
(1957) 04 AP CK 0018
In the Andhra Pradesh High Court
Case No : Appeal No. 95 of 1952

KALWA DEVADATHAM AND OTHERS

APPELLANT

Vs

UNION OF INDIA AND OTHERS

RESPONDENT

Date of Decision : 11-04-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 14, 22, 23, 25, 25A

Citation : AIR 1958 AP 131 : (1958) 33 ITR 56

Hon'ble Judges : Chandra Redddy, C.J.; Chandra Reddy, J

Bench : Division Bench

Judgement

CHANDRA REDDY, J. - These two appeals are against the judgment of the Subordinate Judge, Kurnool, in O.S. No. 52 of 1950 and No. 54 of 1949. The two suits giving rise to these appeals were instituted by the same plaintiffs for the purpose of setting aside some sales. As the subject-matter of the suits was practically the same and the plaintiffs were the same they were tried together and a common judgment was delivered.

In O.S. No. 52 of 1950 the first defendant is the Union of India, defendants Nos. 2, 3 and 4 the District Collector, Kurnool, Revenue Divisional Officer, Nandyal, and the Tahsildar, Nandyal, respectively. The other defendants are the purchasers of various items of property in auction held by the revenue authorities. The suit was brought for a declaration that the assessment order made by the Income Tax Officer, Kurnool, in G.I. No. 3810/44-45, 45-46 and 46-47 are unenforceable against the suit properties of the plaintiffs and consequently the sales of those properties by the revenue authorities were void and illegal and for other consequential reliefs. The circumstances leading up to this suit are the following :

The plaintiffs, three in number, and their father one Nagappa constituted members of a joint Hindu family. The father carried on business in cotton and yarn and earned large profits. For the accounting years 1944-45, 1945-46 and

1946-47 assessments were made on 25th February, 1948, 12th March, 1948, and 15th April, 1948, and the tax payable by the assessee in regard to these three years amounted to Rs. 1,23,225-5-0. As the assessee defaulted in making the payment, the Income Tax Officer forwarded to the District Collector a certificate under his signature specifying the amount of arrears from the assessee. On receipt of the certificate, the Collector proceeded to recover from the assessee the amounts specified under the Revenue Recovery Act. It is in the process of realisation of these arrears that the properties in suit were brought to sale and purchased by defendants Nos. 6 to 29. Before confirmation of the sales could take place, the plaintiffs moved the High Court of Madras under article 226 of the Constitution and obtained stay of further proceedings. It is to avoid these sales that the present action has been laid on the contentions that the assessments were illegal for the reason that the Income Tax Officer violated the provisions of section 25A of the Indian Income Tax Act (hereinafter referred to as the Act) in that he held an inquiry under that section although he was informed of a partition that took place in the family while the assessment proceedings were pending, that the assessments were based not upon the accounts produced by the assessee but upon the estimates made by the Income Tax Officer and as such not enforceable against the plaintiffs and that the minors were under no obligation to pay the debts as they were avyavaharika debts having been incurred by their father in a trade which was speculative in nature and that in any event items Nos. 46 to 51 which formed their separate properties could not be proceeded against.

The suit was contested by a written statement filed by all the defendants. The defence raised by the Union of India, the first defendant, was that the alleged partition was a fictitious one, the document therefore having been brought into existence with the deliberate intention of avoiding payment of Income Tax, that in fact no claim was put in before the Income Tax Officer that a partition should be recorded and that the assessments were enforceable against the properties in question as they related to a period prior to partition and that lastly the assessments having been made against the father of the plaintiffs as the kartha of the joint Hindu family the plaintiffs share in the joint family properties was liable to tax and the properties were liable for the discharge of the fathers legal liability even under the doctrine of pious obligation.

The trial court gave relief to the plaintiffs only as respects items Nos. 46 to 51, and the suit was dismissed in regard to other properties. The plaintiffs aggrieved by the judgment to the extent it was against them filed this appeal while the Union of India preferred cross-objections as regards items Nos. 46 to 51.

The judgment of the subordinate judge is assailed by Mr. Chalapathi Rao on various grounds. The first contention urged was that the trial court acted illegally in proceeding to make the assessment with full knowledge of partition effected amongst the members of the joint Hindu family without holding any enquiry contemplated by section 25A of the Act with the result that the assessments

could not be said to be assessments under the Act and, therefore, it was not competent to the authorities concerned to levy execution on the basis of such assessments.

Before we examine the soundness of this submission, it is convenient to set out the terms of section 25A :

"25A. (1) Where, at the time of making an assessment u/s 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income Tax Officer shall make such inquiry there into as he may think fit, and, if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect :

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation, the Income Tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place, and each member or group of members shall, in addition to any Income Tax for which he or it may be separately liable and, notwithstanding anything contained in sub-section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; and the Income Tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provision of section 23 :

Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family."

Thus, in order to attract this provision a claim should be made that partition had taken place among the members of the family. It is only then that an Income Tax Officer is required to make an enquiry. The argument that at the time of making the assessment it was claimed on behalf of the family is founded on the contents of Exhibit A- 251, a statement of Nagappa before the Income Tax Officer in the year 1948. The recitals on which reliance is placed in that document are these :

"I am at present living singly. My sons divided from me about ten months back. There is a document to that effect.

One of them was a major and two of them are minors. The guardian to these minor children is my wife. I divided my family properties between myself and my children."

The question for determination is whether this amounts to a claim that a partition had taken place as envisaged u/s 25A. In our judgment, the statement referred to cannot have the effect contended for. It is not sufficient to merely inform the Officer concerned that the family was disrupted or that even the properties were divided amongst the members of the family. There should be a request that an order might be passed to the effect that the family property had been partitioned amongst the members and that an assessment should be levied as laid down in section 25 of the Act. Form C(1), i.e., the form prescribed by the Indian Income Tax Rules which is a form of appeal u/s 25A, gives an indication as to how the claim should be made :

"To

The Appellate Assistant Commissioner of Income Tax.

