BOMBAY HIGH COURT

Waman Satwappa Kalghatgi

Vs

Commissioner of Income-Tax

(H Kania, Kt., C.J. Chagla, J.)

18.09.1945

JUDGMENT

Harilal Kania, Kt., Ag. C.J.

1. This is a reference made under Section 66(1) of the Indian Income-tax Act, 1922, by the Income-tax Appellate Tribunal.

2. The relevant facts as found in the statement of case are these: The year of assessment is 1942-43 and the income of the previous year, which is sought to be taxed, is the Hindu year commencing from October 31, 1940, and ending on October 20, 1941. The assessee was sought to be assessed as the karta of a joint Hindu family. He had been so assessed in the previous years. In July, 1941, the members decided to separate and make a partition of the family properties and assets. For that purpose they divided themselves into four groups. The first group consisted of the aseessee, his wife and three minor sons together. The remaining three groups consisted of the three major sons and their own families. They started making a division of the family cash, jewellery and the businesses and completed it on July 30, 1941. That division was embodied in a memorandum which the parties executed that day. The document expressly stated, and the fact was also admitted before the Tribunal, that the shares of the different groups in the moveables and businesses did not correspond exactly with the interest which they possessed in the family estate according to Hindu law, It appears that there was some disagreement amongst the members as regards the division of the immoveable properties and consequently there was a reference to arbitration so that the final adjustment of the shares should be made by the arbitrators, at the time of the division. On July 31, 1941, the parties submitted a reference to arbitration and the award was made on October 16, 1941. Thereafter a decree on the award was passed on February 3, 1942.

3. In paragraph 7 of the statement of case it is stated as follows;

After the division of the business on July 30, 1941, the applicant and his three major sons

separately carried on those that were assigned to their respective shares till the end of the year of account, i.e. October 20, 1941.

4. On March 12, 1942, the applicant applied to the Income-tax Officer to record an order of partition under Section 25A(J) of the Act. The order was made on July 30, 1942. The assessee at first claimed that the income of the joint family for the whole year under the circumstances should not be assessed as such but the individual members only should be assessed. In the alternative he claimed that the income of the businesses between July 30 and October 20 should be treated as separate income. The Tribunal rejected the larger contention but has referred for the Court's opinion the narrower question in respect of the profits of the several businesses between July 30, and October 20, 1941, in the following terms:Whether in the circumstances of the case and having regard to the provisions of Section 25A of the Indian Income-tax Act, 1922, the profits and gains of the several businesses for the period from July 30, 1941, to October 20, 1941, have been rightly included in the total income of the Hindu undivided family represented by the applicant, for the assessment year 1942-43 ?

5. The material facts therefore are that according to the findings of the Tribunal the businesses were at one time joint family businesses. They were allotted to the individual members on July 3(0, 1941, and the assesses and his three major sons thereafter separately carried on those businesses which were assigned to the respective shares till the end of the year.. It also appears that the immoveable properties belonging to the family were not allotted to individual members and the shares therein were; not specifically defined. The value of the moveables and the businesses divided on July 30, 1941, were unequal and they had to be equalised at the time of the division of the immoveable properties. The Tribunal was of the opinion that there can be only one partition under Hindu law and therefore in the present case as there was no completed partition till October 16, 1941, the assessee was liable to be assessed for the whole year on the footing that he was the karta of the joint family.

6. On behalf of the assessee it is contended that the Tribunal has taken a wrong view. It is urged that there is nothing in law to prevent a Hindu family from parting with one or more of its assets in favour of a stranger of a member. If that is done, that particular asset ceases to be a joint family property and the income, profits and gains of such asset in no event can be considered to be that of the joint family. It is contended that the assessment of the karta is and can only be in respect of the income of the joint family properties. In *Sardar Bahadur Sir Sunder Singh Majithia v. The Commissioner of Income-tax*[1] it is pointed out that Section 25A deals with the position of a joint family which was in existence when the income of the joint family property was received but was not in existence at the date of the assessment. The law therefore provides that in such a cafie if the joint family has been divided and the properties have been partitioned

amongst the various members in definite proportions, the Income-tax Officer can pass an order under a 25A (3) and thereafter the assessment will be on the individual members only and not on the manager as representing the family. In Section 14(j), it is therefore provided that tax shall not be payable by the assessee in respect of any sum which he receives as a member of an undivided Hindu family. This is obviously with a view to avoid double taxation. On behalf of the assessee our attention was drawn to *Bansidhar Dhandhania v. Commissioner of Income-tax*[2] where the Court held that if businesses were allotted to individual members when the immoveable properties had not been partitioned, the income of the businesses did not form part of the income of the joint family for which the karta could be assessed as before. The assessee further relied on the abovementioned judgment of the Privy Council in Majithia's case.

