

(1972) 12 MP CK 0008

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 213 of 1969

Commissioner of Income Tax

APPELLANT

Vs

Sheonarayan Harnarayan

RESPONDENT

Date of Decision : 05-12-1972

Acts Referred:

Income Tax Act, 1922 — Section 26A
Madhya Pradesh Excise Rules, 1915 — Rule 4

Citation : (1975) 100 ITR 213 : (1973) JLJ 438 : (1973) 18 MPLJ 726

Hon'ble Judges : P.K. Tare, C.J;S.M.N. Raina, J

Bench : Division Bench

Advocate : L.S. Shukla and P.S. Khirwadkar, for the Appellant; Y.S. Dharmadhikari, for the Respondent

Judgement

Tare, C.J.

In this reference u/s 66(1) of the Indian Income Tax Act, 1922, the Income Tax Appellate Tribunal, at the instance of the petitioner, namely, the Commissioner of Income Tax, has referred the following question for our opinion :

" Whether, on the facts and in the circumstances of the case, the assessee-firm constituted by the instrument of partnership, dated September 20, 1952, was entitled to the grant of registration for the assessment year 1960-61, u/s 26A of the Indian Income Tax Act, 1922, when one of its two businesses, namely, liquor business, was carried on by it on the basis of licence issued by the Government in the name of one of its partners, Umashanker ? "

The present reference arises on the following facts: The question relates to the assessment year 1960-61. The respondent-firm consisted of two partners, namely, Sheonarayan and Umashanker. Previous to that, Harnarayan was a partner of the firm along with Umashanker, but, after the death of Harnarayan, Sheonarayan, and Umashanker formed a partnership by a deed dated September 20, 1952, for carrying on business in medicines and liquor. The liquor business

was carried on by the partnership firm on the basis of a licence granted by the Government in the name of Umashanker. The respondent-firm, therefore, applied for registration for the purposes of the Indian Income Tax Act, 1922, and an application was made to the Income Tax Officer for registration u/s 26A of that Act within the prescribed time. The respondent-firm stated that it had duly intimated to the Collector that the liquor business in respect of which licence had been issued in the name of Umashanker, who was one of the partners, would be carried on by the partnership firm. The Income Tax Officer refused registration to the respondent-firm on the ground that the assessee could not prove that it had intimated to the Collector the fact that the liquor business would be carried on by the firm. The Income Tax Officer was further of the opinion that the contract of partnership in respect of the liquor business was void as being opposed to public policy. For that proposition, the Income Tax Officer relied on the following decisions : COMMISSIONER OF Income Tax Vs. KRISHNA REDDY, , Commissioner of I.T., Mysore, T.C. Coorg and Bangalore Vs. Union Tobacco Co., Ernakulam, , COMMISSIONER OF Income Tax Vs. BENARSI DAS AND COMPANY, and D. Mohideen Sahib and Co., Excise Contractors Vs. Commissioner of Income Tax, . The Income Tax Officer, therefore, refused registration of the respondent-firm.

The respondent-firm preferred an appeal before the Appellate Assistant Commissioner of Income Tax who, relying on a decision of this court, namely, Dayabhai and Co. Vs. Commissioner of Income Tax, allowed the appeal. The learned Appellate Assistant Commissioner expressed the view that merely because the licence stood in the name of one partner, the carrying on of the transport business by the firm of Dayabhai and Co. was not illegal as observed by the High Court, and, therefore, the partnership could carry on the said business, although the licence or permit might be in the name of one partner only. Therefore, following the view of this court in Dayabhai and Co. v. Commissioner of Income Tax, the Appellate Assistant Commissioner allowed the assessee's appeal and granted it registration.

The Income Tax Officer preferred an appeal before the Income Tax Appellate Tribunal which was dismissed and the order of the Appellate Assistant Commissioner was confirmed. Therefore, the Commissioner of Income Tax, feeling aggrieved by the view expressed by the Income Tax Appellate Tribunal, successfully requested the Tribunal to refer the question for our opinion.

