BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Shamsunder Juthalal

(R Kantawala, C.J V Tulzapurkar, J.)

01.08.1977

JUDGMENT

Kantawala, C.J.

1. The controversy in this reference lies in a very narrow compass. At the instance of the revenue and subject to the modification made by the High Court, the following two questions are required to be determined by us :

> "1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in coming to the conclusion that the assessee was entitled to set off to the extent of one-fourth share of losses of his father in the firms in question ?
>
> 2. Whether, on the facts and in the circumstances of the case, the assessee is entitled to claim a set-off of the losses suffered by his father for the assessment year 1958-59 ?"

2. The questions referred to relate to the assessment year 1958-59 for which the relevant previous years is the Maru year 2013-2014 (covering the period November 3, 1956, to October 23, 1957). Shamsunder, the assessee is the son of one Juthalal Motilal. Juthalal was a partner in three firms, namely, (1) M/s. Chimanram Motilal (Cotton & Wheat), (2) Chimanram Motilal (Gold & Silver), and (3) M/s. Kamlapat Motilal. Juthala died on October 22, 1955, leaving him surviving his four heirs, including the assessee. The assessee inherited one-fourth of his father's share of interest in the three firms referred to above. In the assessment years up to 1956-57 all the three firms were assessed as registered firms. There were certain losses and those losses had been apportioned amongst the partners including Juthalal. In the assessment for the year 1958-59, the assessee claimed that to the the extent to which he had succeeded to his father's interest in the said firms the share of loss apportionable to the father was liable to be allowed in his hands under section 24(2)(iii)(e) of the Indian Income-tax Act, 1922 (hereinafter referred to as "the Act").

3. The Income-tax Officer rejected the contention for a set-off of the losses incurred in the earlier

years so far as the assessee was concerned. According to him such set-off was not permissible under section 24(2)(iii) (e) of the Act. He took the view that after thee death of Juthalal the assessee became a partner in the said three firms. He was not obliged to become a partner in the said three firms and the said three firms were also not under an obligation to take him as a partner. According to the Income-tax Officer, the assessee had not become a partner in the three firms by inheritance, but he had become a partner by his choice. To such a case, according to him, the right to claim a set-off under the provisions of section 24(2)(iii)(e) was not available.

4. In an appeal by the assessee, the Appellate Assistant Commissioner followed his earlier order negative the claim for similar set-off for the year 1957-58 and confirmed the order of the Income-tax Officer.

5. In a second appeal by the assessee before the Tribunal, it was urged on behalf of the assessee before the Tribunal that similar claims for set-off by two of the brothers of the assessee were upheld by the Appellate Assistant Commissioner. It was also submitted that in any even the claim for set-off made by the assessee was supported by the decision of this court in the case of Commissioner of Income-tax v. Bai Maniben [1960] 38 ITR 80 (Bom). An attempt was made on behalf of the revenue before the Tribunal to distinguish the decision of the Bombay High Court in Bai Maniben's case [1960] 38 ITR 80. It was sought to be urged that that case was decided on the facts of that case and no general principle was laid down therein which should be applied in the present case. The Tribunal accepted the contention on behalf of the assessee. According to the Tribunal, the case of the assessee was fairly and squarely covered by the decision in Bai Maniben's case [1960] 38 ITR 80 (Bom). The case of the assessee was one of inheritance and the case was fully covered by the proviso (e) and the disallowance of the loss by way of set-off was not justified. The Tribunal took notice of the fact that so far as the orders of the Appellate Assistant Commissioner were concerned in relation to the other two brothers no attempt was made by the revenue to challenge the same. The Tribunal under the circumstances upheld the assessee's claim for set-off to the extent of one-fourth share of the losses apportioned to the father in accordance with the assessments made on the firm. The above two questions arise from this order of the Tribunal.

