M/S. Wazid Ali Abid Ali

Vs

Commissioner of Income Tax, Lucknow

And

Additional Commissioner of Income Tax, Gujarat, Ahmedabad

Vs

United Commercial Co., Ahmedabad

Civil Appeals Nos. 1792 (NT) of 1974 and 609 (NT) of 1975

(Sabyasachi Mukharji, G. L. Oza JJ)

10.11.1987

JUDGMENT

SABYASACHI MUKHERJI, J. -

1 By this judgment we will dispose of two appeals - first one at the instance of the assessee and the second one at the instance of the revenue - but both these appeals deal with one common situation namely the position of the registered firm during the assessment year if one of the partners dies or retires. Civil Appeal No. 1792 (NT) of 1974 is an appeal by the assessee from the judgment and order of the Allahabad High Court dated December 22, 1972 answering the following question referred to it under Section 256(1) of the Income Tax Act, 1961, hereinafter referred to as the Act, for the assessment year 1965-66 in favour of the revenue and in the negative :

> Whether, on the facts and in the circumstances of the case the Tribunal was justified in holding that for the period covered by the old constitution the income was assessable in the hands of the assessee as a registered firm ?

2. For the assessment year 1965-66 the relevant previous year commenced on November 17, 1963 and ended on November 4, 1964. The assessee was a partnership firm styled as Messrs Wazid Ali Abid Ali of Phulpur in the district of Azamgarh. It was constituted under a deed of partnership dated March 17, 1959 with 17 members. The said deed provided, inter alia, as follows :

> That where the deed is silent, it shall be governed by the Indian Partnership Act save and except that on the death or demise of any partner the firm shall not be dissolved but shall be carried on with the remaining partners and that heir and representative of the deceased partner who resides in India on such terms and conditions to which they mutually agree.

3. On June 4, 1964, one of the partners, Qamaruddin died and his son, Fariduddin joined the firm as a partner. New deed of partnership evidencing the change in the constitution of the firm was not executed before November 4, 1964. The assessee filed a declaration in Form No. XII for the

relevant assessment year 1965-66 under Section 184(7) of the Act. The declaration was signed by the 16 members who had continued all along and also by Fariduddin who had become a partner in place of his deceased father. The deceased held that the admission of a new partner in place of the deceased partner amounted to a change in the constitution of the firm. He, therefore, held that the assessee was not entitled to the continued benefit of registration under Section 184(7) of the Act. He was of the opinion that the firm had failed to file a fresh application for registration and therefore he disallowed the benefit of registration to the firm. On appeal the Appellate Assistant Commissioner held that the assessment year should have filed a fresh application for registration along with the partnership deed embodying the change in the constitution of the firm. The appeal was accordingly dismissed by him. The assessee preferred further appeal to the Tribunal and urged that the change which occurred on the death of Qamaruddin did not require the execution of a new deed of partnership nor a fresh application for registration. Alternatively, it was contended that the assessee was entitled to the continued benefit of registration at least for that part of the previous year during which Qamaruddin had remained alive. The Tribunal was the view that the death of Qamaruddin and the inclusion of Fariduddin involved a change in the constitution of the firm. It was, therefore, necessary that a fresh deed of partnership should have been executed as well as a fresh application for registration filed. The Tribunal, however, accepted the alternative contention and observed that the conditions laid down in sub-section (7) of Section 184 of the Act had been satisfied and that the assessee would be entitled to the benefit of registration up to June 4, 1964, that is to say, a part of the previous year. In view of Section 187(2) of the Act, it was obligatory according to the Tribunal and the deceased to make single assessment only on the assessee and to apportion the total income between the partners who were entitled to receive the profits accordingly as they were entitled to share the profits, the firm being assessed as a registered firm in respect of the profits ending June 4, 1964 and as an unregistered firm in respect of the profits for the remaining part of the previous year. Thereupon the aforesaid question was referred to the High Court.

4. The High Court was of the view that on the death of Qamaruddin on June 4, 1964 and on the entry of Fariduddin, there was a change in the constitution of the firm. According to the High Court by virtue of Section 42(c) of the Indian Partnership Act, 1932 a firm was dissolved by the death of the partner but as the section provided that was subject to the contract between the partners. The High Court was of the view that Clause 7 of the partnership deed date March 17, 1959 specifically stipulated that the firm would not be dissolved on the death of a partner but it would be carried on with the remaining partners and such heirs of the deceased partner who resides in India on terms and conditions to which they mutually agree. The High Court was of the view that if there was any heir of the deceased partner who resides in India and agrees with the surviving partners on the terms and conditions on which he could be admitted to the partnership, the firm would not be dissolved. The High Court was further of the view that the condition that there should be mutual agreement between the surviving partners and the incoming partner indicated that the inclusion of the heir of the deceased partner was not automatic one but rested on agreement.

