

(1971) 02 CAL CK 0005
In the Calcutta High Court
Case No : Matter No. 177 of 1969

Bijoy Kumar Burman

APPELLANT

Vs

Income Tax Officer, "E" Ward and Others

RESPONDENT

Date of Decision : 10-02-1971

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 148

Citation : (1972) 84 ITR 71

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : D. Pal, for the Appellant; Dipak Sen, for the Respondent

Judgement

Sabyasachi Mukharji, J.—It appears that one Raja Burman died sometime in 1923 leaving considerable properties to his sons, including his son, Narayandas Burman, the father of the petitioner. The said Narayandas Burman died in 1939 leaving again considerable properties to his wife and three sons including the petitioner. They constituted a joint Hindu undivided family. On 27th January, 1949, a partition suit was filed. Thereafter, it appears that a receiver was appointed by this court over the said properties. On 11th July, 1949, this court in the said partition suit, being Suit No. 330 of 1949, passed a preliminary decree declaring, inter alia, that Shri Bijoy Kumar Burman, being the petitioner herein, was entitled to one equal fourth part or share of the joint family properties and the other members of the family were also each entitled to one-fourth part or share thereof, Thereafter, for the assessment years 1950-51 to 1959-60, the petitioner was assessed as an individual with one-fourth share income of the property. It has been stated that on 13th April, 1957, a partition by metes and bounds of the said properties took place among the coparceners and the said partition was finalised on the 24th March, 1970. For the assessment years 1960-61 to 1964-65, the said one-fourth share income of the house property was assessed in the status of the Hindu undivided family consisting of the petitioner and his wife and sons as the petitioner is governed by the Mitakshara

school, of Hindu law. On 27th February, 1965, notices were issued in the name of "Bijoy Kumar Burman and others" u/s 148 of the Income Tax Act, 1961, for the assessment years 1960-61 to 1963-64. On the 23rd March, 1965, notices were issued u/s 148 of the Income Tax Act, 1961, for the assessment years 1956-57 to 1959-60, with the approval of the Commissioner of Income Tax, West Bengal III. The said notices are the subject-matter of challenge in this application under Article 226 of the Constitution. It has to be stated that, after the issue of the notices, after February, 1965, there were correspondence between the Income Tax department and the petitioner whereunder the petitioner requested the respondents to drop the proceeding and clarify the status of the petitioner. The respondent No. 1 by the letter dated 21st May. 1967, had informed the petitioner that the status of " Bijoy Kumar Burman and others " was Hindu undivided family. Thereafter, the petitioner having failed in his attempt to persuade the respondents to drop proceedings u/s 148 and u/s 139(2) of the Income Tax Act moved this application in March, 1969, and obtained a rule nisi.

2. On behalf of the petitioner Dr. Pal contended, firstly, that at the relevant time the Hindu undivided family had disrupted and the notices after the institution of the suit for partition could not be issued to the Hindu undivided family. He further urged that there was no reason for the Income Tax Officer to come to the belief that there was a Hindu undivided family for the relevant assessment years in respect of which the said notices had been issued or that any income belonging to the said Hindu undivided family has escaped assessment or had been under-assessed. It has to be noted that the Hindu undivided family consisting of the heirs of Narayandas Burman had never been assessed to any Income Tax at any point of time. Dr. Pal, secondly, submitted, in any event, the notices were vague inasmuch as they did not indicate whose income was alleged to have escaped assessment in respect of which the said proceedings had been taken.

3. The first point that requires consideration therefore is, was the Income Tax Officer justified in issuing the notices u/s 148 of the Income Tax Act, 1961, for the relevant assessment years? In the affidavit-in-opposition dealing with the institution of the partition suit it had been stated in paragraph 4 as follows:

" I crave leave to refer to the records and proceedings in the said suit No. 330 of 1949 and also to the decree dated the 11th July, 1949, passed therein and save as appearing therefrom I make no admission as to the allegations in the said paragraph. I deny in particular that there has been any partition in pursuance of the terms of the said decree or that the petitioner, his two brothers and his mother became the co-owners of the said properties. I say that the coparceners did not proceed to obtain actual partition and there has been no award by the commissioner of partition, appointed in the said suit."

