CALCUTTA HIGH COURT

Commissioner of Income-Tax

Vs

U.C. Mahatab, Maharaja of Burdwan

(Sabyasacht Mukharji and S M Guha, JJ.)

08.09.1980

JUDGMENT

Sabyasacht Mukharji, J.

1. In this case, the assessment years involved are 1963-64, 1964-65 and 1965-Theassessee was the holder of an impartible estate known as the Burdwan Raj and was governed by the Mitakshara school of Hindu law. There was a partition of the family properties, according to the assessee, between the assessee and his three sons, by a deed dated 10th April, 1962. The assessee claimed partition of the family properties before the ITO. The ITO was of the view that the assessee has been assessed as an individual in the past and there has been no HUF which could be partitioned within the meaning of Section 171(1) of the I.T. Act, 1961, and the claim for partition was not enforceable. He was also of the view that the partition had not taken place in the true sense of the term as the assessee's mother and brother had no right to relinquish their title or interest in the impartible estate which was solely governed by the rule of primogeniture. He further found that there was a clear bar in Hindu law from making a gift by a coparcener till the individual coparcener's interest was determined by means of partition and the very fact that the assessee had made a gift in favour of his brother on the 17th October, 1958, to the detriment of the existing HUF proved that the claim for partition was not enforceable. The ITO also rejected the contention of the assessee that the gift should be considered as partial partition. He also held that the entire property had not been divided. He rejected the assessee's contention that the partition was unequal in view of the assessee's position as also in order to discharge the liabilities and for meeting the expenses of pending litigation. Thus, he did not accept the partition and included the entire income in the hands of the assessee as an individual.

2. There was an appeal before the AAC. The AAC was of the view that after the coming into force of the Hindu Succession Act, 1956, the irnpartible estate vested in the hands of the joint family. He, further found that the impartible estate ceased to exist after the Hindu Succession

Act, 1956, came into force and the property comprised in the estate became the joint family property. He observed that Section 171 only referred to the position of law in respect of an HUF which had been assessed under the I.T. Act, 1961, and its claim regarding partition and it did not deny the existence of the HUF which might be owning property but had not been assessed to tax. As regards the gift, he held that the transfers were by way of family arrangements and it amounted to partial partition of the properties owned by the HUF. He also held that the intention to partition was really the test and once the members of the family partitioned the property in definite shares, though in unequal shares, the partition was complete. He also found that the assessee had filed separate return in the status of an HUF which itself showed, according to the AAC, that there was an HUF. The AAC further found that there was a partition by a deed of partition dated 10th April, 1962, and the properties mentioned in the deed of partition passed on, according to the AAC, to the different coparceners and the ITO was, therefore, not justified in including the income from such properties in the income of the assessee. He thus directed the ITO to exclude the income from those properties which had been allotted to the shares of the other coparceners from the total income of the assessee.

3. The revenue preferred an appeal before the Tribunal. It was urged that under Section 27(ii) of the I.T. Act, 1961, the holder of an impartible estate should be deemed to be the owner of all the properties comprised in the estate and the income of all the properties of the estate were to be included in the total income of the assessee so long as Section 27(ii) was on the statute book. It was further urged that the impartible estate was not held in coparcenary and so there could not be any partition of the impartible estate. It was further submitted the gift alleged by the assessee could not amount to partial partition. Counsel on behalf of the assessee had submitted before the Tribunal, as he did before us, that after the passing of the Hindu Succession Act, 1956, the impartible estate ceased to exist and the properties became the HUF properties and these were divisible and there could be a valid partition. The Tribunal held that though the impartible estate could not be held in coparcenary, still the estate belonged to the joint family. According to the Tribunal, by the passing of the Hindu Succession Act, 1956, the law in respect of the impartible estate had radically changed and the. impartible estates were abolished except those saved by Section 5(ii) of the said Act, viz., the Hindu Succession Act, 1956. Under Section 4 of the Hindu Succession Act, the law of succession hitherto applicable to the Hindus, either by virtue of any text, rule, custom or usage, ceased to have effect in respect of matters dealt with under the said Act. All impartible estates except those saved under Sections 5(ii) and 5(iii) would now have the ordinary incidents of property and the provisions of the Hindu Succession Act, 1956. It was further held that the instant case, did not come within the exception of Section 5(ii) and 5(iii) of the said Act. Thus, according to the Tribunal, the rule of primogeniture was no longer enforceable and the impartible estate was abolished. It was further held that Section 27(ii) of the

