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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPEAL No. 50 of 2001

M/S SRI GANGANAGAR FERTILIZER CORP.

V/S

C I T

Mr. ANJAY KOTHARI, for the appellant.

Mr. KK BISSA, for the respondent

Date of Order : 30.1.2008

HON'BLE SHRI N P GUPTA, J.
HON'BLE SHRI DEO NARAYAN THANVI, J.

ORDER

Heard learned counsel for the parties.

This is an assessee's appeal against the order of the Income Tax Appellate Tribunal dated 18.3.1999 (Annexure-9). The appeal was admitted on 23.7.2001, by framing following substantial question of law:-

"Whether in the facts and circumstances of the case, when the appellant firm has taken a stand that 9 godowns in question have been given to the partners of the firm in lieu of their share profit sharing ratio in profit, the taxability of the firm in respect of income from house property from godowns in question could be subject to tax without examining the question of ownership vis a vis entitlement to receive rents?"

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From the look at the impugned order dated 18.3.99, (Annexure-9), it transpires that thereby two appeals were decided, being Appeal Nos.471 and 472/JP 1983, which related to the Assessment Years 1979-80 and 1980-81 respectively.

This order was passed consequent upon the opinion given by this Court, in reference, being D.B.I.T. Reference No.33/1985 vide judgment dated 21.07.94, answering the question in favour of the Department, and against the assessee. Prior to this, earlier order was passed by the learned Tribunal on 28.7.84, whereby, both the appeals being I.T.A. Nos.471 and 472/JP of 1983 were allowed.

The necessary facts are, that the assessee is a partnership firm, and during the continuance of business, a document came to be executed on 31.1.79, whereby, nine godowns were given to the respective partners, in proportion of their sharing profits. The question thereupon arose was, that since the document of 31.1.79 was not registered, the assessee was assessed for the income of these nine godowns, treating the assessee to be continuing to be holder of the assets.

In appeal, the CIT must have confirmed the order, as the appeal before the ITAT was filed by the assessee. Since the order of CIT has not been produced, we are at

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loss to have its opinion. However, the learned Tribunal in Annexure-7 found, that in view of the provisions of Sections 14, 15, 19 and 22 of the Partnership Act, 1932, the partners may by means of an agreement among themselves decide, as to what could be the firm's assets and what could not be the firm's assets, and such an agreement can be entered, either initially, at any time during the continuance of the partnership, and the document dated 31.1.79 was considered to be a partial dissolution deed. Then, in view of the judgment of the Gujarat High Court, reported in 95 ITR 393, it was considered that the adjustment of mutual rights amongst the partners, if reduced in writing does not require any specific registration. It was further held, that where the property registered in the names of all the partners, or some of the partners, but are treated as firm's assets, as per the agreement among the partners, in those cases, there is no requirement of registration in favour of the firm. Obviously as a necessary corollary, the adjustment of mutual rights by withdrawing the assets of the partnership by the partners, which in the instant case is amongst all the partners, and in the same ratio, as they had been sharing the profits and losses, does not require registration. Then, it was found that the partners have clearly stated their intention of excluding the property representing 9 godowns from the firm's assets, and carried out all the acts with outside parties, who are directly

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involved, like the Banks had given loans against these godowns, and the Food Corporation of India, has taken these nine godowns on hire, therefore, should be treated as assets, jointly owned by the partners in their individual capacity, since 1.2.1979.

It is against this judgment (Annexure-7) dated 28.7.84, that reference was made to this Court, and this Court vide judgment dated 21.7.94, which is reported in 214 ITR 317, held that the Tribunal was not justified in holding that the partners of the Firm, by virtue of the partial dissolution deed, could hold certain properties which originally belonged to the firm, in the capacity of the co-owners, in the same ratio in which they shared the profits and gains from the business of the firm, without going through the requirement of Section 17(1)(b) of the Registration Act. Thus, by virtue of this judgment, the property continued to be the property of the Firm. Accordingly, the learned ITAT, after receiving this judgment by this Court, reversed the order (Annexure-7), and confirmed the order of the CIT.

Before we proceed further, it may be noticed, that since by Annexure-9, two appeals were decided for different assessment years, therefore, two appeals were required to be filed before this court also, while only one appeal has been filed, therefore, learned counsel for the assessee was

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given option, to chose as to, to which assessment year or the appeal before the ITAT, he wants this appeal to be confined, and the learned counsel opted for confining this appeal to assessment year 1979-80, covered by appeal No.471 before the ITAT. In that view of the matter, we would not go into the aspect of liability of the assessee for the assessment year 1980-81, which was covered by the appeal No.472. We find from the order Annexure-9, that in the appeal regarding assessment year 1979-80, it was contended, that the income for the month of March 1979 became due in the month of April 1979 only, and this income, thus did not come within the period of assessment year 1979-80. This contention was accepted, and the matter was restored to the file of the AO to examine afresh, and after giving an effective opportunity to assessee, pass fresh order.

Then coming to the question as framed by this Court vide order dated 23.7.2001, it was argued by learned counsel for the assessee, that the Hon'ble Supreme Court in CIT Vs. Podar Cement Pvt. Ltd. & Ors., reported in (1997) 226 ITR 625 (SC) has taken the view, that Section 27 has been amended by Finance Act of 1987, with retrospective effect, with a result that under Section 22, owner is a person, who is entitled to receive income in his own right, and by virtue of amended provision of Section 27, a person who is allowed to take or retain possession of any building or part thereof in part performance of a contract of the

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nature referred to in Section 53A of the Transfer of Property Act, 1882 shall be deemed to be the owner of that building or part thereof, and this provision has been held to be retrospective and, therefore, the learned Tribunal was in error in passing the impugned order, and should have held the respective partners to be the owners, and should not have been added to the income of the assessee.

We have considered the submissions, and find, that this amendment was made in the year 1987, while, the earlier judgment dated 21.7.94 was rendered in the year 1994, and this aspect was not pressed into the service before this Court. This Court interpreted the various provisions of the different legislations, as pressed into service, including Partnership Act and the Registration Act, and gave its opinion as above. Admittedly, this judgment has not been challenged by the assessee further. If the assessee felt, that by virtue of the provisions of Section 22, by virtue of amendment made in Section 27, the interpretation given by this Court in the aforesaid judgment was not correct, the said judgment was required to be challenged further, that having not been done, the rights of the parties did get crystallized by the said judgment, to the effect, that the properties continued to remain the properties of the Firm.

That being the position, in our view, it was not open

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to the learned Tribunal, on the face of the said judgment dated 21.7.94, to take any different view, and attempt to come to the conclusion, about the assessee being not continuing to be the owner of the assets, so as to not be liable to the income thereof.

In our view, the rights of the parties did come to be decided by the judgment inter-parties, being judgment of this Court dated 21.7.94, and that is not under challenge. For the sake of arguments, even if it were to be assumed, that subsequently, the Hon'ble Supreme Court has taken some different interpretation of law, that would not entitle the appellant assessee to claim, that the judgment inter-parties should not have any binding effect.

Another aspect, which requires to be noticed is, that since, the order Annexure-9 relates to two different assessment years as noticed above, and the present appeal has been confined to assessment year 1979-80 only. Obviously, the assessment for the year 1980-81 is not under challenge, therefore, any inconsistent situation can also not allowed to be brought about.

The net result is, that the question as framed is required to be, and is answered in favour of the Revenue and against the assessee, in view of the judgment of this Court being Annexure-8 dated 21.7.94 (214 ITR 317). The

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appeal is therefore dismissed.

(DEO NARAYAN THANVI), J.

(N P GUPTA), J.

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