

(1985) 04 AP CK 0014

In the Andhra Pradesh High Court

Case No : Referred Case No. 150 of 1976

Pannabai

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 22-04-1985

Acts Referred:

Gift Tax Act, 1958 — Section 2

Income Tax Act, 1961 — Section 139(2), 143(2), 143(3), 148, 160

Wealth Tax Act, 1957 — Section 14(2), 17, 3

Citation : (1985) 153 ITR 608

Hon'ble Judges : B.P. Jeevan Reddi, C.J.;Y.V. Anjaneyulu, J;G. Ramanujulu Naidu, J

Bench : Full Bench

Advocate : None, for the Appellant; M. Suryanarayana Murthy, for the Respondent

Judgement

Obul Reddi, C.J.—The question that arises for our determination is whether the share income derived by the assessee from a partnership firm can be taxed fully in her hands as representing a body of persons or only 1/7th of the share income which represents her share alone in the share income.

2. The relevant facts are these : One Karodimal was a partner in the firm of M/s. Mysore Khandasari Sugar Mills, Mukthiargunj, Hyderabad. He had 30% share in that firm. He died intestate on May 16, 1968, leaving behind him his wife and six minor children. His wife, Smt. Pannabai, the assessee herein, entered into a partnership agreement with the other partners to continue the business of the firm and she was allotted the same 30% share which her husband held in that firm. Some other changes were also made in the constitution of the firm and that is evidenced by a new partnership deed dated May 24, 1968. In the deed, it was mentioned that, after the death of Karodimal, it was decided to continue the business of the firm and that is how the fresh partnership deed came to be executed. For the assessment year 1970-71 with which we are concerned, the share income from that partnership had to be determined. She admitted 1/7th of

her share in the firm on the ground that, after the death of her husband, she stepped into his shoes as a partner in the firm and, therefore, she represents her six minor children also, since all of them are the legal heirs of her deceased husband. It was also stated that the entire capital standing in the name of her husband has been left in the firm as capital in her name and that all the seven of them are entitled to 1/7th share each. It is on that ground she claimed that what was assessable in her hands was only 1/7th of the share arising from the firm. The ITO negated her claim and assessed the entire share income in her hands treating it as income of the assessee. She then preferred an appeal and the AAC dismissed the appeal agreeing with the findings of the ITO. Then she preferred a further appeal to the Tribunal and the Tribunal, while confirming the order of the AAC, however, made the following modification :

"It is no doubt true that the Income Tax Officer assessed the assessee as an individuals, but in our opinion, the correct status would be "a body of individuals"."

3. In so holding that the status of the assessee would be that of a body of individuals, the Tribunal followed the decision of this court in *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, . At the instance of the assessee, the following question was referred to this court for our opinion :

"Whether, on the facts and in the circumstances of the case, the share income derived from the firm can be taxed fully in the hands of the assessee or only 1/7th of the share income representing only her share in the said share income be taxed in her individual hands ?"

4. What Mr. Madhusudan Raj appearing for the assessee contends is that s. 19 of the Hindu Succession Act prescribes the mode of succession when two or more heirs succeed together to the property of an intestate and that, when all the heirs together had succeeded, each having an equal share in the property left behind by the deceased, the Tribunal erred in not assessing the income derived from the firm to the extent of the share of each of the heirs including that of the assessee. The learned counsel has also invited our attention to the following view expressed by Palkhivala in his "Law and Practice of Income Tax, Sixth edition, vol. I, page 825.

"Where a business is inherited by the widow and minor children of the deceased owner and the widow carries on the business of behalf of herself and of her minor children as their guardian or trustee, the business profits should be assessed on the basis of the portion of the assessable profits falling to the share of each beneficiary and at the individual rates of tax applicable separately to the total income of each beneficiary."

5. The Tribunal felt bound by the decision of this court in *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, and directed assessment to be made treating the status of the assessee as body of individuals. According to Mr. Madhusudan Raj, the learned Judges were then dealing with the case of a

proprietary concern where the widow was carrying on the business in the common interest of all the heirs for the benefit of all of them by one of them and the present case is not one where the proprietary concern devolved on the heirs, i.e., "a body of individuals", but a case of partnership where the widow of the deceased had only 1/7th right to the 30% investment made by the deceased. This contention he puts forth on the basis of the claim made by the widow that the entire capital standing in the name of her husband had been left in the firm in the name of the assessee and that the minors were, therefore, entitled to the benefits of it to the extent of 1/7th share each in accordance with the provisions of s. 19 of the Hindu Succession Act. Having regard to the importance of the question and to the fact that a question of this nature is likely to arise quite often and in view of the opinion expressed by Palkhivala in his "Law and Practice of Income Tax, sixth edition, Vol. I, page 825, we are inclined to refer the question referred for the decision of a Full Bench. Post the reference before a Full Bench of three judges.

