
(1964) 12 OHC CK 0019

In the Orissa High Court

Case No : Spl. Jurisdiction Case No. 24 of 1963

Mahapatra Bhandar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 04-12-1964

Acts Referred:

Income Tax Act, 1922 — Section 26A

Citation : AIR 1965 Ori 160 : (1965) 58 ITR 671

Hon'ble Judges : R.L. Narasimham, C.J;R.K. Das, J

Bench : Division Bench

Advocate : R.N. Misra and R.C. Patnaik, for the Appellant; D. Mohanty, for the Respondent

Judgement

Narasimham, C.J.—This is a reference u/s 66(1) of the Indian Income Tax Act, 1922 made by the Income Tax Appellate Tribunal referring the following question for the opinion of this Court :

"Whether on the facts and circumstances of the case the Income Tax Officer was justified in refusing registration of the alleged firm u/s 26-A or the Income Tax Act."

2. One Udayanath Mohapatra held a license for excise shop in ganja and opium in his own name, for the previous year ending 31-3-62 for which the assessment year would be 1952-53. Finding difficulty in financing the said excise shop individually, he entered into partnership with five other persons and a deed of partnership was executed on 30-3-1950. In that deed the interest of each partner in the profits and losses was specified. The partnership firm was described as Mohapatra Bhandar and that firm applied for registration u/s 26-A of the Income Tax Act for the year in question. The Income Tax authorities refused registration of the firm on the ground that the transfer of excise business by Udayanath to the firm was prohibited, by the Excise Laws of Orissa and consequently the object of the firm was to carry on unlawful business.

3. Possession and sale of Ganja are regulated by the Provisions of the Bihar and Orissa Excise Act under which such possession and sale are prohibited except in accordance with a licence granted under the Act. Rule 152 of the Rules made by the Board of Revenue, Orissa under that Act is as follows :

"No transfer or sub-lease (whether entire or partial) of a licence shall be made except with the previous permission of the Collector."

Possession and sale of opium is governed by the provision of the Opium Act of 1878 which prohibits such possession and sale except by a person holding a permit or licence, in accordance with the Rules made by the Government of Orissa, under that Act. The Board of Revenue made subsidiary rules under the provisions of the said Rules, regarding the grant of license made under the Opium Laws. Condition No. 8 of the General Conditions applicable to such licenses is as follows :

"No transfer or sub-lease (whether entire or partial) of a license shall be made except with the previous permission of the Collector."

Here it is admitted that the previous permission of the Collector was not taken so as to enable the assessee firm to carry on the business of possessing and selling opium and Ganja for the year in question. Hence any agreement between the licensee namely Udayanath Mohapatra and the other partners for carrying on the business in respect of those conditions without obtaining the previous permission of the Collector would be unlawful because carrying on such business without license is an offence under the Bihar and Orissa Excise Act and the Opium Act.

4. The learned Tribunal relied on a Madras decision reported in D. Mohideen Sahib and Co., Excise Contractors Vs. Commissioner of Income Tax, which again was based on an earlier Full Bench decision of the same High Court, reported in Velu Padayachi v. Sivasooriam Pillai AIR 1950 Mad 444 where it was held that such an agreement is void ab initio. This view has been followed by the Kerala High Court in Commissioner of I.T., Mysore, T.C. Coorg and Bangalore Vs. Union Tobacco Co., Ernakulam, and by the Punjab High Court in COMMISSIONER OF Income Tax Vs. BENARSI DAS AND COMPANY., .

5. Mr. Misra for the assessee however, urged that so long as the actual business of possessing and selling the excisable goods was done by the licensee, the mere fact that it entered into partnership with other persons for carrying on that business will not amount to "transfer or sub-lease" of the license, and consequently such an agreement of partnership" would not be unlawful. For this purpose he relied on Gordhandas Kersowji v. Champsey Dossa AIR 1921 PC 137, Shiam Bihari Lal v. Malhi AIR 1917 All 54 (1); Radhey Shiyam v. Mewalal AIR 1929 All 210 and a decision of the Patna High Court reported in The Commissioner of Income Tax Vs. K.C.S. Reddy and Messions Indian Union Mica Company, .

