

**(1968) 10 DEL CK 0027**

**In the Delhi High Court**

**Case No :** Income-tax Reference No. 5-C of 1965

Commissioner of Income Tax

APPELLANT

Vs

Bawa Arjan Singh

RESPONDENT

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**Date of Decision :** 11-10-1968

**Acts Referred:**

**Citation :** (1969) 73 ITR 576

**Hon'ble Judges :** T.V.R. Tatachari, J;S.K. Kapur, J

**Bench :** Division Bench

**Advocate :** A.N. Kirpal and D.K. Kapur, for the Appellant; Kirpa Ram Bajaj and P.N. Monga, for the Respondent

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## **Judgement**

1. The following question has been referred to us by the Income Tax Appellate Tribunal, Delhi Bench " B ", u/s 66(1) of the Indian Income Tax Act, 1922:

" Whether, on the facts and circumstances of the case, the correct status of the assessed is that of an individual or a Hindu undivided family ? " 2. The relevant year of assessment is 1959-60. Bawa Arjan Singh along with his father, Bawa Dinga Singh, and his brothers, Bawa Gian Singh and Bawa Sunder Singh, constituted a Hindu undivided family. The family was engaged in timber business under the name and style of Spedding Dinga Singh at Lahore. Assessments to Income Tax were being made on the Hindu undivided family. Bawa Dinga Singh died in the year 1939 and on April 30, 1940, there was a partition of the business between the three brothers. The timber business having been divided, it was carried on subsequently in partnership. The assessed was thereafter being assessed in his individual capacity. Again, on May 1, 1946, the house properties belonging to the family, which had not been partitioned earlier, were partitioned among the brothers. This partition was also recognised by the revenue and assessments were, thereafter, made on the assessed as individual. With respect to the assessment years 1957-58, 1958-59 and 1959-60, the assessed filed returns in his individual capacity but later revised the same claiming that he should be assessed in the status of a Hindu undivided family. The family was

stated to consist of the assessed, his widowed mother, wife and two unmarried daughters. The assessed having lost before the Income Tax Officer and the Appellate Assistant Commissioner preferred an appeal to the Tribunal only in respect of the assessment year 1959-60. The Tribunal held :

" The expression used in the Income Tax Act is " Hindu undivided family " and not " coparcenary". A Hindu coparcenary is a much narrower body than the Hindu undivided family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, the grandsons, and great-grandsons of the holder of the joint property for the time being, in other words, the three generations next to the holder in unbroken male descent (cf. para. 213 of Mullet's Hindu Law, 12th edition). A Hindu undivided family, on the other hand, consists of all persons lineally descended from a common ancestor, and include their wives and unmarried daughters (ibid. para. 212).

It is common ground that the parties are governed by the Mitakshara school of Hindu law in the instant case. The assessed's father died subsequent to the enactment of the Hindu Women's Rights to Property Act, 1937, with the result that his widowed mother obtained, on her husband's death, the same interest that her husband had, with the limitation that the interest is not absolute but is limited in the manner of a Hindu widow's estate. But, at the same time, she is entitled to have the same type of partition as a male coparcener would have . . .

It is thus clear that in this case, the assessed's mother is a member of the Hindu undivided family along with the assessed. The departmental officers have placed reliance on the decision of the Privy Council in Kalyanji Vithaldas's case. But in a series of decisions it has been held that there can be a joint family even if the family is reduced to single male member provided there are other members entitled to maintenance from the estate, We would refer in this connection to the following decisions : VEDATHANNI Vs. THE COMMISSIONER OF Income Tax, MADRAS., , (1934) 2 ITR 463 , The Commissioner of Income Tax Vs. Gomedalli Lakshminarayan, , BHAGWATI Vs. COMMISSIONER OF Income Tax, C.P. AND U.P., and Commissioner of Income Tax, Delhi, Ajmer, Rajasthan and Madhya Bharat Vs. Dhannalal Devilal, .

In view of the above considerations, we are of opinion that the assessed is entitled to succeed."

3. One of the contentions raised by Mr. Kirpal, the learned counsel for the revenue, was that in considering the status of the assessed the widow of Bawa Dinga Singh should be excluded because there was a complete partition in 1940 resulting in severance of all the coparceners and/or members of the family. He said that the question, Therefore, should be answered in the light of the fact that Bawa Arjan Singh's widowed mother was not a member of the family. This aspect does not appear to have been presented before the Income Tax Appellate Tribunal at all and I must, Therefore, proceed on the finding arrived at by the Tribunal, namely, that Bawa Arjan Singh's mother was a member of the family

along with him. I will, however, deal with the other aspect of the case also and determine the status by excluding the widow of Bawa Dinga Singh.

