

(2001) 10 P&H CK 0018

In the Punjab And Haryana At Chandigarh

Case No : W.T.R. No's. 34 to 38 of 1982, 2 to 4 of 1985 and 76 of 1990, I.T.R. No. 38 of 1986 and W.T.C. 12 of 1992

Guru Amarjit Singh

APPELLANT

Vs

The Commissioner of Wealth Tax

RESPONDENT

Date of Decision : 05-10-2001

Acts Referred:

General Clauses Act, 1897 — Section 5
Hindu Succession Act, 1956 — Section 4, 5
Income Tax Act, 1961 — Section 27, 27(1)
Wealth Tax Act, 1957 — Section 4(6)

Citation : (2001) 171 CTR 37

Hon'ble Judges : Jawahar Lal Gupta, J; Ashutosh Mohunta, J

Bench : Division Bench

Advocate : A.K. Mittal and Akshay Bhan, for the Appellant; R.P. Sawhney and Rajesh Bindal, for the Respondent

Final Decision : Dismissed

Judgement

Jawahar Lal Gupta, J.—The cleavage of judicial opinion regarding the effect of the Hindu Succession Act, 1956 on the old customary rules of "Primogeniture" and "Impartible Estates" has led to prevarication in the decisions under the Income/Wealth Tax Acts, As a result, the Assessee as well as the Revenue are aggrieved by the orders relating to the different Assessment Years. Thus, these 11 cases,

2. Learned counsel for the parties have referred to the facts as emerging from the record of Wealth Tax Reference Nos. 34 to 38 of 1982. By its composite order of March 30, 1982, the Income Tax Appellate Tribunal has referred the following question for the opinion of this Court:-

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was to be assessed as an individual in respect of the impartible estate on the ground that he was a holder of such an impartible estate in the assessment years under consideration?"

3. The facts may be briefly noticed.

Guru Amarjit Singh is the Assessee. He was the holder of an impartible estate for the last about 40 years which was "much before the passing of the Hindu Succession Act." Upto the Assessment Year 1969-70, the Estate was being assessed as belonging to the Hindu undivided family. However, for the five assessment years viz. 1970-71 and 1972-73 to 1975-76, the holder of the Estate was assessed as an individual. The Wealth Tax Officer had taken the view that the Assessee being the holder of an "impartible estate, the value of the estate has to be assessed in his hands in the status of an individual as per provisions of Section 4(6) of the Wealth Tax Act, 1957." The contention of the Assessee that with the passing of the Hindu Succession Act, 1956, the concept of "impartible estate" had become obsolete was rejected. The value of the estate was, thus, included in the wealth of the Assessee. Copies of the five orders passed by the Wealth Tax Officer are at Annexure "A" to "A-4".

The Assessee appealed. It was contended that in view of the provisions of Sections 4 and 5 of the Hindu Succession Act, 1956, the orders passed by the Wealth Tax Officer could not be sustained. However, the Commissioner of Wealth Tax (Appeals) held that "although the impartible estate was a joint Hindu property, during the life of the holder of the impartible estate, it would be holder's absolute property". Thus, the appeals were dismissed. Copies of the five orders are at Annexures "B" to "B-4".

The Assessee challenged the orders before the Income Tax Appellate Tribunal. After consideration of the matter, the Tribunal held that the property belongs to the "joint family but in the circumstances of the case, the holder has to be assessed in his capacity as an individual." Thus, the appeals were dismissed. The Assessee filed a petition u/s 27(1) of the Wealth Tax Act, 1957. It was accepted. Hence, these five References. In the connected cases, the Revenue is the petitioner.

4. Learned Counsel for the parties have been heard. 5. Mr. Ajay Mittal, counsel for the Assessee contended that Section 4 of the Hindu Succession Act, 1956, gives an over-riding effect to the provisions of the Act. On the promulgation of the Act, the rules of "primogeniture" and "impartible estate" had become inoperative. Section 5(ii) carves out a limited exception. The case of the Assessee does not fall within the parameters of Section 5(ii). The Revenue cannot invoke Section 4(6) of the Wealth Tax Act in this case. The provision is applicable only when there is an impartible estate as contemplated u/s 5(ii) of the Hindu Succession Act. Similar is the position with regard to the provisions of Section 27(ii) of the Income Tax Act, 1961. Learned counsel referred to various decisions.

