Apoorva Shantilal Shah, Uf

Vs

Commissioner of Income Tax, Gujarat-I, Ahmedabad

Civil Appeal No. 35(Nt) of 1982

(P.N. Bhagwati, A.N. Sen JJ)

03.03.1983

JUDGMENT

AMARENDRA NATH SEN, J. –

1. The principal question for decision in this appeal by special leave is weather the father in exercise of his right as patria potestas or otherwise can effect a partial partition between himself and his minor sons of joint family properties of a Hindu joint family governed by the Mitakshara school of Hindu law.

2. The assessee, a Hindu undivided family (hereinafter referred to as 'HUF'), which consists of four members, namely, (1) Shri Apoorva Shantilal Shah, (2) his wife, Smt. Karuna, and their minor sons, (3) Chintan and (4) Tejal, is the appellant before us. The members of the HUF are governed by the Mitakshara school of Hindu law. The assessment year in question is the year 1975-76. During the assessment pertaining to the assessment year under consideration, Shri Apoorva, who is the father of the minor sons and husband of Smt. Karuna and the Karta of the HUF, made an application to the ITO for recognising a partial partition, under Section 171 of the I. T. Act, 1961 (hereinafter referred to as 'the Act'), claiming that two partial partitions had taken place amongst the members of the said family, one on December 24, 1973, in respect of 200 shares of Gujarat Steel Tubes Ltd. and the other on December 29, 1973, in respect of 1,777 shares of the same company.

3. On enquiry the Income Tax Officer (hereinafter for the sake of brevity referred to as 'I. T. O.') found that the partial partitions had been embodied in memoranda of agreements of partition. The ITO, however, refused to record that there had been a partial partition of the joint family properties, as he was of the view that the partial partitions in question could not be recognised inasmuch as the remaining shares, after making certain allocations in favour of the two minor sons were not allotted in their entirety to the remaining third coparcener, namely, Shri Apoorva separately or to Shri Apoorva and his wife, Karuna, jointly, describing them as members of the HUF. The ITO further held that the said partitions did not purport to have been made at the instance of the minor children, as this course would require the approval of the court but the same had been purported to have been made at the instance of Shri Apoorva. The ITO hinted in the order that the distribution of the shares had not been made equally either amongst the three members, including the two minor sons, or amongst the four members of the HUF, as Apoorva's wife, Karuna, also became entitled to an equal share on partition between the father and the sons.

4. Against the order of the ITO the assessee HUF presented an appeal before the Appellate Assistant Commissioner (hereinafter referred to as 'AAC' for the sake of brevity). The AAC allowed the appeal and held that there had been genuine partial partitions between the coparceners in respect of

the said shares. The AAC held that it was not necessary to obtain the court's sanction even in a case where some of the parties to the partition were minors. As regards the point that the distribution of shareholdings had not been made on equal basis, the AAC, taking into consideration some earlier partitions, came to the conclusion that the distribution had been equally made. The AAC further observed that even if the distribution had not been made on equal basis that would not affect the validity of the partitions in question, as the minor sons, if they felt aggrieved in this regard, could on the attainment of majority seek to avoid the said partitions.

5. Aggrieved by the order of the A. A. C., the Revenue went up in appeal to the Income-tax Appellate Tribunal (referred to as the 'Tribunal' hereinafter for the sake of brevity) to challenge the AAC's recognition of the said partitions. The Tribunal held for reasons recorded in the order that the partial partitions in the instant case were outside the framework of the Hindu law and as such they could not be recognised as valid for the purpose of Section 171 of the Act. In that view of the matter the Tribunal set aside the AAC's order and restored the order of the I. T. O.

6. Under Section 256 (1) of the Act, the Tribunal referred the following questions to the High Court :

> (1) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that Shri Apoorva Shantilal could not himself have given consent on behalf of his minor sons to the partitions proposed by him individual capacity as father?
>
> (2) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the partial partitions were outside the framework of Hindu law?
>
> (3) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the partial partitions could not be recognised as valid for the purpose of section 171 of the Income-tax Act, 1961?
>
> (4) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that partial partitions made by a Hindu farther in exercise of his patria potestas cannot be recorded as a valid partition under section 171 of the Income-tax Act, 1961?
>
> (5) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the partial partition did not amount to a family arrangement in which the father acted as a natural guardian of the two minor sons after he had exercised his patria potestas?
>
> (6) Whether the Income-tax Department is computed to challenge the exercise of patria potestas by a Hindu father in respect of coparcenery property, making a partial partition?

