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**Court :** Mumbai

**Decided On :** Oct-07-1940

**Reported in :** [1941]9ITR44(Bom)

**Appeal No. :** Income-tax Reference No. 3 of 1940

**Appellant :** The Central Talkies Circuit, Matunga,

**Respondent :** Re.

**Judgement :**

BEAUMONT, C.J. - This is a reference made by the Commissioner of Income-tax raising the question : 'Whether there was any evidence to justify the Appellate Officers finding of fact that the partnership stated to be in existence by the deed of July 14, 1937 was not a genuine partnership'.

The assessees are a firm carrying on business in the name of Central Talkies Circuit, Matunga, and down to the partnership deed of July 14, 1937 the partners were : V. H. Desai with 3 annas share. (he is described as the original sub-proprietor), his wife with 3 annas share, his minor son with 2 annas and his major son 2 annas and two outside partners. As from April 1, 1937 an amendment was introduced into the Income-tax Act by the addition of Section 16(3) under which the share of a wife or minor son in a partnership has to be included in the income of an assessee. Having that provision in mind, a partnership deed of July 14, 1937 was executed under which the mother of V. H. Desai was substituted for his wife

and minor son, and she was given 4 1/2 annas. That is to say, the 5 annas which had previously been divided between the wife and the minor son, were distributed as to 1/2 anna for V. H. Desai and 4 1/2 annas for the mother, who thus became entitled to the largest share in the firm. It is, of course, not disputed that the object of the alteration was to avoid the effect of Section 16(3) of the Income-tax Act.

On an application to register the firm, the Income-tax Officer refused registration on the ground that the partnership deed produced was one prepared only to avoid what he calls 'proper taxation' owing to the operation of the new Section 16(3) of the Act. That is not a good ground for refusing to register. I do not like the expression 'proper taxation.' Taxation is either legal as falling within the terms of the taxing Act, or non-existent. As has been pointed out many times by this and other Courts, any one is entitled so to conduct his affairs within the law as to avoid incidence of taxation, and if a man finds that he will suffer less in taxation by carrying on business in partnership with his mother rather than his wife, he is entitled to select his mother. But the partnership must be a genuine partnership. The Assistant Commissioner, no doubt, appreciated that the Income-tax Officer had not put his case on the right ground, and he called for the books of the alleged partnership and came to the conclusion that there was no genuine partnership, and with that conclusion the Commissioner agrees. He relies on the fact that a large cash balance of nearly a lakh and a half existed in this partnership in 1937, which made it unnecessary to secure a new financing partner, that it is not proved that the mother has in fact brought in any capital, nor is it proved that she had any capital to bring in. I think he might also have relied on other evidence of a negative character, namely, that there was no evidence that the mother knew anything about the business, or has assisted in the conduct of the business in any way. The contention of the assessee is that the evidence produced before the Assistant Commissioner was not such as could possibly justify him in refusing to register the firm.

By Section 26-A of the Income-tax Act application may be made to the Income-tax Officer on behalf of any firm constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of the Act, and then under sub-section (2) rules may be made. Under the rules, which

were in force down to April 1, 1939, it is provided in Rule 2 that any firm constituted under an instrument of partnership specifying the individual shares of the partners may register with the Income-tax Officer the particulars contained in the instrument. Then it is provided that the application must contain certain particulars, including the name of the partners in the firm with the share of each in the business. Then Rule 4 provides that on the production of the original instrument of partnership or on the acceptance by the Income-tax Officer of a certified copy thereof, the Income-tax Officer shall register the instrument and issue a certificate. Since the coming into operation of the Income-tax (Amendment) Act, 1939, Rule 4 has been altered, and it now reads : 'If, on receipt of the application referred to in Rule 3, the Income-tax Officer is satisfied that there is a firm in existence constituted as shown in the instrument of partnership' then he has to register. Having regard to the authorities on the old rule, I think that the new rule really does not alter the law as it previously existed; it only makes the true effect of Rule 4 clearer than it was under the previous wording. Under the old rule the Courts held that the Income-tax Officer was entitled to consider whether the deed produced for registration really constituted a partnership as alleged. Under Rule 2 the only person who can apply for registration is a firm constituted under an instrument of partnership specifying the individual shares of the partners, which must, of course, mean specifying correctly the individual shares of the partners. I think it is open, whether under the old rule or the new rule, to the Income-tax Officer to say that the shares, which appear in the deed, are not the true shares of the partners, and therefore, there is no proper application by the requisite firm. Speaking for myself, I should say that if it were shown that one of the partners was only a nominee of a share allotted to him or her for another partner, the deed would not then specify correctly the individual shares. I think it must specify correctly the individual and beneficial shares, because that is a matter which is relevant from the point of view of the Income-tax authorities. If the Assistant commissioner had any evidence before him to lead to the conclusion that the mother in the case was not really entitled to a beneficial interest of 4 1/2 annas share, I think he was justified in refusing to register the deed.

