

FULL BENCH.

Before Jai Lal, Monroe and Abdul Rashid JJ.

MITTAR CHAND-LAKHMI DAS (ASSEESSEE)

1936

Petitioners

Nov. 23.

versus

COMMISSIONER OF INCOME-TAX, PUNJAB—
Respondent.

Civil Reference No. 11 of 1936.

Indian Income-tax Act, XI of 1922 (as amended by Act III of 1928), Sections 25-A, 26 : Hindu undivided family carrying on a business — changed into a partnership after disruption — whether chargeable under Section 25-A or Section 26 — Applicability of Section 25-A, explained.

Held, that when it is found that at the time of assessment the members of a Hindu undivided family which used to carry on a family business have effected a partition, and have thereafter carried on the business as a firm on contractual relationship of partnership, that firm is chargeable under section 26 of the Indian Income-tax Act in respect of business which was carried on by the family in the "previous year" and not under section 25-A of the Act.

Held also, that as the partnership is so chargeable the shares of the partners are not to be included in the assessment upon the family under section 25-A (2) of the Act.

Section 25-A would cover the case of a Joint Hindu Family in which there has been a disruption and consequent partition, but no continuance of the business, either by the members of the Joint Hindu Family on contractual basis, or by some of them alone or jointly with others, or even by strangers.

Beli Ram and Brothers v. Commissioner of Income-tax, Punjab (1), followed.

Case referred under Section 66 (2) of the Indian Income-tax Act, by Mr. A. M. Bown, Commissioner of Income-tax, Punjab, N.-W. F. and Delhi Provinces

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with his letter No. S.-18/R. D. 35, dated 18th March, 1936, for orders of the High Court.

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TAX.

JAI LAL J.

KIRPA RAM BAJAJ, for Petitioners—JAGAN NATH AGGARWAL and S. M SIKRI, for Respondent.

JAI LAL J.—Two questions have been referred to this Court under section 66 (2) of the Indian Income-tax Act by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces. They are—

(1) When it is found that at the time of assessment the members of a Hindu undivided family have changed their natural family relationship to a contractual relationship or partnership, is that partnership chargeable under section 26 in respect of business which was carried on by the family in the “ previous year ” ?

(2) If the partnership be so chargeable, are the shares of the partners to be included in the assessment upon the family under section 25-A (2) ?

Messrs. Mittar Chand-Lakhmi Dass of Rawalpindi contested their assessment for the year 1935-36 which had been made by the Income-tax Officer on the basis of their income during the accounting period from 13th April, 1934, to the 13th April, 1935. It appears that Mittar Chand and his three sons, Lakhmi Dass, Mangal Sain and Chanan Mall, constituted a Hindu undivided family and carried on business as Produce Merchants in the name of Mittar Chand-Lakhmi Dass. They also owned a family residential house. Their income was assessed to income-tax as on a joint Hindu family. On the 7th of February, 1935, there was disruption of the joint Hindu family and consequent partition of the coparcenary property. A deed was executed by the

parties on the 10th March, 1935, reciting this disruption and partition, and on the same day a deed of partnership was executed whereby the four persons mentioned above agreed to continue the business on a contractual basis with a capital of Rs.15,000 which was deemed to have been contributed by each party. It was also recited that the family residential house had been divided into four portions and assigned to each partner separately. On these facts the learned Commissioner of Income-tax has accepted the contention of the assessee that there has been a disruption of the joint Hindu family and a partition of the family property among the various members thereof.

The contention of the assessee is that it should be assumed that from the 7th of February, 1935, a firm has been newly constituted within the meaning of section 26 (1) of the Indian Income-tax Act. The contention raised on behalf of the Commissioner is that assessment of the income for the year 1935-36 should be made under section 25-A (2) of the Indian Income-tax Act and not under section 26 as claimed by the assessee.

It is desirable at this stage to read the two sections referred to above. Section 25-A is "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.

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“ Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

“ (2) Where such an order has been passed, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no separation or partition had taken place, and each member or group of members shall in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it;

“ and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23 :

“ Provided that all the separated members and groups of members shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.”

Section 26 (1) is “ Where, at the time of making an assessment under section 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, the assessments on the firm and on the members thereof shall, subject to the provisions of this Act, be made as if the firm had been constituted throughout the previous year as it is constituted at the time of making the assessment, and as if each member had received a share of the profits of that year proportionate to his interest in the firm at the time of making the assessment.

“ (2) Where, at the time of making an assessment under section 23 it is found that the person carrying

on any business, 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."

Sections 25-A and 26 in their present form were enacted in 1928. Previously there was no section corresponding to section 25-A but section 26 read as follows:—

"Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted, or on the person engaged in the business, profession or vocation, as the case may be, at the time of the making of the assessment."

