PARTITION

I. HINDU LAW CONCEPT

The right of partition, like the right of self acquisitions is an off shoot of the growing pressure of individualism. Partition according to Mitakshara, is "the allotment of definite shares to individual members of property over which many persons have joint ownership". This definition emphasises the doctrine of samudayik swavavada or communal ownership. It assumes that the ownership of individual coparceners in a joint family extends to the whole of joint family property and explains that by partition this state of overlapping ownership

1. विनिशिष्ट जातः में सत्ता अति समुदायक सत्ता अवस्था लागू -
   सत्ता समुदायिक

Mitakshar on Yajnavalkaya, II, 114.
terminates with the result that each coparcener becomes the exclusive owner of the allotted share of the property. Jimuthavahana on the other hand defines partition as "particularizing the ownership of an individual member which ownership appertains to a portion of the joint family property although such portion may not have been defined specifically". He emphasises the doctrine of pradesika swatvatvad i.e., the ownership of a coparcener extending over a particular portion of the property although such portion is not ascertained and not available for exclusive enjoyment until partition is effected. It is interesting to note that Nilakantha and Raghunandana, not only do not agree with the definition given by their respective masters, but lean in favour of the definition given by the opposing school. Be it as it may, partition terminates the existing corporate structure of a joint family and signifies the triumph of


The effect of a partition is to dissolve the coparcenary, with the result that separating members henceforth hold their respective shares as their separate property, and the share of each member will pass on his death to his heirs. But if a member while separating from his other coparceners, continues joint with his own male issue, the share allotted to him on partition will in his hands retain the character of a coparcenary property as regards the male issue.

In a joint Hindu family governed by the Mitakshara law, no individual member of that family, while it remains undivided, can predicate that he has a certain definite share in the property of the family. The rights of the coparceners are defined when there is partition. The concept of partition according to Mitakshara school consists in defining the shares of the respective coparceners in the joint property, an actual division of the property by metes and bounds is not necessary to constitute partition. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. The parties may, thereafter, choose to divide the property by metes and bounds, or may continue to live together and enjoy the property in common as before.

4. Ibid.
But whether they do the one or the other, it affects only the mode of enjoyment but not the tenure of the property.
The property ceases to be joint immediately the shares are defined and thereafter the parties hold the property as tenant in common. Partition is thus the severance of joint status and is a matter of individual volition. All that is necessary therefore to constitute a partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Amongst the various modes of partition, in each case conduct must evidence unequivocal intention to sever the joint family status. Motive behind partition is immaterial. It is from the intention to sever followed by

6. See Rewun Persad v Radha Beeby (1846) 4 M.I.A. 137; Appovier v Rama Subba Aliyan (1866) 11 M.I.A. 75; Suraj Narain v Jugal Narain (1913) 35 All. 80; See also Mulla, Hindu Law, 13th Edn. (Reprint 1970), pp. 372, 373.

7. Puttrangamma v M.S. Rangamma, A.I.R. 1968 S.C. 1018 (It is well established that once the intention is declared and its communication made, the severance of status takes place, assent or dissent of the other coparceners is immaterial); Madugoda Goudappa Saiky v Ram Chandra, A.I.R., 1969, S.C. 1076; See also Syed Kasam v Jorawar Singh, A.I.R., 1922 P.C. 353; Ashutosh Rath v Vysyaraju Badrinarayan (1972) 38 C.L.T., 857; A Katheswama v A. Veechu, A.I.R. 1951 Mad. 561; Raghunath Kar v Gajendra Kar, A.I.R. 1973 Ori. 157.

8. Suraj Narain v Jugal Narain (1913) 35 All. 80; Soundarsajan V Arunachalam (1905) 39 Mad. 159; Girja Bai v S. Dhundiraj, A.I.R., 1910 P.C. 104.
conduct which seeks to effectuate that intention, that partition results: mere specification of share without evidence of intention to sever does not result in partition. It is not necessary that there should be an agreement between all the coparceners for the disruption of the joint status. It is immaterial in such a case whether the other coparceners give their assent to the separation or not. As a general rule both under Mitakshara and Dayabhaga schools every coparcener has a right to partition and every coparcener is


10. Mudigowda Gowdappa Sanuk v Ramchandra Revgowda (dead) by a legal representative and another, A.I.R. 1969 S.C. 1076; Puttamanamma v M.S. Ranganna, A.I.R. 1968 S.C. 1018; Byed Kasam v Jorawar Singh, A.I.R. 1922, P.C. 353; Ashutosh v Vyasraj (1972) 38 C.L.T., 857; A.Kathesuma v A.Veechu, A.I.R. 1951 Mad., 561; Raghumath Kar v Gajendra Kar, A.I.R., 1973 Ori., 157; Suraj Narain v Iqbal Narain (1913) 35 All. 80 (P.C.); Girja Nandini v Sadashiv Bhundiraj, A.I.R., 1916, P.C. 104; see also Rukmabai v Laxminarayan, A.I.R., 1960 S.C. 335; (A coparcener expressing his intention to sever need not give any reason. Motives are also irrelevant. Nor does it matter, in what form and what manner communication of an intention is made. However, the expression of an intention must be a conscious and informed act; sham documents, or even statements and admissions serving a genuine purpose, but made in ignorance of correct legal position, may not be a satisfactory evidence of severance).
entitled to a share on partition. Apart from the coparceners, no one else has a right to partition. No female (though member of Hindu joint family) has a right to partition, but if partition takes place, there are certain females who are entitled to a share. An alienee of coparcener's interest, wherever such an alienation is valid, has also a right to partition, to get the undivided interest of the coparcener (alienor) by filing a suit, but such a partition is entirely different than that made at the instance of a coparcener.

11. There are also certain exceptions to this general rule:
(a) an unqualified coparcener has no right to partition, and (b) in Bombay school sons cannot ask for partition against their father if the latter is joint with his own father or collateral. Another qualification to the general rule recognised under the Mitakshara jurisdiction is that the father's right to partition is superior to the right of partition of all others. The father can, not only effect partition between himself and his sons, but he can also impose a partition on his sons inter se. This does not apply under the Dayabhaga school. Since the Dayabhaga father is the absolute owner of all properties, and the question of partition during his life time does not arise, though he can, if he likes, distribute his properties among his sons. See for details, Dewan, P., Modern Hindu Law, 1979 Edn. p.283.

12. Father's wife, mother and grand-mother; under the Hindu Women's Right to Property Act, 1937, a Mitakshara Coparcener's widow took the same interest (Contd.....)
Under the Mitakshara, as said before, there are always two steps in a complete partition. That is first the definition of shares which is technically called "division in interest" or "division of status" which may be brought about by agreement, by filing a suit, or by expressing an intention to divide, and second there is a physical division of the property or to which we may call "division by metes and bounds" and which may take place, years after the division in interest. But under Dayabhaga system the members of the joint family are divided in interest; they are in a position analogous to that of tenants in common that is to say, they are originally in the same position as the members of a Mitakshara family after the family has disrupted, and there has been a division of interest.

