Income-Tax Officer, Calicut

Vs

Smt. N. K. Sarada Thampatty.

Civil Appeals Nos. 778 and 781 of 1976

(K. Jayachandra Reddy, K. N. Singh, Kuldip Singh JJ)

14.09.1990

JUDGMENT

K. N. SINGH J. –

1. These appeals on certificate issued by the High Court under article 133 of the Constitution are directed against the orders and judgments of the High Court of Kerala (See (1976) 105 ITR 67).

Briefly, the facts giving rise to these appeals are : the respondents was a member of the erstwhile Nilambur Kovilagam governed by the Madras Marumakkathayam Act; she was assessed to income-tax as Hindu undivided family as the family possessed considerable property including lands, forests and other properties. The Income-tax Officer assessed the respondent for the assessment years 1967-68, 1968-69 and 1969-70 treating the members of the family included within the Hindu undivided family. Before the Income-tax Officer, the respondent raised a plea that there had been a division of tavazhi under a partition agreement dated July 3, 1958, whereby all lands except forest lands were divided among the members of the family. The respondent further claimed that the members of the tavazhi swelled to 14 and these members effected a division in status by a registered document dated February 21, 1963. She further alleged that the division of tavazhi into 14 shares was effected by a civil court decree in a partition Suit No. O.S. 22 of 1961 in the Court of Kozhikode. It was pointed out on behalf of the respondent that the partition suit was decreed and the properties were allotted to the respective shareholders. The civil court had appointed a Commissioner to divide the property by metes and bounds in accordance with the shares of individual members. The respondent further claimed that since the status of the Hindu undivided family was disrupted on account of the decree of partition, the Hindu undivided family could not be assessed to income-tax, and instead the income derived by the individual members could be considered for assessment.

The Income-tax Officer rejected the respondent's claim and assessed the respondent as the head of the tavazhi for the assessment years 1967-68, 1968-69 and 1969-70, by his order dated March 16, 1970/March 27,1970, the Income-tax Officer held that the decree of the civil court merely conferred a right on the members of the family to separate possession of the land falling to their share after the physical partition, and the final partition could be made on application made by individual members after depositing the Commissioner's fee. Since the civil court decree was a preliminary decree and no final decree had been passed and no a actual partition had been effected and no physical partition by metes and bounds had taken place in pursuance of the decree of purposes of assessment. The Income-tax Officer observed that, earlier, the assessee was assessed on in the status of a Hindu undivided family, and since no other evidence except the decree of the civil court had been produced by her to show that there has been a real partition, the assessee's claim for partition could not be accepted. The respondent filed a writ petition in the High Court under articles 226 of the

constitution for quashing the orders of the Income-tax Officer on the ground that he failed to recognise the disruption of the Hindu undivided family while making the assessment. A learned single judge of the High Court allowed the writ petitioner and quashed the assessment orders. On appeal at the instance of the Revenue, a Division Bench of the High Court affirmed the order of the single judge. On an application made on behalf of the Revenue, the High Court granted a certificate under article 133 of the Constitution. Hence, these appeals.

The learned single judge held that section 171 of the Income-tax act does not apply to a case when the division was effected before the commencement of the accounting period, and the Hindu undivided family having received no income during the accounting period, it could not be assessed to tax notwithstanding the fiction introduced by section 171. In appeal, the Division Bench held that there was no express provision in sections of the section that the income of the family, after its division, must be treated or deemed to be the income of the family, after its division, must be treated or deemed to be the income of the Hindu undivided family in spite of disruption of joint status. The Bench held that a Hindu undivided family is a separate and distinct entity from the members constitution it and, if that entity does not receive any income, the members' income could not be assessed as income of the Hindu undivided family. The Division Bench further held that had been a partition in the family and the tavazhi has ceased to be Hindu undivided family long before the accounting periods, the provisions of the Act could not be pressed into service for the purpose of taxing the income of the individual members of the family treating them as having the status of a Hindu undivided family with the aid of section 171 of the Act.

The main question which falls for consideration is as to whether the partition as effected by the agreement dated February 21, 1963, and also the decree of the civil court amount to "partition" under the Explanation to section 171 of the Act and further whether the income- tax officer acted contrary to law in holding that, in spite of the partition as alleged by the respondent, the status of a Hindu undivided family was not disrupted and that status continued for the purposes of assessment during the relevant assessment years. Under section 171, a Hindu family assessed as Hindu undivided family is deemed, for the purposes of the Act, to continue as Hindu undivided family except where partition is proved to have been effect in accordance with the section. The section further provides that, if any person, at the time of making of assessment, claims that a partition, total or partial, has taken place among the members of the Hindu undivided family, the Income-tax Officer is required to make in inquiry after giving notice to all the members of the family, and to record findings, on the question of partition. If on inquiry, he comes to the finding and there has been a partition, the individual liability of the members is to be computed according to the portion of the joint family property allotted to them. What would amount to partition for the purposes of the section is contained in the Explanation to the section which defines partition as under :

