L. Baij Nath vs Commissioner Of Income-Tax, U. P. And ... on 15 April, 1954

Equivalent citations: [1954]26ITR324(ALL)

ORDER

The Order of the Court was pronounced by MALIK, J. - This case has been referred to this Court under Section 66(1) of the Indian Income-tax Act, 1922, for an answer to the following question :

> "Does the circumstance that the property held jointly by Baij Nath group and another group of the family has not been divided in definite portions stand in the way of the family has not been divided in definite portions stand in the way of the appellant in obtaining an order under Section 25A (1) in view of the fact that the property has hitherto been treated as the property of a Hindu undivided family composed of both the above mentioned groups."

The facts which have given rise to the above question are that the assessee Baij Nath was assessed under the style of Amba Prasad Baij Nath as a Hindu undivided family from the year 1931-32 without any objection. During the assessment year 1938-39 Baij Nath claimed that he had been assessed wrongly as a member of a joint Hindu family and that he was and had been, as a matter of fact, separate from his nephews, the sons of Amba Prasad. His claim was, however, rejected and he was continued to be assessed in the years 1938-39, 1939-40 and 1940-41 as a member of the joint Hindu family.

During the assessment year 1941-42 he again raised the same plea and filed an application under Section 25A of the Indian Income-tax Act, 1922. In that application he mentioned that he was not a member Panna Lal and Hira Lal who were the sons of Amba Prasad, that he had never been a member of a Hindu undivided family with them and that the assessment therefore "should be separate on the applicant along with his son".

This plea was rejected by the Additional Income-tax Officer who held that under Section 25A (3) the assessment must continue to be made as a Hindu undivided family unless an order under Section 25A(1) was passed and the Income-tax Officer was satisfied that the joint family property had been partitioned among the various members or groups of members in definite portions. The Income-tax Officer, however, held that the entire joint family property had not been partitioned and there had been therefore no partition within the meaning of Section 25A of the Income-tax Act. This matter was in due course taken to the Income-tax Appellate Tribunal who dismissed the appeal by an order dated the 20th July, 1942.

The assessee then applied under Section 66(1) of the Act for a reference to this Court and formulated several points of law which are set out in his application. The Commissioner of Income-tax objected to the reference on the ground that the application did not raise any question of law and the only

question was a question of fact whether the Hindu family was divided or not and he, therefore, submitted that no reference should be made. The Appellate Tribunal, however, granted the application and has made a reference to this Court for an answer to the question formulated by it which we have set out above.

After having gone through the statement of the case and having heard counsel for the parties we are not satisfied that the statements in the case are sufficient to enable us to determine the question raised thereby and we are, therefore, compelled to refer the case back to the Appellate Tribunal who would clearly formulate the findings of fact on which the question of law referred to this Court for answer arises and, if necessary, reframe the question.

Section 25A refers to a case where a member of a Hindu family hitherto assessed as undivided applies to the Income-tax Officer, at the time of making an assessment under Section 23, that the partition has taken place among the members of such family and therefore the family should no longer be treated as a Hindu undivided family. Sub-section (1) of Section 25A lays down that when such an application is made, the Income-tax Officer shall make enquiries 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 and so long as such an order has not been recorded the assessee, who has been assessed as a Hindu undivided family, must continue to be so assessed in spite of the fact that there may have been a division of status [see Section 25A (3)].

The question, therefore, that an Income-tax Officer has to put to himself when an application is made by a person, who was assessed as a member of a Hindu undivided family and who claims that there has since then been a partition, is whether the joint family property has or has not been divided among the members in definite portions. If he is satisfied that there has been such a partition then he records an order and all the necessary consequences then follow.

In the case before us in the order of the Appellate Tribunal dated the 20th July, 1942, the Members of the Tribunal held as follows :

> "In the case with which we are dealing there is admittedly a portion of the property which is still to be divided although the property in question has been held to be owned in common and not as coparcenary property."

In the statement of the case the Members of the Tribunal seem to have scrupulously avoided the words "joint family property". They have, no doubt, used the words "the property held jointly by Baij Nath group and another group", but that the property may never have been joint family property and may have been property held in common.

