tained allegations only as regards 6 and not as regards the rest. This would mean that the Tribunal had no jurisdiction to find that more than 6 votes had been improperly rejected in his case. If the votes regarding which no plea of impropriety had been raised by Jabar Singh were eliminated, it would follow that as a result of the final scrutiny Genda Lal had obtained properly 5,660 valid votes as against 5,658 polled by Jabar Singh. The result of the election, therefore, was materially affected by the improper reception or refusal of votes and therefore I consider that the election of Jabar Singh was properly set aside and that is why I concur in the order that the appeal should be dismissed.

Appeal dismissed.

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December, 20

(A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH JJ.)

Income Tax Act (11 *of* 1922), *s.* 25(3) and (4)—*Firm carrying on business in* 1918—*Disintegration into two firms—If discontinuance of business.*

By s. 25(4) of the Income-tax Act, "Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939....carrying on any business, profession or vocation in which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession."

A firm bearing the same name as the appellant firm, had been carrying on business from before 1918 and had paid tax on that business under the Income-tax Act, 1918. The firm did three kinds of businesses, namely, (a) in piece-goods, yarn as general merchants,

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(b) in the manufacture and sale of umbrellas and (c) in the manufacture and sale of soaps. There were various changes in the constitution of the firm between 1918 and 1934. In May 1939 two documents were executed, one by the then members of the firm, and a stranger H. being Ex. CI and the other by those members alone, being Ex. CII. It appeared from Ex. CI that the business in the manufacture and sale of umbrellas and soaps was being carried on from October-November 1937 by the parties to it as partners while Ex. CII showed that the parties to it had been carrying on the business in yarn, piecegoods and as general merchants as partners from the same time as mentioned in Ex. CI. On October 30, 1943 a document styled as an agreement of partnership was executed by five persons who were then the persons interested in the businesses carried on under the instrument of May 30, 1939. This document referred to the two agreements of partnership of May 30, 1939 and certain subsequent retirements of partners and admissions of new partners and provided that the businesses previously carried on by the two partnerships referred to in the instruments of May 30, 1939, would thereafter be carried on by one single partnership constituted by the parties to it. Thereafter all the businesses aforesaid were carried on by this single partnership. The firm constituted by the instrument of October 30, 1943 continued with certain changes in its constitution till February 7, 1948 when the then partners of it entered into an agreement with a company to transfer the business of the firm to the latter, the transfer to be completed by February 13, 1948 and the transfer was in fact made. The firm constituted by the document of October 30, 1943 claimed relief under s. 25(4) in assessment for the years 1948-49 and 1949-50 on the ground that it had been carrying on a business on April 1, 1939 when the Income-tax (Amendment) Act, 1939 commenced to operate on which business tax had been charged under the Act of 1918 and that it was succeeded in that business by a company in February 1948.

Held: (*per* Sarkar and Shah JJ.). The assessee was not entitled to the relief.

Exs. CI and CII showed that the business that had been carried on by the firm existing in 1918 was discontinued in October/November 1937 and its businesses were split up into two and from then carried on by two independent partnerships brought into existence by those documents. The old firm was brought to an end by Exs. CI and CII.

When a business carried on in one unit is disintegrated and divided into parts, the parts are not the whole, though all the parts taken together constitute the whole. In such case there is a discontinuance of the original businesses.

S. N. A. S. A. Annamalai, Chettiar v. *Commissioner of Income-tax, Madras*, 20 I. T. R. 238. referred to.

The business on which tax had been charged under the Act of 1918 was not being carried on on April 1, 1939 by the firm which had paid tax under that Act.

The business to which the company succeeded under the agreement of February 7, 1948 cannot before the succession be said to have been carried on by a firm which was carrying on business on April 1, 1939, for that firm had been newly formed under the instrument of October 30, 1943, which expressly revoked the partnership agreements of May 30, 1939 under which two firms had been brought into existence.

