KERALA HIGH COURT

Popmuli Manakkal Parameshwaran Nambudripad

Vs

Inspecting Assistant Commissioner of Agricultural Income Tax

Original Petn. No. 2979 of 1965

(K.K. Mathew, T.S. Krishnamoorthy Iyer and V. Balakrishna Eradi, JJ.)

21.11.1967

JUDGMENT

T.S Krishnamoorthy Iyer, J.

1. (for himself and on behalf of Eradi, J.) This is an original petition filed under Article 226 of the Constitution to issue a writ of. prohibition against the respondent who is the Inspecting Assistant Commissioner of Agricultural Income Tax and Sales Tax (Special), Kozhikode, prohibiting him from taking further proceedings for assessing the petitioner as the manager of Poomulli Mana in the status of a Hindu Undivided family to agricultural income tax for the assessment year 1961-62 pursuant to Ext. P-1 notice dated 10-3-1965 issued under Section 35 and Ext. P-3 notice issued under Section 17(4) of the Agricultural Income Tax Act, 1950.

2. The petitioner - Parameshwaran Namboodiripad - is a member of Poomuli Mana consisting of a Namboodiri family in Kerala State and the members of the Mana were governed by the Madras Nambudiri Act, 1932 (Act 21 of 1933). Now they are governed by the Kerala Nambudiri Act, 1958 (Act 27 of 1958). The members of the family own considerable items of agricultural lands in the Malabar and in the erstwhile Travencore-Cochin State.

3. The area which originally formed the District of Malabar in the Madras State became part of the State of Kerala as and from 1-11-1956. The Travencore-Cochin Agricultural Income Tax (Amendment) Act, 1957 (Act 8 of 1957) amended the Travencore-Cochin Agricultural Income Tax Act, 1950, and extended the same to the whole of the Kerala State including the Malabar area with effect from 1-4-1957.

4. The Agricultural Income Tax Authorities of the State attempted to assee the petitioner who was then the manager of the Illom in the status of Hindu undivided family to tax for the assessment year 1957-58 by the assessment order dated 12-2-1958. The assessment order was quashed on 25-11-1958 in O.P. 178 of 1958 on the file of this court.

5. On 30-3-1958 all the members of the Poomulli Mana including the petitioner entered into a registered partition deed under which they became divided and most of the properties belonging

to the Mana were also divided by metes and bounds among them. The petitioner ceased to be the manager of the family from 1-4-1958.

6. Nevertheless, the Agricultural Income Tax Authorities issued notices to the petitioner under Sections 17(2) and 39 of the Agricultural Income Tax Act, proposing to assess him as the manager of the family in the status of Hindu undivided family for the assessment years 1957-58 and 1958-59. The petitioner challenged the validity of the notices in O. P. 340 of 1959 which was allowed by a division bench of this Court consisting of M.S. Menon and T.K. Joseph, JJ. on 18-1-1960 observing thus :

> "The learned Government Pleader submits, quite categorically that the assessment proposed is of the petitioner as an 'individual,' and not in any other capacity.

In view of the submission we do not consider it necessary to proceed further in this petition. We record the fact that the Department does not propose to assess the petitioner except as an individual and leave him to seek his remedies under the Act or the Constitution in case he feels himself aggrieved by any subsequent action of the Department".

7. Again the Department issued a notice dated 9-2-1960 under Section 35 of the Agricultural Income Tax Act, 1950 proposing to assess the petitioner in the status of Hindu undivided family for the assessment year 1959-60. The notice was quashed in O. P. 750 of 1960 by Vaidialingam, J., by the judgment dated 3-1-1961 on the ground that it is against the undertaking given by the Government Pleader in O. P. 340 of 1959. The decision in O. P. 750 of 1960 was confirmed in Writ Appeal 76 of 1961.

8. Yet another notice dated 8-11-1961 was issued by the Department under Section 35 of the Agricultural Income Tax Act, 1950, for assessing the petitioner to tax in the status of Hindu undivided family for the assessment year 1958-59. This notice also was quashed in O. P. 31 of 1962 by Vaidialingam, J. who observed thus :

> "I am perfectly satisfied that this notice. Ext. P-1, is rot in accordance with the judgment of this Court in O. P. No. 750 of 1960 and I am also satisfied that this is really issued in flagrant violation of the undertaking given on behalf of the Department by the learned Government Pleader and also contrary to the directions given by this Court in 6. P. Nos. 340 of 1959 and 750 of 1960".

The decision of Vaidialingam, J. in O. P. 31 of 1962 was rendered on 17-12-1963.

9. Section 29 of the Agricultural Income Tax Act 1950 (before the Amendment Act 12 of 1964) read thus "Assessment after partition of a Hindu undivided family or Marumakkathayam tarwad. (1) Where at the time of making an assessment under Section 18. It is claimed by or on behalf of any member of a Hindu undivided family, Aliyasanthana family or branch or Marumakkathayam tarwad hitherto assessed as undivided that a partition has taken place among the members or groups of members of such family or tarwad. the Agricultural Income-tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied that the joint family property has

been partitioned among the various members or group of members in definite portions he shall record an order to that effect :

> Provided that no such order shall be recorded until notice of the inquiry has been served on all the adult members of the family or tarwad entitled to the property as far as may be practicable or in such other manner as may be prescribed :
> (2) Where such an order has been passed, the Agricultural Income-tax Officer shall make an assessment of the total agricultural income received by or on behalf of the family or tarwad as such, as if no partition had taken place, and each member or group of members shall, in addition to any agricultural Income-tax for which he or it may be separately liable, and notwithstand and anything contained in clause (a) of Section 10, be liable for a share of the tax on the incomes so assessed according to the portion of the family or tarwad property allotted to him or it and the Agricultural Income-tax Officer, shall make assessments accordingly on the various members and groups of members in accordance with the provisions of Section 18 :
> Provided that all the members and groups of members whose family or tarwad property has been partitioned shall be liable jointly and severally for the tax on the total agricultural income received by or on behalf of the family or tarwad as such up to the date of the partition.
> (3) Where such an order has not been passed in respect of a Hindu family. Aliyasanthana family or branch or Marumakkathayam tarwad hitherto assessed as undivided, such family or tarwad shall be deemed for the purposes of this Act to continue to be an undivided family or tarwad".

10. The above provision was amended on 10-4-1964 by Act 12 of 1964. Section 29 of the Agricultural Income Tax Act, 1950, as amended by Act 12 of 1964 reads thus :

> "Assessment after partition of a Hindu undivided family : (1) Where at the time of making an assessment under Section 18, it is claimed by or on behalf of any member of a family hitherto assessed as a Hindu undivided family or which is being assessed for the first time as a Hindu undivided family that a partition has taken place among the members or groups of members of such family, the Agricultural Income-tax Officer shall make such inquiry therein to as he may think fit, and if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect :
> Provided that no such order shall be recorded until notice of the inquiry has been served on all the adult members of the family entitled to the property as far as may be practicable or in such other manner as may be prescribed.
> (2) Where such an order has been passed, the Agricultural Income-tax Officer shall make an assessment of the total agricultural income received by or on behalf of the family as such, as if no partition had taken place, and each member or group of members shall, in addition to any agricultural income-tax for which he or it may be separately liable, and

notwithstanding anything contained in clause (a) of Sub-Section (1) of Section 10, be liable for a share of the tax on the incomes so assessed according to the portion of the family property allotted to him or it and the Agricultural Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of Section 18 :

Provided that all the members and groups of members whose family property has been partitioned shall be liable jointly and severally for the tax on the total agricultural income received by or on behalf of the family as such up to the date of partition.