Learned counsel for the Department has urged that if once an assessment has been made as a Hindu undivided family then the entire property, the income of which was treated as the income of the Hindu undivided family, must be proved to have been divided between the various members before the assessee could get an order in his favour under Section 25A(1) of the Act and partial partition or mere division of status was not enough.

By the Amending Act of 1939 the words "that a separation of the members of the family has taken place and" were omitted. It was hoped that after these amendments the controversy upon the question whether mere separation in status, without partition of property by metes and bounds, was sufficient to attract the application of Section 25A(1) would be set at rest but such hope has been belied.

In In re, Gulab Singh Johri Mal a Bench of the Lahore High Court, has taken the view that disruption in the status without partition by metes and bounds was sufficient. In our opinion, however, where the assessee claims a change in the status, for the purposes of income-tax assessment, on the ground of "partition" proof of a mere disruption of status is not enough, without partition of joint family property by metes and bounds. This would seem to follow from the language of the section and the pronouncement of their Lordships of the Judicial Committee in the case of Sir Sunder Singh Majinthia wherein their Lordships have observed :-

> "If, however, though the joint Hindu family has come to an end it be found that its property has not been partitioned in definite portions, then the family is to be deemed to continue - that is to be an existent Hindu family upon which assessment can be made on its gains of the previous year."

In In re Kishan Chand Khanna and Sons, decided by a Bench of the Lahore High Court in the year 1944, Kishan Chand Khanna and his sons was then executed and it was admitted that the entire property was the self-acquired property of the father but he divided it between himself and his five sons. The question arose whether Section 25A had any application and it was held by the Tribunal that "underlying the scheme of prior to the date of the application, that there was a joint family in existence prior to the date of the application, that the same had disrupted and that the property thereof was partitioned in specified portions. A Bench of the Lahore High Court held that to resolve the difficulty created by clause (3) of Section 25A Section 25A (1) should be read so as to cover not only property that in fact joint family property by the Income-tax authorities, even though it was not in fact joint family property. The argument of learned counsel is that as the entire property of the assessee Baij Nath and his nephews, the application was bound to fail under Section 25A(1) and that it is unnecessary to call for a fresh statement of the case from the Appellate Tribunal.

We have carefully considered the decision, In re Kishan Chand Khanna and Sons, and, with the greatest respect to the learned Judges who decided the case, we find it very difficult to follow that decision. The decision in that case could be based only on some rule of estoppel or res judicata. The rule of estoppel or of res judicata is, if at all, of very limited application in these income-tax cases. Learned counsel for the Department had to admit that he could not say that there was any question of res judicata and when we put to him the other alternative he was not able to formulate how any question of estoppel could probably arise. The mere fact that in one particular year an item of property was treated as the property belonging to the Hindu undivided family would not debar a member of the family from proving in any subsequent year to the satisfaction of the Income-tax Officer that the income of such item was wrongly included as income of the joint family as the property was, as a matter of fact, his separate property, the income from which should have been included in his individual assessment.

Before the amendment of the year 1930 Section 25A of the Act referred to a case of "a Hindu family hitherto undivided" which had subsequently separated and the members of which claimed that they had partitioned the property. By the amending Act XXII of 1930 the words "assessed as" were added before the word "undivided"; and now the section would apply to every case where a Hindu family was assessed as the Hindu undivided family was assessed as the Hindu undivided family and a member applied that a partition had taken place and he was, therefore, no longer liable to be taxed as a Hindu undivided family. It is then that he has to satisfy the Income-tax Officer that the joint family property had been divided into definite portions. Section 25A(3) of the Act will only apply to cases coming under Section 25A(1). As we read the Section 25A (1), it does not seem to us to apply to a case where a member of an undivided family and therefore there is no question of partition or that he had become the sole survivor of a Hindu undivided family and the property which had once belonged to the joint family had become his exclusive property. It does not appear that in a case, where the Income-tax Officer on further materials being placed before him finds that the old assessment was wrong or that the property belonged to the applicant who should have been assessed as an individual, there is any bar in Section 25A (1) or Section 25A (3) to the Income-tax Officer deciding that matter and making his assessment accordingly, in any subsequent year.

