Madras High Court
M.S.M.M. Meyyappa Chettiar vs Commissioner Of Income-Tax on 5 December, 1949
Equivalent citations: AIR 1951 Mad 506, 1950 18 ITR 586 Mad, (1950) 2 MLJ 353
Author: S Rao
Bench: S Rao, V Sastri
JUDGMENT Satyanarayana Rao, J.

1. Under section 66 (i), Income-tax Act, the Appellate Tribunal referred to this Court the following question :

"Whether in the circumstances of the case the finding of the Appellate Tribunal that there has been no partition within the meaning of Section 25-A is right."

The applicant who is the assessee is the karta of a Hindu undivided family which consisted of himself and his two minor sons, Chocka-lingam and Meyyappan. Daring the assessment year 1940-41, the assessee applied under Section 25-A, Income-tax Act, for an order recording a partition which had taken place among the members of the family. The family was assessed till that date as an undivided family. In December 1941, another son was born; but the partition claimed was long before that date and even before the period of gestation. According to the applicant the partition was on 22-2-1940 which was reduced to writing on 5-4-1940, as evidenced by the partition deed of that date. The property of the family which was the subject-matter of partition consisted of businesses, houses and other immovable properties, jewels and shares. There were four businesses which were exclusively owned by the family and one in partnership with others. The sole businesses were Ipoh M. S. M. M., Sithiawan M. S. M. M., Rangoon M. S. M. M. and Karai-kudi M. S. M. M. and the joint business was at Singapore M. S. M. M. On 22-2-1940, the assessee wrote a letter to his agent at Ipoh directing him to make certain entries in the accounts to evidence the partition of the businesses. The sons being minors, the father, it was claimed, exercised his right under Hindu law of bringing about a division between himself and his sons and also between the sons inter se. The partition deed of 5-4-1940 shows that the Rangoon business was allotted exclusively to the father, and that the other businesses at Ipoh and Sithiawan and the combined business at Singapore were divided equally between the three sharers. The Karaikudi business was also taken entirely by the father. The share allotted to each member was described in three schedules, Schedule A representing the share of the father, Schedule B representing the property allotted to Chockalingam and Schedule C to Meyyappan. Items 1 to 12 and 16 are houses and house-sites in which each of the members was allotted a third share. Items 13, 14 and 15 of Schedule A were exclusively allotted to the father as well as the shares in Karaikudi Sri Minakshi Sundare-swar Electric Power Corporation Ltd., and other shares in other companies. The family owned undivided shares in certain villages and they were also distributed between the sharers. The jewels, silver articles and vessels were not physically divided ; but each member was declared entitled to a third share.

2. The partition was not recognised by the Income-tax authorities, including the Appellate Tribunal. The ultimate finding of the Appellate Tribunal was that though the businesses were divided, the division was unequal and that as regards the immovable properties and moveable properties, there being no physical division as contemplated by Section 25-A, the partition could not be recognised.

The Appellate Tribunal has recorded a finding that the partition of the businesses was altogether null and void, as the father's overriding power recognised under Hindu law of bringing about a division between himself and his sons could be effected only if the division actually made was fair and equal. As in the present case the division was wholly unequal, it is void and is of no legal effect. The inequality of the division of the businesses is hased upon the fact that the father took for himself three rubber estates and houses at Ipoh whose book value was, 5,13,000 dollars, at a valuation of 1 lakh dollars which was adjusted in the account books between the various sharers. These assets, it was found, were undervalued, and the father practically obtained for himself the three rubber estates and the houses for one-fifth of their value, and the distribution therefore of the properties made by the father was unequal. In view of the letter of 22 2-1940, which contained the directions given to the agent at Ipoh by the father to make these adjustments with regard to the rubber estates and the houses and also to carry out the division of the other businesses in the accounts, it is a proper inference to draw that this arrangement relating to the rubber estates and the houses was part of the partition arrangement and not a sale by the father to himself of the assets of the family at a value of l lakh dollars. This is also the view of the Appellate Tribunal, and there is no reason to differ from that conclusion.

3. The position, therefore, is that the businesses were divided, though unequally, the jewels were not divided, and so fur as the immovable properties are concerned, regarding 13 items, the division was only into three shares of each item, one share being allotted to each member. In some of these items the family itself owned a fraction of the interest in the property and was not the owner of the properties in their entirety. The question therefore is whether the partition so made satisfies the requirements of Section 25-A, Income-tax Act. The question formulated by the Appellate Tri-bunal really covers more than one contention raised on behalf of the assessee, and the Appel-lates Tribunal in the statement of the case has made it clear that the four questions of law raised by the applicant in his application for reference are really covered by the question which has been referred to this Court. It is on that footing that the matter has to be considered.

4. The case raises two questions on the facts stated above. The first is whether the division of the businesses brought about by the father in exercise of his superior power is valid and effective, notwithstanding the unequal nature of the division. The second is whether, in the absence of a physical division, that is, in the case of immovable properties by metes and bounds and in the case of jewels a physi-

cal separation of the items, there was such a partition of the properties as could be recognised under Section 25-A of the Act.

5. The first question is entirely one which arises under Hindu law. Under the Mitakshara law the father has the undoubted right and privilege of effecting a partition between himself and his sons, whether they are majors or minors, without their consent. He may divide the properties physically or may only bring about a division in status. This division may be between himself and his sons or even between the sons inter se. The partition so made, however, must be fair and equal. See Kanda-swami v. Doraiswami Aiyar, 2 Mad. 317 and Venkatapathi Raju v. Venkatanarasimha Raju, I. l. R. (1937) Mad. 1 : (A. I. R. (23) 1936 P. C. 264), (Mayne's Hindu Law, 11th Edn. 1950, pp. 547 and

548). This power of the father is exercisable also by the grandfather but with the qualification that he can only separate himself from his grandsons and not make a division between the grandsons inter se. (See Subbarami Reddi v. Chenchu Raghava Reddi, I. L. R. (1945) Mad. 714 : (A. I. R. (32) 1945 Mad. 327) and Mayne, 11th Edn., p. 548). If the partition is unequal and unfair it is open to the sons if they are majors, to repudiate the partition; but if they are minors, it is open to them to avoid that partition by appropriate proceedings after they attain majority. The partition, therefore, will be good until it is set aside. It is not void and is not without effect. This right of avoidance based on the inequality of the shares is a personal right of the minors and cannot be exercised by others. The power is not a conditional power in the sense that, if the condition of the partition being fair and equal is not satisfied, the power ceases to have operative force. The partition will be valid in such circumstances until it is avoided by the minors, and until it is repudiated by the major sons. These principles have been well recognised in the two decisions already referred to. It has never been held and no decision has been brought to our notice taking the view that in such circumstances the partition is wholly void and is of no legal effect. Whether it is an alienation under the Hindu law by a guardian on behalf of the minor or a partition effected by the father in the exercise of hia peculiar power the transaction will be good until it is set aside; it is voidable and not void. The view therefore of the Appellate Tribunal that the-partition is void and is of no legal effect so far as the businesses are concerned on the ground that it is an unequal division cannot be accepted as applying the law correctly. The ground therefore on which the Tribunal held that the partition of the businesses was void cannot be sustained. There is therefore an effective division of the businesses.

