M/S. Kalloomal Tapeswari Prasad (Huf), Kanpur

Vs

Commissioner of Income Tax, Kanpur

With Commissioner of Income Tax Kanpur

Vs

M/S. Kalloomal Tapeswari Prasad (Huf), Kanpur

Civil Appeals No. 1370 of 1974 and 1768 of 1975

(E. S. Venkataramiah, R. S. Pathak JJ)

12.01.1982

JUDGMENT

VENKATARAMIAH, J. –

1. These two appeals by certificate - one by the assessee and the other by the Commissioner of Income Tax, Kanpur -are filed against the judgment ands order dated September 29, 1972 of the High Court of Judicature at Allahabad in Income Tax Reference No. 47 of 1971 under Section 256 [1] of the Income Tax act, 1961 [hereinafter referred to as 'the Act'] made by the Income Tax Appellate Tribunal, Allahabad Bench, Allahabad [for short 'the Tribunal']. The two questions which were referred by the Tribunal for the opinion of the High Court were :

> [1] Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the properties in dispute were capable of division in definite portions amongst the 10 coparceners as contemplated in Explanation [a] [i] to section 171 of the Income Tax Act, 1961 and that even otherwise the mere severance of status was not sufficient to entitle the assessee to succeed in its claim for partial partition ?
>
> [2] Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the income from the properties in dispute which were accepted to have been partitioned under the Hindu law but with regard to which an order accepting the claim of partial partition was not made was liable to be included in the computation of the assessee's income ?

2. The assessee is a Hindu undivided family known as M/s. Kalloomal Tapeswari Prasad and the year of assessment is 1964-65. The assessee is governed by the Mitakshara school of law. The following genealogical tree represents the relationship amongst the members of the family :

> # Phakki Lal ----------|----|---------- | | | Chandoolal [his wife Bishambhar Nath [died Sitaram [wife - Rampiari died on issueless in 1940 - wife Kripa Devi] September 17, 1963] Predeceased him] | | | | ---------- | | | ---------- ---------- Gopalji Ramji | | | | | Jagat Roop Swarup Shyam Bimal Narain

Narain Narain Narain Narain##

3. During the relevant previous year, the family consisted of Chandoolal, Sitaram and his wife Kripa Devi, Jagat Narain, Roop Narain, Swarup Narain, Shyam Narain and Bimal Narain who were the five sons of Chandoolal and Gopalji and Ramji, the two sons of Sitaram. The assessee [Hindu undivided family] was deriving income from various sources such as income from property, income from money-leading business, income from speculation business and cloth business etc. There was a partial partition in the family in the year 1951 when a sum of Rs. 5,00,000 out of its total capital of Rs. 12, 85,423 was divided amongst the coparceners at the rate of Rs. 41, 666-10-8 amongst members of Chandoolal's branch. Kripa Devi did not receive any share at that partition. The said partial partition was accepted and acted upon by the Income Tax Department thereafter the cloth business was treated as the business of a firm consisting of most of the coparceners as partners. Again on December 11, 1963 which fell within the previous year relevant for the assessment year in question i.e. 1964-65, according to the assessee, there was another partial partition orally as a result of which its 18 immovable properties were divided amongst the 10 members of the family and that they held those properties as tenants-in-common from that date. It was claimed by the assessee in the course of the assessment proceedings that the members of the family had commenced to maintain separate accounts with regard to the income from the said 18 properties and to divide the net profits amongst themselves according to their respective shares at the end of each year. The 18 immovable properties were situated in different places and their valuation was as follows :

# ---------- Sl. no. Municipal number of Value the property ---------- 1. 75/2 1, 78, 875 2. 76/162 27, 000 3. 76/169 45, 000 4. 47/110 13, 500 5. 47/26 20, 700 6. 48/203 16, 200 7. 55/124 90, 000 8. 55/36 | 9. 55/37 | 41, 400 10 70/87 | 1, 57, 500 11. 71/150 8, 100 12. 71/89 8, 600 13. 71/112 19, 800 14. 63/61 7, 425 15. 51/68 17, 100 16. 51/73 14, 400 17. 86/37 20, 400 18. 1/30 1 A 45, 000 ---------- 7, 26, 120 ----------##

