BOMBAY HIGH COURT

Gordhandas T. Mangaldas

Vs

Commissioner of Income-Tax

(N.R. Gundil, J.)

25.09.1942

JUDGMENT

N.R. Gundil, J.

Under Section 33 of the Indian Income-tax Act (XI of 1922), the Income-tax Appellate Tribunal, Bombay Bench, (consisting of N. R. Gundil, Judicial Member, and P. C. Malhotra, Accountant Member), delivered the following judgment on November 28, 1941.

> "This is an appeal from an oredr of the Appellate Assistant Commissioner of Income-tax, B Range, Bombay. It relates to the assessment made upon the appellant, Mr. Gordhands T. Mangaldas, for the assessment year 1939-40. The Income-tax Officer computed the total asessable income at Rs. 44,647, but in appeal the Appellate Assistant Commissioner reduced it to Rs. 35,856. There is no further objection as to the amount of income assessed on the income assessed. And the only contest before us is in regard to the apellant being assessed on the income of the Hindu undivided faimely of which he is the father and manager.

2. Till the assessment year in question, the appellant and his three sons were a Hindu undivided faimely governed by the Mitakshara schoolof Hindu law, and the appellant used to be assessed on that footing in respect of the total family income which is chifly derived from properties situated in Bombay. In the assessment of 1939-40 it was alleged that there was a partition in the family, the severange of coparcenary being expressed in several letters, dated July 2 and 3, 1939, which the sons wrote to the father and to one another declaring their intention to aeparate and to enjoy their respective share in the joint faimly property, stated to be one-fourth in each case in severalty. They also proposed to appoint Messrs. Little & Co., Solicitors, to act for them in the matter of completing the partition and preparing necessary Deeds of Settlement of their respective share with a view to preserve them from being wasted. There is, however, no evidance on record that the appellant father gave a corresponding assent to his sons declarations except

claiming a partition before the Income-tax Officer and in appeal. But the matter apears to have been taken up by the Solicitors, although nothing further than preparing certain drafts of deeds was done till the date of the present assessment. There is no dispute as to these several facts. The learned Counsel expressly admitted before us that the family property has not been divided by metes and bounds.

3. In course of the assessment under consideration the appellant claimed a partition in the faimly on these facts, and ask the Income-tax Officer to record an order under Section 25A(1) of the Act. The Officer made an enquiry and passed a separate order declining to record the partition. He held that no partition such as that contemplated by Section 25A(1) had taken place among the member of the family, inasmuch as the partition of the joint faimely property in definate portions had not been made. In appeal the learned Appellate Assisstant Commisioner thought that a mere severance of the joint status implied in the several declaration of intention to separate did not suffice to bring the case within the purview of the section. While conceding that the section did not require an actual division of the joint family property by metres and bounds, the learned Appellate Assistant Commissioner thought at the same time that the section did demand a division of the property by an allotment of shares to different members; and that therefore in the absence of such a division the claim to an order under Section 25A(1) could not be accepted. From this decision the present appeal is taken; and the several grounds set out in the memorandum resolve into one main point whether there has been a partition of the undivided family property in definite portions so as to justify an order under Section 25A(1) of the Act.

4. But before proceeding to consider the main issue it will be well to dispose of a preliminary point taken by the learned Departmental Representative that the Tribunal has no power to entertain and decide the question of partition in this appeal. The facts bearing on the point may be very shortly stated. We have stated before that the claim to partition was made before the Income-tax Officer in course of the assessment. It was therefore in order. The Officer made the necessary enquiry and passed a separate order under Section 25A(1) on the same date as the assessment order. These orders were followed by a notice of demand under Section 29 of the Indian Income-tax Act. From the order-sheet it appears that no notice of two separate orders having been passed was served upon the appellant. He applied for a certified copy of the assessment order which was duly furnished to him. He then preferred an appeal to the Appellate Assistant Commissioner from the assessment contending, inter alia, that the Income-tax Officer was wrong in disallowing the claim to partition, without preferring a separate appeal from the order under Section 25A(1) which is provided by Section 30 of the Act. In these circumstances, the learned Departmental Representative contends that the Appellate Assistant Commissioner had no jurisdiction to entertain and decide the question of partition in a regular assessment appeal; and that consequently the Tribunal is precluded from entertaining the question either.