The only question before us is whether there was any such evidence. If there was, his conclusion must stand, as we are not sitting in appeal on the Assistant

Commissioner. I am not prepared to say in this case that there was no evidence before the Assistant Commissioner on which he could find that this partnership was not proved to exist in the terms specified in the deed sought to be registered. The grounds on which he relies, coupled with the absence of any evidence that the mother really was for any purpose,-finance, working or otherwise-a partner in this firm, do afford some ground on which the Assistant Commissioner could hold that this never was genuine partnership, that it was a mere device to escape payment of income-tax, and that it was not an effective means of evading such payment.

In my opinion, therefore, the question raised must be answered in the affirmative. The assessee to pay costs.

KANIA, J. - In this matter an application was made for the registration of the firm for the year 1932-33 disclosing therein the names of the following persons as partners with the shares mentioned against their names :

1. Mr. V. H. Desai ... 4 annas.
2. Mr. H. V. Desai (his adult son) ... 2'
3. Mrs. Taramati V. Desai ... 4'
4. Mrs. Ratnagauri C. Munim ... 5'
5. Charity ... 1 anna.

By another deed prepared later on, and dated July 28, 1936, the shares of the partners were registered as follows :-

1. Mr. V. H. Desai (original sub-proprietor) ... 3 annas..
2. Mrs. T. B. Desai (wife of No. 1) ... 3'
3. Mr. M. V. Desai (minor son of No. 1) ... 2'
4. Mr. H. T. Desai (adult son of No. 1) ... 2'

5. Mrs. Ratnagauri C. Munim ... 3'

6. Mr. Nandkumar C. Munim ... 2'

7. Charity ... 1 anna.

Thereafter there came the amendment of Section 16(3) of the Income-tax Act, in respect of the shares standing in the names of a wife and minor son of a partner. On that provision being made in the Income-tax Act, a new partnership deed July 14, 1937 was executed. The partners therein mentioned were Mr. V. H. Desai with 3 1/2 annas share, his mother (Mrs. Vijayabai M Desai in place of Mr. T. V. Desai and Mr. M. V. Desai) with 4 1/2 annas share, and the remaining partners with their shares as in the previous deed. It is not disputed, that this reshuffling of the shares was made because of the amendment of the Income-tax Act. The Income-tax Officer, before whom the matter came first rejected the partnership deed dated July 14, 1937 as the motive was to get round the Amendment. That was wrong. The motives of a person in making alterations in the mode of his doing business are no guide for rejecting the registration of a firm. As has been pointed out repeatedly, if any subject could manage his business affairs as to pay the least tax which he might be liable to, he may do so provided the whole action is within the law.

In the present case when this partnership deed was put before the Income-tax Officer, he had to inquire under Section 26-A read along with Rules 2 to 4, whether the firm constituted under the instrument of partnership and stating the particulars contained in the instrument was a genuine partnership. The rule, as amended by the Act of 1939, in terms gives power to the Income-tax authorities to make the inquiry and determine whether the deed is genuine and also whether the partnership is constituted as stated in the deed. The words of old Rule 2, however, are sufficiently wide enough to include such an inquiry. The question whether the taxing authorities had the right to inquire whether the deed was a genuine one or not came to be considered in *In re Bisweshwarlal Brijlal* (1930) 57 Cal. 1336; 4 I.T.C. 365 and it was held that they had that authority. No reference to Rule 2 is found in the judgments there, but it is based on general principles of law. Rule 2, as it existed before April 1939, in my opinion, supports that conclusion. A number

of cases, which have been cited to us, show that the power to make the inquiry about the genuineness of the deed is recognised and affirmed by the Courts.