4. Mr. Kirpal, the learned counsel for the revenue, principally relied on a decision of the Privy Council in *Kalyanji Vithaldas v. Commissioner of Income Tax*, [1937] 5 ITR 90. In this case a firm was started by Moolji and Purshtotam (brothers who had separated) and Kalyanji (not related to either). In 1919 Moolji made gifts of capital to each of his sons by his first wife, namely, Kanji and Sewdas. Till 1919, Moolji, Kanji and Sewdas were separate from each other. In 1919, Kanji and Chaturbhuj were taken into the partnership. In 1930, Sewdas and Kalyanji's brother, Champsi, were taken into the firm. The interest of Kanji and Sewdas was a gift from their father Moolji, and that of Chaturbhuj a gift from his brother, Kalyanji. The decision proceeded on the finding that it had not been proved that any individual partner had thrown his interest in the firm or receipts there from into the common stock. Dealing with the cases of Kanji and Sewdas their Lordships of the Privy Council assumed that their interest was ancestral property so that if either had a son that son would have taken an interest therein by birth and came to the conclusion that no son having been born, no such interest had arisen to qualify or diminish the interest given by Moolji to Kanji and to Sewdas and that existence of a wife, or of a wife and a daughter, did not make any difference so as to make the income as that of a Hindu undivided family. It was observed :

" A man's wife and daughter are entitled to be maintained by him out of his separate property as well as out of property in which he has a coparcenary interest, but the mere existence of a wife or daughter does not make ancestral property joint. " Interest" is a word of wide and vague significance, and no doubt it might be used of a wife's or daughter's right to be maintained, which right accrues in the daughter's case on birth; but if the father's obligations are increased, his ownership is not divested, divided or impaired by marriage or the birth of a daughter. This is equally true of ancestral property belonging to himself alone as of self-acquired property , . . The phrase " Hindu undivided family" is used in the statute with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words " Hindu coparcenary ", all the more that it is not possible to say on the face of the Act that no female can be a member. The Bombay High Court, on the other hand, in *Lakshminarayan's* case, having held that the assessed, his wife and mother were a Hindu undivided family, arrived too readily at the conclusion that the income was the income of the family. " 5. The Judicial Committee proceeded to observe :

" The relevant meaning in the present case is the ordinary meaning in Hindu law according to the Benares school. In an extra legal sense, and even for some purposes of legal theory, ancestral property may perhaps be described, and usefully described, as family property; but it does not follow that in the eye of the Hindu law it belongs, save in certain circumstances, to the family as distinct

from the individual. By reason of its origin a man's property may be liable to be divested wholly or in part on the happening of a particular event, or may be answerable for particular obligations, or may pass at his death in a particular way ; but if, in spite of all such facts, his personal law regards him as the owner, the property as his property and the income there from as his income, it is chargeable to Income Tax as his, i.e., as the income of an individual. In their Lordships' view it would not be in consonance with ordinary notions or with a correct interpretation of the law of the Mitakshara, to hold that property which a man has obtained from his father belongs to a Hindu undivided family by reason of having a wife and daughters." 6. If a property belonged at one stage to a Hindu undivided family and that family, by reason of certain circumstances, is reduced to a single coparcener and some female members it will continue to be a joint family property is now settled beyond dispute by the decision of their Lordships of the Supreme Court in *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, . In that case Buddappa, his wife, his two unmarried daughters and his adopted son were members of a Hindu undivided family. Buddappa died on July 9, 1952. During his lifetime Buddappa was assessed with respect to the business of the family in the status of a manager of the Hindu undivided family. For the assessment year 1951-52 (accounting period ended November 8, 1950) the Income Tax Officer assessed the family under the title " Sri Gowli Buddappa (deceased) represented by his legal successor, Sri Gowli Buddanna, Oil mill owner, Raichur ". The Tribunal referred three questions to the High Court, the two relevant questions being :

" (i) Whether the sole male surviving coparcener of the Hindu joint family, his widowed mother and sisters constitute a Hindu undivided family within the meaning of the Income Tax Act?

