

Umacharan Shaw & Bros. vs Commissioner Of Income-Tax, West ... on 15 May, 1959

Equivalent citations: [1959]37ITR271(SC)

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Bench: M. Hidayatullah

JUDGMENT

Hidayatullah, J.

1. These are two appeals with the special leave of this court, against an order dated June 1, 1956, of the High Court of Judicature at Calcutta in Income-tax Reference No. 10 of 1956 and an order of the Income-tax Appellate Tribunal, Calcutta Bench, dated March 22, 1955, in I.T.A. No. 5037 of 1954-55 (assessment year 1948- 49). The Income-tax Appellate Tribunal by its order dismissed an appeal filed by the appellant firm to impugn an order of the Appellate Assistant Commissioner of Income-tax confirming an order declining to register the appellant firm under section 26A of the Indian Income-tax Act, hereinafter referred to as the Act. The order of the High Court was passed rejecting summarily an application by the appellant firm under section 66(2) of the Act. The present judgment shall dispose of both the appeals.

2. The facts of the case are as follows : One Bhutan Mohan Shaw, who died in 1908, had three sons, Uma Charan Shaw, Aboy Charan Shaw and Panchukali Shaw. On his death, these three sons were alive, and there was also his widow, Mst. Surabala Dassi. Bhutan Mohan Shaw held an excise licence in this name for the retail sale of foreign liquor at a shop situated at No. 1, Dharamtala Street in Calcutta. After his death, the brothers formed a Hindu joint family of which Uma Charan was the Karta. They were governed by the Dayabhaga law. The family continued the said business of sale of foreign liquor and the excise licences were taken in the names of Uma Charan and Panchukali. During the years that flowed the business of the family was extended and other shops were opened. In addition to the retail shop of foreign liquor at Dharamtala Street the family had an excise shop at Nos. 201 and 202, Chandney Chawh Sheet, Calcutta, for the wholesale of foreign liquor and an oilman stores (known as Shaw Brothers Stores) at No. 12/13, Bertram Street, Calcutta. The licences of these shops were held in different names of the members but not in the name of the Hindu joint family. The family has acquired immovable properties in Calcutta in addition to the shops.

3. In 1938, it is alleged, the family disrupted, and on April 7, 1939, Uma Charan and his two brothers entered into a deed of partnership which was also registered with the Registrar of Firms, Bengal. By this deed the three brothers agreed to carry on the joint family business in partnership, and they opened a separate book of account which they called Bati Khata which purported to show the capital

contributions and accounts of the partners and also division of profits amongst them according to their shares. The appellant firm alleges also that even before the emergence of the partnership the brothers had begun to live in separate houses and had separated in mess, food and worship. The deed of partnership also provided that the income of the immovable property was to be collected jointly and divided equally between the three brothers. During the earlier years the joint family was assessed as a Hindu undivided family under the name of Uma Charan Shaw and Brothers, with Uma Charan Shaw as the Karta in respect of the business and the immovable property.

4. In the assessment year 1939-40, Uma Charan Shaw made applications under section 25A and 26A of the Act asking for an order that the family had effected a partition and for registration of the partnership firm as formed by the deed of April 7, 1939, but the applications were rejected by the Income-tax Officer, district II(2), Calcutta. The income-tax authorities continued to assess the Hindu undivided family. On December 1, 1944, all the immovable property of the family was conveyed to a limited liability company called the Bhuban Mohan Shaw Estate, Ltd., by the three brothers who were each allotted 91 shares of the face value of Rs. 1,000 each. Thereafter, the income of these properties was assessed in the hands of the company.

5. Aboy Charan Shaw died on April 14, 1945, and according to the deed of 1939 his son, Shashadhar Shaw, was taken in as a partner, representing the Branch of the deceased brother. The share of the branch was the same as that of Aboy Charan. In January, 1946, another limited liability company called the Shaw Brothers Stores, Ltd. consisting of Uma Charan, Panchukali and Shashadhar took over the business of Shaw Brothers at No. 12/13, Bertram Street, Calcutta. The income of that business was, thence, assessed in the hands of the said company.

6. Uma Charan died on January 25, 1947, and his son Radha Raman Shaw was taken into the partnership with a share equal to that of his father. On April 10, 1947, a fresh deed of partnership was entered into by Panchukali, Shashadhar and Radha Raman in respect of the remaining shops, namely.

