
(1979) 08 CAL CK 0017

In the Calcutta High Court

Case No : Income-tax Reference No. 129 of 1975

Mathurdas Govardhandas

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 24-08-1979

Acts Referred:

Income Tax Act, 1961 — Section 170, 187, 187(2), 188, 189
Partnership Act, 1932 — Section 31, 32, 33, 34, 40

Citation : (1980) 125 ITR 470 : (1981) 5 TAXMAN 177

Hon'ble Judges : Dipak Kumar Sen, J;C.K. Banerji, J

Bench : Division Bench

Advocate : P.K. Pal and R.N. Dutt, for the Appellant; Suhas Sen, for the Respondent

Judgement

Dipak Kumar Sen, J.—The facts and the proceedings leading up to the present reference are as follows :

Mathurdas Govardhandas, the assessee, is a partnership-firm which carries on business as general merchants and bankers and also as the managing agents of a company named Metal Distributor Ltd. up to April, 1965. The assessee was constituted by a deed of partnership dated the 17th December, 1963, with three partners, namely, Govardhandas Binani, Ghanshyamdas Binani having 2/5ths share each and Sm. Padma Binani, the wife of Ghanshyamdas, having 1/5th share, respectively, in the said partnership. The said deed did not provide for the continuation of the said partnership in the event of the death of any of the partners.

2. During the assessment year 1966-67, the relevant accounting period being the year ending on the 24th October, 1965, the said Govardhandas Binani died on the 19th April, 1965. On the 7th May, 1965, another deed of partnership was executed by the surviving partners, namely, Ghanshyamdas Binani and the said Padma Binani, recording, inter alia, as follows :

(a) The partnership carried on under the earlier deed dated the 17th December, 1963, was a partnership at will and on the death of Govardhandas Binani the partnership stood dissolved.

(b) The surviving partners had agreed to become partners and continue the business of the old firm to be commenced immediately after the dissolution of the same.

(c) The name of the new partnership would be Mathurdas Govardhandas.

(d) The new firm would take over all assets and liabilities of the old firm.

(e) The shares of the said Ghanshyamdas Binani and Padma Binani in the assets and profits of the new firm would be 4/5ths and 1/5th, respectively.

3. For the assessment year 1966-67, the assessee filed two returns of income, one being for the period between the 1st November, 1964, and the 19th April, 1965, i.e., up to the death of the said Govardhandas Binani and the other being for the period from the 28th April, 1965, up to the end of the accounting period, i.e., the 24th October, 1965, and claimed that separate assessments should be made for the said periods inasmuch as after the 19th April, 1965, an entirely new firm had come into existence and had succeeded the old firm. The ITO held that inasmuch as both the partners in the new firm had been partners in the old firm, it was a case of change of constitution of a firm within the meaning of Section 182(2)(a) of the I.T. Act, 1961, and not one of succession u/s 188 of the said Act. Accordingly, he made one assessment for the assessment year.

4. Being aggrieved, the assessee preferred an appeal to the AAC who found that after the death of the said partner no valuation or estimate of his share in the old firm had been made and that the accounts have been carried on in the same set of books till the end of the accounting period though separate profit and loss accounts were made out for the said two periods. He also noted that there was no gap between the date of the death of Govardhandas Binani and the date on which the new partnership came into existence and that Padma Binani was admittedly a common partner in both the firms. He held that the provisions of Section 187 of the Act were attracted in the facts and accordingly upheld the order of the ITO.

5. From the order of the AAC, the assessee preferred a further appeal to the Income Tax Appellate Tribunal. It was contended in, the said appeal by the assessee that as there was no provision in the deed of partnership dated the 17th December, 1963, that the partnership would continue in the case of death of any of the partners, the earlier partnership came to an end on the death of Govardhandas. There was no transaction in the account of the first partnership after the 19th April, 1965, and a new firm had come into existence by the 20th April, 1965. It was submitted that it was a case of succession and not that of a change in the constitution of the firm. Contentions to the contrary were made on behalf of the revenue. The Tribunal held that, as on the death of one of the these

partners the remaining two partners had continued as partners, therefore, one assessment had to be made for the relevant year. The Tribunal upheld the decision of the AAC and dismissed the appeal.

