

MISCELLANEOUS CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

SUNDER SINGH MAJITHIA (APPLICANT) v. COMMISSIONER OF INCOME-TAX (OPPOSITE PARTY)*

1938
March, 9

Income-tax Act (XI of 1922), sections 25A, 26A—Partial partition or division of one item of joint family property—Joint Hindu family converted into partnership regarding that item—Registration of partnership for purposes of Income-tax Act—Rules of Board of Revenue under Income-tax Act, rule 4.

Section 25A of the Income-tax Act contemplates a case in which the members of a joint family have separated in status from each other so that the joint family as such ceases to exist and there has been a partition of all the joint family property ; it has no application to a case of a partial partition of the joint family property.

It is open to the Income-tax Officer to suspend orders on an application already presented under section 26A by members of a Hindu family until the assessment proceedings are held. If at the time of making the assessment a claim is made under section 25A, it is the duty of the Income-tax Officer to decide whether there has been a separation of members and a partition of the property within the meaning of that section. If it is found that there has been such separation and partition, an order will be passed to that effect ; and if it appears that a firm has been constituted by the separate units which have come into existence, the Income-tax Officer will proceed under section 26 and will then register the firm upon an application under section 26A. Notwithstanding the language of rule No. 4 of the Rules of the Board of Inland Revenue issued under Notification No. 3—1.T., dated the 1st of April, 1922, the Income-tax Officer has authority to refuse to register an instrument of partnership and he should not register a firm upon receipt of an application under section 26A if he has reason to think that it is not a genuine and valid firm such as is recognized by the Income-tax Act.

Sir *Tej Bahadur Sapru* and Mr. *D. Sanyal*, for the applicant.

Dr. *N P. Asthana*, for the opposite party.

COLLISTER and BAJPAI, JJ. :—This is a statement of a case by the Commissioner of Income-tax, Central and United Provinces, under section 66(2) of the Indian

Income-tax Act. The reference was made at the instance of Sardar Bahadur Dr. Sir Sundar Singh Majithia, C.I.E., who is the head of an undivided Hindu family consisting of himself and his three sons.

The Commissioner states that "The assessee enjoys a large income from property, has deposits in banks and shares in companies, does money and grain-lending business and is interested in a sugar factory styled as the Saraiya Sugar Factory." For several years Sir Sundar Singh was also a member of the Executive Council of the Punjab Government and drew a salary in that capacity. The assessment year with which we are concerned is 1932-33, and the accounting year ended with the 30th of September, 1931. The members of this family are Jats of the Sher Gill tribe in the Amritsar district in the Punjab and they are, as we have already said, an undivided Hindu family. In previous years the assessee submitted returns on the footing that the business of the sugar factory was a joint family concern, but at the assessment to which this case relates it was alleged that the father and the sons had divided this business among themselves, while retaining their status as a joint Hindu family and holding all other properties as properties of the Hindu undivided family. It is said that this partition took place in September, 1931, and under it the father received a four anna share and the three sons a three anna share each, and their mother received the remaining three anna share for life. On the 12th of February, 1933, these five persons executed an instrument of partnership. On the 13th of February an application was made to the Income-tax Officer under section 26A of the Act for registration of the firm which was said to have come into existence under this deed of partnership and for separate assessment on its basis. On the 18th of April, 1933, the application was allowed and assessment was made accordingly, but on the 20th of September, 1933, the Commissioner set aside that assessment and directed that a fresh

1938

SUNDAR
SINGH
MAJITHIA
v.
COMMISSIONER
OF
INCOME-
TAX

1938
 SUNDAR
 SINGH
 MAJITHIA
 v.
 COMMISSIONER
 OF
 INCOME-
 TAX

assessment be made. Accordingly on the 16th of December, 1933, the Income-tax Officer made a fresh assessment, treating the assessee as an individual and including the profits from the sugar factory; and the "firm" was not registered under section 26A of the Act.

Two appeals were filed to the Assistant Commissioner, one being against the refusal to register the alleged firm under section 26A and the other being against the assessment. The Assistant Commissioner upheld the order of the Income-tax Officer refusing to register the firm, but modified his assessment order by directing that the assessment should be that of a Hindu undivided family and by granting an abatement in respect to super-tax.

Thereafter an application for review was preferred to the Commissioner under section 33 and also an application under section 66(2) requiring the Commissioner to refer certain questions for the decision of this Court. The Commissioner rejected the application for review, but has stated a case for our decision. The question referred to us is as follows:

"In all the circumstances of this case, having regard to the personal law governing the assessee and the requirements of the Transfer of Property Act (No. IV of 1882) and the Stamp Act (II of 1899), has the deed of partnership (Appendix A), dated the 12th of February, 1933, brought into existence a genuine firm entitled to registration under the provisions of section 26A of the Act?"