JUDGMENT OF FULL BENCH

The judgment of the court was delivered by

Ramanujulu Naidu, J.

6. One Sri Karodimal was a partner in the firm, M/s. Mysore Kandasari Sugar Mills, Mukthiargunj, Hyderabad, carrying on the business of manufacture and sale of khandasari sugar and other bye-products. He had 30 per cent share in the said firm as evidenced by a deed of partnership dated August 19, 1966. He died intestate on May 16, 1968, leaving behind him, his wife and six minor children. On his death, his wife, Smt. Panna Bai, entered into a fresh deed of partnership dated May 24, 1968, with the other partners to continue the business of the firm and she was allotted the same 30 per cent. share held by her deceased husband in the firm. Some other changes in the constitution of the firm were also made. The deed of partnership was, however, given effect to from May 17, 1968.

7. For the assessment year 1970-71, the entire income representing 30 percent share in the profits of the firm derived by Smt. Panna Bai was sought to be assessed to tax in her hands. The assessee, Smt. Panna Bai, however, claimed that on the death of her husband, she merely stepped into his shoes as a partner of the firm, that while doing so she represented her six minor children also, all of them being the other legal heirs of her deceased husband, and that only 1/7th of her share in the profits derived by her from the firm was liable to be taxed. The ITO negatived her claim holding that it was not recited in the fresh deed of partnership that the assessee was taken as a partner in the place of her deceased husband or that the capital in his account should be treated as her capital, that there was no sub-contract between the assessee and her minor children for sharing among themselves the income derived by the assessee from the firm, that there was no nexus between the capital that stood in the account

of her husband in the firm and her being admitted as a partner of the firm and that there was no overriding title on the income derived by the assessee in favour of her children.

8. On appeal preferred by the assessee, the AAC confirmed the findings of the ITO. While dismissing the appeal, the AAC added that the income derived by the assessee from the firm represented her share of profits therein on account of privity of contract between her and other partners, that she did not receive the income derived from the firm on behalf of her minor children and that the provisions of ss. 160 and 161 of the I.T. Act had no application.

9. On further appeal, the Income Tax Appellate Tribunal observed :

"There is no doubt that after the death of Sri Karodimal, his properties, whatever they are, would devolve on his heirs u/s 8 of the Hindu Succession act since Karodimal died intestate. Section 19 of the said Act further states that the property inherited by the heirs of the deceased u/s 8 would be held by them as tenants-in-common. Therefore, all the properties including the interest of the deceased in the firm of M/s. Mysore Khandasari Sugar Mills, had devolved on the legal heirs, viz., the wife and the children of Shri Karodimal, as tenants-in-common. On the death of Shri Karodimal, his heirs could have demanded the interest of Shri Karodimal in the firm. There are well-established principles in regard to determination of the interest of a partner, but that has not been done here. On the other hand, the capital standing in the name of Shri Karodimal has been retained in the business of the firm. At this juncture, we would like to point out that the Income Tax officer is not correct in stating that the capital standing in the name of Shri Karodimal has not been taken as the capital of the widow, smt. Panna Bai. From the accounts, it is clear that the balance standing in the accounts of Shri Karodimal has been transferred to Smt. Panna Bai's account at the beginning of the accounting year relevant to the year under consideration. In other words, the lady agreed to join as a partner and continue the same business which was carried on by the firm in which her deceased husband was a partner and after his death by leaving the capital standing in the name of the deceased intact as her capital. She has same share as her husband was getting. She has thus entered into the partnership agreement for the purpose of carrying on the business specially and evidently with an idea of benefiting her children with profits arising from the business. It is true that there is no agreement between herself and the minors represented by anybody else. Nevertheless, she is entitled to continue the business for the benefit of the minor children and from her conduct it is manifest that she is entitled to continue the business for the benefit of herself and her children and for that purpose left the capital standing in the name of her deceased husband in the firm and it was treated as her capital. It is also true that the minors are entitled to an interest in the firm which includes capital, but no demand has been made and no division of capital took place. From these it could be inferred that the assessee has been continuing the business which her husband carried on earlier with the same rights and

obligations and definitely for her benefit and for the benefit of her minor children."

10. Having thus observed, the Tribunal, however, held :

"It is no doubt true that the Income Tax Officer assessed the assessee as an individual, but, in our opinion, the correct status would be "a body of individuals". The assessment has to be modified accordingly."

