
(1974) 02 OHC CK 0006
In the Orissa High Court
Case No : S.J.C. No's. 179 to 187 of 1970

State of Orissa

APPELLANT

Vs

Gouranga Prasad Gountia

RESPONDENT

Date of Decision : 01-02-1974

Acts Referred:

Orissa Agricultural Income Tax Act, 1947 — Section 11, 29(1), 29(2)

Citation : (1974) 40 CLT 237

Hon'ble Judges : R.N. Misra, J;K.B. Panda, J

Bench : Division Bench

Advocate : A. Agarwalla, for the Respondent

Judgement

R.N. Misra, J.—u/s 29(2) of the Orissa Agricultural Income Tax Act (hereinafter referred to as the Act) the Additional Income Tax Tribunal has started a case and referred the following question for determination d this Court:

whether on the facts and in the circumstances of the case the opponent can be liable to agricultural income tax in view of Section 11 of the Orissa Agricultural Income Tax Act?

We are concerned with nine assessment years between 1958-59 and 1966-67. One Durga Prasad was the karta of a Hindu joint family consisting of himself and two sons-Nabin and Abhin. Durga Prasad's wife is Malati. In 1956 by an unregistered deed of partition the properties of the family were separated, but Durga Prasad continued to be holding the share of his wife as also of the minor son Abhin for convenience of possession and enjoyment. Nabin who was an adult son had separated, but Durga Prasad was also looking after the cultivation of his property.

2. The Assessing Officer as also the Appellate Authority came to hold that there was no partition and, therefore, the entire income was available to be assessed in the hands of the Assessee Durga Prasad. The Additional Agricultural Income Tax Tribunal came to hold:

The main contention urged on behalf of the Assessee-Appellant is that there was an unregistered partition deed between the Assessee-Appellant and his two sons Nabin and Abhin on 25-5-1956 and on the basis of this unregistered deed of partition the ?Rayati Khatian? has been issued in the names of the father and his two sons in the settlement of Bhogra conversion proceedings on 19-9-1962 and accordingly different lands have been allotted to the shares of the father and also his two sons. In view of the fact that the unregistered partition deed was followed by Bhogra conversion proceedings and the issue of Raiti Khatian in the names of the father and his two sons separately clearly go to show that there was partition between the father and the sons from the year 1956.

Having recorded a finding that there was a partition the Additional Tribunal proceeded to say,

It is admitted that Durga Prasad holds both the shares of himself and his wife and also that of his minor son. Nabin Kumar the major son has no separate enjoyment of the share of his properties.

According to the Additional Agricultural Income Tax Tribunal the assessment of the income from the properties of the major son Nabin in the hands of Durga Prasad was not justified. It accordingly directed the (sic) there of and required recomputation of the agricultural income tax.

3. In the application made to the Additional Agricultural Income Tax Tribunal the finding regarding partition was disputed and it was contended that even if the fact of partition was conceded for the sake of argument the Assessee could still be liable under the Orissa Agricultural Income Tax Act for the entire income including that of the major son.

4. There is no dispute that the Assessing Officer and the First Appellate Authority had not accepted the claim of partition. The Additional Agricultural Income Tax Tribunal was, however, prepared to hold relying upon the unregistered deed of partition as also the separate khatians issued in the Bhogra conversion proceedings wherein the said partition was accepted that there had been a complete partition between the father and the two sons. As the record stands, the bone of contention seems to have been that even if the partition was upheld, in view of the admission of the Assessee that he was in actual enjoyment of the property that fell to the share of the elder son the entire income including the income from that share was liable to be taxed in the hands of the Assessee u/s 11 of the Act.

5. The learned Standing Counsel contended? before us that the question within its purview admits of a dispute regarding the finding of partition and claimed that if necessary we should modify the question suitably so that the correctness of the finding regarding partition may be open to examination. We are afraid on the facts of the case and keeping the nature of the question that has been sent to us it would be really going out of the way to do so. If the Revenue was interested in challenging the finding of partition itself on the footing that it was reached

arbitrarily or without the necessary evidence on record, a pointed question should have been raised both u/s 29(1) of the Act and if necessary also in this Court so that the Additional Tribunal could have been called upon to state a case apprehensive enough of such a question. We do not think it would be appropriate to modify the question as suggested by the learned Standing Counsel so that the appropriateness of the finding of partition may also be examined. We feel advised to accept the statement of the case as made and proceed to deal with the matter.

6. The finding as recorded, therefore, goes to show that Durga Prasad and his two sons had partitioned. In the partition one-fourth share in the property was allotted to the wife Malati. Durga Prasad was possessing the property allotted to the shares of Malati and the minor son Abhin. Nabin had his separate share, but Durga Prasad was also in cultivating possession thereof. We are not called upon in the facts of this case to find out whether the Revenue was right in including the shares of Malati and Abhin for determining the income liable for assessment in the hands of Durga Prasad. Therefore we refrain from expressing any opinion on that question. The short question that arises for consideration is as to whether the property of Nabin which was in possession of the father could also be taken into account for assessment of agricultural income tax in the hands of Durga Prasad.

7. In the two recent cases of this Court the scope of Section 11 of the Act has been clearly elucidated. The first case is of Ramanath Panda v. State of Orissa (1971) (1) C.W.R. 208 and the second one is that of Ladukishore Das v. State of Orissa XXXVIU (1972) C.L.T. 636. In both these cases it has been indicated relying upon decisions of the Supreme Court referred to therein that after a completed partition the property that has been allotted to a co-sharer could no more be held by another in law. "Hold" carries the sense of possessing in the eye of law with a right to possess which can only flow out of title therein. After there has been a completed partition permissive possession of one co-sharer in regard to the property allotted to another would not amount to holding of that property. Between "holding" and "possessing" of property as legal concepts there is substantial difference. Liability to tax under the Orissa Agricultural Income Tax Act would not arise merely because there would be possession. That is why advisedly the legislature has used the word "hold" in Section 11 of the Act. In the facts and circumstances of the case as found by the second Appellate Authority Durga Prasad cannot be found in law to be holding the property allotted to the share of Nabin. Therefore, the Additional Tribunal was right in its conclusion that the income relatable to the property allotted to Nabin would not be assessed to agricultural income tax in the hands of Durga Prasad notwithstanding the admission of Durga Prasad that he was actually possessing the property on behalf of the true owner. After all the scheme in Section 11 of the Act is for a convenient method of assessment.

8. We would accordingly answer the question referred to us by saying.

On the facts and in the circumstances of the case the Assessee could not be made liable to agricultural income tax in regard to the income arising out of the share of Nabin Kumar by virtue of Section 11 of the Orissa Agricultural Income Tax Act.

We make no order as to costs.

K.B. Panda J.

9. I agree.