

(1962) 02 CAL CK 0003

Calcutta High Court

Case No: Income-tax Reference No. 73 of 1957

COMMISSIONER OF Income Tax

APPELLANT

Vs

RUPCHAND ROUTHMALL.

RESPONDENT

Date of Decision: Feb. 13, 1962**Acts Referred:**

- Income Tax Act, 1961 - Section 26A

Citation: (1963) 50 ITR 295**Hon'ble Judges:** Ray, J; G. K. Mitter, J**Bench:** Full Bench

Judgement

RAY J. - The assessee firm applied for registration u/s 26A of the Income Tax Act on the basis of an instrument of partnership dated July 21, 1950. The parties to the agreement were Tolaram Dugar and his three sons, Hanumanmall, Naurathmall and Surajmall, the last one being a minor represented by his mother and natural guardian, Monohari Devi, and Routhmall Dugar and his sons, Keshrichand, Motilal and Chhatarsingh, the last one being a minor represented by his mother and natural guardian, Bhawani Debi. In the agreement it is stated that Tolaram and his sons, Hanumanmall, Naurathmmall and Surajmall, constituted a Hindu undivided family and Routhmall and his sons, Keshrichand, Motilal and Chhatarsingh, constituted another Hindu undivided family and that these tow Hindu undivided families were carrying on business in partnership under an agreement dated November 24, 1937, under the name and style of Rupchand Routhmall. It is further stated in the July, 1950, agreement that the two Hindu undivided families were partitioned and there was an agreement of of partition on March 30, 1950. It was stated in the agreement of July, 1950, that for the benefit of the minors it was agreed that they should remain joint with their respective fathers and that Tolaram and Routhmall, who were the kartas of the two Hindu undivided families, agreed to admit their respective sons, Hanumanmall, Naurathmall, Keshrichand and Motilal, as partners in the business carried on under the name and style of Rupchand

Routhmall. The share of Tolaram jointly with his minor son, Surajmall Dugar, was put down as four annas and similarly, Routhmall jointly with his minor son was entitled to a four annas share. The remaining parties were each allotted two annas share. Though the partnership deed was executed in July, 1950, retrospective effect was given from March, 1950. The Income Tax authorities rejected the application on the grounds, firstly, that the shares of Tolaram and Routhmall were collectively shown as four annas each though they were shown as distinct partners and thus the shares of the individual partners were not specified and, secondly, that profits and losses had to be shared by all the partners in accordance with their shares with the result that the minors were made liable for the losses as partners and minors could not enter into such partnership agreements.

The assessee firm preferred an appeal and contended that Tolaram and Routhmall were two Hindu undivided families, each family consisting of a father and minor son and a share of four annas was allotted to each of such undivided families and, therefore, the shares were not unspecified. The Tribunal held that Tolaram and Routhmall who admitted the adult sons as partners were kartas of the erstwhile Hindu undivided families as well as of the truncated Hindu undivided families and that the minors were not partners and, therefore, the firm was entitled to registration.

On these facts the following question of law has been referred :

"Whether on a proper construction of the deed of partnership dated July 21, 1950, the assessee was a firm entitled to registration u/s 26A of the Indian Income Tax Act and with effect from July 21, 1950 ?"

Counsel for the Commissioner contended, firstly, that by the document of partnership minors were in fact shown as having shares in the business, secondly, that it was impossible to ignore the minors by saying that the contract was really between Hindu undivided family consisting of the father and minor son because there is no such joint family after severance of the undivided families and, thirdly, if the minors are partners the shares of the minor and his father remain unspecified.

Counsel for the Commissioner referred to the deed of partnership dated July 21, 1950, and contended that though the minors did not sign the deed they were parties to the deed. In support of the contention reliance was placed on the recitals that the parties agreed to carry on the business in co-partnership with one another and that the parties thought it fit and desirable to lay down and specify in writing the shares of the parties as also the terms and conditions under which the business was to be carried on. Secondly, it was contended that clause 2 of the July, 1950, agreement stated that the parties were to bear profit or loss in the business and it was not open to the Tribunal to rewrite the agreement by holding that the minor is not to bear the loss and, thirdly, that registration can be granted only on the agreement between the parties and on the covenants set out and that there could

not be registration of an agreement by adding something thereto or subtracting something therefrom.

Counsel for the Commissioner laid emphasis on the agreement of partition dated March 30, 1950, and contended that unless there was a general partition the mother would not be entitled to a share and that the mother's share could not be relinquished in favour of her husband and three sons including the minor. It is true that in the agreement for partition it is stated that the father will remain joint with the minor son and further that in the partnership agreement of July 21, 1950, it is stated that the father is entitled jointly with his minor son to a four annas share but it was contended that it does not mean that there is a joint family. After there has been severance of the joint family by a general partition there has to be an agreement to reunite and a minor cannot enter into an agreement to reunite. Therefore, counsel for the Commissioner contended that the minor could not claim to have reunited and become a joint family with his father.