5. The High Court referred to the decision in In re Makerwal Colliery ((1942) 10 ITR 422 (Lah), where Monir, J. observed that under the partnership constituted by a deed of partnership, the legal representatives of a deceased partner, who by reason of a provision in the deed was entitled but not bound to become a partner for a period which might be the same or different from the period fixed under the deed he was to continue in the partnership for the unexpired portion of the period, the constitution of the firm is altered and, therefore, the new firm could not apply for the renewal or registration nor can in such a case the new firm apply for registration of the original partnership as ex hypothesi, the applicants for registration were not parties to the deed of partnership. There the learned Judge had further observed that the only course open to seek registration was to execute a

new deed of partnership and to apply for the registration of that deed.

6. Reference was made by the High Court to the decision of the Orissa High Court in Giridharilal Seetaram & Bros. v. CIT ((1949) 17 ITR 282 (Ori HC)). The Orissa High Court held that in case where the partnership deed provided that on the death of a partner his legal representative was entitled to join the partnership and the partnership would be continued without dissolution, an application for registration signed by the surviving partners and the son of the deceased partner was not defective and should not be rejected on the ground that the original partnership deed without any altercation had been produced. The learned Judge observed :

It may be that ordinarily on the death of any of the partners, the firm gets dissolved automatically but it does not so dissolve where the deceased partner's heir automatically, by virtue of the terms of the deed, becomes a partner without any fresh agreement.

According to the High Court the aforesaid observation of the learned Judge had not been endorsed by the Allahabad High Court in Panna Lal Babu Lal v. CIT ((1969) 73 ITR 503 (All HC)). While agreeing to the observations in Makerwal Colliery ((1942) 10 ITR 422 (Lah)) Oak, C.J., and T. P. Mukherjee, J. found themselves unable to adopt the view taken in Giridharilal Seetaram & Bros. ((1949) 17 ITR 282 (Ori HC)) that on the death of a partner his successor would become a partner of the firm automatically. It was open to the heir, according to their decision, to join or not to join the partnership. He was not bound to do so. In that view, application for renewal of registration signed by the surviving partners and the son of the deceased partner could be rejected because the constitution of the firm was no longer reflected in the instrument of partnership. The High Court in the instant case was of the view that the Tribunal was right in holding that the inclusion of Fariduddin as a partner upon the death of Qamaruddin resulted in a change in the constitution of the firm and it could no longer be given the continued benefit of registration on the basis of the original partnership deed. The High Court was of the view that the next question was whether the Tribunal was also right in holding that the assessee was entitled to the continued benefit of registration in respect of the profits upto June 4, 1964 that is to say the period during which Qamaruddin remained alive. According to the High Court it was clear that continued benefit of registration must be in respect of the entire assessment year, and therefore it must affect the profits of the entire year relating to the assessment year. If the firm had dissolved on June 4, 1964 with the death of Qamaruddin the relevant previous year would have been the period commencing from November 17, 1963 to June 4, 1964 and the profits for that period would have been treated for the assessment as in a case of a registered firm. The firm was, however, not dissolved and continued in existence throughout the previous year that is to say from November 17, 1963 to November 4, 1964. The High Court was, therefore, of the view that there was merely a change in the constitution of the firm. The High Court was of the opinion that by reason of the proviso to sub-section (7) of Section 184 of the Act the registration granted in a preceding year could not continue to have effect for the assessment year under consideration. The High Court was of the view that it was necessary for the assessee by reason of Section 184(8) of the Act to apply for fresh registration for the assessment year concerned in accordance with the provisions of Section 184. That required an instrument evidencing the partnership and specifying the individual shares of partners. The declaration in Form No. XII was misconceived, according to the High Court. The view taken by the that the profits up to June 4, 1964 should be treated as in case of a registered firm and the profits for the rest of the previous year should be treated as in case of an unregistered firm, according to the High Court, found no support in the statute. The High Court was of the view that dividing the profits of the previous year in this fashion amounted to treating the firm as a registered firm for a part of the assessment year and an unregistered firm for the remaining part. The High Court found it difficult to

conceive such a case under the Act. The High Court was, therefore, of the view that the Tribunal as not right in holding that during the period covered by the constitution of the original partnership deed the income was assessable in the hands of the assessee as a registered firm. The High Court accordingly answered the question in the negative. In consequence, the revenue succeeded. The validity of this answer to the question has been challenged in this appeal by the assessee. Indeed, on this question divergent views have been taken by different High Courts as we shall presently notice.

7. Civil Appeal No. 609 (NT) of 1975 is an appeal by certificate granted by the High Court of Gujarat and admitted by this Court, This is an appeal from the High Court of Gujarat at the instance of the revenue for the assessment year 1964-65. The following two questions were referred to the High Court of Gujarat :

> (1) Whether, in the facts and circumstances of the case, there was any dissolution of the partnership on the date of death of Shri Sarabhai Chimanlal and that therefore there should be separate assessment till the date of his death ?
>
> (2) Whether in the facts and circumstances of the case, provisions of Section 187(2) apply to the facts of the case ?

