

(1977) 05 DEL CK 0001

In the Delhi High Court

Case No : Income Tax Reference No. 39 of 1973

The Commissioner of Income Tax

APPELLANT

Vs

Memo Devi

RESPONDENT

Date of Decision : 13-05-1977

Acts Referred:

Citation : (1977) ILR Delhi 1 : (1978) 113 ITR 335

Hon'ble Judges : T.V.R. Tatachari, C.J.; T.P.S Chawla, J

Bench : Division Bench

Advocate : B. Kirpal, C.S. Vaidhyathan and B.D. Sharma, for the Appellant;

Judgement

T.V.R. Tatachari, C.J.

(1) The Income Tax Appellate Tribunal, "Delhi Bench "A" "; has referred the following two questions to this High Court u/s 66(1) of the Indian Income Tax Act, 1922, at the instance of the Commissioner of Income Tax, Delhi:-

"1. Whether on the facts and in the circumstances of the case was there an Association of Persons under the name and style of Delhi Beopar Mandal with R. B. Harish Chandra as member during the accounting year relevant to the assessment year 1952-53 ?

2. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that compensation received by the three persons could not be included in the total income of the Association of Persons and that whether tax assessed on Association of Persons could not be realised from Memo Devi as a legal heir of late R. B. Harish Chandra ?" This case has a long history which has to be set out for a proper appreciation of the aforesaid questions.

(2) The assessed before the Income Tax Officer was Delhi Beopar Mandal. The case relates to the assessment year 1952-53 corresponding to the previous year ending on 31st March. 1952.

(3) A partnership firm, styled as "Delhi Beopar Mandal" was constituted on 27th

October, 1936, and a deed of partnership was executed between Lala Desh Bandhu, Lala Vidya Dhar, Lala Ram Kishan Dass, Lala Narain Datt, and Lala Harish Chandra. It was recited in the said deed that a land, measuring 189 bighas and 5 bids was (kham) and situated at Mauza Shampur adjacent to Pusa Agricultural Research Institute, Delhi, had been purchased, that the five parties to the deed were interested in the said purchase as mentioned in the deed, that besides the said purchase, the Parties to the deed also intended to purchase further lands and either sell such lands after developing, them or build houses or shops or any other buildings or such plots of land or do any other allied business, and that for those purposes the five parties wanted to enter into partnership and executed the aforesaid deed.

(4) It was also recited in the deed that the plot of land already purchased was divided into 45 shares, the five parties having 15 shares, 15 shares, 5 shares, 5 shares and 5 shares respectively. It was further recited in the deed that the partnership shall subsist until the aforesaid plot of land or any other plot of land that may be purchased was not disposed of after development or until the partnership was dissolved by mutual agreement. The further relevant recitals in the deed were that it was always open to the parties to have such specified shares in all the further purchases as were mutually agreed to by the parties, that the partnership will not be considered to be dissolved by the death of a partner, but his heirs at law will be the partners in his place that no partner shall alienate his share to a stranger, but can, however, sell his share to any of the other partners, that if out of the other partners there were more than one prepared to purchase such shares, they might settle the price by bidding for it, and that each partner had a right to mortgage his share.

(5) Certain particulars were given at the end of the deed regarding the land measuring 189 bighas and 5 bids was according to which the said land was purchased only in the names of three of the parties, namely, Lala Desh Bandhu, Lala Vidya Dhar, and Lala Ram Kishan Dass. The name of Lala Harish Chandra also occurs in the document as printed in the record for the Reference, but the counsel are agreed that it is a misprint. However, as already stated, it was agreed in the deed that all the five parties were to have the respective shares mentioned above, and Lala Harish Chandra was to have only five shares.

(6) It appears that in 1948 the land was acquired by the Delhi Improvement Trust, and compensation was to be paid for the land by the Government.

(7) A copy of the order of the Income Tax Appellate Tribunal, dated 7th September, 1959, in I.T.A. No. 1621 of 1958-59, relating to the assessment year 1948-49, has been placed on record in the present reference. The assessed was M/s Delhi Beopar Mandal. It was stated in that order that the assessed firm consisted of three partners, Desh Bandhu Gupta, Vidya Dhar and Ram Kishan Dass, that between 8th April, 1936, and 5th June, 1936, they purchased 189 bighas and 5 bids was of land in the area which has since been known as Patel Nagar, and that they admitted Lala Narain Datt and R. B. Harish Chandra in

