
(1965) 08 AHC CK 0018

In the Allahabad High Court

Case No : Income Tax R. Miscellaneous Case No. 599 of 1962

JER and CO.

APPELLANT

Vs

COMMISSIONER OF Income Tax, U.P.

RESPONDENT

Date of Decision : 13-08-1965

Acts Referred:

Contract Act, 1872 — Section 29
Income Tax Act, 1961 — Section 33A, 66

Citation : (1966) 60 ITR 335

Hon'ble Judges : M. C. Desai, C.J; Manchanda, J

Bench : Full Bench

Judgement

M. C. DESAI C.J. - This a statement of a case submitted by the Income Tax Appellate Tribunal, Bombay Bench "A", at the instance of the Commissioner of Income Tax, U.P., inviting this court to answer the following question :

"Whether in the facts and circumstances of this case, the assessee-firm was entitled to registration u/s 26A of the Indian Income Tax Act, 1922, for the assessment years 1958-59 and 1959-60 ?"

The previous years relevant to the assessment years 1958-59 and 1959-60 are financial years April 1, 1957 -March 31, 1958 and April 1, 1958 - March 31, 1959. The assessee is a partnership constituted on July 21, 1945, of two partners (1) Dady and (2) Minoo, who are brothers. The partners had been carrying on wholesale business in wines under the name and style of Jer and Company at Agra since October 1, 1944, but the partnership was constituted by a written document on July 21, 1945. The material terms of the deed of partnership are as follows :

The partnership business will continue to be carried on under the name and style of Jer and Company. The duration of the partnership will be at will. The shares of the two brothers in the profits will be half and half. They will contribute towards the capital of the business equally and will be entitled to interest at a certain rate on their investment. The net profits will be determined after deducting all

business expenses including depreciation, interest on investment, loans, taxes etc. The partners will devote their whole time and attention to the partnership business and will not enter into or carry on any business either alone or in partnership which is of a competitive nature. The partnership will maintain an account with a bank and it will be operated upon by either of the partners. Neither of the partners is at liberty to assign his share, right, title or interest or part of it, without the consent of the other. Account books will be kept at the place of business and each partner will be entitled to inspect them.

The Excise Commissioner has been granting Dady a licence in form F.L. 2 for wholesale vending of foreign liquor at Agra since 1945.

Section 24 of the U.P. Excise Act has authorized the Excise Commissioner to grant licence's for wholesale vending liquor. u/s 31 every licence granted under the Act is subject to such restrictions and conditions and to be in such form as may be prescribed. Form F.L. 2 is the prescribed form of a licence for wholesale vending of foreign liquor. Clause 13 of it is to the effect that "the business covered by this licence shall not be sublet or transferred", clause 14 is to the effect that there should be a signboard mentioning the vendors name at the door of the premises and clause 16 is to the effect that the licence should not allow any person other than the authorized salesman to conduct sales. The Excise Commissioner is authorised to cancel or suspend a licence for a breach by the holder of the licence or as permitted by the conditions of the licence. u/s 41(e), the Excise Commissioner may make rules, with the previous consent of the State Government, prescribing the restrictions under, and the conditions on, which any licence may be granted, including provision for the following matters :

"....

(viii) the regulation of the transfer of the licences."

Rule 322 of the Excise Manual lays down that an excise licence is personal to the licence to whom it is granted and a Collector should not allow a transfer or sublease or partnership of an excise licence without the prior approval of the Excise Commissioner. Rule 333 prohibits the grant of a licence to a firm unless it is a registered joint stock company and directs that instead a licence should be granted in the names of the partners of a firm as individuals. If a licensee desires to take a person into partnership with him the licensing authority can permit it only in certain circumstances mentioned in rule 344. One circumstance is that the shop cannot well be managed by a single licensee aided by one or more salesmen. The rule further provides that when a licence in partnership is granted, the partnership should not consist of more than two partners, that both must be jointly and severally responsible for the conduct of the shop and that a licensee taking into partnership in his excise business any person in a manner other than that prescribed in the rule will render himself liable to the cancellation of the licence. Rule 362 is about the licence in form F.L. 2. u/s 64 a licensee can be prosecuted for disobedience of a direction contained in a licence or for disobeying

a rule made under the Act should be published in the Gazette. Section 40 requires pre-publication.

