

ANDHRA PRADESH HIGH COURT

Addl. I.-T. Commr.

Vs.

Vinayaka Cinema

Case Referred Nos. 22 and 67 of 1975

(B.J. Divan, C.J., Sambasiva Rao, Lakshmaiah, Raghuvir and Amareswari, JJ.)

10.08.1977

JUDGMENT

Divan, C.J. (majority view; himself with Sambasiva Rao and Amareswari, JJ.)

1. These two matters have been placed before a Full Bench of five Judges in view of the order of reference made by a Division Bench of which one of us (Divan C. J.) was a member on December 1, 1976. Those two matters were referred to a larger Bench in view of the conflicting decisions of the different High Courts on the point which is involved in both these matters.

2. The question that has to be decided is whether the provisions of Section 187 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') can be invoked by the Income-tax authorities, when a partnership firm is dissolved; and after the dissolution of the partnership firm, the business of the firm is continued by another partnership firm in which one or more of the partners of the dissolved firm have also joined and there are thus common partners between the dissolved firm and the new firm which continues the business of the old firm.

3. In order to appreciate the controversies arising in both these matters, we will first refer to the facts in R. C. No. 22 of 1975. We are concerned in this case with assessment year 1969-70. The relevant accounting year is financial year 1968-69. The assessee is a registered firm carrying on business of running a cinema theatre under the name and style of " Sri Vinayaka Cinema" at Nellore. The partnership was constituted by a partnership deed dated April 29, 1967. This partnership was duly registered under the provisions of the Income-tax Act. Amongst 9 partners of the firm, Srinivasulu and his son, Kamalakara Rao were also partners. Kamalakara Rao was a major at the relevant time and was the managing partner of the firm. Srinivasulu had gifted away four out of the twelve shares that he held in the firm to his daughter Smt. Y. V. Ramani and had formed a sub-partnership with her in the firm. The sub-partnership was recognised by the Income-tax Department and assessments were made separately on the father and daughter in respect of their respective share incomes. Srinivasulu, died on August 17, 1968 and on that very day another partner, Subbarama Reddy, retired from the firm after gifting away his interest in the firm's business to one K. Panchala Lakshamma. There was no clause in the partnership deed dated April 29, 1967 providing that, in the event of the death of one of the partners, the firm was

not to be dissolved. Hence, as a result of the death of Srinivasulu, the old partnership firm stood dissolved under the provisions of the Partnership Act. By a deed dated August 19, 1968, a new partnership firm was constituted and under the new partnership deed, seven of the partners of the old firm together with two new partners, viz., Y. V. Ramani and K. Panchala Lakshamma, started a new partnership firm. This new firm was also registered under the Income-tax Act. For the assessment year 1969-70, two separate returns were filed, one for the period 1-4-1968 to 17-8-1968 and the other for the period 18-8-1968 to 31-3-1969. It may be mentioned that the business of the old firm was taken over and continued by the new firm that came into existence under the partnership deed dated August 19, 1968. An application for renewal of registration was sent along with the return for the first period while for the second period, a fresh application in form 11 was filed.

4. On those facts, the Income-tax Officer held that there was only a change in the constitution of the firm as contemplated by Section 187 (2) of the Act and he accordingly clubbed the incomes of the two periods and made a single assessment. He however granted registration to the firm that came into existence under the partnership deed of August 19, 1968 and allocated the profits among the respective partners who constituted the firm in the two different periods. Against this decision of the Income-tax Officer, the matter was taken in appeal to the Appellate Assistant Commissioner. The contention of the assessee was accepted by the Assistant Commissioner observing that, in the absence of any provision in the partnership deed to continue the firm even after the death of a partner, the firm stood dissolved on August 17, 1968 when Srinivasulu died and the firm, which came into existence on August 18, 1968 was a new firm. The matter was taken in appeal to the Tribunal by the Revenue. The Tribunal held that the Appellate Assistant Commissioner was right in directing that there should be two separate assessments, one for the period 1-4-1968 to 17-8-1968 and the other 18-8-1968 to 31-3-1969. On these facts ultimately, at the instance of the Revenue, the following question came to be referred to this Court for its opinion :

" Whether, on the facts and in the circumstances of the case and in view of Section 187 (2) (e) of the Income-tax Act, 1961, a single assessment could not be made on the aggregate of the incomes for the two periods and the tax charged on such aggregate income?"

5. In R. C. No. 67 of 1975, the facts are as follows : The assessment year under consideration is 1971-72. The accounting year is the financial year from April 1, 1970 to March 31, 1971. There were originally two partners in the firm, M/s Prasad Motors and Electricals. They were Ch. Suryanarayana and K. Sanyasiraju. Each of these two partners represented his Hindu undivided family in the business of the partnership firm. During the course of the financial year 1970-71 which is the accounting year for this firm, a partition took place in the family of Ch. Suryanarayana and after the partition, he retired from the partnership with effect from October 1, 1970. As a result of the retirement of Suryanarayana, it is obvious that the firm stood dissolved because the only partner left thereafter was K. Sanyasi Raju. A new partnership deed was executed on October 26, 1970 and under this deed, a new partnership firm was brought into existence with effect from October 1, 1970. Under this new partnership deed, five minors some of whom belonged to the family of Suryanarayana, were admitted to the benefits of the partnership and two strangers were taken as partners. On these facts, two returns were filed, one

for the period 1-4-1970 to 30-9-1970 and the other for the period 1-10-1970 to 31-3-1971. The Income-tax Officer held that there was only a change in the constitution of the firm with effect from October 1, 1970 and he accordingly clubbed the incomes of the two periods and made a single assessment on the income of the entire period from April 1, 1970 to March 31, 1971 under Section 187 (2) of the Act. The assessee took the matter in appeal and the Appellate Assistant Commissioner confirmed the order of the Income-tax Officer. The assessee carried the matter in further appeal to the Tribunal and the Tribunal held that, on the retirement of Suryanarayana, the firm which existed till then between Suryanarayana and Sanyasi Raju was dissolved and what was brought into existence on October 1, 1970 was entirely a new firm and hence the provisions of Section 187 (2) were not applicable. The Tribunal directed that there should be two separate assessments on the two firms, one on the old firm from April 1, 1970 to September 30, 1970 and the other on the new firm, which came into existence under the partnership deed of October 26, 1970, for the period October 1, 1970 to March 31, 1971. Thereafter, at the instance of the Revenue, the following question has been referred to this Court for its opinion :

" Whether, on the facts and in the circumstances of the case, there was a change in the constitution of the earlier firm on 1-10-1970 in terms of Section 187 (2) of the Income-tax Act, 1961, or whether the firm that came into existence on that date under the deed dated 26-10-1970 was a new firm which succeeded the earlier firm in terms of Section 188 of the Act."

It is obvious from the narration of facts set out hereinabove that the main question that we have to consider is the effect of the provisions of Section 187 (2) of the Income-tax Act when, under the provisions of the Partnership Act, a firm is dissolved.

6. In order to appreciate the controversy that has arisen, it will be necessary to refer to some of the provisions of the Income-tax Act. Sub-section (23) of Section 2 says that the words 'firm,' 'partner' and 'partnership' have the meanings respectively assigned to them in the Indian Partnership Act, 1932 (9 of 1932); but the expression 'partner' shall also include any person who, being a minor has been admitted to the benefits of partnership. It is thus clear that a departure to this limited extent from the provisions of the Partnership Act has been made by the Income-tax Act, because under the provisions of the Partnership Act, a minor can only be admitted to the benefits of the partnership, but cannot be a partner because partnership requires an agreement between the partners and the minor cannot enter into a contract because of the provisions of Section 11 of the Contract Act. Under that section of the Contract Act, a contract by the minor would be void and hence the Partnership Act provides that a minor can only be admitted to the benefits of the partnership; but he cannot become a partner. For the purpose of the Income-tax Act, however a minor admitted to the benefits of the partnership is also a partner.

7. Under Section 2 (31), 'person' includes by Clause (iv) a firm and Section 4 of the Act, which is the charging section, provides that, where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of the Act in respect of the total income of the previous year or previous years as the case may be, of every person. By virtue of the definition of the word 'person' it is obvious that a firm, as distinguished from the partners constituting the firm is an assessable entity and can be assessed as such. Chapter XVI of the Act

contains special provisions applicable to firms. This chapter consists of Sections 182 to 189 (both inclusive). Section 182 provides for assessment of registered firms and Section 183 provides for assessment of unregistered firms. Section 184 provides for application for registration of firms. Section 185 deals with the procedure on receipt of application for registration or renewal of registration and Section 186 deals with cancellation of registration. Sections 187, 188 and 189 are in the part of Chapter XVI, which is designated as Part-C with the heading " Changes in constitution, succession and dissolution."Section 187 (1) is in these terms :

" 187 (1) Where at the time of making an assessment under Section 143 or Section 144 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 : Provided that -

- (i) the income of the previous year shall, for the purposes of inclusion in the total incomes of the partners, be apportioned between the partners who, in such previous year, were entitled to receive the same; and
- (ii) 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."

Section 188 provides for succession of one firm by another firm. It may be pointed out that Section 170 of the Act provides for succession to business otherwise than on death and it deals with all persons and not merely with succession of one firm by another. Under Section 188, 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. Therefore, it is obvious that Section 188 is a specific provision which has to be applied when there is a succession of one firm by another as distinguished from a change in the constitution of the firm and the case is not one covered by Section 187. Section 189 deals with a situation when the firm is dissolved or the business of a firm has been discontinued and under Sub-section (1), where any business or profession carried on by a firm has been discontinued or where a firm is dissolved, the Income-tax Officer shall make an assessment of the total income of the firm as if no such discontinuance or dissolution had taken place and all the provisions of the Act including the provisions relating to the levy of a penalty or any other sum chargeable under any provisions of the Act shall apply, so far as may be, to such assessment.

8. At this stage, it will be relevant to refer to some of the provisions of the Indian Partnership Act, 1932. Section 4 provides that " partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any or them acting for all. Persons who have entered into partnership with one another are called 'individually 'partners' and collectively 'a firm' and the name under which their business is carried on is called the 'firm name'. Chapter V of the Partnership Act deals with incoming and outgoing partners. Section 31 deals with introduction of a partner and it says that, subject to contract between the partners and to the provisions of Section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners. Under Section 32 (1), a partner may retire with the consent of all the other partners, in accordance with an express agreement by the partners or where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire. Section 33 provides for expulsion of a partner. Section 34 (1) provides that, where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of

adjudication is made, whether or not the firm is thereby dissolved. Sub-section (2) of Section 34 provides that, where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made. Section 35 provides that, where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death. Chapter VI of the Partnership Act provides for dissolution of a firm and under Section 39, the dissolution of partnership between all the partners of a firm is called the 'dissolution of the firm'. Section 42 provides :

- " Subject to contract between the partners a firm is dissolved-
- (a) if constituted for a fixed term, by the expiry of that term;
 - (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;
 - (c) by the death of a partner; and
 - (d) by the adjudication of a partner as an insolvent"

It is therefore clear that, subject to contract between the partners, a firm is dissolved by the death of a partner or by the adjudication of a partner as an insolvent. If, under the partnership deed or any other agreement entered into between the partners before the date of the death of one of the partners or before the date of the adjudication of one of the partners as an insolvent, it is agreed between the partners *inter se* that the firm shall not be dissolved on the death or on the adjudication of one of the partners as an insolvent, the firm would continue

9. Mr. Rama Rao, the learned counsel for the Revenue has emphasised before us that the words " cease to be partners"which occur in Section 187 (2) (a) of the Income-tax Act, are also to be found in the Partnership Act, because it is obvious that, if one or more of the partners cease to be partners or one or more new partners are admitted in a firm which exists and continues both under the Partnership Act as well as under the Income-tax Act, there is a mere change in the constitution of the firm and there is no new firm which comes into existence. In this case, we cannot do better than refer to the observations of Sir John Beaumont delivering the opinion of their Lordships of the Privy Council in *Bhagvanji v. Alembic Chemical Works*¹, In para. 10 at p. 101 of the report, it was observed:

" Before the Board it was argued that under the Indian Partnership Act, 1932, a firm is recognized as an entity apart from the persons constituting it and that the entity continues so long as the firm exists and continues to carry on its business. It is true that the Indian Partnership Act goes further than the English Partnership Act, 1890 in recognizing that a firm may possess a personality distinct from the persons constituting it, the law in India in that respect being more in accordance

¹ AIR 1948 P. C. 100

with the law of Scotland, than with that of England. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession."