4. When required by the Income Tax Officer to explain as to why the properties were not divided in definite portions as required by section 171 of the Act, the assessee stated that physical division of the properties in question amongst the 10 members was impossible and the only possible way to partition those properties was to define their respective shares and to enjoy the income from them separately. In support of the above claim the assessee relied upon a copy of an award dated April 15, 1964 made by one S. B. Tandon which was made into a decree in Suit No. 60 of 1964 on the file of the Court of the First civil Judge, Kanpur dated September 21, 1964. In that award the arbitrator had stated that the properties did not admit of physical division. The Income Tax Officer did not agree with the assessee's contention that it was not possible to divide the properties in question in definite portions. Accordingly he rejected the claim of partial partition in respect of the 18 immovable properties and proceeded to assess the income derived therefrom in the hands of the assessee. Against the order of the Income Tax Officer, the assessee filed an appeal before the Appellate Assistant Commissioner of Income Tax. During the pendency of that appeal the assessee appointed another arbitrator by the name Lakshman Swaroop, a retired Chief Engineer to examine the possibility of a physical division of each of the 18 properties into 10 portions and if that was not possible to suggest any other mode or modes to divide them into 10 parts in accordance with the share allotted to each of the parties to the partition. By his award dated February 3, 1965, Lakshman Swaroop stated that the aforesaid properties were "not capable of physical division into 10 shares by metes and bounds and that any practical division is that of allocation of proportionate shares in all the 18 properties in question". It may be mentioned here that out of the 10 shares, six shares were 1/12th each and four shares were 1/8th each. Chandoomal and his five sons had been allotted 1/12th

each and Sitaram, his wife and his two sons had been allotted 1/4th each. Lakshman Swaroop was also examined as a witness before the Appellate assistant Commissioner by the assessee and cross-examined by the Income Tax Officer. The Appellate Assistant Commissioner on a consideration of the material before him including the decree of the court referred to above and the evidence of Lakshman Swaroop held that the case of the assessee, thereafter took up the matter before the Tribunal in appeal. The Tribunal also was of the view that the contention of the assessee that if the properties had been divided into 10 shares, they would have either been destroyed or would have lost in valued was not correct. Accordingly the claim of the assessee under Section 171 of the Act that there was a partial partition was rejected. Thereupon a on an application of the assessee made under Section 256 [1] of the act, the two question set out above were referred by the Tribunal to the High Court for its opinion.

5. After hearing the parties, the High Court recorded its answer to the first question in the affirmative and in favour of the Department and in reaching that conclusion, it observed thus :

> We have seen the evidence of the arbitrator as well as the Chief Engineer, and it is apparent therefrom that even though the 18 properties could not individually be divided into 10 shares without destroying their utility but after assessing the value of the properties, they could be apportioned between the 10 members and the difference in the allocations could be equalised by payment of cash amounts by one to the other. In our opinion, it cannot, in such a situation, be said that these 18 properties were incapable of physical division in 10 shares, and so, in view of clause [a] [i] of the Explanation, mere severance of status was not sufficient for recording a finding of partition.

6. The High Court answered the second question in favour of the assessee holding that the income accruing from the 18 immovable properties after December 11, 1963 was however not liable to be included in the computation of the joint Hindu family's income. In recording this answer, the High Court observed thus :

> Section 171 of the 1961 Act in essence, is a re-enactment of Section 25-A with the difference that it applies not only to cases of total partition but also to cases of partial partition. There are some incidental changes as well, e.g. Section 171 applies also for purposes of levying and collecting penalty, fine or interest and in addition requires the Income Tax Officer to record a finding as to the date of which total or partial partition took place. The fact that Section 171 applies to a partial partition [meaning a partition which is partial as regards the persons or as regards the properties of the family or both] as well shows that a finding of partial partition can be recorded and on such a finding being recorded under sub-section [4] the total income of the joint family in respect of the period up to the date of partition is to be assessed as if no partition had taken place and each member of the family was to be liable notwithstanding anything contained in clause [2] of Section 10, jointly and severally for the tax on the income so assessed. Thus Section 171, like Section 25-A, seeks to nullify the effect of Section 10 [2] under which a member was not liable to be taxed on the income received as a member of Hindu undivided family. The section does not entitle the inclusion of income from an asset which has ceased to belong to the joint family, in the assessment of the joint Hindu family.

