
(1972) 05 GAU CK 0002

In the Gauhati High Court

Case No : Income-tax Reference No. 6 of 1968

Tolaram Bijoy Kumar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 26-05-1972

Acts Referred:

Income Tax Act, 1922 — Section 25A, 66(1)

Citation : (1973) 90 ITR 162

Hon'ble Judges : P.K. Goswami, C.J.;Baharul Islam, J

Bench : Division Bench

Advocate : S.M. Lahiri and B.K. Das, for the Appellant; J.P. Bhattacharjee, for the Respondent

Judgement

Goswami, C.J.—The present assessee is admittedly a Hindu undivided family (H.U.F.) carrying on business in jute and country produce in the name and style of Tolaram Bijoy Kumar, of which Tolaram Saraf is the karta, and the reference relates to the assessment year 1960-61, the relevant previous year being 2016 R.N. corresponding to 1959-60. This assessee started business some time after March 28, 1959, as will be seen later.

2. The facts and circumstances that may be gathered from the statement of case of the Tribunal may briefly be stated. Tolaram, the karta of the present assessee, H.U.F., is the son of Narmal. Narmal died in the year 1945, leaving three sons Srinivas, Nathmal and Tolaram. The past history is as follows:

There was a business in the name of Narmal Srinivas in grocery, jute, etc., and it was started in or about the year 1924 at Dhubri. There was a branch at Gouripore, The records of Income Tax available showed that Narmal Srinivas was assessed to Income Tax during the years 1933-34, 1934-35 and 1935-36. The name of the business was changed to Nathmal Tolaram in the relevant previous year 1936-37. In that year, as the records revealed, the assessee was Nathmal Tolaram as H.U.F. For the earlier years, the status of that assessee is not clear as the relevant records containing the copies of the assessment orders were not

preserved by the department. But, from the assessment year 1942-43, the assessee, Nathmal Tolaram, returned the income from the business as belonging to a H.U.F, up to the assessment year 1949-50. That family of Nathmal and his sons, carrying on business as Nathmal Tolaram, remained joint till it was partitioned with effect from April 6, 1949 (the last date of 2005 R.N.). After the partition, the business at Dhubri and Gouripore was converted into a partnership business, as is evidenced by a deed of partnership executed by the three brothers on April 7, 1949 (annexure " A "). The material portion of the deed, for our purpose, may be set out:

" Whereas all the parties had formed a Hindu undivided family and were living and carrying on business since long time as members of Hindu undivided family under the name and style of Nathmal Tolaram at Dhubri and whereas there was dispute regarding the control, management and enjoyment of the property and separate possession and ascertainment of due shares of parties and whereas due to difference that arose amongst the members of the family the parties hereto mutually effected a partition of the capital, business assets and immovable properties at the end of Sambat year 2005 corresponding to 6th April, 1949, and division of business capital was duly recorded in the books of accounts for the year 2005 and all the properties were divided between the parties according to their respective shares and pursuant thereto a family memorandum of partition was signed by all the parties on the 8th day of Chait Sudi 2005, i.e., 6th April, 1949, and whereas the parties hereto mutually agreed to enter into partnership for the purpose of carrying on the aforesaid business in partnership on the terms, conditions and stipulations hereinafter appearing now this indenture witnesseth ..."

Certain clauses of the deed may also be quoted;

" (2) That the parties hereto declare that the immovable properties belonging to the joint family have been partitioned in metes and bounds in proportion to their respective shares, and the division of business capital done at the end of 2005 Ramnavami is also accepted by the parties.

(3) The business carried on under the name and style of Nathmal Tolaram at Dhubri or at Gouripur or at any other places recited hereto-before shall continue to be carried on in partnership under the name and style and shall have been deemed to be effected on and from the 9th day of Chait Sudi 2006 and the parties shall be at liberty to start branch or branches from time to time under any name and style as may be mutually agreed between the parties.

(6) That the parties will invest capital according to their conveniences and interest may be allowed on capital at the rate as may be mutually agreed to between the parties.

