

CALCUTTA HIGH COURT

Kaniram Hazarimull

Vs

Commissioner of Income-Tax

(Chakravartti, C.J.)

07.09.1954

JUDGMENT

Chakravartti, C.J.

1. We have felt some difficulty in dealing with this reference because of the form in which the question was referred or caused to be referred and because of the meaning which was sought to be attributed to it on behalf of the assessee. The assessee is a Hindu undivided family, called Kaniram Hazarimull and one Indra Chand Kejriwal is its karta. On the 18th April, 1933, Indra Chand entered into a partnership with eight other persons for the purpose of floating and obtaining the managing agency of a proposed mill to be called the Shankar Sugar Mills Limited. Clause 4 of the deed of partnership provided that the partnership capital was to be Rs. 12,00,000 to be contributed by the partners in accordance with their shares, that it would be applied by each partner to the purchasing or getting to be purchase shares of the proposed mill according to his share specified in the deed and that one-third of the share money was to be paid within a month and the remaining two-thirds on such dates as might be decided later. Clause 7 of the deed provided that the profits of the partnership would be ascertained and distributed between the partners according to their shares on 30th September of each year. Indra Chand's share in the partnership was one-fourth. On the 11th May, 1935, a second deed of partnership was executed which in substance confirmed the earlier partnership. By that time the mill had been established and it appears from articles 135 and 136 of the articles of association of the mill company that the firm of managing agents was to get allowances and commission at certain scales. The partnership deed of 1935 dealt with the managing agency profits in clause 2 and it was provided that the profits would be divided among the partners in accordance with their shares - the share of Indra Chand Kejriwal being still one-fourth. The question in the present reference is whether the one-fourth share of the managing agency income, derived by Indra Chand Kejriwal from the partnership, was rightly included in the assessment of the Hindu undivided family in its assessments for the assessment years 1940-41 to 1942-43. The Income-tax authorities as well as

the Tribunal found that Indra Chand was a partner of the managing agency firm, not in this Individual capacity but as the representative of the Hindu undivided family and on that footing they came to the conclusion that the income derived by Indra Chand Kejriwal really belonged to the Hindu undivided family whose books also showed it as a receipt. When asked to refer the question to this court, the Tribunal declined to do so in the view that whether or not Kejriwal was a partner in his individual capacity or as a representative of the Hindu undivided family was a question of fact in which no question of law was involved. Subsequently, the assessee moved this Court under section 66 (2) of the Income-tax Act and obtained a direction upon the Appellate Tribunal to refer to this Court the following question of law :-

"Whether upon the facts and circumstances of this case the income of Indra Chand Kejriwal the karta of the assessee, a Hindu undivided family, which he derived as a partner of the partnership firm of Messrs. Indra Chand Hariram formed part of the income of the said undivided Hindu family and could be assessed to tax as such ?"

Mr. Gupta, who appeared on behalf of the assessee, wanted to argue the question as if it had asked whether, in law, the income of the karta of a Hindu undivided family derived by him as a member of a partnership could ever be the partnership income of the family itself. On behalf could ever be the partnership income of the family itself. On behalf of the Commissioner of Income of the family itself. On behalf of the Commissioner of Income-tax, it was contended by Mr. Meyer that it was not open to the assessee to raise that extreme question of law as comprised in the question referred, because the controversy before the authorities below had always been on the basis that the karta of a Hindu Undivided family could be a partner in a firm either in his individual capacity or as a representative of the Hindu undivided family of which he was the karta and that the only question which had been raised was, in which of the two capacities Kejriwal was a partner of the firm of Indra Chand Hariram in the present case. Mr. Meyer also complained that if the extreme question of law, now sought to be raised, had been raised before the taxing authorities, it might have been possible for the Department to make an alternative case that, in any event, the income having been found to have been received by the Hindu undivided family could be rightly included among its assessable income and taxed as such. It was said that if the extreme question of law now sought to be raised was entertained and answered in favour of the assessee, it would succeed on a case never made before the authorities below and the Department would be deprived of the opportunity of taxing the income which it might have done on another basis.

