INCOME TAX OFFICER, CALICUT

v.

SMT. N.K. SARADA THAMPATTY

SEPTEMBER 14, 1990

[K.N. SINGH, K. JAGANNATHA SHETTY AND KULDIP SINGH, JJ.]

Income Tax Act, 1961—Section 171—Scope of—Assessment under—Hindu Undivided Family—Construction of—Plea of partition taken by assessee—Duties of Income Tax Officer indicated.

Income Tax Act, 1961—Section 171, Explanation—"Partition"—Managing and Legislative intention of.

Income Tax Act, 1961—Section 171, Explanation—Assessee claming partition—Onus to prove disruption of Hindu Undivided Family status on the assessee.

Income Tax Act, 1961—Section 171, Explanation—Partition under and Hindu Law partition—Differentiated.

Income Tax Act, 1961—Section 171, Explanation—Assessee claiming partition—No physical division of properties status of Hindu Undivided Family not disrupted—Income derived from the properties continued to be impressed with the HUF character and can be taxed.

Respondent was assessed for the assessment years of 1967-68, 1968-69 and 1969-70 treating her as the head of the HUF. She contended before the Income Tax Officer that under the partition agreement dated 3.7.1958 the Tavazhi was divided, the HUF status of the Tavazhi was disrupted on account of the Civil Court decree made in a partition suit and the properties were divided into 14 shares and the HUF could not be assessed to income tax. The Income Tax Officer rejected the claim of the respondent on the ground that since the preliminary decree of the Civil Court, and not become final and no physical or actual partition had taken place; the status of HUF continued for the purpose of Tax.

The Single Judge of the High Court allowed the Writ Petition of the respondent holding that Section 171 of the Income Tax Act does not apply to a case where the division was effected before the commence-

A ment of the accounting period and HUF having received no income during the accounting period it could not be assessed to tax notwithstanding the legal fiction under Section 171. In appeal the Division Bench held that there was no express provision in Section 171 nor was there any necessary implication arising from the provisions of the section that the income of the family after its division must be treated or B deemed to be the income of the HUF inspite of disruption of joint status. The Bench held that HUF is a separate and distinct entity from the members constituting it and if that entity does not receive any income, the members' income could not be assessed as income of the HUF. The Division Bench further held that since there had been partition in the family and Tavazhi had ceased to be HUF long before the accounting periods, the provisions of the Act could not be pressed into service for the purpose of C taxing the income of the individual members of the family treating them having the status of HUF with the aid of Section 171 of the Act.

The High Court granted certificate to the Revenue under Article 133 of the Constitution. Hence these appeals.

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Allowing the appeal, the Court,

HELD: 1. Under Section 171 a Hindu Family assessed as HUF, is deemed for the purposes of the Act to continue as HUF except where partition is proved to have been effected in accordance with the section. E The section further provides that if any person at the time of making of assessment claims that partition total or partial has taken place among the members of the HUF, the Income Tax Officer is required to make an inquiry after giving notice to all the members of the family, and to record findings on the question of partition. If on inquiry he comes to the finding that there has been partition, individual liability of members F is to be computed according to the portion of the joint family property allotted to them.

2. The definition of partition does not recognise a partition even if it is effected by a decree of court unless there is a physical division of the property and if the property is not capable of being physically divided G then there should be division of the property to the extent it is possible otherwise the severance of status will not amount to partition. In considering the factum of partition for the purposes of assessment it is not permissible to ignore the special meaning assigned to partition under the explanation, even if the partition is effected through a decree of the court. Ordinarily decree of a Civil Court in a partition suit is good H evidence in proof of partition but under Section 171 a legal fiction has

been introduced according to which a preliminary decree of partition is not enough, instead there should be actual physical division of the property pursuant to final decree, by metes and bounds. The Legislature has assigned a special meaning to partition under the aforesaid Explanation with a view to safeguard the interest of the Revenue.

3. Any assessee claiming partition of HUF must prove the disruption of the status of HUF in accordance with the provisions of Section 171 having special regard to the Explanation. The assessee must prove that a partition effected by agreement or through court's decree, was followed by actual physical division of the property. In the absence of such proof partition is not sufficient to disrupt the status of Hindu Undivided Family for the purpose of assessment of tax.