6. On an application of the assessee u/s 256(1) of the I.T. Act, 1961, the Tribunal has drawn up a statement of case and has referred the following question of law for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that the provisions of Section 187(2)(a) would be applicable and as such only one assessment for the whole year was rightly made ? "

7. At the hearing, learned counsel for the assessee contended before us that inasmuch as the deed dated the 17th December, 1963, constituting the first partnership did not provide for continuation of the firm on the death of a partner, u/s 42(c) of the Indian Partnership Act, the first partnership stood dissolved on the death of the said partner on the 19th April, 1965. The new partnership no doubt came into existence immediately thereafter but it succeeded to the business of the first partnership and two assessments ought to have been made on the two firms u/s 188 of the Act, It was further submitted that where there was dissolution of a firm on the death of a partner and a new firm came into existence with some of the partners of the original firm it would not be a mere change in the constitution of a firm and Section 187 of the Act would not apply.

8. Learned counsel for the revenue contended on the other hand that Govardhandas Binani ceased to be a partner in the first partnership by reason of his death and the surviving partners became partners in the reconstituted firm with a change in their respective shares and, therefore, the case fell squarely within Section 187 of the Act. It was further contended that this was not a case of succession of one firm by another within the meaning of Section 188.

9. Learned counsel submitted further that, in any event, it was clear from the facts that the first partnership was never intended to be dissolved on the death of any of its partners. After Govardhandas died no balance was struck or valuation made of the share of the deceased partner. The new partnership continued the same business in the same name, without any gap, with the same set of books and applied for registration in form No. 11A which was applicable in a case where there was a change in the constitution of the firm and obtained registration on that basis.

10. In support of the respective contentions of the parties the following decisions were cited at the bar and the same are considered hereafter in their chronological order :

(a) R.B. Jessa Ram Fateh Chand Vs. Commissioner of Income Tax, . In this case, after one of the partners of the assessee, a partnership firm, had died the remaining partners continued the business. For the assessment year in question,

the assessee filed two separate returns but the ITO made one assessment. Successive appeals of the assessee were rejected by the AAC and the Tribunal. On a reference, the Allahabad High Court, following a decision of the Supreme Court in *Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another*, held that for the purpose of assessment a firm was a unit independent of its partners and the I.T. Act invested a firm with a personality which survived reconstitution. When the firm is dissolved but the business is not discontinued, there being only a change in the constitution of the firm, assessment had to be made u/s 26(1) of the Indian I.T. Act, 1922.

(b) *Sandersons and Morgans Vs. Income Tax Officer, "A" Ward and Others*, . The assessee in this case, a partnership-firm of solicitors, was at the material time constituted under a deed which provided that the death or retirement of any partner would not dissolve the partnership. The assessee was registered under the I.T. Act.

On the 7th December, 1963, one of the partners of the assessee died and the surviving partners continued the business of the firm till 31st December, 1963, without any fresh agreement. On 31st December, 1963, another partner of the assessee retired and by a deed dated 14th May, 1964, a new partnership was constituted for four years. A declaration was filed on the 29th June, 1964, for continuation of the earlier registration stating that there had been no change in the constitution of the firm up to the 31st December, 1964.

For the assessment year 1964-65, the accounting period being the calendar year 1963, the ITO refused registration to the assessee and passed an order u/s 184(4) treating the assessee as an unregistered firm on the ground that one of the partners had died during the accounting year and that the assessee has not submitted the original deed of partnership. The assessee's application for rectification of the said order and also an appeal therefrom were unsuccessful. In an application of the assessee under art. 226 of the Constitution, it was held by a single Bench of this court that the expression "change in the constitution of the firm" not having been defined either in the I.T. Act or in the Partnership Act, must be construed in its ordinary meaning and normally and ordinarily would mean every alteration in the set-up of the firm, viz., death, retirement, incapacity of partners, alteration of the shares of the partners in the firm, etc. Death would certainly indicate change in the constitution of the firm. The application was dismissed.