The question whether the joint family property which has been proved, or admitted to be such, has been partitioned in definite portions among the various members or groups of members in the family is a question of fact which has to be decided by the Income-tax Officer on the evidence that may be placed before him. We can, however, visualise a case where, though every portion of the property that could reasonably be divided had been divided but there was some item left undivided because either from its nature or on account of some provision of law it was not capable of partition into definite portions. Could it be said in such a case that the requirements of the section had not been fulfilled ? It is one of the elementary principles of interpretation that an Act should be interpreted in a reasonable manner and not in such a way as to require a person to do what is impossible. In such cases if a question arises, the Tribunal may have to consider whether in substance and in fact the family property has been divided.

It would not, however, be proper for us to try to interpret Section 25A (1) of the Act in the abstract without knowing the facts whether there is any joint family property which is still undivided and, if so, what is the nature thereof. In most cases the findings of fact recorded by the Tribunal would answer the question whether the requirements of Section 25A (1) have or have not been fulfilled. As we have said, it may be that in some special case a difficult question of law may arise, for example, where every bit of property has been divided, but there is an heirloom, say an old family picture, an old family gun or a sword which it is not possible to divide in different portions and is kept undivided, or a case where by reason of some provision of law it is not possible to divide one item of property. In such a case a serious question may arise whether it could be said that the joint family property had not been divided in definite portions as required by Section 25A (1) of the Act.

Learned counsel for the assessee as well as the Department tried to refer to a judgment of a civil court in a civil suit and also certain other papers so that we may be able to record a finding for ourselves whether there was any joint family property that had remained undivided. We want, however, to make it quite clear that it is an entirely wrong procedure. The facts giving rise to the

question of law must be clearly stated and the findings of fact on which the question of law must be clearly formulated in referring order, and this Court cannot be asked to sit as a Court of first appeal against the appellate decision or the referring order of the Tribunal. The previous orders and such other relevant documents as are sent along with the orders and such other relevant documents as are sent along with the referring order are not on the record with the object that we may come to different conclusions on the facts but so that the facts given in the referring order are clearly understood by us and are properly explained by counsel. In a statement of case properly drawn up they are, where necessary, referred to and are made parts thereof.

We, therefore, think that this case must go back to the Appellate Tribunal for a clear statement of the case and the questions of law for the decision of this Court which arise out of the order of the Appellate Tribunal passed under Section 33 (4) must be clearly formulated.

[In pursuance of the abovesaid order of the High Court the Appellate Tribunal submitted the following further statement of case.] SUPPLEMENTARY STATEMENT OF CASE On the application of the assessee, the predecessor Bench of the Tribunal had drawn up a statement of the case framing certain questions of law to refer to the High Court. The High Court under Section 66 (4) has referred the case back to the Tribunal with certain observations, which are reproduced below :-

> "The facts giving rise to the question of law must be clearly stated and the findings of fact on which the question of law arises must be clearly formulated in the referring order..... We, therefore, think that this case must go back to the Appellate Tribunal for a clear statement of the case and the questions of law for the decision of this Court which arise out of the order of the Appellate Tribunal passed under Section 33 (4) must be clearly formulated."

We, therefore, proceed to draw up another statement of case in pursuance of the above directions.

2. The present reference arises out of the Tribunals order, dated 20th July, 1942, in 25 A. P. A. No. 1 (C. P.) of 1942-43, in connection with the assessment year 1941-42. The assessee had been claiming partition since the assessment year 1938-39 and has been constantly applying under Section 25A of the Income-tax Act for assessment after recognition of the partition of Hindu undivided family. However, he continued to be assessed in the status of a Hindu undivided family. In the assessment year 1941-42, he again submitted an application under Section 25A claiming partition amongst the members of the family and praying for an order under Section 25A. This prayer was based mainly on the judgment dated 22nd September, 1941, of the First Civil Judge, Meerut, in suit for partition brought by L. Chunni Lal and his sons, v. Baijnath and others, i.e., by Chunni Lal and his three sons against L. Baijanth and his son and Munna Lal, his three brothers, Panna Lal, Hiralal and Jaiprakash and Parmeshwar Saran, the son of Munna Lal. The following pedigree will explain the relationship of the Plaintiffs and the defendants :

> Lekhraj ½ ½ ½ Bhagwan½ das Phulchand Ghasiram ½ ½ Basheshwar Dayal Baij Nath Deft. 1.