4. Under the Hindu Law members of a joint family may agree to partition of the joint family property by private settlement, agreement, arbitration or through court's decree. Members of the family may also agree to share the income from the property according to their respective share. In all such eventualities joint status of family may be disrupted but such disruption of family status is not recognised by the Legislature for purposes of Income Tax. Section 171 of the Act and the Explanation to it, prescribes a special meaning to partition which is different from the general principles of Hindu Law. It contains a deeming provision under which partition of the property of HUF is accepted only if there has been actual physical division of the property, in the absence of any such proof, the HUF shall be deemed to continue for the purpose of assessment of tax. Any agreement between the members of the joint family effecting partition, or a decree of the Court for partition cannot terminate the status of HUF unless it is shown that the joint family property was physically divided in accordance with the agreement or decree of the Court.

5. The respondent for the first time raised the plea of partition and disruption of HUF in the proceedings for the assessment years 1967-68, 1968-69 and 1969-70. There had been no physical division of the properties by metes and bounds. The status of HUF had not been disrupted, and the income derived from the properties for the purposes of assessment continued to be impressed with the HUF character.

Parameswaran Nambudiripad v. *Inspecting Assistant Commissioner of Agricultural Income tax,* 72 I.T.R. 644; *Inspecting Assistant Commissioner of Agricultural Income Tax and Sales Tax (Special), Kozhikode* v. *Poomulli Manekkal Parameswaran Namboodiripad,* 83 I.T.R. 108, distinguished.

Kaloomal Tapeshwar Prasad **v.** *C.I.T., Kanpur,* **133 I.T.R. 690, followed.**

Sunder Singh Majithia **v.** *Commissioner of Income Tax,* **[1942] 10 I.T.R. 457** *Shankar Narayanan* **v.** *Income Tax Officer,* **153 I.T.R. 562, referred.**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 778 and 781 of 1976.

From the Judgment and Order dated 30.6.1975 and 8.8.1975 of the Kerala High Court in Writ Appeal Nos. 126 and 378 of 1973.

V. Gaurishanker, S. Rajappa and Ms. A. Subhashini for the Appellant.

G. Vishwanatha Iyer, Mrs. K. Prasanti and N. Sudhakaran for the Respondent.

The Judgment of the Court was delivered by

SINGH, J. These appeals on certificate issued by the High Court under Article 133 of the Constitution are directed against the order and judgment of the High Court of Kerala.

Briefly, the facts giving rise to these appeals are: the respondent was a member of the erstwhile Nilambut Kovilagam governed by the Madras Marumakkathyyam Act, she was assessed to Income Tax as Hindu Undivided Family as the family possessed considerable property including lands, forests and other properties. The Income Tax Officer assessed the respondent for the assessment years 1967-68, 1968-69 and 1969-70 treating the members of the family included within the HUF. Before the Income Tax Officer, the respondent raised a plea, that there had been division of Tavazhi under a partition agreement dated 3.7.1958 whereby all lands except forest lands were divided among the members of the family. The respondent further claimed that the members of the Tavazhi swelled to 14 and these members effected a division in status by a registered document dated 21.2.1963. She further alleged that the division of Tavazhi into 14 shares was effected by a Civil Court decree in partition suit No. O.S. 22/1961 in the Court of Kozhikode. It was pointed out on behalf of the respondent that the partition suit was decreed and the properties were

allotted to the respective share holders. The Civil Court had appointed a commissioner to divide the property by metes and bounds in accordance to the shares of individual members. The respondent further claimed that since the status of HUF was disrupted on account of the decree of partition the HUF could not be assessed to income tax, instead the income derived by individual members could be considered for assessment.

The Income Tax Officer rejected the respondent's claim and assessed the respondent as the head of the Tavazhi for the assessment years 1967-68, 1968-69 and 1969-70 by his order dated 16.3.1970/ 27.3.1970. The Income Tax Officer held that the decree of the Civil Court merely conferred right on the members of the family for separate possession of the land falling to their share after the physical partition, and the final partition could be made on application made by individual members after depositing Commissioner's fee. Since the Civil Court decree was a preliminary decree and no final decree had been passed and no actual partition had been effected and no physical partition by metes and bounds had taken place in pursuance of the decree of partition, the status of HUF continued for purposes of assessment. The Income Tax Officer observed that earlier the assessee was assessed having the status of HUF, and since no other evidence except the decree of the Civil Court had been produced by her to show that there has been a real partition, therefore, the assessee's claim for partition could not be accepted. The respondent filed a writ petition in the High Court under Article 226 of the Constitution for quashing the orders of the Income Tax Officer on the ground that he failed to recognise the disruption of HUF in making the assessment. A learned single Judge of the High Court allowed the writ petition and quashed the assessment orders. On appeal at the instance of the Revenue, a Division Bench of the High Court affirmed the order of the single Judge. On an application made on behalf of the Revenue the High Court granted certificate under Article 133 of the Constitution. Hence these appeals.

