

SUREME COURT OF INDIA

Jer And Co.

Vs.

Commissioner of Income-Tax, U.P.

(J Shah, A Grover and K Hegde JJ.)

13.01.1971

JUDGMENT

J.C. SHAH, C.J.

1. By an agreement dated July 21, 1945, two brothers Dady and Minoo entered into a partnership to carry on the business of wholesale merchants and in foreign liquor in the name and style of "Jer and Company" at Agra Dady obtained in 1945 a licence from the Excise authorities Under Rule 574 of the U.P. Excise Rules for wholesale vending of foreign liquor. The licence was renewed every year. The licence contained no prohibition against entering into partnership for carrying on the business in foreign liquor by the holder of the licence.

2. The partnership was registered Under Section 26A of the Indian Income-tax Act 1922 till the assessment year 1957-58 and tax was assessed and levied on the footing that the firm was a registered firm. On applications for renewal filed by the firm for the assessment years 1958-59 and 1959-60, the Income-tax Officer granted registration, but the order was set aside by the Commissioner of Income-tax in exercise of his power Under Section 33B of the Indian Income-tax Act. The firm appealed against the order to the Income-tax Appellate Tribunal. The Tribunal allowed the appeal holding that there was no sub-letting or transfer of the business covered by the licence in contravention of Clause 13 of the licence, that the licence had been granted from 1945 in the same form as for the assessment years under consideration, that the partners carried on the business of wholesale merchants in addition to that of vending liquor wholesale, that the partnership deed was for sharing the profits alone and on that account there was no violation of the terms of the licence.

3. At the instance of the Commissioner, the following question was referred by the Tribunal to the High Court of Allahabad :

Whether on the facts and in the circumstances of the case the firm was entitled to registration Under Section 26A of the Income-tax Act, 1922.

The High Court answered the question in the negative. The firm has appealed to this Court with special leave.

4. The Commissioner and the High Court proceeded on the footing that the licence was governed by Rule 322 which prohibited the holder of the licence from entering into a partnership with another person. But the licence, it is clear from the record, was in Form FL II issued under the U.P. Excise Manual. The licence does not prohibit the holder from entering into partnership by the holder of the licence : it merely provides that the licence shall not be sub-let or transferred. Since there is no prohibition against entry by the holder of the licence into a partnership the question whether the partnership was illegal does not arise. The firm was entitled on that account to registration. It is somewhat unfortunate that the attention of the Commissioner and the High Court was not invited to the form in which the licence was issued by the Excise authorities. They proceeded to decide the case on the footing that Rule 322 of the Excise Manual applied. But that Rule has no application here.

5. On that view, it is unnecessary to consider the other questions argued at the bar, whether the partnership related to sharing of profits of the business in liquor carried on by the two partners and that it was not a partnership relating to the licence.

6. The appeals are, therefore, allowed. The answer recorded by the High Court is discharged and the answer to the questions will be in the affirmative. The Commissioner will pay the costs of the appellant in this Court and in the High Court. One hearing fee.