6. In AIR 1921 P C 137 it was held on a construction of the provisions of the

Bombay Salt Act, 1890, that if a licensee admits partners into his business for the purpose of sharing the profits only, though the actual manufacture of salt was done by the licensee himself there was no contravention of the statutory prohibition against alienation of the licensee's interest. Their Lordships however took care to observe that the decisions to the contrary, based on other Acts had no application to that case. In AIR 1917 All 54 (1) it was held that if a licensee under the U.P. Excise Act contracted with another person on the understanding that the latter would advance money to the former in sharing the profits of the business, there was no transfer or sub-lease of the license inasmuch as a contract did not entitle the transferee to sell any of the goods covered by the license AIR 1929 All 210 also is a case of this type. In Karsan Sadashiv Patil v. Gatlu Shiwaji Patil ILR 37 Bom 320 also it was held on a construction of the Bombay Abkari Act that if a licensee takes in partners for the purpose of sharing profits only there would be no transfer or sub-lease of the license. But in that very case it was pointed out that in Abkari Rules of 1895 there was prohibition of transfer or sub-lease (in whole or in part) of the right of the licensee to vend excisable goods and that in 1902 all references to the question of sub-letting a part of the right to vend or of admitting persons into the business were omitted from the rules. It was in consequence of this omission that the learned Judge held that a mere admission of partners for the purpose of sharing profits would not amount to transfer or sub-lease of the license.

7. Here, however the rules quoted above expressly prohibit even partial transfer or sub-lease of the license. The language of the Orissa rule seems to be similar to the rule in Bombay in 1895--as pointed out in the aforesaid Bombay decision. It may therefore be held that if a licensee admits other persons as partners merely for the purpose of obtaining financial contribution for his business and sharing in the profits thereof there may be partial transfer of the license which is also prohibited in the Orissa Rules.

8. Apart from this consideration, it was never the case of the assessee at any time that the actual business of possessing and selling excisable goods was carried on only by Udayanath Mohapatra and the other persons merely made financial contributions and shared in the profit without actually managing the business. The partnership deed which is on the record does not show that the management of the firm so far as these articles were concerned was left entirely in the sole charge of Udayanath Mohapatra. The findings of fact of all the Income Tax authorities are as follows :

"Shri U.N. Mohapatra one of the partners took a license for excise shop in his own name. On the footing that he was not able to finance the excise business individually he made over the business to the firm in lieu of finance to meet the requirement of the Excise business. It was agreed that the partners would share the profits or loss in the excise business also according to the share of each partner in the firm. The firm financed the business and took over its management At the end of the year the net result of the several excise shops

were incorporated in its profit and loss account."

This finding clearly shows that the firm did not merely take over the financial part of the business but the entire business including its management. The business here consists merely in storing and selling excisable goods like opium and ganja and when the Income Tax authorities have categorically held that this business was handed over by the licensee to the Firm and the firm managed this business during the year in question, it must be held that there was a complete transfer of the business against the provisions of the Excise Rules prevailing in the State.

9. The Patna case reported in *The Commissioner of Income Tax Vs. K.C.S. Reddy and Messions Indian Union Mica Company*, is clearly distinguishable. There a licensee under the provisions of the Bihar Mica Act 1948 entered into a partnership with other persons for dealing in mica but he remained the managing partner of the firm. The learned Judges therefore held that the actual business of dealing in mica was done by the licensee himself and not by the partnership firm. This will be clear from the following pages at page 566 (of ITR): (at p. 399 of AIR):--

"It is the admitted position in this case that Mr. K. C. Reddy who is one of the partners of the Firm is in possession of a dealer's licence and under para. 6 of the partnership deed Mr. K.C. Reddy is the Managing Partner. If Mr. K.C. Reddy had the intention of delegating to the other partners of the firm the power of selling or purchasing mica, it is undoubtedly open to him to apply to the controller under the provision of Section 7 of the statute for endorsing the name of the other partners on the licence The important point to be noticed is that there is no express prohibition in the Bihar Mica Act, that a partnership cannot carry on the business of dealing in mica provided of course that the person who actually sells and who actually purchases and who is actually in possession of the mica has the dealer's licence required u/s 4 (1) (d) of the Act."

Here as already pointed out there is no finding that Udayanath Mohapatra was the managing partner of the Firm for excise business. The partnership deed itself shows that there was no managing partner for the firm and the finding of fact by the Tribunal is that the Firm carried on the business which would necessarily mean the securing, possessing and selling of excisable articles in question.

10. Mr. Misra then contended that there is no clear finding on this point by the lower authority and a further statement of the case may be called for from the Tribunal as to whether all the partners or the licensee alone actually carried on the business of possessing and selling excisable articles. In my opinion there is no ambiguity in the findings of the Tribunal quoted above and it is unnecessary to call for a further statement of the case.

11. For these reasons I would following the Madras, Kerala and the Punjab decisions referred to earlier, hold that the agreement of partnership was unlawful and consequently the Income Tax Authorities were justified in refusing

registration of the partnership.

12. The question is therefore answered in the affirmative. The applicant should pay the costs of this reference to the opposite party.

R.K. Das, J.

13. I agree.