

(1937) 10 AHC CK 0009
In the Allahabad High Court
S. C. MULLICK AND SONS, IN RE.

Date of Decision : 25-10-1937

Acts Referred:

Income Tax Act, 1961 — Section 66

Citation : (1938) 6 ITR 99

Hon'ble Judges : Mohammad Ismail, J

Bench : Division Bench

Judgement

MOHAMMAD ISMAIL, J. - This is a reference by the Income Tax Commissioner u/s 66 of the Income tax Act. Before we state the question which we have to answer it is necessary to state such facts as will indicate the implications of those questions.

At page 9 of the statement of the case will be found a pedigree. The common ancestor is one Lakhi Narain Mullick. One of his sons S. C. Mullick migrated from Bengal to Benares and there started hardware business, which proved to be lucrative and became the foundation of the fortune of the family. S. C. Mullick had two sons, A. D. Mullick and K. D. Mullick. S. C. Mullick died in 1930. His A. D. Mullick died in 1933. K. D. Mullick who is alive has two sons and A. D. Mullick has left 7 sons. Up to 1934 the entire family was treated for income tax purpose as a joint Hindu family governed by the Dayabhag schools of law and assessed as such. On the 14th July, 1934, a deed purporting to be one of partnership was executed by K. D. Mullick his two sons, and the seven sons of A. D. Mullick. The deed recites that when S C Mullick was settled down was a minor at the time, they started business as partners and that subsequently the sons of the two brothers were admitted into partnership and constituted a firm. The deed goes on to recited that the firm was "reconstituted" after the death of A. D. Mullick in 1933. Finally, the deed declares that the entire stock in trade of the hardware business belongs to a firm of which the executant thereof are partners. On 23rd July, 1934, K. D. Mullick applied under Sec. 26-A of the Income tax Act for registration of the firm. With the application the deed of partnership, already referred to, was filed. Though, to begin with, the controversy was in connection with application for registration, assessment proceedings appear also to have

been taken and the question arose whether the income of the hardware concern should be considered to be the income of a firm of which S. C. Mullick descendants are partners, or the income of a joint Hindu family consisting of K. D. Mullick and the sons of A D Mullick. It was contended by the assesseees that they were members of a firm; while the Income tax Department treated the income as that of a joint family governed by the Dayabhag school of law. The Assistant commissioner held that A D Mullick and K D Mullick and after the death of A. D. Mullick his 7 sons and K. D. Mullick were members of a joint Hindu family governed by the Dayabhag law and the assets of the hardware business were joint Hindu family property. He also held that the deed of partnership, dated 14th July 1934, represented a fictitious transaction. The Assistant Commissioner expressed the view that members of a joint Hindu family cannot become partners qua joint family property. The application for registration under Sec. 26-A was rejected. The reference before us was made by the Commissioner of Income tax at the instance of K. D. Mullick. The three questions which we are required to answer are as follows :-

"(1) Whether the assessee, being a family governed by the Dayabhag branch of Hindu law is a Hindu undivided family within the meaning of the Indian Income Tax Act, 1922;

(2) If the answer to the first question is in the affirmative, whether there was evidence upon which the Additional Income tax Officer could hold that no partition had taken place among the members of the family; and

(3) Whether in the circumstances of this case, the Income Tax Officer was justified in going behind the partnership deed, dated the 14th July 1934, and holding that there was no firm in existence such as could be registered u/s 26-A of the Indian Income tax Act, 1922."

As regards the first question the Commissioner has expressed the opinion that members of a Dayabhag family cannot become separated members thereof, except by a division of its property by metes and bounds. He has referred to Ganga Sagar Ananda Mohan Saha which was a covers case. The assesseees in that case claimed to be members of a joint Hindu family governed by the Dayabhag Law, while the Income tax Department maintained the contrary. C. C. Ghose, J., who delivered the judgment of the Full Bench, observed that "The essence of a coparcenary under the Mitakshara Law is unity of ownership whereas under the Dayabhag law the essence of a coparcenary is unity of possession. So long as there is unity of possession no coparceners can say that a particular share of the property belongs to him. That he can say only after a partition. Partition them, according to the Dayabhag law consists in splitting up joint possession and assigning specific portions of the property to the several coparceners." The question in that case was whether certain circumstances furnished evidence of partition in a Dayabhag family and what seems to have been emphasised is that partition could not be held to be established only because the members were separate in mess and residence and held the family

