COMMISSIONER OF INCOME TAX KERALA-II, ERNAKULAM A

v.

M/S. KANDATH MOTORS ETC.

MARCH 4, 1997

[B.P. JEEVAN REDDY AND SUHAS C. SEN, JJ.] B

Income Tax Act, 1961 : Sec. 186(1)—Partnership firm—Registration of—Death of a partner—New Partnership Deed signed by one partner twice;—Individual and representative capacity—Income Tax Officer cancelled registration—On appeal—Tribunal held that partnership was genuine—On reference, High Court affirmed the views of Tribunal—Held, no legal bar to a person joining as a nominee of the deceased partner—No reason to doubt the validity of partnership agreement—Partnership. C

The assessee was a registered partnership firm under the Income Tax Act, 1961. The partnership Deed was constituted by six partners. On the death of one of the partners, a fresh partnership deed was executed. One 'K' signed the partnership deed twice, in his individual capacity and also in representative capacity. The Income Tax Officer in exercise of his powers under s.186(1) of the Income Tax Act cancelled the registration on the ground that no genuine partnership firm was in existence. The Appellate Assistant Commissioner upheld the views of the Income Tax Officer. On appeal the Tribunal held that partnership firm was genuine and the Income Tax Officer was in error in cancelling the registration of the firm. On reference the High Court affirmed the views of the Tribunal. Hence this appeal by the revenue. D E F

Dismissing the appeal, this Court

HELD : 1 There can be no legal bar to a personal representation of the deceased partner being admitted to the partnership by the surviving partners. If the personal representation of the deceased is also one of the surviving partners, he can agree to join the new partnership as a nominee of the legal heirs of the deceased partner. [679-D] G

2. There is no reason to doubt the validity of the partnership agreement as there were four other partners and 'K' was holding a power of attorney on behalf of the other legal heirs. There is nothing in the partner- H

A **ship Act or the Contract Act which prevents an agreement of this nature being entered into by the six partners. It is not possible to hold that 'K' would do anything in the partnership which would be in his interest and against the interest of the other legal heirs. [683-G-H]**

B *Lachman Das* **v.** *Commissioner of Income Tax,* **(1948) 16 ITR 35 (PC) and** *Chandrakant Manilal Shah and Another* **v.** *Commissioner of Income Tax,* **(1992) 193 ITR 1, relied on.**

Messrs. Hoosen Kasam Dada, (a firm) **v.** *Commissioner of Income Tax, Bengal,* **5 ITR 182 and** *Rai Bahadur Lokenath Prasad Dhandhania* **v.** C *Commissioner of Income Tax, Bihar and Orissa,* **8 ITR 369, distinguished.**

Commissioner of Income Tax **v.** *Adbul Rahim,* **55 ITR 651;** *Commissioner of Income Tax* **v.** *Bagvalakshmi & Co.,* **55 ITR 660;** *Agarwal and Co.* **v.** *Commissioner of Income Tax,* **U.P., 77 ITR 10;** *Commissioner of Income Tax* **v.** *Kalu Babu Lal Chand,* **37 ITR 23 (SC) and** *Commissioner of Income* D. *Tax, Bombay City II* **v.** *Raghavi Anandji & Co.,* **100 ITR 246, referred to.**

"Lindley and Banks on Partnership", **16th Edition;** *Halsbury's Law of England,* **4th Edn., Vol. 9 Contract, Article 204 and** *Mayne's Hindu Law* **(9th Edn), Page 398, referred to.**

E

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3069 of 1980 Etc.

From the Judgment and order dated 24.5.79 of the Kerala High Court in I.T.R. No. 85 of 1979.

F

G.C. Sharma, T.L.V. Iyer, Joseph Vellapally, B.S. Ahuja, S.N. Terdol, P. Parmeswaran, S. Balakrishnan, S. Prasad, (S. Ganesh and Mrs. A.K. Verma) for J.B.D. & Co., Sameer Parekh, E.R. Kumar, R. Deepamala, P.H. Parekh, U.V. Eradi, A.P. Medh, K.V. Mohan, Aruneshwar Gupta G Mukul Mudgal, Dhruv Mehta, S.K. Mehta for the appearing parties.

The Judgment of the Court was delivered by

SEN, J. This case relates to assessment year 1972-73 for which the relevant previous year was the year commencing on 1.7.1970 and ending H on 30.6.1971.

