
(1992) 07 KAR CK 0027
In the Karnataka High Court
Case No : IT Reference Case No. 95 of 1989

Bharath Kumar D. Bhatia

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 21-07-1992

Acts Referred:

Citation : (1992) 65 TAXMAN 282

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : K.R. Prasad, for the Appellant; H. Raghavendra Rao and M.V. Seshachala, for the Respondent

Judgement

K. Shivashankar Bhat, J.—The question referred u/s 256(2) of the income tax Act, 1961, ("the Act") in respect of the assessment year 1977-78 reads as follows:

"Whether, on the facts and in the circumstances of the case, the share income from Hind Automats was liable to tax in the hands of the assessee as an individual?"

The assessee in this case had obtained, on partition in the larger family, his interest in the partnership firm of Hind Automats when he was unmarried. On his marriage on 16-1-1973 the share income, according to the assessee, came to be of the HUF ("HUF"), consisting of himself and his wife. This claim was not accepted by the ITO. On appeal, the AAC accepted the case of the assessee and granted the status of a HUF. On appeal by the department, the Tribunal held that the existence of a wife does not make the income derived from the erstwhile ancestral property as that of the HUF and, accordingly, the share income belonged to the assessee as an individual.

2. In C. Krishna Prasad Vs. Commissioner of Income Tax, Bangalore, Krishnaprasad was the sole individual who obtained the property at a partition. There was no other member in his family. This Court held that,

"In order to constitute a Hindu undivided family, it is not necessary that there must be at least two male members. A coparcener with his wife and unmarried daughters can constitute a Hindu undivided family as held by the Supreme Court in *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*,

The Bench further pointed out that in *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, the Supreme Court held that the expression "Hindu undivided family" in the Act is used in the sense in which Hindu joint family is understood under the personal law of the Hindus. But, under Hindu law, a male member of a joint Hindu family obtaining a share on partition by himself would not constitute a HUF; when he marries and has a wife he would be entitled to be assessed in the status of a Hindu undivided family. This Court held after referring to Mulla's "Principles of Hindu Law":

"... We have not been shown any decision or treatise on Hindu law in support of the assessee's contention that a male member of a joint Hindu family obtaining a share on partition would constitute a Hindu undivided family if he has no wife or children. No doubt, when he marries and has a wife, he would be entitled to be assessed in the status of a Hindu undivided family. In our opinion, in order to constitute a Joint family, there must be more than one member; one member by himself cannot constitute a joint family. A member taking a share on partition of joint family properties has the potentialities of becoming a joint Hindu family; but until he marries he cannot be considered as a Hindu undivided family...." [Emphasis supplied] (p. 528)

3. The sentence italicised by us above clearly supports the contention of the assessee before us. This decision was affirmed by the Supreme Court in *C. Krishna Prasad Vs. Commissioner of Income Tax, Bangalore*, The Supreme Court held that a single individual cannot constitute a HUF and cannot be assessed as such and that the term "family" connotes a group of people related by blood or marriage and the term "family" consisting of a single individual is a contradiction in terms. The Supreme Court also stated that the expression "Hindu undivided family" in the Act is used in the sense in which a "Hindu joint family" is understood under the various schools of Hindu law and that under the Hindu law it is not predicated of a Hindu joint family that there must be a male member. The Supreme Court further pointed out that the assessment in the status of a HUF can be made only when there are two or more members in the HUF. The relevant law is further stated thus:

"The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession (see page 272 of Mulla's Principles of Hindu Law, 14th edition). A person who for the time being is the sole surviving coparcener is. entitled to dispose of the coparcenary property as if

it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the alienation, whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten (see page 320, *ibid.*). In view of the above it cannot be denied that the appellant at present is the absolute owner of the property which fell to his share as a result of partition and that he can deal with it as he wishes. There is admittedly no female member in existence who is entitled to maintenance from the above-mentioned property or who is capable of adopting a son to a deceased coparcener. Even if the assessee-appellant in future introduces a new member into the family by adoption or otherwise, his present full ownership of the property cannot be affected. Such a new member on becoming a member of the coparcenary would be entitled to such share in the property as would remain undisposed of by the assessee. In order to determine the status of the assessee for the purpose of income tax we have to look to the relatives as they exist at present and it would not be correct to project into the matter future possibilities which might or might not materialise. This would indeed amount to speculation and the same is not permissible. Excursions to the realm of speculation may be legitimate and justified when one is engaged in the study of philosophy and metaphysics; they are wholly unwarranted when one is dealing with the mundane subject of the status of the assessee for the purpose of the income tax assessment. For this purpose we have to look to facts as they exist and emerge from the record and not to what they may or may not be in future. As things are at present in the instant case, there can in our view be hardly any doubt that the assessee is an individual and not a family." [Emphasis supplied] (p. 497)