In the present case, on the findings, the position is that the joint Hindu family stood disrupted in

relation to the 18 immovable properties as a result of the oral partition dated December 11, 1963. Thereafter the income of these properties belonged to the individual members and not to the joint family. It could not be included in the assessment of the family.

7. Aggrieved by the answer to the first question, the assessee has filed Civil Appeal No. 1370 of 1974 and aggrieved by the answer to the second question, the Revenue has filed Civil Appeal No. 1768 of 1975.

8. It is necessary to refer to the history of the relevant provisions in order to decide the questions raised before us. Under the Indian Income Tax Act, 1922 [for short 'the 1922 Act'] a Hindu undivided family could be assessed on its income. Section 3 of the 1922 Act laid down that where any Central Act enacted that income tax should be charged for any year at any rate or rates, tax at that rate or those rates should be charged for that year in accordance with and subject to the provisions of that Act in respect of total income of the previous year of every individual, Hindu undivided family etc. But Section 14 [1] of the 1922 Act provided that no tax was payable by an individual assessee in respect of any sum which he received as a member of a Hindu undivided family where such a sum had been paid out of the income of the family. Section 25 - A was inserted in the 1922 Act in the year 1928 providing for the machinery for assessment after partition of a Hindu undivided family. That section immediately before the repeal of the 1922 Act read as follows :

> 25-A. Assessment after partition of a Hindu undivided family. - [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 a undivided that a partition has taken place among the members so such family, the Income Tax Officer shall make such enquiry thereinto as he may think fit, and, if he is satisfied that the joint family property has been partitioned among the 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 notice of the enquiry have been served on all the members of the family.
>
> [2] Where such an order has been passed, or where any person has succeeded to a business, profession or vacation 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 14, be liable for 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 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.

9. Section 25-A of the 1922 Act as it stood then [subsequent modifications in it being immaterial for the purposes of this case] came up for consideration by the Judicial Committee of the Privy Council in Sir. Sundar Singh Majithia v. C. I. T. The Privy Council held that Section 25-A of the 1922 Act provided that if it be found that the family property had been partitioned in definite portions, assessment might be made, notwithstanding Section 14 [1] on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the tax. It was further held that if, however, though the joint Hindu family had come to an end, it be found that its property had not been partitioned in definite portions then the family was to be deemed to continue - that is, to be an existent Hindu family upon which assessment could be made on its gains of the previous year. But it was of the view that Section 25 - A had nothing to say about any Hindu undivided family which continued in existence never having been disrupted. Such a case was held to fall outside sub-section [3] of Section 25-A and in effect, it held that the said section did not apply to cases of partial partition.

10. In Gordhandas T. Mangaldas v. C. I. T., Kania, J. [as he then was] who agreed with Beaumont, C.J. explained the scheme of Section 25-A of the 1922 Act [as it stood then] in his concurring judgment thus :

> It is material to bear in mind the scheme of the Income Tax Act, in the first instance. Under Section 2 and 3 the different units stated therein are liable to be taxed as such. One of them is a joint Hindu family. In order to avoid double taxation, Section 14 lays down that when the individual member is being assessed, his income as a member of a joint family should not be assessed again. Then comes the stage, what happens when a family, which has once been so assessed, comes to a partition. To meet that contingency, Section 25-A has been enacted. In the section, as it existed before the amendment of 1939, in terms the Income Tax Officer required proof [i] that a separation of the members of the joint family had taken place and [ii] that the joint family property had family property had bee partitioned amongst the various members or groups of members in definite portions. On being satisfied on those points he had to record an order to that effect. The effect of such a recording was that the joint family income would be assessed and recovered in terms of sub-section [2]. In the absence of such order, under sub-section [3] the joint family continued to be assessed as before.

