

Saroj Aggarwal

Vs

Commissioner of Income-Tax, U.P.

Civil Appeal No. 542 of 1974

(V. D. Tulzapurkar, Sabyasachi Mukharji JJ)

30.09.1985

JUDGMENT

SABYASACHI MUKHARJI J. –

This appeal by special leave is from the judgment and order of the Allahabad High Court dated May 21, 1971, in Income-tax Reference No. 44 of 1965.

This reference arose in respect of the assessment year 1962-63. One Prem Shankar was a partner in three partnership firms, namely, (1) M/s. Hari Shankar Gauri Shankar, (2) M/s. Hari Shankar Gauri Shankar Rice and Dal Mills, and (3) Sri Ram Mahadeo Mills. The said Prem Shankar died on or about July 24, 1959, leaving his widow, Smt. Saroj Agarwal, who is the assessee in the present appeal. After the death of Prem Shankar, Smt. Saroj Agarwal, the assessee herein, joined the partnership in which her husband was a partner before his death. It is necessary, in view of the contentions raised in this appeal, to refer to the partnership deed between the deceased husband of the assessee and his partners. The deed was dated July 30, 1957. It described the three partners - one being L. Hari Shankar and the others being L. Gauri Shankar and the third being L. Prem Shankar, the deceased husband of the assessee.

On behalf of the assessee it was stressed before us, as was apparent from the deed, that they all had the same address as described in the said partnership deed. This was pointed out to stress the point that they were members of a joint Hindu family. The recital in the said deed stated that they had been carrying on business since July 9, 1956, and the partnership deed was executed on July 9, 1956, and thereafter one Baijnath, who was also a partner as per the deed of July, 1956, had retired and the parties mentioned in the deed had decided and agreed to carry on business in partnership and the terms were reduced to writing. Clause 6 stated, inter alia, that the partnership was a partnership at will and the Indian Partnership Act, 1932, applied to it. Clause 7 stated that shares of the parties in the profits (or losses, if any) should be as under :

#First party 0/5/3 in a rupeeSecond party 0/5/3 in a rupeeThird party 0/5/6 in a rupee##

The other clauses were the usual partnership clauses not very material for the present controversy.

The next deed of partnership was dated August 12, 1959, which was executed by the present assessee and the wife of L. Gauri Shankar, the second partner in the original deed, and also Shri Hari Shankar, the first partner. This deed was executed on August 12, 1959, while Prem Shankar had died on July 24, 1959. All the executants to this deed were described as residents of the same old address as in the first- mentioned deed indicating thereby that they came from a joint Hindu

family residing at the same place. It recorded the death of Prem Shankar and he died leaving the present assessee as widow who had adopted one Sudhir Kumar Agarwal, s/o L. Gauri Shankar, the second partner in the original partnership firm, as a son on July 27, 1959, i.e., three days after the death of Prem Shankar. The present assessee had joined the partnership and Gauri Shankar retired from the partnership and his wife, Smt. Shakuntala, had joined the partnership "in his place" and his minor son, Ravi Agarwal, under the guardianship of h

"(2) That the profits and losses of the said firm shall be shared by the partners and the minors since July 27, 1959, as under :

Profits Loss(1) L. Hari Shankar Agarwal 0/5/4 0/5/4(2) Smt. Shakuntala Agarwal 0/2/8 0/5/4(3) Smt. Saroj Agarwal 0/2/8 0/5/4(4) Ravi Agarwal 0/2/8(5) Sudhir Kumar Agarwal 0/2/8##

(7) That the partnership shall not dissolve on the death of a partner. The legal representative of the deceased shall come in his place as partner."

This deed clearly stipulated that the firm would continue to be run under the above name and style and/or in such other names at Kanpur or at such other places as the parties might from time to time determine, and would not be dissolved on the death of a partner. It altered the proportionate share of profits and loss which became necessary due to admission to the benefits of partnership of some minor partners. There is another subsequent deed of partnership, which it is not material for our present purpose, to be referred to.