Per, Hidayatullah J. (dissenting) (i) Sub-ss. (3) and (4) of s. 25 of the Act are mutually exclusive: sub-s. (3) was only applicable when the business was discontinued and that in the term "succession" was not to be included a change in the constitution of the partnership. In sub-s. (4) the emphasis is on succession to a person who on April 1, 1939 was carrying on any business on which tax was at any time charged under the Act 1918. In sub-s. (3) the emphasis is on the discontinuance of the business which had paid tax under the Act 1918.

(ii) There is difference of approach to the same facts under the law of partnership and the Income-tax law.

Charandas v. *Haridas*, (1960)39 I. T. R. 202 and *Dulichand* v. *Commissioner of Income-tax, Nagpur*, [1956] S.C.R. 154, referred to.

(iii) Discontinuance of a firm is not a mere change in the constitution of the firm or even succession where, though the business changes hands, the original business which paid the tax in 1918 is carried on.

Shivram Poddar v. *Income-tax, Officer*, C. A. No. 455 of 1963 dated December 13, 1963, referred to.

(iv) All cases of discontinuance of businesses are treated under sub-s. (3) and all cases of succession under sub-s. (4) and all cases of mere change in the constitution of the firm are neither cases under sub-s. (3) nor under sub-s. (4). These sub-sections do not apply to cases where the business was not in existence before the Act 1922 came into force.

Ambalal Himatlal v. *Commissioner of Income-tax and Excess Profits Tax, Bombay North*, (1951) 20 I.T.R. 280, referred to.

(v) Since the soap and umbrella businesses were not in existence and no relief could be claimed in respect of these businesses, changes in respect of them were irrelevant.

(vi) by the expression "discontinued" in sub-s. (3) is meant complete cessation of business. In the present case it could be said that this had taken place in respect of the piece-goods business; this might

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have been managed by persons other than those who had paid the tax under the 1918 Act, but the business was not discontinued for the application of sub-s. (3).

Commissioner of Income-tax, Bombay v. *P. E. Polson,* (1945)13 I. T. R. 384, *Commissioner of Income-tax, West Bengal* v. A. W. *Figgies and Co.* [1954] S. C. R. 171 and *Mevoppar* v. *Commissioner of Income-tax, Madras,* I. L. R. (1944) Mad. 166, referred to.

(vii) In the present case there was no succession and it falls within the rule laid down by this Court in *Figgies'* case.

(viii) Though a firm was to be regarded as an entity for the purpose of the Income-tax Act, that entity was not to be taken to be disturbed by the coming in or going out of partners. Applying the test to the present case it was held that the identity of the entity was never lost and there was never a succession till the year 1948. No question of the dissolution of the old firm in piece-goods business ever arose. It continued right through, even other newly started businesses were owned by it. It cannot be said that the old firm had either discontinued or had been succeeded by another person. Hemchand was a mere employee though described as a partner. The entry of Hemchand did not constitute a dissolution of the old firm.

Commissioner of Income-tax, Bombay City v. *Kolhia Hirdagarh Co. Ltd., Bombay,* (1949) 17 I. T. R. 545 and *Commissioner of Income-tax, Bombay City* v. *Sir Homi Metters Executor,* (1955) 28 I. T. R. 928, referred to.

(ix) The appellants are entitled to succeed in their claim regarding the business in piece-goods yarn and banking which alone had paid tax under the 1918 Act.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 275-276 of 1963.

Appeals by special leave from the judgment and order dated May 2, 1960 of the Kerala High Court in Income-tax Referred case No. 98 of 1955(M).

S. T. Desai, C. V. Mahalingam, B. Parthasarathi and *J. B. Dadachanji,* for the appellant (in both the appeals).

K. N. Rajagopal Sastri and *R. N. Sachthey,* for the respondent (in both the appeals).

December 20, 1963. The Judgment of A. K. Sarkar and J. C. Shah, JJ. was delivered by Sarkar, J. M. Hidayatullah, J. delivered a Dissenting opinion.

SARKAR J.—These two appeals arise out of assessments of the appellant to income-tax for the years 1948-49 and 1949-50. The question in these appeals is whether on the facts to be presently stated, the appellant was entitled to relief under s. 25(4) of the Income-tax Act, 1922.

