

(1933) 11 AHC CK 0001
In the Allahabad High Court
Case No : Miscellaneous Case No. 92 of 1933

BIRADHMAL LODHA

APPELLANT

Vs

COMMISSIONER OF Income Tax.

RESPONDENT

Date of Decision : 03-11-1933

Acts Referred:

Citation : (1933) 11 AHC CK 0001

Hon'ble Judges : Niamatullah, J; Bennet, J

Bench : Division Bench

Judgement

BENNET, J. - This is a miscellaneous Income Tax case in which an assessee made an application to this Court u/s 66 (3), Income Tax Act, and this Court framed five questions provisionally on the facts as stated by the assessee and required the Income Tax Commissioner has stated a case and the case has now been argued before this Court by learned counsel on each side. The first two questions which were framed by this Court provisionally were as follows :-

(1) Whether in the case of a partial division of a joint family property Section 25-A has any application ? (2) Whether any failure on the part of the assessee to substantiate their claim on this point in an earlier year of assessment precludes them from raising the point in a subsequent year of assessment?

In regard to the second question the Income Tax Commissioner states that the assessee is not precluded from advancing a claim, and therefore is no contest on this point, and we accept that view. On the first question the facts as stated are as follows :-

The assessee is a joint Hindu family carrying on business in the name of Kanwalnen Hamir Singh. The business is managed by Rai Bahadur Seth Biradh Mal Lodha, the karta of the joint family. Their head-quarters are in Ajmere, but money-lending and other transactions are carried on in other parts of British India and Indian States. The joint family submitted a return for the income for the year 1927, to November 1928, on 10th September, 1929 for the year

1929-30. The return was not accepted as correct by the Income Tax Officer because the extracts from the accounts showed that losses incurred outside British India had been deducted and income derived from dividends on shares of Edward Mills, Beawar, had not been included. The assesseees were therefore directed by notices under Sections 22 (4) and 23 (2), Income Tax Act, to produce account books or any other evidence on which they relied to substantiate their return. The assesseees did appear before the Income Tax Officer and proceedings before the Income Tax Officer went on for over a year, and on 31st October, 1930, the Income Tax Officer assessed the income of the assesseees including the dividends on shares in Edward Mills, Beawar. It is in regard to these shares that first question is framed. The facts stated by the Commissioner are as follows : In 1906 there were 392 shares purchased by the joint family with joint family funds and they were shown in the names of certain members of the joint family and of the munim as follows :

Shares Seth Guman Mal

121

Rai Bahadur Seth Biradh Mal (the present Karta)...

113

Diwan Bahadur Umed Mal ...

21

Seth Gadh Mal ...

21

Seth Chand Mal ...

21

Seth Abhai Mal ...

85

Seth Choga Lal ...

10

Total

392

On 20th October, 1922, 315 shares were transferred to the names of various members of the joint family as follows :

Shares Diwan Bahadur Seth Umed Mal (Who was then Karta) ...

105

Seth Biradh Mal (the present Karta) ...

53

Seth Gadh Mal ...

52

Seth Kan Mal ...

53

Seth Jeth Mal ...

52

Total ...

