be able to constitute an undivided family with his wife and daughter.

That is does not take more than one male to form a joint Hindu family with females is well-established. In Gowli Buddanna v. Commissioner of Income-tax, one Buddanna, his wife, his two unmarried daughters and his adopted son, Buddanna, were members of a Hindu undivided family. On Buddappa's death a question arose whether the adopted son who was the sole surviving coparcener could form a joint Hindu family with his mother and sisters and could accordingly be assessed in the status of a manager of the Hindu undivided family. Speaking for the court, Shah J. observed :

> "The plea that there must be at least two male members to form a Hindu undivided family as a taxable entity also has no force. The expression 'Hindu undivided family' in the Income-tax Act is used in the sense in which a Hindu joint family is understood under the personal law of Hindus. Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members, and apparently the Income-tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members."

In N. V. Narendranath v. Commissioner of Wealth-tax, the appellant filed returns for wealth-tax in

the status of a Hindu undivided family which at the material time consisted of himself, his wife and two minor daughters. The claim to be assessed in the status of a Hindu undivided family rested on the circumstance that wealth returned consisted of ancestral property received or deemed to have been received by the appellant on partition with his father and brothers. The High Court held that as the appellant's family did not have any other male coparcener, the assets must be held to belong to he as an individual and not to the Hindu undivided family. That decision was set aside by this court on the ground that a joint Hindu family could consist under the Hindu law of a single male member, his wife and daughters and that it was not necessary that the assessable unit should consist of at least two male members.

In both of these cases, Gowli Buddanna's and Narendranath's, the assessee was a member of a pre-existing joint family and had, in one cases on the death of his father and in the other on partition, became the sole surviving coparcener. But the decision in those cases did not rarest on the consideration that there was an antecedent history of jointness. The alternative argument in Gowli Buddanna's case 2 (page 226) was an independent argument incorrelated to the per-existence of a joint family. The passage which we have extracted from the judgment of Shah J. in that case shows that the decision of this court did not proceed from any such consideration. The court held in terms categorical that the Hindu undivided family as an assessable entity need not consist of at least two male members. The same is true of the decision in Narendranath's case (see page 886).

Thus, the contention of the department that in the absence of a pre- existing joint family the appellant cannot constitute a Hindu undivided family with his wife and unmarried daughter must fail. The view of the High Court that the appellant has "no son and, therefore, no undivided family" is plainly unsound and must also be rejected. Accordingly, the question whether the income of the Kathoke Lodge can be assessed in the hands of the appellants as a karta or manager of the joint family must be decided on the basis that the appellant, his wife and unmarried daughter are members of a Hindu undivided family.

By the declaration of January 26, 1956, the appellant threw Kathoke Lodge into the family hotchpot abandoning all separate claims to that property. The genuineness of that declaration was accepted by the Tribunal. The High Court too decided the reference on the footing that the appellant had thrown the property into the common hotchpot and that "after the declaration, the property..... would be property of a Hindu undivided family in the hands of the assessee" (page 471). Learned counsel for the department attempted to raise a new contention before us that there is no such thing under the Hindu law as impressing separate property with the character of joint family property, that the only doctrine known in this behalf to Hindu law is the doctrine of be lending and since, prior to the declaration the family hotchpot in the instant case was empty, there was nothing with which the Kathoke Lodge or its income could be blended and, therefore, the declaration is ineffective to convert that property into joint family property. Learned counsel for the appellant cited several decisions of the High Courts to controvert the department's contention. But apart from the merits of the point we ruled that the contention was not open to the department. The statement of case framed by the Tribunal shows that such a contention was not raised before the Tribunal. The Commissioner of Income-tax himself asked for the reference of a question to the High Court for its opinion. That question concerns the point whether having regard to the conduct of the appellant his self-acquired property could be said to be impressed with the character of joint family property. The question did not cover the contention raised before us on behalf of the department. But above all, though an argument was raised in the High Court on behalf of the department that for the operation of the doctrine of blending it was essential that there should exist not only a coparcenary but also a coparcenary property, learned counsel who appeared for the department in the High Court "did not,

after some discussion, press that there should necessarily be coparcenary property". This was not a concession on a question of law in the sense as to what the true legal position was. What the department's counsel stated in the High Court was that he did not want to press the particular point. In our opinion, it is not open to the department to take before us a contention which in the first place does not arises out of the reference and which the department's counsel in the High Court raised but did not press.