The appellant claimed relief under s. 25(4) contending that it had transferred its business to a limited company with effect either from November 13, 1947 or February 13, 1948, by an instrument executed on February 7, 1948. The claim was rejected by the Income-tax Officer and by the Appellate Assistant Commissioner and also by the Income-tax Appellate Tribunal on appeal to it. The appellant then moved the Tribunal to refer a certain question to the High Court at Madras under s. 66(1) of the Act but that application was rejected. It then moved the High Court under s. 66(2) of the Act and the High Court directed the Tribunal to refer the following question for determination by it:

> "Whether, on the facts and in the circumstances of the case, the assessee is not entitled to relief under section 25(4) of the Indian Income-tax Act, and to what extent?"

The Tribunal duly drew up a statement of case and referred the question along with it to the High Court. There were really two references as there were two cases before the Tribunal. These however were heard together by the High Court and disposed of by one judgment. The High Court held that the appellant was not entitled to any relief under s. 25(4). The present appeals are from the judgment of the High Court.

The facts have to be stated at some length but before we do that we think it would be profitable to set out the statutory provisions concerned. Though we are directly concerned with sub-sec. (4) of s. 25, a consideration of sub-sec. (3) of that section will throw useful light on the matter

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in question and so we set both these sub-sections out below:

S. 25. .....

(3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, ...is discontinued, then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance.....

(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939.....carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession.....

Both these sub-sections gave a further right to the assessee but with that right we are not concerned and shall, therefore, make no more reference to it.

Now it will be seen that under sub-sec. (3) the discontinuance of the business gave rise to a relief from taxation in respect of its income provided however that there had not been a succession to the business as mentioned in sub-sec. (4) which, as will later be seen, has to be a succession taking place after April 1, 1939. The succession contemplated in sub-sec. (4) again must have taken place before the discontinuance for if the business is discontinued it ceases to exist and cannot be succeeded to.

Sub-section (4) requires certain conditions to be fulfilled before a claim to relief under it can be made. As the present appeals relate only to a business carried on by a

firm, in discussing these conditions we will omit all references to the professions, vocations and owners of businesses other than firms. We would like to remind here that a firm is a taxable unit under the Income-tax Act and it is a person as that word is used in the Act. Now the first condition of the applicability of sub-sec. (4) of s. 25 is that the business must have been charged to tax under the Indian Income-tax Act, 1918. This Act was in force between 1918 and 1922 in which year it was replaced by the present Act. So the business must have been in existence sometime between 1918 and 1922. Under the Act of 1918 tax was assessed, computed and levied on the income of the year of assessment but under the Act of 1922 the scheme of assessment of income and tax was modified. By that Act tax was assessed on the income of the previous year and the result of the innovation was that the income of the year 1921-22 was assessed twice, once under the Act of 1918 and again under the Act of 1922 and it was because of this that relief was given by sub-secs. (3) and (4) of s. 25. The second condition of the applicability of s. 25(4) is that that business must have been carried on at the commencement of the Indian Income-tax Act (Amendment) Act, 1939, that is, April 1, 1939, by the person claiming the relief. The third condition is that the person carrying on the business on April 1, 1939 has to be succeeded by another person as the owner carrying on the business. Obviously, the succession indicated must have been after April 1, 1939, as we have earlier stated, for a person carrying on a business on that date can only be succeeded in that business by another person on a date later than it. The fourth condition is that the succession was not merely a change in the constitution of the firm. This condition, of course, is applicable only where, as in the present case, the business was carried on by a firm.

The appellant, who is the assessee in these cases, is a firm. It contends that it had been carrying on a business on April 1, 1939 from before and on that business tax had been charged under the Act of 1918 and that it was succeeded by a company as owner of the business as a result of a transfer by an instrument executed on February 7, 1948. The appellant further contends that its constitution has changed

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from time to time but the firm has never been dissolved so that it has been the same firm continuing and carrying on the same business from before 1918 till the transfer aforesaid. It is on this basis that it claimed the benefit of s. 25(4) of the Act.

