

(1990) 11 KAR CK 0057

In the Karnataka High Court

Case No : Civil Revision Petition No. 1728 of 1980

P.M. Subbaiah

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 28-11-1990

Acts Referred:

Income Tax Act, 1922 — Section 25 A

Mysore Agricultural Income Tax Act, 1957 — Section 3 (3), 30, 30 (3)

Citation : (1991) 190 ITR 440

Hon'ble Judges : M.P. Chandrakantaraj Urs, J;K.B. Navadgi, J

Bench : Division Bench

Advocate : G. Sarangan, for the Appellant; H.L. Dattu, Govt. Pleader, for the Respondent

Judgement

M.P. Chandrakantharaj Urs, J.—This is a revision petition u/s 55 of the Karnataka Agricultural Income Tax Act, 1957 (hereinafter referred to as the "Act"), preferred by the assessee. The assessee is a coffee planter. He filed the return for the assessment year 1976-77 (accounting period April 1, 1975 to March 31, 1976) disclosing his status as an association of persons. The association in question consisted of the assessee, P.M. Subbaiah, his two brothers and two sisters, all having attained the age of majority, undisputedly, prior to that assessment year, the family was being assessed as a Hindu undivided family. After the death of the karta of the Hindu undivided family which was some years before the assessment year 1976-77, an advocate from Madikeri represented the assessee before the Agricultural Income Tax Officer, Virajpet. The members of the family had entered into an agreement dated April 2, 1975, by which they had severed their status as members of the Hindu undivided family and declared themselves as equal shares in the joint properties of the family. He, therefore, contended that the assessment should be concluded against the association of person u/s 3(3) of the Act as tenants-in-common. The assessing authority did not accede though he examined the claim put forward in regard to the disruption of the status of the joint Hindu family and examined the agreement which had

been signed by all the members of the family and which was placed before him by the advocate appearing for the assessee (a little later in the course of this order, we shall extract the exact words used by the assessing authority in regard to this aspect of the case, in the light of the arguments advanced by the learned High Court Government Pleader appearing for the respondent-Commissioner.) However, the advocate for the assessee had no objection to the computation of income by the assessing authority where certain allowance was disallowed and the income returned at Rs. 17,302.42 was raised to Rs. 69,287.42 by allowing expenses of Rs. 74,025 on the income of Rs. 1,43,312.42. Aggrieved by that assessment order, the assessee filed an appeal before the Deputy Commissioner of Commercial taxes (Appeals), Mangalore Division, Mangalore, in Appeal No. KATT/ AP-52 of 1978-79. But the appeal was confined not to the assessment quantifying the taxable agricultural income but to the finding recorded in regard to the status of the assessee. The appellate authority, accepting the case put forward by the assessee, Set aside the finding recorded by the Agricultural Income Tax Officer, Virajpet, following the Division Bench decision of this court in P. Cheradappa Pai Vs. Agricultural Income Tax Officer, Puttur, , and directed that the assessment be concluded against the assessee and other member of the family as tenants-in-common. That order was passed on October 28, 1978. Thereafter, the Commissioner of Agricultural Income Tax, Karnataka, Bangalore, considered the order of the Deputy Commissioner of Commercial Taxes (Appeals), who was also the Deputy Commissioner of Appeals under the Act, to be an erroneous order prejudicial to the Revenue and, therefore, invoking his suo motu revision powers u/s 36 of the Act, issued a show cause notice to the assessee as to why the appellate order should not be set aside and the assessment order passed by the Agricultural Income Tax Officer, Virajpet, restored and affirmed, as a there was clear violation of the mandatory requirement of sub-sections (1) and (2) of section 30 of the Act, resulting in there being a presumption that, in the absence of a an order, after due notice to all the parties under sub-section (1) of section 30, the family continued to be joint in status on account of the legal fiction created by sub-section (3) of section 30 of the Act. The assessee resisted that proposition and contended that once there was disruption of the joint status, what the appellate authority had done was correct and specifically relied upon the decision of Allahabad High Court in the case of COMMISSIONER OF Income Tax, U. P. Vs. PURUSHOTTAM DAS RAIS., and contended that section 30(3) was not at all attracted, as held by the Allahabad High Court in respect of a similar question arising under the Indian Income Tax Act, 1922, with reference to section 25A of that Act, which is in pari material with section 30 of the Act. That contention was negatived and the Commissioner set aside the appellate order holding that, in view of sub-section (3) of section 30 of the Act which clearly provided for a presumption in favour of the family continuing as a Hindu undivided family, the appellate authority was in error in interfering with the assessing authority's order.

