

(1968) 03 CAL CK 0015

In the Calcutta High Court

Case No : Income Tax Reference No. 124 of 1964

COMMISSIONER OF Income Tax, CALCUTTA

APPELLANT

Vs

KEJRIWAL TRADERS.

RESPONDENT

Date of Decision : 07-03-1968

Acts Referred:

Income Tax Act, 1961 — Section 26A, 66(1)
Partnership Act, 1932 — Section 39, 40

Citation : (1969) 71 ITR 463

Hon'ble Judges : P. B. Mukharji, J;K. L. Roy, J

Bench : Full Bench

Judgement

P. B. MUKHARJI J. - The Commissioner of Income Tax called for this reference from the Tribunal. The question arising for an answer by this court on this reference u/s 66(1) of the Income Tax Act is as follows :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that registration u/s 26A of the Indian Income Tax Act should be granted to the assessee with reference to the portion of the relevant accounting year commencing from the 1st February, 1957, and ending on the 30th September, 1957 ?"

The facts giving rise to this question are as follows : The assessment year in this case is 1958-59 and the relevant previous year is from February 1, 1957, to December 31, 1957. The assessee claims to be a firm constituted under a partnership deed dated the 18th April, 1957, and applied for registration of that instrument of partnership u/s 26A for the relevant assessment year. There were four partners to this deed of partnership dated the 18th April, 1957, with equal shares in the profits and losses, namely, (1) Kanhaiyalal, (2) Banwarilal, (3) Nathmal, and (4) Iyer. Nathmal retired from the partnership from the 30th September, 1957, by another deed. That is dated the 31st January, 1958. The controversy and the confusion in this reference arise in respect of these two deeds, one dated the 18th April, 1957, and the other dated the 31st January,

1958. It is necessary to keep these two deeds clearly separately in mind while trying to approach this question.

The Income Tax Officer held that the deed dated 31st January, 1958, recorded merely the dissolution of the firm of four partners with effect from 30th September, 1957, but did not bring into existence any new partnership. The Income Tax Officer, therefore, refused to allow registration to the assessee-firm by his order dated the 20th August, 1960. His finding is, "there is no instrument of partnership governing the firm after the 30th September, 1957, nor are the sharing of the profits and losses specifically laid down. The two main conditions for grant of registration u/s 26A are thus not fulfilled, viz., (i) the firm should be constituted by a regular instrument of partnership, effective at the time of the assessment, (ii) the share of profits and losses should be specified in the instrument. As those conditions are not satisfied, the registration applied for is refused."

It is needless to point out here that the application for registration on the basis of the partnership deed dated the 18th April, 1957, was made on the 5th September, 1957. It is also needless to point out, but necessary to bear in mind, that the second deed dated the 31st January, 1958, was coming after the relevant previous year which in this case was between February 1, 1957, to December 31, 1957.

The assessee appealed to the Appellate Assistant Commissioner. There again the assessee contended that there was no dissolution but only a change in the constitution by the deed of the 31st January, 1958. the Appellate Assistant Commissioner accepted the assessee's contention and held, on an interpretation of the provisions of the deed dated the 31st January, 1958, that it was not a case of dissolution but a change in the constitution of the firm. The reasons and finding of the Appellate Assistant Commissioner can be stated in his own words as follows :

"A partner may retire by various means and one of the ways under which he could retire is when the firm stands dissolved. In view of the various clauses of the indenture discussed above, it cannot be stated that the agreement stipulated only dissolution of the firm and nothing else. Unfortunately, the appellant firm has not used the word dissolved in a proper manner but the real intention of the document considering all the provisions is that the partnership consisting of four partners stood dissolved on September 30, 1957, and thereafter the three continuing partners carried on the business under the same name and under the same terms and conditions and hence, in fact, there was only a change in the constitution of the firm. Taking into consideration these facts, I do not agree with the Income Tax Officer."

He, therefore, allowed the appeal.

Now, it was the department's turn to appeal. The department appealed to the Tribunal. The statement of the case points out that question before the Tribunal

was whether the firm was entitled to registration u/s 26A for the whole of the relevant previous year commencing from February 1, 1957, to December 31, 1957.

