

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Baimaniben

(S Desai, C.J. Shah, J.)

30.06.1959

JUDGMENT

Shah, J.

1. A business in cloth was conducted in the name of Hiralal Mathuradas in partnership at Mulji Jetha Market, Bombay. Of that partnership Hiralal and his nephew Jayantilal were partners with equal shares in profits and loss. Hiralal died on August 14, 1953, intestate and leaving him surviving his widow Bai Mani, but no children. On August 15, 1953, a partnership deed was executed under which certain terms of partnership between Jayantilal and Bai Maniben, widow of Hiralal, were recorded and under which the business conducted in the name of Hiralal Mathuradas was to be continued, and under that agreement of partnership the business was conducted. In the assessment year 1953-54, when Hiralal was alive, in conducting the business a loss of Rs. 1,07,420 odd was incurred. In the year 1954-55 also in conducting the business loss was incurred. For the first time, assessment was made on the widow Bai Mani in the assessment year 1954-55. As the partnership had suffered a loss in that year, no tax was assessed as payable by her. In the assessment year 1955-56, the partnership earned some profit and her share of the loss of the year 1954-55 and also a half share of the loss which was suffered prior to August 14, 1953, was sought to be set off by the assessee Bai Mani under section 24(2) of the Income-tax Act. In respect of the share of loss suffered during the lifetime of Hiralal, Bai Mani claimed in the assessment proceedings that she had by inheritance succeeded him in the constitution of the firm and, therefore, his share in the loss was liable to be set off against the income, profits or gains of the business for the assessment year 1955-56. The Income-tax Officer negatived that contention and the Appellate Assistant Commissioner confirmed that order. The Tribunal, however, held that the share of Hiralal was given to Bai Mani and that it had devolved on her as she was the legal heir of Hiralal and that she had succeeded by inheritance to his share of the partnership. On that view they gave the benefit to the assessee of the provisions of section 24(2).

2. At the instance of the Commissioner, the Tribunal has now referred the following question :

"Whether on the facts and circumstances of the case the assessee is entitled to claim a set-off of the assessable profits against the losses suffered by the assessee's husband in the assessment years 1953-54 and 1954-55 under section 24(2) of the Income-tax Act?"

3. Section 24(2) provides :

"Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on March 31, 1940, in any business, profession or vocation, and the loss cannot be wholly set off under sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no other head of income shall be carried forward to the following year."

4. That provision is followed by a proviso which under clause (e) enacts that where a change has occurred in the constitution of a firm, nothing in this section shall be deemed to entitle the firm to have set off so much of the loss proportionate to the share of a retired or deceased partner computed in accordance with the provisions of clause (b) of sub-section (1) of section 16 as exceeds his share of profits, if any, of the previous year in the firm, or to entitle any partner to the benefit of any portion of the said loss which is not apportionable to him under the said clause (b), and where any person carrying on any business, profession or vocation has been succeeded in such capacity by another person, otherwise than by inheritance nothing in this section shall be deemed to entitle any person other than the person incurring the loss to have it set off against his income, profits or gains. Evidently, there has been change in the constitution of the firm Hiralal Mathuradas and the losses in the year before the date on which the constitution of the firm was altered cannot be set off against the profits of the subsequent years unless the person carrying on the business, i.e. Hiralal, has been succeeded in such capacity by another person by inheritance. Therefore, the sole question to be decided in this case is whether Bai Mani has by inheritance succeeded to her husband Hiralal in the constitution of the firm as partner. On the materials placed, we have no doubt that she has so succeeded. The business was originally conducted under the agreement of partnership dated July 18, 1952, between Hiralal and Jayantilal. It was a partnership which was terminable on either party giving six months' notice in writing to the other of his intention to terminate the same. Each of the partners under the term of the agreement was entitled to the capital and property for the time being of the partnership and to the goodwill of the business in equal shares. By clause 13 of the agreement, in the event of any partner dying during the continuance of the partnership, the surviving partner was given an option to purchase the share of the deceased partner in the capital and assets of the business at a valuation to be made by agreement and in default of agreement by arbitration. By clause 14 it was provided that if the surviving partner did not exercise the option of purchasing the share and interest of the deceased partner or if the partnership was determined for any cause, whatever, the partnership was to be wound up and the assets distributed as provided by the Indian Partnership Act. On the death of

Hiralal option was not exercised by the surviving partner Jayantilal to purchase the share of his deceased partner Hiralal nor was any attempt made to wind up the partnership and the business of the partnership was continued and a fresh partnership agreement was executed on August 15, 1953, whereunder the business conducted in the name of Hiralal Mathuradas was conducted in partnership between Jayantilal and the assessee Bai Mani. On these facts, the Tribunal has come to the conclusion, especially having regard to the quantum of interest which Hiralal had, and the extent of capital which he had brought into the partnership and the relation which subsisted between Hiralal and Jayantilal and the conduct of the two partners Jayantilal and Bai Mani that the latter had succeeded to her husband Hiralal in his capacity as a partner by inheritance. In our view, the Tribunal's conclusion is one on a question of fact and we do not think we will be justified having regard to the evidence in interfering with the conclusion of the Tribunal.

5. On the view taken by us, the answer to the question submitted to us will be in the affirmative.
6. Commissioner to pay the costs of the assessee.
7. Question answered in the affirmative.

