

BOMBAY HIGH COURTY

Dwarkadas Khetan

Vs.

Commissioner of Income-Tax

I.T. Ref. No. 34 of 1955

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

23.02.1956

JUDGMENT

Chagla, C.J.

1. This reference raises a question as to the right of the assessee firm to be registered under Section 26A, Income Tax Act.
2. The facts are that prior to 01-01-1945 four partners, one of whom was Dwarkadas Khetan, carried on a partnership business. On 01-01-1945 the Partnership was dissolved and Dwarkadas carried on the business as a proprietary concern. Dwarkadas acquired the rights of the selling agency of the Seksaria Cotton Mills on 12-02-1946 and although the instrument which gave him this right was dated 12-02-1946 the right was to commence from 01-01-1946. On 27-03-1946 an instrument of partnership was executed by four persons who agreed to carry on the business of the selling agency in partnership. One was Dwarkadas Khetan. There were two other major partners and the third was a minor Kantilal Keshardeo. The partnership agreement was executed both by the minor himself and also by his natural guardian, his father, on behalf of the minor, and the assessee firm which was constituted under this partnership deed applied for registration under Section 26A and the application was rejected.
3. The Tribunal has agreed with the income tax authorities that registration in law cannot be granted to this partnership and the Tribunal has come to this conclusion on two grounds. The first ground is that under this partnership deed a minor is made a partner and therefore the partnership deed is void. The Advocate General has drawn our attention to the various provisions of the partnership deed which seems to make the minor liable for losses, if any losses were incurred by this partnership. But it seems to us that the position in law is perfectly clear. A minor cannot become a partner in a business; he could only be admitted to the benefits of the partnership. In other words, although he can be given a share in the profits of a partnership business, he cannot

be made liable for any losses incurred by the partnership. Assuming this partnership deed purports to make the minor a partner, illegal effect is perfectly clear. In law the minor does not become a partner; he does not become liable for losses; he would only be entitled to the profits according to his share. It is difficult to understand how the Tribunal could possibly have taken the view that the partnership deed itself was void.

If the partnership deed was void it could create no rights and no right would flow from it. In other words, even as between the major partners according to the Tribunal no rights were created and no liabilities imposed. It is impossible to accept that contention. The proper view and the only legal view was that on a proper construction of this partnership deed the three major signatories became the partners and the minor signatory was admitted to the benefits of the partnership. Under the Income-tax Act itself the expression "partner" includes a minor who is admitted to the benefits of the Partnership and this is for obvious reasons because when a partnership is registered to the benefits of which a minor has been admitted, his share is considered as a share for the purposes of allocation of profit and therefore no difficulty whatever could be experienced in registering this instrument of partnership under Section 26A.

4. The Advocate General has relied on a decision reported in - '*Banka Mal Lalja Ram and Co. v. Commissioner of Income-tax, Delhi*!', There the Punjab High Court held, as the headnote indicates,

"that a minor under Section 30, Partnership Act cannot be a full fledged partner in a partnership firm. A minor cannot therefore enter into a partnership through his guardian even when the other partners are consenting. Such a contract would be invalid and the partnership cannot be registered under Section 26A, Income-tax Act, 1922". But significantly the headnote adds in brackets :

"The High Court did not consider the question whether the partnership should be taken to be a valid partnership consisting of the adult Partners excluding the minor on the ground that no such question was referred to the High Court." The question which the Punjab High Court did not consider is the very question that we have to consider, and even when we turn to the question that was referred to the Punjab High Court the question was : "Whether a minor son can, according to law, enter into a partnership through his mother, the natural guardian, even with the consent of the other partner ?"

With respect to the Punjab High Court, the question answers itself, because he cannot, the law does not permit him to do so. In our opinion, therefore, that decision is not a direct authority for the proposition that the Income Tax authorities cannot consider a partnership, in which a minor is described as a partner, as a valid partnership consisting of adult partners excluding the minor who must be looked upon as having been only admitted to the benefits of the partnership.

5. The second contention, in our opinion, also must be answered against the view taken by the Tribunal. This partnership deed, although it is dated 27-03-1946, recites in clause (3) :

"The partnership shall be deemed to have commenced from 01-01-1946 and shall continue until the partners hereto decide unanimously in writing to terminate the same."

The view taken by the Tribunal is that inasmuch as the partnership deed is dated 27-03-1946, the partnership which commenced on 01-01-1946 prior to the execution of the deed

¹ AIR 1953 Pun 270

cannot be registered under Section 26A. Before we look at the authorities let us look at the section itself and see what are the requirements of that section. Any firm can make an application under Section 26A for registration and the two conditions that it has got to comply with are that it must be constituted under an instrument of partnership and the second condition is that the instrument of partnership must specify the individual shares of the partners. If these two conditions are satisfied it would be entitled to registration.