On appeal, a Division Bench of this court confirmed this decision.

(c) *Dharam Pal Sat Dev Vs. Commissioner of Income Tax*, . In this case, the assessee, a partnership firm, was constituted between three persons by a deed which did not provide for the continuance of the partnership in the event of death of any of the partners." During the relevant accounting period, one of the partners died whereafter a new partnership was formed with the surviving partners and the son of the deceased partner. For the relevant assessment year,

the two returns were filed being respectively for the period up to the death of the said partner and for the balance of the accounting year. It was contended that on the death of the said partner the old firm stood dissolved. The ITO held that there was only a change in the constitution of the firm and made a single assessment for the year. The order of the ITO was sustained by the AAC and the Tribunal. On a reference, it was held by the Punjab and Haryana High Court, that :

(i) though a firm might stand dissolved u/s 42 of the Indian Partnership Act, 1932, Section 187 of the I.T. Act, 1961, might still apply;

(ii) as two of the partners of the old firm continued in the new firm there was only a change in the constitution of the firm within the meaning of Section 187(2) of the Act.

(d) *Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another*, . In this case, a partnership had been constituted under a deed with two partners and three minors were admitted to the benefits thereof. On the death of one of the partners a new firm was constituted by another deed executed between the surviving partner and a son of the deceased partner. The said minors were also admitted to the benefits of this new partnership. For the relevant assessment year, it was claimed that the old firm stood dissolved on the death of its partner, the new firm had succeeded it and u/s 188 of the I.T. Act, 1961, there should be separate assessments of the two firms. The ITO made one assessment on the basis that there had been a reconstitution of the old firm within the meaning of Section 187 of the Act. This order was challenged in an application under Article 226 of the Constitution which ultimately came up before a Full Bench of the Allahabad High Court. By a majority judgment of the Full Bench, it was, inter alia, held as follows:

(i) Section 187 of the I.T. Act, 1961, does not define " change in the constitution of the firm " but clearly contemplates the reconstitution of a firm under Sections 31 and 32 of the Indian Partnership Act and provides by way of abundant caution that even if only one of the partners of the original firm is retained in the reconstituted firm or where the same partners continued with only a change in their respective shares it will still be a reconstitution,

(ii) But where a firm is dissolved either by agreement or by operation of law, the question of reconstitution does not arise and if another firm takes over the business it will be a case of succession governed by Section 188 of the I.T. Act, 1961, even though some of the partners in the two firms are common.

In the facts, it was held that the firm being initially constituted with two partners, after the death of one of them, the new firm could only succeed to the business of the old firm and the assessment should be made u/s 188 of the I.T. Act.

(e) *Kaithari Lungi Stores Vs. Commissioner of Income Tax*, . A firm consisting of 15 partners was constituted by a deed dated the 15th February, 1962. The deed

provided, inter alia, as follows :

(i) If any one of the partners passed away, the remaining partners would meet, decide and pay to the legal heirs of the deceased the balance due on capital and share of profit.

(ii) The question of taking in the legal heirs of the deceased as partners would be considered and decided immediately after the event.

One of the partners died on the 27th May, 1963. The surviving partners continued to carry on the business and admitted a third party as a partner with effect from the 28th May, 1963. A fresh deed of partnership was accordingly executed on the 10th July, 1963.

On the 15th December, 1963, two of the partners retired and the remaining 13 partners continued to carry on the business with effect from the 16th December, 1963, under a fresh deed executed on the 4th January, 1964. For the relevant assessment year (the accounting year ending on the 11th April, 1964), the firm filed three returns of income covering the periods under the three partnership deeds and claimed that three separate assessments should be made. The ITO did not accept the contention of the assessee and made one assessment u/s 187 of the I.T. Act, 1961, on the basis that there had been only a change in the constitution of the firm. The decision of the ITO was upheld by the AAC and the Tribunal. On a reference, the Madras High Court held as follows :

(i) Though under the general law every change in the constitution of a firm would amount to a dissolution thereof and bringing into existence a new firm, a firm being a compendious name for its partners, both under the Indian Partnership Act and the I.T. Act a firm would be deemed to continue as a unit of business and a unit of assessment.