315

and 76 shares were sold, and one share was given to charity. Up to 1926 the income from these shares was taken as part of the joint family income for the purposes of Income Tax assessment, and no objection was made. In the year 1927 the manager of the joint family made an objection to the inclusion of the income derived from these shares in the joint family income and notices were issued to the various members of the family to appear before the Income Tax Officer in order that an enquiry might be made. A letter dated 28th November, 1927, was received from the manager asking for postponement and saying that he would later appear and explain in regard to the shares and that the members need not attend. He failed however to give any explanation or evidence, and on 16th January, 1928, the income Tax Officer informed him that as the evidence required had not been given the income from dividends of the Edward Mills will be treated as joint income. This was done for that year and for the two subsequent years and no objection was made by the assesseees. As we have seen, in the year of which the assessment is in question, the return omitted this income, and the Income Tax Officer issued notices to the assesseees to substantiate their return by the production of account books and other evidence. The order of the Income Tax officer dated 31st October, 1930, making the assessment mentions : "Income shown less and detected on examination Rs. 35,918-10-8. "This income apparently includes Rs. 24,906-9-1. But there does not appear to have been any claim advanced before the Income Tax Officer in regard to the dividends from the Edward Mills on this occasion, and there is no mention in his order that any such claim was made. The order is a long and detailed one and deals in detail with various items claimed by the assesseees. There is no allegation in any affidavit of the assesseees that the point was raised before the Income Tax Officer. The point was raised before the Assistant Commissioner of Income Tax on the appeal of the assesseees, and he deals with the point and considers an affidavit which was produced by the assesseees. He states that he was not satisfied with the evidence produced before him by the assesseees, and he then adds that as the law of Income Tax stands he believes

that he is not competent to make a decision. He refers to Section 25-A, Income Tax Act and says :

"Under that section the claim that a partition has taken place must be made before the Income Tax Officer while he is making his assessment u/s 23 of the Act. It was improper for the assesseees to raise this question for the first time in appeal, and as an appellate Court I am not competent to decide the question raised by them now."

Now it is contended for the assesseees that Section 25-A will not cover the present case because Section 25-A refers to a partition among the members of the family and the Income Tax Officer has to be satisfied that a separation has taken place and that the joint family property has been partitioned among the various members or groups of members in definite proportions. I consider that that objection is correct and that Section 25-A does not refer to a case like the present where there is an allegation that there was no partition in the joint family but there was merely a division of a particular portion of the joint family property among the various members. Therefore, the answer to the first question is in the negative, and is that in the case of a partial division of a joint family property Section 25-A has no application. But I find it impossible to dispose of this portion of the case without framing a further question as follows :

(1-A) Should the plea that certain shares have been divided between the members of a joint Hindu Family be raised at the time of making an assessment u/s 23 or can it be raised for the first time on an appeal against that assessment ? When the first question was framed by the Bench of which I was a member, we stated quite definitely, as shown on p. 35 of the printed book, that :

"It appears therefore that on this part of the case two questions of law might arise. We say might arise because we shall have to find ultimately, on the facts to be found by the Commissioner for our benefit, what are the actual points of law that do arise in the case."

Section 66 (5) lays down : "The High Court upon the hearing of any of such case shall decide the questions of law raised thereby." This shows that it is open to this Court when hearing the case on the statement of the Commissioner to decide what are the questions of law which arise, and in fact that has been held in the ruling reported in Shiva Prasad Gupta Vs. Commissioner of Income Tax, In the present case when the first question was framed there was nothing to show that the objection had not been taken by the assesseees before the Income Tax Officer. The additional question which I have noted as arising was read out by me to learned counsel for the assesseees at the time of his argument, and he had an opportunity of meeting that question. No further statement of the case appears necessary on this point as the facts appear to be clear. Much argument was made by learned counsel that the Assistant Commissioner had based his rejection of the objection solely on the ground of Section 25-A. But Section 25-A is not the only point to which his order refers, and he has definitely stated : "It was