Here it must be mentioned that the possibility of such a point arising before the Appellate Assistant Commissioner seems to have been contemplated by the appellant who anticipated it in his memo of appeal below contending that he had not been furnished with a copy of the separate order under Section 25A; and that he came to know of it after he had received a copy of the assessment order in which the Income-tax Officer had made a reference to the latter. But the point as to the Appellate Commissioners jurisdiction to consider the question of partition in a regular assessment appeal does not appear to have been raised before him, and, in consequence, the Officer probably thought that he had power to decide the question which had been expressly raised in the memorandum of appeal. In effect he treated the regular assessment appeal as one taken from an order under Section 25A also. We cannot say that the Appellate Assistant Commissioner acted without jurisdiction in these circumstances. There was also no question of loss of revenue, inasmuch as no fee is prescribed for an appeal before the Appellate Assistant Commissioner. At any rate, the appeal before us is specially to be taken on a point of partition, although it is registered as a regular assessment appeal, apparently because it had been so treated below. We therefore think that having regard to the peculiar circumstances above stated we ought not to take notice of a defect which appears to us to be too formal and throw out the appeal on the particular ground.

5. Coming to the main question, the substance of the learned Counsels arguments is that in a joint Hindu family governed by the Mitakshara school an unequivocal expression of intention by a member or members constitutes a partition; and that, thereafter, they hold the joint family property in ascertained shares, an actual division by metes and bounds not being necessary to complete the severance. He contends further that holding of the family property in ascertained shares by the members is all that is required by Section 25A(1) of the Act, as amended in 1939. In other words, it is argued that an ascertainment of shares on a partition in the manner just stated amounts to a partition of the joint family property among the various members in definite portions contemplated by Section 25A, and that it is not necessary that there should be an actual division of the property by metes and bounds. There can be no doubt or dispute as to the correctness of these two propositions of Hindu law stated by the learned Counsel. At the same time, it must be borne in mind that such a kind of partition, i.e., by an ascertainment of shares in the family property, primarily affects the questions of alienation and succession among Hindus with which we are not concerned in this case. The precise point before us is whether a notional partition of family property by an ascertainment of the proportion of shares is all that is demanded by Section 25A(1) of the Income-tax Act which lays down that the Income-tax Officer shall record an order of partition if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions. In other words, the point we have to decide is whether an ascertainment of shares resulting from an unequivocal expression of intention to separate, i.e., a notional division, amounts to a partition in

definite portions within the meaning of the section. The learned Counsels argument is that both the expressions mean the same thing, while it is contended on behalf of the Department that a mere notional ascertainment of shares does not suffice to fulfil the condition laid down by the section.

