

(1967) 11 AHC CK 0021

In the Allahabad High Court

Case No : Income-tax Reference No. 366 of 1963

Agarwal and Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 30-11-1967

Acts Referred:

Companies Act, 1913 — Section 4(2), 4(3)
Income Tax Act, 1922 — Section 26A

Citation : (1968) 68 ITR 673

Hon'ble Judges : M.H. Beg, J; Jagdish Sahai, J; J.N. Takru, J

Bench : Full Bench

Advocate : P.R. Agarwal, Bharatji Agarwal, U.S. Avasthi and J. Sarup, for the Appellant; R.L. Gulati, for the Respondent

Final Decision : Disposed Of

Judgement

This Judgment has been overruled by : Agarwal and Co. Vs. Commissioner of Income Tax, Uttar Pradesh, AIR 1970 SC 1343 : (1970) 77 ITR 10 : (1970) 2 SCC 48 : (1971) 1 SCR 237

Jagdish Sahai, J.—The Income Tax Appellate Tribunal, Delhi Bench, (hereinafter referred to as " the Tribunal") has submitted a statement of the case and referred the following question of law at the instance of the assessee, Messrs. Agarwal and Co. (hereinafter referred to as " the assessee ") u/s 66(1) of the Income Tax Act, 1922 (hereinafter referred to as the "Act") :

" Whether on the facts and in the circumstances of the case, registration was rightly refused to the firm on the ground that it violated the provisions of Section 4 of the Indian Companies Act, 1913 ?"

2. The assessment years in question are 1952-53, 1953-54 and 1954-55.

3. The Tribunal submitted one statement of the case and referred one question of law because the point raised is common to all the three years.

4. The assessee-firm was constituted in 1934. A deed of partnership was drawn up on January 24, 1936, but as some of the members died fresh partnership deeds were subsequently drawn up. The one with which we are concerned in this case is dated July 7, 1950, a copy whereof has been made a part of the statement of the case.

5. According to this document, there were in all 18 partners. The assessee firm applied for registration u/s 26A in all the three years. The Income Tax Officer refused registration every time on the finding that the partnership consisted of more than 20 persons which was violative of Section 4 of the Indian Companies Act and for that reason could not be registered as a partnership. The orders passed in each year were affirmed on the assessee's appeals by the Appellate Assistant Commissioner and the Tribunal. It is clear from the statement of the case that some of the partners of the assessee-firm had joined it only in their representative capacity being kartas of their respective Hindu undivided families. The appellate order of the Tribunal has been made a part of the statement of the case and has been marked as annexure "E" in the referring order. In paragraph 4 of the appellate order the Tribunal has clearly stated that :

" As already mentioned, the number of partners as mentioned in the partnership deed was 18. It is common ground that most, if not all, of them were kartas and represented their respective families in the partnership." For its finding that the partnership could not be registered the Tribunal relied upon Section 4(3) of the Indian Companies Act, as it stood at the relevant time ;

"4. (1)

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament of the United Kingdom or some other Indian law or Royal Charter or Letters Patent.

(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded.

(4) Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business ..."

6. The Tribunal was of the opinion that several partners of the assessee-firm having entered into partnership in their representative capacity of being kartas of their respective Hindu undivided families, the total number of adult members in such families should be taken into consideration while determining whether or not the number exceeded twenty.

7. Mr. Jagdish Swarup strenuously contended that it is well settled and beyond all controversy that there can be no partnership between two Hindu undivided families. He contended that, inasmuch as a Hindu undivided family is not a legal entity or a juristic person and partnership is a contractual relationship capable of being entered into by someone who is either a sentient being or a juristic person or a legal entity it cannot enter into a partnership. He also contended that it would lead to anomalous results if two Hindu undivided families enter into partnership because the number of partners would go on varying according to the deaths and births in the two families. He has placed reliance upon the following cases :

RAM KUMAR RAMNIWAS OF NANPARA Vs. RE.,

Kshetra Mohan-sannyasi Charan Sadhukhan Vs. Commissioner of Excess Profits Tax, West Bengal,

The Commissioner of Income Tax, West Bengal Vs. Kalu Babu Lal Chand,

Firm of Bhagat Ram Mohanlal Vs. The Commissioner of Excess Profits Tax, Madhya Pradesh, Nagpur and Another,

The Commissioner of Income Tax, Bombay City, Bombay Vs. Nandlal Gandlal,

Jitmal Bhuramal v. Commissioner of Income Tax [1962] 44 ITR 887 (S.C.)

Commissioner of Income Tax, Madras Vs. Sivakasi Match Export Company,

Commissioner of Income Tax, Gujarat Vs. A. Abdul Rahim and Co.,

Commissioner of Income Tax, Madras Vs. Bagyalakshmi and Co., Udamalpet, and

Charandas Haridas and Another Vs. The Commissioner of Income Tax, Bombay North, Kutch, Saurashtra and Ahmedabad and Another,

8. As a bald proposition of law and in strict technical sense it is true that a Hindu undivided family cannot constitute a partnership firm but it is well settled and fully recognized that, even though the partner may be the karta of a Hindu undivided family, the Hindu undivided family has an interest in the partnership business. It was clearly pointed out in RAM KUMAR RAMNIWAS OF NANPARA Vs. RE., that when the karta acting within his right under the Hindu law enters into a partnership he makes the entire joint family liable for the debt of the partnership and entitled to receive the benefits thereof.

9. It was also pointed out in Commissioner of Income Tax v. Nandlal Gandlal that the coparcener (karta) is undoubtedly accountable to the family for the income received.

