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In re:
Bevubari Union
& Exchange of
Enclaves

Gajendragadkar J.

as indicated above; in that case Parliament may have to pass a law on those lines under Art. 368 and then follow it up with a law relatable to the amended Art. 3 to implement the agreement.

Q. 3. Same as answers (a), (b) and (c) to Question 2.

Reference answered accordingly.

CHARANDAS HARIDAS AND ANOTHER

v.

THE COMMISSIONER OF INCOME-TAX,
BOMBAY NORTH, KUTCH, SAURASHTRA
AND AHMEDABAD & ANOTHER

(S. K. DAS, J. L. KAPUR and M. HIDAYATULLAH, JJ.)

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March 15.

Income-tax—Income from managing agency—Karta of Hindu undivided family becoming partner of managing agency firm—Income therefrom assessed as family income—Subsequent partition of managing agency commission—Claim for assessment as individual income of divided members.

C, who was the Karta of the Hindu undivided family consisting of his wife, three sons and himself, was a partner in six managing agency firms in six Mills, and the income received by him as partner was being assessed as that of the Hindu undivided family for the purposes of income-tax. On December 31, 1945, C, acting for his three minor sons and himself, and his wife entered into an oral agreement for a partial partition, with effect from January 1, 1946, by which C gave a certain share to his daughter in the managing agency commission from two of the six managing agencies held by the family and the balance together with the shares in the other managing agencies was divided into five equal shares between C, his wife and sons. The agreement was subsequently recorded in a document dated September 11, 1946, which recited, inter alia: "By this partition we decided that whatever commission fell due till 31-12-45 and which is received after 31-12-45 should be kept joint and in respect of the commission which accrues from 1-1-46 and received after that date each of us become absolute owner of his one-fifth share and therefore from the date, i.e., from 1-1-46 these commissions cease to be the joint property of our family." For the assessment years 1947-48 and 1948-49, C claimed that the income from the managing agency firms should no longer be treated as the income of the Hindu undivided family but as the separate income of the divided members, but the Income-tax authorities rejected the claim on the grounds that by the document in question the division was of the income and not of the assets from which the income wa

derived and since income-tax was payable at the moment of time when income accrued, this income must be taken to have accrued to the Hindu undivided family :

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Held, that inasmuch as there was no other effective mode of partitioning this asset and further in view of the finding that the partition was not a pretence, the asset must be treated as divided for purposes of income-tax law and the income was not assessable as the income of the Hindu undivided family.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 108 of 1957.

Appeal by special leave from the judgment and order dated February 16, 1955, of the Bombay High Court in Income-tax Reference No. 35/x of 1954.

A. V. Viswanatha Sastri, B. K. B. Naidu and I. N. Shroff, for the appellants.

C. K. Daphary, Solicitor-General of India K. N. Rajagopal Sastri and D. Gupta, for the respondents.

1960. March 15. The Judgment of the Court was delivered by

HIDAYATULLAH, J.—This is an appeal with the special leave of this Court against the judgment and order dated February 16, 1955, of the High Court of Bombay in an Income-tax Reference under s. 66(2) of the Indian Income-tax Act.

Hidayatullah J.

The appellants are two assesseees, Charandas Haridas and Chinubhai Haridas, whose cases are identical, and, in fact, there was a consolidated reference by the Income-tax Appellate Tribunal, which was answered by the High Court by its judgment. The respondents are respectively the Commissioner of Income-tax, Bombay North, Kutch and Saurashtra and the Commissioner of Income-tax, Delhi, Ajmer, Rajasthan and Madhya Bharat. The two appellants represented two units of Hindu undivided families. Charandas Haridas represented his wife, three sons and himself, and Chinubhai Haridas represented his wife, son and himself. In stating the facts relative to the two families, it will not be necessary to give them separately, because the question which was answered by the High Court in the judgment under appeal arose in identical circumstances in the two families. The only difference is in the shares held respectively by the two Hindu undivided families in the managing

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agencies to be hereafter mentioned. We will, therefore, confine ourselves to a statement of the facts relating to Charandas Haridas only.

Charandas Haridas was the *Karta* of the Hindu undivided family consisting of his wife, three sons and himself. He was a partner in six managing agency firms in six Mills. In previous years, the income received by him as partner in these managing agencies was being assessed as the income of the Hindu undivided family. On December 31, 1945, Charandas Haridas acting for his three minor sons and himself and Shantaben, his wife, entered into an oral agreement for a partial partition. By that agreement Charandas Haridas gave an one pie share to his daughter, Pratima, in the managing agency commission from two of the six managing agencies held by the family. The balance together with the shares in the other managing agencies was divided into five equal shares between Charandas Haridas, his wife and sons. This agreement was to come into effect from January 1, 1946, which was the beginning of a fresh accounting year. On September 11, 1946, Charandas Haridas acting for himself and his minor sons, and Shantaben executed a memorandum of partial partition in which the above facts were recited, the document purporting to be a record of what had taken place orally earlier.

