

(1988) 01 AHC CK 0038

In the Allahabad High Court

Case No : Income-tax Reference No. 106 of 1983

Virendra Kumar Avinash Kumar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 14-01-1988

Acts Referred:

Income Tax Act, 1961 — Section 185

Citation : (1988) 171 ITR 263

Hon'ble Judges : R.M. Sahai, J;Om Prakash, J

Bench : Division Bench

Advocate : V.K. Rastogi, for the Appellant; Rajesh Kumar, for the Respondent

Final Decision : Disposed Of

Judgement

Om Prakash, J.—At the instance of the assessee, the Income Tax Appellate Tribunal (Allahabad Bench) has made this reference to this court u/s 256(1) of the Income Tax Act, 1961, for seeking our opinion on the following questions :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was legally justified in refusing registration to the assessee-firm ?

2. Whether the Tribunal was legally correct in holding that the capital contribution of the partners was a necessary requirement of the partnership?"

2. The facts, in brief, are that a partnership firm in the name and style of M/s. Virendra Kumar Avinash Kumar was constituted by Sri Jagat Narain with his two sons, namely, Sri Virendra Kumar and Sri Avinash Kumar, under the partnership deed dated October 17, 1972. The share of each partner in the profit and loss was 1/3rd. The said partnership applied for registration by filing Form No. 11 before the Income Tax Officer on June 14, 1973. The original partnership deed was filed with the Income Tax Officer. It is stated in the partnership deed that Sri Jagat Narain constituted a joint Hindu family with his two sons and his wife, Smt. Chanda Devi, that Sri Jagat Narain had been carrying on business on a small scale for several years, in which funds belonging to the Hindu undivided family

were invested ; that, for the first time on October 17, 1972, when the aforesaid partnership came into existence, the members of the Hindu undivided family prepared the statement of the family investment; that the statement showed that the total investment of the Hindu undivided family in the business was to the tune of Rs. 26,960.32; that the members of the Hindu undivided family effected a partial partition in respect of the Hindu undivided family capital in the business ; that the said capital was divided into four equal shares; that Sri Jagat Narain and both his sons invested the amount which they received on partial partition of the capital of the Hindu undivided family in the partnership business.

3. The Income Tax Officer was of the view that the erstwhile business was the individual business of Sri Jagat Narain and that was not the business of the Hindu undivided family. A view was, therefore, taken that the entire capital in the business was the capital of Sri Jagat Narain and his two sons were not entitled to any share in the said capital. The case of partial partition of the capital of the Hindu undivided family was thus rejected. It was held by the Income Tax Officer that the two sons of Sri Jagat Narain were benamidars of their father and the partnership business was not genuine. The claim for registration was, therefore, refused.

4. The dispute was carried in appeal to the Appellate Assistant Commissioner and further to the Appellate Tribunal. The Appellate Tribunal was, however, of the view that the partnership could not be said to be not genuine merely on the ground that the erstwhile business was the business of Sri Jagat Narain, that no capital of the Hindu undivided family was invested therein and that no partition of such capital was possible since the business belonged to Sri Jagat Narain individually. The Tribunal was of the view that even if the business belonged to Sri Jagat Narain individually, he could have made a gift of the amount, invested by his two sons in the partnership business, to them and at the most their contribution to the capital of the partnership firm could be brought to tax in the hands of Sri Jagat Narain as deemed gift under the provisions of the Gift-tax Act. The Appellate Tribunal, therefore, remanded the case to the Appellate Assistant Commissioner with a direction that the assessee might produce any other evidence to support its case. After remand, the Appellate Assistant Commissioner repeated his view, as he was of the opinion that despite the direction having been given by the Appellate Tribunal, no fresh evidence was produced by the assessee to support the theory of gift. He, therefore, adhered to his earlier view that the capital contributed by the two sons of Sri Jagat Narain in fact belonged to the latter and the sons were benamidars of their father. The dispute was again carried to the Appellate Tribunal on second round and then it was held that there was no evidence that the capital contributed by the two sons of Sri Jagat Narain was their own and there being no capital contribution by the two sons in the partnership firm, which was according to the Tribunal, an essential element of a genuine partnership, no genuine partnership was formed under the deed dated October 17, 1972.

5. Having heard the rival submissions of the parties, we are of the considered view that the approach of the Tribunal, which they adopted on second round, is not sound. Partnership is a matter of agreement and for a valid agreement, there must be more than one party, there must be a proposal and acceptance thereof and in addition to that there should be a valid consideration for the agreement. Section 185(1) of the Act, 1961, states that on receipt of an application for the registration of a firm, the Income Tax Officer shall enquire into the genuineness of the firm and its constitution as specified in the instrument of partnership, and if he is satisfied that there is or was during the previous year in existence a genuine firm with the constitution so specified, he shall pass an order in writing registering the firm for the assessment year. The Explanation following Sub-section (1) to Section 185, so far as relevant, states that for the purposes of the section and Section 186, a firm shall not be regarded as a genuine firm if any partner of the firm was in relation to the whole or any part of his share in the income or property of the firm at any time during the previous year, a benamidar of any other partner to whom the first-mentioned partner does not stand in the relationship of a spouse or minor child. "Benamidar" has not been defined anywhere in the Act. The question is whether the two sons of Sri Jagat Narain can be regarded as benamidars simply because the capital contributed by them in the partnership business, for the sake of assumption, belonged to their father. This question begs the question whether the capital contribution by each partner is a sine qua non for a genuine partnership. As already pointed out, for a valid agreement, consideration is an essential element. Whether for a partnership agreement, capital contribution alone can constitute consideration, is a moot question in this case. In the commentary on Indian Contract and Specific Relief Acts, IXth edition, celebrated authors, Pollock and Mulla, opined at page 43 that the essence of consideration is that the promisee takes on himself some kind of burden or "detriment", as the English authorities call it. Let us see whether the two sons of Sri Jagat Narian have taken upon themselves any kind of burden or whether there is anything to their detriment in the agreement. Clause 8 of the partnership deed dated October 17, 1972, runs thus :

"8. That the partners shall be loyal and faithful to the firm and shall at all times to their best promote the interests of the firm's business."