The Tribunal's order has raised many arguments and controversies. What the Tribunal does is as follows. The Tribunal agrees with the Appellate Assistant Commissioner that by the deed dated January 31, 1958, there was ex post fact declaration relating to the retirement of the partner, Nathmull, with effect from September 30, 1957, while the remaining three partners continued to carry on the business of the firm. In fact, the Tribunal says : "There was no dissolution of the partnership strictly so called but there was only a change in the constitution of the firm on the said date (September 30, 1957)."

The Tribunal, however, did not stop with that part of the order but proceeded to discuss the question of registration of the instrument of partnership dated April 18, 1957, u/s 26A of the Income Tax Act. The Tribunal raises the question by saying that the point for decision is whether the firm was entitled to registration u/s 26A for the whole of the previous year commencing from February 1, 1957, to December 31, 1957. The Tribunal's operative part of the order is as follows :

"We hold, therefore, that the assessee-firm was not entitled to registration after September 30, 1957. So far as the period from February 1, 1957, to September 30, 1957, the application filed by the assessee u/s 26A conforms of all the statutory requirements and there is no reason why registration should be refused for the said period. In the result, the department's appeal succeeds in part. The registration allowed by the Appellate Assistant Commissioner to the assessee-firm is cancelled only in respect of the period from October 1, 1957, to December 31, 1957."

In coming to this conclusion, the Tribunal noticed that the requirements of section 26A were mandatory and admitted of no exceptions read with the Supreme Court decision in *R. C. Mitter & Sons v. Commissioner of Income Tax*, which laid down the ratio that the instrument of partnership must be existing in the relevant previous year. The next step in the reasoning of the Tribunal is to interpret the deed of January 31, 1958, as equalising the shares of the three continuing partners. But, according to the Tribunal, as this deed was executed after the expiry of the relevant previous year, it could not, therefore, be held that there was any "instrument of partnership specifying the individual shares of the partners" within the meaning of section 26A in the relevant previous year in respect of the newly constituted firm.

It is difficult to see why the Tribunal was considering the registration of the second deed of partnership dated January 31, 1958, when that was not the subject-matter for registration. The partnership instrument which was for registration before the taxing authority was the one dated April 18, 1957. What the Tribunal should have considered was to find out whether that was registrable or not. By attempting to consider this subsequent deed of January 31, 1958, it

confused the issues. That is where the present confusion arises.

The Tribunal's order is plainly self-contradictory. If the Tribunal was agreeing with the Appellate Assistant Commissioners' conclusion that the deed of January 31, 1958, did not mean dissolution but was only a continuation of the old firm, then there was no point in the Tribunal discussing and holding that the deed of January 31, 1958, was not registrable and giving the ground that it was beyond the relevant previous year and that it did not specify the shares. All that was plainly unnecessary. If the firm had not been dissolved, then the existing firm under the instrument of April 18, 1957, which was the only instrument, was to be registered, and there could not be, without dissolution, any further question of whole or part of the previous year. In other words, the Tribunal's order is vitiated by a dichotomy of attitude and facts created by the Tribunal, which resulted in splitting up and truncating the accounting year and holding that there should be really a registration for 8 months, from February 1, 1957, to September 30, 1957, in respect of the instrument of partnership dated April 18, 1957, and at the same time holding that there was no dissolution but only a change in the constitution of the firm.

It is necessary in this context not to confuse the purposes of the provision of section 26A of the Income Tax Act with those of section 26. Section 26A, with which we are directly concerned in answering this question, is only a procedure for the registration of firms for the purpose of the Income Tax Act. Assessment of firms, registered or unregistered, has for its substantive section, section 23(5) of the Income Tax Act and section 26 of the Income Tax Act deals with what is called the change in the constitution of a firm. But neither section 23(5) nor section 26 of the Income Tax Act lays down or deal with the procedure for registration of firms for the purpose of the Income Tax Act which is done only by section 26A of the statute. That is why Mr. Pal, appearing for the revenue, graphically described the position by saying that while assessment may be possible u/s 26, and certainly u/s 23(5), no registration on the facts of this case is possible u/s 26A of the Income Tax Act.

