

# MADHYA PRADESH HIGH COURT

Commissioner of Income Tax

Vs.

Seth Gopaldas

Misc Civil Case-No. 230 of 1971  
(A.P. Sen, C.J. and J.S. Verma, J.)

14.04.1978

## ORDER

**J.S. Verma, J.**

1. This reference under section 256 (1) of the Income Tax Act, 1961 thereafter called 'the Act') has been made at the instance of the Commissioner of Income-tax to answer certain questions said to arise out of the order dated 1c-6-1970 of the Income Tax Appellate Tribunal, Indore Bench, Indore, in I.T A. No. 318 (Ind) of 1969-70. The questions so referred for the opinion of this Court are the following, viz.

- (1) Whether a Hindu father has a right to bring about a partial partition among his sons inter se as part of his patria potestas and without the consent of his sons ?
- (2) If the answer to question No 1 is in the affirmative, whether on the facts and in the circumstances of the cite, the Tribunal was legally justified in holding that the assesses claim for recording a partial partition was valid ?
- (3) Whether on the facts and circumstances of the case, the Tribunal was justified in allowing the claim for partial partition as per the application of the assesses ?
- (4) What is the legal effect of the order of the Tribunal allowing the assesses claim for partial partition and if so from what date ?

2. The assesses is a Hindu Undivided Family of which Seth Gopaldas of Ichhawar is the 'Karta' The relevant assessment year is 1964-65 for which the accounting period ended on Diwali 1963. i.e. 20-10-63. The asseesee was assessed as a Hindu Undivided family upto the assessment year 1963-64. For the assessment year 1963-

64, an application was made on 6-7-1963 under section 171 of the Act. for recording a finding of total partition in respect of this Hindu Undivided Family. However, that application was rejected and the assessee's claim of total partition was not recognized.

3. For the relevant assessment year 1964-65, initially a claim for recognizing a total partition within the family was made by the assessee but subsequently by an application dated 16-9-1967 filed by Seth Gopaldas under section 171 of the Act, a claim was made for recording a partial partition only, which was reiterated by Mahendra Kumar, a major son of Seth Gopaldas, by another application made on 16-1-1969 to the Income Tax Officer.

4. Some of the relevant details concerning the Hindu Undivided Family, of which Seth Gopaldas is the Karta are now stated. The assessee Hindu Undivided Family was running two shops known as "M/s Ramkishan Dhanraj" and "M/s Ramkishan Hemraj". Hernrai died leaving his widow Harkuwarbai and no issues. Harkuwarbai then adopted Hiralal as her son who died issueless in early 1928, survived by his widow Kasturibai and the said Harkuwarbai. Therefore, on 21-3-1928 the widow Kasturibai, with the consent of her mother-in-law Harkuwarbai, adopted the said Gopaldas as a son. Prior to the adoption of Gopaldas, by an agreement between the concerned parties on 19-3-1928, Kasiuribai was allotted certain specified properties. It appears that after some time the relations between Kasturibai and Gopaldas became strained which led to a litigation wherein the adoption of Gopaldas was challenged, but the Civil Court upheld the validity of adoption of Gopaldas. The validity of adoption of Gopaldas, so settled, is no longer under change. Gopaldas has three sons, Mahendra Kumar, Krishna Kumar and Dinesh Kumar, the fourth son Rajendra Kumar having died in infancy; and three daughters, viz., Premlata, Suryakanta and Chandrakanta. Of the daughters, Premlata alone was married at the relevant time.

5. By a registered deed of partition dated 23-10-1962, Seth Gopaldas, in exercise of his right as paterfamilias, without the consent of his sons, who were all then minors, effected a partition of the family properties specified therein describing that partition as a total partition. Similarly, on 27-10-1962 Seth Gopaldas, in exercise of his right as paterfamilias, partitioned the main movables which were not covered by the partition deed dated 23-10-1962. In the present case it has not been disputed at any stage that the partition so made by Seth Gopaldas without the consent of his sons, in exercise of his right as paterfamilias admittedly, did not include the entire family properties and was

at best only a partial partition of the family properties. This fact was disputed because in a raid by the Income-tax Authorities of the premises of the assessee on 23-1-1965 certain account books and fixed profit receipts were seized which clearly showed that the H U. F. owned also the amounts so discovered in the raid which had not been included in the partition made on 23-10-1962 and 27-10-1962. Obviously because of this discovery as a result of which the partition made on 23-10-1962 and 17-10-1962 could not be treated as a total partition, a claim for recording partial partition only under section 171, of the Act was made by Seth Gopaldas in place of the original prayer for recording a total partition. His eldest son Mahendra Kumar having also become major by then, another application for the same purpose under section 171 of the Act was made on 16-1-1969 by Mahendra Kumar.

