

(1979) 11 MP CK 0030

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 309 of 1973

GANESH RICE MILLS

APPELLANT

Vs

COMMISSIONER OF Income Tax, M.P.

RESPONDENT

Date of Decision : 12-11-1979

Acts Referred:

Income Tax Act, 1961 — Section 143, 144, 170, 187, 188
Partnership Act, 1932 — Section 30

Citation : (1981) 15 CTR 148 : (1981) 132 ITR 257

Hon'ble Judges : G. P. Singh, C.J

Bench : Division Bench

Judgement

G. P. SINGH C.J. - This reference is made under s. 256(1) of the I.T. Act, 1961, by the Income Tax Appellate Tribunal, referring for our answer the following question of law :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the firm was not entitled to continuation of registration for the period from Diwali 1963 to March 11, 1964 ?"

The reference relates to the assessment year 1965-66. The relevant previous year is from Diwali 1963 to Diwali 1964. M/s. Ganesh Rice Mills was constituted as a partnership firm by an instrument of partnership executed on October 25, 1956. The firm consisted of the adult partners, namely, Chandra Shekhar Trivedi and Shyam Manohar. The adult partners had each 6 annas share in the profits of the firm. The minor, Narayan Prasad, was admitted to the benefits of the partnership. He was given 4 annas share in the profits. The partnership was granted registration up to the assessment year 1964-65. An application was filed for allowing the continuation of the registration of the partnership under s. 184(7) on July 1, 1965, for the assessment year 1965-66. This application was signed by Shyam Manohar and Narayan Prasad, who had become major, on March 1, 1963. Chandra Shekhar, the other adult partner, retired on March 11, 1964, and thereafter died on March, 1965. Another instrument of partnership

was executed on April 15, 1964, with effect from March 12, 1964, by Shyam Manohar and Narayan Prasad. The application filed on July 1, 1964 continuation of registration of the firm as constituted by the earlier instrument of partnership up to March 11, 1964, on the plea that the firm was dissolved on that date and new firm was constituted from March 12, 1964, by the second instrument of partnership executed on April 5, 1964. The ITO refused continuation of registration of the firm and his order was confirmed in appeal by the AAC. The Tribunal also confirmed the order refusing continuation of registration of the firm on the reasoning that the minor, having become a major, there was a change in the constitution of the firm and that no registration could be granted for a part of the previous year.

Section 184(7) of the Act which deals with continuation of registration of a firm for subsequent assessment years read as follows :

"184. (7) Where registrations granted to any firm for any assessment year, it shall have effect for every subsequent assessment year :

Provided that -

(i) there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the registration was granted; and

(ii) the firm furnishes along with its returns of income for the assessment year concerned, a declaration to that effect, in the prescribed form and verified in the prescribed manner."

The form of declaration prescribed under prov. (ii) to s. 184(7) is Form No. 12, which is as follows :

"Declaration u/s 184(7) of the Income Tax Act, 1961, for continuation of registration.

To,

The Income Tax Officer,

.....

Re : Assessment year 19 -19

We, on behalf of..... declare that :

(i) our firm was granted registration for the assessment year 19..... -19....., vide order dated..... 19....., passed by the Income Tax Officer..... and -

(ii) there has been no change in the constitution of the firm or the shares of the partners since the last day of the previous year relevant to the assessment year 19..... -19..... up to the last day of the previous year relevant to the assessment year 19..... -19..... or to the date (..... 19.....) of dissolution of the firm; and

(iii) none of the partners of the firm, was, at any time during the previous year, in relation to the whole or any part of his share in the income or property of the firm a benamindar of any other partner to whom he is not related as spouse or minor child.

We further declare that the information given above is correct and complete.

Date

Signature

Address

- 1.
- 2.
- 3.
- 4.

Section 187 provides that where, at the time of making an assessment under s. 143 or s. 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. Where a firm carrying on a business or profession is succeeded by another firm, and the case is not covered by s. 187, s. 188 requires that separate assessments shall be made on the predecessor-firm and the successor-firm in accordance with the provisions of s. 170.

A perusal of s. 184(7) will show that an application for continuation of registration can be made only if there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership. A change in the constitution of the firm referred to a change in the identity of partner. "Shares of the partners as evidenced by the instrument of partnership" refer to their shares in profit and loss as disclosed by the instrument of partnership. Section 2(23) of the Act defines a partner to include a minor admitted to the benefits of partnership. In view of this special definition, it cannot be said that when a minor admitted to the benefits of a partnership becomes a major and so becomes a partner in the real sense by becoming liable for losses also, there is any change in the identity of partners. The question that generally arises in such cases is whether when the minor becomes a major and becomes liable for losses also, there is any change in "the shares of the partners as evidenced by the instrument of partnership"? If the instrument of partnership does not on a proper construction disclose how the losses would be shared on the minor becoming a major, it can certainly be said that on the minor becoming a major there occurs a change in the shares of the partners as evidenced by the instrument of partnership. But if the instrument of partnership is comprehensive and on a fair reading provides the manner in which the losses would be shared on the minor becoming a major, it cannot be said that there is a change in the share of the partners as evidenced by the instrument of partnership. This

question was considered in detail by a Full Bench of the Allahabad High Court in *BADRI NARAIN KASHI PRASAD Vs. ADDL. COMMISSIONER OF INCOME TAX. FANCY STORES v. COMMISSIONER OF INCOME TAX. R. C. GUPTA and SONS v. COMMISSIONER OF INCOME TAX. BENI PD. SIDGOPAL v. COMMISSIONER OF INCOME TAX.*, , in which some previous cases of that court were overruled. The Full Bench observed that where the instrument of partnership foresees the eventuality of a minor becoming a major and makes a provision for the distribution of the shares of profits at that time, the instrument evidences the change in the shares; but if it is not possible to ascertain the share from the instrument, at the stage, it will be case where the instrument does not evidence the change. It was further observed that if, on a reasonable construction of the instrument of partnership, the redistribution of the shares in losses on the minor attaining majority can be ascertained, it will be a case where the instrument of partnership evidences the changes in the shares and it would not be possible to say that there is a change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership within the meaning of the first proviso to s. 184(7). We respectfully agree with the view taken by the Allahabad High Court.