4. At the hearing of this application, Mr. Dipak Kumar Sen, learned counsel for the revenue, contended that from the statements contained in the affidavit it could be inferred that there were reasons to believe that the income of the Hindu undivided family had escaped assessment. He also produced at the time of the

hearing the reasons recorded for starting proceedings u/s 147 of the Income Tax Act, 1961. It would be relevant in view of the controversy in this case to set out the said reasons:

"Sarbashree Bijoy Kr. Burman, Krishna Kr. Burman and Rajendra Kr. Burman are assessed in their individual status by the Income Tax Officer, "H" Ward, Dist. IV(2). It is found that these files were started some time in September, 1953, on the basis of voluntary returns filed by above-named persons. It appears that these persons filed voluntary returns showing income from house property only. The above persons have one-fourth share in the properties at 161, Netaji Subhas Road, 227, Mahatma Gandhi Road, 213, Mahatma Gandhi Road and 55A, Clive Street. In the course of the assessment year 1962-63 a deposition has been obtained from Sri Bijoy Kr. Barman. It appears from this deposition that the grandfather of Sri Bijoy Kr. Burman left some properties to his 5 sons some time in 1923. Thereafter, litigation started between these 5 sons. Finally, under the order of the High Court receivers were appointed. The receiver used to give to late Narayandas Burman, father of Sri Bijoy Kr. Burman, a sum of Rs. 700 p.m. as his 1/5th share in the net income from the properties. The receivers were, however, discharged some time in 1959. On the death of late Narayandas Burman sometime in 1939, Sri Bijoy Kr. Burman along with his two brothers, Sarbashree Krishna Kr. Burman and Rajendra Kr. Burman and widowed mother, Sm. Rani Burman, constituted a joint Hindu family. Some time in 1948, Shri Bijoy Kr. Burman filed a petition before the honourable High Court for partition of the joint properties between himself and his two brothers and widowed mother. The High Court passed decree in the partition suit being No. 330 of 1949. In this decree, it was ordered that Shri S.N. Modak, Bar-at-law, will be appointed a commissioner of partition and he was to make division of the properties by metes and bounds and award compensation where necessary. It appears that there has been no award from the commissioner of partition as yet. It has been stated that the coparceners did not pursue for actual partition till all the parties became majors. The youngest brother, Shri Rajendra Kr. Burman, went out to Germany for studies. The members of the family are now awaiting Ms arrival and the properties will be divided by metes and bounds on his arrival early."

5. Dr. Pal drew my attention to the decision of this court in the case of Shri Srilal Bagri Vs. Commissioner of Wealth Tax, , for the proposition that after the institution of a suit for partition the Hindu undivided family was disrupted and it was not necessary to await the division by metes and bounds to effectuate a severance of the joint status. This position is well-settled by decisions of the Privy Council and the Supreme Court. Reference may be made to the decision in Kawal Naim v. Budh Singh L.R. [1917] IndAp 159 ; 40 I.C. 286 (P.C.), and Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another, , If, however, the suit for partition is filed fraudulently with the intention that it would not be acted upon or as a make-belief, then a severance of joint status is not created thereby, because by institution of suit in such circumstances there is no unequivocal expression of intention to separate. The question, therefore, is

whether in this case the Income Tax Officer had reasons to believe that the suit for partition had been filed fraudulently or that it was really a make-belief. It appears from the reasons recorded, which has been noted above, that after the institution of the suit a receiver was appointed by this court. A commissioner of partition had also been appointed. As a matter of fact nowhere in the reasons which have been recorded by the Income Tax Officer it has been stated that the suit was filed mala fide or fraudulently or that the suit was merely a make-believe. What, on the other hand, has been stated was that, though the suit had been filed, actual partition by metes and bounds had, at the relevant years, not taken place. The Income Tax Officer is obviously proceeding on the basis that, in order to be a partition or disruption of a joint status, there had to be division by metes and bounds and the partition had to be carried into effect. But that is not the position in law. Mr. Sen, for the revenue, contended that if from the affidavit it was clear that there was a joint family then this court should not go to the sufficiency of the reasons. Mr. Sen drew my attention to the decision of the Supreme Court in the case of Income Tax Officer, A-ward, Lucknow Vs. Bachulal Kapoor, . It has to be noted, however, that there the Allahabad High Court was moved under Article 226 of the Constitution for quashing the notice u/s 34 of the Indian Income Tax Act, 1922, on two grounds, namely, (a) that the income for the assessment year had already been assessed in the hands of the members and therefore it could not be assessed again as the income of the family, and (b) that the family had ceased to exist and the partition had been recognised and as such no valid notice could be issued by the Income Tax Officer to the respondent" in the capacity of a "karta of a family. It has, however, to be noted that in that case there was no challenge made as to the existence of the grounds for the formation of the belief and in the counter-affidavit the Income Tax Officer observed that he had information that, notwithstanding the compromise decree, the members of the family were living together and had joint mess and that the business was run by the petitioner in that case. On those facts the Supreme Court came to the conclusion that the case of the revenue was that the compromise was a make-believe and the family, in fact, had continued to be joint. At the time of the previous assessment this fact had been withheld from the revenue, authority and as such the fact that there had been assessment of the individual members of the family or that the partition had been recognised by virtue of an order u/s 25A of the Indian Income Tax Act, 1922, were no grounds for quashing the impugned notices. Here, of course, the facts are entirely different. As has been mentioned, there was no assessment of this Hindu undivided family consisting of the sons or the heirs of Narayandas Burman at any time prior to the issuance of these impugned notices. Secondly, there was in this case no question of application of the provisions of Section 25A of the Indian Income Tax Act, 1922, or the corresponding provision of the 1961 Act. Thirdly, in this case there is a specific challenge as to the existence of the grounds for the formation of the belief. Pursuant to that challenge the grounds have been disclosed. It is therefore the duty of the court to see whether these grounds disclosed could be said to have a material bearing on the question of the