We now proceed to set out the facts of the case in a chronological order. It appears that a firm bearing the same name as that of the appellant, that is, Sait (or Shah) Nagjee Purshotham and Company was started in 1902 and was reconstituted by an agreement of partnership dated December 6, 1918. On the last mentioned date it carried on business in piece-goods, yarn, and other articles at Calicut with branches in Madras and Bombay. It also subsequently started a business of manufacture and sale of umbrellas but the precise date of the commencement of this business does not appear from the record. Sometime about 1932 it started another business of manufacture and sale of soap. For practical purposes the firm can be treated as having been constituted by this document of December 6, 1918. The partnership agreement of December 6, 1918 was between the following six persons, Purushotham, Nagjee, Narayanjee, Krishnajee, Maneklal and Bhagwanjee. Of these persons the last named was an outsider and the rest were members of a family. The agreement provided that the withdrawal of a partner for whatever reason, would not dissolve the partnership as between the remaining partners. Krishnajee died in 1933 and Bhagwanjee retired about that time. On January 2, 1934, the remaining four partners executed an instrument varying some of the terms of the agreement of December 6, 1918. The instrument, however, provided that subject to the variations made the agreement of December 6, 1918 was to remain effective. It is not in dispute that there was no dissolution of the firm by the instrument of January 2, 1934. Thereafter on April 27, 1934 Purushotham died and the firm was then left with three partners, namely, Nagjee, Narayanjee and Maneklal.

Then we get two instruments both dated May 30, 1939, each described as an agreement of partnership. One instrument, which is marked as annexure C I, was between Nagjee, Narayanjee, Maneklal and Hemchand. The other instrument, which is marked as annexure C II was between

Nagjee, Narayanjee and Maneklal. It will be necessary to set out later some of the terms of these instruments, for on them a large part of the arguments advanced in this case has turned. Briefly it may be stated here that the appellant contends that these agreements did not really create new partnerships dissolving the existing one. Its case is that under annexure C I an outsider Hemchand was admitted as partner in some of the businesses of the existing partnership, namely, the umbrella and soap businesses and by the other instrument, annexure C II, the other existing businesses of that partnership, *e.g.*, in yarn, piece-goods, money-lending etc., were continued by the subsisting partners mentioned above. The contention of the respondent, on the other hand, is that these two instruments show that the business of the existing firm had been split up into two and transferred to two different owners, namely, two newly constituted firms with different partners, some of whom were no doubt common, and this amounted to a discontinuance of the business of the old firm. It was contended that after such discontinuance it could not be said that the same business on which tax had been charged under the Act of 1918 was being carried on on April 1, 1939 and no question, therefore, of any subsequent succession to that business to make sub-sec. (4) of s. 25 applicable, could arise.

We next have an instrument of October 30, 1943, also styled an agreement of partnership, to which Narayanjee, Maneklal, Jayanand, Leeladhar and Prabhulal were parties. It refers to the two "agreements of partnership of May 30, 1939" and certain retirements of partners and admission of new partners and provides that the parties to the instrument had agreed to carry on "as one single partnership" the businesses carried on previously by the two partnerships referred to in the instruments of May 30, 1939. One of the contentions of the respondent is that even if it was not right in its view of the instruments of May 30, 1939, this instrument of October 30, 1943 clearly evidenced a dissolution of the partnership then existing and the creation of an entirely new partnership to which the business of the old firm was transferred. It was said that this was a succession to business within the meaning of sub-sec. (4) of s. 25 and, therefore, the later succession, if any, by the transfer of Febru-

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ary 7, 1948 could not provide the basis for relief under s. 25(4). Whether relief could be granted under the earlier succession, it was said, is irrelevant for such relief had never been claimed.

The last instrument to which we have to refer is the agreement of February 7, 1948 between Maneklal, Jayanand, Leeladhar and Prabhulal as partners of the appellant firm and a limited company formed to take over the business of the firm. By this instrument the parties agreed that the business of the firm would be transferred to the company with effect from November 13, 1947, the transfer to be completed on February 13, 1948 by payment of the consideration of Rs. 4 lacs by the vendee and delivery of possession of the assets of the business by the vendor. It is on this instrument that the appellant, which is the firm constituted by Maneklal, Jayanand, Leeladhar and Prabhulal, claimed relief under s. 25(4) in its assessment for the years 1948-49 and 1949-50.