The case made before the authorities below appears sufficiently from the orders respectively recorded by them. Nothing appears to have been said before the Income-tax Officer in course of the assessment for the assessment year 1940-41. The case made before the Income-tax Officer in

the course of the assessment for the year 1941-42 is thus stated in the assessment order :It is claimed by the assessee that Babu Indrachand who is a karta of the assessee Hindu undivided family styled Kaniram Hazarimall, is the partner in the unregistered firm of Indrachand Hariram in his individual capacity and not in his representative capacity as karta of the family and as such income from the share of the unregistered firm should not be included in the assessment of the assessee family." (See page 53 of the paper book).Again, the assessment order for the year 1942-43 contains the following statement :-

"As in the assessment for 1941-42, the assessee claims that Babu Indrachand who is a karta of the assessee Hindu undivided family styled Kaniram Hazarimull is a partner in the firm of Indrachand Hariram of Captaingunj, in his individual capacity and as such income from the share should not be included in the assessment of the family." (See page 64 of the paper book).The reference to the assessee's contention in the Appellate Assistant Commissioners order in respect of the assessment year 1940-41 reads as follows :-The contention is that the income of Indrachand Kejriwal from the partnership was received by him in his individual capacity and not representing the Hindu undivided family." (See page 65 of the paper book).So again, the order of the Appellate Assistant Commissioner in respect of the assessment year 1941-42 states the claim of the assessee to have been that Mr. Indrachand Kejriwal is a partner in the managing agency firm in his individual capacity and that his income from this partnership should not, therefore, be included in the income of the Hindu undivided family. (See page 69 of the paper book). And lastly, the order of the Appellate Assistant Commissioner in respect of the assessment year 1942-43 says that the objection advanced on behalf of the assessee was that the partnership income had arisen to Indra Chand individually. Curiously enough, the order of the Appellate Tribunal has not been included in the paper book, but we have supplied with a typed copy of it. It appears from the order that once again the contention was that Indra Chand was a partner of the firm in his individual capacity and if the books of the Hindu undivided family showed receipt of the income, it was because Indra Chand, after having received it, had given it or passed it on to the Hindu undivided family.I do not find in the contentions raised before the successive authorities any trace of the argument sought to be advanced by. What appears to have been debated before the authorities below was a straight question as to whether Indra Chand was a partner on his own account or whether he was a partner as a representative of the family, but this question was debated and considered not on the footing that the karta of a Hindu undivided family could not in law be a partner on the family's behalf and the partnership income derived by the karta could not in law be the family income. The controversy appears to have been conducted on the basis that in fact Indra Chand did not represent the family in the partnership, but was there in his own personal interest. In those circumstances it does not

seem to be in order that the assessee should try to raise a new point which the Tribunal was not asked to consider and to which the case stated does not refer. Dealing with an attempt to raise a new point before them in support of the assessment, the judicial Committee observed in the case of *Commissioner of Income-tax, Punjab v. Dewan Krishna Kishore* as follows : "It is neither convenient, nor conducive to accuracy that new and important points of law should be raised for the first time at their Lordships Board or that decisions should be given on matters not duly submitted to the High Court."

A difficulty has however been created by the form in which the question has been framed under the direction of this Court and caused to be referred for decision. It has already been held by this Court in the case of *Chainrup Sampatram v. Commissioner of Income-tax, West Bengal*, that once this Court has directed a case to be stated with reference to a particular question, it is no longer open to the Bench finally dealing with the reference to hold that the question is not a question of law or that it does not arise out of the appellate order. A reservation, however, was made and it was to the effect that although the Bench finally dealing with the reference might be precluded from holding that the question did not arise out of the appellate order, it might still hold that it did not arise out of the facts of the case, although the appellate order might have discussed it. In the present case, although the language in which the question was framed by this Court admits of the point raised by Mr. Gupta, the Tribunal did not understand it in that sense and have stated a case only in terms of the controversy before them. When the limited character of the controversy before the taxing authorities and the Tribunal was pointed out to Mr. Gupta, he asked whether, if the income of Kejriwal could not in law be the income of the Hindu undivided family, we would still answer the question referred in the affirmative, for the reason that the basic question of law had not been raised before the authorities below. Happily, it is not necessary for us to answer that conundrum, inasmuch as it appears to me that if we limit ourselves to the case as stated and read the question referred in relation to it, we can make room for the extreme contention of Mr. Gupta and yet find an answer for it within the case stated. The statement of case which sets out the facts found, upon which the appellate order of the Tribunal rests says that on those facts the Tribunal held "that the share income earned during these three years is really the income of the assessee Hindu undivided family and rightly was assessed as such." Mr. Gupta conceded that if we answered the question as to whether the Tribunal was rightly in holding, on the basis of the facts on which it relied, that the income concerned was the income of the Hindu undivided family, he would be satisfied. An affirmative answer would necessarily exclude the extreme contention of Mr. Gupta. The argument of Mr. Gupta was short and simple. He said that the Income-tax Act might have, if it so wished, given a new definition of partnership and created a type of partnership not known to the general law, but it had not done so. Instead it said specifically in section 2 (6B) that the terms "partner" and "partnership" had the same meaning in the Act as they had in the Partnership Act. If the concept of a partner and of partnership under the

