

KERALA HIGH COURT

Sankaranarayanan Bhattathiripad

Vs

Income Tax Officer

O.P. Nos. 2098 of 1981-B, 2132/81-F, 2145 of 81-G and 2154 of 1981-H

(T. Kochu Thommen, J.)

14.03.1984

JUDGMENT

T. Kochu Thommen, J.

1. The petitioners are brothers. They belong to a Namboodiri Illom. Subsequent to a partition in the family in 1957, each of them has been in separate possession and enjoyment of the respectively allotted portion of the properties. Each has a family of his own and has been assessed to Income Tax separately in the status of HUF. During the accounting year relevant to the assessment year 1977-78, the Kerala Joint Hindu Family System (Abolition) Act, 1975, came into force with effect from December 1, 1976. (I shall refer to this Act as the "State Act" or the "Abolition Act" as the context requires). In the course of the assessment proceedings, each of the assesseees (petitioners) contended that, in view of the Abolition Act, he should no longer be assessed in the status of HUF, but as the full owner of his separate share as if a partition had taken place in his family. This contention was rejected by the ITO by his impugned orders in respect of each of the petitioners on the ground that the Abolition Act did not bring about a physical division of the properties held by the HUF so as to warrant a finding of partition in terms of Section 171 of the I.T. Act. This finding of the officer is challenged by the petitioners. Their principal contention is that to a "Kerala Hindu undivided family", abolished by the State Act, Section 171 of the I.T. Act has no application, and it is repugnant to the provisions of the State Act, for the family is not only disrupted, but the system or the concept itself has been statutorily abolished. The question, therefore, is, does Section 171 of the I.T. Act apply to the petitioners or is it repugnant to the State Act, as they contend.

2. The Abolition Act replaced the joint tenancy in the properties held by members of every "joint Hindu family" in Kerala by tenancy in common. The Act was passed by the State Legislature by virtue of its power under entry 5 of the Concurrent List in the Seventh Schedule to the Constitution, after obtaining the consent of the President of India. The petitioners rightly contend

that any provision of the I.T. Act which is repugnant to any provision of the Abolition Act will be of no effect, for Article 254(2) of the Constitution says that the State law with respect to a matter in the Concurrent List shall prevail in the State over an earlier law made by Parliament or an existing law with respect to the same matter, provided the State law has received the consent of the President. But is there any repugnancy between the two enactments.

3. Counsel for the petitioners, Shri G. Sivarajan, submits that after the coming into force of the State Act, there is no longer a joint Hindu family in Kerala which can be assessed as such, or which can be deemed to continue as such, for the purpose of assessment by importing a fiction in terms of Section 171 of the I.T. Act. Only the individual members of the erstwhile families are liable to be assessed in respect of the income earned from the properties allotted to them.

4. I shall first consider the relevant provisions of the State Act. The object of the enactment is to abolish the joint family system among Hindus in the State. The petitioners belong to a Namboodiri Illom which is included in the definition of the joint Hindu family. Section 4 of the State Act provides:

"4. Joint tenancy to be replaced by tenancy in common :-

(1) All members of an undivided Hindu family governed by the Mitakshara law holding any coparcenary property on the day this Act comes into force shall with effect from that day, be deemed to hold it as tenants-in-common as if a partition had taken place among all the members of that undivided Hindu family as respects such property and as if each one of them is holding his or her share separately as full owner thereof:

"Provided that nothing in this sub-section shall affect the right to maintenance or the right to marriage or funeral expenses out of the coparcenary property or the right to residence, if any, of the members of an undivided Hindu family, other than persons who have become entitled to hold their shares separately, and any such right can be enforced as if this Act had not been passed.

(2) All members of a joint Hindu family, other than an undivided Hindu family referred to in Sub-section (1), holding any joint family property on the day this Act comes into force, shall, with effect from that day, be deemed to hold it as tenants-in common, as if a partition of such property per capita had taken place among all the members of the family living on the day aforesaid, whether such members were entitled to claim such partition or not under the law applicable to them, and as if each one of the members is holding his or her share separately as full owner thereof,"

The effect of this section is that the members of the joint family, the status of which has been disrupted by the State Act, are deemed to hold the properties which they hitherto held jointly, as tenants-in-common as if there was a partition among them. As a result of the statutory disruption, what was held by the members as joint tenants has come to be held by them as tenants in common. This is made possible by deeming that a change in status has occurred as if there was a

partition. The State Act does not say which portion of which property shall belong to which member, but has only apportioned among the members their respective shares which each of them shall hold separately as full owner thereof. The members have become separate in interest and in right, but no physical division of the properties into definite portions has taken place as a result of the Act. That is a matter for the members to accomplish by agreement amongst themselves (or by arbitration or suit) in accordance with their respective shares.

