

(1954) 02 PAT CK 0008

In the Patna High Court

Case No : Misc. J.C. No's. 147 and 148 of 1951

Bhimraj Bansidhar

APPELLANT

Vs

Commr. of Income Tax

RESPONDENT

Date of Decision : 22-02-1954

Acts Referred:

Income Tax Act, 1961 — Section 26A, 66(2)

Citation : AIR 1955 Patna 172 : (1954) 26 ITR 185

Hon'ble Judges : Ramaswami, J;Ahmad, J

Bench : Division Bench

Advocate : S.N. Dutta and S.K. Mazumdar, for the Appellant; R.J. Bahadur, for the Respondent

Judgement

1. In this case Messrs. Bhimraj Bansidhar carried on wholesale business in cloth and also owned house property in the town of Ranchi. The Hindu undivided, family carried on business till 29-6-1946 on which date the books of the business were closed, the accounts were taken and the net assets were divided among all the members of the Hindu undivided family, namely, Bhimraj (father), Janki Devi (mother), and five sons Atma Ram, Chiranjilal Sawarmal, Prabhu Dayal and Jagdish.

2. On 30-6-1946 a new business-under the same name of Bhimraj Bansidhar was started in the first instance with the four major sons as partners of the firm. A deed of partnership was executed by the four sons, Chiranjilal, Atma Ram, Sawarmal and Parbhu Dayal on 3-9-1946, indicating therein that the partnership was formed with retrospective effect from 30-6-1946. This agreement was varied by a second deed of partnership dated 30-10-1946, by which the benefits of the partnership were extended to the minor son Jagdish. For the assessment year 1948-49, the Hindu undivided family filed a return showing an income of Rs. 2612/- and odd. It was claimed by Bansidhar, who filed the return as the karta, that the cloth business no longer belonged to the joint family but belonged to a partnership consisting of the five sons. The accounting year for which the return

was filed was the Rathjatra year 2003-2004, which corresponds to 30-6-1946 to 19-6-1947.

An application for registration of the new firm signed by the four major sons and by the father acting for the minor son was also made to the Income Tax Officer who refused to register the firm on the ground that there had been no effective transfer of assets from the Hindu undivided family to the new partnership, and in any case the new partnership was not a genuine partnership and the ownership of the cloth business continued to remain incharge of the Hindu undivided family. The Income Tax Officer, therefore, rejected the application made by the partners for registration of the firm and at the same time increased the quantum of assessment upon the Hindu undivided family to a sum of Rs. 37,292.

An appeal was taken from the order of the Income Tax Officer to the Appellate Assistant Commissioner who dismissed the appeal and affirmed the decision of the Income Tax Officer on the ground that there was no valid transfer of the assets from the Hindu undivided family to the new partnership. The Hindu undivided, family through its karta Bansidhar and the partners of the newly constituted partnership preferred appeals before the Income Tax Appellate Tribunal but these appeals were dismissed with slight modification and the decision of the Appellate Assistant Commissioner was affirmed as regards the quantum of assessment upon the Hindu undivided family and as regards the refusal to register the partnership u/s 26A, Income Tax Act.

3. At the instance of the High Court the Income Tax Appellate Tribunal has referred the following question of law u/s 66(2), Income Tax Act:

"On the facts and circumstances found, did the entries in the books of account dated 29-6-1946, and the deeds of partnership executed on 3-9-1946 and 30-10-1946, constitute in law a disruption of the joint family status in respect of business and bring into existence a partnership firm entitled to registration u/s 26A, Income Tax Act, and was it open to the Income Tax authorities to come to a contrary decision."

The contention on behalf of the assessee is that there was no material before the Income Tax Appellate Tribunal for reaching the conclusion that there was no disruption of joint family status in respect of the business of cloth and there was no partnership firm constituted between the five sons of Bansidhar which was entitled to registration u/s 26A, Income Tax Act.

4. Mr. Dutt conceded that the question involved is primarily a question of fact but argued that since there is no material in this case to support the finding of the Appellate Tribunal the question would become a question of law. Mr. Dutt pointed out that none of the reasons given by the Appellate Tribunal has any proximate bearing on the question whether the partnership was actually constituted in the accounting year. On behalf of the assessee the two documents of partnership dated 3-9-1946, and 30-10-1946 were produced in proof of the fact that the alleged partnership was formed. These documents are registered documents and

the contention of Mr. Dutt is that there is no valid reason given by the Appellate Tribunal for holding that the partnership was fictitious transaction. Counsel also referred to the account books of the assessee dated 29-6-1946 and said that the books of account showed that on 29-6-1946 there was an accounting of the assets and liabilities and the business was divided into seven shares and personal accounts were opened for the seven family members and a sum of Rs. 33756/- was credited to the account of each of the seven members.

The Appellate Tribunal has said that the book balances were simply brought down from the old folios to the new folios and, therefore, some suspicion must be attached to the transaction. There is no point in this observation for the only method by which a business can be divided as a going concern is by dividing the book balances in the names of persons to whom the shares of business have been allotted. A partition may be brought about by mere specification of the shares in the accounts and making entries therein to show that business is held in severally or in specified shares; it is not necessary that there should be physical division of the business. That is the view taken by the Madras High Court in -- *Jakka Devayya and Sons, Tenali Vs. Commissioner of Income Tax, Madras*, and by the Patna High Court in -- *R. B. BANSIDHAR DHANDHANIA AND ANOTHER Vs. COMMISSIONER OF Income Tax, BIHAR AND ORISSA.*, . The truth is that a business as a going concern cannot be divided into parts in the same manner as a house or a block of land and the partition of a business is only possible by making entries in the books of account.