On behalf of the revenue, it is contended that the instrument of partnership dated April 18, 1957, which was sought to be registered under the Income Tax Act by the assessee in this case, does not specify the requirement of section 26A. In the first place, it is said that this deed or instrument of partnership dated April 18, 1957 is not a current partnership which lasted for the whole of the accounting year or rather the previous year. It is argued that this old instrument of April 18, 1957, has been scrapped altogether and there was and could be no point in registering it. It was then argued that the new instrument dated January 30, 1958, did not specify the shares and it could not be a complete instrument of partnership, because it cannot be properly understood without reference to the old deed of April 18, 1957, which has been scrapped. Lastly, of course, for the revenue it has been repeatedly said that the application for registration in this case was not in respect of the new partnership which came into existence on

January 31, 1958, but was in respect of the older one under the date, April 18, 1957. Running, through all these arguments and contentions made on behalf of the revenue, the main contention, of course, is that the instrument of partnership actually dissolved in fact and in law in the light of the deed of January 31, 1958.

On behalf of the assessee, Mr. Sen contends that, notwithstanding the fact that the word "dissolved" is used in the deed of January 31, 1958, what happened thereunder was not dissolution in fact or in law but only retirement of one partner, Nathmull, with the continuance of the old firm or 3 partners with augmented shares.

The registration u/s 26A of the Income Tax Act is registration of the "instrument of partnership". It is that instrument of partnership, specifying the individual shares of the partners, which has to be registered for the purpose of the Income Tax Act. It is not, therefore to be compared or confused with the registration of the firm under the Partnership Act. Under the Partnership Act, it is the firm which is registered. The instrument is registered for the taxation of the firm and, therefore, the instrument requires the specification of the shares of the partners. Secondly, such a registration u/s 26A of the Income Tax Act is only effected for the assessment to be made for that particular period. Therefore, it is the assessee-firm for that years which is entitled to registration. The question is whether this test is satisfied by the assessee in this case.

It will be appropriate here to notice some of relevant decisions touching these points.

In *Kylasa Sarabhaiah v. Commissioner of Income Tax* the Supreme Court laid down the principle that, although the application for registration of a firm u/s 26A had strictly to be in conformity with the Act and the Rules, in ascertaining whether the application was in conformity with the Rules, the deed of partnership had to be reasonably construed. It was laid down there that the right to registration u/s 26A being conditional upon the specification of the individual shares of the partners, a deed of partnership between a firm and an individual which specified the the collective shares of the firm, without more, could not be registered. It was further laid down by that decision that the word "specifying" used in section 26A and rule 2 of the Indian Income Tax Rules, 1922, meant "mentioning, describing or defining in detail" but, nevertheless, it did not mean expressly setting out in fractional or other shares. Again in *Parekh Wadilal Jivanbhai v. Commissioner of Income Tax* the Supreme Court, reading the partnership deed as a whole in that particular case, came to the conclusion that there was sufficient specification of the individual shares of the partners within the meaning of section 26A of the Income Tax Act and the firm was entitled to registration.

In the light of these observations and the law laid down by the Supreme Court, it will, therefore, be necessary to analyse the different clauses in the deeds of 18th

April, 1957, and the 31st April, 1958, to determine the issue whether there has been a dissolution of the firm as embodied in the instrument of partnership of the 18th April, 1957, in the present case.

The relevant clauses in the deed of partnership dated 18th April, 1957, are clauses 1, 5, 12, 14, 17, 21 and 22. Clause 1 provides that the partnership shall be deemed to have commenced as on and from the 1st day of February, 1957, and shall continue until determined as hereinafter provided. Clause 21 of this partnership deed provides that any of the partners may retire from the partnership after giving to the others three calendar months notice in writing of his intention so to do. Clause 22 expressly declares that the retirement or death of any partner shall not dissolve the partnership. Clause 5 states that the capital of the partnership shall be contributed by the partners in equal proportions and clause 12 declares that the profits and losses of the partnership shall be divided and borne by and between the partners in equal proportions. There were four partners under this instrument of partnership so that each partner had one-fourth share. By clause 14 of this partnership deed, the account of the partnership are to be made and adjusted on the 30th day of June and the 31st day of December in each year or on such other date as the partners may determine. In other words, the years for the accounts was the calendar year adjustable once on 30th June and the other on 31st December every year. Clause 17 of this partnership deed provides for the distribution of the net profits of the partnership after payment of all Income Tax, sales tax and other taxes, interest on capital, loans and advances and all other outstanding to be divided between the partners in equal proportions.