(10) That on death and retirement of any partner the business of the partnership may be continued by the heirs or legal representatives of the deceased partner or the remaining partners may continue the business according to their desires

and the parties shall at all times be at liberty to co-opt new partners as and when they deem necessary to do so amongst themselves."

In the books maintained by the family at the time of the partition, the capital of the business standing in the names of various relations and female members was consolidated and Srinivas, Nathmal and Tolaram were credited each with Rs. 1,18,172. There was a division of the capital account in the Hindu undivided family books on April 6, 1949. Srinivas Saraf as first party, Nathmal Saraf, Mahavir Prasad, minor represented by his father, Nathmal Saraf as second party, and Tolaram Saraf, Hanuman Prasad Agarwala, minor represented by his father, Tolaram Saraf, as third party, executed a deed of partition on August 23, 1950 (annexure "B"). The deed recites;

" Whereas all the above three parties had formed a Hindu undivided family and have been living together and carrying on business since long as members of Hindu undivided family under the name and style of Nathmal Tolaram and were joint in mess and worship and had acquired properties and assets and whereas there was dispute regarding the control, management and enjoyment of the property and business and separate possession and ascertainment of due shares of the parties and whereas due to differences that arose amongst the members of the family all the parties hereto mutually effected a partition of the capital, business, assets and immovable properties at the end of the Sambat year 2005 Ramnavami corresponding to 6th April, 1949, and division of business capital was duly recorded in the books of accounts for the year 2005 Sambat year and all the properties were divided between the parties according to their respective shares and pursuant thereto a family memorandum of partition was signed by all the parties on Chait Sudi 8th 2005 Samvat, i.e., 6th April, 1949, and whereas since then the parties are in separate possession and enjoyment of their respective shares of assets and properties. Now the parties in order, to avoid any dispute in future arising between themselves or their heirs and successors have agreed to embody the terms of the memorandum of partition in a formal deed of partition duly registered and These Presents Witnesseth as follows:

(1) The parties hereto confirm that division of capital of business recorded in the names of the respective parties in the books of accounts of Nathmal Tolaram at the end of the year 2005 has been correctly done."

Then the immovable properties were recorded therein as divided between the three parties in schedules " A ", " B " and " C ". Clause (4) of the deed reads:

" (4) That the assets and liabilities of the business have vested in equal proportion in all the parties."

On September 19, 1950, an application was made for passing an order u/s 25A of the Indian Income Tax Act, 1922, to record the partition. The Income Tax Officer allowed the partition by his order dated August 17, 1954, with effect from the last date of 2005 R.N. The firm which took over the quondam family business of Nathmal Tolaram was assessed thereafter as a registered firm. During the

accounting year relevant for 1953-54, the firm of Messrs. Nathmal Tolaram started business in petrol, high speed oil, etc. There was an outside partner by name Bhudarmal Khatawat in this business for a year. Both before and after introduction of this outside partner, the petrol business formed part of the business of Nathmal Tolaram as a branch thereof. After the partition was recognised from 1950-51 the share income from the firm, Nathmal Tolaram (including the petrol business), was being assessed in the hands of Tolaram as an individual. The other brothers were also similarly taxed on the share income as individuals. On October 30, 1957, Srinivas, the first of the three brothers, died. Bhagwani Devi, his wife, entered the firm as a partner, thereafter. On March 28, 1959, the firm of Messrs. Nathmal Tolaram was shown to have been dissolved and a new firm, Nathmal Tolaram (Petrol Depot), was shown to have been started so as to continue the petrol business with the same partners.

3. With the capital received on the dissolution of the firm of Messrs. Nathmal Tolaram, Tolaram started a business in the name of Tolaram Bijoy Kumar, to deal in jute and country produce. The income from this business is, admittedly, (that of) a Hindu undivided family business.