10. In Firm Bhagat Ram Mohanlal v. Commissioner of Excess Profits Tax it was observed as follows :

" If members of a coparcenary are to be regarded as having become partners in

a firm with strangers, they would also become under the partnership law partners inter se, and it would cut at the very root of the notion of a joint undivided family to hold that with reference to coparcenary properties the members can at the same time be both coparceners and partners. "

11. It is not necessary to multiply authorities because, in all the cases cited by Sri Jagdish Swarup, nothing has been said against the position that, even though the members of a Hindu undivided family as such do not become partners of a firm in which their karta has become a partner in his representative capacity representing the Hindu undivided family, they were none the less fully interested in the partnership business, are liable to pay its losses and entitled to receive its profits. In other words, in effect though not in law, they are partners.

12. The proposition that a Hindu undivided family as such cannot enter into partnership with another Hindu undivided family or with an individual has come into existence because the roots of partnership lie in contract and in order to make a contract there must be a sentient being or a juristic person or a legal entity which a Hindu undivided family is not.

13. That being the position, the question to consider is as to what does Section 4(3) of the Indian Companies Act mean ? After all, the legislature has made the provision and it must be administered. Having considered the matter I am of the opinion that the words used in the provision mean that when in effect or for practical purposes a partnership has been constituted between Hindu undivided families, the partnership would be subject to the provisions of Section 4(3) of the Companies Act. The words used in the section are " where two or more such joint families form a partnership ". It is not possible to say that because under the Contract Act and the Partnership Act two or more joint families as such cannot form a partnership, therefore, the words mentioned above are surplusages. As pointed out earlier by me, those words clearly mean that, when two or more joint families, in effect, or as a fact (quite apart from the law) form a partnership, the consequences given in Section 4 of the Companies Act would ensue.

14. There is a difference between an actual state of affairs and the legal sanctity to those state of affairs. As a matter of fact, two or more Hindu undivided families .may constitute a partnership business but it will not be recognised by law of partnership. The purpose of Sub-section (3) is to meet even those cases where, in effect, two or more joint families form a partnership though, in law, they should not or could not form such a partnership. It is a matter of common knowledge that even though in the technical and strict sense of the law when a karta enters into partnership on behalf of the Hindu undivided family in his representative capacity the members of the Hindu undivided family do not become partners of the firm but nonetheless the firm is " popularly described as one between two Hindu undivided families". See Kshetra Mohan-sannyasi Charan Sadhukhan Vs. Commissioner of Excess Profits Tax, West Bengal, . It is in order to bring such cases of partnerships popularly called " the partnership of Hindu undivided families" within the clutches of Section 4 of the Indian Companies Act

that the legislature used the words " where two or more such joint families form a partnership ". The provision deals only with a factual state of affairs. The words used by it are " where two or more such joint families form a legal or a valid partnership". This provision came on the statute book in 1936, but even before that the position was clear that a partnership is a creature of contract and for its formation sentient beings or juristic persons or legal entities were required and a mere association of individuals like a Hindu undivided family could not form a partnership. The legislature knew this legal position yet in 1936 thought it fit and proper to use the words " where two or more such joint families form a partnership " in Section 4(3) of the Act.

15. Mr. Jagdish Swarup, while admitting that these words must be given their natural and grammatical meaning, contended that all that these words mean is that only when all the adult members of one Hindu undivided family entered into partnership with all the adult members of another Hindu undivided family that Sub-section (3) of Section 4 of the Indian Companies Act would come into play. I am not prepared to accept this interpretation of these words ; firstly, because when a Hindu undivided family is in a state of jointness its individual members (quite apart from the karta), even though adults, cannot commit the Hindu undivided family either in law or in fact into a partnership business and, secondly, it would be creating an anomalous position of a co-partnership along with a coparcenership which is not permissible so long as the Hindu family is undivided.

16. The provisions of Section 4(3) of the Indian Companies Act cannot be so read as to militate against the accepted legal position mentioned above. It is elementary that the members of a Hindu undivided family are coparceners and not co-partners. Consequently, if the interpretation put by Mr. Jagdish Swarup were to be accepted an anomalous and difficult position wholly inconsistent with the Hindu law would come into existence.

17. Mr. Jagdish Swarup also placed reliance upon AIR 1930 300 (Privy Council) 301 and cited the following passage from that report for my consideration :

" We think that u/s 4, Companies Act, what we have to see is whether, where an association or partnership is formed for purposes of carrying on a business, each of the members will be liable individually upon contracts made and whether each would have rights accruing to him upon such contracts."

18. This decision is of 1930 and cannot throw any light on the words that came into existence for the first time in 1936. Mr. Jagdish Swarup also placed reliance upon COMMISSIONER OF Income Tax, U.P. Vs. ROOPNARAIN RAMCHANDRA (A FIRM), . He contends that this case is an authority so far as this court is concerned on the interpretation of Section 4(3) of the Act. I have very carefully perused this judgment. Even though their Lordships have not accepted the Calcutta view expressed in Shyamlal Roy Vs. Madhusudan Roy and Others, on which the Tribunal relied, they have not interpreted the provisions of Section

4(3) of the Act. Besides, the facts in the case are very different from those before us. The question there was not the one before us, i.e., if a partnership is formed with several kartas of Hindu undivided families joining it in their representative capacities would or would not the number of all the adult members constituting those Hindu undivided families be totalled up for the purposes of Section 4(3) of the Act? They were dealing with the case of sub-partnership. That case is, therefore, clearly distinguishable.

19. Mr. Jagdish Swarup next contended that, inasmuch as the partnership deed does not show that various kartas have entered into partnership business in their representative capacity, the question of counting the adult members of the Hindu undivided families does not arise in the present case.

