
(1992) 12 KAR CK 0007

In the Karnataka High Court

Case No : Income Tax R. Cs. No's. 90 and 91 of 1992

S.D. Muniswamy

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 10-12-1992

Acts Referred:

Income Tax Act, 1961 — Section 171, 263

Citation : (1993) 202 ITR 399 : (1994) 72 TAXMAN 212

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : S. Ganesh Rao, for the Appellant; H. Raghvendra Rao, for the Respondent

Judgement

K. Shivashankar Bhat, J.—In respect of the assessment years 1973-74 and 1974-75 the following question has been referred for our consideration u/s 256(2) of the Income Tax Act, 1961 :

"On the facts and in the circumstances of the assessee's case whether the partial partition claimed by the assessee is valid in law ?"

2. The assessee is a Hindu undivided family consisting of S. D. Muniswamy, his wife and a minor son, Mahesh. The family owned several properties and the karta, Muniswamy, claimed that there was partial partition on November 1, 1972. The document evidencing the same dated November 9, 1972, was furnished to the Revenue. Initially, the Income Tax Officer accepted the case of the assessee that there was a partial partition and one item of the family property was allotted to the share of the minor son and seven items of properties were allotted to the share of Muniswamy and the family jewellery was allotted to the share of Muniswamy's wife. There was no reference to the other properties; obviously, the other properties continue to be Hindu undivided family properties as stated in the memorandum of partial partition. The partial Partition was thus accepted in the assessment year 1973-74. However, the Commissioner did not accept this partial partition and initiated proceedings u/s 263 of the Act and ultimately held

that it was not a case of partial partition. Following the aforesaid decision of the Commissioner, the case of partial partition was not accepted for the assessment year 1974-75 by the Income Tax Officer. The assessee approached the Appellate Tribunal without any success resulting in these references.

3. The statement of the case at para 2 states that, as per the document reflecting the partial partition, there were no other divisible properties owned by the Hindu undivided family and that is the statement found in the said document.

4. Having perused the said document, it is quite clear that no such statement is found in the memorandum of partial partition. Para 1 of the document refers to the parties to the document and para 2 of the document refers to the members of the family and the status of Muniswamy as the karta of the family. Para 3 says that the said Hindu undivided family owns "several assets" which, on the first day of November, 1972 included the following immovable properties :

(i) to (vii) ...

It is unnecessary to enumerate these eight items; thereafter, para 4 says, that in addition to the "share and other assets", the said Hindu undivided family also owned jewelry

As per para 5, properties Nos. (i) to (v) and (vii) were retained by Muniswamy for himself and property No. (iv) was given to Mahesh. Jewellery of the Hindu undivided family were given to the mother of the minor, Mahesh.

Para 6 states that, with effect from November 1, 1972 the Hindu undivided family ceased to be the owner of the above assets, which obviously referred to the assets specifically mentioned in para 3 and para 4. Para 7 of the document further stated that, as regards other properties the same shall continue to the assets of the Hindu undivided family. The annexure to this document the property allotted to the minor Mahesh, as well as the properties allotted to the share of Muniswamy.

5. From the order of assessment, dated April 13, 1977 pertaining to the assessment year 1973-74 it is disclosed that, in addition to these properties, the Hindu undivided family also had business shares in two firms (1) Messrs. S. D. Dhondusa Dhaktappa and Brothers and (2) Messrs. Shivaji and Company.

6. The appellate Tribunal rejected the appeal of the assessee by holding that partial partition in respect of properties can take place among the members of the family only if one or more items of properties belonging to the family are divided equally among the member of the family taking the entirety of one item of property, while the other members do not get any share in that item of property.

