land available for the enforcement of that right can arise, except incidentally and in case a default takes place.

SUBRAYA v. KRISHNA.

OLDFIELD, J.

I concur in the opinion expressed by my Lord.

COUTTS TROTTER, J.—I am of the same opinion and have nothing to add.

COUTTS TROTTER, J.

N.R.

SPECIAL BENCH.

Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and Mr. Justice Ramesam.

CHIEF COMMISSIONER OF INCOME-TAX, MADRAS, REFERRING OFFICER,

1923, March 8.

v.

DORAISWAMI AYYANGAR AND BROTHERS, ASSESSEES.*

Indian Income-tax Act (VII of 1918), sec. 2 (12-A)—Registration of some members of a joint family as a firm—Partnership of some members by a document—Liability of the joint family to super-tax.

Registration of some members of a joint family as a firm as defined in section 2 (12-A) of the Indian Income-tax Act (VII of 1918) precludes the assessment of the family as an undivided family to super-tax on the income derived from the business of the firm unless the firm so registered has been shown to carry on its business on behalf and for the benefit of the joint family. Nor does mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super-tax as part of the income of the undivided family, if the partnership is conducted on behalf of and for the benefit of the joint family.

CASE stated by the Secretary to the Chief Commissioner of Income-tax, Madras, in his letter, dated 5th

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* Referred Case No. 14 of 1921.

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August 1921, S.T.A. No. 27, under section 6 of the Super-tax Act of 1920 read with section 51 of the Income-tax Act of 1918 for decision of the High Court.

In this case a joint Hindu family consisted of a father and four sons. The four sons combined and started a joint partnership business in 1907 and executed a formal deed of partnership in November 1920 and had it registered with the Collector and Commissioner of Income-tax, Madras, in January 1921. The said officer issued the Certificate of Registration and declared it to have effect from 1st April 1920. He treated the income derived from partnership business as income of the joint family and assessed the firm to super-tax. The firm objected to the assessment on the grounds that the firm's business was no business of the joint family which consisted of the father also, that the firm was a separate entity by itself, that the father was only a lender to the firm and that the income of the firm could not be added to the income of the joint family so as to enable the Income-tax Officer to assess the firm to super-tax. The firm also objected before the Income-tax Officer that being a registered firm it was not liable to super-tax. On these objections the Commissioner of Income-tax referred for decision to the High Court under section 6 of the Super-tax Act (1920) read with section 51 of the Income-tax Act of 1918 the two following questions:—

"1. Does the registration of the brothers as a firm as defined by section 2 (12) of Act VII of 1918 preclude the assessment of the family as an undivided family to super-tax on the income derived from the business of the firm?

2. If not, does the mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super-tax as part of the income of the undivided family?"

The necessary facts not being clear the High Court required the Commissioner to give more information after taking evidence. The Commissioner then sent his report which he wound up as follows :-

"On the whole, no adequate evidence has been adduced which would enable one to record a finding as a fact whether the original capital of the firm was wholly or in part derived from joint family funds. It can only be inferred from the conduct of the assessees and all the circumstances of the case that appellants intended to trade as a joint family and did trade as such."

A. Krishnaswami Ayyar (with *M. Subraya Ayyar*) for the assessee.—The firm is not liable to super-tax for the following reasons :—The Super-tax Act exempts registered firms from super-tax. The firm is not an asset of the family. The father has no concern with the business of the firm and he is a mere lender in respect of it. It is clear from *Sudarsanam Maistri* v. *Narasimhulu Maistri*(1), that when some only of the members of a family are partners in a business or when a particular property is expressly agreed to be treated as partnership property, the incidents of joint family property do not apply to the partnership or the property. It is also clear from *Appovier* v. *Rama Subba Aiyan*(2) that in respect of a particular property the members of a family may by an agreement treat themselves as separated in status. See also *Rungun Monee Dossee* v. *Kassinath Dutt*(3). The finding given by the Commissioner is not against this view. There is no finding that the business belongs to the joint family.