The day of 19

The petition of of post-office,

District, sheweth as follows :-

1. u/s 25A of the Indian Income Tax Act, 1922, your petitioner/petitioners, who belong to a Hindu family hitherto assessed as undivided, claimed before the Income Tax Officer, at the time of assessment that a partition had taken place among the members of the family and that the joint family property had been partitioned among the various members (or groups of members) in definite portions and prayed that an order might be passed to this effect as laid down in section 25A(1) and that an assessment be lived as laid down in section 25A(2).

(2) By his order, dated the, a copy of which is herewith attached, the Income Tax Officer has refused to pass the order referred to above and make assessments accordingly as laid down in section 25A. Your petitioner/petitioners therefore request(s) that the Income Tax Officer may be directed to pass such an order u/s 25A and to levy an assessment as laid down in section 25A.

Signed.

Grounds of Appeal

Form of Verification.

I/We, the petitioner/petitioners, named in the above petition, do hereby declare that what is stated therein is true to best of my/our information and belief.

Signed....."

It is not pretended that any request was made to the Income Tax Officer either

for recognising the partition or for making an assessment as laid down in that section. The partition deed was not filed before the Income Tax Officer, nor does the father say that he made the request. In Exhibit A-257, the notice issued u/s 80 of the CPC to the Income Tax Officer by the mother of the plaintiffs as guardian through an advocate, it is alleged that a communication dated 1st December, 1948, was addressed to the Income Tax Officer intimating the partition and requesting him not to recover the Income Tax due by their father from the properties. According to this, the last request for the purpose was made only in the month of December, 1948. By that time, the assessments were already over. There is no reference to any claim put forward by the father on behalf of the family at the time of the assessment.

Further, section 25A could not be extended to the instant case as there was no division of all the family properties. The partition deed, Exhibit A-1, does not purport to divide the business amongst the members of the family. The explanation now given by the counsel for the appellants for this omission is that it formed the separate property of the father and for that reason it was not brought into division. We shall immediately show that this is an untenable contention, for, it is evident from all the records that this was treated as family business.

It was further submitted that section 25A could be given effect to the extent to which there was a division of the family properties and a complete division is not a prerequisite to the applicability of section 25A. We do not think this proposition is acceptable. The language of the section makes it plain that the whole joint family property should be partitioned. The words that the joint family has been partitioned imply that all the properties owned by the family were partitioned. *Meyyappa Chettiar v. Commissioner of Income Tax* cited by Mr. Chalapathi Rao to substantiate his contention does not really support him. On the other hand, it has the effect of destroying it and strengthening our view. It is laid down there that an order u/s 25A could come into operation only where in addition to the severance in status there was a partition of all the family properties and until such order was made the family should be deemed to be an undivided family for purposes of Income Tax. It follows that this provision could not come into play when there is a partial partition. So, even if the Income Tax Officer had proceeded in the first instance under that section the result would have been the same, i.e., the request to accept the partition could not have been granted. Quite aside, in the instant case, it would not have made any difference in practice in the particular circumstances of the case whether the assessment was continued to be made as before or levied u/s 25A, i.e., whether it was made on the family as an entity through its manager the father, or made on individual members on the footing of the previous disruption. Even on the latter basis, the assessment was to be made as if no partition had taken place and notwithstanding that the assessment had to be made on the members of the family under sub-section (2) their properties could be proceeded against since all the members were jointly and severally liable for the whole tax so that one or other or all could be

proceeded against. There would thus have been no material difference.

Mr. Vedantachari drew our attention to a ruling of the Supreme Court in *Lakshminarain Bhadani v. Commissioner of Income Tax, Bihar and Orissa* which ruled inter alia that it did not appear necessary when proceedings were initiated u/s 34 read with section 22 of the Income Tax Act to issue notice to every member of the family because the Officer was proceeding to assess the income of the Hindu undivided family as it existed prior to partition and argued on the basis of this that as the assessments were in regard to account years anterior to partition it was not obligatory on the part of the Income Tax Officer to proceed u/s 25A. It is not necessary for us to consider how far that judgment has any relevancy in the context of this enquiry.

We will next consider whether even granting that the Income Tax Officer erred in ignoring the claim under that section it is open to challenge it in a civil court. Section 30 of the Act contains a provision enabling an aggrieved assessee to file an appeal against the order of the Income Tax Officer objecting among other things to an order u/s 25A, and u/s 31(3)(e) the Appellate Assistant Commissioner could direct the Income Tax Officer to make a further inquiry and pass a fresh order or to make an assessment in the manner laid down in sub-section (2) of section 25A. There is a further right of appeal to the Appellate Tribunal u/s 33(1) against the order of the Appellate Assistant Commissioner and that Tribunal could pass such order as it thinks fit under sub-section (4). If the assessee is not satisfied, there is the further remedy given to the aggrieved party u/s 66(1) of the Act under which the Appellate Tribunal could be required to refer to the High Court any questions of law arising out of such order, apart from the powers of revision vested in the Commissioner of Income Tax u/s 33A to set right any irregularities committed by the Income Tax Officers. Thus, it is open to the assessee to avail himself of all the remedies enumerated above.