5. The claim made on behalf of the Assessee was controverted by Mr. R.P. Sawhney, counsel for the Revenue. He contended that the Assessee continues to be the holder of the impartible estate. The provisions of the Hindu Succession Act

have made no difference to the existing position. Thus, the estate and the Income therefrom have to be assessed in the hands of the individual till his death. Only thereafter, the succession shall open and the Assessment shall be made in the hands of the successor/s. He further submitted that if the contention as raised on behalf of the Assessee is accepted, the provisions of Section 4(6) of the Wealth Tax Act and Section 27(ii) of the Income Tax Act, would be rendered redundant. Mr. Sawhney also referred to various decisions in support of his submissions.

6. The primary question that arises for consideration is - Has the Hindu Succession Act, 1956, brought about any change in the rules of Hindu law relating to the rules of "primogeniture" and "impartible property"?

"Impartible" in its ordinary sense means "indivisible." In the present context, it implies an estate that cannot be partitioned. By virtue of a restraint imposed by custom or the grant.

A property can be indivisible by its very nature. Like an idol. Another property can be totally partible. Like, a piece of land, a house or even money. Land etc. can be easily partitioned to carve out shares. However, even a partible property can be made impartible. By law. Even by custom. Where restraint on partition is imposed by custom, it can be effective only when the said custom is ancient, invariable and is established by long usage. Then it has the force of law.

One of the recognized customs is embodied in the old rule of "primogeniture." In simple words, it means the primacy of the first-born son. He succeeds to the estate to the exclusion of all the other survivors. As a result, the estate, though ancestral, is made impartible.

Normally, in a joint property belonging to an undivided family, the members can claim the right to partition, to restrain alienations; to maintenance and the right of succession by survivorship. However, in case of an impartible estate, there would be a restraint on the right of the members to claim partition or make alienation. This restriction is "compatible with the custom of impartibility." However, the remaining two rights subsist and the property would be legally recognized as belonging to the joint family.

Does the 1956 Act make any change?

The Act, as the preamble shows, was promulgated "to amend and codify the law relating to intestate succession among Hindus." Thus, the Act was enacted with two things in view. The existing position had to be changed. Secondly, the law relating to succession was to be codified. To be put together in one place. Codification in its ordinary sense implies "a written revision of all existing statutory laws amendments and new provisions." The old is replaced by the new. The "code" is "self contained and complete." The result is that the Court is not "at liberty to go outside the law so created simply because before the existence of that enactment, another law prevailed." It is on this basis that the effect of the

Act has to be considered.

7. For the purposes of the present case, the relevant provisions are contained in Sections 4 and 5. Sections 4 provides as under: -

"4. Over-riding effect of Act - (1) Save as otherwise expressly provided in this Act-

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commence of this Act shall cease to have effect with respect of any matter for which provisions is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provision of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings".

A perusal of the above provision shows that the Act has an overriding effect. On promulgation of the Act, "any text, rule or interpretation of Hindu law or any custom or usage as part of that law ... cease to have effect with respect to any matter for which provision is made" in it. Thus, any custom or law which was in force before June 17, 1956, ceased to apply to the Hindus to the extent it was inconsistent with the provisions of the 1956 Act.

An exception was carved out in Section 5 whereby certain properties were specifically excluded from the application of the Act. For the purposes of this case the relevant provision is contained in Clause (ii). It reads as under: -

"5. Act not to apply to certain properties - This Act shall not apply to-

(ii) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act", A perusal of the above provision shows that if by the terms of an agreement or covenant entered into by the Ruler of an Indian State with the Government of India or under an existing enactment, the estate was to descend to an individual, the provisions of the Act would not apply. There is a rationale for the exception. The rights of the Rajas who had joined the Union were governed by the terms of binding instruments. The succession was governed by the terms of accession. The undertaking, if any, had to be honored. The promise had to be fulfilled. Thus, it appears that the special provision was made.

What is the result? By virtue of Section 4, the customary rule of "primogeniture" was abrogated. The succession was to be governed by the provisions of the Hindu Succession Act. Even the rights, which were inchoate, were made

enforceable. The property, which was hither-to-fore "impartible", had become capable of partition.

8. Mr. Sawhney contended that succession to the estate would open only on the death of the holder. Till then, the position would remain unaltered. Is it so?

