

INCOME-TAX REFERENCE.

*Before Mr. Madhavan Nair, Officiating Chief Justice,
Mr. Justice Stone and Mr. Justice King.*

JUPUDY KESAVA RAO, BANKER, RESIDING AT
BHIMAVARAM, WEST GODAVARI DISTRICT, PETITIONER,

1935,
October 2.

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 26 (2)—Succession referred to in—Meaning of—Undivided Hindu family consisting of father and son—Business carried on by—Death of father and manager—Son continuing business on—“Succeeds” to business of father, if—Undivided Hindu family contemplated in Act—Nature of—Assessee singly, if a member of—Assessee and his wife, if together constitute such family.

What is contemplated by section 26 (2) of the Indian Income-tax Act of 1922 is not merely succession in the management of business by another person. The word “succession” as used in the section connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he after the succession carries on in such capacity, that is, the capacity as owner.

An undivided Hindu family consisting of the assessee and his father carried on a business. The father, the manager of the family, died and after his death the assessee continued to carry on the business.

Held that the assessee could not be said to have “succeeded” to the business of his father within the meaning of section 26 (2) of the Act and was not therefore liable to be assessed under that section.

The undivided Hindu family which was carrying on business has not been “succeeded” in such capacity by the assessee, as the assessee was himself in part the owner of the property already, and as such there has been no transfer of

* Original Petition No. 147 of 1934.

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ownership in the business as he has become entitled to it by survivorship.

Quaere (i) whether the assessee singly could not be conceived of as a member of an undivided Hindu family ;

(ii) whether the assessee and his wife who was alive did not taken together constitute an undivided Hindu family ; and

(iii) whether the undivided Hindu family contemplated in the Income-tax Act is an undivided Hindu coparcenary.

PETITION under section 66 (3) of the Indian Income-tax Act (XI of 1922).

P. V. Vallabhacharlu for petitioner.

M. Patanjali Sastri for Commissioner of Income-tax.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

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NAIR O.C.J.

MADHAVAN NAIR O.C.J.—The question referred to us is :

In the circumstances of this case is the petitioner herein liable to be assessed under section 26 (2) of the Indian Income-tax Act?

The circumstances are these : The petitioner, J. Kesava Rao, and his deceased father, J. Gangayya, constituted a Hindu undivided family deriving income from money-lending business. Gangayya was the manager of the family and the assessments used to be levied on him as representative of the family. For the assessment of the year 1932-33 (accounting year 1931-32) notice was issued to Gangayya under section 22 (2) of the Income-tax Act on 9th April 1932 and he filed his return on 20th May 1932 showing a net income of Rs. 12,755. Gangayya died on 15th July 1932 before assessment could be levied on him. After his death the petitioner continued to carry on the business. Notices were

then issued to him under sections 22 (4) and 23 (2) of the Act. He complied with these notices and was finally assessed to income-tax on a total taxable income of Rs. 50,550. The Income-tax Officer did not levy on him super-tax on the excess over Rs. 30,000 of the total income on the assumption that the petitioner like his father represented a Hindu undivided family.

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The petitioner appealed to the Assistant Commissioner objecting to the amount of the assessment. In the course of the appeal he learnt that the petitioner had no children or brothers. In the circumstances he considered that the assessment should have been made on the petitioner as an individual and not as a Hindu undivided family since, in his opinion after the death of the petitioner's father in July 1932 the Hindu undivided family ceased to exist and the petitioner became the sole surviving member of the original Hindu undivided family. He therefore issued a notice to the petitioner under section 31 (3) proposing to treat him as an individual and levy super-tax accordingly. The petitioner contended that himself and his wife constituted a Hindu undivided family and that therefore the assessment made on him as a Hindu undivided family was correct. The objection was overruled and the super-tax was levied accordingly. The question arising for decision is whether in these circumstances the petitioner is liable to be assessed under section 26 (2) of the Indian Income-tax Act.

Sub-section (2) of section 26 of the Income-tax Act runs as follows :

“Where, at the time of making an assessment under section 23, it is found that the person carrying on any business,

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profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

In support of his contention that he is not liable to assessment under the above section the petitioner urges two points. In the first place, he contends that, inasmuch as he got the entire business by survivorship under Hindu Law, he cannot be said to have "succeeded" to the business within the meaning of that term as used in the section. In other words, he argues that there cannot be a succession by a person to something of which he was in part the owner already. His next contention is that for the application of the section a person carrying on any business, profession or vocation should be succeeded in such capacity by another person, that he alone or he and his wife would constitute a Hindu undivided family just as he and his father constituted one before, and that, the Hindu undivided family remaining the same both before and after the death of his father, the terms of the section are not satisfied and that therefore he is not liable to be assessed under it. If either of these points is decided in his favour, he would succeed in the reference.