2. Therefore, the present revision petition by the assessee, inter alia, contending

that the respondent-Commissioner had no jurisdiction as there was no order prejudicial to the Revenue and there was no error of law in the order of the Deputy commissioner (Appeals).

3. It is useful to set out section 30 of the Act and it is as follows :

"30. Assessment after partition of a Hindu undivided family. - (1) Where at time of making an assessment u/s 19, it is claimed by or on behalf of any member of a Hindu undivided family, or branch, an Aliyasanthana family or a Marumakkattayam tarwad or tavazhi hitherto assessed as undivided that a partition or maintenance division has taken place among the members or groups of members of such family, branch, tarwad or tavazhi, the Agricultural Income Tax Officer shall make such inquiry there into as he may think fit, and if he is satisfied that there has been a partition or maintenance division of the property by metes and bounds among the various members or groups of members and separate enjoyment by them, he shall record an order to that effect :

Provided that no such order shall be recorded until notice of the inquiry has been served on all the adult members of the family, branch, tarwad or tavazhi entitled to the property as far as may be practicable or in such other manner as maybe prescribed.

(2) When such an order has been passed, the Agricultural Income Tax Officer shall make an assessment of the total agricultural income received by or on behalf of the family, branch, tarwad or tavazhi as such, as if no partition or maintenance division had taken place and each member or group of members shall, in addition to any agricultural Income Tax for which he or it may be separately liable, and notwithstanding anything contained in clause (a) of section 12, be liable for a share of tax on the income so assessed according to the portion of the family, branch, tarwad or tavazhi property allotted to him or it and the Agricultural Income Tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 19 :

Provided that all the members and groups of members whose family, branch, tarwad or tavazhi property has been partitioned or divided for maintenance shall be liable jointly and severally for the tax on the total agricultural income received by or on behalf of the family, branch, tarwad or tavazhi as such up to the date of the partition."

4. One of the questions which falls to be answered is, regard being had to the language of sub-section (1) of section 30 of the Act, on the undisputed facts, whether one should come to the conclusion that there was an enquiry and a finding of fact recorded after such enquiry. It is also clear from the language of section 30 that it is procedural in character and nature.

5. The learned Government pleader, Shri Dattu, does not dispute that the return was filed before the authority by the petitioner who was the eldest son of late

Palekanda Muthanna disclosing the status in the return in the prescribed form as association of persons. The plea before the Agricultural Income Tax Officer, the assessing authority, was that, on account of the agreement dated April 2, 1975, shares in the properties of the joint family had been determined in equal proportion to all the members of the family and, therefore, that agreement signed by all the members of the family was evidence of disruption of the status of the joint family. Accordingly, the assessing authority has dealt with that contention in the following terms :

"During the year under assessment, the assessee has claimed the status of "tenants-in-common". The assessment up to the year under assessment was being made in the status of a "Hindu undivided family". At the time of hearing of the case, the assessee's representative pleaded that the status of a Hindu undivided family was disrupted on April 2, 1975, and shares of the properties have been determined by the members of the Hindu undivided family. The claim of the assessee was examined. Since the Hindu undivided family was not disrupted earlier even though the erstwhile karta of the Hindu undivided family, late Palekanda Muthanna, expired some years back and the assessment in this case was continued in the name of the family male members, the status claimed as "tenants-in-common" at this stage is not acceptable."

6. In the light of the conclusion reached as above, the assessment was concluded treating the return, not as a return of an association of persons but as a return filed by the karta of a Hindu undivided family. On this question, which alone was pressed before the first appellate authority, the appellate authority found as follows :

XBIX" In the return of income filed in Form No. 3 on July 13, 1977, the appellant has shown the status as tenants-in-common. At the time of hearing before the Assessing Officer, the learned representative has filed a copy of the agreement dated April 2, 1975, entered into between...under the status of the joint family, wherein they have expressed their desire to terminate the joint family status which was hitherto enjoyed by them without changing the tenure of the property, but to change the mode of enjoyment. According to the said agreement, the joint family status was terminated and they have agreed to enjoy the property as tenants-in-common in equal shares. From the above agreement, it is clear that the joint family status has been disrupted from April 2, 1975. This position of law has been clearly affirmed by our Hon"ble High Court in the case of P. Cheradappa Pai Vs. Agricultural Income Tax Officer, Puttur, In the instant case, it is clear from the agreement that the members of the joint family have expressed their intention to sever and have agreed to hold the property as tenants-in - common in equal shares. Therefore, the appellants cannot be assessed under the status of a Hindu undivided family and they have to be assessed only as "tenants-in-common".