(3) Where such an order has not been passed in respect of a family hitherto assessed as a Hindu undivided or which is being assessed for the first time as a Hindu Undivided family, such family shall be deemed, for the purpose of this Act, to continue to be a Hindu undivided family"

11. The above provision was given retrospective effect from 1-4-1958. Based on the above Section, a notice dated 1-6-1964 was issued under Section 35 of the Act to the petitioner for assessing the agricultural income accrued to the undivided Hindu family during the period from 1-11-1956 to 31-3-1958. The validity of this notice was questioned in O. P. 1495 of 1964. During the pendency of the petition the Department passed the order of assessment on 20-5-1965. A Division Bench of this Court quashed the notice and the order of assessment, making the following observations :

"One of the submissions of the petitioner is that in the light of the Judgments in O. P. No. 750 of 1960 (affirmed in Writ Appeal No. 76 of 1961) and O. P. No. 31 of 1962 it is no longer open to the Department to attempt an assessment of the petitioner in any capacity other than that of an individual in respect of the assessment year 1958-59. We are in entire agreement with this submission and in view of that, it is unnecessary to consider the various other submissions made by counsel for the petitioner in support of his petition. We need only add that we are unable to sea anything in the amending Act referred to in the notice dated 1-6-1964 the Agricultural Income-tax (Amendment) Act, 1964 which permits the Department to disrupt the finality of the judgments mentioned above".

12. During the pendency of O. P. 1493 of 1964 the Department issued Exts. P-1 and P-3 which are sought to be quashed in the proceedings before us. Ext. P-3 is based on Ext. P-1 and it is enough to reproduce Ext. P-1 which reads thus :

"GIR. P. 3/61-62.

Office of the Inspecting Assistant Commissioner of Agricultural Income tax and Sales-tax (Special) Kozhikode, D/d. 10-3-1965. Notice under Section 35 of the A.I.T. Act. In exercise of the powers conferred on me under Section 35 and of all the other provisions enabling thereto, I hereby require you to file a Return of the Agrl. Income of your family properties which you held as its Kartha, in the previous year beginning on 1-4-1960 and ending on 31-3-1961 and chargeable to tax for the assessment year61-62, in the form enclosed, within 35 days of the

receipt of this notice. You are informed that in terms of the amendment of the Act by Act 12 of 1964 it is proposed to assess you as the Manager of the Hindu undivided Family giving the status of Hindu Undivided Family and the concessions contemplated under Section 3(3).
Default to file the return within the time given entails completion of the assessment ex parte.
Sd/- (Assessing Authority)
Inspecting Asst. Commissioner of Agrl.
Income and Sales Tax (Spl.) Kozhikode.
To
Sri P.M. Parameswaran Namboodripad, Poomulli Mana, Peringad, Via Pooani (RPAD) "

13. The petitioner filed his reply to Ext. P-1 on 30-3-1965. A copy of the said reply is marked Ext. P-2. The petitioner stated therein that the members of the Poomulli Mana partitioned their properties and became divided among themselves under the partition deed of 30-3-1958 and thereafter there is no undivided family and the petitioner is neither the Kartha nor the Manager of any Hindu undivided family. Ext. P-2 also pointed out that the partition in the family was accepted by the Department and individual assessments were made on the members for the years 1959-60 to 1964-65 and the tax assessed was paid by all the members and that the amendment of Section 29 by Act 12 of 1964 cannot cause a reunion among the members to form a Hindu undivided family.

14. On behalf of the respondent, the Assistant Secretary (Law) Board of Revenue (Kerala), Ernakulam has filed a counter-affidavit. While admitting the partition deed dated 30-3-1958 among the members of the Mana it is averred that under Section 29(3) of the Agricultural Income Tax Act, 1950, the family shall be deemed for the purpose of the Act, to continue to be a Hindu undivided family until an order is passed by the Agricultural Income Tax Officer under Section 29(1) of the Act recording the partition and Exts. P-1 and P-3 are therefore legal.

15. The points raised by the learned counsel for the petitioner are : (1) That the issue of Exts. P-1 and P-3 is against the undertaking given by the Department recorded in the decision in O. P. 340 of 1959 and is also against the directions given in the prior decisions of this Court in the several petitions filed by the petitioner. (2) That during the accounting year from 1-4-1960 to 31-3-1961 there was no Hindu undivided family in existence which received the agricultural income and the petitioner is not the manager or the karnavan of the family since 30-3-1958 and Section 29 of the Agricultural Income Tax Act, 1950, as amended by Act 12 of 1964 cannot have any application to the case. (3) That the assessment proceedings based on Exts. P-1 and P-3 are barred by res judicata on account of the decisions of this Court in the petitions referred to. (4) That Section 29 of the Agricultural Income Tax Act, 1950, offends Article 14 of the Constitution.

16. Point No. 1. It has to be observed that the reasoning in O. P. 1495 of 1964 for quashing the notice issued to the petitioner for assessing him in the status of Hindu undivided family for the assessment year 1958-59 is equally applicable to the petition before us and on that ground Exts. P-1 and P-3 have to be quashed. But since we do not want to rest our decision on that reasoning alone, we are considering the other contentions raised on behalf of the petitioner.
17. Point No. 2. This question depends upon the scope and ambit of Section 29 of the Agricultural Income Tax Act, 1950 as amended by Act 12 of 1964. In this connection we have to mention even at the risk of repetition that the members of the Illom divided most of the properties by metes and bounds and got themselves divided by the deed of 30-3-1958. The deed

of partition is not in any way impeached in the counter-affidavit filed by the Department. The contention on behalf of the Department is that in spite of the partition of 30-3-1958, Section 29(3) of the Agricultural Income Tax Act, 1950, enables the Agricultural Income Tax Officer by a fiction to treat the divided members of the Illom as a Hindu undivided family for the purpose of the Agricultural Income Tax Act 1950, unless an order recording the partition is passed under Section 29(1) of the Act.

18. The charging Section in the Agricultural Income Tax Act, 1950, is Section 3 thereof. Section 3(1) provides that Agricultural Income Tax at the rate or rates specified in the Schedule to that Act shall be charged for each financial year in accordance with and subject to the provisions of the Act, on the total agricultural income of the previous year of every person. 'Person' defined in Section 2(m) of the Act means any individual or association of individuals, owning or holding property for himself or for any other, or partly for his own benefit and partly for another, either as owner, trustee, receiver, common manager, administrator or executor or in any capacity recognized by law, and includes a Hindu undivided family a firm or a company, an association of individuals whether incorporated or not, and any institution capable of holding property. 'Hindu undivided family' defined in Section 2 (kk) of the Act includes an undivided Marumak-kathayam tarwad or thavazhi, an undivided Aliyasanthana family or branch, a family governed by the law applicable to Nambudiris and an undivided Mithakshara family'. A Hindu undivided family is therefore a unit of assessment under Section 3(1) of the Act. If a Hindu undivided family has to be assessed the assessment can only be on the total agricultural income of the previous year received by the Hindu undivided family. Ext. P-1 has called upon the petitioner to submit a return of the agricultural income of your family properties which you held as its Kartha, in the previous year beginning on 1-4-1960 and ending on 31-3-1961 and chargeable to tax for the assessment year 1961-62'. In view of the partition deed of 30-3-1958 there was no Hindu undivided family in respect of any income during the relevant accounting period and the petitioner was also deprived of his status as the karanavan and manager of the family. So far there is no difficulty. But the question is whether this position is in any way altered because of the substitution of Section 29 by Act 12 of 1964, and whether the said provision can be construed as having the effect of taxing that income as the income of a Hindu family which in fact was not in existence under the Hindu Law during the relevant accounting year so as to receive the agricultural income sought to be assessed.

19. Section 29 of the Agricultural Income Tax Act, 1950, only prescribes the procedure for the assessment after partition of a Hindu undivided family. The said provision deals with the assessment of a family hitherto assessed as a Hindu undivided family or a family which is being assessed for the first time as a Hindu undivided family. Sub-Section (2) of Section 29 makes it clear the assessment that is contemplated in Sub-Section (1) thereof is of "the total agricultural income received by or on behalf of the family as such". Liability to tax does not depend on assessment. The order of assessment merely quantifies the liability which is created by the charging provisions of the Act and which accrues not later than the close of the previous year. Lord Dunedin observed in *Whitney v. Inland Revenue Commissioners*[1], thus :

> "Now, there are three stages in the imposition of a tax there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That,

ex-hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

The Privy Council said in *Wallace Brothers and Co. Ltd. v. Commissioner of Income-tax*[2]–

"The rate of tax for the year of assessment may he fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But. the liability to tax arises by virtue of the charging section alone, and H arises not later than the close of the previous year, though quantification of the amount payable is postponed." In *Chatturam v. I. T. Commissioner, Bihar*[3], the Federal Court speaking with reference of the Income Tax Act. 1922. Observed :

"The liability to pay the tax is founded on Sections 3 and 4, Income-tax Act, which are the charging Sections. Section 22 etc. are the machinery sections to determine the amount, of tax."

