

(1971) 11 KL CK 0004
In the High Court Of Kerala
Case No : O.P. No. 4083 of 1970

N.K. Sarada Thampatty Nilambur

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision : 09-11-1971

Acts Referred:

Income Tax Act, 1961 — Section 10, 143, 144, 171, 171(3)

Citation : (1973) KLJ 360

Hon'ble Judges : M.U. Issac, J

Bench : Single Bench

Advocate : K. Kuttikrishna Menon and A.P. Chandrasekharan, for the Appellant;
P.A. Francis and P.K. Ravindranath, for the Respondent

Judgement

M.U. Issac, J.—The petitioner was the head of a tavazhi in the Nilamboor Kovilagam, which was partitioned on 12-11-1951. In that partition, the forest lands belonging to the Kovilagam were left undivided, allotting 9/112 share to the petitioner's tavazhi. Thereafter the petitioner was being assessed as the head of a Hindu Undivided Family. For the assessment year 1967-68, the petitioner made a claim under S. 171 of the Income Tax Act, 1961 that her tavazhi had been divided by a registered agreement executed by the members of the tavazhi on 21-2-1963, and that she was not, therefore, liable to be assessed as head of such family. By his order, Ex. P1 dated 16-3-1970, the petitioner's claim was rejected by the Income Tax Officer. Accordingly the petitioner was assessed as head of the tavazhi for the assessment years 1967-68, 1968-69, and 1969-70 as per orders Exs. P2 and P3 dated 16-3-1970 and Ex. P4 dated 27-3-1970 respectively. This writ petition has been filed to quash the aforesaid orders on the ground that during the previous years to which the said assessments relate there was no undivided family. The facts of the case are not in dispute. One of the tavazhi of the Nilambur Kovilagam filed O.. 22 of 1961 in the Sub Court, Kozhikode for partition of the forest lands which had been left undivided in the partition of 1951. Naturally the members of the petitioner's tavazhi were parties to that suit. The agreement of partition of the petitioner's

tavazhi was executed during the pendency of the above suit. The suit was decreed on 24-9-1965 allotting individual shares in the suit property to the members of the petitioner's tavazhi on the basis of the aforesaid partition agreement. It is admitted that the tavazhi properties have not been divided among its members by metes and bounds under this agreement. The relevant clause of the partition agreement has been extracted in the original petition. There is no dispute that by the said agreement and by the aforesaid decree, there has been a severance in status of the petitioner's tavazhi as a joint Hindu family, and under law the tavazhi docs not exist as a joint Hindu family after 21-2-1963, the date of the partition agreement.

2. If S. 171 of the Act will apply to the above assessments, the petitioner would not be entitled to any of the reliefs claimed by her, since the partition relied on by her was not one effecting a physical division of the property. But her contention is that the said section has application only to a partition effected during the previous year to which the assessment relates, and that it has, therefore, no application to the impugned assessments. Then there is no question of recording any finding under sub-s.(3) of S. 171 in this case. The order Ex. P1 can be ignored; and there is no question of quashing it.

3. S. 171 of the Income Tax Act, 1961 reads:

ASSESSMENT AFTER PARTITION OF A HINDU UNDIVIDED FAMILY.

171. (1) A Hindu family hitherto assessed as undivided shall be deemed for the purposes of this Act, to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the Hindu undivided family.

(2) Where, at the time of making an assessment under S. 143 or S. 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition, whether total or partial has taken place among the members of such family, the Income Tax Officer shall make an inquiry there into after giving notice of the inquiry to all the members of the family.

(3) On the completion of the inquiry, the Income Tax Officer shall record a finding as to whether there has been a total or partial partition of the joint family property, and, if there been such a partition, the date on which it has taken place.

(4) Where a finding of total or partial partition has been recorded by the Income Tax Officer under this section, and the partition took place during the previous year:

(a) the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place; and

(b) Such member or group of members shall, in addition to any tax for which he or it may be separately liable and notwithstanding anything contained in Clause (2) of S. 10, be jointly and severally liable for the tax on the income so assessed.

(5) Where a finding of total or partial partition has been recorded by the Income Tax Officer under this section, and the partition took place after the expiry of the previous year, the total income of the previous year of the joint family shall be assessed as if no partition had taken place; and the provisions of Clause (b) of sub-s.(4) shall, so far as may be, apply to the case.

(6) Notwithstanding anything contained in this section, if the Income Tax Officer finds after completion of the assessment of a Hindu Undivided Family, that the family has already effected a partition, whether total or partial, the Income Tax Officer shall proceed to recover the tax from every person who was a member of the family before the partition, and every such person shall be jointly and severally liable for the tax on the income so assessed.

(7) For the purposes of this section, the several liability of any member or group of members thereunder shall be computed according to the portion of joint family property allotted to him or it at the partition, whether total or partial.

(8) The provisions of this section shall, so far as may be. apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to the date of partition, whether total or partial, of a Hindu undivided family as they apply in relation to the levy and collection of tax in respect of any such period.