7. For reasons recorded in the judgment the High Court answered all the question in the affirmative and against the assessee. The High Court in its judgment has held that the father under the Hindu law has no power or authority to effect any partial partition of the joint family properties between himself and his minor sons. The High Court has observed that apart from the decision of the Madhya Pradesh High Court in the case of CIT v. Seth Gopaldas (HUF)((1979) 116 ITR 577 (MP)), there was on decision of any court on the point. The High Court also considered other decisions and

books and treatises on Hindu law. The High Court held that on a consideration of the authorities, the following propositions were established :

> 1. From the standpoint of ancient Hindu Law, what was recognised was only a partition in respect of all the properties of the HUF, upon disruption of the status of the HUF regardless of whether the properties were actually divided by metes and bounds or whether these were there after (after disruption of joint status) held as tenants- in-common.
>
> 2. Partial partition in the sense of division in respect of a part of the assets whilst continuing the status of HUF in respect of the rest of the ancient Hindu Law.
>
> 3. Partial partition in the sense of division of some of the properties whilst continuing the status of HUF in respect of other items of property originally belonging to the HUF came to be recognised only later on by evolution custom and by Judge-made law.
>
> 4. Such a partial partition was so recognised only if it was made by the consent of all the coparceners. In other words, partial partition in respect of only some items of property whilst continuing the status of HUF in respect of the rest of the items of property could be effected only with the consent of all the coparceners. When there was a disruption of the status of the HUF only one or only some of the coparceners could not insist on a division of some items of the property without effecting division in respect of all the items of properties except by consent of all the coparceners.
>
> 5. In respect of a joint family consisting of a father and his sons, the traditional Hindu Law recognised the right of a father in his capacity as patria protestas to exercise his extraordinary power to disrupt the status of an HUF and to divide his sons inter se without their consent subject to the rider that 'all' assets of the HUF were subjected to partition.
>
> 6. The aforesaid extraordinary power is subject to the qualification that he gives to his sons as equal share and the division is not unfair (vide GUPTA's Hindu Law, 2nd Edn, page 259) :

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

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

8. The High Court Observed :

> The validity of the aforesaid propositions is incapable of being disputed and his not been disputed. What has been contended on behalf of the assessee is that whilst there is no express provision in so many words, either in the ancient Hindu texts or Judge-

made law, that the power of a Hindu father to effect a partition of an HUF consisting of himself and his sons including minor sons in exercise if his power as patria potestas extends even to partition in respect of only some items of property, it is required to be inferred by implication. In other words, it is argued that though there is no express reference to the power to effect a partial partition in the sense of division of some items of property while continuing the status of an HUF in respect of the rest and though such power is not recognised in terms, it follows as a necessary corollary.

The High Court noted that this contention has been negatived by the Madhya Pradesh High Court in the case of Gopaldas and the Gujarat High Court for reasons recorded in the judgment rejected this contention. The High Court further held that the transaction in question was in any event invalid in the facts and in the circumstances of this case.

9. Aggrieved by the judgment of the High Court, the assessee with special leave granted by this Court has preferred this appeal.

10. In this appeal before us, two contentions have been urged on behalf of the appellant. The first contention urged is that the High Court went wrong in holding that the father cannot effect any, valid partial partition, between himself and his minor sons, of the joint family property belong to an HUF consisting of himself, his wife and minor sons who are governed by the Mitakshara School of Hindu law. The other contention raised is that the High Court erred in coming to the conclusion that in the facts and circumstances of this case, the partial partitions were invalid.

11. Mr. Desai learned counsel appearing on behalf of the appellant has advanced the following arguments.

1. According to the Mitakshara School of Hindu law, the father has a power to divide ancestral property among his sons and the partition made by him is binding on his sons provided that the power is exercised bona fide and in accordance with law, which regulates and restricts it in the interests of his sons. This sons. This power on the part of the father is recognised in text books on Hindu law and has been accepted in a number of decisions beginning with the case of Kandasami v. Doraisami Ayyar. (ILR (1878-80) 2 Mad 317 : 5 Ind Jur 352)

2. A father in any such case of ancestral property has the power to separate from all or from even some of his sons remaining joint with the other sons or leaving them to continue as a joint family with each other. The consent of the sons is not necessary for the exercise of that power whether they are majors or minors. In this connection reference is made to paragraph 323 of Hindu law by D. E. Mulla and paragraph 458 at page 559 of Mayne's Hindu Law and Usage (11th Edn.).