For the assessment year 1962-63, the Income-tax Officer while making the assessment on the assessee included under section 64 of the Income-tax Act, 1961, in the total income, the share income as well as the interest earned by the minor adopted son from the partnerships to the benefits of which the minor son was admitted. Prem Shankar, since deceased, while he was a partner had an unabsorbed loss of Rs. 25,914 from speculation suffered as a partner of the firm, M/s. Hari Shankar Gauri Shankar Rice & Dal Mills. It so appears from the order of the Appellant Assistant Commissioner. The Tribunal, in the statement for the present appeal, has, however, stated that this statement by the Appellate Assistant Commissioner was not strictly correct and as per the orders of the Income-tax Officer passed under section 35 of the Indian Income-tax Act, 1922, for the assessment years 1958-59, 1959-60 and 1960-61, the speculation losses were from the firms of M/s. Hari Shankar Gauri Shankar Rice & Dal Mills as well as from Ha

The second contention, which is relevant for the present purpose, raised before the Appellate Assistant Commissioner on behalf of the assessee was that the assessee was entitled to have the speculation losses of the earlier years set off against her share of speculation profits from the firm for the assessment year under appeal as per the provisions of section 78(2) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"). Section 78 of the Act is as follows :

"78. Carry forward and set off of losses in case of change in constitution of firm or on succession. - (1) Where a change has occurred in the constitution of a firm, nothing in this Chapter shall entitle the firm to have carried forward and set off so much of the loss proportionate to the share of a retired or deceased partner computed in accordance with section 67 as exceeds his share of profits, if any, of the previous year in the firm, or entitle any partner to the benefit of any portion of the said loss which is not apportionable to him under section 67.

(2) Where any person carrying on any business or profession has been succeeded in such capacity by another person otherwise than by inheritance, nothing in this Chapter shall entitle any person other than the person incurring the loss to have it carried forward and set off against his income."

A similar claim was also made in respect of Sudhir Kumar who had a share of speculation profits from the firms. The contention of the assessee was that the assessee had succeeded her husband as a partner and her son had also succeeded his father as he was admitted to the benefits of partnership on his father's death and, therefore, the share of speculation losses of Prem Shankar should have been set off against the assessee's and minor son's share of speculation profits in the assessment year under appeal. In the alternative, it was contended that in any case as the minor's share of speculation profits had been considered as the assessee's share and since the assessee had succeeded her deceased husband, the set-off was allowable against the minor's share of profits too. The Appellate Assistant Commissioner while dealing with this contention of the assessee held that there could be no succession or inheritance in respect of membership of a firm and that on the death of husband or father, the wife or the son m

The Appellate Assistant Commissioner rejected the contentions of the assessee so far as this contention with which this appeal is concerned and held that the assessee was not entitled to set off the speculation losses suffered by her husband against her speculation profits of the assessment year under appeal.

From the decision of the Appellate Assistant Commissioner, both the assessee and the Revenue went up in appeal before the Tribunal.

Regarding the contention involved in this appeal, the attention of the Tribunal was drawn to the decision of the Bombay High Court in the case of CIT v. Bai Maniben [1960] 38 ITR 80. It was urged that the said decision covered the situation in the instant case. It was contended on the other hand on behalf of the Revenue with reference to the said partnership deed and other relevant documents that the facts were otherwise. It was urged specifically that the new partnership deed of the firm of M/s. Hari Shankar Gauri Shankar Rice & Dal Mills was executed after the death of Prem Shankar which is dated August 12, 1959. In the preamble, it was stated that the assessee had joined the partnership which meant, according to the Revenue, that she had joined the partnership voluntarily and had not come in place of her husband by way of inheritance. It was also pointed out that the shares were also altered. It was urged on behalf of the Revenue that the facts of this case were essentially different from those that were

The Tribunal accepted the assessee's contention and held that reading the partnership deed, it was clear that the assessee and the minor adopted son were admitted to the various partnerships after the death of Prem Shankar because they were the heirs of Prem Shankar and because of the relationship which subsisted between the assessee and the other partners, the assessee had succeeded by inheritance to her husband in her capacity as partner. The Tribunal noted and it was not provided in the partnership deed that after the death of any partner, the firm would not be dissolved, but it appears that actually after the death of the partner, the firm was not dissolved but had continued. It appears not only that it was the factual position but also it was intended to be so because of the natural inference that follows from the relationship of the parties. The Tribunal allowed the assessee's appeal.

From the said decision of the Tribunal, there was a reference before the Allahabad High Court under

section 256(2) of the Act, at the instance of the Revenue, referring the following question for the opinion of the High Court :

"Whether, on the facts and in the circumstances of this case, the assessee was entitled to the set-off of speculation losses brought forward from earlier years against the speculation profits of the assessment year under appeal ?"

