

## **Bihari Lal Jaiswal And Ors. vs Commissioner Of Income Tax And Ors. on 16 November, 1995**

**Equivalent citations: [1996]217ITR746(SC), JT1995(8)SC257, 1995(6)SCALE508, (1996)1SCC443, [1995]SUPP5SCR285**

**Bench: B.P. Jeevan Reddy, B.N. Kirpal**

### **JUDGMENT**

B.R. Jeevan Reddy, J.

1. These appeals are preferred against the judgment and order of the Madhya Pradesh High Court rejecting the applications filed by the assessee under Section 256(2) of the Income Tax Act, 1961. The assessee had requested the High Court to direct the Tribunal to state the following question of law for its opinion:

Whether on the facts and in the circumstances of the case, the applicant could be refused registration under Section 185 of the Income-tax Act, 1961 on the ground that its constitution was illegal for breach of the provisions of clause VI of the General Licence Conditions made under the Excise Rules, although no action was taken by the Collector for cancellation of the licence under clause 14 of the Licence in Form C.S. 3, inspite of written intimation, dated 27.4.1967 about its constitution.

2. The High Court rejected the applications on the ground that the question sought to be raised by the assessee was concluded against it by two decisions of that Court, viz., Commissioner of Income Tax, Madhya Pradesh v. Sheonarayan Hamarayan and Commissioner of Income Tax, Madhya Pradesh v. Pagoda Hotel and Restaurant .

3. A licence for retail sale of country spirit under supply system in form C.S. No. 3 of the Madhya Pradesh Excise Rules, 1960 was obtained by Biharilal Jaiswal in respect of twenty two out-stall shops in Tehsil Sarangarh, District Raigarh in the public auction held in January, 1968. The licence was effective for the period commencing on April 1, 1968 and ending with March 31, 1969. Biharilal Jaiswal entered into a partnership with ten other persons to conduct the business under the said licence. The partnership is evidenced by the deed dated August 30, 1968. An application for grant of registration to the said firm under Sections 184 and 185 of the Act was filed in Form-11. The Income Tax Officer rejected the application for registration on the ground that the partnership having been formed in violation of Clause (VI) of the General Licence Conditions prescribed by the Madhya Pradesh Excise Rules is illegal and cannot, therefore, claim registration under the Income Tax Act. On appeal, the Appellate Assistant Commissioner directed the Income Tax Officer to grant

registration as prayed for, against which order the Revenue appealed to the Tribunal. The Tribunal reversed the order of the Appellate Assistant Commissioner and restored the order of the Income Tax Officer. Thereupon, the assessee applied to the Tribunal to refer two questions under Section 256(1) of the Act which was refused. The application to the High Court under Section 256(2) to refer the aforesaid (consolidated) question was also rejected as stated above.

4. Clause (VI) of the Central Licence Conditions prescribed by the Excise Rules reads thus:

VI. TRANSFER OR SUBLEASE OF LICENCE : No privilege of supply or sale shall be sold, transferred or sub-leased, nor shall a holder of any such privilege enter into a partnership for the working of such privilege in any way or manner without the written permission of the Collector, which shall be endorsed on the licence. A partner, sub-lessee, transferee shall be bound by all the conditions of the licence, but the original licensee also shall continue to be responsible to the State Government for the due payment of the licence fees and proper working of the shop, except that in the case of a transfer his responsibility shall cease as soon as the transfer is endorsed on the licence.

5. Another condition of licence, viz., Clause (14) provided that "on breach of any of the conditions of this licence or of any of the provisions of the Madhya Pradesh Excise Act, 1915, or the Rules made thereunder, this licence may be cancelled by the Collector."

6. A few clauses in the partnership deed may also be noticed. The preamble to the partnership deed reads:

Whereas Shri Girdharilal son of Buddhulal Jaiswal of Ambikapur has secured the excise contract of two Liquor shops Goda Chowk and Talaiya in Bhopal in Sehore District for Rs. 3,05,000.00 and 1,50,000.00 respectively total of Rs. 4,55,000.00 in his name in the open auction held on 31st January, 1968 for the period from 1st April 1968 to 31st March 1969 and whereas as agreed between the aforesaid persons and as he alone unable to execute the same contract individually for want of funds and whereas the parties No. 1 to 6 named above having agreed to carry on the above contract business in partnership with effect from 1.4.68 desire to reduce in writing and place in a legal form the terms and conditions under which they have agreed to carry on the partnership business, they do hereby declare and stipulate that they have been partners in the firm named and styled as 'GIRDHARILAL JAISWAL LIQUOR CONTRACTOR BHOPAL on the terms and conditions as detailed below :

7. Clause (7) of the partnership deed provided that:

No partner shall be entitled to any remuneration for taking part in the conduct of the firms and that all the partners shall carry on the same to the common advantage, be just and faithful to each other and shall render the accounts and full information of all things effective the firms business.

