

(1934) 12 CAL CK 0003
In the Calcutta High Court
IN RE MOOLJI SICKA AND OTHERS.

Date of Decision : 13-12-1934

Acts Referred:

Income Tax Act, 1922 — Section 34, 66(2)

Citation : (1935) 3 ITR 123

Hon'ble Judges : Lort-Williams, J; Lord-Williams, J; Jack, J

Bench : Full Bench

Judgement

LORT-WILLIAMS, J. - This is a case stated u/s 66(2) of the Income Tax Act (XI of 1922).

Originally the question of law submitted for the opinion of this Court was "whether in the circumstances recorded in this case, assessee's share of income from the firm of Moolji Sicka and Company is assessable against him in the status of a Hindu undivided family or of an individual."

The firm of Moolji Sicka and Company was first registered as a partnership of five persons and their shares were assessed as individuals. Each of the partners contended that they ought to be assessed as five Hindu undivided families.

The Commissioner found as a fact that none of the assessee's had succeeded in proving that they had thrown their separate income into common stock. This was in respect of the 1930-31 assessment and was based on a partnership deed of 1919.

The present case arises on the assessment for 1931-32 and is founded on a partnership deed of 1930.

The facts which have been found show that the firm was started in 1912 by Moolji Sicka, his brother Purushotham and Kalyanjee with funds which were not ancestral. The funds of Moolji and Purushotham were apparently derived from their mother. These two were not joint at any material time.

In 1919 a deed of partnership was executed and Kanji, Moolji's son, and Chathurbhuj, Kalyanjee's brother, were added as partners, about the same time,

Moolji married a second wife, which led to family complications, and he and his sons decided to live apart. He transferred to each of them a part of his interest in partnership, and his first wife went to live with them. Kalyanji and his brothers Chaturbhuj and Champsi also agreed to live separately, and Kalyanji, transferred a part of his interest to each of them.

For several years difficulties were experienced by the income tax authorities in obtaining any satisfactory accounts from the firm, and in 1930 steps were taken, u/s 34 of the Act, against the assessees. One result was that a further deed of partnership was executed under which Sewdas (another of Mooljis Sons) and Champsi, the other brother of Kalyanji, became partners, and shares were allotted to them.

Moolji lives in Bombay and has a son by his second wife. Purshotham lives in the same house and has a son and daughters. Apparently he no longer takes any active part in the business. Kalyanji is at the firms branch at Gondia. He has three sons and daughters. Chaturbhuj has a daughter but no son. He and Champsi are at Gondia. All these live separately. Kanji and Sewdas live in the same house with their mother, but they live separately. Kanji has daughters only. Sewdas has no issue, but includes his mother in his alleged family.

It has been found as a fact that none of the assessee has made any assignment to any joint family accounts or for any joint purposes. The opinion of the Commissioner was that as the shares of Moolji, Purshotham and Kalyanji were all self-acquired without the employment of any ancestral funds, and as there was not proof that any of them had thrown his share into common stock, the shares were to be deemed individual for the purpose of income tax. He decided that as Chaturbhuj's share came from his brother Kalyanji's self-acquired property, and he has no son, and as there was no proof of his having thrown his share into the common stock of a non-existent co-parcenary, the share remained individual. Further, he decided that even if Kalyanji's separate property could have been treated as held in co-parcenary, with his brothers prior to 1919, yet after the partition (if any) the shares were separate and individual. That even assuming that Kanji and Sewdas's shares were gifts by their father out of self-acquired property, there was no proof of Moolji's determination that the shares were to be held by either as ancestral property, and that though it might become ancestral if sons were born to Kanji and Sewdas, it cannot at present be regarded as other than separate and individual. Further he held that even if Moolji's self-acquired property was being held in common stock in 1919, yet after the partition it had become separate and individual.

He stated that at the time of assessment none of the assesses claimed to be a karta of a Hindu undivided family, nor did they so describe themselves in the returns made by them, nor in their petitions to the Income Tax Officer, not in their applications for registration of the firm and no such description is mentioned in the partnership deeds. Until the appeal to the Assistant Commissioner, they did not suggest that they were other than individuals so far

as taxation under the Income Tax Act was concerned. It is alleged that in a former affidavit relating to some prior assessment some of the assesseees claimed that they were kartas of Hindu undivided families, but this evidence is not before us and forms not part of the present case.