Having examined the true nature of an undivided family under the Hindu law and in view of the findings of the Tribunal and the High Court on the second aspect, two points emerge clear : Firstly, that the appellant constituted a Hindu undivided family with his wife and unmarried daughter and, secondly, that Kathoke Lodge which was the appellant's separate property was thrown by him into the family hotchpot. It remains now to consider whether the income of Kathoke Lodges must be assessed in the hands of the appellant as individual or whether it can be assessed in his status as manager of the Hindu undivided family.

Since the conclusion reached by the High Court that the income of Kathoke Lodge cannot be assessed in the appellant's status as a manager of the Hindu undivided family is based wholly on the decision in Kalyanji's case and since that decision also loomed large in the arguments before us, it is necessary to examine it closely.

The relevant facts of that case are these : One Sicka had two sons, Moolji and Purshottom. From his first wife, Moolji had two sons, Kanji and Sewdas, both of whom were married but neither of whom had a son. From his second wife, Moolji had a son, Mohan Das. Kanji had a wife and a daughter while Sewdas had a wife but no issue. Moolji, Kanji and Sewdas separated from one another in about 1919. In the same year Moolji made gifts of capital to Kanji and Sewdas. Moolji continued to live jointly with his second wife and the son, Mohan Das, born of her. Purshottom had a wife, a son and a daughter.

There was another family of which the head was one Vithaldas. He had three sons, Kalyanji, Chaturbhuj and Champsi. Kalyanji had a wife three sons and a daughter while Chaturbhuj had a wife and daughters.

Moolji and Purushottom, the two sons of Sicka, who had already separated from each other started in 1912 a business called Moolji Sicka and Company in partnership with Kalyanji, the son of Vithaldas. The three partners employed their self-acquired properties for the purpose of that business. In course of time, Moolji's sons, Kanji and Sewdas, and Vithaldas' sons, Chaturbhuj and Champsi, were taken into the partnership with the result that by 1930 the partnership came to consist of seven partners, Moolji, his sons, Kanji, Chaturbhuj and Champsi. The interest of Kanji and Sewdas in the firm was a gift from the their father, Moolji, and that of Chaturbhuj a gift from his brother, Kalyanji. Those of the partners whose interest in the firm was separate property were not shown to have thrown that property or the receipts therefrom into the common stock.

The Privy Council had six appeals before it which were filed by the partners of the firm except Champsi. The appeals related to the assessment year 1931-32. The controversy was whether the partners should each be assessed to super-tax upon his share of the profits as an individual or whether the six shares should each be assessed as income of a Hindu undivided family.

Three partners out of the six, namely, Moolji, Purushottom and Kalyanji, were each members of a Hindu undivided family. Each of these three partners had a son or sons from whom he was not

divided.

But the income which these partners received from the firm was their separate and self-acquired property. Since the income was not thrown into the common stock, the Privy Council held that it could not be regarded as ther income of the respective joint families.

The fourth partner, Chaturbhuj, had no son. His interest in the firm was obtained from his brother, Kalyanji, and therefore, the income which he received from his share in the profits of the firm was a self-acquired and not ancestral property. The Privy Council observed that even if Chaturbhuj were to have a son, that son would have taken by birth no interest in the income which fell to Chaturbhuj's share and, therefore, the income was assessable in the hands of Chaturbhuj as his separate income and not that of the joint Hindu family.

According to the Privy Council, in none of the cases of these four partners was the result affected by the fact that any partner had a wife and a daughter or a wife and more than one daughter. If the mere existence of a son did not make a father's self-acquired property joint family property, it was untenable that the existence of a wife or a daughter could do so.

In the case of the remaining two partners, Kanji and Sewdas, their interest in the firm was obtained under a gift from their father. The Privy Council assumed, without deciding the question, that such an interest was ancestral property in the hands of the sons so that if either Kanji or Sewdas had a son, the son would have taken interest in the property by birth. But neither Kanji nor Sewdas had a son. Kanji's family consisted of himself, his wife and daughter while Sewdas's family consisted of himself and his wife. The Privy Council held that the wife and daughter may be entitled to be maintained out of a person's separate as well as joint family property but the mere existence of a wife or daughter did not make ancestral property joint.