4. It appears that for the year 1959-60, as in the previous years after the partition with effect from April 6, 1949, Tolaram, karta of the present assessee, H. U. F. Tolaram Bijay Kumar claimed to be assessed as an individual with regard to his income from the petrol business of Nathmal Tolaram (Petrol Depot) so that the said income in his hands was not to be included as income of the H. U. F. Tolaram Bijoy Kumar. Thus, for 1959-60, it was claimed that there should be two assessments, one on H.U.F. on the income of Bijoy Kumar Tolaram and the other on Tolaram as individual on the share income from Nathmal Tolaram (Petrol Depot). The Income Tax Officer as well as the Appellate Assistant Commissioner rejected this claim, but on appeal the Income Tax Appellate Tribunal, hereinafter referred to as "the Tribunal", reversed the order of the Appellate Assistant Commissioner and allowed the assessee's claim.

5. That leads to the assessment year 1960-61, with which we are concerned. In this year also the assessee claimed similarly as in the previous year 1959-60, that his one-third share income amounting to Rs. 21,746 from Nathmal Tolaram (Petrol Depot) was assessable in his hands as an individual and not in the hands of the H. U. F., Tolaram Bijoy Kumar, the present assessee. The Income Tax Officer this time again rejected the claim. The Appellate Assistant Commissioner, on appeal, on a review of the entire facts and circumstances, some of which were not available earlier to the Tribunal in disposing of the appeal with regard to the previous year, also rejected the claim and affirmed the order of the Income Tax Officer. Thereafter, the matter was taken to the Tribunal at Calcutta at the instance of the assessee and the Tribunal, agreeing with the Appellate Assistant Commissioner that fresh facts came to light in the assessment year in question which had not been produced before the earlier Tribunal in the previous year, rejected the assessee's claim. That is how the matter has now come to us on a

reference u/s 66(1} of the Indian Income Tax Act, 1922.

6. The question of law referred by the Tribunal on the application of the assessee is as follows:

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the share income of Rs. 21,746 from Messrs. Nathraal Tolaram (Petrol Depot) was assessable in the hands of the assessee family ?"

In dealing with a case arising out of the Income Tax Act, the personal law of the parties will govern in determining their status. According to the Hindu law, which governs the assessee, the position may be described as found in Mulla's Hindu Law, thirteenth edition:

" 220. Property, according to the Hindu law, may be divided into two classes, namely, (1) joint family property, and (2) separate property.

Joint family property may be divided, according to the source from which it comes, into-

(1) ancestral property; and

(2) separate property of coparceners thrown into the common coparcenary stock.

Property jointly acquired by the members of a joint family with the aid of ancestral property is joint family property. Property jointly acquired by the members of a joint family without the aid of ancestral property may or may not be joint family property; whether it is so or not is a question of fact in each case.

The term " joint family property" is synonymous with " coparcenary property"

" Separate" property includes " self-acquired " property."

" 228. (1) Where property has been acquired in business by persons constituting a joint Hindu family by their joint labour, the question arises whether the property so acquired is joint family property, or whether it is merely the joint property of the joint acquirers, or whether it is ordinary partnership property. If it is joint family property, the male issue of the acquirers take an interest in it by birth. If it is the joint property of the acquirers, it will pass by survivorship, but the male issue of the acquirers do not take interest in it by birth. If it is partnership property, it is governed by the provisions of the Indian Partnership Act, 1932, so that the share of each of the joint acquirers will pass on his death to his heirs, and not by survivorship.

(2) If the property so acquired is acquired with the aid of joint family property, it becomes joint family property.

(3) If the property so acquired is acquired without the aid of joint family property, the presumption is that it is the joint property of the joint acquirers, but this presumption may be rebutted by proof that the persons constituting the joint family acquired the property not as members of a joint family, but as

members of an ordinary trade partnership resting on contract, in which case the property will be deemed to be partnership property."