(ii) The words " ceasing to be partners " in Section 187(2) of the I.T. Act, which included a case of death by reason of a contract to the contrary or any other law, did not bring about a dissolution of the partnership.

From the clauses in the deed referred to hereinbefore and the conduct of the parties in continuing the business in the manner as was done, it was held that the partners intended and there was an implied contract that the death of a partner would not bring about a dissolution of the partnership and, therefore, there were only successive changes in the constitution of the firm and Section 187(2) of the I.T. Act, 1961, was applicable.

(f) Addl. CIT v. Visakha Flour Mitts [1977] 108 ITR 466 . In this case, during two successive assessment years two of the partners of a firm, the assessee, died. In each case, the surviving partners continued the business of the firm with the sons of the deceased partners by drawing up fresh deeds of partnership in the same name and in the same place. In each of the said two assessment years, the assessee filed two returns and contended that on the death of the partner in each year the firm stood dissolved as there was no specific provision in the deeds

providing for the continuation of the firm on such a contingency and assessment should be made u/s 188 of the I.T. Act. The ITO brought to tax the entire income of the firm in each of the assessment years u/s 187 of the Act. The AAC and the Tribunal upheld the decision of the ITO. A reference from the order of the Tribunal was disposed of by a Full Bench of the Andhra Pradesh High Court. Construing the scheme in the I.T. Act for the assessment of firms and the relevant provisions of the partnership Act, the majority of the Full Bench held that Section 187 of the I.T. Act, 1961, proceeded on the basis of certain statutory fictions which must be given effect to notwithstanding the provisions of the Partnership Act. If there was a conflict between the provisions of the I.T. Act and the Partnership Act, the provisions of the former would prevail. In certain cases, there would be overlapping of Sections 187 and 188 and in such cases Section 187 had to be applied. It was held that when a firm was dissolved within the meaning of Section 42(c) of the Partnership Act, and the business was continued by the surviving partners or by the surviving partners with some others there would be a change in the constitution of the firm within the meaning of Section 187(2) and the said section would apply.

(g) Addl. Commissioner of Income Tax, Gujarat Vs. Harjivandas Hathibhai, . In this case, during the relevant assessment year one of the partners of the assessee, a partnership firm, died and a new partnership was entered into between the surviving partners with the widow of the deceased partner which commenced its business from the day after the death of the deceased partner. The deed of the original partnership did not provide for continuation of the firm on the death of its partners. It was contended at the assessment that the original firm stood dissolved on the death of its said partner and a new firm came into existence thereafter, and as such the incomes of the two firms should not be clubbed together in the said year. The ITO held on the facts that there was a change in the constitution of the firm and the provisions of Section 187 of the I.T. Act, 1961, were attracted. Accordingly, he made one assessment for the said assessment year. The AAC confirmed the order of the ITO. The Tribunal, however, held that, as the old firm was dissolved on the death of its partner, Section 187 of the Act could not apply and there should be separate assessments of the successive firms. On a reference, the Gujarat High Court agreed with the majority judgment of the Allahabad High Court in Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, and held that, unless the words of the I.T. Act were compelling, it would not be correct to depart from the well-known principles of partnership law. When a firm was dissolved the relationship between the partners under the Partnership Act came to an end. If a new firm was constituted thereafter, a new relationship came into existence and if the new firm continued the old business, it would be a case of succession u/s 188 of the Act. The High Court, however, held that where the deed did not expressly provide that the partnership would continue in the event of the death of some of its partners or even expressly provided for dissolution it could still be possible to infer from the facts and circumstances and the conduct of the parties that there was an

agreement express or implied between the partners overriding the deed that in the event of the death of one of them the firm would not be dissolved. In the facts of that case, the revenue contended that there was such an agreement and the same could be inferred from, inter alia, the following facts :

- (i) No dissolution deed was drawn up on the death of the partner.
- (ii) The assessee did not notify the bank or the Registrar of Firms of the dissolution of the firm.
- (iii) The rights and liabilities of the parties immediately on the death of the said partners were not determined and the same books and the same trading account were continued.
- (iv) A single profit and loss account for the entire period was made and profits were distributed on time basis.
- (v) The new firm did not file its return of income to the officer having jurisdiction over new cases and did not suo motu pay advance tax, and
- (vi) The new firm had applied for registration in Form No. 11A as required in the case of a change in the constitution of a firm.

