

(1961) 08 AP CK 0011

In the Andhra Pradesh High Court

Case No : Writ Appeals No"s. 49 and 50 of 1960

ADDITIONAL Income Tax OFFICER, CUDDAPAH

APPELLANT

Vs

A. THIMMAYYA AND ANOTHER.

RESPONDENT

Date of Decision : 03-08-1961

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1962) 1 AnWR 344 : (1962) 46 ITR 999

Hon'ble Judges : Chandra Reddy, C.J;Chandra Redddy, C.J

Bench : Division Bench

Judgement

CHANDRA REDDY C.J. - In these appeals against the order of our learned brother, Seshachelapati J., issuing a writ of mandamus directing the appellant to make an apportionment of the tax payable by the Hindu joint family of the respondents as contemplated by section 25A(2) of the Indian Income Tax Act (hereinafter referred to as the Act) the controversy rages round the question as to the consequences that flow from an order u/s 25A of the Act recognising a partition as having been effected from an earlier date.

In order to appreciate the contentions urged by the respective parties, it is necessary to narrate the material facts briefly. The first respondent in the two appeals and one Venkatanarasu along with their father, Krishnappa, constituted a Hindu undivided family. The family was carrying on business in mining. For the years 1941-42, 1942-43, 1943-44, 1944-45, 1945-46 and 1946-47 the family was assessed to tax. Assessments for the years 1941-42 to 1946-47 were made on 30th September, 1947, 30th September, 1948, 28th February, 1949, 15th March, 1950, and 30th November, 1950, respectively. The assessments for the years 1941-42 and 1942-43 were subject to reassessments u/s 34 of the Act. The total tax imposed on this family was Rs. 65,750.

Meanwhile, i.e., on 20th March, 1948, an application u/s 25A was made by one of the sons of Krishnappa Venkatanarasu before the Income Tax Officer, Cuddapah, putting forward a case of partition of the Hindu undivided family

styled as Krishnappa and Sons, which was till then assessed as a Hindu undivided family, and of division of the joint family properties between the members in definite portions and requesting the Income Tax Officer that an order be made u/s 25A(1) of the Act and assessments made on the several members of the family in accordance with the requirements of section 23 read with section 25A(2). The proper officer passed an order on June 30, 1952, holding that the partition of the family must be deemed to have been effected on November 2, 1946.

Against the assessments made by the Income Tax Officer for the years 1941-42 to 1946-47, appeals were filed before the Appellate Assistant Commissioner, but without success. The assessee carried further appeals to the Income Tax Appellate Tribunal in regard to the assessment years 1944-45, 1945-46 and 1946-47 and the Tribunal granted partial relief in regard to the assessment years 1945-46 and 1946-47. A reference u/s 66(2) of the Act was not accepted by this court.

Subsequent to the partition of the family, a partnership was formed by the erstwhile coparceners of the partnership family for carrying on mining business. On May 6, 1946, a company under the name and style of Krishnappa Asbestos and Barytes (Private) Ltd. was constituted and the registered firm was dissolved on May 20, 1947, as from the next day, the private limited company taking over the business and the assets of the registered firm of Krishnappa and Sons for a consideration of Rs. 2,04,000.

After the formation of the limited company, Ranganatham, the first respondent in W.A. No. 50 of 1960 was employed as the general manager of the mines of the company on a salary of Rs. 400 per mensem, while Thimmaiah, the first respondent in the other appeal, his brother, was engaged as the mines superintendent on a monthly salary of Rs. 500.

The Additional Income Tax Officer, Cuddapah, the appellant before us in both the appeals, issued notices dated 25th June, 1958, u/s 46(5) to the managing director of the Krishnappa Asbestos and Barytes (Private) Ltd. stating that a sum of Rs. 65,750 was due from Ranganatham and Thimmaiah on account of Income Tax and directing the managing director to deduct the amount of Rs. 65,780 from out of the salaries payable to the defaulters and credit the same forthwith to the Government of India.

It is to quash this notice that the jurisdiction of this court under article 226 of the Constitution of India was invoked, complaining that the tax payable by the family as such could not be demanded from the petitioners, having regard to the order passed u/s 25A of the Act.

These petitions were opposed by the department on various grounds, the chief of them being that the petitioners could make no complaint of the notice demanding from them the whole of the tax due and payable by them, since the partition was made in June, 1952, long after the assessments were made. It was

also urged by the learned counsel for the department that the petitioners were not entitled to pray for the issue of a writ of certiorari, as the notices were not judicial or quasi-judicial proceedings but were purely administrative or ministerial acts.

Our learned brother overruled the objections formulated on behalf of the appellants and granted a writ of mandamus having regard to the plea of the department that the notices were in the nature of administrative or ministerial acts.