To the same effect are the observations of the Supreme Court in *Commr. of Income-tax v. A. W. Figgies and Co*². Mahajan J. (as he then was) speaking for the Supreme Court, observed:

" It is true that under the law of partnership a firm has no legal existence apart from its partners and it is merely a compendious name to describe its partners but it is also equally true that under that law there is no dissolution of the firm by the mere incoming or outgoing of partners. A partner can retire with the consent of the other partners and a person can be introduced in the partnership by the consent of the other partners. The reconstituted firm can carry on its business in the same firm's name till dissolution. The law with respect to retiring partners as enacted in the Partnership Act is to a certain extent a compromise between the strict doctrine of English thing in the firm but a collective name for individuals carrying on business in partnership and the mercantile usage which, recognises the firm as a distinct person or quasi Corporation."

Mr. Rama Rao drew our attention to Black's Law Dictionary, Fourth Edition, page 282 where the word " cease"has been defined to mean to stop, to become extinct, to pass away, to come to an end. Similarly in Webster's International Dictionary the word 'cease' has been defined to mean a discontinuance or andtemporary or final ceasing. In Corpus Juris Secundum, volume 14, at page 58, the word 'cease' has been defined to mean to become extinct or pass away, to come to as end or stop. Mr. Rama Rao also drew our attention to the fact that Section 37 of the Partnership Act mentions the words 'ceased to be a partner.' Section 45 (1) of the Partnership Act provides for liability for acts of partners done after dissolution and it says:

" 45. (1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolutions, until public notice is given of the dissolution. Provided that the estate of a partner who dies or who is adjudicated an insolvent or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner."

It is true that, in the limited context of Section 45 (1) of the Partnership Act, even on dissolution of Partnership because of the other provisions of the Partnership Act, the partner, who died, can be said to have ceased to be a partner. Such cessation may either be because of the death of a partner or because of adjudication of a partner as an insolvent or because of retirement of a partner. In the context of Section 45 (1) the words " ceased to be a partner"are undoubtedly used to cover all these three contingencies.

²24 ITR 405. at p. 408

10. At this stage, before starting discussion on the different authorities to which our attention has been drawn, it is necessary to refer to the analogous provisions of the Income-tax Act, 1922 (hereinafter referred to as '1922 Act'). Under Section 26 (1).

" Where, at the time of making an assessment under Section 23, it is found that, a change

has occurred in the constitution of a firm or that a firm has been newly constituted, the assessment shall be made on the firm as constituted at the time of making the assessment."

The two provisos to sub section (2) of Section 26 provided for succession of a business and it says that, where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub section (4) of Section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year. It is obvious from what we have stated above that the provisions of Section 26 (1) of 1922 Act had been re-enacted as Section 187 (1) of 1961 Act and an important change is that, whereas Section 26 (1) spoke of a change in the constitution of the firm and also of the firm being newly constituted under 1961 Act, provision is made only for a change in the constitution of the firm and it does not deal with the eventuality of a firm being newly constituted. This change as between the provisions of 1922 Act and 1961 Act is very material, because if the provisions of Section 26 (1) of 1922 Act are borne in mind, the distinction between Section 26 (1) of the 1922 Act and Section 187 (1) of 1961 Act will clearly remain in the forefront.

11. To deal in a chronological order with the authorities under the Income-tax Act, we will refer to the decision of the Supreme Court in *Commr. of Income- tax v. A. W. Figgies and Co.* AIR 1953 Supreme Court 455 (supra). The Court there was concerned with succession under Section 26 (1) and the question was one of the applicability of Section 25 (4) and Section 26 (1) of the 1922 Act, Mahajan, J., (as he then was) speaking for the Supreme Court, observed at page 409 of the report; (24 ITR) : (at p. 456 of AIR 1953 SC) :

" But under the Income-tax Act, the position is somewhat different. A firm can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually."

After referring to the charging Section 3 of 1922 Act analogous to the charging Section 4 of 1961 Act, Mahajan J. observed (at p. 456 of AIR) :

" The partners of the firm are distinct assessable entities, while the firm as such is a separate and distinct unit for purposes of assessment Sections 26, 48 and 55 of the Act fully bear out this position. These provisions of the Act go to show that the technical view of the nature of a partnership, under English law or Indian law, cannot be taken in applying the law of income tax. The true question to decide is one of identity of the unit assessed under the Income-tax Act, 1918 which paid double tax in the year 1939, with the unit to whose business the private limited company succeeded in the year 1947."

12. In *Shivram Poddar v. Income-tax Officer*³, the Supreme Court was concerned with the discontinuance of business of a firm and the provisions of Section 26 (1) and other connected provisions of 1922 Act. Shah, J. (as he then was) speaking for the Supreme Court, observed at p. 827 of the report (51 ITR) :

"Discontinuance of business has the same connotation in Section 44 as it has in Section 25 of the Act; it does not cover mere change in ownership or in the constitution of the unit of assessment. Section 44 is, therefore, attracted only when the business of a firm is discontinued, i. e. when there is complete cessation of the business and not when there is a change in the ownership of the firm or in its constitution, because by reconstitution of the firm, no change is brought in the personality of the firm and succession to the business and not discontinuance of the business results. Under the ordinary law governing partnerships, modification in the constitution of the firm in the absence of a special agreement to the contrary amounts to dissolution of the firm and reconstitution thereof, a firm at common law being a group of individuals who have agreed to share the profits of a business carried on by all or any of them acting for all and supersession of the agreement brings about an end of the relation. But the Income-tax Act recognised a firm for purposes of assessment as a unit independent of the partners constituting it; it invests the firm with a personality which survives reconstitution. A firm discontinuing its business may be assessed in the manner provided by Section 25 (1) in the year of account in which it discontinues its business; it may also be assessed in the year of assessment. In either case, it is the assessment of the income of the firm. Where the firm is dissolved, but the business is not discontinued, there being change in the constitution of the firm, assessment has to be made under Section 26 (1), and if there be succession to the business, assessment has to be made under Section 26 (2). The provisions relating to assessment on reconstituted or newly constituted firms and on succession to the business are obligatory. Therefore, even when there is change in the ownership of the business carried on by a firm on reconstitution or because of a new constitution, assessment must still be made upon the firm."

(Emphasis supplied by us).

13. Mr. Rama Rao for the Revenue has very strongly relied upon the particular words in the above passage, which we have underlined; but it must not be forgotten that it was while dealing with the provisions of Section 26 (1) which dealt with both changes occurring in the constitution of the firm and a newly-constituted firm that those observations were made. Assessment undoubtedly had to be made under Section 26 (1) when there was a change in the constitution of the firm and when a firm was newly constituted. If a partnership firm was dissolved and the business of the firm was continued by another firm under the provisions of 1922 Act, since there would be a newly-constituted firm as distinguished from a change of the constitution of the firm, the provisions of Section 26 (1) of 1922 Act had to be invoked. But the question is whether, with the change in the provisions of Section 26 (1) by the dropping of the reference "a newly-constituted firm" occurring in Section 26 (1), the above observations of the Supreme Court have any force to the provisions of Section 187 (1) of 1961 Act. We are

³⁵¹ ITR 823

unable to accept the contention of Mr. Rama Rao that Section 187 (1) would cover the case of a firm which is dissolved, but its business has been continued by a new firm, though some of the partners of the new firm may be common to the old firm as well. We see no reason to apply the above observations of the Supreme Court, particularly the underlined words to the language of

Section 187 (1) of 1961 Act. Those observations were made in the context of the language of Section 26 (1) of 1922 Act where the language and scheme of the section were entirely different.

14. The decision In Shivram Poddar's case (AIR 1964 Supreme Court 1095) was followed by the Supreme Court in *Commr. of Income-tax v. Kirkend Coal Co*⁴,. At. p. 70 of the report (74 ITR) .: (at. p. 1354 of AIR SC) Shah, J., (as he then was) speaking for the Supreme Court quoted extensively from the decision in Shivram Podder's case supra and the passages which we have extracted from that decision were also extracted by Shah, J., in *Commr. of Income-tax v. Kirkend Coal Co*⁵. For the reasons which we have set out hereinabove, the decision in *Commr. of Income-tax v. Kirkend Coal Co*⁶. which was delivered in the context of the provisions of Section 26 (1) and Section 44 of the 1922 Act, cannot entirely help us in interpreting the provisions of Section 187 (1) which depart from the provisions of Section 26 (1) of 1922 Act in very material particulars, as we have pointed out above.

15. We may however refer to another decision of the Supreme Court in *Commr. of Income-tax v. K. H. Chambers*⁷ The question was what was meant by succession in the context of the Income-tax Act. Subba Rao, J. (as he then was) quoted with approval, at page 680 of the report, (of 55 ITR) : (at pp. 973, 974 of AIR 1965 SC) from the decision of Finlay J. in *Malayalam Plantations Ltd. v. Clark*⁸ The passage from the decision of Finlay, J., is in these terms:

" The substance of what was done, I think clearly was this. The thing was taken over as a going concern, taken over with the things growing on it, and with the coolies employed to work the estate. I am not going into it any further because it is essentially a question of fact, but I cannot avoid the view that there was material upon which commissioners might arrive at the conclusion that there was a succession."

16. Commenting upon this observation of Finlay, J., Subba Rao, J. (as he then was) observed:-

" This is an authority for the position that if a business was taken over as a going concern the mere fact that some assets, which were not required by the successor for the carrying on of the business, were not transferred to him would not make it any the less a succession in law. It is not necessary to multiply decisions. Succession involves change of ownership; that is, the transferor goes out and the transferee comes in; it connotes that the whole business is transferred; it also implies that substantially the identity and the continuity of the business are preserved. If there is a transfer of a business, any arrangement between the transferor and the transferee in respect of some of the assets and liabilities not with

⁴74 ITR 67

⁶74 ITR 67

⁸(1935) 19 Tax Cas 314

⁵74 ITR 67

⁷55 ITR 674

a view to enable the transferor to run a part of the business transferred out to enable the transferee to run the business unhampered by the load of debts or for any other appropriate collateral purpose cannot detract from the totality of succession"

This decision of the Supreme Court points out that, if there is any change of ownership in the

sense of the transferor going out and the transferee coming in and at the same time substantially the identity and the continuity of the business have been preserved, there would be a succession as distinguished from mere continuance of the firm if the , transferor and the transferee are partnership firms.