11. The computation of income and tax thereon requiring no alteration, the Tribunal confirmed the assessment subject to the change of status of the assessee as "a body of individuals". In other words, the assessment of Smt. Panna Bai to tax as an individual was held to be bad. In so holding that the status of the assessee would be a "body of individuals", the Tribunal followed the decision of this court in *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, . The assessee thereupon required the Income Tax Appellate Tribunal, Hyderabad, under s. 256(1) of the I.T. Act, 1961, to refer the following two questions of law arising out of its order for the opinion of this court :

"(i) whether, on the facts and in the circumstances of the case, the share income derived from the firm can be taxed fully in the hands of the assessee or only 1/7th of the share income representing only her share in the said share income be taxed in her individual hands ?

(ii) Whether, on the facts and in the circumstances of the case, the Honourable Tribunal is correct to direct that the assessee may be taxed in the status of "body of individuals" and be taxed as one unit only ?"

12. The Tribunal after drawing up a statement of the case, however, referred only the first question presumably under the impression that it is comprehensive enough to take within its ambit the second question also. We, therefore, proceed on the assumption that both the questions were referred by the Appellate Tribunal.

13. The reference came up before a Division Bench of this court. It was urged on behalf of the assessee that under s. 19 of the Hindu succession Act, if two or more heirs succeeded together to the property of an intestate, they would take the property per capita and as tenants-in-common and that the Tribunal erred in not assessing the income derived from the firm to the extent of 1/7th share of each of the heirs including that of the assessee. The correctness of the decision rendered in *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, was canvassed. Reliance was also placed upon the following passage contained in the treatise on "Law and Practice of Income Tax" by Kanga and Palkhivala (sixth edition, Vol. I, p. 825.) :

"Where a business is inherited by the widow and minor children of the deceased owner and the widow carries on the business on behalf of herself and of her minor children as their guardian or trustee, the business profits should be assessed on the basis of the portion of assessable profits falling to the share of

each beneficiary and at the individual rates of tax applicable separately to the total income of each beneficiary."

14. Having regard to the importance of the question debated before the Division Bench, the same was referred for decision of a Full Bench of this court. We are thus seized of the reference.

15. As the assessee was not represented by a counsel, we requested Sri Habib Ansari, an advocate practising in this court, to assist us as *amicus curiae*.

16. We may now notice the relevant provisions of the I.T. Act. section 3 of the Indian I.T. Act, 1922, listed the units chargeable to Income Tax. It mentioned an "association of persons" but not a "body of individuals". In the I.T. Act of 1961, Income Tax is levied on a person and "person" is defined in s. 2(31) by an inclusive definition which includes, among other categories, the category of "an association of persons or a body of individuals, whether incorporated or not". Thus, a "body of individuals" is brought in and placed along side "an association of persons". Section 2(xviii) of the G.T. Act defines a person as including a "Hindu undivided family or a company or an association or a body of individuals or persons, whether incorporated or not".

17. In *Commissioner of Gift Tax, Kerala Vs. R. Valsala Amma*, the facts were that a mother bequeathed to her two daughters "a cinema theatre building with machinery" and another building described as police quarters. The two daughters gifted the buildings to their brother. The question arose whether gift-tax should be assessed treating the two ladies as an association or a body of individuals or as distinct individuals. The Supreme Court held that the property was received by the two ladies as tenants-in-common, that each had a definite half share, that each must, therefore, be considered to have gifted her half share of the property, that they did not make the gift an association or a body of individuals, though the gift was made through one single document and that it was surprising that the ITO or the AAC or the Tribunal should have ever thought that the gift in question was by an association or by a body of individuals.

18. It may be thus noted that according to the Supreme Court, persons holding property as tenants-in-common, each one having a distinct defined share in that undivided property, cannot be said to be an "association of persons" or a "body of individuals" for the purpose of gift-tax.

19. In *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, the facts were : Late Pannalal ran certain businesses known as "Deccan wine and General stores", "Moti Wine and General Stores" and "Tinu's Bar and Hotel". On his death in 1959, his heirs, his widow and two minor children succeeded to the three business. For the assessment year 1959-60 and 1960-61, assessments in respect of the income from the three businesses were made as if the assessee's collective status was that of an "individual". For the assessment years 1961-62, 1962-63 and 1963-64, assessments were made as if the assessee's status was a "Hindu undivided family". For the assessment years 1964-65 and 1965-66, the