½ ½ ½ Amba Prasad Bishambhar ½ Bhagwant alias Mewa Ram ½ ½ ½ ½ ½ Munna Lal Deft. 3.

Chunna Lal Plff. 1 Pannalal Deft. 5.

Hiralal Deft. 6.

Jai Prakash Deft. 7.

½ ½ ½ ½ Parmeshwar Saran Deft. 4.

Suresh Prasad Plff. 4.

Mahesh Prasad Plff. 3.

Ramesh Prasad Plff. 2.

3. In this suit, three reliefs were prayed, (1) that a declaration may be granted to the plaintiffs that they own a share out of the landed property specified in list A of the plaint, (2) that the plaintiffs have 1/10th share out of the house property and the moveable properties given in list B and (3) that if the family was not found joint or reunited, the defendant No. 1 may be called upon to furnish accounts of the income of landed property and the house property and the sum due to the plaintiffs may be decreed to them. List A comprised of revenue paying landed property, schedule B comprised of houses and schedule C comprised of miscellaneous property including cloth shop in the name of Munnalal and brothers and share in sugar mills at Cawnpore standing in the name of L. Baijnath, some decrees for money, some cash in deposit, certain dues from agricultural and house tenants and other moveable property. The defendant No. 1 and his son (defendant No. 2), i.e., Baijnath and Ramnath, filed one written statement raising the plea that the family was not joint, that no reunion had taken place in the family and that the properties were separate. The character of ownership in respect of each of the items in suit was indicated by them and the properties which were owned in common together with the specification of the shares of the parties in them were disclosed. About the cloth shop mentioned in list (c), it was said in the written statement that the defendants Nos. 1 and 2 have nothing to do with it and that it belonged to defendant No. 3. Defendants Nos. 3 and 4, i.e., Munnalal and his son Parmeshwar Saran, filed another statement showing that the family was joint and the plaintiff No. 1 and defendant No. 1 were the managers of the family and that the defendants were entitled to 1/10th share on partition. As regards the cloth shop it was urged that there was no shop in the name of Munnalal and brothers, that the cloth shop was started by the defendant No. 3 in the name of one Dharam Prakash by borrowing money from him and it had nothing to do with the family assets. There were other pleas which are not relevant for the purpose of this reference. The defendants Nos. 5 to 7, i.e., Pannalal, Hiralal, and Jai Prakash, who were the other brothers of plaintiff Chunnalal, filed a third written statement alleging the property to be joint family property and raising certain pleas which were more or less personal in their nature. Of these pleadings, the learned Civil Judge framed several issues, of which issues Nos. 1, 2, 3 and 9 are only mentioned for the purpose of the present case. These issues are as follows :-

(1) Are the plaintiffs and the defendants members of a joint Hindu family ?

(2) Is the property in suit parties ancestral or joint family propert ?

(3) Was there any reunion between parties or their ancestors ?

(4) Which of the properties, if any, are defendants separate propertie ?

The finding of the Civil Judge with regard to the first and third issues was :-

> "In this case the evidence cannot prove jointness or reunion. The finding must be that the plaintiffs and the defendants Nos. 1 and 2 are not members of a joint Hindu family. The rest of the defendants are, no doubt, joint with the plaintiffs".

As regards the second and ninth issues, his findings were summed as follows :-

> "There was no ancestral nucleus worth the name an on this ground the property in dispute cannot be treated to be ancestral. On the score of blending also I cannot treat the property to be ancestral. A question of dealing with the income jointly arose by sheer force of circumstances. According to my finding on the foregoing issue the properties must be considered separately and the share of the parties must be determined in the light of the evidence".

Under issue No. 9, the Civil Judge then discussed the character of each property with reference to the shares of the parties in each of them and held certain items in list B to belong to one set of them and others comprising of the building to belong to all the parties to the suit as they were jointly acquired in the name of members belonging to both the branches according to the pedigree. In the cloth shop shown in list C of the plaint, it was held that the defendants Nos. 3 and 4. The shares in the sugar mills of Cawnpore were given to the defendants Nos. 1 and 2 exclusively, as they were acquired in the name of diffident No. 1 by Ghasi Ram, his father. Similarly, other items of list C were dealt with and in some the plaintiffs were given a share and in others they were not.

