Supreme Court of India
Malabar Fisheries Co, Calcutta vs Commissioner Of Income Tax, ... on 19 September, 1979
Equivalent citations: 1980 AIR 176, 1980 SCR (1) 696
Author: V Tulzapurkar
Bench: Tulzapurkar, V.D.

PETITIONER:
MALABAR FISHERIES CO, CALCUTTA

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX, KERALA

DATE OF JUDGMENT19/09/1979

BENCH:
TULZAPURKAR, V.D.
BENCH:
TULZAPURKAR, V.D.
BHAGWATI, P.N.
PATHAK, R.S.

CITATION:
1980 AIR 176 1980 SCR (1) 696
1979 SCC (4) 766
CITATOR INFO :
R 1986 SC 368 (9,11,12)

ACT:
Firm dissolved-Assets distributed among partners-Distribution-If amounts to transfer of assets within the meaning of express ion "otherwise transferred" in S. 34(3)(b) 17 Income Tax Act 1961.
Words and Phrase-'Transfer'-Meaning of-Distribution of assets among, partners-Whether amounts to transfer-Income Tax Act 1961, S. 2(47).

HEADNOTE:
The appellant, a dissolved firm as originally constituted on April 1, 1959, consisted of four partners and carried on different business in different names and styles. The firm was dissolved on March 31, 1963 and under the deed of dissolution executed by and between the partners, the first business concern was taken over by one of the partners, the remaining concerns by two of the other partners and the fourth partner received, a sum of money in lieu of his respective shares in the assets of all the businesses of the firm. During the four assessment years 1960-61 to 1963-64 the firm had installed various items of

machinery in respect of which it received development rebate in its respective tax assessments under s. 33 of the Act.

On dissolution of the firm on March 31, 1963, the Income-tax officer took the view that s. 34(3)(b) of the Act applied on the ground that there was a sale or transfer of the machinery by the firm within the period mentioned in that section and accordingly acting under s. 155(5) of the Act he withdrew the development rebate allowed to the firm for the said assessment years, the amending orders being passed against the dissolved firm.

The appeals preferred by the dissolved firm through one of its erstwhile partners, were dismissed by the Appellate Assistant Commissioner who held that s. 155(5) was rightly resorted to since s. 34(3)(b) of the Act applied to the case.

The Income-tax Appellate Tribunal allowed the appeals by the dissolved firm holding that there was no question of any sale or transfer within the meaning of s. 34(3)(b) in a transaction involving the adjustment of the rights of the partners of a dissolved firm, but at the instance of the Revenue (Respondent) referred two questions of law to the, 'High Court viz. (a) whether there was only an adjustment of the mutual rights of the partners and the provisions of s. 34(3) were not applicable and (b) whether there was a transfer of assets with in the meaning of the words 'otherwise transferred' occurring in s. 34(3) (b) of the Act.

The High Court answered the second question in the affirmative and against the assessee holding that a dissolution of a firm amounted to extinguishment of the rights of the firm in the assets of the partnership and accordingly was a transfer within the meaning of s. 2(47) of the Act and that, therefore the provisions of s. 34(3)(b) applied to the case.

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Allowing the appeals to this Court,

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HELD: 1. There is no transfer of assets involved even in the sense of any extinguishment of the firm's rights in the partnership assets when distribution takes place upon dissolution. [709 F]

2. Section 34(3) (b) of the Act is not applicable to the case an(l the view of the Tribunal is upheld. [710 E]

3. The firm as such has no separate rights of its own in the partnership assets but it is the partners who own jointly in common the assets of the partner ship and, therefore, the consequence of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and, there is no question of any extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of s. 2(47) of the Act. [709 E]

4. On a plain reading of s. 34(3) (b) it will appear clear that before that provision can be invoked or applied three conditions are required to be satisfied: (a) that the ship, machinery or plant must have been sold or otherwise transferred, (b) that such a sale or transfer must be by the assessee and (c) that the same must be before they expiry of eight years from the end of the previous year in which it was acquired or installed. It is only when these three conditions are satisfied that any allowance made under s. 33 shall be deemed to have been wrongly made and the Income-tax officer acting under s. 155(5) will be entitled to withdraw such allowance. [703 C-D]