assessee claimed the status of an "association of persons" and assessments were made on that basis. For the assessment year 1966-67 also, the assessee submitted a return claiming the status of an "association of persons". However, by a subsequent letter dated March 27, 1967, it was claimed that each of the three individuals, i.e., the mother and the two minor children, should be separately assessed in their "individual" status on their respective one-third share of the income from the business. It was pointed out in the letter that in the course of the year of account, there was a partition of the businesses in the sense that the capital of the businesses was divided in equal shares among the three individuals. The ITO did not accept the plea that the three persons should be separately assessed as individuals. He held that the three persons constituted a "body of individuals" and should be assessed as such and not as an "association of person" either. The order of assessment made by the ITO was confirmed by the AAC and the Income Tax appellate Tribunal. On a reference made to the High court at the instance of the assessee, it was contended that the expression "body of individuals" should be construed ejusdem generis with the expression "association of persons" in the definition of "person" in s. 2(31) of the I.T. Act, 1961 and since the mother and the two minor children could not constitute an "association of persons", on the same principle they would not constitute a "body of individuals" either.

20. It was held by a Division Bench of this court consisting of Chinnappa Reddy J., as he then was, and A.D.V. Reddy J. :

"The expression "body of individuals" must have a distinct meaning of its own, otherwise parliament would not have introduced it. It may have some characteristics common with "an association of persons" but it cannot be the same thing as, or a mere species of, an "association of persons". (headnote) :

"An association of persons does not mean any and every combination of persons. It is only when they associate themselves in an income-producing activity that they become an association of persons. They must combine to engage in such an activity; the engagement must be pursuant to the combined will of the persons constituting the association; there must be a meeting of the minds, so to speak. In a nutshell, there must be a common design to produce income. If there is no common design, there is no association. Common interest is not enough. Production of income is not enough. This interpretation of the expression "association of persons" flows from the meaning of word "association". When the word "association" is replaced by the word "body", it must follow that the feature of common design or combined will so peculiar or distinctive to an association of persons is not a characteristic of a body of individuals. The absence of a common design is what principally distinguishes a body of individuals from an association of persons. Another distinguishing feature is that the one refers to persons and the other to individuals. A person, by definition, includes an individual. But an individual, apparently, does not include a person. These are the features which distinguish "body of individuals" from "association

of persons". The two expressions are placed along side each other in section 2(31)(vii) because of the common characteristics possessed by them; both deal with combinations, whether of persons or individuals, who have a common interest and who are engaged in income-producing activity.

We are of the view that the expression "body of individuals" should receive a wide interpretation, perhaps not wide enough to include a combination of individuals who merely receive income jointly without anything further as in the case of co-heirs inheriting shares or securities, but certainly wide enough to include a combination of individuals who have a unity of interest but who are not actuated by a common design and one or more of whose members produce or help to produce income for the benefit of all."

21. Before the learned judges, reliance was placed upon the decision of the Supreme Court in *Commissioner of Gift Tax, Kerala Vs. R. Valsala Amma*, and it was contended that the expression "body of individuals" occurring in s. 2(31)(vii) of the I.T. Act should receive the very same interpretation placed by the Supreme Court on the very same expression occurring in s. 2(xviii) of the G.T. Act. Repelling the contention, the division Bench observed (p. 118 of 106 ITR) :

"It is commonplace in the interpretation of statutes that the same word or expression occurring in different statutes or in different parts of the same statute need not mean the same thing. The word or expression must take its colour from the context, more so in the labyrinth of taxing statutes. We are not concerned with a body of individuals in the abstract. We are concerned with "a body of individuals" in the context of the Income Tax Act which is different from "a body of individuals" in the context of the Gift-tax Act. The considerations which determine whether a gift is made by a body of individuals are obviously different from the considerations which determine whether income has accrued or is deemed to accrue to a body of individuals. further, in the case before the Supreme Court, the subject matter of the gift was property, i.e., buildings and not business. If the subject-matter of the gift was running business carried on by the two ladies, perhaps the position might have been different. For example, if the ladies were carrying on cinema business and had gifted both the theatres and the business, it might perhaps have been possible to argue that while the building was gifted by the ladies as individuals, the business was gifted by them as a body of individuals."

22. In the result, the Division Bench held that the three individuals had a common interest in the businesses, that the businesses, though not carried on pursuant to a common design, were carried on for their common benefit by one of them representing all of them and that the three individuals clearly constituted a body of individuals.

23. In *Meera and Company Vs. Commissioner of Income Tax*, , the interpretation placed by the Division Bench of this court in *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, upon the expressions, "association of persons" and

"body of individuals" employed in the inclusive definition of "person" contained in s. 2(31) of the I.T. Act found full acceptance with a division Bench of the Punjab and Haryana High Court.