4. On the strength of the abovementioned finding of the Civil Court, the applicant, Baijanth, son of Ghasi Ram, contended before the Income-tax Officer, that since there was no joint family property, the question of partition as contemplated by Section 25A(1) did not arise and the properties held as tenants-in-common by any of the two branches of the family were wrongly considered as properties belonging to a Hindu undivided family in the preceding years assessment. The Income-tax Officer, however, decided that for the purposes of assessment, the family must be treated as a Hindu undivided family till such time as an order under Section 25A was obtained and as it was not shown by the assessee that actual partition of the joint family property had taken place under the order of the Civil Judge, no order under Section 25A(1) could be passed.

5. The assessee appealed against the order to the Appellate Assistant Commissioner, who upheld the order of the Income-tax Officer, and dismissed the appeal by his order dated 10th March, 1942.

Against the Appellate Assistant Commissioners order, the assessee preferred an appeal to the Appellate Tribunal. Before the Tribunal, the Department relied on the ruling on the Oudh Chief Court in Chhedi Lal Nand Kishore v. Commissioner of Income-tax, C. P. & U. P. in support of the proposition that under section 25A (3) of the Income-tax Act, the business, the profits of which have hitherto been assessed as income of a Hindu undivided family must be deemed to continue as a joint family business until an order under Section 25A had been made. Relying upon this authority, the Tribunal held that since there admittedly was an undivided property, the income of which had been assessed in the preceding year as the income of the Hindu undivided family, an order under Section 25A could not be obtained so long as any such property remained unpartitioned in definite proportions, and dismissed the appeal.

6. The application for reference under Section 66(1) was then made to the Tribunal suggesting that the following questions of law arise out of the Tribunals order :-

> (1) Whether in the circumstances of the case sub-section (3) of Section 25A was no bar to pass a favourable order under sub-section (1) of the same section ?
>
> (2) Had not the Hindu undivided family created as a fiction of law by sub-section (3) of Section 25A legally disrupted from the date of the institution of the suit for partition or from the date of the filing of the written statement by the present petitioner or from the date of the order of the 1st Civil Judge wherein shares of the parties were clearly define ?
>
> (3) Whether there was not enough material to hold that application under Section 25A was illegally rejecte ?
>
> (4) Whether the accepting of the application made under Section 25A was justified in law, holding that either there was no Hindu Undivided Family during the previous yea ?
>
> (5) or the alleged Hindu undivided family ceased to exist when it was disrupted by the order of the Civil Judge dated 22nd September, 1941, wherein definite shares of the parties were define ?

7. The Commissioner in his reply filed under rules 53 and 54 of the Appellate Tribunal Rules contended that there was no question of law which arose out of the Tribunals order and argued that the question whether a Hindu Undivided family is divided or not is a question of fact. The predecessor Bench of the Tribunal however framed the following questions of law and referred it to the High Court :-

> "Does the circumstances that the property held jointly by Baij Nath group and another group of the family has not been divided in definite proportions, stand in the way of the appellant in obtaining an order under Section 25A (1) in view of the fact that the property has hitherto been treated as the property of a Hindu undivided

family composed of both the above mentioned group ?"

8. The subject matter of the assessment in the year 1941-42 is described as follows :-

"Property and retail sale of cloth"

In the assessment order of 1944-45, description of this property has been clarified as house property. The house property was dealt in the partition suit in list B and the cloth business as item No. 1 in list C. The decision of the Civil Judge in regard to the cloth shop was that the plaintiff had a 1/5th share in it and as regards the house property in list B the operative part of his order said that in certain houses, the plaintiffs share was 1/10th and in others, the plaintiffs share was 1/5th. Out of the movables, he declared some items to be divisible and held that the rest of the properties shall not be divided.

9. From the above narration of the facts, it is clear that according to the findings of the Civil Judge, there is not ancestral or joint Hindu family property, but only joint property, in some of which the applicants share has been specified but not actually partitioned. In the cloth business, the plaintiff has been given 1/5th share, but no actual partition has yet taken place. The family has continued to be assessed as a Hindu undivided family. The questions of law that therefore, arise out of the Tribunals order for reference are :-

"1. Whether in the circumstances of the case as the applicant had allowed himself to be assessed as Hindu undivided family for a series of years sub-section (3) of section 25A was a bar for the applicant to obtain an order under sub-section (1) of the same section ?"