The rule of primogeniture is merely a provision for preference. The basis implication of the rule is that the estate should go to the first-born son in the family. By this process, the partition of the property was avoided. The estate and family remained undivided. Once the rule of "primogeniture" is abrogated, the impartibility of the property shall cease to subsist. "Impartibility" in its very nature is the result of custom. Once the custom is abrogated, the impartibility cannot continue. The restraint on partition gets removed. Once the law with regard to preference ceases to exist, it cannot be allowed to continue till the death of the holder. This would be contrary to the plain language of the provision in Section 4.

Still more, if the contention of Mr. Sawhney is accepted, the provisions of the Hindu Succession Act itself shall remain in abeyance. The Act shall come into force, not from the date of its promulgation but from the date of the death of the holder. This would be plainly contrary to the language of Section 4. The "law in force immediately before the commencement of the Act ceases to have effect. It cannot continue in operation. This position emerges from the plain language of the enactment. Thus, even a statute, which is inconsistent with the Act, cannot continue in force. Can a "custom" be still effective? We think not.

Moreover the Acts of Parliament are publicly enacted. In fact, publicity precedes the promulgation. u/s 5 of the Genial Clauses Act, 1897, an Act of Parliament comes into force on the day it receives the assent of the President. In the present case, it is the admitted position that the Act had been promulgated on June 17, 1956. If the contentions of Mr. Sawhney were accepted, the Act would actually remain in abeyance till the date of the death of the holder. In other words, the date of enforcement of the Act would be uncertain. It would vary from family to family and case to case. This would lead to chaos. Such cannot be the state of law. In any case, the courts shall always be reluctant to countenance such a consequence.

In this context, it deserves mention that the classes of heirs which were recognized under the old Hindu law have ceased to exist on the coming into force of the Act. Now the heirs are divided into four classes as given in the Schedule. The property devolves in equal shares among the son, daughter, widow and mother of the deceased. The male and female heirs are treated equally. The limited estate possessed by a female Hindu is abolished. Now she holds the property as an absolute owner with full power to deal with it. The heirs generally "take the property per capita." The rights which law confers cannot be made inchoate by the process of interpretation. This would defeat the purpose of the Statute.

9. A similar issue had fallen for consideration before a Division Bench of this Court in *Taro Vs. Darshan Singh and Others*, . In para 2, it was held by the Bench that ""Agricultural custom is certainly "a law" governing succession amongst Jats. Thus, we have no doubt that by virtue of Sections 2 and 4 of the Hindu Succession Act, Punjab Agricultural Custom, so far as it was applicable to Hindus, is no longer in force so far as the matters of succession etc. are concerned which are now governed by the provisions of the Hindu Succession Act."

10. Again in *Hans Raj Basant Ram Vs. Dhanwant Singh Balwant Singh*, , another Division Bench of this Court had considered the matter. One of the issues related to the abrogation of the rule of custom on the promulgation of the 1956 Act. It was held that Section 4 "does away with the rule of custom so far as succession is concerned and, therefore, after the Hindu Succession Act came into force, no Hindu can be said to be governed by the rules of customary law and the succession to the property held by a Hindu must be regulated by the provisions of the Hindu Succession Act."

11. In *Sundari and Others Vs. Laxmi and Others*, , it was held by their Lordships that "Section 4 of the Act gives over-riding application to the provisions of the Act and lays down that in respect of any of the matters dealt with in the Act all existing laws whether in the shape of enactment or otherwise which are inconsistent with the Act are repealed. Any other law in force immediately before the commencement of this Act ceases to apply to Hindus in so far as it is inconsistent with any of the provisions contained in the Act. It is, therefore, clear that the provisions of Aliyasanthana law whether customary or statutory will cease to apply, in so far as they are inconsistent with the Hindu succession Act."

12. Following these decisions, a Division Bench of Gujarat High Court in *Pratapsinhji N. Desai v. Commissioner of Income Tax* (1983) 139 ITR 77, has while considering the effect of Section 4, observed at page 92 that "we are unable to agree with the contention urged on behalf of the Revenue that the classical Hindu law as contained in the custom or usage would continue to be in operation even though a contrary provision has been made in that behalf in the Hindu Succession Act, till the succession opens after the said Act coming into force." A similar view has been taken by the Patna High Court in *Commissioner of Income Tax Vs. Maharaja Chintamani Saran Nath Sah Deo*, and by the Rajasthan High Court.

13. Mr. Sawhney contended that if the view as expressed in the aforesaid decisions is accepted as correct, the provisions contained in Sections 4(6) of the Wealth Tax Act and 27(ii) of the Income Tax Act, 1961, would be rendered redundant. Is it so?