improper for the assesseees to raise this question for the first time in appeal." All that Section 25-A provides is that a claim which comes u/s should be made at the time of making an assessment. Although the present claim does not come u/s 25-A it appears to me that it is also a claim which must be made at the time of making an assessment. Under the CPC it is not open to a party on appeal to advance a claim for relief on a ground which he has not taken in his plaint, and even as regards the production of new evidence it is laid down by O. 41, R. 27 that additional evidence can only be admitted in appeal where such evidence is required by the appellate Court itself in order to enable it to pronounce judgment, or where evidence has been refused by the Court of first instance. If the civil Courts are so stringent in regard to the rule that new matters should not be raised for the first time in appeal, why should it be laid down that appeals under the Income Tax Act should be conducted with greater laxity. In the present case, as already stated, the assesseees sent return which did not include the income from shares in the Edward Mills, Beawar. u/s 23 (2) the Income Tax Officer considered that return was incomplete on this ground, and this was one of his reasons for issuing a notice to the assesseees u/s 23 (2) "to produce account books or any other evidence on which they relied to substantiate their return." That a notice u/s 23 (2) was issued is shown by the statement of the case, paragraph 2, and is admitted by the assesseees in the petition to the Court page 25, paragraph 5. I consider that in reply to this notice the assesseees should have raised the plea that the shares had been divided between the members of the family, and they should have produced evidence to support that plea. The return was submitted on 10th September, 1929, and the assessment order of Income Tax Officer was made on 31st October, 1930, more than a year later so that there was ample time to make the plea and produce the evidence. The necessity for evidence on his point had been brought to the notice of the assesseees by the order of the Income Tax Officer dated 16th January, 1928, on page 38 of the paper book. This was in connection with a plea on the point raised on the assessment for the year previous to the year now under consideration.

An allegation like the claim in regard to the Edward Mills is an allegation of fact which requires evidence to prove it, and it is an allegation which should obviously be made before the Income Tax Officer at assessment, when he has issued a notice u/s 23 (2) calling on the assesseees to prove the correctness of their return which has omitted the dividends from these shares. The allegation should be followed up with evidence to prove it. But the order of the Assistant Commissioner on page 17 states that the question was raised by the assesseees for the first time on appeal. I consider that this question (1-A) arises because when this Court has decided the Assistant Commissioner was not correct in holding that Section 25-A barred the question being raised before him in the appeal, the question remains whether the question should or should not be raised before him in the appeal. I do not consider that the Assistant Commissioner should be left to decide this for himself without guidance on the point of law by this Court. It is the questions of law raised by the case which this

Court decides u/s 66 (5), and not the questions of law raised by the statement of the case. This is especially so in cases like the present where the statement was applied on the direction of this Court which tentatively framed certain questions. In other words, the questions did not arise on the statement, but the statement arose on the questions. The fundamental question of law on this part of the case is whether the plea raised by the assesseees for the first time on appeal can or should be entertained on appeal and the question cannot be fully decided by the mere finding that the particular reason given by the Assistant Commissioner was not correct.

It is true that section 31 (3) (b) does give the Assistant Commissioner hearing an appeal power to order further enquiry. But this is in case he sets aside the assessment and directs the Income Tax Officer to make a fresh assessment :

"after making such further inquiry as the Income Tax Officer thinks fit or the Assistant Commissioner may direct."

I consider that the section means that the assessment could be set aside on the ground that it is defective on record as it stands, and not that it should be set aside on the ground that new evidence if heard and accepted would prove that the assessment was defective. It is only after the assessment is set aside that further enquiry would be made, for the purpose of making a fresh assessment. But apart from this view of the wording of Section 31 (3) (b), I consider that on general principles of the law of procedure the question is one which in the circumstances of the present case should not be entertained by the Assistant Commissioner in appeal. The assesseees had ample opportunity to raise the matter before the Income Tax Officer; the order of the Income Tax Officer in the previous year had given them ample notice that the Income Tax Officer expected evidence to be supplied on such a matter; and the Income Tax Officer had issued a notice to them u/s 23 (2) putting them to the proof of the correctness of their return which omitted the income from these shares. When in the face of all this the assesseees neglect to produce any evidence on the point before the Income Tax Officer, I consider that they should not be allowed to raise the matter for the first time on appeal and expect that further opportunity will be afforded to them to produce evidence. It will of course be open to the assesseees to raise the matter before the Income Tax Officer, at the time of assessment in any other year, and it is somewhat remarkable that they do not state that they have done so. But I consider that there must be some finality to the enquiries into the facts for a particular year, and I consider that the stage for enquiry was passed when the question was raised. My answer to question (1-A) is that under the circumstances of this case the claim could not be raised for the first time in appeal.