partnership by a deed, dated 27th October, 1936. that the said two new partners contributed their share of the cost price of the land proportionate to the share taken by them, viz. 1/9th share. Reference was then made to the terms of the deed which we have already set out earlier in this judgment. It was then stated in the order that the partnership sold about 28 bighas of land to various persons at a considerable profit, that the partnership also purchased more lands for which money was borrowed, that various sales were made from time to time by the assessed, that the balance of the land was acquired by the Delhi Improvement Trust in 1946 (seems to be a mistake for 1948) and compensation was paid sometime later, and that in that appeal the Tribunal was concerned only with the excess (i.e. the profit) realised on the sale of 13 bighas and 7 bids was of land acquired by the Improvement Trust amounting to Rs. 14669. The Tribunal held inter alia, that the various transactions entered into, were regular business transactions in landed property, that the deed, dated 27th October, 1936, brought into existence a proper partnership, that the intention of parties was to develop the land with a view to make a profit, that the fact that the land was acquired by the Delhi Improvement Trust did not alter the nature of the transaction, and if the lands were held by the assessed as a stock-in-trade, it mattered little whether they were sold or acquired, that if as a result of the acquisition the assessed had suffered a loss, such a loss would be a business loss, that the deed itself clearly indicated that the various persons in whose names the land stood in the revenue records held the land on behalf of the partnership, and it was not necessary to get the land transferred in the name of the partnership, that the agreement was to share the profit realised in the scheme of profit-making, and that the appellate Assistant Commissioner had given valid reasons for holding that the excess realised on the sale of land was business income and liable to tax. In that view, the Tribunal dismissed the appeal.

(8) We have next on the record an order of the Appellate Assistant Commissioner, dated 23rd February, 1960, in respect of the assessment year 1950-51. It was stated in this order that the assesses, M/s Delhi Beopar Mandal, had filed an appeal before the Income Tax Appellate Tribunal for the assessment year 1948-49 and the same had been decided against the assessed, that the assessed filed a reference application u/s 66(1) of the Income Tax Act and the same had been rejected, that the assessed then filed an application u/s 35 stating that the Appellate Tribunal did not take into account certain facts and that the appeal should be heard over again, but the application was rejected by the Tribunal, and that in its order rejecting the application, the Tribunal observed that:-

"After careful consideration of the facts produced by the assessed, the Tribunal came to the conclusion that the transaction in land was a business venture in the nature of trade".

The Appellate Assistant Commissioner went on to state that it was thus clear that the Appellate Tribunal had taken into consideration all the facts and evidence

placed on record by the assessed, that in the appeal before him for the assessment year 1950-51, the points raised were just the same as for the assessment year 1948-49, and that it was, Therefore, unnecessary for him to go into the details of the facts again. In that view, he rejected the appeal for the reasons given by the Tribunal in its order for the assessment year 1948-49.

(9) According to the statement of case in the present reference, all the five original parties had died, and their legal representatives were- (1) Shri Kishan Dev Dutt, son and legal heir of late Shri Narain Dutt; (2) Smt. Kala Wati, widow and legal heir of late Shri Vidya Dhar; (3) Shri Vishwas Bandhu Gupta, son and legal heir of Shri Desh Bandhu Gupta; (4) Shri Dwarka Dass, son and legal heir of late Shri Rama Krishan Dass; and (5) Smt. Memo Devi, widow and legal heir of late Shri R. B. Harish Chandra.

(10) As stated earlier, in 1948, the whole of the land was acquired by the Delhi Improvement Trust, and compensation was awarded at a certain rate. It appears that the said compensation was received by the persons in whose names the land was recorded, and neither Lala Harish Chandra, nor his widow Shrimati Memo Devi, received any amount from those who received the compensation. Shrimati Memo Devi, Therefore, filed a suit. No. 383 of 1960, for dissolution of the partnership and for rendition of accounts, in the Court of the Commercial Subordinate Judge, Delhi, who, by his judgment, dated 18th "March, 1964, held that the plaint clearly disclosed a cause of action against the defendants and the widow of Lala Harish Chandra could file a suit for dissolution of the alleged partnership and rendition of accounts against the defendants who were the legal representatives of the remaining parties; that the alleged partnership did not stand dissolved on the death of any of the parties and the defendants would be liable to render accounts if the partnership was proved to exist between the original parties; that, however, the deed, dated 27th October, 1936, could not be said to be a partnership deed and no partnership could be said to have come into existence in law, as there was no agreement in the deed to share the profits of the business which was intended to be carried on by them as required by Section 4 of the Indian Partnership Act; that what happened was that certain land was purchased before the parties entered into the agreement, dated 27th October, 1936, that each of the parties to the said deed were agreed to be the owners of certain defined shares in the land which was put into the alleged partnership business: that, however, since there was no agreement in the deed to share the profits, no partnership existed between them; that in the absence of any partnership, the parties to the deed were only co owners of the land by virtue of the agreement in the deed; that the land which was dealt with in the deed was acquired by the Delhi Improvement Trust and the only dispute that remained was with respect to the compensation and the same could not be said to be an act of doing any business for the partnership; that no work or business whatsoever was done (seems to be a mistake for "was to be done") by the alleged partnership, and the effect was that there could not be any dissolution of the partnership or rendition of accounts; that whatever compensation was awarded by the

Government might be taken by the parties according to their own shares from the Government direct, and nobody could be held responsible for the share of the compensation of any other party unless it was specifically alleged or proved that that party had taken some amount or share of that other party; and that the suit was not barred by time as contended by the defendants. In that view, the learned Subordinate Judge dismissed" the suit.

