DOES REMUNERATION OF A COPARCENER CONSTITUTE JOINT FAMILY INCOME?

THE CONSPICUOUS feature of the judgment of the Supreme Court in *Bhagwant* v. *Digambar*,[1] lies in its astounding *obiter* on a well settled point of Hindu law. One's sense of distress is heightened because the Bench included Bhagwati C. J., who has been regarded by many as a judicial craftsman without a peer. It may be recalled in this context that a considered *obiter* of the Supreme Court is binding on all subordinate courts. In the instant case it is worthwhile to note that the statement in question has all the *indicia* of a considered *obiter*.

In essence the case involves the issue as to whether remuneration paid to the plaintiff-appellant as a managing agent is his separate or joint family property. On the facts the decision is to the effect that it constituted joint family income. It is not intended to criticise the decision on this ground. For, under the articles of the company, the managing agency was to devolve on a person belonging to the Sulakhe family, nominated by all adult members of the joint family unanimously.

But then the court in its judgment adverts to an argument advanced by the appellant counsel, V. M. Tarkunde, *viz.*, even if the income of the plaintiff for services rendered as a managing agent be treated as joint family property, nonetheless there should be an apportionment of the income between the joint family and the plaintiff as he alone rendered all the services. Rejecting the argument, without any qualification or reservation the court states:

> The character of any joint family property does not change with the severance of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By an unilateral act it is not open to any member of the joint family to convert any joint family property into his personal property.[2]

If what is sought to be conveyed in the above passage is that the entire remuneration is a joint family asset divisible amongst the members, who hold it in severalty after a division in interest (though there is no

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1. A. I. R. 1986 S. C. 79. The Bench consisted of P. N. Bhagwati C.J., A. N. Sen and D. P. Madon JJ. The judgment of the court was delivered by A. N. Sen J.

2. *Id.* at 90.

partition by *metes and bounds*) it could have been put differently, precisely and elegantly. But that is not the case. Also its facts make it abundantly clear that the Supreme Court was not adverting to the position that prevails under the Income-tax Act 1961,[3] wherein it is provided that partition means "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".

It now remains for us to show how the statement contradicts the well-established precedents of the Privy Council and the Supreme Court on this point in the past and creates utter confusion.

In the *locus classicus* on the subject, *Appovier* v. *Rama Subba Aiyan*,[4] Lord Westbury stated:

> It is necessary to bear in mind the twofold application of the word "division". There may be a division of right, and there may be a division of property. . . .[5]

In *Kakumanu Pedasubhayya* v. *Kakumanu Akkamma*[6] T. L. Venkatarama Aiyar J. observed:

> The view was at one time held that there could be no partition, unless all the coparceners agreed to it or until a decree was passed in a suit for partition. But the question was finally settled by the decision of the Privy Council in Girja Bai v. Sadashiv Dhundiraj, 43 Ind App 151 ... wherein it was held, on a review of the original texts and adopting the observation to the effect in Suraj Narain v. Ikbal Narain, 40 Ind App 40 at p. 45 (PC) . . . that every coparcener has got a right to become divided at his own will and option whether the other coparceners agree to it or not, that a division in status take place when he expresses his intention to become separate unequivocally and unambiguously, that the filing of a suit for partition is a clear expression of such an intention, and that, in consequence, there is a severance in status when the action for partition is filed.[7]

In the epochal decision on the law of partition, *Raghavamma* v. *Chenchamma*[8] it was observed:

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3. Explanation to section 171.
4. 11 M. I. A. 75 (1866-67).
5. *Id.* at 91.
6. A. I. R. 1958 S. C. 1042. The Bench consisted of T. L. Venkatarama Aiyar, P. B. Gajendragadkar and A. K. Sarkar JJ.
7. *Id.* at 1046.
8. A. I. R. 1964 S. C. 136. The Bench consisted of K. Subba Rao, Raghubar Dayal and J. R. Mudholkar, JJ.

> The Sanskrit expressions "sankalpa" (resolution) in Saraswati Vilas, "akechchaya" (will of single coparcener) in Viramitrodaya, "budhivisesha" (particular state or condition of the mind) in Vyavahara Mayukha, bring out the idea that the severance of joint status is a matter of individual direction. The Hindu law texts, therefore, support the proposition that severance in status is brought about by unilateral exercise of discretion.[9]

After quoting the decisions of the Judicial Committee of the Privy Council the court went on to state:

> In Syed Kasam v. Jorawar Singh, ILR 50 Cal 84 the Judicial Committee, after reviewing its earlier decision laid down the settled law on the subject thus:
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> > It is settled law that in the case of a joint Hindu family subject to the law of Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, *even though no actual division takes place. . . .*[10]

If one may say so with utmost respect, perhaps the time has come when we should pray: God! save us from the 'considered *dicta*' of the Supreme Court.

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9. *Id* at 148. (Per Subba Rao J., as he then was).
10. *Ibid.* (Emphasis added).

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