I.T. Act, 1961, would be applicable, if at all, to those estates saved by Section 5(ii) and 5(iii) of the Hindu Succession Act, 1956, but not to other impartible estates which no longer existed. Since the estate, in the instant case, was no longer an impartible estate, according to the Tribunal, Section 27(ii) of the I.T. Act, 1961, could not be made applicable. It was further held that the property, in the instant case, belonged to the Hindu joint family and there had been a valid partition of the family property by a deed dated 10th April, 1962, and the shares of the parties had been divided into definite shares. Thus, the coparceners, according to the Tribunal, after partition, became the owners of the properties allotted to them. It was further held that there was nothing to doubt the partition. The Tribunal, accordingly, upheld the order of the AAC directing the ITO to exclude the income from those properties allotted to the shares of the other coparceners from the total income of the assessee. In order to complete the narration, it may be mentioned that the properties or the income in respect of which exclusion is being claimed in the orders under consideration were immovable properties.

4. On the above facts, under Section 256(1) of the I.T. Act, 1961, the following questions have been referred to this court:

> "1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the impartible estate of which the assessee was a holder ceased to exist after the coming into force of the Hindu Succession Act, 1956, and Section 27(ii) of the Income-tax Act, 1961, cannot be made applicable ?
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> 2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the property of the impartible estate belongs to the Hindu joint family ?
>
> 3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the partition of the properties comprising the impartible estate by a deed dated 10th April, 1962, amongst the coparceners was valid and thus excluding the income from those properties allotted to the shares of the other coparceners from the total income of the assessee ?"

5. Now, this problem was first considered by the Judicial Committee in the decision in the case of *CIT v. Dewan Bahadur Dewan Krishna Kishore*[1] There the Judicial Committee was considering this question in the background of the Indian I.T. Act, 1922, as it stood at the relevant time. The year involved is important. It was the assessment year 1937-38. The Judicial Committee held that as regards the house property, for the purposes of Section 9 of the Indian I.T. Act, 1922, the income of an impartible estate to which the assessee had succeeded by the rule of primogeniture prevailing in his family governed by the Mitakshara law was chargeable in his

hands as that of the HUF and not as that of an individual, inasmuch as under the Hindu law the estate was owned by the joint family. But, as regards the interests for the purpose of Section 8 and 12 of the Act, income of such an estate was chargeable in the hands of the assessee as that of an individual and not as that of an HUF, as such the income was not the income of the HUF but was the income of the assessee notwithstanding the fact that he had sons from whom he was not divided. The Judicial Committee observed that the word "property of which he was the owner" in Section 9 of the Indian I.T. Act, 1922, as it stood then could not be urged to mean as " of which the annual value he is the owner ". The Judicial Committee expressed doubt as to whether an income from house property could be charged in the assessee's hands as the income of an individual under Section 12 of the Indian I.T. Act, 1922, on the ground that though the HUF owned the property, the income thereof belonged absolutely to the assessee. This doubt of the Judicial Committee was met by an amendment that was to follow soon thereafter. The relevant section of the Indian I.T. Act, 1922, at that time did not include Sub-section (4) of Section 9. That sub-section was added to Section 9 by Section 4 of the I.T. and Business Profits Tax (Amendment) Act, 1948, and it came into effect from 31st March, 1948, Section 9, as it stood at the relevant time, dealt with income from property and provided that the tax shall be payable by an assessee under the head " Income from property " in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax subject to certain allowances mentioned in different sub-clauses. Other clauses of Section 9 and the Explanation thereto are not relevant for our present purpose. Section 9(2) provided that for the purposes of this section, the annual value of any property should be deemed to be the sum for which the property might reasonably be expected to let from year to year. The other provisos, which were from time to time, amended need not detain us for our present purpose. Sub-section (3), which also underwent certain amendment in 1939, provided that where the property was owned by an association of two or more persons and their respective shares were definite and ascertainable, such persons should not in respect of such property be assessed as an association of persons but the share of each such person in the income from the property as computed in accordance with the section should be included in his total income. This primarily deals with Hindu joint families which are governed by the Dayabhaga system of Hindu law. Sub-section (4) of Section 9 was added, as we have mentioned before, with effect from 31st March, 1948, and provided as follows:

> "(4) For the purposes of this section, the holder of an impartible estate shall be deemed to be the individual owner of all the properties comprised in the estate."

6. As a result of this amendment, the effect of the decision of the Judicial Committee to a very large extent was nullified. This position would be clear if we refer to the subsequent Supreme Court decision. But before we do that, it would be instructive to refer to the decision of the Patna High Court, out of which decision, it went to the Supreme Court. The Division Bench of the Patna High Court in the case of *Maharaj Kumar Kamal Singh v. CIT*[2] had occasion to consider the situation tinder the Indian I.T. Act, 1922, though they took into consideration also the provisions of Sections 27(i) and 27(ii) of the I.T. Act, 1961, with which, in the instant case, we are concerned. It will be necessary to set out Clause (ii) of Section 27 of the I.T. Act, 1961, which runs as follows :

> " 27. 'Owner of house property ','annual charge', etc., defined.--For the purpose of Section s 22 to 26-
>
> (ii) the holder of an impartible estate shall be deemed to be the individual owner of all the properties comprised in the estate.",

7. This is in terms identical with Sub-section (4) of Section 9 of the Indian I.T. Act, 1922, after its amendment in 1948. The Division Bench of the Patna High Court in the aforesaid decision was concerned with the question whether where income from assets transferred to the wife were sought to be included in the total income of the husband under the provisions of Section 16(3), would it necessarily mean that the transferor-husband was himself the owner of the asset before they were transferred. Since the properties comprised in an impartible estate belonged to the HUF, of which the holder of the estate was a member, the income from house property transferred by the holder of an impartible estate to his wife could not be included, it was held by the Division Bench of the Patna High Court. According to the Patna High Court, the provision in Section 9(4), as amended in 1948, the holder of an impartible estate was deemed to be the individual owner Of all the properties comprised in the estate and that was a provision confined to the purposes of Section 9 for assessment of income from house property. We are here concerned with the question of the assessment of properties comprised in the estate with respect to impartible estate. Even on the basis of the authority of the Division Bench of the Patna High Court the position is clear. The Division Bench, further, observed that a taxing statute must be construed strictly. The Division Bench, however, went on to observe at page 734 about the present law as follows :

> "The present law (Income-tax Act, 1961) has brought about a different position. Sections 22 to 27 deal with income from house property. In Section 27(ii) it is provided that, for the purposes of Section s 22 to 26, the holder of an impartible estate shall be deemed to be an individual owner of all the properties comprised in the estate. Under Section 27(i), an

individual who transfers otherwise than for adequate consideration any house property to his or her spouse, not being a transfer in connection with an agreement to live apart, or to a minor child not being a married daughter, is to be deemed to be the owner of the house property so transferred. An owner of a house property is liable to assessment (Section 22). The above two provisions of Section 27 taken together bring the husband-transferor of house property comprised in an impartible estate to the wife under the liability of assessment on the income from that house property. Section 64 of the new Act corresponds to Section 16(3) of the old Act,"