8. In Pagoda Hotel and Restaurant, a Division Bench of the Madhya Pradesh High Court had opined that the prohibition contained in Clause (VI) of the General Licence Conditions is absolute and is couched in wide terms. Since the said clause expressly prohibited the entering into partnership for working the business/privilege under the licence, it was held, no partnership could have been entered into with respect to the said business. Accordingly, it was held that no registration can be granted under Section 26(A) of the Indian Income Tax Act, 1922 to such an invalid partnership. The High Court distinguished the decisions of the Bombay and Patna High Courts in *Champsey v. Gordhandas A.I.R. (1917) Bom. 250*, *Commissioner of Income Tax v. Prakash Ram Gupta and Commissioner of Income Tax v. Mandal (N.C.) & Co. (1969) 72 I.T.R. 707 Patna* on the ground that the statutory provisions concerned in those cases merely prohibited the transfer of the privilege but did not contain a prohibition against entering into partnership whereas the Madhya Pradesh Rules expressly prohibited the entering into partnership as well. This decision was followed in *Sheonarayan Hamarayan*. The Division Bench rejected the contention put forward by the assessee that the decision in *Pagoda Hotel and Restaurant* must be deemed to have been overruled by the decision of this Court in *Jer and Company v. Commissioner of Income Tax*. The High Court pointed out that the statutory provision concerned in *Jer and Company* was altogether different from the one contained in the Madhya Pradesh Excise Rules. The correctness of the said decisions, which have been followed in the order under appeal, are questioned in these appeals.

9. Sub-section (1) of Section 184 (the order sub-section being not relevant for the present purpose are not referred to) read as follows at the relevant time:

184. Application for registration.- (I) An application for registration of a firm for the purposes of this Act may be made to the Income Tax Officer on behalf of any firm, if -

(i) the partnership is evidenced by an instrument; and

(ii) the individual shares of the partners are specified in that instrument.

10. Sub-section (1) of Section 185, which too is relevant for our purpose, read thus at the relevant time:

185. Procedure on receipt of application. - (1) On receipt of an application for the registration of a firm, the Income Tax Officer, shall inquire into the genuineness of the firm and its constitution as specified in the instrument of partnership, and -

(a) if he is satisfied that there is or was during the previous year in existence a genuine firm with the constitution so specified, he shall pass an order in writing registering the firm for the assessment year,

(b) if he is not so satisfied, he shall pass an order in writing refusing to register the firm.

11. The position emerging from the above two sub-sections is this; an application for registration of a firm for the purposes of the Act could be made on behalf of any firm if the partnership was evidenced by instrument and that instrument specified the individual shares of the partners. On such application being filed, the Income Tax Officer was obliged to enquire into the genuineness of the firm and its constitution as specified in the instrument of partnership and if, on such enquiry, he was satisfied that a genuine firm with the constitution as specified in the instrument of partnership was in existence during the relevant previous year, he was obliged to grant registration. If, however, he was not so satisfied, he was to reject the application.\*

12. In the present case, the partnership was evidenced by an instrument of Partnership which specified the individual shares of the partners. The Truth of the partnership agreement was not disputed by the Revenue nor was it disputed that the partners as specified in the instrument of partnership did the business under the excise licence for the relevant excise year/financial year. It is equally not in dispute that the written permission of the Collector was not obtained for entering into such partnership, though the assessee says that they had applied for the same. The only question is whether such a partnership could not be called a genuine partnership and whether such a partnership was dies-entitled to registration under the Act because of the fact that it was entered into without obtaining the written permission of the Collector. In other words, the question is whether a partnership which is prohibited by the law governing the licence and the business under the licence can yet be granted registration under the income Tax Act. We have set out hereinbefore Clause (VI) of the General Conditions of Licence. It provided that (a) the privilege of supply or sale granted to the licensee shall not be sold, transferred or sub-leased without the written permission of the Collector which shall be endorsed on the licence, (b) the holder of such license/privilege shall not enter into a partnership for the working of such privilege in any way or manner without the written permission of the collector which shall be endorsed on the licence, and (c) a partner, sub-lessee or a transferee shall be bound by all the conditions of licence but that did not mean that the original licensee was free of any obligations under the licence. The original licensee continued to be responsible to the State Government for the due payment of the licence fees and proper working of the shops except in the case of a transfer of licence in which case the responsibility of the original License ceased as soon as the transfer was endorsed on the licence. Clause (14) of the Licence further provided that on breach of any of the conditions of licence or any of the provisions of the Madhya Pradesh Excise Act or the Rules made thereunder, the licence may be cancelled by the Collector.

