

(1949) 08 CAL CK 0038
In the Calcutta High Court
Case No : Income-tax Ref. No. 10 of 1948

Commissioner of Income Tax Central	Vs	APPELLANT
Dudwala and Co.		RESPONDENT

Date of Decision : 31-08-1949

Acts Referred:

Income Tax Act, 1922 — Section 26A

Citation : AIR 1950 Cal 315 : (1950) 18 ITR 653

Hon'ble Judges : Harries, C.J.; Chatterjee, J

Bench : Division Bench

Advocate : S.K. Gupta and J.C. Pal, for the Appellant; Atul C. Gupta and Hemanta Bose, for the Respondent

Judgement

Chatterjee, J.—At the instance of the Commissioners of Income Tax, the question of law which has been referred to this Court for its opinion by the Tribunal is in these terms :

"Whether on the facts and in the circumstances of this case the Tribunal was right in holding that the partnership firm of Dudwala & Co. should be registered u/s 26A of the Income Tax Act."

2. The facts shortly are as follows. The partners of the firm were Rai Bahadur Rameshwar Nathany, representing the Mitakshara joint family under the name and style of Baldeodas Rameswar, one Mannalal Musuddi and one Ramkumar Agarwal. Mannalal Musuddi went out of the partnership in November 1942 and a fresh deed was executed by which the two partners carried on the business of the firm, in which the share of Rameswar Nathany (representing Baldeodas Rameswar) was twelve annas and Ramkumar Agarwala three anna. The remaining one anna share was devoted to charity. The deed was dated 10th February 1946.

3. A suit for partition was instituted by one of the members of the Hindu undivided family. That suit was instituted on the original side of this Court and

was marked No. 1436 of 1943. That litigation resulted in a compromise and a consent decree was passed. The relevant clauses are set out in para. 4 of the referring order.

4. By Clause 1 of the terms of Settlement, the joint family came to an end on 21st September 1943. In Clause 3 the shares of each of the members of the family after the partition are stated. Clauses 7 and 10 are important and they are set out below,

Clause 7. "The business carried on under the names and Styles of Rai Bahadur Baldeodas Rameswar and Rameswar Nathany & Co. shall be stopped from the date hereof but this is not to affect the partnership carried on under the name and Style of Messrs. Dudwala & Co, in which Messrs Baldeodas Rameswar are the partners and the said partnership shall be continued as provided in Clause 10 hereof."

Clause 10. "In the firm of Dudwalla & Co. the parties hereto have twelve annas shares and it shall remain joint and the parties shall be entitled thereto according to the shares mentioned in Clause 3 thereof."

5. An application was made in this case u/s 26A, Income Tax Act. That section is in the following terms.

(1) Application may be made to the Income Tax officer on behalf of any firm, constituted under an instrument of partnership, specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to Income Tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall, contain such particulars and shall be in such form and be verified in such manner, as may be prescribed; and it shall be dealt with by the Income Tax officer in such manner as may be prescribed."

6. Dr. S. K. Gupta, learned counsel for the revenue authorities, drew our attention to the rules bearing on the subject under Rule 2.

"Any firm constituted under an Instrument of partnership specifying the individual shares of the partners may under the Provisions of Section 26A, Income Tax Act register with the Income Tax officer the particulars contained in the said Instrument on application made in this behalf."

7. Such application shall be signed by all the partners.

8. In the schedule to the form set out in Rule 3 there is a note which says that the application must be signed by all the partners (not being minors) in the firm as constituted at the date on which the application is made and it must specify the names of the partner, the address, the date of admittance to partnership, interest on capital or loans, salary or commission from the firm and share in the balance of profit or loss.

9. Dr. Gupta also drew our attention to Rule 4 which states that if on receipt of application referred in Rule 3 the Income Tax officer is satisfied that there is a firm in existence constituted as shown in the Instrument of Partnership, and that the application has been properly made we shall grant a certificate stating that the instrument of partnership has been registered with him u/s 26A, Income Tax Act.

10. The application u/s 26A was refused by the Income Tax Officer on the ground that (as?) the joint family had come to an end it could not form a partnership with a stranger as such until and unless the separate members of the family along with the stranger Ram Kumar formed themselves into a partnership and asked for registration.

11. On appeal the Assistant Commissioner took the same view. But the Tribunal held, and in our opinion rightly that the application ought not to have been refused and that the application was maintainable u/s 264.

12. Inasmuch as the Tribunal allowed the appeal of the assessee and ordered that the firm of Dudwala and Company should be registered the revenue authorities wanted the above question to be referred to this Court.