20. The partnership deed is a neutral or colourless document so far as the question whether the kartas have joined in their individual capacity or as representatives of the Hindu undivided families concerned. But it is clear from the statement of the case and from the appellate order of the Tribunal that the assessee's case throughout has been that the kartas had entered into a partnership business not in their individual capacity but as representing their Hindu undivided families.

21. For the reasons mentioned above, I would answer the question in the affirmative against the assessee and in favour of the department. In the circumstances of the case I would make no order as to costs.

22. M. H. Beg, J.--The question referred to us is stated as follows :

" Whether, on the facts and in the circumstances of the case, registration was rightly refused to the firm on the ground that it violated the provisions of Section 4 of the Indian Companies Act, 1913 ?"

23. I think we ought to approach this question from the angle of the facts and circumstances of the case found by the Tribunal, and then consider whether these facts found constitute a breach of the provisions of Section 4 of the Companies Act. The question which causes difficulty may, in my opinion, be thus put : Do the facts found enable us to conclude that the partnership with which we are concerned consists merely of individuals who are kartas of their respective families or of representatives through whom the whole bodies constituting the joint families are meant to function as partners ? If the former position is correct, the partnership is legal and not struck by Section 4 of the Companies Act. If the latter position was sought to be achieved by the partnership deed, the so called partnership would be struck by Section 4(2) of the Act.

24. The partnership deed which had to be interpreted, embodying the agreement of the partnership alleged to be between " joint families " and not between individuals, certainly does not mention that the joint families are partners at all. It does not assign any role to joint families or to any partners as representatives

or delegates of joint families. The partnership deed is, prima facie, between individuals who are not even described as kartas or representatives of their respective Hindu joint families. However, the statement of the case makes the appellate order of the Tribunal a part of the statement. The appellate order says :

" It is common ground that most, if not all, of them were kartas and represented their respective families in the partnership."

25. But, can the partners, who admit that they are kartas representing their respective Hindu undivided families, make the Hindu undivided families " partners ", as that term is understood in law, by such an admission ? This is the simple question of some difficulty which we have to answer.

26. I find it very difficult to accept a distinction between partnership in law and a partnership in popular understanding or in fact. When a legislative provision, such as Section 4 of the Companies Act, contemplates a partnership it must be deemed to refer to " partnership " as it is understood in law, As has been pointed out by my learned brother, the added provision 4(3) of the Companies Act, which we have to interpret, was enacted after the Partnership Act of 1932. The legislature must, therefore, be deemed to be aware of the meaning of the term " partnership " as found in Section 4 of the Partnership Act. Partnership is, as has already been pointed out by my learned brother, a contract between sentient beings and legal entities. It is a particular kind of contractual legal bond, A joint family is not a " person " or such a legal entity which can enter into a contract of partnership at all. Section 4 of the Partnership Act defines " partnership" as a relation between "persons" who have agreed to share the profits of the business carried on by all or any one of them acting for all. A karta of a joint family can only become a partner as an individual. I find it very difficult to conceive of a representative making a group of individuals, such as a joint family, a partner at all as defined by Section 4 of the Partnership Act. The contract of partnership, moreover, cannot be entered into between groups of persons as entities with changing membership such as Hindu joint families are. The only manner in which such groups of persons can be conceived of as partners is as sets of individuals each of whom is a party to the deed of partnership.

27. Cases may, however, arise in which groups of persons seek to become partners through another representing them. In those cases, a problem will arise whether what the group has tried to do will create a partnership in the eye of law at all. Such an attempt will entail the consequence that it will be struck by Section 4, Sub-sections (2) and (3) of the Companies Act, provided the intention is to make more than twenty persons partners. Otherwise, no question of counting the members of the groups as partners would arise. The relevant Section 4, Sub-sections (2) and (3) read as follows :

" (2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or

partnership or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council or of Royal Charter or Letters Patent.

(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded."

28. It will be noticed that the object of Section 4(2) is to limit the number of persons carrying on business as a company, association, or partnership to twenty unless the company, association or partnership is registered under the Act. The object of Section 4(3), which was added by Act XXII of 1936, was to exempt a joint family carrying on joint family trade or business from the restriction contained in Section 4(2) itself. But, as soon as "two or more such joint families form a partnership" the restriction becomes operative again. The term "partnership" when used in a legislative provision must necessarily be given its legal connotation. I do not think that what could not be a partnership in the eye of law could have been referred to in Section 4(3) of the Companies Act.

29. In Mulla's Principles of Hindu Law, XIII edition (at page 440), we find the following definition :

"A joint Hindu family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters."

30. Thus, the term "joint Hindu family" is used to denote a collection of individuals related in the manner indicated above and that is all. It is also clarified here : "A Hindu coparcenary is a much narrower body than a joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property." Now, the section we have to interpret does not refer to the Hindu coparcenary but only mentions joint families. It does not indicate that the joint families themselves were to be treated as partners. If this was the intention, there was no point in counting individuals but, logically speaking, families would have to be counted as units of partnership.

31. Even if the karta of a joint family represents a joint family, he does so only in the capacity of the manager of the coparcenary property. He is not a personal representative or agent or delegate of each member of the joint family in transactions such as partnership. Section 4(3) of the Act does not deal with the question of joint families carrying on business through kartas or representatives. Therefore, I find it very difficult to read into Section 4(3) of the Companies Act a concept of joint Hindu families themselves becoming partners through kartas or representatives. Nor do I see the need for all the members of different joint families to be included in a partnership simply because the kartas of those families are partners. The question of counting the number of members of a joint family can only arise if more than one member of such a family is actually a

partner. Before any person can be said to be actually a "partner" in the eye of law, the partnership must legally exist. A partnership consisting of joint families as legal entities or persons who are partners is not legally possible under our law. Hence, we must interpret Section 4(3), consistently with the law, to denote a partnership of individuals who belong to two or more joint families. That is all we can reasonably do as we cannot, by a "sidewind", create a new kind of partnership not recognised by law.