The question then is weather, in the instant case, the instrument of partnership on a reasonable construction can be said to provide for the reallocation of losses on the minor becoming a major. The relevant clause of the instrument of partnership are cls. (2) and (3) which read as follows :

"(2) That the share of the partners in accordance with which they shall be entitled for profits or be liable for losses shall be as below :

Serial No.

Name of partners

Extent of shares

1

Chandra Shekhar

0-6-0

2

Shyam Manohar

0-6-0

3

Narayan Prasad (minor) admitted to benefits of partnership and thus entitled to share profits only

0-4-0

Total

0-16-0

(3) That proper accounts shall be maintained of the firms business under the mercantile system and the accounts shall be divided between the partners as per their shares as above."

Clause(2), to being with, provides that the partners shall be entitled for profits and losses as indicated in that clause, but there is a note against the name of Narayan Prasad (minor) that he was admitted to the benefits of the partnership and thus entitled to share profits only. On reading cl. (2) as a whole, it is clear that on a proper construction, the partners were not to shares losses in accordance with their shares in profits during the minority of Narayan Prasad. But after Narayan Prasad become a major and consequently a partner in accordance with s. 30 of the Indian Partnership Act, the note that Narayan Prasad was entitled to share profits only ceased to be operative and all the partners including Narayan Prasad became liable to share losses in accordance with the shares specified in cl. (2). In our opinion, therefore, cls. (2) and (3) of the instrument of partnership, on a fair construction, provide for distribution of losses amongst the partners on the minor attaining majority. It cannot, therefore, be said that on Narayan Prasads attaining majority there arose any change in the shares of the partners which was not evidenced by the instrument of partnership. The facts before is are similar to the facts in reference No. 510/74 decided by the Full Bench in BADRI NARAIN KASHI PRASAD Vs. ADDL. COMMISSIONER OF INCOME TAX. FANCY STORES v. COMMISSIONER OF INCOME TAX. R. C. GUPTA and SONS v. COMMISSIONER OF INCOME TAX. BENI PD. SIDGOPAL v. COMMISSIONER OF INCOME TAX., . We hold that there was no change in the constitution of the firm or the share of the partners as evidenced by the instrument of partnership on the ground that the minor partner, Narayan Prasad, become major and started sharing losses after March 1, 1963. The learned counsel for the department drew our attention to another Full Bench judgment of the Allahabad High Court in Addl. Commissioner of Income Tax Vs. Gauri Vishwanath Dal Mills, . In that case, however, the instrument of partnership was such that it was not possible to ascertain how the losses were to be apportioned after the minor became a major. The case is, therefore, distinguishable and has no application here. The first ground on which the Tribunal refused continuation of registration of the firm cannot, therefore, be supported.

The second ground on which the Tribunal confirmed refusal of continuation of registration is that a continuation of registration cannot be granted for a part of the year. The argument of the learned counsel of the assessee-firm is that the firm was dissolved on the retirement of Chandra Shekhar on March 11, 1964, when a new firm was constituted consisting of Shyam Manohar and Narayan Prasad by another instrument of partnership executed on April 5, 1964, and that as the firm stood dissolved on March 11, 1964, it was entitled to have a

recognition of the continuation of registration till that date. In this connection the learned counsel relies on cl. (2) of Form No. 12 which provides for a delectation that there has been no change in the constitution of the firm or in the shares of the partners up to the last date of the previous year relevant to the assessment year or up to the date of dissolution of the firm. The learned counsel also relies up Additional Commissioner of Income Tax Vs. Abdul Kareem and Company, , where continuation of registration for a broken period was recognized. The difficulty in accepting the argument of the learned causal is that in the instant case there is no finding given by the Tribunal that on the retirement of Chandra Shekhar there was a dissolution of the firm. The Tribunal has held that on the retirement of Chandra Shekhar there was a change in the constitution of the firm which was continued by the remaining partners. In this connection the Tribunal has referred to cl. (3) of the instrument of partnership executed on April 5, 1964, in which it is stated that on the retirement of Chandra Shekhar with effect from march 11, 1964, the remaining partners namely, Shyam Manohar and Narayan Prasad, reconstituted the firm and continued the partnership business. The question, whether, when a partner retires, a new firm comes into existence or the of firm continues, is always a question of fact to be determined on the circumstances of each case : See COMMISSIONER OF Income Tax, CALCUTTA Vs. KEJRIWAL TRADERS., . The question whether on the retirement of Chandra Shekhar the old firm continued or whether it was dissolved and a new firm came into existence has not been referred to use and we also do not find any flaw in the reasoning of the Tribunal and its conclusion that the same firm continued with a change in its constitution. On this finding the declaration given that the firm continued up to March 11, 1964, when it was dissolved as required by s. 184(7) in Form No. 12 was not correct. Section 184(7) read with Form No. 12 contemplates a continuation of registration for a part of the year when the firm stands dissolved but there is no question of continuation of registration for a part of the year when the firm continues after a change in its constitution which is not evidenced by an instrument of partnership. In such a case an application for registration has to be made in accordance with the new instrument off partnership. It is on this ground that the order of the Tribunal confirming refusal of recognition or continuation of registration for a part of the year can be upheld.

For the reasons given above, we answer the question referred to us in the affirmative, in favour of the department and against the assessees. There shall be no order as to costs.