Initially, the assessee firm was constituted by a Partnership Deed dated 13.9.1966 and consisted of six persons :

1. K.K. Sudevan
2. K.S. Krishnadas
3. K.A. Jayapalan
4. K.S. Haridas
5. K.A. Mohandas
6. K.A. Haridas

The partnership had been granted registration under the Income Tax Act. Clause 13 of that Partnership Deed provided that the death or retirement of any one of the partners shall not have the effect of dissolving the firm, but the firm may be continued by the surviving or remaining partners on such terms and conditions as may be agreed upon in writing between them.

On 9.2.1970 Sudevan, one of the partners, died. Sudevan had executed a Will on 28th January, 1970 by which his properties devolved upon his three adult sons, K.S. Krishnadas, K.S. Haridas and K.S. Bhagavandas.

On 20th February, 1970 a fresh Partnership Deed was executed. The partners were :

1. K.S. Krishnadas	(No. 2 above - also heir under the will),
2. K.A. Jayapalan	(No. 3 above),
3. K.S. Haridas	(No. 4 above - also heir under they will),
4. K.A. Mohandas	(No. 5 above),
5. K.A. Haridas	(No. 6 above),
6. K.S. Krishnadas	(No. 2 above but described in the partnership as Krishnadas representing the heirs of late Shri K.K. Sudevan as per the registered Will No. 10 of 1970

A and being the Attorney of the heirs hereinafter called the six partners).

All these six partners had signed the Partnership Deed. K.S. Krishnadas signed it twice, in his individual capacity and also in his representative capacity.

B

The Income Tax Officer Initially granted registration to the newly constituted partnership firm for the assessment year 1971- 72 (accounting year ending on 30th June, 1970). But for the assessment year 1972-73 (accounting year ending on 30th June, 1971), the Income Tax Officer in C exercise of his powers under Section 186(1) of the Income Tax Act, 1961 cancelled the registration. The Income Tax Officer was of the view that Krishnadas had joined the firm in two capacities - (1) his individual capacity and (2) as representing the heirs of late K.K. Sudevan. According to the Income Tax Officer, no genuine partnership firm was in existence and Registration could not be granted to such a firm. The Appellate D Assistant Commissioner upheld the view of the Income Tax Officer. The Tribunal, however, was of the view that the partnership was genuine and the Income Tax Officer was in error in cancelling the registration of the firm merely because Krishnadas had signed the Partnership Deed twice in two capacities. At the instance of the Commissioner of Income Tax, the E following question of law was referred to the High Court :-

> "Whether there was during the year (commencing from 1.7.1970 and ending with 30.6.1971) relevant to assessment year 1972-73, a genuine firm in existence as registered?"

F The High Court answered the question in the affirmative and against the Revenue. The High Court was of the view that merely because Krishnadas had signed the Partnership Deed twice, once in his individual capacity and again as representing the three heirs under the will of Sudevan, would not invalidate the partnership agreement.

G The important point to note is that in the partnership, there were four other partners apart from Krishnadas. Krishnadas might not have constituted a partnership with himself in another capacity. But if a partnership exists between Krishnadas and several other persons, there is no legal bar to Krishnadas's joining the partnership in the capacity of a nominee of H others. On the question whether a trustee of personal representative or

nominee can join as partner, the law stated in "Lindley and Banks on Partnership", 16th Edition is "A trustee or personal representative may clearly enter into partnership, although he will be personally liable for any debts and liabilities thereby incurred." A

If a partner dies, the surviving partners may carry on the business by forming another partnership. In such a case, they will have to account for the share of the deceased partner to his legal representatives. But if a partner dies, his legal representative may be admitted to the new partnership by the surviving partners. The only question in such a case will be whether any share of profit received by him qua partner belongs to him personally or to the estate which he represents. The answer will inevitably depend on the facts and circumstances of the case. B C

However, there can be no legal bar to a personal representative of the deceased partner being admitted to the partnership by the surviving partners. If the personal representative of the deceased is also one of the surviving partners, he can agree to join the new partnership as a nominee of the legal heirs of the deceased partner. D

The only difficulty that is being pointed out in this case is that the executor, Krishnadas, who was one of the surviving partners of the erstwhile partnership, has joined the new partnership individually and also as representative of the deceaed Sudevan. This would have created a problem, had there been any conflict of interest of Krishnadas as an individual and as a representative of the legal heirs of Sudevan. But that is not the case here. The properties of Sudevan under his will passed on to his three sons all of whom were adults. Out of the three sons, Haridas and Krishnadas joined the partnership. Only Bhagavandas remained outside. Having regard to the composition of the partnership, it is not possible to hold that Krishnadas could do anything in the partnership which would be in his interest and against the interest of the other legal heirs of Sudevan. E F

