

(1978) 01 CAL CK 0033

Calcutta High Court

Case No: Income-tax Reference No. 228 of 1975

Bengal Decorators

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

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**Date of Decision:** Jan. 20, 1978**Acts Referred:**

- Income Tax Act, 1961 - Section 184(3), 184(7), 187(2)
- Income Tax Rules, 1962 - Rule 22(5)

**Citation:** (1978) 113 ITR 805**Hon'ble Judges:** Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J**Bench:** Division Bench**Advocate:** Debi De and M. De, for the Appellant; A. Sengupta and P.K. Majumdar, for the Respondent

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**Judgement**

Sabyasachi Mukharji, J.

In this reference u/s 256(1) of the Income Tax Act, 1961, the following question has been referred to this court :

" Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessee is not entitled to continuation of registration for the assessment years 1968-69 and 1969-70?"

2. This reference relates to the assessment years 1968-69 and 1969-70. It was claimed in the course of proceedings for the assessment year 1967-68 that the assessee was a firm consisting of two partners, namely, Shri Shyamdhan Sett and Sm. Krishna Sett, which was entitled to registration. This was followed by a claim for continuation of registration for the assessment years 1968-69 and 1969-70. The Income Tax Officer did not allow registration for the assessment year 1967-68 on the ground that since Shyamdhan Sett got drowned while taking a bath in the river Hooghly on the 3rd October, 1967, and was not heard of since then, there was no genuine firm in existence. The Income Tax Officer refused the claim of registration

for the assessment year 1967-68 and the claim for continuation of registration for the assessment years 1968-69 and 1969-70.

3. There was an appeal before the Appellate Assistant Commissioner from the said decision of the Income Tax Officer. The Appellate Assistant Commissioner by a consolidated order granted registration for the assessment year 1967-68 and continuation of registration for the assessment years 1968-69 and 1969-70. The revenue did not question the order of the Appellate Assistant Commissioner granting registration for the assessment year 1967-68, since during the previous year relevant to this assessment year, Shri Shyamdhan Sett was alive, but the revenue challenged the action of the Appellate Assistant Commissioner in granting continuation of the registration for the assessment years 1968-69 and 1969-70 and filed appeals against the order of the Appellate Assistant Commissioner for those years. The Tribunal referred to the decision of this court in the case of [Sandersons and Morgans Vs. Income Tax Officer, "A" Ward and Others](#), and was of the opinion that there was an alteration in the set up of the firm, namely, by death or incapacity of the partner and as such there was a change in the constitution of the firm and, therefore, according to the Tribunal, the firm was not entitled to continue its registration. The Tribunal also thought it necessary to point out that under Sub-rule (5) of Rule 22 of the Income Tax Rules, 1962, the application was defective.

4. It has to be mentioned that in the meantime on or about the 26th February, 1968, this court had appointed one Gopal Chandra Sett to be the administrator-pendente lite in respect of the estate of Shyamdhan Sett. The relevant portion of the order reads as follows :

" It is ordered that without being required to furnish any security and without being allowed any remuneration the said applicant, Gopal Chandra Sett, be and he is hereby appointed the administrator-pendente lite (hereinafter referred to as the " said administrator ") of the estate and properties of the deceased above-named with power to him to get in and collect all moneys due and properties belonging to the estate of the deceased above named and to look after and/or manage the business and interest of the deceased above-named in the firm " the Bengal Decorators " (hereinafter referred to as the " said firm ") and to conduct or defend all suits or proceedings by or against the deceased above-named in any court and for the purpose thereof to open or operate all bank accounts and to appoint servants, agents, pleaders, advocates and attorneys and to make sign, verify and affirm all pleadings, petitions, affidavits and other necessary documents and papers and to sign, endorse or encash cheques, drafts and other negotiable instruments on behalf of the deceased above-named. And it is further ordered that the said administrator do, out of the share of profits of the said business and out of the income of the estate of the deceased above-named, pay the debts and liabilities of the deceased above-named including insurance premium, if necessary, and do also pay per month a sum of Rs. 500 only or such sum as may be agreed by all the heirs of the

deceased above-named for maintenance of the family of the said deceased above named and also do pay the marriage expenses of the unmarried daughters, Kumari Jharna Sett and Kumari Manika Sett, of such amount as may be agreed by all the heirs of the deceased above-named."

5. Ultimately, by an order dated the 13th June, 1973, it was ordered that the death of Shyamdhan Sett should be presumed from the disappearance of Shyamdhan Sett on or after the 3rd October, 1967. The learned judge, who made the order, inter alia, observed as follows :

" From the materials on record and from the oral evidence of the witness I am satisfied that it is a fit case where the death of the said Shyamdhan Sett should be presumed from the disappearance of the said Shyamdhan Sett on or after the 3rd day of October, 1967, under the circumstances stated hereinabove and as mentioned in the petition and in the affidavit on record. ....

It is ordered that the death of Shyamdhan Sett above-named be presumed from the disappearance of the said Shyamdhan Sett on or after the 3rd day of October, 1967, from the circumstances attending such disappearance as mentioned in the petition and in the affidavit filed herein and also as recorded in the evidence adduced by the witnesses called by the petitioner. Orders already made will continue. The police report may be returned after furnishing loco-copies. Liberty to mention for the hearing of the rest of the application for grant. "

6. Registration of a firm is guided by Section 184 of the Income Tax Act, 1961. Registration once granted would continue provided certain conditions are fulfilled. Those conditions are mentioned in Sub-section (7) of Section 184.