The third and fourth question are as follows : (3) Whether there was any evidence before the Income Tax department for the conclusion that the sum of Rs. 36,000 and odd represents profits derived by the assesseees from transaction in British India ? (4) If the profits mentioned in question No. (3) be regarded as

profits received from transactions that took place in British India, whether the losses incurred in respect of the business at Tonk, Saronj, Jodhpur and Shahpura shops should not also be regarded, as a matter of law, as losses incurred in transaction that took place in British India ?

In regard to these questions the statement of the case is that the firm of the joint family has numerous branches in various Indian States. In four of these branches, Jaipur, Alwar, Nimbhera and Kotah, the Income Tax Officer assessed an income of Rs. 36,055-12-9. The statement proceeds that the Jaipur and Kotah branches alone had from transactions in British India received more than this total sum. The question No. (3) was "Whether there was any evidence before the Income Tax department for this conclusion ?" The statement of the Commissioner refers to the account books of the Jaipur Branch and those of the assesses Calcutta, Bombay and Ajmere branches. He states that some years ago certain amounts were transferred from the headquarters branch at Ajmere to Kotah and Jaipur branches. Afterwards it was found that this capital could be more profitably utilised in financing transactions in Calcutta and Bombay, and it was therefore transferred from the Kotah and Jaipur branches to the Calcutta and Bombay branches. The Calcutta and Bombay branches pay the interest which is earned on this capital to the Kotah and Jaipur branches. The evidence for this is the books of the Calcutta, Bombay and Jaipur branches where these sums were clearly shown. Now some confusion arose from a consideration of how this income has been treated under the Act. This income comes u/s 4 (1) which lays down that the Act applies to all income profits or gains, accruing, or arising, or received in British India. The interest on this capital accrues and arises in British India, that is in Calcutta and Bombay, and therefore the Act applies to this income.

The answer to this question (3) therefore is in the affirmative. The question No. (4) asked whether as a rule of law if the profits in question No. (3) be regarded as profits which took place in transactions in British India, the losses incurred in respect of the business at Tonk, Saronj, Jodhpur and Shahpura shops should not be regarded as losses in transactions which took place in British India? Learned counsel for the assessee did not attempt to maintain this proposition, and it is obvious that the answer must be in the negative. The losses in the shops in these Indian States are not shown to have any connection with British India, and no income from these shops, had been brought into British India and assessed u/s 4 (2).

The last question No. (5) is as follows : Whether, in the circumstances of the case, the Assistant Commissioner was right in law in refusing to investigate the claim as to payment of interest on deposits alleged to have been made in the business Hamir Singh Samir Mal by members of the family and relations not members of the family?

The question raised here is very similar to the question which I have raised in 1-A. There is a branch of the main family business carrying on business at Ajmere