Counsel on behalf of the assessee contended that since it was stated in the deed of partition dated March 30, 1950, that the father and minor son were to continue to remain joint there was a partial partition and there was a truncated joint family out of the erstwhile joint family. It was also contended that the partnership agreement of July, 1950, was not signed either by the minor or anyone on his behalf and the minor was not admitted to the benefits of partnership, for the deed of partnership was not an agreement to that effect, and, finally, the recital that Tolaram and Routhmall agreed to admit 2nd, 3rd, 6th and 7th parties as partners had the result that the minor was not a partner and the fathers, Tolaram and Routhmall, were partners in their capacity as karta of their respective families consisting of them and their respective minor sons.

The agreement of partition dated March 30, 1950, shows that there were two undivided families one consisting of Tolaram's branch and the other consisting of Routhmall's branch and that there were dissensions between the members of the two undivided families. The mother who was entitled to a share on partition expressed an intention not to participate in the business and accordingly gave away her share in the business and capital equally in favour of her husband and three sons. In the operative part of the agreement of partition it is stated that the parties placed on record that the Hindu undivided family has been divided among the parties. The result in my opinion is that there is a severance of the joint family and there is division of the shares and thereafter the father and the minor son remain joint in a loose sense for the sake of convenience. Clause 6 of the partition agreement states that the minor remained joint with his father and that the minor's share of capital and profit shall be amalgamated and credited to the account of the father. In this context the words "jointly with his minor son" in the partnership but the extent of it is not specified in the partnership agreement.

The law is stated in Mulla's Hindu Law, 12th edition, paragraph 315, at page 485, to be, that a wife cannot herself demand a partition. But if a partition takes place between her husband and her sons she is entitled to receive a share equal to that of her sons and to hold that share separately even from her husband. I am, therefore, of opinion that the fact that the wife, namely, the mother, became entitled to and obtained a share shows positively that there was a general partition and negatives any suggestion of partial partition. When the joint family status is put an end to, if any property remains undivided the presumption would be that the members of the family would hold the property as tenants-in-common unless and until a special agreement to hold as joint tenants is proved : see Mulla's Hindu Law, 12th edition, paragraph 328, at page 503 and 504. I am unable to hold that after the husband and the three sons became each entitled to a share of the mother's share relinquished on partition. After partition there can be a reunion but such reunion but such reunion is the result of an agreement and it is indisputable that since the minor is not competent to contract an agreement to reunite cannot be made by or on behalf of the minor (*Balabux v. Rukhmabai*; see Mulla's Hindu Law, 12th edition, paragraph 344, at pages 517-518).

The effect of the partition agreement is that there has been a severance of the joint family. There is not reunion between the father and the minor son. Therefore, after severance of the joint family the minor acquires a share. To hold that in the partnership agreement the father held shares in his individual capacity and as karta is to deny the minor's share and to make a new agreement contrary to the real agreement between the parties. In the case of *Commissioner of Income Tax v. Dwarkadas Khetan & Co.* it was held that an agreement under which a minor who was admitted as a partner sharing in the profits and bearing losses could not be registered u/s 26A of the Income Tax Act. It is true that in the *Dwarkadas Khetan* case, the minor was a signatory to the instrument whereas in the present case the minor is not a signatory. But that in my opinion does not make any difference for the reason that if on the construction of the partnership agreement the minor is a partner the agreement suffers from equal infirmity, and is incapable of registration. If the minor is a partner then the question remains as to whether the shares of all the partners are specified in the agreement. It is stated in the agreement that the father is jointly entitled with his minor son to a four annas share but that in my opinion does not specify as to what the specific share of the minor or of the father is.

On the construction of the partnership agreement I am of the opinion that the minor is a party sharing profits and losses. The partnership agreement does not in my opinion show that Tolaram and Routhmall agreed as kartas of their respective truncated families as was contended by the assessee because, firstly, there is no joint family after severance without a reunion and, secondly, if they were kartas they would not hold shares along with their respective minor sons. In the case of

Commissioner of Income Tax v. Nandlal Gandadal the Supreme Court said that when a karta of an undivided Hindu family and the other partners but between the coparcener individually and the other partners. The Tribunal in the present case erred in holding that the shares were allotted to the Hindu undivided families and the Tribunal could not take away the individual character of Tolaram and Routhmall and make them partners qua undivided families.

For all these reasons I am of opinion that the minor is a partner and his share is not specified and the agreement is incapable of registration. The question is, therefore, answered in the negative. The assessee is to pay costs. Certificate for two counsel.

G. K. MITTER J. - I agree.