

## **Agarwal & Co. vs The Income-Tax Officer And Another. on 14 October, 1955**

**Equivalent citations: [1956]29ITR342(ALL)**

### **JUDGMENT**

CHATURVEDI, J. - This is a petition under article 226 of the Constitution.

The petitioner is a firm carrying on the business of managing agency. The petitioners firm was constituted in 1934 and a deed of partnership was drawn up on the 24th of January, 1936. The partnership consisted of 18 members. It was provided in the deed of partnership that upon the death of any partner, the other partners shall take the heirs or legal representatives of the deceased partner into partnership, in place of the deceased. Four of the partners subsequently died and their heirs were taken in. One fresh partnership deed was executed on the 17th of November, 1938, the second on the 24th of July, 1942, the third on the 21st of January, 1949, and the fourth deed was executed on the 7th of July, 1950; and all these deeds contained substantially the same terms on which the firm was registered in the year 1936 and the registration was renewed every year till the financial year 1951-52. For the year 1952-53 an application was made as unusual for the renewal of the registration under section 26A of the Income-tax Act. The Income-tax officer, Special Circle, Kanpur, appears to have taken up this matter at the time of assessment of the firm to income-tax for the year 1952-53. He took up the matter on the 23rd October, 1954, and he first dealt with the matter of the registration of the firm. In his opinion the firm had been wrongly registered previously and he cancelled the registration for the years 1950-51 and 1951-52. As regards the application for renewal of registration for the year 1952-53, he says that the registration for the previous years having been cancelled, the registration could not be renewed. He also remarked that as the firm consisted of more than 20 members it could not be registered nor could its registration be renewed. The firm ostensibly consisted of 18 partners, but the Income-tax Officer was of the view that at least two of these partners were kartas of joint Hindu families and the members of those families should also be deemed to be the members of this firm and adding the names of all the members of the two joint families, the number of members would exceed 20 and the registration of the firm would be invalid because of the provisions of section 4 of the Companies Act. As a result of the cancellation of registration, the partners of the firm became liable to pay an additional income-tax of Rs. 20,000 for the year 1950-51 and Rs. 15,000 for the year 1951-52. The refusal to renew the registration of the firm for the year 1952-53 has resulted in an assessment of more than a lakh of rupees. The petitioners firm filed appeals against these orders on the 22nd of November, 1954, before the Appellate Assistant Commissioner of Income-tax. These appeals are still pending. On the 30th of November, 1954, an application was made on behalf of the petitioner praying that the demand of the tax from the firm be stayed till the disposal of the appeals already filed, but the said officer rejected the application. A representation was made to the Commissioner of Income-tax, but it did not prove to be of much avail. The present petition was then filed on the 5th of April, 1955. praying that a writ of certiorari be issued quashing the orders of the Income-tax Officer dated the 23rd of October, 1954, cancelling the registration of the petitioners firm in respect of the years 1950-51 and 1951-52

and refusing to renew the registration for the year 1952-53 and that a writ of mandamus be issued directing the Income-tax Officer to withdraw the above orders and to reconsider the petitioners application for renewal of registration for the year 1952-53.

The learned counsel for the petitioner urged that the orders of the Income-tax Officer complained against are liable to be set aside because they were passed without issuing any notice to the petitioner intimating to it that questions of cancellation or refusal to renew the registration would be considered by the Income-tax Officer on the 23rd of October, 1954. It has also been argued that notice was necessary before these orders could be legally passed, and in the absence of notice, the Income-tax Officer had no jurisdiction to pass the orders. It was then contended that rule 6B of the Rules framed under section 59 of the Indian Income-tax Act was ultra vires the rule making power, because no section of the Indian Income-tax Act permits the framing of a rule like this. Lastly, it was contended that the order of the Income-tax Officer contained patent error of law on the face of it inasmuch as the Income-tax Officer thought that one or more joint Hindu families could be partners in a firm as such families. The contention is that only a karta of the family or any adult male member may become a partner in the firm and this may be either in an individual capacity or as a karta. Even if he becomes a member of the firm as a karta of his family, the whole family does not become a partner in the firm and the other members of the family are in the position of sub-partners through the karta. But all the members of the Hindu joint family do not become partners of a firm simply because a karta is one of the partners. The learned counsel for the respondents has taken a preliminary objection to the hearing of this petition and that objection is that the orders passed by the Income-tax Officer are appealable and appeals have already been filed against those orders. There is thus another remedy open to the petitioners and this writ petition should not, therefore, be entertained. I propose to consider the preliminary point first.