7. On behalf of the Commissioner it is urged that Majithia's case is not applicable because in that case the family had continued to be joint and it was only one asset which had been taken out of the family properties and treated by agreement between the parties as a partnership asset. It was contended that the observations in that case were inapplicable when the family unit had been disrupted although there had been no partition of the family assets. Mr. Setalvad further relied on Medam Gurumurthi Setty v. Commr. of Income-tax, Madras in support of the contention that the partition contemplated by Section 25A means a complete partition and not a partial partition. It was contended that if in the course of division of the joint family assets some assets are handed over to individual members till an order under Section 25A(3) is made, the manager continues to be liable to be assessed with the ' status' of the ' joint undivided Hindu family.' He urged that the scheme of Section 25A negatived the contention of the assessee.

8. In my view, the contention of the assessee is correct. In Majithia's case the Board held that it was open to the members of a joint Hindu family to separate one of its assets, so as to make it not to belong to the joint family and in respect of which they can enter into an agreement of partnership. If that asset was a business, the income derived from carrying on such a business thereafter would not form part of the joint family income and Section 25A would not come in the way of such an arrangement. This is in accordance with the ordinary rule that there is nothing in Hindu law to prevent individual members from holding separate property. In such a case the member' will be liable to be taxed on his separate income. In respect of the joint family income however the manager will be liable to pay the tax as the karta. It must be remembered that Section 25A is a machinery section. It is not a charging section much less it can be construed as altering the Hindu law as such. Mr. Setalvad's argument that that line of reasoning cannot apply when the joint family status has come to an end does not appeal to me. There appears no reason why in the course of partition, which may take five to ten years if the immoveable properties are not capable of being easily sold, the members should not be given the moveables which become their absolute property from the moment they are so given to them individually, so that they can

deal with them according to their absolute discretion and right and which is under their absolute domain. The income of such assets so irrevocably transferred to each member is his individual income with which the joint family has nothing to do. If such an arrangement can be arrived at when the joint family is in existence, there is nothing in law to prevent the same being done in the course of partition of a joint family. The question whether it has been so done is a question of fact, but in law I find nothing to prevent such a thing being done.

9. In Medam Gurutmvrthi Setty v. Commr. of Inc-tax, Madras the question submitted for the Court's opinion was this:Whether the partition could be said to have been taken place within the meaning of Section 25A on 15th October 1938 when the members began to live separately though all the properties were not divided.It must be noticed that the question was whether on the date mentioned in the question, on the facts, it could be stated that there was a partition within the meaning of Section 25A. The facts mentioned in the report are these: On October 15, 1938, the brothers agreed to separate and on January 22, 1941, a deed of partition was executed and registered. The family estate consisted of immoveable and moveable properties. On October 15, they divided the cash which they possessed. Each brother was given a house. The other immoveable properties were also divided amongst the brothers on that day. On December 25, 1938, they divided the furniture and household utensils. The family had carried on a grocery business but the assets of this business were not divided till February 24, 1930, On these facts the assesses contended that there was a partition within the meaning of Section 25A on October 15, 1938. That contention was rejected. To that extent there is no difficulty in agreeing with the conclusion of the Court. In the course of his judgment the Chief Justice observed (p. 179):Partition means a completed partition. The fact that some assets are divided and others are left for division at a future date would not be a partition within the meaning of the section... In this case important assets, namely, those of the business were not divided until February 1939 and the Court has been informed that other assets still remain to be divided. In the circumstances it is clear that the date of the partition is not the 15th October 1938, and that is the answer to give to the reference.

10. While agreeing with the answer given by the Court, with respect, I am unable to agree with the conclusion that Section 25A does not contemplate a division amongst the members of assets of a joint family which can from that moment be their individual property and cease to be the joint family property.

11. On the other hand Bansidhar Dhandhania's case relied upon by the assessee brings out the point very clearly. In that case there was a partition and a severance of the joint family status. Businesses were allotted to members and the profits thereof were enjoyed by them individually for their absolute use and benefit. In giving judgment Manohar Lall J. found as a fact that (p.

77):the assessee is no longer a joint undivided Hindu family... So far as the businesses are concerned it is impossible to divide them except by sharing of the profits and losses at the close of the year or whenever the accounting comes to be made for the profit and loss of the business of the relevant years.As a fact he found that the accounts were kept separately. It was further found that the house property and the jote lands were not partitioned. He then observed as follows (p. 77):It must not, therefore, be held that there is no complete partition but only a partial partition. But such a partial partition comes within the operation of Section 254 of the Act as observed by their Lordships in Sunder Singh's case and the Commissioner's view to the contrary is wrong. The members of the assessee's family in these circumstances must be deemed to continue to form a joint Hindu family for the purposes of assessing them on that portion of the income which is deriveable from the properties which have not been partitioned in definite portion other than the businesses.The facts there were very similar to the facts here. Businesses were allotted to individual members while the immoveable properties remained to be partitioned. The Court there held that the income of the businesses should be treated as the income of the individual members and for that income the joint family cannot be assessed. In my opinion, that is the correct construction of Section 25A of the Act.