The crucial fact in Kalyanji's case on which the ultimate decision rested are these :

> (i) In regard to three partners, Moolji, Purushottom and Kalyanji, though each of them was the held of his joint family which included in every case a son or sons, the income which each received from the firm was his separate and self-acquired property which was not thrown into the common stock.
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> (ii) In regard to Chaturbhuj, though he had no son, that fact was irrelevant because his interest in the firm was his self-acquired or separate property in which the son could have taken no interest by birth.
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> (iii) And in regard to Kanji and Sewdas, even if their interest in the firm was assumed to be ancestral property, the income which they received from the firm was their separate property as neither of them had a son who could take interest in the ancestral property by birth.

The appeals of the six partners before the Privy Council fall into two classes. Those of Moolji, Purushottom, Kalyanji and Chaturbhuj fall in one class while those of Kanji and Sewdas fall in another class. There is a point of distinction between the cases of the four partners falling within ther first class on the one hand and that of the appellant on the other. But the point of distinction is not that Moolji, Purushottom and Kalyanji had a son or sons and the appellant has non, because though the three partners were heads of their respective joint families which included in every case a son or sons, the income which each received from the firm was his separate and self-acquired

property which was not thrown into the common stock. The mere existence of a son or sons in a joint Hindu family does not make the father's separate or self-acquired property joint family property. Though Chaturbhuj had no son that fact would not by itself bring his case on par with the appellant's, because Chaturbhuj's interest in the firm was his separate property which also was not thrown into the common stock. If the mere fact that Moolji, Purushottom and Kalyanji had each a son or sons did not make their separate property joint family property, the mere existence of a wife or daughter could not bring about that result in Chaturbhuj's case.

As contrasted with the cases of these four partners, Kathoke Lodge which was once the separate property of the appellant, was thrown by him in the common stock, which raises the question whether that circumstance is sufficient to justify the assessment of the income from that property in the appellant's status as the manager of the joint family. On this point the cases of Kanji and Sewdas furnish a near parallel. They did not have to throw their interest in the firm in the common stock because that interest was, on assumption, their ancestral property. But, even though the property as ancestral, the income which they received from it was treated as their separate property as neither of them had a son who could take interest in the ancestral property by birth. Applying that analogy, even if Kathoke Lodges were to be an ancestral asset, its income would still have to be treated as the appellant's separate property as he has no son who could take interest in that property by birth. On this reasoning, the effect of the appellant throwing Kathoke Lodge into the family hotchpot could not be more telling than if that property was his ancestral property.

But then it is urged by the learned counsel for the appellant that the Privy Council was in error in its decision on the nature of income received by Kanji and Sewdas from what was assumed to be ancestral property and, therefore, the decision on that aspect of the matter ought not to be followed in determining the true nature of the income received by the appellant from Kothoke Lodge. This submission is founded on the disapproval by this court of certain observations made by the Privy Council in Kalyanji's case.

The Privy Council, in its judgment in Kalyanji's case, referred in passing to Lakshminarayan's case and observed that :

> "The Bombay High Court, on the other hand, in Lakshminarayan's case, having held that the assessee, his wife and mother were a Hindu undivided family, arrived too readily at the conclusion that the income was the income of the family."

The decision of the Bombay High Court which the Privy Counsel had in mind is Commissioner of Income-tax v. Gomedalli Lakshminarayan. There is a fundamental distinction between Lakshminarayan's case and Kalyanji's case which, with respect, the Privy Council failed to notice. In Lakshminarayan's case, the joint Hindu family consisted of a father, his wife, their son and the son's wife. The property of the joint family as ancestral in the hands of the father and the son had acquired by birth an interest therein. (See the judgment of Rangnekar J. at page 369). There was a subsisting undivided family during the father's lifetime and that undivided family did not come to an end on the father's death. The same undivided family continued after the death of the father, with the son, his mother and his wife as its members. The effect of the father's death was merely this that the son, instead of the father, became the manager of the joint family. The income from ancestral property was the income of the joint family during the father's lifetime and father his death it continued to be the income of the self-same joint family. The only change that had come about was that one like in the chain was snapped by death. But the death of a members of a joint Hindu family does not ordinarily disrupt the joint family. The Bombay High Court, therefore, held that the income