There is no doubt that as a result of the instrument of February 7, 1948 the Company succeeded to the business that was being carried on by the firm of Nagjee, Purushotham and Company as then constituted as aforesaid, as bankers, piece-goods and yarn merchants and as soap and umbrella manufacturers and sellers. The question, however is, was this firm a firm which had been carrying on a business on April 1, 1939 and which business had been charged to tax under the Act of 1918? The High Court took the view that it was not and we think, that that view is correct. In our opinion, the business was discontinued in 1937 and what was subsequently carried on was not the same business.

We now turn to annexures C I and C II dated May 30, 1939. Taking annexure C I first, the material portions of this document are as follows:—

> "This agreement of Partnership.....between (1) Nagjee....(2) Narayanjee....(3) Maneklal ....and (4) Hemchand....(hereinafter called the partners) witnesseth as follows:
>
> Whereas Partners 1 to 4 have been carrying on a business as partners from the beginning of Samvat 1994 (=October-November 1937) in

the manufacture and sale of Soaps under the name of 'The Vegetable Soap Works' Proprietor Sait Nagjee Purushotham & Co., and in the manufacture and sale of umbrellas in Calicut with branches at Madras and Bombay under the name and style of Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants at Calicut and Madras and in the name of Sha Nagjee Purushotham & Co., at Bombay hereinafter called the Firm;

And whereas it is thought advisable to reduce the terms of the said partnership into writing for the proper and better conduct of the business;

The Partners have agreed and also hereby agree to the following:

(1) The Firm shall continue to be as of old namely Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants. The Firm shall continue to do business in the manufacture and sale of soaps under the name of the 'Vegetable Soap Works' and in umbrellas under the name of 'Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants as aforesaid with Head Office at Calicut and branch at Madras under the same name and branch at Bombay under the name of 'Sha Nagjee Purushotham & Co.'

. . . . .

. . . . .

(4) The business of the Firm shall consist mainly in the manufacture and sale of soaps and umbrellas and such allied products and such other articles as all the partners or the majority of them may agree.

. . . . .

. . . . .

(8) It is always understood by the Partners herein that the Firm of Sait Nagjee Purushotham

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& Co., Bankers, Piece-goods and Yarn merchants, Calicut, the partners whereof are the Partners 1 to 3 herein shall advance as heretofore all funds that are necessary for the conduct of this Partnership.....Such advances shall be deemed as loan by the firm of Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn Merchants to the Firm.....

(9) Until otherwise determined by Partners Nos. 1, 2 and 3 in writing the Partnership shall not borrow any amount from any one other than the Firm Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn merchants referred to in para 8 above.

. . . . . .

(25) All the Partners hereby agree that Partners 1 to 3 herein are the Partners of the Firm of Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn merchants, Calicut."

We now set out the material portions of annexure C II.

"This agreement of partnership.....between (1) Nagjee....(2) Narayanjee.... and Maneklal....hereinafter called the Partners witnesseth as follows:

Whereas under the Agreement of Partnership dated the 6th day of December 1918..... (1) Purushotham .... (2) Nagjee .... (3) Narayanjee .... (4) Karsanjee .... (5) Bhagvanjee (6) Maneklal .... have carried on a partnership trade in Piece-goods, Banking and other articles in Calicut with branches at Madras and Bombay, and

Whereas (1) Purushotham .... (2) Karsanjee .... and (3) Bhagvanjee .... ceased to be partners either by retirement or death; and

Whereas the remaining partners (1) Nagjee .... (2) Narayanjee.... and (3) Maneklal.... settled the claims in full of the partners who ceased to exist and agreed to carry on and continue and are continuing the existing partnership business under the name and style of 'Sait Nagjee Purushotham & Co.' Bankers, Piece-goods and Yarn Merchants, hereinafter called the 'Firm'; and

Whereas it is thought advisable and prudent to reduce into writing the terms and conditions agreed upon orally by them the Partners agree and have agreed to the following terms and regulations stipulated hereunder.