17. We may point out that, apart from these decisions of the Supreme Court which we have just now noted, under Section 26 (1) of the 1922 Act, there has been no decision of the Supreme Court regarding the provisions of Section 187 (1) of the 1961 Act and hence we will first notice the provisions of Sections 187, 188 and 189 in the context in which they occur in 1961 Act and then consider how the High Courts including this Court have dealt with this aspect of the law.

18. Section 187 which we have set out hereinabove deals with change in constitution of a firm. The very concept of change in the constitution of a firm envisages that the same identical firm continues as before, but there is a change in the composition of the firm or as Section 184 (7) and Section 187 (2) (b) point out, there may be an alteration in the shares *inter se* of the partners of the firm. The change in the constitution of the firm in the sense of continuity being maintained and the identity of the firm being maintained is contemplated by the provisions of Sections 31 to 35 of the Partnership Act. The firm does not get dissolved as a result of the change in the constitution of the firm. There may be the introduction of a new partner or there may be the retirement of a partner or there may be expulsion of a partner or where there is a contract to the contrary, the partnership does not get dissolved even on the death of a partner. Similarly, if a partner is adjudicated an insolvent, and there is a provision to the contrary between the partners that the insolvency of one of the partners is not to bring about a dissolution of the firm, such adjudication of one of the partners as an insolvent may also bring about a change in the constitution of the firm because the insolvent ceases to be a partner of the firm; but the firm will not be dissolved. The very basic concept underlying Section 187 (i) is that one and the same firm must be continuing throughout the assessment year under consideration. But there it a change in the constitution of the firm, though the firm, as to entity, continues as one and single entity throughout the period. If the firm ceases to exist, the relationship of partners *inter se* comes to an end and therefore the firm can no longer be said to continue as before. Since the continuance or the existence of the firm is the basic concept underlying Section 187 (1) which speaks of a change in the constitution of the firm, it is obvious that the provisions of Section 187 (2), which defines " for the purposes of this section"what is meant by change in the constitution of the firm, cannot go contrary to the basic concept underlying Section 187 (1). Clause (a) of Section 187 (2) provides that, for the purposes of this section, 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, one or more of the persons who were partners of the firm before the change continue as partner or partners after the change. Similarly, where all the partners continued with a change in their respective shares, or in the shares of some of them, there is a mere change in the constitution of the firm. It is obvious that, if the words " if one or more of the partners cease to be partners"are understood in the sense of the provisions of the Sections in Chapter V of the partnership Act without doing violence to the underlying concept of Section 187 (1) the motions of the Partnership Act and the Income-tax Act can be reconciled. There is nothing in the Income-tax Act which compels us to take a different view and which counsels us to hold that the scheme of these sections and the basic concept under the Partnership Act are departed from when the legislature enacted Section 187 (1). The words " for the purposes of this Section"occurring at the commencement of Section 187 (2) cannot serve the purpose of a non obstante clause, as has been

contended by Mr. Rama Rao. There is no provision in the Partnership Act which contemplates that, by a mere change in the constitution of the firm by virtue of the provisions of the Partnership Act, a firm can be said to be continued, as the two concepts are diametrically to each other. If there is a dissolution, the firm comes to an end and if a firm comes to an end, there cannot be a continuity of the firm as it stood prior to its dissolution and therefore, after the dissolution, there cannot be said to be a mere change in the constitution of a firm.

19. It may be pointed out that Section 189 (1) deals with a situation where any business or profession carried on by a firm has been discontinued or where a firm is dissolved and the liabilities of the firm which has been dissolved or the liabilities of the firm which has discontinued its business or the income of the firm which has been dissolved or the income of the firm which has discontinued its business are to be adjusted in the light of Section 189 (1). It is, therefore, difficult to accept the contention urged on behalf of the Revenue that Section 187 also contemplates a situation where a firm has been dissolved because of the provisions of the Partnership Act. It may be pointed out that, once a firm is dissolved under sub section (8) at Section 184, a fresh registration will have to be applied for. Even if there is a change in the constitution of the firm, the firm has to apply for fresh registration. We are merely referring to the provisions of Section 184 with a view to point out that the notions and concepts in the Partnership Act are not totally to be overlooked when considering the provisions of the 1961 Act. Moreover, Section 2 (23) requires the words 'firm,' 'partner' and 'partnership to be interpreted in the same manner as has been done in the Partnership Act. Once a firm is dissolved in view of the provisions of the Partnership Act, it is obvious that that firm comes to an end and there cannot be said to be a change in the constitution of such a firm just because after the dissolution of the firm, by virtue of a new agreement between some of the partners of the dissolved firm, the business of the firm is continued and the new firm takes over the business of the old firm. It is possible to urge that, in the event of a firm being dissolved under the provisions of the Partnership Act, if some of the partners of the dissolved firm agree to restart the business by virtue of a new agreement, there is a newly-constituted firm; but the words " a newly-constituted firm" which were present in Section 26 (1) of the 1922 Act are absent from Section 187 (1) of the 1961 Act. Under these circumstances, by a mere process of interpretation, it obviously follows that the basic concept underlying Section 187 is a continuity of a firm as an entity. Once dissolution comes about, the provisions of Section 187 can never apply. Therefore, the decision in *Shivram Poddar v. Income-tax Officer (AIR 1964 Supreme Court 1095)* supra and *Commr. of Income-tax v. Kirkend Coal Co. (AIR 1969 Supreme Court 1352)* supra both decided by the Supreme Court, cannot help the Income-tax authorities in such an eventuality.

20. We may point out that the Madras High Court in *Kaithari Lungi Stores v. Commr. of Income-tax*⁹ dealt with the provisions of Section 187 and Ramaswami J. speaking for the Division Bench of the Madras High Court, observed at page 164 of the report (104 ITR) : (at p. 356 of 1977 Tax LR) :

" A change in the constitution of a firm must be distinguished from the dissolution of the firm. The distinction was clearly brought out by this Court in *Tyresoles (India) Calcutta v. Commr. of Income-tax*¹⁰, and the following passage in that Judgment is worth quoting:

" The dissolution and reconstitution of a partnership are two different legal concepts. The dissolution puts an end to the partnership, but reconstitution keeps it subsisting, though in another form. A dissolution followed by some of the erst-while partners taking over the

assets and liabilities of the dissolved Partnership and forming themselves into a Partnership is not reconstitution of the original Partnership. The Partnership formed after the dissolution is a new Partnership and not a continuation of the old Partnership for it would be contradiction in terms to say that what ceased to exist was continued. A reconstitution of a firm or Partnership necessarily implies that the firm never became extinct. What it denotes is a structural alteration of the membership of the firm, by addition or reduction of members and an incidental redistribution of the shares of the partners."

21. Ramaswami, J. further observed:

" In our opinion, the words " ceasing to be partners" in Section 187 (2) would also include a case of death of a partner when such death, by reason of a contract to the contrary or by reason of any law, did not bring about the dissolution of the Partnership."

The learned Judges of the Madras High Court declined to accept the view propounded by Seth, J. in *Dahi Laxmi Dal Factory v. Income-tax Officer*¹¹ We respectfully agree with the conclusions of the learned Judges of the Madras High Court because, on our own analysis of the wording of the Sections, we have come to the same conclusions.

22. We will now examine in chronological order the decisions of the different High Courts delivered in the context of Section 187. In *Dharam Pal Sat Dev v. Commr. of Income-tax*¹² a Division Bench of the Punjab and Haryana High Court dealt with a situation where three partners were carrying on the Partnership business and one of the partners died. The remaining two partners and the son of the deceased entered into Partnership after the death of the deceased partner and they carried on the same business as previous Partnership. There was no clause in the Partnership deed before the death of the partner providing for non-dissolution of the firm in the event of the death of one of the partners. On these facts, the Division Bench held that the provisions of the Partnership Act can be referred to only if it is found that a particular situation is not covered by the provisions of the Income-tax Act. A particular case can be covered by Section 188 of the Act only when it is a succession of one firm by another, meaning thereby that there is a complete change and no one of the partners in the previous firm

⁹104 ITR 160 : (1977 Tax LR 354 (Mad))

¹¹103 ITR 517 (All) (FB).

¹⁰(1963) 49 ITR 515 (Mad)

¹²(1974) 97 ITR 302 (Punjab)

continued to be a partner in the latter firm, which was not the case before the Division Bench. Bhopinder Singh Dhillon, J. delivering the judgment of the Division Bench, referred to the decisions, of the Supreme Court in *Commr. of Income-tax v. Kirkend Coal Co.* (AIR 1969 Supreme Court 1352) supra and *Shivram Poddar v. Income-tax Officer* (AIR 1954 Supreme Court 1075) supra and it appears from the decision of the Division Bench of the Punjab and Haryana High Court, that the learned Judges did not distinguish between Section 26 (1) of the 1922 Act and Section 187 (1) of the 1961 Act and reproduced the observations of the Supreme Court in Shivaram Poddar's case (at p. 1098 of AIR), supra :

" Where the firm is dissolved, but the business is not discontinued, there being a change in the constitution of the firm, assessment has to be made under Section 26 (1) and if

there be succession to the business, assessment has to be made under Section 26 (2)."

We have already pointed out that those observations in Shivram Poddar's case supra cannot apply to cases arising under Section 187 (1) of the 1961 Act. With great respect to the teamed Judge of the Punjab and Haryana High Court, we are unable to accept their reasoning regarding Section 187 (1).

23. The next decision in point of time is the majority decision of the Full Bench of the Allahabad High Court in *Dahi Laxmi Dal Factory v. Income-tax Officer 1975 Tax LR 132 (All) (FB)* supra. The majority of the learned Judges there held that Section 187 of the Income-tax Act 1961 applies only where a firm is reconstituted in accordance with Sections 31 and 32 of the Indian Partnership Act, namely, when a new partner is taken in or an existing partner retires with, title consent of all the partners or without their consent if the contract at Partnership so provides. But where a firm is dissolved either by agreement of the partners or by operation of law and another firm, takes over the business, that will be a case of succession governed by Section 188 of the Act, even though some of the partners of the two firms are common. In the case before the Full Bench of the Allahabad High Court, the old firm was constituted by two partners. One of them died and there was no stipulation in the partnership deed that the firm shall not stand dissolved on the death of a partner. Even if there had been such a stipulation., the firm could not have been saved from dissolution, because after the death of one of the partners, only one partner was left and one man cannot constitute a firm. The firm automatically came to an end. Since the erstwhile firm stood dissolved on the death of one of the partners, the new firm which took over the same business could be assessed only in accordance with Section 188 and a single assessment for the whole year was not valid. With respect, we agree with the learned Judges who delivered the majority decision of the Full Bench of the Allahabad High Court, but we differ from them only to the limited extent that the reconstitution of the firm is covered not only by Sections 31 and 32 of the Partnership Act but also by the other provisions of Chapter V of the Partnership Act under which because of a contract to the contrary a firm is not dissolved even on the death of one of the partners of the firm or on the adjudication of a partner as an insolvent. We agree with the comment of the learned Judges of the Madras High Court in *Kaithari Lungi Stores v. Commr. of Income-tax (1977 Tax 354 (Mad))* (supra) about this majority decision of the Full Bench of the Allahabad High Court; but barring this divergence of views between ourselves and the majority of the learned Judges of the Allahabad High Court as to when there can be said to be a change in the constitution of firm viz., whether only under the provisions of Sections 31 and 32 of the Partnership Act or whether under the other provisions of Chapter V of the Partnership Act as well, we agree with the conclusions of the learned Judges of the Full Bench of the Allahabad High Court.