Dady held the licence during the two assessment years also but the business of wholesale vending of foreign liquor at Agra was done by the partnership under the name and style of Jer and Company and not by Dady. Jer and Company had engaged an authorized salesman named Mohammad Ismail to do the actual vending. Jer and Company never obtained a licence from the Excise Commissioner for the wholesale vending of foreign liquor. The partnership was registered u/s 26A of the Income Tax Act in 1945-46 and the registration was renewed from year to year up to end of the assessment year 1950-60. The registration was renewed for the assessment year 1958-59 on September 8, 1958, and for the assessment year 1959-60 on July 10, 1959. On September 3, 1960, the Commissioner of Income Tax acting u/s 33a of the Income Tax Act cancelled the renewal for the two assessment years after the necessary formalities because in his opinion the object of the partnership was illegal, it being to carry on the business of selling foreign liquor contrary to the rules framed by the Government under the Excise Act. The partnership filed an appeal which was allowed by the Tribunal. The gist of its findings is given below :

"The question is whether the business covered by the licence had been sublet or transferred and it must be answered in the negative because the business of vending liquor continues to be carried on by Dady as well. Clause 13 of the licence has not been contravened and the licence could not be, and has not been, cancelled on the ground of the contravention of any condition of the licence. There is no absolute prohibition against the forming of a partnership to carry on the business of vending foreign liquor under a licence. Both Dady and Minoo have been carrying on the business of wholesale vending of foreign liquor and the partnership is not only for sharing the profits. The business is being carried on by the partnership on the licence issued to Dady and within the knowledge of the excise authorities. There is no illegality in the partnership agreement and consequently the partnership is entitled to registration."

Subsequently, at the instance of the Commissioner of Income Tax, U.P., the Tribunal has submitted this statement to this court.

Under section 26A renewal of registration of a partnership may be refused or cancelled. The Government have framed Registration of partnership Rules regarding the applications for registration and renewal of registration. Rule 4 deals with an application for registration and rule 6 with renewal of registration. Before a partnership is registered the Income Tax Officer must be satisfied that a partnership constituted as shown in the instrument of partnership exists. Under rule 6B registration or renewal of registration may be cancelled on the ground that the partnership was registered "without there being a genuine form in existence."

It has been found by the Tribunal that a genuine partnership constituted by Dady

and Minoo as shown by the instrument of partnership dated July 21, 1945, was in existence during the assessment years. It has been further found that the licence to carry on the business was issued in the name of Dady alone and that the business of vending liquor was carried on by the assessee. There is no licence obtained by the assessee to carry on the business and it is prohibited by law from carrying it on. A partnership is nothing but the partners taken collectively; the assessee is Dady and Minoo taken together. But there is a distinction between Dady alone and Dady and Minoo taken collectively as a partnership; Dady alone cannot be said to be identical completely with Dady and Minoo. The business is carried on by the assessee by virtue of the licence issued in the name of Dady, it is not its case that it is carrying it on without any licence. It relies upon the licence issued to Dady as the authority for its carrying it on. Dady himself has permitted the business to be carried on by it. Lastly, the licensed business had to be carried on. These facts established beyond any doubt that he has transferred the licence to the assessee. He himself has allowed the assessee to use the licence and if this does not mean that he has transferred it to the assessee I do not know what else it means. The only object behind transfer of a licence by the licensee to another person is to enable the other person to carry on the business on the authority of the licence so if a person other than the licensee carries on the business on its authority and with the approval of the licensee it must mean that the licence has been transferred to him.