Reading this deed of partnership dated April 18, 1957, and the different clauses therein, it is clear that retirement of one partner was not to dissolve the partnership in the present case and any partner could retire by giving the others notice of 3 months. Now, although Nathmull retired from this firm on September 30, 1957, and although it was not necessary under this partnership deed to create another partnership deed, for such retirement did not dissolve the partnership, yet in fact that was what was done on January 31, 1958, where a regular indenture of that date was signed by these four persons. Mr. Sen, on behalf of the assessee, contends that this deed dated January 31, 1958, on a proper interpretation, should mean not a deed of dissolution. He relies on five main features of this particular deed dated January 31, 1958, in support of his contention.

We shall, therefore, now analyse this deed of January 31, 1958. In the first place, the recital in the deed shows that this was between the "continuing partners", on the one hand, and the "retiring partner", on the other. Therefore, Mr. Sen for the assessee contends that the partnership was continuing in spite of the retirement. Secondly, the recital also states : "Whereas on the said last mentioned dated (October 30, 1957), it was agreed that the said partnership should be determined on the terms and conditions hereinafter appearing." Mr. Sen on this

recital contends that it was "determination" of the partnership and not "dissolution". Thirdly, the recital also states :

"And further the retiring partner should withdraw from the said business leaving the same to be carried on by the continuing partners under the said name and style and firm of Kejriwal Traders for the benefit of the continuing partners or otherwise as the continuing partners might think proper."

Therefore, Mr. Sen, for the assessee, contends that it was only a case of retiring partner withdrawing, leaving it to the continuing partners to continue the old firm. Fourthly, in clause 1 of the operative part of this deed, while speaking of the notice, the clause mentions "of the intended continuance of the said business by the continuing partners shall be forthwith advertised in newspapers." On this, Mr. Sen, for the assessee, contends that this was not dissolution but continuance of the old partnership business. Fifthly, in the third clause of the operative part of the deed of January 31, 1958, the words which occur are : ".....hold the same unto the continuing partners absolutely and in proportion to their existing shares." On this, Mr. Sen contends that the partnership continued.

There is a good deal of force behind the argument so advanced by Mr. Sen for the assessee on the basis of these clauses and expressions. But that is not the whole story of interpretation of this deed of January 31, 1958.

Mr. Pal, for the revenue, has equally relied on this deed of January 31, 1958, to show that it contains words and clauses which unmistakably and unequivocally declare that the partnership created by the instrument of partnership deed dated April 18, 1957, was in fact and in law dissolved. In support of this argument Mr. Pal relies first on the recital where it is said :

"Whereas on the last mentioned date (October 30, 1957) it was further expressly agreed that all the debts and liabilities of the said firm of Kejriwal Traders to persons other than the retiring partners shall subject to the proviso contained in clause 5 hereunder be paid by the continuing partners who shall indemnify the retiring partner against the same."

Mr. Pal contends that all the debts and liabilities were, therefore, taken over by the new firm of three partners and not the old firm of four partners. Secondly, Mr. Pal, for the revenue, contends that the operative clauses in the deed of January 31, 1958, leave no room for doubt that there was dissolution of the firm as constituted by the instrument of partnership dated April 18, 1957. In support of that argument, he relies, secondly, on clause 1 of the deed of January 31, 1958, where it is solemnly, clearly and unequivocally declared :

"In pursuance of the said agreement and in consideration of the promises they the parties hereto declare that they dissolved on the 30th day of September, 1957, and hereby dissolve as from the said 30th day of September, 1957, the partnership theretofore subsisting between them in the said business of Kejriwal Traders as aforesaid and notice of such dissolution.....shall forthwith be

advertised in newspapers."

Mr. Pal, for the revenue, contends with a good deal of force that there can be no doubt after the use of the words "dissolved" and "dissolution", not once but repeatedly, and not equivocally but clearly stating that the partnership under the deed of April 18, 1957, is dissolved, the use of the expression "intended continuance" cannot override the clear words and convert the dissolution into a continuance or a change in the constitution of a firm. Again, Mr. Pal, for the revenue, relies on clause 3 of the operative part of this deed of January 31, 1958, pointing out the statement :

"All that the undivided 1/4th share and interest of the retiring partner of and in the said business of the partnership hereby dissolved....."