Despite this, could the correctness of the assessment be questioned in a court of law ? In our opinion, such a suit is not competent, especially in view of section 67 of the Act which recites : "No suit shall be brought in any civil court to set aside or modify any assessment made under this Act.." Mr. Chalapathi Rao argues that the present case does not fall within the purview of the section as his clients do not seek to set aside or modify the assessment made under the Act, but only asked for a declaration that it did not bind them and that their properties could not be sold for the realisation of arrears of tax. This is a distinction without difference. The case of the Privy Council reported in *Raleigh Investment Co. Ltd. v. Governor-General in Council* and relied on by him shows how untenable the argument is. As pointed out by their Lordships "though in form the relief claimed did not profess to modify or set aside the assessment in substance it did". In that case, the prayer was for payment of the sum due by virtue of the notice of demand, the basis of the claim of the assessee being that in computation of the assessable income reliance was placed on a provision of the Income Tax Act which according to him was ultra vires the Indian Legislature

and the assessment was therefore wrong. Their Lordships rejected a submission similar to the one now made because the repayment of the part of the sum due by virtue of the notice of demand could not be ordered so long as the assessment stood. Likewise in the present case, so long as the order of assessment is unassailable, the sales of the properties effected in enforcement of the assessment orders could not be impeached. In the words of their Lordships "the claim for a declaration cannot be rationally regarded as having any relevance except as leading up to the claim for repayment and the claim injunction is merely a verbiage". This case is also an authority for the position that the assessment could not be questioned in a court of law assuming the assessing officer had taken into account an ultra vires provision of the Act. That circumstance was immaterial in determining whether the assessment was made under the Act because it was not a nullity like an order of court lacking jurisdiction and therefore could not be regarded as not having been made under the Act.

In our opinion, this pronouncement of the Judicial Committee governs the instant case and section 67 is attracted to this case as the assessments in question were made under the Act and cannot be said to be outside the Act. What was intended to be excluded was a challenge to the assessment in a civil court. The Act contains a self-contained code setting up a machinery not only for the purpose of ascertainment of the Income Tax but to provide remedies in regard to obligations created by the statute by conferring rights of appeal to be carried to various tribunals.

The rulings cited by the counsel for the appellants are not of much avail to him. *Secretary of State v. Mask & Co.* dealt with section 188 of the Sea Customs Act. The point for consideration there was whether a civil court had jurisdiction to entertain a suit to recover an excess amount collected from the plaintiff by levying a higher duty upon a higher tariff value. The Judicial Committee, reversing a judgment of the High Court, allowed an appeal against the judgment of the sub-ordinate judge who held that the court had no jurisdiction to entertain the suit, opined that the order of the Assistant Collector of Customs to the effect that the articles imported by the plaintiff were assessable at a particular rate was a decision or an order passed by an officer of customs within the meaning of section 188 of the Customs Act and the decision of the Collector of Customs on appeal therefrom which was confirmed on revision u/s 191 was final and the jurisdiction of the civil courts was excluded. In dealing with the question whether the order of the Collector impugned by their Lordships excluded the jurisdiction of civil courts to entertain a challenge of the merits of that decision, they remark :

"It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded the civil courts have jurisdiction to examine into cases where the provisions of the

Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

It is this passage that was called in aid by the counsel for the appellants, but this is not really helpful to the appellants because section 67 has specifically excluded the jurisdiction of the civil courts in regard to the matters specified therein. Nor could it be said that the Officers in this case have not acted in conformity with the fundamental principles of the judicial procedure or that the provisions of the Act have been disregarded. He cited some more decisions which are of this nature. Most of them related to cases where there was substantial disregard of the provisions of law which created the authority of certain statutory bodies which regulated their decision. There is no such infringement in this case. The Income Tax Officer had acted throughout within the scope of the Act. As already pointed out above, there were many remedies available to the assessee to canvass the assessment and if he had failed to do so or if he had availed himself of them unsuccessfully he could not resort to a civil court for questioning their correctness.

In order to get over this difficulty it was urged by Mr. Chalapathi Rao that the rights of appeal or revision or of reference to the High Court are conferred only on the assessee and they could not be taken advantage of by a stranger. In his submission the assessee being only the father he alone could take the assessment in appeal, etc., and the sons had no locus standi to do it and therefore they are not bound by the assessment. It is for this proposition that *Raleigh Investment Co. v. Governor-General in Council* was quoted. We have already referred to this pronouncement and set out the principles laid down therein. It does not deal with any point as to the persons bound by the assessment. That apart, such a situation does not arise in this case. We feel the argument in this behalf is utterly devoid of substance. Exhibits B-22, B-23 and B-24, the assessment orders for the accounting years 1944-45, 1945-46, and 1946-47 respectively, make it abundantly clear that the joint family of the plaintiffs and their father was assessed as a unit. For the accounting year 1944-45 the father seems to have declared his status as an individual but had admitted at the time of the hearing that the business belonged to the family consisting of himself and his two sons and the assessment would therefore be made on the family represented by the assessee as its kartha. For the subsequent years the levy was made on the same footing. It is futile in the face of this material to maintain that the assessee was not the joint family but their father as an individual was assessed to tax. The attitude now adopted is also inconsistent with the stand taken by them in regard to section 25A. That provision of law could be invoked only on the assumption that on that date the family was assessed as a unit. If the assessee was only a particular individual there was no scope to call in aid that section because it has no application to the case of a Hindu family which has never been assessed before as a unit of assessment. It is only in cases where up to the date of the claim the tax was being imposed upon a family as an entity that the relief could be claimed under

that section. This is an incongruous position taken by the appellants and is of no assistance to them. Once a family is assessed as an undivided family it continues to be so assessed even after partition unless and until an order was made u/s 25A recognising the partition.

Further, the case as presented now does not seem to have been put forward either in the notice issued u/s 80 of the CPC (Exhibit A-257) or in the plaint. The averments in paragraph 7 of the plaint are significant.

"Subsequent to the partition between the father and sons, the Income Tax Officer, Kurnool, is said to have made separate orders of assessment against the father under the status of Hindu undivided family for three separate years of assessment, 1944-45, 1945-46 and 1946-47."

We are unable to find in the plaint any attack against the assessment on the ground of the family not being the assessee.

The facts noticed above proclaim categorically that the joint Hindu family of the plaintiffs and their father was the assessee for the accounting years with the father as the manager. The consequence is that they are bound by the assessment so long as it has not been set aside.