The business had to be carried on by Dady alone and it was carried on by the assessee, it may be argued that this involves transfer of the business by Dady to the assessee. Actually there was no transfer of any business because Dady never carried on the business, it having been always carried on by the assessee. There would have been transfer of business if he had carried it on for some time and then it was carried on by the assessee. However, this is of no consequence because transfer of the business also is in contravention of clause 13 of the licence itself and the licence is rendered liable to cancellation.

A transfer or partnership of an excise licence can be sanctioned only by the Collector with the prior approval of the Excise Commissioner; there has been neither sanction by the Collector for any transfer or partnership nor approval by the Excise Commissioner. The assessee is certainly an old firm carrying on the licence business but I am not prepared to infer approval of the Excise Commissioner and sanction of the Collector from this fact alone. Even these two inferences will not suffice because sanction by the Collector would be valid only if he could and did infer approval of the Excise Commissioners approval to the sanction. He was not bound to infer it and unless he actually inferred it he could not sanction the transfer or partnership. The assessee relied upon *J. D. Italia v. Cowasjee and Thiagaraja Pillai v. Commissioner of Income Tax*. The facts in the two cases were different and they were governed by a different Act and different Rules. The provisions of the U.P. Excise Act and the U.P. Excise Rules may be similar to those of the Madras Excise Act and the Madras Excise Rules but are not

identical with them and an interpretation of the latter is of no avail in interpreting the former. I respectfully agree with the observation of Ranganadam Chetty, J. in *Chandaji Sukhraj & Co. v. Lal & Co.* that a decision under one Act or Rule is no precedent for a case under another Act or Rule. In the case of *J. D. Italia* it was found as a matter of fact that the authorities were aware of the existence of the partnership before the licence was issued; they had actually turned down the request to issue the licence in the name of partnership. There is no finding here that not only the Collector but also Excise Commissioner knew that the business was to be carried on by the assessee even though the licence was issued in the name of Dady. The Tribunals finding that "it is too much to believe the excise authorities did not know about this" is not a definite finding and the words "the excise authorities" are too vague to include necessarily the Excise Commissioner. Moreover, while permission to do an act may be inferred from the knowledge that the act was being, or was intended to be, done, sanction requires a positive act on the part of the authority having power to sanction and may not be inferred in a like manner. Further, all that has been found by the Tribunal is that there was knowledge, not that it was derived from disclosures made by Dady. It is quite likely that the excise authorities were under a misapprehension about the law - they might have wrongly thought that there was identity between Dady and the assessee and that the carrying on of the business by the assessee did not amount to transfer of the licence from Dady to it. If they continued to grant a licence to Dady or refrained from taking any action to cancel the licence under this misapprehension of the law, sanction and approval required under the Rules can simply not be inferred. I am not prepared to infer that the Excise Commissioner approved of the transfer of the licence and that the Collector knew that he had approved of it and sanctioned it.

The transfer of the licence is in contravention of rule 322 of the Excise Rules. The assessee relied upon *Shiam Behari Lal v. Malhi*, *Radhey Shiyam v. Mewa Lal*, *Chandaji Sukhraj & Co. v. Lal & Co.*, *Shiv Dayal v. Fim Bishan Das Uma Charan Shaw & Bros. v. Commissioner of Income Tax and Commissioner of Income Tax v. K. C. S. Reddy* in support of his contention that there was nothing illegal in what it and Dady have done. The case of *Shiam Behari Lal*, *Radhey Shiyam* and *Shiv Dayal* were cases in which the licensee entered into a partnership with others for sharing the profits or loss from the business and not for carrying on the business itself. Now a contract to share the profit or loss of a business has no effect whatsoever on the contract under which the business itself is carried on. If the business is carried on by a partnership and a partner enters into a contract with a third person for sharing the profits and losses pertaining to his share this contract has no effect at all on the partnership and the other partners are not affected by it as I explained in *Commissioner of Income Tax v. Roopnarain Ramchandra* (I.T.R. No. 522 of 1961) decided on August 3, 1965. Similarly if a business is carried on under a licence granted to a person and the licensee enters into a contract with a third person for sharing his profits and losses the contract has no effect at all on the relation between him and the State or the licence

