

(1975) 03 CAL CK 0012

In the Calcutta High Court

Case No : Income-tax Reference No. 71 of 1970

Premasukh Ganeshmull

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-03-1975

Acts Referred:

Income Tax Act, 1922 — Section 2(6B), 26A
Partnership Act, 1932 — Section 13

Citation : (1978) 1 ILR (Cal) 578 : (1977) 106 ITR 1004

Hon'ble Judges : R.N. Pyne, J; Deb, J

Bench : Division Bench

Advocate : D. Paul and A.K. Roy Choudhury, for the Appellant; B. Pal and A. Sen Gupta, for the Respondent

Judgement

Deb, J.—This is a reference u/s 66(1) of the Indian Income Tax Act, 1922, and the question is as follows ;

"Whether, on the facts and in the circumstances of the case, and having regard to the terms of the deed of partnership dated April 26, 1959, the firm constituted thereunder was eligible for registration ?"

2. The reference relates to the assessment year 1960-61, and it arises out of the registration proceedings u/s 26A of the Indian Income Tax Act, 1922. The assessee is a firm constituted under a deed of partnership dated April 28, 1959. The minor sons of a deceased partner, namely, Hiralal Chhajer, were admitted to the benefits of this partnership and they were given 1/10th share of profits of the firm. The Income Tax Officer refused registration, for, according to him, the individual shares of those minors are not specified in this partnership deed. The Appellate Assistant Commissioner allowed the appeal filed by the assessee, on the ground that in the absence of any specification of the individual shares of the partners the presumption under the Partnership Act, namely, that the partners shall have equal shares in the profit of the firm should apply in the case of minors and, therefore, those minors have equal share in their collective share

and in that view of the matter he directed the Income Tax Officer to grant registration to the assessee-firm.

3. In the appeal filed by the revenue, it has been held by the Tribunal that the individual shares of those minors are not specified and, therefore, the Tribunal allowed the appeal filed by the revenue and set aside the order of the Appellate Assistant Commissioner. In this connection we may note here that an appeal was also filed by the assessee, but we are not concerned with it in this reference.

4. There is no dispute before us that, on a reasonable construction of the partnership deed as a whole in the light of the relevant facts and circumstances of the case, the minor sons of Hiralal were admitted to the benefits of the partnership as found by the Tribunal and, therefore, it is not necessary for us to give any reason in support of that finding of the Tribunal. The only submission of Dr. Pal, the learned counsel for the assessee, is that these minors have equal shares in their collective share of profit of the firm and, therefore, their individual shares are also specified in this deed and hence the Tribunal erred in holding that the firm was not entitled to the registration u/s 26A of the Act.

5. I have underlined the portions of the partnership deed on which Dr. Pal has placed reliance and they are as follows :

"This Indenture of Partnership is made this the 26th day of April, One thousand nine hundred and fifty-nine between (1) Kanailal Chhajer, (2) Budh Singh Chhajer, (3) Nirmal Kumar Chhajer, (4) Rup Chand Chhajer minor represented by his guardian mother Smt. Moksha Kumari Devi, (5) Gopi Chand Chhajer minor represented by his guardian mother Smt. Moksha Kumari Devi, all sons of Sri Premasukh Chhajer of Beldanga, (6) Dip Chand Chhajer, (7) Abhoy Kumar Chhajer, Jhumarmull Chhajer, Nanda Kumar Chhajer and Rekh Chand Chhajer minor sons of late Hiralal Chhajer (forming a Hindu undivided family) all represented by their guardian mother Smt. Basuraati Chhajer, (8) Bahadur Singh Chhajer, (9) Dull Chand Chhajer minor represented by his guardian mother Smt. Padmabati Debi and (10) Ratan Lal Chhajer minor represented by his mother guardian Smt. Padmabati Debi, Nos. (6), (8), (9) and (10) being sons of late Ganeshmull Chhajer of Beldanga--all the persons noted above at present residing at Beldanga in the district Murshidabad. Whereas the partners Nos. (1) to (6) and (8) to (10) and also the late Hiralal Chhajer who had been running partnership business under the style of Premasukh Ganeshmull have deemed it proper to admit the minor sons of said Hiralal Chhajer noted above into the benefits of partnership with all the rights and interests of the deceased on his death (which occurred on 25-4-59) and draw up a fresh regular deed of partnership in order to allay any future doubts or difficulties, this instrument of partnership is drawn up with condition and terms as noted below :

1. The firm will continue without any break as before under the old style and continue to deal in jute and country products as formerly with head office at Beldanga and its existing branches. The firm may take up fresh business and

start new branch if desired.....