13. The contention of Sri Pramod Swarup, learned Counsel for the appellant is that the prohibition contained in Clause (IV) of the General Licence Conditions provided by the Madhya Pradesh Excise Rules has no relevance in the matter of grant of registration under Sections 184 and 185 of the Income Tax Act. May be, the learned Counsel says, the said partnership would not be recognised by, and may not be able to enforce any of their right against, the Excise Department but so far as the Income Tax Act is concerned, such a partnership existed in fact and did actually do the business during the relevant previous year. In other words, the learned Counsel says, the partnership was a genuine partnership. It was evidenced by an instrument of partnership specifying the individual shares of the partners and therefore, entitled to grant of registration. The learned Counsel for the Revenue, on the other hand, submits that since the excise law in force in Madhya Pradesh at the

relevant time prohibited the entering into of partnership for the working of the privilege granted under the licence without the written permission of the Collector, no such partnership can be recognised in law. What is prohibited by one enactment cannot be recognised or sanctioned by another enactment. This should be so, he says, even if the enactment prohibiting the partnership is a State enactment and the Act whereunder registration is sought is a Parliamentary enactment; otherwise, it would be opposed to public policy. The learned Counsel submits that an illegal partnership cannot be characterised as a genuine partnership within the meaning of Section 185(1). Section 23 of the Contract Act, the learned Counsel points out, declares that every agreement of which the object or consideration is unlawful is void. (Section 23 provides, inter alia, that where "the object of an agreement is...of such a nature that if permitted, it would defeat the provisions of any law", it is an unlawful agreement and accordingly void.) The Income Tax Act cannot sanction, recognise or grant registration to such a partnership agreement, he says.

14. The question concerned herein has been the subject-matter of consideration by this Court as well as several High Courts in the country. We shall first refer to the decisions of this Court.

15. In *Umtacharan Shaw & Bros: v. Commissioner of Income Tax, West Bengal*, the question arose with reference to Section 26A of the Indian Income Tax Act, 1992. Section 42(1)(a) of the Bengal Excise Act provided that "subject to such restrictions as the State Government may prescribe, the authority who granted any licence, permit or pass under this Act may cancel or suspend it...(a) if it is transferred or sub let by the holder thereof without the permission of the said authority". The Tribunal had, of course, denied the registration not on the ground of illegality of partnership but on the ground that a genuine partnership had not come into existence. Even so, this Court referred to the said provision of the Bengal Excise Act and observed, "(T)here was no evidence that the excise licence were transferred or sub-let. The three shops, it appears, were managed separately and their accounts were kept distinct. There was thus nothing which militated against the partnership and it cannot be said that this affected the genuineness of the agreement". Having thus observed, this Court went into the material relevant on the question of genuineness of the partnership and held that there was no material upon which the Income Tax Officer could come to the conclusion that the firm was not genuine. We may mention that this decision is not really relevant on the question arising in these appeals, yet we have referred to it because it happened to be the first decision relied upon by the learned Counsel for the assessee appellant.

16. The next decision relied upon is in *Jer and Company*. It was a case of the licensee entering into a partnership with others for doing the business under the licence. Though the High Court had proceeded on the footing that the excise licence concerned therein was governed by Rule 322, which prohibited the holder of the licence from entering into a partnership with another person, this Court found, as a matter of fact, that the licence concerned therein was not governed by Rule 322 but by a different rule in the Uttar Pradesh Excise Rules. The licence was issued in Form FL-II. It did not prohibit the licensee from entering into partnership with respect to the business under the licence. It merely provided that the licensee shall not sub-let or transfer the licence. In this view of the matter, this Court held that the question whether the partnership was illegal did not arise in that case and the firm was entitled to registration. This is what the Court said:

The Commissioner and the High Court proceeded on the footing that the licence was governed by rule 322 which prohibited the holder of the licence from entering into a partnership with another person. But the licence, it is clear from the record, was in Form FL II issued under the U.P. Excise Manual. The licence does not prohibit the holder from entering into partnership by the holder of the licence; it merely provides that the licence shall not be sub-let or transferred. Since there is no prohibition against entry by the holder of the licence into a partnership the question whether the partnership was illegal does not arise. The firm was entitled on that account to registration. It is somewhat unfortunate that the attention of the Commissioner and the High Court was not invited to the form in which the licence was issued by the excise authorities. They proceeded to decide the case on the footing that rule 322 of the Excise Manual applied. But that rule has no application here.