granted to him. This contract does not at all amount to transfer of the licence or even to entering into partnership for carrying on the business. Therefore, the decisions in the cases of Shiam Behari Lal, etc., are of no avail. In the cases of Chandaji Sukhraj & Co. and K. C. S. Reddy the licensee entered into a partnership with others for carrying on the licensed business and it was held that the partnership was not invalid. In the case of Chandaji Sukhraj & Co. there was no prohibition on the licensees entering into partnership with others; he was only required to report the fact to the licensing authority within a certain time. If a licensee entered into a partnership and informed the licensing authority of the fact, there is no question of there being anything wrong; but even if he did not inform the licensing authority of the fact, the only wrong committed by him is the failure to inform it and this failure could have no effect on the validity of the partnership. He may be liable for the failure but not for entering into the partnership at all. The view taken in the case of K. C. S. Reddy was that a partnership is not a "person" within the prohibition of the Bihar Mica Act under which no "person" can deal in mica except under a licence, that a partnership dealing in mica without a licence in its favour does not commit an offence under the Act and that consequently the formation of the partnership is not against law. The learned judges found that though the business was carried on by a partnership it was the licensee-partner who actually dealt in mica and was in possession of it. The decision given in the circumstances is of no avail in the instant case. In the case of Uma Charan Shaw & Bros. there was no transfer of the licence at all and so it was held by the Supreme Court that the formation of the partnership was not in violation of the Bengal Excise Rules. What was argued before the Supreme Court was that the partnership was not genuine and support was sought from section 42 of the Bengal Excise Act forbidding transfer or sub-letting of a licence without permission. The Supreme Court observed that there was no evidence that the licence was transferred and that there was nothing to suggest that the partnership was not genuine. This decision is, therefore, of no help. In *Commissioner of Income Tax v. Union Tobacco Company Ansari*, J. said that *Velu Padayachi v. Sivasooriam Pillai* deciding that a partnership entered into for conducting a licensed business was void is not overruled by this Supreme Court decision. In the case of Chandaji Sukhraj & Co. it was held that taking a partner does not amount to transfer of the licence. Forming a partnership is nothing but entering into a contract and a contract by itself is not a transfer; so forming a partnership by itself can never amount to transfer. When a licence is granted to a person to carry on a business he possesses the licence and if he carries on the business he possesses the business also. If thereafter he enters into a partnership with another and the partnership carries on the business there is transfer of the business. If before starting the business he entered into a partnership with another and the partnership starts the business there is transfer of the licence to the partnership as explained above. But in both cases the transfer follows the formation of the partnership and the act of transfer is quite distinct from the forming of the partnership. The forming of the partnership itself does not comprehend the transfer and I respectfully agree with what was said in

the case of Chandaji Sukhraj & Co. In *Gauri Shankar v. Mumtaz Ali Khan* the facts were that Mumtaz Ali Khan took a ferry on lease from the Government agreeing not to sub-let it and then entered into partnership with another person to run the ferry and it was held that the contract between him and the other person was valid and an action could be maintained on it. The lease prohibited only a sub-lease or a transfer but not a partnership; this was the ratio decided of the decision. The question arose between Mumtaz Ali Khan and his partner and not between Mumtaz Ali Khan and the Government, stranger to the partnership. Further, the question whether a lessee entering into partnership amounts to a sub-lease or transfer of the lease is not quite the same as the question whether a licensee entering into partnership amounts to transfer of the licence or not, because a licence in its very nature is personal, no business can be carried on without a licence and the licensed business must be carried on.