32. It may be mentioned here that, according to Section 30 of the Partnership Act, a minor cannot be a partner although he may be admitted to the benefits of a partnership. Therefore, the object of the inartistically worded Section 4(3) of the Companies Act may well be to make it clear that minors thus admitted to the benefits of a partnership, simply because they happen to be members of joint Hindu families carrying on business through coparceners, will not be counted as partners when the number of partners is determined for the purposes of Section 4(2) of the Act. In my opinion, the provisions of Section 4(3) must be read in the context of and in harmony with Sections 4 and 30 of the Partnership Act.

33. It may also be mentioned that Section 6 of the Partnership Act lays down the mode of determining whether a group of persons does or does not form a partnership firm. It enables the authority which has to determine the question to go behind the deed of partnership. In the present case, the department tried to make out that, as the partners mentioned in the deed were not the real partners but the real partners were the Hindu undivided families, the ostensible partnership was not genuine. The argument seemed to be that the state of affairs apparent from the deed was not the real state of affairs as regards the parties to the partnership. Curiously, this argument was rejected on the ground that this was a new stand which could not be taken up by the department. If this was so, the logical inference was that the partnership deed represented the actual state of affairs. In other words, the ostensible partners were the real partners in the case before us. Hence, the question of counting others does not arise here.

34. The cases placed before us on behalf of the department itself may be cited in support of my conclusions. In *Firm Bhagat Ram Mohanlal v. Commissioner of Excess Profits Tax*, it was held by the Supreme Court :

" It is well settled that when the karta of a joint Hindu family enters into a partnership with strangers, the members of the family do not ipso facto become partners in that firm. They have no right to take part in its management or to sue for its dissolution. The creditors of the firm would no doubt be entitled to proceed against the joint family assets including the shares of the non-partner coparceners for realisation of their debts. But that is because, under the Hindu law, the karta has the right when properly carrying on business to pledge the credit of the joint family to the extent of its assets, and not because the junior members become partners in the business. In short, the liability of the latter arises by reason of their status as coparceners and not by reason of any contract

of partnership by them."

35. As I read that case, the proposition laid down there, that the contract of partnership which "cuts at the very root of the notion of a joint undivided family", excludes the possibility of making the members of the joint family automatically partners on the sole ground that the karta of the family, who represents his family, is a party to the deed of partnership. The legal bond in a partnership is the creature of contract. The legal relationship between the karta and members of the joint family is the outcome of status. Even where the karta brings the joint family funds into partnership and may have separate obligations towards other family members under the personal law for those assets of the joint family, he remains an individual for the purposes of the Partnership Act and also for the purposes of Section 4(3) of the Companies Act.

36. Another case relied upon on behalf of the department was BENARES CLOTH DEALERS SYNDICATE Vs. Income Tax OFFICER, BENARES., . Here, the provisions of Section 4 of the Indian Companies Act were held to have been contravened by the partnership found in the case. The question whether there was a partnership between certain individuals and certain joint families and certain firms was determined on an interpretation of the deed and on the facts of that particular case. In the course of his judgment, Desai C. J., keeping in view the provisions of Section 4 of the Indian Companies Act, observed :

" There would have been no sense in prohibiting a Hindu undivided family's being a partner if there was no such thing as distinct from its karta's being a partner, i.e., if its being a partner were the same as its karta's being a partner. In (1948) 16 ITR 35 (Privy Council) the Supreme Court held that there can be a partnership between a karta and a coparcener and did not consider the validity of a partnership between a Hindu undivided family and a coparcener. A partnership between a karta and a coparcener was recognised because it is not a partnership between the Hindu undivided family and its coparcener. It was pointed out that when a karta is a partner, the Hindu undivided family does not become a partner. Here, though nominally the three kartas were said to be the partners, really the three Hindu undivided families were the partners."

37. On the facts of that case, it was held to be an attempt to make joint families partners through kartas. Hence, a contravention of Section 4(3) of the Companies Act was made out. I would confine what was laid down there to the particular facts of that case.

38. I am unable to treat a finding in the present case, that each karta was a partner in his representative capacity, as equivalent to a finding that the joint families themselves, as groups of individuals, were partners. The fact that a karta is a partner in a representative capacity may only mean that the benefits of the partnership will be reaped by the joint family in accordance with personal law. That, however, has nothing to do with the question whether it is a partnership in which the members of the group, that is to say, members of the

joint family, are themselves partners. In the above-mentioned case, a distinction was drawn between the cases where the karta was a partner and those in which the Hindu undivided family purported to become a partner through the karta. Upon the findings recorded by the Tribunal in the case before us, I do not find it possible to go to the extent of holding that it means that the undivided families themselves, consisting of groups of individuals, were sought to be made partners through the kartas.