... which her husband had at the time of his death. She has also been given the right to partition under the Act. But the partition is not equivalent to partition initiated at the instance of coparceners.

This Act of 1937 since repealed by the Hindu Succession Act, 1956, and under this Act coparceners interest in the coparcenary property devolves by succession by virtue of Section 6 of the Act among the males and females given in Class I of the Schedule simultaneously.

13. Normally it does happen. Division of status is therefore possible even though no partition by metes and bounds takes place (see Gur Narain Das v Gur Tabal Das, A.I.R., 1952, S.C. 225 at p.227) but with this type of division Income-tax Law is not concerned at all.

(1) **Severance of Status**

The genesis of individual volition (हृदेन्द्रिय) bringing about a severance in joint family can be traced from the text of Yajnavalkya:

"In land, corrodty (annuity,etc.), or wealth received from the grandfather, the ownership of the father and the son is only equal".

Text is commented by Vijnanesvara thus:

"In property obtained by a paternal grandfather through gifts, conquests etc., the ownership of both the father and the son is well known to the world and therefore there is a partition (of his property). Because there is equal right, therefore, the partition is not merely at the desire of the father nor does the father get a double share".

---

15. **Severance of status may be partial or total and it may be partial as to persons or partial as to property.**

16. Yajnavalkya _mrityi_, Ch.II-121.

17. **Mitakshara,646-48 (Trans.Setlur)**
It is now a settled doctrine of Hindu law that any member of a joint Hindu family can bring about separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. If this is done it would amount to division of status, whatever mode be used. The jural basis of the doctrine has been expounded by the early writers of Hindu law. These texts do not give clear

And thus though the mother is having her menstrual courses (has not lost the capacity to bear children) and the father has attachment and does not desire a partition, yet by the will or (desire) of the son a partition of the grand-father's wealth does take place.

*Vijnaneswara:* See Mit., 1. V.8.

From this it is known that without any speech (or explanation even by means of a determination (or resolution) only partition is effected, just an appointed daughter is constituted by mere intention without speech.

*Saraswathi Vilasa Placitum,* 28.

(Contd...)
indication to construe the intention of the individual member and certain allied questions like mode of communication of intention, date from which severance is effective and for the answer we have to look to judicial decisions. From the study of early texts we find

Here too there is no distinction between a partition during the life time of the father or after his death and partition at the desire of the sons may take place or even by desire (or at the will) of single coparcener.

Viramitrodaya of Mitra Misra, Ch. II, 23.

Even in the absence of any common (joint family) property, severance does indeed result by the mere declaration. "I am separate from thee" because Severance is a particular state (or condition) of mind and the declaration is merely a manifestation of this mental state (or condition).

Vyavaharamayukha of Nilkanthabhatta, Ch. IV, Sec.iii-I.
that emphasis is laid on "budhi visesha" (particular state or condition of the mind) as the decisive factor in producing a severance in status and the declaration is stated to be merely "abhivyanjika" or manifestation which might vary according to circumstances. The rule of law applicable to cases of separation from the joint undivided family was categorically laid down in Suraj Narain V Iqbal Narain19 thus:

"What may amount to a separation20 or what conduct on the part of some of the members may lead to disruption of the joint undivided family, and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severality, may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed".

In Giria Bai V Sadashiv Dhundiraj21, the judicial Committee examined the texts relevant to the point of Hindu law and

19. (1913) 35 All., 80 (P.C.).
20. If one of the coparceners mortgages his share in all the properties in favour of other coparceners. This act on the part of one of the coparceners cannot have the effect of severance of status because of the fact that for severance of status one must express his unequivocal intention to separate from the joint family and enjoy his share in severalty. (sri Laxminarayana Udpe V Padmanabulapa, A.I.R., 1972, Mys., 81 at p.63).
referred to the distinction that exists between a severance in status so far as the separating member is concerned and de facto division into specific shares of the property held until then jointly, and laid down the law as under:

"One is a matter of individual decision, the desire on the part of any member to sever himself from the joint family and enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that, by the intervention of the court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the court has simply to give effect to his right to have his share allocated separately from the other".

Again in Syed Kasam V Jorawar Singh, it was observed

22. A.I.R., 1922 P.C. 353; See also A. Raghayamma V A. Chenchamma, A.I.R., 1964 S.C., 136; (It was held that a member of a joint Hindu family seeking to separate himself from others will have to make known his intention to other members of his family from whom he seeks to separate); Puttrangamma V M.S. Rangamma, A.I.R., 1968, S.C. 1018 at pp. 1020-1022 see for latter developments.
"It is settled law that in the case of a joint family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place, and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree".

From the judicial approach it is clear that the 'intention' to separate by a person or persons to be effective it is essential that such 'intention' to separate should reach the other member or members of the joint Hindu family by any process appropriate to the given situation and circumstances of the particular case. It is worth noticing that the cases which establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the de facto division into specific shares of the property held until then jointly.\textsuperscript{23}

\textbf{Communication- when effective}

A series of decisions\textsuperscript{24} of the Madras High Court laid down that the severance of status is effective with effect

\begin{itemize}
\item \textsuperscript{23} Supra f.n. 21 at p. 108.
\item \textsuperscript{24} Rama V Meenakshi, A.I.R., 1931 Mad. 278; Narayana V Purushottama, A.I.R., 1938 Mad. 390; Indira V Sivaprasada, A.I.R., 1953 Mad. 461.
\end{itemize}
from the date on which communication was made. After reviewing all the authorities Supreme Court in *Raghavamma V Chenachamma*, Subba Rao, J., came to the following conclusions:

(a) The communications of intention to sever must be communicated to all interested parties;

(b) Communications of intention received by interested parties will relate back to the date of notice i.e. severance will be effective from the date on which the communication was put into transmission; but this is subject to next proposition;

(c) The vested right that might accrue in the interval, between the date of transmission and receipt, are preserved.

This was explained thus:

"But between two dates, the person expressing his intention may lose his interest in the family property; he may withdraw his intention to divide, he may die before his intention to divide is conveyed to the other members of the family; with the result that his interest survives to the other members. A manager of the Joint Family may sell away the entire family property for debts binding on the family. There may be similar other instances".

26. The notice to the Karta is enough in certain cases.
His Lordship advanced the rationale thus:

"If the doctrine of relating back is invoked without any limitation thereon, vested rights so created will be affected and the settled titles may be disturbed."

