

(1967) 07 CAL CK 0018**Calcutta High Court****Case No:** Matter No. 131 of 1963

Commissioner of Income Tax
(Central) Calcutta

APPELLANT

Rampooria Cotton Mills Ltd.

Vs**RESPONDENT****Date of Decision:** July 18, 1967**Acts Referred:**

- Income Tax Act, 1961 - Section 10, 16(1)(b), 23(5)(b), 24, 24(1)

Citation: 72 CWN 325**Hon'ble Judges:** K.L. Roy, J; B.N. Banerjee, J**Bench:** Division Bench**Advocate:** B. Gupta, for the Appellant; T.K. Basu and J.B. Paul, for the Respondent

Judgement

K.L. Roy, J.

The question raised in this reference u/s 66(1) of the income tax Act, 1922 (hereinafter referred to as the Act) seems to be concluded by a decision of the Supreme Court and the interpretation put on that decision by the Bombay High Court and the Gujarat High Court. The assessee is a company and the year of assessment in question is 1956-57, the previous year ending on the 30th June, 1955. From the statement of the case, the following facts as found by the Tribunal appear. There was an unregistered firm of two partners comprising of the assessee company and a firm named M/s. Gopiram Poddar & Company. The assessee had ten annas share and the other party had six annas share in the profits and losses of this firm. The Hirji Mills Ltd., Bombay, had gone into liquidation and the firm took on lease from the Court Receiver, Bombay, the Hirji Mills on a monthly rental of Rs. 30,000/-. The Court Receiver, however, was un-able to give possession of the weaving section of the mills and the firm found it difficult to carry on the operation of the mills and the lease was given up after a period of two months. There was a total loss of Rs. 1,40,798/- and the assessee company's ten annas share therein came to Rs. 87,999/-. The assessee claimed deduction of this loss out of its profits

from other businesses. The income tax Officer held that as there was no written agreement between the partners on the basis of which the joint venture was run, the firm must be held to be an unregistered firm and the loss sustained by such a firm could not be allowed as a set-off by allocation amongst its partners. He, therefore, disallowed the assessee's claim. The Appellate Assistant Commissioner dismissed the assessee's appeal and confirmed the disallowance made by the income tax Officer on more or less the same reasons.

2. On the assessee's further appeal to the Tribunal against the order of the Appellate Assistant Commissioner, the Tribunal held that an unregistered firm of two partners comprising of the assessee and Messers. Gopiram Poddar & Co. undertook to run the Hirji Mills Ltd., Bombay. As the department had not taxed the unregistered firm as an independent unit, the assessee could not be precluded from getting the set-off of its loss in the joint venture from its other business income. The loss was clearly allowable against the other business income of the assessee. In coming to this conclusion, the Tribunal relied on the decision of the Bom. High Court in (1) [Jadhavji Narsidas and Co. Vs. The Commissioner of Income Tax, Bombay City-II,](#) . In view of its decision, the Tribunal did not record any finding as to the other contention raised by the assessee before it, namely, that there could be no valid partnership between the assessee company and the firm of Gopiram Paddar & Co., as a firm could not legally be a partner in another firm and as such the venture in leasing the Hirjee Mills was a joint venture between the assessee company and the firm of Messrs. Gopiram Poddar & Co., and the bar to set-off of a claim for loss in the second proviso to Section 24(1) was not applicable to such a case.

3. At the instance of the Commissioner the Tribunal has referred the following question of law to this Court:--

"Whether, in the facts and circumstances of the case, the Tribunal is right in holding that the assessee is entitled to a set-off of a sum of Rs. 87,999/- being its share of loss in a joint venture with Messrs. Gopiram and Company against its profits from other businesses?"

4. Mr. B. Gupta, the learned counsel appearing on behalf of the Commissioner, was extremely fair in drawing our attention to the decision of the Supreme Court in (2) [The Commissioner of Income Tax, Bombay City II, Bombay Vs. Jadavji Narsidas and Co.,](#) , where, though the decision of the Bombay High Court which had been relied on by the Tribunal in its order had been reversed, the Supreme Court based its decision on the fact that in the case before it the claim for set-off was being made by the assessee who was not a partner in the unregistered firm. Mr. Gupta also drew our attention to two decisions, one of the Bombay High Court in (3) [Commissioner of Income Tax, Bombay South Vs. Jagannath Narsingdas,](#) , and the other of the Gujurat High Court in (4) [The Commissioner of Income Tax, Gujarat, Ahmedabad Vs. Jethalal Zaverchand Patalia,](#) . Mr. Gupta referred to a passage in the judgment of the Supreme Court at page 47 of the Report which is to the following effect:--

"To begin with, the assessee firm as a firm could not enter into a partnership with Damji, Damji could be admitted into the assessee firm or the members of the assessee firm could enter into a partnership with Damji in their individual capacity. The assessee firm how-ever could not do so as a firm. This was held by this Court in Dunichand v. Commissioner of income tax. There was thus a partnership between Damji and the four members of the assessee firm acting for themselves and indeed the deed which has been produced in this case shows as much. In the affairs of the unregistered firm, the assessee firm had no locus standi. There were thus two distinct partnerships. One was the assessee firm which was registered consisting of four partners and the second was an unregistered firm consisting of five partners of whom the fifth was Damji."