The facts involved in the said appeal were that the assessee was a partnership firm. The firm was granted registration in the preceding year 1963-64 under the Act. Originally the firm consisted of five partners and one of the partners was Sarabhai Chimanlal. Sarabhai died on March 9, 1963. The business of the firm was of executing contracts entered into with the Railways for handling of goods at various stations and also some business in respect of coal, dealing in coal on commission etc. The major part of the work was that of handling contracts entered into with the Railways for handling goods at Sabarmati Railway Station in Gujarat. On the death of Sarabhai Chimanlal, the books of the partnership firm dealing with the contracts with the Railways were closed. The firm was maintaining its accounts in three separate sets of books. Set No. I dealt with the contracts of Railways. In accounts maintained in Set No. II and Set No. III books of accounts were continued but in accounts of Set No. I balances were struck after preparing profit and loss up to June, 1963, and the profits were credited to the respective partners' accounts including the receipts. Thereafter the account of the deceased was carried forward in different books. In respect of the other businesses, the books were closed but at the end of the period of account, profits were determined and bifurcated between periods, the first period till the date of death of the deceased partner and the second period being after his death. The previous year was Samvat Year 2019. Samvat Year 2019 commenced from October 28, 1962 and ended on October 27, 1963. The profits were credited in the account of Sarabhai along with the accounts of other partners for both the periods so far as Set No. II and Set No. III were concerned. The assessee firm filed two returns for the assessment year in question - one for the period ending on March 9, 1963 and the other for the rest of the accounting period. A declaration under Section 184(7) was enclosed along with the return for the first period. The basis on which these two returns were filed was that according to the assessee there was dissolution of the firm on the death of Sarabhai Chimanlal and, therefore, the subsequent continuance of business was only for the purpose of winding up the firm. The Income Tax Officer refused to accept the contentions of the assessee and his main ground was that there was a change in the constitution of the firm within the meaning of Section 187(2). Therefore, the assessee should have applied for registration and should not have remained content with the filing of the declaration under Section 184(7) of the Act. Against the said decision, the assessee appealed and the Appellate Assistant Commissioner agreed with the conclusion of the Income Tax Officer and dismissed the appeal. The assessee appealed to the Appellate Tribunal. The Tribunal came to the conclusion that

there was a dissolution of the partnership on March 9, 1963 and that conclusion was drawn from the various circumstances which the Tribunal took into consideration. Then at the instance of the revenue, reference was made to the High Court on the aforesaid two questions mentioned hereinbefore.

8. The Tribunal had negatived the contention that Section 187(2) of the Act, applied to the facts and circumstances of the case. The High Court took into account two clauses in the background of the partnership deed. Accordingly to the Tribunal that the balances were completely struck and carried to a new set of book was an important circumstance and evidence find out whether the parties did want to bring about dissolution. The Tribunal was of the view that by virtue of Clause 8 of the partnership deed the death of a partner would not bring about a dissolution automatically, yet by mutual consent of the parties which could be inferred from the facts the firm has been dissolved. The High Court, however, noted that the primary circumstance was that the books of accounts in Set No. I, which was in respect of major business, were closed on the death of Sarabhai Chimanlal. The Tribunal, however, had noted that the contract in respect of the Sabarmati Railway Station was to expire on March 31, 1963 but the contract was deemed to have been extended till April 30, 1963. As soon as Sarabhai died, books of accounts of the firm were closed and necessary entries were effected in respect of other railway stations also, since the contracts were terminated, that is, in September 1963 books of other railway stations were also closed. The High Court noted that another major circumstance in support of its conclusion was mutual consent for dissolution of the firm and the fact that the partnership firm did not enter into new business activities and did not undertake any new contract. The High Court noted that if the surviving partners of the firm wanted the firm should continue as it could be continued under Clause 8 of the partnership deed then surely they would have taken new contracts or entered into new activities because a firm like the assessee firm surely would have come to a halt if there were no business activities or no new business contracts. The Tribunal had found considerable substance in the contention of the assessee that after the death of Sarabhai, the partners wanted to close the business. Another circumstance which had appealed to the Tribunal was that the profits earned subsequent to the death of Sarabhai were also credited to the account of the deceased proportionately and even in respect of profit earned for the subsequent period the deceased partner was given profit. The High Court noted that these, according to the assessee, indicated that the firm was dissolved but in the course of winding up whatever was realised was proportionately distributed and amount coming to the share of the deceased was credited in his account even though he had expired on March 9, 1963. The High Court noted that the Tribunal was of the view that the conduct of the partners clearly indicated that firm had agreed not to carry on business and whatever was done after death of Sarabhai was merely by realisation of certain outstanding dues in the course of dissolution of the firm in discharging certain obligations by completing the contracts entered into prior to the death of Sarabhai.