An alternative contention pressed upon us by Mr. Chalapathi Rao was that as the assessment was based not upon the books of account maintained by the family and which reflected a true state of affairs but estimated by the Income Tax Officer it was only a fictional debt and cannot be regarded as a family debt. The answer to this has already been furnished by us. If the plaintiffs were also assessee being members of the joint family, the remedy to be pursued by them has already been indicated and cannot form the subject matter of the suit. Even otherwise this has to be repelled. The Income Tax Officer is not bound to accept as correct either the return submitted by the assessee or the accounts maintained by him in support of it. If the assessee fails to produce evidence in support of his return or the accounts produced are not reliable it is compulsory on the part of the Income Tax Officer to make the assessment based on his judgment and determine the sum payable by the assessee to the best of his judgment. The only test is whether he has exercised his judgment honestly and did not act dishonestly or vindictively or capriciously. The judgment of the Privy Council in *Commissioner of Income Tax, United and Central Provinces v. Badridas* contains an exhaustive exposition on this topic and answers the argument advanced by the counsel for the appellants. The law on the subject is stated by their Lordships in the following passage :

"The officer is to make an assessment to the best of his judgment against a persons who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the

assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense too the assessment must be to some extent arbitrary."

On these remarks of their Lordships of the Privy Council, there is little scope for the submission that the assessments being arbitrary they could not be enforced against the appellants. In the case on hand, the Income Tax Officer found that the account books did not show the profits earned by the company in the business. He found that the entries were concocted for the purpose of evading the tax. So, he summoned the account books of the customers of the assessee and on a comparison of the various entries with reference to the account books of the customers he found that the assessee had concealed large sums of money earned by him by way of profit. The Income Tax Officer who had gone into these matters at some length had given several reasons in support of the conclusion that the assessee had suppressed a large part of his profits. In those circumstances, he had no option but to make an estimate of the income of the family which, according to him, was a reasonable one and which does not appear to be arbitrary.

The learned counsel next raised questions as to the liability of the sons to pay the debts of the father which arose out of speculative trade and as such partook of the nature of *avyavaharika* debts. According to him, the business for which the debts were contracted by the father was his separate one with which the family had no concern. He went further and stated that as the debts were incurred by him in a speculative trade and in regard to wagering contracts they partook of the nature of *avyavaharika* debts and hence they would not come within the theory of pious obligation of the sons. Alternatively, he maintained that the sons were not liable to discharge the debts of the father which were post partition debts, and not pre-partition debts. These various questions do not really arise in this case and the arguments advanced were absolutely unrelated to facts. On the assumption that the joint Hindu family was not the assessee, were grounded all the contentions which are pressed on behalf of the appellants. We have already reached the decision that the assessee being the family consisting of the plaintiffs and their father they are liable to pay the tax so long as the assessments stands uncanceled.

Even apart from that, there is nothing to be said in favour of the appellant on merits. Almost all the properties owned by the family and which formed the subject-matter of the alleged partition were traceable to the profits of the business. The acquisitions made by the father took various forms. What he acquired for the family was in the shape of landed properties, house, investment in several concerns and banks, and shares in the companies. The ancestral property consisted only of two houses and two acres of wet land as admitted by P.W. Nos. 4 and 6 and it was Nagappa, the father of the plaintiffs, that obtained

extensive properties for the family as appears from the evidence of P.W. Nos. 4, and 6 even Nagappa. P.W. No. 4, mother of the plaintiffs, admitted that by the time he joined her husband he was having only two houses and he purchased thirty houses within the last ten years. P.W. No. 6 deposed that Nagappa was the biggest dealer in yarn in Nandyal and was making good profits from 1941 onwards and that after 1940 he purchased properties worth a lakh and a little more and he could do so because he was making good profits. He also stated that about 25 years back all the property possessed by the family was worth about Rs. 25,000. To a like effect are the statements of Nagappa in his cross-examination in the witness-box. That the property was worth at least Rs. 1,25,000 appears in Exhibit A-1, the deed of partition. In such a situation, there is absolutely no force in the argument that the father contracted debts for the business which was of a speculative nature and, therefore, the debts were tainted with immorality and illegality for which reason the liability of the sons by reason of the theory of pious obligation is excluded. It is in respect of the huge profits made by the father that the Income Tax was imposed and so the family being in enjoyment of these properties is liable to bear the burden of the tax and they cannot escape payment of tax by taking refuge under untenable pleas.

Even the submission that it was a separate business of the father and not family business is equally unsubstantial. Apart from the statement made by the father before the Income Tax Officer that the business was joint family business, Exhibit A-1 itself supplies evidence of the family having so treated it. As already remarked, most of the properties were purchased with the income derived from the family. They were treated as those of the family and were purported to be divided amongst the various members thereof. It is only on this footing that Exhibit A-257 was issued. The recitals in paragraph 5 of that notice, viz., that the plaintiffs properties were not liable to be proceeded against for recovery of the Income Tax due by their father on the ground that the trade which was carried on was not ancestral but a new and a speculative one, that the debts were in respect of his wagering and black marketing transactions etc. are explicable only on that hypothesis. The same result flows from some of the averments in the plaint also. Paragraph 3 of the plaint sets up the case that the father was doing "new, speculative and reckless business" in yarn (consisting of wagering contracts) calculated to ruin the family and at that juncture their mother intervened and enforced a final partition. How could separate business of the father of the description given above be calculated to ruin the family. If at all, that would affect only the share of the father. Thus the contents of paragraph 3 are only in conformity with the business being joint family business. Moreover, the members of the joint family accepted the properties acquired by the manager as those of the family which denotes that the business out of which the profits accrued was recognised as that of the family. Exhibit A-1 recites inter alia "till now our entire family has been enjoying movable and immovable properties jointly". It is also significant that there is nothing to indicate in the document that the father was indulging in speculative transactions which were detrimental

to the family or that the business was a separate one unconnected with the family. On the other hand, the reasons given for the partition are that the father was neglecting the education of his children and that he had fallen into evil ways. We shall presently show that these recitals were concocted by the father himself in order to defraud and defeat the creditors and the Income Tax Department. We have already shown that almost all the properties owned by the family were the acquisitions of the father. If the business was the separate business of the father and not of the family, then the earnings from it will belong exclusively to the father and the properties acquired therewith would constitute his self-acquisition in which case plaintiffs will have no sort of right or interest therein. So, assuming for arguments sake that it was separate business, they can take the properties only subject to the liability to pay the debts of the father. However in this case, it has only academic interest. There is thus no substance in the contentions either as regards the character of the business or the binding nature of the debts etc.