11. The same view was followed in Waman Satwappa Kalghatgi v. C. I. T. and in M. S. M. S. Meyyappa Chettiar v. C. I. T.

12. The Court had to consider the true meaning of Section 25-A of the 1922 Act in Lakshmichand Baijnath v. C. I. T. Venkatarama Aiyar, J. speaking for the Court observed in the above case thus :

Now, when a claim is made under Section 25-A, the points to be decided by the Income Tax Officer are whether there has been a partition in the family, and if so, what the definite portions are in which the division had been made among the members or groups of members. The question as to what the income of the family assessable to tax under Section 23 [3] was, would be foreign to the scope of an enquiry under Section 25-A. That section was, it should be noted introduced by the Indian Income

Tax [Amendment] Act, 1928 [3 of 1928], for removing a defect which the working of the Act as enacted in 1922 had disclosed. Under the provisions of the act as they stood prior to the amendment, when the assessee was an undivided family, no assessment could be made thereon if at the time of the assessment it had become divided, because at that point of time, there was no undivided family in existence which could be taxed, though when the income was received in the year of account the family was joint. Nor could the individual members of the family be taxed in respect of such income as the same is exempt from tax under section 14 [1] of the Act. The result of these provisions was that a joint family which had become divided at the time of assessment escaped tax altogether. To remove this defect, Section 25-A enacted that until an order is made under that section, the family should be deemed to continue as an undivided family. When an order is made under that section, its effect is that while the tax payable on the total income is apportioned among the divided members or groups, all of them are liable for the tax payable on the total income of the family. What that tax is would depend on the assessment of income in proceedings taken under Section 23, and an order under Section 25-A would have no effect on that assessment.

13. The above view was reiterated by this Court in Kalwa Devadattam v. Union of India, in Addl. I. T. O. v. A. Thimmayya and in Joint Family of Udayan Chinubhai v. C. I. T. The substance of all these decisions was that under section 25-A of the 1922 act a Hindu undivided family which had been assessed to tax could be treated as undivided an subjected to tax under the Act in that status unless and until an order was made under section 25-A [1] and if in the course of the assessment proceedings it is claimed by any of the members of the Hindu undivided family that there has been total partition of the family property resulting in physical division thereof as it was capable of, the assessing authority should hold an enquiry and decide whether there hand been such a partition or not. If held that such a partition had taken place, he should proceed to make an assessment of the total income of the family as if no partition had taken place and then proceed to apportion the liability as stated in Section 25-A amongst the individual members of the family. If no claim was made or if the claim where it was made was disallowed after enquiry, the Hindu undivided family would continue to be liable to be assessed as such. This was the legal position under the 1922 Act.

14. The law relating to assessment of Hindu undivided family, however underwent a change when the Act came into force. Section 171 of the act which corresponds to Section 25-A of the 1922 Act reads thus :

> 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 insofar 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 under section 143 or Section 144, it is claimed by or on behalf of 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.

[5] Where a finding of total or partial partition has been recorded by the Income Tax Officer under this; section, and the partition took place after the expiry of the previous year, the total income of the previous year of the joint family shall be assessed as if no partition had taken place; and the provisions of clause [b] of sub-section [4] shall, so far as may be, apply to the case.

[6] Notwithstanding anything contained in this section, if the Income Tax Officer finds after completion of the assessment of a Hindu undivided family that the family has already effected a partition, whether total or partial, the Income Tax Officer shall proceed to recover the tax from every person who was a member of the family before the partition, and every such person shall be jointly and severally liable for the tax on the income so assessed.

[7] For the purpose of this section, the several liability of any member of group of members thereunder shall be computed according to the portion of the joint family property allotted to him or it at the partition, whether total or partial.

[8] The provisions of this section shall, so far as may be, apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to the date of the partition, whether total or partial, of a Hindu undivided family as they apply in relation to the levy and collection of tax in respect of any such period.

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.

15. Section 4(1) of the Act which levies the charge of income tax states that where any Central Act enacts that income tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall be charged for that year in accordance with, and subject to the

provisions, of the Act in respect of the total income of the previous year or previous years, as the case may be, of every person. The expression "person" is defined in Section 2(31) of the Act as including within its meaning a Hindu Undivided family. In order to avoid double taxation of the same income under the Act, any sum received by an individual as a member of a Hindu undivided family, where such sum has been paid out of the income of the family is required by Section 10(2) of the Act not to be included in computing the total income of a previous year of any person. This requirement, however, is subject to Section 64(2) of the Act, with effect from April 1, 1971. Then follows Section 171 of the Act which provides for the assessment after partition of a Hindu undivided family.