6. The question which arose before the Income Tax Officer on these facts, was whether in a Hindu undivided Family governed by Mitakshara, the father's right as paterfamilias extended to making even a partial partition between himself and his sons, without the consent of his sons. This was the main question necessary for disposal of the application made under section 171 of the Act by the assessee for recording a finding of partial partition.

7. The Income Tax Officer, by his order dated 24-3-1969, rejected the assessee's claim of partial partition made in this manner. On appeal by the assessee, the appellate Assistant Commissioner by his order dated 13-8-1969 upheld the Income Tax Officer's order for the same reasons and added one more reason, viz., that the adoption of Gopaldas was invalid. The assessee then went up to the Tribunal in a further appeal. The Tribunal has upheld the assessee's contention of a valid partial partition being made in this manner by Seth Gopaldas in exercise of his right as paterfamilias without the consent of his sons. The Tribunal rejected all the reasons given by the Income Tax Officer and the Appellate Assistant Commissioner in support of their view. The validity of the adoption of Gopaldas upheld by the Tribunal is no longer in controversy.

8. The Commissioner of Income Tax being aggrieved by the conclusion reached by the Tribunal mainly on the question of validity of the so called partial partition made by Seth Gopaldas, sought and has been granted this reference by the Tribunal, to answer the aforesaid questions.

9. The first and the main question for our decision is whether in a Hindu Undivided Family governed by Mitakshara, the right of the father as the patria potestas extends even to the making of a partial partition in respect of the joint family properties, and not only a total partition, without the consent of his son. This main question is the aforesaid question No (1) referred to this Court for decision, The other questions referred are only ancillary, the answer to which would follow from the answer to the main question. We shall, therefore, now consider this main question.

10. It is common ground before us that there is no authority deciding the above point and that we have, therefore, to consider and decide the same on the basis of first principles. In such a situation, it would be appropriate to begin with a reference to certain extracts from the ancient text, which may throw light on this subject. Such extracts from the translation of ancient texts are therefore, now quoted: Colebrooke's Translation of Mitakshara (by Sarkar :

"Partition (vibhaga) is the adjustment of diverse rights regarding the whole, by distributing them on particular portions of the aggregate."

(Ch I, Sect. 1, para 4)

"1. At what time, by whom, and how, partition may be made will be next considered. Explaining those points, the author says, 'when the father makes a partition, let him separate his sons (from himself) at his pleasure, and either (dismiss) the eldest with the best share, or (if he choose) all may be equal shares.'

2. when a father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two or more sons."

(Ch. 1, Sec. II, Paras 1 and 2)

In the analysis given after translation of the text, the meaning of "Partition" is stated as under:

"Partition is the adjustment of diverse rights extending over the whole estate, to specific portions of the same." S. S. Sanyal's Translation On of Hindu Law on Inheritance :

"Partition (vibhaga) is the adjustment of the ownership of many persons in the aggregate wealth by assigning particular portions of the aggregate to a several

ownership."

(Ch. 1, Sec I, Para 4)

J. C. Ghose's Commentaries on Principles of Hindu Law (First Edition, Vol II) :  
"Partition (vibhaga) is the adjustment of diverse rights regarding the whole, by distributing them on particular portions of the aggregate."

(Ch. I, Section 1, Para 4)

11. The above extracts taken from authentic translations of the ancient text show that in defining "partition" use of expressions 'whole', 'aggregate' and 'aggregate wealth' has been made. Similarly, in Analysis of Colebrooke's Translation, the expression used is 'whole estate'. These expressions used while giving the meaning and explaining 'partition' clearly indicate that the text contemplated only a partition of the 'aggregate wealth' or 'whole estate' i.e. a total or complete partition of the entire joint family properties, and a partial partition of the properties was not within contemplation. It follows necessarily, that the power given thereafter in the text to the father to make a partition during his lifetime even without consent of his sons must relate only to a partition understood in this sense, i.e. a complete partition of all the family properties.