6. Judicial opinion on this important question presents a good deal of divergence. Each side has cited decided authorities in support of its contention, and we shall notice several..... that appear to be more important than the rest. Here it may be pointed out that all these cases were decided under Section 25A before its amendment in 1939. As it then stood, the section required an Income-tax Officer to satisfy himself first that a separation of the members of a Hindu family had taken place, and secondly, that the joint family property had been partitioned among the various members in definite portions. The amendment of 1939 deleted the first of these two requirements and retained the second. So that assistance of these several cases may yet be sought as to the meaning of the second condition retained in the section. In Biradhmal Lodha v. Commissioner of Income-tax, U. P. Niamatullah, J., held that Section 25A(1) contemplates a case in which a disruption of a Hindu family occurs, so that a joint family ceases to exist and no property previously belonging to it retains the character of a joint family property; and that, therefore, it is immaterial whether the property is divided by metes and bounds or is held in defined shares. His Lordship thought that a partition contemplated by Section 25A(1) is not necessarily a partition by metes and bounds : vide page 178 of the report. But with the greatest respect to his Lordship we cannot help thinking that his observations went much further than the answer that the question raised in that case required. For it will be clear from page 165 of the report that the precise question before their Lordships was whether in the case of a partial division of a joint family property Section 25A has any application. It was not a case of complete partition of the family property. Also the family had retained its joint sta tus. And, consequently, Bennet, J., who was a party to the decision answered that a division of a particular portion of the joint family property did not fulfil the requirements of Section 25A(1). Thus the observations of Niamatullah, J., appear to be more or less obiter dicta. Biradhamals case was decided on November 3, 1933. On July 22, 1934, the question, as it arises in this case, directly arose before a Division Bench of the Lahore High Court in Saligram Ramlal v. Commissioner of Income-tax, Punjab, and their Lordships held that Section 25A of the Income-tax Act contemplates an actual partition by metes and bounds of the joint family property and not a mere change of coparcenary to a tenancy-in-common by a severance of the joint status. Biradmals case was neither cited at the bar nor noticed in their Lordships judgment. The question once again came up before a Full Bench of the same High Court on October 19, 1934, in Sher Singh Nathu Ram v. Commissioner of Income-tax, Punjab. Dalip Singh, J., who delive red the judgment of the Full Bench thought that a partition by metes and bounds was not necessary to bring a case under Section 25A(1). His Lordship observed that the word "share" was synonymous for "portion", so that the expression

partition in "definite portions" means the same thing as partition in "definite shares." This case was followed by the Judicial Commissioners Court, Nagpur, in Sir Bisesardas Daga and Others, In re on January 7, 1935, in which reference is made to Biradma l Lodhas case also. Lastly, the most recent case cited before us by the learned Departmental Representative is that of Lachiram Baldeodas v. Commissioner of Income-tax, Bihar and Orissa, decided by the Patna High Court on May 7, 1936. In this case too, a reference to the several cases noticed above is not found. Wort, C.J., held that under Section 25A the Income-tax Officer was not concerned with the national separation of the family and that he has to enquire into the question whether the joint family property had in fact been divided. It appears to us from his judgment that his Lordship made a distinction between partition by a notional ascertainment of shares and a division of the property in fact.

7. Thus the question raised before us presents considerable difficulty in view of the conflict of opinion among the different High Courts and also different Benches of the same High Court, as well as in the absence of a Bombay decision which would be binding upon us in Bombay. We are therefore left to give our own answer on a careful consideration of the several judgments read with the provisions of Section 25A of the Indian Income-tax Act. We have stated before that the question raised in Biradhmal Lodhas case was materially different, being one of a partial partition. In the rest of the cases, however, the question that is now raised before us was specifically referred for decision. We have to observe that the Income-tax Act provides for assessment of Hindu families after partition, that is to say, if the co-owners desire to be assessed as separate units they must own incomes which can be regarded as separate entities. It is extremely difficult to say that the income of a share notionally separated on an ascertainment merely by the severance of status can at all be regarded as a separate entity for the purposes of the tax. In the Lahore Full Bench case Dalip Singh, J., observed that the word "portion" used in the section is identical in meaning with "share"; and, in this connection, his Lordship referred to their dictionary meaning. But with the greatest respect to his Lordship it must be said that the words "portion" and "share" carry somewhat different meanings in ordinary language in the light of which we have to construe the former word occuring in the Income-tax Act. We do not generally speak of a notional share as a portion. For instance, we speak of a portion of a house to let, and not a share. The word "partition" in its ordinary sense would mean a division of property between co-owners, and not a mere conversion of coparcenary into a tenancy-in-common. Although we do not intend to go as far as to say that there must be division by metes and bounds of family property before a Hindu assessee can claim an order under Section 25A, we respectfully agree with the dictum of Wort, C.J., in Lachiram Baldeodas v. Commissioner of Income-tax, Bihar and Orissa, that a division in fact is necessary under Section 25A(1). Such a division will be sufficiently made by an allotment of shares among the members of the family and not merely by a notional ascertainment of their proportions in relation to the whole. That is