24. In CIT v. Harivadan Tribhovandas [1977] 106 ITR 495 a Division Bench of the Gujarat High Court had an occasion to examine the scope of the expression. "body of individuals" occurring in s. 2(31) of the I.T. Act and in the course of its discussion, the Division Bench expressed full agreement with the following observations made by the Division Bench of this court in Deccan Wine and General Stores Vs. Commissioner of Income Tax, .

"We are of the view that the expression "body of individuals" should receive a wide interpretation, perhaps not wide enough to include a combination of individuals who merely receive income jointly without anything further as in the case of co-heirs inheriting shares or securities, but certainly wide enough to include a combination of individuals who have a unity of interest but who are not actuated by a common design, and one or more of whose members produce or help to produce income for the benefit of all."

25. The Division Bench of the Gujarat High Court did not, however, approve the distinction drawn by the division Bench of this court in Deccan Wine and General Stores Vs. Commissioner of Income Tax, between the provisions of the G.T. Act and the I.T. Act while examining the decision rendered by the Supreme Court in Commissioner of Gift Tax, Kerala Vs. R. Valsala Amma, . It was observed by the Division Bench of the Gujarat High Court that there was very little difference between the provisions of the two taxation statutes viz., the G.T. Act and the I.T. Act, and that there was no reason why the connotation of the expressions "association of persons" and "body of individuals" occurring in the two statutes should receive different meaning.

26. IN Commissioner of Income Tax Vs. A.P. Parukutty Mooppilamma and Others, the facts were that certain properties belonged to a HUF. There was a partition in the HUF and the properties were divided among eighteen shares. Some of the properties were left out of the division but the deed of partition made it clear that each member of the erstwhile HUF had 1/18th share in it. M, one of the erstwhile members of the HUF, was authorised to manage the properties. Some of the trees in the property were sold and M returned the profits derived therefrom as income of a body of individuals for the assessment years 1969-70 and 1970-71. Before the assessing authority, it was, however, contended that the assessment could not be made in the status of "body of individuals" because each member of the erstwhile HUF had 1/18th share therein. The ITO assessed that the correct status to be assigned was that of an "association of persons". The Tribunal reversed the decisions of both the authorities and held that after partition, the members had owned the properties not yet divided by metes and bounds as co-owners, that there had been no community of profit or loss, that the income accrued directly to the members, that it was only for the sake of convenience the same was received by one of them and that, therefore, the

members were assessable as individuals.

27. On a reference to the High Court of Kerala, it was held that the fact that the assessee had originally referred to themselves as a "body of individuals" was irrelevant, that the status of the assessee was not a "body of individuals", that the erstwhile members of the HUF were assessable directly as individuals and that the Tribunal was right. In the course of its discussion, the division Bench of the Kerala High Court referred to the well-recognised rule of construction collected from Interpretation of Statutes by Maxwell (10th edn., p. 332) and quoted with approval by the Supreme Court in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, , the rules of construction being, "that when two or more words which are susceptible of analogous meaning are coupled together noscuntur a sociis, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general". The Division Bench added *Commissioner of Income Tax Vs. A.P. Parukutty Mooppilamma and Others*, :

"In construing the word "body of individuals" occurring in s. 2(31), along side the words "association of persons", we should bear in mind the aforesaid well-settled principles of interpretation laid down by courts. It is now well-settled by decisions of the Supreme Court that in order to constitute an association, persons must join in a common purpose or action and the object of the association must be to produce income. It is not enough that the persons receive the income jointly. The words "body of individuals" occurring in s. 2(31) of the Act, along side "association of persons", should be understood in the said background and context. The meaning to be given to the words "association of persons", above referred to, was first laid down by the Supreme Court in *Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna*, a decision rendered as early as April 14, 1960, so that when Parliament enacted the I.T. Act 1961, and inserted the definition in s. 2(31) of the Act, Parliament should have used the words, "association of persons" along side "body of individuals", it fully being aware of the meaning given to the words "association of persons" by the Supreme Court."

28. After referring to the decision of the Supreme Court in *Commissioner of Gift Tax, Kerala Vs. R. Valsala Amma*, in detail, the Division Bench observed that the interpretation placed by the Supreme Court on the expressions "association of persons" and "body of individuals" occurring in s. 2(xviii) of the G.T. Act would equally apply to the expressions "association of persons" and "body of individuals" employed in the inclusive definition of "person" contained in s. 2(31) of the I.T. Act. Adverting to the three decisions of the *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, , the Division Bench observed that the decisions did not give due and sufficient importance to (1) the legislative history of s. 2(31) of the Act and the principle of interpretation to be applied in construing s. 2(31) of the Act in the context and also, (2) to the decision of the Supreme Court in *Commissioner of Gift Tax, Kerala Vs. R. Valsala Amma*, . In the

result, the Division Bench held that the reasoning and the conclusion of the Tribunal holding that the status of the assessee could not be a "body of individuals" was well justified and that the individual members should be assessed directly regarding the capital gains, as held by the Tribunal.