12. The gist of the father's power to effect a partition without the consent of his sons has been summarised in Gupte's Hindu Law (Second Edition) at page 259, as follows :

"The power of the father to sever the sons inter se is a survival of the patria potestas and may be exercised by him without the consent of his sons."

x x x

"Again, in all cases, his power must be exercised by him bona fide and in accordance with law; the division must not be unfair and the allotments must be equal. He must give his sons equal shares with himself."

We would also refer to some other authoritative text books by distinguished authors

Hindu Law by Raghavachariar (Sixth Edition):

"According to Hindu Law it is competent to a father to make a partition during

his life, and the partition so made by him binds his sons, not because the sons are consenting parties to the arrangement, but because it is the result of a power conferred on him, though subject to certain restrictions imposed in the interests of the family .....Thus the father is in his lifetime competent to affect a separation in the family even without the consent of his sons provided the shares allotted to himself and the sons are equal and the mere fact that the share of one son is not separated by metes and bounds does not affect the status-split up by the father by a deed of partition giving separate shares to the sons . .....The father's power to effect a severance in his joint family both as between himself and his sons and as between the sons inter se is a right inherent only in the father as a survival of the patria potestas and is not exercisable by any other ancestor as for instance a grand-father with reference to his grand-sons " (Page 388)

Mayne's Treatise on Hindu Law and Usage (11th Edn.) :

"Partition of property by the father was even a Vedic custom and the Smritis refer to Manu having divided his property amongst his sons .....When a father wished to become a vanaprastha (hermit), or an ascetic ..... partition would suggest itself as the obvious solution ..... Apastamba apparently required that the father should, during his life-time, divide his wealth equally amongst his sons prior to his becoming an ascetic or a hermit". (page 312)

"A Hindu father under the Mitakshara law can, It has been held, effect a partition between himself and his-sons without their consent and this is rested on the Mitakshara I, II, 2. This test has been held to apply not only to property acquired by the father himself but also to ancestral property. The father has power to effect a division not only between himself and his sons but also between the sons Inter se." (page 547)

"In all these cases, the father's power must be exercised bona fide and in accordance with law; the division must not be unfair and the allotments must be equal." (Page 548)

Mulla's Principles of Hindu Law (14th Edition) :

"The father of a joint family has the power to divide the family property at any moment during his life, provided he gives his sons equal shares with himself, and if he dies so, the effect in law is not only a separation of the father from the sons, but a separation of the sons inter se. The consent of the sons is not necessary for the exercise of that power..... The right of a father to sever the

sons inter se is a part of the potria potestas still recognised by the Hindu law."(Page 410)

Raymond West's Hindu Law (Thin Edn.) Vol. I :

"As regards separation at the desire of one or several coparcener's only, the head of a family, whether a father grandfather, or great grand-father may separate from his descendants at any time." (Page 699)

"A partial Division however, cannot be enforced : the coparcener must claim the whole of his share." (Page 657)

13. While dealing with the question of partial partition in section 328 of Mulla's Hindu Law, certain principles have been deduced from the decisions of the Privy Council and the Supreme Court and one such principle stated at page 423 is that "though a partition may be partial by mutual agreement of parties, no coparcener can by suit enforce a partial partition against the other coparcener's. The suit must be one for a complete partition. " No doubt this is in the context of a suit for partition but it is not unreasonable to infer that a partial partition requires mutual agreement of all the parties and cannot be made against their will, even though a complete partition can be enforced by one coparcener against the will of the remaining coparcener's. The additional power given to the father appears to be of bringing about a total partition against the will of his sons without resorting to a suit whereas any other coparcener can achieve this result only by a suit. However, a partial partition can be made only by consent of all and cannot be obtained even by a suit. The reason obviously is that no one should be forced to remain partly joint in respect of some properties only, once a division has been made in the family.

14. It is settled that one of the limits imposed on the exercise of this extraordinary power by the father is that the allotment of shares made by him should be equal. It is also settled that where the father makes an unequal distribution of the family properties while making such a partition, the partition is merely violable at the Instance of the aggrieved son or the sons, as the case may be, and it to not void ab initio. All the same, this limit on exercise of the father's power to make a valid partition, also indicates that the power contemplated by the text was only to make a complete partition and not merely a partial partition in respect of the properties. The question of testing the validity of a partition made by the father on this basis can arise only where the partition is total and not where it is only partial in respect of some of the properties. It is clear from the text that this limit on the father's power is imposed

and is intended to be a check at the time when he is making the partition. Thus, this is another indication in the text that the partition contemplated to be made by the father in the exercise of his extraordinary power without the consent on his sons was intended only to be a total partition in respect of all the family properties.