(2) The Agreement of Partnership dated the 6th day of December 1918 is hereby revoked and the affairs of the Firm shall be regulated and governed by the Regulations agreed upon orally and reduced into writing in this Deed and the terms and conditions of the revoked deed shall not in future apply to the 'Firm' except such as have been repeated in this Deed.

. . . . .

. . . . .

(20) All the partners hereby agree that they in their individual capacity are and shall be Partners also along with Hemchand Veerjee Sait in a Partnership business in Soaps and Umbrellas carried on in Calicut and Madras under the name and style of Sait Nagjee Purushotham and Co., Soap and Umbrella Merchants and in Bombay under the name and style of Shah Nagjee Purushotham & Co., the terms and conditions whereof are embodied in an Agreement of Partnership dated 30-5-1939 signed by all the Partners.

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It is clear that these two instruments recite events which had happened in 1937. Annexure C I shows that in October/November of that year a new partnership was started to do businesses of manufacture and sale of soap and umbrella between Hemraj and the remaining partners of the pre-existing firm of the same name, that is, Nagjee, Narayanjee and Manecklal. This is clear from the terms of the instrument which we have earlier set out. We think it right especially to draw attention to the terms of cls. 8, 9 and 25 of annexure C I. These indicate that there were two firms, namely, one, of which the constitution appeared from annexure C I and which carried on umbrella and soap businesses and the other, consisting of Nagjee, Narayanjee and Manecklal carrying on other kinds of businesses the constitution of which appeared from annexure C II. Clauses (8) and (9) show that one firm was to lend money to the other. Such an agreement could not of course have been made unless the two firms were separate. By cl. (25) all the parties to annexure C I agreed that the firm constituted by Nagjee, Narayanjee and Manecklal was a different firm.

Learned counsel relied on cl. 1 of annexure C I and contended that it provided for the continuance of the old firm, that is, the firm constituted by the instrument of December 6, 1918 and hence no new firm had been created. We think that this contention is without foundation. There is no reference in annexure C I to the firm constituted by the instrument of December 6, 1918. The word "firm" in annexure C I refers to the partnership brought into existence by it. Clause 1 says that "The Firm shall continue to be of old". The word "old" refers to the partnership orally brought into existence in October/November 1937 to which reference is made in the first recital and to put down the terms of which in writing, annexure C I was executed. Likewise the provision in cl. 1 that "The Firm shall continue to do business" refers to the continuance of the business carried on prior to May 30, 1939 by the firm brought into existence in October/November 1937 by the oral agreement. The continuance cannot be a continuance of the firm or business of the partnership of 1918 for annexure C I makes no reference to that partnership at all. It may be

that the partnership of 1918 was carried on in the same name as the firm referred to in annexure C I but we are not aware that an identity of names establishes that the two firms are same. It seems to us beyond question that the partnership mentioned in annexure C I is different from the partnership which was brought about by the instrument of December 6, 1918 for the partners in the two firms were not the same. It has not been shown to us, neither do we think, that where different groups of persons, some of whom are common, carry on different businesses under different agreements, they can form one partnership. Further, as clearly appears from annexure C II, the firm brought into existence by the 1918 instrument was dissolved and a new firm was started between Nagjee, Narayanjee and Manecklal after the retirement of Purushotham in 1934. If the 1918 firm was thus dissolved it could not, of course, be continued. So the firm created by annexure C I could not have been a continuation of the 1918 partnership. Therefore, the firm mentioned in annexure C I is a new firm and not the old 1918 firm reconstituted.

This position is reinforced by the terms of annexure C II. First it is called an agreement of partnership, that is, agreement creating a partnership. The recital provides that the remaining partners of the firm constituted by the instrument of 1918 agreed to carry on and continue the existing partnership business. Clause (2) states that the deed of December 6, 1918 is revoked and the affairs of the firm would be governed by the terms of annexure C II and the conditions of the revoked deed were not to apply. It is impossible after this to say that the partnership constituted by the instrument of December 6, 1918 was not dissolved. There is no warrant for the view for which the appellant contended, that only the terms on which the business under the document of December 6, 1918 was carried were revoked and not the head agreement to do business in partnership. The fact that an express agreement to carry on the business in partnership was made (for which see the third recital in annexure C II) further indicates that the agreement to that effect in the instrument of December 6, 1918 was no longer subsisting. In this case the term providing for the continu-