16. Under Hindu law partition may be either total or partial. A partial partition may be as regards persons who are members of the family or as regards properties which belong to it. Where there has been a partition, it is presumed that it was a total one both as to the parties and property but when there is a partition between brothers, there is no presumption that there has been partition between one of them and his descendants. It is however, open to a party who alleges that the partition has been partial either as to persons or as to property to establish it. The decision on that question depends on proof of what the parties intended - whether they intended the partition to be partial either as to persons or as to properties or as to both. When there is partial partition as to property, the family ceases to be undivided so far as properties in respect of which such partition has taken place but continues to be undivided with regard to the remaining family property. After such partial partition, the rights of inheritance and alienation differ accordingly as the property in question belongs to the members in their divided or undivided capacity. Partition can be brought about (1) by a father during his lifetime between himself and his sons by dividing properties equally amongst them, (2) by agreement, or (3) by a suit or arbitration. a declaration of intention of a coparceners to become divided brings about severance of statues. As observed by the Privy Council in Appovier v. Rama Subba Aiyan "When the members of an undivided family agree among themselves with regard to a particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided". A physical division of the property which is the subject-matter of partition is not necessary to complete the process of partition insofar as that item of property is concerned under Hindu law. The parties to the partition may enjoy the property in question as tenants-in-common. In Appovier case the Privy Council further laid down that "if there be a conversion of the joint tenancy of an undivided family into a tenancy-in-common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may, at any time, be claimed by virtue of the separate right."

17. It is thus clear that Hindu law does not require that the property must in every case be partitioned by metes and bounds or physically into different portions to complete a partition. Disruption of status can be brought about by any of the modes referred to above and it is open to the parties to enjoy their share of property as tenants-in-common in any manner known to law according to their desire. But the income tax law introduces certain conditions of its own to give effect to the partition under Section 171 of the Act.

18. Section 171 of the Act applies to a case where there is a Hindu undivided family which had been assessed as such under the Act until a claim is made under Section 171(2) that there has been a

partition - total or partial - in it. The partition contemplated under Section 171 of the Act may be either total or partial. Here there is a departure made from Section 25-A of the 1922 Act which was concerned with a total partition. only. In sub-sections (2) to (5) and (8) of Section 171 of the Act, the word 'partition' is qualified by words 'total or partial. The Explanation to Section 171 of the Act to which we shall revert again also defines the expression "partial partition" as meaning 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. Sub-section (2) of Section 171 provides that where at the time of making an assessment under Section 143 or Section 144 of the Act it is claimed by or on behalf of any member of a Hindu undivided 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 enquiry into the said claim after giving notice to all the members of the family. On the completion of the enquiry, the Income Tax Officer is required by sub-section (3) of Section 171 to record a finding as to whether the claim of partition, total or partial, is true or not and if there has been such a partition, the date on which it has taken place. Sub-section (4) of Section 171 states that when a finding of total or partial partition has been recorded by the Income Tax Officer and the partition had taken place during the previous year 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 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 to the tax on the income so assessed. Where the finding recorded is that the partition had taken place after the expiry of the previous year then the joint family has to be assessed under sub-section (5) of Section 171 as if no partition had taken place and the tax due shall be recoverable mutatis mutandis as provided in clause (b) of sub-section (4) thereof. The several liability of a member or a group of the undivided family has to be determined under sub-section (7) of Section 171 according to the share of family property allotted to him or to the group, as the case may be. Sub-section (8) of Section 171 extends the above rules of assessment and liability to levy and collection of any penalty, interest, fine etc. payable by the family up to the date of partition. Sub-section (6) of Section 171 which contains a non obstinate clause empowers the Income Tax Officer to recover the tax due from a family from every member of the family before the partition even if he finds after the completion of assessment that the family has undergone a partition already. The true effect of this provision is discussed in Govinddas v. I. T. O.