Para 323 of Mulla's Hindu Law, 11th Edn., at pages 443 and 444 reads as follows :

The father of a joint family has the power to divide the family property at any moment during his life, provided he gives his sons equal shares with himself, and if he does so, the effect in law is not only a separation of the father from the sons, but a separation of the sons inter se. The consent of the sons is not necessary for the

exercise of the power. But a grandfather has no power to bring about a separation among the grandsons. The right of father to sever the sons inter se is a part of the patria potestas still recognised by the Hindu Law.

Para 458 of Mayne's Hindu Law and Usage, 11th Edn., at pages 559 and 560, reads as follows :

Partition may be either total or partial. A partition may be partial either as regards the persons making it or the property divided.

It is open to the members of a joint family to sever in interest in respect of a part of the joint estate while retaining their status of a joint family and holding the rest as the properties of an undivided family.

Any one coparcener may separate from the others, but no coparcener except the father of grandfather, can compel the others to become separate amongst themselves. A father may separate from all or from some of his sons, remaining joint with the other sons or leaving them to continue a joint family with each other. A separation between coparceners, for instance, between two brothers, does neither necessarily nor even ordinarily involve a separation between either of the coparceners and his own sons.

3. So extensive and wide is this patriarchal power of the father that it has been recognised even in cases where all the sons were minors or an only son was a lunatic. Reference is made to the decision of the Bombay High Court in the case of Bapu Hambira Patil v. Shankar Bhau Patil(AIR 1926 Bom 160: 28 Bom LR 46 : 93 IC 213), and to the decision of the Madras High Court in the case of Venkateswara Pattar v. K. Mankayammal. (AIR 1935 Mad 775 : 69 Mad LJ 410 : 42 Mad LW 955)

4. Section 171 of the Income Tax Act, 1961 and Section 25-A of the earlier Act of 1922 have been all along accepted as machinery provisions and not charging sections. In the earlier Act, though there was no express reference to partial partitions, the preferable view expressed in decisions under that Act was that if there was a partial partition of an asset of the family or an asset of the family was divided and a partnership was constituted and the family continued joint as regards other properties, the assessment on the basis of an undivided Hindu family would be confined to the income of the properties so remaining undivided and the income of the property partitioned would be excluded from the computation of the income for assessment. It was only income received from the properties not partitioned that would be considered to be income of the joint family Reliance has been placed on the decision in the case of Charandas Haridas v. C. I. T., Bombay. ((1960) 39 ITR 202 : (1960) 3 SCR 296 : AIR 1960 SC 910 : 1960 SCJ 929)

5. This power of the father has been described as his "superior power" or "peculiar power" or "patria potestas". There is neither principle nor authority for the proposition that the exercise of this independent and extensive power of the father, even in the context of minor sons, could not take into its purview the lesser power to partition only some of the family properties without disrupting the status of the member of the joint family as regards other properties even when it is a genuine exercise of the lesser power. At no time was there recognised any limitation or

inhibition on the power of the father, though of course the partition effected by him had to be fair and equitable. There is no text of Hindu law which prohibits partial partition whether as to person or as to property.

6. The decision of the Privy Council in the case of Appovier v. Rama Subba Aiyan((1866-67) 11 MIA 75 : 8 WR PC 1 :2 Sar 218), when it speaks of partial partition of the joint family by agreement of the coparcener, it cannot possibly be read as restricting the patriarchal and superior power of the father to the father to effect division of the entire joint family properties and to exclude its operation in case of exercise of the lesser right of division of only some of the family properties.

12. Mr. Manchanda learned counsel appearing on behalf of the department, has advanced the following arguments :

1. Under ancient Hindu law, partial partition was unknown. Severance of status disrupted the family. The joint family need not necessarily have any property. If it has property, then its separation is only an incidence of the severance of status.

2. Partial partition is judge-made law and the earlist case where this was mooted was in 1846 in the case of Rewun persad v. Radha Beeby((1846-51) 4 MIA 137 , 165 : 7 WR 35 : 1 Sar 327) . This was followed in Appovier's case and then in certain decisions of Indian courts, Reference is also made to paragraph 458 of Mayne's Book on Hindu Law and Usage for contending that an agreement the parties is a sine qua non.