The Supreme Court had to consider a similar question under the Wealth-tax Act in *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, The following observations of that decision are apposite :

" In the present case the property which is sought to be taxed in the hands of the appellant originally belonged to the Hindu undivided family belonging to the appellant, his father and his brothers. They were joint family properties of that Hindu undivided family when the partition took place between the appellant, his father and his brothers and these properties came to the share of the appellant and the question presented for determination is whether they ceased to bear the character of joint family properties and became the absolute properties of the appellant. As pointed out by the Judicial Committee in *Arunachalam's* case, it is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as " joint property of the undivided family ". Applying this test it is clear, though in the absence of male issue the dividing coparcener may be properly described in a sense as the owner of the properties, that upon the adoption of a son or birth of a son to him, it would assume a different quality. It continues to be ancestral property in his hands as regards his male issue for their rights had already attached upon it and the partition only cuts off the claims of the dividing coparceners. The father and his male issue still remain joint. The same rule would apply even when a partition had been made before the birth of the male issue or before a son is adopted, for the share which is taken at a partition by one of the coparceners is taken by him as representing his branch. Again, the ownership of the dividing coparcener is such that female members of the family may have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it see *Arunachalam's* case [1957] A.C. 540 : [1958] 34 ITR 42 : 3 E.D.C. 825 (P.C.) . It is evident that these are the incidents which arise because the properties have been and have not ceased to be joint family properties. It is no doubt true that there was a partition between the assessee, his wife and minor daughters on the one hand and his father and brothers on the other hand. But the effect of partition did not affect the character of these properties which did not cease to be joint family properties in the hands of the appellant. Our conclusion is that when a coparcener having a wife and two minor daughters and no son receives his share of the joint family properties on partition, such property in the hands of the coparcener belongs to the Hindu undivided family of himself, his wife and minor daughters and cannot be assessed as his individual property. It is clear that the present case falls within the ratio of the decision of this court in *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, and the Appellate Tribunal was right in holding that the status of the respondent was that of a Hindu undivided family and not that of an individual. "

To the same effect is the decision of the Supreme Court in P.N. Krishna Iyer Vs. Commissioner of Income Tax, Kerala, where the following observations appear:

" Income received by a member of a Hindu undivided family from a firm or a company in which the funds of the Hindu undivided family are invested, even though the income may be partially traceable to personal exertion of the member, is taxable as the income of the Hindu undivided family, if it is earned by detriment to the family funds or with the aid or assistance of those funds; otherwise it is taxable as the member's separate income."

Bearing in mind the above legal principles we may examine the facts found by the Tribunal. The Tribunal found that from the earliest assessment available from the records the business is treated as joint family business of Narmal and his sons and has been assessed accordingly. The returns that are available on record give out the same position. This is described by the Tribunal as conduct of the parties as far as the Income Tax assessments are concerned showing the business to be a joint family business. Even without taking note of the above conduct, the Tribunal took note of the deed of partnership as well as the deed of partition, mentioned above, wherein " there is an open solemn admission that the members have been treating the business as joint family business". The Tribunal also noted the manner in which the actual partition took place. The Tribunal then concluded that it was the joint family property which was partitioned and it did not lose its character when it came into the hands of Tolaram.

7. In the present case, therefore, we find that there was a business carried on by the father, Narmal, with his sons in the name and style of Narmal Srinivas. Although there is no material to show if any family nucleus was embarked on that business, the character of the business carried on by the father, Narmal, with his sons by whatever name it was described, became evident when for the first time the property consisting of the business as well as the immovable properties were partitioned amongst the sons of Narmal in 1949, after Narmal's death. The registered partition deed was preceded by " a family memorandum of partition " signed by all the parties on April 6, 1949. This fact is particularly noted in the deed of partnership dated 7th April, 1949. The aforesaid family settlement was later incorporated in a formal deed of partition dated 23rd August, 1950. A perusal of this deed clearly evidences an open acknowledgment by all the parties about the erstwhile joint family business carried on under the name and style of Nathmal Tolaram and that it was that business and the immovable properties of that Hindu undivided family that were the subject-matter of partition. The partition deed clearly shows that Tolaram Saraf was executing the deed of partition representing his branch of the family. The property thereby falling into his share under this instrument of partition is therefore invested with the character of joint family property of Tolaram and his sons. Again, it is with this property divided amongst the brothers that they constituted a partnership on April 7, 1949. When therefore, Tolaram joined the

partnership by investing his share of the property which he got by partition, he has joined the partnership of firstly Nathmal Tolaram and later Nathmal Tolaram (Petrol Depot) as representing his branch of the family consisting of himself and his sons. There is no material whatsoever to come to a conclusion that this property which came to the share of Tolaram was his self-acquired property. The property even after partition, did not lose the character of joint family property which was the acknowledged position adopted by the parties to the instrument of partition. We are, therefore, clearly of opinion that the deed of partition in this case is decisive of the matter with regard to the character of the property that came into the hands of Tolaram on partition. It can be safely concluded that the property is a portion of the joint property of the Hindu undivided family consisting of Tolaram and his sons and which was invested in the business of the firm.