6. Mr. Joshi, on behalf of the revenue, submitted that the benefit of section 24(2)(iii)(e) can only be available if the assessee was taken up as a partner in the new firm by way of inheritance. His submission was that if regard be had to the terms of the original deed of partnership and the new deed of partnership that was entered into after the death of Juthalal, it is quite clear that as a result of a separate and independent agreement the assessee had become a partner and he was not admitted as a partner simply by reason of inheritance and the benefit of set-off given by the Tribunal was not justified under the provisions of section 24(2)(iii)(e). So far as the decision of

this court in *Bai Maniben's case*[1] was concerned, he submitted that the case was decided on its own facts and cannot be regarded as an authority for the present case if regard be had to the the original deed of partnership under which Juthalal was a partner and the fresh deed of partnership that was entered into after his death.

7. Section 24 of the Act provides for set-off of loss in computing aggregate income. We are concerned in the present case with the provisions of section 24(2)(iii)(e) and we have to consider whether as a result of these provisions the claim of the assessee for a set-off is justified. The said provisions are as under :

> "24. (2) 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 the 31st day of March, 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, and...
>
> (iii) if the loss in either case cannot be wholly so set off, the amount of loss not so set-off shall be carried forward to the following year and so on but no loss shall be so carried forward for more that eight years :
>
> Provided that - ...
>
> (e) 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 entitled any person other than the person incurring the loss to have it set off against his income, profits or gains;..."

8. We are concerned in this case with the latter part of clause (e) of the proviso. We have to consider in the present case whether the assessee has succeeded to his father's share in the partnership otherwise than by inheritance. On a plain reading of clause (e) it is quite clear that if the assessee has succeeded as a partner by inheritance then he will be justified in his claim for a set-off of one-fourth share of the losses which were suffered by the firm while deceased Juthalal

was a partner, but if he has become a partner otherwise than by inheritance then he will not be entitled to have any claim for set-off of losses incurred by the firm during the lifetime of his father.

9. All the three firm in which Juthalal was partner had similar deeds of partnership. It will suffice for the present purpose if we refer to the partnership agreement of the firm of Chimanram Motilal (Cotton & Wheat). That agreement was entered into on June 1, 1949, between three partners, namely, Juthalal, who later on died, Vishnudayal Dwarkadas and Mahabirprasad Juthalal, one of the sons of Juthalal. The three partners were to share the profits and bear the losses in the following proportion :

Rs.

Juthalal	0-6-0 in a rupee
Vishnudayal Dwarkadas	0-6-0 in a rupee
Mahabirprasad	0-4-0 in a rupee

10. It is necessary for the present case to refer to two of the terms of this partnership agreement, namely, clauses (3) and (6), which are as under :

> "(3) The partnership shall be a partnership at will terminable by any partner on his giving to the others three months' previous notice of his intention so to do.
>
> (6) The death of any partner shall not dissolve the partnership. On the death of any partner unless the surviving partners otherwise decide, the share of the deceased partner shall be continued up to the end of the accounting year in which he dies after which it shall cease and determine." Relying upon the language used in clause (6) it is urged by Mr. Joshi that under the said clause on the death of one of the partners his heir was not entitled to become a partner as a matter of right. The partnership was only for the sake of convenience to be continued up to the end of the accounting year in which the death of a partner took place and thereafter the partnership was to cease and determine. He submitted that such being the language of clause (6) it is not open to any of the sons of Juthalal to contend that they are entitled to be taken up as partners in respect of the share of their deceased father, Juthalal. Such a contention, in our opinion, cannot be accepted. It is undoubtedly true that clause (6) contemplates that the death of a partner will not automatically dissolve the partnership. However, the surviving partners can decide to continue the firm in such manner as they like and if they decide to take the heirs of the