The learned single Judge held that Section 171 of the Income Tax Act does not apply to a case where the division was effected before the commencement of the accounting period, and the HUF having received no income during the accounting period it could not be assessed to tax notwithstanding the fiction introduced by Section 171. In appeal the Division Bench held that there was no express provision in Section 171 nor was there any necessary implication arising from the provisions of the Section that the income of the family after its division must

be treated or deemed to be the income of the HUF inspite of disruption of joint status. The Bench held that a HUF is a separate and distinct entity from the members constituting it and if that entity does not receive any income, the members' income could not be assessed as income of the HUF. The Division Bench further held that since there had been partition in the family and Tavazhi had ceased to be HUF long before the accounting periods, the provisions of the Act could not be pressed into service for the purpose of taxing the income of the individual members of the family treating them having the status of HUF with the aid of Section 171 of the Act.

The main question which falls for consideration is as to whether the partition as effected by the agreement dated 21.2.1963 and also the decree of the Civil Court amount to "partition" under the explanation to Section 171 of the Act and further whether the Income Tax Officer acted contrary to law in holding that inspite of the partition as alleged by the respondent, the status of HUF was not disrupted and that status continued for the purposes of assessment during the relevant assessment years. Under Section 171 a Hindu Family assessed as HUF, is deemed for the purposes of the Act to continue as HUF except where partition is proved to have been effected in accordance with the section. The section further provides that if any person at the time of making of assessment claims that partition total or partial has taken place among the members of the HUF, the Income Tax Officer is required to make an inquiry after giving notice to all the members of the family, and to record findings on the question of partition. If on inquiry he comes to the finding that there has been partition, individual liability of members is to be computed according to the portion of the joint family property allotted to them. What would amount to partition for the purposes of the Section is contained in the Explanation to the Section which defines partition as under:

> "Explanation—In this Section—
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> (a) 'partition' means—
>
> (i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or
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> (ii) where the property does not admit of a physical division, then such division as the property admits of, but a

mere severance of status shall not be deemed to be a partition." A

The above definition of the partition does not recognise a partition even if it is effected by a decree of court unless there is a physical division of the property and if the property is not capable of being B physically divided then there should be division of the property to the extent it is possible otherwise the severance of status will not amount to partition. In considering the factum of partition for the purposes of assessment it is not permissible to ignore the special meaning assigned to partition under the explanation, even if the partition is effected through a decree of the court. Ordinarily decree of a Civil Court in a partition suit is good evidence in proof of partition but under Section C 171 a legal fiction has been introduced according to which a preliminary decree of partition is not enough, instead there should be actual physical division of the property pursuant to final decree, by metes and bounds. The Legislature has assigned special meaning to partition under the aforesaid Explanation with a view to safeguard the D interest of the Revenue. Any assessee claiming partition of HUF must prove the disruption of the status of HUF in accordance with the provisions of Section 171 having special regard to the Explanation. The assessee must prove that a partition effected by agreement or through court's decree, was followed by actual physical division of the property. In the absence of such proof partition is not sufficient to E disrupt the status of Hindu Undivided Family for the purpose of assessment of tax. Under the Hindu Law members of a joint family may agree to partition of the joint family property by private settlement, agreement, arbitration or through court's decree. Members of the family may also agree to share the income from the property according to their respective share. In all such eventualities joint status F of family may be disrupted but such disruption of family status is not recognised by the Legislature for purposes of Income Tax. Section 171 of the Act and the Explanation to it, prescribes a special meaning to partition which is different from the general principles of Hindu Law. It contains a deeming provision under which partition of the property of HUF is accepted only if there has been actual physical division of G the property, in the absence of any such proof, the HUF shall be deemed to continue for the purpose of assessment of tax. Any agreement between the members of the joint family effecting partition, or a decree of the Court for partition cannot terminate the status of HUF unless it is shown that the joint family property was physically divided in accordance with the agreement or decree of the Court. H