15. Some authoritative decisions may now be referred. The father's power of making a partition together with its origin and the object thereof was authoritatively laid down by the eminent judge Muttuswami Ayyar, J , In *kandaswami v. Doraswami Ayyar*,<sup>1</sup> which continues to be a leading case on the point. Some relevant extracts from the judgment are as under :

'According to the Hindu Law it is competent to a father to make a partition during his life, and the partition so made by him binds his sons, not because the sons are consenting parties to the arrangement, but because it is the result of a power conferred on him, though subject to certain restrictions imposed in the interest of his family.'

x x x

'In Chapter 1, Section 11, Vol. 2, the author of the Mitakshara says : When a father wishes to make a partition, he may at his pleasure, separate his children from himself, whether one, two or more sons. In commenting on this passage Balambhatta says : "He may make them distinct and several by giving to them shares of the inheritance." It appears from paragraph 6 that he may do so both with respect to property acquired on himself and property inherited by him that in the one case the distribution may be unequal, while in the other it should be equal .....

\* \* \*

'It is again observed that it is a power regulated by law, and must be exercised bona fide in accordance with it.'

\* \* \*

'Thus, according to the Mitakshara, the father has a power to divide the property

among his sons, whether the property is ancestral or self-acquired, and the partition made by him is complete and binding provided that he exercises that power bona fide and in accordance with law, which regulates and restricts it in the interest of his sons.' (Pages 321-322)

'Thus, it will be seen that this power was intended to be exercised when he was about to sever his connection with the family as its head either by becoming a religious anchorite or a resigned recluse. Who else could be better entrusted with this power than a father, who from his position would be best able to decide whether it was to the interest of his sons that they should live in union or apart from one another, and as a general rule to make an impartial distribution? Lest this power might be abused, the law insisted upon the distribution being equal, subject to certain recognized exceptions.' (Page 325)

'Upon the text of authority in this part of India this power of distribution is an exception in the case of a partition made by the father, and an incident, not of ownership, but of paternal power, though that power must be exercised without partiality and within the limits fixed by the law.' (Page 326)

In *Girja Bai v. Sadashiv Dhundiraj and others*,<sup>2</sup> the meaning of "partition" In Hindu Law has been considered with reference to the texts and their Lordships of the Privy Council have summarized the position as under :

'In Hindu law, "partition" does not mean simply division of property into specific shares; it covers, as pointed out by Lord Westbury in *Appovier's case* (II Moo. Ind. Ap. 71, 76, 78), both "division of title and division of property." In the *Mitakshara*, *Vijñaneswara* defined the word "Vibhaga", which is usually rendered into English by the word "partition", as the "adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate." *Mitra Mishra* explains in the *Virovitdaya* the meaning of this passage : he shows that the definition of *Vijñaneswara* does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals, who claim the heritage jointly. He says (*Sarkar's translation*, ch. I, e. 36) : For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares." ' (Page 159)

In *Alluri Venkatapathi Raju and another v. Dantuluri Venkatanarasimha Raju and others*,<sup>3</sup> the extent of father's power to affect a partition was summarized as

follows:-

'There can be no doubt that the father of a joint family has the power to divide the family at any time during his life without the consent of his sons, and, If he makes a division, it has the effect of separating, not only the father from the sons, but also the sons inter se.' (Page 401)

16. From the above quoted extracts taken from the ancient text as also the decisions wherein they were relied on and construed, it would appear that the meaning of "partition" as defined in the text did not include within its ambit a "partial partition" also and that the "partition" contemplated by the text referred only to a complete or total partition of the whole property belonging to the joint family so that a partial partition at least in respect of properties of the joint family was not intended. In this background, the father's overriding power to effect a partition between himself and his sons without the consent of his sons, which power flows from the ancient text, cannot, therefore, be ordinarily understood as conferring that power to effect also a partial partition in respect of the family properties. Even though partial partitions have been taking place for a long time, the law relating to the same is practically judge made law since the Hindu law texts do not contemplate cases of partial partition : Raghvachariar Hindu Law, Sixth Edition, Page 433. Since the ancient text did not contemplate partial partition in respect of property and, therefore, did not provide for it, it is reasonable to assume that the father's overriding power to make a partition without the consent of his sons cannot be held to include a power to make a partial partition in respect of properties, at least on the basis of power flowing from the ancient text. As earlier stated, no decided case recognizing such a power in the father to effect partial partition of the family properties without the consent of his sons has been brought to our notice. Thus, even case law is not available to support that view.