He argues that this again is clear statement that the parties intended to dissolve the partnership under the deed dated April 18, 1957. This is not the end of the matter. Even clause 4 of the deed of January 31, 1958, used the expression "said partnership hereby dissolved." This is again repeated in clause 5 of this deed of January 18, 1958, whereby it is stated : "The said firm hereby dissolved." Lastly, Mr. Pal, for the revenue, relies on the proviso to clause 5 of this deed of January 31, 1958, where it is said :

"Provided always and it is hereby agreed and declared by and between parties that the obligation to pay his share of Income Tax, if any, in respect of the partnership business as also any other unforeseen liability in respect thereof shall remain with the retiring partners and the indemnity hereby given by the continuing partners will not apply thereof."

On this, Mr. Pal argues that the retiring partner took the obligation to pay his share of the Income Tax, thereby concluding that no question of registration of this firm could arise u/s 26A any more.

No doubt, the court in interpreting documents in this context has to do so reasonably. The fact is that the parties clearly used the word "dissolution", not once but repeatedly, in this document of January 31, 1958. The context appears to exclude the construction that it was a mere change in the constitution or that it was only the retirement of one partner while the others continued the old firm. Section 39 and 40 of the Partnership Act clearly provide that the dissolution of the partnership between all the partners of a firm is called a dissolution of the firm and that a firm may be dissolved with the consent of all the partners. All the partners in this case by this deed of January 31, 1958, do clearly state that the firm of 1957 is dissolved. Under the Partnership Act, the dissolution is, therefore, a dissolution of the firm of April, 1957, and there is no escape from it.

Mr. Sen, for the assessee, relied on the decision of the Madras High Court in *Tyresoles (India), Calcutta v. Commissioner of Income Tax*. The Madras High Court there expressed the view that in determining whether there was a dissolution or reconstitution of a firm, the terms used by the parties to describe

the change is not important and the real intention of the parties is to be ascertained. As a principle of general application, no one can quarrel with that concept. Words used, however, in formal deeds, duly registered, have an importance in documents which should not be lightly brushed aside as meaningless, even though they may not be technically over-emphasized, specially when such words appear in formal documents prepared by or in the presence of solicitors and pleaders, as they are in the present case before us. No doubt, the word "dissolution" was used in the Tyresoles (India) case and yet it was held there that there was not a dissolution in law or in fact but a change in the constitution of the firm. But then again the clauses in the partnership deed on which the decision in Tyresoles case turned are significantly and radically different from the clauses that we have to construe in the present reference before us. Two significant clauses in the partnership deed in Tyresoles (India) case are now to be noticed which distinguish completely that decision from the present case before us. In Tyresoles (India) case, clause 1 of the document in question was noticed by the Madras High Court as decisive because it recited that "the partnership is dissolved so far as the retiring partners are concerned." Therefore, Jagadisan J., at page 531 of the report of the Tyresoles (India) case, observed as follows :

"A full and complete dissolution of the partnership between all the partners would certainly have not been described in this manner if, in fact, such a dissolution was intended by the parties."

This is exactly the difference between the Tyresoles case and the present case before us. In the present case, the firm under the instrument of partnership deed dated April 18, 1957, was unreservedly dissolved without using the expression that "it was only a dissolution in respect of the retiring partners".

The second distinguishing clause in Tyresoles case was the provision "for the continuance of the business of the surviving partners and which enables the outgoing partner to a share of profits for as long a period of 8 years". Therefore, Jagadisan J., at page 531, noticed this distinctive feature and observed as follows :

"No member of a dissolved firm can insist as a term of dissolution that the quondam partnership business should be carried on by the other members for his benefit also. Such a stipulation is wholly repugnant to dissolution."

This again is a crucial difference between the partnership deed of Tyresoles case and the present reference before us. Here it is only those called the continuing partners who form into a new partnership with augmented shares of 1/3rd each and with no benefit whatever to the retiring partner for the profits that would accrue after this new firm came into existence. Indeed, as pointed out by us, the clause in the deed of January 31, 1958, expressly made it clear that the business thereafter was to continue only for the benefit of the continuing partners and not for the retiring partner.