(ii) Whether the assessment of the income in. the hands of the Hindu undivided family was correct ? "

7. Shah J., after analysing the facts of *Kalyanji Vithaldas*'s case, observed:

"It may however be recalled that in *Kalyanji Vithaldas*'s case income assessed to tax belonged separately to four out of six partners: of the remaining two, it was from an ancestral source, but the fact that each such partner had a wife or daughter did not make that income from an ancestral source, income of the undivided family of the partner, his wife and daughter. In *Gomedalli Lakshminarayan*'s case, the property from which income accrued belonged to a Hindu undivided family and the effect of the death of the father, who was a manager, was merely to invest the rights of a manager upon the son. The income from the property was and continued to remain the income of the undivided family. This distinction which had a vital bearing on the issue falling to be determined, was not given effect to by the Judicial Committee in *A. P. Swamy Gomedalli*'s case, [1937] 5 ITR 416 8. After discussion of the case law on the subject, their Lordships held :

" Property of a joint family, Therefore, does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. In the case in hand the property which yielded the income originally belonged to a Hindu undivided family. On the death of Buddappa, the family which included a widow and females born in the family was represented by Buddanna alone, but the property still continued to belong to that undivided family and income received there from was taxable as income of the Hindu undivided family." 9. Another decision of the Judicial Committee in a matter arising from Ceylon is Attorney-General of Ceylon v. A.R. Arunachalam Chettiar, [1957] A.C. 540 ; [1958] 34 ITR 42. In that case one Arunachalam and his son constituted a joint family governed by the Mitakshara school of Hindu law. The undivided son died in 1934, and Arunachalam became the sole surviving coparcener in a Hindu undivided family to which a number of female members belonged. Arunachalam died in 1938. The widows had the power to adopt sons and that power was exercised after the death of Arunachalam. It was held that Arunachalam was at the time of his death a member of a Hindu undivided family the same undivided family of which his son, when alive, was a member, and of which the continuity was preserved after Arunachalam's death by adoption by the widows of the family. The Judicial Committee observed :

"..... though it may be correct to speak of him [the sole surviving coparcener] 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 ... 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 . . . 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. The fatal flaw in the argument of the appellant appeared to be that, having labelled the surviving coparcener " owner", he then attributed to his ownership such a congeries of rights that the property could no longer be called " joint family property ". The family, a body fluctuating in numbers and comprised of male and female members, may equally well be said to be owners of the property, but owners whose ownership is qualified by the powers of the coparceners. There is in fact nothing to be gained by the use of the word "owner " in this connection. 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." 10. These decisions, Therefore, finally set at rest the question that a family consisting of only one coparcener and female members can enjoy the status of a Hindu undivided family within the Income Tax Act.,

11. The facts in favor of the assessed are stronger in the case at hand. The Tribunal posed the question for answer whether the assessed, together with his widowed mother, his wife and two unmarried daughters, constituted a Hindu undivided family and found that the assessed's mother was a member of the Hindu undivided family along with the assessed. According to the Tribunal, Therefore, Bawa Arjan Singh even after partition continued joint with his mother. If that property at that stage belonged to a Hindu undivided family, the family cannot cease to enjoy that status. It is beyond dispute that a person can throw his property, movable or immovable, into a common hotchpot by mere expression of his intention in that behalf. If the divided coparcener had done that there could have been no problem. That, however, was not done and the assessed cannot base its claim on that. The assessed revised Ins returns for the years 1957-58 to 1959-60, but that was done after the assessment year so that the assessed cannot say that revision of the returns was an unequivocal expression of the intention to throw the property in the common stock. My answer, Therefore, is that the business in the hands of the assessed was that of the family consisting, inter alia, of Bawa Arjan Singh and his widowed mother.

12. I will now proceed to answer the question on the assumption that the assessed's mother also separated as urged by Mr. Kirpal (though there is no material on the record pointing towards that). The position, in my opinion, will not be any different even in those circumstances. In C.N. Arunachala Mudaliar Vs. C.A. Muruganatha Mudaliar and Another, their Lordships of the Supreme Court held that the property of the grandfather would normally vest in the father as an ancestral property if and when the father inherited the property on the death of the grandfather or received it, by partition, made by the grandfather himself during his lifetime. On both these occasions, the grandfather's property would devolve on the father by virtue of the latter's legal right as son or descendant of the former and would consequently be an ancestral property in his hands. In COMMISSIONER OF Income Tax, U.P. Vs. BENI PRASAD TANDON., a Division Bench of the Allahabad High Court reviewed the entire case law on the subject. In that case the assessed constituted a Hindu undivided family with his father. The family property was completely partitioned and the assessed was for several years assessed as an individual. In the assessment for the years 1958-59 the income assessed in the hands of the assessed included income from property allotted to the assessed on partition. The assessed contended that the income from such property was the income of the Hindu undivided family consisting of his wife and unmarried daughters. It was held that the assessed constituted a Hindu undivided family with his wife and unmarried daughters in respect of the property devolving to him on partition even in the absence of male issue. It was observed ;