24. In *Addl. Commr. of Income-tax Gujarat v. Harjivandas Hathibhai*¹³, a Division Bench of the Gujarat High Court to which one of us (Divan C. J.) was a party, the provisions of Section 187 were considered and it was held (at p. 1112 Para 7) :

" Even though a partner retires, the firm continues as before. What is meant by a change in the constitution of the firm is coming in of a new partner with the consent of all the existing partners or by the retirement of a partner with the consent of all the partners. In such cases there is a mere change in the constitution of the firm and nothing more. The

same firm continues as before. The question of dissolution of the firm either by operation of law or by act of parties is a different thing altogether. When a firm is dissolved, the old relationship comes to an end and a new relationship comes into existence and if the succeeding Partnership firm continues the old business, then there is succession of one firm by another as contemplated by Section 188. Sub-section (2) of Section 187 merely specifies two kinds of changes in the constitution of the firm. Clause (a) of sub section (2) of Section 187 refers to the continuance of the firm on one or more of the partners ceasing to be partners or one or more new partners being admitted. It deals with cases of retirement of partners and introduction of new partners but the firm would continue in such a case. Therefore, all that sub section (2) of Section 187 points out is that with the retirement of one or more of the partners so long as one of the old partners continues and with the introduction of new partners there is a mere change in the constitution of the firm."

25. At page 1112 of the report, the Division Bench of the Gujarat High Court pointed out:

" Even apart from the decision of the learned Judges of the Allahabad High Court in the Full Bench decision referred to above (Dahi Laxmi Dal Factory's case (1975 Tax LR 132 (All)) (FB) it is obvious on general principles that unless the words of the Income-tax Act compel us to do so, it would not be correct to depart from the well-known principles of Partnership law. The Partnership law contemplates retirement of a partner and even though a partner retires the firm continues as before. What is meant by a change in the constitution of the firm is coming in of a new partner with the consent of all the existing partners or by the retirement of a partner with the consent of all the partners; in such cases there is a mere change in the constitution of the firm and nothing more. The same firm continues as before."

26. We are in agreement with this conclusion of the learned Judges of the Division Bench of the Gujarat High Court.

27. In *Addl. Commr. of Income-tax v. Visakha Flour Mills*¹⁴ a Full Bench of this Court consisting of one of us (Raghuvir J.) Kondaiah and Gangadhara Rao, JJ. held (at p. 47) :

¹³1976 Tax LR 1107 (Guj)

¹⁴1977 Tax LR 41 (Andh Pra)

" A change in the constitution of a firm within the meaning of Section 187 would occur where (i) one of the partners voluntarily retires or is expelled leaving the remaining partners to continue the business or (ii) a new partner is introduced with the consent of the existing partners or

(iii) all the partners continue as before but with re-adjustment or reallocation of shares of one or more or all of them, or (iv) one of the partners dies. Under Section 42 (6) of the Partnership Act, the firm gets dissolved if any one of the partners dies when there is no specific agreement in the deed of partnership to the effect that notwithstanding the death of any one of the partners, the firm continues to do its business with the remaining

partners."It was further held by the Full Bench :

" If there is conflict between the provisions of the Income-tax Act and those under the Partnership Act, the provisions of the Income-tax Act would prevail over those of the Partnership Act."

Pausing here we are in agreement with this proposition of law; but as pointed out earlier, in fact, there is no conflict between the provisions of Section 187 (1) of the Income-tax Act and the provisions of the Partnership Act, when one bears in mind the basic concept underlying the provisions of Section 187, viz. the continuity of the firm as an entity in the eye of law. The Full Bench further observed :

" A close and combined reading of Sections 187 and 188 does not warrant or justify the assumption that Section 187 is not applicable to a case of dissolution of a firm. Where therefore, a firm is dissolved on account of the death of a partner by virtue of the provisions of Section 42 (c) of the Partnership Act and the business is continued by the remaining partners or by the remaining partners and another in the place of the deceased partner, there being only a change in the constitution of the firm within the meaning of Section 187 (2) (a) the assessment of the firm for the previous year or years must invariably be made under Section 187 and if there be succession to the business by another separate entity owned by altogether different partners, assessment has to be made under Section 188 as it would squarely fall under Section 188."

The Full Bench further held.:

" However, if there are one or more of the partners continuing as partners in the second firm, it must be construed to be only a change in the constitution of the firm within the meaning of Section 187 but not a case of succession as contemplated by Section 188."

With great respect to the learned Judges of the Full Bench of this Court, we are unable to agree with their interpretation of Sections 187 and 188 of the Income-tax Act, 1961.

28. Sections 187, 188 and 189 deal with three different situations. Section 187 deals with a case where the firm continues to be the same as before in the eye of law, but there is a change in the constitution either because of a partner coming into or another partner going out and so long as one partner is common there is said to be a mere change in the constitution of the firm. Section 188 deals with situation where there is a succession of one firm by another firm and in such a situation, the assessment has to be made in the light of Section 170. Section 189 deals with a situation where a partnership firm is dissolved or its business discontinued. Just because some of the partners of the dissolved firm constitute a new partnership firm by a new agreement arrived at among themselves, it cannot be said that the old firm continues with a mere change in the constitution. It is altogether a new firm and the learned Judges of the Madras High Court have rightly pointed out in *Kauthari Lungi Stores v. Commr. of Income-tax (1977 Tax LR 354 (Mad))* (supra) that a change in the constitution of the firm must be distinguished from the dissolution of the firm. Under these circumstances, we are unable to accept the reasoning or conclusions of the

learned Judges of the Full Bench of this Court in *Addl. Commr. of Income-tax v. Visakha Flour Mills. 1977 Tax LR 41 (Andh Pra) (FB)* (supra), as regards the interpretation of Section 187 in the context of dissolution of a firm by virtue of the provisions of the Partnership Act.

29. Mr. Rama Rao for the Revenue drew our attention to a decision of a Division Bench of the Allahabad High Court in *R. B. Jessa Ram Fateh Chand v. Commr. of Income-tax*¹⁵, But this decision was overruled by the majority of the learned Judges of the Full Bench of the Allahabad High Court in *Dahi Laxmi Dal Factory v Income-tax Officer*, (1975 Tax LR 132 (All) (FB)) (supra), and since we substantially agree with the conclusions of the majority of the learned Judges of the Full Bench in *Dahi Laxmi Dal Factory v. Income-tax Officer* (supra), it is not necessary for us to deal with this decision.

30. In *Commr. of Income-tax v. Ketukutty*¹⁶, a Division Bench of the Kerala High Court dealt with a situation where, because of Clause 7 of the partnership deed, the firm was not to be dissolved in the event of the death of one of the partners and since the firm was not dissolved, the case would squarely fall under the provisions of Section 187 (1) of the Income-tax Act.

31. In *Hoshiarpur Electric Supply Co. v. Commr. of Income-tax*¹⁷, after setting out the passage from the decision of the Supreme Court in *Commr. of I.-T. v. A. W. Figgies and Co.*, (AIR 1953 Supreme Court 455) (supra), the learned Judges of the Punjab and Haryana High Court observed :

These observations quite precisely apply to the present case, because their Lordships definitely decided that technically the law of partnership does not apply to a case like the present which is to be considered by applying the law of income-tax. In the present case also the business of the firm originally constituted continued as the electrical undertaking at Hoshiarpur from the very beginning right down to its purchase by the Punjab Government, and it continued to be the same unit throughout, carrying on the same business of supply of electricity, the same place and there was no cesser of that business or any change in the unit"

32. The question which we have to consider in the present case did not arise strictly for the decision in that particular case and it is not necessary for us to deal with that particular case in greater detail.

33. In *Sandersons and Morgans v. Income-tax Officer*¹⁸, Sabyasachi Mukharji, J. of the

¹⁵(1971) 81 ITR 409 (All)

¹⁷(1971) 79 ITR 164 (Punj)

¹⁶85 ITR 102 : (1972 Tax LR 72 (Ker))

¹⁸87 ITR 270 : (1973 Tax LR 614 (Cal))

Calcutta High Court, sitting single, dealt with a situation where there was a contract to the contrary providing that, in the event of death of one of the partners, the partnership firm was not to be dissolved. Thus it is obvious that the case would clearly fall under the provisions of Section 187 of the Income-tax Act, 1961. At page 281 of the report (87 ITR) : (at p. 620 of Tax LR), Sabyasachi Mukharji, J. observed :

" Therefore, the expression " change in the constitution of the firm" must be construed in

the light of the ordinary meaning unless the language of the section or the purpose of the Act compels one to hold otherwise. " Change in the constitution of the firm"normally and ordinarily would mean every alteration in the set-up of the firm viz. death, retirement, incapacity of partners, alteration of the shares of the partners to the firm etc. Whether any particular alteration would amount to a change in the constitution of the firm would depend upon the context of the use of that expression. Partnership is the relationship between persons who have agreed to share the profits of a business carried on by all or any of them acting for all according to the definition of the Partnership Act. Therefore, constitution of the firm is a matter of agreement between the parties, subject, however, to the fact that the parties cannot contract out of the legal obligations."

34. Sabyasachi Mukharji, J. further observed :

"I must construe the expression " Constitution of the firm"by its ordinary connotation and construe by that connotation that death would certainly indicate a 'change in the constitution of the firm'."

With respect, we are unable to agree with the later part of the reasoning of the learned single Judge of the Calcutta High Court.

35. In *Commr. of Income-tax v. T. Veera Raghavulu Chetty and Sons*¹⁹, a Division Bench, of this Court consisting of Obul Reddi, C. J. and Sriramulu, J., dealt with a situation where there was introduction of new partners in the midst of the accounting year. They were not dealing with a situation where a firm was dissolved because of the provisions of the Partnership Act, and it was held that the entire income of the firm for the whole year was to be assessed instead of two separate assessments and the conclusion of the learned Judges of the Division Bench is correct in the light of the fact that the case was clearly governed by the provisions of Section 187 (1) as interpreted by us. These are all the different decisions which have a bearing on this case.

