
(1950) 03 OHC CK 0010
In the Orissa High Court
Case No : S.J.C. No. 17 of 1947

Rangalal Modi

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 03-03-1950

Acts Referred:

Income Tax Act, 1922 — Section 25A, 25A(1)

Citation : AIR 1950 Ori 191 : (1950) 18 ITR 383

Hon'ble Judges : Ray, C.J.; Jagannadhadas, J

Bench : Division Bench

Advocate : B.N. Mohanty, for the Appellant; G.C. Das, for the Respondent

Judgement

Jagannadhadas, J.—This is a reference under the Income Tax Act. This Court by its order dated 3rd January 1949, directed the Income Tax Appellate, Tribunal to state a case u/s 66 (2) of the Act. In pursuance of that order the question that has been referred for decision of this Court is stated by the Tribunal in the following terms:

"Whether on the facts and in the circumstances of the case the Tribunal erred in law in holding that the applicant was not entitled to an order u/s 25-A."

2. To appreciate the question at issue, the facts and the circumstances of the case as they appear from the records require to be elucidated. They are as follows:

3. The assessee is one Rangalal Modi of Cuttack. The assessment year is 1944-45 and the accounting year is Dewali of 1949 to dewali of 1943 which is stated to be from 8th November 1919 to 10th November 1943. Rangalal Modi and his sons constituted a joint Hindu family and were being assessed as such. During the course of the assessment in question, the assessee claimed that this joint family had become disrupted on 9th November 1949 and subsequently as evidenced by a partition, deed dated 9th October 1943, that is, during the course of the accounting year and that accordingly he is entitled to an order u/s 25-A of the

Act and for assessment accordingly. The Income tax authorities have held that he was not so entitled and hence this reference.

4. One Hariram was the father of Rangalal. The original joint family consisting of Hariram and his sons including Rangalal appears to have separated some years previously, i.e., in or about 1934, and we are not directly concerned with the same. After the disruption of the original joint family, Rangalal with his sons constituted a joint family and it is with the alleged disruption thereof we are at present concerned. This family owned or had interest in properties described in Sohs. A to E of the registered partition-deed dated 25th October 1943. They consist of lands, buildings and mills. It would appear that one of the sons of Rangalal by name Manalal had brought a suit for partition and got his share in the family property by a decree dated 10th August 1942. The present partition is therefore concerned with the remaining properties of the joint family and is between Rangalal and his three other sons, Basudev, Kanhailal and Chaturbhuj. The partition-deed recites that on 9th November 1942, that is, the day following the Dewali, in 1942, the parties namely, Rangalal and his three sons had divided all business in four equal shares and that since then they were carrying on business in four equal shares and that since then they were carrying on business in partnership, with defined shares and on terms specified in separate deeds of partition executed by the said parties. It also recites that the parties had divided ornaments, utensils, etc., amicably as between themselves and that since 9th November 1942, they were completely separated in interest, mess and property, from each other and that each of the parties is separately dealing with their respective properties and separately managing their respective families. The partition-deed accordingly deals with only immovable property of the family and it recites that parties 1 to 4 have amicably divided the same, some by metes and bounds and some by ascertainment of definite shares as set forth in the Schedules. A reference to the schedules shows that the properties in Schedule (A) were allotted to party No. 1 namely, Rangalal, those in Schedule (B) to party no. 2, Basudev Prasad, Schedule (C) to party No. 3, Kanhailal and in Schedule (D) to party no. 4 Chaturbhuj. Properties in Schedule (E) however were not partitioned by metes and bounds and it is stated in the partition-deed para. 6 as follows:

"We the parties one to four shall own and possess the same with defined shares of four annas each and we will get them partitioned by metes and bound in future whenever we or any of us parties 1 to 4 deem it convenient and possible and the parties 1 to 4 each remains liable for payment of rent, tax and other charges (one fourth each) with effect from 9th November 1942."