29. In *Commissioner of Income Tax Vs. Deghamwala Estates*, , a Division Bench of the Madras High Court held that mere execution of a document of sale by two or more persons owning the property jointly could not bring the co-owners together as a body of individuals and that there must be something more than joining together and executing the document to constitute them as a "body of individuals". In the course of its discussion, it was observed (p. 689) :

"Thus, in order to constitute an association of persons, there must be joining together in a common purpose or in a common action, the object of which is to produce income, profits and gains.... (p. 691). The word "body" would require an association for some common purpose or for a common cause or there must be unity under some common tie or occupation. A mere collection of individuals without a common tie or a common aim cannot be taken to be a body of individuals falling within s. 2(31) of the Income Tax Act, 1961... (p. 692). Though a body of individuals is not identical with an association of persons, they have some similarities. An association of persons may consist of non-individuals too. But a body of individuals has to consist only of individuals or human beings.... (p. 692). Section 47(2) itself appears to us to give a clue to the interpretation of the expression "body of individuals". It contemplates "distribution of capital assets on the dissolution of the body of individuals", as in the case of a firm or other association of persons. This itself shows that the body of individuals whether incorporated or not must be capable of holding properties as an entity and of distributing them at the time when it dissolves. Thus, a common purpose or a common tie, actual or potential capacity to hold properties or disposable income would be the minimum requirement of such a body of individuals. The purpose or the aim should, in the context of the I.T. Act, be to produce income or hold income-producing assets."

30. The Division Bench while adverting to the decision of the Supreme Court in *Commissioner of Gift Tax, Kerala Vs. R. Valsala Amma*, and noticing the distinction of the decision of the Supreme Court by the Division Bench of this court in *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, :

"This manner of distinction of the Supreme Court's decision has been dissented from in the judgment of the Gujarat High Court in *Commissioner of Income Tax, Gujarat III Vs. Harivadan Tribhovandas*, . We would agree, with respect, with the Gujarat High Court in the view that it has taken regarding the applicability of the decision. Whatever may be the position regarding the applicability of the Supreme Court's decision to the facts in the case before the Andhra Pradesh High Court, still as far as the case before us is concerned, we find that it has great relevance. As against the gift in the Supreme Court's decision, there are sales in the case before us. If two co-owners executing a gift deed in respect of

certain properties could not be a body of individuals for the purpose of assessment to gift-tax, similarly the tenants-in-common executing a sale deed would not constitute a body of individuals. There must be something more than joining together and executing a document to bring the co-owners together as a body of individuals."

31. In Commissioner of Income Tax, Andhra Pradesh Vs. Pabbati Shankaraiah and Others, , the facts were that one Shankaraiah was the karta of a HUF consisting of himself, his wife, his major son and two minor sons. He was a partner in a firm having 30 per cent. share therein. The income derived by him from the firm was being assessed in the hands of the HUF up to and including the assessment year 1964-65 as he was a karta of the family. On October 26, 1963, there was a partial partition in the family in respect of the interest of the family in the firm. At the partition, shankaraiah was allotted 12 percent. share while the other sons were each allotted 6 percent. share. The capital standing in the name of shankaraiah in the firm, which admittedly belonged to the joint family, was divided into four equal shares and necessary entries were also made in the books of the firm. It was also agreed that Shankaraiah should continue as a partner and that the profits derived by him should be divided between himself and his three sons in the proportion to the shares allotted to them. Another agreement was the sons should have no rights in the assets of the firm and that they would be merely entitled to receive their proportionate share of profits from shankaraiah. Shankaraiah's major son was, however, taken as a partner in the firm and he was receiving 6 per cent. of profits from the firm. The assessments were made for the assessment years 1966-67, 1967-68, 1968-69 and 1969-70, on Shankaraiah. Recognising the partial partition, 12 per cent. of the profits derived from the firm was included in the assessments. The remaining 18 per cent. of the profits derived from the firm was not included in the hands of Shankaraiah. Later, the ITO felt that there was a "body of individuals" consisting of shankaraiah and his two minor sons, which had to be assessed in respect of 24 per cent. of profits derived from the firm. A notice under s. 148 was accordingly issued for the assessment years 1966-67, 1967-68, 1968-69 and 1969-70. For the assessment years 1970-71 and 1971-72, notices under s. 139(2) were issued. The assessee filed writ petitions questioning the notices issued under s. 148 and the same were dismissed by a single judge of this court following the decision of the division Bench of this court in Deccan Wine and General Stores Vs. Commissioner of Income Tax, . The assessee unsuccessfully filed writ appeals. The ITO passed orders for the years 1966-67 to 1969-70, assessing 24 per cent. share of profits derived from the firm in the hands of the "body of individuals". The assessee preferred appeals before the AAC, without success. On further appeal, the Appellate Tribunal held that there was no activity carried on by the "body of individuals" that only a partial partition of the HUF was effected whereunder each member of the family was allotted a share, that the karta continued to be a partner of the firm, was accountable to the divided members in respect of their proportionate share of profits in the firm and that

