

Omprakash and ors. Vs. Union of India (Uoi) and anr.

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Court : Madhya Pradesh

Decided On : Mar-20-1982

Reported in : (1982)30CTR(MP)129; [1983]144ITR247(MP)

Judge : G.P. Singh, C.J. and ;K.K. Dube, J.

Acts : [Income Tax Act, 1922](#) - Sections 25A and 46; ;[Income Tax Act, 1961](#) - Sections 281

Appeal No. : First Appeal No. 20 of 1975

Appellant : Omprakash and ors.

Respondent : Union of India (Uoi) and anr.

Advocate for Def. : B.K. Rawat, Adv.

Advocate for Pet/Ap. : J.P. Sanghi and ;V.K. Sanghi, Adv.

Judgement :

G.P. Singh, C.J.

1. This is an appeal by the plaintiff against the judgment and decree dated 23rd December, 1974, passed by the Additional District Judge, Seoni, dismissing Civil Suit No. 3-A of 1967 for a declaration that houses Nos. 69 and 40, situated in Budhwari Ward, Seoni, are not liable to be attached or sold for the income-tax dues against the HUF, Shivnarayan Prabhudayal, and for an injunction restraining

the Union of India from proceeding against the houses to recover the said dues.

2. It is not in dispute that an HUF was being assessed in the name of Shivnarayan Prabhudayal right from 1945 under the Indian I.T. Act, 1922. This HUF consisted of Prabhudayal, his wife, Kesarbai, and two sons, Harishchandra and Rameshchandra. Shivnarayan was the father of Prabhudayal. The family owned immovable properties including the two suit houses at Seoni and agricultural lands. It also carried on business in the name of Shivnarayan Prabhudayal. The said HUF was assessed for the assessment years 1957-58 and 1958-59 and revenue recovery certificates for recovery of Rs. 1,81,015.54 and Rs. 24,413.65 for these years, respectively, were sent by the ITO to the Tahsildar, Seoni. Prabhudayal died on 26th May, 1964. The Tahsildar in recovery proceedings passed orders on 23rd November, 1964, for attachment of the property of Harishchandra as a result of which the two suit houses were attached. Objections were filed by Seth Gopikishan which were rejected by the Tahsildar on 28th July, 1966. Thereafter, the suit in which this appeal arises was filed by Seth Gopikishan as a trustee for the estate of three minors, viz., Omprakash, Jaiprakash and Vijaykumar, all sons of Harishchandra, against the Union of India and Harishchandra for declaration and injunction.

3. The plaintiff alleged that there was a complete partition of the joint Hindu family of Prabhudayal. The partition was effected by Prabhudayal on 16th May, 1953, a memorandum of which was executed in the form of a letter on 20th May, 1953. In this partition, Prabhudayal kept for himself the business. The rest of the properties were divided into two shares, one going to Harishchandra with liability to maintain the father (Prabhudayal) and the other going to Rameshchandra with liability to maintain the mother (Kesarbai). The suit houses fell to the share of Harishchandra. It is further alleged that a registered partition deed was also executed on 9th April, 1957, only confirming the partition of urban property already made on 16th May, 1953. It is then alleged that in the manganese business which Prabhudayal carried on after the partition, he became heavily indebted to the plaintiff, Seth Gopikishan, who is his son-in-law. The indebtedness to his son-in-law weighed on Prabhudayal, who was an orthodox Hindu, and he pressed his son, Harishchandra, to redeem him from this indebtedness. Harishchandra was

also at the time indebted to the plaintiff. In consideration of the debts against himself and his father, Prabhudayal, and a small amount taken in cash, Harishchandra transferred the suit houses to the plaintiff, Seth Gopikishan, by a sale deed dated 27th June, 1962, which was also signed by Prabhudayal. Plaintiff, Seth Gopikishan, accepted the transfer but because of his close relationship with Prabhudayal, he did not like to enjoy the suit houses for himself and declared a trust in respect of these houses for the benefit of the minor children of Harishchandra, viz., Omprakash, Jaiprakash and Vijaykumar. As already stated, the relief claimed in the suit was of declaration that the suit houses belonged to the plaintiff and were not liable to be attached and sold for the income-tax dues against the HUF, Shivnarayan Prabhudayal. Injunction was also claimed to restrain the Union of India from proceeding against the houses to recover the said dues.

