

BOMBAY HIGH COURT

Jesingbhai Ujamshi Assessee

Vs.

Commissioner of Income-Tax

Income-tax Reference No. 12 of 1949

(Chagla, C.J. and Tendolkar, J.)

19.09.1949

JUDGMENT

1. At the instance of the assessee, the Tribunal referred the following questions to the High Court;

"Whether in the circumstances of the case the three partners of the assessee firm having certain shares in the business at Bhavnagar can in law constitute another firm at Ahmadabad by having different shares in the Ahmadabad business ?

or

Whether in the circumstances of the case the question whether there were two firms or only one firm is a question of fact?"

Chagla, C.J.

1A. The assessee is a partnership firm consisting of Jesingbhai and his son Manilal and his grandson Shantilal. The firm came into existence in 1924, and in 1924 the partners were Jesingbhai, Manilal and Mangaldas, the father of Shantilal. Mangaldas died in 1941 and Shantilal was introduced into the partnership. This firm does business at Ahmedabad and its business consists of sarafi, insurance, brokerage, cotton, etc., and there is a partnership deed defining the shares of the partners which is dated 26th January 1934. According to this partnership deed, the shares of the three partners are 5 annas each and 1 anna is reserved for charity, but as that share is completely under the control of Jesingbbai it has been found by the Department, and that finding is accepted by the Tribunal, that that share really belongs to Jesingbhai. Therefore, the shares are 6 annas to Jesingbbai and 6 annas each to the other two partners. These three partners also carried on another business at Bhavnagar and this business was commenced in 1918 and the shares of the three partners are equal.

2. The question that arose for the determination of the Tribunal was whether these two partnerships constitute two different firms or whether the three partners carry on the same firm and the same business at Ahmadabad and Bhavnagar. The Tribunal came to the conclusion that in law when three common partners carry on two businesses, they must be deemed to be the same firm and not two different firms. The Tribunal took the view that under the ordinary law a firm is not a legal entity; it is merely a compendious way of describing the partners who carry on the particular business. The Tribunal is right that that is the correct position, under the ordinary law. But under the Indian Income-tax Act, the position is different because a firm is recognized by the Indian Income-tax Act as an assessee as much as an individual or a joint Hindu family. It is a taxable unit, and even when a firm is registered under Section 25(3), it is the firm as an assessee that is taxed, and then the section provides how the individual partners of a registered firm are to be assessed and taxed. In coming to the conclusion that the Tribunal did, it relied on a decision of this Court is *Vissonji Sons and Co. v. Commissioner of Income-tax*¹, Sir John Beaumont C.J., who delivered the judgment in that case, expressed the opinion that in law a firm had no existence independently of its partners, and if there are two firms consisting of exactly the same partners, the real position in law was that there was only one firm. It may carry on separate businesses and may carry on these businesses in different names, but in fact there was only one firm in law. With great respect to the learned Chief Justice, the actual question that he had to consider in that reference was whether a certain item which the assessee claimed as a bad debt was a bad debt or not, and the learned Chief Justice disposed of that reference by coming to the conclusion that this question was really a question of fact and the only question of law that arose was whether there was sufficient evidence to justify the finding of fact by the Tribunal. Therefore, this particular observation on which the Tribunal has relied was not called for, for the determination of the reference and therefore it must be looked upon as a pure obiter. As against this obiter, there are two decisions to which Sir Jamshedji has drawn our attention which are directly in point and which have taken the view contrary to the decision of the learned Chief Justice. One is a decision of the Calcutta High Court in *Martin and Co. v. Commissioner of Income-tax, Bengal*², In that case the partners of M.A. Co., purchased the business of B. and Co. and the partners of the two firms were common partners, and M. and Co. decided to continue the business of B. and Co. separately under the old name, and the question that the High Court of Calcutta had to consider was whether B. and Co. must be assessed separately as a firm. In delivering the judgment, Sir George Rankin C.J., stated that the proposition that the same persons with the same shares cannot for income-tax purposes be partners of two entirely separate firms is a highly abstract proposition (p. 482) :

"It may or may not be correct, but I am not prepared as at present advised to proceed upon so very general a principle without a careful inquiry into the concrete case and into the matters above mentioned. It may turn out that the case depends on the question of fact whether the two firms were entirely separate, a question of fact including the question of intention."

Therefore, Sir George Rankin treated this particular question as a question of fact and not as a question of law. He conceded that in law the same partners may constitute two different firms in the eye of income-tax law, but whether the two businesses were carried on by two separate firms or were the businesses of the same firm was a question of fact to be determined by the Tribunal. A similar view was taken by the Lahore High Court in the case of *Krishna Ginning and Pressing Factory v. Commissioner of Income-tax, Punjab*³, In that case, under the same partnership deed, two separate businesses were to be carried

¹1946-14 ILR 272 (Bom)

³⁵ ITC 334 (Lah)

²⁴ ITC 478

on, and the question that arose for determination was whether two separate firms came into existence under the same partnership deed or only one firm, and, on the construction of the partnership deed, the High Court at Lahore came to the conclusion that there was only one firm and not two firms. The very fact that the Lahore High Court considered this question clearly shows that according to that High Court in law there could be two separate firms although the partners of the two firms may be common.

3. Therefore, we disagree with the Tribunal in the view it has taken of the law and we are of the opinion that there is nothing in law to preclude common partners constituting two separate firms for the purpose of the Income-tax Act. Whether there are two firms or only one firm is a question of fact which can only be determined by the Tribunal itself. As the Tribunal has not determined the necessary facts in this case, having taken a different view of the law, we would, after answering the question of law, ask the Tribunal to determine the necessary facts on the evidence before it and come to the conclusion whether the two businesses carried on by the partners in this case constituted two different firms or one firm for the purpose of the Indian Income-tax Act.

4. We will reformulate the first question submitted to us in the following terms :

"Whether in law common partners can constitute two separate firms in respect of different businesses carried on by these partners for the purpose of the Indian Income-tax Act."

Having reformulated that question we answer the question in the affirmative. With regard to the second question, we agree with the Tribunal that it is a question of fact, and we answer it in the affirmative. We, therefore, direct that the case of the assessee should be dealt with in accordance with the opinion expressed in our judgment. Commissioner to pay costs.

Answer accordingly.