Under the Income Tax Act, provisions for registration of a firm are contained in Sections 184 and 185. In order to obtain registration under the said Section 184, the Assessing Officer has to be satisfied that the partnership is evidenced by an instrument and the individual shares of the partner are specified in that instrument. The application for registration has to be signed by all the partners (not being minor) personally. On receipt of application for registration, the Income Tax Officer has to G H

A inquire into the genuineness of the firm and its constitution as specified in the instrument of partnership. If he is satisfied that there was in existence a genuine firm with the constitution so specified, he is required by Section 185 to pass an order in writing registering the firm. If he is not satisfied about the genuineness of the firm or its constitution as specified in the instrument of partnership, he has to pass an order in writing refusing to
B register the firm.

It was held by this Court in the case of *Commissioner of Income Tax* v. *Abdul Rahim,* 55 ITR 651, that a partnership cannot be held to be not genuine or be denied registration merely because a partner has joined in
C a representative capacity, or is a trustee or benamidar for an outside or for another partner, or is otherwise not beneficially entitled to the whole or part of his share of profits. In that case, the firm was held entitled to registration although there was a private arrangement between two of the partners (to which the other partners were not parties) that one will pass on his share of profits to the other. It was held by this Court that a firm
D would be entitled to registration although a partner may divide his share of profits with others, e.g. sub-partners or members of another firm.

In the case of *Commissioner of Income Tax* v. *Bagyalakshmi & Co.,* 55 ITR 660, this Court held the firm to be entitled to registration although two partners who had been members of a joint family were not entitled to
E the entire beneficial interest in their shares of profits but had to divide their shares with other members of their family which was partitioned. Subba Rao, J. observed :

> "A contract of partnership has no concern with the obligation of
F the partners to others in respect of their shares of profit in the partnership. It only regulates the rights and liabilities of the partners. A partner may be the karta of a joint Hindu family; he may be a trustee; he may enter into a sub-partnership with others; he may, under an agreement, express or implied, be the repre-
G sentative of a group of persons; he may be a benamidar for another. In all such case he occupies a dual position. Qua the partnership, he functions in his personal capacity; qua the third parties, in his representative capacity. The third parties, whom one of the partners represents, cannot enforce their rights against the other partners nor can the other partners do so against the said third
H parties. Their right is only to a share in the profits of their

partner-representative in accordance with law or in accordance with the terms of agreement, as the case may be." A

We were referred to a large number of cases relating to the problem of genuineness of partnership firm.

In the case of *Messrs. Hoosen Kasam Dada, (a firm)* v. *Commissioner of Income Tax, Bengal,* 5 ITR 182, it was held that a wakf represented by mutawalli could not enter into a partnership. Under the Mohammedan law, the moment a wakf is created all rights of property vested in the Almighty. Therefore, the partnership which purports to exist with a wakf represented by the mutawalli as a partner was no partnership in law and could not be registered under the Indian Income Tax Act, 1922. It was also observed by Costello, J., "I entirely fail to see how it could be argued that a man can be at one and the same time a partner in his individual capacity and a partner, in a representative capacity. Taking that point alone, it follows, in my opinion, that there was no partnership in law of the description set forth in the application made by the assessees". B C D

This observation must be confined to the facts of that case where it was found that there was a possibility of conflict of interest between Hoosen Kasam Dada as an individual and as a representative of the two wakfs. A partnership has to be brought about by a contract. It has to be seen that there is a valid contract between two persons. A person cannot contract with himself. But where a person has different capacities, he may have power to contract in his representative capacity with himself as an individual e.g. as an executor, a trustee and administrator or an agent. (Halsbury's Laws of England, 4th Edition, Vol. 9, Contract, Article 204). E

In the case of *Rai Bahadur Lokenath Prasad Dhandhania* v. *Commissioner of Income Tax, Bihar and Orissa,* 8 ITR 369, a deed of partnership was drawn up between A in his individual capacity, of the one part, and the joint Hindu family consisting of A and his two sons of which A was the Karta, of the other part. An application for registration of the firm was refused by the Income Tax Officer. It was held by a Division Bench of the Patna High Court that the decision of the Income Tax Officer was correct. After referring to the following passage from Mayne's Hindu Law (9th Edn.) at page 398 : F G

"Where a managing member of a joint family enters into a partnership with a stranger the other member of the family do not *'ipso* H

A *facto*' become partners of the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case the family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger : the partnership will be governed by the Act."