5. Section 2(47) gives an artificial extended meaning to the expression 'transfer' for, it not merely includes transactions of 'sale' and 'exchange' which in ordinary parlance would mean transfers but also 'relinquishment' or 'extinguishment of rights' which are ordinarily not included in that concept. [703 E]

6. In Commissioner of Income-Tax v. Dewas Cine Corporation, 68 I.T.R. 240, the concept of distribution of assets consequent upon the dissolution of the firm was considered in the context of the balancing charge arising under the second proviso to s. 10(2) (vii) of the 1922 Act. This Court held that the expression "sale or sold" when used in s. 10(2)(vii) and the second proviso thereto must be understood in their ordinary meaning and that "sale" according to its ordinary meaning meant a transfer of property for a price, and further enunciated the proposition that the distribution of surplus upon dissolution of a partnership after discharging debts and obligations was always by way of adjustment of rights of partners in the assets of the partnership and did not amount to a transfer such less for a price. The question of raising a balancing charge against the dissolved firm, a separate taxable entity which had been allowed depreciation in the earlier years, was also considered by the Court and it took the view that no balancing charge arose against the firm inasmuch as no sale or transfer was involved in the transaction of distribution of the assets to erstwhile partners of the firm consequent upon its dissolution. [703G, 704 E-G]

7. In Bankey Lal Vaidya's case, 79 I.T.R. 594, the concept of distribution of assets to the partners of a firm consequent upon its dissolution was considered in the context of the charge on capital gains arising under s. 128(1) of the 1922 Act. This Court observed that the rights of the parties were adjusted by handing
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over to one of the partners the entire assets and to the other partner the money value of his share and such a transaction was neither a sale nor exchange nor transfer of the assets of the firm. [704 H, 705 D]

8. (i) It is well-known that commercial men and accountants on the one hand and lawyers on the other have

different notions respecting the nature of the firm. [705 H]

(ii) Commercial men and accountants are apt to look upon a film in the light in which lawyers look upon a corporation i.e. as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. [706 B]

(iii) The firm is not recognised by English lawyers as distinct from the members composing it. What is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. [706 G, H]

Lindley on Partnership 12th Edn. pp. 27 and 28; referred to.

9. In English jurisprudence a firm is only a compendious name for certain persons who carry on business or have authorised one or more of their number to carry it on, in such a way that they are jointly entitled to the profits and jointly liable for the debts and losses of the business. Further, partnership property is regarded as belonging to the firm, but this is only for the purpose of distinguishing the same from the separate property of the partners. But, in law the partnership property is jointly owned by all the partners composing the firm. [707 B-C]

10. The position as regards the nature of a firm and its property in Indian Law under the Indian Partnership Act, 1932 is almost the same as in English law. Here also a partnership firm is not a distinct legal entity and the partner ship property in law belongs to all the partners constituting the firm. The Indian Act, like the English Act avoids making a firm a corporate body enjoying the right of perpetual succession, [708 B, E]

Bhagwanji Morarji Goculdas v. Alembic Chemical Works Co. Ltd. and Ors., AIR 1948 PC 100; referred to.

11. A partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property in which all partners have a joint or common interest. [709 C]

Addanki Narayannappa and Anr. v. Bhaskara Krishnappa and 12 Ors., [1961] 3 S.C.R. 400, referred to.

12. Every dissolution must in point of time he anterior to the actual distribution; division or allotment of the assets that takes place after making accounts and discharging the debts and liabilities due by the firm. Upon dissolution the firm ceases to exist; then follows the making of accounts, then the discharge of debts and liabilities and thereupon distribution, division or allotment of assets takes place inter se between the erstwhile partners by way of mutual adjustment. of rights between them. The distribution, division or allotment of assets to the

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erstwhile partners, is not done by the dissolved firm. In this sense there is no transfer of assets by the assessee (dissolved firm) to any person. [710 C]

13. The view Of the High Court that thy. distribution of assets effected by a deed takes Place eo instanti with the dissolution or that it is effected by the dissolved firm not accepted. [710 D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.. 196- 199/ 73.