1. Kanailal Chhajer ... 1/10 share
2. Budh Singh Chhajer ... "
3. Nirmal Kumar Chhajer ... "
4. Rupchand Chhajer (minor) ... "
5. Gopi Chand Chhajer (minor) ... "
6. Dip Chand Chhajer ... "
- 7.

Abhoy Kumar Chhajer, Jhumarmull Chhajer, Nanda Kumar Chhajer, Rekh Chand Chhajer, all minors represented by their mother guardian Smt. Basumati Chhajer ... "

8. Bahadur Singh Chhajer ... "
9. Duli Chand Chhajer (minor) ... "
10. Ratan Lal Chhajer (minor) ... "

5. No minor partners will share the loss in the business if any determined by proper accounting at the end of any accounting period during his period of minority but such loss due in the accounts of the minors will be shared proportionately by the major partners.

6. The firm will not be dissolved on the death of any partner but all the male heirs of the deceased will automatically step into his share so far as this partnership is concerned with all his assets and liabilities."

6. We do not find anything in this deed nor there is any material on the record to suggest that the minor sons of Hiralal should have equal shares in their collective share of profit of the firm. Further, the partnership deed expressly says that they form a "Hindu undivided family" and are admitted to the benefits of the partnership as the minor sons of their deceased father with all his rights and interests in the firm on the date of his death. Their mother had an equal share with them under the Hindu Succession Act, 1956, but she was not made a partner of the firm. These facts, in our opinion, lead to an irresistible conclusion that those minor sons were not given equal share in their collective share which was given to them as a single unit to avoid any future complications with regard to their joint family and also "to allay any future doubts or difficulties" in respect of the partnership business, Hence, we are not impressed by the contention of Dr. Pal.

7. This being the true construction of this deed, it leads us to the submission of Dr. Pal, namely, that u/s 13(b) of the Indian Partnership Act, 1932, those minors

have equal shares in their collective share, but the minors are not the partners of the firm and, therefore, Section 13(b), in our opinion, has no application in the facts and circumstances of this case. Where a minor is admitted to the benefits of the partnership he will, u/s 30(2) of the Partnership Act, receive "the profits of the firm as may be agreed upon". These minors are given a collective share and, therefore, to hold that they have equal shares in their collective share is to make a new contract for the parties which the court is wholly incompetent to do. Hence, this contention of Dr. Pal must also fail.

8. His next submission is that under the Hindu law these minors have equal shares in their collective share, for the principle of Hindu law is that where a gift or bequest is made to two persons without specification of share they will take the property in equal shares as held by this court in the case of COMMISSIONER OF Income Tax, WEST BENGAL Vs. PULIN BEHARI DEY., . But Dr. Pal has admitted before us that these minor sons are members of an undivided family governed by the Mitakshara School of Hindu law and, therefore, there is no merit in his contention, for in the case of Jogeswar Narain Deo v. Ram Chandra Dutt ILR [1896] Cal 670 Lord Watson said : "The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family."

9. Further, in the case of AIR 1933 72 (Privy Council) , Sir John Willis said that:

" the principle of joint tenancy is unknown to Hindu law except in the case of the joint property of an undivided Hindu family governed by the Mitakshara law which under that law passes by survivorship."

