**(1976) 12 PAT CK 0008**

**In the Patna High Court**

**Case No :** Civil Writ Jurisdiction Case No. 521 of 1973

Mohan Lal Agarwalla and Another — APPELLANT

Vs

Rameshwar Lal Agarwalla and Others — RESPONDENT

**Date of Decision :** 06-12-1976

**Acts Referred:**

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 171

**Citation :** (1978) 112 ITR 457

**Hon'ble Judges :** P.S. Sahay, J;Hari Lal Agarwal, J

**Bench :** Division Bench

**Advocate :** B.P. Rajgarhia, Shambhu Prasad, Deb Prasad, Suresh Prasad and A. Sahay, for the Appellant; N.N Roy and Jaya Roy for respondents Nos. 1 to 9, Pralay Kumar Sinha, for respondent Nos. 10 to 11 and K.K. Jhunjhunwala, for the Respondent

# Judgement

Hari Lal Agarwal, J.—This writ application relates to an Income Tax assessment proceeding for the assessment year 1970-71. One M/s. Rameshwarlal Bansidhar, consisting of Rameshwarlal Agarwala himself, his brother Bansidhar and their sons, was being assessed as a Hindu undivided family, Rameshwarlal Agarwalla being the karta of the joint family. On an earlier occasion, that is, during the course of the assessment proceeding for the year 1961-62, the said Rameshwarlal Agarwalla (respondent No. 1) on March 19, 1964, as karta, had filed a petition before the Income Tax Officer (respondent No. 12) informing him that there had been a partial partition in the joint family of business and properties on June 30, 1959, and offering to pay half of the tax amounting to Rs. 4,503 and throwing the liability for the balance on his brother, Bansidhar. Upon filing of the said application, a proceeding u/s 25A of the Indian Income Tax Act, 1922 (hereinafter called the old Act), was initiated by the Income Tax Officer. The partition was claimed on the basis of a Chitha dated July 1, 1959, drawn on a plain paper. The petitioner''s father, Bhansidhar, however, contested the claim of partition of his elder brother, Rameshwarlal. The Income Tax Officer, by his order dated March 19, 1966 (annexure F), to the supplementary affidavit filed by respondent No. 10 today, rejected the claim of Rameshwarlal and assessment was made treating the family as an undivided Hindu family.

2. An appeal was taken before the Appellate Assistant Commissioner by Rameshwarlal which was dismissed (vide annexure G) and so was the fate of the second appeal filed by him before the Income Tax Appellate Tribunal. He then filed a writ application being C.W.J.C. No. 760 of 1972. Thiscourt, on a consideration of the facts and circumstances of the case, and taking the view that there had been a violation of the principles of natural justice, set aside the order of the Tribunal and sent the matter back " for a fresh disposal of the appeal before it in accordance with law and in the light of this judgment " (vide annexure 7). It may be mentioned here that this court made certain observations and directed the Tribunal to consider the same. When the matter went to the Tribunal after the remand, the Tribunal, in its turn, set aside the orders of the lower authorities and remitted the matter back to the Income Tax Officer to pass a fresh order " after allowing proper opportunity to the karta as well as to the other members of the family and examine all the papers which may be relevant for deciding the issue ". The Tribunal also gave certain directions to the assessing officer. This proceeding, however, is said to be still pending. But when the assessment proceeding for the period 1970-71 was going on, Rameshwarlal filed another petition on September 7, 1972, before the Income Tax Officer (respondent No. 12) stating that there had been a total partition of his undivided Hindu family properties among the two branches of the two brothers aforesaid, namely, Rameshwarlal and his brother, Bansidhar, on the basis of the said Chitha dated July 1, 1959, on and from June 30, 1959. The Income Tax Officer started an enquiry u/s 171 of the Income Tax Act, 1961 (hereinafter referred to as the new Act), a provision analogus to Section 25A of the old Act. He issued letters to both the brothers and examined them on solemn affirmation, and on consideration of the materials that were produced by the said parties, by his order dated March 26, 1973 (annexure 6), came to the conclusion that "there has been a total partition of the joint family properties on June 30, 1959, as evidenced by the Chitha dated July 1, 1959 ". He accordingly allowed the claim of partition with effect from July 1, 1959. This order is under challenge in the present writ application by the petitioners who are the two sons of the aforesaid Bansidhar. The other members of the family have been added in the category of the respondents.

3. The ground advanced in challenge of the impugned order by the petitioners is that the Income Tax Officer passed the order without any notice to them and thereby he committed infraction of the provisions contained in Sub-section (2) of Section 171 of the new Income Tax Act which requires that the Income Tax Officer shall make an enquiry only after giving notice of the enquiry to all the members of the family,

4. A counter-affidavit has been filed on behalf of respondents No. 1 to 8. These

 

respondents have stated that the petitioners had full knowledge of the proceeding in question and that their father, Bansidhar, was taking full interest in the enquiry conducted by the Income Tax Officer on their behalf as well. It has further been asserted that full opportunity was allowed by the Income Tax Officer to the parties to produce evidence that they desired.

