

(1966) 08 PAT CK 0004

In the Patna High Court

Case No : Miscellaneous Judicial Case No. 1768 of 1964

HANUMANMAL PERIWAL

APPELLANT

Vs

COMMISSIONER OF WEALTH-TAX, BIHAR and ORISSA.

RESPONDENT

Date of Decision : 20-08-1966

Acts Referred:

Citation : (1968) 67 ITR 320

Hon'ble Judges : Mahapatra, J;A. B. N. Sinha, J

Bench : Full Bench

Judgement

MAHAPATRA J. - The question referred by the Income Tax Appellate Tribunal, Patna Bench, Patna, u/s 27(1) of the wealth-tax Act, in relation to the assessment year 1960-61, the corresponding valuation date being the 31st October, 1959, is :

"Whether, in the facts and circumstances of the case, the assessment to wealth-tax for the assessment year 1960-61 had been rightly made on the assessee in the status of an individual ?"

On the valuation date, the assessee's family consisted of himself, his wife and an unmarried daughter. He received the assets, on the valuation of which the wealth-tax was levied upon him, on partition between himself and another member of a Hindu joint family. Neither at the time of the partition nor till the valuation date, the assessee had any male child. He submitted his return in the status of a Hindu undivided family. But the Wealth-tax Officer determined the status of the assessee as that of an individual. The assessee claimed to be assessed as a Hindu undivided family in an appeal before the Appellate Assistant Commissioner, but without success. Similar was the position when he went in appeal to the Income Tax Appellate Tribunal. On his request, the present reference was made by the Tribunal.

The point for determination is whether, after partition effected in a Hindu undivided family, the assets that come to a separated member, who had no male

issue at the time, can be said to belong to him absolutely. It cannot be disputed in respect of such assets, when a son is subsequently born to or adopted by the separated member, the coparcenary consisting of the father and the son will own them and the son by his birth will have an interest and share in those assets; he can also claim partition if he so likes. In other words, those assets will belong to the coparcenary or Hindu joint family. The wealth-tax authorities have taken the view that the assets received by the assessee on partition belong to him absolutely, although they were capable of being owned by a Hindu undivided family consisting of the assessee and his son or sons that may be born or adopted subsequently. This finding is now under attack.

The charging section of the Wealth-tax Act, 1957, is section 3, where it is provided that a tax in respect of the net wealth of every individual, Hindu undivided family and company shall be charged. The net wealth as defined in section 2(m) of the Act will necessarily belong to such individual Hindu undivided family or company. Section 5 of the Act details the exemptions of some types of assets from taxation. In clause (ii) of sub-section (1) of section 5 of the Act, the interest of the assessee in the coparcenary property of any Hindu undivided family of which he is a member is not liable to be taxed. Keeping this in mind, we have to see if the assets involved in the instant case belonged to the assessee or to the Hindu undivided family of which he was a member. If it belonged to the latter, then the assessee's interest in that property was to be excluded from assessment. "Hindu undivided family" is used not always in the same sense as a "Hindu coparcenary". But, for purpose of exemptions as provided under clause (ii) or sub-section (1) of section 5 of the Act, the assessee's share or interest in the coparcenary property of the joint family is envisaged. What the assessee got on partition as his share in the ancestral property of the joint family longer retains the character of coparcenary property, as the partition cut off the claims of the other dividing coparceners. If the assessee would have any coparcener in his own branch, either a son, grandson or great-grandson, the partitioned share of the ancestral property would belong to that coparcenary after the break of the larger and parent coparcenary. In the present case, however, the assessee had no son either born or adopted till the date of valuation; and, therefore, the property that he got on partition became his separate property (not in the sense as self-acquired property) belonging to him alone. No doubt, if a son is born to or adopted by him, he will have an interest in that property by his birth or adoption and will constitute a coparcenary with the assessee; but till such birth or adoption the property continues as the separate property of the assessee. In other words, the share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue, who takes an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. But as regards other relations, it is separate property; and if the coparcener dies without leaving male issue, it passes to his heirs by succession (see Mulla's Principles of Hindu Law, 13th edition, page 249).

There is a distinction between a coparcener obtaining ancestral property as his share on partition and a sole surviving coparcener in possession of the ancestral property. In the latter case, the estate in the hands of a sole surviving coparcener retains the character of coparcenary property, though the coparcenary unit is reduced to one only for the time being. If there is a widow of a deceased coparcener in the family, she can bring into existence another coparcener by adoption. Since the coparcenary was not broken before the ancestral property came to remain in possession of the sole surviving coparcener, the character of the property remains as before and the property belongs to the joint family. For assessment the status will be Hindu undivided family. A case in point is *Attorney-General of Ceylon v. Ar. Arunachalam Chettiar*. There, after the death of the only son in 1934, the father became the sole surviving coparcener of the Hindu undivided family in which there were also a number of females including the widow of the predeceased son, who had the right to adopt. All the female members of that family had the right of maintenance and other rights which belonged to them as such members. In that position, the father died in 1938; and a question arose whether at the time of his death he was a member of a Hindu undivided family. Section 73 of the Estate Duty Ordinance, 1938, of Ceylon was :

"Where a member of a Hindu undivided family dies, no estate duty shall be payable on any property proved to the satisfaction of the Commissioner to be the joint property of that Hindu undivided family."