Their Lordships of the Supreme Court observed in *Kalwa Devadattam v. Union of India*[4],

"Under the Indian Income-tax Act liability to pay income-tax arises on the accrual of the income, and not from the computation made by the taxing authorities in the course of assessment proceedings; it arises at a point of time not later than the close of the year of account."

The position is the same under the Kerala Agricultural Income Tax Act, 1950, Sub-Section (1) of Section 29 only prescribes the procedure thereby members of a family hitherto assessed in the status of a Hindu undivided family or which is being assessed for the first time as a Hindu undivided family may obtain an order that they may, because of the division of the joint family property in definite portions, be assessed as separate members. The essence of the section is that the income must in the first instance be received by the family as such. The claim by any member of the family referred to in Sub-Section (1) of Section 29 is to be made at the time of making an assessment under Section 18 of the Act. The words 'at the time of making an assessment under Section 18, mean in the course of assessment proceedings and are not no doubt confined to the time of making the final order of assessment. The

[1](1926) 10 Tax Cases 88 at. p. 110
[2](1948) 16 ITR 240 : AIR 1948 PC 118
[3](1947) 15 ITR 302 at p. 308 : (AIR 1947 FC 32 at p. 35)
[4] (1963) 49 ITR 165 at p. 171 : (AIR 1964 SC 880 at p. 883)

assessment under Section 18 is based on the return filed under Section 17 or based on the omission to file a return under Section 17(2) or on account of any failure to comply with the terms of the notice issued under Section 17(2) or Section 17(4) of the Act. Section 17(1) of the Act says :

"Every person whose total agricultural income during the previous year exceeded the maximum amount which is not chargeable to the agricultural Income-tax Officer so as to reach him before the 1st June every year to return in the prescribed form and verified in the prescribed manner, setting forth his total agricultural income during the previous

year."

The person who is obliged to file the return is the person whose total agricultural income during the previous exceeded the maximum amount which is not chargeable to agricultural income-tax. This obviously shows that the liability to pay the tax must have been incurred by the assesses at a point of time not later than the close of the accounting year. If the assessee was not in existence at all in the year of account, there is no scope for assessing him to tax.

20. The contention of the learned Advocate General was based on Sub-Section (3) of Section 29 of the Act. His submission was that in the absence of an order by the Agricultural Income Tax Officer under Sub-Section (1) of Section 29 of the Act recognizing the partition in respect of a family which is being assessed for the first time as a Hindu undivided family such family shall be deemed for the purpose of the Act to continue to be a Hindu undivided family, even though the members have become divided. The plea was that since the partition of 30-3-1958 has not been recognized by an order under Section 29(1) of the Act, the Namboodiri family of the petitioner is deemed under Section 29(3) of the Act a Hindu undivided family in existence during the relevant accounting year and therefore Exts. P-1 and P-3 for assessing the petitioner in the status of Hindu undivided family are valid.

21. It is true that an order can be recorded under Section 29(1) of the Act only when there is a disruption of the joint family coupled with a partition of all the family properties in definite portions, even though under Hindu law the joint family will cease to exist if there is a division in status among the members without a division of the joint family properties by metes and bounds. In Hindu Law when there is severance of joint status the joint family ceases to exist as an entity although the properties are not partitioned. As far as Section 29 of the Act is concerned, the joint family although its status has been severed continues to exist till all the properties of the family are completely and finally partitioned. But we do not think that this can in any way support the contention of the learned Advocate General. It is to be remembered in this connection that what has got to be assessed under sub-clause (2) of Section 29 is the total income of the joint family. The Income Tax Officer has therefore to ascertain for the purpose of the assessment under Section 29 what is the total income of the joint family. The contention of the learned Advocate General if accepted will lead to the consequence that even if a Hindu undivided family has become disrupted by the members effecting a division of title and division of all the properties by metes and bounds the family has to he treated because of Section 29(3) of the Act as a Hindu undivided family for the purpose of the Act, unless an order recognizing the partition is recorded by the Agricultural Income Tax Officer under Section 29(1) of the Act. We do not think that Section 29 of the Act envisages such a situation. There are no decisions based on the said provision to support the contention raised by the learned Advocate General. Both sides relied on some decisions which have discussed the scope of Section 25A of the Indian Income Tax Act, 1922. The terms of Section 29 of the Agricultural Income Tax Act, 1950, are not similar to those of Section 25A of the Indian Income Tax Act, 1922. But Section 29 of the Agricultural Income Tax Act, 1950, before its amendment by Act 12 of 1964 contained substantially the same terms of Section 25A of the Indian Income Tax Act, 1922. The result of the amendment of Section 29 of the Agricultural Income Tax Act by Act 12 of 1964 is that a Hindu undivided family which is being assessed for the first time will also be governed by the Section. The decisions based on Section 25A of the Indian Income Tax Act, 1922 will afford some guidance in the interpretation

of Section 29 of the Agricultural Income Tax Act, 1950 In *Sundar Singh Majithia v. Commissioner of Income Tax, United and Central Provinces*[5], their Lordships of the Judicial Committee observed thus :

> "Section 25A is directed to the difficulty which arose when an undivided family had received income in the year of account but was no longer in existence as such at the time of assessment. The difficulty was the more acute by reason of the provision - an important principle of the Act contained in Section 14(1) :
> 'The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family.'

Section 25-A deals with the difficulty in two ways, which are explained by the rule, applicable to families governed by the Mitakshara. that by a mere claim of partition a division of interest may be effected among co-parceners so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filing of a suit for partition may have this effect though it may take years before the shares of the various parties are determined or partition made by metes and bounds. Meanwhile the family property will belong to the members as it does in a Dayabhaga family in effect as tenants in common. Section 25A provides that if it be found that the family property has been partitioned in definite portions, assessment may be made, notwithstanding Section 14(1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the total tax. If, however, though the joint Hindu family has come to an end it be found that its property has not been partitioned in definite portions, then the family is to be deemed to continue - that is to be an existent Hindu family upon which assessment can be made on its gains of the previous year."
Venkatarama Aiyar, J., in *Lakhmichand Baijnath v. Commissioner of Income Tax*[6], Observed :

> "Now, when a claim is made under Section 25A, the points to be decided by the Income Tax Officer are whether there has been a partition in the family, and if so, what the definite portions are in which the division had been made

[5](1942) 10 ITR 457 at pp. 464, 465 : (AIR 1942 PC 57 at pp. 60, 61)
[6](1959) 35 ITR 416 at pp. 421, 422 : (AIR 1959 SC 341 at p. 344)

> among the members or groups of members. The question as to what the
> income of the family assessable to tax under Section 23(3) was would be foreign to the scope of an enquiry under Section 25A. That section was, it should be noted, introduced by the Indian Income-tax (Amendment) Act, 1928 (3 of 1928), for removing a defect which the working of the Act as enacted in 1922 had disclosed. Under the provisions of the Act as they stood prior to the amendment, when the assessee was an undivided family, no assessment could be made thereon if at the time of the assessment it had become divided, because at that point of time, there was no undivided family in existence which could be taxed, though when the income was received in the year of account the family was joint. Nor could the individual members of the family be taxed in respect of such income as the same is exempt from tax under Section 14(1) of the Act. The result of these

provisions was that a joint family which had become divided at the time of the assessment escaped tax altogether. To remove this defect, Section 25A enacted that until an Order is made under that section, the family should be deemed to continue as an undivided family. When an order is made under that section, its effect is that while the tax payable on the total income is apportioned among the divided members or groups, all of them are liable for the tax payable on the total income of the family. What that tax is would depend on the assessment of income in proceedings taken under Section 23, and an order under Section 25A would have no effect on that assessment. It is in this context that we must read the observations in the order under Section 25A relied on for the appellant."

