

Dulichand Laxminarayan

Vs

Commissioner of Income Tax, Nagpur

Civil Appeal No. 135 of 1955

(CJI S. R. Dass, T. L. Venkatarama Ayyar, N. H. Bhagwati JJ)

17.02.1956

JUDGMENT

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DAS, C.J. -

This an appeal from the judgment and order passed by a Bench of the Nagpur High Court on December 30, 1953, in Miscellaneous Civil Case No. 35 of 1952, whereby the Bench answered in the negative the question that had been referred to them by the Income-tax Appellate Tribunal, Bombay, under section 66(1) of the Indian Income- tax Act, 1922 (hereinafter referred to as the Act).

In connection with the assessment for the assessment year 1949-50 of Dhulichand Laxminarayan, an unregistered firm, an application was made under section 26A of the Act before the Income-tax Officer, Raigarh, for its registration as a firm constituted under a deed of partnership dated February 17, 1947. In the opening paragraph of that deed the names and descriptions of the parties thereto were set out in the following words :

"We, Dulichand Laxminarayan Firm, through Malik (partner) Laxminarayan son of Laljimal, Laxmi Narayan Chandulal Firm through Malik (partner) Chandulal son of Nanakchand, Mukhram Bholaram Firm through Malik (partner) Tekchand so of Bholaram, Jeramdas Hiralal Firm through Malik (partner) Ganpatram son of Mangatrai, Agarwar Bani, aged 50, 40, 28, 25, 45 residing at Raigarh are partners in equal shares with effect from January 5, 1946, in the firm Dulichand Laxminarayan in whose name Importers' Licence of cloth is issued for Raigarh State group-Raigarh Jaipur Saraigarh, Udeypur and Sakti State, on the following terms and conditions....."

Then follow 15 clauses containing the terms on which the partnership business was agreed to be done. At the foot of the deed signatures were appended in the following order one below the other:

Laxminarayan for Dulichand Laxmi Narayan

Beharilal for Jairam Das Hiralal

Ganpatram for Mangatrai Ganpatram

Tekchand for Mukhram Bholaram

## Chandulal for Laxminarayan Chandulal.

It is common ground that out of the five constituent parties Dulichand Laxminarayan, Jairamdas Hiralal and Laxminarayan Chandulal are separate firms constituted under three separate deeds of partnership and that Laxminarayan, Beharilal and Chandulal, who signed the deed on behalf of those firms are partners in their respective firms. There is also no dispute that Mukhram Bholaram is the name of a business carried on by a Hindu undivided family of which Tekchand, who has signed for it, is the karta. It is also conceded that Mangatrai Ganpatram is an individual. The application for registration was signed by the same five individuals who had signed the deed of partnership.

Finding that Dulichand Laxminarayan constituted under the aforesaid deed of partnership dated February 17, 1946, consisted of three firms, one Hindu undivided family business and one individual and taking the view that a firm or a Hindu undivided family could not be registered as a firm under section 26A and accordingly on February 26, 1950, he rejected the application.

On appeal the Appellate Assistant Commissioner held that when a firm entered into a partnership with another firm the result in law was that all the partners of each of the smaller firms became partners of the bigger firm and, therefore, there was no legal flaw in the constitution of the bigger firm of Dulichand Laxminarayan. He, however, took the view that, as the application for registration had not also been signed personally by all the partners of those three smaller firms as required by section 26A of the Act and rule 2 of the Rules framed under section 59 of the Act, there was no valid application for registration and consequently the firm could not be registered. The result was that on August 5, 1950, the Appellate Assistant Commissioner dismissed the appeal.

The assessee appealed to the Income-tax Appellate Tribunal. The Tribunal agreed with the Appellate Assistant Commissioner that a valid partnership had been brought into existence but reversed the decision of the Appellate Assistant Commissioner on the ground that as all the five executants of the deed had signed the application for registration, the requirements of law had been satisfied. Accordingly on June 12, 1951, the Tribunal directed registration of the firm.

On the application of the Commissioner of Income-tax, Madhya Pradesh, the Tribunal under section 66(1) of the Act drew up a statement of case and submitted to the High Court of Nagpur the following question of law, namely :

Whether on the facts of the case the assessee is entitled to registration under section 26A of the Income-tax Act ?

The reference came up for hearing before a Bench of the Nagpur High Court on December 30, 1953. Following their own judgment delivered earlier in the day in Miscellaneous Civil Case No. 189 of 1951, Jabalpur Ice Manufacturing Association v. Commissioner of Income-tax, Madhya Pradesh and Bhopal, the High Court answered the referred question in the negative. In view, however, of the importance of the question involved in the reference the High Court, under section 66A(2) of the Act, gave a certificate of fitness for appeal to this Court. Hence the present appeal.