The High Court held that the method of distribution of profits on time basis was well known and was followed when the same business was continued and such a circumstance by itself could not lead to an inference that there had been an agreement between the partners during their lifetime that the firm should continue after the death of any of its partners. The facts that the firm asked for registration on the basis of a change in its constitution and the failure to notify the bank and the Registrar of Firms of the dissolution could not alter the legal position. From the conduct of the surviving partners and the facts and circumstances relied on by the revenue it could not be inferred that there had been any agreement between all the partners during their lifetime that on the death of any of them the firm should continue.

(h) Commissioner of Income Tax Vs. Kunj Behari Shyam Lal, . In this case, the majority of a Full Bench of the Allahabad High Court followed the majority judgment of the same court in Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, .

(i) Nandlal Sohanlal, Jullundur Vs. The Commissioner of Income Tax, Patiala, . In this case, the deed constituting the assessee, a partnership firm, did not provide for its continuation on the death of any of its partners. During the relevant assessment year one of the partners died and a new partnership was constituted by the surviving partners and the minor son of the deceased partner was admitted to its benefits. For the said assessment year two returns of income were filed. The ITO applied Section 187 of the I.T. Act, 1961, and made one assessment. Such assessment was sustained by the Appellate Tribunal. On a reference, the majority of a Full Bench of the Punjab and Haryana High Court

agreed with and applied the law laid down by the majority of the Andhra Pradesh High Court in *Visakha Flour Mills* [1977] 108 ITR 466 (AP) [FB] and disagreed with the decision of the Allahabad High Court in *Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another*, . It was held that Section 187 of the I.T. Act, 1961, would apply.

(j) *The Additional Commissioner of Income Tax, (Andhra Pradesh, Hyderabad) Vs. Vinayaka Cinema, Nellore*, .

In this case, during the relevant assessment year, one of the partners of the assessee, a partnership firm, died. Another partner retired on the same day and transferred his interest in the firm to a third party. The deed did not provide for the continuance of the firm in the event of the death of any of the partners. By another deed executed immediately thereafter a new partnership was constituted where seven partners of the old firm joined and two new partners were taken in. The new firm was registered and it continued the business of the old firm. In the relevant assessment year two separate returns of income were filed. The ITO held that there was only a change in the constitution of the firm u/s 187(2) of the I.T. Act, 1961. He clubbed the entire income and made one assessment. On an appeal, the AAC held that on the death of the partner the firm stood dissolved and accordingly two separate assessments had to be made on the two firms. This was confirmed by the Appellate Tribunal. On a reference, the majority of a Full Bench of the Andhra Pradesh High Court took a different view from the majority decision of the earlier Full Bench of the same High Court in the case of *Visakha Flour Mills* [1977] 108 ITR 466 (AP) [FB] concurring with the decision of the Full Bench of the Allahabad High Court in *Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another*, and that of the Gujarat High Court in *Addl. Commissioner of Income Tax, Gujarat Vs. Harjivandas Hathibhai*, . It was held, inter alia, as follows (pp. 484, 485 of 110 ITR);

"The very basic concept underlying Section 187(1) is that one and the same firm must be continuing throughout the assessment year under consideration. But there is a change in the constitution of the firm, though the firm, as an entity, continues as one and single entity throughout the period. If the firm ceases to exist, the relationship of partners inter se comes to an end and, therefore, the firm can no longer be said to continue as before. Since the continuance or the existence of the firm is the basic concept underlying Section 187(1), which speaks of a change in the constitution of the firm, it is obvious that the provisions of Section 187(2) which defines "for the purposes of this section" what is meant by change in the constitution of the firm, cannot go contrary to the basic concept underlying Section 187(1). Clause (a) of Section 187(2) provides that, for the purposes of this section, there is a change in the constitution of the firm if one or more of the partners cease to be partners or one or more new partners are admitted. In such circumstances, one or more of the persons who were partners of the firm before the change continue as partner or partners after the change...It is obvious that, if the words " if one or more of the