As regards the letter written by the respondent-firm to the Collector, a copy of the same is to be found at page 14 of the paper-book, the same being marked annexure "B", which was purported to have been written on December 15, 1958. In that letter, the respondent-firm had intimated the Collector that the liquor business would be carried on in partnership. In our opinion, mere intimation to the Collector will not be enough. Under Rule VI of the Rules relating to General Licence Conditions, framed u/s 62 of the Madhya Pradesh Excise Act, 1915, the Collector has to sanction the business being carried on in partnership and,

accordingly, he is to make an endorsement on the licence itself to that effect. Unless that endorsement be there, it cannot be urged that the Collector had consented to the liquor business being carried on in partnership. Thus, a mere intimation to the Collector would not be sufficient. From this point of view, the question arises whether the action of the respondent-firm in insisting on carrying on the liquor business in partnership would be void, it being opposed to public policy, as per Section 23 of the Indian Contract Act. If it be considered to be void, then naturally, the Income Tax Officer would be justified in refusing registration of the firm for the purpose of liquor business. At this stage, it is pertinent to note that the Income Tax Officer granted the request of the respondent-firm for registration for the purposes of the business of medicines and registration was refused only in respect of the liquor business.

At the outset, we might observe that the case of Dayabhai and Co. Vs. Commissioner of Income Tax, would stand on a slightly different footing and it cannot be considered to be an authority for the proposition canvassed in the present case. Dayabhai's case was a case of a permit granted under the Motor Vehicles Act, 1939. The Income Tax Officer refused registration as, in his opinion, Sections 31 and 59 of the Motor Vehicles Act prohibited the motor transport business being carried on in partnership. The Income Tax Officer thought that the partnership was illegal. The Division Bench, however, held that the partnership was not rendered illegal and Sections 31 and 59(1) of the Motor Vehicles Act were no bar to the granting of registration. Section 31 of that Act provides for transfer of ownership. It may usefully be reproduced as follows:

"31. (1) Where the ownership of any motor vehicle registered under this Chapter is transferred,--

(a) the transferor shall, within fourteen days of the transfer, report the transfer to the registering authority within whose jurisdiction the transfer is effected and shall simultaneously send a copy of the said report to the transferee;

(b) the transferee shall, within thirty days of the transfer, report the transfer to the registering authority within whose jurisdiction he resides, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered in the certificate of registration.

(2) A registering authority other than the original registration authority making any such entry shall communicate the transfer of ownership to the original registering authority."

Section 59 of the Motor Vehicles Act, 1939, relates to general conditions attaching to all permits. It is as follows :

" (1) Save as provided in Section 61, a permit shall not be transferable from one person to another except with the permission of the Transport Authority

which granted the permit and shall not without such permission operate to confer on any person to whom a vehicle covered by the permit is transferred any right to use that vehicle in the manner authorised by the permit.

(2) The holder of a permit may, with the permission of the authority by which the permit was granted, replace any vehicle covered by the permit, by any other vehicle of the same nature.

(3) The following shall be the conditions of every permit-

(a) that the vehicle or vehicles to which the permit relates carry valid certificate of fitness issued u/s 38 and are at all times so maintained as to comply with the requirements of Chapter V and the rules made thereunder;

(b) that the vehicle or vehicles to which the permit relates are not driven at a speed exceeding the speed lawful under this Act;

(c) that any prohibition or restriction imposed and any fares or freights fixed by notification made u/s 43 are observed in connection with any vehicle or vehicles to which the permit relates;

(d) that the vehicle or vehicles to which the permit relates are not driven in contravention of the provisions of Section 5 or Section 72 ;

(e) that the provisions of this Act limiting the hours of work of drivers are observed in connection with any vehicle or vehicles to which the permit relates; and

(f) that the provisions of Chapter VIII so far as they apply to the holder of the permit are observed."

We may observe that Sections 31 and 59 of the Motor Vehicles Act, 1939, require a motor vehicle to be run under a permit and on certain conditions. Mere possession of a motor vehicle is by itself no offence. Therefore, we are clearly of the opinion that cases of permit where its working depends on certain conditions would stand on a different footing from a permit required for an article, the mere possession of which without a permit would constitute an offence under the law of the land; for instance, mere possession of liquor without a permit by itself would be an offence, or mere possession of poisonous drugs without a proper licence would also be an offence. Such cases are to be distinguished where the mere possession of an article without a proper permit or licence itself constitutes an offence. We are of the opinion that if such cases are to be distinguished, then the analogy of *Dayabhai and Co. Vs. Commissioner of Income Tax*, cannot be made applicable to cases where a licence or a permit is required for the very possession of an article by a person and a further permit may be necessary for its sale or disposition.