(11) It has to be noted that the view taken by the Income Tax Appellate Tribunal, in its order, dated 7th September, 1959, in I.T.A. No. 1621 of 1958-59, relating to the assessment year 1948-49, to the effect that the deed, dated 27th October, 1936, brought into existence a proper partnership, was contrary to the view taken by the learned Commercial Subordinate Judge in Suit No. 383 of 1960. As already stated, according to the learned Commercial Subordinate Judge, the deed could not be said to be a partnership deed and a partnership could not be said to have come into existence in law as there was no agreement in the deed. to share the profits of the business which was intended to be carried on by them as required by Section 4 of the Indian Partnership Act. He had also taken the view that the parties were co-owners, that the only dispute that remained was with respect to the compensation and the same could not be said to be an act of doing any business for the partnership, and that there could not, Therefore, be any dissolution of partnership or rendition of accounts, but whatever compensation was awarded by the Government might be taken by the parties according to their own shares from the Government direct. As all the concerned persons were parties to the said suit, and the judgment had admittedly become final, the findings by the learned Subordinate Judge, being by a civil court, inter parties, are binding on the said parties, and they would prevail over the view expressed by the Income Tax Appellate Tribunal.

(12) Then, for the assessment year 1952-53 with which we are now concerned, a "nil" return signed by Lala Vidya Dhar, Lala Vishwas Bandhu Gupta, son and legal heir of late Shri Desh Bandhu Gupta, Shri Krishna Dev Dutt, son and legal heir of late Shri Narain Dutt, and Lala Ram Kishan Das, was filed with a note in Section "D" of the return that a sum of Rs. 98,658.00 was received as compensation from the Government of India, and that the same was not: taxable under the provisions of the Indian Income Tax Act, 1922. The said return was not signed by Shrimati Memo Devi, wife of Lala Harish Chandra who is said to have died by the date of the return

(13) The Income Tax Officer completed the assessment of Delhi Beopar Mandal for the assessment year 1952-53 on an income of Rs. 98,658.00 in the status of "Association of Persons". In his assessment order, dated 12th March, 1962, he stated that notices u/s 23(2) of the Act were served on all the legal heirs of the deceased co-sharers in Delhi Beopar Mandal, including Shrimati Memo Devi. The Income Tax Officer treated the assessee as an "Association of Persons" and held that the transaction in land was a business in the nature of a trade and the surplus amount received was taxable as income from business.

(14) A notice of demand, was then served upon Shrimati Memo Devi calling upon her to pay the tax.

(15) Aggrieved by the same, Shrimati Memo Devi preferred an appeal to the Appellate Assistant Commissioner. In her Memorandum of Appeal, she submitted that neither her husband nor herself had signed the return for the assessment year 1948-49, that she had not received any notice nor was otherwise aware of the assessment proceedings or even the affairs of Delhi Beopar Mandal, and as such the said proceedings were null and void as against her and not binding on her, that the very basis of the order of the Income Tax Officer for the assessment year 1952-53 was wrong as he based his whole order on the assessment order relating to the assessment year 1948-49. that in the suit filed by her against the other partners or cosharers of Delhi Beopar Mandal, the partners or co-sharers had, instead of admitting her share and making payment of the same to her, even gone to the length of denying the said share and their liability to render accounts of the monies received by them, that Income Tax could be charged only from a person to whom any income had accrued or by whom any income had been received, that admittedly the compensation was paid to the three co-sharers of the Delhi Beopar Mandal in whose names the lands compulsorily acquired had stood recorded in the revenue records and not to the Delhi Beopar Mandal, and as such neither any income accrued to the Delhi Beopar Mandal nor was the said income received by the said Mandal, that in any case no income accrued to or was received by her either as a member of the Delhi Beopar Mandal or in her personal capacity, that she could be charged with Income Tax only when her suit against the other co-sharers of the Delhi Beopar Mandal was decreed, or when the other partners or co-sharers accepted her claim and paid her share, because, then alone the said income could be said to have accrued to her, that only the three co-sharers who were recorded as owners of the land in revenue records had received money in their personal capacity without any reference to Delhi Beopar Mandal, and that in the circumstances her appeal may be allowed.