Two alternative positions were taken by the assessee, one being on the basis that the sugar factory was self-acquired property of Sir Sundar Singh and the other being that it was joint ancestral property until it was partitioned preparatory to the deed of partnership.

The Commissioner, in agreement with the view expressed by the Assistant Commissioner, is of opinion that if the sugar factory was the self-acquired property of Sir Sundar Singh, the distribution of shares on his part among his sons and his wife required to be effected by a registered instrument and that, if it was joint family

property, the partition was ineffectual on the ground that the shares allocated thereunder, being unequal in extent, were not legal shares as sanctioned by the Hindu law.

We will first consider the matter on the hypothesis that the sugar factory was the self-acquired property of Sir Sundar Singh.

Learned counsel for the assessee concedes that if Sir Sundar Singh owned immovable property and if he wished to include others in that ownership and if in pursuance of such wish he transferred shares in the immovable property by distribution among his sons and his wife, a registered instrument was necessary; but he pleads that in fact no immovable property was transferred. He contends that what was conveyed to each son and to the wife was a share in the machinery and the business only, the building or buildings being placed at the disposal of this ownership for the purpose of carrying on the business; the title in such building or buildings was reserved to himself by Sir Sundar Singh. We are referred to certain clauses in the deed of partnership. . . . Learned counsel for the department concedes that in India machinery is not treated as immovable property; but he maintains that a share in the buildings also was transferred to each son and to the wife.

It is true that the partnership deed does not specifically mention buildings, but we are clearly of opinion that, since depreciation on account of buildings was claimed by this "firm", it must be held that, if the sugar factory was the self-acquired property of Sir Sundar Singh, shares in the buildings as well as in the business and machinery were distributed among the sons and wife of the owner. And such distribution could only be effected by means of a registered instrument.

We will now examine the matter on the assumption that the factory was joint family property until it was partitioned for the purpose of entering into a partnership. Learned counsel for the department concedes

1938

SUNDAR
SINGH
MAJITHIA
v.
COMMISS-
SIONER
OF
INCOME-
TAX

1938

SUNDAR
SINGH
MAITHIA
v.
COMMISSIONER
OF
INCOME-
TAX

that if it was joint family property, no question of the Transfer of Property Act or of the Stamp Act will arise. He also concedes that there is nothing in the Hindu law to prevent a joint family from partitioning a portion only of the property while retaining the status of an undivided family and keeping the rest of the property joint. He further concedes that there may be a partition of property in unequal shares by agreement between the members of the family. But he strenuously pleads that for the purposes of the Income-tax Act members of an undivided Hindu family cannot enter into a partnership in respect to a portion of a joint property which they have partitioned among themselves.

In the present case the status of the family is admittedly still undivided and the rest of the property—apart from the sugar factory—is still joint. Now section 25A(1) of the Income-tax Act provides that

“Where, at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect: Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.”

Sub-section (3) of that section provides that “Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family.”

In our opinion, the language of this section makes it perfectly clear that an order declaring separation shall

only be passed if (1) the members of the family have separated in status from each other and (2) there has been a partition of all the joint family property. In *Biradhmal Lodha v. Commissioner of Income-tax* (1) it was held by a Bench of this Court that section 25A of the Income-tax Act has no application in the case of a partial division of a joint family property. At page 509 BENNET, J., observed: "I consider that . . . section 25A does not refer to a case like the present where there is an allegation that there was no partition in the joint family but there was merely a division of a particular portion of the joint family property among the various members. Therefore the answer to the first question is in the negative, and is that in the case of a partial division of a joint family property section 25A has no application." Similarly at page 519 NIAMAT-ULLAH, J., said: "Whether the transaction be styled as one of partial partition of the family property or as transfer of part of the family property, section 25A of the Income-tax Act does not, in my opinion, apply. That section contemplates a case in which a disruption of the family occurs, so that a joint family, as such, ceases to exist and no property previously belonging to it retains the character of joint family property." If we may respectfully say so, we are in full agreement with that view and we are of opinion that in the circumstances of the case before us the family continues to be a single unit for the purposes of assessment under the Income-tax Act.

Sir *Tej Bahadur Sapru*, on behalf of the assessee, has argued that as soon as the application for registration was made on the 13th of February, 1933, under section 26A, it was the duty of the Income-tax Officer to register it forthwith; it was not open to him to make any inquiry as to the validity of the firm for the purposes of the Income-tax Act. This argument is founded on the mandatory terms of rule No. 4 of the Rules of the Board of Inland Revenue issued under notification No. 3-I. T.,

1938

SUNDAR
SINGH
MAJITHIA
v.
COMMIS-
SIONER
OF
INCOME-
TAX

1938

dated the 1st of April, 1922, as subsequently amended.