5. The properties in Schedule (E) are (1) Khas mahal rayati lands in the town of Cuttack on which stand pucca and kuchha structures with buildings and appurtenances. It is stated to be of the extent of 186 acres, out of an extent of 796 acres appertaining to Khatian no. 1384 and allotted to the share of party No. 1 Rangalal Modi in the deed of family settlement dated 6th September 1984 (i.e.,

as between Rangalal and his brothers). Item 2 in Schedule (E) is 8-53-acres of permanent lease-hold lands situated in Mouza Byree with buildings, structures, appurtenances etc., commonly known as Swastika Bice Milla. Schedule E also mentions lease-hold land under license no. 4 in summadi factor platform no. 3 of the total extent of 180.86 acres. But para. 7 of the partition-deed shows that it is not a joint family asset and that it has accordingly been allotted to party No. 1 under the partition-deed and we are therefore not concerned with it. The main reason by the assessee has been refused an order u/s 25-A was the fact that the properties (other than summadi lease-hold) in Schedule (E) have not been partitioned by metes and bounds between the members of the family. It may also be mentioned that para. 9 of the partition-deed shows that the family cremation ground and the garden attached to it, the guesthouse at Manikghoab Bazar and the ancestral house at Ramgrah in Jaipur state will not be partitioned according to the wish of late Hariram Modi and his five sons. These items have apparently been treated as impartible by agreement not only between the members to this partition deed, but presumably between the members of the original family of Hariram and his sons. It has not been suggested in the course of the Income Tax proceedings that the fact that these items of property alone remain without partition is any ground for refusing to make an order u/s 25A. Now coming to the actual findings of the Income Tax authorities, it would appear that the Income Tax officer was inclined to think that as a fact no partition at all took place as alleged. On that ground he rejected the application of the assesses for an order u/s 26A. The Appellate Assistant Commissioner and the In-come-tax Appellate Tribunal however have decided against the assessee on the ground that the entire family assets have not been partitioned by metes and bounds. They were of the view that since there has not been a complete partition of the entire joint family property, the joint family will be deemed to continue for purposes of income tax. They rely on the fact that the properties in Schedule (E) have not been partitioned by metes and bounds. The only question therefore is, if the partition of all the other items of family property as recited in the partition-deed is genuine (and not a make-believe as the Income Tax officer was inclined to think), the fact that the two items of property comprised in Schedule (E) Have not been partitioned by metes and bounds is enough to disentitle the assessee to an order u/s 25A.

6. It may be mentioned that though as already stated para. 6 of the partition-deed recites that properties in Schedule (E) will be partitioned by metes and bounds in future whenever all or any of the parties deem it convenient or possible to so, it is stated to us that item 1 in Schedule (E) is a plot on which the family, house is situated and in which the various parties live in separate portions as a matter of family convenience, though there has been no partition by metes and bounds and also that item 2 in Schedule (E) is a land on which the Swastika rice mill and its appurtenances stand and that it is an item of partnership asset according to the partnership-deed between the parties relating to this mill, expressly or by implication. These suggestions have not been investigated.

7. It is in the light of the facts and circumstances above stated the question under reference baa to be answered. Section 254 (1) runs as follows:

"Where, at the time of making an assessment u/s 28, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income Tax officer shall make such inquiry thereinto as he may think fit and, if he is satisfied that the joint family property has been partitioned among the various members or groups of members En definite portions, he shall record an order to that effect."

7. The effect of making such an order under Sub-section (1) is dealt with in Sub-section (s) which says that where such an order has been passed the Income Tax officer in to make an assessment of the income, as if no partition had taken place, but that each member of the family is to be liable for a share of the income, tax so assessed according to the portion of the joint family property allotted to him. Sub-section (3) further says that where such an order baa not been passed, the family shall be deemed to continue as a Hindu undivided family for the purposes of the Act.

8. The interpretation of this section and its application to varying facts and circumstances has come up for notice in a number of decided cases which it is unnecessary to recapitulate, as they have all been noticed exhaustively in the judgment of the Bombay High Court in Gordhandas T. Mangaldas Vs. The Commissioner of Income Tax, . The question has turned on the interpretation of the phrase, in Section 25A (1).

"If he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions."