19. Now we come to sub-section (1) of Section 171 of the Act which contains a 'deeming' provision. It says a Hindu family hitherto assessed as undivided shall be deemed for the purposes of the Act to continue to be a Hindu undivided family except where and insofar as a finding of partition has been recorded in respect of it under Section 171. Partition referred to here can obviously include a partial partition also either as regards the persons constitution the undivided family or the properties belonging to it or both, in view of the provisions contained in the other sub-sections in and the Explanation to Section 171. Where there is no claim that a partition - total or partial - had taken place made or where it is made and disallowed a Hindu undivided family which is hitherto being assessed as such will have to be assessed as such notwithstanding the fact a partition had in fact taken place as per Hindu law. A finding to the effect that partition had taken place has to be recorded under Section 171 by the Income Tax Officer. He can record such a finding only if the partition in question satisfies the definition of the expression "partition" found in Explanation so Section 171. a transaction can be recognised as a partition under Section 171 only if, where the property admits of a physical division, a physical division of the property has taken place. In such a case mere physical division of the income without a physical division of the property producing income cannot be treated as a partition. Even where the property does not admit of a physical

division then such division as the property admits of should take place to satisfy the test of a partition under Section 171. Mere proof of severance of status under Hindu law is not sufficient to treat such a transaction as a partition. If a transaction does not satisfy the above additional conditions it cannot be treated as a partition under the Act even through under Hindu law there has been a partition -total or partial. The consequence will be that the undivided family will be continued to be assessed as such by reason of sub-section (1) of Section 171.

20. At this stage one contention urged on behalf of the assessee needs to be considered. It is asserted on behalf of the assessee that the fiction contained in Section 171(1) of the ? Act does not at all apply to an undivided family which continues to be in fact an undivided family even after a partial partition as regards some of its properties had taken place. The argument is that a 'deeming' provision can operate only where the real state of affairs is different from what the law deems as existing and it cannot where the real state of affairs is the same as the one which law by a fiction treats as existing. It is urged that since the undivided family in fact continues even after a partial partition as regards property, there is no need to enact a rule declaring that it shall be deemed to continue as an undivided family. Hence Section 17(1) of the Act cannot be construed as being applicable to such a case. In other words, it is urged that where all the members of an undivided family continue to be members of such family owing the remaining properties which are yielding income after a partial partition as regards some properties has taken place, the undivided family is liable to be assessed as such only in respect of the income derived by it from the remaining items of property owned by it and the income derived from properties which have gone out of the ownership of the family by reason of the partial partition should be excluded from the total income of the family. Reliance is placed on the following observations of the Privy Council in the case of Sir Sundar Singh Majithia where sub-section (3) of Section 25-a of the 1922 Act arose for consideration :

> The section has nothing to say about the Hindu undivided family which continues in existence, never having been disrupted. Such a case is outside sub-section (3) because it is not within the section at all. No sub-section is required to enable an undivided family which has never been broken up to be deemed to continue. But it need not have the same assets or the same income in each year, and it can part with an item of its property to its individual members if it takes the proper steps.

21. It is not necessary to make any comment on these observations as they had held the filed until the Act came into force with Section 171 inserted in it. The Parliament enacted Section 171 after taking note of the above decision and several other decision following it which had taken the view that a partial partition did not fall within the scope of Section 25-A. It expressly stated in Section 171 of the Act that the said provision was applicable to both kinds of partitions - total or partial. It has also defined partial partition as one which is partial as regards persons constituting the undivided family or as regards the properties belonging to the undivided family or both. Virtually the present provision deals with all kinds of partitions the nature of which sometimes may be difficult to predicate correctly. Take a joint family consisting of a father, his sons and grandsons as shown in the following genealogical tree :

# A ---------- | | | B C D | | | ---------- ---------- ---------- ---- | | | | | | E F G H I J##

22. When a partition takes place in the above family there may be a partition when all of them - A, B, C, D, E, F, G, H, I, and J become divided each of them taking his rightful share in the family

property. In this case there is a total partition. The second kind of partition may be amongst four groups, the first consisting of A only, the second consisting of B, E and F, the third consisting of C, G and H and the fourth consisting of D, I and J - each group taking 1/4th share in all the properties and the branch of B, the branch of C., and the branch of D continuing as undivided families. The third kind of partition may be a partition where any one of the three branches - the branch of B, or the branch of C, or the branch of D separates from the rest of the family taking its share thus resulting in two undivided families - one family which has gone out of the family and the other consisting of the remaining members. In these cases the partition can be called partial both as regards persons and as regards properties. The next kind of partition may be one where all the members divide amongst themselves only some of the family properties and continue as members of an undivided family owing the remaining family properties. This is called a partial partition as regards property. Even here the division of the property which is the subject-matter of partial partition may be group-wise also. In the case of a partial partition as regards property, one thing noticeable is that after such partition, the property which is the subject-matter of partition is held by the members of the family as tenants-in-common and the rest of the family properties continue to be held by them as members of the undivided family. This is the every principle which is expounded by the Privy Council in Appovier case in the two passages extracted above.