We find that when an unequivocal intention to separate of the coparcener comes to the knowledge of other coparcener whatever the mode of communication is employed by the coparcener is immaterial, the severance of status takes place with effect from the moment the intention is communicated. The family is disrupted after the expression of intention to separate is made and the coparcenary comes to an end. No act done by any member of a joint family, can operate as a partition, unless it has been done with the intention to put an end of his status as a coparcener and acquire a new status of a separate owner. Partition according to Hindu Law, consists in a numerical division of the property; in other words, it consists in defining the shares of coparceners in the joint

28a. Emphasis supplied.
29a. Emphasis supplied.
29b. Emphasis supplied.
property; an actual division of the property by metes and bound is not necessary. 30 Once shares are defined whether by agreement between the parties or otherwise, the partition is complete. The property ceases to be joint immediately the shares are defined, and henceforth the parties hold the property as tenants in common. 31

When a suit is filed by a member of the coparcenary governed by Mitakshara Law that is clearly an unequivocal intimation of his intention to sever his joint status from the date when a suit is instituted. 32 In Puttrangamma V M.S.Ranganna 33, Ramaswami, J., said:

"that the process of communication may vary with the circumstances of each particular case. The proof of formal despatch or receipt of communication by other members of the family is not essential, nor its absence fatal to the severance of status. What is necessary is that the declaration to be effective should reach the person or persons affected by some process appropriate to the given situation and circumstances of the particular case".

30. Appovier V Rama Subba Adyan (1866) 11 M.I.A., 75 at pp. 89-90; Ram Pershad V Lakhpati (1903) 30 I.A.; Shoodan V Balkaron (1921) 43 All. 193; See also Mulla, Principles of Hindu Law, 13th Edn. (reprint 1970) at pp. 372-373.


33. A.I.R., 1968 S.C. 1018; See also Mudigowda V Ram Chandra,
In this case the Karta, who had daughters only and was in the hospital, posted registered letters intimating his intention to sever. The coparceners, having known his intention, prevailed upon him and in consequence thereof, the letters were withdrawn from the post office before they reached their destination. The Court concluded that the communication was sufficient and effective and it could not be withdrawn and the division of status of Karta from the joint Hindu family had taken place with effect from the date of the notice. As to the question whether notice to Karta alone would be enough, the Supreme Court indicated that it will not be enough, but it should be given to all interested parties. That view may be correct keeping in view the circumstances of that case but we do not agree with this conclusion because Karta is to act for all and a notice to Karta who is the custodian of the joint family property is sufficient. As to question whether notice be served on major members or substantial body of them or it

---

A.I.R. 1969 S.C. 1076; Bijoy Kumar Burman v I.T.O. (1972) 84 I.T.R. 71 (the disruption of Hindu undivided family takes place on the institution of a suit for partition and the joint status comes to an end).


35. Communication to Karta or to heads of different branches is enough and effective.
should be served on all. Paras Dewan is of the view that if it is communicated to all the coparceners, it is sufficient; no one else need be communicated. Last assertion is confusing and misleading and we do not agree with it as notice under law is to be given to coparceners only and when it is served on all the coparceners then who remains behind to be served with notice. As for the minors are concerned notice to Karta is enough.

(ii) Partition by metes and bounds

Once the shares are defined, there is severance of joint status. The parties then make a physical division of the property, this is known as partition by metes and bounds. The fakeness or genuineness of a partition should not be confused with an arrangement that a joint family may make for convenience's sake under which coparceners divide the property while remaining joint. Such arrangements are recognised in law. They do not amount to partition and from them no

36. Emphasis supplied.
38. Pandy V Venkata (1968) 1 A.P.W.R. 36 (This is a correct position).
inference can be drawn, that a partition has taken place, howsoever long an arrangement may continue, unless it is shown that subsequently coparceners agreed to partition and apportion the respective portions of properties in their possession. Hindu law does not require that the property must in every case be partitioned by metes and bounds if separate enjoyment can otherwise be secured according to the shares of the members as mere "severance of status" is considered as partition.

From the earlier study it is clear that under the Hindu concept of law there was no provision of partition on the individual volition of the sons. Son's right by


41. After the death of the father and of the mother, the brothers having assembled, may divide among themselves in equal shares the paternal (and the maternal) estate; for they have no power (over it) while the parents alive.

Manu IX, 104.

Gautama XV, 15, 19.

(Contd...)
birth and right to partition are in fact the later developments beginning by the end of Sutra period. Likewise as a general rule the entire joint family property is subject to partition and every partition is a total partition and made once, but we find that partition may be partial or total and it may be partial as to persons or partial as to property which is also the later developments and a triumph of individualism.

It must be remembered that partition of joint Hindu family property is not a transfer in the strict sense. Partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty.

Gautama imposed even religious sanction that a son who enforces partition against the will of his father should be excluded from funeral repasts.

42. Once is the partition (of inheritance) made, (once is) a maiden given in marriage, (and) once does (a man) say, 'I will give'; each of those three (acts is done) once only.

43. Gutta Radha Krishna V Gutta Sarasamma, A.I.R., 1951, Mad. 213; C.I.T. V Kesnav Lal Lallubhai Patel (1965) 55 I.T.R. 637 (S.C.); See also Girja Bai V S. Dhundiraj, A.I.R. 1916 P.C. 104 at p. 107. "Partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed what is effected by partition is only the adjustment of the proprietary right into specific shares".
Each one of the sharers had an antecedent title and therefore no conveyance is involved in the process as a conferment of a new title is not necessary. Obviously no question of transfer of assets can arise when all that happens is separation in status, though the result of such severance in status is that the property hitherto held by the coparcenary is held thereafter by the separated members as tenants in common. Subsequent partition between the divided members of the family does not amount either to a transfer of assets from that body of the tenants-in-common to each of such tenants-in-common.

II. DISRUPTION OF HINDU UNDIVIDED FAMILY UNDER THE INCOME-TAX LAW

There is nothing in the Income-tax Law which prevents the members of a Hindu joint family from dividing any asset. Such division must, of course, be effective so as to bind

---

44. Although the words "definite portions" used in S.25A(1) of the Income-tax Act (1922) do not appear in S.171 of the 1961 Act, Explanation (a) to that section makes it clear that a physical division of the income without a physical division of the property, which is capable of physical division, is not to be deemed a partition nor a mere severance of status. Explanation (a) (i) lays down that where the property admits of a physical division, a physical division of the property, and not a mere division of its income, amongst the members will constitute a

(Contd....)
the members. Partition to be effective must be by metes and bounds as mere breaking up a joint status is not enough as is the case under the Hindu law. The question of severance of status is a complicated one and it becomes more complicated as far the income-tax cases are concerned, as a Hindu joint family may make a fake or notorial partition to avoid the tax incidence. In such a case question arises as to whether such a fake claim of partition can be taken as genuine one by the Income-tax Officer? The answer is that if the fakeness is given the garb of reality, then this must be taken as genuine partition. If the expression of intention is a mere preference or a sham, there is, in the eyes of law, no separation of joint family status. The necessary requisites for an order recording partition under section 171(3) are:

(1) that the Hindu undivided family which is seeking to obtain an order that a partition has taken place among its members, should have been hitherto assessed as undivided;

---

"partition" within the meaning of Section 171 of the 1961 Act. Explanation (a)(ii) lays down that where the property does not admit of a physical division, then such division as the property may admit of shall be taken to be a "partition". See Kalloomal Tapeshwari Prasad V C.I.T. (1973) Tax L.R. 697 (All.).


