INCOME-TAX APPLICATION.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

BANSIDHAR & SONS

v.

THE COMMISSIONER OF INCOME-TAX, BURMA.*

1937
Nov. 10.

Income-tax—"Hindu undivided family"—Persons previously assessed as Hindu undivided family—Claim to be assessed separately—Establishment of claim—Inquiry by Income-tax Officer—Discretion as to evidence—Question of fact—Reference to High Court—Burma Income-tax Act, ss. 25A (1), 66 (3).

The term "Hindu undivided family" as used in the Income-tax Act has a wider significance than the Hindu joint family known to Hindu law.

Kalyanji Vithal Das v. *The Commissioner of Income-tax, Bengal*, I.L.R. [1937] 1 Cal. 653, referred to.

Before persons who have been previously assessed as a Hindu undivided family can claim to be separately assessed as members of a contractual partnership they must establish that the undivided family has been dissolved.

In re Bisveswarlal Brijlal, I.L.R. 57 Cal. 1336, referred to.

Where an Income-tax Officer makes an inquiry under s. 25A of the Income-tax Act as to whether a partition has taken place among the members of a Hindu family hitherto assessed as undivided he has a discretion as to the conduct of the inquiry and to hear such evidence, and such evidence only, as he may deem necessary to arrive at his decision. Such decision is a decision on a question of pure fact, and so long as his discretion is not exercised arbitrarily or fancifully, and there are before him some materials on which he can arrive at the conclusion at which he has arrived, his decision cannot be canvassed before the High Court on an application under s. 66 (3) of the Income-tax Act.

Daniel for the applicants. The applicants formed a contractual partnership in 1936 and applied to the income-tax authorities to be assessed as such and not as a joint Hindu family as hithertofore. The application was rejected. The assessees were, strictly speaking, not a Hindu joint family though the father and sons lived together. There was no ancestral property, and all the property of the business was the

* Civil Misc. Application No. 56 of 1937.

self-acquired property of the father, who chose to take his sons into partnership with him. The applicants sought to adduce evidence before the income-tax authorities to show that there was no ancestral property in the case, but the Commissioner of Income-tax came to a finding without examining the witnesses cited for the purpose.

[DUNKLEY, J. Is that the real grievance ?]

In a way, yes. The finding of the income-tax department does not rest on proper basis, and the failure to examine the witnesses cited to show that there was no ancestral property vitiated the finding. On this question alone the case should be stated to the High Court.

A. Eggar (Advocate-General) for the Crown. Case-law shows that evidence of disruption is necessary before a joint family can be held to have separated. The assessees have admitted that they are still an " undivided family " living together.

[DUNKLEY, J. The case really falls to be determined by s. 25A and not 26A of the Act. The short answer to the application seems to be that the Income-tax Officer can hold any inquiry he likes on the issue, and the Court would have no jurisdiction in the matter because the finding would relate to a pure question of fact.]

Yes. And there is nothing in s. 25A to show that the origin of the family is in any way relevant. What is needed to be proved is separation, and till that is proved an assessee assessed as an undivided family would continue to be so treated (s. 25A). The decision in *In re Bisveswarlal* (1) summarizes the position.

(1) I.L.R. 57 Cal. 1336.

1937

BANSIDHAR & SONS v. THE COMMISSIONER OF INCOME-TAX, BURMA.

See also *Ghanshayam Das* v. *Commissioner of Income-tax, Bihar and Orissa* (1); *Jathu Shah-Nathu Shah* v. *Commissioner of Income-tax* (2); *Mittar Chand-Lakhmi Das* v. *Commissioner of Income-tax, Punjab* (3); *Kalyanji Vithal* v. *The Commissioner of Income-tax, Bengal* (4).

DUNKLEY, J.—This is an application under section 66, sub-clause (3), of the Income-tax Act by one Bansidhar and his five sons, who admittedly form a Hindu joint family but it is now alleged that the business in respect of which they have been assessed to income-tax is not joint family property. From the year 1932-33 they were annually assessed to income-tax under section 3 of the Act as a Hindu undivided family in respect of the profits of this business, but when the time came for the assessment for the year 1936-37 a claim was made that Bansidhar and his five sons formed a contractual partnership in respect of and for the purpose of carrying on this business, and not a Hindu undivided family. The deed of partnership between them was ultimately produced, although there was considerable delay in its production, and an application purporting to be under section 26A of the Act was made for the registration of this partnership for the purposes of the Income-tax Act. The Income-tax Officer held an enquiry and came to the conclusion that the family still remained undivided and refused to register the partnership. His decision on this point was upheld on appeal by the Assistant Commissioner of Income-tax, and further on revision of the latter's order by the Commissioner of Income-tax. It is out of the final order of the Commissioner that the present application has arisen.

(1) 6 I.T.C. 198.
(2) I.L.R. 14 Lah. 134.
(3) I.L.R. 18 Lah. 189.
(4) I.L.R. [1937] 1 Cal. 653.

Now, the question of law on which by their application the applicants desire us to require the Commissioner of Income-tax to state a case is propounded in paragraph 13 of the present application as follows :

" Is it legal in the circumstances of this case to hold that there is no partnership between Bansidhar and his five sons ? or, in other words, is it legal for the head of a Hindu joint family who has no ancestral property to enter into a partnership with his sons in respect of his own self-acquired or separate business, which was built up by him individually without the employment of any ancestral funds, even though he and his sons live together as a Hindu undivided family ?"

But in the course of the argument it has been admitted by learned counsel for the applicants that this question does not cover the real grievance of the applicants and does not arise out of the order of the Commissioner of Income-tax. The real grievance of the applicants is entirely different and has arisen under these circumstances.