Section 30(1) of the Income-tax Act is the section which enumerates the orders which are appealable. Amongst these are two orders which are relevant for purposes of this case. It is stated that any assessee objecting to the cancellation by an Income-tax Officer of the registration of a firm under sub-section (4) of section 23 or to a refusal to register a firm under this sub-section or under section 26A may file an appeal against the order. The next question is whether the orders passed by the Income-tax Officer come under any of the above sections, namely, section 23(4) or section 26A. Section 23 deals with the procedure that has to be followed while making an assessment of income-tax. Sub-section (4) of this section enumerates cases in which the Income-tax Officer can make assessment to the best of his judgment. It is stated in this sub-section that where an assessment is made under it, the Income-tax Officer may refuse to register the firm or may cancel its registration if it is already registered, provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the date of the issue of the notice by the Income-tax Officer to the firm, intimating his intention to cancel its registration. This sub-section applies only to those cases where a registration is cancelled or refused while making an assessment to the best of his judgment. In the instant case no question of any assessment to the best of his judgment arose because the accounts were produced on behalf of the petitioners and the Income-tax Officer never intended to proceed under this sub-section. The other section, namely section 26A, prescribes the procedure to be followed for registration of firms. It says that an application may be made to the Income-tax Officer for registration of the firm for purposes of this Act and the application may be

made by such person, at such times and shall contain such particulars and shall be in such form as may be prescribed. The application is then to be dealt with by the Income-tax Officer in such manner as may be prescribed. This section is concerned only with the question of the registration of a firm and does not speak of the cancellation of registration of any firm. The procedure prescribed is that contained in the rules framed under the Act. But besides containing the procedure that has to be followed in registering or refusing the registration of a firm, rule 6B has been added which permits the cancellation of the registration of the firm. The orders cancelling the registration of the firm for the two previous years cannot possibly fall under section 26A and they appear to have been made under rule 6B. The rules do not provide for the filing of any appeal against an order made under rule 6B. It would thus be clear that no appeals lie against the orders passed cancelling the registration of the firm for the years 1950-51 and 1951-52. As regards the order of refusal to register the firm or refusing to renew the registration of the firm, it might possibly be said that order comes under section 26A and is appealable. The petitioner had no remedy against the orders cancelling the registration of the firm for the two previous years and the preliminary objection with respect to the orders cancelling registration must, therefore, be overruled.

Coming now to the order refusing to renew the registration in the year 1952-53, the position is that order has been based on the two previous orders directing cancellation of registration. A copy of the order has been filed and is marked annexure H to the affidavit. It proceeds by saying that by a separate order of even date, registration was cancelled under rule 6B for the years 1950-51 and 1951-52 and the application for renewal of registration thus becomes infructuous. It is then said that as stated in his order passed under rule 6B there was no genuine firm in existence inasmuch as the limitation on the number of partners had been exceeded. A reading of the order shows that it is based on the previous order canceling registration and if those orders are to be quashed, the order refusing registration may also be set aside. The third order being based on two previous ones, it appears to be proper to deal with all of them together. It may be stated here that the existence of another remedy does not act as an absolute bar to the jurisdiction of this Court to quash the order under certiorari. The circumstances mentioned above, I think, justify the quashing of this appealable order also. The preliminary objection thus has to be overruled.

The first submission of the learned counsel for the petitioner is that these orders should be quashed as no notice was issued to the firm that the Income-tax Officer proposed to consider the desirability of cancelling the registration for the years 1950-51 and 1951-52 or the question of refusing registration for the year 1952-53. His contention is that a previous notice is necessary because the orders have the result of depriving the petitioner of substantial property in the form of money and before any order affecting a person's right to property is passed, it is necessary that a notice should be issued to the petitioner to show cause why the said order be not passed. I see force in the contention of the learned counsel for the petitioner. The orders cancelling registration of the firm for the previous two years had the effect of depriving the petitioner of a sum of more than Rs. 35,000 and the order refusing the registration for the year 1952-53 also had a similar result. It is a well known principle of law that before an order depriving a person of his property is passed, opportunity should be given to him to show cause why the order should not be passed. I propose to refer to only one case on the point in which the law has been fully discussed, if I may respectfully say so. This is the case of *Rameshwar Prasad Kedar Nath v. District Magistrate* [A.I.R. 1954 All. 144.]

After discussing a number of cases on the point Mootham, J., (as he then was) observed as follows :

"I think these case are, as I have said, authorities for the salutary principle that a man must not be deprived of his property without being given an opportunity of being heard."