46. Mudigowda V Ram Chandra, A.I.R. 1969 S.C. 1076; see also (Contd...)
(2) that at the time of making an assessment under section 143 or section 144, for a particular year, a claim must have been put forward by or on behalf of any member of the family that a partition, whether total or partial\(^7\) has taken place among the members of the family; and

(3) that on such claim being put forward, the Income-tax Officer is required to make an enquiry into the matter and, before doing so, is bound to give notice to all the members of the family.

On the completion of the enquiry, if the Income-tax Officer is satisfied that there has been effected a partition total or partial, of the joint family property, he has to record a finding to that effect and also to record the date on which it has taken place.\(^8\)

---


\(^8\) Partial partition is not recognised now vide Finance Act, 1980. But the partial partitions having taken place before 1.1.1979 would continue to be recognised for Income-tax Assessment purposes.

It may readily be seen that for the purpose of section 171, "Partition" or "partial partition" must be of the

49. As far the rule of partial partition is concerned that is the same as under the personal law of Hindus. The distinction is only as regards the "division of status". Under Hindu law mere breaking up a joint status is considered as partition while under Sections 171(a)(1) and (ii) of the Income-tax Act partition is only acceptable when it is by metes and bounds.

In the case of partial partition, section 25A of the 1922 Act had no application. But where the entire joint family was, in fact, disrupted in status and where the properties of the family were partitioned between the members thereof in definite portions, it was held that the assessee was entitled to an order under section 25A(1) of the 1922 Act, notwithstanding that some items of the family properties which were comparatively small in proportion to the entire family assets and which produced only a substantially small income in relation to the total income of the family, were kept undivided for solid and substantial reason whether of practicability, convenience or reasonable sentiment not affecting the general bonafide intention of becoming completely separated units for all purposes. (Ranglal Modi V C.I.T. (1960) 18 I.T.R. 383 at p.395); Section 171 of the 1961 Act applies to a case of partial partition also (Motilal Shyam Sunder V C.I.T. (1972) 84 I.T.R. 186 (All.); Govinddas V I.T.O. (1976) 103 I.T.R. (S.C.)- Under section 25A of the 1922 Act the only partition which could be recorded was the total partition and not partial partition. Whether a particular asset of a family is capable of partial partition or not will depend upon the nature of asset. It may be that a business or a share cannot be divided partially. But it does not follow that no single item can be subjected to a partial partition. For instance the family may easily divide the whole or part of the capital standing in its credit in a business (Brij Mohan Lal Rameshwar Lal V C.I.T. (1971) 82 I.T.R. 173 (All.).

Even apart from these provisions, a partial partition can validly be effected by the members of the joint family (see C.I.T. V Kishori Lal Sunder Lal (1968) 69 I.T.R. 229 (Funj.); Brij Mohan Lal Rameshwar Lal V C.I.T. (1971) 82 I.T.R. 173 (All.).
type as defined in the explanation to that section. The mere breaking up of joint status is not enough: Explanation reads as:

(a) "Partition" means:

(i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or

(ii) where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition;

(b) "partial partition" means a partition which is partial as regards the persons constituting the Hindu undivided family, or the properties belonging to the Hindu undivided family, or both.

The provisions of section 171, though similar in many respects to the provisions of section 25A of the 1922 Act, undoubtedly contain some innovations. Where it is found

50. **Under section 25A of the 1922 Act:**

(1) The partition operated where the joint family property had been partitioned among the various members or groups of members in definite portions.

(2) The machinery available for personal recovery of the tax assessed on the Hindu undivided family was available only where the partition of the family was complete.

(Contd....)
that a family has disrupted by metes and bounds in definite portions from a particular date and an order to that effect is recorded by the I.T.O., the income upto the date of disruption will be assessed as if a partition had not taken place. The charging section imposes charge on the total income of the previous year of every person and "person" has been defined as including a Hindu undivided family. The Hindu undivided family is assessed as a distinct entity, and when once it is assessed as such - unless a complete disruption is recorded by the Income-tax Officer, the assessment is required

.... (3) The recording of an order of partition could be made only if a member claimed at the time of making an assessment that a partition has taken place.

Under section 171 of the 1961 Act:

(1) The provisions are more comprehensive and include within them a case of partial partition.

(2) The machinery is now available in both the cases, namely, where there is a total as also a partial partition.

(3) On claim being made, the I.T.O. is bound to make an enquiry and record a finding. Even without any such claim having been made, the I.T.O. is entitled of his own to act under section 171(6) and that even after an assessment has been completed.

to be continued, on the Hindu undivided family as such. 51
The deeming provision in section 171(1) 53 of continuation of the joint status of a family can have application only where the family in question has been assessed as a Hindu undivided family in the preceding previous year. Section 171(1) does not permit the assessing authority to create a family by rejoining divided parts of a family. Section 171(1) refers to a family known to law and not one which can be deemed so by the authority. If once, the Income-tax Officer has accepted a partition and has assessed the disrupted

51. See Piyarelal and others V C.I.T. (1933) 1 I.T.R. 215; Ganesh Dass Ram Singh of Benelgonj in re; (1941) 9 I.T.R. 311; Raja Singh Obera V C.I.T. (1934) 1 I.T.R. 331; Makhan Lal Ram Sawroop, in re; (1945) 13 I.T.R. 46; to the question whether a Hindu joint family has partitioned or not is a question of fact. See also Nihori Lal Prabhu Davai V C.I.T. (1951) 19 I.T.R. 240 (the burden of proving that partial partition has taken place is on the assessee).