13. In our opinion, the Appellate Tribunal was justified in taking the view that Section 26A did apply to this case. All that the section requires is that there should be a firm constituted under an instrument of partnership and that the deed of partnership must specify the individual shares of the partners and that an application should be made, in the prescribed form and should comply with the Rules.

14. Dr. Gupta's point is that in the application form it was stated that Nathany was the Karta or manager of a Hindu undivided family. If so it was a mere surplusage. The fact that there was a dissolution of the joint family which was governed by the Mitakshara School of law had no effect at all on the constitution of the firm. It was rightly conceded by Dr. Gupta that the members of the Joint family were not partners of the firm of Dudwala and company. Where A, the karta or managing member of a Hindu joint family enters into a partnership with B, a stranger, then A alone can be taken to be a partner and B is entitled and bound to treat only with A as a co-partner. In a suit for dissolution only A and B would be parties. To enable the members of A's family to intervene in the affairs of the firm would introduce confusion into partnership law and would paralyse trade and business. Coparcenary is the result of status but partnership is constituted by contract and the members of A's family have no contractual relations with B. The Karta, Rai Bahadur Rameswar Nathany, was thus one of the partners and the fact that there was a disruption of the coparcenary to which, he belonged did not affect his status as a partner of the firm.

15. It was urged by Dr. Gupta that a Hindu undivided family governed by the Mitakshara school of Hindu law, ceased to exist as such on the institution of the suit and in any event on the consent decree being passed therein. According to

the true notion of an undivided Mitakshara family, it is settled law that no individual member can predicate of the joint property, that he as a member of a joint family, has a certain definite share. Partition, therefore, consists in ascertaining and defining the shares of the coparceners in the joint properties and the actual division of the properties by metes and bounds is not necessary.

16. Dr. Gupta argues that under Clause 10 of the decree, it was stated that in the firm of Dudwala and Company the parties had twelve annas share and it was stated that it shall remain joint. But he points out that the consent decree further provided in that clause that the parties shall be entitled thereto according to the shares mentioned in Clause 3 thereof which defines the shares of each of the members of the family in the joint family assets or properties.

17. In our opinion, even if Clause 10 did not state that the parties would be entitled to the 12 annas in the partnership according to the shares mentioned in Clause. 3 of the terms of settlement, the effect would be the same. After the shares have been defined the members of the Mitakshara joint family may divide the property by mates and bounds or they may continue to live together and enjoy the property in common. Yet, that would effect, the mode of enjoyment but not the tenure of the property, Therefore, the mere mention that the parties would be entitled to twelve annas share of the firm of Dudwala and Company according to the shares specified in the terms of settlement did not make any alteration as to the real character of the property. The family ceased to be joint and the shares were defined, and the necessary consequence is that any property, e. g., the twelve annas share in that firm would be held by the members of the family as tenants in common.

18. But that has no effect whatsoever on. the rights of the Rai Bahadur as a member of the firm. It cannot be contended that the firm was dissolved because the consent decree had been passed in the suit brought by one of the Nathany's in this Court. The revenue authorities are really refusing to register the firm so as to exact higher tax on the basis that they were an unregistered firm. It is not really their case that Dudwalla & Co., ceased to be a firm. Only the nature of the liability of the Rai Bahadur vis-a-vis his coparceners was changed as a result of that decree in the partition suit. Before the disruption he as Karta was liable to account in a very limited sense. A co-parcener seeking partition is not entitled to require the Karta to account for his past dealings in the family property, All that he is entitled to is an account of the family property as it exists at the time he demands a partition. That law was settled in this High Court in the case of Parmeshwar Dube v. Gobind Dube 43 Cal. 459 : (A. I. R.1916 Cal. 500). After the partition decree was passed, the Rai Bahadur would be liable to render account in respect of the twelve annas share on a different basis. But still he would continue to be a member of that firm and the partnership would not be in any way affected by the passing of that decree in the partition suit.

19. In my opinion the Tribunal was right when it took the view that the partnership continued and Section 26A was applicable.

20. Vis-a-vis the members of the family of the Rai Bahadur might be liable to account, as I said before, on a different footing. But he did not cease to be a partner of the firm and as such the application was rightly made u/s 26-A on behalf of the firm which was constituted under a proper instrument of partition which specified the individual shares of the partners.

21. The answer to the question put to us must therefore be in the affirmative. The assesseees are entitled to their costs of this Reference. Certified for two counsel.

Harries C.J.

I agree.