formation of the belief. The law being well-settled on this point by the decision of the Supreme Court that the disruption of a Hindu undivided, family takes place on the institution of a suit for partition and the joint status comes to an end, it must be held that since there is no evidence or grounds to believe that the suit was filed mala fide or as a colourable device, it cannot be said that during the relevant assessment years there was this joint Hindu undivided family or that there were any grounds for holding such a belief. In this case the department seems to have proceeded on the basis that the joint status continued, until there was an actual division or partition by metes and bounds. That is an erroneous point of view. The department has indicated neither in the affidavit nor in the reasons recorded for reopening the assessment any grounds for believing that the suit itself was a make-belief and was not intended to be acted upon. If the suit was proper, the institution of the suit created a disruption of the Hindu undivided family and thereafter there was no Hindu undivided family. Therefore, there is no question of the escapement of the income of the said Hindu undivided family for the relevant assessment years. The notices, therefore, are liable to be quashed on the said ground.

6. Dr. Pal's next point was that the notices were vague. The notices have been issued in the following terms;

"NOTICE u/s 148 OF THE Income Tax ACT, 1961. No. IV(2)/83.-b/c Income Tax Office, Dist. IV(2)/Cal.

dated the 27/2/1965.

To

Sri Bijoy Kumar Burman & others, 55/A, Clive Street, Calcutta.

Whereas I have reason to believe that your income
----- the income
of..... in respect of which
----- chargeable to tax for the
assessment year 1963-64 has escaped you are assessable assessment within the
meaning of Section 147 of the Income Tax Act, 1961. I, therefore, propose to
assess/reassess the income-----
-----for the recompute
loss/depreciation allowance said assessment year....."

7. It was urged that the notices were vague as these did not indicate to which " Bijoy Kumar Burman and others " these notices referred because there was undoubtedly a Hindu undivided family consisting of Bijoy Kumar Burman, his wife and sons and that the status of "Bijoy Kumar Burman and others" had not been stated. Dr. Pal drew my attention to the observations of Chakravartti C.J., in the case of R.N. Base v. Manindra Lal Goswami [1958] 33 ITR 435 (Cal.). He also contended that waiver or acquiescence would not cure the defect. He drew my attention to the decision of this court in the case of Sewlal Daga v. Commissioner

of Income Tax [1965] 55 ITR 406 (Cal.). In the view I have taken on the first point it is not necessary for me to discuss this aspect of the notices.

8. Mr. Dipak Kumar Sen, learned counsel for the revenue, contended that the question whether the .Hindu undivided family was in existence or not was a question of fact and on such a question of fact this court should not entertain this application. He drew my attention to the decision of K. L. Roy J. in the case of Bikash Chandra Ghose v. Sri U. N. Bala, Income Tax Officer "B" Ward, Dist. 2, Calcutta, See Appendix p. 78 infra. It is undoubtedly true that it is for the revenue to find out facts; but where a decision of the authority is challenged by stating that there were no reasons and where the reasons have been disclosed and it appears from such reasons disclosed that they are not legally tenable and/or cannot have rational nexus to the formation of the belief, then the petitioner is entitled to seek relief under Article 226 of the Constitution.

9. In the above view of the matter this application must succeed. The respondents are directed to cancel, withdraw and rescind the notices dated the 27th February, 1965, issued u/s 148 of the Income Tax Act, 1961, for the assessment years 1960-61 to 1963-64 and to cancel the notices of the 23rd March, 1965, for the assessment years 1956-57 to 1959-60, issued u/s 148 of the Income Tax Act, 1961, and to desist from taking any further proceedings in respect thereof. Let writs in the nature of mandamus issue accordingly. The rule is made absolute to the extent indicated above. There will be no order as to costs. There will be a stay of operation of this order for a period of six weeks from date.