

PATNA HIGH COURT

Commissioner of Income-Tax

Vs

N.C. Mandal & Co

(U Sinha and Kanhaiyaji, JJ.)

08.11.1968

JUDGMENT

U.N. Sinha, J.

1. These two references under Section 66(1) of the Indian Income-tax Act, 1922, have been heard together and this judgment will govern both the cases. The question of law which has been referred to this court, covering both the cases, is as follows :'

" Whether, on the facts and circumstances of the case, the assessee firm was entitled to registration under Section 26A of the Income-tax Act for the assessment years 1959-60 and 1960-61 ? "

2. The relevant facts are as follows: The assessee firm was constituted under a deed of partnership dated the 4th December, 1958, and comprised of four partners, who had shares in the profits and losses of the business in equal proportion. The capital was fixed at Rs. 26,000, to be contributed equally by the partners. The preamble of the partnership deed provided as follows: (The first party mentioned in the preamble referred to Sri Nakul Chandra Mandal).

"Whereas the parties have taken in the name of the 1st party licence of eight pachwai shops, viz., (1) Sitaramdera, (2) Sonari pachwai shop, (3) Monifit pachwai shop, (4) Haludboni pachwai shop, (5) Hargar-ghuttu pachwai shop, (6) Jugsalai pachwai shop, (7) Adityapur pachwai shop and (8) Mango pachwai shop, all within the District of Singhbhum, in the year 1958-59 commencing from the first day of April, 1958 (one thousand nine hundred and fifty-eight) in partnership with one another and whereas the parties have agreed to carry on the business of the pachwai shops in partnership with one another on the terms and conditions noted in this partnership ; And whereas it is necessary and expedient to reduce the terms in writing ; Now this deed witnesseth and it is hereby mutually agreed that the parties shall become and be partners upon the following terms : "

3. Thereafter, several clauses in the partnership deed referred to the terms and conditions on which the partnership was based. Two of these clauses are quoted below, as the argument advanced on behalf of the Commissioner of Income-tax was mainly based on them :

" 2. That the name of the firm shall be ' N. C. Mandal and Co.' for the facility of the business.....

7. That the first party, Sri Nakul Chandra Mandal, shall manage the partnership business on behalf of all the partners and shall be paid the salary of Rs. 200 per month for the same."

4. An application for registration of the partnership for the financial year 1959-60, under Section 26A of the Income-tax Act, was refused by the Income-tax Officer by order dated the 15th September, 1960. It was held that the constitution of the partnership between Sri N. C. Mandal, the licensee, and the other three partners had amounted to a sub-lease and hence the formation of the partnership was illegal. This has given rise to Tax Case No. 49 of 1966 in this court. The two sections of the Bihar and Orissa Excise Act, 1915 (Act No. II of 1915), which govern the matter, run, as follows:

"Section 22.--Grant of exclusive privilege of manufacture and sale of country liquor or intoxicating drugs.--(1) The State Government may grant to any person, on such conditions and for such period as it may think fit, the exclusive privilege-

(a) of manufacturing or supplying wholesale, or

(b) of manufacturing and supplying wholesale, or

(c) of selling wholesale or retail, or

(d) of manufacturing or supplying wholesale and selling retail, or

(e) of manufacturing and supplying wholesale and selling retail any country liquor or intoxicating drug within any specified local area :

Provided that such public notice shall be given of the intention to grant any such exclusive privilege, and that any objections made by any person residing within the area affected shall be considered before an exclusive privilege is granted.

(2) No grantee of any privilege under Sub-section (1) shall exercise the same unless or until he has received a licence in that behalf from the Collector or the Excise Commissioner.

Section 23.--Transfer of exclusive privilege.--(1) A grantee of an exclusive privilege under Section 22 shall not let or assign the same or any portion thereof unless he is expressly authorised, by a condition made under that section, to do so.

(2) Such letting or assignment shall be made only to a person approved by the Collector or (if the letting or assignment extends to more than one district) the Excise Commissioner.

(3) The lessee or assignee shall not exercise any rights as such unless and until the Collector has, upon his application, granted him a licence to do so."

5. This order of the Income-tax Officer was affirmed on appeal by the Appellate Assistant

Commissioner by his order dated the 16th January, 1961. The same reasoning was given by the appellate court, namely, that there was in effect a sub-letting of the licence taken by Sri N. C. Mandal. By order dated the 28th December, 1961, the Income-tax Appellate Tribunal, Patna Bench, did not accept the view of the Appellate Assistant Commissioner and remanded the case for a fresh decision. After referring to several cases on the point including that of *Commissioner of Income-tax v. K.C.S. Reddy*¹, of this court, the Appellate Tribunal stated thus :

" Before deciding whether a valid partnership exists or not there has to be a proper finding of fact as to whether the excise licences obtained by N. C. Mandal have been transferred to the partnership. This is a matter which has to be determined not only on interpretation of the terms of the partnership deed but also with reference to the actual state of affairs as disclosed by the account books. Since neither the Income-tax Officer nor the Appellate Assistant Commissioner had adverted their minds to this aspect of the matter, we do not wish to express any opinion on the actual state of affairs and would send the case back to the Appellate Assistant Commissioner for disposal of the appeal, de novo, after recording a finding as to whether the excise licences obtained by N. C. Mandal have in fact been transferred to the partnership."