partners cease to be partners " are understood in the sense of the provisions of the sections in Chapter V of the Partnership Act without doing violence to the underlying concept of Section 187(1), the notions of the Partnership Act and the Income Tax Act can be reconciled. There is nothing in the income tax Act which compels us to take a different view and which compels us to hold that the scheme of these sections and the basic concept under the Partnership Act are departed from when the legislature enacted Section 187(1)...Once a firm is dissolved in view of the provisions of the Partnership Act, it is obvious that that firm comes to an end and there cannot be said to be a change in the constitution of such a firm just because after the dissolution of the firm, by virtue of a new agreement between some of the partners of the dissolved firm, the business of the firm is continued and the new firm takes over the business of the old firm. It is possible to urge that, in the event of a firm being dissolved under the provisions of the Partnership Act, if some of the partners of the dissolved firm agree to restart the business by virtue of a new agreement, there is a newly constituted firm; but the words "a newly constituted firm" which were present in Section 26(1) of the 1922 Act are absent from Section 187(1) of the 1961 Act. Under these circumstances, by a mere process of interpretation, it obviously follows that the basic concept underlying Section 187 is a continuity of a firm as an entity. Once dissolution comes about, the provisions of Section 187 can never apply."

(k) MAVUKKARAI (N) ESTATE TEA FACTORY Vs. ADDITIONAL COMMISSIONER OF Income Tax, MADRAS-II., . In this case, during the relevant assessment year four partners retired from a partnership firm executing a deed of release under which one remaining partner took over the rights and liabilities of the firm. On the same day, he inducted three new partners and constituted a new firm in the same name as the old firm. For the relevant assessment year two separate returns of income respectively for the old firm up to the date of the retirement of the said partners and for the new firm for the balance of the accounting year were filed. The ITO held that there was only a re-constitution of the old firm and made one assessment for the entire period on the new firm u/s 187(2) of the Act. An application for revision against the said assessment before the Commissioner was unsuccessful and thereafter the assessment was challenged in an application under Article 226 of the Constitution. A Division Bench of the Madras High Court held, inter alia, as follows :

(i) Even if the extinction of the old firm and constitution of the new firm took place simultaneously it must be presumed in law that the retirement of the partners of the old firm preceded the constitution of the new firm as unless the old firm ceased to exist, the new firm could not come into existence.

(ii) As the sole remaining partner took over the assets and liabilities of the business it must be held that at least for one moment the business had become a sole proprietary business and only thereafter the new firm was constituted with the other partners.

(iii) Merely because there was a partner common to the two firms it could not be said that the old firm continued with a mere change in its constitution.

11. The following decisions were also cited at the Bar.

(a) Moni Prosad Singh and Another Vs. State of West Bengal and Others, ,

(b) Executors of The Estate of J.K. Dubash Vs. Commissioner of Income Tax, Bombay City, ,

(c) K.A. Dawood Sahib Vs. V.A. Sheik Mohideen Sahib and Another, ,

(d) SATYA NARAYAN KHAN Vs. Income Tax OFFICER, CALCUTTA, AND OTHERS., ,

(e) Addl. Commissioner of Income Tax, Gujarat Vs. United Commercial Co., .

12. The said decisions are either not relevant to the point in issue in the instant case or do not lay down any new proposition and as such need not be considered further.

13. To appreciate the controversy in the instant case, it is necessary to refer to the relevant sections of the I.T. Act, 1961.

"170. (1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession,--

(a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;

(b) the successor shall be assessed in respect of the income of the previous year after the date of succession,..."

"187. (1) Where at the time of making an assessment u/s 143 or Section 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 :

Provided that-

(i) the income of the previous year shall, for the purposes of inclusion in the total incomes of the partners, be apportioned between the partners who, in such previous year, were entitled to receive the same ; and

(ii) when the tax assessed upon a partner cannot be recovered from him, it shall be recovered from the firm as constituted at the time of making the assessment.