EXPLANATION: In this section:

(a) "Partition" means

(1) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or (ii) where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition;

(b) "Partial partition" means a partition which is partial as regards the persons constituting the Hindu Undivided Family, or the properties belonging to the Hindu Undivided Family, or both.

It is contended on behalf of the Income Tax Officer that unless and until a finding is recorded by him under sub-s.(3) of S. 171 of the Act that a partition of the joint family property has taken place by physical division, the family shall be deemed to continue undivided for the purpose of the Act, and that it would be assessed in that capacity, though it might have legally ceased to exist. In other words, the question whether the family existed as a joint or undivided family during any part of the previous year is irrelevant. Even if it did not exist, it would be deemed to exist for ever for the purpose of assessment, until a finding under sub-s.(3) is recorded by the Income Tax Officer. Reliance is made in support of the above contention mainly on the language of sub-s.(1).

4. I am unable to accept the above contention. S. 171 of the Act corresponds to S. 25A of the Indian Income Tax Act, 1922 and also S. 29 of the Agricultural Income Tax Act, 1950. It is well settled by decision of the Supreme Court and other Indian Courts that such a provision has been enacted for the purpose of assessing the income of a Hindu Undivided Family, which ceases to exist in any previous year or thereafter. The machinery created for that purpose is to deem such a family continuing as, undivided, so that the income which accrued to it can be assessed. In the absence of such a device, the income of the undivided family cannot be assessed, since there would be no undivided family for being assessed on account of the partition. This provision was not intended to create any new or different liability other than the one created by the charging section, which is S. 4 in the 1961 Act. S. 4 provides that income tax shall be charged in respect of the total income of the previous year of every person. The word person is defined in S. 2(31); and it includes an individual as well as a Hindu Undivided Family. The charge is against a person as defined above. There is no question of a charge against a non existing person, or fictitious person. The machinery provision is for assessing and collecting the tax due from a person who incurred that liability and subsequently ceased to exist. It is a provision for preventing escape from a liability incurred. No doubt for the purpose of S. 171 a physical division of the property of the undivided family, to the extent it is possible, alone is recognised. That does not affect the question whether a Hindu Undivided Family, which did not exist in fact and under law, and could not, therefore, receive any income during the previous year, can be assessed to tax as an undivided family, for the reason it did not seek a finding of the Income Tax Officer under S. 171 (3) of the Act. The consequence of such a finding is mentioned in sub-s.(4); and it is that the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place. Nothing is mentioned in this Section regarding the income of the family property after the above date. It is obvious that such income would be the income of the individual members of the family, and they would be assessed on that basis. Express provision is contained in sub-s.(1) as to how the assessment is to be made in the absence of a finding under sub-s. (3); and it is that the family shall be deemed to continue undivided and assessed in that capacity. In my view, what I have stated above is the purport and the only scope of the above section, it applies only to the assessment of a Hindu Undivided Family which was partitioned during the previous year to which the assessment relates or any time thereafter. It has no application for the assessment of a Hindu Undivided Family, which has been partitioned and thereby ceased to exist as an undivided family before the commencement of the previous year.

5. The above view has support in the majority judgment of a Full Bench decision of this Court in Parameswaran Nambudiripad Vs. Inspecting Assistant Commissioner of Agricultural Income Tax, . It was S. 29 of the Agricultural Income Tax Act, 1950 that arose for construction in the above decision. That

section, as already stated, contains the same provision, though differently worded, as S. 171 of the Income Tax Act, 1961. There is a learned and instructive discussion of the whole question in the majority judgment. It is unnecessary for me to repeat here the reasons stated therein by the learned Judge, except to say that respectfully agree with them. The above decision was taken in appeal before the Supreme Court in *Inspecting Assistant Commissioner of Agricultural Income Tax and Sales Tax (Special), Kozhikode Vs. Poomulli Manekkal Parameswaran Namboodiripad*, . The decision of this Court was upheld by the Supreme Court, but as rightly pointed out by the learned representative for the Income Tax Officer, the view taken by the majority judgment regarding application of S. 29 of the Agricultural Income Tax Act has not been endorsed by the Supreme Court. The Supreme Court decision rests on the fact that the family had been admittedly divided long before the previous year which the assessment related. The following passage appearing in the judgment of the Supreme Court is instructive:

If the family has ceased to exist even before the assessment proceedings started then there can be no family which is being assessed to tax for the first time. Possibly the intention of the legislature was to bring in the cases of undivided families not taxed in the previous years which were in existence during the whole or part of the previous year but were divided before the assessment proceedings commenced. It is not necessary for us in this case to decide whether that intention has been expressed with sufficient clarity so as to make it enforceable.

The above passage indicates that, though the Supreme Court left open the question relating to the scope and applicability of the Section, it impliedly accepted the majority view of this Court, by holding that the section has no application to a family which ceased to exist before the previous year. The same view as I have taken here has been taken by my learned brother Govindan Nair, J. in his judgment dated 1-12-1969 in O.P. No. 1545 of 1968. For the reasons stated above I quash the assessment orders Exs. P2, P3 and P4. The Income Tax Officer will be free to continue the assessment proceedings against the members of the petitioner's *tavazhi* in accordance with law. In the circumstances of the case there will be no order as to costs.