This reference by the Commissioner was made on the 8th June, 1933. At or about that time, certain further affidavits were filed. The Commissioner says, in an Appendix to the Paperbook that the application for reference to the High Court was made on the 14th January, 1933. Appellants were heard on various dates up to the 3rd May, and the Commissioner stated the case on the information on record up to that date. Subsequent to the drafting of the reference, three affidavits were filed which the Commissioner has appended to the case at the request of the applicants. Concerning those affidavits, the Commissioner says that in his opinion they ought not to be considered, that the statements contained in them are contrary to the facts recorded, and that there was no evidence of any of the assesseees having thrown his property into common stock. It is to be noted in passing that in all the three affidavits the deponents state that they always treated their earnings as belonging to their joint families, and nowhere state that these earnings were in fact joint property.

Upon consideration of the case stated, the Court decided that the findings of fact were not specific or sufficient nor were they properly stated, and referred the case back to the Commissioner and we have now to consider the Supplementary Statement made u/s 66(4).

In the meantime, the Commissioner was succeeded by another Commissioner, and this Commissioner states that the circumstances which were recorded by his predecessor in the several cases were as follows :-

(1) Mooljis case :- He does not claim to be a member of any ancestral undivided family. His case is that he is separate from his brothers and from his sons by his first wife, that he is living with his second wife and a male child by her, and that he and they constitute a Hindu undivided family. The fund with which he started the business was not ancestral. He became a partner in his individual capacity and not as representing any family. His share always was self acquired. He failed to prove that it was thrown into common-stock. He started the partnership in 1912 with his self acquired funds and in his individual capacity, and even if it be assumed that this became a joint fund with his sons then by partition in 1919, he ceased to have a joint fund thereafter. He kept his capital in and earnings from the partnership as his own separate property, and all that he did in 1919, was to make a gift to each of his sons of a certain amount of money wherewith they became partners.

(2) Purshotam :- His case is that he is separate from Moolji, and not a member of any ancestral joint family. He is living with his wife and an infant son and daughter. He claims that they institute a Hindu undivided family. He also became a partner in his individual capacity and not as representing any family. His capital

was self-acquired property. No ancestral funds were employed in obtaining his partnership. He failed to prove that his earnings were thrown into common-stock.

(3) Kalyanji :- He is not a member of an ancestral joint family. His family consist of his wife, three male children and a daughter. He is not joint with his brothers. They live and mess separately. He became a partner in his individual capacity without employing any ancestral funds. His share is self-acquired. He has failed to prove that his earnings were thrown into common stock. He became a partner in 1912 with his self-acquired funds, and always acted in his individual capacity. What he did in 1919 amounted merely to the making of a gift of part of his own money to his brother. Even if the capital and the earnings are to be taken as joint up to 1919, since 1919 when this alleged partition occurred, the property of each of them became separate.

(4) Chaturbhuj :- His family consist of himself, his wife and a daughter, and no male child. He is not a member of an ancestral joint family. His share in the capital was transferred from Kalyanjis account in the firm. He has failed to prove that his earnings were thrown into common stock. Even assuming that he was joint with his brother before 1919, what he got as a result of the partition in that year became his separate and self-acquired property.

(5) Kanji :- He is Mooljis son by his first wife. He separated in 1919. His family consist of his wife and daughter and no male child. He and his brother Sewdas live in one house with their mother, and mess together. His share of the capital came by way of transfer from Mooljis account. This was really a gift by Mooljis account. This was really a gift made by Moolji out of his own self-acquired money.

The Commissioner states that he accepts the he accept the evidence of his predecessor and finds the facts again as found by him. In accordance with the directions of this Court he has carefully examined the evidence and has enquired further into the following matters in particular.

1 (a) Whether the capital in the firm belong to the assesseees in their individual capacities ?

1 (b) Whether entered into the partnership as representing the family, or acted in any way on behalf of the family when entering into the partnership ?

(2) Whether there is any common stock of the family?

(3) Whether the assesseees treated their earning as belonging to the family? Or have they kept their earning separate? or have they thrown them into common stock?

(4) Who are the members of the family of each of the assesseees?

(5) Whether the family of the assesseees as it now stands is a Hindu undivided family within the meaning of the Income Tax Act?

He states, and this is correct that the last question in its not a pure question of

fact, and he formulates two further question stated by his predecessor.

(1) Whether the family of the assessee as it now stands is a Hindu undivided family within the meaning of the income Tax Act?

(2) If the first question be answered in the affirmative whether in circumstances recorded in the case the income in question should be treated as income of that family and assessed as such?