what we think Wort, C.J., meant by a division in fact. This view, in our opinion, is supported by the language of Section 25A(2) which provides for separarte assessment of a divided member of a Hindu family. The concluding poriton of the sub-section is to the effect that a divided member shall be liable for a share of the tax on the income so assessed (i.e., assessed on the total income of the family) according to the protion of the joint family property allotted to him. We therefore think that their must at least be an allotment of a share to a member of the family before he can claim to be assessed as a separate unit. That is not so in the present case. Lastly, one cannot overlook that Section 25A of the Income-tax Act provides machinery for making separate assessments of divided members of a Hindu family, and we are afraid that construing Section 25A(1) in the manner urged on behalf of the appellant would make the provisions unworkable, since such a construction would conflict with the language of the concluding portion of Section 25A(2) which we have just noticed. In conclusion we desire to add that controversy like the present which is bound to arise in future also would be set at rest by amending section 25A(1) to fall in line with sub-section (2) of that section as indicated above.

8. For these reasons we hold that the appeal must fail on the main point arising in this case. We therefore confirm the Appellate Assistant Commissioners order and dismiss this appeal."On the application of the assessee under Section 66(1) of the Indian Income-tax Act (XI of 1922) the Appellate Tribunal referred the case to the Bombay High Court.

JUDGMENT

Beaumont, C.J.

This is a reference made by the Appellate Tribunal, Bombay Bench, under Section 66(1) of the Indian Income-tax Act, raising a question which has given rise to a difference of judicial opinion. The question is :

> "Whether on the facts of this case it has been rightly held that the joint family property of the petitioner and his sons has not been partitioned in definite portions within the meaning of Section 25A(1) of the Indian Income-tax (Amendment) Act, 1922 ?"

The facts giving rise to the question have never been in dispute. The assessment year is the year 1939-40, and down to July 3, 1939, there was a Hindu joint family consisting of the father and three sons, and on that date severance took place. The three sons all intimated an unequivocal desire to sever, the joint family, and according to the law applicable to Hindu joint families under the Mitakshara system that expression of a wish on the part of the sons severed the joint family, and, as there were only four coparceners, the necessary result was that the shares in the joint family property became divided equally between the four coparcencers, who then held as tenants-in-common. But there has been no physical division of the joint family property. I use the

expression "physical division" in preference to the more usual expression "division by metes and bounds", because the latter expression is only applicable strictly to immovable property. Both the Assistant Commissioner and the Appellate Tribunal considered that a mere severance of the joint family was not enough for the purpose of Section 25-A : that there must be an allotment of shares, though both Tribunals thought that a physical division was not necessary. I must confess that I do not follow that opinion. It appears to me perfectly plain, on the finding that the joint family severed in July, 1939, that the shares were definitely ascertained, and there being four members of the family each became entitled to a one-for the share of the family property. To my mind, the real question to be determined is whether Section 25A requires a physical division, or is satisfied only by a division in interest.

Before coming to Section 25A, it is to be noticed that a joint Hindu family is one of the taxable units under Section 3 of the Indian Income-tax Act, and that Section 14(1) provides that 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. That, of course, is designed to avoid double assessment. If the family pays, the individual members are not required to pay.Section 25A (1) before the amendment of 1939 provided :

> "Where, at the time of making an assessment under Section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that a separation of the members of the family has taken place and 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."