(i) Messrs. Uma Charan Shaw, No. 40, Moti Sil Street, Calcutta,

(ii) Messrs. Panchukali Shaw and Radha Rama Shaw, No. 1, Dharamtala Street, Calcutta, and

(iii) Messrs. S. B. Dassi and A. C. Shaw at No. 201/202, Chandney Chawck Street, Calcutta.

7. The said deed of partnership relating to these three shops was the basis of a fresh application under section 25A of the Act, out of which these two appeals have ultimately arisen.

8. At first, a return was filed as a Hindu undivided family but the appellant. The return was corrected by filing another but again as a Hindu undivided family. A third return was then filed as a firm in the name of Uma charan Shaw and Brothers, a firm of partners. Simultaneously, applications were made under sections 25A and 26A of the Act. The Income-tax Officer II(2),

Calcutta, by his order dated March 31, 1953, rejected the application under section 26A and though he did not pass a separate order on the application under section 25A, he observed that the assessment should be as a Hindu undivided family as hitherto. The usual appeals followed but were dismissed. The appellants applied first to the Tribunal under section 66(1) and later to the High court under section 66(2) for a reference but failed. The appellant firm accordingly filed the two appeals as stated above.

9. In rejecting the claim for registration, the Income-tax Officer gave as his reasons that there was no separate capital account of the alleged partners in the books of business of the appellant land the profit of each partner was not credited in his account in the ledger. The Income-tax Officer did not attach any value to the Bati Khata because the reason for maintaining such a book was "not very clear or convincing". He also pointed out that the deed of partnership was executed with retrospective effect which added to the doubts about the genuineness of the firm, particularly as the excise business was being continued as before under different names. He added that the partnership firm could have asked for registration earlier specially after the decision in *Sic Sunder Singh Majithia's* case in 1942.

10. The Appellate Assistant Commissioner of Income-tax endorsed all the above reasons, and added a few others. He pointed out that no less than two returns for the assessment year in question were filed in the status of Hindu undivided family before the return was filed as a firm. This showed an afterthought. He also referred to drawings by the members in the books of the Chandney Chawk and Dharamtala shops but there was no separate capital account at the head office. He did not accept the Bati Khata which, according to him, was kept outside the business accounts for no good reason. The reason advanced before him by the appellant that it was so kept to avoid difficulties with the Excise Department and to keep it away from the ken of employees was not considered as sound.

11. The Tribunal summarized all these reasons and added others. They may be quoted in its own words :

"It was admitted on behalf of the assessee that the existence of the partnerships not communicated to any outside authority including the bank in which the assessee has an account. It was represented that even when the partners constituted a Hindu undivided family, they had a bank account in the name of one of the partners and the same is continued even after the partnership was constituted. It was also admitted that the outside world is not aware of the fact that the excise business is being carried on in partnership. A partnership is an artificial legal entity. If the partnership among the three partners is one which could not be disclosed to the very authorities under whom licences are obtained for the excise shops and the fact that the partnership having come into existence is not made known to others, it will not be open to the assessee to claim registration under section 26A. All this establishes that no genuine partnership had come into existence.

On the materials placed before us, we do not find any cogent reason to interfered with the order passed by the income-tax authorities. The assessee has not established

the division of the Capital of the business and that the profits are being divided among the partners from the business books. The alleged Bati Khata is not a valid and recognised account book. The formation of the partnership itself is in violation of the Excise Rules. Therefore, the partnership cannot be treated as a valid and genuine partnership for being registered under section 26A."

12. As to the last reason, the Tribunal explained itself in the order it made subsequently on the application under section 66(1) of the Act by saying :

"The appellate Tribunal has not based its decision on the illegality of the partnership. On the materials placed before them, they come to the conclusion that a genuine partnership had not come into existence."

