

(1968) 02 GAU CK 0002

In the Gauhati High Court

Case No : Income-tax Reference No. 14 of 1966

Commissioner of Income Tax

APPELLANT

Vs

Kedarmall Keshardeo

RESPONDENT

Date of Decision : 20-02-1968

Acts Referred:

Income Tax Act, 1922 — Section 2(6B), 26A, 33B

Income Tax Act, 1961 — Section 297(2)

Partnership Act, 1932 — Section 30, 4

Citation : AIR 1968 Guw 68 : (1969) 73 ITR 150

Hon'ble Judges : C. Sanjeeva Row Nayudu, C.J.; P.K. Goswami, J

Bench : Division Bench

Advocate : G.K. Talukdar, for the Appellant; A.C. Mitra, J.P. Bhattacharjee and S.N. Medhi, for the Respondent

Judgement

Goswami, J.—The following questions of law are referred to us u/s 66(1) of the Income Tax Act, 1922, by the Income Tax Appellate Tribunal, "A" Bench, Calcutta :

" (i) Whether, on the facts and in the circumstances of the case and on a correct interpretation of the partnership deed dated February 25, 1953, the Tribunal was justified in law in holding :

(a) that Smt. Tribeni Debi was a partner in a representative capacity;

(b) that the minor, Sri Gobindratn Bajaj, was not made a full-fledged partner who had been made liable for losses also;

(c) that Smt. Tribeni Debi was not a partner in a dual capacity and as such the deed of partnership was not invalid;

(d) that Smt. Tribeni Debi and her minor son, Sri Gobindram Bajaj, had not been made partners jointly and that their individual shares were not required to be specified ?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee-firm constituted under the deed of partnership dated February 25, 1953, was entitled to registration and in setting aside the order of the Commissioner u/s 33B of the Indian Income Tax Act, 1922 ?

(iii) Whether, on the facts and in the circumstances of the case, the Commissioner of Income Tax could in law invoke jurisdiction under the provisions of Section 33B of the Indian Income Tax Act, 1922, after the aforesaid Act had been repealed by Section 297 of the Income Tax Act, 1961?"

2. So far as the third question is concerned, the matter is now concluded by a decision of the Supreme Court in the case of *Kalawati Devi Harlalka v. Commissioner of Income Tax* [1967] 66 ITR 680 (S.C.).

3. It has been held by their Lordships that the Commissioner had jurisdiction to issue the notices u/s 33B of the Act of 1922, in view of Section 297(2) of the Act of 1961, and paragraph 4 of the Income Tax (Removal of Difficulties) Order, 1962. It has been further held that Section 297(2)(a) of the Income Tax Act, 1961, includes within its scope a proceeding u/s 33B of the Indian Income Tax Act, 1922. The answer to this question, therefore, must be in the affirmative in that the Commissioner had jurisdiction u/s 33B of the Indian Income Tax Act, 1922, to dispose of the matter even after the repeal of the said Act by Section 297(1) of the Income Tax Act, 1961.

4. The first two questions turn on the interpretation of the deed of partnership dated February 25, 1953. It appears that this deed was between Baijnath Bajaj referred to as the 1st partner of the 1st part, Purga Dutt Bajaj referred to as the 2nd partner of the 2nd part, Keshardeo Bajaj referred to as the 3rd partner of the 3rd part and Smt. Tribeni Debi, widow of Banarshilal Bajaj, for herself and as natural guardian of her minor son, Gobindram Bajaj, referred to as the 4th partner of the 4th part. Clause 4 of the partnership deed may be usefully quoted:

" 4. That each of the first partner, second partner, third partner and fourth partner shall be entitled to four annas share in the profits of the partnership and the said partners shall similarly in like proportion be liable for losses including losses of capital, if any. "

5. The deed was signed by the partners and Tribeni Debi, the fourth partner, signed for self and on behalf of her minor son, Gobindram.

6. The simple point for consideration in this reference is whether on the terms of this partnership deed it can be safely concluded that the partners described therein are only four, or four plus one, viz., the minor son. If, however, on the terms of this document it is found that the minor Gobindram Bajaj has also been included in this partnership, the deed suffers from the absence of specific share of the minor, Gobindram Bajaj, therein. It may then be possible to argue that the minor has been made also liable for loss as it is agreed in the document that all

the partners will be liable for losses including the losses of capital if any.