6. The next question is whether there is partition of the immovable properties and the jewels whicn can be recognised under Section 25-A. The interpretation of this section is the subject-matter of several decisions which are by no means reconcilable. The doubts and difficulties have been to a large extent resolved by the decision of the Pirvy Council in Sundar Singh v. Commissioner of Income-tax, I.L.R. (1943) ALL. 69 : (A.i.r. (29) 1942 P. c. 57). Under section 3 of the Act an undivided family is recognised as a unit for taxation. Section 25-A is not a charging section bat only provides a machinery for purposes of assessment. In order to avoid double taxation Section 14 (1) provides that an assessee is not liable to pay any tax in respect of any sum which he receives as a member of a Hindu undivided family, where such a sum has been paid out of the income of the family. Section 25-A is intended to meet the difficulty which arises when an undivided family receives income in the year of account as an undivided family but ceases to exist as such at the time of assessment. If Section 25-A is not on the statute book, the individual member who became separated during the year of assessment will not be liable to pay tax in respect of income which he received as a member of the joint family, and the family which has ceased to be joint cannot be assessed to income-tax in respect of any sum which was received in the previous year, as an undivided family. In other words, if the family status was disrupted and there was no partition of the property, if Section 25-A did not exist, the members of the family would have escaped the assessment. So long as the family continues joint, Section 25-A does not come into operation. If the family while continuing joint parts with some of its property either to a member or members or even to a stranger, the income from such property would not form part of the income of the undivided family and has to be excluded from the assessment of the undivided family. Even if there is a partial partition of the properties, if the status of the family is not affected by such partition, the properties as partitioned ceased to be joint family properties, and their income cannot enter into the

computation of the income of the undivided family. The income of the family fluctuates. The income of the undivided family gets reduced by parting with the property; but so long as the status of the family continued undivided, the income of the remaining properties owned and possessed by the family forms the basis for the assessment for purposes of income-tax. If there is merely a division in status during the assessment year by reason of Section 25-A, if the condition of partition of the property among the various members and groups of members in definite portions is not satisfied, the family will be deemed to be undivided for the purpose of the Act and will continue to be a Hindu undivided family. The important condition for the separation of the assessment in the manner provided by Sub-clause (2) of Section 25-A, is proof of the fact that the joint family property has been partitioned among the various members or groups of members in definite portions. If this is satisfied under Sub-clause (2) in respect of the income which was received by the family as an undivided family during the accounting year, each member will be liable to pay a share of the tax on the income in proportion to the joint family property allotted to him. Of course under the proviso to that clause the liability of the members who have partitioned the property continues to be joint and several in respect of the tax. If the crucial fact is not established, however, under Sub-clause (3), the family is assessed as undivided, as it is deemed for the purpose of the Act to continue to be an undivided Hindu family. The distinction therefore tinder the section is between what under Hindu law is known as a division of a right, i. e., division of the joint status, and the division of the property. If it merely stops at the division of the right it seems to be clear from the decision of the Privy Council itself that such a division of interest would not satisfy the requirement of the section. Before 1939 when the section was amended, the section required that the Income-tax Officer "should be satisfied that a separation of the members of the family has taken place, and that the joint family property has been partitioned among the various members or groups of members in definite portions before recording an order to that effect."

By the Amending Act of 1939 the words "if he is satisfied that a separation of the members of the family has taken place" were omitted. From this omission, in some of the decisions an inference was drawn that if there was merely a division in status, the section would not come into operation. But it seems to me that if the second part of the clause that the joint family property has been partitioned among the various members in definite portions is satisfied, it follows from it that not only the property was divided but that the status also was disrupted. When once there is a complete partition of the properties the separation in status of the family automatically follows. The omission of the first part of the clause in 1939 may be due to the fact that it was thought redundant to retain it. In my judgment, the decision of the Privy Council definitely establishes that if there is merely a division in status without the property being partitioned in definite portions, then the family is deemed to continue undivided, notwithstanding the division in status by virtue of Section 25-A. The gist of the decision of the Privy Council is contained in the following passage which appears at p. 465 in Sundar Singh v. Commissioner of Income-tax, (1942) 10 I. T. R. 457 at p. 465 : (A.I.R. (29) 1942 P. C. 57):

"Section 25-A deals with the difficulty in two ways, which are explained by the rule, applicable to families governed by the Mitakshara, that by a mere claim of partition a division of interest may be effected among coparceners so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filing of a suit for partition may have this effect though it may take years before the shares of the various parties are determined or partition made by metes and

bounds. Meanwhile the family property will belong to the members as it does in a Dayabhaga family --in effect as tenants in common. Section 25A provides that if it be found that the family property has been partitioned in definite portions, assessment may be made, notwithstanding Section 14 (1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the total tax. 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 the assessment can be made on its gains of the previous year."

7. This last sentence, in my opinion, is conclusive on the point that mere division of interest and the disruption of the joint family status without a partition in definite portions is ineffective under Sub-section (2) of Section 25-A, to justify an assessment in the manner provided under that clause. Under Sub-section (3) the family is deemed in such circumstances to be an undivided Hindu family. This decision of the Privy Council is also authority for the position that even if there was a partial partition or an item of property was alienated to a stranger or an asset of the family was divided and a partnership was constituted, as the family continued joint and continued to own other properties, the assessment on the basis of undivided Hindu family would be confined to the income of the property so remaining undivided, and the income of the property partitioned or alienated would be excluded from computation of the income for assessment. It follows from the foregoing discussion that so long as the family remains undivided the section has no application. If, however, the family is merely divided in status, that would not affect the legality of the assessment of the inoome received in the previous year as the income of the undivided family, as by the operation of Sub-clause (3) of Section 25-A, the family is deemed to continus undivided, and is assessed accordingly. If, however, there is a partition of the properties in definite portions the result envisaged in. Sub-clause (2) would follow.