8. This decision, as we have mentioned hereinbefore, went up in appeal before the Supreme Court and the Supreme Court had to consider this question in the case of CIT v. Maharaj Kumar Kamal Singh . There, the Supreme Court found that the respondent, holder of an impartible estate assessed as an individual, had granted two house properties to his wife for life. It was held by the Supreme Court that the provisions of Section 16(3)(a)(iii) of the Indian I.T. Act, 1922, applied and the income from the two house properties transferred to the wife had to be included in the total income of the respondent. Prior to the transfer, the respondent would have been considered to be the owner of the house properties under Section 9(4)(a) for the purpose of ascertaining his income from the house property and the income from that house properties would have been taken into account in computing his total income. The words " for the purpose of this section" in Section 9(4)(a) really meant for the purpose of determining the taxable income of the assessee. The Supreme Court further observed that it was true that the legal fiction should not be extended beyond the purpose for which it was enacted but that did not mean that the court should not give effect to that fiction. Section 27(ii) of the I.T. Act, 1961, which took the place of Section 9(4)(a) of the Indian I.T. Act, 1922, merely made explicit what was implied in Section 9(4) and this did not effect any change in law. Therefore, the Supreme Court held that the net annual value of the residential house was to be computed at 10 per cent, of the respondent's total income under the first proviso to Section 9(2) of the Act. While we are on this aspect, it is necessary to bear in mind the actual scope and effect of the Hindu Succession Act, 1956. The Hindu Succession Act, 1956, as the preamble to the Act states was to amend and modify the law relating to intestate succession among Hindus. Therefore, it was a law, as the Tribunal seems to suggest to modify those operations of the Hindu law which related to impartible estate ; according to the Tribunal, in this case, there is nothing on record to show that the present assessee, with whose income we arc concerned, became a successor to the impartible estate after the coming into operation of the Hindu Succession Act, 1956. Had it been so and had there been any investigation on this aspect different considerations might have arisen whether on succession after the coming into operation of the Hindu Succession Act, 1956, the assessee inherited the property by the rule of primogeniture. But be that as it may, in view of the preamble to the Act in

conjunction with Hindu law, Section 4 of the Act provides as follows:

> "4. (1) Save as otherwise expressly provided in this Act,--
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> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
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> (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.
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> (2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

9. It is clear, in our opinion, this Hindu Succession Act only dealt with the position at the time of succession after ^the coming into operation of the Hindu Succession Act, 1956. It did not affect the position and character of the HUF or of the ingredients of the impartible estate as such of an impartible estate which is in existence from before the coming into operation of the Hindu Succession Act, 1956.

10. The Tribunal had referred to the fact that Section 9(4) of the Indian I.T. Act, 1922, might be applicable to those classes of property which are mentioned in Section 5(ii) and 5(iii) of the Hindu Succession Act, with which we are unable to agree, Section 5(ii) and 5(iii) dealt with certain specific classes of properties, i.e., properties, succession to which was regulated by the Indian Succession Act, 1925, by reason of the provisions contained in Section 21 of the Special Marriage Act, 1954, and any estate which descended to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Govt. of India or by the terms of any enactment passed before the commencement of the Act. As we have mentioned before, the Hindu Succession Act, 1956, only regulated and abrogated those portions of the Hindu law which related to succession after the coming into operation of the Hindu Succession Act and did not modify or amend the existence of joint or composite ownership of properties under the Hindu joint family law.