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ance must refer to the continuance of the business and not to the continuance of the partnership agreement because that was expressly revoked. If this is not the correct view, then cl. 20 would be inexplicable. That clause states that the partners in their individual capacity would be partners with Hemchand in another business the terms of which partnership appear in another partnership agreement of the same date and which is annexure C I. This would show that the old partnership of 1918 had given up doing some of its existing businesses and it was decided to carry them on under a new partnership agreement. This would support the view that the old partnership was dissolved for it would not have otherwise given up those businesses.

The two instruments annexure C I and C II, therefore, clearly establish that in October/November 1937 the business that was carried on by the firm of Sait Nagjee Purushotham and Co. till that date, was discontinued and its businesses were split up into two and carried on by two independent partnerships then brought into existence. When this happens it is impossible to say that the pre-existing business was continued. This view finds support from *S. N. A. S. A. Annamalai Chettiar* v. *Commissioner of Income-tax, Madras*(1) where it was held that when a business carried on in one unit is disintegrated and divided into parts, the parts are not the whole even though all the parts taken together constitute the whole. That was a case of a joint family business which on partition was split up between different members of the family. It was held that as a result of this splitting up there was a discontinuance of the original business at the date of the partition and on such discontinuance the family became entitled to relief under s. 25(3). It is of some significance to point out that the partners constituting the appellant at the moment of the transfer in 1948 also thought that in 1937 the old firm ceased to exist and its business was carried on thereafter by two independent firms, for the document of October 30, 1943 has referred to annexures C I and C II as constituting two independent partnerships and proceeded to revoke them both and provided that the parties to the instrument "have

(1) 20 I. T. R. 238.

agreed to carry on and continue as one single partnership business the existing partnership businesses of Sait Nagjee Purushotham and Co., Bankers, Piece-goods and Yarn Merchants, Sait Nagjee Purushotham and Co., Soap and Umbrella Merchants."

Now when the business on which tax was charged under the Act of 1918—which, it is not disputed, happened in this case—was discontinued in 1937 it could not have been carried on on April 1, 1939. What was then carried on must have been some other business. So one of the conditions on which relief under s. 25(4) of the Act could be claimed was not satisfied and the claim would not be maintainable.

Furthermore, for the reasons earlier stated, it must be held that on April 1, 1939 the business, assuming its identity to have continued in spite of the splitting up, was being carried on by two persons, namely, two firms with different partners. Now the person who transferred the business which caused the succession in 1948 on which the appellant relies for relief under s. 25(4), was a single firm. This latter firm could not have been brought about by a change in the constitution of an existing firm, for there were two existing firms and they could not become one by simple changes in their constitution. Indeed the instrument of October 30, 1943 which brought the transferor firm, the appellant before us, into existence, expressly states that "The Agreements of Partnerships dated 30th May 1939..... are hereby revoked". It follows that at the date the succession relied upon can be said to have taken place, the business was being carried on by a person different from those who carried it on on April 1, 1939. So another condition of the applicability of s. 25(4) of the Act is not satisfied. The claim for relief under that section must fail on this ground also.

If it were to be said that the partnerships were brought into existence on May 30, 1939 by annexures C I and C II instead of in October/November 1937, then also the appellant's claim must fail. Whenever the new partnerships were brought into existence, the result would, in our view, necessarily be that the business of the old partnership which was

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taken over by the two new firms must be deemed to have been discontinued. On the principle stated in *Annamalai Chettiar's* case,(1) there could not in such a case be a succession of the business from one to another. That being so, there can be no question of the succession to the business carried on at the commencement of the Indian Income-tax (Amendment) Act, 1939, that is, April 1, 1939 and on which tax was charged under the Act of 1918 having taken place in 1948 as claimed by the appellant. What was discontinued could not be succeeded to. Even if it was held that on May 30, 1939, there was a succession to the business which we do not think is a correct view to take, that also would disentitle the appellant to relief under sub-sec. (4) of s. 25 in the years 1948-49 and 1949-50, for it should, in such an event, have claimed the relief in the year 1939-40.