The question, then, is whether in the present case the Commissioner was right in holding that there was evidence on which he could come to the conclusion that the partnership deed as put forth was not genuine. The contention involves the question whether the statement of shares of the individual partners as mentioned in the deed is also correct. No particular reported case has been cited in which this last mentioned question has been specifically raised. It appears to me that if it is conceded that the commissioner has the power to inquire whether the partnership deed as put forth by the applicants is genuine or not, it does involve a consideration whether the share of an individual partner as mentioned therein is also correctly stated or not. For example if the share of a partner were stated to be 5 annas, and on inquiry and taking evidence the Commissioner definitely came to the conclusion that the share was 4 annas, the partnership agreement as put forth by the applicants would not be correct, and there appears to be little doubt that the Commissioner would be entitled to hold that the deed executed by the applicants was not a correct partnership deed. 'Partnership', as defined by the Income-tax Act, is a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. It is that relationship as set out in the partnership deed, which, the Commissioner has to determine, exists or not.

Approaching the question from that point of view, in the present case the applicants stated that Mrs. Vijayabai was admitted as a partner with 4 1/2 annas share in consideration of capital brought by her into the business. That is the only ground set up by the applicants in support of their allegation that this lady was given the share. The Assistant Commissioner made inquiries about this allegation. He looked into the books of account. The books contained two entries showing the total sum of about Rs. 20,000 credited to her. On considering the other entries the Assistant Commissioner came to the conclusion that those were mere book entries. It is not open to this Court to inquire whether that conclusion of the Assistant Commissioner is right or wrong. On looking into the evidence, which consists of the books of account of the partnership, he held that the only ground

alleged by the applicants for giving this lady this large share in the partnership was not proved. In arriving at that conclusion, it is not possible for this Court to say that there was no evidence, He had jurisdiction to hold that the only motive alleged for giving her this share was not proved to exist, and therefore, in his opinion the statement that Bai Vijayabai was entitled to a 4 1/2 annas share in this partnership was not proved.

It is not the case of the Applicants here that Vijayabai was a trustee in respect of this share for Mr. Desai or for any other partner. If that case had been urged, it would have been inquired into, and I express no opinion as to what the result of the inquiry would have been. The applicant went to the Assistant Commissioner on the footing that 4 1/2 annas share was given to Vijayabai as a capitalist partner. The Assistant Commissioner found that the evidence was not satisfactory and came to a conclusion against the Applicant. Under the circumstances it is not possible to say that there is no evidence for coming to the conclusion that the partnership agreement as put forth did not correctly represent the state of affairs and therefore, the reference fails.

The order of the Court was as follows :-

## **ORDER**

Upon the Reference of the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, dated March 26, 1940 made pursuant to an order made by the Honourable Court in the matter of the Civil Application No. 872 of 1938 under Section 66(3) of the Indian Income-tax Act, XI of 1922, and the reference having been called on for hearing on October 4, instant and this day the said Commissioner and the above named assessee the Central Talkies Circuit appearing respectively by Advocates and upon reading the said Reference THIS COURT DOTH answer the question referred to in the said reference in the affirmative AND DOTH DECLARE that there was evidence to justify the Appellate Officers finding of fact that the partnership stated to be in existence by the said deed referred to in the said reference was not a genuine partnership AND THIS COURT DOTH ORDER that the said assessee do pay to the Commissioner of Income-tax, Bombay, Presidency, Sind & Baluchistan, his costs of the said

Reference and of this order when taxed and noted in the margin hereon. Witness Sir John William Fisher Beaumont, Knight, Chief Justice at Bombay aforesaid this seventh day of October one thousand nine hundred and forty.

Reference answered in the affirmative.

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