Section 26A of the Act under which the application for registration was made provides as follows:

"(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed."

The relevant portion of rule 2 of the Rules made under section 59 of the Act runs thus :

"Any firm constituted under an instrument of partnership specifying the individual shares of the partners may, under the provisions of section 26A of the Indian Income-tax Act, 1923 (hereinafter in these rules referred to as the Act), register with the Income-tax Officer, the particulars contained in the said instrument on application made in this behalf.

Such application shall be signed by all the partners (not being minors) personally, or....."

At the hearing before us it was at one time suggested that the partners of the firm consisted of the five individuals who had signed the deed and each of them had an equal share as specified therein and that as all the said five partners had signed the application for registration the requirements of section 26A of the Act and rule 2 had been fully complied with and the assessee should have been registered as a firm for the purposes of the Act. A perusal of the deed and particularly the portions hereinbefore set out indicate beyond any doubt that the intention of the parties quite clearly was that of the three constituent firms and not the particular member of each of the said three firms who had signed the deed for his respective firm was to be the partner in the bigger firm constituted under this deed. The contention that only the five individual executants of the deed were the partners of the newly created firm runs counter to the apparent tenor of the deed and cannot be entertained. Indeed, learned counsel appearing in support of this appeal did not press this point. The main argument before us has centered round the larger question as to whether a firm as such can be a partner in another firm.

Section 26A of the Act quoted above postulates the existence of a firm, for otherwise no question of its registration can possibly arise. The Act, however, does not indicate what a firm signifies or how it is to be constituted. Indeed section 2(6B) of the Act clearly provides, inter alia, that "firm" and "partnership" have the same meanings respectively as they have in the Indian Partnership Act, 1932. We have, therefore, to go to the last mentioned Act to ascertain what a firm is and how it can be created.

Turning, then, to the Indian Partnership Act, 1932, we come to section 4 which defines "partnership, "partner," "firm" and "firm name" in the words following :-

4. Definition of "partnership", "partner", "firm" and "firm name" BEAH :  
"Partnership" is the relation between persons who have agree to share the profits of a business carried on by all of them acting for all.

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name."

This section clearly requires the presence of three elements, namely, (1) that there must be an agreement entered into by two or more persons; (2) that the agreement must be to share the profits

of a business; and (3) that the business must be carried on by all or any of those persons acting for all. According to this definition "persons" who have entered into partnership with one another are collectively called a "firm" and the name under which their business is carried on is called the "firm name". The first question that arises is as to whether a firm as such can enter into an agreement with another firm or individual. The answer to the question would depend on whether a firm can be called a "person".

There is no definition of the word "person" in the Partnership Act. The General Clauses Act, 1897, however, by section 3(42) provides that "person shall include any company or association or body of individuals whether incorporated or not." The firm is not a company but is certainly an association or body of individuals. The argument is that applying that definition to the word "persons" occurring in section 4, one can at once say that an unincorporated association or body of persons, like a firm, can enter into a partnership just as by the application of that definition to section 4 of the Indian Partnership Act a company can become a partner in a firm. The definitions given in section 3 of the General Clauses Act, 1897, however, apply when there is nothing repugnant in the subject or context. It is difficult to say that there is anything repugnant in the context of section 4 itself which will exclude the application of that definition to the word "persons" occurring in section 4. Is there, however, anything repugnant in the subject of partnership law, which will exclude the application of that definition to section 4 ?

As pointed out in Lindley on Partnership, 11th Edition at page 153, merchants and lawyers have different notions respecting the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, i.e., as a body distinct from the members composing it. In other words merchants are used to regard a firm, for purposes of business, as having a separate and independent existence apart from its partners. In some systems of law this separate personality of a firm apart from its members has received full and formal recognition, as, for instance, in Scotland. That is, however, not the English common law conception of a firm. English lawyers do not recognize a firm as an entity distinct from the members composing it. Our partnership law is based on English law and we have also adopted the notions of English lawyers as regards a partnership firm.

Some of the mercantile usages relating to a firm have, however, found their way into the law of partnership. Thus in keeping accounts, merchants habitually show a firm as a debtor to each partner for what he brings into the common stock and each partner is shown as a debtor to the firm for all that he takes out of that stock. But under the English common law, a firm not being a legal entity, could not sue or be sued in the firm name or sue or be sued by its own partner, for one cannot sue oneself. Later on this rigid law of procedure. However, gave way to considerations of commercial convenience and permitted a firm to sue or be sued in the firm name, as if it were a corporate body (see the Code of Civil Procedure, Order XXX, corresponding to Rules of the English Supreme Court, Order XLVIII-A). The law of procedure has gone to the length of allowing a firm to sue or be sued by another firm having some common partners or even to sue or be sued by one or more of its own partners (see Order XXX, rule 9, of the Code of Civil Procedure), as if the firm is an entity distinct from its partners. Again, in taking partnership accounts and in administering partnership assets, the law has, to some extent, adopted the mercantile view and the liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met and discharged by the firm out of its assets. The creditors of the firm are, in the first place, paid out of the partnership assets and if there is any surplus then the share of each partner in such surplus is applied in payment of his separate debts, if any, or paid to him. Conversely, separate property of a partner is applied first in the payment of his separate debts and the surplus, if any, is utilised in meeting the debts of the firm