By an order dated 11th January, 1937, the Commissioner directed the Income-tax Officer, Magwe, to record any evidence called by the applicants to establish that this business was not created out of ancestral property : this evidence was to be heard at Taungdwingyi, where the business is carried on. Subsequently, on the 16th March, on the representation of the applicants that several of the witnesses whom they desired to call resided in Rangoon, the Commissioner directed the Income-tax Officer to cause these Rangoon witnesses to be examined on commission. For some reason this was not done, and the proceedings were returned to the Commissioner without these Rangoon witnesses having been examined. The Commissioner before passing orders failed to examine these Rangoon witnesses. He declined to hear them on the ground

1937

BANSIDHAR & SONS v. THE COMMISSIONER OF INCOME-TAX, BURMA.

DUNKLEY, J.

that the applicants desired to adduce this evidence to show that the business was started without capital and was built up by the sole efforts of the head of the family, and even if these facts were established they would not assist the applicants in proving that they do not constitute a Hindu undivided family within the meaning of that term as used in the Income-tax Act. The grievance of the applicants is the refusal of the Commissioner to examine these witnesses. Their learned counsel now admits that the question which he desires to have referred ought to be framed in some such form as the following: "Whether the order of the Commissioner of the 23rd April, 1937, is good in law in view of his refusal to examine all the witnesses tendered for the purpose of proving the alleged partnership."

In the case of *Kalyanji Vithal Das* v. *The Commissioner of Income-tax, Bengal* (1) their Lordships of the Privy Council have pointed out that the term "Hindu undivided family" as used in the Income-tax Act has a wider significance than the Hindu joint family known to Hindu Law; and in *In re Bisveswarlal Brijlal* (2) Rankin C.J. pointed out that before persons who have been previously assessed as a Hindu undivided family can claim to be separately assessed as members of a contractual partnership they must establish that the joint family has been dissolved. In view of the admission of the applicants that for all purposes, other than this business, they continue to be a joint family, evidence regarding the origin and growth of this business would plainly be useless in this case.

Apart from this consideration, this application fails on another ground. The application to the Income-tax Officer for registration of the firm has been treated

(1) I.L.R. [1937] 1 Cal. 653. (2) (1930) I.L.R. 57 Cal. 1336.

throughout, by the Income-tax Officer, by the Assistant Commissioner and by the Commissioner of Income-tax, as an application under the provisions of section 26A of the Act although it did not comply with the provisions of this section and the rules made thereunder. Clearly this application lay, not under the provisions of section 26A, but under the provisions of section 25A, which has reference to a claim made by or on behalf of a Hindu family which has hitherto been assessed as undivided that partition has taken place among the members of the family. The provisions of this section were plainly applicable to the original claim made by the applicants.

Now, under section 25A, when such a claim is made the Income-tax Officer shall make such inquiry thereinto *as he may think fit* ; that is, he has a discretion to conduct that inquiry in such manner as may seem to him, in his judgment, to be best in the circumstances of the particular case and to hear such evidence, and such evidence only, as he may in his discretion consider it necessary to hear to enable him to come to a decision on the question whether a separation of the members of the family has taken place or not. His decision is a decision on a question of pure fact, and so long as his discretion is not exercised arbitrarily or fancifully, and there are before him some materials on which he can arrive at the conclusion at which he has arrived, his decision cannot be canvassed before the High Court on an application under section 66, because no question of law can arise thereout. There is in the present case, in the admissions of the applicants alone, ample material on which the Income-tax Officer, and subsequently the Assistant Commissioner and Commissioner of Income-tax, could arrive at the decision at which they did arrive, and the applicants cannot be heard under the provisions of section 66 to complain that in the exercise

1937

BANSIDHAR & SONS v. THE COMMISSIONER OF INCOME-TAX, BURMA.

DUNKLEY, J.

of his discretion the Commissioner of Income-tax declined to hear certain evidence.

This application therefore fails and is dismissed with costs ten gold mohurs.

ROBERTS, C.J.—I agree.

LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

1937

Nov. 11.

U PO HLA AND ANOTHER

v.

KO PO SANT AND ANOTHER.*

Landlord and tenant, agreement between—Landlord's charge on crops for rent—Execution-creditor of tenant—Attachment and sale of crops—Equities binding on property—Knowledge of the creditor—Title of judgment-creditor.

Where there is an agreement between the landlord and his tenant that the crops grown upon the land should be charged with payment of rent an execution-creditor of the tenant is bound by this agreement, and it is immaterial whether he has knowledge of it or not. A judgment-creditor can in execution attach and bring to sale only the right, title and interest of his judgment-debtor in the property he attaches and is bound by all the equities which were binding on the property in the hands of the judgment-debtor. The creditor cannot have a better title than his judgment-debtor and therefore cannot override the landlord's charge on the crops for his rent.

A.R.M.A.L.A. Veerappa Chettyar v. *R.M.M.K. Mutukumaru Pillay*, L.P. Ap. 8 of 1931, H.C. Ran. ; *S.M.R.M. Firm* v. *P.L.A.R.M. Firm*, L.P. Ap. 7 of 1935, H.C. Ran., followed.

Tun Tin for the appellant.

Rahman for the respondent.

ROBERTS, C.J.—This appeal must be allowed and we must set aside the judgment of Mr. Justice Spargo and of the Assistant District Judge and restore the decree

* Letters Patent Appeal No. 4 of 1937 arising out of Special Civil Second Appeal No. 351 of 1936 of this Court.