

Commissioner of Income-Tax, Punjab, Himachal Pradesh and Jammu & Kashmir

Vs

Chander Bhan Harbhajanlal

Civil Appeal No. 602 of 1963

(A. K. Sarkar, J. R. Mudholkar, R. S. Bachawat JJ)

04.01.1966

JUDGMENT

BACHAWAT J. –

This appeal by special leave is from an order of the Punjab High Court rejecting an application by the Commissioner of Income-tax, Punjab, under section 66(2) of the Indian Income-tax Act, 1922. On April 21, 1953, 14 partners of the firm of Messrs. Chander Bhan Harbhajan Lal of Rupar (hereinafter referred to as the assessee- firm) constituted under the instrument of partnership dated December 5, 1952, applied to the Income-tax Officer, Project Circle, Ambala, for registration of the firm under section 26A of the Indian Income- tax Act. It may be mentioned at this stage that there was another firm of the name of Chander Bhan & Co. of Ferozepore (hereinafter referred to as the Ferozepore firm), consisting of 8 partners and constituted under a deed dated June 14, 1952, which provided, inter alia;

"If any one of the executants enters into business individually or along with another person, all the partners of the firm shall be entitled to the profit and liable for the loss, accruing from that business according to the shares hereinbefore mentioned."

One Gosain Chander Bhan was a partner of both the assessee-firm and the Ferozepore firm. In the course of proceedings arising out of the application for registration of the assessee-firm under section 26A, Harbhajan Lal, one of its partners, stated on January 30, 1954 :

"I, Harbhajan Lal, son of Shri Ram Chand Of Rupar, solemnly declare that firm, M/s. Chander Bhan Harbhajan Lal, consisted of 14 partners as mentioned in the return and deed of partnership. Gosain Chander Bhan was a partner not in his individual capacity but on behalf of the firm, M/s. Gosain Chander Bhan and Company, Ferozepur, having about six partners... Others partners are partners in their individual capacity."

It seems that the other partners of the assessee-firm made similar statements on February 27, 1954.

The capital of the assessee-firm was supplied by Gosain Chander Bhan. It appears that Gosain Chander Bhan had taken the capital from the Ferozepore firm, and the amount was shown as an item in his accounts with the Ferozepore firm.

By his order dated February 27, 1954, the Income-tax Officer rejected the application under section 26A. He held that (1) the deed dated December 5, 1952, did not specify the date of the constitution

of the assessee-firm; (2) some of the parties to the deed having no experience in the business of the firm were not really partners therein, and the number of partners in the firm had been artificially increased with a view to reduce the taxable liability; (3) the firm was not genuine, as it had no banking account, did not possess the income-tax clearance certificate, did not notify its constitution to the P.W.D., and payments were received from the P.W.D. in the name of Harbhajan Lal. On appeal, the Appellate Assistant Commissioner, Ambala Branch, set aside all these findings of the Income-tax Officer. The correctness of the decision of the Appellate Assistant Commissioner on these points is no longer challenged.

The Income-tax Officer also held that though the deed dated December 5, 1952, stated that Gosain Chander Bhan was the partner having 6/16th share, in reality the Ferozepore firm was the partner of the assessee-firm having 6/16th share therein and, consequently, the assessee-firm was illegally constituted, because (1) the Ferozepore firm could not legally be a partner in the assessee-firm; (2) the total number of partners of the assessee firm was 21, and (3) moreover, the individual shares of the eight partners of the Ferozepore firm were not specified in the deed dated December 5, 1952. On these findings, the Income-tax Officer rejected the application under section 26A. On appeal, the Appellate Assistant Commissioner set aside these findings, and held that Gosain Chander Bhan was the partner of the assessee-firm in his individual capacity and not as representative of and on behalf of all the partners of the Ferozepore firm. He held that Gosain Chander Bhan had merely agreed to share his profits and losses in

- "1. Whether the Income-tax Appellate Tribunal was right in applying the decision of the Patna High Court in the case of Commissioner of Income-tax v. Agardih Colliery Company and the Punjab High Court in the case of Commissioner of Income-tax v. Laxmi Trading Company to the facts of this case ?
2. If the answer to question No. 1 is in the affirmative whether the rulings noted above lay down a correct law ?
3. Whether there is any material to show that there was a subpartnership formed by Gosain Chander Bhan with other persons at Ferozepur ?
4. Whether, in the circumstances of the case, the correct status of the assessee was firm or association of persons and whether registration under section 26A of the Indian Income-tax Act could be allowed in this case ?"