of the ancestral property should be assessed in the son's status as a manager of the undivided family and not in his individual capacity. When Lakshminarayan's case came up before the Privy Council in appeal, it regarded itself as bound by the interpretation put in Kalyanji's case, on the expression "Hindu undivided family" as employed in section 55 of the Indian Income-tax Act and observed that the facts of the case were not materially different from the facts of Kalyanji's case. The Privy Council, therefore, answered the question by holding that :

> "..... the income received by right of survivorship by the sole surviving male member of a Hindu undivided family can be taxed in the hands of such male member as his own individual income for the purposes of assessment to super-tax under section 55 of the Indian Income-tax Act, 1922."

The decision of the Privy Council in Lakshminarayan's case and the observations made by it in Kalyanji's case regarding the view taken by the Bombay High Court in Lakshminarayan's case were expressly disapproved by this court at least in two cases. In Gowli Buddanna's case after discussing the decisions in Kalyanji's case and Lakshminarayan's case, this court observed :

> "It may however be recalled that in Kalyanji Vithaldas's case income assessed to tax belonged separately to four out of six partners; of the remaining two it was from an ancestral source, but the fact that each such partner had a wife or daughter did not make that income from an ancestral source income of the undivided family of the partner, his wife and daughter. In Gowedalli Lakshminarayan's case the property from which income accrued belonged to a Hindu undivided family and the effect of the death of the father, who was a manager, was merely to invest the rights of a manager upon the son. The income from the property was and continued to remain the income of the undivided family. This distinction which had a vital bearing on the issue falling to be determined was not given effect to by thee Judicial Committee in A. P. Swamy Gomedalli's case."

In Narendranath's case too this court disapproved of the Privy Council decision in Lakhminarayan's case and pointed out that the Privy Council had failed to notice the distinction between the facts of Kalyanji's case and those of Lakshminarayan's case in observing that the Bombay High Court "arrived too readily at the conclusion that the income was the income of the family".

The appellant's counsel is thus right in his submission that the observations made by the Privy Council in Kalyanji's case as regards the correctness of the Bombay view in Lakshminarayan's case is not good law. In fact, the decision of the Privy Council in appeal from the judgment of the Bombay High Court in Lakshminarayan's case has itself been disapproved by this court. But that does not affect the correctness of the Privy Council decision in Kalyanji's case itself as regards the nature of the income received by the six partners from the firm. That part of the judgment in Kalyanji's case has never been doubted and is open to no exception. For the matter of that, the error of the Privy Council's decision in Lakshminarayan's case consisted in overlooking the factual distinction between that case and Kalyanji's case, as a result of which the ratio of Kalyanji's case came to be wrongly applied to Lakshminarayan's case.

The ratio of Kalyanji's case would, therefore, apply to the instant case, the parallel being furnished by the cases of Kanji and Sewdas. But a word of explanation is necessary in the interest of clarity. The reason why the case of Kanji and Sewdas furnish a close parallel is the very reason for which their cases were held by this court to be distinguishable from Lakshminarayan's case. In

Lakshminarayan's case the property was ancestral in the hands of the father, the son had acquired an interest by birth therein, there was a subsisting Hindu undivided family during the lifetime of the father and since that family did not come to an end on the death of the father, the Bombay High Court had rightly held that the income continued to be the income of the joint family and was liable to super-tax as such income. In regard to Moolji, Purushottom, Kalyanji and Chaturbhuj, no such question arose as their interest in the firm was their separate property which was not thrown into the common stock. As regards Kanji and Sewdas, they were divided from their father, Moolji, at least since 1919 in which year Moolji made gifts of capital to them. Kanji joined the firm in 1919 and Sewdas in 1930. The assessment year in reference to which the dispute arose was 1931-32. Thus the gifted property of which the income was to be charged to super-tax was not the ancestral or joint family property of a subsisting Hindu undivided family consisting of Moolji, Kanji and Sewdas. Were it so, the case would have fallen within the ratio of the judgment of the Bombay High Court in Lakshminarayan's case As in the cases of Kanji and Sewdas, so here, the property of which the income is to be brought to tax was not the joint family property of which the income is to be brought to tax was not the joint family property of a subsisting Hindu undivided family which had devolved on a sole surviving coparcener. In that letter class of cases the view has been consistently taken, except for the decision of the Privy Council in Lakshminarayan's case that property of a joint family does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. The decision of the Privy Council in Attorney-General of Ceylon v. A. R. Arunachalam Chettiar the decisions of this court in the cases of Gowli Buddanna and Narendranath and the decision of the Bombay High Court in Lakshminarayan's case fall within that class and are not to be confused with cases like the one on hand, which fall within the rule in Kalyanji's case.