In the assessment years 1947-48 and 1948-49, Charandas Haridas claimed that the income should no longer be treated as the income of the Hindu undivided family but as the separate income of the divided members. The Income-tax Officer declined to treat the income as any but of the Hindu undivided family, and assessed the income as before. An appeal to the Appellate Assistant Commissioner was unsuccessful, and the matter was taken to the Income-tax Appellate Tribunal. The Appellate Tribunal held that by the document in question, the division, if any, was of the income and not of the assets from which the income was derived, inasmuch as "the agreements of the managing agency with the managed Companies did not undergo any change whatever as a result of the alleged partition". The Appellate Tribunal,

therefore, held that the arrangement to share the receipts from this source of income was not binding on the Department, if the assets themselves continued to remain joint. It further held that the document was "a farce", and did not save the family from assessment as Hindu undivided family. The Tribunal having declined to state a case under s. 66(1) of the Indian Income-tax Act, Charandas Haridas moved the Bombay High Court, and obtained an order under s. 66(2) of the Act. The question on which the case was stated was :

"Whether there were materials to justify the finding of the Tribunal that the income in the share of the commission agency of the Mills was the income of the Hindu undivided family?"

The High Court stated that though the reference was very elaborately argued, it raised a very simple question of fact and all that it was required to find out was whether there were materials before the Appellate Tribunal upon which the finding of fact could be rested. The High Court held that though the finding given by the Appellate Tribunal could not be construed as a finding that the document was not genuine, the method adopted by the family to partition the assets was insufficient to bring about the result intended by it. According to the High Court, the Appellate Tribunal was right in holding that the document was ineffective, and though the income might have been purported to be divided and might, in fact, have been so divided, the source of income still remained united as belonging to the Hindu undivided family. It accordingly answered the question in the affirmative, holding that there were materials before the Tribunal on which it could reach the conclusion that in so far as these income-bearing assets were concerned, they still belonged to the Hindu undivided family. Leave to appeal to this Court was refused by the High Court, but Charandas Haridas applied to this Court and obtained special leave, and the present appeal was filed.

Mr. Viswanatha Sastri appearing for Charandas Haridas, pointed out that a Hindu undivided family cannot be a partner of a firm. Charandas Haridas,

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therefore, though he represented the Hindu undivided family, in his capacity as a partner could not insist that the other members of the family be received as partners, or admitted to the benefits of partnership. The only mode in which the partition could be made was to divide the income, and this had the necessary effect, in law, of dividing the assets, if not for the purposes of the Partnership Act, at least for the purposes of assessing income-tax. He, therefore, contended that the Hindu undivided family which had ceased to exist in so far as these assets were concerned, could not be assessed as such after January 1, 1946, the date from which the partition was effective. The learned Solicitor-General for the Department contended that the argument itself involved the assumption that the assets were not, in fact, divided, and since income-tax was payable at the moment of time when income accrued, this income must be taken to have accrued to the Hindu undivided family and its subsequent partition into five or six shares did not affect the position.

Before we deal with these arguments, it is necessary to quote the operative portion of the document, which is as follows :

“ Re:—Partial partition of the Hindu Undivided Family of Charandas Haridas of Ahmedabad.

We the undersigned Sheth Charandas Haridas by himself and as the guardian of minors Rameshchandra Charandas, Anilkumar Charandas and Gautamkumar Charandas and Shantaben Charandas all residing in Shahibaug, Ahmedabad make this memorandum (Nondh) that, we have a Hindu undivided family and Sheth Charandas Haridas manages our family's joint property as Karta or Manager and all of us as members of the joint undivided family are entitled to our joint undivided family as Malik. Our family received a commission of Re. 0-1-11. 5/12 from the Vijaya Mills Co., Ltd. and out of this commission Sheth Charandas Haridas as Karta or Manager of the family has given already a commission of one pie to Pratima, the daughter of the family. So also out of the commission of Re. 0-2- $\frac{1}{2}$ received by the family from the Gopal

Mills Co., Ltd. Sheth Charandas Haridas as Karta and Manager has given already to Pratima one pie commission. After deducting these Re. 0-1-10. 5/12 and Re. 0-1-11½ commission remained. These commissions and other commission received from various other mills have been partitioned orally by us on Samvat Year 2002 Magsar Vadi 12, dated 31st December, 1945. By this partition we decided that whatever commission fell due till 31-12-45 and which is received after 31-12-45 should be kept joint and in respect of the commission which accrues from 1-1-46 and received after that date each of us become absolute owner of his one-fifth share and therefore from the date, i.e., from 1-1-46 these commissions cease to be the joint property of our family. But it is our desire that we should keep a memorandum for our memory of the oral partial partition effected on Samvat Year 2002 Magsar Vadi 12, dated 31-12-45 pursuant to which we have partitioned the commissions to be received by our family. Because of this we keep this note."