SUNDAR
SINGH
MAJITHIA
v.
COMMISSIONER
OF
INCOME-
TAX

That rule reads as follows:

“(1) On the production of the original instrument of partnership or on the acceptance by the Income-tax Officer of a certified copy thereof, the Income-tax Officer shall enter in writing at the foot of the instrument or copy, as the case may be, the following certificate, namely: ‘This instrument of partnership (or this certified copy of an instrument of partnership) has this day been registered with me, the Income-tax Officer for _____ in the province of _____ under clause (14) of section 2 of the Indian Income-tax Act, 1922. This certificate of registration has effect from the day of April, 19__ up to the 31st day of March, 19__.’

“(2) The certificate shall be signed and dated by the Income-tax Officer who shall thereupon return to the applicant the instrument of partnership or the certified copy thereof, as the case may be, and shall retain the copy or duplicate copy thereof.”

We are unable to accept the contention of learned counsel. Section 26A of the Act provides that

“(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

“(2) The application shall be made by such person or persons and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.”

Rule No. 2 under the notification already mentioned prescribes that such application shall ordinarily be made before the income of the firm is assessed. The words in

section 26A(1), "for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax", would seem to indicate that the Income-tax Officer should not register a firm upon receipt of an application under that section if he has reason to think that it is not a firm such as is recognized by the Act. That the Income-tax Officer has authority to refuse to register an instrument of partnership is further proved by the fact that under section 30 there is a right of appeal against such refusal; and if registration has been wrongly allowed, the Commissioner has the power to set aside that order under section 33.

In *Tara Chand Pohnu Mal v. Commissioner of Income-tax* (1) the assessee had been assessed up to 1928-29 as a joint family, but during the 1929-30 proceedings a member of the family applied on the 17th of May, 1929, for the registration of the family as a firm alleged to have been constituted under an instrument of partnership, dated the 4th of January, 1929. A separate claim was not put in to the effect that the Hindu undivided family had disrupted. The Income-tax Officer registered the firm without holding any inquiry as to whether the family had actually effected a partition; but at a subsequent assessment the Income-tax Officer found that the status of the assessee was, in fact, that of a joint Hindu family. It was held by a Bench of the Lahore High Court that it was open to the Income-tax Officer to go into the question whether the family was joint or not, as it is an issue of fact, and that a wrong decision in the previous year by the Income-tax Officer could be corrected in a subsequent year.

Section 26A comes after section 25A and section 26, and we think that it is open to the Income-tax Officer to suspend orders on an application already presented under section 26A by members of a Hindu family until the assessment proceedings are held. If at the time of making the assessment a claim is made under section 25A,

1938

SUNDAR
SINGH
MAJITHIA
v.
COMMIS-
SIONER
OF
INCOME-
TAX

(1) A.I.R. 1936 Lah. 836.

1938
 SUNDAR
 SENGH
 MAJITHIA
 v.
 COMMISSIONER
 OF
 INCOME-
 TAX

it is the duty of the Income-tax Officer to decide whether there has been a separation of members and a partition of the property within the meaning of sub-section (1) of that section. If it is found that there has been such separation and partition, an order will be passed to that effect; and if it appears that a firm has been constituted by the separated units which have come into existence, the Income-tax Officer will proceed under section 26 and will then register the firm upon an application under section 26A. In the present case no claim was made under section 25A. Nor could such claim legally be made in view of the fact that there had been a partition of a portion only of the joint property and the status of the family remained undivided. Therefore, under sub-section (3) of section 25A the family will be deemed, for the purposes of the Act, to continue to be a Hindu undivided family and will be assessed as a single unit, and for the constitution of a firm there must be more than one unit. The application for registration under section 26A was rightly disallowed.

Our answer to the question formulated by the learned Commissioner is in the negative. We direct that a copy of our judgment under the seal of the Court and the signature of the Registrar be sent to the Commissioner. The department is entitled to the costs of this reference.

REVISIONAL CRIMINAL

Before Mr. Justice Allsop

EMPEROR v. HIRA LAL*

1938
 March, 22

U. P. Prevention of Adulteration Act (Local Act VI of 1912), sections 12, 15(2)—Summons not specifically setting forth the particulars of the offence charged—"Prosecutor", who is—Whether prejudice to accused or failure of justice—Criminal Procedure Code, section 537.

A failure to give the particulars in the summons required by section 15(2) of the U. P. Prevention of Adulteration Act does

*Criminal Revision No. 148 of 1938, from an order of S. M. Mir, Sessions Judge of Fatchpur, dated the 4th of February, 1938.