
(1981) 01 CAL CK 0022

In the Calcutta High Court

Case No : Income-tax Reference No. 536 of 1973

Commissioner of Income Tax

APPELLANT

Vs

Associate Industrial Distributors

RESPONDENT

Date of Decision : 14-01-1981

Acts Referred:

Income Tax Act, 1922 — Section 26A
Income Tax Act, 1961 — Section 184
Income Tax Rules, 1962 — Rule 22
Partnership Act, 1932 — Section 30, 4

Citation : (1981) 22 CTR 281 : (1982) 138 ITR 304 : (1981) 6 TAXMAN 368

Hon'ble Judges : Sudhindra Mohan Guha, J;Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : B.L. Pal and P. Majumdar, for the Appellant;R.N. Bajoria and D.K. Dhar, for the Respondent

Judgement

Sudhindra Mohan Guha, J.—In this reference u/s 256(1) of the I.T. Act, 1961, at the instance of the Commissioner of Income Tax, West Bengal, Calcutta, the following question has been referred to this court :

"Whether, on the facts and in the circumstances of the case, and on a proper construction of the deed dated 6th September, 1963, the Tribunal was correct in law in holding that a genuine firm had come into existence and the same was entitled to registration ?"

2. This reference relates to the assessment year 1964-65. The assessee claimed that it was a registered firm constituted under an instrument of partnership deed dated 6th September, 1963, but was assessed as an association of persons. According to the instrument of partnership dated 6th September, 1963, there were ten partners including a private limited company, M/s. Charat Ram Shri Dhar Private Ltd. Besides, ten minors were admitted to the benefits of the partnership. The ITO took objection to the clause, in the instrument of partnership deed, providing for the contribution of capital or in default the

liability to pay interest by the minors who were admitted to the benefits of the partnership. According to the ITO, the terms and conditions for the minors being admitted to the benefits of the partnership had not been assented to by the guardians in the instrument of partnership itself or by separate agreement at the time the partnership came into existence and these made the partnership invalid. Another objection of the ITO was that 49.80% of the profits were for the minors who had been admitted to the benefits of the partnership even though none of the guardians of the minors had contributed any capital on behalf of the minors and the minors were also incapable of doing any work in the conduct of the business of the firm. He, therefore, also held that the firm was not genuine. The assessment was, therefore, made in the status of an association of persons and the assessee's claim for registration was refused.

3. Against this action of the ITO, two appeals were filed before the AAC, one against the refusal to grant registration and another against the assessment made in the status of an association of persons. On the basis of the affidavits filed by the guardians of the minors, the AAC came to the conclusion that the guardians were fully aware of the terms and conditions under which the minors were admitted to the benefits of the partnership and they had assented to these terms and conditions. He further held that the mere fact that there was no contribution of capital on behalf of the minors, who were admitted to the benefits of the partnership, did not militate against the genuineness of the firm or the genuineness of the minors being admitted to the benefits of partnership. He, therefore, directed the ITO to grant registration to the firm and also directed that the assessment should be made in the status of a registered firm.

4. Being aggrieved by these orders, the department came up in appeal before the Appellate Tribunal. The Appellate Tribunal was of the opinion that the partnership would not be held to be invalid simply because there were terms and conditions for the admission of the minors to the benefits of the partnership and it was open to the guardians of the minors admitted to the benefits of the partnership to agree to the terms and conditions on which the minors were admitted to the benefits of partnership. The Appellate Tribunal also found that there was no actual contribution of capital on behalf of the minors, who were admitted to the benefits of the partnership, and no necessity arose to ask for such capital contribution. Failure to make contribution of capital on behalf of the minors, in the opinion of the Tribunal, did not make the firm not genuine and there was nothing illegal in the arrangement. Thus, the orders of the AAC directing the ITO to grant registration and amend the status in which the assessment was made from "association of persons" to "registered firm" were upheld.

5. Before the Tribunal several points were raised on behalf of the department. But Mr. Balai Pal, learned advocate for the Revenue, presses the only point before us, viz., that the deed of partnership having not been signed by the guardians and having not contained any evidence as to the acceptance of the

benefits by the guardians on behalf of the minors, was invalid and could not be registered. The other points urged before the Tribunal were not pressed before us. It may be pointed out in this connection that the Tribunal was of the view that the minors were not and could not be partners and as such in such circumstances if the guardians of the minors had not signed the deed that by itself did not invalidate the deed. There was no dispute as to the fact that the guardians had signed the statement of accounts and had received the ad-interim shares of profits attributable to the shares of the minors. Such conduct, on the part of the (guardians of the) minors, according to the Tribunal, was sufficient evidence to show that they had assented to the terms on which the minors had been admitted to the benefits of the partnership. Before the AAC the affidavits of these guardians, each one expressly declaring that he was fully aware of the provisions of the deed of partnership and had assented to the same as guardians of the minors and in full awareness of the same he had accepted the same partnership on behalf of the minors, had been filed. In spite of all these facts, it is contended by Mr. Pal that some evidence of such acceptance by the guardians must be incorporated in the deed of partnership itself.

