**MYSORE HIGH COURT**

I.P. Munavalli

Vs

Commissioner of Income Tax

I.T.R.C. 26 of 1967 decided on 10.3.1969

(Somnath Iyer and Ahmed Ali Khan, JJ.)

11.03.1969

**JUDGMENT**

**Somnath Iyer, J.**

1. This reference at the instance of the assessees is made by the Incometax Appellate Tribunal under Section 256(1) of the Income-tax Act, 1961.

2. The father I.P. Munavalli and the son C.I. Munavalli are the assessees and the assessment year is 1963-64. The Hindu undivided family of which I.P. Munavalli was the karta, was carrying on a business in foodgrains and pulses and on November 9,1961, according to the statement of the case submitted to us, the father and the son entered into an agreement of partnership under which the sone became a working partner and the other partner was the Joint family of which the father was the karta. The profits and losses had to be shared equally by the two partners.

3. When the assessees made an application for registration of the firm under Section 185 of the Act, the Income-tax Officer refused registration on the ground that there was no partition between the members of the family, and there was no genuine partnership which came into being between the members of the family.

4. The appellate assistant commissioner was of a different view. In his opinion, a partnership between the Hindu Joint-family represented by the karta and a member of the coparcenary who became a working partner was a good partnership and that there was no legal impediment to such a partnership coming into being. He was of the further opinion that the partnership was a genuine partnership. So, he granted the registration sought by the assessess.

5. But in the further appeal preferred by the department, the registration granted by the appellate assistant commissioner was vacated and the refusal of such registration by the income-tax officer was restored.

6. The question of law referred to this Court reads:

Whether, on the facts and in the circumstances of the case the agreement dated 9.11.1961 between Shri I.P. Munavalli and C.I. Munavalli brought into existence a valid partnership entitled to registration under section 185 of the Income-tax Act, 1961."

7. The Tribunal very rightly placed before itself the two questions which had to be decided in the appeal preferred by the department from the order made by the appellate assistant commissioner. The first was whether the assessees had established the genuineness of the partnership, and the second was whether the partnership such as the one which had been entered into between the Hindu, joint-family through its karta the father and the sone who became a working partner was in law permissible. The finding of the Tribunal on the legal question was adverse to the assessess. It had no doubt in its mind that no partnership of this kind can come into being between the Hindu-joint-family through its karta on the one hand and the coparceners on other until after there was a division of the assests and the properties of the coparcenary. The Tribunal thought that until there was such a division, no partnership between the family and its coparceners could come into being. Having reached that conclusion, the Tribunal allowed the appeal without however recording any finding on the question, which it was its duty to decide, namely, the question whether the finding of the appellate assistant commissioner that the partnership was a genuine partnership was or was not supportable.

8. Mr. Desai for the assessee asked our attention to the decision of the Privy Council in *Lachman Das v. Commissioner of Income-tax*[1], in which the Privy Council made the enunciation that an individual coparcener while remaining joint, can possess, enjoy and utilise, in any way he likes, property which was his individual property, not acquired with the aid of or with any detriment to the joint family property, and that it therefore followed that to be able to utilise that property at his will, he must be accorded the freedom to enter into contractual relations with others including his family so long as it is represented in such transaction by a definite personality like its manager.

9. That was a case in which the coparcener who entered into contract with the family represented by its manager made a contribution of his own separate property towards the capital of the firm, and the view taken by the Privy Council was that the partnership entered into in that way was a perfectly legal partnership and that it was quite unnecessary for the members of the coparcenary to make a partition of their family properties in the first instance before entering into such partnership.

10. The view taken by the Privy Council in that way was accepted as correct by the Supreme Court in *Firm Bhagat Ram Mohanlal v. Commr. of Excess profits Tax*[2], The discussion in that case surrounded the question whether if a Hindu joint-family entered into a partnership with strangers through its Karta, the junior members of the family also became partners in their personal capacity.