53. 171(1) reads:
"A Hindu family hitherto assessed as undivided shall be deemed for the purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the Hindu undivided family".
members as provided in section 171(4)\(^5\), he cannot again proceed, for any year, to assess the members, in the status of a joint family.\(^5\)

Partition - A question of Fact or Law

Whether an undivided Hindu family has been disrupted or not is a question of fact depending on the intention of the members and a finding of the Income-tax Officer on the circumstances that there was no intention to divide is a

54. 171(4) reads:

"Where a finding of total or partial partition has been recorded by the Income-tax Officer under this section, and the partition took place during the previous year -

(a) the total income of the joint family in respect of the period upto the date of partition had taken place; and

(b) each member or group of members shall, in addition to any tax for which he or it may be separately liable and notwithstanding anything contained in clause (2) of section 10, be jointly and severally liable for the tax on the income so assessed".

finding of fact. But whether there was evidence on which it was open to the Income-tax authorities to come to such a finding is a question of Law. The finding in that regard should be arrived at by making a correct approach to and applying the proper principles of law. If there is a misdirection on the part of the Income-tax authorities in law in arriving at the finding, that is an error apparent on the face of the order which justifies the exercise of certiorari jurisdiction. But the legal effect of each disruption is a question of law for purposes of a reference.


III. DISTINCTION WITH HINDU LAW CONCEPT

PHYSICAL DIVISION

The explanation to section 171 of the 1961 Act, puts the matter beyond the pale of controversy regarding the principle applied under section 25A of the 1922 Act which required the partition of Hindu undivided family properties "in definite portions". A mere division of interest or mere change of the Hindu undivided family to a tenancy in common is not enough as is under the concept of partition under the personal law of Hindus. Under the Hindu law once the shares are defined, the parties may divide the property by metes and bounds or they may continue to live together and enjoy the property in common. In either case only mode of enjoyment is changed and not the tenure of the property. Under the Hindu law after the division of status, parties henceforth hold the property as tenants in common. Under

this Act it is not enough that the Hindu undivided family
has come to an end, but it is necessary to prove a partition
by metes and bounds, or a physical division of Hindu undivided
family property, wherever possible. Mere division of income
without a physical division of property will not be deemed
to be a partition. This is the distinction between Hindu
law rule and the rule under the Income-tax Act 1961. Under
Hindu law partition is effective by division of status or
division of properties by metes and bounds. Total partition
means complete partition of all the family properties

61. As stated earlier.

(Mys.); M. Balasubramaniam v Ag. I.T.O. (1973) 87 I.T.R.
623 (Mad.); Fatehchand Mahesri v State of W.B., A.I.R.
1972 Cal. 177; Kamakshi Ammal v Balakrishna Pillai, A.I.R.
372-374; See also Gour, H.S., The Hindu Code, p. 66(2nd ed.)
wherein it is stated:

"(1) Partition is the intentional severance of
coparcenary interest by members of a joint
family;

(2) An unequivocal expression of an intention to
separate such interest may amount to partition;

(3) Partition may be effected by the defining of
rights or by the division of property by metes
and bounds".

p. 670 (S.C.); See also Rameshwar Prasad Singh v Sheo-
including the properties yielding no income. The provisions of S.171 are mandatory. They apply also to cases where the claim relates to a partition which took place before or after the close of the accounting year in question. For the application of S.171 there must be positive evidence to show that a complete or partial partition has taken place, in fact, amongst members in relation to entire or a part of property formerly belonging to Hindu undivided family. It cannot be presumed that a partition has been effected. Merely transferring certain sums or assets of the Hindu undivided family to the members, in equal or unequal shares is not enough. A physical division of the family property in definite portions among all the members is not necessary; it is enough if on the physical division groups of members are allotted different properties, and a group may then hold its property as a smaller joint family or as tenants in common. This section would have no effect at all on families under Dayabhaga system unless it requires

64. Meyyappa Chettiar V C.I.T. (1950) 18 I.T.R. 586 (Mad.).
   Mammad Keyl V W.T.O. (1966) 60 I.T.R. 737 (Kerala); P.M.
   (Ker.).
66. C.E.O. V Suresh Chandra (1973) 91 I.T.R. 42 (Delhi);
   (Contd...)
a physical division of the property into definite portions because their shares are already defined and they are required to have it individualized by making partition by metes and bounds. Partition of the family property means division of property physically and not mere division in interest as we find under the Mitakshara Law. If the property has been divided physically in definite portions, the Income-tax Officer cannot refuse to recognise the partition merely because the shares allotted to the various members are not in accordance with the parties' rights, or because the interests of minor coparceners are prejudiced by inequality of the division of property. Even in a case where the property is not divided by metes and bounds, if a separated member alienates his share in such property, the joint family cannot be assessed on the income from the alienated share in the property, although an order under this section may not have been passed. However,

---

the expression "Partition" must be construed with regard to the nature of the property concerned. A business cannot be physically divided into parts in the same manner as a piece of land; division may be possible only in the books of the business; i.e., by making appropriate entries in the books of accounts; and in such a special case, having regard to the nature of the property; a partition may be recognised under this section even if there is not, and cannot be, a physical division of the property. The explanation to section 171 makes it clear that whereas in the case of property which admits of a physical division, a physical division of property is necessary and merely physical division of the income is not enough; where the property does not admit of a physical division partition means such division as the property admits of, and in


All these cases are concerning partition of business except the first one.
such a case even a physical division of the income may be enough. For instance, a share in a firm in which the Karta
is a partner representing the family, may be effectively partitioned by dividing the income and making appropriate entries in the books of account.\textsuperscript{74} If the shares of a company belong to a joint family but stand in different lots in the individual name of each of the members of the family, and if on partition of the family each member takes the share standing in his own name, needless to say the shares are "Partitioned" within the meaning of this section.\textsuperscript{75}

Before the 1961 Act, Section 25A of the 1922 Act required the satisfaction of the I.T.O., to the effect that joint family's properties have been partitioned in "definite portions" among the various members or groups of members. These words indicated a physical division in which a member or group of members took a particular property with the right to hold, enjoy, dispose of or even destroy it. The expression "definite portions" was not appropriate to describe an undivided share in Hindu undivided family, where all or a particular


member or group of members could claim, was a proportion of the income, and a division of the corpus, but he or they could not claim any "definite portion" of the property. An order recording partition could be made only if the properties of the Hindu undivided family were partitioned in "definite portions", that is, the properties were physically divided if they admitted of such division, otherwise in such division as they admit of. Though the words "definite portions" do not appear in section 171 of the 1961 Act but the explanation(a) to section 171 is sufficiently indicative of the intention of the legislature.