Shah, J., pointed out in (1963) 49 ITR 165 : AIR 1964 SC 880 :

"Under Section 25A of the Income-tax Act, if at the date when the liability to pay tax arose there was in existence a joint family which has subsequently disrupted, the tax will still be assessed on the joint family. The machinery for recovery of the tax however differs according as an order recording partition is made by a member of the family that the joint family property has, since the close of the year of account been partitioned among the various members or groups of members in definite portions, he must record an order to that effect and thereupon notwithstanding anything contained in Sub-Section (1) of Section 14 of the Act each member or group of members is liable in addition to any income-tax for which he is separately liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it. But even after this apportionment of liability for the tax assessed on the total income of the joint family, the members of the family or groups thereof remain jointly and severally liable for the tax assessed on the total income received by the family as such. If no order is recorded under Sub-Section (1) of Section 25A, by virtue of Sub-Section (3) the family shall be deemed, for the purposes of the Act, to continue to remain a Hindu undivided family. Section 25A merely sets up machinery for avoiding difficulties encountered in levying and collecting tax, where since the income was received the property of the joint family has been partitioned in definite portions, while at the same time affirming the liability of such members or group of members, jointly and severally to satisfy the total tax in respect of the income of the family as such. The section seeks to remove the bar imposed by Section 14(1) against recovery of tax from an individual member of a joint Hindu family in respect of any sum which he receives as a member of the family, and to ensure recovery of tax due, notwithstanding partition. The incidence of tax, but not the quantum is readjusted to altered conditions."

Their Lordships of the Supreme Court observed in *Gowli Buddappa v. Income Tax Commissioner, Mysore*[7],:

"Sub-Section (1) of Section 25A on which reliance was placed also does not imply that a Hindu undivided family must consist of mere male members than one. The Sub-Section

only prescribes the procedure whereby the members of a family which has hitherto been assessed in the status of a Hindu undivided family may obtain an order that they may, because of partition of the joint status be assessed as separated members. The clause is purely procedural."

Shah, J. observed in *Addl. Income Tax Officer v. A. Thimayya*[8]*,*

> "Whereas in the case of an assessment of the income of the joint family, the tax liability is charged upon the assets of the family when upon a partition an order under Sub-Section (1) has been recorded all members and groups of members are expressly declared by the proviso to be jointly and severally liable for the tax assessed on the total income received by or on behalf of the joint family. Liability which so long as an order was not recorded under Section 25A(1) was restricted to the assets of the Hindu undivided family is by virtue of the proviso to Sub-Section (2) transformed when the order is recorded, into personal liability of the members for the amount of tax due by the family.

An order under Sub-Section (1) can only be made if certain conditions co-exist - the family in question has been hitherto assessed as undivided and a claim is made at the time of making an assessment that partition of the family property has been made between the members or groups in definite portions. Sub-Section (2) of Section 25A becomes effective only if an order under Section 25A(1) is made and not otherwise. In terms the sub-section enacts that the Income Tax Officer shall assess the total income received by or on behalf of the joint family and apportion it in the manner provided by Sub-Section (2) where an order is passed under Sub-Section (1). The scheme of Section 25A is therefore clear; a Hindu undivided family hitherto assessed in respect of its income will continue to be assessed in that status notwithstanding partition of the property among its members. If a claim is raised at the time of making an assessment that a partition has been effected, the Income-tax Officer must make an inquiry after notice to all the members of the family and make an order that the family property has been partitioned in definite portions, if he is satisfied in that behalf. The Income-tax Officer is by law required still to make the assessment of the income of the Hindu undivided family, as if no partition had taken place and then to apportion

[7](1966) 60 ITR 290 at p. 297: (AIR 1966 SC 1523 at p. 1526)
[8](1965) 55 ITR 666 at p. 671: (AIR 1965 SC 1238 at p. 1241)

the total tax liability and to add to the separate Income of the members or groups of members the tax proportionate to the portion of the joint family property allotted to such members or groups of members and to make under Section 23 assessment on the members accordingly. If no claim for recording partition is made, or if a claim is made and is disallowed or the claim is not considered by the Income-tax Officer, the assessment of the Hindu undivided family which has hitherto been assessed as undivided will continue to be made as if the Hindu undivided family has received the income and is liable to be assessed."

22. The scope and scheme of Section 29 of the Agricultural Income Tax Act, 1950, is the same. Section 25A of the Indian income Tax Act, 1922, has no application to a Hindu family which has never been assessed before as a joint family whereas Section 29 of the Agricultural Income Tax

Act 1950 (after its amendment by Act 12 of 1964) will apply to the case of a Hindu family which is being assessed for the first time as a Hindu undivided family. The fiction created by Sub-Section (3) of Section 29 will depend upon the result of the assessment proceedings mentioned in Sub-Section (1) of Section 29, and the fiction can operate only for the assessment of the income in the subsequent years of account received by the family. In respect of a family which is being assessed for the first time as a Hindu undivided family, no claim under Sub-Section (1) of Section 29 is possible if the Hindu undivided family continues to be joint. A claim is possible only on the ground that a partition has taken place among the members of the family. The said sub-section authorizes the Agricultural Income Tax Officer to conduct an enquiry and if he is satisfied that the Joint family properties have been partitioned among the sharers in definite portions he shall record an order that a partition has taken place. Sub-Section (3) of Section 29 says that where such an order has not been passed in respect of a family which is being assessed for the first time as a Hindu undivided family, such family shall for the purpose of this Act continue to be a Hindu undivided family. There was some discussion at the bar as to whether an order refusing to recognize a claim for partition mentioned in Sub-Section (1) of Section 29 is necessary for the fiction in Sub-Section (3) of Section 29 to operate. It is not necessary to decide this point as we are of the view that the fiction in Sub-Section (3) of Section 29 can operate in respect of a Hindu undivided family which is being assessed for the first time, only when proceedings for assessment and levy are pending. This is possible only when the Hindu undivided family as understood in Hindu law has incurred the liability to pay the tax before the close of the year of account, by the receipt of the agricultural income. If on the other hand there was no Hindu undivided family as understood in Hindu law in existence in the accounting year, and the assessment proceedings are started against a member of the family on the ground that he was the manager and the income of the family properties received by all the members is joint family income there is no scope for applying Section 29(1) and as a result Section 29(3) cannot be invoked. Section 29(3) cannot be read independent of Section 29(1). It is controlled by Sub-Section (1) of Section 29 of the Act. The learned Advocate General relied on the well known dictum of Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*[9]*,*

> "If you are bidden to treat an imaginary state of affairs as real, you must surely

[9](1932) AC 109

> unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. .....The statute says that you must imagine a certain state of affairs : it does not say that having done so, you must permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

The Supreme Court in *Income Tax Commissioner v. Amarchand*[10] in considering the scope of the fiction under Section 24B of the Indian Income Tax Act, 1922, observed thus :

> "By Section 24B the legal representatives have, by fiction of law, become assessees as provided in that section but that fiction cannot be extended beyond the object for which it was enacted. As was observed by this Court in *Bengal Immunity Co. Ltd. v. The State of Bihar*[11]*,* legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond that legitimate field.

In *Assistant Controller v. Balakrishna Menon*[12] a Full Bench of this Court observed :

> "It is equally clear that legal fictions are created for definite purposes, that they are limited to the purposes for which they arcreated and that they should not be extended beyond that legitimate field."

23. We are of the view that the fiction in Section 29(3) of the Act is a limited one and operates only on those families referred to in Sub-Section (1) of Section 29 of the Act and against whom assessment proceedings under Section 18 can be started under Section 17 of the Act.

24. It therefore follows that during the relevant accounting year there was no Hindu undivided family in existence and the notices issued to assess the petitioner as the manager of the Illom in the status of Hindu undivided family are Illegal and without jurisdiction. Since the petitioner has to succeed on the findings on points 1 and 2, we are not expressing any opinion on points 3 and 4.

25. In the result, we allow the petition and issue a writ of prohibition restraining the respondent from taking further proceedings against the petitioner based on Exts. P-1 and P-3. The petitioner will have his costs including advocate's fee ₹ 250.

Mathew, J.