The Counsel for the Commissioner meets the above points by saying that the petitioner, considered as an individual which he now unquestionably is, is a person distinct from the undivided Hindu family of which before the death of his father he was a member, that he cannot by himself alone or even with his wife constitute a joint Hindu family, that he has

succeeded to the business in the sense in which the term "succeeded" is ordinarily understood and that he is therefore liable to be assessed under section 26 (2).

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Both the questions raised are not free from difficulty. Section 26 (2) has not been very happily worded. The terms "the person carrying on any business, profession or vocation has been succeeded in such capacity by another person" may well suggest that what is contemplated is merely succession in the management of business by another person; but obviously that cannot have been the intention of the Legislature. It appears to us that the word "succession" as used in the section connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he after the succession carries on in such capacity, that is, the capacity as owner. If this view is correct, as we think it is, then it seems fairly clear that the undivided Hindu family which was carrying on business has not been "succeeded" in such capacity by the petitioner, as the petitioner was himself in part the owner of the property already, and as such there has been no transfer of ownership in the business as he has become entitled to it by survivorship. No authority relevant for deciding the point has been cited by either side. The decision in *Arunachalam Chettiar v. Commissioner of Income-tax, Madras*(1), relied on by the Commissioner, in which it was held that in cases where there has been a partition of an undivided Hindu

(1) (1929) 3 I.T.C. 441; 57 M.L.J. 300.

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trading family section 26 applies, does not help him, for those are not cases where one party gets the property of another by survivorship. It would therefore follow that the petitioner has not "succeeded" to the business of his father within the meaning of section 26 (2) of the Act and is not therefore liable to be assessed under that section.

In the above view it is not necessary to decide the point whether the petitioner himself or with his wife does not constitute an undivided Hindu family—the second point raised in the case. However, as the point was argued for some time, we will briefly refer to the arguments. The petitioner's Counsel is prepared to argue that the petitioner by himself would constitute an undivided Hindu family ; but in the present case, he contends, it is not necessary for him to go so far as the petitioner has his wife living and they together, he argues, would certainly come within the description of an undivided Hindu family. This argument is not without force, and would seem to have some authority to support it. Strictly speaking, it is not difficult to conceive of the petitioner singly as a member of an undivided Hindu family ; that he was a member of an undivided family when his father was living cannot be disputed ; that family has never been divided and the petitioner, though he is the only one living now, may well be said to represent in his person the undivided Hindu family. But it is not necessary to pursue this line of thought, as, as already stated, the petitioner has his wife living, and do they not taken together constitute an undivided Hindu family ? If a son is born to

them, there cannot be any doubt that there would come an undivided Hindu family into existence and so it is said that potentially there is an undivided family now in existence. On the other hand, it is urged that when the original undivided family is reduced to a single member the property of the family loses its character of joint family property and that the sole remaining member is reduced to the position of an individual owning those properties and that his wife does not in any manner form a member of an undivided Hindu family. It is argued that the wife or widow of a coparcener has only a right of maintenance and has no substantial rights to the property of the family. This argument assumes that the term "undivided Hindu family" should be limited to a family of coparceners. The petitioner's contention seems to be supported by an observation of RAMESAM J. in *Vedathanni v. Commissioner of Income-tax, Madras*(1). In that case, the first question referred to the High Court was whether the maintenance and arrears of maintenance received by a widow of a member of a joint undivided Hindu family is not exempt from taxation under section 14 (1) and other sections of the Act. In deciding that point the learned Judge expressed the view that the contention, that even where the family is reduced to a single male member there is still a joint family, at any rate where there are a number of widows and other persons entitled to maintenance, is not untenable. This question did not directly arise for decision before the learned Judge. After the arguments were over, Mr. Sastri on behalf of the Income-tax

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(1) (1932) I.L.R. 56 Mad. 1 (S.B.).

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Commissioner brought to our notice a judgment of the Calcutta High Court in *In re Moolji Sicca and others*(1) which seems to support the view that he has been contending for, namely, that the undivided Hindu family contemplated in the Income-tax Act is an undivided Hindu coparcenary. In the present case it is not necessary to decide which of the above contentions should be accepted, as we have decided the first point raised by the petitioner in his favour and that is enough to dispose of the case.

We would accordingly answer that in the circumstances of this case the petitioner is not liable to be assessed under section 26(2) of the Indian Income-tax Act. He is entitled to his costs of Rs. 250 and the refund of Rs. 100 deposited by him.

A.S.V.

(1) (1934) 3 I.T.R. 123.
