

PATNA HIGH COURT

Sahai Brothers

Vs

Commissioner of Income-tax

Misc. Judicial Case No. 398 of 1955

(Ramaswami, C.J. and Kanhaiya Singh, J.)

26.04.1957

ORDER

Kanhaiya Singh, J.

1. In this case the assessee is a firm constituted of Sri Kamleshwari Sahai and thirteen other family members. The assessment year is 1950-51 and the corresponding accounting year is the financial year 1949-50. During the assessment year the assessee applied for registration of the partnership under Section 26-A of the Income-tax Act. The instrument of partnership is dated 22nd May, 1949, and is annexure A to the statement of the case. The Income-tax Officer refused to register the partnership on the ground that two of the partners, namely, Uma Shankar Sahai and Narendra Shankar Sahai, were minors and the document of partnership was invalid on that account. The assessee took the matter on appeal to the Appellate Assistant Commissioner against the decision of the Income-tax Officer, but the appeal was dismissed. The Appellate Tribunal also took the view that the minors were shown as full-fledged partners in the partnership deed, sharing both profits and losses, and, therefore, the partnership could not be registered by the Income-tax Authorities under Section 26-A.

2. At the instance of the assessee the Appellate Tribunal has made a statement of the case under Section 66 (1) of the Income-tax Act on the following question of law :

"Whether on a true construction of the deed of partnership and under the circumstances of this case, there was any valid partnership register able under Section 26-A of the Indian Income-tax Act?"

3. On behalf of the assessee Mr. Dutta put forward the argument that the Appellate Tribunal has taken an erroneous view of the law and that the partnership constituted by the document dated 22nd May, 1949, should have been registered under Section 26-A of the Income-tax Act. It was submitted that merely because two minors were included in the partnership deed the contract of partnership as between the adult partners could not become invalid, and as a matter of construction it ought to be held that there was a valid partnership between the adult partners and

the two minors were admitted to the benefits of that valid partnership. The argument put forward by learned Counsel for the assessee is well founded and must be accepted as correct. Under Section 30 of the Partnership Act it is open to the partners to admit a minor to the benefits of the partnership. Reference may be made to Section 30 of the Partnership Act on this point. Section 30 enacts : "

"30.(1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

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At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm:

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months." Section 2 (6-B) of the Income-tax Act is also relevant in this connection. Section 2 (6-B) states that the expressions "firm", "partner" and "partnership" have the same meanings respectively as in the Indian Partnership Act, 1932 (9 of 1932), provided that the expression "partner" includes any person who being a minor has been admitted to the benefits of the partnership.

It is also a well-established proposition that the agreements entered into between several persons, some of whom are by law incompetent to contract, are not wholly null and void, but are only less effective than if all the parties to them were competent to contract. That is the view expressed in Lindley on Partnership, 11th edition, on page 87, where the law on the point is stated as follows :

"Agreement entered into between several persons, some of whom are by law incompetent to contract, are not wholly null and void, but are only in some respects less effective than if all the parties to them were competent hence there is nothing to prevent a person who is not sui juris from being a partner. But if any such person is a partner, his or her want of capacity to contract will necessarily give rise to consequences deserving special notice."

We are, therefore, of opinion that in the present case there was a valid contract of partnership as between the twelve adult partners constituted by the deed of partnership dated 22nd May, 1949, but as regards the two minor partners, Uma Shankar Sahai and Narendra Shankar Sahai, it must be held as a matter of construction of the deed of partnership that these two minor partners were admitted to the benefits of the partnership. It is true that paragraph 8 and paragraph 17 of the

partnership deed states that all the partners, including the minor partners, would be liable for the loss borne by the partnership. But this clause has no legal effect so far as the minor partners are concerned, because in the eye of law the minor cannot become a partner or become liable for losses but he is only entitled to the benefit of profits according to his share. As a matter of construction, therefore, we consider that the deed of partnership dated 22nd May, 1949, should be interpreted only as admitting the two minor partners, Uma Shankar Sahai and Narendra Shankar Sahai, to the benefit of the partnership and not as making them full fledged partners liable for the losses incurred by the partnership. This view of the law is borne out by two decisions of the Madras High Court, *Jakka Devayya and Sons v. Commissioner of Income-tax, Madras*¹, and *P. Vincent v. Commissioner of Income-tax, Madras*², which are the decisions of Satyanarayana Rao and Rajagopalan JJ., and also by a decision of the Bombay High Court pronounced by Chagla C.J. and Tendolkar J. in *Dwarkadas Khetan and Co. v. Commissioner of Income-tax, Bombay City*³, On behalf of the Income-tax Department Mr. Shiveshwar Prasad Sinha referred to a decision of the Punjab High Court in *Banka Mal Lajja Ram and Co. v. Commissioner of Income-tax, Delhi*⁴, But this decision is only to the effect that a minor cannot be a full-fledged partner in a partnership firm under Section 30 of the Indian Partnership Act and, therefore, a minor cannot enter into a partnership through his guardian even when the other partners consented. But the learned Judges did not consider the question whether the partnership should be taken as a valid partnership consisting of the adult partners excluding the minor on the ground that no such question was referred to the High Court. This case has, therefore, no bearing on the question presented for determination in the present case, namely, the question whether the Income-tax Authorities could register a partnership in which a minor is described as a partner as a valid partnership consisting of adult partners excluding the minor who may be regarded as having been admitted to the benefits of the partnership. This question was not examined in the Punjab case. Counsel on behalf of the Income-tax Department also referred to two other cases, *Messrs. Hoosen Kasam Dada v. Commissioner of Income-tax Bengal*⁵, and *P. A. Raju Chettiar and Brothers v. Commissioner of Income-tax, Madras*⁶, We do not consider that the ratio of these two cases has any application to the present case. In 1937-5 ITR 182 (Cal), the question for determination was whether a wakf created under the Muhammadan Law could enter into a partnership with other persons and whether such a partnership would be registered as a firm under Section 26-A of the Indian Income-tax Act. It was held in that case that a partnership which purported to exist with a wakf represented by the Mutwalli as a partner was no partnership in law because right of property under the Muhammadan Law had passed out of the wakf and vested in the Almighty being which is not a personal entity and so the requirement of Section 4 of the Indian Partnership Act was not satisfied. It is obvious that the question at issue in the present case is wholly different. In the other case, namely, (1949) 17 ITR 51, the question for determination was whether it is open to an Income-tax Officer to make an enquiry into the genuine character of the partnership in an application made by the partnership for registration under Section 26-A of the Income-tax Act. It was held by the Madras High Court that when an application for registration is made, the Income-tax Officer was entitled to examine whether the partnership was genuine; and if he found that there was no genuineness about the partnership, it was open to him to reject the application on the ground that there was no genuine partnership brought into existence by the deed. We do not consider that this case has any bearing upon the question we are examining in the present case.

4. For the reasons we have already expressed, we hold that upon a true construction of the deed of partnership dated the 22nd May, 1949, and in the circumstances of the case, there was a valid

partnership which could be registered under Section 26 A of the Indian Income-tax Act. We accordingly answer the question of law referred by the Income-tax Appellate Tribunal in favour of the assessee and against the Income-tax Department. The assessee is entitled to the costs of this reference. Hearing fee Rs. 250/-

Answer accordingly.

Cases Referred.

¹(1952) 22 ITR 264

²(1952) 22 ITR 285

³(1956) 29 ITR 903

⁴(1953) 24 ITR 150

⁵(1937) 5 ITR 182 (Cal)

⁶(1949) 17 ITR 51