4. In the written statement filed by the Union of India, the oral partition dated 16th May, 1953, and the registered partition dated 9th April, 1957, were denied. Similarly, the transfer of the suit houses in favour of the plaintiff and creation of the trust were also denied. It was pleaded by the Union of India that the transfer made in favour of the plaintiff was bogus and without consideration and was made to defeat the income-tax dues. It was also pleaded that the houses were still owned by the assessee-HUF. It was further pleaded that the ITO did not record any finding as to partition and the HUF must be deemed to continue for purposes of the I.T. Act.

5. The trial court disbelieved the oral partition but held that a valid partition took place on 9th April, 1957, when the registered partition deed was executed and that in that partition the suit houses fell to the share, of Harishchandra and Prabhudayal jointly. It was further held that the sale deed executed in favour of the plaintiff was fictitious and sham and was executed with a view to defeat the recovery, of income-tax dues, The trial court also held that the HUF continued for the purposes of the I.T. Act as there was no adjudication by the ITO about partition and consequent disruption of the family. On these findings, the trial court dismissed the suit. The appeal was filed by Seth Gopikishan as a trustee on behalf of the three minors, but as the minors became major during the pendency of the

appeal, they become appellants in their own right and the name of Seth Gopikishan was struck off.

6. The first question that has been argued before us by the learned counsel for the appellants is that there was an 'Oral partition as alleged in the plaint on 16th May, 1953, and as evidenced by the memorandum of partition executed on 20th May, 1953. The learned counsel in this connection has referred to the oral evidence of P.W. 1--Shri V.K. Sanghi, P.W. 2--Seth Gopikishan, P.W. 3--Rameshchandra, P.W. 5--Wasudeoprasad, P.W. 6--Bharatlal and D.W. 1--Harishchandra. P.W. 1--Shri V.K. Sanghi, is a son-in-law of Prabhudayal. The oral partition did not take place before him. Even the memorandum dated 20th May, 1953, was not executed before him. P.W. 2--Seth Gopikishan, the original plaintiff, as earlier noticed, is also a son-in-law of Prabhudayal. He too was not present at the time of oral partition of 16th May, 1953, or at the time of the execution of the memorandum relating thereto on 20th May, 1953. P.W. 3, Rameshchandra, is the second son of Prabhudayal. He is clearly interested in the litigation. P.W. 5, Wasudeoprasad, is a tenant. He states that after 1953 he started paying rent to Kesarbai. He too is related to Prabhudayal in that his father was a cousin of Prabhudayal. His evidence is not reliable. P.W. 6, Bharatlal, is the munim of the family. D.W. 1, Harishchandra, is the father of the appellants and though a defendant in the suit is clearly interested in supporting the appellants. From the oral evidence of these witnesses it is not safe to hold that there was any oral partition as alleged in the plaint. Moreover, there are strong circumstances which negative the existence of such a partition. The memorandum of oral partition, Ex. P-9, dated 20th May, 1953, does not bear any endorsement that it was produced at any stage in any court or before any authority. It could have been prepared at any time during the lifetime of Prabhudayal. The registered partition deed, Ex. P-10, which was executed on 9th May, 1957, does not refer to any oral or prior partition. The very first paragraph of this partition deed recites that the executants of the document, viz., Prabhudayal, Harishchandra, Rameshchandra and Kesarbai, are members of a joint Hindu family. The document further recites that the property is being divided by this partition deed. This document clearly negatives the existence of any prior partition. Had the case of prior oral partition been true, there must have been something in this document to show that there

was such a partition.