We will now say a word about another point raised on behalf of the appellants that the sons could not be required to meet their demands based on the assessment as that was a debt that arose subsequent to partition as the assessment was made only subsequent to partition. This argument is founded on some observations of the Privy Council in *Doorga Prosad v. Secretary of State*. In their Lordships opinion "although Income Tax may be properly due for a certain year, it is not in law so due. It is calculated and assessed by reference to the income of the assessee for a given year. But, it is due when demand is made u/s 29 and section 45 of the Act. It then becomes a debt due to the Crown but not for any particular period." These remarks do not lend any countenance to the contention urged by the appellants. Their Lordships made them in dealing with the objection to the certificate issued by the Income Tax Officer. In column 4, no period for which the demand was due was stated as required by the heading to that column. Their Lordships were not considering whether the liability had not arisen prior to the making of the assessments. The proposition cannot be disputed that the liability to tax does not depend on the assessments. It arises by virtue of the charging section. All that is done by the assessment is quantifying the liability which is created by sections 3 and 4.

The principle is stated by the Privy Council in *Wallace Bros. v. Commissioner of Income Tax* thus :

"the charge for tax at the rate fixed for the year of assessment is a charge in respect of the income of the previous year, not a charge in respect of the income of the year of assessment as measured by the income of the previous year..... the rate of tax for the year of assessment..... will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone. and it arises not later than the close of the previous year, though quantification of the amount payable is postponed."

The doctrine of *Chatturam v. Commissioner of Income Tax, Bihar*, decided by the Federal Court is in accord with this. Relying upon the ruling of the House of Lords

in *Whitney v. Inland Revenue*, it is ruled by the Federal Court that the liability to tax is not dependent on the assessment; that *ex hypothesi* has already been fixed and the order of assessment merely fixes the amount of liability which is already definitely and finally created by sections 3 and 4 which are the charging sections. What follows is that the liability to pay tax in regard to accounting years 1944-47 had arisen before partition though the assessments have been made subsequently and it is inapt to describe it as a post-partition debt. This contention also therefore fails and is rejected.

There remains for consideration the objection that all the sales ought to be set aside for the reason that the purchasers did not deposit the balance of the price in time. The point made is that the auction-purchasers who paid out 15 per cent. of the purchase money at the time of the sale had not deposited the balance within the time prescribed and consequently all the sales have become void. Support is sought for this argument in the provisions of section 36, clause (4), of the Madras Revenue Recovery Act which provides :

"Where the purchaser may refuse or omit to deposit the said sum of money, or to complete the payment of the remaining purchase money, the property shall be resold at the expense and hazard of such purchaser, and the amount of the loss or expense which may attend such refusal or omission shall be recoverable from such purchaser in the same manner as arrears of public revenue. Where the lands may, on the second sale, sell for a higher price than at the first sale, the difference or increase shall be the property of him on whose account the said first sale was made."

But we do not think this section renders any assistance to the appellants. The clause "the property shall be resold at the expense and hazard of such purchaser" etc. only implies that the resale is at the risk and hazard of the first purchaser. It does not mean that the Collector is compelled to hold a resale in the event of the first purchaser not depositing the remainder of the purchase money within thirty days. It is in the discretion of the officer concerned to take action under that rule and he is under no obligation to put it into operation. He has surely discretion to extend the time for paying the balance of the purchase price, in proper cases.

This opinion of ours is reinforced by the judgment of the Madras High Court in *Sonaya v. Kalamegham*. There the learned Judges remarked that the intendment of the section was not to deprive the Government of an election to give credit to the person in whose favour the property was knocked down and "to compel the Government in every case to proceed to a resale even where there may be no risk of eventual failure of payment". Moreover, that rule does not envisage the eventuality of the sale itself becoming void. Assuming it was compulsory for the Collector to have a resale and he was failed to do it that could not result in the sale being rendered void. So long as the resale is not held the original sale stands. This circumstance also brings out the force of the reason that the intention of the Legislature was not to deprive the officer concerned of the power

to treat the first sale as subsisting despite the default of the first purchaser to make the necessary deposit within the prescribed time.

Furthermore, if the deposit could not be made in time, the purchasers are not to blame. The plaintiffs themselves were responsible for this as is evident from paragraph 9 of the plaint. As mentioned at the outset, the High Court of Madras stayed all proceedings in furtherance of the sales in C.M.P. No. 4838 of 1950 which was taken out by the plaintiffs. Having thus prevented the purchasers from making the necessary deposit they cannot now turn round and say that the sales should be treated as non est by reason of the requisite deposits not having been made within the prescribed time. Therefore, this argument also lacks force and is overruled.

It follows that the judgment under appeal is correct and is not open to any exception and the suit was rightly dismissed by the trial court with regard to items Nos. 1 to 45.

In the result, the appeal is dismissed with costs.

We will now take up the cross-objections filed by the first defendant which involved items Nos. 46 to 51. These properties were purchased under Exhibit A-230 on 15th March, 1944, in the names of the plaintiffs for a sum of Rs. 23,500. They were also brought to sale on the footing that they were the joint family properties of the assesseees. The action was raised by the plaintiffs disputing the claim of the Department that they were the properties of the joint family and asserting that they formed their separate properties.

The main point that falls for determination is whether the acquisition was by the father benami for the whole family in the names of the sons. In the context of this enquiry, the determining factors will be the sources of the purchase money and the intention of the purchaser in acquiring the property in the name of another, i.e., whether the intention was that he should retain the beneficial interest though the purchase was in the name of another. It is incontrovertible that the burden of proving that a transaction is sham or that the person in whose name the property stands is not the real owner is on those who assert it, the ordinary presumption being that the apparent state of affairs is real. To put it differently, the apparent tenor of the document should prevail unless and until it is established that the document was not really for the benefit of the person in whose name it was executed.