IV. ASSESSMENT AFTER DISRUPTION

Section 171 embodies the provisions relating to assessment of disrupted Hindu undivided families in a simplified and comprehensive form with abundant caution to make assessment on Hindu undivided family foolproof and effective. Section 171(1) of the Act, specifically states that a Hindu family hitherto assessed as undivided shall be deemed to continue to be a Hindu undivided family, except where and in so far as finding of partition has been given under this section in respect of the Hindu undivided family. The words "hitherto assessed" show that this section does not cover assessment of Hindu undivided family not assessed before. So, such family can escape assessment under section

147 etc., as this section stands at present. Once the family is disrupted there is no provision relating to its liability apart from section 171. Section 171(2) provides that at the time of making an assessment under section 143 or 144 a claim should be made by or on behalf of any member of the Hindu undivided family that a partition, total or partial has taken place among the members of the family and the I.T.O. should make inquiry into the claim of partition and is bound to give notice of the enquiry to all the members of the family. This is a procedural provision and non-performance of the procedure will be deemed to be an irregularity on the part of the I.T.O. which can be corrected by the appellate authorities. The provisions of this section only apply in the course of assessment in order to see whether the family continues to own the same properties which it had in the earlier year. Worth noticing feature of this sub-section is that it does not give any right to any member of the joint family which he or she does not have.


possess under the personal law governing the parties where
there is no scope for partition, there is no possibility of
making a provision therein. 81

Section 171(3) further provides that on the completion
of the enquiry, if the Income-tax Officer is satisfied that there
has been a partition, whether total or partial, of the joint
family property, he has to record his finding to that effect and
also record the date on which such partition has taken place.82
Where order has been made recording the partition, the assessment
of the total income received by or on behalf of the joint family
as such is required to be made in accordance with the procedure
laid down in section 171(4)(a) and (5). The procedure is to
compute the total income of the joint family upto the date of
partition and also determine the tax payable by the joint family,
as such as if no partition had taken place and as if joint family
was still in existence. 83 Section 171(4)(b) makes each member

Additional I.T.O. V A.Thimmeya (1965) 59 I.T.R. 666 at
p.671 (S.C.).
83. Lakshminarain Bhadani V C.I.T. (1951) 20 I.T.R. 594 (S.C.);
See also C.I.T. V Saren Singh Ram Singh (1946) 14 I.T.R.,
152 at p.171.
or group of members jointly and severally liable for the whole amount of tax determined as payable by the joint family.\textsuperscript{84} From the above it is clear that all these sub-sections\textsuperscript{85} contemplate a case where at the time of making assessment under section 143 or 144, a claim is made by or on behalf of any member of the Hindu family that a total or partial partition has taken place among its members. But even where no such claim is made at the time of making assessment under sections 143 or 144 and hence no order recording partition is made in the course of assessment as contemplated under sub-sections (2) to (5), if it is found, after completion of the assessment, that the family has already effected a partition total or partial all the members shall be jointly and severally liable for the tax assessed as payable by the joint family under section 171(6) and the tax liability shall be apportioned among the members "according to the portions of the joint family property allotted to each of them", under section 171(7). But fresh assessments under

\begin{itemize}
\item \textsuperscript{85} Sub sections (2) to (5) of section 171.
\item \textsuperscript{86} There is a dictum of the Beaumont, C.J. in Gordhandas Mangaldas V C.I.T. (1943) 11 I.T.R. 183, at p.795, that above words in inverted commas mean that tax must be apportioned according to income-yielding capacity of different portions of property allotted to various members or groups of members and not according to quantum of the interest or capital value of the share taken by each of them. Allahabad High Court took the contrary view in Kailasmath Bhargava V.C.I.T. (1962) 46 I.T.R. 928.
\end{itemize}
section 143 have not to be made on them in respect of the income of Hindu undivided family. Sub section (6) of section 171 thus for the first time imposed, joint and several liability on the members for the tax assessed on the Hindu undivided family and this was a personal liability as distinct from liability limited to the joint family property received on partition. Though sub-sections (1)-(5) of section 171 merely lay down the machinery for assessment of Hindu undivided family after partition, sub-section (6) of section 171 is clearly a substantive provision imposing new liability on the members for the tax determined as payable by the joint family. The provisions of section 171 override partially section 10(2) which exempts from tax a member of an undivided family in respect of any sum received by him as such member out of the income of the family. Section 171(8) embodies the provisions relating to the "levy and collection of penalty, interest, fine or other sum" in respect of any period up to the date of partition.

89. Ibid.
90. See sub-section (4)(b) of Section 171; See also Kalwadattam V Union of India (1963) 49 I.T.R. 165 at p.172 (S.C.);Veerappa Chettiar V C.I.T. (1968) 70 I.T.R. 737 at pp.739-740 (Mad.).
Apart from the provisions of Section 171, the department can invoke the principle of Hindu law that if a partition takes place after the family had incurred a debt but no provision is made at the time of partition for payment of the debt, the creditor can proceed to recover it from every one of the members to the extent of the family property in his hands.\(^9\)

A. Assessment\(^9\) after Total Partition\(^9\)

The effect of recording a total partition is to recognise, for purposes of Income-tax administration, that the Hindu undivided family, status is severed, and the properties are partitioned among the members of Hindu undivided family. After the order is recorded the original Hindu undivided family has no existence in fact or in point of law-personal or Income-tax.\(^9\) An order of


93. Total partition contemplates a complete partition of all the family properties, including the properties yielding no income - see Addition I.T.O. V A. Thimmaya (1965) 55 I.T.R., 666 (S.C.); Meyyappa Chettiar V C.I.T. (1950) 18 I.T.R. 586 (Mad.).


Whenever an order is made under section 171(3), recognising the partition of a Hindu undivided family, has having taken place on a particular date anterior to the date of the order, the order must be deemed to have been made on that anterior date for all legal purposes (See I.T.O.V A.Thimmayya (1962) 46 I.T.R. 999 (A.P.) affirmed on different grounds in (1965) 55 I.T.R. 666(S.C.)); See also Ag.I.T. V V.N.Narayanan Bhattadiripad (1972) 83 I.T.R. 453 (S.C.).


In the absence of an order under section 171 by Income-tax (Contd...)
under section 171 (3) notwithstanding the severance of the Hindu undivided family status or partition among the members, a Hindu undivided family, hitherto assessed as undivided continues to be liable to be assessed in the status of Hindu undivided family. But when an order recording partition is made, the family ceases to be assessed, in respect of the period after the date of partition, as a Hindu undivided family. In respect of such period the family cannot be assessed in the status of a Hindu undivided family unless the order of partition is set aside by a competent authority. 99

The Income-tax Officer may assess the income of a Hindu family hitherto assessed as Hindu undivided family notwithstanding partition:

(i) If no claim for recording a partition has been made to him; or

(ii) If he is not satisfied about the truth of the claim that there has been a total or partial partition; or

(iii) If on account of some error or inadvertance he fails to dispose of the claim.

