

(2005) 03 AHC CK 0105

Allahabad High Court

Case No: Income Tax Reference No. 249 of 1991

The Commissioner of Income
Tax

APPELLANT

Vs

Gupta Cold Storage

RESPONDENT

Date of Decision: March 9, 2005

Acts Referred:

- Income Tax Act, 1961 - Section 154, 184, 185(2), 186, 256(1)
- Provincial Small Cause Courts Act, 1887 - Section 17(1)

Citation: (2005) 198 CTR 387

Hon'ble Judges: R.K. Agarwal, J; Prakash Krishna, J

Bench: Division Bench

Advocate: A.N. Mahajan and S.C, for the Appellant;

Final Decision: Allowed

Judgement

Prakash Krishna, J.

The Income Tax Appellate Tribunal, Allahabad has referred following question of law u/s 256(1) of the Income Tax Act, 1961 (here in after referred to as the Act) for opinion to this Court:

"Whether the Tribunal, in the facts and circumstances of the case, was justified in law in up holding that the supplementary partnership deed, duly signed by the guardians of the minor, after expiry of the assessment year validated the partnership deed retrospectively or not ?"

2. The reference relates to the assessment year 1971- 72

3. The assessee respondent claimed registration of firm on the basis of partnership deed executed on 7-11-1969. The application in Form No. 11 and 11-A were filed on 23-2-1970 together with the partnership deed. The Income Tax Officer found that the assessee firm is not genuine firm but it is a branch of the main firm M/s

Goverdhan Dass Brij Behari Lal, consequently registration was refused vide order dated 18-3-1974. This order was confirmed in first appeal. The Tribunal, in Second appeal, set aside the order refusing to grant registration and remanded back the matter to Income Tax Officer for fresh consideration. It appears that during the pendency of assessment proceeding consequent upon the remand, the assessee respondent filed supplementary deed, which was duly executed by the guardian of the minors. The department's objection was that in the partnership deed executed on 7-11-1969 minors were admitted to the benefits of partnership firm but the deed was signed by the adult partners only and was not signed by any person on behalf of the minors. It was not signed by the guardian of the minors. The said mistake was sought to be ratified by filing supplementary deed duly signed by the guardian of the minors on 27-12-1976. Again, the Income Tax Officer refused to grant registration to the assessee respondent. However, the said order was set-aside in appeal by the Commissioner of Income Tax (Appeals) and the Income Tax Officer was directed to grant registration to the firm. This order has been confirmed by the Tribunal.

4. Heard teamed counsel for the parties. Sri A.N. Mahajan, learned Standing Counsel for the department submitted that the assessed firm was not entitled for registration under the provisions of the Act as the original partnership deed executed on 7-11-1969 was not signed by the guardian of minors and thus, was invalid. The said defect was sought to be removed by filing supplementary deed duly signed by the guardian of minors on 27-12-1976 after the close of previous year. He advanced this argument on the basis of Full Bench decision of this Court in [The Addl. Commissioner of Income Tax Vs. Uttam Kumar Pramod Kumar](#), and also referred the judgment of Supreme Court in the case of [Sri Ramamohan Motor Service Vs. Commissioner of Income Tax](#). In contra, Sri Satish Madhyan learned counsel for the assessee respondent placed reliance on a Division Bench of this Court in the case of [Commissioner of Income Tax Vs. Commercial Finance Corporation](#), and submitted that the defects contained in the partnership deed dated 7-11-1969 having been removed by the guardian of minor by the deed duly signed by him on 27-12-1976, the partnership firm is entitled for registration.

5. We have given careful consideration to the respective submissions of the counsel for parties. It has been found that the assessee had fulfilled all the technical requirement for seeking registration namely written partnership deed containing terms and conditions of the partnership including distribution of profit and losses amongst the partners. It is not the case of the department that profit and losses have not been apportioned amongst the partners in accordance with the terms of the partnership deed. For the purposes of present reference the only objection raised by the department was that the partnership deed in which some of the minors have been admitted to the benefits of partnership, partnership deed has not been signed by their guardian. It is also not in dispute that subsequently a supplemental deed was filed, genuineness of which has not been questioned by the

department. In view of these facts the question arises as to whether the deed of ratification/ supplementary deed duly signed by the guardian of the minors on 27-12-1976 would cure the defect in the partnership deed executed on 7-11-1969 for the relevant assessment year 1971-72 or not.