On further consideration he finds the following facts :

1 (a) The nucleus of the capital with which the three original members of the firm, viz., Moolji, Purshottam and Kalyanjee started the business was not ancestral. The capital supplied by them belonged to these assesseees in their respective individual capacities and was their self-acquired property. As regards the capital supplied by the three added members (viz., Kanji, Chatubhuj and Shewdas), this also belonged to them in their individual capacities because they got it by way of gift, and it was their self-acquired fund.

1 (b) On the question whether or not all of them purported to act for the family in the partnership, he refers to the fact that in none of the deeds of partnership are they described as Kartas of Hindu undivided families nor is he satisfied that the alleged partition between Mooljee and his sons, was, in fact a partition of property which, previous to that date had been joint family property. He says that the evidence before him was not sufficient to establish it.

With regard to the three additional affidavits the Commissioner came to the conclusion that these had been filed because the assesseees realized the defects in their case and wished to strengthen. He says that he attaches no value to these affidavits, which I understand to mean that he does not believe the facts stated therein. He says also that he was not satisfied with the explanation given that the accounts of the business have been mislaid, and it is obvious from his statement, that he came to the conclusion that the assesseees were keeping back accounts in order to prevent the Commissioner from inquiring too closely into the extent of the business which they were carrying on. The result was that he found as a fact that there was no joint family fund in any of the cases, that each of the partners became partners with their separate self-acquired funds, and that none of them threw their funds into the common stock of their respective families. In fact, there was no evidence that there ever had been any common stock.

Apart from these affidavits, he says that there is no evidence that Kanji and Sewdas got their shares from their father by partition, or that Chaturbhuj got his share from his brother Kalyanji similarly. Indeed at the last hearing before him it was admitted that the original of Kalyanjis capital was unknown, and he was asked to presume that Kalyanji had ancestral property which was later divided. Except for the three affidavits stating that each of assessee maintain his family out of his earnings, he found that there was no evidence to show that either property or earnings had been thrown into common stock, or that the income

had been treated as income of the family. The assessee kept the properties at their own absolute disposal.

The Commissioner then dealt with the question, what is a Hindu undivided family within the meaning of the Act, whether it connotes a family having co-parcenary property, and he quoted from Maynes Hindu Law, 9th Edition, 346, the following - "Section 269. It is evident that there can be no limit to the numbers of persons of whom a Hindu joint family consists, or to the remoteness of their descent from the common ancestor, and consequently to the remoteness of their relationship from each other. But the Hindu co-parcenary, properly so-called, constitutes a much narrower body. When we speak of a Hindu joint family as constituting a co-parcenary, we refer not to the entire number of persons who can trace from a common ancestor, and amongst whom no partition has ever taken place; we include only those persons who by virtue of relationship, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts and at their pleasure to enforce its partition. Outside this body, there is a fringe of persons who possess inferior rights such as that of maintenance, or who may under certain contingencies, hope to enter into the co-parcenary", and he arrived at the conclusion that the legislature, in using the expression Hindu undivided family, had in view a family which in the eye of law is the owner of the income, and did not intend the expression to connote a mere combination of persons who have no legal claim to such income, or right to insist on a division of such income. Therefore he held that in none of these cases was there a Hindu undivided family within the meaning of the Income Tax Act.

Further he stated his opinion that even if he were wrong upon the first point, yet in view of the facts found that the income of each of the assessee was self-acquired, and there had been no waiver by the assessee of their separate rights, the income in each case remained individual throughout, and was rightly assessed by the Income Tax Officer as that of an individual.

In this case, a good deal of time and trouble has been caused by the inability of the Commissioner to distinguish between questions of law and question of fact. The result has been that, being in doubt, they have left a considerable part of their own burden to be discharged by this Court. This task is really not very difficult if the Commissioner will make an effort to think clearly. The origin and source of property, or income are matters of fact. Whether property or income has been treated as separate or as ancestral, or joint is a question of law, or of mixed law and fact. Whether property or income has been treated as separate or has or has not been thrown into common stock are question of fact. But whether the alleged owners are entitled to treat it as separate, or whether it must be regarded as joint, is a question of law or of mixed law and fact. In this case, all question of pure fact have been found against the contention of the assessee.

The first question of law to be decided is, what is meant by the expression "Hindu undivided family," in the Income Tax Act. I have already referred to a

quotation from Mayne on this point, and the remarks of the late Sir Dinshaw Mulla at page 230 of the 7th Edition of his work on Hindu Law are similar. Is the meaning to be restricted to the narrower, or extended to the wider body mentioned by these authors, that is to say, is to be restricted to the co-parcenary, or extended to the Hindu joint family?