In Arunachalam Chettiar's case a father and son constituted a joint Hindu family along with females including the widow of a pre-deceased son. On the death of the son in 1934, the father became the sole surviving coparcener. By a Ceylonese Ordinance, property passing on the death of a member of a Hindu undivided family was exempt from payment of estate duty. On the death of the father a question arose whether, in view of the Ordinance, his estate was liable to estate duty. The Privy Council held that the father was at his death a member of a Hindu undivided family, the same undivided family of which his son, when alive was a member, and of which the continuity was preserved after the father's death by adoptions made by the widows who were members of the family. In Gowli Buddanna's case there was a subsisting Hindu undivided family between father, his wife, two unmarried daughters and an adopted son. In respect of the income from dealings of the family, the father was assessed during his lifetime in the status of a manager of the Hindu undivided family. After the death of the father the adopted son contended that he should be assessed as an individual. This contention was rejected uniformly at all stages. After examining various authorities including Kalyanji's case Lakshminarayan's case and Arunachalam's case this court held that property which belongs to a Hindu undivided family does not cease to belong to it because of the temporary reduction of the coparcenary unit to a single individual, who possesses rights which an owner of property may possess. A similar view was taken by this court in Narendranath's case which raised a question under the Wealth-tax Act. Narendranath's family consisted, at the material time, of his wife and two minor daughters. Since partition with his father and brothers, it was held by this court that his status was that of a Hindu undivided family and not that of an individual.

While dealing with the question whether the assets which came to Narendranath's share on partition ceased to bear the character of joint family properties and became his individual property, this court observed.

> "In this connection, a distinction must be drawn between two classes of cases where an assessee is sought to be assessed in respect of ancestral property held by him : (1) where property not originally joint is received by the assessee and the question has to be asked whether it has acquired the character of a joint family property in the hands of the assessee and (2) where the property already impressed with the character of joint family property comes into the hands of the assessee as a single coparcener and the question required to be considered is whether it has retained the character of joint family property in the hands of the assessee r is converted into absolute property of the assessee."

After referring to Kalyanji's case and noticing the observation of the Judicial Committee that income from an ancestral source does not necessarily become the income of the undivided family consisting of a man, his wife and daughter, this court held;

> "Different considerations would be applicable, where property already impressed with the character of joint family property comes into the hands of a single coparcener. The question to be asked in such a case is whether it sheds the character of joint family property and becomes the absolute property of the single coparcener."

In the result the court concluded that the case fell within the rule in Gowli Buddanna's case.

There are thus two classes of cases, each requiring a different approach. In cases falling within the rule in Gowli Buddanna's case the question to ask is whether property which belonged to a subsisting undivided family ceases to have that character merely because the family is represented by a sole surviving coparcener who possesses rights which an owner of property may possess. For the matter of that, the same question has to be asked in cases where the family, for the time being, consists of widows of deceased coparcener as in Commissioner of Income-tax v. Rm. Ar. Ar. Veerappa Chettiar so long as the property which was regionally of the joint Hindu family remains in the hands if the widows of the members of the family and is not divided amongst them. In cases falling within the rule in Kalyanji's case the question to ask is whether property which did not belong to a subsisting undivided family has truly acquired the character of joint family property in the hands of the assessee. In this class of cases, the composition of the family is a matter of great relevance for, though a joint Hindu family may consist of a man, his wife and daughter, the mere existence of a wife and daughter will not justify the assessment of income from the joint family property in the status of the head as a manager of the joint family. The appellant's case falls within the rule in Kalyanji's case since the property, before it came into his hands, was not impressed with the character of joint family property. It is of great relevance that he has no son and his joint family consists, for the time being, of himself, his wife and daughter.