Appeals by Special Leave from the Judgment and order date 14-7-1972 of the Kerala High Court in Income Tax Reference Nos. 115-118 of 1970.

K S. Ramamurthy, P. N. Ramalingam and A. T. M. Sampath for the Appellant.

B. B. Ahuja and Miss A. Subhashini for the Respondent. The Judgment of The Court was delivered by TULZAPURKAR, J.-These appeals by special leave raise an interesting question of law whether the distribution of assets of a firm consequent on its dissolution amounts to a transfer of assets within the meaning of the expression "otherwise transferred" occurring in s. 34 (3) (b) of the Indian Income Tax Act, 1961, having regard: to the definition of 'transfer' in s. 2(47) of the Act ?

The facts giving rise to the question lie in a narrow compass. The appellant (M/s Malabar Fisheries Co.) is a dissolved firm represented by one of its erstwhile partners. The firm as originally constituted on April], 1959 consisted of four partners and carried on six different business in six different names and styles namely, (a) Malabar Fisheries Co., (b) Coastal Engineering Co., (c) Cochin Tin Factory, (d) Goodwill Industries, all at Falluruthy, (e) Combine Steel Industries at the Industrial Estate at Alavakkot and (f) Lite Metal Industries at Viskhapatnam in Andhra Pradesh. The firm was dissolved on March 31, 1963 and under the deed of dissolution executed by and between the partners, the first business concern was taken over by one of the partners, the remaining five concerns by two of the other partners and the fourth partner received a sum of Rs. 3,81,082/- in lieu of his respective shares in the assets of all the businesses of the firm. It appears that during the four assessment years 1960-61 to 1963-64 the firm had installed various items of machinery in respect of which it received development rebate in its respective tax assessments under s. 33 of the Act. On dissolution of the firm on March 31, 1963, the Income-tax Officer took the view that s. 34 (3) (b) of the Act applied on the ground that there was a sale or transfer of the machinery by the firm within the period mentioned in that section and accordingly acting under s. 155 (5) of the Act he withdrew the development rebate allowed to the firm for the said assessment years, the amending, orders being passed against the dissolved firm. The assesses i.e., the dissolved firm through one of its erstwhile partners preferred appeals against the order of the Income-tax officer withdrawing the development rebate but the appellate Assistant Commissioner by his order dated July 24, 1964 dismissed the appeals holding that s. 155(5) was rightly resorted to since s. 34

(3) (b) of the Act applied to the case. The matter was carried in further appeals; by the dissolved firm to the Income-tax Appellate Tribunal, Cochin Bench, Ernakulam, and it was contended that the distribution of the assets of the firm consequent on its dissolution did not amount to a sale or transfer and, therefore, the transaction would not come within the purview of s. 34 (3) (b). The Tribunal by its common order dated January 6, 1970 allowed the appeals holding that the case fell within the principle laid down by this Court in the case of Commissioner of Income-tax v. Dewas Cine Corporation and that there was no question of any sale or transfer within the meaning of s. 34(3) (b) in a transaction involving the adjustment of the rights of the partners of a dissolved firm.

At the instance of the Revenue, the Tribunal referred two questions of law to the High Court for its opinion, namely "(1) Whether on the facts and in the circumstances of this case, the Appellate Tribunal was legally correct in holding that there was no question of sale and that it was only an adjustment of the mutual rights of the partners and that the provisions of section 34 (3) were not applicable ?

(2) Whether on the facts and in the circumstances of this case, there was a transfer of assets within the meaning to the words 'otherwise transferred' occurring in Section 34(3) (b) to the Income-Tax Act ?" The High Court answered the second question in the affirmative and against the assessee and in view of that answer, declined to answer first question as being unnecessary. The High Court took the view that this Court's decisions in Dewas Cine Corporation case (supra) and Bankey Lal Vaidya's case to the effect that the distribution, division or allotment of assets between partners of firm consequent on its dissolution amounts to a mutual adjustment of rights of the partners and does not amount to a sale or transfer had been rendered under the Income-Tax Act, 1922 wherein the expression 'sale' or 'transfer' had not been defined whereas in the 1961 Act by which the case was governed, the expression 'transfer' had been defined by s. 2(47) in a very wide manner so as to include not merely a sale or exchange but also 'extinguishment of any rights' in capital assets. The High Court hold that a dissolution of a firm amounted to extinguishment of the rights of the firm in the assets of the partnership and accordingly was a transfer within the meaning of s. 2(47) of the Act and that, therefore, the provisions of s. 34(3) (b) applied to the case. It is this view of the High Court that is being challenged before us in these appals by the assessee.