17. The learned Counsel for the Revenue understands the said decision as laying down that a partnership prohibited by the excise law cannot be granted registration under the Income Tax Act, while the learned Counsel for the assessee reads it differently. Be that as it may, the fact remains that the rule concerned in the said decision did not prohibit entering into partnership by the licensee with respect to the business under the licence. It was for the said reason, this Court held that the partnership cannot be called illegal and cannot be refused registration.

18. So, far as the High Courts are concerned, their decisions turned upon the particular language of the statutory provisions concerned in each case. Several of these decisions have been referred to in an exhaustive decision of the Andhra Pradesh High Court in Commissioner of Income Tax, Andhra Pradesh-IV v. Nalli Venkaturamana and Ors. rendered with reference to Andhra Pradesh Excise Rules. Rule 19(1) of the Andhra Pradesh Excise Rules, 1969 provided that the licensee shall not transfer the licence for the sale of arrack and toddy to any other persons". At the same time, Sub-rule (2) of Rule 19 provided that "(2) where a licence is granted jointly, no licensee shall include or exclude any partner except with the previous permission of the licencing authority." In both the cases considered in the said decision, the licence was granted in the name of an individual who in turn entered into a partnership with others for conducting and carrying on the business under the said licence. The High Court took the view that so far as Sub-rule (1) of Rule 19 is concerned, it did not prohibit entering into a partnership with respect to the business under the licence and that it merely prohibited the transfer of the licence. On this basis, the High Court held that the partnership entered into by the licensee(s) in the cases before them cannot be said to be opposed to or violative of Sub-rule (1) of Rule 19. So far as Sub-rule (2) of Rule 19 is concerned, the High Court construed it as not applicable to a case where the licence was granted in the name of a single person. The High Court opined that Sub-rule (2) applied only where the licence was granted jointly in the name of two or more persons, i.e., to a partnership, in which case, it held the sub-rule provided that no partners shall be excluded or included without the previous permission of the licencing authority. In the words of the High Court, the position under Rule 19(2) is this : "Rule 19(2) requires that whenever a new partner is introduced or excluded, the previous permission of the licencing authority should be obtained. But if such permission is not obtained, the partnership is not rendered illegal. As between the partners it continues to be valid and entitled to registration under the IT. Act." On the above reasoning, the High Court held that the two partnership agreements before them did not violate

either Sub-rule (1) or Sub-rule (2) of Rule 19 and cannot be refused registration under Section 185 of the Income Tax Act. The correctness of the interpretation placed by the High Court on Rule 19(2) does not fall for our consideration herein. Even so, we must say that the proposition, quoted by us hereinabove, is unacceptable as will be evident from the following discussion.

