

**INSPECTING ASSISTANT COMMISSIONER OF
AGRICULTURAL INCOME TAX AND
SALES TAX, KOZHIKODE**

v.

**POOMULLI MANAKKAL PARAMESWARAN
NAMBOODRIPAD**

August 18, 1971

[K. S. HEGDE AND A. N. GROVER, JJ.]

Travancore-Cochin Agricultural Income-tax Act, 1950, as amended by Act 12 of 1964, s. 29—Scope of.

In 1958, there was a partition in the family of the respondent by a registered partition deed. In January 1960, it was conceded on behalf of the Agricultural Income-tax Officer, before the High Court, that the respondent was liable to be taxed only as an 'individual', that is, it was conceded that the respondent's family was a divided family. Various attempts made by the Department thereafter, to assess the respondent as *Karta* of his family were set aside by the High Court, and the respondent and other members of his quondam family were assessed as 'individuals' till 1964. In 1965, notice was again issued to the respondent with respect to the assessment year 1961-62 for assessing him as the *karta* of his family, and the respondent filed a writ petition in the High Court. The Department contended that in view of the amendment of s. 29 of the Travancore-Cochin Agricultural Income-tax Act, 1950, by Act 12 of 1964, it was permissible for the Department to re-assess the respondent as the *Karta* of the family as no decision that the respondents family was a divided family had been rendered by the Agricultural Income-tax Officer and the family must hence be deemed to be an undivided family. The High Court held in favour of the assessee.

Dismissing the appeal to this Court,

HELD: (1) The amended s. 29 was given retrospective effect from April 1, 1958; but it is only a machinery section. It is attracted to an assessment proceeding only if one of the two conditions prescribed in sub. s. (1) is established, namely, either the family in question was being assessed as an undivided family in the previous assessment year, or, that the family was being assessed for the first time. The deeming provision contained in s. 29(3) can have application only in cases where one or the other conditions prescribed by s. 29(1) is satisfied and not otherwise. [303F-G; 307F-H]

In the present case, every attempt made by the assessing authority to assess the quondam family of the respondent was set aside by the High Court and the department had not only not assessed that family as an undivided family, but had assessed the individual members of the family as divided members. That is, the question whether the family was divided or not had been gone into and decided. It cannot also be said that the family was 'hitherto assessed' as a Hindu undivided family'. [307H; 308A-B]

(Hegde, J.)

A (2) The expression 'which (meaning family) is being assessed for the first time as a Hindu undivided family' presupposes the existence of the family. Section 29(1) does not permit the assessing authority to create a family by re-joining the divided parties or otherwise. If the family has ceased to exist even before the assessment proceeding started then there can be no family which is being assessed to tax for the first time. [308B-F]

B In the present case, the family sought to be taxed was 'non-existing' in the concerned previous years and hence could not be considered as a Hindu undivided family 'being assessed for the first time'. Therefore, the 'deeming' provision in s. 29(3) could not be applied. [308G-H]

C *Additional Income-tax Officer, Cuddapah v. A. Thimmaraya* 55 I.T.R. 666(S.C.), referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 62 and 63 of 1969.

D Appeals from the judgment and order dated November 21, 1967 of the Kerala High Court in O. P. Nos. 2979 of 1965 and 1395 of 1966.

V. A. Seyid Muhammad, P. K. Pillai for M. R. Krishna Pillai, for the appellant (in both the appeals).

S. T. Desai and A. S. Nambiar, for the respondent (in both the appeals).

E The Judgment of the Court was delivered by

F **Hegde, J.** In these appeals by certificates brought by the Department, we have to decide as to what is the true scope of s. 29 of the Kerala Agricultural Income-tax Act, 1950 as amended in 1964 (to be hereinafter referred to as the Act)?

G This case has a long history which by no means is complimentary to the Department. The common respondent in both these appeals moved the High Court of Kerala under Art. 226 of the Constitution praying that the appellant herein may be prohibited from taking further proceedings for assessing him as the karta of Poomulli Mana to agricultural income-tax for the assessment year 1961-62.

H The respondent was the karta of a Namboodri family known as Poomulli Mana till March 30, 1958. The Namboodris in the Malabar District of the Kerala State were previously governed by the Madras Nambudri Act, 1932. Now they are governed by the Kerala Nambudri

