(1993) 03 KL CK 0039

In the High Court Of Kerala

Case No : Income Tax R. No. 23 of 1989

Commissioner of Income Tax APPELLANT

Vs

Palliveedu Traders RESPONDENT

Date of Decision : 01-03-1993

Acts Referred:
Income Tax Act, 1961 — Section 185, 185(1)
Partnership Act, 1932 — Section 4

Citation : (1993) 111 CTR 221 : (1993) 204 ITR 141 : (1995) 82 TAXMAN 462

Hon'ble Judges : K.S. Paripoornan, J;K.P. Balanarayana Marar, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; V.M. Kurien, for additional respondents Nos. 3, 4 and 5, for the Respondent

Judgement

K.P. Balanarayana Marar, J.—In pursuance of the direction of this court in Original Petition No. 714 of 1982, at the instance of the Revenue, the following two questions were referred to this court u/s 256(2) of the Income Tax Act, 1961, for a decision thereon :

"(i) Whether, on the facts and in the circumstances of the case, the assessee is entitled to registration under the Income Tax Act, 1961 ?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal is justified in interfering with the finding of the Income Tax Officer (confirmed by the Appellate Assistant Commissioner) that both Smt. Kadishabi and Smt. Ayishabi were benamidars of Shri Abdullakoya?"

The assessee-firm is constituted by four partners, viz., (i) Sri A.V. Mammed Haji, (ii) Sri M.A. Aboobacker, (iii) Smt. P.M. Kadishabi and (iv) Smt. P.M. Ayishabi. The first two partners had contributed Rs. 25,000 and Rs. 5,000, respectively. The other two partners bad not contributed any amount towards capital. The building wherein the business was conducted by the firm is owned by Smt. Kadishabi. By the partnership deed, all the four partners were entitled to equal shares in the profit and loss of the firm. An application for registration was made in Form No. 11 by the firm. After discussing with the assessee''s authorised representative, the Income Tax Officer refused registration for the reason that the partnership was not a genuine one. On appeal, the Appellate Assistant Commissioner of Income Tax concurred with that order. The assessee carried the matter in second appeal before the Income Tax Appellate Tribunal, Cochin Bench. The Tribunal, by its order dated February 9, 1981, found the partnership firm to be a genuine one and entitled to registration. The Income Tax Officer was directed to allow registration to the firm. The reference application by the Department was rejected by the Tribunal holding that no question of law arises. It was thereafter that the Commissioner of Income Tax moved this court u/s 256(2) of the Income Tax Act, 1961, by Original Petition No. 714 of 1982 and, in pursuance to the order thereon, the two questions aforementioned were referred to this court.

2. Heard counsel on both sides.

3. On hearing counsel and on a reading of the sworn statements of the three partners, viz., A.V. Mammed Haji, Smt. P.M. Kadishabi and Smt. P.M. Ayishabi, the conclusion is inescapable that the Tribunal has committed an error of law in finding the partnership firm to be genuine. The deed of partnership and the sworn statements of the abovementioned partners were not properly considered by the Tribunal in order to ascertain whether the partnership was a genuine one. The Tribunal has, therefore, committed a grave error in interfering with the concurrent finding reached by the Income Tax Officer and the Appellate Assistant Commissioner.

4. The partnership was constituted by four partners of whom only two had contributed towards capital. The third partner, Smt. P.M. Kadishabi, did not make any contribution but the building where the partnership firm conducted business belongs to her. Though the assessment order mentions about the capital contributed by the first two partners, viz., Mammed Haji and Aboobacker, as Rs. 25,000 and Rs. 5,000, respectively, the partnership deed, annexure-D, does not make mention of these amounts whereas Clause (5) of the document states that the capital of the firm shall be as disclosed by the books of account of the firm. It is the admitted case of the parties that partners 3 and 4, viz., Smt. Kadishabi and Smt. Ayishabi, had not contributed any amount towards capital. The net profit or loss of the firm is to be divided or borne among the partners equally. The Income Tax Officer found the partnership to be not genuine mainly on the basis of the sworn statements given by Smt. Kadishabi and Smt. Ayishabi. In her statement, annexure-E, Smt. Kadishabi stated that she had no business in her own name or otherwise and that she does not have any source of income other than the amount given by her husband. She looks after the household affairs and has no source of income of her own. The same is the sworn statement of the other partner, Smt. Ayishabi. She also stated that she is only a housewife and has no source of income of her own. She has no business of her own. All her matters are looked after by her husband. It would appear from the sworn