36. It is true, as pointed out by the Gujarat High Court in *Addl. Commr. of Income-tax, Gujarat v. Harjivandas Hathibhai*, (1976 Tax LR 1107 (Guj)) (supra), in para 10 of its judgment that contract to the contrary can be spelled out from the conduct of the parties : but such conduct must be of the partners who constituted the firm before the dissolution took place under the provisions of the Partnership Act. It cannot be said that the conduct of the surviving partners, after the dissolution of the firm, is any indication regarding the existence of the contract to the contrary before the death of the deceased person, which brings about the dissolution of the firm. Even the subsequent conduct of the surviving

¹⁹100 ITR 723 : (1976 Tax LR 460 (Andh Pra))

partners may indicate under certain circumstances that there must have been a contract to the contrary between the surviving partners and the deceased partner during the lifetime of the deceased partner. But as we have stated above, it is a mere question of inference from the facts. The decision of the Gujarat High Court in *Ramprasad Firm v. Bai Reva*²⁰, which was relied upon by Mr. Rama Rao in support of his argument, merely lays down the same proposition and it does not advance the case of the Revenue any further. These are all the decisions which have been cited before us at the Bar and on a perusal and consideration of these different decisions and in

the light of the provisions of Section 187 as interpreted by us, it must be held that Section 187 does not apply to a situation where a firm is dissolved by the operation of one or the other provisions of the Partnership Act and after dissolution, one or more of the partners of the dissolved firm continue the same business as before by a fresh agreement with one or more new partners.

37. In the light of the above conclusion, it is not strictly necessary for us to deal with the contention urged by Mr. Swamy who appears for the assessee in R. C. No. 67 of 1975 that, even if the case falls under Section 187, there should be two assessments. It is not possible for us to accept that contention because under the scheme of the Act, once the case falls under Section 187, there must be a single assessment because there is only one assessee viz. the firm as it stood constituted at the end of the assessment year and there can be only one assessment in respect of a single assessee. This argument which appealed to the dissenting Judge, H. N. Seth J. of the Allahabad High Court in *Dahi Laxmi Dal Factory v. Income-tax Officer*, (1975 Tax LR 132 (All)) (FB) (supra), therefore, cannot be sustained.

38. In view of our conclusion as above, it necessarily follows that, in R. C. No. 22/75, because of the death of Srinivasulu on August, 17, 1968, the old firm was dissolved and there was succession to that firm by another firm within the meaning of Section 188 when under a new agreement seven of the old partners together with two new partners continued the old business before. Therefore, the case was not covered by Section 187 and hence it is obligatory on the part of the Income-tax Officer to make two separate assessments, one on the dissolved firm and the other on the new partnership firm. We therefore answer the question in R. C. No. 22 of 1975 in the affirmation i.e. in favour of the assessee and against the Revenue. In R. C. No. 67/75 on the retirement of Ch. Suryanarayana with effect from September 30, 1970, the old firm, which was in existence till then, came to an end because there were only two partners and one partner, Ch. Suryanarayana retired and the other partner, K. Sanyasiraju could not continue the business of the firm. Because of that dissolution, though the business of the partnership was carried on by another firm and was continued, there was a mere succession within the meaning of Section 188 and the case was not covered by the provisions of Section 187. Under these circumstances, we answer the question referred to us in R. C. No. 67/75 in the negative as to the first part and in the affirmative as to the second part i.e. in favor of the assessee as to both parts of the question. The Commissioner will pay the costs of the reference to the assessee in each of these two matters. Advocate's fee Rs. 250/- in each.

Lakshmaiah, J. (minority view) :- The point that arises for determination in this reference pertains to the interpretation of Section 187 of the income-tax Act, 1961.

39-A. " The main question"that we have to consider on the facts of the two cases referred,
²⁰ AIR 1970 Guj269

as formulated by My Lord Chief Justice, is " the effect of the provisions of Section 187 (2) of the Income-tax Act, when under the provisions of the " Partnership Act, a firm is dissolved."

40. But the crucial problem that requires solution into this reference is whether it can be said that " a change had occurred in the constitution of a firm" , within the meaning of that expression as occurring in Section 187 of the Income-tax Act, 1961 when a partner dies, " 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."

41. In other words, to put it differently the question is whether, if a partner dies, he does not cease to be a partner under Section 187 (2) of the Income-tax Act.

42. The problem of interpretation can be approached both textually as well as contextually.

1. TEXTUAL APPROACH :

" A Statute is the will of the legislature, and the fundamental rule of interpretation to which all others are subordinate, is that a statute is to be expounded 'according to the intent of them that made it. If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words themselves in such case best declaring the intention of the legislature. The object of all interpretation of a statute is to determine what intention is conveyed, either expressly or impliedly, by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it..... The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first place, reference to cases.....

When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. *Absoluta Sententia Expositore non Indiget*. Such language best declares, without more, the intention of the law giver, and is decisive of it. The rule of construction is 'to intend the legislature to have meant what they have actually expressed."

(Maxwell on The Interpretation of Statutes - Eleventh Edition, pages 1 to 4).

43. Section 187 of the Income-tax Act, 1961 (referred to hereinafter as the Act) reads :

" 187. Change in constitution of a Firm. –

(1) Where at the time of making an assessment under Section 143 or Section 144 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 : Provided that -

(i) the income of the previous year shall, for the purposes of inclusion in the total incomes of the partners, be apportioned between the partners, who, in such previous year, were entitled to receive the same; and

(ii) 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.

2. For the purposes of this section, there is a change in the constitution of the firm.....

(a) 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

(b) where all the partners continue with a change in their respective shares or in the shares

of some of them."

44. Chapter XVI of the Act wherein the above section occurs deals with " special provision applicable to firms"with regard to assessment. Section 182 provides for assessment of registered firms and Section 183, for assessment of unregistered firms. Sections 184 to 186 deal with " registration of firms."

45. Of the remaining other three sections in that Chapter, Section 187 deals with " Change in constitution of a firm,"S. 188, with " Succession of one firm by another firm" , and Section 189, with " firm dissolved or business discontinued."

46. Chapter IV deals with the general 'procedure for assessment.' Section 139, the first section under that Chapter provides for the return of total income by an assessee.

47. Where a return has been made under Section 139, Section 143 provides for the making of an assessment of the assessee by the Income-tax Officer.

48. Where there is failure on the part of the assessee to make the return under Section 139, or to comply with some or all of the requirements of Sections 142 and 143, Section 144 provides for the making of a best judgment assessment by the Income-tax Officer.

49. Where at the time of making an assessment under Section 143 or Section 144, it is found that a change has occurred in the constitution of a firm the assessment shall have to be made under Section 187 on the firm as constituted at the time of making the assessment.

50. As to when such a change in the constitution of the firm takes place, sub section (2) of Section 187 provides by saying, leaving the immaterial portion,

" For the purposes of this section, there is a change in the constitution of the firm - if one.....of the partners cease to be partners.....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."

51. Assuming that " such circumstances"as mentioned in Sub-section (2) exist, the question is whether there can be a change in the constitution of the firm, if one of the partners dies and whether on account of the death of such a partner, he does not cease to be a partner.

52. The statutory expression needing explanation is 'if one.....of the partners cease to be partners'. When does a partner cease to be a partner ? Whether a partner does not cease to be a partner on account of his death, are the questions to be answered. Put that way, not much dialectical dexterity, nor any interpretative ingenuity is needed to reach the conclusion that a partner ceases to be a partner on account of his death as a partner cannot be said to continue as a partner after his death excepting it be when the legislature so provides by any fiction, and it is nobody's case that the legislature so provided.

53. The aforesaid statutory expression as to when " a partner ceases to be a partner" and whether

a partner does not cease to be a partner after his death, do not admit any dubity or ambiguity as to justify a need to have resort to any extrinsic material such as what is contained in the Partnership Act.

54. The words of the statute are in themselves precise and unambiguous. No more is necessary than to expound those words in their natural and original sense, as the words themselves best declare the intention of the legislature. The safer and correct course of dealing with a question of construction is to take the words themselves and arrive at their meaning, without in the first place, reference to cases and other extrinsic material. When the language is not only plain but admits of one meaning, the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation.

55. I am therefore of the opinion that when a partner of a firm dies, such a partner ceases to be a partner and as such there will be " a change in the constitution of the firm" under sub section (2) of Section 187 of the Act provided that one or more of the persons who were partners of the firm before the change continue as partner or partners after the change.

56. The contextual theory of interpretation of the Section 187 of the Act to which we now propose to advert does not in any way militate against the aforesaid view.

57. How far reference to and reliance upon the concepts of Partnership Act militate against the aforesaid interpretation of Section 187 of the Act is a question proposed to be answered under the contextual theory of interpretation. CONTEXTUAL APPROACH :

58. Consolidating Act - Principles and Presumptions of Interpretation :

The Income-tax Act, 1961 as its preamble discloses, is an Act to consolidate and amend the law relating to income-tax and super-tax. This Act by Section 297 repealed the Indian Income-tax Act, 1922 which also contained the same preamble.

59. In *Ravulu Subba Rao v. Commr. of Income-tax*²¹, Justice Venkatarama Ayyar speaking for the Supreme Court observed, referring to the Indian Income-tax Act, 1922 :

" The Act is, as stated in the preamble. one to consolidate and amend the law relating to income-tax."

After referring to the rule of construction to be applied to such a statute as stated by Lord Herschell in *Bank of England v Vagliano Bros.*, (1891 AC 107) the learned Judge stated at page 170 of the report thus :-

²¹(1956) 30 ITR 163

" We must therefore construe the provisions of the Indian Income-tax Act as forming a Code complete in itself and exhaustive of the matters dealt with therein, and ascertain what their true scope is."

(emphasis supplied).

60. The House of Lords decision in *Bank of England v. Vagliano Bros*²²., concerned with the interpretation of the Bills of Exchange Act, 1882 which codified the law relating to Negotiable Instruments. Lord Herschell laid down the proper rule of construction thus :

" I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."

61. In *Rogers Pratt Co. v. Secretary of State*²³ a Full Bench of the Calcutta High Court considered the principles of interpretation applicable to the interpretation of Income-tax Act, 1918, Mukerji, J. observed at page 41 of the report :

" A perusal of the several enactments makes it clear that the Income-tax Act of 1918 (Act VII of 1918) effected a radical change in the scheme and scope of operation of this branch of law. The Act of 1918 professes to be a consolidating and amending statute; on any point specifically dealt with in the Act the law is to be ascertained by interpreting the language used in the statute in its natural meaning, uninfluenced by considerations derived from the previous state of the law: *Administrator General v. Premlal*²⁴ *Norendra v. Kamalbasini*²⁵ and *Ramdas v. Amarchand and Co*²⁶. Reference to the previous state of the law would be permissible for the purpose of aiding in the construction of a new statute if any provision therein is of doubtful import: *Bank of England v. Vagliano Bros*²⁷ *Robinson v. Canadian Pacific Rly. Co*²⁸. and *Morsey Docks v. Cameron*²⁹ "

" The purpose of a consolidating statute is to present the whole body of the statutory law on a subject in complete form, repealing the former statutes."

(Halsbury's Laws of England, Third Edition Vol. 36 Para 538 at Page 366).

²²(1891) A C P 107 at pp. 144 and 145

²⁴(1895) ILR 22 Cal 788 (PC)

²³(AIR 1925 Calcutta 34 at p. 41 (FB))

²⁵(1896) ILR 23 Cal 563 (PC)

²⁶(1916) ILR 40 Bom 630

²⁸(1892 AC 481)

²⁷(1891 AC 107)

²⁹(1864) 11 HLC 443

62. The following passages on consolidating statute and their interpretation from Maxwell on The Interpretation of Statutes. Twelfth Edition are very instructive.

" Consolidating Statutes.

A consolidating statute is one which collects the statutory provisions relating to a particular topic, and embodies them in a single Act of Parliament, making only minor amendments and improvements.