Act, 1958. The respondent's family owned large tracts of lands both in Malabar District which was a part of the Madras State till November 1, 1956 as well as in the erstwhile Travancore and Cochin State. Under the States Reorganization Act, 1954, the new State of Kerala was formed consisting of the former Malabar District of the State of Madras as well as the former Travancore-Cochin State. The new State of Kerala came into being on November 1, 1956. Thereafter the Travancore-Cochin Agricultural Income-tax Act, 1950 was extended to the former Malabar District with effect from April 1, 1957 by Kerala Act 8 of 1957. In the assessment year 1957-58, the assessing authorities assessed Poomulli Mana as an undivided family. That order was quashed by the High Court. On March 30, 1958, the members of the family entered into a registered partition deed under which the family became divided. Thereafter the respondent ceased to be the karta of the family. Nevertheless the authorities under the Act issued notices to the respondent under s. 17 (2) and s. 39 of the Act proposing to assess him as the manager of his H.U.F. for the assessment years 1957-58 and 1958-59. The respondent challenged the validity of those notices before the High Court of Kerala. When the case came up for hearing before a Division Bench of the High Court, the learned Counsel appearing for the Department informed the Court that the Department was going to assess the respondent only as an "individual" and not as the karta of his family. On the basis of that representation, the Court passed the following order :

"The learned Government Pleader submits, quite categorically that the assessment proposed is of the petitioner as an 'individual', and not in any other capacity.

In view of the submission we do not consider it necessary to proceed further with the petition. We record the fact that the Department does not propose to assess the petitioner except as an individual and leave him to seek his remedies under the Act or the Constitution in case he feels himself aggrieved by any subsequent action of the Department."

Despite this assurance, the Department issued a notice under s. 35 of the Act on February 9, 1960 proposing to

(Hegde, J.)

- A assess the respondent as the karta of his H.U.F. for the assessment year 1959-60. The respondent again moved the High Court to quash that notice. The said notice was quashed by a learned single judge of the High Court on January 3, 1961 on the ground that it is against the undertaking given by the Government in the earlier proceedings.
- B That decision was affirmed in appeal. Yet another notice dated November 8, 1961 was issued by the Department under s. 35 to the respondent to show cause why he should not be taxed as the karta of his H.U.F. for the assessment year 1958-59. This notice was again quashed by the High Court by its judgment dated December 17, 1963.

Section 29 of the Agricultural Income-tax Act, 1950 was amended by the Kerala legislature by Act 12 of 1964. We shall now set out s. 29 as it stood before its amendment in 1964 as well as the amended section.

- D Section 29 of the Act (before the amendment by Act 12 of 1964) read thus :

E “29. (1) Where at the time of making an assessment under Section 18, it is claimed by or on behalf of any member of a Hindu undivided family, (Ali-
 F yasanthana family or branch or Marumakkathayam tarwad) hitherto assessed as undivided that a partition has taken place among the members or groups of members of such family or tarwad the Agricultural Income-tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied 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 :

G Provided that no such order shall be recorded until notice of the inquiry has been served on all the adult members of the family or tarwad entitled to the property as far as may be practicable or in such other manner as may be prescribed.

H (2) Where such an order has been passed, the Agricultural Income-tax Officer shall make an assessment of the total agricultural income received by or on behalf of the family or tarwad as such, as if no partition had taken place, and each member

or group of members shall, in addition to any agricultural income-tax for which he or it may be separately liable, and notwithstanding anything contained in clause (a) of Section 10, be liable for a share of the tax on the incomes so assessed according to the portion of the family or tarwad property allotted to him or it and the Agricultural Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of Section 18 :

Provided that all the members and groups of members whose family or tarwad property has been partitioned shall be liable jointly and severally for the tax on the total agricultural income received by or on behalf of the family or tarwad as such up to the date of the partition.

(3) Where such an order has not been passed in respect of a Hindu family, (Aliyasanthana family or branch or Marumakkathayam tarwad) hitherto assessed as undivided, such family or tarwad shall be deemed for the purposes of this Act to continue to be an undivided family or tarwad."

Section 29 after its amendment by Act 12 of 1964 reads :

"(1) Assessment after partition of a Hindu undivided family.—

Where at the time of making an assessment under section 18, it is claimed by or on behalf of any member of a family hitherto assessed as a Hindu undivided family or which is being assessed for the first time as a Hindu undivided family that a partition has taken place among the members or groups of members of such family, the Agricultural Income-tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied 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 :

Provided that no such order shall be recorded until notice of the inquiry has been served on all the adult members of the family entitled to the pro-

(Hegde, J.)

A perty as far as may be practicable or in such other manner as may be prescribed.

B (2) Where such order has been passed, the Agricultural Income-tax Officer shall make an assessment of the total agricultural income received by or on behalf of the family as such, as if no partition had taken place, and each member or group of members shall, in addition to any agricultural income-tax for which he or it may be separately liable, and notwithstanding anything contained in clause C (a) of sub-section (1) of section 10, be liable for a share of the tax on the incomes so assessed according to the portion of the family property allotted to him or it and the Agricultural Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 18 :

D Provided that all the members and groups of members whose family property has been partitioned shall be liable jointly and severally for the tax on the total agricultural income received by or on behalf of the family as such upto the date E of the partition.

