

(1996) 09 AHC CK 0034

In the Allahabad High Court

Case No : Income-tax Reference No's. 157, 158 and 247 of 1983

Sushil Kumar and Sons

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 11-09-1996

Acts Referred:

Income Tax Act, 1961 — Section 171, 40
Income Tax Act, 1961 — Section 171, 40
Income Tax Act, 1961 — Section 171, 40

Citation : (1998) 145 CTR 121 : (1998) 234 ITR 98

Hon'ble Judges : Paritosh K. Mukherjee, J;M.C. Agarwal, J

Bench : Division Bench

Advocate : Rakesh Kumar Agrawal and Pramod Kumar Jain, for the Appellant;
Shekhar Srivastava, for the Respondent

Judgement

M.C. Agarwal, J.—These three references u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), pertain to the assessment year 1975-76 and have been made by the Income Tax Appellate Tribunal, Delhi Bench "E".

2. There was a Hindu undivided family known as Sushil Kumar and Sons (HUF). There was also a partnership firm named Sushil Kumar and Sons in which the karta of the aforesaid Hindu undivided family was, along with his wife, a partner representing the Hindu undivided family. During the course of the assessment for the assessment year 1975-76 of the Hindu undivided family a claim u/s 171 of the Act was made that on October 1, 1973, there was a partial partition in respect of a sum of Rs. 1,00,000 out of the capital of the Hindu undivided family invested in the said firm and a memorandum dated October 2, 1973, was executed. The sum of Rs. 1,00,000 was partitioned as under :

- "1. Rs. 20,000 to Sandeep Kumar and Prabha Rani.
2. Rs. 20,000 to Sushil Kumar and Manish Kumar.
3. Rs. 20,000 to Km. Vanita.

4. Rs. 20,000 to Km. Anuradha.

5. Rs. 20,000 to Km. Nello."

3. Sandeep Kumar and Manish Kumar were the minor sons of the karta, Sushil Kumar, and Vanita, Anuradha and Nello were his daughters. Necessary entries relating to the partition were made in the books of account of the Hindu undivided family as well as those of the partnership firm. The Income Tax Officer passed an order u/s 171 holding the partition not to be legal. This was upheld by the Appellate Assistant Commissioner and then by the Tribunal. The Income Tax Appellate Tribunal took the view that since there was only one adult male member, namely, Sushil Kumar, in the family, he cannot effect a valid partition. For this, reliance was placed on a judgment of the Madhya Pradesh High Court in Commissioner of Income Tax Vs. Seth Gopaldas (H.U.F.), . The Tribunal also took the view that the share of the Hindu undivided family in the partnership business not being identifiable was incapable of partition. For this, reliance was placed in Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, . On these facts, the Appellate Tribunal, at the instance of the assessee has referred the following questions for the opinion of this court :

"1. Whether, on the facts and circumstances of the case, the Tribunal was, in law, justified in dealing with the issue as to recording u/s 171(5) of finding of partial partition without first having determined as to whether in respect of the income from the asset purported to be partitioned, the assessee used to be assessed or not earlier in the status of Hindu undivided family ?

2. Whether, on the facts and circumstances of the case, the Tribunal was justified in law in holding that the partial partition in question was under Hindu law not valid ?

3. Whether, on the facts and circumstances of the case, the Tribunal was justified in law in holding that the partial partition in question was bad in law even independently of requirement of Hindu law as to there being minimum two adult co-partners ?"

4. In Income Tax Reference No. 158 of 1983, the reference has been made at the instance of the aforesaid Hindu undivided family. The grievance of the Hindu undivided family arises from the quantum assessment order in which the interest paid to the aforesaid five persons/group of persons was included in the income of the Hindu undivided family as the same was disallowed in the case of the firm u/s 40(b) of the Act "and was included in the share income of the firm. The following question has been referred for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in upholding the inclusion of interest income received by the various members of the Hindu undivided family from the firm, Sushil Kumar and Sons, towards the total income of the assessee-Hindu undivided family ?"

5. In Income Tax Reference No. 247 of 1983, the reference has been made at the instance of the partnership firm. In consequence of the aforesaid partition, sums of Rs. 20,000 each were credited in the names of the aforesaid five persons/group of persons and a sum of Rs. 1,00,000 was debited to the capital account of the said Hindu undivided family. Interest was paid on the sum of Rs. 20,000 each aforesaid which because of the order u/s 171 rejecting the partition was disallowed and added back in terms of section 40(b) and was allocated to the share of the Hindu undivided family. The following question has been referred by the Tribunal for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in holding that the interest paid by the assessee-firm to the various members of the Hindu undivided family of Sushil Kumar and Sons has to be disallowed as per provisions of section 40(b) of the Income Tax Act, 1961 ?"

6. We have heard Sri Rakesh Kumar Agarwal and Sri Pramod Kumar Jain, learned counsel for the assessee, and Sri Shekhar Srivastava, learned standing counsel for the respondent.

7. As stated above, the first question referred by the Tribunal in Income Tax Reference No. 157 of 1983 arising out of I. T. A. No. 4127(Del) of 1979 does not arise out of the order of the Tribunal as it was not the case of either party at any stage of the proceedings that the joint Hindu family in which a partial partition was alleged to have taken place was not assessed to tax under the Act. We, therefore, decline to answer the said question.