26. I regret my inability to agree.

27. This is an application for a writ of prohibition restraining the respondent, the Inspecting Assistant Commissioner of Agricultural Income-tax and Sales-tax, Special Circle, Kozhikode, from taking further proceedings in pursuance of the notice Ext. P-

[10](1963) 48 ITR 59 at p. 66 : (AIR 1963 SC 1448 at p. 1452)

[11]1955-2 SCR 603 at p. 646 : AIR 1965 SC 661 at p. 680

[12]1967 Ker LT 148 : AIR 1967 Ker210

1 issued by him to the petitioner under Section 35 of the Agricultural Income-tax Act, 1950, hereinafter referred to as the Act, proposing to re-assess the income of the family of which the petitioner was the kartha and manager for the year commencing from 1-4-1960 and ended on 31-3-1961 and chargeable to tax for the assessment year 1961-62, and also to restrain him from proceeding further in pursuance of Ext. P-3 notice issued under Section 17 (4) of the Act.

28. The petitioner was the kartha of Poomulli Mana, a Namboodiri family, governed by the Madras Namboodiri Act, 1933. On 1-11-1956 the District of Malabar in which the illom is situate became part of the Kerala State. The concerned Agricultural Income-tax Officer of the Kerala State assessed the illom to Agricultural Income-tax for the assessment year 1957-58 by an order dated 12-2-1958. This was resisted by the petitioner and he filed O. P. No. 178 of 1958 to quash the order of assessment. The O. P. was allowed by this court giving the department freedom to assess the agricultural income derived from the lands of the illom in the erstwhile Travencore-Cochin area.

29. The members of the illom, it is alleged, entered into a partition on 30-3-1958 by a registered

document. It is claimed by the petitioner that under the document all the properties in the direct possession of the illom were divided by metes and bounds and the rent payable in respect of the properties in the possession of tenants has been apportioned among the members. For the year 1958-59 the Agricultural Income-tax Officer issued notice proposing to assess the petitioner as the kartha and manager of the family. Petitioner thereupon filed O. P. No. 340 of 1959 praying for a writ of prohibition. At the time of hearing the O. P. an undertaking was given by the Government Pleader appearing for the Department, that the petitioner would be assessed only as an individual, the court disposed of the writ petition stating that in view of the undertaking it is not necessary to proceed further with the merits of the petition. The undertaking was recorded by the court. Again, the Agricultural Income tax Officer attempted to assess the petitioner as the kartha of the family for the year 1958-59. Petitioner filed O. P. No. 750 of 1960 for a writ of prohibition and this court allowed the petition, observing that the petitioner could be assessed only in the status of individual. Against this order the Agricultural Income-tax Officer filed W. A. No. 76 of 1961. That was dismissed. The Department again issued notice to the petitioner proposing to assess him as the manager of the illom for the assessment year 1958-59. Petitioner filed O. P. No. 31 of 1962 to quash the notice. This court allowed the petition. For the assessment years 1959-60 to 1965-66 orders have been passed assessing the petitioner and the other members of the family in the status of individuals.

30. On 10-4-1964 the Legislature of Kerala State passed Act 12 of 1964 with retrospective effect from 1-4-1958 by which some of the provisions of the Agricultural Income-tax Act, 1950, were amended. Section 29 after the amendment reads :

> "Where at the time of making an assessment under Section 18, it is claimed by or on behalf of any member of a family hitherto assessed as a Hindu undivided family or which is being assessed for the first time as a Hindu undivided family that a partition has taken place among the members or groups of members of such family, the Agricultural Income-tax Officer shall make such inquiry there into as he may think fit, and if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect :
> Provided that no such order shall be recorded until notice of the inquiry has been served on all the adult members of the family entitled to the property as far as may be practicable or in such other manner as may be prescribed.
> (2) Where such an order has been passed, the Agricultural Income-tax Officer shall make an assessment of the total Agricultural income received by or on behalf of the family, as such, as if no partition had taken place and each member or group of members shall, in addition to any agricultural income-tax for which he or it may be separately liable, and notwithstanding anything contained in clause (a) of Sub-Section (1) of Section 10, be liable for a share of the tax on the Income so assessed according to the portion of the family property allotted to him or it and the Agricultural Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of Section 18 :
> Provided that all the members and groups of members whose family property has been partitioned shall be liable jointly and severally for the tax on the total agricultural income

received by or on behalf of the family as such up to the date of the partition.

(3) Where such an order has not been passed in respect of a family hitherto assessed as a Hindu undivided family or which is being assessed for the first time as a Hindu undivided family, such family shall be deemed, for the purpose of this Act, to continue to be a Hindu undivided family."

The concerned Agricultural Income-tax Officer issued a notice to the petitioner on 1-6-1964 proposing to assess him for the year 1958-59 as the kartha of the family. On 23-6-1964 the petitioner filed O. P. No. 1495 of 1964 for a writ of prohibition restraining the Department from assessing the petitioner as the Kartha of the family On 10-3-1965 the Inspecting Assistant Commissioner of Agricultural Income-tax and Sales-tax issued the impugned notice under Section 35 of the Act directing him to file a return of the income of the properties of the illom for the year beginning from 1-3-1960 and ended on 31-3-1961. Petitioner filed objections to the notice.

31. When this writ petition came up for hearing along with O. P. No. 1495 of 1964, this petition was adjourned, and it was thereafter referred to a Full Bench. O. P. No. 1495 of 1964 was disposed of holding that the petitioner could be assessed only as 'individual' for the year 1958-59 for the reason that the previous orders of this court holding that the petitioner was liable to be assessed only as 'individual' have become final and that the Department cannot bypass those orders and assess the petitioner as the kartha of the family.

32. The main contentions of the petitioner in this petition are that the family was governed by the provisions of the Madras Namboodiri Act, that the family attained a status of division by the members thereof entering into a partition on 30-3-1958, that since each member has a definite share in the properties of the family, the members became tenants-in-common of the properties on 1-4-1958, that they could thereafter be assessed only as tenants-in-common under Section 3 (5) of the Act, that it was not open to the Legislature by any contrivance henceforward to make them members of a Hindu undivided family, that the petitioner ceased to be the manager of an undivided family by the partition, that no income was received by a Hindu undivided family in the accounting year 1960-61 and so the petitioner cannot be assessed as the manager of the family, that the status of the petitioner and the other members of the family as individuals for the purpose of assessment has become res judicata by reason of the decisions of this court in the previous writ petitions, that at any rate the fundamental assumption on the basis of which the assessments were made for the years 1959-60 and 1960-61 was that the family had attained a status of division, and therefore, the respondent could not have issued the notice for re-assessing the petitioner in the status of manager of a Hindu undivided family for the year 1961-62, and that the provisions of Section 29 are ultra vires the Constitution in that they offend Article 14 of the Constitution.

33. It was argued for the petitioner that under the charging Section, Section 3 (1) of the Act, a person alone is chargeable to tax, that the family which attained a status of division by the execution of the partition deed was not a unit of assessment, that an essential condition for applying Section 29 was that a Hindu undivided family must have received income in the accounting year, and since the family became disrupted even before the accounting year and no income was received by a Hindu undivided family, the notice was bad.

34. Section 29, before it was amended in 1964 was practically the same as Section 25-A of the Indian Income-tax Act, 1952. That section was enacted to meet the difficulty of levying and collecting the tax in cases where a Hindu undivided family received income in the accounting year, but was no longer in existence as such at the time of assessment. The section provides that if it is found that the family property has been partitioned in definite portions, the assessment must be made on the members of the family by apportioning among them the tax which would have been payable by the family had it remained joint, while at the same time all the members are jointly and severally liable for the total tax.

35. In AIR 1964 SC 880, the Supreme Court quoted with approval the following observation of the Privy Council in AIR 1942 PC 57.