We should first therefore address ourselves to the question as to who furnished the consideration. The case of the plaintiffs in this behalf is that the money for making the purchase was supplied by their maternal grandmother while that of the Department is that this came from P.W. 8 himself. We will have to examine the material to see if the plea of benami is made out.

The counsel for the cross-objector relied on the version of Nagappa as presented before the Income Tax Officer (Exhibit B-22) which may be extracted here :

"Questioned about it, the assessee's explanation at first was that necessary funds for this investment came from his mother-in-law Mahankali Seshamma. He later on varied this version and said that part of it, namely, Rs. 13,000, was paid by his mother-in-law and the balance was from out of the funds left behind by his grandmother, Gaddam Lakshmakka. His mother-in-law was interviewed by my inspector who recorded a statement from her. She stated that when her husband died, she might have had with her about Rs. 4,000 to Rs. 5,000 which she gave to her daughter, i.e., the assessee's wife, now and then."

The explanation said to have been given by Nagappa was not put to him when he was in the witness-box and as such it cannot have any evidentiary value. But the money invested for the purchase of these lands was taken into account for computing the profits derived by the family in the yarn business for the purpose tax. In other words, the source of purchase money for this land was traced to the family business, the story that either the whole or part of it having been contributed by the mother-in-law having been disbelieved.

We will next turn to the oral evidence bearing on this aspect of the case. P.W. No. 4 deposed that her mother purchased these properties for the plaintiff with the money given to her by her, i.e., the money which was bequeathed to her mother Seshamma by her father. Seshamma is said to have given the money to Nagappa when the properties were purchased and the latter paid to the vendee before the sub-register. This story is not capable of belief. That her husband could not have willed away his property to Seshamma could be gathered from the admission of P.W. 4, that he and his brother were joint till the former's death, that the expenses and earnings of Seshamma's husband and his brother were joint. The will said to have been executed was not forthcoming and no explanation is furnished for its non-production. In the course of the cross-examination, witness changed the story by saying that her uncle left everything to them as he had no children or family but he did not execute any document in favour of her mother, that at the time of his death he stated orally that her mother should take all the properties and that her mother and maternal uncle alone knew of what her mother got from her paternal uncle. The witness had to admit that her mother was not having any accounts of money so far as she knew and she did not know whether her mother was lending any moneys to any one. These discrepant and contradictory statements suggest that there is no truth in her story.

P.W. 5 sought to corroborate P.W. 4 in the chief-examination. He deposed that he saw Seshamma giving Rs. 6,000 to Nagappa four years back which became six years in the next breath, that a month later Seshamma brought Rs. 3,000 and gave it to P.W. 4 and Nagappa, that ten days after this Seshamma brought Rs. 12,000 and gave it to Nagappa and P.W. 4 and the latter gave it to Nagappa, that Seshamma had no immovable property other than the house which she had bequeathed to her daughter under a will, which as we have already remarked, had not seen the light of the day. But the witness did not know how Seshamma got the cash. Down below we find a varying version put forward by this witness.

He stated that "on the date of registration of Exhibit A-230 Seshamma had asked P.W. 4 to bring the money. That day the key of the iron safe was with P.W. 4 only. P.W. 4 brought some money and we counted Rs. 18,000 and took it with us. P.W. 4 brought Rs. 18,000 only and that amount was kept in a bundle." Apart from the discrepancy noticed above, the earlier part does not tally with the dates on which various payments were made to the vendees as disclosed by Exhibit A-230. As pointed out by trial court he is interested in the plaintiffs and was "accommodating the plaintiffs to the best of his mite." No weight need therefore be attached to his testimony.

P.W. 8 tried to give confirmatory evidence on this part of the case by showing that the properties in dispute were purchased by Seshamma, his mother-in-law, for the plaintiff, and that the latter paid her money as consideration for Exhibit A-230. But this does not fit in with his statements in the cross-examination :

"She was coming to our house till four or five years back. From four or five years back, she was living in our house only. She died in our house only. By the time of her death she had some land, a house and some cash. She gave these properties to her daughter by a will. She was having a house at Atmakur also by the time of her death. I know that my mother-in-law executed a will but I do not know when she executed it."

If, according to him, all the properties of Seshamma including cash were given to P.W. 4 under a will she could not have paid Rs. 23,500 into the hands of this witness for the purchase of the lands. The statement given by Seshamma before the Inspector of Income Tax reveals that when her husband died she might have had with her about Rs. 4,000 to Rs. 5,000 which she might have given to her daughter, the assessee's wife, now and then. This statement was marked by consent. P.W. 8 was questioned about this when he was in the witness-box. The answers given by him were :

"I learnt she gave statement before the Income Tax Inspector. I sent a wire to the Income Tax authorities that my mother-in-law's statement was taken by coercion. I did not give a notice to the Income Tax authorities to produce the telegram."

Thus, the story given by each of the witnesses in their regard conflicts with that of other. This is because they came forward to speak to something which had no existence. The case of grandmothers gift had to be put forward, as any other theory might not appear even plausible. On the material on record, the inference is inescapable that the money for buying the properties was supplied by Nagappa, the manager of the family, and not by Seshamma.

Even the trial court was not prepared to give any credence to the statements of P. Ws. 4, 5 and 8 in this regard. After discussing elaborately the evidence of these witness bearing on this aspect of the matter and rejecting their testimony, it summed up the position thus :

"Thus, there is no satisfactory evidence at all to show that P.W. 4s mother had advanced the money for making the purchase of items Nos. 46 to 51. Thus, there is no satisfactory evidence at all to show that the purchase under Exhibit A-230 was made with the money supplied by M. Seshamma."