Once it is realised that there are two distinct classes of cases which require a different approach, there would be no difficulty in understanding the implications of the apparently conflicting tests involved as guides for deciding the two classes of cases. In Kalyanji's case 1 the Privy Council observed :

> "In an extra legal sense, and even for some purposes of legal theory, ancestral property may perhaps be described, and usefully described, as family property; but it does not follow that in the eye of the Hindu law it belongs, save in certain circumstances, to the family as distinct from the individual. By reason of its origin a man's property may be liable to be divested wholly or in part on the happening of a

> particular event, or may be answerable for particular obligations, or may pass at his death in a particular way; but if, in spite of all such facts, his personal law regards him as the owner, the property as his property and the income therefrom as his income, it is chargeable to income-tax as his, i.e., as the income of an individual. In their Lordships' view it would not be in consonance with ordinary notions or with a correct interpretation of the law of the Mitakshara, to hold that property which a man has obtained from his father belongs to a Hindu undivided family by reason of having a wife and daughters."

On the other hand, in Arunachalam's case which falls within the rule in Gowli Buddanna's case the Privy Council observed :

> "But though it may be correct to speak of him (the sole surviving coparcener) as the 'owner', yet it is still correct to described that which he owns as the joint family property. For his ownership is such that the adoption of a son it assumes a different quality : it is such, too, that female members of the family (whose members may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and as not ceased to be joint family property..... it would not appear reasonable to impart to the legislature the intention to discriminate, so long as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparcener."

Holding that it was an irrelevant consideration that a single coparcener could alienate the property in a manner not open to one of several coparcener, the Privy Council said :

> "Let it be assumed that his power of alienation is unassailable : that means no more than that he has in the circumstances the power to alienate joint family property. That is what it is until he alienates it, and, if he does not alienate it, that is what is remains. The fatal flaw in the argument of the appellant appeared to be that, having labeled the surviving coparcener 'owner', he then attributed to his ownership such a conjures of rights that the property could no longer be called 'joint family property. The family, a body fluctuating in numbers and comprises of male and female members, may equally well be said to be owners of the property, but owners whose ownership is qualified by the powers of the coparcener. There is in fact nothing to be gained by the use of the word 'owner' in this connection. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family."

These two sets of tests, both evolved by the Privy Council, govern two distinct sets of cases and there is no inconsistency between the two tests. The test evolved in Kalyanji's case not in Arunachalam's or Goli Buddanna's case 3, has to be applied to the instant case.

Kathoke Lodge was not an asset of a pre-existing joint family of which the appellant was a member. It became an item of joint family property for the first time when the appellant threw what was his separate property into the family hotchpot. The appellant has no son. His wife and unmarried daughter were entitled to be maintained by him from out of the income of Kathoke Lodge while it was his separate property. Their rights in that property are not enlarged for the reason that the

property was thrown into the family hotchpot. Not being coparcener of the appellant, they have neither a right by birth in the property nor the right to demand its partition nor indeed the right to restrain the appellant from alienating the property for any purpose whatsoever. Their prior right to be maintained out of the income of Kathoke Lodge remains what it was even after the property was thrown into the family after it was thrown into the common stock, but, it does not follow that in the eye of Hindu law it belongs to the family, as it would have, if the property were to devolve on the appellant as a sole surviving coparcener.

The property which the appellant has put into the common stock may change its legal incidents on the birth of a son but until that event happens the property, in the eye of Hindu law, is really his. He can deal with it as a full owner, unrestrained by considerations of legal necessity or benefit of the estate. He may sell it, mortgage it or make a gift of it. Even a son born or adopted after the alienation shall have to take the family hotchpot as he finds it. A son born, begotten or adopted after the alienation has no right to challenge the alienation.

Since the personal law of the appellant regards him as the owner of Kathoke Lodge and the income therefrom as his income even after the property was thrown into the family hotchpot, the income would be chargeable to income-tax as his individual income and not that of the family.

For these reasons, we dismiss the appeal but there will be no order as to costs.

Appeal dismissed.

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