6. In this connection learned Standing Counsel placed strong reliance upon the Full Bench judgment of this Court in the case of [The Addl. Commissioner of Income Tax Vs. Uttam Kumar Pramod Kumar](#), We have carefully considered the said decision and we find that it has hardly any application to the controversy in hand. In that case the Court was considering the effect of not signing of partnership deed on behalf of minors by the guardian. In that connection it was held that when no one acting as a minor's guardian signs the document, no agreement with the minor comes into existence. The deed purporting to be partnership deed with minors is wholly invalid and cannot be registered. A close examination of the fact of the case do disclose that although the minors were admitted to the benefits of partnership as per allegation of the assessee of that case, but they were treated as full-fledged partners. The minors were made liable to share the losses also according to their share specified and were treated at par with the major partners. The fact that the were minors was not even mentioned in the deed. In this back drop of the factual matrix the full Bench held that when no one acting as minors' guardian signed the documents, no agreement with the minors comes into existence. The Court was not faced with the question as to whether such a deed which is otherwise valid except that it was not signed by the guardian of minors can or cannot be ratified subsequently by the guardian by executing a supplementary or ratification deed. It may also be noted here that in the case of same assessee a Division Bench of this Court had held in [ADDITIONAL COMMISSIONER OF Income Tax, KANPUR Vs. UTTAM KUMAR PROMOD KUMAR.](#), that signing of the deed on behalf of minors by the guardian is essential for the purposes of registration of firm under the Act when a minor has been admitted to the benefits of partnership. A subsequent Division Bench, doubted the correctness of this proposition, which fed reference to the Full Bench. The judgment of Uttam Kumar Pramod Kumar (supra) was some what contrary or was not in consonance of the prevailing legal situation, prevailing both in the mind of revenue authorities as well as amongst the tax payers as is apparent from the Board instructions through its letter dated 19-3-1976. The said letter was reproduced in the order of the Tribunal and is being quoted below:

"In [ADDITIONAL COMMISSIONER OF Income Tax, KANPUR Vs. UTTAM KUMAR PROMOD KUMAR.](#), the Allahabad High Court has held that admission of minors to the benefits of partnership must be duly witnessed by the guardian or someone duly authorized in this behalf before the partnership deed can be accepted as valid. The Board have decided that this decision is to be followed in all charges and further it will not only be for future but it would apply with equal force to the past assessments also and remedial action would become necessary, if the principles laid down are rigidly applied in all such cases. So far it has been taken that where a

minor is admitted to the benefits of partnership, it was not necessary for such admission to be evidenced by any body on behalf of the minor and even if it was so evidenced in view of the supreme Court's decision in [Commissioner of Income Tax, Mysore Vs. Shah Mohandas Sadhuram](#), it would not amount to the minor being admitted to the partnership unreservedly. To reverse what has happened in the all completed cases would raise practical problems.

In view of the practical difficulties involved the Board have examined the question of following the decision of the Allahabad High Court both for completed and pending assessments. The Board is of the view that it was not desirable to disturb completed assessments by cancelling registrations already granted. As opportunity should be given to the concerned assesseees to make necessary attestations or to amend the partnership deeds and where the needful was not done, steps should be taken to cancel registration. It has also been decided by the Board that if any action to cancel registration was required, necessary action should be taken u/s 263. However, if it was not possible to take recourse to Section 263, action might be taken u/s 154/186.

The Board have also decided that in so far as pending assessment are concerned, an opportunity may be given to amend the partnership deed and if done so, the registration will not be refused on this ground."

6. The assessee respondent as a matter of fact has come out with the allegation that as soon as the ratio of the Division Bench judgment of this Court in the case of [ADDITIONAL COMMISSIONER OF Income Tax, KANPUR Vs. UTTAM KUMAR PROMOD KUMAR](#), came to its knowledge the deed of ratification was executed and was filed on 27-12-1976 before the Income Tax Officer to remove the defects in the partnership deed. The Commissioner of Income Tax (A) has accepted this plea of the assessee and found that the assessee filed the supplementary deed before the Income Tax Officer, who did not even asked for it. The action of the assessee was justified in view of the Board's letter dated 19-3-1976.

7. Section 185(2) of the Act provides that where the assessing authority considers that application for registration is not in order, he shall intimate the defect to the firm and will give it an opportunity to rectify the defect in the application within a period of one month from the date of such intimation. If that defect is not rectified within that period, the assessing authority shall by writing reject the application. It is not in dispute that in the present case no such opportunity was given to the assessee respondent. The assessing authority without calling upon the assessee to rectify the defect straight away refused to grant registration to the firm, which is obviously not legal in view of the Board's letter dated 19-3-1976.

8. The said instruction clearly casts a duty on the assessing authority to give opportunity to the assessee to rectify the defects in the pending matters at the assessment stage.