11. Reliance was placed on behalf of the assessee on another decision of the Supreme Court in the case of CWT v. Rajah Velugoti Sarvagna Kumar Krishna Yachendra Bahadur . There, the point was that the compensation paid or payable under Section 45 of the Madras Estates

(Abolition and Conversion into Ryotwari) Act, 1948, as adopted by Andhra Pradesh, on the abolition of a zamindari (an impartible estate), to the sons of the holder of the estate was the absolute property of the sons and in that compensation the holder had no right whatsoever. Such compensation paid or payable to the sons could not be considered to be the wealth of the holder or his joint family for the purposes of the W.T. Act, 1957. But the decision in that case rested on the provisions of Section 45 of the particular Act mentioned hereinbefore, which provided as follows :

> "For deciding this question it is necessary to refer to certain provisions of the Act. Section 45 of the Act provides :
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> (1) In the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the following provisions shall apply...
>
> (6) The balance of the aggregate compensation shall be divided among the sharers, as if they owned such balance as a joint Hindu family and a partition thereof had been effected among them on the notified date."

12. The Supreme Court held that to summarise the effect of Section 45, though the estate belonged to the holder exclusively, that Act deemed it as the estate belonging to the family of the holder and further that the holder as well as his legitimate sons were considered as the sharers in that estate. Section 45 of the said Act provided that after making the disbursements prescribed in that section, the balance of the compensation amount would be distributed among the holder and his legitimate sons in accordance with the provisions contained in that Act. In that context, the said decision was made. Section 45 proceeded on the basis that there was a statutory partition between the father and the sons in so far as the payment of compensation was concerned and the amount paid or payable to the sons was their exclusive property. Whether there was partition in respect of other properties or not, so far as the payment of compensation was concerned, the Supreme Court noted, there was a partition between the father and the sons, in view of Section 45 of the Act. The Supreme Court, cautioned itself that Section 45 proceeded on the basis that the holder and his sons constituted a joint family and the estate belonged to the joint family, but that was only for the purpose of that Act. The said authority, in our opinion, should not be relied on in support of the proposition that after the coming into operation of the Hindu Succession Act, 1956, the impartible estate was no longer there.

13. On behalf of the revenue, reliance was placed on the decision of the Supreme Court in the case of *Chinnathayi v. Kulasekara Pandiya Naicker* . But that case dealt with an entirely different

position and not with the position with which we are concerned and we do not think that it will be of any assistance for us to refer to the said decision in detail.

14. Learned advocate for the assessee also relied on the decision of the Patna High Court in the case of *Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo* . There, at page 465 of the report, the Division Bench of the Patna High Court noted that the original plaintiff had died in September, 1957, and his two sons and four widows (of whom the first son was the appellant and the others were respondents there) were substituted in his place as plaintiffs. In that context, the Patna High Court observed in para. 7 of the said decision that after the commencement of the Act of 1956, Rudra Pratap was substituted and the decision had no occasion to consider the effect of Section 9(4) of the Indian I.T. Act, 1922, or Section 27(ii) of the I.T. Act, 1961, and, in our view, it could not be of much relevance,

15. The Tribunal in its appellate order had referred to the order in the case of the assessee in respect of the appeal for the assessment years 1944-45 to 1946-47, in Income-tax Appellate Order Nos. 6280 to 6282 of 1950-51 (order of 11th March, 1958). The Tribunal had observed that the income from house property was not liable to be taxed in the hands of the assessee in the status of an individual but should be taxed in the hands of the HUF of which the assessee was the karta. It must be borne in mind that this order related to the assessment for the assessment years. 1944-45 to 1946-47, that is to say, prior to the introduction of Section 9(4) of the Indian I.T. Act, 1922. The Tribunal had also referred to the decision of the Calcutta High Court in Income-tax Reference No. 277 of 1966 under the Expenditure-tax Act. We had sent for the unreported judgment in the said decision. The decision delivered by the learned Acting Chief Justice was on the following question :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that separate assessments should be made on the assessee as an individual and also as the karta of the joint Hindu family under the Expenditure-tax Act, 1957, for the assessment years 1958-59 and 1959-60?"