In the construction of a consolidation Act, the presumption that Parliament does not intend to alter the existing law applies with particular force. For the object of the Act was merely to 'reproduce the law as it stood before'."(at pp. 20, 21)

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In interpreting a consolidating Act, account is taken of judicial decisions on provisions contained in the statutes now codified. 'One has to remember', said Lord Evershed M. R., that Parliament must be taken to have been aware of the decisions of the courts in the meantime."(at page 24)

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In the case of a consolidating Act there is a particularly strong presumption that it does not alter the law contained in the statutes which it replaces. The reason is that it is the invariable practice of Parliament to require from those who have preferred a consolidation Bill an assurance that it will make no substantial change in the law and to have that checked by a committee."(at pp. 116, 117).

" The statutes dealing with a particular subject may constitute a special code in regard thereto. Among the objects intended to be attained by the codification of laws are the collection and embodiment in one statute of all the laws and parts of laws on the same subject, which had previously been enacted and which it is intended to continue in force."(page 59).

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" Codes, Compilations, and Revisions.- It has generally been held that codes and compiled or revised statutes intended to express either the whole of the general laws of a state, or of some great sub-division of such laws, may be adopted by one act under a general title without violating a constitutional provision prohibiting the enactment of any bill containing more than one subject and requiring that subject to be expressed in the title. In this respect, it has been declared that any construction of these with the very commendable policy of incorporating the entire body of statutory law on one general subject in a single act, instead of dividing it into a number of separate acts, would not only be contrary to its spirit but also seriously embarrassing to honest legislation"(p. 184).

(From 'American Jurisprudence' Vol 50) " Consolidation is the reduction into a systematic form of the whole of the statute law relating to a given subject, as illustrated or explained by judicial decisions. " The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing when the consolidating Act was passed. 'Referring to Section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, Lord Hanworth M. R. said : 'the

object therefore of the Act was to consolidate and reproduce the law as it stood before the passing of that Act,"(at pp. 361., 362).

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" One has to begin"(said Evershed M. R. in 1958) " by the consideration that the Judicature Act is a consolidating Act and one does not look for substantial changes in the law in a consolidating Act."

And of the Trustee Act 1925 Romer L. J. said: " It is a consolidation Act..It is therefore, extremely unlikely, to say the least of it, that it effected any substantial change in the pre-existing law."In *Galloway v. Galloway* Lord Radcliffe said: " This is a consolidation Act, the function of which is to repeat but not to amend the existing statute law."(pp. 363 and364) (Craies on Statute-law Seventh Edition). Law Commission of India - Twelfth Report on Income-tax Act, 1922.

63. The Income-tax Act, 1961 came into force on April, 1, 1962. It is based on the recommendations contained in the Law Commission's 12th Report, 1958.

64. In this connection, it is very interesting and instructive to notice what the Law Commission has said in their report about Chapter XVI of the Act which deals with the special provisions applicable to Firms (wherein Sections 187 to 189 occur) in para 65 at page 22 of their report:

" 65. Chapter XVI Special Provisions applicable to firms, - All the provisions of the Act applicable to firms have been gathered together in this chapter. This will enable the partners and others to ascertain the law from one Chapter instead of searching for provisions, dispersed all over the Act.

The principal changes made in this Chapter are given below :

(1) The provisions contained at present in the Rules regarding the registration and cancellation of registration of firms, have been incorporated in the Act.

(2) The provision for fresh application for registration every year has been deleted, as it entails hardship. A declaration that there has been no change in the constitution of the firm will suffice.

(3) There was some difficulty in determining when there is a change in the constitution of a firm and when there is a succession. The specific circumstances which result in a change in the constitution of a firm have now been defined."

MACHINERY PROVISIONS - PRESUMPTIONS :-

65. Sections 187 to 189 in Chapter XVI of the Act relate to assessment of firms. They are not charging sections. They are only machinery provisions.

66. Lord Normand speaking for the Judicial Committee of the Privy Council, while interpreting Section 34 of the Indian Income-tax Act, 1922 in *Commr. of Income-tax Bengal v. Mahaliram Ramjidas*³⁰ observed :

" The section, although it is part of the taxing Act, imposes no charge on the subject and deals merely with the machinery of assessment. In interpreting provisions of this kind the rule is that that construction should be preferred which makes the machinery workable, Ut Res Valeat Potius Quam Pereat."(at p. 448).

67. Justice Sarkar (as he then was) laid down the following rule of construction for machinery provisions in a taxing statute in *Gursahai Saigal v. Commr. of Income-tax, Punjab*³¹

" Now it is well recognised that the rule of construction on which the assessee relies applies only to a taxing provision and has no application to all provisions in a taxing statute. It does not, for example, apply to a provision not creating a charge for the tax but laying down the machinery for its calculation or procedure for its collection. The provisions in a taxing statute dealing with machinery for assessment have to be construed by the ordinary rules of construction, that is to say, in accordance with the clear intention of the legislature which is to make a charge levied effective. Reference may be made to a few cases laying down this distinction. In *commr. of Income-tax v. Mahaliram Ramjidas*³², it was said :-

'The Section, although it is part of a taxing Act, imposes no charge on the subject, and deals merely with the machinery of assessment. In interpreting provisions of this kind the rule is that that construction should be preferred which makes the machinery workable, Ut Res Valeat Potius Quam Pereat.'

In *India United Mills Ltd. v. Commr. of Excess Profits Tax*³³ this court observed :-

'That section is, it should be emphasised, not a charging section, but a machinery section and a machinery section should be so construed as to effectuate the charging sections.'

68-69. The aforesaid rule of construction laid down by Sarkar, J. (as he then was) was referred to with approval by Justice Subbarao (as he then was) in a later case *Banarsi Deebi v. Income-tax Officer*³⁴). CONTEXTUAL THEORY OF CONSTRUCTION :

70. The Judicial Committee of the Privy Council in *Canada Sugar Refining Co. v. Reg*³⁵., speaking through Lord Davey observed at p. 741 of the report :-

" Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

71. The following passages on principles of interpretation from Halsbury's Laws of England Third Edition Volume 36 may be usefully referred :-

" The dominant purpose in construing a statute is to ascertain the intention of the legislature as so expressed. This intention, and therefore the meaning of the statute, is primarily to be sought in the words used in the statute itself, which must, if they are plain

and unambiguous, be applied as they stand,

³¹(1963) 48 ITR (SC) 1 (at p. 5)

³³(1955) 27 ITR 20

³⁵(1898) AC 735

³²(AIR 1940 PC 124)

³⁴(1964) 53 ITR (SC) 100 at p. 104

If the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament and there is no need to look elsewhere to discover their intention or their meaning. (pp. 387, 388)

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Although the words of a statute are normally to be construed in their ordinary meaning, due regard must be had to their subject matter and object, and to the occasion on which and the circumstances with reference to which they are used, and they should be construed in the light of their context rather than in what may be either their strict etymological sense or their popular meaning apart from that context."(at p. 394).

REFERENTIAL LEGISLATION INCORPORATING THE PROVISIONS OF PARTNERSHIP ACT INTO INCOME-TAX ACT - LIMITS AND EXTENT :

72. Unless the context otherwise requires, the Income-tax Act, 1961 provides in the definition clause by Section 2 (23) that " firm" , " partner"and " partnership"have the meaning respectively assigned to them in the Indian Partnership Act, 1932; but the expression 'partner' shall also include 'any person who, being a minor, has been admitted to the benefits of partnership."

73. The clue to the proper appreciation of the impact of Partnership Act on the Income-tax Act, particularly on Section 187 thereof, is to be found only in a correct appraisal of what is called the theory of " Referential Legislation."

74. The earliest case recognising this *principle was R. v. Merionethshire Inhabitants*³⁶ There, statute 43 G 3 E. 59 applied statute 13 G. C. 78 " as fully and effectually as if the same and every part thereof were hereinafter repealed and re-enacted."

75. The classic exposition of the subject by Lord Esher, Master of Rolls in the year 1866 in In Re Wood's Estate; Ex parte Her Majesty's Commrs. of Works and Buildings (1886) 31 Ch. D 607 was followed in subsequent decisions, here, there, everywhere, set the trend in this branch of law.

76. In that case, Act 18 and 19 Victoria Ch. 95 was passed in 1855, after the passing of the 'Lands Clauses Act.' The material Sections of the Act of 1855 are 9th and 11th. By the 9th section, certain Sections of the Act of 1840 are incorporated into the Act of 1855. The Act of 1840 was passed before the Lands Clauses Act. Considering the legal effect of the 9th Section of the Act of 1855 which brings into that Act those sections of the former Act. Lord Esher, M. R. said :

"It is to put them into the Act of 1855 just as if they had been written into it for the first time. If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into

the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were

³⁶(1844) 6 QB 343

actually in the Act of 1855."(pp. 615, 616).

77. Speaking about the Legislative practice to incorporate by reference, the Supreme Court of India said in *A. T. Corporation v. Asstt. Collector, Customs*³⁷.

" It is a well accepted Legislative practice to incorporate by reference, if the Legislature so chooses, the provisions of some other Act in so far as they are relevant for the purposes of and in furtherance of the scheme and object of that Act"

78. The same practice has been obtaining in the United States of America. Mr. Justice Sanford delivering the opinion of the Supreme Court of *America said in Engel v. Devenport*³⁸

" The adoption of an earlier statute by reference makes it as much as part of the later act as though it had been incorporated at full length. *Kendall v. United States*³⁹, *Interstate Concol. Street R. Co. v. Massachusetts*⁴⁰, It brings into the later act " all that is fairly covered by the reference"(Panama R. Co. Case, (1923) 264 U. S. 375 (392) : 68 Law ed. 748 (755) : 44 Sup. Ct. Rep. 391); that is to say all the provisions of the former act which, from the nature of the subject-matter, are applicable to the later act."

" The adoption of an earlier statute by reference makes it as much part of the later Act as though it has been incorporated at Full length." (American Jurisprudence Vol. 50 at p. 58).

" Where a statute incorporates by reference the whole or any part of an earlier statute, the provisions so incorporated are in general to be construed as they would be if set out in full in the later statute."

(Halsbury's Laws of England-Third Edition Volume 36 at p. 404).

" The effect of incorporating one Act with another is presumably to make them parts of the same Code."

(Craies on Statute Law-Seventh Edition at p. 360). LEGAL PERSONALITY OF A FIRM : Text Books :

79. Speaking about the legal conception of personality Sir John Salmond said in his 'Jurisprudence' Twelfth Edition in paragraph 61 at page 299:

" So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess judicial significance, and this is the exclusive point of view from which personality receives legal recognition.

Persons as so defined are of two kinds, distinguishable as natural and legal. A

³⁷(AIR 1972 SC 648) at page 654

³⁸(1925) 70 Law Ed. 813 at p. 817

³⁹(1838) 12 Pet. 524 at p. 625 : 9 Law ed. 1181, 1221; Re Heath, 144 U.S. at pp. 92, 94 : 36 Law ed. 358 at p. 359 : 12 Sup. Ct. Rep. 615

⁴⁰(1907) 207 U. S. 79, 85 : 52 Law ed. 111, 114 : 28 Sup Ct. Rep. 26 : 12 Ann. Cas. 555

natural person is a human being. Legal persons are beings, real or imaginary, who for the purpose of legal reasoning are treated in greater or less degree in the same way as human beings."

