
(1981) 05 DEL CK 0018

In the Delhi High Court

Case No : Income Tax Reference No"s. 1 and 64 of 1973

Commissioner of Income Tax

APPELLANT

Vs

Sant Lal Arvind Kumar

RESPONDENT

Date of Decision : 15-05-1981

Acts Referred:

Citation : (1981) 25 CTR 207 : (1981) ILR Delhi 40 : (1982) 136 ITR 379

Hon'ble Judges : S. Ranganathan, J;Leila Seth, J

Bench : Division Bench

Advocate : W. Singh, Anoop Sharma and T.M.Ansari, for the Appellant;

Judgement

S. Ranganathan, J.

(1) These two references can be disposed of by a common judgment as there is a common question of law. In Itr 1/73 the assessed is a firm carried on in the name and style of M/s. Sant Lal Arvind Kumar, Delhi. It had four partners, Shri Sant Lal, Shri Hukam Chaad, Smt. Prem Wati and Smt. Gaitri Devi. On 13-7-1968 Shri Sant Lal expired. The original partnership deed contained no provision that the death of any partner would not dissolve the firm audit was common ground at the various stages that when Sant Lal died on 13-7-1968 there was a dissolution of the firm of four partners referred to above. The firm books of account were closed on that date. Subsequently a partnership deed was executed on 16-7-1968 under which the three other erstwhile partners constituted a partnership With Arvind Kumar, a grandson of Shri Sant Lal and this partnership continue to carry on the business previously carried on by the firm of four partners. Shri Sant Lal had 30% share in the firm out of which 25 % was given to Arvind Kumar and 5% was added to the share of Smt. Gaitri Devi, one of the three old partners. For the assessment year 1969-70 two separate returns of income were filed in the name of Sant Lal Arvind Kumar. The first return of income showed the income for the. period from 1-4-1968 to 13-7-1968. The second return showed the income from 14-7-1968 to 28-3-1969. The assessee's claim was that on the death of Shri Sant Lal the earlier firm had been dissolved,

consequently there were two separate and independent firms in existence for the two periods .mentioned above and that these had to be assessed separately for the assessment year 1969-70. The Income Tax officer,, however, took the view that what had happened on 13-7-1968 was only "a change in the constitution of the firm" within the. meaning of section 187 of the Income Tax Act, 1961 and that the firm of Sant Lal Arvind Kumar as constituted at the time of the assessment was assessable for the assessment year 1969-70 in respect of the income of the entire period from 1-4-1968 to 31-3-1969, the death of Shri Sant Lal notwithstanding. Of course the income of the previous year was apportioned on time basis and allotted in respect of the first period to the four partners mentioned in the first deed and in respect of the second period to the four partners mentioned in the second deed. It is the correctness of this action of the Income Tax officer that is being challenged in this reference. The Income Tax appellate Tribunal having accepted the assessed's plea and decided the appeal before it in favor of the assessed the following question of law has been referred to this court at the instance of the Commissioner of Income Tax :

"WHETHER on the facts and in the circumstances of the case the appellate Tribunal was right in law in holding that two assessments should be made on the firm of M/s. Sant Lal Arvind Kumar for the assessment year 1969-70 in regard to its income for two periods viz. 1-4-1968 to 13-7-1968 and 13-7-1968 to 28-3-1969 falling in one accounting year, holding that it Was not a case of change in the constitution of the firm governed by the provisions of section 187 ?"

In Income Tax Reference No. 64/73 the facts are similar. The assessment year concerned is 1966-67, the relevant previous year being the year which ended on 23-10-1965. A firm known as "M/s. K. Gian Chand Jain & Co." has been constituted under an instrument of partnership dated 17-1-1963. The partners were Gian Chand and his four sons. There was no clause in the partnership deed providing that the partnership shall not be dissolved by the death of any of the partners. The assessed was being assessed to income tax with reference to a previous year which in respect of the assessment year 1966-67 would have normally ended on 23-10-1965. However, on 5-2-1965 Gian Chand died. It is common ground that on the death of Gian Chand the firm was dissolved. The books of accounts were closed. On 8-2-1965 a fresh deed of partnership was drawn up between Raj Devi widow of Gian Chand and the other three erstwhile partners and this partnership continued to carry on business previously carried on by the firm of Gian Chand Jain & Co. and his three sons with effect from 6-2-1965. Clause 12 of the partnership deed dated 8-2-1965 stated that on account of the death of Gian Chand the words "the old firm" stood dissolved on 5-2-1965 and that all the assets and liabilities of the old firm as on that date had been taken over by the new partnership firm. For the assessment year 1966-67 two returns of income were filed: one in respect of the accounting period ended on 5-2-1965 and the other in respect of the period from 6-2-1965 to 23-10-1965 and the Income Tax officer was requested to make separate assessments in respect of the two periods. However, the Income Tax officer was of opinion that