Nevertheless, the trial court reached the decision that the transactions impugned as benami were not proved to be such by the Department for the reason that the burden of proving that the purchase was really for the benefit of the family lay heavily on the defendants, that there was no evidence that the consideration proceeded from the joint family funds and that lastly there was no reason for P.W. 8 to make purchases in the names of plaintiffs Nos. 1 and 2 instead of in his own name if the purchase was really for the family when admittedly he purchased very valuable properties in his own name between the years 1943 and 1946. We are unable to agree with the trial court that it was not shown that the consideration for the sale deed had not proceeded from the father. If the story that the money was found by the grandmother of the plaintiffs is rejected, we think the only reasonable inference to be drawn is that it is the father that utilised a part of his profits for this purpose. In this context, it must be remembered that the ostensible vendees, i.e., plaintiffs Nos. 1 and 2, were minors at that time and it is not their case that apart from the alleged gift of this money by the mother-in-law they had any other source of income. Added to this is the circumstances that the Department treated the purchase money as having been a part of the earnings of the joint family. A case of this kind should be judged on reasonable probabilities and the legal inferences arising from admitted facts as it is not always possible to obtain evidence which conclusively establishes it. A careful appraisal of all the facts leads to the conclusion that part of the profits of the business formed the bulk of the consideration for sale in question.

As regards the finding of the judge bearing on motive, we must observe that he had overlooked an important factor. At that time, an attachment of the properties of the family was pending. A suit was filed by one Kamaji Saremal Firm against Nagappa in 1942 for about Rs. 16,000 and an attachment before judgment was effected. It is seen that on the date on which the purchase was made the attachment was subsisting and it was raised only on 31st August, 1944, when the suit was dismissed by the trial court. So, in taking the property in the name of the minor sons the object of the father is evidently to keep it beyond the reach of the creditors. The learned judge poses the question as to why Nagappa who acquired large properties in his own name between the years 1945 and 1946 should resort to benami transactions in respect of these items. The answer is this. The exact dates of the purchases are not known. In all probability, they might have been bought after the dismissal of the suit. It is argued that merely because the father supplied funds for this purchase it does not follow that the ostensible vendees had no beneficial interest and that the purchaser intended to reserve the benefit to the whole family. We agree that it does not by itself indicate that the beneficiary was the family. But, in the circumstances of the

case, it is difficult to predicate that the father intended to donate the properties of the sons. As already remarked, the family properties were under attachment. There is another factor which has some bearing on the question. At the relevant time Nagappa had only two sons and the family properties will ultimately go to them only. Why then should the purchase be made in the name of the two sons and not in the name of the manager of the family except it be to secure it for the family by screening it from the creditors ? These considerations are pertinent in this inquiry. In arriving at a decision in such matters, it is the cumulative effect of the circumstances that should weigh with the court. Each fact viewed in isolation may not furnish any decisive answer. In this context what Lord Radcliffe stated in *Edwards (Inspector of Taxes) v. Bairstow* is :

"I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be in neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

On a review of all the facts and the surrounding circumstances we have reached the decision that these items were purchased by Nagappa in the names of the first and second plaintiffs benami for the family. That is the only way in which he should have thought of fulfilling his object, namely, to defeat the creditors. This is sufficient to dispose of the cross-objections.

It was faintly argued before us that the requisite notice was not served on the plaintiffs; but this point was not taken in the lower court evidently because there was no substance in it. There has been no investigation into this matter by the trial court. Even otherwise, we feel it is unsustainable in the view we take of the nature of the partition. In our opinion, the partition was a sham and colourable one designed to serve as a cloak for keeping the property from the reach of the creditors.

A scrutiny of the recitals of the document, the subsequent conduct of the parties and other relevant factors can only lead to the reasonable inference that the partition was not a genuine one.

Before we enter upon a discussion as to the genuineness of the partition we may conveniently deal with the contention that if the object of the parties is found to be to place the family properties from the reach of the fathers creditors the partition must be found to be a real one since a sham one would not serve the purpose. The foundation for this argument is a judgment of the Madras High Court in *Ramanathan Chettiar v. Shanmugam*. We cannot subscribe to this proposition. The ruling cited did not lay down any rule in such broad terms. On the facts of the case, the learned Judges decided that there was an effective partition even if it was an unequal one by reason of the father having been allotted a smaller share. The passage which gave occasion to this argument is found in page 387 of the report :

"But these considerations, while no doubt giving rise to a strong suspicion that

the parties intended to secure, if possible, the sons shares in the family properties from the reach of the fathers creditors as suggested for the appellants, do not lead to any inference that the transaction was not intended to be operative between the parties. Indeed, the very motive which according to the appellants prompted the execution of the deed at this juncture would be a strong reason for supposing that the parties intended to bring about a real partition, for a sham transaction would not serve the purpose they had in view."

The following sentence makes it abundantly clear that the decision is based on the facts of the case : "On the other hand several witnesses including the writer and attestors deposed that the partition was due to the quarrel between the two wives of Subrahmanyam Chettiar" etc. In the opinion of the learned Judges, there were real causes for entering into partition.

Moreover the learned Judges in setting out the effect of the authorities have stated definitely that a mere colourable partition not meant to be operative could be ignored and the creditor could enforce his remedies as if the parties still continued to be joint. It was a misreading of the judgment that was responsible for the decision of the trial court on this subject.

There is no invariable rule that every family partition brought about for the purpose of defeating the creditors should be regarded as a real one. The object of keeping the property out of reach of the creditors could be fulfilled by resorting to inoperative partitions. The intention to defraud the creditors could be effectuated by making them believe that there was a genuine partition in the family and thus save the shares shown to have been allotted to the other members of the family in the document for the family while the real object might be that the members should continue to live together sharing in the enjoyment of the property and the erstwhile manager continuing as such thereafter also. Such a colourable transaction can be used to prevent the creditors to have recourse to the family properties for realising their debts. Instances of colourable partitions used as mere devices to defeat the creditors are to be found in decided cases. See *Indarpal v. Imperial Bank* and *Krishna Swarup v. Brijraj Singh*. In the second of these two cases it was held that a decree for partition at the instance of the minors sons should be treated as a sham one and ignored by the creditors and they could proceed against the share allotted to the sons in execution of the decree obtained by the creditors if the suit for partition was promoted by a desire to defeat the rights of the creditors and was not made in good faith. As already pointed out, the very ruling relied on for the appellants furnishes an authority for the view we have taken. The submission on this topic is therefore overruled.