80. G. W. Paton in his Text Book of 'Jurisprudence' Third Edition at page 247 said :

" Most of the matters involve not tangible things which exist in the world around us independently of man, but intangible things created in one way or another by man for his purposes as a social animal. Notions and concepts like rights and duties, juristic acts, remedial rights, property, or possession, although they may be concerned with tangible things in one way or another, are not themselves tangible things but represent or stand for or serve or describe certain relationships."

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" It is difficult to conceive of rights or duties except as going to the relationships between persons."

" If by persons we meant always human beings that perhaps there would not need to be much discussion about legal personality. It is clear, however, that the law creates not only its own rules for determining the relationships between persons but its own rules for determining what entitles shall be recognised as persons for the purposes of the law. For the purposes of the law an idol, a trade union, or a 'one man' commercial company may be recognised as persons for the purposes of legal relationships, distinct from any human beings connected with them."

81. Hans Kolson in his " General Theory of Law and State" under the heading " The Legal Person" said at page 93 :

" The concept of a legal person is another general concept used in the presentation of positive law and closely related to the concepts of legal duty and legal right. The concept of the legal person - who, by definition, is the subject of legal duties and legal rights - answers the need of imagining a bearer of the rights and duties. Juristic thinking is not satisfied with the insight that a certain human action or omission forms the contents of a duty or a right. There must exist something, that 'has' the duty or the right. In this idea, a general trend of human thought is manifested. Empirically observable qualities, too, are interpreted as qualities of an object or a substance, and grammatically they are represented as predicates of a subject. This substance is not an additional entity. The grammatical subject denoting it is only a symbol of the fact that the qualities form a unity."

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" This duplication of the object of knowledge is characteristic of the primitive mythological thinking which is called animism. According to the animistic interpretation of nature, every object of the perceptual world is believed to be the abode of an invisible spirit who is the master of the object, who " has" the object in the same way as the substance has its qualities, the grammatical subject its predicates. Thus the legal person, as ordinarily understood, also " has"its legal duties and rights in this same sense. The legal person is the legal substance to which duties and rights belong as legal qualities. The idea that " the person has"duties and rights involves the relation of substance and quality.

In reality, however, the legal person is not a separate entity besides 'its' duties and rights, but only their personified unity or - since duties and rights are legal norms - the personified unity of a set of legal norms."

82. Ernest Barker in his introduction to 'Natural Law and the Theory of Society"by Otto Gireke said at page IXIII.

" Legal personality, as distinct from Psychological and ethical personality, is a power or capacity for legal action - a capacity recognised by law (and only existing when recognised by law) for originating such action as belongs to the scheme of law. From this point of view the existence of legal personality not only presupposes, as that of moral personality does the presence of human society; it also presupposes the presence of an organised legal association. It is a thing bound up with rights; in fact it is a capacity for rights; and rights, in the full sense of the word, are only possible in such an association. Now rights may belong, and obviously do belong, to groups as well as to individuals. In the field of the organised legal association we must therefore assign legal personality to groups as well as to individuals, and here we have to admit that there are Group-persons as well as individual persons.

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" Similarly many of the groups contained in the State are legal persons. They have a capacity for rights; and a capacity for rights means a legal personality."

83. L. C. B. Gower in his book " The Principles of Modern Company Law"Third Edition said at page 67 :-

"Statutes of the early nineteenth century enabled the Crown by letters patent to confer all or any of the advantages of incorporation without actually granting corporate personality, and similarly as statute may confer many of these privileges without actual incorporation. In fact, this has been done in several cases, with the result that between the two extremes of an unincorporated club or society and the corporation there are many hybrids, which though formally unincorporated, possess a greater or lesser number of the attributes of a corporation. Among these hybrids even partnership ought perhaps to be included for the partners can now sue or be sued in the firm's name."Case Law :

84. *Bonsor v. Musicians' Union*⁴¹, is a case decided by House of Lords where Lord Keith of Avonhilton referring with approval the decision of Farwell, J. in *Taff Vale Rly. case*, (1901 AC 426) observed at page 150 about the conception of legal entity thus :

" The view which I have endeavoured to formulate is, I think, entirely consistent with the decisions and dicta in earlier trade union cases which have come before this House. In the *Taff Vale Rly. case* Farwell J. whose judgment was upheld by this House, does not describe a registered trade union as a legal entity, though he does so in another case to which I refer later. He uses language, however, from

⁴¹(1956 AC 104)

which I think the conception of such a union as a legal entity arose. For instance, he says : Now although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individual which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that is unknown to the common law. The legislature has legalised it, and it must be dealt with by the courts according to the intention of the legislature." In other places he refers to it as a creature of statute. In this House Lord Halsbury L. C. expressly adopted the judgment of Farwell J. and in a short sentence referred to such a trade union as a thing created by the legislature, Lord MacNaghten, Lord Shand and Lord Brampton also accepted the judgment of Farwell, J."

85. The Judicial Committee of the Privy Council observed about the 'legal personality' thus in *Bhagwanji v. Alembic Chemical Works*⁴² Sir John Beaumont observed :

" It is true that the Indian partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it; the law in India in that respect being more in accordance with the law of Scotland, than with that of England. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession."

86. Chief Justice Subba Rao of Andhra Pradesh High Court (as he then was) observed in *T. Jalayya v. N. Venkateswara Rao*⁴³, thus :-

" At the outset it is necessary to ascertain the legal characteristics of a firm. It is settled law that a firm is not legal entity but only consists of the individual partners for the time being. The essential characteristic of a firm is that each partner is a representative of the other partners. Each of the partners is an agent and a principal. He is an agent in so far as

he can bind the other partners by his acts within the scope of the partnership business and he is a principal to the extent that he is bound by the acts of the other partners. The liabilities of the firm can be enforced against each of the partners personally. The aforesaid legal concept is the foundation of the decision of the Judicial Committee in the matter of *Stuart Samuel*, (1913) AC 514."

87. Our Supreme Court speaking through Justice Mahajan (as he then was) in *Commr. of Income-tax v. A. W. Figgies and Co*⁴⁴, thus :

" It is true that under the law of partnership a firm has no legal existence apart

⁴²(AIR 1948 PC 100) at page 101

⁴⁴24 ITR 405 held at pages 408 and 409 : (At page 456 of AIR)

⁴³(AIR 1957 And Prad 658) at pages 660 and 661

from its partners and it is merely a compendious name to describe its partners but it is also equally true that under that law there is no dissolution of the firm by the mere incoming or outgoing of partners. A partner can retire with the consent of the other partners and a person can be introduced in the partnership by the consent of the other partners. The reconstituted firm can carry on its business in the same firm's name till dissolution. The law with respect to retiring partners as enacted in the Partnership Act is to a certain extent a compromise between the strict doctrine of English Common Law which refuses to see anything in the firm but a collective name for individuals carrying on business in partnership and the mercantile usage which recognises the firm as a distinct person or quasi- corporation. But under the Income-tax Act the position is somewhat different. A firm can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually."

88. After quoting Section 3 of the Income-tax Act, 1922 the learned Judge proceeded to state thus :

" The partners of the firm are distinct assessable entities, while the firm as such is a separate and distinct unit for purposes of assessment. Sections 26, 48 and 55 of the Act fully bear out this position. These provisions of the Act go to show that the technical view of the nature of a partnership, under English law or Indian Law, cannot be taken in applying the law of Income-tax."

89. Yet on another occasion the Supreme Court of India in *Shivram Poddar v. Income-tax Officer*⁴⁵, speaking through Shah, J. (as he then was) observed (at p. 1097 of AIR) :

" A firm whether registered or unregistered is recognised under the Act as a unit of assessment (Sections 3 and 2 (2)) and its income computed under clauses (3) and (4) of Section 23 as the income of any other unit."

x x x x

" Under the ordinary law governing partnership modification in the constitution of the firm in the absence of a special agreement to the contrary amounts to dissolution of the

firm and reconstitution thereof, a firm at common law being a group of individuals who have agreed to share the profits of a business carried on by all or any of them acting for all, and supersession of the agreement brings about an end of the relation. But the Income-tax Act recognises a firm for purposes of assessment as a unit independent of the partners constituting it; it invests the firm with a personality which survives reconstitution."

90. Dias in his 'Jurisprudence' Fourth Edition at page 340 said :

" A human being ceases to be a person, in law as in fact, at death" .

"a statute can always abrogate the effect of a judicial decision, and the courts regard themselves as bound to give effect to legislation....."(at p. 164).

(Rupert Cross in his 'Precedent in English Law').

⁴⁵((1964) 51 ITR 823)

" A statute is abrogative and can sweep away inconvenient rules."

(at p. 211) (Paton on 'Jurisprudence' third Edition).

91. We shall now proceed to discuss the problem raised in the aforesaid background.

92. The Income-tax Act, 1961 as its preamble discloses, is an Act to consolidate and amend the law relating to income-tax and super-tax. That Act by Section 297 repealed the Indian Income-tax Act, 1922. The purpose of consolidating a statute is to present the whole body of the statutory law on a subject in a complete form repealing the former statutes. There is a strong presumption that the consolidating Act does not alter the law contained in the statutes it replaces. We must construe the provisions of a consolidating Act as forming a code complete in itself and exhaustive of the matters dealt with therein and ascertain what their true scope is, as otherwise its utility as a consolidating Act will be almost entirely destroyed and the very object with which it was enacted will be frustrated.

93. Unless the context otherwise requires, the Act provides in the definition clause by Section 2 (23) that 'firm', 'partner' and 'partnership' have the meanings respectively assigned to them in the Indian Partnership Act, 1932, but the expression 'Partner' shall also include 'any person who being a minor, has been admitted to the benefits of partnership.'

94. The Partnership Act defines by Section 4 the aforesaid expressions. " Partnership" is 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." Persons who have entered into partnership with one another are called individually 'Partners' and collectively 'a firm' and the name under which their business is carried on is called the 'Firm name'. The expression 'Partnership' does not occur in Section 187 and the expression 'Partner' was assigned in the Act an extended meaning. We are not now concerned with these two expressions for construing Section 187. The expression 'Firm' contained therein needs explanation and interpretation.

95. When the Income-tax Act defines 'Firm' to have the same meaning assigned to it by the Partnership Act, the legal effect of that is to write Partnership Act definition of firm into the Income-tax Act just as if it has been actually written in it with the pen or printed in it and the moment you have that in the Income-tax Act, you have no occasion to refer to the Partnership Act at all.

96. Such of those provisions of Partnership Act which were adopted by or incorporated into the Income-tax Act through the well-recognised and established device or referential legislation, must be dealt with as if they were actually in the Income-tax Act, with the judicial Interpretation placed upon those adopted or incorporated concepts. There is thus no occasion to spell out any conflict, apparent or real, between the two Acts as the one was integrated into or interwoven into the warp and woof of the other later Act. For all practical purposes, it is the later Income-tax Act alone that has got to be looked into.