Government Pleader (*C. V. Anantakrishna Ayyar*) for the Government. The question is one of fact. If the firm is really a business of the joint family it is liable to be assessed to super-tax though some members alone of the family constitute the firm and the firm is registered.

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(1) (1902) I.L.R., 25 Mad., 149 at 158. (2) (1866) 11 M.I.A., 75 at page 90.
(3) (1868) 13 W.R. (F.B.), 76 (footnote).

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If there is no clear finding on this point a finding may be called for.

The JUDGMENT of the Court was delivered by

COUTTS TROTTER, J.

COUTTS TROTTER, J.—This is a case stated by the Chief Commissioner of Income-tax to the High Court under section 51 of the Income-tax Act (VII of 1918) read with section 6 of the Super-tax Act, 1920. The question for decision is whether the assessees who are the registered firm of M. Doraiswami Ayyangar and Brothers are assessable to super-tax as an undivided Hindu family and the specific questions put to us are as follows :—

"(1) Does the registration of the brothers as a firm as defined under section 2 (12) of Act VII of 1918 preclude the assessment of the family as an undivided family to super-tax on the income derived from the business of this firm ?

"2. If not, does the mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super-tax as part of the income of the undivided family ?"

When this case first came before us we thought it necessary to have more information than was afforded to us by the original case stated and therefore referred the case back for a finding of fact as to whether the original capital of the firm was wholly or in part derived from joint family funds. The answer to that is to be found in the Commissioner's letter, dated the 5th of August 1922, the concluding paragraph of which runs as follows :—

"On the whole no adequate evidence has been adduced which would enable one to record a finding as a fact whether the original capital of the firm was wholly or in part derived from joint family funds."

To that is appended the following statement :—

"It can only be inferred from the conduct of the assessees and all the circumstances of the case that appellants intended to trade as a joint family and did trade as such."

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COUTTS TROTTER, J.

We desire to say with regard to this last statement that it is in no way relevant to anything that we referred back to the Commissioner, that we decline to treat it as a finding of fact by which we are bound in framing our answer to the questions referred to us. It appears to us to be a deduction of law from known circumstances rather than a finding of fact, but in any event, we disregard it as being in no way called for in connexion with the matter that has been referred. In any event it is vitiated by the laxity of reasoning which led up to and is evidenced by, the language in paragraph (3) of the same document in which it is said that "the four brothers 'practically' form the joint family." A joint family consists of certain definite persons and any given individual must either be a member of it or not. The general legal position appears to us to be beyond doubt. Members of a joint family may engage in trade in such a way as to embark on the adventure funds of the joint family and pledge its credit to their undertaking. On the other hand the members of a joint family may embark on a trade without involving the funds of the joint family in it, and in that event, their profits as traders would be self-acquisitions and the losses would not be recoverable from the joint family property. The members who actually take part in the trade may enter into a deed of partnership between themselves or between themselves and a stranger partner which of course would regulate their dealings *inter se* and with the stranger partner but need not necessarily affect the question as to whether and how far the property of the joint family is to be regarded as involved in the adventure. It is not conclusive to show that some funds of the joint family were invested in the trade; because they might have been borrowed by the trading members as a loan of a definite sum to be repaid by the trading firm just as if it was a

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loan from strangers. In the present case the accounts appear to show that such a course has been pursued here and that the amounts advanced by Mr. M. Ananthachariar, the father of the assessees and apparently the manager of the joint family of which they are all admittedly members, were treated as a mere loan for the purpose of the business to be repaid with interest in the ordinary way and not as an indication that the business was conducted as a joint family business. But that is a question of fact and inference which is primarily at least for the determination of the Commissioner and not of this Court. We therefore answer the questions put to us in the only way we can answer them on the materials before us.

(1) Yes, unless the firm so registered has been shown to carry on its business on behalf of and for the benefit of the joint family.

(2) The answer is in accordance with the preceding answer.

The mere constitution of a partnership between some members of the family will not preclude the assessment in cases where the partnership is conducted on behalf of and for the benefit of the joint family.

As we have been unable on the materials before us to give a final determination of the rights of the parties we make no order as to costs.

N.R.