We are, therefore, unable to hold, on the interpretation of the specific clauses in

the deeds dated April 18, 1957, and January 31, 1958, in the present reference before us that what has happened is only a retirement or a change in the constitution and not a dissolution. We hold that there has been on the specific and express terms and clauses in the deed a dissolution both in fact and in law. That is the only interpretation to which we can arrive at reading the deeds as a whole.

We also find it difficult to uphold that order of the Tribunal as made in the present case. The kind of allocation suggested by the order of the Tribunal is, to our mind, illegal and not permissible under the Income Tax Act. To allocate a part to the old firm so long as it continues and the rest to the new firm when it came into existence during the accounting year could not, in our view, be done by virtue of the express clause which we have quoted in the deed dated January 31, 1958, which expressly declares that all debts and liabilities have been taken over by the new firm. Therefore, the old firm's existence as a unit for tax liability has been wiped out by this agreement between the parties. It is the three parties in the new partnership who alone have taken over the liability for taxes of the old firm under the instrument of partnership dated April 18, 1957. In such circumstances, to permit the registration of the deed of April 18, 1957, even partially for period of the accounting year cannot, in our view, be done. We need hardly emphasize that the deed of January 31, 1958, was not in the previous year so far as the accounting is concerned which, as we have noted, was from February 1, 1957, to December 31, 1957. We are not unmindful of the provisions of section 2(11)(c) of the Income Tax Act. The fact remains that the parties continued to treat the calendar year as the year and we have quoted the relevant clauses in the deed of April 18, 1957, in support of the view we are taking.

It is, therefore, not permissible in our view to break the periods of accounting and to allow piece-meal registration of the instrument of partnership u/s 26A of the Income Tax Act. To do so would be to defeat the whole purpose of section 26A. The illustration which appears uppermost in our mind is that if, during the 12 months in a year a partnership is dissolved or changed by 12 monthly documents or deeds, then the question both from the practical and legal point of view is which is the document which the taxing authorities have to register for a partnership u/s 26A of the Income Tax Act. It should always be borne in mind that the registration u/s 26A of the Income Tax Act is an annual registration.

Here again it will be appropriate to notice some of the major decisions on this point.

The leading case is *R. C. Mitter & Sons v. Commissioner of Income Tax*, a decision of the Supreme Court. It is laid down there that :

"The words constituted under an instrument of partnership in section 26A of the Income Tax Act include not only firms which have been created by an instrument of partnership but also those which may have been created by word of mouth but have been subsequently clothed in legal form by reducing the terms and

conditions of the partnership to writing."

It is also stated there that the firms, which were created by word of mouth but the constitution of which was subsequently reduced to writing, could also be registered u/s 26A. But, it was pointed out by the majority that it is essential that the instrument of partnership should have been in existence in the accounting year in respect of which assessment has been made. One would normally think that it must be in existence for the whole of the accounting year and not a part of the accounting year. That seems to be the trend of the decision as we read it. Otherwise the effect of annual registration for the whole year will be nullified. The next important principle laid down by the Supreme Court in his case is that five essential conditions must be satisfied to qualify for registration u/s 26A, viz., (1) the firm should be constituted under an instrument of partnership, specifying the individual shares of the partners; (2) an application on behalf of, and signed by, all the partners and containing all the particulars as set out in the rules must be made; (3) the application should be made before the assessment of the firm u/s 23 for that particular year; (4) the profits or losses, if any, of the business relating to the accounting year should have been divided or credited, as the case may be, in accordance with the terms of the instrument; and (5) the partnership must be genuine and must actually have existed in conformity with the terms and conditions of the instrument of partnership, in the accounting year.

The deed of partnership dated April 18, 1957, certainly did not, on the facts of this case, last out the whole of the accounting year in the sense laid down by the Supreme Court. It was observed by the Supreme Court, specially at pages 198 to 199 of that report, as follows :

"It is clear from what has been said above with reference to the relevant provisions of the Act, that the certificate of registration has reference to a particular assessment year, and has effect for the assessment year, and has effect for the assessment to be made for that particular year. In other words, the terms of the partnership should appear in the instrument of partnership in respect of the relevant accounting year. It is equally clear that the firm to be registered should have been in existence during the accounting year, constituted as shown in the instrument of partnership. The Rules, thus, contemplate a document operative during the accounting year."