5. In the counter-affidavit filed on behalf of respondent No. 12, it has been stated that right from assessment years 1961-62, when the claim for partition of the Hindu undivided family was first made, all the petitioners were never given any notice, rather notices were always issued only to the two brothers representing the two branches of their smaller Hindu undivided family (wrongly stated in the counter-affidavit as bigger Hindu undivided family). He has also reiterated the statement made by the contesting respondents that full opportunity was given to the two brothers and a proper inquiry was conducted in the matter. It is not necessary to state the other facts brought on the record of this case for the view we are proposing to take in the matter.

6. We have heard learned counsel for the parties at great length and we feel satisfied on the facts of this case that in view of the fact that the father of the petitioners, Bansidhar, who had been contesting the claim of his brother, Rameshwarlal, for partition all through, was fully representing the interest, it cannot be said that there was any infraction of the requirement of the provisions of giving notice of the enquiry contemplated u/s 171 of the new Income Tax Act. The petitioners have failed to satisfy us that there is any conflict of interest between them and their father. It appears that Bansidhar has filed an appeal against the impugned order before the Appellate Assistant Commissioner and that appeal is still pending although it was at one time heard in part. It also appears that a notice had been issued to the petitioners as well of that appeal and the petitioners had appeared through their advocate and had participated to some extent in the said proceeding. A strong argument was, therefore, raised on behalf of the respondents that the petitioners should not be permitted to pursue this writ application as they have already availed of the internal alternative remedy which may be equally efficacious and complete, so much so that the petitioners themselves have appeared in the said proceeding. Learned counsel appearing for the petitioners, however, contended that the appeal could lie u/s 246 of the new Income Tax Act before the Appellate Assistant Commissioner only at the instance of the assessee who might be aggrieved by an order of the Income Tax Officer and inasmuch as the petitioners were not assessees, nor their father, their appeal was precarious. We have given our thought to this aspect of the matter. No authority was, however, cited at the Bar as to whether the petitioners, or for that matter their father, had any right of appeal u/s 246 of the Act, being a person aggrieved. In view of the fact that Section 171(2) of the Act contemplates an order to be passed after holding an enquiry and giving notice to the members of the family, a view is not impossible to be taken that the law contemplated giving of the notice of the inquiry to the members of the family. Then such members may either oppose the claim of partition or may support it,

 

and if the order goes against the contention of any member, he can be said to be a person aggrieved and to have a right of appeal u/s 246 of the new income tax Act. But we do not propose to decide this question conclusively and the expression may be taken to be only tentative.

7. We have already stated earlier that Bansidhar had participated in the inquiry and the appeal is psnding in which the petitioners have also intervened and appeared. The question that have been raised by the petitioners can very well be raised and considered by the appellate authority as well and, therefore, we do not feel persuaded to interfere in the writ jurisdiction when the petitioners have already availed of the internal statutory remedy, where, apart from the jurisdictional and legal question, a more comprehensive investigation can be made. It is no doubt true that the order of assessment is independent for each year and does not operate as res judicata in any subsequent year ; the position of an order u/s 171 of the new Income Tax Act is peculiar on account of its special nature. As under Sub-section (3) of Section 171, in giving effect to an order, the Hindu undivided family will be considered to have been a family as from the date recorded in that order, it cannot be contended that the family continues to have joint existence any further. The Income Tax Officer in the impugned order, as already indicated earlier, has held that there was a partition in the family from July 1, 1959. After recording this finding, it would not be possible for the Income Tax Officer, who is still to consider the proceeding for the assessment year 1961-62, to take a different view, as the date of partition happens to be the same date which has been claimed in the said assessment proceeding. The result of this order, therefore, is that the assessment order that has yet to be passed in the earlier proceeding for the year 1961-62 would be practically a mechanical one. We have seen that the proceeding travelled up to this court and various directions and observations were given to the Income Tax Officer. A grievance has been rightly made by the learned counsel for the petitioners that without completing the said proceeding the Income Tax Officer by passing the impugned assessment order might have made all those observations and directions infructuous. We feel impressed by this contention but still we propose to dismiss this writ application with certain observation and liberties to the petitioner. We deliberately refrain from going to that length and to examine as to whether the Income Tax Officer passed the impugned order and took into account and carried out all those directions and observations. This aspect of the matter can be better examined by the learned Appellate Assistant Commissioner himself before whom the matter is still pending and to whose hands we leave this aspect of the matter to be considered.

8. The result of all the above discussion is that, while dismissing this writ application, we direct the Appellate Assistant Commissioner (added respondent No. 13 by a separate order) to hear the appeal and dispose of the same, which is pending before him, after giving the petitioners full opportunity of hearing. We would also direct him to permit the petitioners to examine either of them, if they so like, and produce any documentary evidence. The learned Appellate Assistant

 

Commissioner would then proceed to dispose of the appeal in the light of the materials on the record taken by the Income Tax Officer and those taken by him in the appellate stage and dispose of the same on its merits. It is further made clear that if it is held that the appeal by the father of the petitioners, Bansidhar, is not maintainable, he being not an assessee within the meaning of Section 246 of the new Income Tax Act, the petitioners would be at liberty to come to this court again.

9. In the result, this application is accordingly dismissed with the observations and directions as indicated above. There will be no order as to costs.

P.S. Sahay, J.

10. I agree.