Sub-section (2) deals with assessment when an order is made under sub-section (1), and under sub-section (3) the family is to be deemed to be undivided unless an order is passed under sub-section (1).In this case we are dealing with the section as amended in 1939, and in the amended sub-section (1) the words "that a separation of the members of the family has taken place and" are omitted, so that the Income-tax Officer instead of having to be satisfied of two things, that a separation of the members of the family has taken place and that the joint family property has been partitioned, is not only required to be satisfied o one thing, namely, that the joint family property has been partitioned among the various members or groups of members in definite portions.The question arising is whether the requirement that the Income-tax Officer shall be satisfied that the joint family property has been partitioned among the various members in definite portions, requires him to be satisfied that the property has been physically divided, or merely that there has been a division in interest.In construing the Act we have to remember that it is an all-India Act, and that it is as applicable to Hindu families under the Dayabhaga system, as

to those under the Mitakshara system. Under the Mitakshara system there are always two steps in a complete partition. There is, first, the division interest, which may be brought about by agreement, by filing a suit, or by expression an intention to divide, and there is the physical division of the property, which may, and often does, take place, years after the division in interest. But under the Dayabhaga system the members of the joint family are divided in interest; they are in a position analogous to that of tenants-in-common , that is to say, they are originally in much the same position as the members a of Mitakshara family after the family has disrupted, and there has been a division in interest. I do not see what effect Section 25A can have on the property of a Dayabhaga joint family, if the opinion of the Income-tax Officer must be directed merely to a division in interest which always existed. It seems to me that Section 25A will have no effect at all on families under the Dayabhaga system, unless it is held to involve a physical division into definite portions. Sub-section (2) of the section also seems to me to favour that construction of the first sub-section, because it provides that where an order has been passed under sub-section (1), the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no separation or partition had taken place, and each member or group of members shall, in addition to any income-tax for which he or it may be separately liable, and notwithstanding anything contained in sub-section (1) of Section 14, be 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. It is argued by the assessee that "according to the portion of the joint family property" means according to the proportion or share of the joint family property. But Mr. Setalvad on behalf of the Commissioner contends that the word "portion" is used in exactly the same sense as in sub-section (1), and refers to a physical part of the property; he suggests, I think correctly, that sub-section (2) is designed, at any rate in part, to meet the case in which there has been a partition of joint family property, where one member gets a portion producing income, and another member gets a portion producing less income, or no income at all, for instance, where one member of the joint family takes income producing lands or shares, and another member takes jewellery of considerable capital value, but producing no income. It would be unfair in such a case to apportion to income amongst the members in proportion to the value of the shares they take. The allocation of the tax ought to be made in accordance with the particular portion of the property which each member has taken.Apart from authority, I should feel no doubt that Section 25A contemplates a physical division of the property. I think that the expression "definite portions" indicates a physical division in which a member takes a particular house in which he can go and live, or a piece of land which he can cultivate, or which he can sell or mortgage, or takes particular ornaments which he can wear or dispose of, and that the expression "definite portions" is not appropriate to describe an undivided share in property where all a particular member can claim is a proportion if the income, and a division of the corpus, but where he cannot claim any definite portion of the property. In a case in

