
(2004) 08 AHC CK 0258
In the Allahabad High Court
Case No : IT Ref. No. 75 of 1983

Commissioner of Income Tax

APPELLANT

Vs

Dharam Prakash

RESPONDENT

Date of Decision : 11-08-2004

Acts Referred:

Income Tax Act, 1961 — Section 171

Citation : (2004) 191 CTR 526

Hon'ble Judges : R.K. Agrawal, J; K.N. Ojha, J

Bench : Division Bench

Advocate : Dhananjay Awasthi, for the Appellant; Gaurav Mahajan, for the Respondent

Final Decision : Dismissed

Judgement

1. The Tribunal has referred the following question of law u/s 256(1) of the IT Act, 1961, hereinafter referred to as the Act, for opinion to this Court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in upholding the alleged partial partition of the 1/3rd share of the assessee-HUF in the capital of the firm M/s Singhasini Engineering Works, 3/2, Vishnupuri, Kanpur, on 1st April, 1976 ?"

2. During the course of assessment proceedings for the asst. yr. 1977-78, the assessee, Dharam Prakash HUF, claimed that a partial partition took place on 1st April, 1976 in respect of its 1/3rd share in the capital of the firm M/s Singhasini Engineering Works. The HUF consisted of the Karta, Shri Dharam Prakash, his wife, Smt. Kamini Srivastava, his three daughters and his minor son Rohitesh. The partial partition was said to have taken place between Dharam Prakash smaller HUF consisting of himself on the one hand and his three daughters and his wife and minor son on the other hand. A memo of partial partition was also executed on 2nd April, 1979. The ITO observed that since a minor son is not in a position to give consent and the wife is not a coparcener competent to claim

partition under the Hindu law, no partial partition could be effected amongst the Karta, his wife and his minor son. He also held that one of the parties to the partial partition, namely, the smaller HUF consisting of the Karta and his three daughters was illegal ab initio. He accordingly, rejected the claim of partial partition.

3. The assessee came up in appeal before the AAC. The AAC did not agree that the consent given by the Karta on behalf of his minor son in his capacity as his natural guardian was valid. He also held that the partial partition was not proper since the minor was required to bear 1/3rd share in the profit and loss of the assessee's share in the firm which meant that the minor was also required to bear the losses.

4. The assessee preferred an appeal before the Tribunal. The Tribunal upheld the claim of the assessee and granted approval to the partial partition claimed by it.

5. We have heard Sri Dhananjay Awasthi, learned counsel appearing for the Revenue, and Sri Gaurav Mahajan, on behalf of the respondent-assessee.

6. The question as to whether Karta can give effect to the partition of the HUF, which consists of minor son, has been settled by the Hon'ble Supreme Court in the case of Apoorva Shantilal Shah, HUF Vs. Commissioner of Income Tax, Gujarat-I, Ahmedabad, . The Hon'ble Supreme Court has held as follows :

"If the father in exercise of his superior right or of his right as patria potestas is entitled to bring about a complete disruption of the joint family and to effect a complete partition of joint family properties of a Hindu joint family consisting of himself and his minor sons even against the wishes of the minors and if a partial partition be permissible with the consent of sons when they have all become major, we see no reason to limit the power or authority of the father to effect the partition only to a case where the partition is total. The superior right or the right of patria potestas which a father enjoys is always expected to be exercised in the best interest of the members of the family and more particularly of his minor sons. The father, undoubtedly, enjoys the right to bring about a complete disruption of the joint family consisting of himself and his minor sons and to effect a complete partition of the joint family properties between himself and his minor sons even against the will of the minor sons and when partial partition under the Hindu law is now accepted and recognised as valid by judicial decisions, we fail to appreciate on what logical grounds it can be said that the father who can bring about a complete partition of the joint family properties between himself and his minor sons will not be entitled to effect a partial partition of the joint family properties between himself and his minor sons, if the father in the interest of the joint family and its members feels that a partial partition of the properties will be in the best interest of the joint family and its members including the minor sons. Even if the test of consent is to apply, the father as the natural guardian of the minor sons will normally be in a position to give such consent and it cannot be said as a matter of universal application that

in all such cases of partition, partial or otherwise, there is bound to be a conflict of interest between the father and his sons. If the father does not act bona fide in the matter when he effects a partition of the joint family properties between himself and his minor sons, whether wholly or partially, the sons on attaining majority may challenge the partition and ask for appropriate reliefs including a proper partition. In appropriate cases, even during minority, the minor sons through a proper guardian may impeach the validity of the partition brought about by the father, either in entirety of the joint family properties, or only in respect of a part thereof, if the partition had been effected by the father to the detriment of the minor sons and to the prejudice of their interests.

We may point out that in the case of Charandas Haridas and Another Vs. The Commissioner of Income Tax, Bombay North, Kutch, Saurashtra and Ahmedabad and Another, , to which we have earlier referred, and in which this Court recognised the validity of partial partition brought about by the father of some joint family properties, the sons were all minors. Also in the case of Moti Lal Shyam Sunder Vs. Commissioner of Income Tax, , earlier quoted, where the Allahabad High Court recognised the validity of a partial partition brought about by the father between himself and his sons, all the sons were minors.

The decision of this Court in the case of Charandas Haridas (supra) and the observations of this Court in the case of Kalloomal Tapeswari Prasad (HUF), Kanpur Vs. Commissioner of Income Tax, Kanpur, , which we have earlier quoted, in our opinion, clinch the decision of the question.

We must, therefore, hold that a partial partition of properties brought about by the father between himself and his minor sons cannot be said to be invalid under the Hindu law and must be held to be valid and binding. We wish to make it clear that this right of the father to effect partial partition of joint family properties between himself and his minor sons, whether in exercise of his superior right as father or in exercise of the right as patria potestas has necessarily to be exercised bona fide by the father and is subject to the right of the sons to challenge the partition if the partition is not fair and just."

7. Respectfully following the aforesaid decision, we answer the question of law referred to us in favour of the assessee and against the Revenue. However, the parties shall bear their own costs.