39. I find it very difficult to appreciate the meaning of making a " karta " a partner in his representative capacity. If such an admission was made on behalf of the assessee it was apparently meant to indicate that the benefits of the partnership were shared by the karta with the other members of the joint family. It did not necessarily mean that the karta was trying to make the members of the joint family partners through himself. There is, I believe, a distinction between these two differing sets of circumstances. In a case in which the karta is a representative of his joint family, only in the sense that he shares with other members of the joint family the benefits of the partnership, the joint family itself cannot be said to be a partner at all. In such cases another jural relationship, governed by the personal law applicable to the karta and members of the joint family, *inter se*, exists in addition to the *vinculum juris* or the legal bond which is embodied in the contract of partnership. On the other hand, in those cases where the karta is merely a vehicle for the assertion of the wills of the members of the joint family, it may be said that his position as a partner is an attempt to import members of the whole group as partners. Such a partnership would be a most unusual and extraordinary kind of partnership. In cases where the karta functions purely as an individual with a will and mind of his own, unaffected by any obligation to consider the views of other members of the joint family, I do not think the members of the joint family can be deemed to be partners even in what may be regarded as the " popular " sense of the term partnership. It appears to me that the findings recorded by the Tribunal in the case before us amount only to making out two sets of jural relationships, one between partners as individuals who are the only partners in the eye of law, and, another, which the partners who, as kartas of their respective families, may have towards the members of their respective joint families. I do not find it possible to make the two findings given by the Tribunal, one, that the partners are kartas of their respective families, and, another, that the partnership deed cannot be held to conceal some ulterior object or set of conditions, consistent with each other in any other way. Therefore, I am inclined to take the view that, upon the findings recorded in the case before us, this case is governed by the *ratio decidendi* of those cases where there are two different sets of jural relationships as is the case where there is a partnership and a sub-partnership.

40. Upon the view I have taken above, the following observations made by the Supreme Court, in *Commissioner of Income Tax, Madras Vs. Bagyalakshmi and Co., Udamalpet*, are fully applicable to the case before us :

" A contract of partnership has no concern with the obligation of the partners to others in respect of their shares of profit in the partnership. It only regulates the rights and liabilities of the partners. A partner may be the karta of a joint Hindu family ; he may be a trustee ; he may enter into a sub-partnership with others ; he may, under an agreement, express or implied, be the representative, of a group of persons ; he may be a benamidar for another. In all such cases he occupies a dual position. Qua the partnership, he functions in his personal capacity ; qua the third parties, in his representative capacity. The third parties, whom one of the partners represents, cannot enforce their rights against the other partners nor the other partners can do so against the said third parties. Their right is only to a share in the profits of their partner-representative in accordance with law or in accordance with the terms of the agreement, as the case may be."

41. I find that the whole series of cases of dual capacity of partners have been dealt with very fully by M. C. Desai C. J. in COMMISSIONER OF Income Tax, U.P. Vs. ROOPNARAIN RAMCHANDRA (A FIRM), . where it was held, at page 327 :

" The effect on a partnership of the fact that a partner is a karta of a Hindu undivided family is the same as that of a sub-partnership entered into by him. If D and E, who is a karta of a Hindu undivided family, enter into an agreement to share the profits of a business carried on by them only D and E are the partners and the coparceners of E are not partners. "

42. His Lordship then quoted the following passage from Mayne on Hindu Law and Usage :

"" Where a managing member of a joint family enters into a partnership with a stranger, the other members of the family do not ipso facto become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Partnership Act. In such a case, the family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger ; the partnership will be governed by the Act."

43. In the above-mentioned case a Division Bench of this court expressed dissent from the view taken by the Calcutta High Court in Shyamlal Roy Vs. Madhusudan Roy and Others, . The Tribunal, in rejecting the assessee's appeal, has purported to rely upon the view taken by the Calcutta High Court. As I find myself, very respectfully, in complete agreement with the view taken by Desai C.J. in Commissioner of Income Tax v. Roopnarain Ramchandra, I do not think it is necessary to embark on a discussion of the Calcutta case relied upon by the Tribunal ; I consider myself bound by the ratio decidendi of COMMISSIONER OF Income Tax, U.P. Vs. ROOPNARAIN RAMCHANDRA (A FIRM), . If I had held a contrary view I would have considered this case to be a fit one for decision by a larger Bench. Apart from the fact that, with great respect, I entirely agree with the view taken by this court in Roopnarain Ramchandra's case, I would like to

point out, incidentally, that the rule of practice in such matters, which the Tribunal sought to circumvent, has been laid down by the Supreme Court in *Mahadeolal Kanodia Vs. The Administrator-general of West Bengal*, . This rule, which has been quoted by the Tribunal, is applicable here. It may be that it is, as laid down, a rule for the guidance of the High Courts, but it would not be desirable at all that the Appellate Tribunal should follow a different practice. The distinction sought to be made out by the Appellate Tribunal, that the previous decision sought to be followed was by the same Bench of the Appellate Tribunal, did not make any difference to the principle embodied in the rule of practice.

44. Those cases, where it was held that a Hindu undivided family cannot be a partner as it is not a legal person, have already been noticed by my learned brother in his judgment. I may, however, indicate my reasons for holding the view that these cases support the interpretation of Section 4(3) of the Companies Act adopted by me.

45. In *RAM KUMAR RAMNIWAS OF NANPARA Vs. RE.*, it was held by a Division Bench of this court that a Hindu undivided family could not legally become a partner as a coparcenary unit. It was also observed that the joint family could be loosely viewed as a partner if the karta, through whom the joint family may either benefit or make itself liable for the debts of the partnership, represented the family. It was, however, clarified that, even in such a case, only the members of the Hindu undivided family whose names appear in the partnership deed could be deemed to be partners in the eye of law. If only those members whose names appear in the partnership deed can be regarded as partners in the eye of law, the joint families referred to by Section 4(3) of the Companies Act could only be groups of partners belonging to joint families who can, taken together, be described as "joint families". Such an interpretation of Section 4(3) of the Companies Act appears to be more in conformity with this ruling than the view that kartas of undivided Hindu families, merely by representing their families in the partnership or by bringing the joint family properties into the partnership, make other coparceners automatically partners. The question of counting the number of the whole body of members of an undivided family could only arise where the whole body is sought to be included among the partners. Otherwise, the question of counting the members of the joint family would not arise at all.