there was no need for any agreement to be entered into in that behalf with the firm. In so holding, the Tribunal placed strong reliance on the decision of a Division Bench of the High Court of Gujarat in Commissioner of Income Tax, Gujarat III Vs. Harivadan Tribhovandas, . The decision of the Division Bench of this court in Deccan Wine and General Stores Vs. Commissioner of Income Tax, , was distinguished by the Tribunal on the ground that in the said case the business had been carried on by the legal representatives after the death of the individual.

32. On a reference made to this court, it was held by a Division Bench consisting of Seetharam Reddy and Jagannadha Rao JJ., that Shankaraiah and his two minor sons did not constitute a "body of individuals", that the agreement entered into by Shankaraiah with his two minor sons created an overriding obligation on Shankaraiah to make over to the minors, the income derived from the firm in proportion to their shares and that in any event Shankaraiah could be said to have received the income from the firm as a constructive trustee with an obligation to hold the same for the benefit of his two minor sons under ss. 81, 90 and 94 of the Indian Trusts Act.

33. The decision in Deccan Deccan Wine and General Stores Vs. Commissioner of Income Tax, of the earlier Division Bench of this court was distinguished on the ground that there was nothing explicit or implicit to spell out from the deed of partition or the subsequent document that there was any unity of interest or that Shankaraiah was producing income for his two minor sons or was carrying on business of the firm for the common benefit of himself and his two minor sons so as to constitute a "body of individuals". It was further held that at best Shankaraiah and his two sons constituted a "combination of individuals", who received income jointly without anything further.

34. As already stated in the instant case, the Tribunal found that on the death of Karodimal, Smt. Panna Bai and her six minor children succeeded to his interest in the firm as tenants-in-common under s. 19 of the Hindu succession Act, that Smt. Panna Bai merely entered into a fresh deed of partnership for the purpose of continuing the business carried on by her benefit and for the benefit of her minor children and that no agreement between herself and her minor sons was required by law for that purpose.

35. On the findings recorded by the Tribunal, it was submitted by Sri Habib Ansari, that Smt. Panna Bai received profits from the firm both on her behalf and on behalf of her minor children, that she was liable to distribute the profits derived from the firm to her minor children in equal moities, that in any event Smt. Panna Bai could be said to have received the profits from the firm in a fiduciary capacity as a constructive trustee with an obligation to hold the same for the benefit of her six minor sons under ss. 81, 90 and 94 of the Indian Trusts Act, that the decision rendered by the latter division bench of this court in Commissioner of Income Tax, Andhra Pradesh Vs. Pabbati Shankaraiah and Others, , would govern the assessee, that the facts in the said case and in the

instant case are identical except that in the instant case, there was no separate agreement entered into between Smt. Panna Bai and her minor children for division of 30 per cent. of profits from the firm, that, in fact, the Tribunal found that such an agreement was not necessary and that the profits derived from the firm could be assessed on the basis if the portion of assessable profits falling to the share of each heir of the deceased and at the individual rates of tax applicable separately to the total income of each of them.

36. It was also contended by Sri Habib Ansari that the impact of s. 19 of the Hindu Succession Act prescribing the mode of succession of two or more heirs to the profits of an intestate as tenants-in-common was not dealt with by the Division Bench in *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, , that the applicability of the provisions contained in Section 81, 90 and 94 of the Indian Trusts Act to the assessee therein was also not adverted to, that the decision, therefore, required reconsideration, that in any event the test laid down by the Supreme Court in the case of *Commissioner of Gift Tax, Kerala Vs. R. Valsala Amma*, , though decided under the G.T. Act, would equally govern a case arising under the corresponding provisions of the I.T. Act, that the distinction of the case of *Valsala Amma* Attempted by the Division Bench was without any difference and that it was rightly dissented from by the High Courts of Gujarat, Madras and Kerala.