97. Under the law of Partnership, a firm has no legal existence apart from its partners and it is merely compendious name to describe its partners. But under the Income-tax Act. the position is somewhat different. A firm can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually. Provisions contained in Section 26 of Act of 1922 corresponding to Section 187 of the Act go to show that the technical view of the nature of a partnership cannot be taken in applying the law of Income-tax. A firm, whether registered or unregistered, is recognized under the Income-tax Act as a unit of assessment and its income computed as the income of any other unit. Legal personality is the gift of law, be it common law or statutory law. With its abrogative force, the legislature can confer legal personality on any entity absolutely or qualifiedly. The Income-tax Act invests a firm with a personality which survives its reconstitution.

98. Section 187 occurs in Chapter XVI of the Act which deals with special provisions applicable to firms. The Income-tax Act, 1961 is based on the recommendations contained in the law Commission's Twelfth Report, 1958. As per that report, the provisions pertaining to firms, wherever they are contained in the Act or the Rules made thereunder, were all collected together in that chapter. As there was some difficulty in determining when there is a change in the constitution of a firm and where there is suggestion, specific circumstances which result in a change in the constitution, of a firm have been defined in Section 187 (2) of the Act. This repealing Act does not thus purport to alter the effect of the provisions of the repealed Act. It is, as it should be, having regard to the consolidating and amendatory nature of the Act.

99. Chapter XVI of the Act containing Sections 187 to 189 relate to assessment of firms. They are not charging sections. They are only machinery provisions. The principles and presumptions of interpretation of charging provisions are not applicable to machinery provisions though contained in the taxing statute. They are to be interpreted just like any other provision of law.

100. With the aforesaid background, we shall now interpret Section 187 of the Act.

101. Where at the time of making an assessment under Section 143 or Section 144, it is found that a change has occurred in the constitution of a firm, the assessment shall have to be made under Section 187 on the firm as constituted at the time of making the assessment. As to when such a change takes place, Section 187 (2) provides by saying that, " for the purpose of this

section, there is a change in the constitution of the firm, if one of the partners ceases to be partners, 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."

102. " A human being ceases to be a person in law, as in fact, at death" . A partner of a firm ceases to be a partner on his death. Therefore, whenever a partner of a firm dies, such a partner ceases to be a partner and as such there will be " change in the constitution of the firm" under Sub-section (2) of Section 187 of the Act, provided that one or more of the persons who were partners of the firm before the change continue as partner or partners after the change.

103. I am fortified in this view of mine by the decisions of the Supreme Court rendered while interpreting Section 26 of Act of 1922 also which corresponds to Section 187 of the Act excepting it be in some particular matter to which we shall advert to during the course of this judgment. The facts of these cases are given in the judgment of My Lord the Chief Justice.

104. In *Commr. of Income-tax v. A. W. Figgies and Co.* (AIR 1953 Supreme Court 455) (supra) the following observations of Mahajan, J. (as he then was) while interpreting Section 25 (4) of 1922 Act are relevant (at page 456) :

" The Section does not regard a mere change in the personnel of the partners as amounting to succession and disregards such a change. It follows from the provisions of the section that a mere change in the constitution of the partnership does not necessarily bring into existence a new assessable unit or a distinct assessable entity and in such a case there is no devolution of the business as a whole."

105. Adverting to the substratum of the business the firm was carrying on, the learned Judge proceeded to observe (at p. 456 of AIR) :

" The true question to decide is one of identity of the unit assessed under the Income-tax Act, 1918, which paid double tax in the year 1939, with the unit to whose business the private limited company succeeded in the year 1947. We have no doubt that the Tribunal and the High Court were right in holding that in spite of the mere changes in the constitution of the firm the business of the firm as originally constituted continued as tea brokers right from its inception till the time it was succeeded by the limited company and that it was the same unit all through, carrying on the same business, at the same place and there was no cesser of that business or any change in the unit."

x x x x

" To all intents and purposes the firm as reconstituted was not a different unit but it remained the same unit in spite of the change in its constitution."

106. It is pertinent to note that the definition of 'partnership' in Section 4 of the Partnership Act lays particular stress upon the 'business being carried on by all the partners or any of them acting for all' with which aspect alone the Income-tax Act is primarily concerned and that aspect of the definition was not allowed to undergo any transformation in the Act though such transformation

took place in the definition of 'partner' and 'firm' either statutorily or judicially.

107. In *Shivram Poddar v. Income-tax Officer*, (AIR 1964 Supreme Court 1095) (supra) the Supreme Court was considering Section 26 (1) and (2) of Income-tax Act, 1922. Justice Shah (as he then was) observed at page 827 of the report (51 ITR) : (At page 1098 of AIR SC) :

" Section 44 is, therefore, attracted only when the business of a firm is discontinued i.e. when there is complete cessation of the business and not when there is a change in the ownership of the firm, or in its constitution, because by reconstitution of the firm, no change is brought in the personality of the firm, and succession to the business end not discontinuance of the business results."

The learned Judge proceeded further to observe at p. 828 (of ITR) : (at page 1098 of AIR SC) :

" Where the firm is dissolved, but the business is not discontinued, there being change in the constitution of the firm, assessment has to be made under Section 26(1) and if there be succession to the business, assessment has to be made under Section 26 (2). The provisions relating to assessment on reconstituted or newly constituted firms, and on succession to the business are obligatory."

108. In *Commr. of Income-tax v. Kirkend Coal Co⁴⁶*, Justice Shah (as he then was) referred to his own judgment in *Shivram Poddar* case, (AIR 1964 Supreme Court 1095) after referring to the same in extenso.

109. But it is submitted that these decisions were rendered in the context of Section 26 (1) of the Income-tax Act, 1922, the language in which differs in a material particular from the language employed in Section 187. We have already extracted Section 187. We shall read Section 26 (1) of 1922 Act :

" 26. Change in constitution of a firm : (1) Where at the time of making an assessment under Section 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, the assessment shall be made on the firm as constituted at the time of making the assessment:

Provided that the income, profits and gains of the previous year shall, for the purpose of inclusion in the total incomes of the partners, be apportioned between the partners who in such previous year were entitled to receive the same :

Provided further that 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."

110. " Change in constitution of a firm" is the marginal heading, same in both the sections. The assessment shall have to be made in both the sections " on the firm as constituted at the time of making the assessment." Whereas the expression " as constituted" under Section 187 refers to a case where " a change has occurred in the constitution of the firm" , that expression in Section 26 (1) refers to that and another case also where " a firm has been newly constituted."

111. The expressions " a change in the constitution of a firm"as well as " a firm has been newly constituted"under Section 26 (1) exhaust between themselves all the cases provided for under the rubric of " a change in the constitution of a firm"as defined for the purpose of Section 187 under clauses (a) and (b) of Sub-section (2) thereof as not to suggest any materiality of change between the old and the corresponding new section.

112. The consolidating Act, 1961 does not purport to bring any material change in the law relating to the assessment of firms. The only change sought to be brought about in 1961 Act as per the Law Commission's Report is to collect all provisions of law contained in the Act and the Rules made thereunder pertaining to the firms' at one place in Chapter XVI and to define the conception of " change in the constitution of the firm"as was done

⁴⁶(74 ITR 67)

under sub- s. (2) of Section 187.

113. There is no case brought to our notice to show that having regard to the subject-matter to which the concept of " a firm has been newly constituted"refers to, it falls under the category of " succession of one firm by another firm"under Section 188 of 1961 Act or under Section 26 (2) of 1922 Act. Besides that, what falls within Section 187 falls outside Section 188. There is that declaration of statutory exclusion of cases falling under Section 187 from out of the purview of Section 188.

114. Firms whether reconstituted or newly constituted or dissolved with their business not being discontinued, fall under Section 26 (1) of the repealed Act of 1922. We may remind ourselves once again of the observations of Justice Shah (as he then was) in Shivram Podder's case (AIR 1964 Supreme Court 1095) that " where the firm is dissolved but the business is not discontinued, there being change in the constitution of the firm, assessment has to be made under Section 26 (1)."

115. Therefore, the Supreme Court decisions are applicable to the interpretation of Section 187 and govern the cases arising thereunder.

116. The framers of the consolidating Act, 1961 grouped together under subheading (c) in Chapter XVI, Section 187 dealing with " change in the constitution of a firm" , Section 188 with " Succession of one firm by another firm"and Section 189 which deals with " firms dissolved or business discontinued "together. Therefore, cases where firm is dissolved and business discontinued fall under Section 189. But cases where there is a dissolution but the business was not discontinued, fall under Section 187 provided the other " conditions mentioned therein are fulfilled.

117. For one thing, the expression " dissolution"does not appear in Section 187. There is no justification grammatically, linguistically or otherwise to read into it by implication conceptions pertaining to dissolution, as the latter cases are already provided for under Section 189 as not to have any need to have recourse to Section 187. The nature of the Act consolidating and amending and the presumptions of interpretation negative such an interpretation.

118. The consequences that may flow or follow from out of dissolution under Partnership Act such as winding up of the affairs of the firm after dissolution are not envisaged in a case of

dissolution followed by reconstitution under Section 187 though such a case may fall under Section 189.

119. Nor the tests of succession as laid down by Justice Subba Rao (as he then was) in *Commr. of Income-tax v. K. H. Chambers*⁴⁷, as referred to by My Lord the Chief Justice are satisfied in the cases under reference.

120. For the reasons given above, I agree with the conclusion reached by Kondaiah, J. speaking for the Full Bench in *Addl. Income-tax Commr., A. P. v. Visakha Flour Mills*⁴⁸, that where a firm is dissolved on account of the death of a partner and the business is

⁴⁷((1965) 55 ITR 674)

⁴⁸1977 Tax LR 41 (Andh Pra) (FB)

continued by the remaining partners and another in the place of the deceased partner, there is only a change in the constitution of the firm within the meaning of Section 187 (2) of the Act. I agree with the conclusion of My Lord the Chief Justice and Kondaiah, J. in the above case that when a case falls under Section 187, there must be a single assessment. I agree with the conclusion of my learned brother, Raghuvir, J.

121. (minority view) :- Raghuvir, J. - In the Full Bench judgment of Visakha Flour Mills case (1977 Tax LR 41) (Andh Pra) (FB) this court considering an identical reference reviewed all the cases which have been cited now before us. Kondaiah, J. speaking for the Full Court dealt with all aspects of the question and the divergent views expressed in this regard by other High Courts in the country. The fact that two of us for the second time affirm and reiterate the views expressed earlier shows the "question is open" (*Chunilal V. Mehta and Sons, Ltd. v. Century Spg. and Mfg. Co. Ltd*⁴⁹), and the subject is capable of discussion as possible "alternative views". There is no case in this court in which the view taken in Visakha Flour Mills case 1977 Tax LR 41 (Andh Pra) (FB) is doubted.

122. The facts necessitating the references in R. C. No. 22 of 1975 and in R. C. No. 67 of 1975 have been fully stated in the opinion of the Chief Justice

123. Following the reasoning stated in the Visakha Flour Mills case (1977 Tax LR 41 (Andh Pra) (FB)) (supra) in R. C No. 22 of 1975 I answer the question that single assessment could be made. The answer is against the assessee and in favour of the Revenue. In R. C. No. 67 of 1975 the firm constituted in the deed on 26-10-1970 has not "succeeded" the earlier firm constituted by the deed on 1-10-1970 within the meaning of Section 188 of the Act but was a "change" under Section 187 (2) of the Act. The answer is in favor of the Revenue and against the assessee.

Answered against the Revenue.

⁴⁹ AIR 1962 SC 1314 at p. 1318 (para 6)