
(1966) 10 AHC CK 0017

In the Allahabad High Court

Case No : Income Tax Miscellaneous Case No. 89 of 1963

Bharat Oil Industries

APPELLANT

Vs

Commissioner, Income Tax

RESPONDENT

Date of Decision : 03-10-1966

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 103, 104

Income Tax Act, 1922 — Section 23(4), 25A, 26A

Income Tax Act, 1961 — Section 144, 171, 184

Citation : AIR 1967 All 557 : (1967) 65 ITR 424

Hon'ble Judges : S.C. Manchanda, J; M.H. Beg, J

Bench : Division Bench

Advocate : K.N. Seth, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Disposed Of

Judgement

Manchanda, J.—This is a consolidated case stated u/s 66(1) of the Income Tax Act (hereinafter referred to as the Act) in respect of assessment years 1958-59 and 1959-60. The question referred is:

"Whether on the facts and in the circumstances of the case the assessee firm was entitled to registration u/s 26-A of the Act?"

2. The material facts are these. The common ancestor was one Chandu Lal who died in the year 1918 leaving only two surviving sons Radha Kishan and Sita Ram. The Appellate Assistant Commissioner found that he had died insolvent. No contrary finding of fact was given by the Appellate Tribunal. After the demise of Chandu Lal, his sons, Radha Kishan and Sita Ram, started a business in 1919 in the name and style of M/s. Radha Kishan Sita Ram. This firm was assessed for the first time in the assessment year 1931-32. The assessments for the assessment years 1931-32 to 1936-36 did not show the status in which the firm was assessed. The next two assessments for the years 1936-37 and 1937-38 were made u/s 23(4) of the Act in the status of a Hindu undivided family.

It is, however, not clear as to how such status came to be determined. Thereafter, the assessee himself showed the status as Hindu undivided family and the assessments were also made in that status right upto the assessment year 1942-43 in the course of the assessment proceedings for the year 1942-43, the assessee claimed a partition u/s 25a of the Act with effect from the 15th of April 1941. The assessee's claim u/s 25A was accepted by the Income Tax Officer. The order u/s 25A has neither been made a part of the case nor the contents thereof have been mentioned in the statement of the case.

It is not clear as to why such an order u/s 25a was sought and whether it was really a partition, between the two brothers as joint owners of the business, or it was a real partition by metes and bounds of all assets of the Hindu undivided family. It is not known whether there were any other assets apart from the business. If the business was the only asset then no division by metes and bounds was required. Be that as it may, the order u/s 25A was passed on the 15th March 1943. Thereafter, the two brothers, Radha Kishan and Sita Ram, entered into a partnership and continued the business in the same name and style. For the assessment year 1943-44, the very Income Tax officer who had passed, the order u/s 25A granted registration to the new firm of Radha Kishan Sita Ram, and, what is, more, Assessed the share income therefrom in the hands of Radha Kishan and Sita Ram in their status as individual and not as representing their smaller Hindu undivided families.

The share income continued to be so assessed in the hands of Sita Ram from 1943-44 to 1957-58 in his status as an individual. The firm of Radha Kishan Sita Ram was also carrying on an oil crushing business under the name and style of Bharat Oil Industries. This it decided to close down. Sita Ram it appears was desirous of carrying on the oil crushing business, and, therefore, on the 11th of June 1956, he decided to form a new firm by taking in two of his sons as partners and also to admit to the benefit of partnership the two of the minor grandsons of the said Radha Kishan. In order that his two sons should also contribute some capital, Sita Ram withdrew Rs. 10,000 from his capital account and gifted Rs. 5,000 to each of his two sons, Prem Narain and Hridey Narain and executed a deed of partnership on the 13th of June 1956 for carrying on the oil mill business in the name and style of Bharat Oil Industries.

3. The said Bharat Oil Industries applied for registration for the assessment year 1958-59 and for renewal for 1959-60. As there was no partition between Sita Ram and his two sons, Prem Narain and Hridey Narain, the Income Tax Officer issued notice to the assessee to show cause why the application for registration should not be rejected. The assessee submitted before the Income Tax Officer that Radha Kishan and Sita Ram had originally commenced the business styled Radha Kishan Sita Ram with borrowed capital and without the aid of joint family nucleus as Chandu Lal, their father had become insolvent during his life time, which fact was proved by the order passed by the Insolvency court adjudging him as an insolvent.

It was further contended that the business was joint business of the two brothers and not joint family business and that the assets that each one of them held in that business were their own-self acquired properties in which their male issue had no right by birth, and therefore, the firm was genuine and entitled to registration. The Income Tax Officer negated these contentions, on the main ground, that for the assessment years 1936-37 to 1942-43 the assessee Radha Kishan and Sita Ram were assessed in the status of a Hindu undivided family and that an Order u/s 25A was passed on the 15th March 1943 and as such it was no longer open to Sita Ram to say after the order u/s 25A that the assets were not the assets of his smaller joint family.