17. By its very nature, the extraordinary right of a father as partial partition to make a partition of the joint family properties without the consent of his sons, so as to also divide them later se, is of ancient vintage and merely a surviving relic of the past patriarchal family which has for long changed into the joint family giving equal right to the sons with their father. The origin of that power and the object for which it was given to the father, i.e., 'when he was about to sever his connection with the family as its head either by becoming a religious anchorite or a resigned recluse' in the words of that great judge, Muttuswami Ayyar J , is also now most often not the reason for its exercise. These are also factors which indicate that there is no justification for

enlargement of this extraordinary right of the father as *parria potestas* so as to include within it something which was originally not within its ambit. A partial partition of the properties which leaves some properties for subsequent division, wherein the father also would have a share, is obviously inconsistent with the avowed object for which this extraordinary power was given to the father. The view that a complete partition of the properties and a total severance of the father's share there from is alone permitted in this manner, is more consistent and in conformity with the origin and object of this extraordinary power given to the father.

18. Sri K.A. Chitale, learned counsel for the assessee, has argued that on general principles, the whole always includes a part thereof, which means that the father's power to effect a total partition without the consent of his sons must also include within its ambit the power to make a partial partition in respect of the properties. The context in which this argument has been advanced, does not permit its acceptance for the reasons already given. There can be no doubt that a principle of general application has to be tested with reference to the context in which it has to be applied and if it does not fit in the context, it has to give way. Applying that test, we do not think such an argument can be accepted.

19. Sri Chitale then urged that for the purpose of section 171 of the Income Tax Act, 1961, it must be held that the father's power to partition the family properties without the consent of his sons includes the power to make even a partial partition of the properties. Learned counsel contended that the scheme of section 171 of the Act so indicate and this is evident from the fact that a departure was made therein by including also partial partitions within its ambit while the corresponding section 25-A of the Income Tax Act, 1922, had applied only to cases of total partition and not also to cases of partial partition. We would, therefore, examine the scheme of section 171 of the Income Tax Act, 1961, to find out if there is anything therein to suggest that even though under the general Hindu law the father's overriding power to make partition of the joint family properties without the consent of his sons may not include within its ambit the power also to make a partial partition of the properties, yet section 171 of the Income Tax Act, 1961, contemplates a wider power being available to the father there under. It has to be remembered that section 171 applies only to valid partition, whether total or partial. Unless the assessee's claim is of a valid partition, whether total or partial, it cannot be recognized under section 171. It is equally clear that a partial partition cannot be recognized under this section, unless it is shown to be

valid, simply because the original claim of total partition is converted into that of a partial partition on discovery that some properties were deliberately left out at the partition which was described as total ; and the partition, if total, would have been valid.

20. Sub-section (1) of section 171 of the Income Tax Act, Act 1961, introduces the fiction that an assesses which has been assessed as a Hindu Undivided Family shall be deemed for the purposes of the Act to continue to be a Hindu Undivided Family till a finding of partition in respect of the family has been given under this section. Sub-section (2) Defines a claim of partition, whether total or partial, among members of such family, to be made before, the Income Tax Officer who is then enjoined to make an enquiry into the claim. This is where the new Act permits also a claim of partial partition in the family to be made whereas under section 25-A of the old Act a claim of total partition alone was permissible. Subsection (s) then requires the Income Tax Officer to record his finding on completion of the enquiry as to whether there has been a total or partial partition of the joint family property, and, if so, the date on which it has taken place. Obviously, the enquiry contemplated is to find out whether the claim is in respect of a genuine and valid partition, total or partial. It is this finding of the income Tax Officer which is referred to in sub-section (1). Sub-sections (4) and (5) deal with the mode of assessment in different situations where the finding of total or partial partition has been recorded by the income Tax Officer. Sub-section (6) deals with the mode of recovery of the tax from every person who was a member of the family before the partition. Sub section (7) is concerned with the several liability of any member or group of members after the partition. Sub-section (8) deals with the levy and collection of the amounts therein specified, subsequent to the partition. The Explanation contained in the section defines "partition" in clause (a) to mean the actual and physical division of properties where the property admits of a physical division and expressly says that a mere severance of status shall not be deemed to be a partition. "Partial partition" is defined in clause (b) of the Explanation and the meaning if the word "partition" occurring therein must be understood in the manner it is defined in clause (a) of the Explanation. It only says that the partial partition may be partial either in respect of the persons or the properties. This is how we read section 171 and we find nothing therein to support Sri Chitale's contention.