(16) The Appellate Assistant Commissioner, by his order, dated 30th November, 1962, dismissed the appeal holding that Shrimati Memo Devi had mentioned in her Writ Petition against the Income Tax Officer as well as the Department that late R. B. Harish Chandra had 1/9th share in the venture regarding the purchase and sale of the land, and, Therefore, it did not lie in her mouth to say that she was not assessable as legal heir of late R. B. Harish Chandra to the profits which were earned out of the venture: that the assessment of the Delhi Beopar Mandal for the assessment year 1950-51 had become final as a result of the appellate order, dated 23rd February, 1960, and it was not possible to go into the share of R. B. Harish Chandra as determined therein: and that since Shrimati Memo Devi was the legal heir to his assets, she had to pay the taxes due from him.

(17) Shrimati Memo Devi then preferred an appeal, I.T.A. No. 10728 of 1968-69, to the Income Tax Appellate Tribunal. The contentions raised in her grounds of

appeal were the same as those raised by her in her appeal to the Appellate Assistant Commissioner. Before the Tribunal, it was contended on behalf of Shrimati Memo Devi mainly- (1) that on the acquisition of the entire land in 1948, all that was due was only the compensation and no income or profit arose out of transactions in land, that as regards the compensation, there was no joint effort to earn it, and it was paid to the three persons who had been recorded as owners of the land in the revenue records, and Shri Harish Chandra or Shrimati Memo Devi had not been paid any share, and that consequently it could not be said that there was an association of person of which late Harish Chandra or Shrimati Memo Devi was a member; (2) that even if it is held that there was an association of persons of which Harish Chandra or Shrimati Memo Devi was a member, since no profit accrued or arose to the association inasmuch as the compensation was paid and received by only three persons, Desh Bandhu Gupta, Vidya Dhar and Ram Kishan Dass, the association (Delhi Beopar Mandal) could not be made liable to pay the tax under the charging Section 4 of the Income Tax Act; (3) that in any case, since Harish Chandra or Shrimati Memo Devi was not a party, to the earning of the compensation and there was no joint effort by either of them in respect of the compensation, and also because neither of them received any amount of the compensation, either of them could not be held to be a member of the association; and no business income or profit could be said to have accrued or arisen to him or to her in the relevant assessment year; and (4) that in view of the decision of the Supreme Court in *E.D. Sassoon and Company Ltd. Vs. The Commissioner of Income Tax, Bombay City*, , before quantification or computation of income, there must be accrual of income to the association of persons of which Harish Chandra or Shrimati Memo Devi was a member, and that the judgment of the civil court showed that Harish Chandra was not a member of the association of persons as Shrimati Memo Devi could not compel rendition of accounts from the other parties.

(18) On the other hand, it was contended on behalf of the revenue, firstly, that Shrimati Memo Devi was not competent to prefer an appeal when her own contention was that she was not a member of the Association of persons; secondly, that during the relevant assessment year Harish Chandra was a partner or a member of the Association of Persons, and as such the assessment had been rightly made on Delhi Beopar Mandal, and the notice of demand to pay the tax was rightly issued to Shrimati Memo Devi; and, thirdly, that the earlier decision of the Tribunal for the assessment year 1948-49 had already clinched the issue.

(19) By its order, dated 17th December, 1972, the Tribunal held- (1) that Shrimati Memo Devi had been aggrieved by the order passed by the revenue authorities and as such she was competent to prefer an appeal; (2) that the case of the Department was that there was an Association of Persons between five parties including Lala Harish Chandra, that according to the Oxford Dictionary "associate" means to join in a common purpose or communication, and according to the decision of the Patna High Court in *KUMAR TARANAND SINHA Vs. STATE*

OF BIHAR., , "to constitute an association of persons there must be present not merely co-ownership but also other indicia of joint enterprise and there must be combination of persons for promotion of a joint enterprise blended together as co-adventurers, that according to the decision of the Supreme Court in Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, , "an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains.....", and that the point for consideration, Therefore, was whether there was evidence of joint enterprise for the purpose of earning income during the accounting year, and whether income accrued or arose to the assessed or to Smt. Memo Devi; (3) that the material on the record did not indicate "any joint enterprise in the year of account by all the persons in the deed and that R. B. Harish Chandra combined for the promotion of joint enterprise along with the other co-adventurers for getting compensation"; (4) that on perusal of the vast mass of evidence and after considering the argument of the assessed's counsel, it was of the opinion that "the assessed or Harish Chandra as its member could not be said to have received or deemed to have received any amount as a result of compensation received by the three parties"; (5) that there was neither an actual or constructive receipt by the assessed, that it was observed in the decision of the Supreme Court in the case of E.D. Sassoon and Company Ltd. Vs. The Commissioner of Income Tax, Bombay City, (1) that the words "accruing and arising" are used in contra distinction to the word "receive" and indicate a right to receive the amount, and that taking into consideration the findings of the learned Subordinate Judge in the civil suit filed by Shrimati Memo Devi, it was of the opinion that in the year in question "there was no purpose or common action taken by R. B. Harish Chandra or by his legal heirs and thus there was no object to produce income or profit or gains during the accounting year by all the persons in the deed", that on the facts of the case, it was satisfied that no income ever reached the assessed or late Harish Chandra as its member and as such the Association of persons, including Harish Chandra, could not be called upon to bear the liability under the charging provisions of the Income Tax Act, and that for all the aforesaid reasons it would allow the assessed's appeal by holding that the compensation received by the registered holders of the land never belonged to the Association of Persons, the assessed, which included the husband of Memo Devi, late Rai Bahadur Harish Chandra, as a party. In that view, the Tribunal allowed the appeal of Shrimati Memo Devi.