deceased partner as partners and distribute the share of the deceased partner amongst them in accordance with the rights of inheritance, then it cannot be said that the heirs when taken up as partners by execution of a new agreement do not acquire the right o the deceased partner by inheritance. As the facts of the present case show the major heirs of Juthalal were taken up as partners and one of the heirs who was a minor was admitted to the benefit of the partnership. Such agreement was entered into in respect of all the three firm and so far as the firm of Chimanram Motilal (Cotton & Wheat) was concerned, the agreement was entered into on November 2, 1955, to the effect that the two continuing partners, Vishnudayal and Mahabirprasad, are parties and two of the other majors, Kamlabai and Shamsunder, are also partners. The youngest son, Arunkumar alias Kailashpat, was a minor and he was admitted to the benefits of the partnership. In the earlier firm Juthalal had 6 annas share in the profits and he was liable to bear losses to the same extent. This six annas share was shared amongst the four heirs in equal share, i.e., Rs. 0-1-6 in a rupee was given to the majors heirs and so far as the minor son was concerned he was admitted to the benefits of the partnership with a right to Rs. 0-1-6 share. Even the recitals in this agreement clearly show that the parties proceeded on the footing that the surviving partners decided to take the heirs of the deceased partner, Juthalal, as partners by way of inheritance. In this new agreement it is, inter alia, stated that consequent on the death of Juthalal his Rs. 0-6-0 share in the old partnership devolved by inheritance on his four heirs, one of them being a minor, and further it states that the parties to the new agreement agreed to continue with effect from October 23, 1955, the business together in partnership with Arunkumar alias Kailashpat, being minor admitted to the benefits of the partnership, on terms and conditions and in the manner laid down in the said deed. Thus, it is quite clear that as option was given to the surviving partners under the earlier partnership agreement to continue the partnership by taking heirs of deceased partner as partners by way of inheritance, they have chosen to do so. Thus, in the present case, the heirs of Juthalal had acquired rights as partners in the new firms that were constituted after the death of Juthalal by way of inheritance, and when such is the case the right of set-off will be available to them under section 24(2)(iii)(e) of the Act.

11. That such is the clear position in law is supported by the decision of this court in the case of Commissioner of Income-tax v. Bai Maniben [1960] 38 ITR 80 (Bom). The facts of the case show that H and his nephew, J. were partners with equal shares in a partnership which conducted business in cloth. He died intestate on August 14, 1953, leaving him surviving only his widow, the assessee. On August 15, 1953, a partnership deed was executed between J and the assessee and under the partnership agreement the business was continued. In the assessment year 1955-56,

the assessee claimed to set off against her share of the profits her share of the loss of the year 1954-55 as well as the share of the loss incurred prior to August 14, 1953, when her husband H was alive. The Appellate Tribunal, on the facts came to the conclusion that the assessee had succeeded by inheritance to her husband, H, in his capacity as a partner, having regard to the quantum of the interest that H had, the extent of the capital he had brought into the partnership, the relation which subsisted between H and J, and the conduct of J and the assessee. The Tribunal gave the benefit of section 24(2) of the Act to the assessee and allowed the set-off claimed by her. On a reference before the High Court, the High Court took the view that the assessee had succeeded by inheritance to H's capacity as partner; that the Tribunals' conclusion was one on a question of fact and having regard to the evidence, the court would not be justified in interfering with that conclusion and that the assessee was, therefore, entitled to set off against her share of the profits the losses suffered by the assessee's husband in the years 1953-54 and 1954-55.

12. In the above case as the terms of the partnership show, 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. Another clause provided that if the surviving partner did not exercise the option purchasing the share and interest of the deceased partners 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. Neither of the things contemplated by this clause was chosen to be done by the surviving partner. He did not exercise the option of purchasing the share of the deceased partner nor did he decide to wind up the partnership. On the other hand, he entered into a fresh partnership agreement of August 15, 1953, whereunder the business conducted in the name of Hiralal Mathuradas was conducted in partnership between the surviving partner, Jayantilal, and the assessee, Bai Mani, widow of Hiralal. On these facts the Tribunal's finding that the widow Bai Mani was taken up as a partner by inheritance was not disturbed by the High Court and the benefits of set-off as contemplated by clause (e) was made available to Bai Mani. We are unable to see any difference between the facts of the present case and the facts in Bai Maniben's case [1960] 38 ITR 80 (Bom) and the principle laid down by this court in that case will equally be attracted in the present case, more so, when the surviving partners have while entering into a new agreement decided to continue the partnership by taking the heirs of the deceased partner as partners. Thus, in our opinion, the Tribunal was right in coming to the conclusion that the assessee was entitled to claim a set-off to the extent of one-fourth share of thee losses.

13. In the result, our answers to the two questions referred are as under :

Question No. 1, in the affirmative.

Question No. 2, in the affirmative.

14. The revenue shall pay the costs of the assessee.

Cases Referred.

1[1977] 106 ITR 286 (Bom)
21[1960] 38 ITR 80 (Bom)