14. Section 4(6) of the Wealth Tax Act came into force w.e.f. April 1, 1965. The provisos contained in Section 27(ii) of the Income Tax Act is in the similar terms. Section 4(6) provides as under:-

"For the purpose of this act, the holder of an impartible estate shall be deemed

to be the individual owner of all the properties comprised in the impartible estate."

15. These provisions introduce a fiction. It is provided that in case of an impartible estate, it shall be assumed that the holder is the owner of all the properties. The fiction has a limited application. It can be invoked only when the assessee holds an impartible estate. In other words, in a case covered by the provisions of Section 5 of the 1956 Act, the holder shall be deemed to be the owner of all the properties comprised in the impartible estate. Not otherwise.

16. In the present controversy, it has not even been remotely suggested that there was any agreement, covenant or enactment within the meaning of Section 5 by virtue of which it may be assumed that the assessee was the holder of an impartible estate. Thus the provisions contained in Sections 4(6) or 27(ii) would not apply.

17. Mr. Sawhney placed strong reliance on the decision of the Andhra Pradesh High Court in *P.V.G. Raju Vs. Commissioner of Wealth-tax*. In this case, it was observed by the Bench that "the Legislature wanted impartible estates to be treated as individual property of the holder and not as his joint family property for the purposes of the tax". It was pointed out by Mr. Mittal that this decision has been considered by the Madras High Court in the *Commissioner of Income Tax Vs. K. Selvaraj. (Cwt V.K. Selvaraj)*, their Lordships were pleased to dissent from the view. Still further, following the view of the Punjab, Gujarat and Patna High Courts, it was observed that "after the enactment of the Hindu Succession Act, the impartible estate's character is lost over the estate and the property would become joint family property".

18. Mr. Sawhney also placed strong reliance on the decision of a Division Bench of the Calcutta High Court in *Commissioner of Income Tax Vs. U.C. Mahatab, Maharaja of Burdwan*, in support of his submission, while dealing with the provisions of Section 4, their Lordships were pleased to observe at page 230 that:-

"It is clear, in our opinion, this Hindu Succession Act only dealt with the position at the time of succession after the coming into operation of the Hindu Succession Act, 1956. It did not affect the position and character of the HUF or of the ingredients of the impartible estate as such of (sic) an impartible estate which is in existence from before the coming into operation of the Hindu Succession Act, 1956." It was further observed that "in view of the provision of Section 27(ii) of the I.T. Act, 1961, and the effect of the Hindu Succession Act, 1956, in our opinion, the Tribunal was in error in coming to the conclusion that the partition as claimed was valid for the reasons aforesaid."

19. With respect and for the reasons given above, we cannot concur with the view taken by their Lordships of the Calcutta High Court.

20. It is the admitted position that the Assessee had succeeded to the ancestral

property by the rule of primogeniture. Upto the Assessment Year 1969-70, the estate had been assessed to wealth tax etc. as belonging to the HUF. The sudden change was made by the Revenue on account of the decision of the Calcutta High Court in U.C. Mahtab's case. For various subsequent years, a contrary view was also taken, for the reasons given above, we are unable to follow the rule laid down by the Andhra and Calcutta High Courts.

21. No other point was raised.

In view of the above, it is held that:-

(i) A perusal of the Preamble to the Hindu Succession Act shows that the old law has been amended. The law has also been codified. Thus, the old rules have been altered and replaced by the new provisions. In regard to matters covered by the provisions of the Hindu Succession Act, 1956, the Court cannot rely upon any custom or usage.

(ii) Section 4 of the Hindu Succession Act abrogates every text, rule, custom and law which was in force immediately before June 17, 1956 in so far as it is inconsistent with any of the provisions contained in the Act. Thus, except the impartible estates covered by the provision of Section 5, the succession to every other property would be governed by the mandate of the 1956 Act. The old rule of primogeniture stands abrogated.

(iii) The provisions of Section 4(6) of the Wealth Tax Act, 1957 and Section 27(ii) of the Income Tax Act, 1961, are applicable only to the impartible estates covered by Section 5 of the Hindu Succession Act, 1956.

22. Thus, the questions as raised in these 10 cases are answered in favour of the Assessee and against the Revenue. In Wealth Tax case No. 12 of 1992, the petition for directing the Tribunal to make a Reference is dismissed as the question of law stands answered in the above terms. In the circumstances, there will be no order as to costs.

Sd/- Ashutosh Mohunta, J.