The document no doubt mentions "a commission" in respect of each of the six managing agencies, which commission was divided by the document. The word "commission", however, has been used in two different senses; sometimes it refers to the amount of the managing agency commission to be received by Charandas Haridas and sometimes to the right to that commission which Charandas Haridas had as a partner. The sole question is whether the source was effectively divided for purposes of the Income-tax law, so that the assessment could not be made upon a Hindu undivided family.

The law was stated by Mayne, and approved by the Privy Council in *Pichappa v. Chokalingam* (1), in the following words :

"Where a managing member of a joint family enters into a partnership with a stranger the other members of the family do not *ipso facto* become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case the

(1) A.I.R. 1934 P.C. 192.

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family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger: the partnership will be governed by the Act.”

Further, the Privy Council in *Appovier v. Rama Subba Aiyar* (1) observed:

“ Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the *status* of the family *quoad* this property. The produce is no longer to be brought to the common chest, as representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family, who are thenceforth to become entitled to those definite shares.”

The Bombay High Court quoted this passage, and stated that there must be a division of the right as well as a division of the property; and unless the division effected a separation of the property into shares, it would remain only as a separation of the income after its accrual and would not affect the asset as such. In this view of the matter, the Bombay High Court held that the asset continued to be joint in spite of the division of the income after its accrual.

In our opinion, here there are three different branches of law to notice. There is the law of Partnership, which takes no account of a Hindu undivided family. There is also the Hindu law, which permits a partition of the family and also a partial partition binding upon the family. There is then the Income-tax law, under which a particular income may be treated as the income of the Hindu undivided family or as the income of the separated members enjoying separate shares by partition. The fact of a partition in the Hindu law may have no effect upon the position of the partner, in so far as the law of Partnership is concerned, but it has full effect upon the family in so far as the Hindu law is concerned. Just as the fact of a *Karta* becoming a partner does not introduce the members of the undivided family into the partnership, the division of the family does not change the position of the partner *vis-a-vis* the other partner or partners. The Income-

(1) (1866) 11 M.I.A. 75.

tax law before the partition takes note, factually, of the position of the *Karta*, and assesses not him *qua* partner but as representing the Hindu undivided family. In doing so, the Income-tax law looks not to the provisions of the Partnership Act, but to the provisions of Hindu law. When once the family has disrupted, the position under the partnership continues as before, but the position under the Hindu law changes. There is then no Hindu undivided family as a unit of assessment in point of fact, and the income which accrues, cannot be said to be of a Hindu undivided family. There is nothing in the Indian Income-tax law or the law of Partnership which prevents the members of a Hindu joint family from dividing any asset. Such division must, of course, be effective so as to bind the members; but Hindu law does not further require that the property must in every case be partitioned by metes and bounds, if separate enjoyment can otherwise be secured according to the shares of the members. For an asset of this kind, there was no other mode of partition open to the parties if they wished to retain the property and yet hold it not jointly but in severalty, and the law does not contemplate that a person should do the impossible. Indeed, the result would have been the same, even if the dividing members had said in so many words that they had partitioned the assets, because in so far as the firms were concerned, the step would have been wholly inconsequential.

The respondent suggested that the family could have partitioned the managing agencies among the members of the family by allotting them severally; but that would not have been possible without a dissolution of the managing agency firms and their reconstitution, which was not altogether in the hands of Charandas Haridas. It was also suggested that the managing agencies could have been allotted to Charandas Haridas while the others took some other property, or a receiver could have been appointed. No doubt, there were many modes of partition which might have been adopted; but the question remains that if the family desired to partition these assets only and no more, could they have acted in some other manner

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to achieve the same result? No answer to this question was attempted.

It is, therefore, manifest that the family took the fullest measure possible for dividing the joint interest into separate interests. There is no suggestion here that this division was a mere pretence; nor has the Appellate Tribunal given such a finding. The document was fully effective between the members of the family, and there was factually no Hindu undivided family in respect of these particular assets. The assets at all times stood in the name of Charandas Haridas, and looked at from the point of view of the law of Partnership, the family had no standing. The assets still are in the name of Charandas Haridas, and looked again from the same viewpoint, the division has no different signification. What has altered is the status of the family. While it was joint, the Department could treat the income as that of the family; but after partition, the Department could not say that it was still the income of the Hindu undivided family, when there was none. In the face of the finding that this was a genuine document and not a sham, and that it effectually divided the income and in the circumstances, the assets, the question answers itself in the negative, that is to say, that there were no materials to justify the finding that the income in the share of the commission agency of the Mills was the income of the Hindu undivided family.

The appeal will be allowed. The respondents will pay the costs of the two assesses here and below. There will be only one set of costs here.

Appeal allowed.