10. These two decisions of the Judicial Committee of the Privy Council were followed by Harries C.J. in COMMISSIONER OF Income Tax, WEST BENGAL Vs. PULIN BEHARI DEY., . Therefore, the instant case before us falls under the exception. That apart, the rights of the minors are solely governed by the partnership deed, which is to be read in the light of the relevant facts and circumstances of the case and not by the Hindu law, for in the case of Ravula Subba Rao and Another Vs. The Commissioner of Income Tax, Madras, the Supreme Court says this :

"Registration confers on the partners a benefit to which they would not have been entitled but for Section 26A, and such a right being a creature of the statute, can be claimed only in accordance with the statute which confers it, and a person who seeks relief u/s 26A must bring himself strictly within its terms before he can claim the benefit of it. In other words, the right is regulated solely by the terms of the statute, and it would be repugnant to the character of such a right to add to those terms by reference to other laws. The statute must be construed as exhaustive in regard to the conditions under which it can be claimed,"(Underlining is for emphasis).

11. The above underlining, in our opinion, sets at rest the argument of Dr. Pal founded upon the Mitakshara School of Hindu Law, and further, in the case of

KARNIDAN RAWATMULL Vs. COMMISSIONER OF Income Tax, CALCUTTA., it has been said by G. K. Mitter J. that :

"It is not open to the Income Tax authorities to go into questions of Hindu law and then find out by reference to the deed of partnership as to what the individual shares of the partners should be. Whatever be the reason, the legislature has not provided for that and the parties must suffer if there has been no compliance with the Act."

12. Hence, we are not impressed by the contention of Dr. Pal in this behalf. It was then contended by him that by following the decisions of the Supreme Court in the cases of Kylasa Sarabhiah, Bombay Cloth Shop, Secunderabad Vs. Commissioner of Income Tax, Andhra Pradesh, and Kylasa Sarabhiah, Bombay Cloth Shop, Secunderabad Vs. Commissioner of Income Tax, Andhra Pradesh, and the decisions of the High Court of Punjab in the cases of COMMISSIONER OF Income Tax Vs. KISHORE CHAND RAMJI DASS., and Kishore Chand Ramji Dass Vs. Commissioner of Income Tax, and the decision of the Madras High Court in the case of A. Asha and Co. Vs. Commissioner of Income Tax, we should hold that these minors have equal shares in their collective share, but we are not impressed by his contention.

13. In the case of Kylasa Sarabhiah, Bombay Cloth Shop, Secunderabad Vs. Commissioner of Income Tax, Andhra Pradesh, , there were 3 major partners in a firm, hereinafter stated as "the yarn shop", in which 4 minors were admitted to the benefits of the partnership. The profits were to be equally shared by them but the losses were to be equally shared by the partners alone. Thereafter, another firm was constituted with 5 partners under a partnership deed in which "the yarn shop" was described as the first party and in which "the yarn shop" had a collective share of profit. The main question was whether the shares of the individual partners of the "yarn shop" were specified in the partnership deed of the new firm for the purpose of registration u/s 26A of the Act, and on that aspect of the matter the Supreme Court, at page 223 of the report, said as follows:

"Merely because the deed of partnership set out in paragraph 8 the collective share of the yarn shop, registration could not be refused, for in the preamble the division of the shares of profits and losses among the three members of the yarn shop and those admitted to the benefits of the partnership is clearly indicated."

14. There was a clear finding of the Supreme Court that in the deed of partnership of the new firm the shares of the partners and the minors admitted to the benefits of the partnership of the firm, "the yarn shop", were "clearly indicated" and hence this decision does not support the contention of Dr. Pal. On the other hand, in our opinion, it goes directly against his contention for the Supreme Court, at page 222 of the report, says this :

"Registration of the firm may be obtained on an application to the Income Tax Officer on behalf of any firm, if the firm be lawfully constituted under an

instrument of partnership which specifies the individual shares of partners but the right to registration u/s 26A being conditional upon specification of the individual shares of the partners, a deed of partnership between a firm and an individual, which specifies the collective share of the firm, without more, cannot be registered."