It may now be taken as fairly well-settled that, the section does not apply to a case where there has been nothing more, between the members of the family, than a division in status and a notional allotment of shares. It is fairly obvious that the phrase "petition in definite portions" has been used in the section to negative a case of mere notional disruption in the joint family status and a consequent division of interest or allotment of shares. It has also been rightly pointed out that the Act which is of all India application, would be inapplicable on the opposite construction to the case of a Dayabbaga joint Hindu family if what was contemplated was only a division in interest. On the other hand, it has been also held that while actual division of the properties is necessary, it is not necessary that every item of property irrespective of its nature or other relevant considerations should have been divided by metes and bounds. The case in Gordhandas T. Mangaldas Vs. The Commissioner of Income Tax, construes the word "definite portions" as indicating physical division of the property. The learned Chief Justice, Beaumont C. J., says as follows :

""The expression "division in definite portions will have to be construed with regard to the nature of the property concerned. A business cannot be divided

into parts in the same manner as a piece of land, division may only be possible in the books, Special cases will have to be dealt with by the Income Tax officer when they arise, If he comes to the conclusion that, having regard to the nature of the property, what has been done amounts to a division in definite portions, he will record his finding under Sub-section (1), if he comes to the conclusion that it does not, then he will have to go on assessing the family under Sub-section (3)."

In the same case Kania J. (as he then was), was also inclined to the view that the word "portion" when read in conjunction with partition of joint family property, would ordinarily mean a physical division, and not a definition or ascertainment of shares only and his Lordship adds :

"The question is always, having regard to the context in each case what is the proper meaning to be attached to the word portion."

and it was pointed out that "in the case of a business a physical division by metes and bounds was not to be expected." It may therefore be taken as settled on the authority of that decision which has been followed in subsequent cases that while a mere disruption of the joint family status and ascertainment of shares is not enough by itself; neither is it necessary in all cases that there should be a physical division by metes and bounds of each and every item of joint family property. It would follow that the fact that some items of joint family property have not been divided by metes and bounds would not by itself be enough to take the case out of Section 25 A, if otherwise taking all the relevant facts and circumstances into consideration, it is reasonable to say that "the joint family property has been partitioned among the various members thereof in definite portions." This Bombay case and other subsequent cases to be noticed later have been taken by the Income Tax authorities as laying down a broad proposition that where some of the properties of the erstwhile joint family have remained without a division by metes and bounds and in that sense there has only been a partial partition of the joint family property, Section 26A would not be applicable. It is the correctness of this assumption with reference to the facts of the present case that requires to be more closely examined, 9. When it is asserted that there has been only a partial partition in the family, it must be remembered that it may apply to two different sets of facts, viz., (1) the family may have divided between themselves some items only of the family property either by metes and bounds or by agreeing to hold them in definite shares but in respect of the rest of the property, they may still continue as an undisrupted and undivided joint Hindu family. (2) The family may be completely disrupted in status and may no longer be a joint Hindu family in respect of family property, but some only of the properties of the family may have been divided between them by metes and bounds or in well-defined portions, but in respect of the other items they may for one reason or another continue to hold them jointly not as undivided Hindu coparceners, but as co-sharers under the ordinary law with definite interests. In the first case, as pointed out by the Privy Council in *Sunder*

Singh v. Commr, of Income Tax, U. P. & C. P. A. I. R. 1942 P. C. 67 : I. L. R. (1943) Kar. 132 the joint family continues, but some items of the joint family property cease to be such and the application of Section 25A is not called for. As the Privy Council says at p. 61 of AIR 1942 57 (Privy Council) :

"Section 25A has nothing to say about any Hindu undivided family which continues its existence, never having been disrupted. Such a case is outside Sub-section (3) because it is not within the section at all. No sub-section is required to enable an undivided family which has never broken up to continue. But it need not have the same assets or same income in each year and it can part with an item of its property to its individual members if it takes the proper steps."

10. With reference to the second Act of facts formulated above as constituting a partial partition different considerations arise. Ex hypothesi the family has become completely disrupted in status and there is no manager of the joint family against whom the assessment is to be levied and no income of the joint family property is to be assessed, if the strict principles of Hindu law were to be applied. It may therefore follow that if the disruption has taken place in the course of the accounting year, a major or substantial portion of the income would escape assessment by virtue of Section 14, Income Tax Act. It may also happen that the Hindu law provision that there can be a notional disruption of a joint family without any substantial and physical separation of the property, may be fraudulently utilised by the family to escape assessment in respect of the higher slabs. Section 25A, is accordingly intended to provide against these contingencies. It provides against them by saying that for the purpose of income, tax a partition of the undivided Hindu family is to be recognised only when the authorities are satisfied that the joint family property has been partitioned among the members "in definite portions" and that when such an order is passed, the income is to be assessed for the accounting" year alone on the footing of the continuance of the family and that the liability is to be apportioned between the individual members, but that if no order to that effect is passed, the joint family is to be deemed to continue.