8. Mr. S. M. Lahiri, the learned counsel for the petitioner, submitted that the Tribunal ignored certain material facts, viz., (1) the fact that the returns were submitted by Tolaram regarding petrol business of Nathmal Tolaram (Petrol Depot) as an individual for a number of years; (2) that Tolaram has nowhere stated that he was carrying on business as karta of H. U. F. Tolaram Bijoy Kumar ; (3) that the petrol business was started with an outsider as one of the partners; and (4) that the widow of Srinivas was substituted as partner in 1957 on her husband's death.

9. Let us deal with each of the points raised. Firstly, the fact of the returns being submitted by Tolaram as an individual may be offset by the earlier fact of the returns being submitted as H. U. F. Secondly, the matter cannot be decided with reference to what Tolaram had chosen to state before the taxing authorities. Thirdly, the fact that an outsider was introduced in the firm would not militate against the position of Tolaram, vis-a-vis, his sons with regard to the property which he obtained on partition. The matter will have to be examined de hors the constitution and working of the firm which will be governed by the terms of the partnership and in accordance with the law of partnership. Fourthly, the fact that the widow of Srinivas joined the firm is in terms of Clause (10) of the partnership deed. We, therefore, do not think that the objection of the learned counsel is well-founded.

10. Now, to the sheet-anchor of Mr. Lahiri's submission. Mr. Lahiri submits that the Division Bench decision, of the Allahabad High Court in CHIRANJI LAL Vs. COMMISSIONER OF Income Tax, U. P., is on all fours with the present case and we should accordingly hold in favour of the assessee. We have carefully examined the aforesaid decision. In our opinion, the facts of that case are not in accord with the basic structure of the Hindu undivided family with which we are concerned here. The following observations from that decision at page 721 will be to the point:

" That particular asset upon partial partition went out of the fold of the larger Hindu undivided family of Chiranjilal-Mohan Lal and even of the smaller family

of Chiranji Lal when the half share of the capital which fell to his branch of the family was further divided in the books of the business between him and his two adult sons in specified shares. The partial partition of the business was thus complete. "

Mr. Lahiri, strenuously relied upon the following observations in that decision in support of his submission:

" Once a partial partition is accepted as being genuine and not a colourable or sham transaction, the share of capital of each such coparcener thereafter ceases to be joint family asset and becomes his individual asset de hors the family, and thereafter it is not possible to say that the nucleus for the new partnership business came from the Hindu undivided family funds."

The above observations, relied upon by the learned counsel, must be confined, in our opinion, to the fact of complete partial partition of the property of even of the smaller branch joint family of Chiranji Lal and his sons. It is clear in that case that the business of the family was partitioned by division of capital in the books of the firm and the capital which fell to the share of Chiranji Lal was further divided amongst himself and his two adult sons in the ratio of 2 : 1 : 1. The decision relied upon by the learned counsel is, therefore, of no assistance to him in the present case where Tolaram obtained a portion of the joint family property as a representative of his branch of the Hindu undivided family, Tolaram Bijoy Kumar. There is no further partition recorded between Tolaram and his sons in this case. This feature clearly distinguishes the aforesaid Allahabad case from the present one.

11. We, therefore, have no hesitation in answering the question of law referred to us in the affirmative. We are of opinion that, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the share income of Rs. 21,746 from Messrs. Nathmal Tolaram (Petrol Depot) was assessable in the hands of the assessee family, Tolaram Bijoy Kumar. In the circumstances of the case, we will, however, make no order as to costs.

Baharul Islam, J.

12. I agree.