Indian Income-tax Act was the same as those concepts under the Partnership Act, a Hindu undivided family could not obviously be or become a partner as such and it could not derive any income as partnership income. Mr. Gupta drew our attention to the fact that what had been taxed in the hands of the Hindu undivided family was a certain amount, said to be not merely so much money or an income receipt, but to be partnership income. His contention was that a Hindu undivided family could not in law enter into a partnership and if a member of the family or its karta did so, he could do so in law only in his individual capacity and the income he derived as a member of the partnership could only be his individual income and necessarily could not be a partner. In support of that court in the case of *Kshetra Mohan Sannyasi Charan Sadhukhan v. Commissioner of Excess Profits Tax, West Bengal*. The passage in the judgment of their Lordships on which Mr. Gupta Particularly relied reads as follows :-

"When two kartas of two Hindu undivided families enter into a partnership agreement the partnership is popularly described as one between the two Hindu undivided families but in the eye of the law it is a partnership between the two kartas and the other members of the families do not ipso facto become partners." Mr. Gupta contended that if a partnership between two kartas was a partnership between them as individuals, the partnership of a karta in his individual capacity and the family could not be said to be a partner through the karta, nor could any other member of the family be said to be a partner unless he had actually entered the partnership. If that reasoning was right, it would certainly follow that Indra Chand Kejriwal could not in law be a partner of the firm of Indra Chand Hariram as the representative of the Hindu undivided family, Kaniram Hazarimull, but could only be a partner as Indra Chand Kejriwal, the individual, and the income derived him as such partner could not be his personal income. The proposition laid down by their Lordships of the Supreme Court is only one of two propositions which the judicial Committee have laid down on this question. Their Lordships of the Supreme Court must be taken to have approved of and reaffirmed for themselves what was held by the judicial Committee in the case of *P. K. P. S. Pichappa Chettiar v. Chokalingam Pillai*. It was held in that case that when a managing member of a joint Hindu family entered into a partnership with a stranger, the other members of the family entered into a partnership with a stranger, the other members of the family did not ipso facto become partners of the business, but only such of the members became partners as in fact entered into a contractual relationship with the stranger. That is certainly one aspect of the position and the principle, as I understand it, is that when the managing member of a Hindu undivided family enters into a partnership, the family cannot be said to have entered into the partnership as such, that is to say, directly and in the capacity of the family. There is, however, another aspect of the question which was dealt with by the Judicial Committee in the later case of *Lala Lachhman Das v. Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces*,

Lahore. The question referred in that case was whether in the circumstances of the case, there could be a valid partnership between one Lachhman Das as representing a Hindu undivided family on the one hand and one Daulat Ram, a member of that undivided Hindu family in his individual capacity, on the other. The High Court of Lahore answered the question in the negative in disagreement with the Appellate Tribunal, but their Lordships of the Judicial Committee reversed the High Court. They said that they were not concerned in that case with the questions relating to the validity of a partnership between a Hindu undivided family "as such" and one of its undivided members in his individual capacity. The question before them was one regarding the validity of a partnership between the karta of the family representing it on the one hand and a member of that family in his individual capacity on the other. Dealing with that question, their Lordships referred to certain earlier cases where it had been held that a Hindu undivided family acting through a karta could enter into a Partnership with a stranger and then they observed as follows :-

"It is clear that if a stranger can enter into partnership, with reference to his own property, with a joint Hindu family through its karta, there is no sound reason in their Lordships view to withhold such opportunity from a coparcener in respect of his separate and individual property."The reasons for that view were given by their Lordships in the following words :-

"It may be pointed out that though in its nature a joint Hindu family may be fleeting and transitory, it has been regarded as capable of entering, through the agency of its karta, into dealings with others. Without accepting the view of some eminent Hindu Judges that a Hindu joint family is, in its true nature, a corporation, capable of a continuous existence in spite of fleeting changes in its constitution, it is enough to state that for the purpose of such a transaction effected through the medium of its karta, it has been, for a long time past, regarded as an entity capable of being represented by its manager. The class of cases, of which the ruling in Chandrika Prasad Ram Swarup v. Commissioner of Income-tax, is an illustration, went on a different principle, namely, that a firm, not being recognized as a legal entity, cannot as such enter into partnership with another firm as such. That principle cannot be applicable to a joint Hindu family in transactions where it acts through the agency of its karta."