" It is true that the observations made by the Privy Council in *Kalyanji Vithaldas v. Commissioner of Income Tax* lend some support to the contention of Mr. Gopal Behari appearing on behalf of the Commissioner, U. P., that under such circumstances the property should be treated as separate property of the individual assessed. But it may be pointed out that in *Kalyanji Vithaldas*'s case the Judicial Committee was not dealing with a case where a member of a joint Hindu family had received property by a partition. The preponderance of judicial authority is in support of the view that, upon partition, the property retains the character of joint family property. We see no sufficient reason "for departing from the view taken by this court in *Pratap Narain*'s case. We are of opinion that the property under consideration should be regarded, as property belonging to the Hindu undivided family consisting of the assessed, his wife and minor daughters and not property exclusively belonging to the assessed. " 13. The same view had been taken earlier by the Allahabad High Court in *PRATAP NARAIN Vs. COMMISSIONER OF Income Tax, U. P.*, and in *GAJANAND SUTWALA Vs. COMMISSIONER OF WEALTH-TAX, U. P.*, . In *Panna Lal Rastogi Vs. Commissioner of Income Tax*, , the Patna High Court, while taking the same view, observed:

" If it be held that the property in the hands of a sole surviving coparcener is not the property of the Hindu undivided family, startling results may ensue. As soon as he gets a son or adopts a son, the property will become the property of a Hindu undivided family. If that son happens to die, the property will then become the property of an " individual " until another son is either born or adopted. We will thus have a bewildering complexity as regards the status of an assessed which would vary from time to time. The safer test seems to be, as pointed out by the Privy Council in the Ceylon case, whether there is a potentiality of a coparcener being brought into existence either by law or by nature. So long as that potentiality is there, the property must be held to be that of a Hindu undivided family. Such a potentiality exists in the case of a sole surviving coparcener, because either he may beget a son or adopt a son. It also existed while the property was in the possession of a Hindu widow prior to the "Hindu Succession Act of 1955, because by making a valid adoption she could continue the original joint family. It is true that in the Orissa case, *Rukmini Bai Rathor Vs. Commissioner of Wealth Tax*, , it was pointed out that when she becomes the full owner of the property by virtue of the Hindu Succession Act, the aforesaid potentiality disappears and the property in her hands must be assessed as that of an " individual". Here, however, the assessed is male, and whether he adopts a son or begets a son a coparcenery is established between him and his son. The property cannot be treated for all purposes as equivalent to his self-acquired property; in which alone his status can be said to be that of an " individual". " 14. Again in *Commissioner of Wealth Tax, Mysore Vs. D.C. Basappa*, , the same view was taken. In *Mulla's Hindu Law*, 13th Edition, p. 249, it is said:

"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. "

15. Mr. Kirpal, the learned counsel for the revenue relied on a decision of the Rajasthan High Court in *Commissioner of Income Tax v. Dhannalal Devilal*. That case is of no assistance to Mr. Kirpal as it turned purely on the interpretation of condition (b) of Clause (i) of Part 1(A) of Schedule I of the Indian Finance Act, 1951, and their Lordships were only concerned with the question whether two male members in the family were lineal descendants of any other living members of the family. Another case relied on by Mr. Kirpal is *T.S. Srinivasan Vs. Commissioner of Income Tax, Madras*, . In that case it was held that if a sole surviving male member begets a son, the income from his ancestral property or property acquired as a result of partition should be assessed as the income of Hindu undivided family only from the date of the birth of the son. The only question argued in that case was whether the assessed became karta of a Hindu undivided family for the assessment year 1953-54 by reason of conception of a son in about March, 1952, and it is in that context that the Madras High Court came to the conclusion that, though a child in the mother's womb was for many purposes regarded by legal fiction as already born, that notion could not be imported for the purposes of taxation. The question arising for consideration in this case was never raised before the Madras High Court. This decision was upheld by their Lordships of the Supreme Court in *T.S. Srinivasan Vs. Commissioner of Income Tax, Madras*, but even before the Supreme Court the arguments were confined to that limited point. This decision is not an authority for the proposition that in the absence of more than one coparcener there cannot be a Hindu undivided family--a point directly decided in *Gowli Buddanna's* case, which is a later decision. If the two decisions, namely, *Dhannalal Devilal's* case and *T. S. Srinivasan's* case, are out of the assessed's way then all the courts are unanimously of the view that I am inclined to take, namely, that in such circumstances the status of the assessed would be that of a Hindu undivided family.

16. In the result, my answer to the question referred is that the correct status of the assessed is that of a Hindu undivided family. In the circumstances, however, I leave the parties to bear their own costs.