7. It may be mentioned here that there was an earlier partnership deed executed on December 30, 1949, between Baijnath Bajaj, Durga Dutt Bajaj, Banarshilal Bajaj and Keshardeo Bajaj and clause 15 of that document provided that in case of death of any of the partners, there will be no dissolution of the firm and in the event of any death of any of the partners, the heirs or legal representatives of the deceased partner shall have the option for joining in the partnership. It is in pursuance of this clause 15 of the earlier deed that on the death of Banarshilal Bajaj, his widow, Tribeni Debi, joined as the fourth partner of the firm. The fact that she has signed the document for self and on behalf of her only minor son, Gobindram Bajaj, would not affect her individual position in the partnership. She has joined the partnership as the fourth partner and she may be accountable to the minor for the profits she has earned out of the partnership. This automatically does not make the minor, Gobindram Bajaj, as a fifth partner in the partnership.

8. Section 4 of the Indian Partnership Act defines " partnership " as a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually " partners " and collectively "a firm". u/s 5 of the same Act, the relation of partnership arises from contract and not from status. Section 30 of the said Act may also be noticed ;

"30, (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.. . . "

9. From the above provisions it will be clear that the document which is relied on as creating the partnership must show that the persons who are parties to the document have clearly signified their assent and entered into the agreement. It does not matter if one of the partners while entering into the partnership acts on behalf of some others, for example, as karta of a joint Hindu undivided family, or as guardian of some minors. The fact that such a person discloses her individual position, as in the present case, showing that Tribeni Debi is not only entering into the agreement of partnership on her own behalf as the widow of Banarshilal Bajaj but also as a natural guardian of her only minor son, Gobindram, would not make the latter automatically a partner in the absence of clear recitals in that behalf in the document. By reading the, document as a whole, it is clear that Tribeni Debi was entering into an agreement of partnership and is individually making the contract and only expressing her personal obligations to the minor

under the personal law. The deed clearly shows that there are four partners who are named and by no stretch of imagination can it be held that the minor has also been admitted to the partnership. True, Tribeni Debi as the natural guardian will have her obligations to the minor but those obligations by themselves would not change her individual character with reference to the partnership created by the instrument.

10. The learned senior Government Advocate appearing for the department draws our attention to a decision of the Supreme Court in the case of Commissioner of Income Tax, Bombay Vs. Dwarkadas Khetan and Co., where the following passage occurs:

" The definition of " partner " in Section 2(6B) is designed to confer equal benefits upon the minor by treating him as a partner; but it does not render a minor a competent and full partner. For that purpose, the law of partnership must be considered, apart from the definition in the Income Tax Act. Section 30 of the Partnership Act clearly lays down that a minor cannot become a partner, though with the consent of the adult partners, he may be admitted to the benefits of partnership. Any document which goes beyond this section cannot be regarded as valid for the purpose of registration. Registration can only be granted of a document between persons who are parties to it and on the covenants set out in it. If the Income Tax authorities register the partnership as between the adults only contrary to the terms of the document, in substance a new contract is made out. It is not open to the Income Tax authorities to register a document which is different from the one actually executed and asked to be registered."

11. This decision does not come to the aid of the learned counsel inasmuch as the instrument in the present case clearly shows that the document is between the four persons mentioned therein. As has been stated above, there is no basis for holding on the recitals of the document that the minor was also admitted into the partnership, and hence cannot be deemed to be a partner u/s 2(6B) of the Indian Income Tax Act.

12. The learned counsel next draws our attention to the following observations of their Lordships of the Supreme Court in the case of N.T. Patel and Company Vs. Commissioner of Income Tax, Madras,

"Registration u/s 26A of the Act confers a benefit be the partners which the partners would not be entitled to but for Section 26A. The right can be claimed only in accordance with the statute which confers it and a person seeking relief under that section must bring himself strictly within the terms of that section."

13. From this the learned counsel submits that, under the Income Tax Rules, the instrument of partnership must specify the individual shares of the partners and this has not been fulfilled in the instant case as, if the minor had been admitted to the partnership, his share has not at all been specified in the instrument. This argument, however, assumes that the partnership, which has been created under

the instrument, is amongst five persons including the minor. As, however, we have already held that the minor has not been admitted into the partnership under the terms of this deed, there is no breach of any provisions under the Income Tax Act or the Rules, and this decision cannot be of any avail to the department.

14. The learned counsel for the respondent has drawn our attention to a decision of the Supreme Court in the case of Commissioner of Income Tax v. Bagyalakshmi & Co., (1965) 55 ITR 660 (S.C.) which throws considerable light on the controversy raised in this reference. The learned counsel relies on the following passage in the judgment:

" 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 can the other partners 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."