"2. Whether the fact that joint property (not joint family property) held by Baijnath and other members of the same family had not been divided in definite proposition stood in the way of the applicant in obtaining an order under Section 25A (1), although the property has been held to be not joint family property by the Civil Judge and the applicant has been held to be a divided branch of the old family."

10. We accordingly refer the aforesaid two questions of law to the High Court at Allahabad for decision.

B. Dayal, for the assessee.

S. C. Das, for the Commissioner.

JUDGMENT A referred was made to this court in the year 1943 and the questions referred for our decisions under Section 66(1) of the Indian Income-tax Act, 1922, was as follows :-

"Does the circumstances that the property held jointly by Baij Nath group and another group of the family has not been divided in definite portions stand in the way

> of the appellant in obtaining an order under Section 25A(1) in view of the fact that the property has hitherto been treated as the property of a Hindu undivided family composed of both the above mentioned groups ?"

A few facts will be necessary to explain how the question arose.

The assessee Baij Nath was assessed as a member of a Hindu undivided family and the assessment was made under the name and style of Amba Prasad Baij Nath from the year 1931-32 without any objection. In the assessment year 1938-39, Baij Nath claimed that he had been wrongly assessed as a member of a Hindu undivided family, that he was and had always been separate from his nephews and that the property was his self-acquired property. His claim was, however, rejected and the Income-tax Officer continued to assess him in the years 1938-39, 1939-40 and 1940-41 as a member of Hindu undivided family.

During the assessment year 1941-42, he again raised the same plea and files an application under Section 25A of the Indian Income-tax Act, 1922. Though the application purported to be under Section 25A, the assessee claimed that he was not and had never been a member of a Hindu undivided family and that the Income-tax Officer had wrongly assessed him in previous years. He prayed that the assessment "should be separate on the applicant along with his son Ram Nath".

The application was dismissed by the Income-tax Officer on the ground that the assessment must continue in the same status unless it could be shown that the property had been divided by meters and bounds. The exact words used by the Income-tax Officer in the order, dated the 10th of December, 1941, were as follows :-

> "The fact whether the family was or was not joint is not relevant. As the assessment till 1940-41 has been made in the status of a Hindu undivided family, the assessee has to prove his claim under Section 25A this year....."

Thus it was held that if the assessment had been made in the status of a Hindu undivided family, the assessee would have to be assessed in the same capacity unless an order under Section 25A was passed by the Income-tax Officer and an order under Section 25A could be passed only if the assessee could prove that the joint family property had actually been divided among the various members. The Income-tax Officer further held :

> "There has been no partition within the meaning of Section 25A of the Income-tax and the Income-tax Appellate Tribunal. The Tribunal did not go into the question whether the assessees contention that he had never been a member of a Hindu undivided family with his nephews was or was not correct and said as follows :-
>
> "It is, therefore, clear that the property which has hitherto been treated as the property of the Hindu undivided family must be shown to have been partitioned in definite portions before an order under Section 25A(1) can be obtained. In the case, with which we are dealing, there is admittedly a portion of the property which is still

> to be divided although the property in question has been held to be owned in common and not as co-parcenary property. In these circumstances, the assessees application under Section 25A (1) was rightly rejected by the Income-tax authorities and we see no reason to interfere with the order under appeal".

While the assessment proceedings were pending, Chunna Lal and his sons had filed a suit (Suit No. 9 of 1940 in the court of the First Civil Judge, Meerut) against the assessee Baij Nath and his son Ram Nath for partition of the property on the ground that the family was joint and the entire property was joint family property. Before the Income-tax Appellate Tribunal gave its decision on the 20th of July, 1942, the learned Civil Judge had decided the case and had held that Baij Nath was not a member of a joint Hindu family with his nephews. The Income-tax Appellate Tribunal, in the statement of the case has quoted the following two issues and given extracts from the judgment of the learned Civil Judge on those issues :-

> "(1) Are the plaintiffs and the defendants members of a joint Hindu family ?
>
> (2) Is the property in suit parties ancestral or joint family propert ?"