6. At the outset he draws our attention to Section 184 of the I.T. Act, 1961, which deals with "Application for registration". Section 184(1) reads as follows :

"184. Application for registration.--(1) An application for registration of a firm for the purpose of this Act may be made to the Income Tax Officer on behalf of any firm if-

(i) the partnership is evidenced by an instrument ; and

(ii) the individual shares of the partners are specified in that instrument."

7. Rule 22 of the I.T. Rules, 1962, also deals with "Application for registration of a firm". Application for registration of a firm for the purposes of the I.T. Act, 1961, has been given in Form No. 11 of the I.T. Rules, 1962. Paragraph 3 of this Form deals with a declaration that amongst others none of the partners was a benamidar of any other partner to whom he is not related as spouse or minor child. Thus, it clearly indicates that the application for registration cannot be made by a minor.

8. In this connection, we may refer to the corresponding section, viz., Section 26A of the Indian I.T. Act, 1922. The section may be quoted here :

"26A. Procedure in registration of firms.--(1) Application may be made to the Income Tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to Income Tax or super tax"

9. It may be noticed that under this section the application could be made on behalf of a firm constituted under an instrument of partnership, whereas u/s 184 it requires that an application for registration may be made on behalf of a firm if

the partnership is evidenced by an instrument and the individual shares of the partners are specified in that instrument. What it requires under this section is only that there must be an evidence of the partnership by an instrument. This is the main criterion for the registration of a firm.

10. Even under the provisions of the Indian I.T. Act, there was no provision that a complete instrument only was valid for registration, that is, an instrument not requiring a supplementation by other evidence but solely operating and containing in itself the complete agreement constituting the partnership. A Special Bench of this court in the case of *In Re: Ramlal Murlidhar*, , Chief Justice Rankin, speaking for the court, was of the opinion that a partnership to be valid does not require its terms to be embodied in an instrument.

11. Moreover, a defective instrument may be supplemented by other evidence such as the conduct of the partners to establish and define those terms. But the Indian I.T. Act, 1922, and the Rules framed thereunder made provision for the registration of those firms only that are constituted under instruments of partnership and of no other firms. It is implied, in the opinion of his Lordship, that only a complete instrument was intended to be valid for registration, that is to say, an instrument which did not require supplementation by other evidence, but contained in itself the complete agreement constituting the partnership and by itself solely operated to create a partnership. His Lordship did not mean to say that an instrument of partnership must consist of one document only. In this case (in 5 ITC), had the 4th partner signified in writing his acceptance of the terms of the partnership, the two documents together might have been held to constitute a complete instrument of partnership. But an instrument must consist of a document or documents, and no such acceptance, in writing, by the 4th partner being forthcoming, the so-called instrument of partnership remained an incomplete instrument. It was also observed that there could not be any objection to the proposition that the ITO may have the right to satisfy himself that the transaction evidenced by the instrument was the real thing. But in the opinion of his Lordship if the Commissioner of Income Tax came to the conclusion that before her death Mst. Rajo had assented to this instrument and that when it was put forward for registration, which was put forward by her along with other partners to be registered, it was such a document as may be admitted to registration under the Indian I.T. Act. The Supreme Court also in the case of *R. C. Hitter & Sons v. CIT* , held that the words "constituted under an instrument of partnership" in Section 26A of the Indian I.T. Act, 1922, included not only firms which have been created by an instrument of partnership but also those which had been created by word of mouth and have been subsequently clothed in legal form by reducing the terms and conditions of the partnership to writing. The firms which were created by word of mouth, but the constitution of which had subsequently been reduced to writing, can also, therefore, be registered u/s 26A. In this case, therefore, the Supreme Court went so far as to say that the terms and conditions of the partnership were intended to be created in the formal deed, even though, under the provisions of Section 26A, the words "constituted under

an instrument of partnership" were there.

12. Mr. Balai Pal, learned advocate for the Revenue, in order to show the scope and powers of the guardian refers to the decision of the Supreme Court in the case of Commissioner of Income Tax, Mysore Vs. Shah Mohandas Sadhuram, . In this case, the ITO rejected the application for registration on the ground that the minors were made parties to a contract by the eldest brother acting on their behalf. The minor had actually been debited with a share of the loss. Taking these facts into account, the ITO held that "the partnership is not entitled to the benefit of registration". The AAC, on appeal, upheld the orders of the ITO. On further appeal, the Appellate Tribunal, following the decision of the Madras High Court in Jakka Devayya and Sons, Tenali Vs. Commissioner of Income Tax, Madras, , construed it as having admitted the minors only to the benefits of the partnership. It accordingly held that the assessee was entitled to be registered. Thus, in the opinion of their Lordships, the partnership deed, reasonably construed, only conferred the benefits of the partnership on the two minors and did not make them full partners. The guardian had agreed to certain clauses in order to effectuate the decision of the major members to confer the benefits of the said partnership to the minors. With reference to that decision, Mr. Pal argues that the guardian had also the power to accept the conditions on which the benefits of partnership were being conferred and such power must be evidenced from the terms and conditions of the deed itself. But there is no warrant for such a proposition in the decision referred to above.