13. There is no doubt that the deed of partnership was, in fact, executed on April 10, 1947. It was registered with the Registrar of Firms, and that it did exist from that date is proved satisfactorily. The deed does say (clause 4) that the co-partnership would be deemed to have commenced from January 25, 1947. The reason for that is obvious. Uma Charan Shaw died on that day, and the appellants believed that his right, title and interest under the partnership created by the document of 1939, passed to Radha Raman Shaw (representing the heirs and successors of Uma Charan Shaw). It is stated in the recitals that from that day the business of the partnership styled as Uma Charan Shaw & Bros. was carried on with Radha Raman as one of the partners

14. The deed then goes on to recite that "the capital of the co- partnership shall be the amount as will be found to the credit of the parties thereof". The deed allowed the parties to draw from time to time reasonable amounts for their respective personal expenditure to be adjusted at the time of the determination of profit and loss of the year. These profits and losses were to be distributed equally between the partners. It was further provided as follows :

"That for properly carrying on with this co-partnership business account/accounts with reputed bank/banks shall be opened in the name of the co-partnership firm or in any other name/names as may be agreed upon.

If agreed upon by and between the partners the parties hereof may continue to operate the existing account/accounts with different bank/banks or close down the same as and when necessary. Such bank account/accounts shall unless otherwise agreed upon be operated jointly and/or severally by the partners."

15. It is contended that these provisions were designed to created a veneer of partnership for income-tax purposes, while the joint family continued as before. By keeping the accounts as hitherto by the partners, the outside would was not informed that the Hindu undivided family had disrupted. The decisions rendered in the case are said to involve a finding of fact, and it is contended for the Department that there was material on which the finding could be rested.

16. Though the Tribunal stated that it had not proceeded on the ground that the partnership was illegal being against the Bengal Excise Act, 1911, the argument was referred to as supporting the conclusion that the firm was not genuine Section 42(1) (a) of the Bengal Excise Act reads :

"42. (1) 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."

17. There was no evidence that the excise licences were transferred or sub-let. The three shops, it appears, were managed separately and their account 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. Extracts from the Bati Khata have been exhibited in this case. They show the capital account of the partners, their drawings from time to time and their profits separately. There is nothing to show that the entries in the Bati Khata were different from the other account books and the Bati Khata served as an abstract of all the business of the partnership. That it was not shown to the excise authorities does not prove that the book was not genuine. This account has been in existence ever since the first partnership agreement, and nothing has been said to establish that it was not regularly maintained in the ordinary course of business. Similarly, the bank accounts were left in the names of the licensees in order to keep the various businesses separate and distinct. The partnership deed provided for this, and there was nothing which made the partnership doubtful. The maintenance of these bank accounts cannot be said to furnish a veneer of partnership while underneath the family continued undisturbed.

18. No doubt, the family continued as Hindu undivided family for nearly three decades, but there was nothing to prevent a family from disrupting and forming a partnership. The earlier decision was not res judicata, and the family could on a subsequent date enter into a fresh agreement with new partners and ask for its registration. This is what was done in 1947, and the occasion was the death of Uma Charan in that year. It must not be forgotten that Uma Charan was the eldest and must have been the senior partner. With his death the need for further adjustments arose, and a fresh document was executed.

19. The Department contends that one of the unusual features was that though the balances of the partners were fluctuating as their drawings were made, the profits continued to be divided equally. This is no doubt an unusual feature, but, it depends upon how the drawings were considered by others. There was an arrangement in the deed itself for cash drawings, and looking at the circumstances of the family the drawings during a year could not be said to be too extensive as others had withdrawn large sums also in their turn.

20. Taking into consideration the entire circumstances of the case, we are satisfied that there was no material on which the Income-tax Officer could come to the conclusion that the firm was not genuine. There are many surmises and conjectures, and the conclusion is the result of suspicion

which cannot take the place of proof in these matters.

21. It was contended that there were three others, viz., the order of assessment, the order under section 25A and the one under section 26A, and merely reversing the order under section 26A cannot be of any consequence particularly as the order under section 25A stands. We are not concerned in these appeals in deciding what advantage will accrue to the appellant firm. That is its look-out, and we do not, therefore, accept the argument.

22. The result is that the order of the Appellate Tribunal is reversed. The firm shall be registered under section 26A of the Act for the assessment year 1948-49. The appeal against the order of the High Court need not be considered, since it is not necessary to pass any orders thereon. There will be no order in that appeal.

23. The appellant shall be entitled to its costs of the appeal against the order of the Appellate Tribunal. The costs of the companion appeal shall be borne as incurred.

24. Civil Appeal No. 41 of 1958 allowed.