> "Section 25A is directed to the difficulty which arose when an undivided family had received income in the year of account but was no longer in existence as such at the time of assessment. The difficulty was the more acute by reason of the provision - an important principle of the Act - contained in Section 14 (1) : "The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

Section 25A deals with the difficulty in two ways, which are explained by the rule, applicable to families governed by the Mitakshara, that by a mere claim of partition a division of interest may be effected among coparceners so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filing of a suit for partition may have this effect though it may take years before the shares of the various parties are determined or partition made by metes and bounds. Meanwhile the family property will belong to the members as it does in a Dayabhaga family - in effect as tenants in common. Section 25A provides that if it be found that the family property has been partitioned in definite portions, assessment may be made, notwithstanding Section 14(1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the total tax." In *Waman Satwappa Kalghatgi v. I.T. Commissioner*[13], Chagla J., as he then was, observed :

> "To my mind the scheme of Section 25A is very clear. It is only when not only the status is severed but also all the properties have been partitioned that the order contemplated by Section 25A(1) can be applied for and made, and till such an order is made, for the purposes of income-tax, the joint family continues to exist as a unit although its status may have come to an end. Sub-clause (2) provides for the mode of assessment after the order has been made. It provides that after the order has been made as contemplated by sub-clause (1) the tax has got to 'be apportioned to the shares' of the different members of the joint family but the tax has got to be assessed on the total income received by the joint family or on behalf of it. But what has got to be remembered is that under sub-section (2) of Section 25A what has got to be assessed is the total income of the joint family ..... .It is true that although the joint family has ceased to exist in the eye of the Hindu Law still it

> may continue in the eye of the Income-tax Act and till all the properties have been partitioned the income received by the kartha from the properties still not partitioned will still be the income of the joint family. But all the same it must be found as a fact that the joint family as recognized by the Income tax Act has received the income which is sought to be assessed."

So, once a family is assessed as a Hindu undivided family the Department can continue to assess it as an undivided family, until an order is passed under the section recognizing a partition. Until and unless such an order is passed the family will be deemed to continue as an undivided Hindu family for the purposes of the Act. By the amendment to Section 29 not only a member of a family hitherto assessed as a Hindu undivided family but also a member of a family which is being assessed to tax for the first time as Hindu undivided family can claim that the family property has been partitioned in definite portions and pray for an order recognizing the partition, and where an order under Sub-Section (1) of Section 29 has not been passed in respect of a family which is being assessed for the first time the family shall be deemed to continue as a Hindu undivided family for the purpose of the Act.

36. Now, no order can be passed under Sub-Section (1) unless there is complete physical division of the family properties and therefore, though a joint family may have come to an end in law, if a complete physical division of the properties has not been effected and consequently no order passed under Sub-Section (1), then the family is deemed for the purpose of the Act to continue to be a joint family, and it could be charged to tax as a unit of assessment despite its disruption in law. In other

[13] AIR 1946 Bom 328 at p. 332

words, until an order is made under Sub-Section (1), which can happen only if the properties of the family have been divided in definite portions, the family must be deemed for the purpose of the Act to continue to be a Hindu undivided family. Even though factually the income has been received in the subsequent accounting years by a disrupted family, the assessment would be made as if the family is an undivided family, by virtue of the fiction treating the family as a Hindu undivided family, the only condition being that the family must have been once assessed to tax as a Hindu undivided family. If the legislature has power to create a fiction and treat a family which bas been disrupted, as a Hindu undivided family for the purpose of continuing to assess it, provided that a Hindu undivided family was originally assessed to lax, unless an order recognizing a partition is made under Section 29(1), I see no reason why the legislature cannot create a fiction and direct the assessment of a disrupted family for the first time as if the family has not been disrupted. To put it differently, if by a fiction the legislature could treat a disrupted family as a 'Hindu undivided family' and therefore a unit of assessment for the purpose of making assessments in subsequent years, if the family was once assessed as a Hindu undivided family, unless and until an order is passed recognizing a partition under Sub-Section (1) of Section 29, one fails to understand why it is not open to the legislature to create a fiction and treat a family which has been divided in status a Hindu undivided family for the purpose of assessing it for the first time. By amendment to Section 29 the legislative fiction was extended to a family which is being assessed for the first time. The expression 'hitherto assessed as a Hindu undivided family' does not necessarily indicate that the family should have remained undivided in status under the Hindu law. If that status was broken after the first assessment on a Hindu undivided family was made, the family will nevertheless be treated for the" purpose of the Act as a Hindu

undivided family and continued to be assessed as a Hindu undivided family, even if the division in status of the family is brought to the notice of the Income-tax Officer by any member of the family. It is only when a partition in definite portions is made that the officer could pass an order recognizing the partition. So, when it is said that any member of a family which is 'hitherto assessed as a Hindu undivided family' can claim that a partition has taken place and therefore the assessment must be on that basis, it does not necessarily mean that the family factually continued as a Hindu undivided family till then. It only meant, that the division in status is not recognized by the income-tax law and that the family will be continued to be assessed as if it were a Hindu undivided family, notwithstanding the fact that it has attained a divided status and the income has been received in the accounting years subsequent to the division, by the family which attained the status of division.

37. It is said that Section 29 is a mere machinery section and that a family which is divided in status cannot for the first time be assessed to tax as a Hindu undivided family by virtue of that section as such a family is not taxable unit under the charging section. It was submitted that only a 'Hindu undivided family' can be taxed for the first time as that alone is a unit of assessment under the charging section. But Section 29(3) as amended says that a family which is being assessed for the first time shall be deemed to continue as a Hindu undivided family for the purpose of the Act when an order recognizing a partition has not been passed under Sub-Section (1) of the Section. When Sub-Section (3) says that such a family will be deemed a Hindu undivided family for the purpose of the Act, which contains the charging section, can this Court say that because the family is divided in status and therefore not unit of assessment under the charging section, it cannot be assessed as a Hindu undivided family ? The mandate of the legislature to treat a family which is being assessed for the first time as a Hindu undivided family for the purpose of the Act means that such a family is a Hindu undivided family.

38. It was argued by the petitioner that a claim is possible only when an assessment is being made on a Hindu undivided family, and since in this case ex hypothesi the family was divided in status the fiction treating the family as a Hindu undivided family for the reason that no order recognizing a partition has been passed for the purpose of assessing it for the first time is unreasonable. The opinion of this Court that the fiction is an unreasonable one has nothing to do with the power of the legislature to enact it. The wisdom or the policy in creating the fiction is not the concern of this Court. If the Legislature hap power, there is an end of the matter.

39. I think, in effect what the respondent says to the petitioner is thus : "If you do not prove that all the properties of the family have been divided in definite portions, the legislature by Sub-Section (3) of Section 29 has bidden me to treat the family as a Hindu undivided family and assess it as a Hindu undivided family". It is possible to whip up the imagination and conjure up a picture of an Income-tax Officer going about like a knight errant and issuing notices to all erstwhile members of Hindu families which long ago divided their properties by metes and bounds, proposing to assess them as Hindu undivided families. But in this case it is admitted that the family has not divided all the properties in definite portions. The justification for a fiction in law is that it promotes a just result, and I will presently try to show the just result which the legislature wanted to bring about by introducing the fiction by the amendment. That the purpose of the fiction is not confined to Section 29 is not left to implication, or speculation by court, and all those rulings which say that the court can look into the purpose of a fiction have no relevancy when Sub-Section (3) of Section 29 clearly says that the family shall be deemed to continue as a

Hindu undivided family 'for the purpose of the Act'. (The emphasis (here into ' ') is mine).

40. The Legislature had a purpose in making the amendment to Section 29, and I think, it is the duty of this court to interpret the provisions of the section in order to enable the legislature to achieve it, if that is permissible. There is no reason why a Hindu family in the Travencore-Cochin area which is divided in status should be treated differently from a Hindu family divided in status situate in the Malabar area of the State, for the sole reason that the former was once assessed under the Act as a Hindu undivided family before it was disrupted but the latter could not be so assessed, as it was disrupted in status before it could be assessed to tax under the Act as a Hindu undivided family on account of certain historical circumstances. This family, it is said, attained status of division on 1-4-1958. This, and other families similarly situate in the Malabar area, could not for historical reasons be assessed to tax as Hindu undivided families under the Act before it was amended. The legislature thought that the circumstances that such families became divided in status before they could be assessed as Hindu undivided families under the Act was not a rational basis for not assessing such families as Hindu undivided families, and so it made the amendment extending the fiction to families which were being assessed for the first time.

41. The only limit to the creation of fiction by the legislature having plenary power over a subject is whether by creating the fiction it transcends the powers vested in it by the Constitution. In *Bailey v. Alabama*[14], Chief Justice Hughes speaking for the majority about the power of the State Legislature under the United States Constitution said :

> "..... It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the State may not in this way interfere with matters withdrawn from its authority by the Federal constitution.

I think, the proper course is to recognize that a State legislature can do whatever it sees fit to do upon a matter within its power unless it is restrained by some express prohibition in the Constitution, and that courts should be careful not to frustrate the object of the legislature by importing into the construction of a statutory provision their own conceptions of reasonableness or of public policy.