46. In *Kshetra Mohan-sannyasi Charan Sadhukhan Vs. Commissioner of Excess Profits Tax, West Bengal*, it was clearly held as follows by their Lordships of the Supreme Court :

" When two kartas of two Hindu undivided families enter into a partnership agreement the partnership is popularly described as one between the two Hindu undivided families but in the eye of the law it is a partnership between the two kartas and the other members of the families do not ipso facto become partners. There is, however, nothing to prevent the individual members of one Hindu undivided family from entering into a partnership with the individual members of another Hindu undivided family and in such a case it is a partnership between

the individual members and it is wholly inappropriate to describe such a partnership as one between two Hindu undivided families."

47. I find it very difficult to hold that the result of this pronouncement is that a partnership between the kartas of undivided Hindu families could be appropriately described as a partnership of joint families as contemplated by Section 4(3) of the Companies Act. In any event, the question of counting the number of members of a joint family among partners could not arise if the kartas only are the partners in the eye of law.

48. In *The Commissioner of Income Tax, West Bengal Vs. Kalu Babu Lal Chand*, it was again held by the Supreme Court :

" It is now well settled that a Hindu undivided family cannot as such enter into a contract of partnership with another person or persons. The karta of the Hindu undivided family, however, may and frequently does enter into partnership with outsiders on behalf and for the benefit of his joint family. But when he does so, the other members of the family do not, vis-a-vis the outsiders, become partners in the firm. They cannot interfere in the management of the firm or claim any account of the partnership business or exercise any of the rights of a partner. So far as the outsiders are concerned, it is the karta who alone is, and is in law recognised as, the partner. Whether in entering into a partnership with outsiders the karta acted in his individual capacity and for his own benefit or he did so as representing his joint family and for its benefit is a question of fact. If for the purpose of contribution of his share of the capital in the firm the karta brought in monies out of the till of the Hindu undivided family, then he must be regarded as having entered into the partnership for the benefit of the Hindu undivided family and as between him and the other members of his family he would be accountable for all profits received by him as his share out of the partnership profits and such profits would be assessable as income in the hands of the Hindu undivided family."

49. As I interpret this decision it lends support to the view that so far as the partnership itself is concerned, as a jural relationship recognised by law, the fact that a karta represents an undivided Hindu family has nothing to do with the jural relationship constituted by the partnership. The jural relationship covering the rights and liabilities between the karta and the other members of a joint undivided family is different. The result is that the fact that the karta is a partner together with the fact that he represents, as between himself and other coparceners, his undivided Hindu family, does not make the other members of the coparcenary body partners automatically. If the other members of a joint family are not partners at all the question of counting their number does not arise,

50. In *The Commissioner of Income Tax, Bombay City, Bombay Vs. Nandlal Gandalal*, it was again held by the Supreme Court :

"The position in Hindu law with regard to a coparcener, even when he is the

karta, entering into partnership with others in carrying on a business is equally well settled. The partnership that is created is a contractual partnership and will be governed by the provisions of the Indian Partnership Act, 1932. The partnership is not between the family and the other partners ; it is a partnership between the coparcener individually and his other partners (see *Kshetra Mohan-sannyasi Charan Sadhukhan Vs. Commissioner of Excess Profits Tax, West Bengal*, The coparcener is undoubtedly accountable to the family for the income received, but the partnership is exclusively one between the contracting members, including the individual coparcener and the strangers to the family. On the death of the coparcener the surviving members of the family cannot claim to continue as partners with the strangers nor can they institute a suit for dissolution of partnership ; nor can the stranger partners sue the surviving members as partners for the coparcener's share of the loss. Therefore, so far as the partnership is concerned, both under partnership law and under Hindu law, the control and management is in the hands of the individual coparcener who is the partner and not in the family."

51. In *Jitmal Bhuramal Vs. Commissioner of Income Tax, Bihar and Orissa*, it was observed by the Supreme Court :

"It was held by this court in *Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur*, that "partnership" being the relation between persons, who have agreed to share the profits of a business carried on by all or any of them acting for all, and "persons" who enter into the partnership being called individually "partners" or collectively "a firm" the word "person" contemplates only natural or artificial, i.e., legal persons, and neither a firm nor a Hindu undivided family can be that person. It was again recently emphasised in the case of *Charandas Haridas and Another Vs. The Commissioner of Income Tax, Bombay North, Kutch, Saurashtra and Ahmedabad and Another*, that where a Hindu undivided family becomes a partner through its karta, the coparcenary has no place in the partnership but only the karta is everything, and in *The Commissioner of Income Tax, Bombay City, Bombay Vs. Nandlal Gandalal*, it was pointed out that both under the Hindu law and under the law of partnership, the Hindu undivided family as such can exercise no control and management over the business of a partnership, of which the coparcenary is a member through the karta."

52. The passage, set out above, may seem to justify speaking of a Hindu undivided family as becoming "a partner through its karta", but a careful examination of the passage reveals that, even in a case of this description the coparcenary as such has no place in the partnership. Read as a whole, the passage surely means that even in a case in which undivided family could be said to participate "as a partner" because its karta is a partner utilising the joint family funds, the coparcenary body is not a partner in the eye of law. I think we are concerned in the case before us with the legal effect of a transaction or contract of partnership and not with a mode in which the factual position may be

described. The Supreme Court was not interpreting Section 4(3) of the Companies Act of 1913, in the above-mentioned case. Therefore, expressions used by it in describing the factual position in the case could not, in my opinion, be used for the purpose of finding out the legislative intent and meaning of a provision which was not under consideration before the Supreme Court at all.

