HIGH COURT OF DELHI

ITR No. 220 of 1982

Date of Decision : February 20, 2001

Shri Kanhaya Lal Sawhney (HUF), New Delhi.....Petitioner
.....through : Nemo

- versus -

Commissioner of Income Tax, Delhi.....Respondent
.....through : Shri R.C. Pandey with
Smt. Premlata Bansal,
Advocates.

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THE HON'BLE Mr. JUSTICE ARIJIT PASAYAT, CHIEF JUSTICE
THE HON'BLE Mr. JUSTICE D.K. JAIN

1. Whether reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes

ARIJIT PASAYAT, C.J. (Oral)

Pursuant to the direction given by this Court under Section 256 (2) of the Income Tax Act, 1961 (in short, 'the Act'), following question has been referred for opinion of this Court by Income Tax Appellate Tribunal, Delhi Bench 'E', New Delhi (in short, 'the Tribunal').

> "Whether, on the facts and circumstances of the case, the Tribunal was right in holding that there had been no valid partial partition of the assets of the Hindu Undivided Family?"

Dispute relates to assessment year 1974-75, for which the accounting year ended on 31.03.1974.

2. Factual position, in a nutshell, is as follows:-

Assessee derived income from property and other sources, i.e., dividend, interest and directors fee, etc. Hindu undivided family (in short, 'H.U.F.) of assessee comprised of Kanhaya Lal Sawhney and his wife Smt. Tarawati Sawhney. Income Tax Officer (in short, 'I.T.O.') noticed that some assets and liabilities were transferred from H.U.F. to Kanhaya Lal Sawhney as also to his wife Smt. Tarawati Sawhney on 31.03.1973, that is the last date of the accounting period relevant to the assessment year 1973-74. On enquiry, he was told that H.U.F. property had been partially partitioned by Kanhaya Lal Sawhney in his capacity as karta and out of the total assets of H.U.F. amounting to Rs.29,13,291/-, he and his wife were allotted assets to the value of Rs.10,55,447/- each and the remaining funds amounting to Rs.8,03,027/- were retained by H.U.F. I.T.O. examined the parties. Kanhaya Lal Sawhney stated that he had effected partial partition of H.U.F. to give a feeling of independence to his wife as desired by her. An affidavit by Smt. Tarawati Sawhney was also filed to the effect that she was a member of H.U.F. which had only one male member, who was the karta as well as the coparcener. The desire expressed was that of Kanhya Lal Sawhney to the effect that the assets and liabilities were apportioned by a memorandum of partial partition to which she was a signatory as one of the witnesses. The affidavit did not narrate that she had desired partition, and therefore, Kanhaya Lal's stand that he had effected partition to give a feeling of security to his wife was not correct and there was indirect transfer of assets. Moreover, it was stated that Explanation to Section 171 of the Act made the position clear, i.e., partition means that where the property did not admit of physical division, such division of the property as the property may admit, but a mere severance was not to be deemed to be a partition. Since there was no evidence that the property at Varanasi had been divided by metes and bounds, I.T.O. rejected the claim of partial partition and made assessment under Section 143 (3) of the Act ignoring the alleged partition. The aforesaid order was assailed before the Appellate Assistant Commissioner (in short, 'AAC'). It was the stand of assessee that genuineness of the transaction, i.e., whether it was a real

partition or sham one could only be considered by I.T.O., and not the motives for t... same. AAC noticed that both the members of H.U.F. had signed the documents relating to the division of assets, which had been duly reflected in the books of accounts and that they had filed their returns accordingly. I.T.O.'s conclusion was obviously without any basis since the right to seek the partition was implicit in joint ownership. She also rejected I.T.O.'s alternative stand that the property at Varanasi had not been divided by meets and bounds, because the family as a whole held only a share in that property which, therefore, could not be further sub-divided physically. Accordingly, AAC cancelled the order passed by I.T.O. and allowed the appeal relating to the order under Section 171 of the Act. Matter was carried in further appeal before the Tribunal by Revenue. It held that the reasoning of I.T.O. in refusing to recognise partial partition as claimed by assessee may not strictly be correct but the alleged partition could not be recognised in the case at hand. Accordingly, it was held that the claim of partial partition was not acceptable. A prayer was made for reference but it was turned down. As noted above, on being moved by assessee under Section 256 (2) of the Act, this Court had directed reference of the question as set out above.

3. We have heard learned counsel for Revenue. There is no appearance on behalf of assessee in spite of notice. Learned counsel for Revenue submitted that for the purpose of partition, two coparceners are necessary and partition of H.U.F. property is not possible when there is only one coparcener with one or more female members.

4. According to the true notion of an undivided family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, that a particular member has a certain definite share, say, one-third or one-fourth. Partition consists of a numerical division of the property. In other words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the

parties may divide the property by metes and bounds, or they may continue to li together and enjoy the property in common as before. But whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. In *Kalyani vs. Narayanan AIR 1980 SC 1173*, the Apex Court observed that a disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right, although not immediately followed by a de facto actual division of the subject matter. This may at any time be claimed by virtue of the separate right. From the time of such disruption each member holds his aliquot share as tenant-in-common irrespective of whether there is actual division of the properties by metes and bounds. It is an established law that actual physical division or partition by metes and bounds is not an essential ingredient for the purpose of effecting severance of status. That is really a formality in the process of partition.

5. In Mulla Principles of Hindu Law 17th Edition (First Volume) at para 315, it has been stated that a wife cannot herself demand a partition. If a partition does take place between her husband and his sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. Similar is the position of widow mother (per Para 316).

6. There is a conceptual difference between a gift and a partition. It takes two to make a gift – a donor and a donee. Besides a gift must involve transfer of the thing gifted. Before the transfer, donee will be nowhere in the picture. Donee will become the owner of the property gifted only because of the transfer of ownership involved in the gift. On the other hand, a partition involves no transfer as it does not confer new title to the person to whom the property is allotted, as was observed by the Madras High Court in *T.G.K. Raman (H.U.F.) vs. Commissioner of Income Tax (1983) 140 ITR 876*. The position at hand is only, in a manner of speaking, joint or undivided. There is a solitary male member, who is the head or karta of the family. As was observed by the Karnataka High Court in *B.T. Ravindranath Punja vs. Commissioner of Income Tax (1989) 179*

ITR 243, a sole surviving coparcener with only female member(s) cannot divide t property or grant any share in the property. In the absence of more than one coparcener, partition is impossible. The grant of any share in the property by the sole surviving male member of H.U.F. to any other family member could only be in the nature of settlement of the property upon them in lieu of their right to maintenance and cannot, by any stretch of reasoning, be said to be a partition of the property amongst them. Therefore, no partition could have taken place in such an event. The Punjab and Haryana Court has taken a similar view in *Sat Pal Bansal vs. Commissioner of Income Tax (1986) 186 ITR 582 (F.B.)*.

7. Above being the position, the question as referred is answered in the affirmative, in favour of Revenue and against the assessee.

This reference is disposed of.

CHIEF JUSTICE

D.K. JAIN, J.

February 20, 2001
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