(20) The Commissioner of Income Tax thereupon sought before the Tribunal, the reference of the two questions which we have already set out earlier in this judgment for the opinion of this Court, and the Tribunal referred the same accordingly. The reference has been numbered as ITR No. 39 of 1973 and is now before us for disposal.

(21) It will be noticed that the two questions overlap each other to some extent, and they involve the determination of the following three points:- (1) Whether

the assessed (Delhi Beopar Mandal) which consisted of the five persons including L. Harish Chandra could be regarded as an Association of Persons in the financial year relevant to the assessment year 1952-53 ? (2) Whether the compensation amount received by the three persons could be said to be income that accrued or arose to the assessed ? and (3) Whether Shrimati Memo Devi, as legal heir of late Harish Chandra, could be made liable for paying the tax on the said amount? Answers to these three points would answer the two questions referred by the Tribunal.

(22) As regards the first point, the Tribunal did not record a specific and clear-cut finding, although the general trend of its order seems to suggest that the assessed, including L. Harish Chandra, was not an Association of persons.

(23) As regards the first point, Mr. Shankar Vaidyalingam, learned counsel for the Revenue, sought to argue that the assessed was a firm in the assessment year 1952-53. But, that was not the case of the Revenue and the Income Tax Officer and the Income Tax Appellate Tribunal dealt with the case on the basis of the assessed being an association of persons, and not a firm. It is not open to the learned counsel to make out a new case on behalf of the Revenue at the stage of this reference. Even otherwise, the Civil Court had held in the suit filed by Smt. Memo Devi that the deed, dated 27th October, 1936, could not be said to be a partnership deed and no partnership could be said to have come into existence in law, as there was no agreement in the deed to share the profits of the business which was intended to be carried on by them as required by Section 4 of the Partnership Act. In any case, clause 3 of the aforesaid deed clearly provided that the partnership was to subsist until the land was not disposed of. So, even if it is assumed that that was a partnership initially, it has to be held to have ceased to subsist on the acquisition of the entire property in 1948. This conclusion derives support from the provision in Section 42(b) of the Partnership Act also. So, in the financial year relevant to the year 1952-53, no partnership was subsisting.

(24) The question then is as to whether there was an "Association of Persons" in the financial year relevant to the assessment year 1952-53. Mr. Shankar Vaidyalingam contended that even if it is held that the partnership had ceased to subsist in 1948, the five persons (including L. Harish Chandra) continued to act together for the purpose of Realizing or receiving the compensation, and there was, Therefore, an "Association of Persons" in the financial year relevant to the assessment year 1952-53 for the common enterprise or purpose, of Realizing or receiving the money. He urged that even though only three of them in whose names the land was registered in the revenue records, had received the compensation money, it must be held that they received it on behalf of the "Association of Persons" as the money accrued to and was receivable by the Association.

(25) The question as to when an "Association of Persons" can be said to have been formed, came up for consideration in some decisions. In *In re B. N. Elias*, (1935) 3 ITR 408 (Calcutta) (4), Derbyshire, C.J. pointed out that the word

"associate" means, according to the Oxford Dictionary, "to join in common purpose, or to join in an action". Referring to the same, the Supreme Court, in Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, , observed that-

"Therefore,an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains."

The Supreme Court pointed out that the same view was also expressed by Beaumont, C.J. in COMMISSIONER OF Income Tax, BOMBAY Vs. LAXMIDAS DEVIDAS AND ANOTHER., and also in DWARAKANATH HARISCHANDRA PITALE AND ANOTHER Vs. RE., , and that in the first of the aforesaid cases, In re B. N. Elias, Costello J. observed as under:-

" IT may well be that the intention of the legislature was to hit combination of individuals who were engaged together in some joint enterprise but did not in law constitute partnerships..... When we find.....that there is a combination of persons formed for the promotion of a joint enterprise.....then I think no difficulty arises whatever in the way of saying that.....these persons did constitute an association....."

The Supreme Court, referring to the above decisions, observed that the said decisions correctly laid down the crucial test for determining what is an "Association of Persons" within the meaning of Section 3 of the Income Tax Act, and that it was, however, necessary to add some words of caution, namely, that-

"There is no formula of universal application as to what facts, how many of them and of what nature, are necessary to come to a conclusion that there is an association of persons within the meaning of Section 3 ; it must depend on the particular facts and circumstances of each case as to whether the conclusion can be drawn or not."

