

(1995) 08 AHC CK 0063

In the Allahabad High Court

Case No : Income-tax Reference No. 29 of 1979

Ram Nath

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 31-08-1995

Acts Referred:

Income Tax Act, 1961 — Section 171

Citation : (1995) 129 CTR 363 : (1996) 217 ITR 661 : (1996) 84 TAXMAN 444

Hon'ble Judges : M.C. Agarwal, J;B.M. Lal, J

Bench : Division Bench

Advocate : R.S. Agarwal, for the Appellant; Ashok Kumar, for the Respondent

Judgement

M.C. Agarwal, J.—The Income Tax Appellate Tribunal, Allahabad Bench, Allahabad, has referred the following questions of law stated to be arising out of its combined order dated September 19, 1977, passed in I. T. A. Nos. 645 and 646 (Allahabad) of 1976-77 :

"(1) Whether, in the circumstances of the case, was the Tribunal justified to hold that the claim of partition was wrongly accepted by the Appellate Assistant Commissioner ?

(2) Whether, in the circumstances of the case, was the Tribunal correct to hold that by separation of karta by taking away his share out of the assets subject-matter of partition among the members of the family a smaller Hindu undivided family comprising of mother and son cannot continue under the Hindu law ?"

2. We have heard learned counsel for the assessee, Sri R.S. Agarwal and learned counsel for the Revenue, Sri Ashok Kumar.

3. The assessee is a Hindu undivided family consisting of Sri Ram Nath, his wife, Smt. Ramshri, and their son, Sri Om Prasad. The dispute relates to the validity of a partial partition by which it was alleged that the karta, Sri Ram Nath, separated from his wife and son by taking away Rs. 10,000 out of the joint family assets

and giving Rs. 20,000 jointly to his wife and son, namely, Smt. Ramshri and Sri Om Prasad.

4. The Income Tax Officer rejected the assessee's claim of partial partition and included the interest income in respect of the aforesaid sum of Rs. 30,000 in the income of the assessee-Hindu undivided family. The assessee appealed to the Appellate Assistant Commissioner of Income Tax who accepted the partition as valid. The Revenue appealed to the Income Tax Appellate Tribunal which negatived the assessee's claim and setting aside the order passed by the Appellate Assistant Commissioner upheld the order passed by the Assessing Officer. In its order, the Income Tax Appellate Tribunal observed as follows :

"On October 22, 1971, the subject-matter of the alleged partition is the sum of Rs. 30,000 and the partition is alleged to have taken place at the insistence of the father. It is true that the father, as a coparcener, could ask for division of the sum of Rs. 30,000 between himself and his son. At this time, the mother would clearly be entitled to an equal share. She could of course refuse to take anything in partition if she so desired. But, in a case where the members of the coparcenary are only two, the moment one member sought partition with regard to certain assets, they would automatically stand partitioned amongst the two coparceners of the family, there remaining nothing joint thereafter between the two of them. It is not possible for the mother not to take her share and remain joint with the son, because what is being divided is the coparcenary property and she has no say in the matter of the division. If the two coparceners decided to separate, the division takes place. As noted above, the mother may choose to take nothing on a partition, but she cannot say that she will take her share and keep it joint with the son, separating from the father and forming a smaller Hindu undivided family with the son. The basic family unit consisted of the father and the mother, and not of the mother and the son. The father can get separated, as noted above, from the son giving in the process her rightful share to the mother, but it is not conceivable in law that he separates from his wife and son, who, in turn, form a smaller family to the exclusion of the father and yet remaining member of the bigger Hindu undivided family with regard to the remaining properties. The learned Appellate Assistant Commissioner had clearly, in our opinion, erred in not taking note of these facts."

5. The Tribunal further observed :

"Taking into account the overall facts of the case, we are of the opinion that the alleged partition deed dated October 22, 1971, was, in fact, not genuine and had no effect in law. It was an artificial device aimed at creating artificial units. It may bear repetition at this stage to state that the bigger Hindu undivided family, consisting of the father, the mother and his son has not come to an end, it subsists simultaneously. Rupees 30,000 could have been partially partitioned between the father and the son giving to the mother her equal share, as was done in respect of Rs. 51,000 earlier on October 18, 1971. But this is not what has been done in the instant case. The assessee's counsel has submitted that

Rs. 30,000 could be taken out of the assets of the bigger family and then the father could go out with Rs. 10,000 leaving the mother and the son joint with regard to Rs. 20,000, thus, constituting a smaller Hindu undivided family inter se. For this stand we, however, find no warrant in the Hindu law nor could learned counsel support his stand by any authority. A joint Hindu family is not an artificial creation, it is a product of law. One cannot make and unmake family units in all sorts of permutations and combinations at will. We, accordingly, reverse the order of the Appellate Assistant Commissioner. ..."

6. A perusal of the Tribunal's findings and observations, as reproduced above, would show that the Tribunal misdirected itself in basing its findings on an irrelevant aspect, i.e., whether the sum of Rs. 20,000 having been jointly taken by the mother and the son, they could legally constitute another Hindu undivided family.

7. Learned counsel for the assessee placed reliance on *Tulsidas Kundanmal Vs. Commissioner of Income Tax*, in which it was held that the mere fact that the wife of the karta chose to reside with her sons and not with her husband would not make the partial partition illegal or not genuine because the wife of the karta was not given any share in the partition. The wife of the karta was certainly a member of the family and under the Hindu law, was entitled to a share when a partition between the father and the son took place. Therefore, the mere fact that the mother and the son took a certain amount jointly amongst themselves could not invalidate the partition if it was otherwise valid in law and satisfied the conditions of a partition, as defined in the Explanation to Section 171 to which the Tribunal does not seem to have diverted its attention. The mother and the son may or may not constitute a Hindu undivided family in respect of the sum of Rs. 20,000 purporting to have been jointly taken by them. That is a question that has to be gone into in their respective assessments or in the assessment of the alleged smaller Hindu undivided family or of the association of persons. The question in whose hands the income from the said sum of Rs. 20,000 would be taxable is, in our view, foreign and irrelevant to the validity of the alleged partial partition dated October 22, 1971. The validity of the partition in question has, therefore, not been validly determined by the Tribunal before whom the applicant-Revenue had claimed that the partition was merely an eyewash. What were the circumstances to brand the partition as an eye wash have not been discussed and the view that the mother and the son could not constitute a Hindu undivided family in respect of the said sum of Rs. 20,000 could not invalidate the partition or make it mere eyewash.

8. In view of the above discussions, we answer the aforesaid question in the negative and find that the Income Tax Appellate Tribunal has not correctly approached the question of the genuineness and validity of the alleged partial partition dated October 22, 1971. The Tribunal's order is, therefore, set aside in so far as it relates to the aforesaid controversy and the Income Tax Appellate Tribunal is directed to redetermine the controversy in accordance with law.

9. The assessee shall get his costs of this reference which we assess at Rs. 1,000.