(2) For the purposes of this section, there is a change in the constitution of the firm-

(a) if one or more of the partners cease to be partners or one or more new partners are admitted, in such circumstances that one or more of the persons who were partners of the firm before the change continue as partner or partners

after the change ; or

(b) where all the partners continue with a change in their respective shares or in the shares of some of them.

" 188. Where a firm carrying on a business or profession is succeeded by another firm, and the case is not one covered by Section 187, separate assessments shall be made on the predecessor firm and the successor firm in accordance with the provisions of Section 170."

" 190. (1) Notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction at source or by advance payment, as the case may be, in accordance with the provisions of this Chapter.

(2) Nothing in this section shall prejudice the charge of tax on such income under the provisions of Sub-section (1) of Section 4."

14. We may also refer to the relevant provisions of the Partnership Act as follows :

"31(1) Subject to contract between the partners and to the provisions of Section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners...."

" 32(1) A partner may retire-

(a) with the consent of all the other partners,-

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire..."

" 33. (1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners....."

" 34. (1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.....".

" 40. A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners. "

" 42. Subject to contract between the partners a firm is dissolved-

(a) if constituted for a fixed term, by the expiry of that term ;

(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;

(c) by the death of a partner; and

(d) by the adjudication of a partner as an insolvent."

" 46. On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights."

15. From the aforementioned sections of the Indian Partnership Act, clear indications are found as to the circumstances under which a firm is reconstituted and also when a firm stands dissolved. If there be a contract to the contrary, whatever be the contingency, a firm will not stand dissolved u/s 42 of the Indian Partnership Act. The remaining partners or some of them may carry on the business of the firm by themselves or along with other persons inducted as new partners. This will be a reconstitution of the firm. But if the firm is dissolved then there is no question of its reconstitution. What comes into existence in its place is a new firm which may take over the business of the old firm.

16. The scheme for assessment of firms in the I.T. Act as appears from the sections quoted as aforesaid shows that different procedures are laid down covering three different contingencies : (a) a change in the constitution of the firm, (b) succession of one firm by another, and (c) dissolution of a firm.

17. Section 187 of the I.T. Act lays down the procedure for assessment in cases where there occurs a change in the constitution of a firm. Where any person who was a partner before the change continues as a partner after the change, then, irrespective of the fact that one or more persons have ceased to be partners or one or more new persons have been admitted as partners, it will still be a change in the constitution within the meaning of the said section. The said section also provides that where there is no change in the personnel but the partners change their respective shares, there will also be a change in the constitution. In all such cases, the change in the constitution will not stand in the way of one assessment which will be made on the firm as at the time of assessment.

18. Section 189 deals specifically with the case of the dissolution of a firm. This is an independent section and is not subject to either Section 187 or Section 188. Therefore, where there is a dissolution of a firm, Section 189 will come into operation and the ITO is bound to assess the dissolved firm and, if the business of the dissolved firm has been taken over by another firm, in our view, the successor firm will have to be assessed u/s 188. The operation of Section 188 in such a case cannot be stayed on the ground that the case might be covered u/s 187.

19. Section 187 of the I.T. Act no doubt gives a special meaning or definition to the expression "change in the constitution of a firm", but the said section ex facie does not seek to define or interpret dissolution of a firm. The concept of dissolution, therefore, has to be understood in the context of general law as also

of the Indian Partnership Act.

20. We do not find any conflict between the provisions of the I.T. Act and those in the Indian Partnership Act in construing the nature, scope, effect and incidents of dissolution of a firm for the purpose of assessment of a firm to Income Tax.

21. We respectfully agree with the decision of the majority judgments of the Full Bench of the Allahabad High Court in Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, and Commissioner of Income Tax Vs. Kunj Behari Shyam Lal, , the decision of the Gujarat High Court in Addl. Commissioner of Income Tax, Gujarat Vs. Harjivandas Hathibhai, and the decision of the majority judgment of the Full Bench of the Andhra Pradesh High Court in The Additional Commissioner of Income Tax, (Andhra Pradesh, Hyderabad) Vs. Vinayaka Cinema, Nellore, , which have laid down that if by operation of law a partnership is dissolved and thereby ceases to exist there can be no question of a change in its constitution and Section 187 of the Act would apply only where the firm continues after a change in its constitution.