The next reason which the Tribunal has given is that there was no formal transfer of assets from the Hindu undivided family to the newly constituted partnership. The Appellate Assistant Commissioner thought that a registered document was necessary for transfer of the assets of the cloth business from the Hindu undivided family to the new partnership and in the absence of such a registered document, there was no effectual transfer of the business from the ownership of the family to the ownership of the firm. This point also appears to have influenced the mind of the Appellate Tribunal though it is not expressly referred to.

5. In our opinion, both the Appellate Assistant Commissioner and the Appellate Tribunal approached the case from a wrong legal standpoint. It is a well-settled proposition that for an agreement to partition the assets of the Hindu family no document is necessary and further Section 25-A, Income Tax Act does not - prohibit members of an undivided Hindu family from entering into a partnership in respect of a portion of the joint property which they have partitioned among themselves. That is the new law laid down by the Judicial Committee in -- *AIR 1942 57 (Privy Council)* . The facts of the present case are closely parallel to the case referred to. The joint family was not completely disrupted but its entity continued to exist for the assessment year 1948-49. The case of the assessee is that there was only partial partition of the assets of the Hindu undivided family and the cloth business was divided between the seven coparceners five of whom

constituted themselves into a partnership and took over the shares of the father and the mother who did not join the partnership. It is not legally necessary that a document should be executed in such a case.

The next reason given by the Appellate Tribunal is that the cash in hand on 29-6-1946 to the extent of Rs. 763-14-3 was brought into account only on 11-3-1947. This appears to be erroneous for the balance sheet as on 29-6-1946 printed at pages 36-37 shows that the cash in hand Rs. 763-14-3 was brought into account on that date.

The account book of the partnership printed at pages 46-47 indicates that the net asset after inclusion of the cash balance of Rs. 763-14-3 was Rs. 2,75,587/3/- and out of this amount the shares of various partners were ascertained to be Rs. 33,757-12-3 each and the account of each of the partners was credited with that amount. The next reason given by the Appellate Tribunal is that

"the bank account was reported to have been operated upon even after the alleged change on 30-6-1946 by the same old persons, namely, the father and all the four major sons of the Hindu undivided family as before."

The Tribunal, however, noticed that in February 1947 the Bank was notified about the change in the Constitution of the business and the father was excluded from operating on the Bank account. But there appears to be no material in support of the reasoning of the Tribunal that the bank account was operated upon by the father after the alleged change on 30-6-1946. This is apparent from the fact that in the two letters written by the Bengal Central Bank and the Bharat Bank (see pages 38-39 of the paper-book) there is no statement that the father operated the respective bank accounts even after the partnership was constituted on 29-6-1946.

6. The Income Tax Appellate Tribunal have also stated that

"the book debts have not been properly assigned by notice to the debtors, nor the Victory Bonds transferred by endorsement and delivery nor the electricity deposit by proper application to the electric Company for transfer."

As regards book debts, we do not think that any assignment to the partnership is required as a matter of law. The question of endorsement of the Victory Bonds could only arise at the time of payment and no adverse inference would, therefore, be properly drawn against the assessee on account of this fact. As regards electricity deposit also no adverse inference could be drawn merely because an application was not made to the electric company soon after 30-6-1946.

A further reason has been given by the Income Tax Appellate Tribunal with respect to the bank overdraft. The Tribunal states:

"Regarding the liabilities the Bank overdraft is presumably on a document,

perhaps a promissory note executed by Bhimraj Bansidhar as karta of the family which has not been withdrawn in favour of a new document from the alleged new partner."

The reason given by the Appellate Tribunal appears to be speculative and no inference can be drawn against the existence of the partnership on account of this particular reason.

7. Lastly the point is taken by the Appellate Tribunal that there was no notice given of the formation of the partnership to the various creditors. But the Tribunal has referred to the fact that the firm of Bhimraj Bansidhar of Calcutta was the largest creditor for a sum of Rs. 1,08,230/- and odd and Chandi Prosad the son of Nagarmal, the karta of that firm, was one of the attesting witnesses to the partnership deed. Not much importance therefore, should be attached to the circumstance that notice of formation of the partnership was not given formally to the various creditors by the Hindu undivided family, In this connection it should not be overlooked that the partnership was registered by the documents dated 3-9-1946 and 30-10-1946, and the registration itself is tantamount in law to notice to the persons concerned.

8. The result of this examination is that there is no material to support the finding of the Income-tax Appellate Tribunal that there was no disruption of joint family status on 29-6-1946 in respect of cloth business and that no partnership was constituted on 30-6-1946 of the five sons of Bansidhar in the manner alleged on their behalf. We hold, on the contrary, that the entries of books of account dated 29-6-1946 and the two deeds of partnership executed on 3-9-1946, and 30-10-1946, constitute sufficient materials in law for a finding as to the disruption of joint family status with respect to the cloth business and for bringing into existence a partnership firm. We are further of opinion that this partnership firm is entitled to registration u/s 2GA, income tax Act, and it was not open to the Income Tax Authorities to come to a contrary decision. We think that the question referred for the opinion of the High Court must be answered in favour of the assessee in both. M. J. C. 147 of 1951 and M. J. C. 148 of 1951. The Income Tax Department must pay the cost of this reference and we assess the hearing fee at Rs. 250/- which is the consolidated fee for both the cases.