No doubt, the Supreme Court there was not concerned with the further question whether the document should be in existence at the very inception of the accounting year or before the year was out. Here the question was not merely of the document being in existence at any time of the year, but the documents, two in number in the present reference, create different legal rights and obligations. In those circumstances, it is not, in our view, possible to split up the assessment partially for a registered firm for a part of the year and partially for an unregistered firm for the rest of the year, either for the same year or for the same assessment year or for the same accounting year or for the same previous

year.

In the Full Bench decision of the Punjab High Court in *Niadar Mal Jagdish Parshad v. Commissioner of Income Tax* it was decided that the requirements of law as to the registration of partnership u/s 26A of the Indian Income Tax Act were (a) the factual existence of the partnership during the whole of the accounting year either under an oral agreement or a written instrument, (b) the existence of a written instrument during the accounting year specifying the individual shares of the partners. The Punjab High Court decided that if those requirements were satisfied then the firm could be registered for the assessment year to which the accounting year corresponded and it was immaterial when during the accounting year the instrument was in fact executed. Now that decision clearly is against the contention of Mr. Sen for the assessee before us in the present case. This decision proceeds on the basis that there must be one partnership during the whole of the accounting year. Different partnerships during parts of the year will not do : see the observations of the Punjab Full Bench at pages 357-58 of that report. The principle there laid down by the Punjab High Court has been followed by the Kerala High Court in *Malankara Timbers v. Commissioner of Income Tax*. There the Kerala High Court quoted with approval the following observations of the Punjab Full Bench decision, namely :

"It will be clear from the language of section 26A, the rules on the subject and the decisions quoted above, that the requirements of law are (a) the factual existence of the partnership during the whole of the accounting year either under an oral agreement or a written instrument, (b) the existence of a written instrument during the accounting year specifying the individual shares of the partners."

The Kerala High Court on the facts of this case pointed out that it was not possible to say that the particular partnership there was factually existing during the whole of the accounting year, for the accounting period with which the Kerala High Court was concerned was the 12 months from April 1, 1959, to March 31, 1960, and all that could be said was that there the deed of partnership was executed on some date between March 23, 1959, the date on which the stamp paper was purchased, and April 29, 1959, the date on which the application for registration was filed. The partnership in question in that case was supposed to have come into existence from March, 1959, by means of a deed purported to have been written up and signed by the partners on that date. The department authorities there refused registration of the firm from 1960-61 relevant to the accounting year April 1, 1959, to March 31, 1960. On a reference to the Kerala High Court it was held that, as there was no material to show that the partnership was factually in existence during the whole of the accounting year and all that could be said was that the deed was executed on some date between the 23rd March and 29th April, 1959, registration was properly refused.

In this connection, it will also be appropriate to notice the decision of the Bombay High Court in *Dastur Dadi & Co. v. Commissioner of Income Tax*. There

the Bombay High Court lays down the principle that an instrument of partnership cannot be regarded as one which specified the shares of the individual partners within the meaning of section 26A. After the retirement of one of the partners either by the aid of the provisions of section 13 of the Partnership Act or by inference drawn from some of the terms of the partnership the shares of the partner in the continuing partnership can be fixed in the event of a dispute between them by a court of law. It emphasises the meaning and interpretation of the words, "specifying the individual shares of the partners" in section 26A. If the shares have to be found by interpretation of the clauses in the deed and the application of the sections of the Partnership Act and the Income Tax Act, then the better opinion is it does not answer the test of the instrument itself "specifying the shares". The same view was taken by a Division Bench of this court in *Commissioner of Income Tax v. Khetan & Co.* : see the observations made therein at pages 186-88.

Lastly, we shall refer to the Supreme Court decision in *N. T. Patel & Co. v. Commissioner of Income Tax*. It lays down the principle that registration u/s 26A of the Act is a right which can be claimed only in accordance with the statute and the rule made thereunder and the person seeking the relief under that section must bring himself strictly within the terms of that section. It was said there that, unless the instrument of partnership specified the individual shares of the partners, the instrument of partnership would not conform with the requirements of section 26A of the Income Tax Act : see the observations of the Supreme Court at page 228 of that report.