7. The learned counsel for the appellants has drawn our attention to the fact that Prabhudayal intimated from time to time, to the ITO even prior to the registered partition dated 9th April, 1957, that the sons had become separate which goes to show that there was an oral partition in May, 1953. We will now refer to this evidence. The return for the assessment year 1954-55 is not on record. The answers to the interrogatories submitted by the Union of India have been admitted into evidence and they are relevant here. It is disclosed from them that the return for the assessment year 1954-55 was submitted in the, status of an HUF by Shivnarayan Prabhudayal. However, on 8th July, 1954, Prabhudayal intimated that movable and immovable properties were divided amongst his sons, Harishchandra and Rameshchandra. No action was taken on this intimation and the assessment was completed in the status of an HUF. Exhibit D-5 is the income-tax return submitted on 24th August, 1955, for the assessment year 1955-56. The return is in the name of Shivnarayan Prabhudayal, an HUF. It, however, mentions Prabhudayal only as the member of the family stating that his sons had become separate. Here again no action was taken on the alleged separation and assessment was made in the status of an HUF. Exhibit D-4 is the return for the assessment year 1956-57. This return was filed by Prabhudayal in the status of individual mentioning that his sons had become separate. The assessment was, however, made in the status of an HUF. The return for the assessment year 1957-58, which is Ex. P-3, was filed on 12th August, 1957, in the status of an HUF, Shivnarayan Prabhudayal. In this return Prabhudayal was shown as karta and Harishchandra and Rameshchandra were shown as adult members of the family. From the answers to the interrogatories it appears that a note was made by Bharatlal, munim of the family, that the partition claimed in the previous years was rejected by other members of the family and a fresh partition was made on 1st May, 1957, which will be claimed in the subsequent years. The assessment for the year 1957-58 was made in the status of an HUF. There are no documents on record for the assessment year 1958-59. The assessment was made in the name of Shivnarayan Prabhudayal in the status of an HUF. The return for the assessment year. 1959-60 was filed in the name of Shivnarayan Prabhudayal as an HUF on 16th August, 1959, by Harishchandra as karta showing Prabhudayal,

Harishchandra and three minor sons of Harishchandra as members of the family. It was also mentioned in this return that Rameshchandra separated in May, 1957.

8. A perusal of all these documents will go to show that although in the returns for the assessment years 1954-55, 1955-56 and 1956-57, it was stated by Prabhudayal at some stage that the sons had become separate but that claim was not pursued and no effort was made to have the partition recognised by the ITO. It clearly appears from the returns filed for the assessment years 1957-58 and 1959-60 and the statement made therein that the claims of partition made in the earlier years were withdrawn and it was stated that the partition took place in May, 1957. Now, the statements relating to partition made in the earlier returns which were not pursued and were later withdrawn cannot support any case of partition prior to the execution of the partition deed on 9th April, 1957. The memorandum of partition said to be executed on 20th May, 1953, was not produced in any of these proceedings. In the proceedings for the assessment year 1957-58, for which the previous year ended on Diwali 1956, assessment was claimed in the status of an HUF without any qualification. In the return for the assessment year 1959-60 the partition was clearly shown from May 1957. From the evidence on record, it is not possible for us to accept the case of the plaintiff of oral partition in May, 1953, or at any time prior to the execution of the partition deed dated 9th April 1957.

9. The complete partition of the family of Shivnarayan Prabhudayal took place in April/May, 1957, and not in 1953 as pleaded. The partition deed dated 9th April, 1957 (Ex. P-10), which divides the urban properties, refers to Prabhudayal, Harishchandra, Kesarbai and Rameshchandra as members of a joint Hindu family, which shows that till then they were not separate. Further, as already seen, partition in the family in May, 1957, was reported to the ITO by the munim, Bharatlal, as a note to the return for the assessment year 1957-58. This partition is also referred to in the income-tax return for the year 1959-60 (Ex. D-1), to which reference has already been made and which was submitted by Harishchandra, father of the appellants, stating that there was separation in the family in May, 1957. It thus appears that the complete partition pleaded in the plaint did not take place in May, 1953, but in April/May, 1957.

10. The learned counsel for the appellants referred to an application dated 12/13th October, 1981, made in this court under Order 41, Rule 27, CPC, for admission of certain revenue records and municipal records showing separate mutation to support the partition, of 1953. The application is not supported by any affidavit. We do not accept the statement that the appellants were not in the know of these documents when the suit was pending in the trial court. We do not require these documents to enable us to pronounce the judgment. We, therefore, reject the application for admission of additional evidence.

11. The learned counsel for the appellant next submitted that when the assessee had intimated the fact of partition, it was incumbent on the part of the ITO to issue notices to all persons concerned and to enquire about the partition and the assessments made without such an enquiry were entirely void for non-compliance with the provisions of Section 25A(1) of the Indian I.T. Act, 1922. In our opinion, there is no merit whatsoever in the submission. We are here concerned only with the assessments made for the assessment years 1957-58 and 1958-59. It is not in dispute that the accounts were kept from Diwali to Diwali and the previous year for the assessment year 1957-58, was Diwali 1955 to Diwali 1956 and for the assessment year 1958-59, from Diwali 1956 to Diwali 1957. We have already noticed that although some notes were given in the returns for earlier years stating separation but they were withdrawn when the return for the assessment year 1957-58 was filed on 12th August, 1957, in the status of an HUF showing Prabhudayal as karta and Harishchandra and Rameshchandra as other adult members of the family with a note that the claim for earlier partition was rejected by the members of the family and that a new partition was made on 1st May, 1957, which would be claimed in the next year. It would thus be seen that no claim for partition was made for the previous year relevant to the assessment year 1957-58. The partition that was intimated took place after the close of the previous year. The liability of the undivided family to pay the tax for the assessment year 1957-58 arose before the partition. The note referred to above did not request for the recording of any partition in that assessment year. Still if it can be taken to be a claim made under Section 25A(1), the omission to hold an enquiry or non-recording of order of partition would not make the assessment void liable to be challenged in a civil suit. This was clearly laid down by the Supreme Court in