By its order dated September, 5, 1955, the Tribunal rejected the application, and held that the questions were concluded by judicial decisions and no useful purpose will be served by referring them again to the High Court. On September, 18, 1956, the Commissioner of Income-tax applied to the Punjab High Court under section 66(2) of the Indian Income-tax Act for an order directing the Tribunal to refer the aforesaid questions to the High Court. At the hearing of the application before the High Court, counsel for the Commissioner of Income-tax gave up questions Nos. 2 and 4, and submitted that the following two questions of law arose for decision :

- "(a) Is there any material on record to support the finding that Gosain Chander Bhan was the real partner of the assessee-firm and is not a partner in a representative capacity representing all the partners of Gosain Chander Bhan and company of Ferozepore, and (b) whether the present is a case of sub-partnership to which the two cases referred to in the order by the Tribunal apply ?"

By its order dated January 24, 1961, the High Court dismissed the application, and held that the question of law were well settled. The Commissioner of Income-tax now appeals to this court by special leave.

Counsel for the appellant contended that all the partners of the Ferozepore firm were the partners in the assessee-firm, having regard to (1) the fact that the capital of the assessee-firm was secured by Gosain Chander Bhan from the Ferozepore firm, (2) the clause in the deed of partnership dated June, 14, 1952, under which all the partners of the Ferozepore firm were entitled to the profit and liable for the loss in respect of the share of Gosain Chander Bhan in the assessee- firm, and (3) the statement of Harbhajan Lal and other partners of the assessee-firm that Gosain Chander Bhan was a partner in the assessee- firm not in his individual capacity but on behalf of the Ferozepore firm. We are unable to accept this contention. The real question before us is whether any substantial question of law arises out of the order of the Tribunal. We think that no such question arises. The deed dated December, 5, 1952, clearly stated that Gosain Chander Bhan and 13 other parties to the deed were the partners of the assessee

The capital of the assessee-firm was supplied by Gosain Chander Bhan. Gosain Chander Bhan in his turn had taken the amount of the capital from the Ferozepore firm, but there is no evidence to show that he took the money otherwise than in his individual capacity. The clause in the partnership deed constituting the Ferozepore firm to the effect that all the partners of the Ferozepore firm are entitled to the profits and liable for the losses accrued in the share of Gosain Chander Bhan in the assessee-firm may show that there is a partnership between Gosain Chander Bhan and other partners of the Ferozepore firm in respect of the share of Gosain Chander Bhan in the profits and losses of the assessee-firm. This partnership, if any, between the members of the Ferozepore firm does not make the Ferozepore firm a partner in the assessee-firm. The Ferozepore firm is not a party to the agreement of partnership constituting the assessee-firm. Gosain Chander Bhan in his individual capacity could legally be a partner in t

"A partner of a firm can certainly secure his capital from any source or surrender his profits to his sub-partner or any other person. Those facts cannot conceivably convert a valid partnership into a bogus one."

The statements of Harbhajan Lal and other partners of the assessee- firm do not carry the matter any further. In the statement dated January 30, 1954, Harbhajan Lal clearly stated that the assessee-firm consisted of 14 partners as mentioned in the deed of partnership dated December 5, 1952. It is true that he stated also that Gosain Chander Bhan was a partner not in his individual capacity but on behalf of the Ferozepore firm, but this statement must be read in the background of the clause in the partnership deed constituting the Ferozepore firm, under which the partners of the Ferozepore firm were entitled to the profits and liable for the losses in the share of Gosain Chander Bhan in the assessee-firm. The statement, fairly read, shows that only the 14 persons mentioned in the deed dated December 5, 1952, were the partners in the assessee-firm. If the 8 partners of the Ferozepore firm were partners in the assessee-firm, Harbhajan Lal could not have stated that the number of the partners of assessee-firm was