property in defined shares. We do not think that that case is an authority for the proposition that it is not open to the members of a Dayabhag family to become divided members, except by dividing the family property by metes and bounds, and that even though the intention to separate had been unequivocally declared and even though everything else necessary to bring about the disruption of the family had been done, the family would nevertheless be regarded in law as a joint family, only because the family property was not divided by metes and bounds, but the members merely agreed to hold in defined shares, as separated members. It is not necessary for us to express a decisive opinion on this part of the case, as, in our opinion, an unambiguous declaration of intention to separate must, in any case, be proved where it is alleged that the members of a Dayabhag family have become divided in status. The Assistant Commissioner has definitely held that there was no evidence before him of the intention of the Mullick family to separate. We have examined the contents of the deed of partnership dated 14th July 1934, with care and have not been able to find anything which may be indicative of such an intention. Indeed, the recitals of the deed taken at their face value, merely show that S. C. Mullick and his two sons had been member of a firm of partnership ever since S. S. Mullick settled down in Benares. The deed contains no reference to the sons of S. C. Mullick after his death being members of a joint family or otherwise. The deed, to our minds, is consistent with the supposition that the executant of it considered themselves to be members of a joint Hindu family qua hardware business and also partners of a firm, which is based on an erroneous view of law. In any case, there is no mention of the fact that the family, which should be presumed to be joint, unless it is otherwise proved, had at any time separated. The Assistant Commissioner has referred to the manner in which the accounts were kept and to other circumstances which gave rise to the inference that the entire family was joint. We have also the additional circumstances which gave rise to the inference that the entire family was joint. We have also the additional circumstance that for assessment purposes right up to 1934 the income from the hardware business was treated without objection as the income of a joint Hindu family. The position as regards question No. 1, assuming it is not a pure one of fact but a mixed question of law and fact may be summed up as follows :

The assessee being members of a Hindu family and descendants of the same common ancestor, should be presumed to be joint till the contrary is established. Apart from possible inferences from the recitals in the partnership deed dated 14th July 1931, which are not binding on the Income tax Department there is no evidence to rebut the aforesaid presumption. The deed of partnership, if it is assumed to have been executed by members of a joint Hindu family, cannot be considered to have brought into existence a legally constituted firm. It has not been seriously contended before us that persons can, at one and the same time, be members of a Joint Hindu family in respect of a joint family property and be also members of a firm of which such property forms the assets. The fact that

such a partnership deed has been executed is not per se sufficient evidence of the disruption of the joint family, having regard to all the circumstances of the present case. Accordingly we answer the first question in the affirmative.

Having answered the first question in the affirmative, we are clearly of opinion that the Additional Income tax Officer had evidence before him on which he could hold that no partition had taken place amongst the members of the family.

We have anticipated, to some extent, in answering the first question, what is our answer to the third question. Having found that the assesseees are members of an undivided family and that the property, of which the income is in question, belongs to such family, they cannot be considered to be partners of a firm. The deed and the recitals contained therein may be evidence, even conclusive, as between the parties to it but the Income tax Department was not bound to accept their correctness and could call upon the executant of the deed to prove the facts recited therein. The Income tax officer was at liberty to decide all disputed questions of fact arising before him and we are unable to say that he was not justified, having regard to the material before him in going behind the partnership deed. We do not think that the third question is very happily worded. As it stands, it gives an impression that if it is answered in the affirmative, the finding of the Income tax officer is affirmed by this court. So far as it is intended to obtain an expression of opinion by this court, on the question of fact involved in it, it should not have been the subject of a reference under Sec. 66. So far as it relates to the question of law viz. whether the partnership deed dated the 14th July, 1934, is binding on the Income tax department, we have already expressed our opinion. Subject to these observations our answer to question No. 3 is in the affirmative.

Let the reference and our answer be returned to the Income tax Commissioner. The costs of this reference shall be paid by the assesseees. We certify that the learned advocate for the Income tax Department has earned a fee of Rs. 200 which shall be taxed if a certificate is filed within six weeks.

Reference answered.