7. With that reasoning, he allowed the appeal and directed that the association of persons be assessed as tenants-in-common.

8. Before we notice the arguments advanced for the Revenue by the learned government Pleader, Sri Dattu, it is useful to set out sub-section (3) of section 3 of the Act :

"3. Charge of agricultural Income Tax. - (1) Agricultural Income Tax at the rate of rates specified in part I of the schedule to this Act shall be charged for each financial year commencing from the first April, 1957, in accordance with and subject to the provisions of this Act, on the total agricultural income of the previous year of every person...

(3) In the case of persons holding property as tenants-in-common and deriving agricultural income, the tax shall be assessed at the rate applicable to the agricultural income of each tenant-in-common."

9. From the above, it is clear that, in the case of persons holding property as tenants-in-common and deriving agricultural income, the tax should be assessed at the rate applicable to the agricultural income of each tenant-in-common. If a finding is recorded that the income derived by the members of the family is income of a tenant-in-common, then sub-section (3) of section 3 as it stood at the relevant time, for the relevant assessment year, automatically is attracted. It is normal rule of construction that, if a particular class of persons is governed by some provision of law or within its ambit, then they stand excluded from the application of other provisions of law in the same enactment. Therefore, if the members of the family or an association of person answer to the description of tenants-in-common by virtue of the agreement of April 2, 1975, then they could not be assessed under any other provision, but sub-section (3) of section 3 of the Act, as held in *P. Cheradappa Pai Vs. Agricultural Income Tax Officer, Puttur*, by a Divisions Bench of this court.

10. In this connection, we may even mention that "person" is defined under clause (b) of section 2 of the Act and provides for an association of individuals, whether incorporated or not. Therefore, the signatories to the agreement of April 2, 1975, did constitute an association of person within the meaning of the expression as defined in the Act.

11. Sri Dattu, the learned Government Pleader appearing for the respondent - Commissioner, strenuously contended that once there was no enquiry as contemplated under sub-section (1) of section 30 of the Act, with notice to all the parties, then the assessment was bad and was of no consequence in the eye of law and as such the commissioner was justified in interfering with the order of the appellate authority. We find it somewhat unusual that such a contention is being advanced in the circumstances of the case. If an order was bad, for that reason, that order which has merged in the appellate order called for interference and as such the assessment should have been set aside by the commissioner. He has not done so, but he has restored the assessment order despite the illegality pointed out by himself. In this behalf, reliance was placed by the learned High Court Government pleader on the decision of the Andhra Pradesh High Court in

the case of KALWA DEVADATHAM AND OTHERS Vs. UNION OF INDIA AND OTHERS, . We are of the view that that decision has really no application to the fact of the present case. Undoubtedly, a Division Bench of that court did hold, while construing section 25A of the Indian Income Tax Act, 1922, that failure to hold an enquiry in accordance with the procedure prescribed under sub-section (1) of section 25A of the Act would be fatal to the assessment proceedings and it was for the assessee to seek an enquiry and a consequential order and not for the Revenue to pass such an order. The learned judges also referred to an earlier decided case of the Madras High Court in the case of M.S.M.M. Meyyappa Chettiar Vs. Commissioner of Income Tax, . But the learned judges, for reasons best known to themselves, we say so with the utmost respect, said that the decision of the Madras High Court had no application. We find it the other way.

12. In the case of M.S.M.M. Meyyappa Chettiar Vs. Commissioner of Income Tax, , a Division Bench of that High Court examined the effect of section 25A in regard to partial partition on the facts of the case and came to the conclusion that sub-section (3) of section 3 of the Act, corresponding to sub-section (30 of section 30 of the Act, had no application at all or was not attracted in cases where there was only a partial partition. In that event, it proceeded to hold that in the case of a Hindu undivided family, the status of which had been disrupted by a partition of some of the properties and not of some other properties, the income derived from the undivided property should be treated as the income of the Hindu undivided family and the income derived from those which were divided should be treated as the income of tenants-in-common. It was this principle which was followed by the Allahabad High Court in the case of COMMISSIONER OF Income Tax, U. P. Vs. PURUSHOTTAM DAS RAIS., , approving the dicta of the Madras High Court in that behalf.