22. With respect we are unable to accept the contrary view taken by the Punjab and Haryana High Court in Dharam Pal Sat Dev Vs. Commissioner of Income Tax, , the earlier Full Bench decision of the Andhra Pradesh High Court in Visakha Flour Mills [1977] 108 ITR 466 and the majority decision of the Full Bench of the Punjab and Haryana High Court in Nandlal Sohanlal, Jullundur Vs. The Commissioner of Income Tax, Patiala, .

23. The decision of this court in Sandersons and Morgans Vs. Income Tax Officer, "A" Ward and Others, , in our view, is not a decision on the question involved in the present reference. In that case, the deed provided that the death or retirement of any of the partners would not dissolve the partnership. During the relevant accounting period one of the partners had died and thereafter without a fresh deed being executed it was contended by the firm that there had been no change in the constitution of the firm and that the earlier registration of the firm continued to be effective. It was held that the firm no doubt continued after the death of a partner but by reason of such death there was a change in the constitution of the firm and, therefore, it was necessary for the firm to apply for fresh registration u/s 184 of the I.T. Act. In that case, the court was not concerned with either the dissolution of a partnership or with Sections 187 or 188 of the I.T. Act, 1961.

24. In the instant case, the earlier deed of partnership dated the 17th December, 1963, did not provide for the continuation of the partnership on the death of any of its partners. Accordingly, it cannot be said that there was any express agreement between the partners that the firm would continue on the death of any of them. It remains to be considered whether from the conduct of the partners and other surrounding facts and circumstances it can be inferred that there was an implied agreement between the said partners that the death of one of them would not bring about a dissolution of the partnership.

25. We have already noted the submissions of the learned counsel for the revenue on this aspect of the matter. It was submitted that on the death of Govardhandas the firm was neither intended to be nor was dissolved, as

- (a) after his death no balance was struck in the accounts ;
- (b) no valuation was made of the share of the deceased partner;
- (c) the new firm continued the same business in the same name without any gap;
- (d) the new firm carried on the business of the old firm with the same set of books ; and
- (e) the new firm applied for registration in Form No. HA on the basis that there was a change in the constitution of the firm.

26. We note that in the deed dated the 7th May, 1965, by which the subsequent partnership was constituted, it was specifically recorded that on the death of Govardhandas, the earlier partnership stood dissolved. Govardhandas died on the 19th April, 1965, and the said deed was executed on the 7th May, 1965, and is good evidence of the contemporaneous intention of the partners.

27. Under the Indian Partnership Act, on the dissolution of a firm, the partners or their representatives have a right to have the surplus in the dissolved firm, if any, determined and obtained their respective shares therein. The fact that the partners or their representatives of the earlier partnership did not exercise such rights and had their shares in the surplus valued, determined and paid has no relevance to and cannot affect the dissolution of the firm, if, in law, the firm is already dissolved. It has been found as a fact that separate accounts for profits and losses for the relevant accounting periods were made. The fact that the new firm applied for continuation of the registration on the basis of a change in constitution cannot also alter the legal position. That the partners of the new firm carried on the same business in the same name with the same set of books must be held to be a decision of the surviving partners. From such conduct and from the aforesaid facts, it does not follow that there was an implied agreement between all the partners of the old firm during their lifetime to continue the firm in the event of the death of any of them. We respectfully agree with the decision of the Gujarat High Court in Addl. Commissioner of Income Tax, Gujarat Vs. Harjivandas Hathibhai, on this point. From the facts relied on by the revenue, it cannot be inferred that there must have been an agreement between all the partners of the old firm during their lifetime that the said firm will not be dissolved on the death of any of them.

28. For the reasons aforesaid, the assessee succeeds in this reference. The question referred is answered in the negative and in favour of the assessee. The reference is disposed of accordingly. There will be no order as to costs.