In *Velu Padayachi v. Sivasooriam Pillai*, *Govindaraj v. Kandaswami*, *D. Mohideen Sahib & Co. v. Commissioner of Income Tax* *Commissioner of Income Tax v. Union Tobacco Company*, *Commissioner of Income Tax v. Benarsi Das & Co.* and *Commissioner of Income Tax v. Krishna Reddy*, the partnership entered into by the licensee with other persons was held to be invalid or void. Moreover, in the case of *Shiam Behari Lal* a licensee entering into partnership, even though the licence expressly prohibited partnership, as in the case of *Hormasji Motabhai v. Pestanji Dhanjibhai*, was held to stand on a different footing. In the case of *Velu Padayachi* the High Court of Madras had to deal with the Madras Excise Act and Rules having similar provisions to our deal with the Madras Excise Act and Rules having similar provisions to our Excise Act and Rules and Horvill, J. observed at page 324 :

"...partnership entered into for the purpose of conducting a business in arrack or toddy on a licence granted...to only one of them is void ab initio...in that it either involves a transfer of the licence, which is prohibited under rule 27 and punishable u/s 56, or a breach of section 15...punishable u/s 55, because the unlicensed partner, by himself or through his agent, the other partner, sells without a licence."

This decision was followed in the cases of *Govindaraj*, and *D. Mohideen Sahib & Co.*, In the case of *Union Tobacco Co.* page 123 :

"...creating equitable interests out of the benefits under a licence is covered by the prohibition against transfers the prohibition against such a transfer would cover any alienations of the partial benefits as well, and the licensee cannot declare himself a trustee of the benefits in favour of another and himself. If doing that contravenes the rule against transfers, and we think it does, entering into a partnership also amounts to such a violation, as a partner is a trustee for his other partners. It is, therefore, clear that a licensee by entering into a partnership passes partial but substantial interests in what he has in favour of another, and thereby does what the rule seeks to forbid...by becoming a partner a licensee...converts without transfer of corpus his possession into that of an

agent. The vicarious possession is then substantially different and the rule against transfer is attracted."

In Benarasi Das & Co.'s case a person obtained a licence for dealing in opium and subsequently entered into partnership with others to run the business and the partnership was declared to be illegal. Similar were the facts in the case of Krishna Reddy and the Andhra Pradesh High Court held the partnership to be void.

In the result my finding is that the assessee-partnership was invalid because it was formed with the avowed object of carrying on the business of wholesale vend in foreign liquor without a licence in its favour. The object of the partnership was to carry on the business on the authority of the licence issued in the name of Dady and transferred by him to the partnership against the provisions of the Excise Act and Rules. Thus it was to carry on the business against the provisions of the Excise Act and Rules and consequently the contract of partnership was void u/s 29 of the Contract Act. As in the eye of law the assessee-partnership did not exist, it could not be registered.

A question was raised about the validity of the Excise Rules on the ground that there was no pre-publication of the Rules as required by section 40 of the Excise Act. Whether the Rules were published or not is a question of fact and the statement of the case does not contain the fact that there was no publication. It is not for this court to ascertain facts and it cannot treat submissions of counsel as facts. In the absence of a finding recorded by the Tribunal that there was no publication of the Rules, this court cannot proceed on the basis that there was no publication. It is no answer to say that only the production of the gazette is required to prove the publication. What we have to consider is not whether the question of the validity of the Rules is one of law or not, but whether it arises out of the Tribunal's order. No question, even if of law, not arising out of the Tribunal's order can be answered by a High Court u/s 66. Harla v. State of Rajasthan is irrelevant; all that it decides is the effect of the non-publication of a resolution of a Council of Ministers. I may at the same time point out that in the case of Radhey Shyam it was pointed out that the Excise Rules are made in exercise of the powers conferred by section 40 and 41 of the Excise Act and have the force of law.

In the result the question should be answered in the negative.

A copy of this judgment should be sent under the seal of the court and the signature of the Registrar to the Income Tax Appellate Tribunal, Bombay Bench A, as required as section 66(5) of the Income Tax Act. The Commissioner of Income Tax should get his costs of this reference, which we assess at Rs. 200. Counsels fee may be assessed at Rs. 200.

MANCHANDA J. - I agree.