A decision relevant on the point we are considering is *Bhausa Ganusa Pawar & Co. v. Commissioner of Income Tax*, another decision of the Bombay High Court. It is interesting from this point of view that it was a case where the court came to the conclusion that it was one of a dissolution of a firm and the formation of a new firm, a conclusion to which we are arriving on the facts of this particular reference before us. There it is laid down by the Bombay High Court that the mere circumstance that the business is continuing without interruption and the new firm has come into existence from the moment of the death of the deceased partner in the old firm was not sufficient to hold that it was a mere change in the constitution of the old firm. It was there held that the application made by the assessee could not be said to be a proper application made for the registration of the firm which was in existence during the accounting year and was, therefore, rightly rejected. We are inclined to take the same view that the mere fact that the day on which Nathmal retired the new firm sprang into existence would not mean that it was the old firm which was continuing. It is always a question of fact in a particular case and of the interpretation of the different articles or clauses in the partnership deeds in each case : see the observations of the learned judge at pages 85-88 in *Bhausa Ganusa Pawar & Co. v. Commissioner of Income Tax*.

It is necessary to mention that where a partnership is dissolved and some of the

partners thereafter take over and carry on the old partnership business, it is a case of succession to the old firm by the new firm and is not merely a change in the constitution of the firm as was indicated in *Jitanram Nirmalram v. Commissioner of Income Tax*. The fact that in such a case some of the partners in the new are also partners in the old would not necessarily make it a case of a change in the constitution of the firm or be inconsistent with succession as in *Kaniram Ganpatrai v. Commissioner of Income Tax*. Therefore, on the facts, we cannot hold in this case that it was the old firm which was continuing or that it was a case of a mere succession, a case which was not made and proved or established nor can we hold that it was a mere change in the constitution of the firm.

For these reasons and on the authorities discussed above, we answer the question in the negative holding that the Tribunal was wrong in permitting registration u/s 26A of the Income Tax Act to the assessee with reference to the portion of the accounting year commencing from the 1st February, 1957, and ending on the 30th September, 1957. In the circumstances, there will be no order as to costs.

K. L. ROY J. - I entirely agree with the judgment just delivered by my Lord and the answer to the question referred to us. I only wish to add a few words on one aspect of the case before us.

Even assuming that there was no dissolution and the assessee-firm was reconstituted on the 30th September, 1957, and that the assessment has been properly made on the reconstituted firm for the entire accounting period relevant to the assessment year 1958-59, was registration in respect of a part of the year only permissible under the provisions of the Income Tax Act ? The application for registration u/s 26A in this case was made for registration for the assessment year 1958-59 of a firm of four partners with equal shares constituted under a deed dated the 18th April, 1957. The application was made on the 5th September, 1957, before there was any change in the constitution of the firm. In *R. C. Mitters* case, already referred to by my Lord, the Supreme Court, after considering rule 5 of the Indian Income Tax Rules, observed that it was clear that the certificate of registration had reference to a particular assessment year and had effect for the assessment to be made for that particular year. Relying on this dicta of the Supreme Court, the Full Bench of the Punjab High Court in *Niadar Mal Jagdish Parshad v. Commissioner of Income Tax* held as follows :

"The registration of the firm before the assessment is for the previous year, which is the same in Income Tax parlance as the accounting year. How the income of an existing partnership in that year can be assessed on two different bases is hard to comprehend."

In this case also if the Tribunal's decision is held to be correct, the effect would be that for the same assessment year there would be two assessments on two different bases, namely, one on the basis of a registered firm for the period 1st

February to 30th September and the other on the basis of an unregistered firm for the period 1st October to 31st December. This, in our opinion, is not permissible. If the authorities below had granted registration to the firm as constituted under the instrument dated the 18th April, 1957, for the period 1st February to 30th September, 1957, there could not possibly be any objection. But in granting registration to the reconstituted firm for only a part of the accounting year, the Tribunal, in my opinion, has erred. I concur in the order made by my Lord.