9. The High Court noted that there were two other circumstances which were pointed out. One was that no new deed of partnership was executed after Sarabhai's death nor was any application made for registration by the surviving partners. The application contemplated by Section 184(7) of the Act was filed in connection with the period uptil March 9, 1963 and it was also pointed out before the High Court that the major source of profits was of the business mentioned in Set No. I, that is, Sabarmati Railway contract and actually in other accounts losses were being incurred or not much profit was being earned in the business set out in Set No. II and Set No. III. After noting these facts, the High Court was of the view that the important thing was the intention of the partners and referring to the different clauses the High Court was of the view that the conclusion of the Tribunal that the partners had by mutual agreement decided to dissolve the firm with effect from March 9, 1963 was a correct and justified one and, therefore, the Tribunal was also justified in holding that

the rest of the activities between March 9, 1963 and the end of the accounting period, that is, till the end of Samvat Year 2019 were in the course of dissolution of the firm. The Tribunal was, therefore, right in holding that there should be separate assessment till the date of death of Sarabhai Chimanlal. So far as the second question was concerned the High Court was of the view that where at the time of making an assessment under Section 143 or Section 144 of the Act, it was found that there was a change which had occurred in the constitution of the firm, the assessment should be made on the firm as constituted at the time of the making of the assessment and one of the consequences of a change occurring in the constitution of the firm was that if there was any change in the previous year the firm had to apply for fresh registration for the assessment year concerned in accordance with the provisions of Section 184. Under sub-section (2) of Section 187, for the purposes of Section 187, there was a change in the constitution of the firm if one or more of the partners ceased to be a partner ore one or more new partners were admitted, in such circumstances where one or more of the persons who were partners of the firm before the change had continued as partner or partners after the change; or where all the partners continued with a change in their respective shares or in the shares of some of them. In those circumstances, according to the High Court, since there was dissolution of the firm with effect from March 9, 1963 there was no question of the same firm being continued with change in the constitution of the firm and the requirements of clause (a) of sub-section (2) of Section 187 were not at all satisfied. The High Court was further of the view that in any event, so far as clause (b) was concerned all the partners did not continue with some change in their respective shares or in the shares of some of them since Sarabhai who held 30 per cent share in the profits of the firm had died on March 9, 1963 and thereafter there was no new partner in his place. Of course, the estate of Sarabhai as represented by his wife Kanchanben who was also a partner got the benefit of the profits which went to the share of Sarabhai but Kanchanben got that amount as representing the estate of Sarabhai and not in her capacity as a partner of the firm. Under these circumstances the provisions of Section 187(2) of the Act could not said to apply to the facts of the present case. In the premises the High Court answered both parts of the first question in the affirmative and in favour of the assessee. As to second the High Court answered it in the negative and in favour of the assessee. The High Court granted the certificate as mentioned hereinbefore to appeal to this Court.

10. The real question with which we are concerned in both these appeals is, therefore, when there is death of a partner within a previous year in case of a registered firm what happens.

11. In order to appreciate the controversy in this case, it is necessary to have perspective of the scheme of the Act for the assessment of firms. Under the scheme of the Act assessment of firm has been provided in Chapter XVI and it can be found in Sections 182 to 189 of the Act. Section 170 of the Act which is relevant in this connection provides succession to business or profession and stipulates that where a person carrying on any business or profession or such person hereinafter in that section being referred to as the predecessor has been succeeded therein by any other person who continues to carry on that business or profession, the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession; and the successor shall be assessed in respect of the income of the previous year after the date of succession. The other sub-sections of Section 170 deal with certain contingencies with which we are not concerned. The expressions "firm" and "partnership" have the same meaning as given in the Indian Partnership Act, 1932. "Partnership" is defined by Section 4 of the said Act as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. It is further stated that the relation of partnership arises from contract and not from status. Section 39 of the said Act provides dissolution of partnership between all the partners of a firm called the "Dissolution of the firm". A firm may be dissolved with the consent of all the partners or