A On behalf of the respondent it was urged that the High Court has placed reliance on a Full Bench decision of Kerala High Court in *Parameswaran Nambudiripad* v. *Inspecting Assistant Commissioner of Agricultural Income-tax,* 72 I.T.R. 664 where it was held that if the HUF was in fact not in existence during any part of an accounting period, and the HUF as such had not received any income, the family B could not be assessed to tax as HUF. The view taken by the Full Bench has been approved by this Court in *Inspecting Assistant Commissioner of Agricultural Income Tax and Sales Tax (Special), Kozhikode* v. *Poomuli Manekkal Parameswaran Namboodiripad,* 33 I.T.R. 108. On a careful scrutiny of the judgment of this Court we find that in that case interpretation of Section 29 of the Kerala Agricultural Income Tax Act 1950 as amended in 1964 was involved. Section 29 after its amendment C in 1964 made provision for assessment of Agricultural tax after partition of a Hindu Undivided Family. Under that Section there was no provision in the nature of Explanation to Section 171 of the Income Tax Act. This Court had no occasion to interpret Section 171 instead the Court interpreted Section 29 of that Act which is quite different D from Section 171, therefore the appellant cannot draw any support from that decision. *In Kaloomal Tapeshwar Prasad* v. *C.I.T., Kanpur,* 133 I.T.R. 690 this Court interpreted Section 171 of the Act in detail. On an elaborate discussion the Court held that under the Hindu Law it is not necessary that the property must in every case be partitioned by metes and bounds or physically into different portions to complete a E partition. Disruption of status can be brought about by any of the modes permissible under the Hindu Law and it is open to the parties to enjoy their share of property in any manner known to law according to their desire but the Income Tax Law does not accept any such partition for the purposes of assessment of tax instead it has introduced certain conditions of its own to give effect to the partition under Section 171 of F the Act. The Court held that in order to claim disruption of HUF on the basis of partition it is necessary to show that the partition had been effected physically by metes and bounds, and in the absence of any such proof, the property would continue to be treated as belonging to the HUF and its income would continue to be included in its total income treating the assesse as HUF.

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The High Court referred to Section 25A of the Income Tax Act, 1922 and placed reliance on a number of decisions in holding that in view of the decree of Civil Court for partition, the HUF status had been disrupted and since there was no evidence on record to show that the HUF had received any income in the accounting year, the income H received by individual members of the joint family could not be

treated to be the income of HUF. The High Court placed reliance on the Privy Council decision in *Sunder Singh Majithia* v. *Commissioner of Income Tax,* [1942] 10 I.T.R. 457 and a number of other decisions also in holding that the legal fiction introduced under Section 171 of the Act could not be extended to create tax liability on the HUF even after disruption of its status, pursuant to the Civil Court's decree for partition. We do not consider it necessary to discuss those decisions, as the purpose and object of Section 171 and the extent of the legal fiction introduced by it has already been considered by this Court in *Kaloomal's* case. The view taken by the High Court under the impugned judgment is not sustainable in law as it is contrary to that decision. In *Shankar Narayanan* v. *Income Tax Officer,* 153 I.T.R. 562 a learned Judge of the Kerala High Court while considering the interpretation of Section 171 held that the view taken by the High Court in the Judgment under appeal *Income Tax Officer, Assessment V, Calicut* v. *Smt. N.K. Sarada Thampatty,* 150 I.T.R. 67 ceased to be good law in view of the decision of this Court in *Kaloomal's* case.

In the instant case since there was no dispute that prior to the assessment year 1967-68 the assessment was made against the HUF of which the respondent was a member. The respondent for the first time raised the plea of partition and disruption of HUF in the proceedings for the assessment years 1967-68, 1968-69 and 1969-70. There was no dispute before the Income Tax Officer that there had been no physical division of the properties by metes and bounds, therefore the Income Tax Officer was justified in holding that the status of HUF had not been disrupted, and the income derived from the properties for the purposes of assessment continued to be impressed with the HUF character. The High Court in our opinion committed error in quashing the order of the Income Tax Officer. In the result, we allow the appeals and set aside the order of the High Court and dismiss the writ petition filed by the respondent. There will be no order as to costs.

V.P. Appeals allowed.