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

The above definition of "partition" does not recognise a partition even if it is effected by a decree of court unless there is a physical division of the property and if the property is not capable of being physically divided, then there should be division of the property to the extent it is possible; otherwise, the severance of status will not amount to a partition. In considering the factum of partition for the purposes of assessment, it is not permissible to ignore the special meaning assigned to partition under the Explanation, even if the partition is effected through a decree of court. Ordinarily, a decree of a civil court in a partition suit is good evidence in proof of partition bit, under section 171, a legal fiction has been introduced according to which a preliminary decree of partition is not enough : instead, there should be actual physical division of the property pursuant to a final decree, by metes and bounds. The legislature has assigned a special meaning to "partition" under the aforesaid Explanation with a view to safeguard the interest of the Revenue. Any assessee claiming partition of the Hindu undivided family must prove the disruption of the status of a Hindu undivided family in accordance with the provisions of section 171, having special regard to the Explanation. The assessee must prove that a partition effected by agreement or through a court's decree was followed by actual physical division of the property. In the absence of such proof, partition is not sufficient to disrupt the status of Hindu law, members of a joint family may agree to pertain of the joint family property by a private settlement, agreement, arbitration or through court's decree. Members of the family may be disrupted but such disruption of family status is not recognised by the legislature for purposes of income-tax Section 171 of the Act and the Explanation to it, prescribe a special meaning to partition which is different from the general principles of Hindu law. It contains a deeming provision under which partition of the property of the Hindu undivided family is accepted only if there has been actual physical division of the property; in the absence of any such proof, the Hindu undivided family shall be deemed to continue for the purpose of assessment of tax, any agreement between the members of the joint family effecting partition or a decree of the court, for partition cannot terminate the status of a Hindu undivided family unless it is shown that the joint family property was physically divided in accordance with the agreement or decree of the court.

On behalf of the respondent, it was urged that the High Court has placed reliance on a Full Bench decision of the Kerala High Court in Parameswaran Nambudiripad v. IAC. IT [1969] 72 ITR 664, where it was held that if the Hindu undivided family was, in fact, not in existence during any part of an accounting period, and the Hindu undivided family as such had not received and income, the family could not be assessed to tax as Hindu undivided family. The view taken by the Full Bench has been approved by this court in IAC of Agrl. IT [1972] 83 ITR 108. On a careful scrutiny of the judgment of this court, we find that, in that case the interpretation of section 29 of the Kerala Agricultural income-tax Act, 1950, as amended in 1964, was involved. Section 29, after its amendment in 1964, made provision for assessment of agricultural income-tax after partition of a Hindu undivided family. Under that section, there was not provision in the nature of the Explanation to section 171 of the Income-tax Act. This court had no occasion to interpret section 171; instead, the court interpreted section 29 of that act which is quite different from section 171, and therefore, the appellant cannot draw any support from that decision. In Kallomal Tapeswari Prasad (HUF) v. CIT [1982] 133 ITR 690, this court interpreted section 171 of the Act in detail. On an elaborate discussion, the court held that, under the Hindu law, it is not necessary 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 a permissible under the Hindu law and it is open to the parties to enjoy their share of property in any manner known to law according to their desire but the income-tax law does not accept any such partition for the purposes of assessment of tax; instead, it has introduced certain conditions of its own to give effect to the

partition under section 171 of the Act. The court held that, in order to claim disruption of the Hindu undivided family o the basis of partition, it is necessary to show that the partition had been effected physically by metes and bounds and, in the absence of any such proof, the property would continue to be treated as belonging to the HUF and its income would continue to be included in its total income treating the assessee as Hindu undivided family.

The High Court referred to section 25A of the Indian Income-tax act, 1922, and placed reliance on a number if decisions in holding that, in view of the decree of the civil court for partition, the Hindu undivided family status had been disrupted and since there was no evidence on record to show that the Hindu undivided family had received any income in the accounting year, the income received by individual members of the joint family could not be treated to be the income of the Hindu undecided family. The High Court placed reliance on the Privy Council decision in Sundar Singh Majithia v. CIT [1942] 10 ITR 457 and a number of other decisions also for holding that the legal fiction introduced under section 171 of the Act could not be extended to create tax liability on the Hindu undivided family even after disruption of its status, pursuant to the civil court's decree for partition. We do not consider it necessary to discuss those decisions, as the purpose and object of section 171 and the extent of the legal fiction introduced by it has already been considered by this court in Kalloomal's case [1982] 133 ITR 690. The view taken by the High Court under the impugned judgment is not sustainable in law as it is contrary to that decision. In Sankaranarayanan Bhattathiripad v. ITO [1985] 153 ITR 562, a learned judge of the Kerala High Court, while considering the interpretation of section 171, held that the view taken by the High Court in the judgment under appeal in ITO v. Smt. N. K. Sarada Thampatty [1976] 105 ITR 67 (Ker), ceased to be good law in view of the decision of this court in Kalloomal's case [1982] 133 ITR 690.

In the instant-case, there was no dispute that, prior to the assessment year 1967-68, the assessment was made on the Hind undivided family of which the respondent was a member. The respondent, for the first time, raised the plea of partition and disruption of Hindu undivided family in the proceedings for the assessment years 1967-68, 1968-69 and 1969-70. There was no dispute before the Income-tax Officer that there had been no physical division of the properties by metes and bounds and therefore, the Income-tax Officer was justified in holding that the status of Hindu undivided family had not been disrupted, and the income derived from the properties for the purposes of assessment continued to be impressed with the Hindu undivided family character. The High Court, in our opinion, committed an error in quashing the order of the Income-tax Officer. In the result, we allow the appeals and set aside the order of the High Court and dismiss the writ petition filed by the respondent. There will be no order as to costs. Appeals allowed.

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