6. The above clause shows that none of the partners was dormant and each one of them was to endeavour to his best to promote the interests of the firm's business. Clause 7 of the said deed clearly shows that each partner agreed to share the loss of the firm to the extent of 1/3rd. So, the sons of Sri Jagat Narain had taken upon themselves the burden of a working partner and they agreed to share the losses to the extent of 1/3rd share each to their detriment. So, in this case, the agreement is not sans consideration.

7. Then the question is whether capital contribution is a necessary ingredient of a valid and genuine partnership. In our view, capital contribution is not a necessary element of a genuine partnership. A similar question came up before the Patna

High Court in Himalaya Engineering Co. Vs. Commissioner of Income Tax, and the Patna High Court, relying on Umacharan Shaw and Bros. Vs. Commissioner of Income Tax, West Bengal, , M/S. SAHABUDDIN MOHAMMAD RAZA (SIWAN) Vs. COMMISSIONER OF Income Tax, BIHAR and ORISSA., and S.S.K. Haja Allaudin Maracair Ammapatnam Vs. The Commissioner of Income Tax, Excess Profits Tax, Madras, , held that the capital contribution was not an essential ingredient of a genuine partnership.

8. In First First Income Tax Officer, City Circle V, Madras-34 Vs. M.R. Dhanalakshmi Ammal and Others, the Madras High Court observed (headnote of Tax L.R.):

"The burden of proof is to be discharged by the party who sets up the case of benami nature of transaction by satisfying the following well known criteria, viz., (1) the source of purchase relating to the transaction, (2) possession of the property, (3) position of the parties and their relationship to one another, (4) circumstances, pecuniary or otherwise, of the alleged transfer, (5) the motive for the transaction, (6) the custody and production of the title deeds, and (7) the previous and subsequent conduct of the parties, and that each of the above said circumstances taken by itself is of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the other, but a combination of some or all of them and a proper weighing and appreciation of their value would go a long way towards indicating whether the ownership has been really transferred or where the real title lies. In every benami transaction, the intention of the parties is the essence."

9. Let us see whether the authorities below have applied the aforementioned criteria to judge the true character of the two sons of Sri Jagat Narain. Decision of benami character will not be confined to the facts as they stood on the date when the partnership agreement was formed. The Income Tax Officer passed the order u/s 185 on October 4, 1976, and the partnership started from October 17, 1972. So the authorities below ought to have taken into consideration the facts that preceded and followed the deed. The totality of the facts and circumstances has not been taken into consideration and the Tribunal on the second round erroneously unduly stressed the fact of capital contribution which is not an essential element of a genuine partnership. That can, at the most, be said to be one of the determining factors, but that is not determinative of the benami character by itself.

10. The Appellate Assistant Commissioner and the Tribunal, both were in error in holding that no fresh evidence was adduced by the assessee after remand of the case to establish that the capital contributed by the two sons of Sri Jagat Narain was acquired by them by way of gift from their father. When the case of the assessee was that before starting the partnership business, the business had been carried on by Sri Jagat Narain with the funds of the Hindu undivided family, in respect of which a partial partition was made and then the capital of the Hindu undivided family was equally distributed amongst the four members of the Hindu

undivided family, it was wholly illogical and unnatural for the assessee to make a somersault and take absolutely a different stand that the capital was not acquired on partial partition of the Hindu undivided family capital, invested in the business, but was acquired as a gift from their father, Sri Jagat Narain. On the facts of the case, as they stand, even if no evidence was adduced that the capital was acquired by way of gift from Sri Jagat Narain, the Tribunal would have taken the worst stand against the assessee that the capital by the two sons of Sri Jagat Narain was not acquired on partial partition, but only by means of a gift from Sri Jagat Narain. When, according to the Tribunal, the capital belongs to Sri Jagat Narain individually, he either could gift the whole or part of it to his sons or invest the same in the names of his sons to reduce his tax liability. There is no material on record, nor has any been pointed out by the authorities below that Sri Jagat Narain resorted to a device of partnership to reduce the tax liability and, therefore, the only inference of gift, at the most, could have been drawn and for that no additional evidence was required. Viewing the matter from any angle, the approach of the Tribunal taken on second round appears to be erroneous.

11. On the facts and circumstances of the case, we are of the view that the Tribunal was wrong in having affirmed the order of the Income Tax Officer refusing to grant registration and we hold that it is a fit case to grant registration to the assessee for the assessment year 1974-75. In view of the foregoing findings, we answer both the questions referred to us in the negative and they are decided in favour of the assessee.

12. Let a copy of this judgment be sent to the Appellate Tribunal to dispose of the case conformably to our judgment.

13. The reference is allowed. There shall be no order as to costs.