3. The powers of patria potestas are confined mainly to the power to sever the status of the joint family as a whole. Judge-made law which has recognised partial partition has attempted to extend the ancient, feudal archaic patriarchal powers of patria potestas to joint families so as to include the power of partial partition with the consent of the parties. There could be no justification for now extending it, particularly as the Legislature itself, as per the Finance Act (2), 1980, w. e. f., April 1, 1980, has derecognised partial partition altogether. Sub-section (9) has been added to Section 171 of the Act and by this provision the partial partition of an HUF effected after December 31, 1978, will be derecognised for income tax purposes and this sub-section has been incorporated with the object of curbing the creation of multiple HUF by making partial partitions. Where an HUF is taxed in the status of HUF it will continue to be taxed as such unless there has been a total partition of the family properties as such unless has been a total partition of the family properties by metes and bounds and an order or that effect is recorded by the I. T. O.

4. The powers of patria potestas of a father have always been understood to be restricted and limited to a complete and whole partition. This power can only be exercised with regard to the entire property, provided the property is divided equally and fairly by the father.

13. We may observe that in the course of the hearing, reference was made to a number of decisions of various courts by the learned counsel for the parties.

14. We shall now proceed to consider the decisions which appear to us to have a material bearing on

the question involved in the appeal. We shall first refer to the decision of this court in the case of Charandas Haridas. This decision which appears to have a clear bearing on the question and which considers an earlier decision of the Privy Council, does not appear to have been cited before the High Court. The Material facts of this case may be briefly noted :

15. Charandas Haridas was the Karta of an HUF consisting of his wife, Shantaben, three sons and himself. He was a partner in six managing agency firms in six mills. In previous years the income received by him as partner in these managing agencies was being assessed as the income of the HUF. On December 11, 1945, Charandas Haridas acting for his three minor sons and himself and Shantaben, his wife, entered into an oral agreement for partial partition. By that agreement Charandas Haridas gave one pie share to his daughter, Pratibha, in the managing agency commission from two of the six managing agencies held by the family. The balance together with the other shares in the other managing agencies was divided in five equal shares between Charandas Haridas, his wife and sons. This agreement was to come into effect from 1st January, 1946, which was the beginning of a fresh accounting year. On 11th September, 1946, Charandas Haridas, acting for himself and his minor sons and Shantaben, executed a memorandum of partial partition in which the above facts were recited, the document purporting to be a record of what had taken place orally earlier. In the assessment years 1947-48 and 1948-49, Charandas Haridas claimed that the income should no longer be treated as the income of the HUF but (should be treated) as the separate income of the divided members. The ITO declined to treat the income as any but of the HUF, and assessed the income as before An appeal to the AAC was unsuccessful and the matter was taken to the Income Tax Appellate Tribunal. The Tribunal held that by the document in question, The division, if any, was of the income and not of the assets from which the income was derived inasmuch as "the agreements of the managing agency with the managed companies did not undergo any change whatever as a result of the alleged partition". The Tribunal, therefore, held that the arrangement to share the receipts from this source of income was not binding on the Department, if the assets themselves continued to remain joint. It further held that the document was "a farce", and did not save the family from assessment as HUF. The following question as directed by the High Court on the application of Charandas Haridas was referred to the High Court :

> Whether there were materials to justify the finding of the Tribunal that the income in the share of the commission agency of the mills was the income of the Hindu undivided family ?

The High Court held that though the finding given by the Appellate Tribunal could not be construed as a finding that the document was not genuine, the method adopted by the family to partition the assets was insufficient to bring about the results intended by it. According to the High Court the Tribunal was right in holding that the document was ineffective and though the income might have been purposed to be divided and might, in fact, have been so divided, the source of income still remained undivided as belonging to the HUF. The High Court accordingly answered the question in the affirmative holding that there were materials before the Tribunal to enable the Tribunal to reach the conclusion that in so far as these income-bearing assets were concerned, they still belonged to the HUF. The assessee, Charandas Haridas, field an appeal in this court with special leave granted by this court. This court allowed the appeal. At page 207, this court referred to the following observations of the Privy Council in Appovier v. Rama Subba Aiyan :

> Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the status of the family quoad this property. The produce is no loner to be brought to the common chest, as representing the income of an

> undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family, who are thenceforth to become entitled to those definite shares.