styled Hamir Singh Samir Mal. The assessee made a claim to the Assistant Commissioner on appeal that certain members of the joint family acting in their individual capacity and also some relatives had deposited their private money with this firm, and that the amount of interest paid on these deposits should be allowed as a deduction from the income derived by the joint family from this branch of their business. The return filed by the assessee for this shop Hamir Singh Samir Mal showed Rs. 84,709-2-0 on the credit side and on the debit side Rs. 4,656-1-0. This latter figure included six items of interest paid to various ladies. These particular deductions were allowed by the Income Tax Officer. u/s 22 (3), Income Tax Act, a person who has furnished a return and subsequently discovers any omission in it can furnish a revised return at any time before the assessment is made. The assessee had sent their return on 10th September, 1929, and the assessment was not made till more than a year later, on 31st October, 1931, but the assessee did not apply at any time before the Income Tax Officer to correct their return. It was not until the case came on appeal before the Assistant Commissioner that the assessee put forward this claim to the large amount of Rs. 84,216-15-6 as interest paid by the firm which should be allowed as a deduction. Now u/s 31 (2) the Assistant Commissioner may before the disposal of any appeal make such further enquiry as he thinks fit or cause further enquiry to be made by the Income Tax Officer. It is claimed by learned counsel for the assessee that the Income Tax Commissioner did not entertain this claim. If such a claim could be entertained on appeal, then it was a matter for the discretion of the Income Tax Commissioner whether he should entertain this claim or not and make any further enquiry, but as I have stated in regard to question 1-A, I consider that such claims cannot be legally made on appeal. The Assistant Commissioner was of the same opinion and he stated : "The claim cannot now be entertained by me." He also referred to Section 25-A and said that the claim should have been made before the Income Tax Officer. I think he was correct in refusing to entertain the claim. At the most it can be said that it was a matter for the discretion of the Income tax Officer, that he exercised his discretion against the assessee and that he refused to make further enquiry on appeal. My answer therefore to the last question is in the affirmative.

As regards the question of costs I consider that the applicants have only succeeded on a technical point in regard to the first question, and that the real point of substance in the matter is the question 1-A on which the assessee fails. The second question was not contested by the Commissioner. In my view therefore the applicants have failed in this reference, and I hold that they are not entitled to any relief arising from the decision which I give on these questions. I therefore considered that in view of the applicants success only on the question of Section 25-A, the assessee shall pay three-fourths of the costs of the opposite party who will pay one-fourth of the costs of the assessee. I would assess the fees of the learned counsel instructed by the Commissioner at Rs. 250.

NIAMATULLAH, J. - I have had the advantage of perusing the order which my learned brother proposes to pass, and find myself in agreement with him

unreservedly in answering question No. 3 in the affirmative and No. 4 in the negative.

Questions Nos. 1 and 2 relate to the same matter and should be disposed of together. The facts bearing on those questions are as follows :

The assessees form a joint Hindu family with its principal place of business at Ajmere. Among other properties it owned 392 shares in the Edward Mills, Beawar, standing in the names of the various members of the family and its munim. It is not disputed by the assessees that the shares formed part of the joint family property in 20th October, 1922, when, it is alleged by them, they were transferred by the joint family to some individual members, each of whom was to hold a number of shares as a separate property. In spite of this alleged arrangement, the income derived from these shares was included as part of the income of joint family property for the purpose of assessment of Income Tax. No objection was raised by the assessees or any individual member thereof till 1926, when the "karta" of the family objected to the inclusion of the dividend as part of the income derived from the family property. Notices were issued to certain members of the family demanding their presence before the Income Tax Officer for the purpose of an enquiry into the correctness or otherwise of the objections preferred by the "karta". No appearance was however entered by any of them, but the "karta" undertook to satisfy the Income Tax Officer on the point. He however took no further steps. The income derived from the shares was treated for assessment purposes as the income derived from joint family property. In two subsequent years the dividend was similarly treated in the assessment of tax payable by the joint family. It does not appear whether in these two years the return furnished by the assessees, included the income derived from the shares or whether the Income Tax Officer himself added it to the income of the family shown in the return or ascertained by him.

This case relates to the assessment for the year 1929-30. It is not disputed that for this year assessees did not show the dividends as part of the income derived from the family property. Income Tax Officer however, obtained correct figures from Edward Mills and included the same for the purpose of assessment of super-tax. No question as regards income tax payable in respect of the income derived from the shares could arise, because it had been paid at the source. The account books of the joint family were produced before the Income Tax Officer probably after notice u/s 23 (2), Income Tax Act, was served on the assessees requiring them to produce evidence in support of their return. The Income Tax Officer included the dividend as part of the family property.