It is conceded at the bar that this section as now enacted has merely clarified the legal position as it existed previous to the amendment in 1928 and that it has neither extended nor restricted the scope of the provisions of the previous section. It is also conceded on behalf of the Income-tax Commissioner that but for section 25-A the income in question of the assessee would have been assessable under section 26. It is, however, contended that as according to the canons relating to the interpretation of statutes a special provision in a statute excludes the operation of the general provision, therefore, section 26 does not govern the present case because it is covered by the special section, that is, 25-A. The argument of the learned counsel is that as section 25-A applies to the income of a joint Hindu family which has disrupted and partition of the joint family property has taken place.

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therefore that section fully covers the present case. But, in my opinion, in this case there is a further circumstance which is not contemplated in section 25-A and that is that the members of the joint Hindu family after partition have continued the former business on a contractual basis, and this additional circumstance, in my opinion, brings section 26 into operation. It must be assumed that a firm has been newly constituted in this case and it is proposed to assess that firm on the basis of the income of the person whose business the firm has continued.

Now, I must make it clear that if section 26 were to apply merely to a firm which has been newly constituted and has not succeeded to any business which was previously carried on by another person, then legally no assessment can be made on it in advance, because there is no accounting period the income whereof can be taken as a guide for the assessment. In the case of an entirely new business started by a newly constituted firm, no assessment, if it conceded, can be made during the first year. It is during the second year that an assessment can be made on the basis of the income of the first year. Section 26, therefore, applies to the case of a business which was done during the previous year but which has been continued during the year of assessment by different persons. Sub-section (1) applies to firms and sub-section (2) applies to persons and not to firms, but the same principle runs through the two sub-sections.

In my opinion, therefore, section 25-A would cover the case of a joint Hindu family in which there has been a disruption and consequent partition but no continuance of the business either by the members of the joint Hindu family on contractual basis or by some

of them alone or jointly with others or even by strangers. Where the business has been discontinued section 25-A will apply, but where it is continued section 26 will apply. This view is supported by the judgment in case No.608 of 1934 [*Beli Ram and Brothers v. Commissioner of Income-tax, Punjab (1)*], in which a Division Bench of this Court took a similar view under similar circumstances with the exception that in that case the disruption of the family had taken place after the expiry of the accounting period and within the year of assessment, the disruption in the present case having taken place within the accounting period, *i.e.*, before the commencement of the year of assessment. This, in my opinion, makes no difference because section 26 does not make any reference to the time of disruption. It only takes into account the factum of disruption. A further ground of distinction, it is alleged, is that in the previous case only some of the members of the joint Hindu family had continued the business on a contractual basis, while in this case all the former members of the family have constituted themselves as a firm on a contractual basis. This again, in my opinion, makes no difference because the business which was carried on by a joint family is now continued by a firm which has been newly constituted and the requirements of section 26 have been fulfilled. The two facts mentioned above therefore are no ground for distinguishing this case from the case decided by the Division Bench.

I would, therefore, answer the first question in the affirmative and the second in the negative and would direct the Commissioner to pay the costs of the assessee of his reference which I would fix at Rs.75 and would

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further direct the Commissioner to refund the deposit of Rs.100 to the assessee.

MONROE J.—I agree.

ABDUL RASHID J.—I agree.

A. N. C.

*Question 1, answered in the affirmative,
 and question 2 in the negative.*

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

FEROZE DIN (DEFENDANT) Appellant

versus

MOHAMMAD DIN (PLAINTIFF) }
 SHAH DIN AND ANOTHER (DEFTS.) } Respondents.

Civil Appeal No. 2156 of 1934.

Court Fees Act, I of 1870, Section 7 (iv) (f) — Suit for dissolution of partnership and rendition of accounts — Preliminary decree in favour of plaintiff — Appeal by defendant — whether can be valued at lesser amount than the value given in the lower Court.

In a suit for dissolution of partnership and rendition of accounts and for a decree for such sum as might be found due, the plaintiff valued the suit under section 7 (iv) (f) of the Court Fees Act at Rs.5,250. The Court passed a preliminary decree in favour of the plaintiff declaring that the partnership was dissolved from a particular date and ordering that the accounts be taken. Against this decision the defendants appealed on the ground that there should have been no preliminary decree. They valued the appeal for purposes of jurisdiction at Rs.5,250, but only at Rs.130 for purposes of the Court fees.

Held, that an appeal of this nature must bear Court fees *ad valorem* on the amount at which the relief is valued in the plaint, and a defendant-appellant cannot value his appeal for the purposes of Court fees at any figure that he likes.