Thereafter this Court proceeded to hold at page 208 :

> In our opinion, here are three different branches of law to notice. There is the law of partnership, which takes no account of a Hindu undivided family. There is also the Hindu law, which permits a partition of the family and also a partial partition binding upon the family. There is then the income-tax law, under which a particular income may be treated as the income of the Hindu undivided family or as the income of the separated members enjoying separate shares by partition. The fact of a partition in the Hindu law may have no effect upon the position of the partner, in so far as the law of partnership is concerned, but it has full effect upon the family in so far as the Hindu law is concerned. Just as the fact of a Karta becoming a partner does not introduce the members of the undivided family into the partnership, the division of the family does not change the position of the partner vis-a-vis the other partner or partners. The Income-tax law before the partition takes note, factually of the position of the Karta, and assesses not him qua partner but as representing the Hindu undivided family. In doing so, the Income-tax law looks not to the provision of the Partnership Act, but to the provisions of Hindu law. When once the family has disrupted, the position under the partnership continues as before, but the position under the Hindu law changes. There is then o Hindu Undivided Family as a unit of assessment in point of fact, and the income which accrues cannot be said to be of a Hindu Undivided Family. There is nothing in the Indian Income-tax law or the law of partnership which prevents the members of a Hindu joint family from dividing any asset. Such division must, of course, be effective so as to bind the members; but Hindu law does not further require that the property must in every case be partitioned by metes and bounds, if separate enjoyment can otherwise be secured according to the shares of the members. For an asset of this kind, there was no other mode of partition open to the parties if they wished to retain the property and yet hold it not jointly but in severalty, and the law does not contemplate that a person should do the impossible. Indeed, the result would have been the same, even if the dividing members had said in so many words that they had partitioned the assets, because in so far as the firms were concerned, the step would have been wholly inconsequential.

This Court further observed at page 209 :

> No doubt, there were many modes of partition which might have been adopted; but the question remains that if the family desired to partition these assets only and no more, could they acted in some other manner to achieve the same result? No answer to the question was attempted.
>
> It is, therefore, manifest that the family took the fullest measure possible for dividing the joint interest into separate interests. There is no suggestion here that this division was a mere pretence; nor has the Appellate Tribunal given such a finding. The document was fully effective between the members of the family, and there was actually no Hindu Undivided Family in respect of these particular assets.

16. In the case of Kalloomal Tapeswari Passed (HUF) v. C. I. T., Kanpur((1982) 133 ITR 690 :(1982) 1 SCC 447 : 1982 SCC (Tax) 73) , this court observed at page 720 : [SCC para 16, p. 458 : SCC (Tax) pp. 83-84]

> Under the 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 as regards 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 according 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 has lifetime between himself and his sons by dividing properties equally amongst them, (2) by agreement, or (3) by a suit or arbitration.
>
> These two decisions of this Court clearly state that partial partition under the Hindu law is permissible.

17. We may mention that in the case of Moti Lal Shyam Sunder v. C. I. T., U. P.((1972) 84 ITR 186 (ALL)) a Division Bench of the Allahabad High Court also recognised the validity of a partial partition. R. S. Pathak J. (as His Lordship then was) who spoke for the Bench, held for reasons stated in the judgment that the Tribunal was in error in holding that the there was no valid partial partition in law on 1st July, 1961.

18. It may be noted this in the case of Charandas Haridas decided by this court and in the case of Moti Lal Shyam Sunder decided by the Allahabad High Court to which we have just referred, all the sons were minors.

19. We have earlier quoted the relevant passages on the subject from Mulla's Hindu Law and from Mayne's Hindu Law and Usage. We may now quote the following observations appearing at p. 18 in Mitakshara and Dayabhaga - Two Treatises on the Hindu Law of Inheritance, translated by H. T. Colebrooke, Esq., in Chapter I, Section II(2) :

> When a father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two or more sons.

20. In History of Dharmashastra by Shri P. V. Kane (2nd Edn., 1973), Vol. III, at p. 592, it has been stated :

> The Manager is called Karta in modern times though the smritis and digests employ words like Kutumbin (Yaj II. 45), Grhin, Grahapati, Prabhu Kat. 543) and not Karta. He has special powers of disposition (by mortgage, sale or gift) of family property in

> a season of distress (for debts), for the purposes and benefit of the family (maintenance, education and marriages of members and other dependents) and particularly for religious purposes (Sraddhas and the like). The father has the same powers as manager and certain other special powers, which no other coparcener has. The father can separate his sons from himself and also among themselves if he so desires, even if they do not desire to separate (Yaj. II. 114).
>
> There are observations more or less to the similar effect in the other commentaries on Hindu law by other learned authors. We do not, therefore, consider it necessary to refer to the comments of the other learned authors placed before us in the course of hearing of the appeal.