In appeal to the Assistant Commissioner from the assessment made by the Income Tax Officer they objected and alleged that the shares did not belong to the joint family but to certain individual members as their separate property. The Assistant Commissioner refused to entertain these pleas on the ground that Section 25-A, Income Tax Act, was a bar to the question being raised in appeal. In this connection he referred to what had been done in previous years. His order

was upheld by the Commissioner, who refused to state a case for adjudication by this Court. On an application by the assesseees, this Court framed among others, questions Nos. 1 and 2, which run as follows :

"(1) Whether in the case of a partial division of a joint family property Section 25-A has any application? and (2) whether in failure on the part of the assesseees to substantiate their claim on this point, in an earlier year of assessment, precludes them from raising the point in a subsequent year of assessment?"

The Commissioner has conceded, in the statement of the case, that question No. 2 should be answered in the negative. He is rightly of opinion that the assesseees are not precluded from raising a question which has so far not been decided on the merits. It is not necessary, in these circumstances, to take any further notice on question No. 2. The first question appears to be based on the assumption that the assesseees objection amounted to an averment that a "partial partition" had taken place in the family of the assesseees. To avoid possible confusion arising from the use of that expression, it should be mentioned that what the assesseees alleged in substance was the shares originally belonging to the joint family had been transferred to individual members thereof, each of whom was to hold the shares allotted to him as his separate or self-acquired property without introducing any change in the constitution of the family which continues to be a coparcenary body. In one sense, it may be considered to be partial partition in so far as that part of the family property has been divided among the members of the joint family, apparently not in equal shares-a point which is quite immaterial. In another sense, the transaction, if in fact it took place, amounted to no more than a transfer by the joint Hindu Family of the shares to certain persons, who were to hold the same in their individual capacity, and not as members of the joint family. The essence of the matter is that the shares ceased to belong to the joint family as such. Whether the transaction be styled as one of partial partition of the family property or as transfer of part of the family property, Section 25 A, Income Tax Act, does not, in my opinion, apply. That section contemplates a case in which a disruption of the family occurs, so that a joint family as such, ceases to exist and no property previously belonging to it retains the character of joint family property. It is immaterial whether it is divided by metes and bounds or is held in defined shares. This is perfectly clear from the language employed in Section 25A (1), which provides that :

"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 separation of the members of the family has taken place and 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."

What the section contemplates is "a separation of the members of the family," which implies that the status of certain members undergoes a change. In other

words, they cease to be members of the joint family. It is an elementary rule of Hindu Law that a mere declaration of an intention to separate brings about a disruption of the family, at any rate, so far as the member making the declaration is concerned. Partition of the joint family property by metes and bounds is not a necessary requirement of the disruption of the family. If the properties remain intact, but the separating members share in them is defined, they are nevertheless considered to have been "partitioned." Partition contemplated by Section 25A is not necessarily a partition by metes and bounds. This view finds further support from the proviso to sub-section 2, which runs as follows :

"Provided that all the separated members and groups of members 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."

In cases in which members of a joint Hindu family agreed to divide among themselves a particular family property, leaving their status and the rest of the family property as before, they cannot be considered to be "separated members." In spite of a partial partition of the kind assumed, they continue to remain members of the same joint family possessed of joint family property left after the disposition of a part. For these reasons I am of opinion that Section 25A was not applicable to the circumstances disclosed by the assessee's objection taken before the Assistant Commissioner, and I answer the first question in the negative. My learned brother, who has answered question No. 1 in the manner I have done, proposes to frame an additional question, which he has called 1-A, and which runs as follows :

"Should the plea that certain shares have been divided between the members of a joint Hindu family be raised at the time of making an assessment u/s 23 or can be raised for the first time on an appeal against that assessment."