F (3) Where such an order has not been passed in respect of a family hitherto assessed as a Hindu undivided family or which is being assessed for the first time as a Hindu undivided family, such family shall be deemed, for the purpose of this Act, to continue to be a Hindu undivided family."

G The amended provision was given retrospective effect with effect from April 1, 1958. Taking advantage of the amendment of s. 29, the Department again issued a notice H to the respondent on June 1, 1964 under s. 35 of the Act calling upon him to show cause why he should not be assessed as the karta of his H.U.F. for the period from November 1, 1956 to March 31, 1958. It may be noted that uptill that date the respondent and other members of his former family were being assessed as 'individuals' and the tax so levied had been paid. In other words for the earlier assessment years, the Department had proceeded on the basis that the family was a divided family.

On receipt of the notice dated June 1, 1964, the respondent again moved the High Court of Kerala to quash the same on various grounds. One of the grounds taken was that the family of the respondent having been treated as divided family in the earlier assessment proceedings, it was not open to the Department to proceed to assess him as the karta of a non-existing family. When that proceeding was pending before the High Court, the assessing authorities passed orders assessing the respondent as karta of his family. A Division Bench of the Kerala High Court quashed the impugned notice as well as the assessment made.

During the pendency of the last mentioned proceeding, the Department issued two more notices to the assessee (marked Ex. P-1 and P-3 before the High Court). The relevant notice for our present purpose is Ex. P-1 and it is dated March 10, 1965. In that notice the assessing authority, in the purported exercise of its powers under s. 35 of the Act required the respondent to file a return of the agricultural income of his family in the previous years beginning from April 1, 1961 and ending on March 31, 1961, chargeable to tax for the assessment year 1961-62 within 35 days of the receipt of that notice. The notice further mentioned that the action proposed therein was permissible in view of the amendment of the Act, by Act 12 of 1964. The respondent replied that in view of the partition in his family, he could not be assessed as the karta of his family and further the partition in question had been accepted by the Department and that the assessments were made on the members of the family as "individuals" from 1959-60 to 1964-65. Thereafter the respondent again moved the High Court to quash those notices on various grounds. The Department contended that in view of the amendment of s. 29 of the Act by Act 12 of 1964, it was permissible for it to reassess the respondent as the karta of the family as no decision that the respondent's family is a divided family had been rendered by the Agricultural Income-tax Officer and therefore the family must be deemed to be an undivided family.

The Writ Petition was heard by a bench of three judges consisting of Mathew, Krishnamoorthy Iyer and Bala-krishna Eradi, JJ. By a majority (Krishnamoorthy Iyer

(Hegde, J.)

A and Eradi, JJ.) the Writ Petition was allowed and the impugned notices were quashed. Mathew, J. was of the opinion that the action taken by the Department was permissible under s. 29 of the Act as amended.

B Now turning to s. 29 of the Act before its amendment, it corresponded with s. 25-A of the Indian Income-tax Act, 1922. The scope of s. 25-A of the Indian Income-tax Act, 1922 came up for consideration both before the Judicial Committee as well as before this Court in various cases. It is sufficient if we refer to the decision of this Court in C *Additional Income-tax Officer Cuddapah v. A. Thimmayya and another* (1). Therein this Court considered the object with which that provision was enacted as well as its scope. Delivering judgment of the Court Shah, J. (as he then was) observed :

D “Under the Indian Income-tax Act, 1922, as it originally stood, a Hindu undivided family was regarded by section 3 as a unit of assessment, but no machinery was set up for levying tax or for enforcing liability to tax on the members of the family, if before the order of assessment the family was divided. E Absence of this machinery was more acutely felt because of section 14 (1) which provided that tax shall not be payable by an assessee in respect of any sum which he received as a member of a Hindu undivided family. Income received by a Hindu undivided family could not therefore be F assessed and collected from the members of the family, if at the time of making the assessment the family was divided. To rectify what was obviously a lacuna, the legislature incorporated section 25A for assessment and enforcement of liability to tax income received by a Hindu G undivided family, which was no longer in existence at the date of assessment. But the new section went very much beyond rectifying the defect in the statute which necessitated the amendment ...

H The section makes two substantive provisions—
(i) that a Hindu undivided family which has been

(1) 55 I.T.R. 666.

assessed to tax shall be deemed, for the purposes of the Act, to continue to be treated as undivided and therefore liable to be taxed in that status unless an order is passed in respect of that family recording partition of its property as contemplated by sub-section (1); and (ii) if at the time of making an assessment it is claimed by or on behalf of the members of the family that the property of the joint family has been partitioned among the members or members in definite portions i.e., a complete partition of the entire estate is made resulting in such physical division of the estate as it is capable of being made, the Income-tax Officer shall hold an enquiry and if he is satisfied that the partition had taken place, he shall record an order to that effect."