9. The another case on which reliance was placed by the learned Standing Counsel is Sri Ram Mohan Motor Services v. Commissioner of Income Tax (supra). The said case is also distinguishable on facts. In the initial partnership deed dated 5-2-1955 the minor was made partner sharing losses along with profits. A fresh deed was executed on 28-6-1962 by which minor was admitted only to the benefits of partnership. In this factual background the Supreme Court by a short judgment dismissed the appeal of the assessee with the observation that there is no error in the order of the High Court refusing to grant registration to the partnership firm. The High Court had held that the firm was not entitled for registration for the accounting period ending December 1961 as there was no valid partnership in existence during that period. The factual scenario involved in the said case is not parallel to the facts of the present case. It is not the case of the department that here minor was admitted as full-fledged partner and was made liable to share losses also. The objection raised by the department is limited one, namely the partnership deed was not signed by the guardian of minors.

10. We find that a Division Bench judgment of our Court in [Commissioner of Income Tax Vs. Commercial Finance Corporation](#), is very near to the facts of the present case. In that case the assessee firm consisted of major partners and minors were admitted to the benefits of partnership. The partnership deed was executed on 1-12-1972 and, on the same date, another agreement was executed between the partners on one hand and guardian of the minors where by the later gave his consent to the admission of minor sons to the benefits of partnership. The original partnership deed was filed with application for registration. It was held by this Court that failure to file the agreement along with original application merely made the application defective and incomplete and since the Income Tax Officer had not given opportunity to the assessee to ratify the defect but the defects have been ratified by the assessee itself, the firm was entitled for registration. In this case the Division Bench judgment of this Court in Uttam Kumar Pramod Kumar (supra) was cited and distinguished on the ground that the Tribunal had found that the partnership was evidenced by a valid instrument of the partnership and consent of the guardian had been duly given for admission of the minor sons to the benefits of partnership. It was held that mere fact that the said agreement was filed with some delay would not disentitle the assessee to the relief of registration. The Division Bench agreed with the Tribunal that absence of the agreement between partners and guardian of minors merely made the application for registration defective and incomplete. That application became complete and competent after this agreement was filed. We could also lay our hands to another Division Bench judgment of this Court in [Commissioner of Income Tax Vs. Bharat Zarda Factory](#), In that case the registration was refused by the Income Tax Officer on the ground that minor Sanjay Kumar was admitted to the benefits of partnership, but no one consented for such an admission on behalf of minors. The Tribunal referred to Clause (7) of the partnership deed which provided that father and guardian shall not interfere with the conduct of

business. It also relied upon the affidavit filed by the minor father and guardian that he had given his consent for such an admission and consequently set aside the order of the Income Tax Officer refusing to grant registration. This Court on these facts approved the order of the Tribunal.

11. The upshot of the above discussion is that if there is some material or evidence to show the consent of the guardian of the minors for admitting the minors to the benefits of partnership firm, the registration of such firm cannot be denied under the Act, and the partnership deed is not fatal for want of signature of the guardian of minors thereon. Section 184 of the Act requires that the firm shall be assessed as partner under the Act if partnership is evidenced by the instrument and individual share of the partners are specified in the instrument. It is not in dispute that partnership is evidenced by the instrument and individual share of the partners are specified in that instrument. The genuineness of the partnership has also not been doubted by the department except that partnership deed was not signed on behalf of minors through their guardian. No doubt Division Bench and Full Bench of this Court in the case of Uttam Kumar Pramod Kumar (supra) has laid down that partnership deed is not valid if not signed by a person acting as minor guardian. But this does not say that such deed can not be ratified or the consent of guardian of minor can not be established by other material.

12. Calcutta, Andhra Pradesh, Kerala and Punjab High Courts have taken a view that the deed of partnership need not be signed by the guardian of minors and the fact that the deed has not been signed by such guardian would not be fatal to the validity of the deed or eligibility of the firm to registration in following cases:

- (1) [Commissioner of Income Tax Vs. Associate Industrial Distributors,](#)
- (2) [Commissioner of Income Tax Vs. Sriram Industrial Distribution,](#)
- (3) [Srinivasa Stainless Steel and Moulding Works Vs. Commissioner of Income Tax,](#)
- (4) Saphari Wines v. Commissioner of Income Tax (1988) 169 ITR 695.
- (5) [Commissioner of Agricultural Income Tax Vs. Elembilery Estate,](#)
- (6) [Commissioner of Income Tax Vs. Jain Steel Rolling Mills,](#)

13. The preponderance of the above cases show that there should be some material to show consent of the guardian of minors for admitting the minors to the benefit of partnership firm. If from the attending circumstances the consent of guardian can be inferred, mere non signing of the partnership deed by the guardian of minors is not fatal.