I do not dispute proposition that the High Court should decide questions of law raised by the statement of the case, though any particular point may not have been put in the form of a definite question, provided the statement of the case shows that such a question arises on the face of it and calls for decision. I do not think such is the case before us. The Assistant Commissioner based his decision solely on his view of Section 25A. I am unable to say what view he would have taken if he had read Section 25A as we have done. The Assistant Commissioner, who heard the appeal and before whom the assessee's categorically stated their objection, declined to entertain it on the ground that Section 25A debarred him from giving effect to the objection. His view was - and it is based on Section 25A - that, as separation had not been alleged before the Income Tax Officer, the assessee's were not entitled to raise it at a subsequent stage, and that the Assistant Commissioner, sitting in appeal, was not "competent" to entertain it. If Section 25A had been applicable, the Assistant Commissioner's refusal to entertain the objection would have been probably right, because Section 25A directs the Income Tax Officer to make an enquiry into the alleged separation

after giving notice to the other members concerned. In other cases Section 31 (2) clearly empowers the Assistant Commissioner.

"to make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income Tax Officer, before disposing of any appeal before him."

It is impossible for us to say that, if the Assistant Commissioner had not considered himself to be debarred from entertaining the assesses objection, he would not have decided the question, if necessary, by making further enquiries into the truth or otherwise of the allegations made by the assesseees. It should be borne in mind that the Income Tax Act contains no rules of pleadings of the nature prescribed by the Code of Civil Procedure. All that it requires an assessee to do is to make a return of "his total income during the previous year" : (see Section 22). On receipt of his return, the Income Tax officer may accept it or call for proof (Section 23). In the present case, it is not disputed that the assesseees had not shown the income derived from the shares as part of the income of the joint family property. In any case, their return clearly indicated that they did not regard the income derived from the shares as part of the joint family property. The Income Tax Officer understood as much. u/s 23 (2), Income Tax Act, it was the duty of the Income Tax Officer, if he thought, as he apparently did, that the return was incorrect in that respect, to call for proof of the fact that the shares had ceased to be part of the joint family property. He issued a notice u/s 23 (2), but it does not appear that he called for proof on the specific question whether the shares had ceased to be part of the family property. He however ascertained from the company the amount of dividend paid and added it to the income shown in the return. The companys register showed that the shares belonged to certain individuals and not to a joint family. The assesseees do not appear to have produced any evidence other than their own account books and what appeared from the companys register showing that the shares did not stand in the name of the joint family.

The Income Tax Officer should be deemed to have found that the shares still belonged to the joint family as he included the dividend as part of the income of the family. The question was pointedly raised before the Assistant Commissioner, who refused to adjudicate on it on the materials before him or to make any enquiry, in the view he took of Section 25A. We shall not be justified if we assume that the Assistant Commissioner, would have found against the assesses or would have refused to exercise his powers u/s 31 (2), even if he held, like our -selves, that Section 25A had no application. On the contrary, I am inclined to think that a responsible officer like the Assistant Commissioner who is to look not only to the interests of public finance but is also to administer justice as between the Crown and its subjects, would have adjudicate on the question and, if necessary considered the question whether further enquiry was necessary. The question raised by the assesseees is of some importance and shall have to be decided sooner or later. The assesseees alleged that these shares were not part of the family property and stood in the names of individuals in their own rights. It

may be that this arrangement was legitimately arrived at by the members of the family, or it may be that it was fraud on Income Tax law and that the family is still the owner of the shares in question, deriving income therefrom and the alleged transfer to individual is sham and fictitious. As to whether the dividends were credited in the account books as income of the joint family is a piece of evidence of some value. The Assistant Commissioner did not apply his mind at all to this aspect of the case as he thought, erroneously to our minds, that Section 25A debarred him from doing so. My view on this part of the case proceeds on the assumption that the Assistant Commissioner based his order exclusively on Section 25A. The Assistant Commissioner's judgment relevant to this point is as follows :

