
(1973) 10 AHC CK 0021

In the Allahabad High Court

Case No : Income-tax Reference No. 427 of 1972

ADDITIONAL COMMISSIONER OF Income Tax, KANPUR

APPELLANT

Vs

UTTAM KUMAR PROMOD KUMAR.

RESPONDENT

Date of Decision : 20-10-1973

Acts Referred:

Income Tax Act, 1961 — Section 185
Partnership Act, 1932 — Section 30, 48
Income Tax Act, 1961 — Section 185
Partnership Act, 1932 — Section 30, 48
Income Tax Act, 1961 — Section 185
Partnership Act, 1932 — Section 30, 48

Citation : (1974) 97 ITR 730

Hon'ble Judges : Hari Swarup, J

Bench : Division Bench

Final Decision : Disposed Off

Judgement

HARI SWARUP J. - The Income Tax Appellate Tribunal has, at the instance of the Addl. Commissioner of Income Tax, Kanpur, referred the following two questions of law for the opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was legally justified in its conclusion that the partnership deed dated November 15, 1961, admitted the minors to the benefits of partnership and they were not full-fledged partners ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee-firm was entitled to registration u/s 185 of the Income Tax Act, 1961 ?"

The assessee-firm was constituted under a deed of partnership dated 15th November, 1961, with two major partners, viz., Kameshwar Dayal and Govardhan Das. Two minors, Uttam Kumar and Pramod Kumar, were also alleged to be admitted to the benefits of this partnership. The Income Tax Officer held

that according to the partnership deed the minors were not only admitted to the benefits of partnership but were made full-fledged partners and accordingly he came to the conclusion that the agreement was not registrable u/s 185 of Income Tax Act, 1961. The assessee went up in appeal, but the appeal was dismissed by the Appellate Assistant Commissioner. The assessee then went up in appeal before the Income Tax Appellate Tribunal. The Tribunal allowed the appeal holding that the partnership deed had created a valid partnership between the two major partners and had only admitted the two minors to the benefits of partnership. The Tribunal, therefore, directed the department to grant registration to the firm. The department, feeling aggrieved, got the aforesaid two questions referred for our opinion.

The relevant clauses of the partnership deed are in the following terms :

"1. That the name of the partnership shall be Uttam Kumar Promod Kumar, Commission Agents, Auraiya, District Etawah, and the share of each party shall be as under :

Rameshwar Dayal, party No. 1

0-4-0 out of a rupee

Goverdhan Das, party No. 2

0-4-0 out of a rupee

Uttam Kumar, party No. 3

0-4-0 out of a rupee

Pramod Kumar, party No. 4

0-4-0 out of a rupee

2. That the partnership shall be taken to be commenced from 10-11-1961. The accounting year of the business shall be from Dipawali to Dipawali.

3. That on the close of the year an account shall be taken of all the assets and liabilities of the firm as also of the profits and losses of the firm. The net profit or loss shall be divided between the parties according to their shares specified above and shall be credited or debited in their personal accounts.

4. That parties Nos. 3 and 4 are the main financiers of the business. The parties may charge a reasonable interest on the capital.

5. That the parties are at liberty to accept money from any other party with or without interest on terms mutually agreed by them. Parties shall be entitled to draw sums of money and such drawings shall be debited to their personal accounts.

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7. That the parties may have dealings with any bank with their mutual consent. All the parties will be competent to operate bank accounts.

8. That the necessary books of accounts shall be kept properly posted and each party shall have a right to inspect the same and take notes therefrom.

9. That the present business of the partnership consists of commission agency. The parties are at liberty to include or exclude any item of business with their mutual consent.

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11. That neither party shall :

(a) assign or mortgage his share in the business,

(b) shall lend money or give credit to or have any dealings on behalf of the partnership with any person whom the other parties shall have previously forbidden to trust or deal with,

(c) secure surety or guarantee for any person or to do or knowingly suffer anything so that the partnership property may be in danger..."

The partnership deed was not signed by or on behalf of the minors. The Tribunal in its order emphasised the non-signing of the document by the minors in the following terms :

"It is then significant to note that the partnership deed is not signed by the minors."