37. In our considered view, it is unnecessary to pronounce upon the correctness or otherwise of the decision rendered in *Deccan Wine and General Stores Vs. Commissioner of Income Tax*, as the Tribunal, having held that the assessment of Smt. Panna Bai in the status of an individual was incompetent, to modify or alter or convert the status of the individual to that of a body of individuals consisting of Smt. Panna Bai and her six minor children without notice to that body of individuals mandatorily required under s. 139(2) of the I.T. Act, 1961.

38. In *Commissioner of Wealth Tax Vs. J.K. Srivastava and Sons*, , the facts were that for the assessment years 1957-58 to 1976-77, the assessee filed its W.T. returns in the status of an association of persons. The WTO rejected the contention of the assessee that no wealth-tax was chargeable on an AOP and assessed it in the status of an individual on the ground that the word "individual" occurring in s. 3 of the W.T. Act, 1957, included an AOP. The AAC affirmed the order of the WTO. the Tribunal held that an "association of persons" was an entity different from an "individual" and a voluntary return filed in the status of an AOP could not be treated as a return in the status of an individual and that since no notice was issued to the assessee in the status of an individual to file a return under s. 14(2), the WTO had no jurisdiction to assess the assessee in the status of an individual and cancelled the assessments.

39. On a reference made to the High Court of Allahabad at the instance of the Revenue, it was held that if the WTO was of the opinion that the correct status of the assessee was that of an individual, he should have issued a notice under s. 14(2) requiring it to file a return, which was not done, and since the period of

limitation for issuing the notice under s. 17 had expired, the Tribunal was justified in cancelling the assessments of the assessee in the status of an individual.

40. In Commissioner of Income Tax, Vidarbha and Marathwada Vs. Associated Cement and Steel Agencies, it was held (p. 777) :

"That a "firm" and an "association of persons" are two different "persons", and, indeed, independent units of assessment, cannot be disputed considering the whole scheme of the I.T. Act, 1961. The mode of their taxing and process (sic) of liability are also different. Thus, even if the identity of the members of the alleged firm and the association of persons is established, there cannot be a valid assessment altering the status declared in the return. Mandatory requirement of the issuing of a notice under s. 143(2) before making assessment under s. 143(3) cannot be lost sight of. In this case, notice was given to the firm in relation to the return filed as firm, and no notice to the association of persons was issued. Therefore, even if it is correct to make assessment in a certain status, such assessment cannot be made in relation to proceedings in an incorrect status."

Sri M. S. N. Murthy, the learned counsel appearing for the Revenue, however, relied upon the decision of a Division Bench of the High Court of MANGAT RAM HAZARI MAL AND ANOTHER Vs. COMMISSIONER OF Income Tax, PUNJAB., . The facts in the said case were that three individuals and a firm consisting of four partners, formed themselves into a partnership and applied for registration as firm under s. 26A of the I.T. Act. Registration was refused on the ground that one of the partners was a firm and the partnership was assessed as an unregistered firm by the ITO, and this assessment was upheld by the AAC. On further appeal, the Tribunal took the view that the partnership was not a "firm" at all and assessed it in the status of an "association of persons". It was contended that the Tribunal had no power to uphold the assessment changing the status of the assessee but could only annual the assessment or remand the case to the ITO to make a fresh assessment on the assessee in the status of an "association of persons".

41. On a reference made at the instance of the assessee, it was held that the assessee was an "association of persons" and not a "firm" and that the Tribunal had power to uphold the assessment changing the status of the assessee into that of an association of persons as the question whether the assessee should be assessed as an unregistered "firm" or as an "association of persons" was raised before the ITO and the AAC and before the Tribunal also.

42. The decision of the High Court of Madras has no relevance to the instant case as neither before the ITO nor before the AAC nor before the Tribunal, it was even hinted by the Revenue that there could be an assessment in the status of a "body of individuals".

43. To sum up, the Tribunal having held that smt. Panna Bai could not be

assessed to tax in the status of an "individual" on the income derived from the firm erred in modifying the assessment in the status of a "body of individuals" consisting of Smt. Panna Bai and her minor children. The Tribunal should have annulled the assessment with liberty to the ITO to assess the income in the status of a body of individuals, if permitted by law, after issuing notice to that body of individuals to submit a return as required by s. 139(2) of the I.T. act. It would be open to that body of individuals to plead among other things that during the assessment year in question, Smt. Panna Bai was not actively associated with the business of the firm and that she did nothing more than receiving 30 per cent. of the profits of the firm. We, accordingly, answer the second question in favour of the assessee and against the Revenue. Our answer to the first question will abide by the decision of the ITO on remand of the case by the Appellate Tribunal. The reference is answered accordingly. No costs.

44. Before parting with the case, we wish to place on record our appreciation of the valuable assistance rendered by Sri Habib Ansari as amicus curiae.