

**(1959) 04 CAL CK 0015**  
**In the Calcutta High Court**  
**Case No : Matter No. 190 of 1958**

Shivram Poddar

APPELLANT

Vs

Income Tax Officer (Central) Circle II Calcutta and Another

RESPONDENT

**Date of Decision :** 27-04-1959

**Acts Referred:**

Income Tax Act, 1922 — Section 44

**Citation :** AIR 1960 Cal 433 : (1960) 40 ITR 155

**Hon'ble Judges :** D.N. Sinha, J

**Bench :** Single Bench

## **Judgement**

D.N. Sinha, J.—The facts in this case are shortly as follows: In the year 1947, the partnership firm of Balmukund Radheshyam came into existence. The petitioner, Shivram poddar was a partner of the said firm. It appears from the returns filed by the Firm for the years 1949-50 and 1950-51, that the principal place of business of the firm was at No. 138, Cross Street, Calcutta, with branches at Ratlam, Indore and 357, Kalbadevi Road, Bombay. The1 firm carried on business as commission agent in cotton, sale and purchase of cotton and cotton piece goods, and speculation in cotton and silver. It is said that the firm was dissolved in February 1950. and that the notice of dissolution of the firm was duly given to the Income Tax Officer, Special Survey Circle III, Calcutta, by March, 1953. This however, is denied by the respondents. On August 20, 1952 a return was filed in respect of the income of the firm before the Income Tax Officer, Special Survey Circle III, Calcutta in respect of the assessment years 1949-50. An order of assessment was made on 28-10-1952. It is said that the Income Tax assessed was duly paid. This firm had an Income Tax file in the office of the Income Tax Officer, Special Survey Circle III, Calcutta and another file in the office of the Second Income Tax Officer, Bombay, in which however, no return was filed and no assessment was made. By an order dated 3-8-1955, the Central Board of Revenue, in exercise of powers under Sub-section (7A) of Section 5 of the Indian Income Tax Act, 1922 (hereinafter referred to as the "Act") transferred the pending Income Tax case in respect of the Bombay and Calcutta files to the file

of the Income Tax Officer (Central) Circle II, Calcutta. By a letter dated 13-10-1955, the Income Tax Officer (Central) Circle II, Calcutta upon the ex-partners of the said firm to produce books of the firm for the year 2004-05, and particularly all the documents relating to the speculation in cotton and silver. On 22-10-1955 the said Income Tax Officer issued a notice u/s 34 of the said Act on the petitioner. A copy of the said notice is annexed Herewith and marked with the letter "E". It was addressed to "Shri Shivram Poddar (Partner), for and On behalf of M/s. Balmukund Radheshyam 138, Cross Street, Calcutta". In that notice it was stated that the said Income Tax Officer had reason to believe that his income assessable to Income Tax for the year ending 31-3-1950, had been under-assessed and that he proposed to re-assess the income. This petitioner was called upon to file his return. Thereafter, there was correspondence between the petitioner and/or his authorised representative and the Income Tax Officer and several notices were issued. It is unnecessary to go into details. On 14-12-1955 the petitioner made an application to this Court under Article 226 of the Constitution, and a rule was issued on 16-12-1955 calling upon the respondents in that application to show cause why appropriate writs should not be issued commanding the said respondents to forbear to give effect to the said notices and for other orders. A copy of this rule is annexed to the petition and marked with the letter "O". By an order made by me dated 23-1-1957 this rule was made absolute and the respondents in the said application were prohibited and restrained from taking any further steps upon the said notice with liberty, however, to proceed against the partners of the said dissolved firm and/or their legal representatives or in any manner in accordance with law. A copy of the rule-absolute is annexed to the petition and marked with the letter "P". The respondents thereupon preferred an appeal, which appeal was dismissed with costs on 26-5-1950. In deciding the said application, I followed my own decision in Manindra L. Goswami Vs. R.N. Bose, Income Tax Officer, , wherein I had held that under the circumstances prevailing in the case, there could not be any assessment or re-assessment of a dissolved firm as such. This decision of mine has been upheld by the Appeal Court in R.N. Bose Vs. Manindra Lal Goswami, . I shall refer to this decision in greater detail presently. On March 28, 1958 the said Income Tax Officer who is the respondent No. 1 in this case issued another notice u/s 34 read with Section 22(2) of the said Act. A copy of this notice is annexed to the petition and marked with the letter "Q". This notice is addressed to "Shri Shivram Poddar, partner of the firm of M/s. Balmukund Radheshyam at the time of its dissolution C/O M/s. Anandram Gajadhar, 33 Netaji Subhas Road," Calcutta." The relevant part of this notice runs as follows:

"Whereas I have reason to believe that M/s Balmukund Radheshyam (name of the firm) was dissolved on or about 24-2-1950 : And whereas the income of the said firm assessable to Income Tax for the assessment year 1949-58 has been under-assessed; And whereas I propose to reassess the said income; And whereas u/s 44 of the Indian Income Tax Act, 1922, you the said Shivram Poddar , and Ramnarain Ojha (deceased) 33. Netaji Subhas Road, Calcutta, who

were partners of the said firm of M/s. Balmukund Radheshyam at the time of its dissolution, are jointly and severally liable to assessment in respect of the income, profits and gains of the said firm before its dissolution and for the amount of tax payable thereon;

Now therefore u/s 34 read with Section 22(2) of the said Act, I require you, the said Shivram Poddar to deliver to me within 35 days of the receipt of this notice a return in the attached form, of the total income and the total world income of the said firm assessable for the year ending 31st March, 1950 .....

2. I have set out the notice in some detail because, the petitioner in this application challenges this notice. In August, 1958 the petitioner protested against the validity of the notice and proceedings and thereafter made an application to this Court and this rule was issued on 18-9-1958 calling upon the respondent No. 1 to show cause why he should not be directed to forebear from giving effect to the said notice and why the said notice and the proceedings should not be quashed by appropriate writs.

3. Before I proceed to deal with the point that has been raised in this application. I might state here that the whole case depends on the interpretation of Section 44 of the said Act. This section has now been amended. For the sake of convenience I set out the original section and the amendment:

"Original Section

44. Where any business, profession or vocation carried on by a firm or an association of persons has been discontinued or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or the association be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall so far as may apply to any such assessment."

4. This section was amended by the Finance Act of 1958 (Act No. 11 of 1958). The new section 44 runs as follows:

"44. The liability in case of a firm or an association discontinued or dissolved. -- Where any business, profession or vocation carried on by a firm or Other association of persons has been discontinued or where a firm or other association of persons is dissolved, the Income Tax Officer shall make an assessment of the total income of the firm. or other association of persons as such as if no such discontinuance or dissolution had taken place.

2. ....

3. Every person who was at the time of such discontinuance or dissolution a partner of the firm or a member of the association, as the case may be shall be jointly and severally liable for the amount of tax or penalty payable, and all the

provisions of Chapter IV so far as may be, shall apply to any such assessment or imposition of penalty."