19. In our opinion, the correct position appears to be this we are confining ourselves to partnerships entered into with respect to a license/permit granted under the State Excise enactments) : these enactments deal with intoxicating liquor, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors (Entry 8 of List-II of the Seventh Schedule to the Constitution and other noxious substances besides providing for duties of excise referred to in Entry 51 of the said List. It has been held by this Court repeatedly that no person has a fundamental right to deal or trade in intoxicating liquors and that the State is entitled to prohibit and/or closely regulate their production, manufacture, possession, transport, purchase and sale. It is enough to refer to the recent Constitution Bench Judgment in *Khoday Distilleries Ltd, & OK. v. State of Kamataka and Ors.* [1995] 1 S.C.C. 574 where in all the earlier decision of this Court have been referred and the proposition aforesaid affirmed. The right of a citizen to deal in these intoxicating liquors is only to the extent it is provided for and permitted by the Act and the Rules made thereunder. Take the Madhya Pradesh Act, with which are concerned herein. Clause (VI) of the General Licence Conditions - it is not disputed that those conditions are statutory in character - provides expressly that a holder of a 10:40 AM 2/12/2008 shall not enter into a partnership for the working of such privilege in any way or manner without the written permission of the Collector, which permission shall be endorsed on the licence. This condition is binding upon the licensee. If so, he cannot enter into a partnership nor can there be, in law, a partnership with respect to (he privilege (business) granted under the licence. No person, and no licensee, can claim any right contrary to the said provision. The object underlying the said clause is self-evident. Since the licence is granted for dealing in intoxicating liquors, the business wherein is *Res extra conunercium* - and also because they are supposed to be harmful and injurious to health and morals of the members of the society - close control is envisaged and provided over the business carried on under the licence. This object will be defeated if the licensee is permitted to bring in strangers into the business, which would mean that instead of the licensee carrying on the business, it would be carried on by others - a situation not conducive to effective implementation of the excise law and consequently deleterious to public interest. It is for this very reason that transfer or sub-letting of licence is uniformly prohibited by several State Excise enactments. It, therefore, follows that any agreement whereunder the licence is transferred, sub-let or a partnership is entered into with respect to the privilege/business under the said licence, contrary to the prohibition contained in the relevant excise enactment, is an agreement prohibited by law. The object of such an agreement must be held to be of such a nature that if permitted it would defeat the provisions of the excise law within the meaning of Section 23 of the Contract Act. Such an agreement is declared by Section 23 to be unlawful and void. The question is whether such an unlawful or void partnership can be treated as a genuine partnership within the meaning of Section 185(1) and whether registration can be granted to such a partnership under the provisions of the Income Tax Act and the Rules made thereunder. We think not. When the law prohibits the entering into a particular partnership agreement, there can be in law no partnership agreement of that nature. The question of such an agreement being genuine cannot, therefore, arise. Where, of course, the statutory provisions or the conditions of

licence do not prohibit the entering into of partnership, it is obvious, such a partnership cannot be held to be illegal, unlawful or void, as held by this Court in *Jer and Company*. But where there is a specific prohibition as in the case before us, any partnership entered into would be unlawful and void agreement within the meaning of Section 23 and no other law, whether State or Central, can recognise such an agreement. The fact that such a partnership can be permitted by the Collector does not detract from the mandatory character of the clause. As pointed out above, Licence Condition No. 14 expressly provides that for breach of any condition of licence or of the Act or the Rules made thereunder, the licence may be cancelled. The context - that it is an excise enactment - should not be forgotten. The grant of registration under the Income Tax Act, it must be remembered, confers a substantial benefit upon the partnership firm and its members. There is no reason why such a benefit should be extended to persons who have entered into a partnership agreement prohibited by law. One arm of law cannot be utilised to defeat the other arm of law. Doing so would be opposed to public policy and bring the law into ridicule. It would be wrong to think that while acting under the Income Tax Act, the Income Tax Officer need not look to the law governing the partnership which is seeking registration. It would probably have been a different matter if the Income Tax Act had specifically provided that registration can be granted notwithstanding that the partnership is violative of any other law - but it does not say so.

20. We may clarify that our holding does not mean that such an illegal partnership cannot be taxed. It is certainly bound to be taxed either as an unregistered partnership firm or as an association of persons. The only question considered herein is its right to claim registration under the Income Tax Act.

21. For the above reasons, the appeals are allowed. The application(s) under Section 256(2) filed by the assessee are allowed. The consequent reference is withdrawn to this Court and answered in the affirmative, i.e., against the assessee and in favour of the Revenue.

\* An explanation was added to Sub-section (1) of Section 185 by the Taxation Laws (Amendment) Act, 1970 with effect from April 1, 1971, which reads thus: "Explanation" - For the purposes of this section and Section 186, a firm shall not be regarded as a genuine firm if any partner of the firm was, in relation to the whole or any part of his share in the income or property of the firm, at any time during the previous year, a benamidar of any other person to whom the first-mentioned partner does not stand in the relationship of a spouse or minor child." Though this explanation was not there during the assessment year concerned herein, it is yet indicative of Parliaments' thinking. The explanation frowned upon benami partners. It declared that existence of a benami partner renders the partnership 'not genuine' within the meaning of Section 185(1), unless, of course, such benami partner happened to be the spouse or minor child. The said explanation was substituted by a more elaborate one with effect from April 1, 1976 by the Taxation Laws (Amendment) Act, 1975. We need not refer to it for the purpose of this case, since it merely elucidates the pre-existing explanation.