6. After remand, registration was allowed by the Appellate Assistant Commissioner, by his order dated the 31st July, 1963. It was stated in this order that there was nothing on the record to show that there had been a transfer or sub-letting of the licence and referring to Clause 7 of the partnership deed, it was mentioned that, under the terms of the partnership deed, it was not necessary for Sri N. C. Mandal to transfer or sub-let the licence to any of the other partners. The decision of this court, mentioned above, was followed and registration was directed.

7. I may now give the salient facts of Tax Case No. 50 of 1966, before referring to the final order of the Income-tax Appellate Tribunal, as that order covers both the cases. Tax Case No. 50 of 1966 refers to an application for registration of the same firm for the assessment year 1960-61. It appears that a fresh partnership deed was executed on the 15th June, 1959, amongst the four partners, the first party being the same Sri Nakul Chandra Mandal. Apart from the date and the details as to the amounts contributed by the four partners, the principal clauses were the same as in the earlier deed, the name and style of the partnership being Messrs. N. C. Mandal & Company. Clause 10 of this deed stated thus :

" 10. The first party shall manage the partnership business subject to general supervision of the other partners and by way of remuneration for the service to be rendered by the first party he shall be entitled to a salary of Rs. 200 (two hundred) per month in addition to his share of profit."

8. The Income-tax Officer refused registration under this deed by his order dated the 22nd February, 1961. It was held that the partnership deed was in contravention of the Excise Act as

the licence had been taken in the name of Sri N.C. Mandal only and the partnership deed amounted to a lease of the licence which is prohibited under the Excise Act. The officer followed his old order dated the 15th September, 1960, for the previous assessment year. This order was reversed by the Appellate Assistant Commissioner on the 30th July, 1963. The Appellate Assistant Commissioner followed his own order dated the 13th July, 1963, and registration was ordered. Thereafter, both the cases were disposed of by the Income-tax Appellate Tribunal, Patna Bench, by its order dated the 9th July, 1964. The orders of the Appellate Assistant Commissioner in both the cases were upheld. It was held that Sri N. C. Mandal was carrying on excise business for the benefit of all the partners and, therefore, there was nothing irregular about it and so the partnership entered into by the parties in these two years was not illegal. Apparently, the decision of this court in Commissioner of Income-tax v. K. C. S. Reddy was followed, as the two members had in their mind their order of remand passed on the 28th December, 1961, in the first case (assessment year 1959-60).

9. Learned counsel for the Commissioner of Income-tax appearing in this court has tried to distinguish the decision of this court, mentioned above, and has referred to the case of the Mohapatra Bhandar v. Commissioner of Income-tax, [1965] 58 I.T.R, 671. The point of distinction urged with respect to the decision of this court is that in the case of Commissioner of Income-tax v. K.C.S. Reddy, the business was to run in the name of the licensee, whereas in the instant cases the business was to run not in the name of Sri N.C. Mandal but in the name of N.C. Mandal & Company. I do not think that this distinction makes any difference in the principle laid down by this court. The case in Commissioner of Income-tax v. K. C. S. Reddy was under the Bihar Mica Act, 1948, and it arose out of an application filed for registration under Section 26A of the Income-tax Act. As held in that case, there is also no express prohibition in the Excise Act that a partnership cannot carry on business of dealing in excisable articles, provided, of course, the person who actually carries on the business has a licence. As will appear from Clauses 7 and 10 of the two partnership deeds, the management of the business was left to Sri N. C. Mandal, and, therefore, it is difficult to hold that, in the instant cases, there has been any contravention of Section 23 of the Excise Act. This is the very ground on which the decision of the Orissa High Court is distinguishable. In Mohapatra Bhandar's case, the learned judges of the Orissa High Court held that the work of securing, possessing and selling of excisable articles had been transferred to the firm. The finding of fact in the instant cases is that the licence obtained by Sri N. C. Mandal had not been transferred or sub-let and our attention has not been drawn to any fact by the learned counsel for the Income-tax Commissioner for coming to a conclusion to the contrary. On this conclusion the decision of the Madras High Court in the case of *D. Mohideen Sahib & Co. v. Commissioner of Income-tax*², relied upon by the learned counsel, is also not applicable. In my opinion, the instant cases are directly covered by the principle laid down by this court in Commissioner of Income-tax v. K.C.S. Reddy.

10. At one stage of the argument learned counsel for the Commissioner of Income-tax urged that both the partnership deeds indicate that the licences had been taken by all the four partners,

although in the name of Sri N. C. Mandal, and so the real licensee was not Sri N. C. Mandal. I fail to follow the significance of this contention. If all the four partners were licensees, then so far as Section 26A of the Indian Income-tax Act, 1922, is concerned, there could not have been any objection to the registration of the firm, unless the very formation of a firm is held to be illegal. But there is nothing in the Excise Act prohibiting formation of a firm for running a business of excisable commodities. In any case, this is not a point which had been urged before the Income-tax Appellate Tribunal for refusing registration of the firm in these two cases.

11. For the reasons given earlier, the answer to the reference must be that the assessee firm was entitled to registration under Section 26A of the Indian Income-tax Act, 1922, for the assessment years 1959-60 and 1960-61 and thus the reference is answered against the Commissioner of Income-tax. The opposite party, the applicant for registration, will be entitled to costs which I assess at a consolidated amount of Rs. 250.

Kanhaiyaji, J.

I agree.

Cases Referred.

1[1960] 38 I.T.R. 560

2[1950] 18 I.T.R. 200