(9) Estoppel was also sought to be raised as a bar against Sharda Rani on the ground that she had again applied for the post of Lecturer in Psychology when fresh applications were invited and she had also appreard in the interview for this post in July 1989 when Smt. Monica Dhingra was selected in preference to her.

(10) In the overall context of the circumstances as narrated, neither of the contentions raised can be sustained. There is no manner of doubt that the College has indeed been unfair to Sharda Rani and patently, considerations other than merit appear to have prevailed in refusing her appointment. When despite repeated communications, Smt. Kiran Gupta did not join her post, the appropriate course for the College would obviously have been to call upon Sharda Rani to take up the appointment. At any rate, once Smt. Kiran Gupta left after holding the post for only three days, coupled with the direction to the Principal of the College as contained in the letter of January 1, 1988 (annexure P/2) that Sharda Rani be appointed in the leave vacancy, it became incumbent upon the College to have offered her this appointment. The College, however, as mentioned earlier, chose to appoint other teachers instead.

(11) Equally devoid of merit is the further plea of estoppel raised on behalf of the College to deny relief to Sharda Rani against the obvious injustice done to her merely on the ground that she had also applied for selection at a subsequent interview where some other candidate was prefered to her. It is not understandable how this can be construed as an estoppel against her.

(12) We thus find no reason of justification for interfering with the judgment of the learned Single Judge which we hereby up-hold and affirm. This appeal is consequently dismissed with Rs. 1,000 as costs.

J.S.T.

Before : *G. C. Mital, A.C.J. & S. S. Grewal, J.*

COMMISSIONER OF INCOME-TAX, PATIALA,—*Applicant.*

versus

SMT. BHAVANI BAI AND OTHERS,—*Respondents.*

General Income-tax Reference Nos. 76 & 77 of 1978.

8th June, 1991.

***Income-tax Act** (XLIII of 1961)—Assessment of share of income received in partial partition of larger HUF consisting of assessee*

wife, two sons and daughter—Assessee received one fourth share in partial partition of larger HUF—Such share is held in his individual capacity and not as share of the smaller HUF representing assessee, wife and minor daughter.

Held, that on partition of the investment made in M/s Ganesh Factory, Talu Ram was allotted one-fourth share which he allowed to continue in the same business and from that share he earned income to be accounted for in the assessment years 1971-72 and 1972-73. On partial partition of the business assets, it is hard to understand how the share allotted to Talu Ram became the asset of smaller HUF. There was partial partition of the assets in a business by father of Talu Ram and his two sons and the share which came to Talu Ram was rightly considered as belonging to Talu Ram's HUF. But, once Talu Ram effected partial partition in the business of M/s Ganesh Factory, one fails to understand how the share allotted to Talu Ram constituted the asset of smaller HUF.

(Para 5)

Commissioner of Income-tax, Orissa *v.* K. Satyanarayan Murty (1984) 147 ITR 140.

(FOLLOWED)

Commissioner of Income-tax *v.* Polaki Butchi Babu (1988) 174 ITR 430 (DISTINGUISHED)

General Income Tax Reference from the order of Shri S. Grover and Shri S. K. Chander Income Tax Appellate Tribunal, Chandigarh Bench dated 18th August, 1978 arising out of R.A. Nos. 95 & 96 of 1977-78 and I.T.A. Nos. 274 & 275 of 1977-78 (Assessment years 1971-72 & 1972-73) referring the below said question of law to the Hon'ble High Court ofr its opinion :

> *"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the share income of Talu Ram from Ganesh Factory should be assessed in the hands of Talu Ram HUF and not Talu Ram, individual ?"*

A. K. Mital, Advocate, *for the Petitioner.*

B. S. Gupta, Sr. Advocate, *for the Respondent.*

JUDGMENT

Gokal Chand Mital, A.C.J.

(1) The Income-Tax Appellate Tribunal, Chandigarh Bench, has referred the following question for opinion of this Court:—

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the share

income of Talu Ram from Ganesh Factory should be assessed in the hands of Talu Ram HUF and not Talu Ram, individual."

The aforesaid question arises from the following facts :

(2) Prior to 1st April, 1960, there was a Hindu Undivided family consisting of Mukhi Kesho Ram as the Karta and his two sons Talu Ram and Madan Lal as the other co-parceners. The HUF had a business in which it had net capital of Rs. 27,440, which was divided equally amongst the co-parceners. At the time of the aforesaid partition, Talu Ram constituted his own HUF, consisting of himself as Karta, his wife, a major son, a minor son and a minor daughter, as members of the HUF. Talu Ram represented his HUF of five members as a partner in representative capacity as Karta in M/s Ganesh Factory Rajpura, till 30th September, 1966. On 1st October, 1966. Talu Ram effected a partial partition of the capital of Rs. 23,852 which stood invested in the aforesaid firm. Talu Ram, his wife and two sons were allotted one-fourth share in the partial partition. The HUF share in the building and machinery was kept joint.