the Lahore High Court, to which I will refer more in detail later, the bench suggested, in construing Section 25A, that the words "portion" and "share" were synonymous. But that, I think, is not so. No doubt, the words sometimes may be used interchangeable, but in connection with property I should say that a portion means a part of the property, whereas a share indicates the interest of some individual in the property. A room may be said to be a portion of a house; it cannot be said to be a share of a house, although it may represent the share of a particular person in the house. "Portion" seems to me the apt word for division of property, and "share" for division of interest, and it is significant that "portion" is used in Section 25A. No doubt the expression "division in definite portions" will have to be construed with regard to the nature of the property concerned. A business cannot be divided into parts in the same manner as a piece of land; division may only be possible in the books. Special cases will have to be dealt with by the Income-tax Officer when they arise. If he comes to the conclusion that, having regard to the nature of the property, what has been done amounts t a division in definite portions, he will record his finding under sub-section (1); if he comes to the conclusiop that it does not, then he will have to go on assessing the family under sub-section (3).The cases on this subject are conflicting, as the Tribunal has noticed. In the first place, there are two decisions of the Lahore High Court, which are in conflict. The first one, decided on June 22, 1934, by Mr. Justice Addison and Mr. Justice Sale is Saligram Ramlal v. Commissioner of Income-tax, and the bench held that Section 25A of the Indian Income-tax Act contemplates an actual partition by metes and bounds of the joint family property and not a mere change of the coparcenary to a tenancy-in-common by a severance of the joint status. The second case in the Lahore High Court, decided by three Judges, Mr. Justice Jai Lal, Mr. Justice Dalip Singh and Mr. Justice Skemp, on October 19, 1934, is Sher Singh Nathu Ram v. Commissioner of Income-tax, and that bench arrived at a precisely opposite conclusion, without any reference to the earlier decision, which presumably was not brought to their attention. The leading judgment which was delivered by Mr. Justice Dalip Singh treats the words "share" and "Portion" as synonymous, and reads Section 25A as requiring only partition in definite shares. As I have already said, I do not agree with that view. Moreover, with all deference to the bench, I think they fell into an error in saying that there are three stages in the partition of a Hindu family subject to the Mitakshara law; the first stage being a disruption without ascertainment of shares, the second, disruption of family with ascertainment of shares, and, the there, a division of property. I do not think it is correct to say that there are more than two stages : a division in interest, and a physical division of the property. Directly there is a disruption of the family, that necessarily determines that the shares belong in severely to the members of the family according to law. Of course, in every case of partition, before a final division takes place, three things must be determined : the property to be divided; the shares into which it is to be divided; and the persons entitled to those shares. In uncontested cases these matters are settled by agreement; in contested cases they may have to be determined by the

Court. But their determination is part of the machinery for effecting the final partition, and does not form an independent stage in partition. In my opinion, The judgment of the earlier bench of the Lahore High Court is to be preferred to that of the later bench.Then there is a decision of a bench of the Allahabad High Court in Biradhmal Lodha v. Commissioner of Income-tax in which it was determined only that Section 25A did not apply to a partial division of joint family property, a view recently accepted by the Privy Council. That question is not before us, but Mr. Justice Niamatullah, in the course of his judgment, said that a division by metes and bounds was not required for the purposes of Section 25A. The question did not really arise in that case and moreover the property in question was a business, to which as have already suggested, special considerations may apply. In my opinion, that case is no authority on the question we have to determine on the construction of Section 25A.Then there is a decision of the Judicial Commissioners Court at Nagpur, Sir Bisesardas Daga, In re, in which the Court said that they followed the view of the Allahabad High Court in the case which I have just mentioned, and considered that Section 25A did not demand partition by metes and bounds. There, again, they were dealing with a business, and they were also influenced by the fact that the Commissioner admitted that a division by metes and bounds was not necessary.Then there is a decision of the Patna High Court in Lachiram Baldeodas v. Commissioner of Income-tax, Bihar. The Acting Chief Justice in that case expressed the opinion that Section 25A contemplated physical division of the property, but I think that was no more than a dictum.Then there is a very recent decision of the Privy Council in Sir sunder Singh Majithia v. Commissioner of Income-tax. U.P. and C.P. which has not yet been reported. In that case this question did not definitely arise, but on one aspect of the case the Board held that it was necessary to consider the effect of Section 25A and the judgment contains observations on the section which are of considerable assistance in the present case. Their Lor dships point out that Section 25A is directed to the difficulty which arose when an undivided family had received income in the year of account but was not longer in existence as such at the time of assessment and they point out that the provision of Section 14(1) must be borne in mind in considering the terms of Section 25A. Then their Lordships go on :- "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 coparcener so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filling of a suit for partition may have this effect thought 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 had 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

of 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."The Board do not say in express words what they mean by the words quoted "partitioned in definite portions," as no question as to their interpretation arose but it seems to me that the Board contemplated a physical division of the property, because the passage quoted shows that they had distinctly in mind the Dayabhaga system, under which no division in interest is necessary.In my opinion, on the words of Section 25A of the Indian Income-tax Act we ought to answer the question put to us n the affirmative, because there has been no physical division of the joint family property. The authorities in India are conflicting, and as I read the decision of the Privy Council, although it is not directly in point, it favour the view that a physical division of the property is required.The assessee to pay costs.