Again at page 49 :-

"Section 24 then provides for the set-off of the loss as well as the carrying forward of the loss. The second proviso deals with the question of set-off in relation to both registered and unregistered firms. It says that when the assessee is an unregistered firm (not assessed as a registered firm) the loss can only be set off against the income, profits and gains of the firm and not those of partners, but if the assessee is a registered firm, the loss which cannot be set-off against the income, profits and gains of the firm shall be apportioned among the partners and they alone shall be entitled to have the amount of loss set-off under the section. Shortly stated, the losses incurred by an unregistered firm can be set-off only against its own profits while the net losses of a registered firm are apportioned among the shareholders and they alone are entitled to set them off..... Now u/s 24(1), second proviso, the losses of the unregistered firm of Damji and these four partners can only be set-off against the income, profits and gains of the unregistered firm and not those of its partners. The loss of Rs. 1,05.641 could be set-off against the income, profits and gains (if any) of the unregistered firm of five persons and not of the partners. In the same manner the loss, if not absorbed, could be carried forward to be set-off against further income, profits and gains of the same unregistered firm of five persons. The High Court was thus in error in holding that those losses could be set-off against the income of the assessee firm. It makes no difference that the department has not assessed the unregistered firm or taken action u/s 23(5) (b). ***
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Whether the partners in their individual assessments would be able to take advantage of section 16 (1) (b) and the decision of the Privy Council in Arunachalam Chettiar v. Commissioner of income tax, (a point almost conceded before us) is not a matter on which we need pronounce our opinion. That question does not arise for our consideration."

5. Mr. Gupta admitted and Mr. T. K. Bose appearing on behalf of the assessee emphasised the fact that the Supreme Court had left the question open as to whether if the assessee himself was a partner in the unregistered firm, he was

entitled to claim set-off of his share of the loss from the firm in his own assessment. The question again arose for determination by the Bombay High Court in Jagannath Narsingdas" case (supra). After referring to the afore-said decision of the Supreme Court, the Bombay observed as follows at page 136 of the Report:--

"In view of these decisions, it is not possible to accept the contention of Mr. Joshi that the second proviso to Section 24(1) can be regarded as an independent provision affecting the computation of the income of the assessee under sec. 10 of the income tax Act. Moreover, even if it were to be assumed that the proviso is an independent provision, in view of the observation of the Supreme Court in (5) [Commissioner of Income Tax Vs. P.M. Muthuraman Chettiar and Another](#), to which we have already made a reference, the said proviso will have application only where the assessee is an unregistered firm. In the present case the assessee is not an unregistered firm. As a matter of fact, the unregistered firm has not been assessed at all. The assessee is an individual and the question is with regard to the computation of the income of that individual u/s 10 of the Indian income tax Act. In our opinion, therefore, the contentions urged by Mr. Joshi cannot be sustained."

6. Then after referring to the decision of the Supreme Court in Jadavji Narsidas" case (supra), the High Court further observed at p. 138 as follows :--

"In view of these observations, which we have referred to above, it seems to us that the decision of the Supreme Court in that case does not lay down the proposition that a partner in an unregistered partnership in his individual assessment cannot adjust the share of the losses suffered by Kim in the unregistered partnership, which has not been assessed, in computing his profits and gains from the business. That question, as we see from the last observations referred to above, was not decided by Their Lordships in that case."

7. In the case of Jethalal Zaverchand Patalia, (supra), the Gujarat High Court also took a similar view. After referring to the observation of the Supreme Court in Jadavji Narsidas" case, (supra), observed as follows :--

"We cannot read these observations of the Supreme Court as laying down the proposition that even in a case where a partner of an unregistered firm seeks to adjust his share of the loss against his profits from other businesses in the computation of his income u/s 10, the second proviso to section 24(1) applies to prevent such adjustment being made. In *Commissioner of income tax v. Mathuraman Chettiar*, (supra), the Supreme Court itself held that the second proviso to section 24(1) can have no application where what is sought to be done is adjustment of loss in one business against front in another and not set-off of loss under one head against profit under another head and that is why the majority Judges in Jadavji Narsidas" case, (supra), after arriving at their conclusion in the passage quoted above, made it clear that they were not deciding what would be the position if a partner in an unregistered firm claimed to adjust his share of loss and in

his individual assessment."

In view of the concurrent finding of the income tax Officer, Appellate Assistant Commissioner and the Tribunal that the assessee company was a partner in the unregistered firm, it must be held that the assessee was entitled to set-off against the profits from its other businesses its share of the loss from the unregistered firm. The question referred to this Court must, therefore, be answered in the affirmative and in favour of the assessee. We make no order for costs in this Reference.

B.N. Banerjee, J.

I agree.