Counsel for the appellant pointed out that the High Court erroneously assumed that the partnership deed constituting the Ferozepore firm was dated June 14, 1954, whereas, in fact, this partnership was dated June 14, 1952. Counsel for the appellant rightly pointed out that on the erroneous assumption that the partnership deed constituting the Ferozepore firm was executed after December 5, 1952, when the assessee-firm was constituted, the High Court held that there was a sub-

partnership between Gosain Chander Bhan and the other partners in the Ferozepore firm in respect of the share of Gosain Chander Bhan in the assessee-firm. Counsel then contended that, in law, a sub-partnership can be entered only after the partnership is constituted, and, therefore, there was no sub-partnership between the members of the Ferozepore firm in respect of the share of Gosain Chander Bhan in the assessee-firm. In support of this contention, counsel relied on the following passage in Lindley on Partnership, 12th edition, pages 99

"A sub-partnership is, as it were, a partnership within a partnership it presupposes the existence of a partnership to which it is itself subordinate."

We need not enquire into the correctness of the counsel's assumption that this passage is an authority for the proposition that there cannot be an agreement of sub-partnership in anticipation of the head partnership coming into existence. But the question whether the relevant clause in the deed dated June 14, 1952, created a sub-partnership in respect of the share of Chander Bhan in the assessee-firm having regard to the fact that this deed was executed before the assessee-firm came to be constituted is not material for the purpose of the case, and need not be decided. The clause regulated the relationship of the partners of the Ferozepore firm inter se, and created a partnership between them in respect of the share of Gosain Chander Bhan in the assessee-firm. Assuming, without deciding, that this partnership was not, strictly speaking, a sub-partnership, it does not follow that the partner of the Ferozepore firm became partners in the assessee-firm. By reason of this clause vis-a-vis the partners of the Feroz

"A contract of partnership has no concern with the obligation of the partners to others in respect of their shares of profit in the partnership. It only regulates the rights and liabilities of the partners. A partner may be the karta of a joint Hindu family; he may be a trustee; he may enter into a sub-partnership with others; he may, under an agreement, express or implied, be the representative of a group of persons; he may be a benamidar for another. In all such cases he occupies a dual position. Qua the partnership, he functions in his personal capacity; qua the third parties in his representative capacity. The third parties, whom one of the partners represents, cannot enforce their rights against the other partners nor the other partners can do so against the said third parties. Their right is only to a share in the profits of their partner-representative in accordance with law or in accordance with the terms of the agreement, as the case may be."

Quite plainly, the relevant clause in the deed dated June 14, 1952, was not part of the agreement of partnership dated December 5, 1952, constituting the assessee-firm, and did not affect the right of the partners of the assessee-firm to claim registration of the assessee-firm under section 26A. It is not possible to say that there are no material on the record to support the finding that Gosain Chander Bhan was a partner of the assessee-firm in his individual capacity and not as representing the Ferozepore firm. The question whether there was a sub-partnership between the members of the Ferozepore firm in respect of the share of Gosain Chander Bhan is not material because assuming that there was no sub-partnership, the members of the Ferozepore firm did not become partners in the assessee-firm by virtue of the relevant clause in the deed dated June 14, 1952, or otherwise. We are, therefore, satisfied that no substantial question of law arises out of the order of the Appellate Tribunal.

Counsel for the appellant submitted that as a question of law arose out of the order of the Tribunal, the High Court was bound to call for a statement of case. We are not inclined to accept this

contention. Where, as in this case, the question of law is not substantial and the answer to the question is self-evident, the High Court is not bound to require the Tribunal to refer the question. In our opinion, the High Court in the exercise of its discretion under section 66(2) rightly rejected the appellant's application.

In the result, the appeal is dismissed with costs.

MUDHOLKAR J. –

This is an appeal from a judgment of the High Court of Punjab rejecting a petition made by the Commissioner of Income-tax, Punjab, under section 66(2) of the Indian Income-tax Act, 1922, for calling upon the Income-tax Appellate Tribunal to refer certain questions of law to the High Court.