Counsel for the assessee contented that the High Court has clearly erred in taking the view that the dissolution of a firm amounts to extinguishment of the rights of the firm in the assets of the partnership. be pointed out that in the two decisions referred to above this Court has clearly enunciated what happens in law upon the dissolution of a firm namely, that the distribution, division or allotment of assets between the partners on dissolution of the firm is merely an adjustment of rights inter se between them and that no sale or transfer is involved in such distribution, division or allotment. According to him there is no change in this legal position even after the enactment of the definition of 'transfer' in s. 2(47) in the 1961 Act. Reference was made to this Court's decision in C.I.T. Gujarat v. R. M. Amin where this Court has held that no transfer of capital assets within the meaning of s. 2 (47) of the, 1961 Act was involved when a shareholder received money representing his shares on the distribution of the net assets of the company in liquidation, that he must be regarded as having received that money in satisfaction of the rights which belonged to him by virtue of his holding the shares and that the transaction did not amount to

any sale, exchange, relinquishment of capital assets or extinguishment of any rights therein. In any case, he contended that in every case dissolution must be anterior in point of time to the distribution that takes place after making accounts and discharging all debts and. liabilities and as such there is no transfer of any assets by the assessee (i.e. the dissolved firm) to any person as contemplated by s. 34(3) (b), but all that happens is that upon dissolution and upon making up of accounts and discharge of liabilities it is the erstwhile partners who mutually adjust their rights and it is by way of adjustment of such rights that distribution, division or allotment of assets takes place. He, therefore urged that s. 34 (3) (b) was inapplicable to the case.

On the other hand, counsel for the Revenue pressed the High Court's view for our acceptance. He urged that the question has to be considered under the 1961 Act in light of the definition of 'transfer' contained in s. 2 (47) which includes within its scope even 'extinguishment of rights in capital assets'. According to him , during the continuance of the partnership the machinery undoubtedly belonged to the firm, the firm as a separate taxable entity got the benefit Of development rebate which was sought to be withdrawn in as much as the firm's rights in the machinery got extinguished upon dissolution and the same got transferred or vested ill individual partner or partners as a result of distribution or allotment made between them be stated qua the. erstwhile partners there may not be any transfer of assets and there may be mutual adjustment of rights but qua the firm there is certainly extinguishment of its rights in the assets of the partnership and in that sense there is a transfer of assets within the definition under s. 2 (47) of the Act.

Since in these appeals the question raised relates to the withdrawal of development rebate under s. 34 (3) (b) read with s. 155 (5) of the 1961 Act in the light of the definition of the expression transfer given. under s. 2 (47) of the Act, it will be desirable to note what these provisions are. Section 34 (3) (b) in so far as is material reads:

> "34. Conditions for depreciation allowance and development rebate.
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> x x x x x 3(b) If any ship, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed, any allowance made under section 33 or under the corresponding provisions of the Indian Income-tax Act, 1922 (XI of 1922), Gin respect of the ship, machinery or plant shall be deemed to have been wrongly made for the purposes of this Act, and the provisions of sub-section (5) of section 155 shall apply accordingly."

Section 155(5) is a procedural provision enabling the Income-tax Officer in a case falling under s. 34(3) (b) to recompute the total income of the assessee for the relevant previous year and make the necessary amendments; in other words, acting under this provision the Income-tax officer withdraw is the development rebate already granted A by passing an amending order. It further provides that such amending order has to be passed within a period of 4 years to be reckoned from the end of the previous year in which the sale or transfer took place.