the case was covered by section 187 of the Income Tax Act, 1961. He, Therefore, made an assessment of Gian Chand Jain & Co. as a registered firm in respect of the profits of the entire period 24-10-1964 to 23-10-1965. He, however, apportioned the above income between the two periods and allocated the share income among Gian Chand Jain and his sons in the first period and among Raj Devi and her sons for the second period. On appeal preferred by the assessed the appellate Tribunal held that there should have been two assessments in respect of the two periods as claimed by the assessed and that the single assessment could not be upheld. The Commissioner of Income Tax applied for a reference to this court and the Tribunal has referred the following question of law for our decision :

"WHETHER on the facts and in the circumstances of the case the Appellate Tribunal was light in directing that two separate assessments should be framed on the firm of M/s. K. Gian Chand Jain & Co. for the assessment year 1966-67, in regard to its income for the two periods viz., 24-10-64 to 5-2-1965 and 6-2-1965 to 23-10-65, falling in one accounting period, holding that it was not a case of change in constitution of the firm governed by the provisions of section 187 of Income Tax Act, 1961?"

(2) Both the references raise a pure question of law. In both the cases there was a firm in existence and one of the partners died in the middle of the previous year. There was no clause in the partnership deed providing that the death of a partner would not dissolve the partnership and the parties have proceeded on the footing that on the death of one of the partners as above mentioned the partnerships stood dissolved under, section 42(c) of the Indian Partnership Act, 1932. The short question for consideration is whether in spite of this position under the partnership law the Income tax Officer is entitled to proceed as if the same firm continued to be in existence throughout the accounting year with nothing but a change in the constitution taking place on the death of the partner. The question posed revolves for its determination on the provisions of section 187, 188 and 189 of the Income Tax Act, 1961 which may be set out for the purpose of easy reference :

"187. Change in constitution of a firm (1) whereat the time of making an assessment u/s 143 or section 144 it is found that a change has occurred in the constitution of a firm, the assessment shall be made on the firm as constituted at the time of making the assessment:

Provided that:

(I) the income of the previous year shall, for the purposes of inclusion in the total incomes of the partners, be apportioned between the partners who in such previous year, were entitled to receive the same ; and

(II) when the tax assessed upon a partner cannot be recovered from him, it shall be recovered from the firm as constituted at the time of making the assessment.

(2)For the purposes of this section, there is a change in the constitution of the firm":

(A)if one or more of the partners cease to be partners or one or more new partners are admitted, in such circumstances that One or more of the persons who were partners of the firm before the change continue as partner copartners after the change; or

(B)where all the partners continue with a change in their respective shares or in the shares of some of them.

188.Succession of one firm by another firm is where a firm carrying on a business or profession is succeeded by another firm, and the case is not one covered by section 187, separate assessment shall be made on the predecessor firm and the successor firm in accordance with the provisions of section 170,

189.Firm dissolved or business discontinued (1) Where any business or profession carried on by a firm has been discontinued or where a firm is dissolved the Income Tax Officer shall make an assessment of the total income of the firm as if no such discontinuance or dissolution had taken place, and all the provisions of this Act, including the provisions relating to the levy of a penalty or any other sum chargeable under any provision of this act, shall apply, so far as may be, to such assessment.

(2).Without prejudice to the generality of the foregoing subsection if the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceeding under this act in respect of any such firm as is referred to in that sub-section is satisfied that the firm was guilty of any of the acts specified in Chapter Xxi he may impose or direct the imposition of a penalty in accordance with the provisions of that Chapter.

(3)Every person who was at the time of such discontinuance or dissolution a partner of the firm, and the legal representative: of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or other sum payable, and all the provisions. of this act, so far as may be, shall apply to any such assessment or imposition of penalty or other sum.

ExplanationThe amount of tax referred to in this sub-section shall also include that part of the share of each partner in the income of the firm before its discontinuance or dissolution which the firm could have retained under sub-section (4) of section 182 but which has not been so retained.

