
(1982) 11 OHC CK 0007

In the Orissa High Court

Case No : Special Jurisdiction Case No. 73 of 1978

Commissioner of Income Tax

APPELLANT

Vs

K. Satyanarayan Murty

RESPONDENT

Date of Decision : 17-11-1982

Acts Referred:

Income Tax Act, 1961 — Section 171

Citation : (1984) 147 ITR 140

Hon'ble Judges : R.N. Misra, C.J.; R.C. Patnaik, J

Bench : Division Bench

Advocate : None, for the Respondent

Judgement

R.N. Misra, C.J.—This is a reference made u/s 256(1) of the I.T. Act of 1961 (hereinafter referred to as "the Act"), by the Cuttack Bench of the Income Tax Appellate Tribunal. The following question has been referred for the opinion of the court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income from property received on partition by the assessee is assessable as the income of the Hindu undivided family consisting of the assessee and his wife ?"

2. We are concerned with the assessment year 1974-75 previous year ending with March 31, 1974. An HUF was the owner of a business carried on in the name and style of Sri Durga Stores at Berhampur in Ganjam District. Up to the assessment year 1968-69, the said business was being assessed in the status of an HUF. During the accounting year 1968-69, K. Satyanarayana Murty (present assessee) claimed partition of the family assets amongst himself as the karta, his two major sons, Nirmal and Surendra, and three minor sons, Janardan, Srinivas and Pundarikakshya. Admittedly, the wife of Satyanarayana Murty was in existence at that time, but there was no material to show whether a share in the HUF property was allotted to her. An application made u/s 171 of the Act was

accepted and the ITO, for the assessment year 1968-69, recorded the following order:

"As I have no other opinion to the contrary, partial partition of the HUF business as claimed by the assessee is allowed."

3. For the assessment year 1974-75, the assessee filed a return showing his status as individual. The only source of income was the share of profits received from Sri Durga Stores. The ITO found that there were two minor sons of the assessee who were also partners of the firm, Sri Durga Stores. He, therefore, added to the assessee's disclosed income the share income of the two minor sons amounting to Rs. 17,304 by invoking the provisions of Section 64(1)(ii) of the Act. The assessee was assessed on an income of Rs. 27,193.

4. On appeal before the AAC, the assessee contended that his status should have been an HUF and the share of income of the two minor sons should not have been included in that of the assessee, because Section 64 applied only to individuals and not to an HUF. The AAC held that the assessee had himself declared in the return for the year his status to be individual and he was being assessed in the earlier years also in the status of individual. As there was no change brought about in his status in the intervening years, there could be no justification for claiming a change of status from individual to HUF. He held:

"The partition of the appellant is a partial partition. It is partial as to only one property of the HUF. The HUF has remained joint with regard to all other properties. The wife of the appellant did not claim any share in the cloth business. Yet she remained a part of the undivided family. There is no other coparcener left in the family unit of the appellant. Therefore, the appellant is absolutely competent to dispose of alienate, transfer, relinquish in entirety his share of property derived from the cloth shop. In this view of the matter his status can be taken as individual."

5. The assessee appealed to the Tribunal and maintained that his correct status was an HUF and the assessment made by holding his status to be individual was wrong. According to the assessee, there was a partial partition in respect of the cloth business owned by the larger HUF of which the assessee, his two major sons and the three minor sons were members. The capital of the cloth business was divided into six equal shares and each of the coparceners was allotted one. These separated coparceners formed themselves into a partnership firm. Once this partition was recognised, the assessee and his wife automatically formed an HUF and what was allotted to the assessee belonged to this HUF. As such, the correct status should have been " HUF " and not " individual". Before the Tribunal, the Revenue took the stand that the assessee was the absolute owner of the property; there was no other coparcener claiming interest in what got allotted to him and, therefore, there could be no HUF.

6. The Tribunal examined the contentions of both the parties. The Accountant Member came to the conclusion that the property under consideration belonged

to the HUF and, therefore, applying Section 64 of the Act, the income of the minor sons could not be added. The Judicial Member, on the other hand, took the view that when property was held by the sole coparcener, there could be no status of an HUF when the assessee and his wife were the only two persons in the family. He, therefore, came to the conclusion that the assessee's status was that of an individual. In view of the difference of opinion, the matter was referred to a third Member and he concurred with the view taken by the Accountant Member that the assessee's status should be that of an HUF and the share income of the two minor sons would not be includible in the computation of the assessee's income.

