

(1976) 08 CAL CK 0038
In the Calcutta High Court
Case No : F.M.A. No. 105 of 1974

Moni Prosad Singh and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 10-08-1976

Acts Referred:

Constitution of India, 1950 — Article 226
General Clauses Act, 1897 — Section 3
Partnership Act, 1932 — Section 4

Citation : 81 CWN 340 : (1977) 39 STC 131

Hon'ble Judges : Manash Nath Roy, J;Anil Kumar Sen, J

Bench : Division Bench

Advocate : Satya Ranjan Sen, for the Appellant;Samarendra Nath Dutta, for the Respondent

Judgement

Manash Nath Roy, J.—This appeal under Clause 15 of the Letters Patent is directed against the Judgment and order dated 13th May, 1973, whereby P.K. Banerjee, J., discharged Civil Rule No. 4279(W) of 1968.

2. The appellants at all material times, as co-partners of Howrah Wire Industries (hereinafter referred to as the said Wire Industries) carried on business amongst others in the manufacture of wire, wire-nettings and different kinds of machineries for the purpose of manufacture of machineries for making barbed wire, wire nail, staple, panel pin and wire drawing at 59, Canning Street and held certificate of registration No. AT/3347A under the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the said Act). They were also co-partners in another business under the name and style of Howrah Steel and Wire Products (hereinafter referred to as the said Wire Products) at the said address of 59, Canning Street, under registration certificate No. AT/3755A issued under the said Act and employed amongst others in the manufacture of mild steel wire and galvanised wire.

3. In or about 1960, the appellants transferred machineries on diverse dates

worth about Rs. 79,318.11 from the said Wire Industries to the said Wire Products and the Commercial Tax Officer concerned treated the said transfers as sales and by his order in annexure C dated 29th March, 1963, assessed them to tax. It is an admitted fact that the appellants filed a return showing the gross turnover at Rs. 6,21,821.32. Thereafter, at the assessment stage, they filed a revised return for the month of December, 1960, reducing the gross turnover from Rs. 1,87,074.35 to Rs. 1,08,336.34 claiming that machinery worth Rs. 72,478.61 and Rs. 6,830.50, which were transferred to the said Wire Products is an allied concern of the partners of the said Wire Industries. The relevant bills Nos. 73/60 and 74/60 were wrongly shown as sales in the original return and contending further that those were mere transfers and not sales. It was also contended that those transfers were shown as sales by mistake. It is also an admitted fact that taking those transfers as sales, the appellants preferred claims for deduction of the amounts, as mentioned hereinbefore, u/s 5(2)(a)(ii) of the said Act. It is also apparent from the records of this proceeding that bill No. 73/60 as aforesaid was for Rs. 38,900 and the appellants have shown Rs. 32,060.50 out of the same on account of sales of machineries and the balance of Rs. 6,839.50, on account of transfer to the said Wire Products. It was contended on behalf of the appellants that the transfer of machineries being from the same partners of our partnership business to another partnership business, could not constitute "sale" within the meaning of the said Act.

4. The respondent, Commercial Tax Officer, by his determination dated 29th March, 1963, found that the concerns as mentioned hereinbefore were owned by the same partners but the said concerns were two distinct and separate entities and the transfers between such separate entities cannot be made except on sale. Apart from the above, on the basis of the initial admission of the appellants and more particularly in view of the fact that the transactions were claimed to be sales, the contentions of the appellants were rejected. It was also found by the said Commercial Tax Officer that the connected vouchers as produced being partly for sale and partly for transfer, they could not be considered anything but for sales and furthermore the appellants made whimsical entries showing the sales as transfers. The taking out of separate licences by two concerns, filing of separate returns by them and over and above the claim for exemptions as mentioned hereinbefore were also made grounds for rejecting the contentions of the appellants and the determination of sale and levy of demand in the instant case.

5. From such determination, the appellants preferred an appeal (Appeal Case No. 176/63-64) u/s 20(1) of the said Act to the respondent, Assistant Commissioner, Commercial Taxes, who by his order dated 26th October, 1964, rejected the said appeal holding, inter alia, that the appellants, because of their conduct and their treatment of the said two concerns as separate and distinct entities, were estopped from putting forward the contentions as made before the Commercial Tax Officer concerned. Being aggrieved by such determination, the appellants preferred a revisional application before the Additional Commissioner of

Commercial Taxes (Revision Case No. 802 of 1964-65) u/s 20(3) of the said Act and by his order dated 29th November, 1967, the said Additional Commissioner rejected the petition and confirmed the appellate order holding, inter alia, that in the absence of any deed of partnership and in view of the conduct of the appellants and their treatment to the partnership, the conclusion that the partnerships were distinct and separate would not be justified. It may be mentioned that in the determination under consideration it has, of course, been rightly observed that under the general principles of law one cannot sell to oneself.