21. The Explanation in section 171 of the Income Tax Act, Act 1961, which defines "partition" and "partial partition" contains nothing to permit an inference that these

expressions are to be understood, or the purpose of the Act in a manner different from that in which they are understood under the general Hindu law. It is also made plain by this Explanation that partition contemplated by this section is not actual division of the property in the manner it is capable of division. That is the last act required to be done for completing a partition and the mere severance in status brought about under the Mitakshara, without actual division of the property, does not amount to "partition" within the meaning of that word used in the section. We have already stated that the definition of "partial partition" contained in clause (b) of the Explanation must be understood by construing the word "partition" used in that clause to mean "partition" as defined in clause (a) of the Explanation. This, in our opinion, is the only reasonable construction of the whole Explanation contained in section 171. "Partition" understood in this sense does not result in any difference when section 171 is applied to a Hindu Undivided Family, whether it is governed by the Mitakshara or Dayabhag.

22. We have already indicated that under the general Hindu law Mitakshara with which we are concerned, such a partial partition of the joint family property without the consent of the sons cannot be made by the father in exercise of his right as parriva potestas. The contents of section 171 of the Income Tax Act, Act 1961, the gist of which we have already indicated, also do not warrant a different conclusion and there is nothing in the section to support Shri Chitale's argument.

23. The decision in *M.S.M.M. Mayyappa Chettlar v. Commissioner of Income-Tax, Madras*,<sup>4</sup> which was in the context of section 25A of the Indian Income Tax Act, 1922, is of no assistance. The facts of that case clearly show that the decision is distinguishable. Therein, the minor sons were represented by their mother and guardian at the partition which was made with the consent of the minor's guardian. That was, therefore, not a case of a partial partition made by the father without the consent of his sons in exercise of his right as parriva potestas, the question which arises for our decision in the instant case. For this reason, the question relating to the validity of a partial partition made by the father without the consent of his sons neither arose for decision of the Madras High Court nor was it decided therein. The real question involved in that case was whether an unequal partition made between the father and his minor sons was void so that the revenue could reject the assessee's claim of partition under section 25-A of the Indian Income Tax Act, 1922 treating it as void, when the sons had not sought to repudiate the partition. It was held that such a partition was merely voidable and not void so that it was not open to the revenue to

avoid such an unequal partition and it was only the sons who could repudiate the same, it being voidable at their instance. It appears to us that the partition having been made with the consent of the sons who were represented by their mother and guardian, that case is clearly distinguishable. Moreover, section 25-A of the Income tax Act, 1922 covered only cases of total partition and not also of partial partition.

24. As a result of the aforesaid discussion, it must be held that there is neither text, nor authority, nor even principle, much less any reason, to support the view that the extraordinary power of the father in a Hindu Undivided Family governed by Mitakshara, to make a partition during his lifetime without the consent of his sons, extends also to making a partial partition of the joint family properties. The object for which this extraordinary power appears to have been given to the father is also not better served by enlarging the father's power so as to include within it, also the power to make a partial partition without the consent of his sons. In fact, as already stated, such power, if held to be included within the father's extraordinary power, would actually be inconsistent with the very purpose for which it was given. There is no reason why the father should, while exercising this overriding power, make only a partial partition of the family properties retaining jointness, also of himself, in the remaining properties. The contention of Sri Chitale, learned counsel for the assessee, cannot therefore, be accepted,

25 The result is that we answer the questions referred to this Court, as follows:

Answer to question No. (1) :-No. A Hindu father does not have a right to bring about a partial partition of, the family properties among his sons Inter se as part of his patria potest as and ,without the consent of his sons.

Answer to question No. (2) :-Does not arise. Answer to question No. (3) :-Nn. On the facts and in the circumstances, of the case, the Tribunal was not justified in allowing the claim for partial partition made by the assessee.

Answer to question No. (4) : -Does not arise.

26. The reference is answered accordingly in favor of the revenue and against the assessee. The assessee shall pay the costs of this reference. Counsel's fee Rs. 200, if certified.

SEP98 (Reference answered accordingly)

Cases Referred.

1. (1880) I.L.R. Mad. 317
2. L.R. 43 I.A. 151
3. L.R. 63 I.A. 397
4. (1950) 18 I.T.R. 568