42. It was argued that there were several previous attempts to assess the family as a Hindu undivided family, and the family was actually assessed to tax in that capacity for the year 1958-59, and therefore, it cannot be said that the family is being assessed to tax for the first time as a Hindu undivided family within the meaning of the section. The argument was that the Department by issuing notices in previous years proposing to assess the family as a Hindu undivided family has made attempts to assess the family, and though the attempts were thwarted by the orders passed in the writ petitions, since steps for assessment have been taken the family cannot be said to be a family 'which is being assessed for the first time as a Hindu undivided family,' within the meaning of Sub-Section (1) of Section 29. I do not think that this contention has much relevance at this stage when we are considering the question of the jurisdiction of the respondent to issue Ext. P-1 notice. However, out of deference for the argument at the Bar, I

would indicate my view. I think, the answer to the contention is that although the Department made several previous attempts to assess the family as a Hindu undivided family and in fact assessed it as Hindu undivided family for the assessment year 1958-59, all those attempts were thwarted, and the order of assessment was quashed by the orders, passed by the High Court, and so it can reasonably be said that the family is being assessed for the first time as a Hindu undivided family. The word 'assess' is verbal coat of many colours. The context alone can determine the sense in which the word is used. (See the decision of the Privy Council in *Commissioner of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas*[15], and *Seth Badridas Daga v. Commissioner of Income-tax*[16], The expression 'which is being assessed for the first time as a Hindu undivided family' would imply that the family has not been assessed to tax in previous years. If the notices issued proposing to assess the family have been

[14](1910) 219 U.S. 219 [16](1949) 17 ITR 209 at p. 211 : (AIR 1949 P.C. 159 at p. 160)

[15](1938) 6 ITR 414 at. p. 418 : (AIR 1938 PC 175 at p. 176)

quashed and if the order of assessment has been set aside, one cannot say that the family has been assessed in any one of the previous years; and therefore, it stands to reason to hold that this is a family which is being assessed for the first time as a Hindu undivided family. It might be observed that the previous part of the sub-section speaks of a family 'hitherto assessed as a Hindu undivided family'. As contrasted with that the legislature used the expression 'which is being assessed for the first time as a Hindu undivided family'. It was not contended on behalf of the petitioner that the words 'hitherto assessed' are intended to convey any idea other than completed assessment, namely assessment to tax. In other words, there was no contention that any step short of completed assessment would be sufficient to bring a family within the expression 'hitherto assessed as a Hindu undivided family'. And, when the legislature used the words 'which is being assessed for the first time as a Hindu undivided family' in the latter part of the sub-section, the aim was to indicate a family which has not been previously assessed to tax as a Hindu undivided family and which, therefore, is being assessed for the first time. As it is admitted that all the notices and the orders of assessment on the family were quashed either in original petitions or appeal, they are non est at the time when a claim would be put forward by a member that there has been a partition in definite portions. So the family is being assessed for the first time as a Hindu undivided family. But it was said that the expression 'which is being assessed for the first time as a Hindu undivided family' connotes a present continuous, that the grammatical construction of the expression is all that is relevant, that if there were any previous attempts to assess the family, let alone the order or orders of assessment, that is sufficient to take the family put of the ambit of the expression 'which is being assessed for the first time as a Hindu undivided family'. Literalism in interpretation may often thwart the purpose of the legislature. Scrupulousness to written words had at times so interfered with the intention of the statute-makers that the courts fell under public suspicion, and recourse was had, excessively, to administrative agencies. (See 29 Harvard Law Review 617, 620). The English theory of interpretation was fully expounded in Haydon's cases*, where all the Barons of the Exchequer declared.

> *3 to 7 b (1584).
>
> "That for the sure and true interpretation of all statutes in general. .... .four things are to be discerned and considered :
>
> (1) What was the common law before the making of the Act.
>
> (2) What was the mischief and defect for which the common law did not provide.

(3) What remedy the Parliament had resolved and appointed to cure the disease of the Commonwealth.
(4) The true reason of the remedy." The theory that the aim of the judges should always be to 'add force and life to the cure and remedy according to the true intent of the marks of the Act' was fully accepted by the older writers. Black-stone**said that,
** 6. Blackstone 1 Comm. 61.

the most universal and effectual way of discovering the meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it." In Bacon's Abridgement*it is laid down that "such Construction ought to be put upon a statute as may best answer the intention which the makers had in view." Plowden**said that the theory that a statute should be interpreted in the light of the cause which moved the legislator to enact it must be followed. He said :

*Bacon's Abridgement (1759) 647 - 'Rules to be observed in the Construction of Statutes.
**Plowdens Rep. 465.
"It is not the words of the law but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz., body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law. ..... and it often happens when you know the letter you know not the sense for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive."

The rule that the courts need search only for grammatical sense of the words was laid down by *Lord Wensleydale in Grey v. Pearson*[17]

"In construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further".

A canon of construction which postulates that the meaning of a statute is to be gathered from its words as they stand and which confines the process of interpretation to the determination of the grammatical or literal meaning of the text must necessarily restrict the opportunity of the judge to apply the theory underlying the rules in Heydon's case. The notion that the function of the court is simply to construe the words as they stand, together with the theory that a decision on one particular set of facts results in establishing a rule to be applied in resolving subsequent questions as to the meaning of a statute is principally responsible for the prevailing complaint that the attitude of the courts towards statutory law tends to be formal and unhelpful. The idea that words speak for themselves without interpretation in the light of the circumstances under which they were composed or arranged has long been exploded. *Lord Macmillan said in Ellerman Lines v. Murray*[18]

> "Where the language used by the Legislature presents a choice of two or more meanings equally tenable it is admissible within certain limits to have resort to the aid of extraneous considerations, and certainly to the context of the statute itself, in order to discover which meaning was most probably intended."

Learned Hand said :

[17](1857) 6 HL Cases 61 at p. 106
[18](1931) AC 126 at p. 148

> "One of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning". (See *Cabell v. Markham*[19] - (quoted in Columbia Law Review Vol. 47 at p. 1263). He again said.

The meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create". (See *Helvering v. Gregary*[20]. quoted in Columbia Law Review Vol. 47 at P. 1267.
He further said :

> "One school says that the judge must follow the letter of the law absolutely I call this the dictionary school. No matter what the result is, he must read the words in their usual meaning and stop where they stop. No judges have ever carried on literally in that spirit, and they would not be long tolerated if they did. Nobody would in fact condemn the surgeon who bled a man in the street to cure him, because there was a law against drawing blood in the streets. Everyone would say that the law was only meant to prevent street fighting and was not intended to cover such a case; that is, that the government which passed that law, although literally it used words which covered the case, did not in fact forbid necessary assistance to sick people. An obviously absurd extreme of that school was where a guilty man escaped, because the indictment left out the word, 'the', alleging that what he did was 'against the peace of state', instead of 'against the peace of the state'. The statute had said that to convict a man the indictment must read like that, but the statute did not mean every syllable it contained." (See 'How far is a Judge free in rendering a decision' - 'The Spirit of Liberty' page 79 at 82.) Justice Holmes said :
> "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed". (See *Johnson v. United States*[21]).

I think, we can best reach the meaning of the amendment of the Section by recourse only to the underlying purpose, and with that as guide by trying to project upon the occasion how we think persons actuated by such a purpose would have dealt with it if it had been presented to them at the time. And when I look at the circumstances which prompted the Legislature to make the

amendment, I think the expression 'which is being assessed for the first time' can only mean a family which has not previously been assessed to tax as a 'Hindu undivided family,' and is therefore, being assessed to tax for the first time.