statement of the first partner, Mammed Haji, that the entire transaction was made out by the husband of Smt. Kadishabi, viz., Abdulla Koya. He stated that Smt. Kadishabi and Smt. Ayishabi were taken as partners as per the directions of Abdulla Koya and they wanted 50 per cent share in the profits of the firm. According to him, Abdulla Koya was looking after the affairs even though the two ladies were taken in as partners. The partnership agreement was also got written by Abdulla Koya. In the face of these three statements, the only conclusion possible is that the two ladies, viz., Smt. Kadishabi and Smt. Ayishabi, have nothing to do with the partnership business and that they were only name-lenders for Abdulla Koya, husband of Smt. Kadishabi. From the statements of Smt. Kadishabi and Smt. Ayishabi, it is clear that a partnership as contemplated u/s 4 of the Indian Partnership Act has not been constituted.

5. The definition of partnership in Section 4 of the Indian Partnership Act contains three elements, viz., (i) there must be an agreement entered into by all the partners concerned, (ii) the agreement must be to share the profits of the business and (iii) the business must be carried on by all or any of the partners concerned acting for all. The third element is absent in the present case since the business was not carried on by all the partners, partners 3 and 4 having stated that they have no business or any interest in any business. It may be contended that partners 3 and 4 are sleeping partners but even then the business must be one carried on by the others acting for the sleeping partners also. Since Smt. Kadishabi and Smt. Ayishabi have nothing to do with the business as stated by them, a partnership as defined in Section 4 of the Act is not constituted.

6. Only a partnership firm is entitled to present an application for registration u/s 184(1) of the Income Tax Act, 1961. Since the firm constituted by annexure-D is not a partnership as defined under the Indian Partnership Act, the request for registration has to be refused for that reason. Furthermore, the Assessing Officer has found the partnership deed to be not genuine which finding was confirmed by the Appellate Assistant Commissioner on appeal. On receipt of an application for registration of a firm, the Assessing Officer has to enquire into the genuineness of the firm and its constitution as specified in the instrument of partnership. He shall grant registration only if he is satisfied that a genuine firm has come into existence. If not, he has to pass an order refusing registration. Section 185(1) of the Income Tax Act, 1961, which deals with the procedure to be adopted by the Assessing Officer, contains an Explanation. According to Clause (b) of that Explanation, a firm shall not be regarded as a genuine one if any partner of the firm was, in relation to the whole or any part of his share in the income or property of the firm, at any time during the previous year, a benamidar of any person, not being a partner of the firm, and any of the other partners knew or had reason to believe that the first-mentioned partner was such benamidar and such knowledge or belief had not been communicated by such other partner to the Assessing Officer in the prescribed manner. From the sworn statements of the three partners, the Assessing Officer inferred that partners 3 and 4 were only benamidars of Sri Abdulla Koya, who was not a partner of the

firm. From the statement of Mammed Haji, it is clear that he knew that Smt. Kadishabi and Smt. Ayishabi were only benamidars. It has not been shown that such knowledge had been communicated to the Assessing Officer in the prescribed manner. In the circumstances, the Assessing Officer was right in regarding the firm as not genuine and in refusing registration. That order was rightly confirmed by the Appellate Assistant Commissioner. The Appellate Tribunal has committed an error of law in finding that the firm is genuine and in directing the Assessing Officer to grant registration. The finding was arrived at by totally ignoring the admission made by the parties.

7. For the aforesaid reasons, both the questions are answered in the negative, i.e., against the assessee and in favour of the Revenue.

8. A copy of this judgment under the seal of the court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, forthwith.