The necessity for making Hindu undivided families liable as such for income tax was, that the income and property of Hindu undivided family is undivided. The members have no separate income or property and cannot, therefore, be taxed as individuals. According to Mitakshara, until partition it cannot be said of any member that he has any definite share in the joint property. But an Income Tax Act obviously is concerned only with income available for taxation and the owners of such income, and if there is no property or no income, an Income Tax Act has no application to a Hindu undivided family in the wider sense to which I have referred. Its provisions are attracted only where there exists property or income, that is to say, where there is joint family property or joint family income or, in other words where there exists a Hindu co-parcenary.

Mr. R. C. Ghose, Mr. Hira Lal Chakravarty and Mr. Pabchannan Ghose on behalf of various assesseees have raised most interesting arguments to prove that a Hindu undivided family may be in possession of joint property or income in the absence of the existence of any co-parcenary. They have pointed out that both wives and daughters have wives and daughters have rights of maintenance, and the sons have certain rights even in their fathers self-acquired property. Consequently they have contended that these are co-owners, through they may not be co-parceners. To take one example. Where two brothers with wives, or wives and daughters, but no son are co-parceners, and one brother dies, their contention is that the Hindu undivided family does not come to an end, though the co-parcenary does, because there must be two co-parceners at least, and neither wife nor daughter can be co-parceners. Similarly, it has been argued that the self-acquired property in the hands of his son, ever though he may not have sons of his own alive or yet born.

Undoubtedly there are parts of the text of Mitakshara and judicial decisions which support such a view. Thus with reference to the effect of a bequest of self-acquired property by father to his son, it is stated in Sastris Hindu law, 7th Edition, at page 345, that there is great diversity of opinion on this point which was left open by the Privy Council in the case of Lala Ram Singh v. Deputy Commissioner of Partabgarh (50 I. A. 265). The author refers to the relevant texts from the Mitakshara, to which my attention has been drawn, and comes to the conclusion that a gift of self-acquired property by the father becomes the self-acquired property of the son, unless the donor limits the rights of the son in express terms. On the other hand, at page 361, he admits that according to the Mitakshara, a son acquires from his birth a right also to the self-acquired property of his father, but states that the character of this right materially differs from that acquired in ancestral property.

But Mulla in the 7th Edition, at page 239 states that the self acquired property of Hindu belongs exclusively to him. No other member of the co-parcenary, not even his male issue, acquires any interest in it by birth. He may sell it or he may make a gift of it or bequeath it by Will to any person he likes. It is not liable to partition and on his death intestate, it passes by succession to his heirs, and not by survivorship, to the surviving co-partners, to the surviving co-parceners, *Katama Natchiar v. The Raja of Shivagunga* (1863) 9 M. I. A. 543 and 613. In my opinion, this is the correct view, and the decisions in the cases of *Muddun Gopal v. Ram Buksh* (1863) W. R. 71 and *Hazari Mall Baby v. Abaninath Adhurjoya* (17 C. W. N. 280) mean no more than that self-acquired property given by a father to his son, because ancestral in the hands of the son only upon the birth of his son, that is to say, it is ancestral property in the hands of the son vis-a-vis his son or sons. It is to be observed also that these decisions have reference only to immovable property. Dr. P. N. Sen in his book on Hindu Jurisprudence, being the Tagore Law Lectures for 1909, states at 129-131, that, as he understands the Mitakshara, the right acquired by a son by birth in the property of his father is not limited to any particular kind of property, but extends over all the property of the father, however acquired, although the extent of the rights is not everywhere the same, but depends on the nature of the property. He then discusses the various texts at length and shows that they are conflicting and attempts to reconcile them. Their Lordship of the Privy Council in the case of *Rao Balwant Singh v. Rani Kishori* (25 I. A. 54) observes that "All these old text-books and commentaries are apt to might religious and moral considerations, not being positive laws, with rules intended for positive laws." This fact undoubtedly gives rise to the difficulties which are met with in attempting to construe the various and apparently discrepant text of the Mitakshara, and I sometimes wonder, when it becomes my duty to consider them or to dissolve the various dilemmas which have arisen in attempting their interpretation, especially in a case such as this, where we have to consider ancient texts in an attempts to construe the terms of a modern Act of the legislature.