6. Thereafter, on 11th April, 1968, Civil Rule No. 4279(W) of 1968 was obtained by the appellants. It is also an admitted fact that the respondents in the said rule have not filed any affidavit-in-opposition and, as such, there has been no return to the rule. The rule came up for hearing before the learned Judge in the trial court on 15th May, 1973 and, unfortunately, at the time of the hearing on that day, nobody on behalf of the petitioners was present. We are sure that because of the said fact, the learned Judge in the trial court was not apprised of the position in law and the rule was discharged as it was felt that findings of fact as involved in the case could not be gone into or investigated by the High Court in a proceeding under Article 226 of the Constitution of India.

7. Mr. Sen, in support of the appeal, contended that on the admitted facts as mentioned hereinbefore, the transfer of machineries by the said Wire Industries to the said Wire Products could not be regarded as "sales" within the meaning of the said Act, since such sale would mean a transaction between two different persons in the ordinary lexicographical sense or meaning of the term "person". He also submitted that when two firms having identical or same sets of persons transfer goods from one to the other, the same would really and in effect be a case of one person transferring goods to himself and as such there would be no "sale". Mr. Sen also made it clear that this branch of argument could not be put forward before the learned Judge in the trial court, as he could not present himself at the time of the hearing of the rule for reasons beyond his control. He has, of course, pointed out that the point was indeed taken in the petition and was available to his clients on the pleadings and documents on record. For the purpose of establishing that a "firm" is not a person and, as such, is not entitled to enter into a partnership with another, Mr. Sen placed reliance on the determination of the Supreme Court in the case of Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur, . That was a case u/s 26A of the Indian Income Tax Act, 1922. In connection with the assessment for the assessment year 1949-50 of Dulichand Laxminarayan, an unregistered firm, an application was made u/s 26A of the Act before the Income Tax Officer, Raigarh, for its registration as a firm constituted under a deed of partnership dated 17th February, 1947. On the basis of the preamble of the deed in question, it was contended that out of the five constituent parties Dulichand Laxminarayan, Jairamdas Hiralal and Laxminarayan Chandulal were separate firms constituted under three separate deeds of partnership and that Laxminarayan, Behari lal and

Chandulal, who signed the deed on behalf of those firms are partners in their respective firms. There was also no dispute that Mukhram Bholaram was the name of a business carried on by a Hindu undivided family of which Tekchand, who had signed for it, was the karta. It was also conceded that Mangatrai Ganpatram was an individual. The application for registration was signed by the same five individuals who had signed the deed of partnership. Finding that Dulichand Laxminarayan constituted under the aforesaid deed of partnership dated 17th February, 1947, consisted of three firms, one Hindu undivided family business and one individual and taking the view that a firm or a Hindu undivided family could not as such enter into a partnership with other firms or individuals, the Income Tax Officer held that the said Dulichand Laxminarayan could not be registered as a firm u/s 26A and, accordingly, on 26th February, 1950, he rejected the application. On appeal the Appellate Assistant Commissioner held that when a firm entered into a partnership with another firm the result in law was that all the partners of each of the smaller firms became partners of the bigger firm and, therefore, there was no legal flaw in the constitution of the bigger firm of Dulichand Laxminarayan. He, however, took the view that, as the application for registration had not also been signed personally by all the partners of those three smaller firms as required by Section 26A of the Act and Rule 2 of the Rules framed u/s 59 of the Act, there was no valid application for registration and, consequently, the firm could not be registered and, as such, dismissed the appeal. On further appeal, the said view was sustained by the Income Tax Appellate Tribunal but they reversed the decision on the ground that as all the five executants of the deed had signed the application for registration, the requirements of law had been satisfied and, accordingly, directed registration to be given to the firm. From such determination, on an application being made by the revenue, the following question of law : "Whether, on the facts of the case, the assessee is entitled to registration u/s 26A of the Income Tax Act?" was referred for determination and the Nagpur High Court answered the question in the negative. In view of the importance of the question, a certificate of fitness for appeal to the Supreme Court u/s 66A(2) of the Act was granted. There, the Supreme Court had the occasion to deal with Section 4 of the Partnership Act, 1932, which defines "partnership", "partner", "firm" and "firm name" and has observed on the basis thereof that the section requires the existence of three elements, viz., (1) that there must be an agreement entered into by two or more persons; (2) that the agreement must be to share the profits of a business ; and (3) that the business must be carried on by all or any of those persons acting for all. Those persons who have entered into partnership are collectively called a "firm" and the name under which their business is carried on is called the "firm name". On the question whether a firm as such can enter into an agreement with another firm or individual, it was observed that the answer to the same would depend on whether a firm can be called a "person". It has been observed by the Supreme Court that there is no definition of the word "person" in the Partnership Act. The General Clauses Act, 1897, however, by Section 3(42) provides that "person shall include any company or association or body of individuals whether

incorporated or not". The firm is not a company, but is certainly an association or body of individuals and considering the provisions of both Indian and English law on the point, it has been held that a firm as such is not entitled to enter into partnership with another firm or individual. In making such decision, in the earlier decision of the Supreme Court, (1955) 27 ITR 88 , was relied on and followed, apart from following the decision of the Privy Council in the case of AIR 1948 100 (Privy Council) , for the proposition that Indian law has not given legal personality to a firm apart from the partners. A reference was also made to the case of Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, , which also supports the said view.