16. There, the Division Bench observed that the AAC had set aside the assessments and directed the Expenditure-tax Officer to make fresh assessments separately on the assessee in the status of an individual and also in the status of an HUF in respect of the assessment year under the Expenditure-tax Act. The Division Bench observed that one point was clear that for the purpose of computing the taxable expenditure, it was immaterial to consider the source from where the money came. This observation of the Division Bench, in our opinion, distinguishes that decision from the point specifically which we have to consider. We have to consider whether the income from the house properties which are taxable under Section 27 could be included in the income of

the joint family. The source of the income is very much material unlike the position as was held in that case under the Expenditure-tax Act. This position was also not disputed before the Division Bench by the revenue. On that basis of the finding and that concession, the Division Bench observed that the answer, was obvious. But the Division Bench was cautious to realise that the consequence of this decision might be disastrous if the ratio of this decision was applied in other fields. There, the Acting Chief Justice, P. B. Mukharji, observed as follows:

"Normally, proverbial judicial timidity prevents a court from looking into the consequences of its order. But we can well imagine what the aftermath will be when the assessment does take place. The situation might be quite Gilbertian in many respects. This will relate to the question of apportioning the expenditure of the assessee as an individual and as a member of a Hindu undivided family. The expenditure will have to hop between Dr. Jekyl and Mr. Hyde all along the line. When the assessee, the Maharaja here, takes his food or drinks, does he do so as an individual or as a member of a Hindu undivided family, at the house ? Whose expenditure will it be ? Individual's or karta's ? There are many other such expenses where this question will be truly acute, leading not merely to the question of dividing but also the question as to how far in this context an apportionment can be made. There will, of course, be some expenses which will be easy to allocate such as expenses for the assessee-Maharaja incurred by going to attend a directors' meeting in Bombay. It is not a theoretical question in this case to find out how are the legal expenses to be allocated. Is it going to be assessed as individual or as a member of Hindu undivided family ? Such are the questions. But we shall be content for the present to confine ourselves to the order we have made with the conventional attitude of the ostrich hiding its head in the sand for the time being and raising it again when the storms break out during the assessments."

17. In view of the provision of Section 27(ii) of the I.T. Act, 1961, and the effect of the Hindu Succession Act, 1956, in our opinion, the Tribunal was in error in coming to the conclusion that the partition as claimed was valid for the reasons aforesaid.

18. Question No. 1 must, therefore, be answered in the negative and in favour of the revenue. So far as the properties covered under Section 27(ii) of the I.T. Act, 1961, are concerned, question No. 2 must also be answered in the negative and in favour of the revenue. Question No. 3, in so far as these cover properties covered by Section 27(ii) of the I.T. Act, 1961, is in the negative and in favour of the revenue.

19. In the facts and circumstances, each party will pay and bear its own costs.

20. In this matter, after we had delivered judgment on the 8th September, 1980, and before we

could sign it, Mr. Sen, learned advocate appearing on behalf of the assessee, sought an opportunity to make certain further submission. As we had not signed the judgment, we gave him such an opportunity upon notice to the revenue.