Learned counsel appearing for the parties also are agreed that the minors had not signed the partnership deed nor had anybody acting on their behalf. The minors were thus not parties to this document. In our opinion, the minors cannot be admitted to the benefits of partnership unless they are parties to the agreement through their guardians. Section 30(1) of the Indian Partnership Act says that a minor 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. Sub-section (5) of the section provides that a minor, within six months of his attaining majority, give public notice that he has elected to become or not to become a partner. The proviso to this sub-section says that if he fails to give

such notice, he shall become a partner on the expiry of the said six months. From the above provisions an inference can legitimately be drawn that a minor, for all practical purposes, when admitted to the benefits of partnership, becomes a partner but does not enjoy the rights or suffer the liabilities of the partner till he attains majority. This leads to the further inference that even for admission of the minor to the benefits of partnership an agreement is required between him and the existing partners. The minors property and funds can be utilised by the firm and for that purpose also it is essential that there should be an agreement on behalf of the minor with other partners. In our opinion, any agreement in which the minors are not parties cannot be validly made to admit the minors to the benefits of partnership u/s 30 of the Act. The same view was taken by this court in *HARDUTT RAY GAJADHAR RAM Vs. COMMISSIONER OF Income Tax.*, . The relevant portion of the judgment runs as follows :

"The deed of partnership was executed on behalf of Krishna Murari by his natural father, Jagdish Prasad. After the adoption, Jagdish Prasad ceased to be the natural guardian of the minor and he had no right to enter into contract on behalf of the minor. In the absence of the consent of the natural guardian of the minor, it is not even possible to hold that the minor was admitted to the benefits of partnership. See *Govindoss v. Official Assignee I.L.R.[1934] 57 Mad. 931.*."

This case came up for consideration before the Supreme Court in the case *Commissioner of Income Tax, Bombay Vs. Dwarkadas Khetan and Co.*, . The Supreme Court observed :

"In *HARDUTT RAY GAJADHAR RAM Vs. COMMISSIONER OF Income Tax.*, , Malik C.J. and Seth J. held that where a minor is admitted as a full partner with equal rights and obligations with adults, the deed is invalid. It is pointed out that the English law on the subject is different. In that case, however, there was one other ground for invalidating the deed, because the minor had been adopted into another family and his natural father who had signed as his guardian in the deed could not do so, as he had ceased to be the natural guardian. The decision, however, supports the case of the Commissioner."

The Supreme Court, thus, has not disapproved, but in a way approved, the view of this court expressed in *HARDUTT RAY GAJADHAR RAM Vs. COMMISSIONER OF Income Tax.*, that the deed should be signed on behalf of the minors. Again in the case of *Commissioner of Income Tax, Mysore Vs. Shah Mohandas Sadhuram*, the Supreme Court while considering sections 30(4) and 48 has observed that the minors guardian has the power to accept the condition on which the benefits of partnership are conferred on the minor. The Supreme Court said :

"It appears to us that the guardian can do all that is necessary to effectuate the conferment and receipt of the benefits of partnership."

No case has been cited before us in which a partnership deed might have been held capable of being registered under the provisions of the Income Tax Act where the benefits to be conferred on a minor had not been accepted through

agreement by the guardian. If it were possible for a minor being admitted to the benefits of partnership by a unilateral act of the partners, a situation may arise where the partners may get the benefit under the Income Tax Act but refuse to give any benefits to the minor, as without the minors guardian being a party to the agreement the minor will not be able to claim the profits of the partnership due to lack of privity of contract. It cannot also be imagined that the money of the minor can be given to the partnership without the agreement about its terms being settled and agreed between the minors guardian and the partners. We thus come to the conclusion that the present deed of partnership by having not been signed by anyone on behalf of the minors was not registrable as far as it concerned the rights and liabilities of the minors.

Further, as the terms of the documents are not such that the agreement might be divided so as to keep the interests of the major partners separate from the benefits to be conferred on the minors and liabilities to be incurred by them, the document cannot be registered even in part; and the entire document must be held to be unregistrable.

Coming to the terms of the deed of partnership we find that the minors were not only admitted to the benefits of partnership, but were given the right of participation in the business of partnership like the major partners. Clause 4 provides that the minors are the main financiers of the business. Clause 5 provides that the parties, meaning all the four persons including the two minors, shall be entitled to accept money from any other party with or without interest on terms to be mutually agreed by them. Clause 7 provides that all the parties may have dealings with any bank; by this clause, all the parties have been made competent to operate bank accounts. They have also been given the right, under clause 8, to inspect the books of account and take notes therefrom. All the parties have been given the liberty, under clause 9, to include or exclude any item of business with their mutual consent. Clause 11 places certain restrictions on the parties and the will of the minors is also a factor to be taken into consideration. From a reading of the entire document it appears that the majors and the minors have been treated on par.