(4) Where such discontinuance or dissolution takes place after any proceedings in respect of an assessment year have commenced, the proceedings may be continued against the persons referred to in sub-section (3) from the stage at which the proceedings stood at the time of such discontinuance or dissolution and all the provisions of this act shall, so far as may be, apply accordingly.

(5) Nothing in this section, shall affect the provisions of section (6) of section

The question that is thus raised before us is covered by a large number of decisions, most of them taking the view that in a case such as this the provisions of section 187 will not apply. These are the two decisions of the Allahabad High Court of the same date reported in *Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another*, and *Commissioner of Income Tax Vs. Kunj Behari Shyam Lal*, followed in the decision of the same High Court in *Addl. Commissioner of Income Tax Vs. Dilsukh Rai Madho Prasad*, the decisions of the Madras High Court in *Kaithari Lungi Stores Vs. Commissioner of Income Tax*, , *MAVUKKARAI (N) ESTATE TEA FACTORY Vs. ADDITIONAL COMMISSIONER OF Income Tax, MADRAS-II.*, , *Additional Commissioner of Income Tax Vs. Thyagasundara Mudaliar and Munuswami Mudaliar and Co.*, , the decision of a full Bench of five Judges of the Andhra Pradesh High Court in *The Additional Commissioner of Income Tax, (Andhra Pradesh, Hyderabad) Vs. Vinayaka Cinema, Nellore*, , overruling an earlier full bench decision of the same High Court in *Additional Cit Vs. Visakha Flour Mills*, 1977 108 Itr 466 (8) (FB) which had in turn over ruled an earlier decision in *Commissioner of Income Tax Vs. T. Veeraraghavulu Chetty and Sons Co.*, and the decision of the Calcutta High Court in *Mathurdas Govardhandas Vs. Commissioner of Income Tax*, . On the other hand the Punjab and Haryana High Court took the contrary view in *Dharam Pal Sat Dev Vs. Commissioner of Income Tax*, which was followed in *Jupiter Foundry and Machines (Knives) Vs. Commissioner of Income Tax* (1977 109 ITR 92) (12) in a slightly different context and was approved by the full Bench of the same High Court in *Nandlal Sohanlal, Jullundur Vs. The Commissioner of Income Tax, Patiala*, and followed in *Commissioner of Income Tax Vs. Jagat Ram Om Parkash*, . There was also a decision of the Andhra Pradesh High Court in *Additional Commissioner of Income Tax Vs. Visakha Flour Mills* (1977 108 ITR 466) (PB) which was in favor of the construction contended for by the department but as noted earlier this full Bench has been overruled by a larger bench in *The Additional Commissioner of Income Tax, (Andhra Pradesh, Hyderabad) Vs. Vinayaka Cinema, Nellore*, . Naturally learned counsel on both sides cited all these decisions before us and also referred various earlier decisions and provisions of the Indian Partnership Act, the Indian Income Tax 1922 as well as the Income Tax Act, 1961 which have been referred to and discussed in these various decisions. After having carefully gone through all these decisions we have come to the conclusion that the view taken by the majority of judicial decisions referred to earlier is the preferable view. We, Therefore, agree with the view taken by the Tribunal though for slightly different reasons. We do not think it necessary to set out or discuss the basis of the decision of the Tribunal in the two cases under reference as the question referred to us fully covered by the decisions of the Allahabad High court, Andhra Pradesh High Court, Madras High Court Gujarat High Court and the Calcutta High Court referred to us above. We do not think that we can usefully add much to the wide range of discussion contained in these judgements and we shall Therefore, content

ourselves with broadly summarizing our reasons as briefly as possible.

The question raised has to be considered in three stages. The first is to consider the position under the Indian partnership Act. It is well known (and it is unnecessary to cite authorities for the proposition) that in general law a firm is not a juristic entity but is only a compendious name for the partners Constituting it and that the firm has a legal personality only for certain limited purpose under certain enactments like the CPC and the Income Tax Act. A passage in Lindley on the Law of Partnership Fourteenth Edition, page 29, brings Out very clearly the distinction between the mercantile and legal notion of a firm and we think that this passage may be usefully extracted : "THE Mercantile And Legal Notion Of A Firm The Interactive view :

Partners are called collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, i.e. as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the firm is made debtor to each partner for what he brings into the, common stock and each partner is made debtor to the firm for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions ; but are always either debtors to or creditors of the firm.