The italicised sentence brings out the principle of Hindu law that a new member of joint family on becoming coparcener would be entitled to claim a share in the ancestral property, hitherto held by the sole member absolutely. Till a coparcener comes into existence, no doubt, the sole coparcener holding ancestral property is entitled to dispose of the same absolutely. That is the peculiarity of the Hindu law. In fact this distinction has been again highlighted by the Supreme Court in *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, The appellant Narendranath had his wife and two minor daughters in his family. There was no other male member. He had obtained certain assets at a partition in the larger family. He claimed the status of a HUF in respect of the assets obtained on partition. The revenue contended that the appellant had absolute right of disposal over the assets, therefore, he was not entitled to the status of a HUF. This contention was not accepted by the Supreme Court. The claim of the assessee was upheld. The Supreme Court pointed out again, that a Hindu coparcenary is a much narrower body than the Hindu joint family and the coparcenary includes only those persons who acquire by birth an interest in the joint family or coparcenary property, these being the sons, grandsons and great grandsons of the holder of the joint property for the time being. A Hindu joint

family consists of all persons lenially decended from a common ancestor and includes their wives and unmarried daughters. While considering the question as to whether the assets that came to the share of the appellant ceased to bear the character of the joint family properties the Supreme Court pointed out that a distinction must be drawn between two classes of cases where an assessee is sought to be assessed in respect of ancestral property held by him: (1) where property not originally joint is received by the assessee and the question has to be asked whether it has acquired the character of a joint family property in the hands of the assessee, and (2) where the property already impressed with the character of joint family property comes into the hands of the assessee as a single coparcener and the question required to be considered is whether it has retained the character of joint family property in the hands of the assessee or is converted into absolute property of the assessee. The Supreme Court further, pointed out that the real question to be asked is whether the property retains the character of joint family property or whether it sheds the character of joint family property and becomes the absolute property of the single coparcener. While considering this aspect the Supreme Court held that the Judicial Committee in *Kalyanji Vithaldas v. CIT* [1937] 5 ITR 90 (PC) did not notice the distinction between these two classes of cases. Similar failure to notice the distinction continued in another case also when the Judicial Committee had to decide in *CIT v. A.P. Swamy Gomedalli* [1937] 5 ITR 416 (PC). The Supreme Court also referred to another decision of the Judicial Committee in *Attorney General of Ceylon v. A.R. Arunachalam Chettiar* [1957] AC 540 and quoted the following passage with approval:

"... though it may be correct to speak of his as the "owner", yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumes a different quality: it is such, too, that female members of the family (whose members may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property. Once again their Lordships quote from the judgment of Gratiaen, J.: To my mind it would make a mockery of the undivided family system if this temporary reduction of the coparcenary unit to a single individual were to convert what was previously joint property belonging to an undivided family into the separate property of the surviving coparcener". To this it may be added that it would not appear reasonable to impart to the Legislature the intention to discriminate, so long as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparceners."

The Supreme Court further noted that the Judicial Committee rejected the contention that since a single coparcener had full power over the property held by him, he must be held to be the absolute owner and that it was held in *A.R. Anmachalam Chettiar's* case (*supra*) the fact that a coparcener possessed a

large power of alienation:

"... appears to their Lordships to be an irrelevant consideration. Let it be assumed that his power of alienation is unassailable; that means no more than that he has in the circumstances the power to alienate joint family property. That is what it is until he alienates it and, if he does not, alienate it, that is what it remains... It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as "joint property" of the undivided family."

The Supreme Court held that the basis of this decision was that the property which was the joint family property of the HUF did not cease to be so because of the "temporary reduction of the coparcenary unit to the character of a single individual and that the character of the property, viz., that it was the joint property of a HUF, remained the same. Proceeding further, the Supreme Court held:

"... though in the absence of male issue the dividing coparcener may be properly described in a sense as the owner of the properties, that upon the adoption of a son or birth of a son to him, it would assume a different quality. It continues to be ancestral property in his hands as regards his male issue for their rights had already attached upon it and the partition only cuts off the claims of the dividing coparceners. The father and his male issue still remain joint. The same rule would apply even when a partition had been made before the birth of the male issue or before a son is adopted, for the share which is taken at a partition by one of the coparceners is taken by him as representing his branch. Again, the ownership of the dividing coparcener is such "that female members of the family may have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it"...." (p. 197)

4. Earlier decision of the Supreme Court in T.S. Srinivasan Vs. Commissioner of Income Tax, Madras, was also distinguished.

From the above, following principles emerge:

- (1) There is a distinction between a coparcener and a member of a joint family. A coparcener no doubt is a member but all members need not be coparceners.
- (2) Property obtained by a coparcener at a partition in a larger HUF is ancestral property in his hands.
- (3) Such ancestral properties may be disposed of by the sole coparcener because of the peculiarity of the circumstance, that is to say, there is no one else to question the alienation or to claim a share in the property at that time.
- (4) HUF may consist of a male member and any other member who may be male or female and such other member may have either a right to claim partition or a right to claim maintenance out of the joint family property.

(5) There is a distinction between two sets of cases:

- (i) a property which was not originally joint may due to certain circumstances acquire the character of a joint family property as in the case of blending; and
- (ii) a property which is already impressed with the character of joint family property coming into the hands of a person as a single coparcener.