"It is admitted by the appellants that the Edward Mills shares were originally held by the undivided family as such. When part of the property of the undivided family was transferred to certain members of that family in their individual capacity, the undivided family became divided in respect of part of its property, though in respect of the remainder of its property the joint status was retained. Now the procedure to be followed when a Hindu undivided family becomes divided (whether in respect of part of its property or all its property is immaterial) is laid down in Section 25A, Income Tax Act. Under that section the claim that a partition has taken place must be made before the Income Tax officer while he is making his assessment u/s 23 of the Act, and any order of the Income Tax Officer u/s 25A is appealable to the Assistant Commissioner of Income Tax u/s 30. In present case no application u/s 25A was made to the Income Tax Officer by the assesseees and no order u/s 25A was passed by the Income Tax Officer. It was improper for the assesseees to raise this question for the first time in appeal, and as an appellate Court I am not competent to decide the question raised by them now. I may however observe that in my opinion the Income Tax Officer was correct, in the absence of any application u/s 25A, in regarding the dividends of the Edward Mills shares as a part of the income of the joint family. He would only be justified in regarding the dividends of the Edward Mills shares as part of the income of the members of the family in their individual capacity if he had satisfied himself, after inquiry into a claim u/s 25A, that the alleged partition had, in fact taken place."

I have quoted practically the whole of the order of the Assistant Commissioner on this point to show conclusively that he based it solely on Section 25A. The sentence "it was improper for the assesseees to raise this question for the first time in appeal" should not be divorced from context. What precedes and what follows it leaves no room for doubt that the impropriety attributed to the assesseees consisted of their omission to raise the question which according to the Assistant Commissioner, they should have raised u/s 25A before the Income Tax officer.

In the circumstances explained above I do not think that question No. 1-A formulated by my learned brother arises. I would have merely answered the

question referred to us and disposed of the reference without expressing any opinion on the question which properly falls within the jurisdiction of the Assistant Commissioner, who should decide for himself whether, assuming Section 25A does not apply the assessee should have done more what they did before the Income Tax Officer; whether on the materials before him any finding, and if so what finding, can be arrived at on the question, namely, whether the shares are part of the family property, and whether the Assistant Commissioner should, in exercise of his discretion, make such further enquiry as he thinks fit u/s 31 (2). But as my learned brother has recorded his views on the question raised by him, I answer it as follows : The plea that the shares have been divided should have been taken by the assessee, in the first instance, by not including the income derived from them in the total income of the joint family shown in the return. This was done. They should have produced evidence in support of the return when they were served with notice u/s 23 (2). Their own account were before the Income Tax Officer, who had also access to the register of the company showing that the shares did not stand in the name of the joint family as such. An enquiry by the Assistant Commissioner could not be claimed as of right; but the Assistant Commissioner could call for further evidence and enquire in the exercise of his power u/s 31 (2). In this case the Assistant Commissioner has not considered the question on the merits nor did he refuse to enquire into it u/s 31 (2). He would have recorded a finding on the evidence already produced and could have called for more.

I may note that no analogy can be drawn from Order 41, Rule 27, Civil Procedure Code, to determine the powers of the Assistant Commissioner hearing an appeal under the Income Tax Act, Section 31 (2), as the latter gives unrestricted direction to the Assistant Commissioner to make further enquiry that is, to obtain more evidence throwing light on the question which he is called upon to decide; while Order 41 Rule 27 confers very limited powers upon a Court of appeal in the matter of admitting fresh evidence.

The only question that remains to be considered is question No. 5. The facts are that the assessee had shown in their return a sum of Rs. 4,000 odd as interest paid by the joint family. The Income Tax Officer made an allowance to that extent. In appeal before the Assistant Commissioner a deduction on Income Tax claimed on no less than Rs. 80,000 odd alleged to have been paid to individual members of the joint family as interest on sums deposited by them. In other words the correctness of their return was repudiated. The Assistant Commissioner refused, in case these circumstances, to investigate this belated and inconsistent claim. He had a discretion to do so; and no error of law can be imputed to him. In this view I answer the 5th question in the affirmative. I agree with my learned brother as regards costs.

Reference answered.