Kania, J.

The relevant facts, sections of the Income-tax Act and authorities cited at the bar have been referred to in the judgment just delivered by the learned Chief justice.The question for consideration is whether on the construction of Section 25A in addition to the unequivocal declaration or decision of a member of a joint Hindu family to disrupt the joint status, in order that individual members may be assessed in respect of the property coming to their share, is it necessary further to show that the joint family property has been partitioned amongst the members in definite portions ? It is material to bear in mind the scheme of the Income-tax Act, in the first instance. Under Sections 2 and 3 the different units stated therein are liable to be taxed as such. One of them is a joint Hindu family. In order to avoid double taxation, Section 14 lays down that when the individual member is being assessed, his income as a member of a joint family should not be assessed again. Then comes to stage, what happens when a family, which has once been so assessed, comes to a partition. To meet that contingency, Section 25A has been enacted. In the section, as it existed before the amendment of 1939, in terms the Income-tax Officer required proof, (i) that a separation of the members of the joint family had taken place and (ii) that the joint family property had been partitioned amongst the various members or groups of members in definite portions. On being satisfied on those points he had to record an order to that effect. The effect of such recording was that the joint family income would be assessed and recovered in terms of sub-section (2). In the absence of such order, under sub-section (3) the joint family continued to be assessed as before.The question before the Court is whether in respect of a Mitakshara family, if it is only shown that the joint family status has ceased to exist, the case is governed by Section 25A(1). In the present case the record shows that the applicants joint family owns immovable properties, and it is not suggested that there is any business. The record further shows that there has been an agreement amongst the members and

the joint family had ceased to exist. It is further shown that Messrs. Little & Co. were instructed to prepare the relative documents to divide the properties amongst the parties according to their shares, and drafts were prepared but that nothing more had been done up to the relevant time.The argument on behalf of the applicant is that under Section 25A, once the joint family status had come to an end, the shares were ascertained, and the latter part of the section must mean that the joint family property had been partitioned in definite portions. In the first instance, it may be noted that the word "portion", when read in conjunction with partition of joint family property, would ordinarily mean a physical division, and not a definition or ascertainment of shares only. It was argued that under the Hindu law on an unequivocal expression of Intention to sever, the joint family status came to an end, and the Income-tax law could not be framed to alter that substantive law. I think this argument is fallacious, because by the Income-tax Act no attempt is made to alter the substantive law. The Income-tax Act only lays down the manner in which the income of what was once a joint family estate should when it is alleged that the joint family had come to a partition, be assessed. The scheme is that if it is proved to the satisfaction of the Income-tax Officer that there was not only a rapture of the joint family status, but definite portions of the joint family property, according to the words used in sub-section (2), had been allotted to individual members, those members were to be assessed in respect of the income allotted to their share.If the omission of the words in the old section is to be used in construing the new one, it seems to me that the same favour the view urged by the Commissioner rather than of the applicant. In the amended section the words "as separation of the members of the family has taken place" have been omitted. That means that out of the two facts for which proof had to be furnished to the income-tax Officer, proof of the first had become unnecessary. The question is why ? And the answer obviously is that it is immaterial if the second is proved. If the applicants contention was sound, the second part of the old sub-section should have been omitted and not the first, because in that event, once it was established that the joint family status has ceased to exist, no further proof was required. The retention of the second portion, and the omission of the first, in my opinion, emphasize the view that a division, that is a physical partition of joint family property in definite portions, is required to be proved.In this connection it is material to bear in mind the Hindu law of joint family. It should be noted that Section 25A is of all-India application, and applies equally to joint families governed by the Mitakshara law and the Dayabhaga law. According to the Dayabhaga law, as stated in all recognised text-books, the members of a joint family have always definite and ascertained share, that is a share which is not liable to be increased or decreased by the death or birth of another member in the family. Bearing that important distinction between the Dayabhaga law and the Mitakshara law in mind, if Section 25A is approached, it is clear that the last part of the section must mean a physical division on partition, because the separate ascertained shares amongst the members of a joint Hindu family governed by the Dayabhaga law already exist before any partition. This point of view is very