5. Under Hindu law, wife of a coparcener is certainly a member of the family, therefore, in the instant case, on the marriage of the assessee his wife became the member of his family with a right to claim maintenance charged on the property held by the assessee which he had obtained earlier under a partition. The family of the assessee, therefore, was a joint family and the property in the hands of the assessee which he got earlier at a partition should be considered as a property held by the assessee in the capacity as a karta of the HUF. It is also necessary to note that at any particular moment of time the assessee can induct a coparcener into the family by adopting a son or there may be a birth of a son to the assessee and in such a situation a coparcener would enter the joint family.

6. The decision of this Court in C. Krishna Prasad's case (supra) is a direct authority to hold that an ancestral property coming into the hands of a person who has no other member in his family, will be held by him as an individual; if so, there is no reason as to why a property treated as an individual property only because there is no other member in the family, should not gain the character of HUF property on the induction of a member resulting in the creation of joint family.

7. Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay, is a decision of the Supreme Court involving a slightly different set of facts. That was a case where a property which was a self-acquired property was thrown into the family hotchpot in order to impress that property with the character of joint family property. The set of facts involved here is the first set out of the two classes stated by the Supreme Court in N.V. Narendranath's case (supra). In fact at page 784, the Supreme Court distinguished both N.V. Narendranath's case (supra) and Gowli Buddanna's case (supra) on this ground. There is an observation which is relevant here:

"Thus, the contention of the department that in the absence of a pre-existing joint family the appellant cannot constitute a Hindu undivided family with his wife and unmarried daughter must fail."

The distinction is brought out by pointing out that the asset in question was not an asset of a pre-existing joint family of which the appellant was a member. Therefore, "the property which the appellant has put into the common stock may change its legal incidents on the birth of a son but until that event happens the property, in the eye of Hindu law, is really his. He can deal with it as a full owner, unrestrained by considerations of legal necessity or benefit of the estate. He may sell it, mortgage it or make a gift of it. Even a son born or adopted after the alienation shall have to take the family hotchpot as he finds it. A son born,

begotten or adopted after the alienation has no right to challenge the alienation".

8. As already stated this decision actually illustrates the first of the two classes of cases stated in N.V. Narendranath's case (*supra*).

9. In Prem Kumar Vs. Commissioner of Income Tax, the Allahabad High Court had an occasion to consider an identical situation. It was held that property falling to a single coparcener on a partition does not lose its character as a joint family property solely for the reason that there is no other member, male or female, at a particular point of time. But once the sole surviving coparcener marries, a joint Hindu family comes into existence, for, the wife along with her husband constitutes a joint Hindu family and there is no difference between a joint Hindu family and a HUF. However, a Full Bench of Patna High Court has taken a different view in Commissioner of Income Tax Vs. Shankar Lal Budhia, . With utmost respect we are not able to agree with the reasoning of the Full Bench. For example, the Court observed:

"... Whether marriage would change that legal position can be tested on the touchstone of the question whether his wife as yet could challenge or object to any alienation of the property by the assessee after her marriage. Plainly the answer has to be in the negative. Admittedly, as yet, there is no child of the wedlock and even if the wife has no right to assail any alienation, one of the basic concepts of limited ownership in a Hindu undivided family would be conspicuous by its absence. Therefore, on this touchstone as well, mere marriage by itself would not convert separate property and individual income tax status to that of a Hindu undivided family." (p. 382)

We are of the view that it is entirely irrelevant as to whether the wife could have challenged the alienation if the assessee alienated the property after the marriage. The test is whether she is a member of the family and has a right to seek charge on the family property for her maintenance in case there is an occasion for her to do so. The Full Bench of the Patna High Court further relied upon Surjit Lal Chhabda's case (*supra*) which we have already referred. No importance was given to the following sentence:

"There is admittedly no family member in existence who is entitled to maintenance from the above mentioned property or who is capable of adopting a son to a distant coparcener."

Another decision, in Commissioner of Income Tax Vs. Vishnu Kumar Bhaiya, is that of Madhya Pradesh High Court which has been followed by the Full Bench of Patna High Court referred above. It is unnecessary to deal with the facts of the said case once again. To complete the citations it is necessary to refer to the case of Commissioner of Income Tax Vs. Harshvadan Mangaldas, In the said case, at the time of partition the coparcener had his daughter with him. It was held that the assessee constituted a joint family and, therefore, the property was held as HUF. This decision certainly supports the contention of the assessee before us. The presence of a minor daughter with the sole coparcener resulted in

bringing to a HUF. Earlier we have emphasised one sentence in C. Krishna Prasad's case (*supra*) wherein it was stated that when the sole member marries and has a wife he would be entitled to be assessed in the status of a HUF. The Supreme Court while affirming this decision has not expressed any doubt about this proposition though it was not necessary for this Court to make the aforesaid observation. We are in respectful agreement with the said statement. Consequently, the question referred to us is answered in the negative and against the revenue.