7. In spite of notice, the assessee has not entered appearance. The question that has been raised in this case seems to have been squarely covered by the decision of the Supreme Court in the case of *Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay*, . In Chhabda's case there were three members in the family: Chhabda himself, his wife and an unmarried daughter. "Kathoke Lodge", which was the personal property of Chhabda, was claimed to have been thrown into the family hotchpot with a view to impressing it with the character of joint family property. The income received from the said property was sought to be assessed in the hands of the HUF consisting of the three members indicated above. In Chhabda's case, the Supreme Court pointed out (at p. 782):

"It is true that the appellant cannot constitute a coparcenary with his wife and unmarried daughter but under the Income Tax Act, a Hindu undivided family, not a coparcenary, is a taxable unit. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property and these are" the sons, grandsons and great-grandsons of the holder of the joint property for the time being, that is to say, the three generations next to the holder in unbroken male descent. Since under the Mitakshara law, the right to joint family property by birth is vested in the male issue only, females who come in only as heirs to obstructed heritage (*sapratibandhadayd*), cannot be coparceners. But we are concerned under the Income Tax Act with the question whether the appellant's wife and unmarried daughter can with him be members of a Hindu undivided family and not of a coparcenary. In the words of Sir George Rankin, who delivered the opinion of the Judicial Committee in *Kalyawji's case* [1937] 5 ITR 90

" 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."

8. Outside the limits of coparcenary, there is a fringe of persons, males and females, who constitute an undivided or joint family. There is no limit to the number of persons who can compose it not to their remoteness from the

common ancestor and to their relationship with one another. A joint Hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters. The daughter, on marriage, ceases to be a member of her father's family and becomes a member of her husband's family. The joint Hindu family is thus a larger body consisting of a group of persons who are united by the tie of sapindaship arising by birth, marriage or adoption. "The fundamental principle of the Hindu joint family is the sapindaship. Without that it is impossible to form a joint Hindu family. With it, as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the sapinda relation, which distinguishes the joint family, and is of its very essence." *Karsondas Dharamsey v. Gangabai* ILR [1908] 32 Bom 479. See also *Hindu Law-in British India* by S.V. Gupta, second edition, page 59.

9. The joint Hindu family, with all its incidents, is thus a creature of law and cannot be created by act of parties, except to the extent to which a stranger may be affiliated to the family by adoption. But the absence of an antecedent history of jointness between the appellant and his ancestors is no impediment to the appellant, his wife and unmarried daughter forming a joint Hindu family. The appellant's wife became his sapinda on her marriage with him. The daughter too, on her birth, became a sapinda and until she leaves the family by marriage, the tie of sapindaship will bind her to the family of her birth. As said by Golapchandra Sarkar Sastri in his "Hindu Law" (eighth edition, page 240), "those that are called by nature to live together, continue to do so" and form a joint Hindu family. The appellant is not by contract seeking to introduce in his family strangers not bound to the family by the tie of sapindaship. The wife and unmarried daughter are members of his family. He is not by agreement making them so. And as a Hindu male, he himself can be the stock of a fresh descent so as to be able to constitute an undivided family with his wife and daughter.

10. That it does not take more than one male to form a joint Hindu family with females is well-established. In *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, one Buddappa, his wife, his two unmarried daughters and his adopted son, Buddanna, were members of a Hindu undivided family. On Buddappa's death a question arose whether the adopted son who was the sole surviving coparcener could form a joint Hindu family with his mother and sisters and could accordingly be assessed in the status of a manager of the Hindu undivided family. Speaking for the court, Shah J., observed :

The plea that there must be at least two male members to form a Hindu undivided family as a taxable entity also has no force. The expression "Hindu undivided family" in the Income Tax Act is used in the sense in which a Hindu joint family is understood under the personal law of Hindus. Under the Hindu system of law, a joint family may consist of a single male member and widows of deceased male members, and apparently the Income Tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members."

11. In *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, , the appellant tiled returns for wealth-tax in the status of a Hindu undivided family which at the material time consisted of himself, his wife and two minor daughters. The claim to be assessed in the status of a Hindu undivided family rested on the circumstance that the wealth returned consisted of ancestral property received or deemed to have been received by the appellant on partition with his father and brothers. The High Court held that as the appellant's family did not have any other male coparcener, the assets must be held to belong to him as an individual and not to the Hindu undivided family. That decision was set aside by this court on the ground that a joint Hindu family could consist under the Hindu law of a single male member, his wife and daughters and that it was not necessary that the assessable unit should consist of at least two male members."

12. Having referred to these two cases, the learned judges in *Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay*, , proceeded to say:

"In both of these cases, *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, and *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, , the assessee was a member of a pre-existing joint family and had, in one case on the death of his father and in the other on partition, become the sole surviving coparcener. But the decision in those cases did not rest on the consideration that there was an antecedent history of jointness. The alternative argument in *Gowli Buddanna's* case was an independent argument uncorrelated to the pre-existence of a joint family. The passage which we have extracted from the judgment of Shah, J. in that case shows that the decision of this court did not proceed from any such consideration. The court held in terms categorical that the Hindu undivided family as an assessable entity need not consist of at least two male members. The same is true of the decision in *Narendmnath's* case.