8. This leads me to the consideration of the question as to the meaning to be attached to "partition in definite portions" occurring in the section. One thing is clear that the partition should be a complete partition of the properties. If by mistake or oversight or having regard to the fact that an item in the nature of things could not be divided, as for example, an idol belonging to the family and worshipped by it, the partition does not on that ground become incomplete. (For a discussion of property indivisible in its nature see Mayne, 11th Edn. 1950, pp. 512 and 513). If the partition is partial in the sense that it does not relate to all the members, that will not matter, as the partition would be recognised only as between the members separated, and the others would continue as joint. That is implicit also in the expression "among the various members or groups of members" occurring in Section 25-A (1). Regarding the meaning of the expression, one-view is that mere division of interest without more which results in converting what waa joint family property into a property held by tenants-in-common would be sufficient 'partition' within the meaning of the section. In view of the decision of the Privy Council already referred to, in my judgment this contention cannot be now seriously maintained. Further, the section refers to partition of the property and not to the status of the members, which is also an indication that mere division of status or disruption of the family is not enough to constitute a partition. It no doubt creates a division in the right, not a division of the property. In this connection what was said by the Privy Council in the well-known case of Appoovier v. Ramasubba Aiyar, 11 M. I. A. 75 : (2 Sar. 218 P. C.)

may be borne in mind. Partition under Hindu law comprises both a division of a right and a division of property. A division of the right is concerned only with the division of the status while something more is required to constitute a division of the property.

9. What is it then that constitutes partition into definite portions? The other extreme view is that it requires a physical division, that is, division by metes and bounds in the case of immovable property, and separation of the properties themselves in the case of movables and other kinds of property. It is, however, conceded by those who take such an extreme view that in the case of a business such a physical division ia impossible. In the ease of business the only kind of division possible is to make entries in the accounts and to indicate by other modes that there is a jseparation of the share of the members of the family owning the business. It is, therefore, conceded that in the case of a business at least a physical division is impossible, but it is said that the meaning to be attached to the expression "partition in definite portions" must vary according to the nature of the property. In my opinion the language of a statute should not be so construed as to give a different meaning in different circumstances and varying with the nature of the property. It must bear a uniform construction whether it is applied to one kind of property or another. To construe, therefore, the expression "definite portions" as equivalent to physical partition in the case of immovable property and movables and a notional or a paper partition in the case of a business is to vary the meaning of the statute according as it is applied to one kind of property or the other. It must have the same meaning, whatever be the nature of the property. Physical division even in the case of immovable property is not the only mode by which definite portions may be ascertained. The word "portions" has the meaning of "part" as well as a "share". Ifc is, therefore, ambiguous; but the word "definite" prefixed to it makes it clear that it is not a mere share in the sense in which tenants-in-common own the property in shares. It must mean something more than a definite fractional interest in the property. Even in the case of immovable property the definite portion or part may be indicated by specifying the boundaries of the property allotted without actual division by metes and bounds or specify even, as for instance in the case of a house, the northern one-third or the northern half or the southern half or the northern one-third and the southern one-third, and so on. In all these cases, even though there is no physical division, it is possible to infer that the property allotted is definite and is a definite portion. In my opinion, therefore, whether in a given case there is or ia not a partition in definite portions must be ascertained from the facts and circumstances of each case. In some cases physical division may be proved ; in others other circumstances of making definite the part allotted may exist.

10. In the present case the division of the houses, Items 1 to 12 and 16, consisted in allotting to each member a third share in the houses which the family owned exclusively and a third share in the fractional share which the family owned in houses jointly along with others. In respect of houses in which the family owned only a fractional interest it is not possible for the members without the concurrence and consent of the other sharers to divide them physically. As the nature of the property admits only a division in the manner adopted in the deed of partition, it may be taken that in respect of those properties fche division was in definite portions. In the cases of houses owned by the family exclusively the position is somewhat different. No doubt the division in respect of those properties is carried a step further. It is not merely the ownership of an undivided one-third share in all the items by the members but in each item a member was allotted a third share. If a suit for

partition by metes and bounds were to be instituted, this division of each item into three shares will be binding on the parties. It will not be open to them to go behind that division and claim that instead of one house, another house in its entirety should be allotted to his share. Further ifc will be open to a member to alienate his share in each of the houses, and the alienee has the right to get each house separated into three shares and take a share by virtue of his rights under the sale deed. Though fche houses are not physically divided, in my opinion, they may be treated as definite portions for the purpose of Section 25-A. Under sub-clause (3) of Section 9 relating to property tax such portions of houses have to be assessed separately and all fche members cannot be assessed as an association of persons. If, therefore, for purpose of assessment under Section 9 of property tax of the houses, each sharer can be treated as an individual and assessed in proportion of his share, there is no reason for not treating the partition in that manner as a partition in definite portions. Eeference was made in fche course of arguments on behalf of fche applicant to fche word "portion" occurring in various parts of Section 9 as indicating a fraction; but that would nofc help the applicant, as fche word "portion" is preceded by fche word "definite" in Section 25-A. It must be a definite portion and nofc merely a portion.

11. The jewels, however, in this case have not been divided and are merely held in common. The jewels, vessels, etc., are valued at Rs. 1,50,000 and do nofc constitute an insignificant portion of the properties. There is no acceptable explanation for nofc dividing them, and even though the businesses were divided and in my view there was also a partition of the immovable property in definite portions, there being no division of the jewels etc., the partition cannot be said to be complete and therefore cannot be recorded under Section 25-A.

12. It remains to refer to the decisions which have been cited at the Bar. In Biradhmal Lodha v. Commissioner of Income-tax, 56 ALL. 504 : (A.I.R. (21) 1934 ALL. 217), Niama-tullah J. was of opinion that a division by metes and bounds was not necessary, and the case was concerned more, like the decision of the Privy Council in Sundar Singh v. Commissioner of Income-tax, I. L. R. 1943 ALL. 69: (A.I.R. (29) 1942 P. C. 57), with the effect of partial partition. At p. 177 the learned Judge states:

"Partition of the joint family property by metes and bounds is not a necessary requirement of the dis-ruption of the family. If the properties remain intact, but the separating member's share in them is defined, they are nevertheless oonsidered to have been 'partitioned.' Partition contemplated by Section 25-A is not necessarily a partition by metes and bounds. This view finds further support from the proviso to Sub-section (2)."

He also observes at p. 178:

"In spite of a partial partition of the kind assumed, they continue to remain members of the same joint family possessed of joint family property left after the disposition of a part. For these reasons I amof opinion that Section 25-A was not applicable to the circumstances disclosed by the assessees' objection taken before the Assistant Commissioner, and I answer the first question in the negative."