The relevant facts are these :

On December 29, 1948, Gosain Chander Bhan and four others entered into a partnership for carrying on the business of contractors in the name of "Gosain Chander Bhan & Co." The partnership was entered into at Ferozepore and Gosain Chander Bhan was a major shareholder in the firm. By a deed of partnership dated June 14, 1952, the firm was reconstituted and three other persons were admitted as partners therein. The old name, however, was continued. One of the terms of the partnership was that if any work was carried on by any one of the partners individually or in partnership with others the profits and losses arising out of that work would be divided amongst all the partners in proportion to their shares in the firm. On December 5, 1952, a partnership firm bearing the name of "Messrs. Chander Bhan Harbhajan Lal" was formed at Rupar. The deed of partnership sets out the names of 14 persons including Gosain Chander Bhan as partners and the object of the firm was to carry on business similar to that carried on by

On April 21, 1953, an application was presented by the partners of the Rupar firm, accompanied by the deed of partnership dated December 5, 1952, before the Income-tax Officer, Ambala, for registration of the firm under section 26A of the Act for the assessment year 1953-54. The Income-tax Officer examined the partners constituting the firm and recorded their statements in order to ascertain the true position with regard to the constitution of the firm. Harbhajan Lal in his statement dated January 30, 1954, and the other partners in their statements dated February 27, 1954, admitted that Gosain Chander Bhan had entered into the partnership not in his individual capacity but on behalf of the Ferozepore firm. The Income-tax Officer also found that the funds invested in the Rupar firm in the name of Gosain Chander Bhan were also provided by the Ferozepore firm. Upon these and some other facts he came to the conclusion that the deed of partnership dated December 5, 1952, did not specify the real partners of the

"(1) Whether there is any material on the record to support the finding that Gosain Chander Bhan was the real partner of the assessee- firm and was not a partner in the representative capacity representing all the partners of Gosain Chander Bhan and Company of Ferozepur ?

(2) Whether the present is a case of sub-partnership to which two cases, Commissioner of Income-tax v. Agardih Colliery Co. and Commissioner of Income-tax v. Laxmi Trading Co. referred to in the order of the Tribunal apply ?"

The High Court, as already stated, dismissed the application and now the matter is before us by special leave.

Before us the learned Additional Solicitor-General, appearing for the department, has raised the following two points :

"(1) that there was a question of law which it was incumbent on the Tribunal to refer to the High Court;

(2) that both the Tribunal and the High Court proceeded to decide the question of law on erroneous premises."

The question of law, according to the learned Additional Solicitor General, is : "Whether on the facts and circumstances of the case the firm, Chander Bhan Harbhajan Lal, was registrable under section 26A ?" It must be borne in mind that the question is not whether there was material on record on the basis of which the Tribunal could come to the conclusion that the firm was registrable but whether, upon the facts found, it was registrable. In other words, the question is as to what is the cumulative effect of all the facts and not what is the effect of only some of the facts found. The contention of the learned Additional Solicitor-General is that when a question of law is said to arise the High Court is bound to call for a reference and it is immaterial that the question is settled already.

If in the facts and circumstances of the case a question of law arises, there is little doubt that under section 66(1) the Tribunal is bound to draw up a statement of the case and refer the question to the High Court. The Tribunal has no discretion in the matter. Where, however, the Tribunal refuses to do so and the High Court is moved under section 66(2) of the Act, the position becomes different. Section 66(2) confers a discretion on the High Court and if the High Court is of the opinion that though a question of law arises it is not substantial or that it is well settled it can reject the petition. What we have, therefore, to ascertain is whether a question of law. at all arises in this case and if so whether a question of law arises it is necessary to ascertain the facts which have been found established by the income-tax authorities. I will recapitulate the facts found by the Income-tax Officer.