11. The further questions that arise are when some properties only are partitioned in definite portions and others are not while the status of the family is completely disrupted, (1) is the joint family in such circumstances to be deemed to continue irrespective of any consideration as to the nature and quantum of the property remaining undivided and the reasons for such non-division and (2) if it is to be deemed undivided, is it to be so considered only in respect of the properties remaining undivided, or in respect of both the divided and undivided - properties. It is these questions that arise on this reference.

12. Some of the considerations relevant to a discussion of the above questions have been dealt with in three recent cases, Medam Gurumurthi Setty Vs. Commissioner of Income Tax, ; Bansidhar v. Commr. of Income Tax, B. & O. AIR 1914 pat. 137 : 23 Fat. 68 and Waman Satwappa Kalghatgi Vs. Commissioner of Income Tax, . In the Madras case it has been broadly assumed that a. 25A will

not apply to the case of a partial partition. The learned Chief Justice says as follows:

"Partition means a completed partition. The fact that some assets are divided and others are left for division at a future date would not be a partition within the meaning of the section."

It has been pointed out in the later case in *Waman Satwappa Kalghatgi Vs. Commissioner of Income Tax*, that the above dicta in the Madras case are too broadly stated though as a decision in its facts, the case may have been correctly decided. In *R. B. BANSIDHAR DHANDHANIA AND ANOTHER Vs. COMMISSIONER OF Income Tax, BIHAR AND ORISSA.*, the facts found were that the undivided family had become disrupted and so far as the businesses of the family were concerned there has been a partition in definite portions to the extent that the nature of the properties permitted, but that substantial properties in the nature of house-properties and jote lands had not been partitioned. Thus it was found that there was no complete partition, but only a partial partition. It was held that the members of the assessee's family in the circumstances must be deemed to continue to form a joint Hindu family for the purpose of assessing them on that portion of the income, which is derivable only from those properties which have not been partitioned in definite portions i.e., other than the businesses. In *Waman Satwappa Kalghatgi Vs. Commissioner of Income Tax*, the facts found were as follows: The members of the family decided in July 1941, to separate and make a partition of the family properties and assets. They completed the division of the family cash, jewellery, the businesses of the family on 30th July 1941, and thereafter the members separately carried on those businesses which were assigned to their respective shares. It was also found as a fact that the immovable properties belonging to the family were not allotted to individual members and shares thereunder were not specifically divided till 16th October 1941. The question that arose was whether in those circumstances, the profits and gains of the several businesses for the period from 30th July 1941 to 20th October 1941, have been rightly included in the total income of the Hindu undivided family represented by the applicant for the assessment year 1942-43. Though as a fact the family had become completely disrupted, it was assumed (and it was not disputed) that the family must be deemed to continue joint by virtue of Sub-section (2) of Section 25A in respect of the immovable properties of the family which were not allotted to individual members until 16th October 1941 and that the income therefrom was to be assessed on the footing of its being joint family income, and it was argued for the Income tax Commissioner that the effect of Section 25A was in such circumstances to enable the income tax authorities to treat the income from the divided properties also as joint family income for the year. This contention was expressly negatived. The position therefore recognised in both the above cases, namely, *R. B. BANSIDHAR DHANDHANIA AND ANOTHER Vs. COMMISSIONER OF Income Tax, BIHAR AND ORISSA.*, and *Waman Satwappa Kalghatgi Vs. Commissioner of Income Tax*, is that in a case where the family has become disrupted according to substantive

Hindu law, but only some properties have been partitioned in definite portions and the others not, while the assessee may not be entitled to a formal order u/s 25A, it is only the income arising out of the undivided properties that is assessable as joint family income and on the footing of the joint family continuing.