It is this aspect of the matter that was referred to by the Privy Council in the judgment in Sundar singh v. Commissioner of Income-tax, I. L. R. 1943 ALL. 69 : (A.I.R. (29) 1942 P. C. 57). The view of the learned Judge regarding the interpretation of Section 25-A that no partition by metes and bounds is necessary and that a division in status would be sufficient is opposed to the decision of the Privy Council. In the same volume there is a decision of the Lahore High Court in Saligram Ramlal v. Commissioner of Income-tax, (1934) 2 I. t. r. 448 : (A.i.r. (21) 1934 Lah. 942) which takes the view that actual partition by metes and bounds of the property is necessary. The property in dispute was a business which was divided and which was subsequently constituted into a partnership. There is a third decision in the same volume at p. 479 of a Special Bench of the Lahore High Court in Sher Singh Nathuram v. Commissioner of Income-tax, (1934) 2 I. T. R. 479 : (A. I. R. (22) 1935 Lah. 81 S.B.) in which Dalip Singh J. delivered the judgment of the Court. In this case it was held that a disruption of the family and a definite ascertainment of the shares of the different members composing the family would be sufficient to constitute a definite portion within the meaning of the section, and that there need not be a physical division by metes and bounds. This again related to a business, and so far as the actual decision that there was a definite ascertainment of the shares of the different members composing the family and that there was therefore a sufficient partition of the business, seems to be correct. The three stages of partition of a Hindu family which the learned Judge adverts to at p, 483 may not be quite accurate, as there are really two stages, disruption of the joint status and division of the property. He also refers to the difficulty of partition by metes and bounds of a business and that the only thing possible in such a case is the ascertainment of the shares. Some of the observations of the learned Judge may be wide off the mark; but actual decision in the case, if I may say so with respect, is correct.

13. The Nagpur High Court considered the question in In re Sir Bisesardas Daga, (1936) 4 I. T. R. 66 (Nag.) and expressed the opinion that physical division was not required under the section and followed the decision of Niama-tullah J. in Biradhmal Lodha v. Commissioner of Income-tax, (1934) 2 I. t. r. 164 : (A. I. R. (21) 1934 ALL. 217). In Lachiram Bal-deodas v. Commissioner of Income-tax, Bihar, (1936) 4 I. T. R. 279 : (A. I. R. (23) 1236 Pat. 476), the Patna High Court took the view that there should be a physical division and not merely a notional separation or division of interest; but the opinion seems to be obiter, as the main question considered was whether or not there was a genuine partnership. In the Bombay High Court Beaumont C. J. and Kania J. had to deal with the question in Gordhandas T. Mangaldas v. Commissioner of Income-tax, Bombay, (1943) 11 I. t. r. 183 : (A. I. R. (80) 1943 Bom. 116). Both the learned Judges construed the section as requiring a physical division of the property and not a mere division in status. The expression "partition in definite portions" according to Beaumont C. J. has to be construed with regard to the nature of the property concerned, and the learned Judge concedes that a business cannot be divided into parts as in the case of land, and the only mode of division possible in the case of a business is division in the books. Kania J. expressed his view at p. 199 that the word "portion" when read in conjunction with partition of joint family property would ordinarily mean a physical division and not a definition or ascertainment of shares only. I respectfully agree with the observations of the learned Judge that ordinarily it would be so; but as conceded in that very decision, in the case of a business, a physical division is impossible, and the nature of the division required must therefore vary with the nature of the property. The learned Judge also construes the Privy Council decision in Sundar Singh v. Commissioner of Income-tax, (1942) 10 I. T. R. 457 : (A. I. R. (29) 1942 P. C. 57) as authority for the

view that mere division in status which brings about a disruption of the family is ineffective to constitute a partition under Section 25A. I respectfully agree with this view of the learned Judge regarding the decision of the Privy Council.

14. There is another decision in the Bombay High Court of Kania O. C. J. and Chagla J., Waman Satwappa v. Commissioner of Income-tax, (1946) 14 I. T. R. 116 : (A. I. R. (33) 1946 Bom. 328), which was a case of division of the properties at various stages. The members of the joint family decided in July 1941, to divide the properties, and, in fact divided the cash, jewellery and businesses by 30-7-1941. There were, however, differences between them regarding the division of the immovable properties which were referred to an arbitration, and an award was made on 16-10-1941. The question that had to be considered was whether the income of the businesses separated and allotted to individual members and earned by them between 30-7-1941, the date of division of the business, and the end of the accounting year, 20-10-1941, should be treated as part of the income of the undivided family or the income of the individuals owning the business. The objection raised was that the partition was not completed till a later date and that therefore there was no completed partition within the meaning of Section 25A of the Act. The case really is governed by the decision of the Privy Council in Sundar Singh v. Commissioner of Income-tax, (1942) 10 I. T. R. 457 : (A. I. R. (29) 1942 P. C. 57). The status of the family was disrupted and the business ceased to belong to the joint family during the relevant period. This asset, therefore, went out of the family and the income therefore ceased to belong to the joint family. Under Sub-section (3) of Section 25A, no doubt until a complete partition is effected the family is treated as an undivided Hindu family but the family ceased to own property, that is, business which was carried on during the period. The income, therefore, earned by them during that period was rightly excluded from the income of the undivided family. The extreme contention urged was that when once a joint family became disrupted, all the properties must be treated as properties of the family until the final partition took place. This contention was not accepted by the Bench as on the authority of the Privy Council case in Sundar Singh v. Com-missioner of Income-tax, 1942-10 I. T. R. 457 : (A. I. R. (29) 1942 P. C. 57), it was open, as pointed out by Sir George Rankin, to a Hindu family to part with the assets either to a stranger or to one of themselves, and if they so part, they cease to belong to the undivided family. The family will, therefore, be treated as joint for the purpose of the income-tax to the extent of the assets which have not been partitioned. It will still continue to be joint for the purpose of the income-tax in respect of properties still retained by the family. In respect of the properties parted under the partial partition, however, those assets can no longer be considered as assets of the family. From this point of view in the present case as there is an undoubted partition of the businesses which I have held to be valid, the income attributable to those businesses must be excluded from the total income of the family from 3-3-1940 till 13-4-1940, the end of the accounting year and in the subsequent assessment.

15. Lastly there is a decision of our Court in Gurumurthi v. Commissioner of Income-tax, Madras, (1944) 12 I. T. R. 176 : (A.T.R. (31) 1944 Mad. 368), by Leach C. J. and Patanjali Sastri J. The only point decided was that "the partition" in the section means "completed partition." If any assets remain undivided or are left for future division, it will not be a completed partition and therefore would be ineffective under the section. No doubt there is an observation in the judgment that Section 25-A refers only to partition of the property and not to separation of status. What

constitutes partition of the property was not considered by the learned Judges, and they were not called upon to deal with that question. The decision, therefore, is not of much assistance in deciding the question what constitutes partition into "definite portions" under the section.