With regards to the right of maintenance etc., of wives and daughters, several authorities have been quoted to show that they certain rights of co-ownership in their husbands or fathers property. This matter is discussed Banerjees Marriage and Stridhana, 3rd Edition, at p. 146 and following pages. The author draws attention to the rights of a wife to a share on partition and shows that, in one sense, the wife has been regarded as a co-owner with her husband. Sir Dinshaw Mulla, at p. 577 of the Edition to which I have already referred, describes the right of a wife to maintenance by her husband as a matter of personal obligation. He says that "maintenance being a matter of personal obligation, the wife has no claim for maintenance against her husbands property in the hands of a transferee from him." On the other hand, Mayne, in the 9th Edition, says that the "right of a widow to her maintenance arises by marriage and that of daughter by birth, it exists during the life of the father and continues after his death. In is a legal obligation attaching upon himself personally and upon his property. He

cannot free himself from it during his life-time, and it attaches upon the inheritance immediately after his death. It seems, therefore, contrary to principle to hold that, by devising the property to another, he could authorise that other to hold it free from claims which neither he himself nor his heir could have resisted." Gopal Chandra Sarkar Sastri in the 7th Edition of his work on "Hindu Law" at p. 362 discusses the character of ownership in Hindu Law. He says that "ownership or rather co-ownership has a peculiar meaning in Hindu Laws persons entitled to some of the rights that constitute ownership or dominion or property in modern jurisprudence, are called co-owners in Hindu Law of the person having all the person having all the rights included in ownership; the wife is declared to become co-owner of the husband from the time of their marriage... The wife and the male issue hold a subordinate position with respect to the ownership of the property of the husband and of the paternal ancestors respectively."

Whatever these rights may amount to, I am satisfied that the Income Tax Act is not concerned with them, and that the legislature did not intend to enact and has not enacted that a Hindu undivided family in these wider senses is a proper objects for taxation under the Income Tax Act. If it were otherwise, a most absurd and unanticipated position would arise. Every Hindu possessing property or income who married would, ipso facto, become with his wife a Hindu undivided family and subject to taxation as such. The Income Tax Act, so far as Hindus are concerned as individuals, would apply only to bachelors. This cannot have been intended. In my opinion therefore where in the sections of the Income Tax Act a Hindu undivided family is mentioned, a Hindu co-parcenary is meant.

This is sufficient to dispose of the cases of Kanji, Sewdas and Chaturbhuj. Whichever is the correct view about self-acquired property, it seems to me to make no difference to the decision in this case. Whether Kanji's interest in this firm is in law self-acquired or ancestral property is irrelevant. The crucial point is the existence or otherwise of a co-parcenary. Kanji, Sewdas and Chaturbhuj have no sons, and it is beyond dispute that under Hindu Law females cannot be co-parceners. There cannot be co-parcenary without co-parceners. There must be a co-parcenary in fact before there can be one in law. In the absence of sons it is clear that neither Kanji, Sewdas or Chaturbhuj can possibly be regarded as members of three separate co-parcenarys. A co-parcenary under the Mitakshara can only start with the birth of a son, as stated in Mulla, 7th Edition, at page 326.

The position with regard to Moolji, Purshottam and Kalyanji is different. Each has no son or sons. But it has been found as a fact in each case that the origin of their capital was in no sense ancestral, and that they have always treated it as separate, and have never thrown either property or income into common stock. Mr. Pugh has argued on behalf of Moolji that the statement in his affidavit, that the property was joint, amounted to a declaration which was irrevocable, and ipso facto created a co-parcenary of which the members were himself and his son, and that his son became thereupon clothed with all the rights of a Hindu co-parcener and could ask for partition and claim his share in the property.

But such a statement is only evidence which goes to prove the intention of the market. As Sir Dinshaw Mulla states at p. 249 of the Edition to which I have already referred "Property which was originally the separate or self-acquired property of a member of a joint family may become Joint Family Property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established, and it will not be inferred from the mere fact of his allowing the other members of the family to use it jointly with himself." Such a statement as is contained in the affidavit is not conclusive. It may have been made and, in the opinion of the Commissioner, was made in order to defeat the claims of the Income Tax Authorities. It has been disbelieved by both Commissioners. If the son ever claims co-paracenary right against his father, this statement may be available as evidence against him, though even this is not certain, having regard to the positions of Section 54 of the Income Tax Act. But it is not conclusive any more than a declaration about a desire to separate is conclusive evidence of intention upon the question whether a partition has been effected or not. The Commissioner has found in all three cases that there was, in fact, no such intention, and the property was never thrown into common stock, but was always treated as separate.

The result is that the answer to the first question put by the Commissioner must be in the negative; the second question therefore does not arise.

The assesseees must pay the costs of this reference, exclusive of any extra costs caused by the reference back. Costs to be taxed by the Taxing Officer.

JACK, J. - I agree.

Reference answered accordingly