in accordance with a contract between the partners. Section 42 provides that subject to contract between the partners, a firm is dissolved, inter alia [see clause (c)] by the death of a partner. It is necessary to bear in mind that Section 143 deals with regular assessment and Section 144 deals with best judgment assessment. Section 182 of the Act which is in Chapter XVI as mentioned hereinbefore provides for assessment of firm and stipulates that notwithstanding anything contained in Sections 143 and 144 and subject to the provisions of sub-section (3), in the case of a registered firm the income of the firm shall be distributed in the manner indicated therein. Sub-section (3) of Section 182 is not material for our purpose. Section 183 of the Act deals with assessment of unregistered firms. Group of sections under heading B "B - Registration of Firms" contained in Section 184 to Section 186 deal with registration of firms. Section 184 of the Act deals with the application for registration of the firms under the said Act. It is not necessary for the present purpose to set out in extenso all the provisions of this sub-section. It may, however, be borne in mind that an application for registration of a firm must be borne in mind that an application for registration of a firm must be made which is evidenced by an instrument and such application may be made during the existence of the firm or after its dissolution. Sub-section (3) of Section 184 stipulates that the application shall be made to the deceased having jurisdiction to assess the firm, and shall be signed by all the partners and in case of dissolution by all persons (not being minors) who were partners in the firm immediately before its dissolution and by the legal representative of any such partners who is deceased. It further stipulates that the application shall be made before the end of the previous year for the assessment year in respect of which registration is sought. The proviso to sub-section (4) also provides that the Income Tax Officer may entertain an application made after the end of the previous year, if he is satisfied that the firm was prevented by sufficient cause from making the application before the end of the previous year. The other requirements of the application, the mode and manner of making it as set out in other sub-sections are not relevant for the present purpose except sub-section (7) of Section 184 which provides that where registration is granted to any firm for any assessment year, it shall have effect for every subsequent assessment year : Provided that there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the registration was granted and the firm furnishes, before the expiry of the time allowed under sub-section (1) or sub-section (2) of Section 139 (whether fixed originally or on extension) for furnishing the return of income for such subsequent assessment year, a declaration to that effect, in the prescribed form and verified in the prescribed manner, so however, that where the Income Tax Officer is satisfied that the firm was prevented by sufficient cause from furnishing the declaration within the time so allowed, he may allow the firm to furnish the declaration at any time before the assessment is made. Sub-section (8) of Section 184 provides that where any such change has taken place in the previous year, the firm shall apply for fresh registration for the assessment year concerned in accordance with the provisions of this section. So, therefore, normally where registration is granted for any firm for any assessment year, it should have effect for every subsequent assessment year unless there is any change in the constitution of the firm or the share of the partners. If there is a change in the constitution of the firm then in such a case the registration will not be continued for subsequent years but will have to be applied afresh. Section 185 deals with the procedure on receipt of the application. It is not necessary for the present purpose to deal with the provisions of the said section in the instant case. Section 186 deals with cancellation of registration. It is not necessary to set out the provisions of the said section. The sections under the heading C are Sections 187, 188 and 189 of the Act and deal with changes in constitution, succession and dissolution. Sub-section (1) of Section 187 provides that where at the time of making an assessment under Section 143 of Section 144 of the Act it is found that a change has occurred in the constitution of a firm, the assessment shall be made on the firm as constituted at the time of making the assessment. The said sub-section

further provides that the income of the previous year shall, for the purposes of inclusion in the total incomes of the partners, be appointed between the partners who, in such previous year, were entitled to receive the same; and when the tax assessed upon a partner cannot be recovered from him, it shall be recovered from the firm as constituted at the time of making the assessment. Sub-section (2) of Section 187 provides that for the purpose of this section, that is to say, Section 187, there is a change in the constitution of the firm, if one or more of the partners cease to be partners or one or more new partners are admitted, in such circumstances that one or more of the persons who were partners of the firm before the change continue as partner or partners after the change or where all the partners continue with a change in their respective shares or in the shares of some of them. Section 188 deals with succession of one firm by another firm. It provides that where a firm carrying on a business or profession is succeeded by another firm, and the case is not one covered by Section 187, separate assessments shall be made on the predecessor firm and the successor firm in accordance with the provisions of Section 170. It may be mentioned that a proviso to sub-section (2) of Section 187 had been inserted by the Taxation Laws (Amendment) Act, 1984 with retrospective effect from April 1, 1975. It provides that nothing contained in clause (a) that is to say, indicating where the change in the constitution of the firm is supposed to have taken place, shall apply to a case where the firm is dissolved on the death of any of its partners. Section 189 deals with firm dissolved or business discontinued. In the context of the above statutory provisions, the question in the instant case is whether on the death of the partners in the two situations mentioned in the above two decisions out of which these appeals have arisen, whether the firm was dissolved or whether two assessments should be made. Now it is well to reiterate that in all cases dissolution does not take place by death if there is a contract to the contrary. If that is so then in such a situation, the next question is whether there was any contract to the contrary in the two situations as contemplated in the decisions with which we are concerned, one of the Allahabad High Court and the other of the Gujarat High Court.