(3) The dispute has arisen with regard to one-fourth share allotted to Talu Ram in partial partition effected on 1st October, 1966, as to whether it has to be considered as belonging to him in his individual capacity or to the smaller HUF representing Talu Ram, his wife and his minor daughter.

(4) For the assessment years 1971-72 and 1972-73, Talu Ram, as Karta of the smaller HUF, declared an income of Rs. 25,350 and Rs. 23,290, respectively. Before the Income-Tax Officer, in assessment proceedings, the question arose as to whether the share which was allotted to Talu Ram in the partition effected on 1st October, 1966, which remained invested in M/s Ganesh Factory, belonged to him individually or to the smaller HUF as claimed by the assessee. While the Income-tax Officer held that the income has to be considered as individual income of Talu Ram, the Appellate Assistant Commissioner and the Tribunal decided in favour of the assessee on the basis of certain decided cases. That is how the question of law has been referred.

(5) On a consideration of the matter, we are of the view that the facts of the case are identical with the facts of *Commissioner* of

Income-tax, Orissa v. *K. Satyanarayan Murty* (1), a decision of the Division Bench of the Orissa High Court. The following dictum was laid by Hon'ble R. N. Misra, C.J. (the present Chief Justice of India):

> "In the instant case, the property in dispute (the share in Sri Durga Stores, allotted to him on partial partition) was his personal property and had no longer the incidence of joint family character. There is no claim of throwing it into the family hotchpot".

The aforesaid quotation squarely applied to the facts of the present case. On partition of the investment made in M/s Ganesh Factory, Talu Ram was allotted one-fourth share which he allowed to continue in the same business and from that share he earned income to be accounted for in the assessment years 1971-72 and 1972-73. On partial partition of the business assets, it is hard to understand how the share allotted to Talu Ram became the asset of smaller HUF. One can understand that if a Karta effects partial partition with his sons, grandsons and great-grandsons, the share allotted to his sons may be considered to belong to their HUF. In this case, on 1st October, 1966, there was partial partition of the assets in a business by father of Talu Ram and his two sons and the share which came to Talu Ram was rightly considered as belonging to Talu Ram's HUF. But, once Talu Ram effected partial partition in the business of M/s Ganesh Factory, one fails to understand how the share allotted to Talu Ram constituted the asset of smaller HUF.

(6) On behalf of the assessee, *Prem Chand, etc.* v. *Commissioner of Income-tax, A. P. Hyderabad* (2), a decision of Andhra Pradesh High Court, and *Gopal Ramanarayan* v. *Commissioner of Income-tax* (3), a decision of the Karnataka High Court, have been cited. The Andhra Pradesh High Court dissented from the decision of the Orissa High Court whereas the Karnataka High Court did not refer to that decision. On a consideration of all the three judgments, with due respect, we follow the reasoning of the Orissa High Court judgment, referred to above.

(7) In fairness to the counsel for the assessee, reference may also be made to *Commissioner of Income-tax* v. *Polaki Butchi Babu* (4),

(1) 1984 147 I.T.R. 140.
(2) (1984) 148 I.T.R. 440.
(3) (1989) 175 I.T.R. 32.
(4) (1988) 174 I.T.R. 430.

another decision of the Orissa High Court. We have gone through the judgment. The facts are distinguishable. Moreover, in this judgment the earlier decision was not considered.

(8) For the reasons recorded above, we answer the referred question in favour of the Revenue and against the assessee, in negative. The Tribunal was not right in holding that the share income of Talu Ram from Ganesh Factory should be assessed in the hands of Talu Ram HUF. It should be assessed in the hands of Talu Ram individual. However, there will be no order as to costs.

J.S.T.

Before : *J. S. Sekhon & S. S. Rathore, JJ.*

MOHINDER AND OTHERS,—*Appellants.*

versus

NAGINA (DECEASED) REPRESENTED BY L.Rs.,—*Respondents.*

Regular Second Appeal No. 1860 *of* 1987.

7th September, 1991.

(*a*) *Indian Succession Act,* 1925—*S.* 63—*Validity of Will*—*Required to be attested by two or more witnesses each of whom must see the testator sign or affix his mark to the Will and each of witness must sign Will in presence of testator*—*Not relevant that person who attested Will be shown as attesting witness*—*Even if witness not shown as attesting witness but proved execution of Will by testator and due attestation by him in terms of S.* 63 *of Act and S.* 68 *of Evidence Act, Will stands proved.*

Held, that a will to be valid is required to be attested by two or more witnesses each of whom must see the testator sign or affix his mark to the will and each of the witness must sign the will in the presence of the testator. It is not relevant that a person who has attested the will, is necessarily to be shown as an attesting witness. Even if the witness is not shown as an attesting witness but he has proved the execution of the will by the testator and due attestation by him in terms of S. 63 and the Indian Succession Act and S. 68 of the Evidence Act, the will stands proved.

(Paras 8 & 9)

(*b*) *Indian Succession Act,* 1925—*Will*—*Valid execution*—*There has to be satisfactory evidence on record that executant was of sound*