53. The above-mentioned cases make it clear that a joint Hindu family cannot be conceived of as a legal entity capable of functioning as a partner in the eye of law. It follows that where a statutory provision speaks of a partnership formed of two or more joint families the reference must be to individual members of joint families forming a partnership and not to joint families as partners or legal entities or persons acting through kartas. Section 4(3) of the Companies Act does not appear to me to deal with cases in which partners will be fictitiously deemed to be joint families even though this is not possible either in fact or under the law as it stands today. It appears to me to denote what is an actual partnership of individuals capable of being recognised by law as a partnership. I, therefore, very respectfully, dissent from the view adopted by my learned brother. My answer to the question is in the negative and in favour of the assessee. I, however, concur with my learned brother that the parties may be left to bear their own costs of this reference as the provision to be interpreted does present a rather difficult problem of interpretation on which there has been no clear authority so far.

BY THE COURT May 19, 1967

54. In view of the difference of opinion between us it is ordered that this case be listed before a third judge. Put up the record of this case before the Hon'ble Chief Justice for nominating a third judge to hear this case.

J.N. Takru, J.

55. The following question of law has been referred to me on a difference of opinion between Jagdish Sahai and Beg JJ. as to the answer to be given to it.

" Whether, on the facts and in the circumstances of the case, registration was rightly refused to the firm on the ground that it violated the provisions of Section 4 of the Indian Companies Act, 1913 ?"

56. The brief facts necessary for the appreciation of the aforesaid question are these : The assessee-firm is a partnership concern doing business under the name and style of Messrs. Agarwal and Co. It was originally constituted in 1934, but as some of its members died from time to time, new partnership deeds were executed and the one with which we are concerned was entered into on the 7th of July, 1950, ostensibly between 18 persons. The assessee-firm applied for registration u/s 26A of the Income Tax Act in respect of the assessment years 1952-53, 1953-54 and 1954-55. The Income Tax Officer refused registration for all these years on the ground that, as the assessee-firm consisted of more than 20 persons, it was invalid u/s 4 of the Indian Companies Act and hence could not

be registered. The assessee-firm appealed unsuccessfully to the Income Tax Appellate Tribunal, but succeeded in getting the latter to make a reference to this court u/s 66(1) of the Income Tax Act on the question of law referred to above. The findings of the Tribunal, on the basis of which the aforesaid question has to be answered, are as follows :

(1) that the number of partners, as mentioned in the partnership deed in question, was 18.

(2) that it is common ground that most, if not all the parties, were kartas and represented their respective families in the partnership, and

(3) that the total number of persons including the members of the aforesaid joint families was more than 20.

57. As the answer to the question depends primarily upon the interpretation of Section 4 of the Indian Companies Act, 1913, it is necessary to quote the relevant parts of it at this very stage. Thus stated, the section reads as follows :

"4. (1).....

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament of the United Kingdom or some other Indian Law or Royal Charter or Letters Patent.

(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded....."

58. Sri Jagdish Swarup, the learned counsel for the assessee-firm, conceded as I thought he was bound to do that if the partnership in question was invalid u/s 4(2) and (3) of the Indian Companies Act, the Income Tax Officer would be justified in refusing to register it u/s 26A of the Income Tax Act. He, however, urged a three-fold contention in favour of the assessee-firm. His first contention was that as a partnership between two joint families was unknown to law, the latter part of Section 4(3) was liable to be ignored as a superfluous provision which the legislature enacted either in ignorance or disregard of the real state of law. His second contention was that as, in any event, two joint families could enter into a partnership only through their kartas, the other adult members of those families would not become partners in it and hence their numbers could not be taken into account in computing the total strength of the partnership. His third contention, which was based more on practical than legal ground, was that if the adult members were also to be regarded as partners of the partnership formed between two joint families then such a partnership could never be registered u/s 26A of the Income Tax Act and the Rules framed thereunder, as

the number of adult members in a joint family being fluctuating and their shares being unpredictable so long as the family remained joint, no valid application for registration could be presented by such a partnership. After hearing the learned counsel for the parties, I am of the opinion that none of these contentions is sound. I shall, therefore, proceed to record my reasons for coming to the conclusion beginning with the second and the third contentions.

59. Now, the questions whether joint families can enter into partnerships with individuals or each other, and if so, whether the members composing them have any legal status vis-a-vis those partnerships have been the subject-matter of decision both by the Judicial Committee of the Privy Council and the Supreme Court. The leading case is that of AIR 1934 192 (Privy Council) in which the Judicial Committee was called upon to consider the questions, (1) whether Virappa Pillai, who was the karta of a joint Hindu family, had entered into the partnership in question on his own account or as the karta of the joint Hindu family, and if the latter, (2) whether the result of his joining the partnership was to make the other members of the joint family also, partners in the partnership. Their lordships observed that the law on these questions was correctly stated in Mayne's Hindu Law, edition 9, at page 398, as follows :

" Where a managing member of a joint family enters into a partnership with a stranger the other members of the family do not ipso facto become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case the family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger ; the partnership will be governed by the Act."

60. The aforesaid view was also taken by the Supreme Court in *Firm of Bhagat Ram Mohanlal Vs. The Commissioner of Excess Profits Tax, Madhya Pradesh, Nagpur and Another, The Commissioner of Income Tax, Bombay City, Bombay Vs. Nandlal Gandlal*, and last of all in *Bajrang Lal Tantai and Ors. v. Smt. Gomti Devi and Ors.*. In the last case the Supreme Court observed thus :

" It is true that when a karta enters into a partnership contract he is merely one of the persons constituting the total number of partners. Behind his back there may be a joint Hindu family or he may be acting in his personal capacity ; but as partnership arises only from contract, in either case it is only the member who makes the contract of partnership with strangers who can be considered to be a partner. Likewise, where the kartas of two joint Hindu families enter into partnership the other members of the joint families do not ipso facto become partners. "

61. Thus the latest decision of the Supreme Court makes ;it abundantly clear that two or more joint families can enter into a partnership through their kartas and in such a partnership the other members of the joint family do not ipso facto become partners. In view of these authorities, and particularly that of *Bajranglal*

Tantai it is too late in the day to contend that a partnership between two joint families is not possible in law, though it is true that under those authorities, only the kartas of the joint families are entitled to be taken into account while computing the number of partners constituting such a partnership.