The section does not say that the firm must be constituted by the instrument of partnership, it does not require that the firm must come into existence by reason of the instrument of partnership, or that the firm should be the creature of the instrument of partnership, or that the firm must not exist prior to the instrument of partnership being executed. The requirement of law is that there must be a written document which has set up the firm which is applying for registration and which document specifies the individual shares of the partners. If a firm comes into existence at a relevant point of time in the accounting year, carries on business, and then the partners decide to have a written partnership and recite the fact that the partnership came into existence on a particular date, that partnership deed would be the instrument of partnership under which the firm was constituted. But the fact would still remain that the partnership was doing business prior to the execution of the instrument of partnership. What must not be overlooked is that what is sought to be registered is not the instrument of partnership but the firm, and the firm is seeking registration for the purpose of certain indulgence which is shown to a registered firm and if the firm can satisfy the authorities that it was carrying on business during the accounting period, then the fact that the partnership deed was executed subsequently can have no bearing on the question of registration. If this be the provision of law, then it is not open to add any further conditions to Section 26A which the Legislature itself has not imposed. In our opinion, it would be totally opposed to any plain construction of Section 26A to suggest that only that firm can be registered which has come into existence by reason of the instrument of partnership.

6. The Advocate General has relied on two decisions, one of the Calcutta High Court and, the other of the Punjab High Court. Both these decisions have taken a contrary view. Our uniform practice has been to fall into line with decisions given by other High Courts because Income-tax Act is an all-India Act, but with respect, when we find that a view is taken which is contrary to the provisions of a section of the Income-tax Act, we cannot, again with respect, fall into line with such a view. More than authorities it is our duty to give effect to the provisions of the Act itself and when the provisions of the Act are clear no authority can persuade us to take a contrary view. The first decision is of the Calcutta High Court reported in - *R. C. Mitter and Sons v.*

*Commissioner of Income Tax*², That is a judgment of Chakravarti, C.J. and Lahiri, J. It will be noticed in that judgment that the learned Chief Justice realised that it was not possible to take the view which he took by reason of the fact that the Legislature had used the expression "under" and not "by", and the learned Chief Justice in terms says that the expression "under" was an inappropriate expression. With respect, if the Legislature chose to use the expression "under" and not "by", the duty of the Court is to give effect to the use by the Legislature of that expression and to construe the expression used by the Legislature. It would not be a correct canon of construction to substitute for the expression "under an instrument" the expression "by an instrument" and then construe the section as if the latter expression had been used by the Legislature.

²(1955) 28 ITR 698 (Cal)

The learned Chief Justice also takes the view that when a partnership deed is executed the partnership can only come into existence in future and that the partnership deed cannot record the fact of a pre-existing partnership. Again with, very great respect, it is the knowledge of all Judges who have had anything to do with, commercial litigation in the city of Bombay that a large number of partnership deeds record the fact of an already existing partnership. In commercial towns like Bombay people start doing business in partnership and they do not attach much importance to the question of recording the terms of the partnership in writing but at a later date they might be persuaded to put their agreement into black and white, and therefore we have innumerable cases where the partnership deed is subsequent to the actual commencement of the partnership firm, and in our opinion there is nothing wrong in law in a partnership deed recording the existence of a partnership which has already come into existence. What is overlooked is that the law does not require that a partnership deed should be in writing. The agreement of partnership may be oral and the oral partnership agreement is as effective as a written partnership agreement. It is only for the purpose of Section 26A and for the purpose of registration that an instrument of partnership is necessary, and partners who have already started doing business by an oral agreement would be perfectly justified in saying to themselves :

"We want our partnership to be registered. The income Tax law does not permit us to do so unless we have an instrument in writing, and therefore we will now proceed to have an instrument in writing." That is exactly what seems to have been done in this case and in our opinion it was done with perfect propriety. The same view of the law was taken by the Punjab High Court in an earlier case reported in - '*Padam Parshad Rattan Chand of Delhi v. Commissioner of Income Tax, Delhi*³,

For the reasons indicated by us with very great respect, we are unable to accept the view of the law taken by those learned Judges.

7. The result therefore is that we answer question (1) in the affirmative : the instrument of partnership created a valid partnership between the three adult partners, Kantilal having been admitted to the benefits of the partnership. The answer to question (2) is that the firm must be

registered with effect from the date when it came into existence, not by reason of the date of the instrument but in point of fact. If it came into existence on 01-01-1946 then it should be registered from that date. If it came into existence at a later date, then from such date.

8. The Commissioner to pay the costs.

Answers accordingly. .

³ AIR 1954 Punj 188