15. In the case of Parekh Wadilal Jivanbhai Vs. Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara, Nagpur, , the facts are as follows: Three brothers with eight other persons were partners of a firm in which each of those brothers had two annas share. After the dissolution of that firm those brothers formed a new firm with the business of two branches at Nagpur of the dissolved firm which were allotted to them and thereafter they executed a deed of partnership dated March 19, 1950, in which it was recited that "the three brothers have agreed to continue the business of the two branches at Nagpur in partnership on the terms mentioned in that document". The new firm was registered u/s 26A of the Act for the assessment year 1951-52 and such registration was also renewed for the assessment year 1952-53 but the Income Tax Officer rejected its application for renewal of registration for the assessment year 1953-54 on the ground that there was no specific clause in the deed of partnership of March 19, 1950, specifying the individual shares of each partner as required by Section 26A of the Act. Appeals filed by the assessee were dismissed on the same ground and the High Court answered the question against the assessee. But the Supreme Court allowed the appeal filed by the assessee by saying, at page 489 of the report, as follows :

"Reading the partnership deed as a whole and in the context of the relevant circumstances of the case, we are of the opinion that there was specification of the individual shares of the partners in the profits within the meaning of Section 26A of the Act and the assessee-firm was entitled to registration for the assessment year in question. It was pointed out by this court in *Kylasa Sarabhiya, Bombay Cloth Shop, Secunderabad Vs. Commissioner of Income Tax, Andhra Pradesh*, that, although the application for registration of a firm u/s 26A of the Act had strictly to be in conformity with the Act and the Rules, in ascertaining whether the application was in conformity with the Rules, the deed of partnership had to be reasonably construed."

16. There was a definite finding of the Supreme Court that the individual shares of the partners were specified in the partnership deed of March 19, 1950, and hence the assessee was entitled to be registered u/s 26A of the Act. The facts of those two cases including the language used in those partnership deeds before the Supreme Court are at poles apart from the facts and the language used in the partnership deed of the instant reference before us and, therefore, in our opinion, those decisions do not lend any assistance to the submissions of Dr. Pal.

17. In the case, *COMMISSIONER OF Income Tax Vs. KISHORE CHAND RAMJI DASS.*, , several minors were admitted to the benefits of the reconstituted firm and they were given 1/10th share collectively in the profits of the reconstituted

firm and it was held by the High Court of Punjab that those minors had equal shares in their collective share and, therefore, the reconstituted firm was entitled to be registered under the Act. This decision was followed by the same court in the case of Kishore Chand Ramji Dass Vs. Commissioner of Income Tax, in which the assessee was the same firm. In the latter case their Lordships of the Punjab High Court distinguished the case of Commissioner of Income Tax, Gujarat Vs. Shivalal Dayaram Panchal, in which their Lordships of the Gujarat High Court have held that the assessee-firm was not entitled to be registered u/s 26A of the Act because the partnership deed did not specify the individual shares in the collective share of the minors admitted to the benefits of the partnership. Their Lordships of the Gujarat High Court have no doubt distinguished the case of COMMISSIONER OF Income Tax Vs. KISHORE CHAND RAMJI DASS., but, at pages 303-04 Commissioner of Income Tax, Gujarat Vs. Shivalal Dayaram Panchal, of the report, their Lordships observed as follows :

"The proposition is now well established and cannot be disputed that when the court is looking at a partnership deed for the purpose of considering whether the firm constituted under it is entitled to registration, the partnership deed must be construed reasonably and each and every part of the partnership deed must be referred to for the purpose of ascertaining whether reading the partnership deed as a whole and from a common sense point of view it can be said that the individual share of each partner is mentioned, described or set out in the partnership deed. If reading the partnership deed in this manner the individual share of each partner can be gathered from the terms of the partnership deed itself, the court would regard the partnership deed as sufficient to meet the requirements of Section 26A and would not insist that the clause setting out the shares must itself contain specification of the individual shares of the partners. If, for example, the share of two or more partners is set out as a collective share in the clause dealing with the shares of the partners, but the preamble or the recital of the partnership deed shows that those partners are to take their collective share in certain specified proportions, the court would look at the partnership deed as a whole and regard the individual shares of those partners as specified in the partnership deed. But here, in the present case, we do not find anything in the partnership deed to show that the two minors were to take the collective share shown against their names in Clause (2) in equal shares as contended for on behalf of the assessee. The only portion of the partnership deed on which reliance was placed on behalf of the assessee was that the two minors were admitted to the benefits of the partnership as male heirs of Balubhai by virtue of Clause (6) of the earlier deed of partnership and that since, as male heirs, their shares in the estate of Balubhai would be equal, they must be deemed to take their collective share in equal proportion. This contention is in our opinion not well-founded and must be rejected. It is no doubt true that the two minors were admitted to the benefits of the partnership because they were the male heirs of Balubhai, but the 1/5th share which was given to them was given to them collectively and the firm was not concerned as to how they chose