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Before proceeding to examine the scope of s. 29, let us recapitulate the events that had taken place.—(i) As long back as March 30, 1958, there was a partition in the family of the respondent; that partition is evidenced by a registered deed. The genuineness as well as the validity of the deed is not in dispute; (ii) On January 18, 1960 on behalf of the Agricultural Income-tax Officer, it was conceded before the High Court that the respondent was liable to be taxed only as an "individual". The implication of this concession was that the respondent's family was a divided family; (iii) Various attempts made by the Department to assess the respondent as karta of his family even after the decision of the High Court on January 18, 1960 were frustrated by the orders of the High Court referred to earlier and; (iv) The respondent and the other members of his quondam family were assessed as "individuals" from 1958-1964. Those assessments had become final and tax levied on them had been paid.

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Section 3(1) is the charging section in the Act. That section reads :

"Agricultural Income-tax at the rate or rates specified in the Schedule to this Act shall be charged for each financial year in accordance with and subject to the provisions of this Act, on the total agricultural income of the previous year of every person."

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(Hegde, J.)

A “Person” is defined in s. 2 (m) as follows :

B “ “person” means any individual or association of individuals, owning or holding property for himself or for any other, or partly for his own benefit and partly for another, either as owner trustee, receiver, common manager administrator, or executor or in any capacity recognised by law and includes, a firm, or a company, an association of individuals, whether incorporated or not, and any institution capable of holding property.”

C Hindu Undivided Family as defined in s. 2 (kk) includes a family governed by Madras Nambudiri Act, 1932.

D Under the Act what is brought to tax in an assessment year is the income of the assessee in the previous year. The scheme of taxation under the Act is similar to that under the Indian Income-tax Act, 1922. The liability to pay tax under the Act in respect of any income is incurred as and when the income is earned and the total income on which the tax is payable in any particular previous year gets settled at the end of the previous year. Section 29 is only a machinery section. This Court has held that s. 25A of the Indian Income-tax Act, 1922 is only a machinery section. The same must be the position in regard to s. 29 of the Act.

F Section 29 is attracted to an assessment proceeding only if one of the two conditions prescribed in s. 29 (1) is established. Either the family in question was being assessed as an undivided family in the previous assessment year or that family is being assessed for the first time. If neither of these conditions exist, s. 29 has no application whatsoever. The deeming provision contained in s. 29 G (3) can have application only in cases where one or the other condition prescribed in s. 29 (1) is satisfied and not otherwise. As seen earlier, every attempt made by the assessing authority to assess the quondam family of the respondent was set aside by the High Court. The High Court has repeatedly held that that family is a divided H family. Again the assessing authority itself in the previous years had proceeded on the basis that the family in question is a divided family. It had not only not assessed

that family as an undivided family but had assessed the individual members of that family as divided members of that family. Hence the question whether that family was divided or undivided had been gone into in the earlier years and decided. That being so, it cannot be said that the family was "hitherto assessed as a Hindu undivided family". Nor can it be said that the family was "being assessed for the first time as a Hindu undivided family". As seen earlier that family was sought to be assessed as Hindu undivided family earlier but ultimately the assessing authority had to assess the members of that family as members of a divided family. In other words it had held the family to be divided one. Such a family cannot be considered as being "assessed for the first time as a Hindu undivided family". The expression "which (meaning family) is being assessed for the first time as a Hindu undivided family" presupposes the existence of the family. That is a condition precedent. Section 29 (1) does not permit the assessing authority to create a family by rejoining the divided parts or otherwise. If that is not so, families which had been divided years back can be again resurrected by the assessing authorities for the purpose of the Act. The family referred to in s. 29 (1) is a family known to law and not a deemed family. The amendment of s. 29 has introduced considerable confusion into that section. At the time of the assessment either there is a family or there is no family. If there is a family its liability has to be judged on the basis of the Act. If the family has ceased to exist even before the assessment proceedings started then there can be no family which is being assessed to tax for the first time. Possibly the intention of the legislature was to bring in the cases of undivided families not taxed in the previous years which were in existence during the whole or part of the previous year but were divided before the assessment proceedings commenced. It is not necessary for us in this case to decide whether that intention has been expressed with sufficient clarity so as to make it enforceable. Suffice is to say that in this case, the family sought to be taxed was non-existing in the concerned previous years and hence cannot be considered as a Hindu undivided family "being assessed for the first time". That being so there is no room for application of the "deeming" provision in s. 29 (3).

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(Hegde, J.)

- A Looking at the course of events, one cannot fail to notice with regret the persistence with which the Department was harassing the respondent. To say the least the conduct of the concerned officers in this case cannot inspire confidence in the functioning of the Department.
- B For the reasons mentioned above we see no merit in these appeals. They are accordingly dismissed with costs.

V.P.S.

Appeals dismissed.