8. As regards question No. 2, we find that the Tribunal's reliance on Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, , was misconceived. That was a case in which the Supreme Court was dealing with an issue as to whether the share of a partner in a partnership firm that owns immovable property as well, is movable property or immovable property. In that case the partnership firm owned movable as well as immovable properties. The firm was dissolved and the assets had been distributed amongst the partners and a deed was executed for the purpose. The question was whether such deed required registration under the Registration Act. The Supreme Court held that the nature of the share was movable property. There are observations to the effect that during the subsistence of the partnership no partner can deal with any portion of the property as his own nor he can assign his interest in a specific item of the partnership property to anyone. It is probably because of these observations that the Tribunal held that the karta of the Hindu undivided family could not partition a part of the amount standing to the credit of the Hindu undivided family's capital account in the partnership firm, but what was important was that the karta of the Hindu undivided family as well as the partnership firm put the partition into actual effect and the account of the karta was debited with Rs. 1,00,000 and the account of the five persons were credited by Rs. 20,000 each. Thus, in effect, a sum of Rs. 1,00,000 stood withdrawn from

the capital account of the karta and on division as aforesaid stood deposited with the firm in their individual accounts in the sums of Rs. 20,000 each. Thus, there was a complete and effective partition. The partition would have been of no effect if the partnership firm had disputed the arrangement and declined to give effect to the arrangement in the family.

9. In *Brij Mohan Lal Rameshwar Lal Vs. Commissioner of Income Tax*, this court held that a partial partition of capital invested in a partnership firm could be made. It was observed that whether a particular asset of a family is capable of partial partition or not will depend upon the nature of the asset and it may be that a business or a share cannot be divided partially but it does not follow that no single item can be divided partially. In that case out of capital of Rs. 1,60,242 the family divided Rs. 60,000 and it was held to be legally permissible. A similar view was taken by another Bench of this court in *Moti Lal Shyam Sunder Vs. Commissioner of Income Tax*. The ground set up by the Assessing Officer and the Appellate Assistant Commissioner that the partition was invalid because the amount was given to some members as groups and also to daughters were also untenable because there was nothing in the Hindu law that debars members of the Hindu undivided family from taking property in partition jointly in groups. As regards the daughters of the karta they certainly had no right to receive the property in a partition amongst the members of the Hindu undivided family but the karta, as manager of the Hindu undivided family, had the legal authority to make a gift to them. This right of the karta was recognized by the Supreme Court in *Guramma Bhratar Chanbasappa Deshmukh and Another Vs. Malappa*. In that case the karta of the Hindu family had made certain gifts to his daughters and it was held that a karta has a right to make reasonable amounts of gift to his daughters and other females of his family. It may be possible for a member of the family which has been adversely affected to challenge a gift if it was unreasonable looking to the circumstances of the family but it is not permissible to the Revenue to do so. The transaction which had been given the shape of a partition makes a transfer of Rs. 20,000 each to the three daughters and the transfer having been effectuated would operate as a gift and the partition could not be rejected on that ground.

10. For the above reasons, we answer question No. 2 reproduced above in favour of the assessee holding that the Tribunal was not justified in holding that the partial partition in question was not valid under the Hindu law.

11. As regards question No. 3 the ruling that was the basis of the Tribunal's decision, namely, *Commissioner of Income Tax Vs. Seth Gopaldas (H.U.F.)*, has been overruled by the Supreme Court in *Apoorva Shantilal Shah, HUF Vs. Commissioner of Income Tax, Gujarat-I, Ahmedabad*, in which it was held that where a family consisted of a father and his minor sons, the father was entitled to effect partial partition of some of the family properties and it was not necessary to have two adult male members for the purpose. It was also held that where the partition was unequal the Income Tax authorities could not challenge

the partition on that ground. The Tribunal's view, therefore, cannot be sustained and question No. 3 is answered in the negative holding that the Tribunal was not justified in law in holding that the partial partition in question was bad in law there being no two adult coparceners.

12. Now we come to Income Tax Reference No. 158 of 1983 that arises out of the Tribunal's order dated May 18, 1982, passed in I. T. A. No. 14126 (Delhi) of 1979. The assessee is the Hindu undivided family whose karta is a partner in the partnership firm, Sushil Kumar and Sons, and that has been assessed as a registered firm under the Act. The share of a partner in the profits of a partnership firm is determined in accordance with section 67 of the Act and the share so determined is final for the purposes of the assessment of the partner. Therefore, the Tribunal in the assessment of the Hindu undivided family could not vary the amount of the share of profit allocated to the assessee-Hindu undivided family in the assessment of the firm. Therefore, the question as reproduced above is answered in the affirmative, in favour of the Revenue and against the assessee.

13. We may, however, clarify that such share is subject to rectification u/s 155 of the Act if in consequence of any order in the case of the firm there is any change in the amount of profit allocated to the assessee.

14. In Income Tax Reference No. 247 of 1983 arising out of the order dated May 18, 1982, passed by the Tribunal in I. T. A. No. 4251 (Del.) of 1979, the assessee is the partnership firm, Sushil Kumar and Sons, that has been assessed as registered firm under the Act. By virtue of the partition referred to above, sums of Rs. 20,000 each were credited to the accounts of the aforesaid persons and a sum of Rs. 1,00,000 was debited to the account of the partner, namely, Sushil Kumar, the karta of the joint Hindu family. Since the partition was held to be invalid in the case of the Hindu undivided family the interest paid on the aforesaid five deposits of Rs. 20,000 each was disallowed u/s 40(b) of the Act treating the same to have been paid to the partner, Sushil Kumar. Since we have held that the partition was valid, the disallowance of the interest u/s 40(b) loses its validity. We, therefore, answer the aforesaid question in the negative and hold that the Tribunal was not justified in holding that the interest paid by the assessee-firm to the various members of the Hindu undivided family of Sushil Kumar and Sons has to be disallowed as per provisions of section 40(b) of the Income Tax Act, 1961.

15. References answered accordingly.

16. An authenticated copy of this order be transmitted to the Income Tax Appellate Tribunal in accordance with section 260 of the Act. The parties shall bear their own costs.