

Syed Mubarak Hussain
The Custodian General of Evacuee Property,
New Delhi

For all these reasons, I accept this petition and quash the order of the Custodian-General, dated the 12th of May, 1952, and direct the issue of a writ of mandamus prohibiting the Custodian Department from interfering with the possession of the petitioner over the land in dispute. The petitioner will get the costs of this petition from the respondent.

Bishan Narain,
J.

CIVIL REFERENCE

Before Falshaw and Bishan Narain, JJ.

M/s B. N. DHEER AND SONS,—*Appellants.*

versus

THE COMMISSIONER OF INCOME-TAX, DELHI,—
Respondent

Civil Reference No. 8 of 1954.

1957

Jan., 31st

Income-tax Act (XI of 1922)—Section 26A—Assessee alleging that it was a firm constituted in January, 1948, consisting of two parties though formal partnership deed was drawn up on 21st June, 1950—Assessee, whether entitled to registration under section 26A and for what years.

Held, that when a deed or instrument of partnership is presented for registration under section 26A, even where the partnership is alleged in the deed to have existed previously on the same terms, this should not be a bar to the registration of the firm, and it should be treated as constituted under the instrument as from the date of the instrument. Consequently registration should not be refused to the assessee firm in this case simply because the instrument of partnership executed in June, 1956, recited the previous existence of the partnership from January, 1948, onwards but that the registration should only take effect from the date of the instrument. This means that the registration should be granted so as to take effect for the assessment year 1951-52 (accounting year 1950), but not as regards the assessment years, 1949-50 and 1950-51.

Messrs Kalsi Mechanical Works, Nandpur v. The Commissioner of Income-tax, Simla (1), *Messrs Padam Parshad-Rattan Chand of Delhi v. Commissioner of Income-tax, Delhi*, (2), and *R. C. Mittar and Sons v. Commissioner of Income-tax, West Bengal* (3), relied on; *Dwarka Das Khotan and Company, Bombay v. Commissioner of Income-tax, Bombay City, Bombay* (4), dissented from.

Case referred by the Income-tax Appellate Tribunal, Bombay, under section 66(i) of the Indian Income-tax Act 1922 (Act XI of 1922 as amended by section 92 of the Income-tax (Amendment) Act 1939, Act VII of 1939, for orders of the High Court.

CHARANJIT LAL, for Appellant.

K. N. RAJAGOPAL SASTRI and G. R. CHOPRA, for Respondent.

ORDER

FALSHAW, J.—These are three connected references (Civil References Numbers 8, 12, and 13 of 1954) under section 66(1) of the Income-tax Act, relating to the assessment of the petitioner firm Messrs B. N. Dheer and Sons of Delhi for the assessment years 1949-50, 1950-51 and 1951-52, (accounting years 1948, 1949, and 1950). In the course of the last of these assessment years the assessee firm applied for registration under section 26A of the Income-tax Act on the allegation that the two partners of the firm had been carrying on the partnership business since January, 1948, each of them having an eight-anna share in business, though the partnership deed in which the terms of the partnership and the shares of the partnership were set out was only drawn up on the 21st of June, 1950. The assessee firm claimed registration under section 26A in respect of the accounting year 1948, assessment year 1949-50, and renewal with regard to the subsequent years under consideration.

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(1) 55 P.L.R. 407.

(2) A.I.R. 1954 Punj. 188.

(3) 28 I.T.R. 698.

(4) A.I.R. 1956 Bom. 321.

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This was refused by the Income-tax Officer principally on the following grounds:—

- “A firm can be constituted only once and if once a firm is verbally constituted, by subsequently writing a partnership deed it cannot be said that the firm is constituted under a partnership deed. In the present case the alleged firm is said to have been verbally constituted in January, 1948, and the partnership deed was executed in June, 1950, i.e., 2½ years from the commencement of the business. The assessee is, therefore, not entitled to registration.”

This view was upheld both by the Appellate Assistant Commissioner and the Appellate Tribunal. In these circumstances the following question has been referred to us:—

“Whether on the facts, and in the circumstances, of the case, the assessee firm could be accorded registration under section 26A of the Income-tax Act, for any of the three Assessment years.”

The relevant words in section 26A are:—

- “(1) 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 purpose of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.”

A question arising out of an instrument of this kind came up for consideration before Kapur, J., and myself in the case of *Messrs Kalsi Mechancial Works, Nandpur v. The Commissioner of Income-tax, Simla* (1), and we held that for the purpose of registration of a firm under section 26A of the Income-tax Act it is necessary that the firm should be constituted by an instrument of partnership and that such a firm which is constituted under an instrument of partnership should have been in existence during the accounting period and should not come into existence during the assessment year, and if it was not in existence during the account period it cannot be registered so as to affect the liabilities of the partners of income-tax accruing during the account period. Hence a firm which is alleged to have come into existence by a verbal agreement in June, 1944, is not entitled to registration under section 26A for the purpose of the assessment for 1949-50, where the instrument of partnership was drawn up only in May, 1949, after the expiry of the relevant period of previous year.