In all these cases the jurisdiction of the Income-tax Officer to assess the income of the family hitherto assessed as undivided remains unaffected.\(^\text{100}\)

(i) Inquiry must follow a Claim

When a claim of partition is made, it is incumbent upon the I.T.O. to enter upon an inquiry and satisfy himself to the effect whether there has been a partition as contemplated under section 171. If he is not satisfied he will continue to assess the Hindu undivided family deeming it as undivided. It is a different matter that according to Hindu law that claim may be equivalent to disruption of Hindu undivided family, but for the Income-tax purpose the family is deemed to continue as Hindu undivided family. On the other hand if the I.T.O. is satisfied of the claim, he has to record an order to that effect and then has to proceed to assess according to the provisions

\(^{100}\text{Additional I.T.O. V A.Thimmayya (1965) 55 I.T.R., 666 at p.672 (S.C.).} \)
of Section 171(4). If the Income-tax Officer after receipt of the claim as contemplated in Section 171 does not issue notice to the members of Hindu undivided family, and if no enquiry or no order is made in pursuance to such application any assessment made in disregard of the provisions of Section 171(2) and 171(3) would be void and not binding on the members of the family. The members of the erstwhile Hindu undivided family, are entitled to raise the contention before the I.T.O. that the partition has taken place among the Hindu undivided family members. This contention may be made either before or at the time of making the assessment for a particular year. The expression "at the time of making an assessment" under section 143 or section 144 means "in the course of the process of assessment". The claim can also be made during the course of assessment, even though the partition had taken place after the close of the relevant


102. See Karri Ramakrishna Reddy v T.R.O., (1973) 87 I.T.R. 86 (A.P.); See also C.I.T. v Kapoor Chand Shrimal (1974) 95 I.T.R., 20 (A.P.) wherein it was held that the assessment may be suitably modified instead of cancelling it.
year. So long as the I.T.O. is making an assessment, whatever might be the period to which that assessment relates, the assessee can seek finding from the I.T.O., that there has been a partition, whether or not the partition has any impact or relevance to the assessment which is being made. Even if an assessee has failed to substantiate his claim of partition in one assessment year, he is not precluded from raising the claim in a subsequent year. But one thing is there that such a claim can be preferred before the Income-tax Officer and not for the first time in an appeal.

(ii) Assessment of Individual Coparcener

When once the factual existence of Hindu undivided family is conceded directly or indirectly, the family would continue to be assessed as Hindu undivided family until a partition is recorded under the provisions of Section 171.


There is no option available to the revenue to assess the individual coparceners in respect of their respective shares in the Hindu undivided family income on an analogy of individual members of an association of persons. Even if partition has taken place and the Hindu undivided family, properties have been divided unless an order is made under Section 171(3) recognising such partition, an assessment made against the family as a unit is valid.106

An order under section 171 recording that partition has been effected is only declarative of the united existence of the family till the date of the partition, there was a Hindu undivided family and, after that date, it ceased to exist.107

(iii) Assessment for Periods Prior to Partition

If after an undivided Hindu family, has disrupted and an order recording partition has been passed under section 171(3), any portion of family income earned prior to partition is found to have escaped assessment, a reassessment may be


made under section 147. In such a case it is not necessary to issue the notice under section 148 to every member of the family; it is sufficient if the notice is addressed to the Hindu undivided family, and served on the quondam karta, for the position is as if the Income-tax Officer was proceeding to assess the income of the family in the year in which the escaped income should have been assessed.

Once an order recognising a partition is made it is imperative on the part of the Income-tax Officer to follow the procedure laid down in section 171(4) and apportion the tax imposed on the Hindu undivided family, between the members thereof and issue a notice of demand on each of them.


109. The same principle would apply where normal assessment proceedings are taken against the joint family under section 143 or 144 after partition to assess the income which had accrued to the family prior to partition, see Gulabrai Manohar Lall V C.I.T. (1953) 23 I.T.R., 333.

But one thing must be remembered that when the order under section 171(3) recognising total\textsuperscript{111} or partial partition of Hindu undivided family, has been made, on the basis of such orders, it is not open to the I.T.O. to take reassessment proceedings under section 147 ignoring his previous order under section 171(3) on the ground that he had received information that the order under section 171(3) was obtained by misrepresentation. The proper course to be adopted in such circumstances for the I.T.O. is to refer the case to Commissioner to take action under section 263 to set aside the order passed under section 171(3) because of the fact that section 147 confers no general power of reviewing an order passed under section 171(3) which is in its nature effective for all subsequent years.\textsuperscript{112}

\textsuperscript{111} Section 283 requires that after the Income-tax Officer has recorded a finding of total partition, he should issue notices in respect of the income of the family on the last manager of the family or if the person is dead, on all adults who were members just before partition.

B. Assessment after Partial Partition

Explanation(b) of section 171 defines a partial partition to mean "a partition which is partial as regards the persons constituting the Hindu undivided family, or the properties belonging to the Hindu undivided family or both." In view of this specific provision partial partition of particular assets can be made. In each and every case where it is found that the partial partition has taken place whether as regards persons or as regards property, the assessee is entitled to recognition of such partial partition under section 171 of the Act. There is nothing in law to prevent the members of a family which has disrupted from parting with undivided assets either to themselves or to a stranger; and where businesses are individually allotted to and carried on by divided members, the fact that the partition was ultimately settled by an arbitration award of a later date will not necessitate the income of their business being


114. C.I.T. V Vajulal Chunilal (1979) 120 I.T.R.,21 at p.28 - where the assessee a member of Hindu undivided family was allotted a particular area of land of Hindu undivided family properties and he executed promissory notes in favour of the other coparceners for the amounts representing their share in the property and it was found that partition was genuine, the assessee was entitled to recognition.
assessed on the family even after they have been made over to undivided members. But in such cases, the family will be assessed only on the income which is still its property, i.e., excluding what has been alienated or definitely divided. Even if a share has been allotted to a person who is not entitled to it, it can be no ground for saying that the partition was illegal or void. Such a partition may be voidable at the instance of the members affected by it but the department has no locus-standi to hold that such a partition is void ab initio. A partition may be partial as regards members, i.e., some may only going out, or as regards properties, some only being partitioned. Thus if a part of the property belongs to the family and the other to a partnership composed of certain members there will be two entities, viz., the family and the firm, and separate assessments have to be made on them. The firm, if genuine, cannot be ignored.

Where there is a partial partition, the share of liability under sub-section (4) will be fixed jointly and severally on the members and groups in addition to their own liability for the divided parts. Members will be individually taxed on divided parts and the family on the joint parts. Whether a particular asset of a family is capable of partial partition or not will depend upon the nature of the asset. It may be that a business or a share cannot be divided partially. But it does not follow that no single item may easily be subjected to a partial partition. For instance, the family may easily divide the whole or part of the capital standing to its credit in a business.