16. There is one other contention urged on behalf of the applicant based upon the language of Section 25-A and that is, that the partition of the properties required under the section must be confined to properties which are the source of assessable income and not to other properties such as lands whose income is exempt from tax, being agricultural income. I do not, however, think that this contention can be sustained. Under section 25-A (2) the proportion has to be worked out according to the portion of the joint family property allotted to the applicant, and this can only mean in the context the entire family property in which a share is allotted and not restricted to property which is the source of the assessable income,

17. It is said that the division is bad, as the motive was to evade income-tax. A co-parcener governed by the Mitakshara Hindu law has the undoubted right to get his share separated. If the separation entails the consequence of reducing the tax in any manner the partition cannot be impeached on the ground that the motive was not laudable. There is authority in support of the view that :

"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax payers may be of his ingenuity, he cannot be compelled to pay an increased tax."

See Inland Revenue Commissioners v. Westminster (Duke), (1936) A. C. 1 at pp. 19 and 20: (104 L. J. K. B. 383). Viscount Simon L. C., in a later case considered that the exercise of such ingenuity was not commendable and was inconsistent with the discharge of the duties of good citizenship, though it is within legal rights. See Latilla, v. Inland Revenue Commissioners, (1943) A. C. 377 at p. 381: (112 L. J. K. B. 158). So long as a transaction is legal, however re-prehensible the object may be, it must be given its effect in law, unless there is a statutory provision invalidating it on the ground that the main purpose is to evade or get a tax reduced as under Section 10-A, Excess Profits Tax Act.

18. The result is that the question referred to us by the Appellate Tribunal must be answered in the affirmative and against the asses-see, and the assesee will pay the costs of the Income-tax Commissioner which is fixed at Rs. 250.

Viswanatha Sastri J.

19. The question that has been referred to us is in these terms :

"Whether in the circumstances of the case the finding of the Appellate Tribunal that there has been no partition within the meaning of Section 25-A, Income-tax Act is right?"

This comprises and compresses the following four questions : (1) Whether by the deed of partition dated 5-4-1940, a partition has taken place among the members of the family of M. S. M. M. ? (2)

Whether the Income-tax Officer has power under Section 25-A, to ignore a partition on the ground that there has been an unequal distribution of the family properties among minor coparceners? (3) Whether the members of the M. S. M. M. family are divided in status, and (4) whether the joint family properties have been partitioned among the various members in "definite portions" within the meaning of Section 25A. We have tried to dissect the order of the Tribunal and unfold the points of law that are involved in the one rolled-up question referred to us by the Tribunal. This Court might well have been spared the task of dissecting the case and probing into every stage of the proceedings for ascertaining the facts and the real questions of law that arise in the case. An answer merely in the affirmative or negative to the question propounded would be easy but unfair to the assessee and productive of much uncertainty and mischief in the course of the assessment proceedings. We have, therefore, heard arguments on all the points involved and shall deal with them in this judgment.

20. The facts have been stated in the judgment of my learned brother, and it is unnecessary to repeat them. The substantial question relates to the effect of the partition arrangement effected by Meyyappa Chettiar dividing himself and his sons inter se. The finding of the Appellate Tribunal ia that the Income-tax Officer was not bound to recognise the deed of partition dated 5-4-1940, under Section 25A of the Act for the following reasons: (1) The partition between the father and his minor sons was so unequal that the father's power under Hindu law to effect a partition between himself and his sons could not be said to have been validly exercised. (2) The revenue authority could ignore the partition for the reason that the division was unequal and prejudicial to the minor sons. (3) The partition was incomplete, many of the family properties not having been divided into definite portions as required by Section 25A, the mere definition of the shares of the members being insufficient.

21. I may clear the ground by stating that the reference to the partition deed dated 5-4-1940, and the arrangements effected thereby as being "not genuine" or "unreal" in the orders of the Income-tax Officer and the Appellate Assistant Commissioner is misleading. There is no doubt that the document was duly executed and registered. It is not the contention of the department here nor is it the finding of the Tribunal that the document was a sham, colourable or fictitious transaction intended by the parties to have no effect. The contention is that the transaction has failed to achieve the desired result of reducing the liability to income-tax by reason of its invalidity under the Hindu law and non-compliance with Section 25A of the Act.

22. Under the Hindu law, a physical division of the properties of a joint family is not necessary to constitute a partition. Once the shares of the members are defined and fixed, there is a severance of the joint status. The aharers may then make a physical division of the property, or they may decide to enjoy it in common. But the property ceases to be joint immediately the shares are defined and thenceforward the sharers hold it as tenants-in-com-mon. A partition whether by means of a physical division of property or by a definition of shares therein, may be either total or partial. The partition of a portion of the joint family properties does not necessarily imply a division in status among the members and whether there has been a severance in status in the case of a partial division must be gathered from the terms of the instrument effecting the partition or the conduct of the parties. In a joint Hindu family consisting of a father and his sons, the father has power,

irrespective of the consent of his sons, to effect a division not only between them and himself but also between the sons inter se (vide Kandaswami v. Doraiswami, 2 Mad. 317 at p. 321; Aiyamer v. Subramania Aiyar, 32 M. L. J. 439 at p. 441 : (A. I. R. (5) 1918 Mad. 395); Venkatapathi v. Venkatanara-simha, I. L. R. (1937) Mad. l at p. 6 : (A. I. R. (23) 1936 P. C. 264). The power of the father extends not only to effecting a division by metes and bounds bub also a division in status between him and his sons inter se (Venkate-swara Pattar v. Mankayammal, 69 M. L. J. 410 : (A. I. R. (22) 1935 Mad. 775), Subbarami Reddi v. Chenchu Raghava Reddi, I.l.r. (1945) Mad. 714: (A. I. R. (32) 1945 Mad. 327). A partition by metes and bounds, if effected by the father in the exercise of the power conferred on him by Hindu law,, must be fair and the allotments substantially equal. In Kandaswami v. Dorai-sami, 2 Mad. 317, the texts of Hindu law were examined and the father's power to effect a partition as well as the limitations on the exercise of that power were clearly formulated. This decision has been uniformly followed in this and the other High Courts.

23. Where a partition is effected by a Hindu father between himself and his sons in the exercise of his power and the sons are allotted a smaller share of the joint property than would justly be due to them so as to defraud them of their equal and legitimate rights, it would be open to the sons to have the partition set aside on the ground of gross inequality or fraud. If the sons happen to be minors at the time of the partition, they can have the partition set aside on their attaining majority: vide Balakishen Das v. Ram Narain Sahu, 30 Cal. 738 at p. 752 : (30 I. A. 139 P. C.). But it is equally open to the sons to acquiesce in and accept the transaction : vide Brijraj Singh v. Sheodan Singh, 35 ALL. 337: (40 I. A. 161 P.C.); Avadh v. Sitaram, 29 ALL. 37 : (3 A. L. J. 785). In other words the transaction is not void but only voidable at the option of the sons and if the latter seek to stand by it or enforce its terms, it will not be open to the father to plead the invalidity of the arrangement on the ground of the inequality of the allotments. Mr, Rama Rao Sahib argues that it is a condition of a valid exercise of the father's power that the division should be fair and equal and, unless this condition is satisfied, the partition purporting to be effected by him would be of no effect whatever, and it is open to the revenue authority to ignore the partition on this ground.