Owing to this impersonification of the firm, there is a tendency to regard its rights and obligations as unaffected by the introduction of a new partner, or by the death or retirement of an old one. Notwithstanding such changes among its members the firm is considered as continuing the same; and the rights and obligations of the old firm are regarded as continuing in favor of or against the new firm as if no changes had occurred. The partners are the agents and sureties of the firm; its agents for the transaction of its business; its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets.

This attitude is undoubtedly encouraged by certain features which characterise most partnerships, in particular the fact that partnerships frequently have a distinctive name which does not necessarily or even usually coincide with the names of the partners, that changes of partners often have no visible effect on the continuity of the partnership business and that virtually every partnership operates a separate banking account in the firm name. Partners may come and go but the firm appears to go on. The legal view : But this is not the legal notion of a firm. The firm is not recognised by English lawyers as distinct from the members composing it. In taking partnership accounts and in administering partnership assets, courts have to some extent adopted the mercantile view, and actions may now, speaking generally, be brought by or against partners in the name of their firm; further, tax assessments are made, in the first instance,

against the partnership, but speaking generally, the firm as such has no legal recognition, e.g. a firm as such cannot be a tenant, and thus cannot claim the benefit of protection under the Landlord and Tenant Act, 1954, Part II. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member, nor can he be employed by his firm, for a man cannot be his own employer. A member of an ordinary partnership fills a double character; he is both a principal and an agent. As a principal he is bound by what he does himself and by what his co-partners do on behalf of the firm provided they keep within the limits of their authority as an agent he binds them by what he does for the firm. 52 provided he keeps within the limits of his authority. But a partner is not the surety of the firm; nor when he "receives money belonging to the partnership does he receive it in a fiduciary capacity. Every member of an ordinary partnership, however, numerous the partners may be, is liable as a principal to have his private property seized for a partnership debt, whether the firm has assets to pay it or not; and until the law was altered in this respect by the Partnership Act, 1890 the property of the firm was liable to be seized for the private debts of any of the partners composing it. This non-recognition of the firm, in the mercantile sense of the word, is one of the most marked differences between partnerships and incorporated companies."

(3) The Indian Partnership Act appears to have given recognition not to the common law view of partnership but to the mercantile view. This distinction is well brought out in the two sets of provisions contained in Chapter V and Chapter Vi of the Indian Partnership Act. Chapter V which is headed "Incoming and Outgoing Partners" envisages the introduction and exit of partners from a firm with the consent of all other partners. A partner may retire; he may be expelled in certain circumstances; he may be adjudicated an insolvent or he may die. Where a partner retires or is expelled from the firm, the firm itself continues as before with only what may be described as a change in its constitution. The insolvency or a death of a partner does not necessarily result in the dissolution of the firm. Under Chapter Vi which sets out the circumstances in which dissolution of a firm takes place a firm may be dissolved with the consent of all the partners or in accordance with the contract between them. It is dissolved if all the partners or except one is adjudicated insolvent or an event happens which makes it unlawful for the firm to be carried on. A firm is dissolved, but only subject to a contract between the partners, on the expiry of the term for which it was formed, on the completion of an adventure or undertaking for which it was formed or by the death of a partner or by the adjudication of a partner as an insolvent. A partnership may be dissolved by a partner giving a notice in writing to all the other partners of his intention to dissolve the firm. On a suit by a partner the court may dissolve a firm on any of the grounds set out in Section

44. The above provisions contained in Chapter V and Chapter Vi of the Partnership Act bring out in sharp contrast the difference between a change in constitution of a firm and dissolution of the firm. If one can imagine a partnership as an association of persons bound by a legal tie or a vinculum Jurisdiction, a change in the constitution of the firm reflects only an adjustment of this legal tie which binds the partners. It is as if there is a belt which encircles all these partners and the belt either shrinks or expands to accommodate or give effect to an incoming or outgoing partner. A dissolution on the other hand is a breaking or a disruption of this legal tie. The belt itself breaks as under and all the persons who were members of the firm stand freed from the above legal tie. There is, thus, a very clear and vital distinction between a case in the change of constitution of the firm and a case of dissolution of a firm. It is not necessary to elaborate on these principles which appear clearly from the observations in the decision of the judicial committee in the case of AIR 1948 100 (Privy Council) : the observations of the Supreme Court in the case of Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, and the observations of Justice Jagadisan in Tyresoles (India), Calcutta Vs. Commissioner of Income Tax, Coimbatore, . We may also refer to a very elaborate and exhaustive discussion in the judgment of Bhagwati J. (9.s his lordship then was) in Keshavlal Lallubhai Narnadas and Others Vs. Patel Bhailal Narandas and Others, particularly the passages at pages 159,160 and 162.