The instant question came up for consideration before a Division Bench of this court in *Commissioner of Income Tax Vs. Pagoda Hotel and Restaurant*, wherein B. Dayal C.J. and S. P. Bhargava J. answered the question referred to them that

the partnership so far as it related to the wine shops was illegal and it could not be registered, but so far as it related to the hotel business, it was a valid partnership and was entitled to be registered under the Income Tax Act. The Division Bench negated the assessee's contention based on the view expressed in *Champsey v. Gordhandas* AIR 1917 Bom 250, *Commissioner of Income Tax Vs. Prakash Ram Gupta*, and *Commissioner of Income Tax Vs. N.C. Mandal and Co.*, . In those cases, the view expressed was that entering into partnership where the outsiders do not interfere with the actual working of the privilege would not amount to transfer of the privilege, and mere transfer of the privilege in any way was prohibited. There was, however, no prohibition against entering into partnership. The Division Bench observed that even in cases where only transfer of privilege was prohibited, other High Courts like the Allahabad High Court in *JER and CO. Vs. COMMISSIONER OF Income Tax, U.P.*, and the Madras High Court in *Velu Padayachi Vs. Sivasooriam Pillai*, had taken a contrary view and had held that entering into partnership really amounted to a transfer of the privilege. However, the Division Bench further observed that the instant case before them was different where entering into partnership in any way had been expressly prohibited. Therefore, the Division Bench felt that there could not be two views on such a matter and it affirmed the view of a learned single judge of the Nagpur High Court in AIR 1937 250 (Nagpur) and held that, in such a case, the partnership would be illegal, it being void ab initio.

For the purpose of convenience, we may reproduce Rule VI of the Madhya Pradesh Excise Rules relating to the General Licence Conditions. The same is as follows :

" No privilege of supply or sale shall be sold, transferred or sub-leased nor shall a holder of any such privilege enter into a partnership for the working of such privilege in any way or manner without the written permission of the Collector, which shall be endorsed on the licence... "

The clear implication of Rule VI is that there cannot be a partnership for the working of such a privilege unless there be a written permission of the Collector which has to be endorsed on the licence.

The learned counsel for the respondent-firm, however, challenged the view expressed by the Division Bench of this court in *Commissioner of Income Tax Vs. Pagoda Hotel and Restaurant*, on the ground that the case of *JER and CO. Vs. COMMISSIONER OF Income Tax, U.P.*, had been reversed by their Lordships of the Supreme Court in *Jer and Co. Vs. Commissioner of Income Tax, U.P.*, . In this connection, we might observe that the reason why their Lordships of the Supreme Court reversed the decision of the Allahabad High Court was that, although Rule 322 of the U.P. Excise Rules, 1910, prohibited a holder of a licence from entering into a partnership with another person, yet the licence actually granted to the firm, *Jer & Co.*, was in Form FL-II and the said licence did not prohibit the holder from entering into partnership. It merely prohibited the licensee from sub-letting or transferring the licence. Thus, there was no

prohibition against the holder of a licence entering into a partnership. Under those circumstances, their Lordships of the Supreme Court laid down that the question of the partnership being illegal would not at all arise. That case, in our opinion, would stand altogether on a different footing and it cannot be considered to be an authority for the contention of the learned counsel for the respondent-firm that, on account of the reversal of the decision of the Allahabad High Court, the view as expressed by a Division Bench of this court in *Commissioner of Income Tax v. Pagoda Hotel & Restaurant* should also be deemed to have been overruled. We find no substance in this contention. In the present case, the very licence granted to the respondent-firm prohibited the respondent from entering into any partnership whatsoever. Therefore, we are of the opinion that the view of the Division Bench of this court as expressed in *Commissioner of Income Tax Vs. Pagoda Hotel and Restaurant*, does not require to be considered, nor can it be said to have been overruled on account of the pronouncement of their Lordships of the Supreme Court in *Jer and Co. Vs. Commissioner of Income Tax, U.P.*, .

In this connection, we might advert to some decisions. In *D. Mohideen Sahib and Co., Excise Contractors Vs. Commissioner of Income Tax*, a Division Bench of the Madras High Court took the view that where a partnership was entered into in respect of arrack business regarding which the licence stood in the names of some of the partners and some other strangers, the agreement of partnership being illegal, the Income Tax Officer would be justified in refusing registration u/s 26A of the Indian Income Tax Act, 1922.