7. This is the basic reasons for the decision of the Appellate Tribunal which, on the face of it, is not correct.

8. For the purpose of the Act, partial partition is defined in the Explanation to

section 171. "Partial partition" means a partition which is partial as regards the persons constituting the hindu undivided family, or the properties belonging to the Hindu undivided family, or both. The definition of partition requires that the property which admits of a physical division should be physically divided. In the very nature of things, the concept of partition requires allotment of a part of a property or a part of the entire assets belonging to the Hindu undivided family. It does not require that every item of property should be divided amongst all the shares. If the family owns 10 items of properties, it is permissible for the Hindu undivided family to retain two items of properties as belonging to the Hindu undivided family and the remaining 8 items may be divided in which, one of the items may be allotted to one sharer and the other items may be allotted to the remaining sharer or sharers. Since the Hindu undivided family continues to possess some property in this illustration it will be a case of partial partition. Similarly, in the case of a family having several members, only one or two members may seek partition and go away from the family, leaving the other members joint; this is again a case of partial partition. For a valid partition, it is unnecessary that every item should be equally divided among the coparceners. No doubt, in case a minor is unfairly treated at the time of partition, it is always open to him to challenge the same subsequently. But so long as the genuineness of the transaction is not doubted as in the instant case, it is not open to the Revenue to contend that the partition is unfair and therefore, should not be recognised. The concept of partial partition for the purpose of the Act is statutorily defined and, therefore, so long as the said definition is satisfied, the Revenue is expected to respect the same.

9. In *Brij Mohan Lal Rameshwar Lal Vs. Commissioner of Income Tax*, the Hindu undivided family was a partner in firm. The capital contributed was Rs. 60,000. In the reconstituted partnership deed, this sum was divided between the sharers in the family. The court accepted the case of the assessee that there was partial partition. It was pointed out that whether a particular asset of a family is capable of partial partition or not will depend upon the nature of the asset. It may be that a business or a share cannot be divided partially. But it does not followed that no single item can be divided partially. The same was approved by another Bench of the same High Court in *Moti Lal Shyam Sunder Vs. Commissioner of Income Tax*,

10. In *Commissioner of Income Tax, Tamil Nadu-IV Vs. M.R.M.M.M. Manickam Chettiar*, the Madras High Court also had an occasion to consider section 171. At page 502, the court observed :

"In the Explanation to section 171 partial partition is defined to mean a partition which is partial as regards the persons constituting the Hindu undivided family, or the properties belonging to the Hindu undivided family or both". There is no restriction as to the properties that could be the subject-matter of a partial partition. It is not necessary, therefore, that a partial partition should be with reference to the whole of an asset, it cannot be held that there was no partial partition. In the case of cash belonging to the joint family therefore, it is not

necessary that the entire cash balance or the amount available to the credit of the family should be divided. But there should be a definitions of the amount that is the subject-matter of a partial partition."

11. The court further observed that there could be no doubt that even with respect to a portion the cash available, there could be a partial partition. Again, at page 504, the Bench observed thus :

"But then validity of a partial partition could to be dependent on the allotment of shares to each of the members of the joint family or coparcenary. If any particular member had given up his right to share with respect to any particular asset among the other sharers will not become invalid (sic). In fact, the Department itself has accepted the allotment of Rs. 50,000 Muthia alone in the assessment year 1969-70 as amounting to a partial partition. Neither the Hindu law nor the Income Tax law requires that in order that a partition may be valid each of the sharers must be allotted a share. Whatever the consequences that may follow by reason of one sharer relinquishing or disclaiming his share with reference to the assessment the partition itself will not be affected. There could also be no restriction as to the number of times partial partition may take place in a family."

12. In Commissioner of Income Tax Vs. Hoshiari Lal Kalyani and Others, the principle was stated thus :

"It is now recognised in Hindu law that the members of a joint family can make a division and severance of interest in respect of a part of the joint estate while retaining the status of a joint family and holding the rest of the estate as properties of the joint family.

The partition in Hindu law is affected by a definite and unequivocal indication of a coparcener's intention to separate, Similarly a partial partition is effected by a definite and unequivocal indication of the coparcener to partition a particular business or property of the joint family leaving the other sets as joint family property. The father as patria potestas an effect a partition in the family if he considers the same to be in the interest of the family. There was no suggestion that such partition was, in any case made against the interests of the minors. An aggrieved member of the coparcenary can question such a partition but not a third party, namely the Income Tax Department. As regards to issues raised in the case of Commissioner of Income Tax Vs. Seth Gopaldas (H.U.F.), that a partial partition can be made only by the consent of all, it may be pointed out that the question of consent would not arise in this case as the sons were minors and they could not give any valid consent. It is the father who acted on their behalf. Thus, we would hold that the father in this case had every right to bring about a partial partition of the family properties among his sons inter se as part of his patria potestas."

13. The above observation of the Calcutta High Court fully supports the contention of the assessee before us.

14. The Karta of a Hindu undivided family can always effect a partition and allot a share to his minor son. The partition may be absolute or partial. So long as the statutory requirement is satisfied, the same shall have to be acted upon by Revenue.
15. For the reasons stated above we disagree with the view taken by the Tribunal.
16. The question is answered in the affirmative and against the Revenue.