I, therefore, think that it was necessary for the Income-tax Officer to have given to the petitioner an opportunity of being heard in this matter of the cancellation of refusal to register the firm. The learned counsel for the respondents contended that the order refusing to register the firm for the year 1952-53 was passed during the course of assessment proceedings, and consequently it was not necessary to give any other notice to the petitioner, that the matter of the refusal of registration would also be considered on the date fixed. I do not think that it can be said that the petitioner had notice that his application for renewal was going to be considered on its merits, because the firm had been registered continuously for the last 13 or 14 years, and the petitioner could have no idea that a different practice might be adopted this time and the renewal of the registration of the firm may be refused. The notice that was given to the petitioner was an ordinary notice under section 23(2) of the Indian Income-tax Act and the petitioner was expected only to lead whatever evidence he liked as regards the amount of income or expenditure for the year under consideration. If the Income-tax Officer had decided to do something unusual and which proceeding was likely to have serious effect on the amount of assessment, he should have issued a notice to the petitioner saying that he proposed this time to consider whether registration should be renewed or not. Otherwise, the petitioner could not even have suspected that this matter would be taken up and he could not, therefore, be ready to show cause against this proposal to refuse the renewal of registration. The petitioner must have thought that the usual practice would be followed and the registration of the firm would be renewed as used to be done previously. Under the circumstances, I think that notice was necessary, in the circumstances of this case, before the Income-tax Officer should have passed any order refusing the registration of the firm.

The next question is whether proper notice was issued in this case to the petitioner and this matter may be shortly disposed of. In paragraph No. 14 of the affidavit filed along with the petition it has been clearly stated that no notice was issued to the petitioner before passing the orders cancelling the previous registration and refusing to renew the registration for the year 1952-53, nor was any opportunity given to the petitioner to be heard on this point. In the counter affidavit it has been stated in paragraph No. 6 that the above assertion of the assessee is incorrect. It then proceeds "Sri R.K. Lahiri, a representative of the firm, had attended in response to the notice under section 23(2) of the Indian Income-tax Act." This statement does not indicate that any intimation was given to the petitioner that the question of cancellation or refusal of registration would be considered by the Income-tax Officer on this date. The representative of the firm attended in response to a notice under section 23(2) and he was ready to put his case before the Income-tax Officer as regards the matters which were considered usually under the above provision of law. But he could possibly have no idea that the question of registration was going to be considered. In paragraph No. 10 it is stated that ample opportunity was given to the assessee to explain his position by issue of notice under section 23(2) of the Indian Income-tax Act. This assertion is practically the same as made in paragraph 6 mentioned above. It is then said that no notice for cancellation of registration was

necessary because rule 6B does not require any such notice to be given. I have already dealt with this question and I think it is necessary that a notice be given before an order under rule 6B is passed. It has also been pleaded that the cancellation of registration was consequential on the refusal of the registration for the year 1952-53 and ample opportunity was granted so far as the assessment of this year was concerned. I think this is clearly putting the facts in the wrong order. The order refusing registration proceeds by saying that it is consequential on the order cancelling registration whereas in this paragraph it is said that it was cancellation which was consequential to refusal. Besides it was possible for the Income-tax Officer to refuse to renew the registration for the year 1952-53 without cancelling the previous registration of the firm, and I do not think how it follows from refusal to register that cancellation for previous years must also be ordered. The proceedings for cancellation of registration and even refusal to renew registration do not necessarily form part of the assessment proceedings themselves and in the facts and circumstances of this case the two matters were entirely distinct and separate. By giving notice of assessment under section 23(2), it cannot be said that notice was also given for consideration of the question whether the registration should be renewed or not. The three orders mentioned above, therefore, have to be quashed as they were passed without giving any notice to the petitioner and notice was essential before the question could be considered and decided.

In view of my decision on the above points, it is not necessary to deal with the other two points raised by the learned counsel for the petitioner and I shall content myself by observing that the points are such as raise substantial questions of law and may require serious consideration if and where it becomes necessary to decide them.

For the reasons given above this petition is allowed and the orders passed by the Income-tax Officer, Special Circle A-Ward, Kanpur, on the 23rd October, 1954, cancelling the previous registration of the petitioners firm for the years 1950-51 and 1951-52 and refusing registration for the year 1952-53 are quashed. The assessments made on the basis of these orders are also quashed. The petitioner will be entitled to his costs of this petition from the respondents.

Petition allowed.