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A further development arose before my Lord the Chief Justice and myself in the case of *Messrs Padam Parshad-Rattan Chand of Delhi v. Commissioner of Income-tax, Delhi* (2). In that case the Income-tax authorities had taken the same view as in the present case, namely, that where an instrument of partnership which is relied on is presented for registration of a firm under section 26A and it recites that the partnership has been in existence for some time before the instrument was drawn up, the partnership cannot be said to be constituted under the instrument and, therefore, it was not entitled to re-

(1) 55 P.L.R. 407.

(2) A.I.R. 1954 Punjab 188.

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gistration at all. The question referred to this Court was:—

“Whether a firm which comes into existence by oral agreement, is entitled to be registered under section 26A, if on the date of the application for registration the terms and conditions of the partnership have been reduced to writing and the application for registration is accompanied by such an instrument?”

The real question was whether the recital of the previous oral partnership in the deed was a bar to the registration of the partnership as from the date of the deed, and I dealt with the matter in my judgment in the following way:—

“I do not think there can be any doubt about the correctness of the view of the Appellate Tribunal expressed in full in its judgment in the appeal—*Messrs Ram Gulam-Madan Lal v. The Income-tax Officer, C-Ward, Delhi*’, which has been printed in full as part of this case that the words ‘constituted under an instrument’ mean ‘created or formed by a formal deed’, but whether the fact that the partners of a firm who jointly executed such a deed choose to allege therein that they have previously been partners for some time on the same terms as those embodied in the deed debars the firm from registration under section 26A is another matter.

Obviously, as we held in the case referred to above, the deed or instrument cannot possibly have retrospective effect as regards the income-tax assessment of the firm.

but I cannot see any objection to the firm's being treated as constituted under the instrument itself. It may be that the partners in these firms act foolishly in alleging the previous existence of the partnership on the same terms in the vain hope of securing retrospective concessions, and in the most literal sense of the words a partnership cannot be said to be constituted under an instrument when admittedly it has been in existence previously.

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On the other hand, the intention of the law is clear, that when partners do draw up an agreement by which their shares in the partnership profits are specified, they are entitled to have the partnership registered under the Act, and thus to have the individual shares of the partners assessed for income-tax, and it seems to me to be an unduly harsh interpretation of the law to say that because the partners say they have been partners previously, they should not be entitled to have the partnership registered even when they have embodied its terms in a deed.

I am accordingly of the opinion that when a deed or instrument of partnership is presented for registration under section 26A, even where the partnership is alleged in the deed to have existed previously on the same terms, this should not be a bar to the registration of the firm, and it should be treated as constituted under the instrument as from the date of the instrument."

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In the light of these decisions the matter now referred to us would appear to be settled as far as the view of this Court is concerned, but our attention has been drawn to a subsequent decision of the Bombay High Court in *Dwarkadas Khetan and Company, Bombay v. Commissioner of Income-tax, Bombay City, Bombay* (1), in which a different view has been expressed by Chagla, C.J., (Tendolkar, J. concurring) and the view of this Court has been dissented from as well as the view expressed by Chakravatti C.J., and Lahiri, J., of the Calcutta High Court in the case of *R.C. Mittar and Sons v. Commissioner of Income-tax, West-Bengal* (2). In the Bombay case the extreme view has been expressed that it would be totally opposed to any plain construction of section 26A to suggest that only that firm can be registered which has come into existence by reason of the instrument of partnership and that a firm must be registered with effect from the date when it came into existence, not by reason of the date of the instrument but in point of fact.

One of the reasons for this view appears to be the view of the learned Chief Justice that "Constituted under an instrument" means something different from "constituted by an instrument" but no explanation of any such difference has been given and with the utmost deference to this view I find myself in complete disagreement with it. I am aware that in many contexts the word "by" means something quite different from the word "under", but in this particular context by which I mean coupled with the word "constituted", it does not seem to me to make any difference, and the plain meaning of section 26A (1) appears to me to be that unless and until a partnership is constituted by an instrument in which the shares of the partners are specified it cannot be registered, and so cannot be taken into account in the

(1) A.I.R. 1956 Bom. 321.

(2) 28 I.T.R. 698.

income-tax assessment of the partners. It would seem to me to be quite contrary to the intention of this part of the Income-tax Act, if an instrument relied on for registration of the partnership were to be given retrospective effect up to some date mentioned in it as the date on which the partnership has actually started. The learned Chief Justice is no doubt correct in his view that an oral partnership is quite legal for ordinary purposes, but this does not mean that an oral partnership has to be recognised by the Income-tax authorities for purposes of assessing the income-tax of the partners, which can only be done when the partnership is embodied in an instrument of partnership and when the partnership has been registered under section 26A.

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In the circumstances I am of the opinion that the view expressed by this Court in *Messrs. Padam Parshad-Rattan Chand of Delhi v. Commissioner of Income-tax, Delhi*, (1), was correct and that registration should not be refused to the assessee firm in this case simply because the instrument of partnership executed in June, 1950, recited the previous existence of the partnership from January, 1948, onwards, but that the registration should only take effect from the date of the instrument. This means that the registration should be granted so as to take effect for the assessment year, 1951-52, (accounting year, 1950) but not as regards the assessment year, 1949-50 and 1950-51 and I would answer the question referred to us accordingly. Since the parties have partially succeeded and partially failed, I would leave them to bear their own costs. (Counsel's fee Rs. 250).

BISHAN NARAIN, J.—I agree.

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J.

(1) A.I.R. 1954 Punj. 188.