12. There was contract to the contrary, in our opinion, in the Allahabad High Court's decision, where the deed provided, inter alia, that where the deed is silent, it shall be governed by the Indian Partnership Act save and except that on the death or demise of any partner the firm shall be dissolved but shall be carried on which the remaining partners and that the heir and representative of the deceased partner who resides in India on such terms and conditions to which they mutually agree. Therefore, on the death of the partner, there is no dissolution by the expressed terms of the contract between the parties but the partnership is deemed to be carried on with the remaining partners and that heir and representative of the deceased partner. The terms and conditions, however, of such carrying on had to be mutually agreed. In that case as mentioned hereinbefore, Qamaruddin one of the partners died on June 4, 1964 being within the relevant time his son, Fariduddin joined the firm as a partner. Before the expiry of November 4, 1964, that is to say, the assessment year which expired on November 4, 1964, the assessee had filed a declaration in Form No. 12 for the assessment year 1965-66 under Section 184(7) of the Act. We are of the opinion that in this case on the death in the constitution of the firm. It did not dissolve the firm but brought about a change in the constitution of the firm. Fresh deed had to be executed under sub-section (7) of Section 187 [sic Section 184(8)]. This follows from the analysis of the different sections of the Act. The application was not filed for the whole of the assessment year; so for part of the assessment year the firm was registered and for the rest the firm was not registered. The appellant held that the assessment year would be entitled to the benefit of registration up to June 4, 1964, that is to say, a part of the previous year. The Tribunal further held that the total income be apportioned between the partners who were entitled to receive the profits accordingly as they were entitled to share the profits, the firm being assessed as a registered firm in respect of the profits ending on June 4, 1964 and as an

unregistered firm in respect of the profits for the remaining part of the previous year. In our opinion this conclusion is correct. The High Court has held that there is no warrant for this view. We are unable to agree. As a matter of fact and analysis of the different sections of the Act lead to that conclusion and there is no contrary provision in the Act. Such a conclusion is logical and equitable and would do justice to both the revenue as well as to the assessee. Our attention was not drawn to any decision of this Court which is against that view, though there is certain amount of divergence of views amongst the High Court on this aspect. According to the High Court, by virtue of Section 42(c) of the Indian Partnership Act, a firm was dissolved by the death of a partner but as the section provided that was subject to the contract between the parties. The High Court was right in the view that clause (7) of the partnership deed dated March 17, 1959 specifically stipulated that the firm would not be dissolved on the death of a partner but it would be carried on with remaining partners and such heir of the deceased partner who resides in India on terms and conditions to which they mutually agreed. The High Court was of the view, in our opinion, rightly that if there was an heir of the deceased partner who resides in India and agrees with the surviving partners on the terms and conditions on which he could be admitted to the partnership, the firm would not be dissolved. The High Court was further of the view that the inclusion of such partner depended upon the mutual agreement between the surviving partners and was not automatic one, on the death of the deceased partner. In the background of the facts of this case, we are of the opinion that the High Court was right that in such circumstances the course open was to seek registration to execute a new deed of partnership and to apply for the registration of that deed. But that does not make the registration up to the date of the death of the deceased partner invalid and in our opinion, subject to any express prohibition indicating the same, the firm is entitled to the benefit of such registration. We have found no such express prohibition, as the analysis of the various sections indicate. On the other hand, it would be just and equitable that the assessee should have that limited benefit. We are of the opinion that the Tribunal took the correct view in the first case.

13. In the aforesaid view of the matter it must be held that the Allahabad High Court was in error in the view it took. The Tribunal was right. The appeal must be allowed, and the judgment and order of the High Court must be set aside.

14. A large number of authorities were cited before us but we shall note some of these. But we are of the opinion that for answering the particular question in view of the clear consequences that flow from the analysis of the sections, it is not necessary to be bogged by decisions. We may, however, refer to Stroud's Judicial Dictionary. Fourth Edition, pages 412-414 where the meaning of the expression "cease" has been analysed from different angles. When and how does a partner cease to be a partner has, however, to be determined in the context of particular set of facts. It is not necessary to the decision in Rex v. General Commissioners of Income Tax for the City of London ((1942) 24 TC 221) where the shares of erstwhile partnership business were apportioned in a particular manner. These though throwing light, however, are no sequitur for the issue before us.

15. CIT v. Shiv Shanker Lal Ram Nath ((1977) 106 ITR 342) is a Bench decision of the Allahabad High Court which held that in case there a firm is reconstituted the old firm ceases to exist. It was observed by the court that Section 187 of the Act even by implication does not create a fiction that the income derived by the old firm becomes the income of the reconstituted firm. The High Court held that the Tribunal was right in holding that after reconstitution it becomes a separate assessable unit. The same High Court in a Full Bench decision of five judges held that it was well settled that on the death of a partner the constitution of the firm changes. It observed that if a partner dies and is replaced by a legal representative there is a change in the constitution of the firm and the new firm will be liable in respect of income derived from the old firm. The Full Bench suggested that after