This contention cannot be accepted. Where there is an execution of a power with something added which is improper, the execution is good and the excess is bad. The execution is not void ab initio. The inequality in the partition could be redressed by an allotment of the excess property retained by the father without disturbing the other terms of the partition arrangement. Even if the division of properties effected by the father were prejudicial to hia minor sons and, therefore, liable to be set aside at their instance, a division in status between the father and his sons would have resulted from the transaction : Venkateswara v. Man-kayammal, 69 M.L.J. 410 at p. 424 : (A.I.R. (22) 1935 Mad. 775); Veerappa Chetti v. Annamalai Chetti, 68 M. L. J. 157 : (A. I. R. (22) 1935 Mad. 316); Kuppan Chettiar v. Masa Goundan, I. L. R. (1937) Mad. 1004 : (A. I. R. (24) 1937 Mad. 424); Thirumala Muthu v. Subramania, (1937) 1 M. L. J. 243 : (A. I. R. (24) 1937 Mad. 458) and Schwebo K. S. R. M. Firm v. Subbiah, I.L.R. (1945) Mad. 138 : (A. I. R. (31) 1944 Mad. 381).

24. For these reasons, I hold that the revenue authority has no right to constitute itself as the self-appointed guardian of minor coparceners and, in that assumed role, avoid a partition arrangement effected by their father in the exercise of his power under the Hindu law, on the ground of an inequality in the partition and the resultant prejudice to the interests of the minors. The

inequality in the allotments is no doubt a circumstance relevant to the determination of the question whether the partition is real or fictitious. An unequal partition can nevertheless be a real partition and there may be reasons of sentiment, gratitude, or affection for the inequality of the allotments. Here, the finding of the Tribunal is that the partition was real but the inequality of the allotments vitiated it completely and rendered it void. The finding of the Tribunal that there was an inequality in the actual allotments is supported by some evidence notably the allotment of family assets of the value of 3 lakhs of rupees to the father at a valuation of one lakh, as a part of the partition arrangement, in spite of the cloak put on the transaction as a conveyance. But that circumstance does not entitle the revenue authority to exercise the right of avoiding the partition, a right which belongs only to the minor coparceners and which they may not find it prudent, proper or profitable to exercise on attaining majority. The propriety of the partition, whether it should be effected at all, whether it should be effected at a particular time, what properties should be allotted to the different members, and how the family properties should be divided, are all matters for the coparceners to decide, if they are adults, or for their guardians, if they are minors or for the father, if the family consists of himself and his minor sons. Once a real and de facto partition is found to have been effected, it is not for the revenue authority to redress alleged inequalities in the partition by professing to ignore it in the interests of the minor coparceners. On the other hand, Section 25A (2) recognises unequal partitions and provides for an apportionment of the tax accordingly. The decision in Commr. of Income-tax, Madras v. Harveys Ltd., (1940) 8 I. T. R. 307 : (A.i.r. (27) 1940 Mad. 602 S. B.) cited by Mr. Eama Eao Sahib was a case where it was held that the revenue authority was entitled to find out the real original cost of a business asset to the as--sessee ignoring an inflated valuation put upon it under an arrangement between the asaessee and another company, for the purpose of obtaining a much larger depreciation allowance than would be allowance on the real cost. This decision lends no countenance to the overriding power claimed by the revenue authority to ignore family partitions merely on the ground of inequality of the allotments. This ground of decision of the Tribunal, therefore, fails.

25. I now proceed to consider the remaining ground of the Tribunal's decision. In the present case, there has been a division in status. The family business at Ipoh and Sithiawan in Burma has been divided into three shares as between the father and his two sons by appropriate entries in the accounts showing a division of capital and menpanam (further contributions). In the Singapore firm the family had only a share along with other partners, but the business of the firm had been closed. No entries relating to the partition of the assets pertaining to the share of the family in the Singapore firm have been made in the Singapore accounts or in the Ipoh accounts where the receipts from the Singapore firm are credited. In respect of thirteen items of the family immovable properties situated here, as well as in respect of silverware and jewels valued at Rs. 1,50,000, there has been no physical division but each of the three sharers is allotted an one-third share. The Tribunal has held that there has not been a partition of the family properties into definite portions as required by Section 25A of the Act.

26. This section has been the victim of conflicting interpretation not only by the different High Courts but by the Judges of the same Court. It is agreed on all hands that Section 25A has no application to a Hindu family which is an undivided family in the year of assessment.

The mere fact that a portion of the joint family property is partitioned or parted with in favour of strangers or individual members of the family does not effect a disruption of the joint Hindu family, though the property so dealt with and its income ceases to be joint family property or joint family income. Section 25A cannot be invoked unless there has been a complete disruption and the joint family has ceased to exist as such at the time of assessment (see Sunder Singh Majithia's case, I. L. R. (1943) ALL. 69 : (A. I. R. (29) 1942 P. C. 57). What is the meaning to be attached to the words "the joint family property has been partitioned among the various members or groups of members in definite portions in Section 25-A?"

27. There may be family properties like lands and houses capable of physical division. There may be properties like a trade or business not capable of physical division. In the case of a family trade or business, "a division into definite portions" cannot mean a winding up of the business and a division of the assets realised on such winding up. Section 25A contemplates a division, not a destruction or extinction of the family property. There may be family properties which are nob partible and which require to be kept in common. Even in respect of properties capable of a physical division; the members may agree that notwithstanding a division of right or interest, they should hold the properties in common in defined shares without a physical division or division by metes and bounds; The section has to be applied to these varying situations in a reasonable way with due regard to its language and object. In some of the decisions cited, the expression "partitioned in definite portions" in Section 25A has been held to include a mere division of right or interest, i. e., a holding of property in defined shares without a physical division (see Biradhamal Lodha's case, 56 ALL. 504 : (A. I. R. (21) 1934 ALL. 217); Sher Singh Natu-ram's case, (1934)-2 I. t. r. 479 : (A. I. R. (22) 1985 Lah. 81 S.B.); Sir Bisesardas Daga's case, (1936)-4 I.T.R. 66 (Nag.)). In other decisions, the contrary view has been taken that Section 25A requires a physical division or partition by metes and bounds at least in cases where the nature of the property admits of such a division and that a mere division in status or a mere change of coparcenary into a tenancy-in-common by a severance of the joint status is not within the section. (See Saligram Ram Lal's case, (1934) 2 I. T. R. 448 : (A. I. R. (21) 1934 Lah. 942) ; Lachiram Baldeo Das's case, (1936)-4 I. T. R. 279 : (A. I. R. (23) 1936 Pat. 476) ; Gordhandas T. Mangaldas v. Commr. of Income-tax, Bom-