7. Sub-section (7) of Section 184 is as follows :

"(7) Where registration is granted to any firm for any assessment year, it shall have effect for every subsequent assessment year :

Provided that--

(i) there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the registration was granted ; and

(ii) the firm furnishes, before the expiry of the time allowed under Sub-section (1) or Sub-section (2) of Section 139 (whether fixed originally or on extension) for furnishing the return of income for such subsequent assessment year, a declaration to that effect, in the prescribed form and verified in the prescribed manner, so, however, that where the Income Tax Officer is satisfied that the firm was prevented by sufficient cause from furnishing the declaration within the time so allowed, he may allow the firm to furnish the declaration at any time before the assessment is made. "

The manner of the application for registration is provided in Sub-section (3) of Section 184 which is to the following effect :

" (3) The application shall be made to the Income Tax Officer having jurisdiction to assess the firm, and shall be signed--

(a) by all the partners (not being minors) personally ; or

(b) in the case of a dissolved firm, by all persons (not being minors) who were partners in the firm immediately before its dissolution and by the legal representative of any such partner who is deceased.

Explanation.--In the case of any partner who is absent from India or is a lunatic or an idiot, the application may be signed by any person duly authorised by him in this behalf, or, as the case may be, by a person entitled under law to represent him. "

8. Section 187 of the Act deals with the change in the constitution of a firm and Sub-section (2) of Section 187 explains the change in the constitution of a firm for the purpose of the section. The said sub-section is to the following effect :

" (2) For the purposes of this section, there is a change in. the constitution of the firm--

(a) if one or more of the partners cease to be partners or one or more new partners are admitted, in such circumstances that one or more of the persons who were partners of the firm before the change continue as partner or partners after the change ; or

(b) where all the partners continue with a change in their respective shares or in the shares of some of them. "

9. On behalf of the assessee it was contended that in this case there was no change in the constitution of the firm because in the relevant years under consideration Shyamdhan Sett could not be said to have died and furthermore, there was no question of the personnel of the firm being changed or the shares of the partners being changed. Counsel for the assessee contended that incapacity of a partner, which was mentioned in the decision of the case, [Sandersons and Morgans Vs. Income Tax Officer, "A" Ward and Others](#), , perhaps requires re-examination in the light of Sub-section (2) of Section 187, It was further urged that the Explanation to subsection (3) of Section 184 contemplated that an application for registration can be signed on behalf of a person who is a partner by another who is entitled under the law to represent him. The case of [Sandersons and Morgans Vs. Income Tax Officer, "A" Ward and Others](#), was concerned with the case where one of the partners had died and the change in the constitution of the firm was considered in that light and the observations in that decision were made in that background. The said decision went up in appeal and was confirmed and the decision of the Division Bench of this court is reported in [SANDERSONS AND MORGANS Vs. Income Tax](#)

[OFFICER, "A" WARD, DISTRICT III\(1\), CALCUTTA, AND OTHERS.,](#) . Our attention was also drawn to the observations of the Full Bench of the Andhra Pradesh High Court in the case of [The Additional Commissioner of Income Tax, \(Andhra Pradesh, Hyderabad\) Vs. Vinayaka Cinema, Nellore,](#) , where the majority of the judges of the Full Bench held that the very basic concept underlying Section 187(1) was that one and the same firm must be continuing throughout the year under consideration. Even if there was a change in the constitution of the firm, the firm, as an entity, must continue as one and single throughout the period. The majority of the learned judges of the Full Bench held that when a partner died and the firm was dissolved, though it could be said that the dead partner ceased to be a partner, it could not be said that there was a mere change in the constitution of the firm. Reference was made to the observations made in the aforesaid decision in the case of [Sandersons and Morgans Vs. Income Tax Officer, "A" Ward and Others,](#) , referred to hereinbefore, and the majority of the learned judges of the Full Bench found themselves unable to agree with the view expressed at page 283 of 87 ITR that death would indicate change in the constitution of the firm. But it may be pointed out with respect that where the partnership deed stipulates that on the death the partnership would not be dissolved, in such a case, as was the case of the firm of Sandersons and Morgans, as mentioned above, there would be " change in the constitution of the firm ". In this case, there were two partners. If in the relevant years Shyamdhan Sett was presumed to be dead, as by the operation of the order of Mr. Justice Dutt he was presumed to be dead from the date of his disappearance from 3rd October, 1967, then, in our opinion, there admittedly had been a change in the constitution of the firm and the fact that Gopal Chandra Sett was appointed administrator-pendente lite to represent the estate must be on the presumption that Shyamdhan Sett is dead. If that is the position then the firm was not entitled to continuation of registration.

10. Furthermore, the application made in view of the rules prescribed was defective. The Supreme Court has held that such an application must strictly comply with the requirements of the law. Reliance in this connection may be placed on the observations of the Supreme Court in the case of [Sri Ramamohan Motor Service Vs. Commissioner of Income Tax, Hyderabad,](#) . For the reasons aforesaid, in either view of the matter, the Tribunal was right in holding that the assessee was not entitled to the continuation of the registration for the assessment years 1968-69 and 1969-70.

11. The question referred is, therefore, answered in the affirmative and in favour of the revenue.

Sudhindra Mohan Guha, J.

12. I agree.