The High Court set out the facts which counsel for the assessee sought to challenge on the ground that most of the facts were not those as found by the Tribunal. We do not find any material or any significant difference between the facts found by the Tribunal and the facts narrated by the High Court, so far as the material question involved in this case is concerned. That is the reason why the facts as found in the statement of the case have been set out hereinbefore in such extensive manner, even though these do not appear in that manner in the judgment of the High Court.

"Set off" and "carry forward and set off" are the subject-matters of sections 70 to 80 of Chapter VI of the Act. Right to carry forward is available only to the persons who had suffered losses. Sub-section (1) of section 78 is not material for our present purpose. Sub-section (2) of section 78, as noticed before, stipulates that where any person carrying on any business or profession has been succeeded in such capacity by another person otherwise than by inheritance, nothing in this Chapter, i.e., the Chapter containing provisions for carry forward and set off of losses in the case of change in the constitution of the firm or on succession, shall entitle any person other than the person incurring the loss to have it carried forward and set off against his income. It is evident on an analysis of the section that mere succession will not permit or bestow the right to carry forward losses in speculation. It is only where succession is by inheritance that the right is given to that person to set off the loss aga

Therefore, the sole and moot question involved in this appeal is, whether the assessee became a partner and as such succeeded by inheritance, i.e., did the wife get her right by inheritance or by entering into a fresh deed of partnership with the existing partners or other partners ? As noted by the Tribunal as well as by the High Court that a more or less identical question fell for consideration by the Bombay High Court in the case of CIT v. Bai Maniben [1960] 38 ITR 80. In that case, H and his nephew, J, were partners with equal shares in a partnership which conducted business in cloth. H died on August 14, 1953, leaving only his widow, the assessee. On August 15, 1953, a partnership deed was executed between J and the assessee and under that partnership agreement, the business was continued. In the assessment year 1955-56, the assessee claimed to set off against her share of profits, her share of the loss of the year 1954-55 as well as the share of the loss incurred prior to August 14, 1953, when her hus y in the present case, is similar to section 78(2) of the Act and allowed the set-off claimed by her. The Bombay High Court, on a reference, held that the assessee had succeeded by inheritance to H's capacity as partner. It further held that the Tribunal's conclusion was one on a question of fact and having regard to the evidence, the court would not be justified in interfering with that conclusion. The assessee was, therefore, entitled to set off against her share of the profits, the losses suffered by the assessee's husband in 1953-54 and 1954-55. The Bombay High Court noted that the sole question decided in that case was whether Bai Maniben had by inheritance succeeded to her husband, Hiralal, in the firm. The High Court noted the significant facts noted by the Tribunal.

There are significant similarities and there are significant dissimilarities also between the facts of the present case and the facts of Bai Maniben [1960] 38 ITR 80, upon which reliance was placed respectively by the assessee as well as the Revenue. It was contended on behalf of the assessee that

this decision is a stare decisis which has stood the test of time and was never doubted until the instant judgment of the Allahabad High Court under appeal and should (therefore) be made applicable in the present case.

According to section 42 of the Partnership Act, subject to contract between the partners, a firm is dissolved, inter alia, by the death of a partner. There was no express contract to the contrary in this case, it was urged. On the other hand, it was urged on behalf of the assessee that a contract under section 42 of the Partnership Act need not be in writing and it might be inferred from the conduct of the parties. If it was found that on the death of a partner, the remaining partners and heirs of the deceased acted in any manner which indicated that the old firm was not dissolved and they had continued to carry on the business, it was possible to infer that the original partners had entered into an agreement that on the death of one of them, the firm would not be dissolved. Reliance was placed on the Calcutta High Court decision in the case of Gokul, Krishna Das v. Shashimukhi Das [1912] 16 CWN 299, where such inference was drawn from the conduct of the parties. Such was also the case in the Bench decision