bay, I. L. R. (1943) Bom. 245 : (A. I. R. (30) 1943 Bom. 116) ; Bansidhar Dhandania's case, 23 Pat. 68 : (A. I. R. (31) 1944 Pat. 137) ; Medam Gurumurthi Setti v. Commr. of Income-tax, Madras, 1944-1 M. L. J. 197 : (A. I. R. (31) 1944 Mad. 368). The contention of Mr. V. K. Thiru-venkatachari, the learned advocate for the as-seasee, is that the reference to partition in defined portions in Section 25-A, is wide enough to include an agreement to hold the family property in defined shares, which is a well recognised form of partition under the Hindu law. He states that Section 25-A is a mere machinery section and does not in any way abrogate the rule of Hindu law that the holding of family property in definite shares without a physical division amounts to a partition. Mr. Rama Rao Sahib for the Department maintains that Section 25-A does not recognise a mere division in status as effecting a partition and to this extent it is a deliberate departure from the rule of Hindu law. The further contention of Mr. V. K. Thiru-venkatachari is that there has been something more than a mere division in status in the present case, because the three members of the family have been given each an one-third share in the items of immovable and moveable property kept in common. This is stated to be a partition in defined portions, the word 'portion' being construed as a synonym for

'share.' He also referred to Section 9 of the Act which recognises the holding of house property in definite shares by different persons with a separate liability to assessment.

28. Section 25-A purports to modify the ordinary Hindu law of partition of joint family property to some extent. This is clear from Section 25-A (3). It is not as if every partition that is recognised by Hindu law is accepted as good for income-tax purposes. Section 25-A ignores a mere division of right or interest, i. e., a division in status, and requires a partition of family property into definite portions before a partition could be recognised. Section 25-A must be read as applicable both to Mitakshara and Dayabhaga families. (See Kalyanji Vitthal-das v. Commr. of Income-tax, Bengal, I. L. R. (1937) 1 Cal. 653 : (A. I. R. (24) 1937 P. C. 36)), In a Dayabhaga family, the members hold the property as tenants-in-common and their shares are always ascertained, whether the family be joint or separate. If mere ascertainment of shares and division of the income of the undivided property according to ascertained shares were to be held sufficient to constitute partition into definite portions, Section 25-A would have no effect on Dayabhaga families. When, therefore, the section speaks of a partition of the family properties in definite portions, it means something more than a definition of shares, for shares are already defined in a Dayabhaga family. It is legitimate to construe Section 25-A (1) as referring to a physical division where the property by its nature is capable of such division and in the case of a trade or business which does not admit of such division, by suitable entries in the books. Section 25-A is evidently intended to avoid prolonged and complicated enquiries into the state of the family by requiring proof of an easily demonstrable fact, namely, a physical division or division by metes and bounds, wherever the property admits of such division. I am not unalive to the argument that the words "definite portions" in Section 25-A should not be read in different senses according to the nature of the property to which they are applied. In the case of a trade or business, the nature of the property is such that a partition in definite portions is effected and can be effected only by suitable entries in the books apportioning the capital and profits to the different sharers. Any other mode of division will result in an extinction of the business as an asset of the family which is not required by Section 25-A. The balance of authority is also in support of this view.

29. In Sundar Singh Majithia's sense, I. L. R. (1943) ALL. 69 : (A. I. R. (29) 1942 P. C. 57), the Judicial Committee, after referring both to Mitakshara and Dayabhaga families, observed:

"If, however, though the joint Hindu family has come to an end, it is 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 the context the reference to "definite portions" is not to a mere definition of shares but to a physical division. In Gordhandas Mangal-das's case, I. L. R. (1943) Bom. 245 : (A. I. R. (30) 1943 Bom. 116), Beaumont C. J. and Kania J. came to the conclusion that the expression "definite portions" in Section 25-A referred to a physical division of the property and not a mere difinition or ascertainment of shares in the property. The word "portion" was construed as a separate part of the property and not a share therein. Beaumont C. J, observed :

"The expression 'definite portion' is not appropriate to describe an undivided share in property where all a particular member can claim is proportion of the income and a division of the corpus but where he cannot claim any definite portion of the property. 'Portion' seems to me the apt word for division of property and 'share' for division of interest and it is significant that 'portion' is used in Section 25-A."

With reference to a family trade or business, the same learned Judge said:

"No doubt, the expression 'division in definite portions' will have to be construed with regard to the nature of the property concerned. A business cannot be divided into parts in the same manner as a piece of land; division may only be possible in the boons."

In a later case of the Bombay High Court, it was held that for purposes of the Income-tax Act, a joint family in spite of a severance of Status, continues to exist as a unit or entity till all the properties belonging to the family are completely and finally partitioned. It is only when that condition is satisfied that an order under Section 25A (1) could be made and till such an order is made, the joint family continues to exist as a unit for assessment to income-tax : see Waman Satwappa v. Commissioner of Income-tax, 48 Bom. L. R. 56: (A.I.R. (33) 1946 Bom. 328). To the same effect was a decision of the Lahore High Court in Saligram Ram Lal's case, (1934) 2 I.T.R. 448 : (A.i.r. (21) 1934 Lah. 942), though a somewhat different view was taken in a later Full Bench decision, Sher Singh Nathuram's case, (1934) 2 I. T. R. 479 : (A. I. R. (22) 193S Lah. 81 S. R.) without reference to the earlier case. The Full Bench case related to a family business and Dalip Singh J., who delivered the leading judgment Stated (pp. 482 and 483) :

"One of the properties owned by a joint Hindu family, as is well-known, may be a trading business as in this case. It is difficult to see how this business could be partitioned by metes and bounds or that anything more could be done to it except to ascertain the shares. No particular object could be served by demanding partition by metes and bounds in a business, for all that would be necessary would be to make a book entry separating the capital and separating the out-standings of the firm and then make another entry re-uniting the capital and re-uniting the outstandings of the firm. I do not see what object would be served by this and it seems to me clear that in the case of a business at any rate, the only reasonable meaning of the words 'partitioned in definite portions' must be 'partitioned in definite shares,' The dictionary gives the word 'share' as a synonym for the word 'portion' and similarly it gives 'portion' as a synonym for the word 'share.' I am not able to see why the word should not take its natural meaning rather than the somewhat forced meaning that partition in definite portions means a partition by metes and bounds."