The Income Tax Officer, therefore, held that as the assets in the firm, though standing in the name of Sita Ram, belonged in fact to his joint Hindu family and thus he was incompetent to make a gift to his sons or to form partnership with his sons without first effecting a partition. between himself and the sons. The Income Tax Officer, consequently, refused registration to the assessee for both the relevant assessment years.

4. On appeal the Appellate Assistant Commissioner held that the weight of evidence clearly showed that, Sita Ram was a partner in his individual capacity in the firm Radha Kishan Sita Ram; that no family nucleus had been utilized in the starting of this business as the father of Sita Ram and Radha Kishan had died an insolvent; that, his entire assets and investments in the said firm of Radha Kishan Sita Ram were his self-acquired properties out of which he could validity make gifts to his sons; and that the assessments made from 1936-37 to 1942-43 in the status of a Hindu undivided family did not operate as estoppel. He considered that the firm was genuine and directed it to be registered.

5. Thereupon, the department went up in appeal to the Tribunal it was contended that the finding of the Appellate Assistant Commissioner that the business of Radha Kishan Sita Ram was originally commenced without joint family nucleus and with borrowed capital was unsupported by any evidence. Even assuming that it was so, it was submitted that there was nothing in law to prevent the Karta of a family to impress upon his self-acquired property the character of joint family and convert his property into joint family property. Further, the conduct of Sita Ram in permitting the business to be assessed in the status of a Hindu undivided family and asking for an order u/s 25a indicated that the self-acquired property was the joint family property, and, therefore, the share he got under the order u/s 25A did not belong to him alone but to the Hindu undivided family consisting of himself and his sons and therefore no valid gifts could be made

6. The Tribunal did not give any finding nor did it say that it reversed the finding given by the Appellate Assistant Commissioner, but disposed of the appeal by saying that it "agreed" with the arguments of the Departmental representatives. The fact that the department had assessed the share income from the said firm for over 12 years, after the 25A order was passed, in the hands of Sita Ram in his status as an individual was brushed aside by observing that the Department

had erred in the past in treating the share income of Sita Ram in the firm Sita Ram Radha Kishan as his individual income.

As already observed, agreeing with the arguments of the Departmental Representative, the Tribunal was of the opinion that the view taken by the Appellate Assistant Commissioner, that the share income from the firm Radha Kishan Sita Ram did not belong to the smaller Hindu undivided family of Sita Ram but solely to Sita Ram and therefore, he could not make a gift to his sons, was wrong. It further went on to hold that the members of a Hindu undivided family could not have formed a partnership without first effecting partition of its assets. The Tribunal, therefore, set aside the order of the Appellate Assistant Commissioner and restored the order of the Income Tax Officer refusing registration to the assessee firm.

7. The position under the Hindu Law is well settled Every coparcener has only interest in joint family or coparcenary property. If the property is joint family property then every male issue of the coparcener acquires an interest by birth, A property have belong to a joint family or it may become joint family property, but there is no presumption in law that property is joint family property. A Hindu even if he is joint may own separate property Such property would belong to him exclusively and no other member of the coparcenary, not even his male issue, acquire any interest therein by birth.

He may sell gift, or bequeath it. It is not liable to partition and upon his death, in testate, it passes on succession to his heirs and not by survivorship to the surviving coparcener Property is ancestral if it is inherited from a paternal ancestor or received by gift or will from a paternal ancestor or when the property is thrown into the common stock i.e. It is blended Blending requires a clear and unequivocal intention of abandoning all separate rights in the property. Blending can neither be inferred from the mere fact of a coparcener allowing the other members of the family to use it conjointly with himself, nor from the mere failure of a member to keep separate accounts of his earnings.

8. In the present case the point which had to be considered and upon which a clear finding of fact had to be recorded by the Tribunal was. as to whether in starting the business in the year 1919 by Sita Ram and Radha Kishan any family nucleus was utilized A clear finding on that point was given by the Appellate Assistant Commissioner, believing the statement of Sita Ram. The Tribunal without giving a finding on that question and without specifically reversing the finding of the Appellate Assistant Commissioner appears to have assumed that some family nucleus was utilized in the year 1919 when the business was first commenced. The burden in an appeal lies upon the party who asks for the finding of fact to be disturbed, on the ground that the finding already given is wrong.

There was no material on the record to disturb the finding of fact which was given by the Appellate Assistant Commissioner. The assumption, therefore, made

by the Tribunal that some family nucleus was utilized was entirely unwarranted. If the finding is that no family nucleus was utilized and the two brothers jointly started a business then even if subsequently for purposes of assessment it was declared that the status was that of a Hindu undivided family it would not be one which could operate as *res judicata* or estop such party from asserting the true position which was that the two brothers were in fact joint owners of the business and it "was never a joint family business.

The fact that a Section 25A order was passed would not per se lead to the conclusion that the firm Radha Kishan Sita Ram was in fact a joint family business. Once an assessment has been made rightly or wrongly in the status of a Hindu undivided family, then, unless an order u/s 25A is passed, the assessment will continue to be made in that status by a fiction of law Section 25A(3) creates such a legal fiction in these words:

"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 purpose of this Act, to continue to be a Hindu undivided family."