This right of partial partition granted to the Hindu undivided families had been widely used for avoidance of proper tax liability by effecting a number of partial partitions, and thus creating a number of additional assessees. For example, if there are five members entitled to a share on partition, various assets or parts of assets could be made the subject of partial partitions as under:

Members of the family A, B, C, D and E.

Partial Partitions

1. A BCDE
2. B ACDE
3. C ABDE
4. D ABCE
5. E ABCD
6. AB CDE
7. AC BDE
8. AD BCE
9. AE BCD
10. BC ADE
11. BD ACE
12. BE ACD
13. CD ABE
14. CE ABD
15. DE ABC

This was a very convenient and easy method of tax avoidance and it was, therefore, necessary to plug the loophole. Accordingly partial partitions of Hindu undivided families were derecognised by the Finance Act of 1980 by the addition of sub-section (9) to section 171 which reads:

"Notwithstanding anything contained in the foregoing provisions of this section, where a partial partition (Contd.)
has taken place after the 31st day of December, 1978 among the members of a Hindu undivided family, hitherto assessed as undivided:

(a) no claim that such partial partition has taken place shall be inquired into under sub-section (2) and no finding shall be recorded under sub-section (3) that such partial partition had taken place and any finding recorded under sub-section (3) to that effect whether before or after the 18th day of June, 1980, being the date of introduction of the Finance (No. 2) Bill, 1980 shall be null and void;

(b) such family shall continue to be liable to be assessed under this Act as if no such partial partition had taken place;

(c) each member or group of members of such family immediately before such partial partition and the family shall be jointly and severally liable for any tax, penalty, interest, fine or other sum payable under this Act by the family in respect of any period, whether before or after such partial partition;

(d) the several liability of any member or group of members aforesaid shall be computed according to portion of the joint family property allotted to him or it at such partial partition;

and the provisions of this act shall apply accordingly.

Thus partial partitions made after 31.12.1978 are not recognised for the purpose of Income-tax and the Hindu undivided family is assessed on the income from all the assets which is
possessed prior to the partition. Only in the case of a complete partition an order will be passed under section 171 unless the partition has taken place before 1.1.1979.

Also Hindu undivided families having one or more members with independent income exceeding the exemption limits were charged to income-tax at rates which were somewhat higher than those applicable in the case of individuals, so assesses used the provisions of partial partition, to give a shape of genuiness to fake partial partitions and this provision became a source of avoidance of liability. With these two changes in regard to taxation of Hindu undivided families, the urge for forming multiple Hindu undivided families merely for fragmentation of income and reduction of tax liability would be weakened.

The effect of de-recognition of partial partition is still to be seen. To find out as to whether the aim with which sub-section (9) has been enacted is achieved, we will have to wait, to see when the cases of partition come to courts and decided. We are of the view that the assesses would certainly find some other device to avoid tax-liability as the avoidance of tax liability is perfectly legal when the fakeness is given the shape of reality.
V. RES JUDICATA

It is well settled that in matters of taxation there would be no question of res judicata. This doctrine and estoppel does not apply to Income-tax proceedings and therefore it is open to the assessee to contend that certain properties and the Income therefrom, which were treated in the past years as belonging to the joint family belong in fact to an individual, and therefore the Income should be assessed in the hands of the individual member. Where an assessee has been wrongly assessed in the past in the status of a Hindu undivided family, he is entitled to claim in the subsequent year that he should be assessed as an individual, but in such a case an application under section 171 for recording a "partition" would be misconceived. According


123. The contrary view taken by the Lahore High Court in re Kishan Chand Khanna & Sons (1944) 12 I.T.R., 289; is, it is submitted, incorrect; see also Kanga and Palkhivala, Income Tax, 6th Edn., 1969 at p. 853.
to Allahabad High Court¹²₄ this section does not apply to a case where an assessee claims that he has never been a member of Hindu undivided family and therefore there is no question of any partition or that he has become the sole survivor of a Hindu undivided family, and the property which had once belonged, to the Hindu undivided family, has become his exclusive property. In some cases it has been held that although the I.T.O., is not bound by the rule of res judicata or estoppel by record, he can re-open a question previously decided, only if fresh facts come to light or if the earlier decision was rendered without taking into consideration material evidence.¹²⁵ The principle is laid down as:

"the doctrine of res judicata does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year. The assessment and the facts found are conclusive only in the year of assessment; the finding of question of fact may be good and cogent evidence in subsequent years, when the same question fails to be determined in another year; but they are not binding and conclusive."¹²⁶


In *Dalhousie Investment Trust Co. v C.I.T.*, 127 wherein, in the years prior to assessment year, the case put forward by the assessee that the various acquisitions and sales of shares were in the nature of investments was accepted by the department, it was held by the Supreme Court that such a decision given in the earlier years is not binding in the proceedings for assessment during subsequent years.

Generally speaking a decision given by I.T.O., for one assessment year does not affect or bind a decision for another year. The doctrine of *res judicata* or *estoppel* by record does not apply to tax cases. 128

In *I.R. v Sweath* 129, Hansworth, M.R., said:

"The assessment is final and conclusive between the parties only in relation to the assessment for the particular year for which it is made. No doubt, a decision reached in one year would be a cogent factor in the determination of a similar point in the following year, but I cannot think that it is to be treated as estoppel binding upon the same party for all years".

Since the assessing officer is not a court, the doctrine of *res judicata* or *estoppel* by record does not apply to his decision; a finding or decision of the Income-tax Authorities in one year may be departed in a subsequent year.\(^{130}\) The recognition by the Revenue in a given year of partition of the family does not preclude the Revenue from treating the family as joint in later years if there is evidence for such a finding.\(^{131}\) But from its very nature, an order under this section recognising partition is intended to apply to future years and the ordinary rule that the principle of *res judicata* does not apply to Income-tax matter, will not apply to this matter.\(^{132}\) If, however, the Income-tax Officer has reason to believe that an order under section 171 has been obtained fraudulently and the income of the family had thus escaped tax, he will be entitled to reopen the case under section 147. If ultimately he cancels the order under section 171, he would re-adjust the assessment on the individual members. Otherwise, he would offend section 10(1) by taxing both the family and the

---


members on the same income. Short of fraud, however, the orders under section 171 are meant to be permanent. 133

An alternative procedure if the Income-tax Officer feels he has passed a wrong order, whether through misrepresentation or otherwise, would be for him to draw the attention of the Commissioner who can revise the order as prejudicial to the Revenue under section 263. 134 The power under section 263 can be exercised by the Commissioner when the following factors co-exist:

(i) There should be a proceeding under the Act;
(ii) in such proceeding the Income-tax Officer must have passed an order; and
(iii) that the Commissioner should consider that the said order is erroneous and prejudicial to the interests of the revenue.

It is only when all these factors co-exist, the Commissioner will have jurisdiction to take action under section 263. 135