62. The next question falling for consideration is whether Section 4(3) of the Companies Act has made any difference to this legal position. Section 4(3) has been quoted earlier, and on its plain terms, it is difficult to see how it can be held not to have done so, at least to the extent indicated therein. As stated earlier, the authorities cited above clearly lay down that when two joint families enter into a partnership through their kartas, the other members of those joint families do not ipso facto become partners in it, from which it follows that their numbers cannot be taken into consideration when computing the number of the partners of such a partnership. But Section 4(3) enacts that for the purpose of ascertaining whether a partnership requires registration under the Indian Companies Act, all the adult members of the joint families constituting it would have to be reckoned as partners thereof. This sub-section therefore makes a clear departure from the accepted position regarding the members of the joint families, other than their kartas, qua the partnership entered into between their joint families. The question which next presents itself for determination is whether there is anything in law or principle which makes such a departure impossible. As far as I am aware there is nothing which can be held to do so, nor was Sri Jagdish Swarup able to bring anything to that effect to my notice. The result, therefore, is that Section 4(3) must be held to have created an artificial body of persons, who are to be regarded, in a loose sense, as partners for the limited purpose indicated in that section, i.e., for the purpose of calculating the total strength of the partnership constituted of two or more joint families. That section, however, does not profess to confer on such adult members the legal status of partners qua the partnership concerned, and for that, as also for all other purposes, those partnerships remain subject to the Indian Partnership Act and the law as laid down in the authorities cited above. Thus interpreted Section 4(3) presents no difficulty in the way of partnership constituted of two or more joint families, getting itself registered u/s 26A of the Indian Income Tax Act, and an application which is signed only by the kartas and which specifies their shares only, i.e., the shares of the joint families represented by them only, cannot be refused registration under that section for want of the signatures, and the details of the shares, of all the adult members of those joint families. Thus, the second and third contentions of Sri Jagdish Swarup have no force and are rejected.

63. This leaves us with the first contention only. That contention, however, does not need any consideration as it has become redundant in view of the opinion expressed by me on the last two contentions of Sri Jagdish Swarup.

64. Sri Jagdish Swarup also sought to argue that as in the opening part of Section 4(3), the joint family referred to was a joint family which carried on joint family trade or business, the partnership referred to in the latter part of that

section should be confined to partnerships of two or more joint families of the kind mentioned in the earlier part, so that if either of them was not a joint family carrying on joint family trade or business, the section would have no application to it. This argument is, however, not open to Sri Jagdish Swarup, (1) because it assumes that the joint families involved in the present partnership did not carry on joint family trade or business, and (2) because that question does not arise out of the statement of case referred to this court.

65. Sri Ashek Gupta, appearing as an intervener before me, contended that as in law the Income Tax Officer could determine the validity of the partnership in question, on the basis of the provisions of the Income Tax Act and the Partnership Act only, he was in error in judging its validity in the light of the provisions of the Indian Companies Act. This contention is so obviously untenable that I would not have made reference to it but for the fact that reliance for it was placed upon the following passage in the Supreme Court decision in *Ravula Subba Rao and Another Vs. The Commissioner of Income Tax, Madras*, :

"Thus, registration confers on the partners a benefit to which they would not have been entitled but for Section 26A, and such a right being a creature of the statute, can be claimed only in accordance with the statute which confers it, and a person who seeks relief u/s 26A must bring himself strictly within its terms before he can claim the benefit of it. In other words, the right is regulated solely by the terms of the statute, and it would be repugnant to the character of such a right to add to those terms by reference to other laws. The statute must be construed as exhaustive in regard to the conditions under which it can be claimed."

66. The aforesaid observation was made in a case in which a duly authorised agent of the partners had signed the application for the registration of the partnership firm on behalf of the principals and as under the relevant rule framed under the Income Tax Act only an application signed by the partners can be entertained, the question arose as to whether the rule of common law which allows a person to act through a duly authorised agent could be invoked to validate the application. It was in this connection that the Supreme Court after observing, as follows :

"The Indian Income Tax Act is a self-contained code exhaustive of the matters dealt with therein, and its provisions show an intention to depart from the common rule *qui facit per alium facit per se*. Its intention again is that a firm should be given the benefit of Section 23(5)(a), only if it is registered u/s 26A in accordance with the conditions laid down in that section and the Rules framed thereunder. And as the word "personally" in Rule 6 requires the application to be signed by the partners in person, the signature by an agent on his behalf is "invalid".

67. made the observation relied upon by Sri Gupta. It will therefore be seen that the passage relied upon by Sri Gupta does not even remotely purport to support

his contention.

68. Thus, for the reasons stated above, I am of the opinion that as the number of persons constituting the partnership in question exceeds 20, in all the three years with which we are concerned in this reference, the Income Tax Officer was right in treating it as invalid u/s 4(2) read with Section 4(3) of the Indian Companies Act, and in refusing registration to it u/s 26A of the Income Tax Act, I would, therefore, in agreement with Jagdish Sahai, J., answer the question referred to this court in the affirmative.

69. Let the papers of this case be returned to the Bench concerned with the answer proposed above.

BY THE COURT

70. The question is answered in the affirmative. The assessee shall pay the costs of the department which we assess at Rs. 400.