As regards the first issue, the finding of the learned Civil Judge was :-

> "In this case the evidence cannot prove jointness or re-union. The finding must be that the plaintiffs and the defendants Nos. 1 and 2 are not members of a joint Hindu family. The rest of the defendants are, no doubt, joint with the plaintiffs".

The issue was decided partly against the plaintiffs. We may mention that the other defendants 3 to 7 were the four brother of Chunna Lal plaintiff and the son of one of those brothers and they had been impleaded as defendants as they did not join in the suit. So the finding of the learned Civil Judge was that Baij Nath was not a member of a Hindu undivided family with the plaintiffs and defendants 3 to 7 though the plaintiffs and defendants 3 to 7 were members of a joint Hindu family.

The finding of the learned Civil Judge on the second issue was :-

> "There was no ancestral nucleus worth the name and on this ground the property in dispute cannot be treated to be ancestral. On the score of blending also, I cannot treat the property to be ancestral."

When the reference was put up before a Bench, of which one of us was a member, it was found that the Tribunal had nor recorded a finding whether there never had been a Hindu undivided family to which Section 25A could be made applicable. In the absence of findings on questions of fact, this Court was not able to answer the question referred to this Court for decision and directed the Income-tax Appellate Tribunal to find the facts and make a fresh statement. The Income-tax Appellate Tribunal has, in compliance with the order, submitted a fresh statement of the case and has formulated the questions for our decision. The questions now formulated are as follows :-

> "1. Whether, in the circumstances of the case, as the applicant had allowed himself to be assessed as Hindu undivided family for a series of years, sub-section (3) of Section 25A was a bar for the applicant to obtain an order under sub-section (1) of the same section ?
>
> 2. Whether the fact that joint property (not joint family property) held by Baijnath and other members of the same family had not been divided in definite portions stood in the way of the applicant in obtaining an order under Section 25A (1), although the property has been held to be not joint family property by the Civil Judge and the applicant has been held to be a divided branch of the old family ?"

The Tribunal, however, has again, instead of giving us the findings of its own, on which the questions have to be answered, made long quotations from the judgment of the learned Civil Judge and has tried to summarise the decision of the learned Civil Judge. A reference under Section 66 has to be answered on findings of fact recorded by the Tribunal and not on any findings that might have been recorded in some litigation between members of the family. When the reference came before a Bench of this Court on the 18th of September, 1950, we were informed by the learned counsel for the assessee that the learned Civil Judges judgment, from which facts had been summarised, had been set aside by a Bench of this Court in First Appeal No. 15 of 1942 decided on 13th January, 1950, and that an appeal was pending against that decision before their Lordships of the Supreme Court. Counsel, therefore, prayed that we may await the decision of the Supreme Court and as learned counsel for the Department also agreed, the hearing was postponed. The Supreme Court in its decision dated the 8th of May, 1953, has reaffirmed the main findings recorded by the learned Civil Judge and has set aside the decision of this Court. The Supreme Court has found that Lekhraj had three sons, Bhagwan Das, Phulchand and Ghasiram, that Bhagwan Das died in 1929 and, at the time of his death, he was separate from his two brothers and that there was no satisfactory evidence that, at the time when Bhagwan Das died, the sons of his two brothers, Phulchand and Ghasiram, who had died earlier than Bhagwan Das, had continued to remain joint, or, they had ever re-united. While restoring the findings of the learned Civil Judge, their Lordships of the Supreme Court remarked :-

> "It had not been proved that Ghasiram and Phulchand continued as members of the joint Hindu family after the separation of Bhagwan Das".

As regards the properties, their Lordships held :-

> "In view of our finding that Ghasiram and Phulchand were not members of a joint Hindu family, all properties separately acquired in the name of Ghasiram or Baij Nath have to be declared as their separate properties".

Except as regards houses and some other movable properties, their Lordships affirmed the decision of the trial Court.