We may observe that the matter would stand more or less concluded by the pronouncement of their Lordships of the Supreme Court in *Umacharan Shaw and Bros. Vs. Commissioner of Income Tax, West Bengal*, wherein the facts were that three brothers formed a joint Hindu family governed by the Dayabhaga law. The family carried on the business of sale of foreign liquor and the licences for its three shops were held in the different names of the members, but not in the name of the family. The family was disrupted in 1938 and, on April 7, 1939, the three brothers entered into a deed of partnership which was registered by which they agreed to carry on the business in partnership. They opened a separate book of account which they called the bati khata which purported to show the capital contribution and accounts of the partners as well as the division of profits amongst them. Their application for registration of the partnership was rejected and the profits of the business continued to be assessed in the hands of the joint family. One of the brothers died in the year 1945 and, as per the terms of the partnership deed, his son was admitted as a partner. Thereafter, another brother died on January 25, 1947, and his son was also admitted to the partnership. On April 10, 1947, on account of these deaths and new admissions, a fresh partnership deed was entered into by the surviving brother and the sons of the two deceased brothers in respect of the three liquor shops. The deed was got duly registered. It provided for the method of accounting for ascertaining the profits of the firm. The taxing authorities refused registration of the firm on the

assumption that there was violation of the Bengal Excise Act, 1911, However, their Lordships of the Supreme Court found that there was no evidence of transgression of the provisions of the Bengal Excise Act, 1911, and there was nothing affecting the validity of the partnership.

It that view, their Lordships of the Supreme Court reversed the decision of the Appellate Tribunal and allowed the appeal filed by the assessee. We may observe that the implication of the pronouncement of their Lordships of the Supreme Court is that if a business is carried on by some members of the joint Hindu family, it is open to them to enter into partnership as long as they do not contravene the provisions of the Excise Act and such a partnership cannot be said to be illegal or void ab initio. Further, there can be no doubt that any partnership for the sharing of the privilege granted by a licence or for the purpose of management of a liquor shop would certainly be void ab initio, the same having been prohibited by specific provisions of the law.

In COMMISSIONER OF Income Tax Vs. KRISHNA REDDY., a Division Bench of the Andhra Pradesh High Court held that the licence for carrying on abkari business under the Hyderabad Abkari Act would be void ab initio as the partnership was in contravention of the law and void ab initio, but as the partners had joined with the common purpose of earning profits, they were assessable as "an association of persons" on the profits made. According to their Lordships, the proper method was not to assess the partner on half the profits, but to assess him and the holder of the licence as an association of persons and, accordingly, both of them were held jointly and severally liable for the entire profits.

We may observe that a case of mere prohibition to transfer or lease a privilege would also stand on a different footing from the case of a prohibition in respect of entering into a partnership. If some persons enter into a partnership for sharing profits or losses without actual participation in the management of a liquor shop, such a partnership might be held to be legal as was the situation in Md. Warasat Hussain Vs. Commissioner of Income Tax, . But, where the partnership purports to participate in the actual management of the liquor shop or in conducting sales or in doing any actual work, such a partnership would necessarily be void as being opposed to public policy, the same being in contravention of Rule VI of the Madhya Pradesh Excise Rules relating to General Licence Conditions. Therefore, we are unable to accept the contention of the learned counsel for the respondent-firm and, in our opinion, the present case would precisely be governed by the pronouncement of a Division Bench of this court in Commissioner of Income Tax Vs. Pagoda Hotel and Restaurant, and we see no reason to depart from the view expressed by that Division Bench.

As a result of the discussion aforesaid, we would answer the question referred to us as follows :

On the facts and in the circumstances of the case, the assessee-firm constituted by the instrument of partnership, dated September 20, 1952, was not entitled to

the grant of registration for the assessment year 1960-61 u/s 26A of the Indian Income Tax Act, 1922, in respect of the liquor business, although it might have been entitled to registration in respect of the business relating to medicines.

We accordingly answer the reference as above. Let this reference be returned to the Income Tax Appellate Tribunal to take further steps in accordance with the answer given by us. However, under the circumstances, we direct that there shall be no order as to the costs of the proceedings in this court which shall be borne as incurred.