23. After a partial partition as regards property, the property divided is held by the members of the undivided family as divided members with all the incidents flowing therefrom and the property not so divided as members of an undivided family. The fiction enacted in Section 171(1) of the Act can, therefore, operate in such a case also because the family which has become divided as regards the property which is the subject-matter of partial partition is deemed to continue as the owner of that property and the recipient of the income derived from it except there and insofar as a finding of partition has been given under Section 171. In such a case it is obvious the real state of affairs is in fact different from what is created by the fiction and it cannot be said that there is no occasion for the fiction to operate. That is the true meaning of Section 171(1) of the Act. In view of the substantial changes that are brought about in Section 171, we find it impossible to accept the contention that the fiction in Section 171(1) of the Act does not operate in the case of partial partition as regards property where the composition of the family has remained unchanged.

24. The answer to the first question referred to the High Court by the Tribunal depends upon the true construction of sub-section (i) of clause (a) of the Explanation to Section 171 of the Act. The subject-matter of partial partition, as mentioned earlier, consisted of 18 items of immovable property. The value of each of them is given in the earlier part of this judgment. Under the partial partition in question, six persons were allotted 1/12th share each in these 18 properties and four persons were allotted 1/8th share each, The total value of the 18 properties was Rs. 7,26,120. Six of the members were, therefore, entitled to properties of the value of Rs. 60,510 each and four of them were entitled to properties of the value of Rs. 90,765 each. Before the Tribunal two submissions were made on behalf of the assessee in support of the plea that the arrangement entered into amongst the parties providing for division of the income of the properties in question without resorting to physical division of the properties was a partition as defined by the Explanation to Section 171 of the Act. The first submission was that the word "property" occurring in clause (a) (i) of the Explanation to Section 171 referred to an individual item of property which is divided and not to all the properties which are divided at the partition - total or partial - and hence as it had been accepted by the Department that each of the 18 items of property could not be divided conveniently into 10 portions without destroying its utility, it had to be held that the properties did not admit of physical division. The second submission which was urged in the alternative was that even if it was possible to distribute the said properties equitably amongst the shares by asking them to make

necessary monetary adjustment to equalise the shares, as the Explanation to Section 171 did not contemplate any such monetary adjustment, the assessee could not be denied under Section 171 the recognition of the partial partition which had taken place as per Hindu Law. In support of this plea the assessee depended upon the opinion of the arbitrator, Tendon, on the basis of whose award the decree had been passed and also the evidence of Lakshman Swaroop tendered before the Appellate Assistant commissioner. Taking into consideration all the material before them and having regard to the shares allotted to each of the members, the market value, situation, size and the age of each of the items of the property in question, the tax payable in respect of each of them and also the fact whether an item of property is in the occupation of a tenant or not the Tribunal came to the conclusion that it was possible to divide the properties in question physically into different lots so that each member could take his rightful share in them. The High Court also has expressed the same opinion.