Kalwa Devadattam v. Union of India : [1963]49ITR165(SC) , The remedy in such cases to a party aggrieved by the omission of the ITO to take steps for recording of the partition is to resort to the machinery provided under the Act and not by recourse to a civil suit. In Addl. ITO v. A. Thimmayya : [1965]55ITR666(SC) , the Supreme Court again, with reference to Section 25 A of the 1922 Act, ruled that the failure to make an order on the claim of partition does not affect the jurisdiction of the ITO to make an assessment of the Hindu family which had hitherto been assessed as undivided. It was observed that the ITO may assess the income of the Hindu family, hitherto assessed as undivided, notwithstanding partition if no claim in that behalf has been made to him or if he is not satisfied about the truth of the claim or if on account of some error or inadvertence he fails to dispose of the claim and that in all these cases the jurisdiction to assess the income of the family hitherto assessed as undivided remain unaffected, for the procedure for making assessment of tax is statutory and any error or irregularity in the assessment can be rectified in the manner provided by the statute alone and the assessment is not liable to be challenged collaterally. The assessment of an HUF without making an enquiry of a claim of partition can certainly be challenged in appeal as held by the Supreme Court in Kapurchand Shrimal v. CIT : [1981]131ITR451(SC) , but it is too much to say that if it is not challenged in accordance with the procedure laid down in the Act such an assessment can be ignored as void or as not binding on the members of the family. As earlier pointed out by us, the assessment cannot be challenged in a civil suit as clearly held in the case of Kalwa Devadattam : [1963]49ITR165(SC) , it has further to be noticed that so far as the assessment year 1958-59 is concerned, there is nothing on record to show that any claim of partition was at all made. The assessment was made in the name of Shivnarayan Prabhudayal in the status : of an HUF. The partition of April/May, 1957, no doubt took place during the assessment year 1957-58, and during the previous year relevant to the assessment year 1958-59, yet as no claim of partition was made or even if made was not disposed of and the partition was not recorded, the statutory fiction contained in Sub-section (3) of Section 25A continued in full operation and the family was to be deemed for the purposes of the Act to continue to be an HUF as assessed before. The words 'for, the purposes of this Act' as used in Sub-section (3) are wide words and they embrace the entire field covered by the Act

including recovery of tax under Section 46. As a result of this fiction, the family continued to be undivided for income-tax purposes and the partition had to be ignored both for assessment of income as also for recovery of tax. The learned counsel, in support of his submission that the assessments were void, relied upon the case of *Karri Ramakrishna Reddy v. Tax Recovery Officer* : [1973]87ITR86(AP) . In this case, the Andhra Pradesh High Court, under Article 226 of the Constitution, held that if no notice is served upon the other members of the family after a claim for partition is made under Section 171 of the I.T. Act, 1961, and if no order is made recording the partition and yet the HUF is assessed, such an assessment order would be void for want of the essential steps to be taken as envisaged by Sub-section (2) and (3) of that Section and the assessment order would not be binding on the members of the family. The decision of the Andhra Pradesh High Court in this case was not given in a suit but under Article 226 of the Constitution where the jurisdiction to interfere is much wider. Moreover, the view taken by the Andhra Pradesh High Court appears to be of doubtful authority and cannot be applied in the face of the Supreme Court decisions in *Kalwa Devadattam* : [1963]49ITR165(SC) and *A. Thimmayya* : [1965]55ITR666(SC) .