21. The various commentaries on the Hindu law by the various learned authors go to indicate that ancient Hindu law speaks of complete severance of joint family and partition of joint family properties and does not mention partial partition either with regard to the joint family properties or with regard to some of the members of the joint family. The right of the father to bring about the disruption of the joint family properties in exercise of his superior right as farther or of his rights as patria potestas is recognised in ancient Hindu Law.

22. It is however, well settled by judicial decisions that the partial partition of a joint Hindu family qua some joint family properties or qua some members of the joint family is permissible and valid in law. The High Court appears to have accepted this position but the High Court then proceeds to hold that the proposition laid down by judicial decisions with regard to partial partition will apply only when partial partition is effected with the consent of the members of the joint family and cannot be extended to a case where partial partition is sought to be brought about by the father in exercise of his superior rights as father or his right as patria potestas. On an anxious and careful consideration of the matter we are unable to agree with the view expressed by High Court.

23. If the father in exercise of his superior right or of his right as patria potestas is entitled to bring about a complete disruption of the joint family and to effect a complete partition of joint family properties of a Hindu joint family consisting of himself and his minor sons even against the wishes of the minors and if a partial partition be permissible with the consent of sons when they have all become major, we see no reason to limit the power or authority of the father to effect the partition only to a case where the partition is total. The superior right or the right of patria potestas which a father enjoys is always expected to be exercised in the best interest of the members of the family and more particularly of his minor sons. The father, undoubtedly, enjoys the right to bring about a complete disruption of the joint family consisting of himself and his minor sons and to effect a complete partition of the joint family properties even against the will of the minor sons. It is also now recognised that a partial partition of joint family properties is permissible. When a father can bring about a complete partition of the joint family properties between himself and his minor sons even against the will of the minor sons and when partial partition under the Hindu law is now accented and recognised as valid by judicial decisions, we fail to appreciate on what logical grounds it can be said that the father who can bring about a complete partition of the joint family properties between himself and his minor sons will not be entitled to effect a partial partition of the joint family properties, between himself and his minor sons, if the father in the interest of the joint family and its members feels that a partial partition of the properties will be in the best interest of the joint family and its members including the minor sons. Even if the test of consent is to apply, the father as the nature guardian of the minor sons will normally be in a position to give such consent and it cannot be said as a matter of universal application that in all such cases of partition, partial or

otherwise, there is bound to be a conflict of interest between the father and his sons. If the father does not act bona fide in the matter when he effects a partition of the joint family properties between himself and his minor sons, whether wholly or partially, the sons on attaining majority may challenge the partition and ask for appropriate reliefs including a proper partition. In appropriate cases, even during minority, the minor sons through a proper guardian may impeach the validity of the partition brought about by the father, either in entirety of the joint family properties, or only in respect of a part thereof, if partition had been effected by the father to the detriment of the minor sons and to the prejudice of their interests.

24. We may point out that in the case of Charandas Haridas to which we have earlier referred, and in which this court recognised the validity of partial partition brought about by the father of some joint family properties, the sons were all minors. also in the case of Moti Lal Shyam Sunder earlier quoted, where the Allahabad High Court recognised the validity of a partial partition brought about by the father between himself and his sons, all the sons were minors.

25. The decision of this in the case of Charandas Haridas and the observations of this court in the case of Kalloomal Tapeswari Prasad which we have earlier quoted, in our opinion, clinch the decision of the question.

26. We must, therefore, hold that a partial partition of properties brought about by the father between himself and his minor sons cannot be said to be invalid under the Hindu law and must be held to be valid and binding. We wish to make it clear that this right of the father to effect a partial partition of joint family properties between himself and his minor sons, whether in exercise of his superior right as father or in exercise of the right as patria potestas has necessarily to be exercised bona fide by the father and is subject to the right of the sons to challenge the partition if the partition is not fair and just.