25. On the facts and in the circumstances of the case, we approve of the above view of the High Court. We feel that the properties involved in this case admitted of physical division into the required number of shares and such division would not have adversely affected their utility. It is common knowledge that in every partition under Hindu law unless the parties agree to enjoy the properties as tenants-in-common, the need for division of the family properties by metes and bounds arises and in that process physical division of several items of property which admit of such physical division does take place. It is not necessary to divide each item into the number of shares to be allotted at a partition. If a large number of items of property are there, they are usually apportioned on an equitable basis having regard to all relevant factors and if necessary by asking the parties to make payments of money to equalise the shares. Such apportionment is also a kind of physical division of the properties contemplated in the Explanation to Section 171. any other view will be one divorced from the realities of life. The case before us is not a case where it was impossible. To make such a division. Nor is it shown that the members were not capable of making payment of any amount for equalisation of shares. We are of the view that there is no material in the case showing that the assessee ever seriously attempted to make a physical division of the property as required by law. All that was attempted was to rely upon the arbitrator's award and Lakshman Swaroop's evidence which were rightly held to be insufficient by the Tribunal to uphold the claim of the assessee. The assessee cannot derive any assistance from the decision of this Court in Charandas Haridas v. C. I. T. There the item of asset which had to be partitioned was the right in certain managing agency agreements. The Court upheld the arrangement of division of commission amongst the members among whom the said right was divided as a partition satisfying the test laid down by the income tax law as it was of the view that any physical division of that right meant the dissolution of the managing agency firms and their reconstitution which was not altogether in the hands of the karta of the family. The Court also was satisfied that the family took the fullest measure possible for dividing the joint interest into separate interests. In the present case we are satisfied that no such attempt to divide the properties was made. This case clearly falls under sub-clause (i) of clause (a) of the Explanation to Section 171 of the Act but does not satisfy the requirement of that sub-clause as no physical division of the properties was made even though they could be conveniently so divided. Sub-clause (ii) thereof does not apply to this case at all. We, therefore, agree with the answer given by the High Court to the first question in the affirmative. The appeal of the assessee is, therefore, liable to be dismissed.

26. Having held that the assessee was not entitled to claim that a partial partition had taken place under Section 171, the High Court fell into an error in holding that the income of the properties which were the subject-matter of partial partition could not be included in the total income of the assessee by relying upon the decision which had been rendered on the basis of Section 25-A of the

1922 Act which had been construed as not being applicable to partial partitions. We have already held that Section 171 of the Act applies to all partitions - total and partial - and that unless a finding is recorded under Section 171 that a partial partition has taken place the income from the properties should be included in the total income of the family by virtue of sub-section (1) of Section 171 of the Act. To put it in other words what would have been the position of a Hindu undivided family which had claimed in an assessment proceeding under the 1922 Act that a total partition had taken place and had failed to secure a finding to that effect in its favour under Section 25-a thereof would be the position of a Hindu undivided family which has failed to substantiate its plea of partial partition as regards property under Section 171 of the Act. The property which is the subject-matter of partial partition would continue to be treated as belonging to the family and its income would continue to be included in its total income until such a finding is recorded. That is the true effect of Section 171(1). It was, however, urged on the analogy of the income from a family property alienated by a karta in favour of a stranger that the income which was not actually received by the family could not be taxed and in support of this plea reliance was placed on a decision of the Madras High Court in A. Kannan Chetty v. C. I. T. In that decision it is observed thus :

> For instance, if the karta of a family effects an alienation or even makes a gift, insofar as the taxing department is concerned it is the income of the members of the Hindu undivided family that can be assessed, and if by reason of an alienation, whether it is binding upon the members of the joint family or not, an item of property ceases to be in the hands of the joint family, it would not be open to the department to say that they would ignore such an alienation, notwithstanding that the possession of the properties and its income may pass into the hands of a stranger. It may be different in cases where the joint family deals with one or more items of property or converts it into a different estate retaining both possession and income in its own hands. That may properly be a case where the department may ignore such a transaction.

27. It is significant that in the passage extracted above the Madras High Court has distinguished the case of an alienation in favour of a stranger from the case where the joint family deals with one or more items of property or converts it into a different estate retaining both possession and income in its own hands. We do not consider that such a plea is available to the assessee because the acceptance of such a plea would lead to the nullification of the scheme of Section 171 of the Act itself. As long as a finding is not recorded under Section 171 holding that a partial partition had taken place the Hindu undivided family should be deemed for the purposes of the Act to be the owner of the property which is the subject-matter of partition and also the recipient of the income from such property. The assessment should be made as such and the tax assessed can be recovered as provided in the Act. In the circumstances, the decision of the High Court on the second question has to be reversed. We accordingly record our answer to the second question in the affirmative and in favour of the Department.

28. In the result, Civil Appeal No. 1370 of 1974 is dismissed and Civil Appeal No. 1768 of 1975 is allowed. The assessee shall pay the costs of the Department. Hearing fee one set.

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