- (1) The original firm, Gosain Chander Bhan & Co., was formed at Ferozepore on December 29, 1948.
- (2) Gosain Chander Bhan had a major share therein.
- (3) This firm was dissolved and reconstituted on June 14, 1952.
- (4) In the original firm there were only 5 partners including Gosain Chander Bhan while in the reconstituted firm there were 8 partners including Gosain Chander Bhan.
- (5) The largest share in the reconstituted partnership was that of Gosain Chander Bhan.
- (6) The partnership deed of December 5, 1952, specified the names of 14 persons including Gosain Chander Bhan as partners but did not specify the names of all the partners of Gosain Chander Bhan & Co. of Ferozepore.
- (7) The funds invested by Gosain Chander Bhan in the Rugar firm came out of the funds belonging to the Ferozepore firm.

(8) Harbhajan Lal and the other partners of the Rugar firm admitted that Gosain Chander Bhan was not a partner in the Rugar firm in his individual capacity but had joined it on behalf of the Ferozepore firm.

(9) The business carried on by the Rugar firm is similar to that carried on by the Ferozepore firm.

None of these findings on questions of fact has been negated or upset by the Appellate Assistant Commissioner or by the Tribunal. These findings must, therefore, be taken as the basis for ascertaining whether a question of law arises, and if it does, they have to be borne in mind for deciding the question. At this stage I would like to mention that the High Court committed an obvious error in stating in its judgment that the reconstituted Ferozepore partnership was formed on June 14, 1954, that is, after the Rugar partnership was formed. This error has obviously led it into a further error, that is, of coming to the conclusion that the Ferozepore partnership was a sub-partnership in relation to the Rugar partnership. Now, ordinarily there can be a sub-partnership, only when there is already in existence another partnership. Since in point of fact the Rugar partnership came into existence after the formation of the Ferozepore partnership, the latter cannot stand in relation to the former as a sub-partnership.

"A sub-partnership is, as it were, a partnership within a partnership : it presupposes the existence of a partnership to which it is itself subordinate."

The correctness of this statement of law is not assailed before us by either side.

It is no doubt settled law that where an application for registration of a firm complies with the requirements of section 26A and of the rules and it is found that the partnership is not genuine the Income-tax Officer is not bound to admit the firm to registration. But it does not follow from this that for ascertaining whether the requirements of law have been satisfied and for ascertaining whether a firm is genuine or is bogus or that it has no legal existence the Income-tax Officer must confine himself to the deed of partnership. He has power to examine the partners and to require them to adduce evidence for satisfying himself about the genuineness or otherwise of the firm and also for satisfying himself about compliance with the requirements of law. Paragraphs 2 and 3 of the order of the Appellate Assistant Commissioner, however, show that he has treated the recitals in the partnership deed of December 5, 1952, as conclusive of the question as to who were the real partners in the Rugar firm. I can find no

"There are two essential conditions before it can be stated that contractual relationship has been brought about between the partners which is the relationship of a partnership and the two conditions are that the partners must agree to share the profits of the business and the business must be carried on by all or any of them for all of them. There can in law be a partnership between the partner in a head-firm and another individual in respect of the partner's share in the head-firm so as to entitle the partners in the sub-firm to apply for registration thereof under section 26A of the Indian Income-tax Act. If several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute a sub-partnership. It makes the parties to it partners inter se, it does not affect the other members of the principal firm."

The sole ground given by the Appellate Assistant Commissioner for holding that Gosain Chander Bhan was a partner in the Rugar firm in his individual capacity is that the preamble to the partnership deed 'clearly sets out that the contracting parties were 14 and that Gosain Chander Bhan was a partner in his individual capacity.' It is true that he has repelled some of the grounds given by the Income-tax Officer in support of his conclusion but, as already stated, he has entirely omitted to consider other facts found by the Income-tax Officer which bear directly on the point. It may be that the finding cannot be said to be based on no evidence but even so, as it has been arrived at by ignoring relevant facts, it is vitiated by an error of law.