the reconstitution the firm becomes a distinct assessable entity, different from the firm before its reconstitution. It observed that two different assessment orders had to be passed, one in respect of income derived by it before reconstitution and the other in respect of income derived after its reconstitution. The decision under appeal here was overruled by the said Full Bench decision. But the Full Bench of the Allahabad High Court consisting of five learned Judges in Vishwanath Seth v. CIT ((1984) 146 ITR 249), overruled the previous decision of that court in CIT v. Shiv Shanker Lal Ram Nath ((1977) 106 ITR 342), and Badri Narain Kashi Prasad v. Addl. CIT ((1978) 115 ITR 858). This Full Bench ruled that under the general law of partnership under the Indian Partnership Act as well as under Section 187 of the Act in case of reconstitution of a firm it retains its identity and is assessable in respect of the entire previous year. In view, however, the scheme of Chapter XVI of the Act, we are unable to agree; if we were left with general position under the Indian Partnership Act, we might have agreed. That decision of the High Court, however did not deal with the controversy in issue.

16. It was held by one of us (Sabyasachi Mukharji, J.) sitting singly in the Calcutta High Court in Sandersons & Morgans v. ITO ((1973) 87 ITR 270), that a "change in the constitution of a firm" normally and ordinarily would mean every alteration in the set up of the firm, that is to say, death, retirement, incapacity of partners, alteration in the shares of the partners in the firm etc. It was so mentioned in Maxwell on the Interpretation of Statutes, tenth edition and observations appearing at page 76 of the said book. The said decision of the Single Judge was confirmed by a Bench decision of that court and is reported in Sandersons and Morgans v. ITO ((1977) 108 ITR 954 (Cal HC) and it was reiterated that if one of the partners dies or retires there is change in the constitution of the firm even if there is no dissolution. This decision was also noted in Bench decision of the Calcutta High Court in Joshi and Co. v. CIT ((1986) 162 ITR 268 at 280).

17. The Full Bench of the Madhya Pradesh High Court in Girdharilal Nannelal v. CIT ((1984) 147 ITR 529) held that any matter for which a provision was made in the Income Tax Act, 1961, was to be governed by it, notwithstanding anything different or to the contrary contained in the general law relating to that matter. It was further held that in the case of a change in the constitution of a firm during the accounting year, the income earned by the firm before such change was to be clubbed with the income earned after such change and a single assessment had to be made on the firm for the entire accounting period. On the analysis of the different sections of the Act we are unable to agree with this conclusion.

18. The Delhi High Court, however, held in the case of CIT v. Sant Lal Arvind Kumar ((1982) 136 ITR 379), that Section 187 of the Income Tax Act came into operation and applied only when there was in the eye of law a firm with continued existence and not to a case where under law one firm had ceased to exist and another came into existence. The High Court observed that the purpose of sub-section (2) of Section 187 was not one of expansion of the normal concept of a change in the constitution of a firm but was really one of limitation; the purpose was not to say that a firm would continue in spite of dissolution but rather to say that, even in a case where there was only a change in the constitution, sub-section (1) would not apply if the partners before or after the change were not common. It is not correct, according to the High Court, to say that Section 187(2) contemplated a change in all cases where the business continued through in the hands of a different firm provided there were common partners. The High Court was of the view that though creating a mild ambiguity, the language of Section 188 is not only inconsistent, or contradictory but in a way is to clarify the meaning of Section 187 and to exclude the possibility of the common law doctrine regarding the personality of a firm even in case of a mere change in the constitution. The concept of partnership, it was held, is one of the agreement between the partners. If the partners agreed, not the

one partner should go out and another should come in, but that on a particular event happening the firm should be treated as dissolved they are entitled to say so, and what the partners have disrupted it is not for a department to unite unless there is specific authorisation in the Act. Where there is, however, no agreement to treat the firm as continuing notwithstanding the death of a partner, the partners have no option to treat the firm as continuing under the Indian Partnership Act, 1932, the firm gets dissolved and the Income Tax Officer is not entitled to ignore this consequence. There is nothing in the language of Section 187, 188 or 189, according to High Court, which precludes the application of the partnership law principles even under the Income Tax Act. It was accordingly, held by the High Court that where the partnership deed of a firm did not contain any provision that the death of a partner would not dissolve the firm, one of the partners of the firm died in the middle of the accounting period and thereafter a fresh deed was executed under which the surviving partners took a fresh partner in the place of the deceased and continued to carry on the business, the case was one of succession and not change in the constitution and separate assessments had to be made in regard to the incomes. With respect we agree that where in a case, there is a change in the constitution of the firm by taking of a new partner and an old firm succeeded by a new firm then in such a case, there might be succession and there could be two assessments as contemplated under Section 188 of the Act. We accept the reasoning of that decision.