13. We are of the view that some useful purpose would be served by referring to the decision of the Supreme Court in somewhat identical circumstances, in the case of Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others, . In the said case, N and his three sons were assessed to tax in the status of a Hindu undivided family for the assessment years 1944-45 to 1946-47 in the months of February and March 1948. As the tax due for those years was not paid, the Madras revenue authorities, at the instance of the Income Tax Department, attached 51 items of immovable properties as belonging to the joint family and of these 38 items were sold by auction. The three sons, through their mother acting as their next friend, instituted a suit against the Union of India, the Madras revenue authorities, the purchasers of the properties at the auction and N, claiming that six of the items of immovable property, which had been acquired in the names of two of the sons, did not at any time belong to the joint family as they were acquired with funds provided by their maternal grandmother, S, and that the other items of property were not liable to be attached and sold since they had been allotted on a partition of the joint family property effected in March, 1947, before the orders of assessment were made.

14. In the background of these facts, Shah J. dismissed the appeal, upholding the judgment of the Andhra Pradesh High Court to which we have earlier referred, on the ground that an order under the Income Tax Act may be set aside within the framework of the statute and a suit filed seeking relief to defeat an order made under the Income Tax Act would be impermissible.

15. That will not in any way assist the Revenue in this case, because in the case of Charandas Haridas and Another Vs. The Commissioner of Income Tax, Bombay North, Kutch, Saurashtra and Ahmedabad and Another, , the Supreme Court had occasion to consider the effect of partition of a Hindu undivided family in circumstances somewhat similar to the facts of the case on hand. C was the karta of a Hindu undivided family consisting of this wife S, his three sons and himself. He was a partner in six managing agency firms and the share of the managing agency commission received by him as such partner was being assessed as the income of the family. On December 31, 1945, C, acting for himself and his minor sons, and his wife S entered into an oral agreement of a partial partition by which he gave his daughter a one pie share of the commission from each of the two of the managing agencies and the balance in those agencies and the commission in the other four managing agencies were divided into five equal shares between C, his wife and his sons. This agreement was to come into effect on January 1, 1946. On September 11, 1946, C, acting for himself and his sons and his wife executed a memorandum of partial partition recording the oral agreement of partition and the particulars of the division.

16. On these facts, with reference to section 25A, Hidayatullah J., as he then was, had this to say (p. 208) :

"In our opinion here there are three different branches of law to notice. There is the law of partnership, which takes no account of a Hindu undivided family. There is also the Hindu law, which permits a partition of the family and also a partial partition binding upon the family. There is then the Income Tax law under which a particular income may be treated as the income of the Hindu undivided family or as the income of the separated members enjoyed separate shares by partition. The fact of a partition in the Hindu law may have no effect upon the position of the partner, in so far as the law of partnership is concerned, but it has full effect upon the family in so far as the Hindu law is concerned. Just as the fact of a karta becoming a partner decided ones not introduce the members of the undivided family into the partnership, the division of the family does not change the position of the partner vis-a-vis the other partner or partners. The Income Tax law before the partition takes note, factually, of the position of the karta, and assesses not him qua partner but as representing the Hindu undivided family. In doing so, the Income Tax law looks not to the provisions of the Partnership Act, but to the provisions of Hindu law. When once the family has disrupted, the position under the partnership continues as before, but the position under the Hindu law changes. There is then no Hindu undivided family as a unit of assessment in point of fact, and the income which accrues cannot be said to be

of a Hindu undivided family."

17. From the above, it is clear that when there is disruption in the status of a Hindu undivided family, then it automatically falls with the divided members, even if there be no partition by metes and bounds, and they will nevertheless be holding the property as tenants-in-common and not as joint tenants.

18. Per contra, the learned High Court Government Pleader, Mr. Dattu, relied upon the decision of the Supreme Court in the case of Kapurchand Shrimal Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad, The Supreme Court in that case came to the conclusion, on the facts of that case, that if no order had been passed under sub-section (1) of section 25A of the Act, the entire assessment would be unlawful and could not be sustained. Where section 25A is attracted to the facts of the case, that proposition of law would apply but where it is not attracted, then the ruling will have no application.