The Supreme Court further observed in the course of the judgment that-

"With regard to the shares, dividends, and interest on deposits there was no finding of any act of joint management. Indeed, the main item consists of the dividends and it is difficult to understand what act of management the widows performed in respect thereof which produced or helped to produce income."

(26) In G. Murugesan and Brothers Vs. Commissioner of Income Tax , Madras, , the facts, as set out in the head-note were as follows:-

"ONES executed a settlement deed in March, 1955, conveying to his four grand-sons, M, K, R and V, a life interest in a house property with remainder to their children. He also purchased certain shares in joint stock companies in the name of "M and Brothers", the applications for transfer being signed by their mother as their guardian till 1959 and thereafter by M for himself and on behalf of his

brothers. M, became a major in March, 1955, and V, the youngest, in December, 1962. The income from the house property and the dividends from the shares were credited to an account headed "M and Brothers" in the books pks of S's firm, and at the end of each year the balance in the account of "M and Brothers" was transferred in equal proportions to the separate and individual accounts of M, K, R and V, in the books of the firm. For the assessment years 1957-58 and 1958-59, the said grandsons submitted their returns in the status of "association of persons" and for the years 1959-60 to 1962-63 they submitted their returns as individuals, specifically staling that they were no more functioning as an "association of persons".

The Supreme Court, after referring to its earlier decisions in Commissioner of Income Tax v. Indira Balakrishna (supra), observed at pages 437 and 438 as follows :-

"FOR forming an "association of persons, the members of the association must join together for the purpose of producing an income. An "association of persons" can be formed only when two or more individuals voluntarily combine together for a certain purpose. Hence volition on the part of the members of the association is an essential ingredient. It is true that even a minor can join an "association of persons" if his lawful guardian gives his consent. In the case of receiving dividends from shares, where there is no question of any management, it is difficult to draw an. inference that two or more shareholders function as an "association of persons" from the mere fact that they jointly own one or more shares and jointly receive the dividends declared. Those circumstances do not by themselves go to show that they acted as an "association of persons."

"BUT unfortunately for the assessed for the assessment years 1957-58 and 1958-59, they themselves had submitted their returns in the status of "association of persons". Those returns were neither withdrawn nor did they file fresh returns as "individuals". It was for the first time in the appeal, it was argued on their behalf, that they should not have been assessed as "association of persons". The question whether the assesseds functioned as an "association of persons" during those years was best known to them. Their admission in that regard is an important piece of evidence. They have made no attempt to show that the said admission was made under erroneous impression of law or is otherwise vitiated. Hence for those years they were rightly assessed as an "association of persons".

Then, referring to the other assessment years, the Supreme Court observed as follows :-

"But so far as the other assessment years are concerned, the same result does not follow. They themselves have specifically stated that they are no more functioning as "association of persons". In the case of "association of persons" it is always open to its members to withdraw from the same. No one can be compelled to continue as a member of an association. For withdrawing from an

association no particular form need be observed. As seen earlier, herein we are concerned only with the realisation of dividends. If the individual members of the Association chose to realise their dividends as individuals, there is an end of the association. The assessed's assertion that they have realised their dividends in their individual capacity remains un rebutted. There is nothing to disprove that claim. None of the facts proved can be said to be inconsistent with the claim made by them."

In that view, the Supreme Court held that during the assessment years 1959-60 to 1962-63, the assesseds could not be held as having functioned as an "association of persons", but that they were liable to be assessed as individuals.

(27) In *Mohamed Noorullah, Representing The Estate of Late Khan Sahib Mohd. Oomer Sahib Vs. The Commissioner of Income Tax, Madras*, , the Supreme Court, referring to its earlier decisions in *Commissioner of Income Tax v. Indira Balakrishna* (supra), reiterated that-

"To constitute an association of persons there must be a combination of individuals who are engaged together in some joint enterprise, blended together as if they were co adventurers ,but not Constituting a partnership. Such association must be one which produces income, profits or gains."

The Supreme Court also pointed out that another test is that-

"As soon as there was election to retain the property and manage it as a joint venture the persons so electing become an association of individuals."

In that case, the income of certain bidi business was inherited by the heirs of a Muslim businessman. The business was being carried on by receivers appointed by a Court as a single business, by the consent of all the parties. The Supreme Court held that-

"The mere fact that a suit was pending at the time for the administration of the estate of the deceased or for the separation of the shares of the co-heirs did not affect the incidence of taxation in the case, because the business was carried on as one business with unitary control and by the consent of the parties",

and that the income was, Therefore, assessable as an income of an "Association of Persons".