11. The Supreme Court made the pronouncement that they did not so become partners

[1]16 ITR 35

[2]29 ITR 521

in their personal capacity and in the context of that discussion, the Supreme Court alluded to the enunciation made by the Privy Council in Lachman Das's case (2) and said this :

> In *Lachman Das v. Commissioner of Income Tax*[3] it was held by the Judicial Committee that the Karta of a joint Hindu family could enter into partnership with an individual member of the coparcenary quod his separate property. It was also held by the Privy Council in *Sundar Singh Majithia v. Commissioner of Income Tax*[4] that there was nothing in the Income-tax Act to prohibit the members of a joint Hindu family from dividing some properties, while electing to retain their joint status, and carrying on business as partners in respect of those properties treating them as its capital. But in the present case, the basis of the partnership agreement of 1940 is that the family was joint and that Mohanlal was its karta and that he entered into the partnership as karta on behalf of the joint family. It is difficult to reconcile this position with that of Chhotelal and Bansilal being also partners in the firm in their individual capacity, which can only be in respect of their separate or divided property. If members of a coparcenary are to be regarded as having become partners in a firm with strangers, they would also become under the partnership law partners inter se, and it would cut at the very root of the notion of a joint undivided family to hold that with reference to coparcenary properties the members can at the same time be both coparceners and partners.:(at page 526)

12. In the context of this discussion made by the Supreme Court, we should set out what was said by the Privy Council on the question whether a coparcener can enter into a partnership with the Karta of the Hindu joint-family of which he is a member, which reads :

> After careful consideration, their Lordships cannot accept this view and on general principles they cannot find any sound reason to distinguish the case of a stranger from that of a coparcener who puts into the partnership what is admittedly his separate property held in his individual capacity and unconnected with the family funds. Whatever the view of a Hindu joint family and its property might have been at early stages of its development, their Lordships thinks that it is now firmly established that an individual coparcener, while remaining joint, can possess, enjoy and utilise, in any way he likes, property which was his individual property, not acquired with the aid of or with any detriment to the joint family property. It follows from this that to be able to utilise this property at his will, he must be accorded the freedom to enter into contractual relations with others, including his family, so long as it is represented in such transactions by a definite personality like its manager. In such a case he retains his share and interests in the property of the family, while he simultaneously enjoys the benefit of his separate property and the fruits of its investment. To be able to do this, it is not necessary for him to separate himself from his family."(at page 40)

[3](16 ITR. 35)

[4](10 ITR. 457)

13. That this view expressed by the Privy Council was fully accepted by the Supreme Court in Bhagat Ram's case (2) is clear from that part of the judgment of the Supreme Court which we have extracted which reads :

> It is difficult to reconcile this position with that of Chhotelal and Bansilal being also

partners in the firm in their individual capacity, which can only be in respect of their separate or divided property.

14. The question which arose in Bhagat Ram's case (2) was whether Chhotelal and Bansilal who were the coparceners of the family also became partners individually with respect to the partnership which came into being between the family represented by is karta and the strangers and the Supreme Court negatived the contention that they had so become partners and what the Supreme Court said was that they could become partners "only in respect of their separate or divided property". The enunciation made by the Supreme Court in that way is not different from the enunciation made by the Privy Council in Lachman Das's case (1).

15. So, it clear that the Supreme Court did not dissent from the opinion expressed by the Privy Council that "in respect of their separate or divided property" the coparceners of a Hindu Joint-family even though they had not become divided from one another and there had been no partition of the family properties, could become partners of a firm of which the joint Hindu family represented by its karta is itself a partner.

16. If a partner by putting into the partnership by way of his capital his separate property or the property which he obtained at a partition on division and thus can become a partner with the family represented by its karta it is difficult to understand how such a partnership cannot come into being and why a coparcener who continues to remain a member of the coparcenary cannot become a working partner of a firm of which he and the family represented by its karta are the partners. In Lachman Das's case (1) the coparcener placed at the disposal of the firm as his capital his separate property, and in the case of a working partner he contributes his skill or labour or both as the case may be. If the partnership is permissible in one case, it would be difficult to assign any reason for reaching the conclusion that it is not permissible in the other.