43. The next point for consideration is whether the orders passed by the concerned Agricultural Income-tax Officer assessing the members of the family as individuals in the years 1959-60 and 1960-61 would estop the respondent from issuing the notice proposing to reassess the family as a Hindu undivided- family for the assessment year

[19]148 F. 2d 737, 379 [21]163 Fed. 30, 32 - quoted in Columbia Law Review Vol. 47 at page 1264

[20]69 F 2d 809, 810

1961-62. It was argued that the fundamental assumption behind the orders assessing the members of the family in the status of individuals for the year 1959-60 and 1960-61, was that there was a division in status of the family, and that the members thereof became tenants-in-common, and therefore, the department would be estopped from contending that the members of the family had not become tenants-in-common by the division. In support of this proposition reliance was placed on the ruling of the Privy Council in *Hoystead v. Commissioner of Taxations*[22], In that case the question for consideration was about the deduction claimable under the relevant provisions of the Land Tax Assessment Act, 1916 (Aust). Upon the assessment for 1919-29, the Commissioner allowed only one deduction of 5000-1, holding that the beneficiaries were not joint owners within the meaning of the Act. The case was then stated to the Full Bench which upheld the Commissioner's view and rejected the argument that the Commissioner was estopped from coming to that conclusion in view of his decision in a previous year. The Privy Council reversed the decision of the Full Bench for the reason that the Commissioner was estopped even though in the previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were. The Privy Council thought that the matter so admitted was fundamental to the decision then given, Lord Shaw in delivering the judgment of the Board after citing numerous authorities said :

> "It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also ex-tends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision."

In the recent case of *Carl Zeisa Stiftung v. Rayner and Keeler Ltd.*[23], Lord Reid speaking about this passage observed :

> "'Comments were made on that passage in *New Burnawick Railway Co. v. British and French Trust Corporation Ltd*[24]. by Lord Russell and Lord Romer and in *Society of Medical Officers of Health v. Hope*[25] by Lord Radcliffe. And there may well be a difference between a case where an issue was in fact decided in the earlier case and a case where it was not in fact decided because the earlier judgment went by default or was founded on an assumption. Indeed, I think that some confusion has been introduced by applying to issue estoppel without modification rules which have been evolved to deal with cause of action estoppel, such as the oft-quoted passage from the judgment of Wigram V.C. in *Henderson v. Henderson*[26] But it is unnecessary to pursue that matter

because in the present case the issues with regard to which the respondents plead estoppel were fully litigated in the West German Court."

The House of Lords had to consider the question of applicability of the principle of res judicata in rating cases in the case of 1960 AC 551. They held that the position of a valuation officer is that of a neutral official charged with the recurring duty of bringing into evidence a valuation list, and he cannot properly be described as a party

[22](1926) AC 155, at pp. 163, 170 [24]1939 A.C 1 [26]1843-3 Hare 100
[23](1967) 1 AC 853 at P. 916 [25]1960 A.C. 551

so as to make the proceedings lis inter parties. In coming to the conclusion that the doctrine of res judicata would not apply in such cases, Lord Radcliffe was influenced by the consideration that if decisions in rating cases are to be treated as conclusive for all time that would impose a needlessly heavy burden upon the administration of rating. The Judicial Committee of the Privy Council had to consider the question again in Trustees of the *Abdul Gafoor Trust v. Commissioner of Income-tax, Colombo*[27] Lord Radcliffe speaking for the Judicial Committee said that the problem of the application of res judicata to taxation cases, cannot be considered on mere academicals grounds and that the doctrine did not apply to tax cases in the sense that the decision to levy tax for one year does not operate as res judicata in dealing with the question of levying tax for a subsequent year. He emphasized the fact that even if the matter was to go to a High Court on a statement of the case, the decision of the High Court would also not create a bar of res judicata in dealing with the tax claim for a subsequent year. The critical thing, said Lord Radcliffe, is that the dispute which alone can be determined by any decision given in the course of the proceedings is limited to one subject only the amount of the assessable income for the year in which the assessment is challenged. The relevant rulings on the point have been considered by the Supreme Court in *Amalgamated Coalfields v. Janapada Sabha*[28], and there the Court observed :

> "In considering this question, it may be unnecessary to distinguish between decision on questions of law which directly and substantially arise in any dispute about the liability for a particular year and questions of law which arise incidentally or in a collateral manner, as Lord Radcliffe himself has observed in the case of the Society of Medical Officers, of Health, 1960 AC 551 that the effect of legal decisions establishing the law would be a different matter. If, for instance, the validity of a taxing statute is impeached by an assessee who is called upon to pay a tax for a particular year and the matter is taken to the High Court or brought before this Court and it is held that the taxing statute is valid, it may not be easy to hold that the decision on this basic and material issue would not operate as res judicata against the assessee for a subsequent year. That, however, is a matter on which it is unnecessary for us to pronounce a definite opinion in the present case."

I do not think that the respondent is estopped from taking proceedings to assess the petitioner as the kartha of the family for the reason that the petitioner and the other members of the family were assessed in the status of individuals for the assessment years 1959-60 and 1960-61. See the decisions in (1942) 10 ITR 457 at p. 465 : (AIR 1942 PC 57 at p. 61), *Bansidhar Dhandhania v. Commissioner of Income Tax*[29], and *Commissioner of Income Tax v. Purushottam Das Pais*[30] If

there is double taxation of the same income, the Department would make the necessary adjustment, but that would not preclude the department from assessing the right unit under the law on its income. See *I. T. Officer, Lucknow v. Bachulal*[31],

44. The next argument which is closely related to the one adverted to above was that

[27](1961) 2 WLR 794 [28]AIR 1964 SC 1013

[29]29(1944) 12 ITR 126 at p. 132 : AIR 1944 Patna 137, (1946) 14 ITR 116 at p. 127 : AIR 1946 Bombay 328 at p. 332

[30](1966) 61 ITR 86 [31](1966) 60 ITR 74 : AIR 1966 SC 1148

by virtue of the orders passed by this Court in O. P. No. 750/1960, O. P. No. 31/ 1962 and O.P. No. 1495/64 the question of the status of the petitioner has become res judicata and the department is precluded from assessing the petitioner the status of the kartha of a Hindu undivided family and assessing him as such. It may be recalled that all these original petitions were concerned with the assessment for the year 1958-59. Any finding or observation in the orders on those petitions that the assessment should be made on the petitioner and the members of the family as individuals would not operate as res judicata in a subsequent year for assessing the family as a Hindu undivided family. The decision in O. P. No. 1495/64 was based only on the previous orders passed by this court on the concession of the Government Pleader or as offshoot of the concession. The controversy was not considered on its merits. Assuming that the decision in the O. P. was made after considering the merits of the case, the decision relates only to the status to be assigned to the petitioner for the year in question in that O. P. and cannot operate as res judicata for assessing the petitioner as the kartha of the family in a different year, for the reasons already mentioned.

45. It was argued that Article 14 of the Constitution would be offended if a disrupted Hindu family is treated differently from a Christian or Mohammedan family. In a Christian or Mohammedan family, the members are co-tenants of the properties of the family, and they are assessable only as co-tenants. It is asked why if in the case of a Christian or Mohammedan family the assessment can be made only on the basis that the members of the family are tenants-in-common, in the case of a Hindu family which has attained a status of division, the same method of assessment is not adopted. The answer is that the legislature has treated Hindu undivided families as a class by themselves for the purposes of the Act. A Hindu undivided family is a unit of assessment under the Act. It has got certain advantages and disadvantages by virtue of that. The legislature has wide latitude in making a classification in a taxing statute. The burden of proving that the classification is unreasonable is upon the petitioner. The court will presume, especially in taxing statutes, that the classification made by the legislature is reasonable. I do not think that the petitioner has succeeded in showing that the classification is unreasonable.

46. I do not see how the respondent in proposing to make a re-assessment on the basis that the family should be deemed to be a Hindu undivided family unless it is proved that all the properties of the family have been divided by metes and bounds exceeds his jurisdiction. It is open to the petitioner to show that all the properties of the family have been divided in definite portions and that there can be no assessment on the basis that the family is a Hindu undivided family. The fiction that the family continues to be a Hindu undivided family will come into play only if the petitioner fails to prove a partition in definite portions.

47. The respondent had no occasion to adjudicate upon the objections filed by the petitioner to

the notice. Before that the petitioner approached this court and obtained a stay of the proceedings. I cannot see how there is lack of jurisdiction for the respondent to proceed under the notices issued by him so that this court might restrain him by a writ of prohibition at this stage.

48. I would dismiss the petition, but without any order as to costs.

BY THE COURT :

49. In view of the opinion of the majority the petition is allowed with costs including advocate's fee ₹ 250.

Petition allowed.