12. Mr. Setalvad further relied on the wording of Section 25A (-2). He argued that where an order has been made as contemplated by Clause (3) of that section, the Income-tax Officer must mate the 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 was argued that it was therefore contemplated by this sub-clause that when there was a rupture of the joint family tie, if the shares were not definitely allotted in individual property to individual .members, the assessment must continue as before. The contention overlooks the important words found in the clause, namely " on assessment of total income received by or on ,behalf of the joint family as such." The essence of the Section is that the income must in the first instance be received by the joint family as such. Once it is so Deceived it makes no difference whether the joint family exists or not on the date of (the assessment. This section, in my opinion, dearly brings out, what was pointed out by the Privy Council in Majithia's case, that the scheme of the section was to tax joint family income as a unit if it was received as such by the joint family, even though at the date of the assessment there may have been a partition.

13. It seems to ma therefore that there being nothing in Hindu law to prevent members of the joint family owning individual assets at certain stages when the joint family exists or when it is in the course of partition, in the present case as the businesses were individually allotted and

worked by the members separately for their own benefit, as found by the Tribunal, the income in question cannot be considered to be the income of the joint family.

14. The question referred to the Court must therefore be answered in the negative. The Commissioner to pay the costs of the reference.

Chagla, J.

15. I agree. Section 25A of the Indian Income-tax Act does not create any new rights or obligations nor does it in any way affect the provisions of the Hindu law. The section merely sets up a machinery by which the income of a joint Hindu family, which was in existence in the accounting year but has become defunct in the year of assessment, can be computed and calculated. 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 the. Income-tax Act is concerned the joint family, although its status has been severed, continues to exist as a unit or entity till all the properties belonging to the joint family- are completely and finally partitioned. 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 the first sub-clause 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 told income of the joint family. Therefore in every caste the Income-tax authorities have to ascertain what 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 karta 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 recognised by the Income-tax Act has received the income which is sought to be assessed. Therefore to my mind the question in this case resolves itself into a question of fact,) viz. is the income of the business which according to the income-tax authorities is a part of the total income of the joint family and was assessed under Sub-section (2} income of the joint family or not ? On this the clear and specific finding of fact is that after July 30, 1941, the three major sons and their family carried on their own businesses separately and they were the owners of those businesses. Now Mr. Setalvad's contention is that once a joint family becomes disrupted till the final partition takes place all its assets must be deemed to be the assets

of the joint family and all the income received must be deemed to be the total income of the joint family. Now in my opinion there is no warrant for that proposition. There is nothing in Hindu law to prevent the members of a joint family which has become disrupted from parting with the assets either to a stranger or to one of themselves. In the Privy Council case (Majithia's case) their Lordships were considering the case of a joint and undivided Hindu family which had merely divided some of its assets, and Sir George Rankin in delivering the judgment of the Board points out that there was no warrant in reading in Section 25A a prohibition that members of a joint and undivided Hindu family cannot part with some of their assets to a stranger or to one of themselves. I find even less warrant for reading in Section 25A a prohibition that members of a family which in Hindu law was joint and undivided but which has ceased to be a joint and undivided family cannot part with assets of that separated joint family either to a stranger or to one of themselves. I agree with the learned Chief Justice that the facts in the Patna case (*Bcmsidhar Dhandhmia v. Commissioner of Income-tax*[3]) are practically undistinguiahable from the facts before us. There the learned Judges found as a fact that the assessee whose case they were considering was no longer at joint and undivided Hindu family. They held that whereas the businesses had been partitioned the house property and the jote lands had not been partitioned and they came to the conclusion that there was no completed partition but only a partial partition and they further held that such a partial partition came within the operation of Section 25A of the Act. The effect of their finding was that as there was not a complete partition but only a partial partition a Hindu family must be considered to be joint for the purposes of the Income-tax Act to the extent of those assets which had not been partitioned. In other words the Hindu family must still be considered as a unit for the purposes of the Income-tax Act to the extent the family had retained the property which had not been partitioned. To the extent it had parted with the assets the finding of the Court is clear that those assets can no longer be considered to be the assets of the family or forming part of total income of the family or that the family was liable to pay tax thereon under Section 25A(2), Under the circumstances I agree with the learned Chief Justice that we must answer the question referred to the Court in the negative, and the Commissioner, should pay the costs of the reference.

Cases Referred.

1(1942) L.R. 69 I.A. 119: S.C. 45 Bom. L.R. 9
2(1943) I.L.R. 23 Pat. 68
3(1943) I.L.R. 23 Pat. 68