19. We have earlier, in the course of this order, pointed out that there was indeed an enquiry, in the words of the enquiry officer, an examination of the fact of partition claimed by the assessing authority. To use his own expression "that was an examination of the question," but he came to the conclusion that no partition had taken place because, even after to the death of the father, the original karta of the family, the family had been assessed as a Hindu undivided family. That is not a reason to defeat the severed status as a Hindu undivided family, as evidenced by the agreement made on April 2, 1975. Once the disruption is established, then the consequences must follow, as ruled by the Supreme Court in Charandas Haridas and Another Vs. The Commissioner of Income Tax, Bombay North, Kutch, Saurashtra and Ahmedabad and Another,

20. Before parting with this case, we must notice the argument advanced by the learned Government Pleader and that is this. The learned Government Pleader stressed that, as there was no notice to the other members of the family and signatories as contemplated by sub-section (1) of section 30 of the Act, the enquiry conducted by the enquiry officer should be held to be no enquiry contemplated under that sub-section. We do not, for more than one reason, accede to the same. First, the return was filed and signed by the eldest member of the family who was one of the signatories in his capacity as a joint owner showing the status of the family as an association of persons. As approved by the Supreme court in the case of Sri Ram Pasricha Vs. Jagannath and Others, , a joint owner or a co-owner has all the rights of the owners and may extract the same in his capacity as a joint or co-owner. The passage is as follows (at p. 2339) :

21. XDXH"Mr. V. S. Desai reads to us from "Salmond on Jurisprudence" (13th Edition) and relies on the following passage in Chapter 8 (Owner-ship). Paragraph 46 at page 254 :

"As a general rule a thing is owned by one person only at a time, but duplicate ownership is perfectly possible. Two or more persons may at the same time have

ownership of the same thing vested in them. This may happen in several distinct ways, but the simplest and most obvious case is that of co-ownership. Partners, for example, are co-owners of the chattels which constitute their stock-in trade, of the lease of the premises on which their business is conducted, and of the debts owing to them by their customers. It is not correct to say that property owned by co-owners is divided between them, each of them owning a separate part. It is an undivided unity, which is vested at the same time in more than one person ... The several ownership of a part is a different thing from the co-ownership of the whole. So soon as each of two co-owners begins to own a part of the thing instead of the whole of it, the co-ownership has been dissolved into sole ownership by the process known as partition. Co-ownership involves the undivided integrity of what is owned."

22. Jurisprudentially it is not correct to say that a co-owner of a property is not its owners. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place. It is, therefore, not possible to accept the submission that the plaintiff who is admittedly the landlord and co-owner of the premises is not the owner of the premises within the meaning of section 13(1) (f). It is not necessary to establish that the plaintiff is the only owner of the property for the purpose of section 13(1) (f) as long as he is a co-owner of the property being at the same time the acknowledged landlord of the defendants."

23. Therefore, the first of the signatories to the agreement could file the return as an association of persons acting for all of them. In any event, if notice was not issued, while holding an enquiry or examining the plea of change in status, the fault would lie with the officer and he cannot be permitted to take advantage of his own fault and, thereafter, consider that lapse to be a ground for the Commissioner to exercise his jurisdiction u/s 36 of the Act. We do not think there is need for issuance of a notice, when all persons competent to contract had signed the agreement, disclosing that they have severed status and that the authenticity of the agreement was never disputed by the Department and the person who appeared and participated in the assessment proceedings was a person duly authorised by one of the tenants-in-common.

24. In any event, in the absence of any complaint by other members of the family of want of notice, we cannot accede to the contention that the enquiry in whatever form it was held was vitiated, for want of issuance of notice. We must, however, observe that the Act or the Rules do not provide for the type or procedure of enquiry to be held by the Agricultural Income Tax Officer under sub-section (1) of section 30 of the Act. As long as he looked into the deed of partition and recorded a finding, that investigation of facts would constitute the enquiry contemplated under the Act. We also must observe in this context by way of caution that sometimes it will not be apposite to rely upon the decision rendered under the Indian Income Tax Act of 1922, with reference to section

25A, corresponding to section 30 of the Act because, under the Income Tax Act, income from different sources are liable to be taxed whereas, under the Act, only the agricultural income may be taxed. Therefore, as long as agricultural property is divided or stands divided in equal proportions, then partition is concluded in so far as the agricultural property is concerned and so far as the Act is concerned.

25. Yet another argument that was advanced was that there was no separate order. We do not think that the contention has any force. It is quite common even in judicial orders to pass interlocutory orders in the final judgment. Therefore, if an order recording a finding purporting to be once after an enquiry under sub-section (1) of section 30 is part of the assessment order, then there will be substantial compliance with the requirement of that sub-section.

26. We, therefore, for the reason given above, hold that the Commissioner had no jurisdiction to exercise his suo motu revisional power, as there was no error of law in the appellate order. If there was no error, then he cannot assume jurisdiction.

27. For the above reasons, we allow the revision petition and set aside the order of the Commissioner and restore that of the appellate authority.

28. We have not referred to many other decisions cited, as we do not think it would serve any purpose in taking the case of the Revenue any further.

29. There will be no order as to costs.