(28) Keeping in view, the propositions laid down in the decisions mentioned above, we now proceed to consider the facts in the present case. Under the terms of the deed, dated 27th October, 1936, the five persons mentioned therein had joined together in a joint enterprise for the production of income by purchase and sale of land after its development. We have held earlier that even if the deed constituted a partnership, it ceased to subsist from and after the acquisition of the entire land in 1948 and, Therefore, in the financial year relevant to the assessment year 1952-53, no partnership was subsisting. On the other hand, though the deed did not constitute a partnership, the five persons

have to be held to have constituted under the deed an "association of persons" in the light of the propositions laid down by the Supreme Court. The question then arises as to whether on the acquisition of the entire land in 1948, the association ceased to subsist thereafter. The answer has to be in the affirmative, because, after the entire land had been acquired, the original purpose of production of income by sale of the land after development was no longer possible. As pointed out by the Supreme Court, for withdrawal of the association no particular form was required. With the disappearance of the land, the original purpose became incapable of achievement, with the result that the five persons could no longer be said to be together for the purpose of producing income, profits or gains. In other words, the "association of persons" automatically ceased to subsist on the acquisition of the entire land in 1948. Mr. Shankar Vaidyalingam urged that after the acquisition of the land, the work of realisation of the compensation amount remained, and that the five persons can be said to have joined together for the purpose of the said realisation or the compensation amount and thus formed an "association of persons". We are unable to accept the argument. On the acquisition, the compensation amount was payable by the Government to the three persons in whose names the land was entered in the revenue records. There is nothing on the record to show that the five persons wanted to act jointly to realise or receive the compensation amount. There was thus no question of any joint enterprise by the five persons to realise or receive the compensation amount. The five persons, who were members of the association, now extinct, could at the most be regarded as co-sharers, and each of them had a proportionate share in it. Even so, as pointed out by Ramaswami C.J. (as his Lordship then was) in KUMAR TARANAND SINHA Vs. STATE OF BIHAR., , "it is well established that in order to constitute an association of individuals there must be present not merely co-ownership but other indicia of joint enterprise are necessary. To put it differently, there must be a combination of persons for the promotion of a joint enterprise bounded together as co-adventurers". As observed by the Supreme Court in Income Tax Commissioner v. Smt. Indira Balakrishna (supra) and G. Murugesan v. Commissioner of Income Tax (supra), in the absence of any "act which has helped to produce income" or "any act of joint management" "which produced or helped to produce income", and even if the fact was that the five persons merely jointly owned and jointly received the compensation amount, it is difficult to draw an inference from that fact that they constituted an "association of persons". So far .as the Government was concerned, it was liable in law to pay the amount to only the three persons in whose names the land was entered in the. revenue records, and there was no question of all the five persons Realizing it from the Government. This is also supported by the fact that the said three persons denied the right of Harish Chandra to a share in the suit filed by Smt. Memo Devi, which shows that the three persons were claiming to act individually, denying jointness. So, the argument of the learned counsel that the five persons should be held to have formed an "association of persons" for Realizing the compensation amount together cannot be accepted as correct.

(29) It follows from the above discussion that the assessed (Delhi Beopar Mandal) which consisted of the five persons including Lala Harish Chandra could not be regarded as an "association of persons" in the financial year relevant to the assessment year 1952-53.

(30) In this connection, Mr. Shankar Vaidyalingam referred us to some decisions. In *Mohamed Noorullah, Representing The Estate of Late Khan Sahib Mohd. Oomer Sahib Vs. The Commissioner of Income Tax, Madras*, , the income of certain Bidi business was inherited by the heirs of a Muslim businessman, Oomer Sahib. After the death of the businessman, the business was carried on without break during the accounting years first by the widow and one Dawood and then jointly by receivers appointed by Court. The Supreme Court held (vide paragraphs 4 and 5) that "the business was in the first instance carried on by the widow and Dawood on behalf of the heirs of Oomer and subsequently when the suits were brought none of the parties wanted to break the unity of control of the business nor its continuity and it was of such a nature that it could not be carried on without such consensus and, Therefore, the receivers carried on the business", and that on these findings the High Court had rightly come to the conclusion that the business was a business of an "association of persons". The facts of that case are thus clearly distinguishable.

(31) In *Joti Prasad Agarwal and Others Vs. Income Tax Officer (B) Ward Mathura*, , the Supreme Court pointed out that there were indications in the affidavit of the petitioners that the association continued to exist even after 6th January, 1948, because the petitioners themselves, in their affidavit, had stated that the president of the association continued, that it was alleged by the petitioners that they had deposited certain moneys with the president for discharging the Income Tax liability of the association and this deposit was made by the persons forming the association subsequent to the discontinuance of the business on 6th January, 1948, that these assertions clearly implied an admission by the petitioners themselves that the association continued to be in existence though the business of the association was no longer being carried on, and that if the association did continue to function, no question could arise of any bar to its being assessed to tax on the income which had been earned by it while it was actually carrying on the business. This decision also is thus distinguishable from the present case.