5. The Finance Act of 1958 received the assent of the President on 28-4-1958. The argument of the learned Standing Counsel appearing on behalf of the petitioner in this case is shortly as follows. He argues that u/s 44 of the Act before the amendment it was not possible to assess a firm which had been dissolved under any circumstances, and that this has been upheld by Chakravarti, C. J. in the decision mentioned above. He says that in the case of the dissolution of a firm, not only was it impossible to assess the firm as such, but also the partners of the firm which had been dissolved could not be assessed. In other words, u/s 44 as it stood before the amendment, once a firm had been dissolved neither the firm nor its partners could be assessed. Strange as this proposition may seem, the learned Standing Counsel argues that such was the law before the 1958 amendment, and if there was any lacunae in the law, his client is entitled to take advantage of it. Section 44 as it stood before the amendment speaks about two categories, namely, a "firm" and an "association of persons". A "firm" means of course, a partnership firm. What is a partnership firm has been defined in Section 4 of the Indian Partnership Act 1932. It is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who entered into partnership with one another are called individually "partners" and collectively "a firm". The dissolution of a firm has been dealt with in Chapter VI of the Indian Partnership Act. According to Section 39, the dissolution of partnership between all the partners of a firm is called the "dissolution of the firm". The word "discontinuance" of a firm is not mentioned in the Indian Partnership Act. The word "discontinuance" has however been used in the body of the Indian Income Tax Act, in other places as well. For example, it has been used in Section 25(3). It has been held by the Judicial Committee in Commissioner of Income Tax, Bombay Sind and (1945) 13 ITR 384 (Privy Council) that the word "discontinuance" in Section 25 (3) of the Act, means complete cessation of business and not discontinuance by transfer or assignment. However, coming back to Section 44, we find that in the first part it talks about a "firm" as well as an "association of persons" and speaks about their discontinuance. In the second part, mention is only made of an "association of persons" and it speaks about its "dissolution". From this, the learned Standing Counsel argues that in the case of a firm, the section, as it stood prior to the amendment, did not contemplate the case of a dissolution. He says that advisedly the legislature has used two different sets of expressions in the two different cases and it is not possible to say that no distinction was intended to be laid down. The learned Standing Counsel referred to the Appeal Court judgment which I have mentioned above, R.N. Bose Vs. Manindra Lal Goswami, . The facts of that case were as follows: A, B, and C were the partners of an un-registered firm, Dyes and Chemical Agency, which did business from April 1, 1940 upto March 31, 1944 when it was dissolved. The Income Tax Officer being of the opinion that the firm's income for

the assessment year 1943-44 had escaped assessment, issued a notice to A u/s 34 of the Indian Income Tax Act 1922, on 25-11-1944. He was described as "A, partner of Dyes and Chemical Agency". The income which had been discovered to have escaped assessment was described as "your income" and he was required to submit a return of "your total income and the total world income" assessable for the year ending March 31, 1944. When the matter came up before me in the Original Court. I held that the notice was bad because, a firm which has been dissolved cannot be assessed as such. I also held that the proper way to proceed was to assess the partners. This was upheld by the Court of Appeal in the decision mentioned above. The learned Chief Justice, however made a statement which has been strongly relied upon by the learned Standing Counsel and which was as follows:

"The question as presented to us, turned on the true construction of Section 44 of the Indian Income Tax Act. That section speaks of a case where any business or profession or vocation carried on by a firm or association of persons has been discontinued and of a case where association of persons were dissolved. The section does not speak of a case at least expressly, where a firm has been dissolved. It will be noticed that when speaking about discontinuance of a business, profession or vocation the section speaks of both a firm and an association of persons, but when speaking of dissolution it drops the "firm". It is therefore, arguable that the dissolution of a firm is not within the contemplation of section 44 at all and. therefore, the Department cannot invoke its aid for the purpose of assessing the income of a dissolved firm. Mr. Meyer agreed that if the Department could not rely on Section 44, there was no other section in the Act which would authorise it to assess the income of a dissolved firm, but he contended that discontinuance included dissolution. I am unable to accept that contention, because although tie dissolution of a firm must involve discontinuance of its business, the converse need not necessarily be true and a firm may conceivably continue to exist after deciding to discontinue its business as firms very often do for various purposes, such as collecting their debts. Why the section should have dropped the firm when speaking of dissolution it is difficult to understand, but I need not pause to speculate about the reasons. The parties have throughout proceeded on the footing that Section 44 applies to the case of a dissolved firm and, for purpose of this case, I shall proceed on the assumption that Section 44 applies."

6. In this paragraph the learned Chief Justice has mentioned that it was "arguable" that a dissolution of a firm was not within the contemplation of Section 44 of the Act. But he has not decided this question finally for the simple reason that parties before him admitted that Section 44 of the Act applied, although it was a case of dissolution, and proceeded upon that footing and it was not necessary to decide the point. In fact, the learned Chief Justice says so in the paragraph set out above. It is true that the learned Chief Justice also says that he was unable to accept the contention that discontinuance included dissolution, but he was obviously thinking about temporary discontinuance, because he

accepts the proposition that the dissolution of a firm must involve the discontinuance of business, but the reverse was not true. The reverse would not be true in the case of temporary discontinuance. But where a partnership business has been permanently discontinued it must be taken to have been dissolved, because it can no longer continue in the eyes of law. There cannot be a partnership which permanently carries on no business. u/s 2 (6B) of the Indian Income Tax Act, a "firm", "partner" and "partnership" have the same meanings as in the Indian Partnership Act, 1932. The word "partnership" has been defined in Section 4 of that Act as follows:

" 4. "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm" and the name under which their business is carried on is called "firm name". "

Therefore the essential feature of a partnership firm is that it must carry on a business. It may be, as the learned Chief Justice points out that a firm temporarily discontinues its business. That involves no consequences. But where the business has been permanently discontinued as is the case here, the firm must be taken to have been dissolved and discontinued. That it has been dissolved is also the petitioner's own case. I therefore do not understand how a firm which has been dissolved and has ceased to exist, can be said to have been not discontinued. Discontinuance must relate either to the relationship of the partners or the business and in the case of dissolution, both are in fact discontinued. The dissolution of a firm is dealt with in Section 39 of the Indian Partnership Act and means the dissolution of partnership between all the partners of a firm. In this particular case it is admitted that it was dissolved. It followed therefore that the business was discontinued. It is nobody's case that it did not. I therefore do not see why the matter is not covered by Section 44 of the Act. It seems to be highly improbable that Section 44 intended to make the partners of a firm liable when there was a temporary discontinuance of business and while the firm still remained in existence and could be made liable, and yet wholly absolve them from all liability when the firm was dissolved, that is to say permanently discontinued and could no longer be made liable as such. Of course, if the Appeal Court decision is taken to have held that Section 44 did not contemplate the case of the dissolution of a firm at all, then I am bound by it, but I do not think that it is the correct interpretation of it, and as such, the matter is still open for me to express my own opinion.

7. The learned Standing Counsel then tried to argue that even after dissolution, a firm need not necessarily be said to have discontinued its business, because it still carries on business for the purpose of winding up. In my opinion this is not a point of substance. The position in the case of winding up of a firm has been explained in "Lindley on Partnership" 11th edition p. 722, at 723. It has been pointed out that for the purposes of winding up, a partnership is "deemed" to

continue, meaning thereby that this is merely a legal fiction and that in fact it does not do so. This is also made clear in Sections 46 and 47 of the Indian Partnership Act. After dissolution, unfinished transactions must be finished, the debts of the firm paid and the surplus distributed amongst the partners, These provisions are based on Section 39 of the English Act and the position in English law has been stated above. For only these limited purposes, the business is "deemed" to continue, but in fact the partnership comes to an end upon dissolution. In this case however, this is merely an academic argument because the firm has long ago been dissolved and it is nobody's case that it is being continued even partially for the purposes of winding up. Indeed, as Mr. Meyer pointed out, the respondents would gladly accept the position that the firm had not yet been dissolved and that it has not discontinued business, because then they can proceed against the firm. This is a position however which the petitioner does not accept with any degree of enthusiasm. Mr. Meyer has taken several minor points which I may briefly refer to, although in view of my decision upon the main issue it is unnecessary to do so. He has stated that in the pleadings there has been an attempt by the petitioner to mislead the Court. The facts stated in the pleadings, particularly with reference to the previous application, might have been more precisely and accurately stated, but I do not think that it can be said that there has been any actual attempt to mislead the Court. Mr. Meyer next takes a point of res judicata. He says that in the previous application the same point arose and the party proceeded on the footing that Section 44 applied and it is now not open to the petitioner to take up the position that u/s 44 he should not be made liable. There can be no doubt that the petitioner is taking two inconsistent positions in the two applications. However the notices in the two cases are not the same, and if there was a real lacuna in the law, then I do not think that the application could have been thrown out on the ground of res judicata or principles analogous thereto or on the ground of estoppel.

8. The result is that I must hold that even before the amendment of Section 44 of the Act, it was possible to proceed against the partners of a firm which had been dissolved and had completely stopped doing business. Accordingly, the notice u/s 34 upon the petitioner was quite legal and no grounds have been shown for my interference. The application is dismissed. The rule is discharged, interim orders vacated. There will be no order for costs. The operation of this order is stayed for a month to enable the petitioner to prefer an appeal.