19. A large number of decisions were referred to us as indicating divergent views. The view which found favour with the Tribunal in the instant case was accepted more or less by the Madhya Pradesh High Court in Dungarsidas Kaluram v. Addl. CIT ((1981) 132 ITR 526), Ganesh dal Mills v. CIT ((1982) 136 ITR 762), by the Allahabad High Court in Dahi Laxmi Dal Factory v. ITO ((1976) 103 ITR 517), by the Gujarat High Court in Addl. CIT v. Harjivandas Hathibhai ((1977) 108 ITR 517), by the Orissa High Court in I. Ramakrishnaiah & Sons v. CIT ((1978) 111 ITR 296), by the Madras High Court in Tyresoles (India), Calcutta v. CIT ((1963) 49 ITR 515), Mavukkarai (N) Estate Tea Factory v. Addl. CIT ((1978) 112 ITR 715).

20. Our attention was, however, drawn to a decision of the Calcutta High Court in the case of Joshi and Co. v. CIT ((1986) 162 ITR 268 at 280). The court held in that case that on the construction of the relevant sections and the rules framed under the Act of 1961, it appears that under the Income Tax Act, 1961, all that an assessee-firm was required to submit is an instrument of partnership as documentary evidence of partnership. It was not stated in the Act that evidence must be contemporaneous nor was it laid down that the instrument of partnership must be executed within the accounting year. On the other hand, it had been left open to the Income Tax Officer to accept an application after the end of the accounting year and a duty was cast on the assessee to submit to the Income Tax Officer all subsequent instruments, if any, which may be in existence, right up to the date of the application showing the changes in the constitution of the firm. Under Rule 23, all changes in the constitution, even after the date of the application, are required to be intimated to the Income Tax Officer. The duty cast on the Income Tax Officer under the Act of 1961 is to ascertain the genuineness of the firm and its constitution as specified in the instrument. The Income Tax Officer may entertain an application made even after the end of the accounting year if he is satisfied that the firm was prevented by sufficient cause from making the application before the end of such period. In commercial practice, the terms of a partnership constituted initially under an oral agreement are often subsequently recorded in writing in an instrument. It was held that this was not prohibited in law. The instrument showed that the partnership had come into existence from the date other than that of the execution of the instrument and also the terms and conditions on which the partnership had been and was being carried on. The Indian Income Tax Act, 1922, required the Income Tax Officer to certify and register the deed itself and the registration of the firm would follow. That is not so under the Income Tax Act of 1961. The High Court referred to the proviso to

section 187(2) and observed that it could not be interpreted to mean that in even case where one of the partners died, the firm was and must be held to be dissolved for the purpose of registration under the Income Tax Act. The language of the proviso was clear and it stated that nothing in clause (a) of Section 187(2) of the Act should apply to a case where a firm was dissolved on the death of any of its partners. In the facts of this case before the High Court, it was held by the High Court that the assessee firm was not dissolved on the death of B, one of its partners. Under the terms of the deed, one of the heirs of the deceased partner was inducted as a partner in the firm in respect and to the extent of the share and interest of the deceased partner. Hence, there has been a change in the constitution of the firm. It was held that the assessee was entitled to registration for the assessment year 1976-77 on the strength of its application made in Forms Nos. II and II-A and on the strength of the new deed of partnership executed after the end of the accounting year. We are in agreement with the views expressed in the said decision. It may, however, be mentioned that so far as the High Court had held that the assessee firm was not dissolved from the death of one of the partners in view of the terms of the partnership deed, but there is a change in the constitution of the firm, High Court was right. Whether the assessee was entitled to registration in the fact of that case on the strength of its application in Forms Nos. II and II-A would, however, require closer examination when the facts of that case are re-examined.

21. In the aforesaid view of the matter, we are of the opinion as indicated earlier the High Court of Allahabad in Civil Appeal No. 1792 of 1974 was in error in the view it took. The appeal must be allowed and the judgment and order of the High Court must be set aside. The view of the Tribunal must be upheld.

22. So far as Civil Appeal No. 609 is concerned the question is whether in the facts and circumstances of the case, there was any dissolution of the partnership on the date of death of Shri Sarabhai Chimanlal and there should be two separate assessments till the death or whether in the facts and circumstances of the cases provisions of Section 187(2) apply to the facts of this case. There the High Court found on examination of the facts of that case, that the assessee's contention was right that the firm as found by the Tribunal was dissolved and the transactions were carried on with the remaining parties in the course of the winding up and for realisation of its dues. The High Court accordingly answered rightly in the affirmative and in favour of the assessee. There was in fact a dissolution as found by the Tribunal and in the facts and circumstances of that case and after the dissolution the firm ceased to exist there should be two separate assessments. The High Court was right in answering the question as it did. It appears to us that the High Court was also right in answering the second question in view of the fact that there was a death and as such dissolution of the firm by the manner in which the parties acted, that there is no question of the same firm being continued and the provisions of Section 187(2) could not be said to apply in the light of the facts.

23. In the view we have taken of the matter, in this appeal, the Civil Appeal No. 609 (NT) of 1975, must fail and is accordingly dismissed.

24. In the facts and circumstances of the case the parties in both the appeals will bear their own costs.

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