Section 2(47) defines the expression "transfer" thus: "2(47) "transfer", in relation to a capital asset, includes the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof, under any law." On a plain reading of s. 34(3) (b) it will appear clear that before that provision can be invoked or applied three conditions are required to be satisfied: (a) that the ship, machinery or plant must have been sold or otherwise transferred, (b) that such a sale or transfer must be by the assessee and (c) that the same must be before the expiry of 8 years from the end of the previous year in which it was acquired or installed. It is only when these three conditions are satisfied that any allowance made under s. 33 shall be deemed to have been wrongly made and the Income-tax officer acting under s. 155(5) will be entitled to withdraw such allowance. Further, s. 2(47) gives an artificial extended meaning to the expression 'transfer' for, it not merely includes transactions of 'sale' and 'exchange' which in ordinary par- lance would mean transfers but also 'relinquishment' or 'extinguishment of rights' which are ordinarily not included in that concept. The question is whether the distribution, division or allotment of assets of firm consequent on its dissolution amounts to a transfer of assets within the meaning of the words "otherwise transferred" occurring in s. 34(3) (b) of the Act, regard being had to the definition of "trans- for" contained in s. 2(47) ? To put it pithily, the question is whether the dissolution of a firm extinguishes the firm's rights in the assets of the partnership so as to constitute a transfer of assets under s. 2(47) ?

In Dewas Cine Corporation case (supra) the concept of distribution of assets consequent upon the dissolution of the firm was considered in the context of the balancing charge arising under the second proviso to s. 10(2) (vii) of the 1922 Act. In that case two individuals, each of whom owne da cinema theatre, formed a partnership to carry on business of exhibition of cinematograph films, bringing the theatres into the books of the firm as its assets. For the assessment years 1950-51 to 1952-53 the Income Tax Officer allowed depreciation aggregating to Rs. 44,380/- in the assessment of the firm in respect of the two theatres. On the dissolution of the firm on September 30.

1951, the theatres were returned to their original owners. In the books of the firm the assets were shown as taken over at the original price less the depreciation allowed, the depreciation being equally divided between the two erstwhile partners. The Tribunal took the view that by restoring the theatres to the original owners there was a transfer by the partnership and the entries adjusting depreciation and writing off the assets at the original value amounted to local recoupment of the entire depreciation by the partnership and on that account the balancing charge arose under the second proviso to s. 10(2) (vii) of the Act. This Court held that on the dissolution of the partnership, each theatre had to be deemed to be returned to the original owner in satisfaction partially or wholly of his claim to a share in the residue of the assets after discharging the debts and other obligations. But thereby the theaters were not in law sold by the partnership to the individual partners in consideration of their respective shares in the residue, and, therefore, the amount of Rs. 44,380/- could not be included in the total income of the partnership as a balancing charge arising under the second proviso to s. 10(2)(vii).

It is true that this Court was concerned with interpreting the expression "sold" used in s. 10(2) (vii) and the second proviso thereto, when the expressions "sale or sold" had nowhere been defined in the Act, and, therefore, this Court held that those expressions when used in s. 10(2) (vii) and the second

proviso thereto must be understood in their ordinary meaning and that "sale" according to its ordinary meaning meant a transfer of property for a price. This Court further enunciated the proposition that the distribution of surplus upon dissolution of a partnership after discharging its debts and obligations was always by way of adjustment of rights of partners in the assets of the partnership and did not amount to a transfer much less for a price. It is significant to note that the question of raising a balancing charge against the dissolved firm, a separate taxable entity which had been allowed depreciation in the earlier years, was considered by this Court and this Court took the view that no balancing charge arose against the firm inasmuch as no sale or transfer was involved in the transaction of distribution of the assets to erstwhile partners of the firm consequent upon its dissolution.