The primary challenge to the judgment of our learned brother is founded upon section 25A(3) of the Act. As the answer to the arguments advanced on either side turns on the interpretation of section 25A, it is convenient to read that section here. It reads :

"25A. (1) Where, at the time of making an assessment u/s 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 the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect :

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation, 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 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; and the Income Tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23 :

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

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

It is seen from this section (2) provides a machinery for collection of tax due from the Hindu undivided family which had become disrupted. Under that

section, if the joint family had been disrupted after the assessment for the previous year, the Income Tax Officer will proceed to make the income of the joint family exigible to tax as if no partition had taken place but he would make an apportionment of the amount of the tax payable by the family according to the portion of the joint family property allotted to each of the members.

We shall presently refer to the circumstances which necessitated the insertion of section 25A into the Act. However, to enable the members of the joint Hindu family to have the benefit of that section, there should be an order of the Income Tax Officer recognising the partition of the family.

Before we proceed further with the consideration of the question as to the applicability of section 25A(3) we shall refer to the judgment of the Supreme Court in *Lakhmichand Baijnath v. Commissioner of Income Tax*, which contains the reasons that induced Parliament to introduce section 25A. In the course of the judgment, this is what their Lordships observed :

"That section was, it should be noted, introduced by the Indian Income Tax (Amendment) Act, 1928 (3 of 1928), for removing defect which the working of the Act as enacted in 1922 had disclosed. Under the provisions of the Act as they stood prior to the amendment, when the assessee was an undivided family, no assessment could be made thereon if at the time of the assessment it had become divided, because at that point of time there was no undivided family in existence which could be taxed, though when the income was received in the year of account the family was joint. Nor could the individual members of the family be taxed in respect of such income as the same is exempt from tax u/s 14(1) of the Act. The result of these provisions was that a joint family which had become divided at the time of the assessment escaped tax altogether. To remove this defect, section 25A enacted that until an order is made under that section, the family should be deemed to continue as an undivided family. When an order is made under that section, its effect is that while the tax payable on the total income is apportioned among the divided members or groups, all of them are liable for the tax payable on the total income of the family. What that tax is would depend on the assessment of income in proceedings taken u/s 23, and an order u/s 25A would have no effect on that assessment..."

In this case, while the assessments were made on the whole Hindu joint family as a unit, no apportionment was made as envisaged by section 25A(2), since at the time when the assessments were made, there was no order passed by the Income Tax Officer u/s 25A(1) and since the order was made sometime after the assessments were made.

The question for consideration is whether the assessments were to be brought in accordance with the provisions of section 25A(2), having regard to the circumstances that the partition was recognised with effect from an anterior date, viz., November 2, 1956. Sri Kondaiah, learned counsel for the department, lays stress on the language of sub-section (3) which recites that the family shall

be deemed to be a Hindu undivided family in the absence of an order passed by the Income Tax Officer under sub-section (1). The learned counsel urges that this connotes that unless and until an order under sub-section (1) is made, the family would be regarded as continuing to be undivided and that the decisions of the Madras High Court in Commissioner of Income Tax v. Swaminathan Chettiar and Raju Chettiar v. Collector of Madras relied on by the learned judge were wrongly decided and they require reconsideration. Sri Kondaiah maintained that the passages called in aid by our learned brother in these cases are not in consonance with the dictum laid down by the Supreme Court in Lakhmichand Baijnath v. Commissioner of Income Tax.

The passage relied on in Commissioner of Income Tax v. Swaminathan Chettiar is as follows :

"Nor is it correct to say that the family should be deemed to continue undivided till the date of the Income Tax Officers order under the section. Where an order is made accepting the partition alleged by the assessee the family must be regarded as having become disrupted on the date of partition as put forward by the assessee. In the present case, therefore, when the notice u/s 34 was issued to the assessee on the 6th July, 1942, the family must be taken to have ceased to exist though the partition which was put forward as having taken place on the 21st January, 1940, was accepted only on the 17th August, 1942."

Exception is taken to the first sentence in the above passage on the argument that sub-section (3) contemplates an order being made recognising the partition and that being so, there is nothing incorrect in saying "that the family should be deemed to continue undivided till the date of the Income Tax Officers order under the section."

There is some force in this argument of Sri Kondaiah. The wording of that sentence may not be quite appropriate. But what the learned judges intended to propound explicable in the following sentence which indicates that when once an order was made under sub-section (1) accepting the partition, it should date back to the date of the partition. Sri Kondaiah attacks this proposition on the ground that if an order is merely passed u/s 25A, it could not have the effect of recognising the partition from an earlier date. We are relieved of the necessity of pronouncing upon the correctness or otherwise of the principle so stated having regard to the nature of the order in question. The order accepting the partition is deemed to have been made on the date from which it was to take effect.

We shall now turn to the following passage in the judgment of Raju Chettiar v. Collector of Madras commented upon by the learned counsel for the department :

"Learned counsel contended that since the order that was passed by the Income Tax Officer was only on 31st December, 1948, the Hindu undivided family should be deemed to have continued in existence till that date. We are unable to accept this interpretation of section 25A(3). Each of the clauses u/s 25A begins with the expression where. To construe where as until does not seem to fit in with the

scheme underlying section 25A of the Act."