B

it was observed in that case :

"it appears to me that the partnership which was sought to be entered into on the 24th of February, 1936, was between Lokenath

C on the one hand and Lokenath on the other as managing member of the joint Hindu family with the result that in this case the family as a unit did not become a partner; in other words that the partnership could be only treated to be in fact between the member of the joint Hindu family and the Karta as the other

D contracting party which in this case is the same person. The result inevitably follows that there is no partnership in law which could have been registered by the Income tax Officer."

The case before us is not of a partnership between the Karta of an H.U.F. with himself in another capacity.

E

The case of *Agarwal and Co.* v. *Commissioner of Income Tax, U.P.*, 77 ITR 10, dealt with a partnership where the two Kartas of two Hindu Undivided Families had formed a partnership. The question was because the capital of the firm came out of the family funds, whether the members

F of the family *ipso facto* became partners of the firm. It was held in that case after referring to the case of *Commissioner of Income Tax* v. *Kalu Babu Lal Chand,* 37 ITR 23 (SC) that it was well settled that an HUF could not as such enter into a contract of partnership with another person or persons. An HUF is a fleeting body. Its composition changed by births, deaths, marriages and divorce. The assumption that a Hindu Joint Family

G could be a partner in a partnership firm was based on an erroneous view of law. It was held that the persons who were shown as partners in the deed must be taken by the Income Tax Officer to have joined the same in their individual capacity. It was not to the Income Tax Officer to go behind the deed and find out whether the partners mentioned in the deed have

H joined in their own right or representing others. It was held :

"Hence, the partnership must be held to have been validity formed as the law did not at the relevant time prohibit anyone, otherwise competent to contract, from entering into a contract of partnership, even though the beneficial interest in his share may vest in others." A

In the case of *Commissioner of Income Tax, Bombay City II* v. *Raghavji Anandji & Co.,* 100 ITR 246, the firm consisted of eleven partners. The deed was signed by one of the partners in two capacities - as an individual and as the Karta of the HUF. It was held that the partnership was valid and entitled to registration. It was held in that case that the partnership agreement was a contract between a person in one capacity and the same person in different capacity only, but it was a contract between a person in two capacities and nine other persons. B C

We were also referred to a decision of this Court in the case of *Chandrakant Manilal Shah and Another* v. *Commissioner of Income Tax,* (1992) 193 ITR 1, where the question of genuineness of partnership between the Karta of an HUF and an undivided member of the family, was considered. This Court following the decision of the Privy Council in the case of *Lachman Das* v. *Commissioner of Income Tax,* (1948) 16 ITR 35 (PC), held that if a stranger can enter into a partnership, with reference to his own property, with a joint Hindu family through its Karta, there is no sound reason to withhold such opportunity from a coparcener in respect of his separate and individual property. D E

In this case before us there are as many as six partners. Krishnadas signed the partnership agreement on his behalf as well as representing the heirs of Sudevan. There is no legal bar to Krishnadas entering into an agreement of partnership with the heir of Sudevan. The only problem is Krishnadas was himself on of the heirs. But, having regard to the principles laid down by the Judicial Committee of the Privy Council and the decisions of this Court in the cases of *Firm Bhagat Ram Mohanlal* and *Chandrakant Manilal Shah* (supra), where it was held that a karta could enter into a partnership with a coparcener of the same Hindu undivided family, we do not see why the validity to this partnership agreement should be doubted, especially in view of the fact that there were four other partners and Krishnadas was holding a power of attorney on behalf of the other legal heirs. There is nothing in the Partnership Act or the Contract Act which F G H

A prevents an agreement of this nature being entered by the six partners.

In our view the Kerala High Court has come to a right decision in this case. The appeal is dismissed. There will be no order as to order as to costs.

B Civil Appeals Nos. 3338/84, 8601-02/83, 411-16/84, 1570-71/93, 4675/84, 3867/92, 7745/95 and Special Leave Petitions (C) Nos. 19919-20/95 & 12744/91.

In view of our decision in Civil Appeal No. 3069 of 1980, the above Appeals and Special Leave Petitions are also dismissed. There will be no order as to costs.

S.V.K.I. Appeals and Petitions dismissed.