17. It was pressed on us by Mr. Rajasekhara Murthy, appearing for the Department, that the High Court of Gujarat in *Pitamberdas Bhikhabai & Co. v. Commissioner of Income Tax*[5], expressed a contrary view. The question which arose in that case was whether in respect of a business belonging to Hindu undivided family, the karta of the family could enter into a valid partnership with some of the coparceners of the family in their individual capacity, and the High Court of Gujarat was of the opinion that no such partnership was in law possible. The view so expressed does not really conflict with the view taken by the Privy Council in Lachman Das's case (1) or by the Supreme Court in Bhagat Ram's case (2). In the case that was decided by the Gujarat High Court, the coparceners entered into a partnership and none of the coparceners became a partner in respect of his separate property; nor did he become a working partner as in the present case.

[5]53 ITR 341

18. The view taken by the High Court of Madras in *Doraiswami Chettiar and Sons v. Commissioner of Income Tax*[6], on which Mr. Rajashekara Murthy next depended, has no resemblance to the case before us. It was again a case in which an existing joint-family business it was alleged had been converted into a partnership between the members of the family, and the High Court of Madras, if we may say so with respect, rightly took the view that such a partnership was no a valid partnership.

19. The decisions of the High Court of Allahabad in *S.C. Mullick and sons In re*[7]*:* and the High

Court of madras in *Govindarajulu Chettiar v. Commissioner of Income-Tax*[8], also concern the question whether the joint family court convert itself into a partnership without more, and the view expressed was that it could not.

20. So, we are of the opinion that in the case before us in which according to the findings of the Income-Tax Appellate Tribunal, C.I. Munavalli became a working partner of the firm of which he and the joint-family represented by its karta I.P. Munavalli were the partners, it was not possible for the Tribunal to take the view that that partnership could not be entered into between the joint-family and C.I. Munavalli unless the creation of that partnership was preceded by a partition of the Hindu joint-family properties. The view taken by the Privy Council that in a case similar to the one before us, it was scarcely necessary for a partition to preceded the creation of partnership, the correctness of which was accepted by the Supreme Court makes it clear that the Tribunal was not right in taking that view.

21. But that we are able to say so does not mean that we can answer the question referred to us by the Tribunal. The question on which we are asked to express our opinion is whether on the facts and in the circumstances of the case, I.P. Munavalli and C.I. Munavalli, the father and son, brought into existence a valid partnership entitled to be registered under S. 185 of the Income-tax Act, 1961. The partnership entered into between them would be one in respect of which registration could be sought under S. 185 of the Income-tax Act only if there was genuine partnership between the father and the son and that partnership was in law a good partnership. We have not acceded to the view taken by the Tribunal that the partnership, entered into between the parties was not a legal partnership and we a re of the clear opinion that it was. But, the registration with respect to that partnership could be granted only if the Tribunal had recorded a finding that the partnership was a genuine partnership. But, unfortunately the Tribunal which did pose the question, recorded no finding with respect to it In para 9 of its order, it said this:

> But where an existing joint family business is alleged to have been converted into a partnership business between the members of the family, the genuineness of the constitution of the partnership has to be established.

22. On this question to which it did address itself at one stage it said noting about it and concluded its order which rested only on its finding on a question of law.

23. So, in that situation it is not disputed that all that we can say in this reference is

[6]49 ITR 565 [8]12 ITR 97
[7]6 ITR 99

that the appeal has not been properly disposed of by the Tribunal and that that appeal has now to be disposed of afresh by it as explained by the Supreme Court in *Esturi Aswathiah v. Commissioner of Income Tax*[9], after recording a finding on the question whether the partnership is a genuine partnership. The Tribunal should now dispose of the appeal in that way and in accordance with the view expressed by us on the question of law as to the legality of the partnership entered into between the partners.

24. We do not think that we should, as suggested by Mr. Rajashekhara Murthy, appearing for the Department, leave open the question as to the legality of the partnership, since on that question we have reached a clear conclusion that there is no legal prohibition to the creation of a

partnership like the one upon which the assessees depended. No Costs.
[9]66 ITR 478