The father at the time of his death held the property as the sole surviving coparcener of the Hindu undivided family, because there had been no partition before in that family. Though no other coparcener came into existence during his lifetime after the death of his son at all material times there subsisted a power of adoption in his sons widow, who was a member of the family; and after his own death a similar power was also in his widow. Their Lordships of the Judicial Committee broke the question arising from those facts into two parts; whether (a) the father was at his death a member of a Hindu undivided family; and (b) the property of which he was the sole coparcener was the property of that Hindu undivided family. On the first question the answer was in the affirmative and that the father at his death was a under Hindu law a male line does not become extinct or a Hindu is not taken to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible. A Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male finally brought to an end while it is possible in nature or law to add a male member to it (see *Partapsing Shivsing v. Agarsinghji Raisinghji and Anant Bhikappa Patil v. Shankar Ramchandra Patil*).

On the second question it was held that a property of which the father was the sole coparcener was the property of that Hindu undivided family. The power of the father in regard to alienation and the way in which a person in his position is generally called the "owner" of a property, was not out of notice by the Judicial

Committee. Learned counsel appearing for the assessee placed great reliance on this decision and argued that the position of a coparcener who has no other coparcener in his own branch, having a share out of ancestral property on partition is in no way different from a sole surviving coparcener remaining in possession of the entire ancestral property on way different from a sole surviving coparcener remaining in possession of the entire ancestral property of the family. This remark may be right in regard to the power of alienation and exclusive possession till another coparcener springs into the family. But the real distinction between the two is that in one, the ancestral property remains undivided with the sole coparcener and in the other, after the break of the larger coparcenary and partition of the ancestral property, a moiety comes to the separated member. In the case of a partition, there may be a potentiality of another coparcener in the separated branch; but until that potentiality materialises either by law or by nature, the coparcenary does not come to exist; the partitioned property in his hands will till then belong to him. If and when another coparcener comes to existence with him, the property will be of that coparcenary or the Hindu undivided family. If, thereafter, one coparcener dies and only one is left in the family, the property will continue to be of the undivided family, as in the case of a sole surviving coparcener. There will be no difficulty or uncertainty or repeated changes in the "status" of such person for purpose of assessment to Income Tax or wealth-tax.

In the Ceylon case referred to above, the distinguishing features were not only that the temporary reduction of the coparcenary unit to a single individual did not convert what was previously the joint family property of the undivided family into separate property of the surviving coparcener but also the female members of the family had the right of maintenance and other rights to that the potentiality in respect of addition of another coparcener to the family by a predeceased coparceners widow is not different from that of a separated coparcener himself, for he can beget or adopt a son to himself. Apparently it may be so, but in the former case, the potentiality is not dependent upon the coparcener and, therefore, of a binding nature upon him. To me, it appears that the main difference between a sold surviving coparcener in possession of ancestral property and a coparcener getting a moiety of ancestral property on partition lies in the character of the property held by such person; with one, it is unbroken ancestral property of the joint family, and with the other, it is a part of it after the coparcenary is broken. In the former case, the coparcenary unit is reduced to a single individual; and in the latter case, the coparcenary unit is broken to different units. The Ceylon case, therefore, cannot provide a complete comparison with the present case.

On the other hand, the case of *T. S. Srinivasan v. Commissioner of Income Tax*, decided on the 29th November, 1965, lays down the correct guidance. In that case, the appellant received certain shares in a private limited company in the partition of a Hindu undivided family and with those shares as nucleus, he acquired house properties, shares and deposits. During the accounting year

1952-53 (the assessment year 1953-54) the appellant claimed that the income from those assets was assessable in the hands of a Hindu undivided family consisting of himself and his son, who was born on December 11, 1952. For him, it was argued that under Hindu law a son conceived or in the mother's womb is equal in many respects to a son actually in existence in the matter of inheritance, partition, survivorship and the right to impeach an alienation made by his father; but it was held that this doctrine is not one of universal application and it applies mainly for the purpose of determining rights to property and safeguarding such rights of the son; that doctrine does not fit in with the scheme of the Income Tax Act. Income Tax is a liability which could not be imposed upon persons yet unborn. In answer to the contention that by the end of the accounting year in that case, the son had already been born, and a Hindu undivided family consisting of the father and the son was in existence and hence the status for assessment of income should have been taken as that of a Hindu undivided family, their Lordships observed that :

"But even if a Hindu undivided family was in existence towards the end of the accounting year, still the whole income received or accrued in the accounting year did not thereby become the assessable income of the Hindu undivided family. Till the child was born the income which accrued to, or arose to, or was received by the assessee was his income."

