

## **Nihori Lal Prabhudayal vs Commissioner Of Income-Tax, U.P., ... on 12 October, 1950**

### **Equivalent citations: [1951]19ITR240(ALL)**

#### **JUDGMENT**

A family consisting of a father and his six sons was assessed as a Hindu undivided family. The family carried on money-lending business in the name and style of Nihori Lal Prabhu Dayal and cloth business in the name of Nihori Lal Hiralal. The accounting period relevant to the assessment year 1946-47 for the money-lending business was from September 27, 1944, to October 15, 1945. And for the cloth business from April 21, 1944, to some date in April, 1945.

The case of the assessee was that there had been a partition in the family, that the money-lending business had been divided on the September 26, 1944, between Nihori Lal and his six sons, three of whom were majors and three were minors, that the cloth business had been partitioned on the April 20, 1945, and the assets divided into seven parts in the same way as the assets of the money-lending business. The case of the assessee was that after these divisions on April 20, 1944, and September 26, 1944 respectively the cloth business and the money-lending business had been carried on in partnership and that on March 21, 1945, a deed of partnership had been executed which was registered by the Registrar of Joint Stock Companies on September 28, 1945. The assessee filed an application under Section 26 A for registration of this firm which was said to have been started after the partition and also claimed a right to be assessed as a firm and not as a Hindu undivided family. The claim of the assessee that there had been partitions, as stated above, was not accepted by the Income-tax Officer and the Appellate Assistant Commissioner. The matter was taken up in appeal before the Appellate Tribunal, and that Tribunal recorded the following finding :-

"On this finding of fact, we hold that the assets of the family business have not ceased to be the family business and have not gone out of it and as such its income was rightly included in the income of the Hindu undivided family."

The burden of proving that there was a partition in the family, as claimed by the assessee, was clearly on the assessee. He produced his books of account to show that the assets had been divided on the dates mentioned by him and separate ledger heads had been opened in his name and in the names of his three adult and three minor sons, and that at the end of the year the profits had been divided equally into seven parts and credited to the different ledger heads. The Tribunal was not satisfied that the case set up by the assessee was proved. Dealing with the question of the registration of the firm the Tribunal pointed out that under the deed of partnership the minors had been made partners of the firms, entitled to the profits and liable to the losses. The Tribunal was rightly of the view that it was not possible for a minor to enter into a partnership and that, under Section 30 of the Partnership Act, though a minor could be admitted to the benefits of a partnership, he could not be made a partner and held responsible for the losses. With this starting point, the Tribunal went into the other facts and found that it was not likely that the members of the joint

Hindu family had been able to prepare a correct profit and loss account on the last date of the year and ascertains the total assets which were to be divided into seven shares. In other words, the Tribunal suspected that the entries in the books, though made later, had been antedated. It was further of the view that there was no reason why there should have been a gap of several months between the partition of the cloth business and the partition of the money-lending business. In the judgment, however, the Tribunal does not appear to have quoted very correctly the view expressed by the Appellate Assistant Commissioner. The Commissioner had pointed out that, while the money-lending business was said to have been partitioned on the September 26, 1944, the cloth business was said to have been partitioned on the April 20, 1944. After stating these facts the Commissioner was probably not properly taken down. What the Commissioner must have meant was that, when the cloth business was partitioned on the April 20, 1944, there was no reason why the money-lending business should have been allowed to be continued out that the deed of partnership had been executed on the March 21, 1945, that is, several months after the two partitions, and that, if the partitions were genuine, there was no reasons why the execution of the partnership deed had so long been delayed. The Tribunal has misunderstood the findings of the Commissioner or mis-stated them in its order, but that, in our view, does not vitiate the conclusion arrived at by the Tribunal. As it is based on certain other grounds which are quoted in the order of the Tribunal.

The other grounds made out by the Appellate Tribunal were that the type and nature of the entries made in the books were such as could easily have been made and so did not inspire its confidence. Next finding was that the partnership having failed the old position remained and the assets retained their original character as property of the undivided Hindu family. In the end it was said that the Tribunal was satisfied that the assets had not gone out of the Hindu undivided family. We have looked into the partnership deed which is an annexure to the statement of the case and a study of that document would leave no doubt in the mind of any body that this so-called partnership was a sham transaction. Nihori Lal, the father, is mentioned in the document as 60 years of age. The entire property, it is said, was his self-acquired property, that as he did not like that there should be any dispute after his death, he was dividing the entire property into seven equal shares and that the firms and also the immovable properties mentioned in the deed of partnership would cease to be joint Hindu family properties and become thereafter properties owned in partnership. There is, at the bottom of this document, a list given of three firms and several items of immovable property. Every one of the members was said to have in it a 1/7th share. The document was signed by Nihori Lal for himself and as guardian of his three minor sons.

The question referred to us by the Tribunal is as follows :-

"Whether there was any material for the Tribunal to hold that the Hindu undivided family business had not passed out of the ownership of the Hindu undivided family and had not been taken over by a valid firm constituted by the members thereof ?"

Learned counsel for the assessee has argued the case at great length and has urged with great force that for every finding recorded by the Tribunal there must be some evidence to justify it and if there is no evidence to support the finding, then that finding cannot stand. This may be true to this extent

that, where the Tribunal records a positive finding, there must be some material to support that finding, but where the finding amounts to this that a party has failed to prove its case, we fail to see why it should be necessary to have positive material to support that finding in every case. If a party on whom the burden of proof lies produces evidence which is considered to be unsatisfactory and is, therefore, disbelieved, the mere fact that there is no evidence to the contrary does not compel the Tribunal to record a finding in favour of the party on whom the burden lies.

Our answer to the first questions, therefore, is that the Tribunal was justified in its view that the assets of the cloth business and the money-lending business had not passed out of the Hindu undivided family.

Coming to the next question, if the partnership is held to be a sham transaction, no question can arise of the registration of the partnership deed.

The Department is entitled to its costs which we assess at Rs. 300.

Reference answered accordingly.