Where the family property consists only of a business, the above observations would hold good; but if they go further and were meant to apply even to properties capable of a physical division, I must respectfully express my dissent.

30. In Biradhmal Lodha's case, 56 ALL. 504: (A.I.B. (21) 1934 ALL. 217), the point now under consideration did not directly arise for decision but Niamatullah J. in the course of his judgment expressed the opinion that a division by metes and bounds was not an indispensable requirement of

Section 25A and that a disruption of the joint family by a division in status was enough. The words "a separation of the members of the family has taken place" which existed in Section 25A, as it then stood, were relied upon by the learned Judge in support of his conclusion. But Section 25A, as it then stood, also required a partition into definite portions in addition to "a separation" of the members. In any case, the Legislature omitted the words above quoted from Section 25A, by the amending Act of 1939 evidently with a view to overrule the view of Niamatullah J. Otherwise, those words would have been retained and the requirement of a partition "in definite portions" would have been omitted. In a brief judgment of this Court in Gurumurthi's case, (1944) l M.L.J. 197 : (A.I.R. (3l) 1944 Mad. 368), it was held that the fact that the members are divided in status and have agreed to hold the property in defined shares would not attract Section 25A unless all the assets have also been divided. The learned Chief Justice observed :

"There is a distinction to be drawn between separation of status and partition of family property. As pointed out by the Privy Council in Sundar Singh Majithia's case, (1942) 10 I. T. R. 457 : (A. L R. (29) 1942 P. C. 57), Section 25A refers only to a partition of the property, . . . Partition means a completed partition. The fact that some assets are divided and others are left for division at a future date would not be a partition within the meaning of the section."

The view of the Patna High Court is the same as that of this Court and the Bombay High Court. In Bansidhar Dhandania v. Commissioner of Income-tax, B. & O., 23 Pat. 68: (A.I.R. (31) 1944 Pat. 137) that Court held that Section 25A (1) required a physical division of the entire family properties among the members of the family or groups of members and that a mere division in status or definition of shares was not enough. Where, however, a physical division is not feasible, as in the case of a business, partition in definite shares by book entries would be enough.

31. As a result of the foregoing discussion, I arrived at the following conclusions: Section 25A, Income-tax Act, provides the machinery for computing and assessing the income of a joint Hindu family which existed during the year of account but has ceased to exist during or prior to the year of assessment. It ignores a mere severance in status, though it would put an end to the joint family under the Hindu law. In spite of the severance, the joint family continues to exist as a "person" or legal entity for purposes of income-tax and is liable to be assessed as such, until all the properties belonging to the joint family are finally and completely partitioned. An order under Section 25-A (1) could be made only when, in addition to a severance in status, there has been a partition of all the family properties among the members and until such an order is made, the family is deemed to be an undivided Hindu family for purposes of income-tax, notwithstanding the severance in status and a partition of some of the properties. In the case of property that admits of a physical division or division by metes and bounds, such division is necessary to satisfy the requirement of a partition "in definite portions" found in Section 25-A. In the case of trades and businesses, there need not be a winding up and division of the goods, outstand-ings and assets in order to satisfy the section. An allotment of a business exclusively to one member or a division of the capital and out-standings of the business in definite shares among the members in the books, coupled with the crediting of the receipts and debiting of the expenses pertaining to the share of each member, would be a sufficient compliance with Section 25-A. The divided members would then be in the position of partners of a firm. If, having regard to the nature of the property, what has been done amounts to a division of the

entire family properties in definite portions, an order under Section 25-A (1) could be passed.

32. In order to prevent possible misconception and hardship, it is necessary to emphasise that under Section 25-A (2) it is only the total income of the joint family in the previous year that is assessed. If by reason of a partial partition effected in a particular year the family businesses alone are divided and each of the members is exclusively allotted a separate business for his share, the income from the businesses subsequent to the division would not be part of the income of the joint family, because the businesses have ceased to be joint family pro. perty. Again, if the members of a joint Hindu family enter into a partnership in respect of a portion of the joint family property which they have divided among themselves, then the property so held in partnership is taken out of the joint family and the income derived by the partnership is not the income of the joint family. If the family moveables, stocks, shares, securities and cash alone are divided among the members, each getting particular moveables or a number of shares and securities or a sum of money exclusively for himself, the lands and houses being left undivided, the income from stocks, shares and securities allotted to the different members would not be the income of the joint family after each division and allotment. In all these cases, where only a portion of the joint family property has been partitioned, the portion so partitioned ceases to belong to the joint family but the joint family still remains and so long as the joint family remains, no order under Section 25-A (1) could be made. But the income of the joint family would comprise only the income arising from such portion of the family assets as have not been partitioned among the members or assigned to one of them on partition. Even though there has been a disruption of the joint family by a division in status, still for purposes of income-tax the joint family is deemed to continue till all the properties have been partitioned. But it is only the income received from the properties not partitioned that would be considered to be the income of the fictional joint family and liable to tax as such. This is the result of Section 25-A(1) and (3) of the Act. It is fallacious to argue that if a joint family becomes divided in status, all its assets must be deemed to be the assets of the joint family and all the income derived therefrom must be deemed to be the total income of the joint family till the final or physical partition of every item of the family property is completed. It may be that between the division in status and the partition of the last item of the family properties, as a result of intermediate arrangements among the members of the family, some part of the assets has been parted with to a stranger or even to one of the members of the family as his own separate and exclusive property. It may be that the divided members enter into a partnership with reference to a family business after dividing it by book entries. In such cases, though the family which is divided in status is deemed to be an undivided family under Section 25-A(3), by reason of the fact that the actual division of the properties has been partial and not total, as required by Section 25-A (1), still the family is deemed to be joint for purposes of income-tax only to the extent of those assets that have not been partitioned. To the extent the family assets have been actually partitioned or taken away from the family and allotted exclusively to the individual members, those assets cannot be considered to be the assets of the artificial joint family created by Section 25-A (3). Nor could that joint family be assessed to income-tax under Section 25-A (2) on the income derived from such assets. Authority in support of the above conclusions will be found in tbe decisions of the Privy Council in Sundar Singh Majithia's case, I. L. R. (1948) ALL. 69 : (A. I. R. (29) 1942 P. C. 67) and of the High Courts in Bansidhar Dhandhania's case, 23 Pat. 68 : (A. I. R. (3l) 1944 Pat. 137) and Waman Satwappa's case, (1946) 14 I. T. R. 116 : (A. I. R. (33) 1946 Bom. 328).

33. Though there has been a division of the business there has not been a partition of moveables nor a partition of immovable properties into definite portions in the present case. Therefore my answer to the question referred to us is that there has been no parti-

tion within the meaning of Section 25-A, Income-tax Act. I agree with my learned brother in the direction for costs.