(see section 49 of the Indian Partnership Act, 1933). In the Indian Income-tax Act itself a firm is, by section 3, which is the charging section, made a unit of assessment.

It is clear from the foregoing discussion that the law, English as well as Indian, has, for some specific purposes, some of which are referred to above, relaxed its rigid notions and extended a limited personality to a firm. Nevertheless, the general concept of partnership, firmly established in both systems of law, still is that a firm is not an entity or "person" in law but is merely an association of individuals and a firm name is only a collective name of those individuals who constitute the firm. In other words, a firm name is merely an expression, only a compendious mode of designating the persons who have agreed to carry on business in partnership. According to the principles of English jurisprudence, which we have adopted, for the purposes of determining legal rights "there is not such thing as a firm known to the law" as was said by James, L.J., in *Ex parte Corbett : In re Shand*. In these circumstances to import the definition of the word "person" occurring in section 3(42) of the General Clauses Act, 1897, into section 4 of the Indian Partnership Act will, according to lawyers, English or Indian, be totally repugnant to the subject of partnership law as they know and understand it to be. It is in this view of the matter that it has been consistently held in this country that a firm as such is not entitled to enter into partnership with another firm or individuals. It is not necessary to refer in detail to those decision may of which will be found cited in *Jabalpur Ice Manufacturing Association v. commissioner of Income-tax, Madhya Pradesh*, to which a reference has already been made. We need only refer to the case of *Bhagwanji Morarji Goculdas v. Alembic Chemical Works Co. Ltd. and Others*, where it has been laid down by the Privy Council that Indian law has not given legal personality to a firm apart from the partners. This view finds support from and is implicit in the observations made by this Court in *Commissioner of Income-tax, West Bengal v. A. W. Figgies & Co. and Others*.

In *In re Jai Dayal Madan Gopal, Sulaiman, C.J.*, followed the Calcutta decisions and was not prepared to dissent from the view that the word "person" in section 239 of the Indian Contract Act, 1872, should not be interpreted so as to include a firm. The learned Chief Justice, however, expressed the view that it was difficult to say that there was anything in section 239 itself which made the application to that section of the definition of "person" as given in General Clauses Act in any way repugnant. The learned Chief Justice, however, does not appear to have considered whether there was anything repugnant in the subject of partnership law, as it prevails in this country, which operates to exclude the application of that definition to the word "person" occurring in section 239 of the Indian Contract Act. In our opinion, the word "persons" in section 4 of the Indian Contract Act, contemplates only natural or artificial, i.e., legal persons and for the reasons stated above, a firm is not a "person" and as such is not entitled to enter into a partnership with another firm or Hindu undivided family or individual. In this view of the matter there can arise no question of registration of a partnership purporting to be one between three firms, a Hindu undivided family business and an individual as a firm under section 26A of the Act.

The learned advocate for the appellant then urges that, at any rate, the partnership was not illegal, for there was no legal impediment in the way of all the members of all the three constituent firms and the karta of the Hindu undivided family and the individual entering into an agreement and that, therefore, a valid partnership was constituted by the deed of partnership under consideration. Assuming that this contention is possible in view of the language which has been used in this deed for describing the parties, the position of the appellant will not improve, for, in order to be entitled to the benefit of registration under the Act, it will have to be shown that the shares of all individual partners are specified in the deed and that all the partners have personally signed the application for registration as required by section 26A of the Act read with rule 2. The deed specifies that each of

the five constituent parties is entitled to an equal, i.e., 1/5 share but it does not specify the individual shares of each of the partners of each of the three smaller constituent firms. Further all the members of those three firms have not signed the application for registration personally. It is said that each of the three persons who executed the deed for the three smaller firms must be regarded as having the authority of their co-partners in their respective firms to sign the application for registration just as they had their authority to execute the deed itself for them. Even if they had such authority - as to which there is no evidence at all on the record - the section and rule 2 require that each partner (not being minors) must sign personally. That admittedly has not been done, and, therefore, the application was not in proper form. In our judgment the answer given by the High Court to the question is correct. This appeal must, therefore, be dismissed with costs.

Appeal dismissed.

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