To my mind, this decision of the Judicial Committee is clear authority for the proposition that although a Hindu undivided family cannot itself and directly enter into a partnership, either with one of its own members or with strangers, it can do so through the medium or the agency of the karta, just as it enters into other contracts through him. There is thus a distinction between a contract by a family as such and a contract by a family through its karta and the position is that

though a family as such cannot be an immediate contracting party to a contract of partnership, it can nevertheless act through its karta who may enter the partnership as its agent and on its behalf. If a Hindu undivided family thus sends its karta to enter into a partnership on its behalf. If a Hindu undivided family thus sends its karta to enter into a partnership on its behalf and can legally do so, I am unable to see why the income derived by the karta as such partner cannot be treated as the income earned by the karta on the family's behalf through ventures or undertakings of other kinds. It is true that the Hindu undivided family cannot itself be a partner, not being a justice person, for the purposes of the Contract Act and not possessing the requisite contractual capacity; but it does not seem to be a violent notion to think that a Hindu undivided family can still act through the karta even in matters of partnership and, if I may use the expression, can invest the karta, together with such family funds as may be necessary, in the partnership for the purpose of earning an income for its own benefit. It has always been regarded correct under the Income-tax law to treat the partnership income of the karta of a Hindu undivided family as the family income, if he was a partner, as the representative of the family as the family income, if he was a partner, as the representative of the family and if, in order to acquire the partnership, family funds were utilised. It will suffice to refer to only two of the latest of such decisions : Mangalchand Mohanlal, In re, and M. N. Murugappa Chetty & Sons v. Commissioner of Income-tax, Madras. I find no reason for holding that the principle or concept upon which the Income-tax law seems so far to have proceeded was fundamentally erroneous or unsound. After all, what were the Income-tax authorities concerned about in the present case ? They were concerned about assessing a Hindu undivided family and finding out its taxable income. If they found that the family had, in fact, earned an income from a partnership by employing its karta to enter into the partnership and to act as a partner on its behalf and if it derived an income from such an investment or undertaking, I am unable to see why the income cannot be treated as the income of the family, even if the family might not in law be capable of entering into a partnership itself. In order that there may be an income liable to taxation, it is not necessary that the income should be derived from a relationship which is legally possible and permissible : it is enough if a relationship yielding an income is found as a fact and if income has, in fact, been received. I should, therefore, think that not only can a Hindu undivided family legally enter into a partnership through its karta by utilising his contractual capacity and thereby earn a partnership income which will be taxable in its hands, but it can also be held to be taxable on the footing that in fact it received the income, which the karta had earned, as its own receipt, on the footing that he was its representative, whether or not in law it could itself be a partner, even through the karta. If such be the true position in law, the only question in the present case is whether the facts relied upon by the Tribunal constitute sufficient evidence on which they could rightly hold that the partnership income of Indra Chand Kejriwal did in fact belong to the Hindu undivided family, as whose representative he has a partner in the firm of Indra Chand Hariram. The facts relied on

are that the partnership was promoted for the purpose of founding and obtaining the managing agency of the Shankar Sugar Mills; that the first deed of partnership provided that each of the partners was to provide capital in accordance with his share; that the capital so contributed was to be employed in the purchase of shares of the Sugar Mills; that so far as Indra Chand was concerned, his share was the capital was not supplied from his individual funds but was provided out of the funds of the family; that the shares of the mill company which were purchased with Indra Chands contribution to the capital of the managing agency firm were purchased not in his personal name, but in the name of the family; and, lastly, that the books of the family showed the partnership income as its own receipt. The contention of the assessee that the entries in the books merely showed that Indra Chand had passed on the money after having earned it on his own account was held to have not been established, because the assessee failed, in spite of repeated adjournments being granted, to produce the books of the company, the partnership firm and of Indra Chand himself. What the family books showed therefore, stood. On the above facts as found by the Tribunal, I am entirely unable to say that there was not sufficient or legal evidence before them on which they could hold that Indra Chand was a partner as a representative of the Hindu undivided family and that the income derived by him was really the familys income, liable to be taxed as such. For the reasons given above, the answer to the question referred must, in my opinion, be in the affirmative. The Commissioner of Income-tax, West Bengal, will have his costs of this reference. Certified for two counsel.

LAHIRI, J. - I agree.

Reference answered in the affirmative.