
(1986) 09 PAT CK 0032

In the Patna High Court

Case No : Taxation Case No's. 170, 171, 175 and 176 of 1976

Commissioner of Income Tax

APPELLANT

Vs

Rajeshwari Prasad

RESPONDENT

Date of Decision : 08-09-1986

Acts Referred:

Citation : (1987) 59 CTR 4 : (1987) 166 ITR 789 : (1986) 29 TAXMAN 470

Hon'ble Judges : Uday Sinha, J; Ashwini Kumar Sinha, J

Bench : Division Bench

Advocate : B.P. Rajgarhia and S.K. Sharan, for the Appellant; A.B.S. Sinha, for the Respondent

Judgement

1. These are four references u/s 256(1) of the Income Tax Act, 1961 ("the Act "). In these references, we are concerned with the assessment years 1968-69 to 1971-72. The facts are common to all the four references. So are the questions referred to us for our opinion. The question referred to us in Taxation Cases Nos. 170 and 171 of 1976 is as follows :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the disputed property belonged to the Hindu undivided family consisting of the assessee himself, his wife and daughter, consequent upon the declaration made by the assessee on November 16, 1967?"

2. The very same question forms question No. 1 in Taxation Cases Nos. 175 and 176 of 1976. The second question referred to us in the latter two references is :

"2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in admitting a fresh piece of evidence which was not produced either before the Income Tax Officer or the Appellate Assistant Commissioner without giving the Department an opportunity to examine the same ?"

3. The substantial question is whether the Tribunal was correct in holding that the disputed property had to be treated and assessed as property of the Hindu

undivided family consisting of the assessee, his wife and daughter. In order to appreciate the questions falling for consideration before us, it is essential that we must take notice of some facts.

4. The assessee is now dead. He was a practising advocate of this State at Patna. He had a house in this town of Patna. In regard to it, he returned his income treating the house property in the status of "individual" till the assessment year 1967-68. In the accounting year 1967-68, he claimed that the house had been thrown in the hotchpot of his Hindu undivided family consisting of himself, his wife and his daughter. He claimed that the income from the house property should be assessed separately as property of the Hindu undivided family and, therefore, it had not been included in his return of individual income.

5. The Income Tax Officer did not accept the claim of the assessee in regard to the house property nor did it find favour with the Appellate Assistant Commissioner. The Tribunal, however, took a different view of the matter. Before the Tribunal, it was contended that although the house had been constructed out of the professional income of the assessee, yet with effect from November 16, 1967, the house property having been thrown in the common hotchpot, it was impressed with the character of Hindu undivided family property. The Tribunal referred to certain letters which had been filed before the Income Tax Officer in which it had been claimed that part of the cost of construction was met out of the landed properties of the assessee which had come to him on the partition of his joint family which then consisted of himself, his two brothers and his father. A copy of the assessee's declaration dated November 16, 1967, was filed before the Tribunal. In that letter, it was mentioned that Rai Bahadur Durga Prasad, father of the assessee, died in 1938. There was a partition in the family in 1939 in which the assessee got some landed properties. By that letter, the assessee declared that by virtue of the fact that the house had been constructed partially from funds which had accrued from properties, which were joint family properties, it had to be treated as Hindu undivided family property, although the major portion of the cost had been met out of the professional income of the assessee. The Tribunal rejected the claim of the assessee that the house property was joint family property since 1952. The Tribunal, however, took the view that by the assessee's declaration dated November 16, 1967, throwing the disputed property in the common hotchpot of the Hindu undivided family consisting of himself, his wife and daughter, it had become the asset of the assessee's Hindu undivided family and the income from that property was not accountable in the hands of the assessee in his individual capacity. The view that the Tribunal took was based upon the decisions of the courts, in *A.R. Shukla Vs. Commissioner of Gift Tax, Gujarat*, and *Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh*, . In that view of the matter, the Tribunal directed that on and from the assessment year 1968-69, the income from the house property had to be assessed as Hindu undivided family property. The Revenue, being aggrieved by the order of the Tribunal treating the income from house property as the income of the Hindu undivided family, has got the references made to us.

6. The relevant findings of fact thus are firstly that the house property was the property of the individual till the assessment year 1967-68. The second finding of the Tribunal was that by the declaration of throwing this property into the hotchpot, the house property was impressed with the character of Hindu undivided family property. Upon these findings of fact let us consider whether the Tribunal was right in the view that it took.

7. Mr. B.P. Rajgarhia, learned senior standing counsel for the petitioner, submitted that the present cases fall within the expanse of the decision of the Supreme Court in *Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay*, while learned counsel for the assessee, on the other hand, contended that the cases fall within the ambit of *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*. Let us see how matters stand.