(4) Applying the above provisions there is no doubt that in the cases presently under reference there was a dissolution of the firms on the death of one of partners. The deeds in question did not contain a provision for the continuation of the firm despite the death of any of the partners and as already mentioned it is not the departments case that there was any contract to the contrary which involved the continuance of a pre-existing firm despite the death so as to bring the case u/s 35 rather than Section 42(c) of the Partnership Act.

(5) The question that next arises is as to whether there is anything in the Income Tax Act, 1961 which compels the introduction of a different concept for the purposes of Income Tax Act. We agree with the decisions earlier referred to that there is nothing in the language of Sections 187, 188 or 189 which preclude the application of the partnership law principles even under the Income Tax Act. In the first place the definition section of the Income Tax Act, Section 2, specifically enacts in clause 23 that for the purposes of Income tax Act the expressions "firm", "partner" and "Partnership" have the same meaning as they have under the Indian Partnership Act. This necessarily means that for any question arising under the Income Tax Act, the concepts of partnership law have full application unless there is something in any particular provision which compels a contrary view. The decision of the Supreme Court in Malabar Fisheries Co. Vs. Commissioner of Income Tax, Kerala, where their lordships have approved the decision of the Privy Council in Bhagwanji Morarji Goculdas earlier referred to make it clear that even under the Income Tax Act the concept of a firm will be the same as under the partnership law and that in the absence of a

contract to the contrary a firm on its dissolution ceases to exist. The decision in *A. W. Piggies and Company* and others earlier referred to illustrated a situation in which, having regard to the context, it was considered to import a limited personality to a partnership firm. Similarly it is well recognised that the firm is a separate assessable "entity which is conceived of as having its own income and its own property or business the income from which is liable to tax. But the question is whether the terms of Sections 187 to 189 carry any implication that even where a firm gets dissolved under the provisions of the partnership law it should be deemed to continue for the purposes of assessment to income tax. The legislature is only too familiar particularly in the Income Tax Act with the very well known legislative innovation of "deeming". The Income-tax Act is replete with provisions which incorporate such statutory fictions and it is not without significance that the language of Section 187 studiously avoids and such statutory fiction. The legislature could have easily said, but did not say, that the firm in the circumstances set out in section 187(2) shall be deemed to continue to exist with only a change in the constitution notwithstanding that under any other law in force it may be considered to have got dissolved on the death of a partner etc.

(6) Not only is there no deeming provision contained in Section 187, the language of that section, particularly sub-section 2, clearly envisages the continued existence "of a "firm". It talks of "a" firm and "the" firm and it also postulates that there are common partners before or after the change that is referred to there. This language clearly envisages that the provision comes into operation and applies only where there is in the eye of law a firm with continued existence and not to a case where, under the law one firm has ceased to exist and another has come into existence. It appears to us that to import any such concept in Section 187 would be to travel beyond the ordinary and natural meaning of the words used in the context of the partnership law that is clearly applicable and that has not been excluded by reason of any specific provision. The judicial decisions deciding to the contrary appear to have read into the language of sub-section (2) of Section 187 an implication that what all has to be done is to compare the partners before a particular event and the partners after the particular event irrespective of whether the firm has continued or not and to have envisaged the definition in Section 187(2) as intended to transcend dissolution of firms under the partnership law. In our opinion the purpose of sub-section (2) is not by way of expansion of the normal concept of a change in constitution. It appears, to be really a purpose of limitation. The purpose of the definition in sub-section (2) appears to be not to say that a firm will continue in spite of dissolution but rather to say that even in a case where there is only a change in the constitution the provisions of sub-section (1) will not apply even if the partners before and after the change are not common. That apart we may also point out that the interpretation to the contrary may lead to a number of, anomalies results. To give an instance if A and B constitute a firm and subsequently they dissolve the firm after which A enters into partnership with C