Thus, the contention of the Department that in the absence of a preexisting joint family, the appellant cannot constitute a Hindu undivided family with his wife and unmarried daughter must fail. The view of the High Court that the appellant has "no son and, therefore, no undivided family" is plainly unsound and must also be rejected. Accordingly, the question whether the income of the Kathoke Lodge can be assessed in the hands of the appellant as a karta or manager of the joint family must be decided on the basis that the appellant, his wife and unmarried daughter are members of a Hindu undivided family."

13. The court then examined the assessee's stand that Kathoke Lodge had been thrown into the family hotchpot, rejected the contention advanced on behalf of the Revenue that there was no scope for self-acquired property to be thrown into the family hotchpot and summarised the factual position thus (101 ITR 785):

"Having examined the true nature of an undivided family under the Hindu law and in view of the findings of the Tribunal and the High Court on the second aspect, two points emerge clear : Firstly, that the appellant constituted a Hindu

undivided family with his wife and unmarried daughter and, secondly, that Kathoke Lodge which was the appellant's separate property was thrown by him into the family hotchpot,"

14. It then remained to be considered whether the income of Kathoke Lodge was to be assessed in the hands of the appellant as an individual or could be assessed in the status of an HUF. The court analysed at length the Judicial Committee's decision in *Kalyanji Vithaldas v. CIT* [1937] 5 ITR 90, referred to the decision of the Bombay High Court in *CIT v. Gomedalli Lakshminarayan* [1935] 3 ITR 367 and the appellate decision of the Privy Council taken from the decision of the Bombay High Court in *CIT v. A. P. Swamy Gomedalli* [1937] 5 ITR 416 and settled the legal position thus (p. 793 of 101 ITR) :

"There are thus two classes of cases, each requiring a different approach. In cases falling within the rule in *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, , the question to ask is whether property which belonged to a subsisting undivided family ceases to have that character merely because the family is represented by a sole surviving coparcener who possesses rights which an owner of property may possess. For the matter of that, the same question has to be asked in cases where the family, for the time being, consists of widows of deceased coparceners as in *Commissioner of Income Tax, Madras Vs. Rm. Ar. Ar. Veerappa Cheitiar*, , so long as the property which was originally of the joint Hindu family remains in the hands of the widows of the members of the family and is not divided amongst them. In cases falling within the rule in *Kalyanji's case* [1937] 5 ITR 90 , the question to ask is whether property which did not belong to a subsisting undivided family has truly acquired the character of joint family property in the hands Of the assessee. In this class of cases, the composition of the family is a matter of great relevance for, though a joint Hindu family may consist of a man, his wife and daughter, the mere existence of a wife and daughter will not justify the assessment of income from the joint family property in the status of the head as a manager of the joint family. The appellant's case falls within the rule in *Kalyanji's case* since the property, before it came into his hands, was not impressed with the character of joint family property. It is of great relevance that he has no son and his joint family consists, for the time being, of himself, his wife and daughter."

15. Adverting to Kathoke Lodge, their Lordships further stated (p. 795):

" Kathoke Lodge was not an asset of a pre-existing joint family of which the appellant was a member. It become an item of joint family property for the first time when the appellant threw what was his separate property into the family hotchpot. The appellant has no son. His wife and unmarried daughter were entitled to be maintained by him from out of the income of Kathoke Lodge while it was his separate property. Their rights in that property are not enlarged for the reason that the property was thrown into the family hotchpot. Not being coparceners of the appellant, they have neither a right by birth in the property nor the right to demand its partition nor indeed the right to restrain the appellant

from alienating the property for any purpose whatsoever. Their prior right to be maintained out of the income of Kathoke Lodge remains what it was even after the property was thrown into the family hotchpot: the right of maintenance, neither more nor less. Thus, Kathoke Lodge may be usefully described as the property of the family after it was thrown into the common stock, but it does not follow that in the eye of Hindu law it belongs to the family, as it would have, if the property were to devolve on the appellant as a sole surviving coparcener."

16. In the instant case, the property in dispute (the share in Sri Durga Stores, allotted to him on partial partition) was his personal property and had no longer the incidence of joint family character. There is no claim of throwing it into the family hotchpot, Even if such a claim had been laid, it would at the most in the loose sense be the property of the HUF of the assessee and his wife but that would not make it property in which the assessee's wife would have any right, title or interest as such. If K. Satyanarayan Murty had become the sole surviving coparcener and there was no question of any partition, the rule in *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, would have applied and the requirement of having at least two male coparceners would not have arisen, In view of the principle succinctly indicated in *Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay*, , we must come to the conclusion that the assessee's status should have been that of an individual and there was no scope to hold that the income was liable to be assessed in the status of an HUF. The question referred to us, therefore, is accordingly answered.

17. As there is no appearance on behalf of the assessee, we direct that there shall be no order for costs of the reference.

Patnaik, J.

18. I agree.