8. Mr. Sen then relied on the Bench decision of the Madras High Court in the case of Mahendra Kumar Ishwarlal and Co. Vs. The State of Madras, . In that case, on the question whether transfer of goods from one firm to another would constitute sale and, consequently, liable to sales tax, it has been held:

To constitute a "sale" within the definition of that word in the Central Sales Tax Act, 1956, there must be two different persons, in the ordinary sense of the term "person". When two firms having identical partners transfer goods from one to the other, it will be really a case of one person transferring goods to himself and there will therefore be no "sale". Even if the shares of the partners in the two firms are different, it will not make any difference to the character of the transaction. The difference in the shares of the partners will have relevance only at the time when the profits and losses are ascertained and divided.

When assets of the partnership are dealt with either for the purpose of acquisition or for sale, it cannot be predicated that the partners have specified shares in such assets. They have all got a common right of ownership in the property dealt with.

9. Thereafter, Mr. Sen relied on the determination in the case of Puloke Chandra Paul v. Commercial Tax Officer [1975] 36 S.T.C. 98. In that case, two brothers carrying on business in partnership were dealers under the said Act and the Central Sales Tax Act, 1956. The registration certificate was issued in the names of the two brothers and not in the name of the partnership firm although the letters were issued in the name of the firm and, on such facts, it has been held that after the amendment of the definition of "dealer" in the said Act, by West Bengal Act No. 48 of 1950, a firm as such is not a dealer under the Bengal Act and the partnership firm in question was not a legal entity under the said Act. As such, the dissolution of the firm had nothing to do with regard to the assessment of the two brothers.

10. Mr. Dutta, appearing for the respondents, could not contest the proposition of law as formulated by Mr. Sen in the manner and form as set out hereinbefore. But he submitted that considering the conduct of the appellants, their treatment in respect of the concerns as mentioned hereinbefore in the matter of assessment, filing of returns and claiming exemptions, no interference should be

made in this jurisdiction and, more particularly, when such interference would mean entering into or deciding the questions of fact as have been arrived at by the tribunals below on due appreciation of the available evidence, pleadings and the conduct of the appellants. It must be recorded that Mr. Dutta, in his usual fairness, conceded the point of law as was urged by Mr. Sen.

11. The decision of the Madras High Court in the case of Mahendra Kumar Ishwarlal and Co. Vs. The State of Madras, applies with all its force to the facts and circumstances of the case. In that case, the petitioners, Mahendra Kumar Ishwarlal and Company, a firm dealing with jaggery and foodgrains was composed of four partners. Those partners were also partners of another firm known as "Chunilal Bhagavandas and Company". In the connected year of assessment, the first named firm claimed to have transferred to the said firm at Bombay, jaggery worth about Rs. 4,40,675.87. The department took the view that such transfer of jaggery represented a sale by the first named firm to the said Bombay firm and should be assessed to Central sales tax. In that case, it was also contended by the assessee that since the partners in both the firms were identical, in spite of the differences in their shares in the business, there could not be any sale at all, because one person cannot sell to himself. Considering the cases of State of Madras v. Sri Murugan Electricals, Madras T.C. No. 40 of 1960 (Madras High Court), Raju Chettiar & Bros. v. State of Madras [1955] 6 S.T.C. 131 and State of Punjab Vs. Jullunder Vegetables Syndicate, , in which the principle as mentioned hereinabove has been enunciated, the determinations as quoted hereinbefore in the said Mahendra Kumar Ishwarlal and Co. Vs. The State of Madras, were made. The definition of "dealer" in the said Act read with the explanations thereunder may include a "firm" and the said "sale" under the said Act also means the transfer of property in goods for cash or deferred payment or other valuable consideration including a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge. The Central Sales Tax Act, as has been found in the said Madras Judgment [1968] 21 S.T.C. 72, contains definitions for "dealer" and "sale", but it does not provide for a similar extension of the meaning of the word "dealer" as in the definition under the Act read with the explanations thereunder. Since the definitions of "sale" both under the said Act and the Central Act in substance are the same, it is safe to rely on the same, as was done in the said Mahendra Kumar Ishwarlal and Co. Vs. The State of Madras, . To constitute a sale, thus, there must be two different persons in the ordinary sense and meaning of the term "person". Therefore, when two partnerships have transferred goods from one to the other as in the instant case and the partners of the two firms are identical, which is also the case under consideration, it would really be a case of one person transferring goods to himself. There cannot, therefore, be a "sale" between them and, in the present case, between the appellants.

12. In view of the above, the appeal is bound to succeed and as such we allow the same and order accordingly after setting aside the Judgment impeached and

further directing the rule to be made absolute with a direction to issue necessary and appropriate writ or writs to set aside the impugned orders in annexures C, D and E of the petition, with a still further direction on the respondents not to act on the basis of those annexures or to enforce them.

13. There will, however, be no order for costs.

14. We, however, make it clear that this order will not preclude the respondents from proceeding afresh in the matter and in accordance with law and to make a fresh assessment, if they are so advised.

Anil Kumar Sen, J.

15. I agree.