(32) Mr. Shankar Vaidyalingam next referred us to the decisions in *K. P. G. B. U. G. M. S. S. A. MOHAMAD ABDUL KAREEM and CO. Vs. COMMISSIONER OF Income Tax, MADRAS*, ; *Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur*, ; and *COMMISSIONER OF Income Tax Vs. KRISHNA REDDY*, . In the first of them, a Division Bench of the High Court of Madras held that although the alleged partnership was an unlawful one, the assessed could be regarded on the facts of the case as "an association of persons" and assessed as such. In the second case, the Supreme Court held that "a firm is not an entity or "person" in law but is merely an association of individuals and a firm name is

only a collective name of those individuals who constitute the firm. In the third case, a Division Bench of the High Court of Andhra Pradesh held that the assessed partnership being in contravention of law was void, but, as the partners had joined with the common purpose of earning profits, they were assessable as "an association of persons" on the profits made. These decisions are not of assistance to the learned counsel, as on the facts of the present case we have pointed out earlier that whether it was initially a partnership firm or an association of persons, it ceased to be such on the acquisition of the entire land in 1948.

(33) On the other hand, Mr. Sharma, learned counsel for the assessed, referred to certain observations of the Supreme Court in *The Commissioner of Income Tax, Punjab Vs. The Lahore Electric Supply Co.*, . In that case, Sarkar, J. observed in paragraph 8 that:

"IT would be laying down strange law to hold that where a business has in fact ceased to be run, it must be deemed as continuing because the outstanding liabilities of that business had not been liquidated."

and in paragraph 9, referring to an observation of Lord Sumner in *Commissioners of Inland Revenue v. South Behar Railway Co.* (1924) 12 Tax Cas 657, commented that:

"We are unable to hold that Lord Sumner intended to lay down that a business which is closed down is deemed to be carried on so long as its outstandings are being collected."

(34) However, in the view we have taken on the facts of the case that the firm of the association had ceased to subsist on the acquisition of the entire land, and that the assessed consisting of the five persons could not be regarded as an "association of persons" in the financial year relevant to the assessment year 1952-53, it is not necessary to make any comment on the effect of the aforesaid observations of Sarkar J.

(35) For the reasons given above, the first point has to be answered in the negative.

(36) The second point for consideration is as to whether the compensation amount received by the three persons could be said to be income that accrued or arose to the assessed consisting of the five persons. The test is whether a debt had been created in favor of the assessed. A debt is created when a right to receive is created (vide *E. D. Sassoon & Co. Ltd. v. I. T. C. Bombay*, 1954 S C 470. In the present case, no doubt, at the time of the acquisition, the five persons had interest in the land by virtue of the arrangement between them. But, so far as the Government was concerned, the land was acquired as belonging to only the three persons whose names were entered in the revenue records. The compensation amount was payable by the Government to and it was common ground before us that it was in fact paid in January and March,

1952, only to the three persons. Only the three persons had the right to receive the compensation amount from the Government. The five persons together had no right to claim or receive the compensation amount from the Government. Therefore, a debt could be said to have been created and the compensation amount could be said to have accrued only to the said three persons. It has to be remembered that we have held earlier that the association of five persons ceased to subsist on acquisition in 1948. It has also to be borne in mind that the three persons denied the right of Harishhandra to a share in the suit filed by Smt. Memo Devi. Thus, at no time did the compensation amount accrue to the assessed consisting of the five persons.

(37) Mr. Shankar Vaidyalingam sought to urge that the three persons were the owners of the land, but as a result of the deed, dated 27th October, 1936, the said three persons were in a fiduciary capacity towards the other two persons as far as the land which was their stock in trade, was concerned, and that when the said stock-in-trade was acquired and the three persons received the compensation in the place of the stock-in-trade, a constructive trust had resulted u/s 94 of the Indian Trusts Act. This was not the stand of the Revenue at any stage of the proceedings before the Income Tax authorities or the Tribunal, and it is not, Therefore, open to the learned counsel to put forward such a contention for the first time in his arguments in this Reference.

(38) Mr. Sharma, learned counsel turn the assessed, sought to contend that because the compensation was received in the financial year relevant to the assessment year 1952-53 in which no business was done, the amount could not be treated as business income. In support of the contention, the learned counsel relied upon the decision of the Supreme Court in *Modi Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Uttar Pradesh, Lucknow*, . This contention also was not raised before the Tribunal, and cannot Therefore, be permitted to be urged for the first time in this Reference.

(39) For the reasons stated above, the second point also has to be answered in the negative. When points I and 2 are answered in the negative, it follows that the third point also has to be answered in the negative.

(40) In the result, we answer the first question referred to this Court in the negative and the second question in the positive. In the circumstances of the case, we make no order as to costs.