to apportion that 1/5th share between themselves. The fact that they were the male heirs of Balubhai was material only in that it entitled them to be admitted to the benefits of the partnership but that did not mean that the 1/5th share which was allotted to them collectively was taken by them necessarily in equal shares ; how they would divide the 1/5th share would be a matter of internal arrangement between them. The portion of the partnership deed relied on on behalf of the assessee cannot, therefore, avail to show that each minor was entitled to an equal share in the 1/5th share allotted collectively to the minors. There was in the result no specification of the individual share of each minor in the new partnership deed."

18. In support of his contention that what their Lordships of the Gujarat High Court have said is no longer good law. Dr. Pal has cited the decision of the Madras High Court in the case of A. Asha and Co. Vs. Commissioner of Income Tax, in which the facts were as follows: There were three partners in a firm known as "Arjandas & Co." but their shares were not specified in the partnership deed. Those partners of Arjandas & Co. in their firm name entered into a partnership with another person under a deed of partnership dated January 15, 1960, in which Arjandas & Co. had a share of 75 paise and the other partner had a share of 25 paise. The application for registration of the firm was refused on the ground that the individual shares of those three partners of Arjandas & Co. were not specified, but it was held by their Lordships of the Madras High Court that the firm was entitled to be registered u/s 26A of the Act by following the decisions of the Supreme Court mentioned earlier and by applying Section 13 of the Indian Partnership Act in the facts and circumstances of that case. But, as already stated, Section 13 of the Indian Partnership Act and those two decisions of the Supreme Court do not in any way help the assessee-firm before us. And, in our opinion, no reliance can be placed by Dr. Pal on the decision of the Madras High Court in support of his above contention. We, however, express no opinion on the submission of Mr. B. L. Pal, the learned counsel for the revenue, namely, that the case of A. Asha and Co. Vs. Commissioner of Income Tax, was not correctly decided.

19. In the case of Khummaji Milapchand and Co. and Another Vs. Commissioner of Income Tax, their Lordships of the Andhra Pradesh High Court expressly dissented from the decisions of the Punjab High Court and after taking into consideration those two decisions of the Supreme Court and following the above decision of the Gujarat High Court and of this court in the case of KARNIDAN RAWATMULL Vs. COMMISSIONER OF Income Tax, CALCUTTA., came to the conclusion that the firm was not entitled to be registered u/s 26A of the Act, because the share of the minors who were admitted to the benefits of the partnership were shown collectively as one unit in the partnership deed, and, hence, their individual shares were not specified in the deed.

20. Individual shares of the partners in the losses of the firm were not shown in the instrument of partnership in the case of United Hardwares Vs. Commissioner

of Income Tax, and it was held that the firm was not entitled to be registered by their Lordships of the Kerala High Court after taking into consideration all the decisions mentioned earlier.

21. The partnership deed did not specify the individual shares of the partners through inadvertence and after the close of the year of accounting a deed of rectification was executed by the partners specifying their individual shares in the case of N.T. Patel and Company Vs. Commissioner of Income Tax, Madras, . The application for registration of the firm u/s 26A of the Act was refused and such refusal was confirmed by the Supreme Court, at page 228 of the report, in the following terms:

"Registration u/s 26A of the Act confers a benefit on the partners which the partners would not be entitled to but for Section 26A. The right can be claimed only in accordance with the statute which confers it and a person seeking relief under that section must bring himself strictly within the terms of that section. The right is strictly regulated by the terms of that statute: Ravula Subba Rao and Another Vs. The Commissioner of Income Tax, Madras, . Section 26A provides:

" 26A. (1) Application may be made to the Income Tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to Income Tax or super-tax."