In Bankey Lal Vaidya's case (supra) the concept of distribution of assets to the partners of a firm consequent upon its dissolution was considered in the context of the charge on capital gains arising under 'H s. 128(1) of the 1922 Act. In that case the respondent assessee, the Karta of a Hindu undivided family, entered into a partnership with to carry on business of manufacturing and selling pharmaceutical products and literature relating thereto. On the dissolution of the partnership, its assets, which included goodwill, machinery, furniture, medicines, library and copyright in respect of certain publications, were valued at Rs. 2,50,000. Since a large majority of assets was incapable of physical division, it was agreed that the assets be taken over by and the respondent assessee be paid his share of the value of the assets in money and accordingly he was paid Rs. 1,25,000/-. The question was whether the sum of Rs. 65,000/-, being part of the amount received by the respondent assessee could be brought to tax as capital gains under s. 12B(1) of the Act ? This Court held that the arrangement between the partners of the firm amounted to a distribution of the assets of the firm on dissolution, that there was no sale or exchange of the respondent's share in the capital assets to D, nor did he transfer his share in the capital assets and, therefore, the sum of Rs. 65,000/- could not be taxed as capital gains. The Court observed that the rights of the parties were adjusted by handing over to one of the partners the entire assets and to the other partner the money value of his share and such a transaction was neither a sale nor exchange nor transfer of assets of the firm.

It cannot, however, be disputed that both these decisions were rendered under the 1922 Act which did not define expressions like "sale" or "transfer" and the question is whether any difference is E; made in the legal position under the 1961 Act by reason of the enactment of the definition of the expression "transfer" in s. 2(47), which includes within its scope a transaction by way of 'extinguishment of any rights in a capital asset' ? The precise argument which has been advanced by the counsel for the Revenue before us, and which found Favour with the High Court is that during the continuance of the partnership the machinery belonged to the firm, that the firm as a taxable entity received the benefit of development rebate in respect thereof under s. 33 of the Act and that upon dissolution the firm's rights in the machinery got extinguished and became vested in the partner or partners to whom it was allotted in the distribution of assets, and, therefore, the transaction so far as the firm is concerned amounts to a transfer of assets under s. 2(47). The question is how far is it correct to say that in law the firm as such has rights in the partnership assets liable to extinguishment upon dissolution ?

It is well-known that commercial men and accountants on the one hand and lawyers on the other have different notions respecting the nature of the firm and this difference between the mercantile view and the legal view has been explained in Lindley on Partnership 12th Edn. at pages 27 and 28 thus:

> "Partners are called collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm Commercial man and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation i.e., as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the firm is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the firm for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions; but are always either debtors to or creditors of the firm Owing to this impersonification of the firm, there is tendency to regard its rights and obligations as unaffected by the introduction of a new partner, or by the death or retirement of an old one. Notwithstanding such changes among its members, the firm is considered as continuing the same; and the rights and obligations of the old firm are regarded as continuing in favour of or against the new firm as if no changes had occurred. The partners are the agents and sureties of the firm, its agent for the transaction of its business, its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets. But this is not the legal notion of a firm. The firm is not recognised by English lawyers as distinct from the members composing it. In taking partnership accounts and in administering partnership assets, Courts have to some extent adopted the mercantile view, and actions may now, speaking generally, be brought by or against partners in the name of their firm; but speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners com posing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member, nor can he be employed by his firm, for a man cannot be his own employer". (Emphasis supplied) .

Unlike the Scottish system of law where the firm is a legal person distinct from the partners composing it, the English Partnership Act, 1890, avoids making a firm a distinct legal entity. In English jurisprudence a firm is only a compendious name for certain persons who carry on business, or have authorised one or more of their number to carry it on, in such a way that they are jointly entitled to the profits and jointly liable for the debts and losses of the business. Further it is true that partnership property is regarded as belonging to the firm, but that is only for the purpose of distinguishing the same form the separate property of the partners. But, in law the partnership property is jointly owned by all the partners composing the firm. In Lindley on Partnership at page

359 the following statement of law occurs:

> "The expression partnership property, partnership stock, partnership assets, joint stock, and joint estate, are used indiscriminately to denote everything to which the firm, or in other words all the partners composing it, can be considered to be entitled as such."

> Again at page 375 the following statement of law occurs:

> "In the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property, but it is not quite clear whether they are interested therein as tenants in com mon, or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest that no partner has a right to take any portion of the partnership property and to say that it is his exclusively. No partner has any such right, either during the existence of the partnership or after it has been dissolved."

As regards the nature of a share of a partner in a firm the following passage in Lindley on Partnership at page 375 brings out legal position very clearly:

> "What is meant by the share of a partner in his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representative, or to a legatee of his share.... and which - ; on his bankruptcy passes to his trustee."