The Full Bench of Madras High Court in the case of Jupudi Kesava Rao v. Commissioner of Income-tax [1935] 3 ITR 339, held that the word "succession" as used in section 26(2) of the Indian Income-tax Act, 1922, meant a transfer of ownership and the person who succeeded another must have by such succession become the owner of the business which his predecessor was carrying on and which he, after the succession, carried on in such capacity. Consequently, it was held that there was no "succession" within the meaning of section 26(2) of the Indian Income-tax Act, 1922, where the business of a joint Hindu family devolved on a coparcener by survivorship under Hindu law. In that case, A and his son, B, constituted a Hindu undivided family. A died after filing a return but before assessment and the family business devolved on B by survivorship. Held, that B did not "succeed" to the business within the meaning of section 26(2) of the Income-tax Act and B was not liable to be assessed as successor under section 26(2),

In the case of Executors of the Estate of J.K. Dubash v. Commissioner of Income-tax [1951] 19 ITR 182 (SC), this court had to consider the provisions of section 25(4) and section 26(2) of the Indian Income-tax Act, 1922. In view of the facts involved in that case, it is not material to discuss in detail that decision.

In the case of Commissioner of Income-tax v. A.W. Figgies and Company [1953] 24 ITR 405, the provisions of section 25(4) of the Indian Income-tax Act, 1922, came up for consideration by this court and it was held that a mere change in the constitution of a partnership did not necessarily bring into existence a new assessable unit or a distinct assessable entity and in such a case, there was no devolution of the business as a whole. The assessee, a partnership firm, carrying on a business consisted of three partners when it paid tax under the Indian Income-tax Act, 1918. There were several changes in the constitution of the firm since then resulting in changes in the shares of the partners. In 1947, the partnership was converted into a limited company and the assessee claimed relief under section 25(4) of the Indian Income-tax Act, 1922. The Income-tax Officer disallowed the claim on the ground that the partners of the firm in 1939 being different from the partners of the firm in 1947, no relief could be give

The Division Bench of the Bombay High Court in the case of Commissioner of Income-tax v. Shamsunder Juthalal [1978] 112 ITR 927, had occasion to consider this question. There, the firm consisted of three partners. J, V, and M. Clause 6 of the partnership deed provided that "the death of any partner shall not dissolve the partnership. On the death of any partner, unless the surviving

partners decide otherwise, the share of the deceased partner shall be continued up to the end of the accounting year in which he dies after which it shall cease and determine". On the death of J on October 22, 1955, the major heirs of J were taken in as partners and one of the heirs who was a minor was admitted to the benefits of the partnership. J's share was apportioned equally among the heirs. The new partnership agreement stated that the parties to the new agreement agreed to continue, with effect from October 23, 1955, the business together in partnership. On the question whether J's son could carry forward and set off the s

In the case of CIT v. Madhukant M. Mehta [1981] 132 ITR 159 (Guj), the question involved was different. The decision under appeal was referred to by the Gujarat High Court at page 182 of the report. It was observed that the said decision was not reconcilable with the decision of the Bombay High Court in CIT v. Bai Maniben [1960] 38 ITR 80 and it was further commented that Bai Maniben's case [1960] 38 ITR 80 was sought to be distinguished in the decision of the Allahabad High Court under appeal, but P.D. Desai J., who delivered the judgment of the Court, expressed the opinion that the court was not satisfied that the distinction made any difference in that case.

The main point which was stressed on behalf of the Revenue was did the wife, the assessee, have a right to join by inheritance or could she refuse to join or were the other partners obliged to take her as partner or had an option not to take her. Succession does not remain in vacuum. After the death of Prem Shankar, did the assessee become a partner as a matter of course or acquired any right to succeed or was it further necessary that she should enter into a fresh agreement ? But in this case, from the facts narrated before, it was evident that the business carried on by the partnership firm was a family concern of the partners. The partners were brothers of the deceased Prem Shankar. They were living in the same house. The new partnership firm was constituted with Prem Shankar's wife and the adopted son with necessary adjustment in the shares of the parties due to the adoption by her as well as the partners-his brothers. The new partnership deed was executed within four days of the death of Prem Shankar an

In the facts and circumstances of this case, we, therefore, hold that though there was no formal deed for four days, there was no vacuum in the succession. The wife, the assessee, of the deceased partner, Prem Shankar, could not get out of the obligation to share in the partnership and she had indeed the right to a share in the partnership. Similarly, the other partners did not have any right to deny her that right.

In the circumstances, we would answer the question in the affirmative and in favour of the assessee. The appeal is accordingly allowed. In the facts and circumstances of the case, parties will pay and bear their own costs.

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