For the purpose of this case the relevant words of that section are constituted under an instrument of partnership specifying the individual shares of the partners". Therefore, unless the instrument of partnership specified the individual shares of the partners the instrument of partnership does not conform to the requirements of the section. In R. C. Mitter & Sons v. Commissioner of Income Tax it was held that the instrument of partnership to be registered should have been in existence in the accounting year in respect of which an assessment is being made. At page 202, Sinha J. (as he then was), said:

"It is, therefore, essential, in the interest of proper administration and enforcement of the relevant provisions relating to the registration of firms, that the firms should strictly comply with the requirements of the law, and it is incumbent upon the Income Tax authorities to insist upon full compliance with the requirements of the law."

In the present case an instrument of partnership was in existence but it did not specify the shares which was one of the requirements for registration and that condition was fulfilled by the deed of rectification dated September 17, 1955. Therefore, it cannot be said that there was the requisite instrument of partnership specifying the individual shares of the partners during the year of account. The High Court, in our opinion, was right in answering the question in the negative."

22. With due respect, we are unable to agree with their Lordships of the Punjab

High Court, for, in our opinion, the law has been correctly laid down by this court in the case of KARNIDAN RAWATMULL Vs. COMMISSIONER OF Income Tax, CALCUTTA., and the High Courts of Gujarat and Andhra Pradesh in the cases already stated and, hence, we overrule the contention of Dr. Pal. Further, it cannot be said that, in law, the minors shall have equal shares where they are given a collective share" without more", for, the Supreme Court has expressly said so in the case of Kylasa Sarabhiah, Bombay Cloth Shop, Secunderabad Vs. Commissioner of Income Tax, Andhra Pradesh, of the report, already quoted. No doubt the partnership deed should be reasonably read as a whole in the light of the facts and circumstances of the case, but undoubtedly the provisions of Section 26A of the Act must be strictly observed by the assessee-firm. It is one of the most essential requirements of Section 26A of the Act that "the individual shares of the partners" must be specified in the "instrument of partnership" and this requirement has not been abrogated by the Supreme Court in those two cases cited by Dr. Pal.

23. Section 2(6B) of the Act provides that "the expression "partner" includes any person who being a minor has been admitted to the benefits of partnership" and, therefore, the individual share of the minors admitted to the benefits of the partnership must be specified in the partnership deed. The deed of partnership before us specified the collective share of all these minors in the profits of the firm "without more" and the materials on the record do not even suggest that they have equal shares in their collective share and, hence, in our opinion, the assessee is not entitled to be registered u/s 26A of the Act, because the individual shares of these minors are not specified in the partnership deed. In this view of the matter, we return our answer in the negative and in favour of the revenue.

24. We would like to record that it has been rightly conceded by Dr. Pal that if the question can be properly answered by us on the materials on the record, we have no jurisdiction to remand the case to the Tribunal nor we have any power to call for supplementary statement of the case from the Tribunal. He has, however, argued that this is a fit case for making an order of remand, but we are unable to accept his contention.

25. Hence, it is not necessary for us to discuss the principles laid down by the Supreme Court in the case of New Jehangir Vakil Mills Ltd. Vs. Commissioner of Income Tax, North, Kutch and Saurashtra, , Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , PETLAD TURKEY RED DYE WORKS CO. LTD. Vs. COMMISSIONER OF Income Tax, BOMBAY NORTH., Commissioner of Income Tax, West Bengal and Another Vs. George Henderson and Co. Ltd., and Raghunath Prasad Poddar, etc. Vs. Commissioner of Income Tax, Calcutta, cited at the Bar in this behalf.

26. In the facts and circumstances of the case, we make no order as to costs.

R.N. Pyne, J.

27. I agree.