The position as regards the nature of a firm and its property in Indian . law under the Indian Partnership Act, 1932 is almost the same as in English law. Here also a partnership firm is not a distinct legal entity and the partnership property in law belongs to all the partners constituting the firm. In Bhagwanji Morarji Goculdas v. Alembic Chemcial Works Co. Ltd. and others the Privy Council in para 10 of the judgment observed thus:

> "Before the Board it was argued that under the Indian Partnership Act, 1932, a firm is recognised as an entity apart from the persons constituting it, and that the entity continues so long as the firm exists and continues to carry on its business. It is true that the Indian Partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it; the law in India in that respect being more in accordance with the law of Scotland, than with that of England. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession. (Emphasis supplied).

It is true that under the Civil Procedure Code order XXX, as under the English Rules of Court, actions may be brought by or against partners in the name of the firm and even between firms and their members but that is only a matter of procedure. It is also true that the firm's property is recognised in more than one way (ss. 14 and 15 of the Partnership Act) but only as that which is "joint estate" of all the partners as distinguished from the "separate estate" of any of them, and not as belonging to a body distinct in law from its members. In Addanki Narayanappa & Anr. v. Bhaskara Krishnappa and 13 Ors, this Court after quoting with approval the aforementioned passages occurring in Lindley on Partnership, 12th Edn., made the following observations in the context of partners' right during the subsistence as well as upon the dissolution of a firm:

> "No doubt since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, how ever, no partner can deal with any portion of the property as his own nor can he assign his interest in a specific item of property of any one. His right is to obtain such profits, if R any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in cl.
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> (a) and sub-cls. (i), (ii) and (iii) of cl. (b) of s.
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> 48."

Having regard to the above discussion, it seems to us clear that a partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property. Or firm's assets all that is meant is property or assets in which all partners have a joint or common interest. If that be the position, it is difficult to accept the contention that upon dissolution the firm's rights in the partnership assets are extinguished. The firm as such has no separate rights of its own in the partnership assets but it is the partners who own jointly in common the assets of the partnership and, therefore, the consequences of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of any extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of s. (47) of the Act. In our view, therefore, there is no transfer of assets involved even in the sense of any extinguishment the firm's rights in the partnership assets when distribution takes place upon dissolution.

Counsel for the Revenue referred us to a decision of the Karnataka High Court in Additional Com missioner of Income-Tax v. M. A. J. Vasanaik, where that Court has taken the view that when individual assets are brought in a partnership firm so as to constitute the partnership property, there is a transfer of interest of the individual to the partnership and ss. 34(3) (b) and 155(5) of 1961 Act are attracted. In the first instance, that decision dealt with the converse case and it does not necessarily follow on parity of reasoning that the distribution, division or allotment of partnership assets to partners of a firm upon its dissolution would amount to a transfer of assets as was sought

to be contended by the counsel for the Revenue. Secondly, it is unnecessary for us to express any opinion on the correctness or otherwise of the view taken by the Karnataka High Court in that case.

There is yet another reason for rejecting the contention of the counsel for the Revenue and that is that the second condition required to be satisfied for attracting s. 34(3) (b) cannot be said to have been satisfied in the case. It is necessary that the sale or transfer of assets must be by the assessee to a person. Now every dissolution must h point of time be anterior to the actual distribution, division or allotment of the assets that takes place after making accounts and discharging the debts and liabilities due by the firm. Upon dissolution the firm ceases to exist; then follows the making up of accounts, then the discharge of debts and liabilities and there upon Distribution, division or allotment of assets takes place inter se between the erstwhile partners by way of mutual adjustment of rights between them. The distribution, division or allotment of assets to the erstwhile partners, is not done by the dissolved firm. In this sense there is no transfer of assets by the assessee (dissolved firm) to any person. It Dis not possible to accept the view of the High Court that the distribution of assets effected by a deed takes place eo instanti' with the dissolution or that it is effected by the dissolved firm.

In the result we are clearly of the view that s. 34(3)(b) of the Act was not applicable to the case and we uphold the view of the Tribunal. The appeals are, therefore, allowed and the Revenue will pay the costs of the appeals to the appellant.

N.V.K. Appeal allowed