and B enters into a partnership with D, the result of the department's interpretation would be that there is only a change in the constitution of the firm. But it would be very difficult to say which of the succeeding firms is to be taken into account for this purpose. The departmental counsel tried to avoid this result by a suggestion that in such a case Section 187(2) will not apply because the business of the earlier firm has gone out of existence and that Section 187(2) will apply only where there is continuous business in existence. But this is a limitation which does not flow from the language of Section 187(2),,Section 187(2) does not talk of the continuance of business or its disruption. It only talks of a firm and its constitution. A firm may dissolve but its business may continue in the hands of a successor. That would be a case covered by Sections 188 and 189. A firm may dissolve and its business may be discontinued. That would be a case covered by Section 189. We are unable to accept the attempt of the counsel for the department to read a further limitation that Section 187(2) contemplates a change in the constitution in all cases where the business continues though in the hands of a different firm provided there are common partners. Another instance of anomaly would be that logically the department's interpretation should be applicable whatever the reasons for dissolution of the earlier firm might be. Thus, for instance, if there are two partners and one of them dies and the other partner continues the business by entering into a fresh partnership with another person, it would be a change in the constitution. Again if partners in a firm are unable to get on with each other and as a result of quarrels among themselves get the firm dissolved compulsorily under the orders of court still there would be only a change in the constitution, if the business happens to continue in the hands of any one of them in partnership with some others. It should be remembered that partnership is a relationship born of an agreement. It can be dissolved by agreement or where there is no agreement, by an order of the court in certain circumstances. To say that such a relationship would subsist notwithstanding the decisions of the partner to put an end to its continued existence is a far reaching consequence which in our opinion should not be accepted unless there is deal- statutory language to that effect.

(7) Some difficulty is no doubt caused in the construction placed by the assessed by the use of the words used in Section 188 of succession not being a case falling u/s 187." Section , talks of a case of succession and it seems to suggest that even a case where one firm is succeeded to by another may in certain cases be a case covered by Section 187(2). In our opinion however too much of significance cannot be attached to these words. In the first place the language of Section 187 has to be interpreted on its own and Section 188 does not put any further meaning into it. It will be remembered here that under the common law of doctrine which we have already referred to, a firm has no legal personality at all apart from the partners. Under that common law doctrine even an ordinary change in constitution which would normally fall within Chapter V of the Indian Partnership Act would result in a case of succession. In fact it will be appropriate to notice that this was exactly the difficulty that arise in the case of

Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, considered by the Supreme Court. In that case there were many changes in the constitution of the firm and it was argued by the department notwithstanding a specific exception in Section 25(4) that these were not mere changes in the constitution but really a case of repeated succession there having been a dissolution on each of the occasions of one firm and the formation of a new firm. It is in order to avoid contention of that type that Section 188 appears to have use the words above referred to. The intention of these words is that, merely because there is a change in the constitution of the firm, it should not be argued that there is a succession of one set of persons by another because such a case would be really covered by Section 187. We, Therefore, think that the language of Section 188 though creating a mild ambiguity not merely not inconsistent or contradictory but is only intended to clarify the meaning of Section 187 and to exclude the possibility of the applicability of the common law doctrine regarding the personality of a firm even in cases of mere change in constitution.

(8) In all the judicial decisions there has been a good deal Of discussion generated by certain observations made by the Supreme Court in Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, . This decision has been explained in the various authorities referred to earlier. These were made in the context of the language of Section 44 of the Indian Income Tax Act, 1922 which was in force at that time. Section 26(1) which corresponds to Section 187 refined not merely to a change in the constitution of a firm at the time of assessment but also to a case where at the time of assessment the Income Tax Officer finds that there is "a firm newly constituted". In other words Section 26(1) of the Act was wider in scope than Section 187. It took in not merely cases of change in the constitution but also cases of a Fresh constitution. It is not necessary for us in the present cases to go into the significance or the effect of such a provision in regard to a firm newly constituted. The more important point to remember is that Section 44 did not contain any reference to a case where a firm was dissolved unless such dissolution resulted in the discontinuance of business. Section 44 dealt with both the case of an association of persons and a firm. But while it referred to dissolution of an association of persons it deliberately refrained from a reference to a case where a firm was dissolved. Reading this conspectus of provisions the Supreme Court, pointed out that the Indian Income Tax Act, 1922 envisaged a partner ship as having a legal personality which transcended its re-constitution and explained that this was the reason why Section 44 did not refer to a case of dissolution of a firm. Those observations of the Supreme Court were really made in a totally different context and in an attempt to explain the absence of a reference to the dissolution of a firm in section 44 of the Act as it then stood. It may also perhaps be of some significance that when the Indian Income Tax Act, 1922 was enacted the law relating to partnership was contained in Indian Partnership Act and that it was only subsequently that the Indian Partnership Act, 1930 came into force adopting, as we have already pointed out. the mercantile understanding of a firm