5. I shall now read Section 171 of the I.T. Act in so far as it is material:

"171. (1) A Hindu family hitherto assessed as undivided shall be deemed for the purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the Hindu undivided family.

(2) Where, at the time of making an assessment under Section 143 or Section 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition, whether total or partial, has taken place among the members of such family, the Income Tax Officer shall make an inquiry thereinto after giving notice of the inquiry to all the members of the family.

(3) On the completion of the inquiry, the Income Tax Officer shall record a finding as to whether there has been a total or partial partition of the joint family property, and, if there has been such a partition, the date on which it has taken place.....

Explanation : In this section,-

(a) 'Partition' means -

(i) Where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or

(ii) where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition.;

(b)"

The effect of this section is that a Hindu family hitherto assessed as undivided shall be deemed, for the purpose of the I.T. Act, to continue as a HUF, except in so far as a finding of partition has been made under this section in respect of that family. If the family had not been assessed in the past as an undivided family, Section 171 would have no application. In respect of a family described under Section 171, a finding of partition is a condition precedent to obtain the benefit under that section. In the absence of such a finding, the family is liable to be assessed on the basis of the total income of the joint family as if no partition had taken place.

6. A finding of partition can be made under the section only where the Explanation to the section is satisfied. The Explanation - says that where the property admits of a physical division, a physical division alone will satisfy the requirements of the section. Where the property does not

admit of a physical division, then such division as the property admits of. A mere severance of status will not satisfy the section.

7. The contention of the petitioners is that Section 171 postulates a partition by agreement and not the extinguishment of the joint family by operation of the statute. Disruption of the family by agreement can give rise to new joint families as constituted by the divided members, whereas abolition of the family by the statute has put an end to the very concept of the joint family. In the case of the latter, the petitioner's counsel contends, Section 171 cannot apply, for it would be repugnant to the State Act which has abolished the joint family system altogether.

8. I do not see any repugnancy between Section 171 of the I.T. Act and any provision of the State Act. Both enactments, in my view, operate in their respective realms without clash. While the State Act has abolished the joint Hindu family system by replacement of the joint tenancy by tenancy in common, Section 171 of the I.T. Act continues to regard the family, despite severance in status, as joint for the purpose of assessing the income derived from the properties jointly held by the family prior to the" partition, except where a finding has been made under the section that the partition has actually resulted in a physical division of the properties.

9. The State Act says that the properties held by the members of the joint family shall, as from the date on which the Act came into force, be deemed to be held by them as tenants-in-common as if there was a partition. This meant that the abolition of the joint family system in Kerala is accomplished by a statutory fiction. What was once a joint tenancy under the HUF is, by a fictional partition, converted into a tenancy-in-common.

10. A joint family is disrupted either by an actual partition by volition of parties or by arbitration or suit, or by a deemed partition by operation of the law. In either event, the family comes to an end. But until the partition has led to a physical division of the properties--whether in the case of an actual partition or statutorily deemed partition--the income derived from such properties, for the purpose of assessment, will continue to be impressed with the joint family character. This is the effect of Section 171 of the I.T. Act. By the State enactment, the legislature has not in any manner intended to intrude into the domain of the I.T. Act. What is payable under the I.T. Act must be paid in terms of the provisions of that Act. If, following the State Act, the tenants-in-common have effected a physical division of their properties, and have thus put an end to the common holding, they would naturally enjoy the benefit of Section 171. Viewed in this light, I see no clash or inconsistency between the provisions of the two enactments. These provisions must be read harmoniously so as not to subject them to any strained construction giving rise to an artificial inconsistency or repugnance.

11. Admittedly, in the case of the present petitioners, there has been no division by metes and bounds of their properties after coming into force of the State Act. Although the joint tenancy has come to an end, each petitioner continues to hold the properties with the other members, of his

family as tenants-in-common. Such properties are, for the purpose of assessment under the I.T. Act, treated by Section 171 as if they were still held by a joint family.

12. The petitioner's counsel seeks to rely upon the decision of this court in *I.T.C. v. Smt. N.K. Sarada Thampatty*¹, That decision stands impliedly overruled by the subsequent decision of the Supreme Court in *Kalloomal Tapeswari Prasad (HUF) v. CIT*², This decision of the Supreme Court clearly supports the construction which I have placed on Section 171 of the I.T. Act.

¹[1976] 105 I.T.R. 67(Ker)

²[1982] 133 ITR 690

13. In the circumstances, the challenge against the impugned orders fails. The original petitions are accordingly dismissed. The parties will bear their respective costs.

Dismissed.