27. Section 171 of the Income Tax Act, 1961 provides as follows :

> (1) A Hindu family hitherto assessed as undivided shall be deemed for the purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the Hindu undivided family.
>
> (2) Where, at the time of making an assessment 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 expire 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 purposes of this section, the several liability of any member or 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 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.

It may be noted that the following further provision was included in the said section as sub-section (9) by the Finance (No. 2) Act, 1980, w. e. f. 1st April, 1980 :

(9) Notwithstanding anything contained in the foregoing provisions of this section, where a partial partition has taken place after the 31st day of December, 1978, among the members of a Hindu undivided family hitherto assessed as undivided, -

a) no claim that such partial partition has taken place shall be inquired into under

sub-section (2) and no finding shall be recorded under sub-section (3) that such partial partition had taken place and any finding recorded under sub-section (3) to that effect whether before or after the 18th day of June, 1980, being the date of introduction of the Finance (No. 2) Bill, 1980, shall be null and void;

(b) such family shall continue to be liable to be assessed under this Act as if no such partial partition had taken place;

(c) each member or group of members of such family immediately before such partial partition and the family shall be jointly and severally liable for any tax, penalty, interest, fine or other sum payable under this Act by the family in respect of any period whether before or after such partial partition;

(d) the several liability of any member or group of members aforesaid shall be computed according to the portion of the joint family property allotted to him or it at such partial partition,

and the provisions of this Act shall apply accordingly.

This sub-section (9) was not in existence at the relevant time and has no retrospective operation and it is of no material consequence in deciding the present case.

28. The aforesaid provisions of the Income Tax Act, as they stood at the material time, clearly recognise partial partition. The definition of partial partition in Explanation (b) makes it clear that partial partition as regards the persons constituting the HUF or as regards properties belonging to the Hindu undivided family, or both, is recognised.

29. In the present case, the partition of the shares belonging to the HUF cannot, therefore, be said to be bad either under the Hindu law or under the Indian I. T. Act. We must, therefore, hold that the High Court went wrong in deciding that partial partition of the joint family prone rites of the Hindu joint family by the father was invalid and could not be recognised under the I. T. Act. The subsequent amendment of Section 171 by inclusion of sub-section (9) does not require any consideration as the said sub-section was not in existence in the relevant assessment year and is only operative from 1st April, 1980.

30. The other question which falls for determination is whether the partition can be said to be bad as at the time of the partition there was no equal division of the shares by the father amongst himself and his minor sons and a part of the shareholding had not been distributed to the father or to father and mother jointly. We may point out that the AAC has found that a the time of division of the shares, the shares had been distributed equally taking into consideration the shares which had earlier been distributed amongst the parties. In our opinion, a partial partition of any joint family property by the father between himself and his sons does not become invalid on the ground that there has been no equal distribution amongst the co- shares. It is expected that the father who seeks to bring about a partial partition of joint family properties will Act bona fide in the interest of the joint family and its members bearing in mind, in particular, the interests of the minor sons. If, however, any such partial partition causes any prejudice to any of the minor sons and if any minor son feels aggrieved by any such partial partition he can always challenge the validity of such partial partition in an appropriate proceeding and the validity of such partial partition will necessarily have to be adjudicated upon in the proceeding on a proper consideration of all the facts and circumstances of

the case. Till such partial partition has been held to be invalid by any competent court, the partial partition must be held to be valid. It is not open to the I. T. authorities to consider a partial partition to be invalid on the ground that shares have not been equally divided and to refuse to recognise the same. It is undoubtedly open to the ITO before recognising the partition to come to a conclusion on proper enquiry whether the partition is genuine or not. If the ITO on enquiry comes to a finding that the partition is sham or fictitious, he will be perfectly with in his right to refuse to recognise the same. In the instant case, there is no finding that the partial partition is sham or fictitious or that the partial partition is not a genuine one and has not been acted upon. As there is no finding that the partial partition is sham or fictitious or not a genuine one, on enquiries made by the ITO, and as the partial partition is otherwise valid under the Hindu Law, the partial partition has necessarily to be recognised under the provisions of Section 171 of the I. T. Act and the assessment must be necessarily made on the basis that there is partial partition of the said shares.

31. In the result, the appeal succeeds. The judgment and order of the High Court are hereby set aside. The partial partition is held to be valid and the ITO is directed to recognise the same and to proceed to make the assessment on the basis that there has been a partial partition of the said shares between the parties. In the facts and circumstances of this case, we do not propose to make any order as to costs.

</html