12. The learned counsel for the appellants then contended that as properties of the family ceased to be joint family properties because of the partition, income from such properties could neither be assessed as income of the HUF nor the properties could be proceeded against for recovery of the tax dues of the HUF. Acceptance of, such a contention would make the fiction contained in Sub-section (3) of Section 25A wholly nugatory. A similar contention with respect to partial partition, which is now covered by Section 171 of the 1961 Act was negatived by the Supreme Court in *Kalloomal Tapeswari Prasad v. CIT* : [1982]133ITR690(SC) . In that case it was observed that the property which is the subject-matter of partial partition would continue to be treated as belonging to the family and its income would continue to be included in its total income until a finding of partial partition is recorded under Section 171. It was also observed that the same result followed under Section 25A of the 1922 Act in the case of a total partition. In other words, if such a partition is not recorded under Section 25A(1), the properties which are subject-matter of partition have to be treated as belonging to the family

for purposes of the Act and their income included in the total income. As a necessary corollary, such properties would also be deemed to be joint family properties for recovery of the tax so assessed. The learned counsel referred to the decision of the Privy Council in *Sundar Singh Majithia v. CIT* [1942] 10 ITR 457, which dealt with a case of partial partition. The Privy Council decision is not relevant here as the case set up in the plaint is of total partition.

13. The learned counsel for the appellant next contended that the suit houses were transferred for consideration in favour of Seth Gopikishan and that these houses after the transfer in his favour ceased to be property of the HUF and they could not be proceeded against for recovery of the income-tax dues of the HUF. The sale deed in favour of Seth Gopikishan was executed on 27th June, 1962, by Prabhudayal and Harishchandra for a consideration of Rs. 29,000. It is stated in the sale deed, Ex. CP-1, that Prabhudayal and Harishchandra were liable to pay to Seth Gopikishan Rs. 25,540 on account of old debts taken from him or his wife and that the remaining amount was paid in cash and by cheque on 15th June, 1962. Now, Seth Gopikishan as already seen was the son-in-law of Prabhudayal. He is admittedly a very rich person and neither he nor his wife, i.e., daughter of Prabhudayal, had made any demand for their dues. Seth Gopikishan has admitted in evidence that he had the knowledge of the income-tax dues of Prabhudayal at the time when he purchased the houses. The assessment cases for the assessment years 1957-58 and 1958-59 were then pending and there was clearly an urgency to shield the property from the recovery proceeding which was likely to start after completion of the assessments. The houses remained in possession of Prabhudayal and Harishchandra even after the sale deed. The houses were later transferred by a trust deed executed by Seth Gopikishan in favour of the sons of Harishchandra on 12th November, 1965 (Ex. CP-2). This trust deed recites that from the very beginning, i.e., from the date of purchase itself, it was made clear by Seth Gopikishan that he took the houses in reverence to sentiments of his father-in-law, i.e., Prabhudayal, and that he had at that very time clearly given out to Harishchandra that he had absolutely no intention to have any beneficial interest in the property and he shall be holding the same as a trustee for and on behalf of the minor sons of Harishchandra till the youngest of them became major and that till then the family of Prabhudayal and Harishchandra will recover the rent and profits

of the property and utilise them for the maintenance and education of the children, the beneficiaries. It will be seen from these documents that there was no real transfer in favour of Seth Gopikishan who had not the slightest intention of taking the property and by the device of sale and creation of trust the real purpose was to shield the suit houses from being proceeded against by the income-tax authorities for recovery of income-tax dues of the HUF, Shivnarayan Prabhudayal. It is true that Seth Gopikishan and Harishchandra both stated and it is also mentioned in the sale deed and the trust deed that Prabhudayal prevailed upon Harishchandra to sell the houses to Seth Gopikishan so as to enable himself to wash off the sin of being indebted to his daughter or daughter's husband. This, in our opinion, was clearly a pretence for executing the sale deed. Even if Prabhudayal was indebted to some extent to Seth Gopikishan or to his daughter, the whole idea in selling the houses was to shield the properties from the I.T. authorities and to evade payment of income-tax. We are unable to accept that it was merely a case of preference of one creditor over another. The sale deed (Ex. CP-1) executed by Prabhudayal and Harishchandra in favour of Seth Gopikishan and the trust deed executed by Seth Gopikishan in favour of the appellants (Ex.- CP-2) were both unreal and were hit by Section 281 of the I.T. Act as they were executed with the clear intention of defrauding the Revenue. The suit houses are, therefore, liable to be attached and sold as properties of the HUF, Shivnarayan Prabhudayal, in the recovery proceedings for the income-tax dues of the assessment years 1957-58 and 1958-59,

14. The appeal fails and is dismissed with costs in favour of respondent No. 1, Union of India.