13. Mr. R. N. Bajoria, learned advocate for the assessee, in order to support his contention, that it was not necessary for every partner to sign the instrument of partnership and even if the instrument of partnership had been signed by only some of them, if it had been assented to by the others, who had not signed it, and they had joined in putting it forward along with other partners for registration, it would be admissible for registration under the Indian I.T. Act, he refers to the decision of the Bombay High Court in the case of Commissioner of Income Tax Vs. R. Dwarkadas and Co., . He specifically draws our attention to page 289 of the report wherein it is stated as follows :

"It has, however, been held that it is not necessary for every partner to sign an instrument of partnership and that, even though the instrument of partnership has been signed by only some of them, but if it had been assented to by others, who had not signed it and they had joined in putting it forward along with other partners for registration, it was admissible for registration under the Indian Income Tax Act."

14. The Punjab and Haryana High Court had occasion to consider the provisions of Section 26A of the Indian I.T. Act, 1922, in the case of Jagan Nath Pyare Lal Vs. Commissioner of Income Tax, . It was found by their Lordships that there could be, validly in existence, an oral partnership but for the purposes of the I.T. Act it was specifically provided u/s 26A of the Act (of 1922) that there should be a partnership constituted under an instrument of partnership specifying the

individual shares of the partners and the precise enquiry which the ITO had to make under Rule 4 (of the 1922 Rules) was whether there was or was not a firm in existence constituted as shown in the instrument of partnership. It is not the requirement in the above referred provision that the firm should come into existence under an instrument of partnership but on the other hand the enquiry to be made is whether a firm is or was in existence, as is shown in the instrument of partnership. It is no more in dispute that if there is a genuine firm in existence, even under an oral partnership, and the instrument is reduced to writing subsequently but during the same assessment year, even then the firm is entitled to registration.

15. In the case of *Pratapmal Luxmichand Vs. Commissioner of Income Tax, Madhya Pradesh*, , the Supreme Court also held that it was not necessary that a partnership agreement should be signed by all the partners and if the agreement had not been signed by one of the partners, but that partner had assented to the agreement and put it forward along with other partners for registration, the agreement would be admissible for registration.

16. It may be noticed here that the Allahabad High Court in *Addl. CIT v. United Commercial Traders* [1978] 112 ITR 953 was of the view that the mere fact that the minor did not sign the partnership deed would not disentitle the firm from getting registration. The Special Bench decision of the Calcutta High Court in the case of *In Re: Ramlal Murlidhar*, was followed. In the light of these decisions we would like to consider the decision of the Full Bench of the Allahabad High Court in the case of *The Addl. Commissioner of Income Tax Vs. Uttam Kumar Pramod Kumar*, . In this case, a deed of partnership showed that the partnership purported to consist of four partners, two of whom were minors. The minors were treated on a par with the majors. The fact that they were minors was not even mentioned. They were not only entitled to share the profits but were liable to share losses as well. It was apparent that they had financed the business. The minors did not sign the partnership nor did any one else, acting as their guardian or otherwise, sign the deed on their behalf. On the question whether the firm was entitled to registration it was held that the document in question having made the minors full-fledged partners was invalid. The other defect that no one had signed the document on behalf of the minors was equally fatal to the validity of the document. The firm was, therefore, not entitled to registration. Under the general law of partnership a minor cannot be a full partner liable to share in the losses. He could only be admitted to the benefits of the partnership. In other words, he is only entitled to share in the profits and not in the losses.

17. In this connection, we may refer to the decision of this court in the case of *COMMISSIONER OF Income Tax, WEST BENGAL Vs. KHETAN AND CO.*, . It is held therein that the signature of the minor would not make it a contract binding on the minor and a minor could enter into a valid partnership with others. It is further held that the fact that the minor was represented by his guardian would not make the agreement valid, as a minor could only be , admitted to the

benefits of a partnership under the law and could not be made a partner even by his guardian.

18. In view of Section 4 and Section 30 of the Partnership Act, a minor cannot be a party to an agreement or contract, but he may be admitted to the benefits of a partnership. In view of the discussions made above and in view of the decisions referred to, with due respect to their Lordships of the Allahabad High Court, we are unable to agree in so far as it held that the document not having been signed on behalf of the minor was fatal to the validity of the document.

19. In the above premises, we answer the question in the affirmative and in favour of the assessee.

20. There will, however, be no order as to costs.

Sabyasachi Mukharji, J.

21. I agree.