8. The facts in the case of *Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay*, were that for the accounting year 1956-57 corresponding to the assessment year 1957-58, the appellant (assessee) declared by a sworn statement before a Presidency Magistrate in Bombay that the house property known as "Kathoke Lodge" had been thrown by him into the "family hotchpot" in order to impress it with the character of joint family property and that he would be holding it as the karta of the joint Hindu family consisting of himself, his wife and an unmarried daughter. Upon those facts, the question referred to the High Court u/s 66(1) of the Indian Income Tax Act, 1922, was "whether, on the facts and in the circumstances of the case, the income from property known as "Kathoke Lodge" was to be assessed separately as the income of the Hindu undivided family of which the assessee was the karta ?" The facts thus in that case were exactly identical to those of the present cases. The submissions advanced on behalf of the assessee and the Revenue were exactly the same as those before us. The Supreme Court reviewed the decision of the Privy Council in *Kalyanji Vithal Das v. CIT* [1937] 5 ITR 90. Parts of it were explained by the Supreme Court, but, in substance, the Supreme Court relied upon it.

9. The Supreme Court considered the decisions in *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, and *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, and held that although "Kathoke Lodge" could be described as property of the family after it was thrown into the common stock, it did not follow that in the eye of the Hindu law, it belonged to the family, as it would have, if the property were to devolve upon the appellant as a sole surviving coparcener.

10. Since reliance has been placed on behalf of the assessee on the case of *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, it is meet that we should take note of the manner in which the case of *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, was distinguished by the Supreme Court. The Supreme Court observed (101 ITR 784):

"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 Vs. Commissioner of Income Tax, Mysore, Bangalore, 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 N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh, ."

11. The Supreme Court further observed as follows 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. It remains now to consider whether the income of Kathoke Lodge must be assessed in the hands of the appellant as an individual or whether it can be assessed in his status as manager of the Hindu undivided family."

12. It will thus be seen that whereas in the case of N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh, , the property was of the Hindu undivided family from its inception and, therefore, the fact that there was only one male member could not deviate from the conclusion that it had to be treated at all times as Hindu undivided family property and the income therefrom would be assessed as such, the case of Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay, was decided on the footing that although there was a Hindu undivided family, the property was not the property of the Hindu undivided family and in that regard we can do no better than quote the observations, of the Supreme Court. The Supreme Court observed as follows 101 ITR 792 :

"In this connection, a distinction must be drawn between two classes of cases where an assessee is sought to be assessed in respect of ancestral property held by him : (1) where property not originally joint is received by the assessee and the question has to be asked whether it has acquired the character of joint family property in the hands of the assessee, and (2) where the property already impressed with the character of joint family property comes into the hands of the assessee as a single coparcener and the question required to be considered is whether it has retained the character of joint family property in the hands of the assessee or is converted into absolute property of the assessee."

13. And further at page 793, the Supreme Court observed :

"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* [1937] 5 ITR 90 , 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."

14. Ultimately, the Supreme Court observed as follows (at page 795) :

"These two sets of tests, both evolved by the Privy Council, govern two distinct sets of cases and there is no inconsistency between the two tests. The test evolved in *Kalyanji's case* [1937] 5 ITR 90 , and not in *Arunachalam's case* [1958] 34 ITR 42 or *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, , has to be applied to the instant case.

Kathoke Ledge was not any asset of a pre-existing joint family of which the appellant was a member. It became 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."

15. The facts of the present case as found are exactly the same as in the case of *Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay*, . In this case also, although there was a Hindu undivided family, the declaration throwing the separate property into the common hotchpot made no difference. The rights of the members of the Hindu undivided family did not get enlarged for the reason that the property was thrown into the family hotchpot. The house property of the assessee could be described as property of the family after it was thrown into the common stock, but as observed by the Supreme Court in *Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay*, , it did not follow that in the eye of Hindu law it belonged to the family, as it would have, if the property were to devolve on the assessee as a sole surviving coparcener. The property of the appellant, put in the common stock, could change its legal incidents on the birth of a son. But that event not having come to pass, the property in the eye of Hindu law, was really of the assessee and he could deal with it as a full owner unrestrained by considerations of legal necessity or benefit to the estate. He could sell that or mortgage that or make a gift of that. Even a son born or adopted after alienation would have to take the family hotchpot as he found it. In that view of the matter, the present case is governed by the case of *Surjit Lal Chhabda* [1915] 101 ITR 776 and not by the case of *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, . There is thus no escape from the position that the Tribunal was not correct in holding that the disputed property belonged to the Hindu undivided family consisting of the assessee, his wife and daughter. It could not be treated as a Hindu undivided family property. The income therefrom had to be treated as the individual income of the assessee. The question thus referred in Taxation Cases Nos. 170 and 171 of 1976 and the first question in the other two cases must, therefore, be answered in favour of the Revenue and against the assessee.

16. In the view that we have taken of the aforesaid question, the second question referred to us has become academic and need not be answered. We, therefore, refuse to answer the second question. Since the assessee is now dead, the references are answered without costs.

17. Let a copy of this judgment be transmitted by the Assistant Registrar to the Income Tax Appellate Tribunal, Patna, in terms of Section 260 of the Income Tax Act, 1961.