clearly brought out in the very recent, but up to now unreported, judgment of the Privy Council, out of which the learned Chief justice has quoted in extenso. That passage clearly shows the interpretation put by their Lordships on Section 25A of the Income-tax Act as affecting the assessment of joint families governed by the Mitakshara law. Their Lordships in the first portion say 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 rights of succession by survivorship." Then they further state that on such a declaration the effect is that the family property will belong to the members as it does in a Dayabhaga family-in effect as tenants-in-common. The result, therefore, is that their Lordships emphasize the view that on the declaration made by a member to sever his tie with the family, the result is what would be the normal state of affairs in a joint family governed by the Dayabhaga law. The passage quoted in the judgment then goes on the state that Section 25A provides that if it be found that the family property has been partitioned in definite portions, assessment may be made on each individual in respect of his share of the profits. But the concluding words emphasize clearly that if such division is not made, the joint family will continue to be assessed as a unit, as it had been assessed before. That passage clearly shows that although the first stage, namely, the declaration of a member to disrupt the family, may be effective, unless the second stage, namely, the division of the property amongst members in definite portions is also shown, the family will be continued to be assessed as a joint family unit.Five decisions of Indian Courts, which have been referred to in the judgment of the learned Chief Justice, were cited at the bar. In all of them the question was in respect of what was once a joint family business. In most of them the question was whether, after the members severed one portion of the joint family asset and entered into a partnership agreement in respect thereof, the Income-tax Officer should have recorded the partnership agreement under Section 26A, or whether such an agreement amounted to a severance of that asset from the rest of the joint family property. Directly none of those cases had to deal with what was to be done unequivocally under Section 25A, in order that individual members may claim to be assessed separately. The observations in those cases have to be read along with the facts, and I emphasize this particularly in respect of the observations of Mr. Justice Niamatullah in Biradhmal Lodha v. Commissioner of Income-tax. The learned Judge there stated that it was not necessary to have a division by metes and bounds, but it should be remembered that, correctly speaking, it is not possible to have a division by metes and bounds of a business, except by winding it up and re bringing the assets under a new partnership agreement. The view of Mr. Justice Dalip Singh in Sher Singh Nathu Ram v. Commissioner of Income-tax , appears to be somewhat widely expressed, and it must be recognized that the word "portion" is not necessarily under all circumstances interchangeable with the word "share." The question is always, having regard to the context in each case, what is the proper meaning to be attached to the word "position." With respect, I differ from the conclusion of the bench of the Lahore High Court which decided the case of Sher Singh Nathu

Ram v. Commissioner of Income-tax where they held that "portion" and "share" were synonyms for the purpose of Section 25A(1). The other cases cited at the bar had dealt with the question of business, and in no case this particular view, namely, what was to be done for bringing the case under Section 25A, when the joint family estate consisted of immovable properties, had been independently considered. All the observations and discussions are in respect of a business which was contended to have been separately carried on after a particular date by members under an alleged agreement of partnership. In my opinion those cases do not directly bear on the point. As has been pointed out Saligram Ramlal v. Commissioner of Income-tax is the only decision in which this question was distinctly dealt with, and the view there expressed is in consonance with the view expressed in this judgment.I, therefore, agree that the question should be answered as stated in the judgment of the learned Chief Justice.

Reference answered accordingly.