It was next urged that the partition was a bona fide one as it was primarily intended to protect the interests of the minor sons against a father who was acting to the detriment of the sons. There is very little room for this contention in the circumstances of this case. At the outset, it must be remembered that Exhibit A-1 was brought into being about a week after a decree was passed by the High Court in A.S. No. 174 of 1945 reversing that of the trial court. We have already

pointed out that prior to 1947 the father had acquired vast and extensive properties for the family. That could not have been the attitude of a person who was either ill-disposed towards his sons or at any rate not actuated by desires to promote their interests. Further the reasons set out in Exhibit A-1 for partition are altogether different from those mentioned in the plaint in O.S. No. 95 of 1951, and that the former ones were merely imaginary could be gleaned from the admissions made by P.W. 4, the mother, especially with regard to the education of the minors. There is very little scope for attributing hostility to P.W. 8 towards his sons. On the other hand, his only anxiety appears to have been to earn as much property as possible for the children and to preserve it for them. Towards this end, he was prepared to defeat and delay the creditors, and he was exercising his ingenuity in achieving his object. In the so-called partition the share shown to have been allotted to him is very small when compared with that allotted to the sons. For his share he was allotted a debt of Rs. 12,000 which could never be realised as could be gathered from his deposition and also properties which were not equal in value to those allowed to the sons. Moreover immediately, under Exhibit A-1, he settles upon his wife the major part of the properties that are alleged to have fallen to his share and he sold away one of the houses. After doing this, he wanted the Income Tax Department to understand that no useful purpose would be served by coercive steps as the property allotted to him that remained after disposal of a good part of it as indicated above was insufficient to meet the demands of the Department. Every attempt was being made by Nagappa to evade payment of debts and the so-called partition was one of his maneuvers in that direction. That not only then but even subsequently he has been taking keen and active interest in his sons is evident from the fact that he was really prosecuting the present suits on behalf of the sons. In the words of the trial judge :

"Though she (P.W. 4) has strongly denied all manner of connection of P.W. 8 with the institution of these suits by the plaintiffs she seems to be totally ignorant of all particulars regarding these suits. The maternal uncle of P.W. 4 who is said to have been her adviser and who is also said to have been responsible for bringing about the partition under Exhibit A-1, has not been examined as a witness for plaintiffs. There is nothing to show that the maternal uncle of P.W. 4 has been taking any interest in these suits. I feel that both these suits are engineered by P.W. 8 himself and that P.W. 8 is the only person that has been attending to the prosecution of these suits."

There can therefore be no question of any one interested in the minors trying to save the minors from the reckless conduct or the hostile attitude of the father. There is no acceptable evidence that he ever acted prejudicially to his minor sons. Nor could there be any ground for such apprehension.

In this context, we are aware of the rule that it is for the person who alleges that a partition or any transaction is sham or colourable to establish it. With this in mind, we have to assess the evidence bearing on the nature of the transaction

evidenced by Exhibit A-1. In the decision of the question as to the genuineness of the partition it is not out of place to remember that the plaintiffs were at that time minors being less than 14, 11 and 3 years respectively as seen from the plaint. This is no doubt not a conclusive circumstance. But if the partition was to take effect, some one was to look after the properties to be allotted to the minors. It is in this connection that the evidence of D.W. 1 and the admissions of P.Ws. 4 and 5 have great importance. D.W. 1 who is an independent and disinterested witness deposed that he had known P.W. 8s family for 40 years, that his wife and children were still living together in the house opposite to his house and that P.W. 8 was collecting rents from all the houses which belonged to the joint family. He seems to be a witness worthy of credit having no axe to grind by giving false evidence against the plaintiffs and we can safely act upon his testimony. P.W. 4, the mother, who is alleged to have been very anxious to bring about the partition stated that her maternal uncle was looking after all the matters, that sometimes the tenants of her sons properties executed a lease document at his house and that the clerk got them executed and brought them to her and that he knew which lands were leased to which tenant. She was unable to say to which particular share any particular land of the family was allotted and did not remember the particulars of the properties allotted to her sons. She did not even know whether the husband was indebted to any one by the date of partition. P.W. 5 who was put forward as the clerk of P.W. 4 managing the properties of her sons in spite of his anxiety to help the plaintiffs had to admit that he could not say which house was leased out to which tenant. He could not give particulars with regards to some of the houses. He could not say whether Sirigiri Venkata Seshanna executed any lease deed in favour of plaintiff. The admissions of P.Ws. 4 and 5 have the effect of confirming the version of D.W. 1 that it was really the father that was still managing the family and that they were all living together and there was really no disruption of the family. It has been brought out in the cross-examination of P.Ws. 4 and 5 that they had absolutely no knowledge of the affairs of the family and that they had nothing to do with the management. Again in the claim proceedings initiated by the present plaintiffs when the properties in dispute were brought to sale in execution of the decree in O.S. No. 7 of 1944 already referred to, the subordinate judge found on the affidavits filed by the parties before him that the petitioners therein, i.e., the present plaintiffs, were residing in the same house as their father and that the judgment-debtor himself was in actual possession of the attached property. In these circumstances, we are inclined to take the view that the partition was not intended by the parties to have any effect and the family continued joint as before with the consequence that the properties in dispute had not lost their character as joint family property and could thus be proceeded against for recovery of the arrears of tax under the Revenue Recovery Act. The result is that the objections are allowed with costs and the decree of the trial court to that extent is modified; in other words the whole suit is dismissed with costs.

Appeal dismissed.