rather than its strict legal connotation. The Act of 1961 does not effect any change in this position. It completely lifts into the Income Tax Act the concept of a "firm" as under the Partnership Act. It provided in Section 187 only for a change in the constitution of a firm though the legislature was well aware of the distinction between a change in constitution and dissolution, it did not incorporate any legal fiction to overcome the effects of operation of the partnership law. Section 189 of the present Act is much wider than Section 44 of the 1922 Act and even a case of dissolution of a firm will come in under the provisions of Section 189 of the Act.

(9) We have tried to only high-light those aspects which we think are very important in answering the question before us and that is why we have refrained from discussing at length the various judicial decisions and the lines of reasoning on which they are based. We may also point out that substantially speaking the difference between the interpretation sought for by the department and the assessed is of very limited consequence. The minority judgments in the Allahabad High Court decisions earlier referred to propounded a point of view that even though a case falls u/s 187 there should be separate assessments on the firm as it stood before the change and as it stood after the change. This line of reasoning is not supported before us and we are of opinion that it is not tenable. In fact this view has been disapproved in various judgments, e. g of Punjab & Haryana High Court in Hoshiarpur Electric Supply Co. Vs. Commissioner of Income Tax, , Mysore High Court in Karupukula Suryanarayana Shetty and Sons Vs. Commissioner of Income Tax, Mysore, and the Andhra Pradesh High Court in Additional Commissioner of Income Tax v. Visakha Flour Mills (1977 188 Itr 466 at 488). The correct approach is that if Section 187 were to be applied the firm is assessable in respect of the income for the entire previous year though the shares of the partners will be allocated only according to their respective periods of membership of the firm. Thus, if Section 187 is applied the partners of the firm will not suffer any disadvantage because the income of the previous year will be apportioned on a time basis has been done the cases under reference only to the partners who were there during the relevant period. Though there will be a single assessment on the firm the share income of the partners will relate to the respective periods for which they have been partners and they will be under no disability. The only controversy, arises regarding the aggregation of the income for the entire period in the hands of the firm for if the firm is treated as continuing entity the income of the entire period will be assessed in its hands and will be liable to tax on that basis whether the firm is a registered firm or an unregistered firm. On the other hand if there are two firms in existence (or in an appropriate case more than two firms) the income in the hands of each will have to be confined to the period of its existence. It is only this aspect that works to the disadvantage of the revenue. It is no doubt true that if the answer propounded by us is the correct one, it may be possible for partners to divide their income into various segments by the simple process of dissolving the firm and thenreconstitutingit with a small change (either in share

or in partners) rather than by calling it a change in the constitution. But as already pointed out the concept of partnership is one of agreement between the partners. If the partners agree not that one partner should go out and another should come in but that on a particular event happening the firm should be treated as dissolved they are entitled to say so and what the partners have disrupted it is not for the department to unite unless there is a specific authorisation in the Act. We may only point out that in the two cases presently under consideration it is not the case that the partners have deliberately purported to have dissolved the firm in order to reduce its liability to tax; the dissolution has occurred on account of the death of one of the partners. It was possible in the present cases to treat the firm as continuing had there been such a clause or understanding among the partners right from the beginning. But when there is no such agreement the "partners have no option to treat the firm as continuing under the Partnership Act, the firm gets dissolved and there is no basis for urging that the Income Tax Officer is entitled to ignore this consequence.

(10) For the reasons mentioned above, we are of opinion that the questions referred to us should be answered as follows:

(11) The Tribunal was right in holding that two assessments should be made on the firm M/s Sant Lal Arvind Kumar for the assessment year 1969-70, one in regard to the income for the period 1-4-1968 to 13-7-1968 and the other for the period from 14-7-1968 to 28-3-1969.

(12) The Appellate Tribunal was right in directing that two separate assessments should be made on the firm M/s K. Gian Chand Jain & Company for the assessment year 1966-67 one in regard to the income for the period from 24-10-1964 to 5-2-1965 and the other in regard to the period from 6-2-1965 to 23-10-1965. We make no order as to costs.

(13) Before parting with the cases, we would like to place on record our appreciation of the neat and succinct arguments of Shri T. M. Ansari whom in the absence of the assessed in Itr 1/73, we requested to assist us as *amicus curiae*.