13. These cases are authority for the position that in the case of complete disruption in status of joint family, followed up by only a partial partition of the family properties by metes and bounds or in definite portions, the joint family is to be deemed to continue only as regards the properties remaining undivided, but that as regards the property already divided; the income therefrom cannot be assessed as the joint family income. Following these cases it would be clear that any broad proposition to the effect that Section 25A does not recognise partial partition would be misleading and wide of the mark. It would be correct only in the sense that an assessee would not be entitled to an order u/s 25A, but it would be incorrect if it is meant to say that the entire erstwhile joint family property is to be treated as the property of the fictional joint family that must be deemed to continue under Sub-section (3) of Section 25A.

14. The further question that arises not so far been dealt with in any decided case, so far as I am aware, is this. Is the fictional joint family to be deemed to continue in respect of the undivided properties and an order u/s 25A to be refused if such undivided properties are comparatively small in relation to the entire family property and they have been left so undivided for bona fide and satisfactory reasons based either on practicability, convenience, or reasonable sentiment ? I am inclined to think that there is nothing in Section 25A which compels such a construction. What the section requires as a condition precedent for an order thereunder is that "the joint family property has been partitioned among the various members thereof in definite portions." While it may be that this condition would not be satisfied if a very substantial portion of the joint family property remains undivided by partition in definite portions, there is no reason to assume that it is applicable only when each and every item of the family property without exception has been partitioned. It must be noticed that the section does not say that what has to be found is the partition of the entire joint family property in definite portions. There is no ground for importing to the phrase "joint family property" occurring in the section, the qualifying word "entire," nor to read the word "property" as being properties. The phrase "joint family property" has a reference not necessarily to each and every individual item thereof but to the group in a rather abstract sense. The joint family property "may well be considered as having been partitioned" notwithstanding that a law item thereof have been kept undivided. It is well-known that there may be circumstances in the case of a family partition which would justify certain items of the family property being left out of partition between the members of a family, who proceed to make a partition between themselves as final and as complete as the circumstances of the situation at the time reasonably permit. For instance, an item of property may not at the time be in the possession of the

family, an item of property may be required to be kept in the possession of one of the female members of the family for maintenance during her lifetime, to be divided between the members thereafter, an item of property in the nature of a family true in which the members have rights, either of trusteeship or of beneficial enjoyment of the surplus may have to be kept joint as a matter of reasonable convenience. There may be family heirlooms, residential houses, cremation or burial grounds and the like, which as a matter of reasonable sentiment may be kept undivided. There may conceivably be other circumstances justifying the keeping of some properties undivided by metes and bounds between the members without detracting from the bona fides of the partition as a complete separation and partition with reference to the circumstances of the family at the time. It may of course happen that some or all of such properties may not produce any income. There is no reason why on such facts, the fiction of the continuance of the joint family should be imported for Income Tax purposes in respect of the divided properties and it has been correctly pointed out in the case in *Waman Satwappa v. Commissioner of Income Tax A. I. R. 1946 Bom. 338 : ILR (1916) Bom. 745* that the application of that fiction to the divided property, ties would be contrary to Sub-section (2) of Section 25A. Is it however necessary that the fiction should be imported to apply in respect of the undivided properties where such undivided properties are comparatively small in relation to totality of the family property and where in spite of their remaining undivided, it is reasonable to come to a fair conclusion taken as a whole or that the joint family property has been partitioned in definite portions ? Is it necessary that the assessee should be declined the benefit of an order u/s 25A in his favour under those circumstances ? I am inclined to think that it would be unreasonable to construe Section 25A to that effect and to continue to assess the group of members constituting the original joint family on the footing that they continue to be joint. My view therefore is that where the entire joint family has, in fact, become disrupted in status and where the properties of the family have been partitioned between the members thereof in definite portions, the assessee would be entitled to an order u/s 25A (i), notwithstanding that some items of the family property which are comparatively small in proportion to the entire family assets and which produce only a substantially small income in relation to the total income of the family properties, are kept undivided for solid and substantial reasons whether of practicability, convenience or reasonable sentiment not affecting the general bona fide intention of becoming completely separated units for all purposes.

15. Since the Income Tax authorities have disposed of the case on a mere general assumption that Section 25A does not apply to the case of a partial partition, and since they have not investigated and considered the facts approaching the same from the point of view that has been elucidated above, the case will have to go back to the Income Tax authorities for a proper investigation and elucidation of the relevant facts and a decision thereon in the light of this judgment.

Ray, C.J.

I agree.