14. However, in the present case the principal question involved is whether the subsequent supplementary deed duly executed by the guardian of the minors on 27-12-1976 can remove the defect in the partnership deed executed on 7-11-1969. To put it differently whether by the deed executed on 27-12-1976 the defect in the

partnership deed executed on 7-11-1969 stands ratified or not, is to be considered, in the present case. This issue is not res-integra. In [Jugraj Singh and Another Vs. Jaswant Singh and Others](#), the validity of a power of Attorney was questioned on the ground that it had not been properly authenticated under law. To meet the said objection, fresh Power of Attorney was executed by owner of the property in favour of the agent as required under law. A question arose as to from which date second Power of Attorney, which was held to be valid would be effective. It was held by Supreme Court that the document after ratifying the earlier document would relate back to the time when first document was made and It cured the illegality in presentation for registration which had taken place. Their Lordship further came to the conclusion that in view of second Power of Attorney there was proper execution of documents of sale and its registration. This decision has been recently followed by Supreme Court in the case of [Punjab University Vs. V.N. Tripathi and Another](#), In this case the appeal filed by the Registrar of the University was rejected by the appellate court on the ground that he was not competent to file the same. Supreme, Court agreed with the submission of learned counsel for the respondents that the day on which appeal was presented, the Registrar was not competent to file appeal but it accepted the second submission of the appellant that action of the Registrar to file appeal was subsequently ratified by the Senate of the University on the recommendation of Syndicate. Supreme Court relying upon its earlier judgment in the case of Jugraj Singh (Supra) held "that ratification was valid and related back to the date of original act.". It has been further held that ratification has the effect of relating back to the time when action was taken without authority. Even assuming that the partnership deed executed on 7-11-1969 was not valid, as contended by the department, the deed has been ratified by the supplementary deed dated 27-12-1976, the genuineness of which has not been disputed by the department, and it will relate back to 7-11-1969. Resultantly the defect in the partnership deed dated 7-11-1969 stood cured.

15. In view of the above discussion we find no merit in the argument of learned Standing Counsel and agree with the view of the Tribunal that in the facts and circumstances of the case supplementary partnership deed duly signed by the guardian of the minors after expiry of assessment year validated the partnership deed retrospectively.

16. Before saying Omega, a few factors need fn be noted. The Board in its instructions vide letter dated 19-3-1976 (as quoted in the earlier part of this judgment) mentions that in the part, prior to the judgment of Additional Commissioner of Income Tax, the Uttam Kumar Pramod Kumar, "so far it has been taken that where a minor is admitted to the benefits, it was not necessary for such admission to be evidenced by any body on behalf of the minor. .". There is divergence of judicial opinion amongst various High Courts. Allahabad High Court in the case of Uttam Kumar Pramod Kumar has held that the partnership deed should necessarily be signed by the guardian of minors when minor is admitted to the

benefits of partnership. With this view other High Courts namely Calcutta, Andhra Pradesh, Kerala and Punjab have dissented from. In this nebulous situation what an assessee is expected to do and the role, which a Court should play in the interest of justice. In such a situation Supreme Court in [Bhagwan Dass Arora Vs. First Additional District Judge, Rampur and Others](#), has laid down that the preferences of Judges should not be allowed to work hardship on litigant in respect of procedural provision. The Apex Court found that on the question of validity of security bond to be furnished for certain amount, the two premier High Courts deferred on the requirement of valid security bond to comply with the provisions of Section 17(1) of Provincial Small Causes Courts Act. The Madras High Court took a view that such bond should be stamped with the Court fee stamp. But the Calcutta High Court found that it was not so required. The Allahabad High Court rejected the bond and preferred to follow the view of Madras High Court which required that the bond should be stamped with the Court fee stamp. In this connection, Supreme Court made following observations, which are fully attracted in the facts of the present case.

"Look at the agony and misery of the appellant Two premier High Courts, Madras and Calcutta differ on the requirement of a valid security bond to comply with the proviso to Section 17(1). And the degree of difference is not narrow but irreconcilable. If the view taken by the Madras, High Court had prevailed with the learned Judge, the matter would have been decided in favour of the appellant because he had already furnished a bond stamped with court fee stamp of Rs. 2/- and it was never suggested that it was inadequate. But as the learned Judge preferred the view taken by the Calcutta High Court, the surety bond was found to be not duly stamped."

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"We are view of the opinion that in this situation the litigant cannot be visited with the consequences of being thrown out of court and shutting the doors of justice in his face. What horrible agonizing situation the appellant faced cannot be gauged. He had produced the surety bond on the first day i.e. August 8, 1977 duly stamped as then advised. And had the learned single Judge preferred the Madras view, which required that it should be stamped with court fee stamp, the appellant was fully protected. To his utter misfortune, the Calcutta view found favour with the learned Single Judge and the appellant suffered the irremediable consequence of this later day preference. We are of the opinion that preferences of judges should not be allowed to work hardship on litigants in respect of a procedural provision."

17. In view of the above discussion we do not find any illegality in the order of the Tribunal. We answer the question referred to us in affirmative i.e. in favour of the assessee and against the department. There shall be, however, no order as to costs.