Undoubtedly, assessments were made from 1936-37 to 1942-43 in the status of a Hindu undivided family in respect of the income from the business of Messrs Radha Kishan Sita Ram, and, therefore, unless and until an order u/s 25A was passed the income therefrom would continue as a result of the legal fiction created by Section 25A(3) to be treated as the income of the Hindu undivided family. It was, in all probability to get over this impediment that an order u/s 25A was obtained As already observed, no copy of the order u/s 25A has been placed on the record, and, therefore, it has become necessary to see what the Income Tax Officer himself, who passed the said order u/s 25A. did in the subsequent assessment of Sita Ram

He assessed the share income of Sita Ram from the said firm as his individual income and not the income of his smaller Hindu undivided family. This state of affairs continued for a period more than 12 years. In these circumstances, there cannot be the slightest doubt that, if Sita Ram had not taken it into his head to make a gift of a sum of Rs. 5000 each to his two sons out of the share capital which stood in his individual name in the books of the firm, no question would have arisen and the department would have continued to assess his share from the said firm as individual income.

A period of 12 years is a long time, and the Department or the Tribunal cannot brush aside the assessment made in the status of an individual merely by saying that an error had been committed The question that had to be considered was whether the two brothers who started a business without any family nucleus could constitute a .joint Hindu family and acquire property with the incidents of joint Hindu family property? That question was not at all considered. The decision of the Supreme Court in *Bhagwan Dayal Vs. Mst. Reoti Devi*, was not brought to the notice of the Tribunal and perhaps this could not have been done because,

although the judgment was delivered on the 4th of September 1961. which was before the Tribunal gave its decision, yet, it was not reported when the Tribunal decided the case Their Lordships observed:

"Hindu Law recognizes only the entire joint family or one or more branches of that family as a corporate unit or units in the manner recognized by law would be considered as joint family property. But in the case of two or more members of a joint Hindu family belonging to the two different branches or even to the same branch, they do not acquire the property as a corporate unit or for the corporate unit and therefore they are only governed by the terms of the contract express or implied where under they have acquired the property. .. and that only two or more members belonging to different branches or even to one and the same branch cannot constitute such a unit and therefore cannot acquire property with the incidents of joint Hindu family property. It is not possible for two members of an undivided Hindu family to deal with the property acquired by them in such a way as to impress upon it the incidents of a joint family property for themselves and their descendants....."

The Supreme Court approved the view taken by this Court in *Himmat Bahadur v. Bhawani Kunwar* ILR(1908) All 352. When dealing with the Madras decision the Supreme Court went on to observe "It is quite clear that the incidents of Hindu undivided family property cannot be lightly conferred upon any acquisition made by two members of a family."

9. in the present case what had to be established by the Department in order to succeed in the appeal before the Tribunal was that there was in fact blending of property as understood in Hindu Law. There is not an iota of evidence on the record to show, beyond the colourless and inconclusive circumstances that from 1936-37 to 1942-43 the assessment was allowed to be made in the status of a Hindu undivided family, that there was in fact any unequivocal throwing of the income so earned by Radha Kishan and Sita Ram into the hotchpotch of their respective smaller Hindu families with the intention of abandoning all separate claims thereto

10. On the other hand, there is the conduct of the assessee for a period of over 12 years which was endorsed by the Department and this leads to the irresistible conclusion that there was never any blending by him of his individual income with the income of his smaller family He continued all along to assert and treat such income as his individual Income. In these circumstances, it is idle to hold the assessee bound by this admission in allowing himself to be assessed in the status of a Hindu undivided family for the assessment years 1936-37 to 1942-43. It was held by a Bench of this Court in *Mahadeo and Others Vs. Baleshwar Prasad and Others*, that "the value of admissions must depend upon the circumstances in which they are made and possible motives for incorrect statements of interested parties should not be ignored The nature of the facts admitted is also material point to be considered. If on the other hand the fact admitted is an inference from evidence and circumstances the weight of

admission may be very little."

In the instant case the admission, if it can be called an admission by the assessee having invited the assessments, to be made in the status of a Hindu undivided family, is at best only a material to be taken into account in ascertaining the true and correct status of Sita Ram in law. The view that we are taking is supported by a decision of the Patna High Court in *Sirdar Bahadur Sirdar Indra Singh Vs. Commissioner of Income Tax*, where Harries C. J. and Manohar Lall, J. took the view that, even if an assessee for several years at his request is assessed in the status of Hindu undivided family but subsequently claimed that he should henceforth be assessed as an individual he can neither be estopped, nor will the principles of *res judicata* apply and the admission made by the assessee will only be at best a piece of evidence to be considered in determining the true status of the assessee. In that case also the business could not be said to have started with any joint family fund nucleus, and the mere declaration in the return of income and assessments made in the status of Hindu undivided family was held not to convert the separate property of the assessee into joint family property.

11. For the reasons given above, we would answer the question referred in the affirmative and in favour of the assessee. The reference is answered accordingly. The department will pay the costs of this reference which we assess at Rs. 250. Counsel's fee is also assessed at Rs. 250.