The first sentence of paragraph 6 of the order of the Appellate Assistant Commissioner quoted above paraphrases the provisions of section 4 of the Partnership Act and is unacceptable. The rest of the quotation appears to have been lifted from the head-note of the decision in Commissioner of Income-tax v. Laxmi Trading Co. The question which fell for decision in that case was :

"Whether there could in law be a partnership between a partner in a head-firm and another individual in respect of the partner's share in the head-firm so as to entitle the partners in the sub-firm to apply for registration thereof under section 26A, Income-tax Act, 1922 ?"

and it was answered in the affirmative.

A sub-partnership can also, as stated by the learned Appellate Assistant Commissioner, apply for registration under section 26A. But where does it all lead to ? Here the question which arises is whether the headfirm as such has entered into partnership with another or whether only one of the partners of the head-firm has entered into partnership with another. For, that is what the question really is. According to the appellant, the Ferozepore firm as a firm has become partner in the Rugar firm and not merely Gosain Chander Bhan. The learned Appellate Assistant Commissioner has not addressed himself to this aspect of the case. At the end of the paragraph, the learned Appellate Assistant Commissioner has observed : "There is no data on the record to substantiate the finding of the Income-tax Officer that the firm was not genuine in view of the local enquiries by him." That, however, is not the whole question. The whole question which arises in this case is whether in the facts and circumstances of this case th

The Tribunal merely referred to the decisions in Laxmi Trading Co's case and in Agardih Colliery Co's case and dismissed the department's appeal. The latter is also a case of sub-partnership and does not assist us in deciding the matter arising here.

It is contended on behalf of the respondents that the question arising here has already been settled by three decisions of this court. The first of these is Commissioner of Income-tax v. Sivakasi Match Exporting Co. In that case this court held that the mere fact that one of the partners of the firm seeking registration brought his capital from another firm of which he was one of the partners and the further circumstances that he shared the profits received by him from the former firm with his partners in the latter firm did not make the former partnership bogus. In the first place, the circumstance that upon a certain set of facts this court arrived at a particular decision would not necessarily make that a binding precedent even though the inference drawn by the court upon which its judgment rests is one of law. In the second place, we have here the fact that one of the partners of the firm seeking registration was a partner in his representative capacity and not merely a partner in his individual capacity

"A partner may be the karta of a joint Hindu family; he may be a trustee; he may enter into a sub-partnership with others; he may, under an agreement, express or implied, be the representative of a group of persons; he may be a benamidar for another. In all such cases he occupies a dual position. Qua the partnership, he functions in his personal capacity; qua the third parties, in his representative capacity. The third parties, whom one of the partners represents, cannot enforce their rights against the other partners nor the other partners can do so against the said third parties. Their right is only to a share in the profits of their partner-representative in accordance with law or in accordance with the terms of the agreement, as the case may be."

It is upon these observations that learned counsel for the respondents has placed strong reliance. These observations are based on the fact that the person admitted as a partner in the firm seeking registration was so admitted as an individual. They cannot apply and were apparently not intended to apply to a kind of a case as the one we have here, that is, where the partner to the knowledge of other partners was joining on behalf of and representing several persons. What has to be determined is the cumulative effect of this circumstance taken along with the other circumstances established in the case. That is a question of law and I am clear that that question is far from being settled and also that it is a substantial question of law.

A further question which arises on the particular facts of this case is whether the Rupa firm can be said to have legal existence because its real partners are not merely 14 persons but there are 7 persons in addition to that number. Under the provisions of section 11 of the Companies Act, 1956 (section 4 of the 1913 Act), where the number of partners exceeds 20, has to be incorporated and that is admittedly not what has been done here. If, therefore, the number is in excess of 20, the firm being unincorporated, it cannot be said to have a legal existence. Unfortunately the Income-tax Appellate Tribunal has not discussed the facts and circumstances of this case but dismissed the second appeal preferred by the appellant on the short ground that there was no merit in it in view of the decisions cited by it. It was necessary for the Tribunal to ascertain whether on the facts of this case those decisions concluded the matter. The questions which arise are, in my opinion, substantial between the parties and are

ORDER. –

In accordance with the opinion of the majority, Civil Appeal No. 605 of 1963 is dismissed with costs. Civil Appeals Nos. 810 and 811 are dismissed, but there will be no order as to costs.

Appeal dismissed.

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