15. Their Lordships held:

" That the firm was entitled to be registered u/s 26A. The shares given to A and B in the partnership deed were correct according to the terms of the partnership deed although A and B were answerable for the profits pertaining to their shares to the divided members of the family. The partition in the family allotting specific shares to its members might have affected the accountability of the two partners to the other members of the family, but did not affect in any way their relationship with the other partners, qua the partnership, or the validity or genuineness of the partnership. Therefore, the Commissioner was wrong in cancelling the registration. "

16. The learned counsel for the respondent has also drawn our attention to another decision of the Supreme Court in the case of Commissioner of Income Tax v. A. Abdul Rahim and Co. [1965] 55 I T.R. 651 (S.C.), and relied on the following passage :

" When a firm makes an application u/s 26A of the Act for registration, the Income Tax Officer can reject the same if he comes to the conclusion that the partnership is not genuine or the instrument of partnership does not specify correctly the individual shares of the partners. But once he comes to the conclusion that the partnership is genuine and a valid one, he cannot refuse

registration on the ground that one of the partners is a benamidar of another. If the partnership is genuine and legal, the share given to the benamidar will be the correct specification of his individual share in the partnership. The beneficial interest in the income pertaining to the share of the said benamidar may have relevance to the matter of assessment, but none in regard to the question of registration.

His benami character does not affect the benamidar's capacity as partner or his relationship with the other members of the partnership. If a partner is only a benamidar for another, it can only mean that he is accountable to the real owner for the profits earned by him from and out of the partnership. Therefore, a benamidar is a mere trustee of the real owner and he has no beneficial interest in the property or the business of the real owner. But, in law, just as in the case of a trustee, he can also enter into a partnership with others.

The benamidar of a partner, qua the other partners, has separate and real existence; he is governed by the terms of the partnership deed; his rights and liabilities are governed by the terms of the contract and by the provisions of the Partnership Act; his liability to third parties for the acts of the partnership is co-equal with that of the other partners; the other partners have no concern with the real owner ; they can only look to him for enforcing their rights or discharging their obligations under the partnership deed. Any internal arrangement between him and another partner is not governed by the terms of the partnership; that arrangement operates only on the profits accruing to the benamidar; it is outside the partnership arrangement."

17. A further reference may also be made to a recent decision of the Supreme Court in the case of Ram Laxman Sugar Mills Vs. Commissioner of Income Tax, Uttar Pradesh and Another, which is also relied on by the learned counsel for the respondent. The following passage may be quoted :

" Held, on an interpretation of the deed, that the intention disclosed by the deed was that L was to be a partner. He was described as manager and he signed the document in that capacity but it was not thereby sought to bring into existence a relationship of partners between his family and the other members described as the second party. The signature of L who signed the documents " for and on behalf of (the family) manager and karta only indicated that he was acting as manager of the family in entering into the partnership agreement. He was not thereby seeking to make the members of the family partners of the firm. The partnership agreement was between L on the one hand and the named persons on the other and the fact that originally L was the karta of the family and that joint family had later ceased to exist by reason of partition did not affect the validity of the partnership or its continuance. L being the contracting party, the application for registration could not be rejected because the other members of the family did not sign the application for renewal of registration of the firm for the year 1950-51. "

18. It is, therefore, firmly established that once the parties entering into the partnership are clearly described in the instrument, there is no scope for further enquiry to find out, by some process of casuistry, if any of the parties has got any obligation to others for the purpose of inducting those others, to whom any of the parties may be accountable, into the arena of partnership and for treating them as partners under the law. We have, therefore, no hesitation in answering the above two questions as follows:

" (i) (a) That the Tribunal was justified in law in holding that Smt. Tribeni Debi was a partner in a representative capacity;

(b) that the minor, Sri Gobindram Bajaj, was not made a full-fledged partner who had been made liable for losses also ;

(c) that Smt. Tribeni Debi was not a partner in a dual capacity and as such the deed of partnership was not invalid; and

(d) that Smt. Tribeni Debi and her minor son, Sri Gobindram Bajaj, had not been made partners jointly and that their individual shares were not required to be specified,

(ii) That the Tribunal was justified in law in holding that the assessee-firm constituted under the deed of partnership dated February 25, 1953, was entitled to registration and in setting aside the order of the Commissioner u/s 33B of the Indian Income Tax Act, 1922. "

19. All the questions are, therefore, answered in the affirmative. We, however, make no order as to costs.