The very significant term of the agreement is that the minors have been made liable for the losses. According to clause 3 the net profits and losses shall be divided between the parties according to their shares and the same shall be credited or debited in their personal accounts. This leaves no doubt that the minors have been treated on par as regards the liabilities as well. This is sufficient to negative the assessee's contention. Learned counsel, however, contends on behalf of the assessee that the suffering of loss is neither a conclusive nor even an important factor for inferring that the minors were not only admitted to the benefits of partnership but were made full partners. In support of his contention he has placed reliance on the case of Commissioner of Income Tax, Mysore Vs. Shah Mohandas Sadhuram, . It is urged that as the partnership deed which had come up for consideration before their Lordships of

the Supreme Court contained in clause (8) the words ! "The losses are agreed to be shared between the members in the like manner", the finding of the court that the minors were not partners indicated that sharing of losses was possible even when the minors were to be admitted only to the benefits of partnership. In our opinion such an inference does not follow from this decision. The Supreme Court in its judgment had posed two questions :

"(1) Does this deed then make the minors full partners or does it only confer benefits of partnership on them ?

(2) Is any clause of the deed void ?"

The observation of the Supreme Court is in the following terms :

"First it is clear from sub-section (2) of section 30 of the Partnership Act that a minor cannot be made liable for losses."

The Supreme Court further observed :

"It follows from the above discussion that as long as a partnership deed does not make a minor full partner, a partnership deed cannot be regarded as invalid on the ground that a guardian has purported to contract on behalf of a minor if the contract is for the purposes mentioned above."

It is not stated anywhere in the judgment either that in fact the partnership deed provided for the suffering of loss by minors or that the provisions in the agreement could not be made of loss being borne by minors even when it was intended to admit the minors only to the benefits of partnership. Dealing with this case, this court in the case of DHARAM CHAND KEDAR NATH Vs. COMMISSIONER OF Income Tax, U. P., observed as under :

"In the Supreme Court case there was, however, no clause as in the instant case regarding the sharing of loss by the minor. In Commissioner of Income Tax, Mysore Vs. Shah Jethaji Phulchand, , a decision delivered on the same date by the Supreme Court as in Commissioner of Income Tax, Mysore Vs. Shah Mohandas Sadhuram, , it was reiterated that the partnership deed should be construed reasonably. In this case, although the minor was described as a full partner, nevertheless it was, on a reading of all the clauses of the deed, held that he was only admitted to the benefits of the partnership. In coming to this conclusion the Supreme Court was influenced mainly by the fact that in clause (9) of that agreement, the minor, though described as a partner, was not made to bear the losses of the firm."

The important recital in the partnership deed under consideration in the case of Commissioner of Income Tax, Mysore Vs. Shah Mohandas Sadhuram, , as quoted in the judgment of the Supreme Court, was :

"..... and whereof we the first and second members have decided to constitute all the said four members as a partnership admitting the third and fourth members thereof to the benefits of the said partnership but not to the

liabilities thereunder."

This assertion shows that the minors were not liable to suffer losses and it was probably this provision in the partnership deed that had led the Bench of this court in the case of DHARAM CHAND KEDAR NATH Vs. COMMISSIONER OF Income Tax, U. P., to hold that in the Supreme Court case there was no clause regarding sharing of loss by the minor.

In the case Commissioner of Income Tax, Mysore Vs. Shah Jethaji Phulchand, the Supreme Court had observed :

The question then arises whether the deed makes the minor a full partner or he has been admitted only to the benefits of partnership. There is no doubt that on a true interpretation of sub-clause (9), the minor is not to bear any losses; the losses are to be borne by Nathmal Jethaji. Sub-section (16) does not make the minor a working partner. The only persons who were entitled to be the working partners are Nathmal Jethaji, Pulchand Nathmal and Sakalchand Thikmaji. It is in the light of these clauses that the other clauses should be construed."

Considering the law laid down in the cases of Commissioner of Income Tax, Bombay Vs. Dwarkadas Khetan and Co., and Commissioner of Income Tax, Mysore Vs. Shah Mohandas Sadhuram, , we are of opinion that the terms of the partnership deed in question are such which purport to make the minors full-fledged partners and not only confer on them the benefits of partnership.

Accordingly, we answer the first question in the negative and in favour of the department. We answer the second question also in the negative and in favour of the department. The Commissioner of Income Tax will be entitled to his costs which we assess at Rs. 200.

Questions answered in the negative.