The criticism of Sri Kondaiah with regard to the last sentence of the above passage is the same as he made with regard to the passage in *Commissioner of Income Tax v. Swaminathan Chettiar* already referred to, namely, that the word where has the same signification as until observed both by the Supreme Court in *Lakhmichand Baijnath v. Commissioner of Income Tax* and by this court in *Kalwa Devadatham v. Union of India*. As we have already stated this argument of Sri Kondaiah is plausible. As observed by us earlier, until an order is passed u/s 25A(1), the family will be deemed to continue to be joint. However, that need not detain us since in this case clearly the partition was to take effect from November 2, 1946.

The contention of Sri Kondaiah is that notwithstanding retrospective effect being given to the order of the Income Tax Officer, we should still regard the family as continuing to be undivided till June 30, 1952, on which date alone the family can be said to be disrupted. We do not think that we can assent to this view. It is true that so long as no order is passed u/s 25A the family will be deemed to be joint. But when that order gives recognition to the partition with reference to a particular date, by a legal fiction, the order must be deemed to have been made on that date. To hold it otherwise would be to ignore the operation of the order recognising the partition from an anterior date. The order in question has introduced the fiction that it was made on November 2, 1946.

Therefore, for all legal purposes, it must be deemed to have been made on the date from which it was intended to take effect. The department, having chosen to give effect to the order recognising the partition from an anterior date, has to follow the consequences that flow from it.

The proposition that a statute which is to have retrospective operation will be deemed to have been on the statute book on the date on which it has to take effect with all the consequences incidental to it is supported by authority. To borrow the picturesque language of Lord Asquith of Bishopstone in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* :

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of those in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

This language is quite appropriate in the context of this enquiry. The department having asked the assessee to imagine that the partition had been effected on November 2, 1946, cannot prevent the inevitable corollaries of the state of affairs to follow.

This dictum was followed by their Lordships of the Supreme Court in Venkatachalam v. Bombay Dyeing and Manufacturing Co. Ltd. and they extracted in their judgment the passage quoted above with approval.

In Mohammad Ghouse v. State of Andhra their Lordships of the Supreme Court remarked that when a rule was given retrospective operation, it must be deemed that the rule was in existence on the date on which it was intended to take effect. The analogy of those decisions would apply to a case of an order giving retrospective operation. We do not see any difference in principle between the case of such an order and the case of rules and statutes. It follows that despite the fact that the order was made on 30th June, 1952, we should imagine that it was made on November 2, 1946, and as such was in existence on the date when the assessments were made, reading sections 23 and 25A of the Act together.

Sri Kondaiah fell back upon the argument that this was not a case in which the extraordinary jurisdiction of this court under article 226 of the Constitution should be exercised having regard to the fact that the assessee had an opportunity to put forward their case when they carried appeals against the original assessments but did not choose to do so and also as it enables them to question the legality of the assessments.

As regards the latter part of the argument, suffice it to say, that it is not open to the assessee to attack the assessments, since the joint family is to be the unit for purposes of assessments. Though an order is passed u/s 25A recognising partition, such an order does not affect the assessments as such. Apart from the language of the section itself, this is made clear in the following passage of the Supreme Court in Lakhmichand Baijnath v. Commissioner of Income Tax :

"What that tax is would depend on the assessment of income in proceedings taken u/s 23, and an order u/s 25A would have no effect on that assessment."

It is, therefore, open to the assessee to question the validity of the assessments and the only relief they could ask for is that of apportionment. In fact, it was stated by the learned counsel for the assessee that they could not challenge the assessments, the only relief they wanted being that apportionment of the tax should be made although there was joint and several liability. The only request that the assessee made was that the department should first proceed against the assets of the joint family and it is only when they could not realise them that they should proceed against the individual members. That being the position, we do not think that the apprehension of the learned counsel for the department has any foundation.

As regards the first of the argument, it is not disputed that there is no such thing as *res judicata* in regard to proceedings before the Income Tax authorities. The mere fact that the assessee did not agitate this question before the Tribunal, would not preclude them from raising that point in these petitions. Further, in the appeals before the Tribunal the assessee were only concerned with the correctness of the assessments. At that time, they were not thinking of

apportionment of the amount of tax payable by each of them. We, therefore, cannot give any effect to this contention of the learned counsel for the department.

It was lastly urged by Sri Kondaiah that section 25A is applicable only to assessment years which followed upon the date of partition. It must be mentioned that this point was not raised either in the counter affidavit or even argued before our learned brother. Even otherwise, we must hold that this contention is unsubstantial as not warranted by the language of the section which refers only to the date when the assessment is made and not to the assessment year. The section itself begins with the words "where, at the time of making an assessment u/s 23....." The relevant time is, therefore, the date of the making of the assessment and not the year of assessment in regard to which of the assessment is sought to be made subsequently. For these reasons we negative this argument also.

In the result, the appeals fail and are dismissed with costs in W.A. No. 49 of 1960. Advocates fee Rs. 100.

Appeals dismissed.