21. We have heard both parties. On behalf of the assessee, it is now contended that the Calcutta properties mentioned in col. 8 of item 4 of the order of the ITO at paras. 12 onwards of the paper book do not form part of the impartible estate. It was sought to be urged that these properties were acquired by the Maharaja, the assessee, out of the accretions of the estate and there was no evidence of treating these properties as part of the impartible estate. In this connection, our attention was drawn to the observations in the Treatise in Hindu Law by Gopal Chandra Sarkar Shastry (1924 Edn.), at page 741. Learned advocate for the assessee also drew our attention to the observations of the Judicial Committee in the case of *Rani Parbati Kumari Debi v. Jagadis Chander Dhabal*[3] where the Judicial Committee held that a Hindu family migrating from one part of India to another was presumed to continue to observe the Shastras (and in that case, the Mitakshara) by which it had been governed and it was further held that on the evidence especially as to ceremonies at marriages, births and shradas that this presumption had not been displaced. Consequently, the Privy Council was of the opinion that the ancestral estate in that case had descended to the half-brother of the deceased in preference to his widows. It was further held that four mouzas in suit, purchased by the deceased out of his savings of his impartible estate, were his self-acquired estate and there was no intention on his part to incorporate these with the ancestral estate for the purpose of his succession, had been proved. In these circumstances, the case was remitted to the High Court to try an issue consequent on the ruling, especially as to the right, in the events which had happened to the four mouzas or to maintenance of the ancestral estate. In the case of *Rajindra, Bahadur Singh v. Rani Raghubans Kunwar*[4] the Judicial Committee had also observed that the Crown had power in British India by grant of lands to limit the descent in any way it pleased, but a subject had no power to impose upon lands or other property any limitation of descent at variance with the ordinary law applicable. In 1861, the Crown had granted a taluqa to a Hindu, subject to a primogeniture sanad. Upon an appeal to the Privy Council in a suit as to succession to the property of a deceased holder of the taluqa, it was declared in 1905 that the taluqa as constituted at the date of the sanad with accretions, if any, or properties, if any, appurtenant to the taluqa passed to the appellant but that the residue of the property passed to the respondent, and the case was remitted for determination under that declaration. No family custom of primogeniture was alleged. The Judicial Commissioner, on appeal, held that under the declaration villages substituted by the Government after 1861 for villages held under the sanad, and the house granted by the Government after 1861 to the taluqa for his use as a taluqa, passed to the appellant, but those villages purchased after 1861 by the deceased taluqa passed to the respondent, whether or not the purchaser intended to incorporate

them with the taluqa. Relying on the aforesaid observations and in view of the fact that previously the return had been filed showing these as partitioned properties, in the instant case before us, learned advocate for the assessee sought to contend that these properties did not form part of the impartible estate and as such were not to be included in the income of the assessee as an individual as has been sought to be done. It may be mentioned that this point was not considered by the Tribunal. Both the AAC and the Tribunal proceeded on the basis that the properties formed part of the impartible estate and the question was considered as to whether as a result of the coming into operation of the Hindu Succession Act, the impartible estate continued to exist or not. Now, we have held, as we have mentioned hereinbefore, that so far as the properties in respect of the impartible estate and the income in respect of which is included under Section 27, Clause (ii), of the I.T. Act, 1961, are concerned, the Hindu Succession Act would not affect to the extent we have indicated in our judgment, but we need not go into that aspect of the matter because that question has not been referred to us nor it appears out of the statement of the case that any such contention was raised before the Tribunal. Mr. Sen also sought to urge that under Sub-section (2) of Section 171 a notice was required to be given when a claim had been made, and in this case, a claim had been made before the ITO that there was a partition of all the members of the family before deciding whether there was any partition or whether the properties could be partible or not. This aspect, again was not urged before the AAC or the Tribunal and no question of law has been referred to us. In that view of the matter, we cannot go into this aspect of the matter, at this stage, but the assessee would be at liberty to urge before the Tribunal when it disposes of the matter under Section 260(1) of the I.T. Act, 1961, in seeking to urge this contention before the Tribunal because these are questions of fact. On behalf of the revenue, Mr. Pal sought to urge, as these questions were not urged before, that the assesses could not be allowed to agitate this point afresh before the Tribunal. Whether this question not being urged before could be allowed to be agitated by the assessee before the Tribunal is a matter which the Tribunal will take into consideration in disposing of the appeal in accordance with law under Sub-section (1) of Section 260 of the I.T. Act, 1961. The principles which are normally applicable in these matters have been mentioned by the Supreme Court in the case of *Esthuri Aswathiah v. CIT*[5]. Bearing the above principles in mind, the Tribunal will dispose of the appeal in accordance with law.

Sudhindra Mohan Guha , J.

22. I agree.

Cases Referred.

1[1941] 9 ITR 695
2[1968] 67 ITR 725

3[1902] LR 29 IA 82 ; ILR 29 Cal 433
4[1918] LR 45 IA 134 ; 48 IC 213
5[1967] 66 ITR 478