On that basis, they upheld the assessment as made in the status of "individual" for the period of the accounting year, till December 11, 1952, when the son was born. There, not only the assessee had the potentiality of adding a coparcener to his own branch, but, in fact, the new coparcener had been conceived before the beginning of the previous year. The principle emerging from this decision of the Supreme Court appears to be that the status of the assessee shall be determined with reference to the existence or otherwise of any other coparcener in the family of the assessee on the relevant date. In the case of assessment of Income Tax the relevant period will be the accounting or previous year and for wealth-tax assessment, it will be the valuation date. In that view, in the present case, as there was no other coparcener with the assessee on the valuation date, the assessment to wealth-tax was rightly made on the basis that the assessee was an individual.

Learned counsel drew our attention to the case of *Panna Lal Rastogi v. Commissioner of Income Tax* decided by a Bench of this court on the 6th December, 1965, where the assessee on partition obtained a share out of the ancestral property of an original joint Hindu family and after partition his family consisted of himself and his wife there being no issue. It was held in that case that for purposes of wealth-tax assessment his status shall be of a Hindu undivided family and not an individual. This decision no doubt supports the assessee's contention in the instant case, but the decision of the Supreme Court in the case of *T. S. Srinivasan v. Commissioner of Income Tax*, is binding upon us and has to be followed. That decision, though earlier, does not appear to have

been placed before their Lordships of the Division Bench in the case of Panna Lal Rastogi v. Commissioner of Income Tax.

For the assessee, reference was also made to the case of Gowli Buddanna v. Commissioner of Income Tax. That was a case of a sole surviving coparcener and not a partitioned coparcener. One Buddappa, his wife and two unmarried daughters and his adopted son, Buddanna, were members of a Hindu undivided family. Buddanna, were members of a Hindu undivided family. Buddappa used to be assessed in respect the income from business dealings of the family during his lifetime in the status of a Hindu undivided family. He died on July 9, 1952. For the assessment year 1951-52, the previous year ended on November 8, 1950. For that assessment year 1951-52, the previous year ended on November ended on November 8, 1950. For that assessment year, since Buddappa was dead by that time, Buddanna (the adopted son) was shown as the assessee, but his status was Hindu undivided family (as decided by the Appellate Assistant Commissioner and affirmed by Appellate tribunal). Buddappa was a resident of and carried on business before January 26, 1950, at Raichur, which was a part of the territory of the Nizam of Hyderabad. His family was governed by the Mitakshara School of Hindu law, but at the material time, there was legislation in force in that territory by which, on the death of a male member in a joint Hindu family, his interest in the family estate devolved upon his widow; such a widow had only a right to receive maintenance from the estate.

On a reference, the Mysore High Court held that the sole male surviving coparcener of the Hindu joint family (Buddanna, his widowed mother and sisters) constituted a Hindu undivided family within the meaning of the Income Tax Act and the income was assessable in the hands of that Hindu undivided family. The assessee's claim to the contrary was not accepted. In appeal before the Supreme Court, the decision of the Mysore High Court was affirmed. Their Lordships followed the Ceylon case, Attorney-General of Ceylon v. Ar. Arunachalam Chettiar, and explained Kalyanji Vithaldass case. They observed in the concluding portion of the judgment :

"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 therefrom was taxable as income of the Hindu undivided family."

Like the Ceylon case, this case is distinguishable from the facts of the present case for the reasons already stated.

A case on the wealth-tax decided by a Division Bench of the Andhra Pradesh High Court in Commissioner of Wealth-tax v. Narendra Nath may be usefully referred

here, as the learned judges brought out the distinction between the joint family estate remaining in the hands of a sole surviving coparcener and a share of the ancestral property coming on partition to a separated coparcener. There, the assessee had a wife and two minor daughters. The assessee's father was the holder of an impartible estate, and he purchased some agricultural lands in the name of the assessee and his brothers. The impartible estate was abolished under the Madras Estate Act, 1948. The compensation in respect of that impartible estate was paid to the assessee's father, to the assessee and to his brothers as contemplated u/s 45 of that Act. The lands belonging to the joint family were partitioned, some in 1950 and the rest in 1954. The assets on which wealth-tax was levied, consisted of the assessee's investments in securities, shares, a partnership business, deposits in banks and agricultural produce from his lands. Their source was the compensation that was paid to the assessee u/s 45 of the Madras Estate Act, 1948 and the property that he obtained on partition from his father. After reference to and discussion of several cases including Kalyanji Vithaldass case and the Ceylon case the court held, on making the distinction between a sole surviving coparcener court held, on making the distinction between a sole surviving coparcener and a partitioned coparcener that the status for assessment to wealth-tax was to be individual and not Hindu undivided family.

In conclusion, following the supreme Court decision in T. S. Srinivasan v. Commissioner of Income Tax, the question framed in the instant case shall have to be answered in the affirmative and against the assessee; the assessment to wealth-tax for the assessment year 1960-61 has been rightly made on the assessee in the status of an individual. But, in view of somewhat complexity of the question involved and different views taken by different courts, there shall be no order for costs in this reference.

A. B. N. SINHA J. - I agree.