As was pointed out by this Court in 1946, it is not for this Court in a reference under Section 66 of the Indian Income-tax Act to take additional evidence or refer to a judgment whether of the civil Court or of the Supreme Court to ascertain facts on which the question referred have to be answered. In view, however, of the fact that the reference was made as far back as 1943 and though the case was once sent back to the Tribunal, the statement of the case now submitted is again just as unsatisfactory as the previous statement, counsel have requested us to consider the findings recorded by the Supreme Court as the findings of fact on which answer may be given. In the statement of the case, though the Tribunal does not say that it has accepted the findings of fact recorded by the learned Civil Judge, it seems to have been intended that the questions framed for our decision may be answered on the basis of the findings recorded by the learned Civil Judge. Those findings have now been upheld by the Supreme Court and there can, therefore, be no objection to our taking those findings into consideration.

The result of those findings is that Baij Nath cannot be said to have ever been a member of a Hindu undivided family with the descendants of Amba Prasad. Though Baij Naths application purported to be under Section 25A, his claim was that he had been wrongly assessed as a member of a Hindu undivided family with his nephews though he was a member of a joint Hindu family with his son Ram Nath.

The fact that, in previous years, Baij Nath had been assessed as a member of a Hindu undivided family consisting of himself and his nephews did not bar the Income-tax Officer from going into the question whether the claim put forward by the assessee was or was not correct and if the Income-tax Officer came to the conclusion that there never had been a Hindu undivided family, no question could arise under Section 25A(1) of the Indian Income-tax Act whether the joint family property had been partitioned among the various members or groups of members in definite portions or not.

The law on the subject was discussed at great length in the order of this Court dated the 8th of May, 1946. That judgment has not been reported. It is not necessary for us to repeat all that was said in that judgment. For the reasons given in that judgment we may make it clear that, on the finding that Baij Nath had never been a member of a Hindu undivided family with his nephews, the mere fact that he had been wrongly assessed as a member of a Hindu undivided family with them did not bar Baij Naths right to raise that question nor was there any bar to the Income-tax Officers going into it and considering whether, in the assessment year in question, viz., 1941-42, he should be assessed as a member of a Hindu undivided family with his nephews. The questions framed by the Tribunal are so defective that we find it difficult to answer them in the way in which they have been framed. Probably, the Tribunal meant that, in view of the fact that it had now been established that the assessee had, in the previous years, been wrongly assessed as a Hindu undivided family with his nephews, Section 25A of the Act was applicable. This Court, in its previous order of the 8th of May, 1946, pointed out :-

> "Section 25A refers to a case where a member of a Hindu family hitherto assessed as undivided applies to the Income-tax Officer, at the time of making an assessment under Section 23, that a partition has taken place among the members of such family and, therefore, the family should no longer be treated as a Hindu undivided family".

It was further said in that order :-

> "As we read Section 25A(1), it does not seem to us to apply to a case where a member takes up the position that he had never been a member of an undivided family and, therefore, there was not question of partition or that he had become the sole survivor of a Hindu undivided family and the property which had once belonged to the joint family had become his exclusive property".

Our answer, therefore, is that Section 25A of the Indian Income-tax Act did not debar the Income-tax Officer from going into the question whether Baij Nath had been wrongly assessed as a member of a Hindu undivided family and sub-section (3) of Section 25A was, therefore, not applicable to such a case.

The second question does not appear to be at all clear. If the Tribunal want an answer to the question whether, where there is no Hindu undivided family and there is no joint family property or co-parcenary property, the mere fact that there was some property held in common by the co-shares and the Income-tax Officer had wrongly assessed the co-sharers as a Hindu undivided family in the previous year will debar the assessee in all subsequent years from claiming that they had never been members of a Hindu undivided family, so that they must continue to be assessed in that capacity unless they can establish in proceedings under Section 25A(1) that the property had been divided by metes and bounds, our answer must be that, in such a case, Section 25A will not be applicable and it is open to the Income-tax Officer to consider whether the assessee should be assessed as a Hindu undivided family or as an individual or a firm.

As the confusion has partly been caused by reason of the fact that though the assessee set out his claim correctly in his application that he should never have been assessed in the status of a Hindu undivided family, he made his application under Section 25A of the Indian Income-tax Act and thereafter continued to claim the benefit under that section, we consider it proper to direct parties to bear their own costs.

Reference answered accordingly.