In the result we have come to the conclusion that the business which had been subjected to tax in 1918 had been discontinued in October/November 1937 or on May 30, 1939 and it was not in existence in 1948 so as to permit a succession to it taking place under the instrument of February 7, 1948. The appeals, therefore, fail and they are accordingly dismissed with costs.

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HIDAYATULLAH J.—I have had the advantage of reading the judgment just delivered by my learned brother Sarkar J. but I have the misfortune to disagree with him in his conclusion that these appeals must be dismissed. In my judgment, these appeals must be allowed. The facts have been set out in detail by my learned brother and I shall content myself with repeating only such facts as are necessary for the elucidation of my point of view.

The appellant is a firm which in 1948 consisted of four partners namely Manecklal Purushotham, Liladhar Narayanjee, Jayanand Nagjee and Prabhulal Naranji. It was carrying on business mainly in piece-goods, yarn, banking and manufacture and sale of umbrellas and soaps. Its head office was at Calicut but it had branches at Bombay and Madras. The history of the firm goes back to the year 1902. In that year, five members of a family by name Purushotham, Nagjee, Narayanjee, Krishnajee and Premchand along

(1) 20 I.T.R. 238.

with one stranger Bhagwanjee started the appellant firm—Sait Nagjee Purushottam & Co. Thereafter, there were changes in the constitution of the firm caused by the death or by the retirement of partners. Of the original partners, Premchand retired in 1912 and another member of the family Manecklal was taken in his place. In 1933 and 1934, two members (Krishnajee and Purushotham) died and Bhagwanjee retired. In that year, the firm consisted of Nagjee, Narayanjee and Manecklal who were members of the original family. We have on the record the partnership deed of December 6, 1918 by which the shares of the partners were adjusted after the retirement of Premchand and the admission of Manecklal and a deed of January 1, 1934 after the death of Krishnajee and retirement of Bhagwanjee. In the deed of 1918, it was stated that this firm carried on business in Calicut, having branches at Madras and Bombay and though Manecklal was included as a new partner, the firm was to carry on and continue the existing partnership business under the same name and style. By the deed of 1918, the earlier partnership deed of April 4, 1902 was revoked and the affairs of the firm were to be regulated by the new deed. It was, however, provided that the withdrawal or death of a partner would not cause a dissolution of the partnership. When the deed of 1934 was entered into, the deed of 1918 was not revoked but only amended; it was, however, provided that the principal deed of partnership—to wit of 1918—would remain in force in so far as it was not inconsistent.

Sometime in the year 1932 or thereabout, the firm had started the manufacture and sale of soaps under the name of "The Vegetable Soap Works" Proprietors Sait Nagjee Purushotham & Co. and perhaps the manufacture and sale of umbrellas in Calicut with branches at Madras and Bombay under the name and style, at Calicut and Madras, of "Sait Nagjee Purushotham & Co. Soap and Umbrella Merchants", and at Bombay of "Sha Nagjee Purushotham & Co.". It may be pointed out that the words "Sha" and "Sait" mean the same thing, and the names were not different.

In 1937, one Hemchand a stranger to the family was admitted as a working partner. On May 30, 1939, two

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deeds were executed. They are respectively marked C1 and C2. C1 was executed by Nagjee, Narayanjee, Maneck-lal and Hemchand. C2 was executed by Nagjee, Narayanjee and Manecklal. In C1 the preamble was as follows:

> "Whereas Partners 1 to 4 have been carrying on a business as Partners from the beginning of Samvat 1994 (Guzarathi Era) in the manufacture and sale of Soaps under the name of "The Vegetable Soap Works" Proprietors Sait Nagjee Purushotham & Co., and in the manufacture and sale of Umbrellas in Calicut with branches at Madras and Bombay under the name and style of Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants at Calicut and Madras and in the name of Sha Nagjee Purushotham & Co. at Bombay hereinafter called the Firm."

The terms relevant to our purpose were:

1. " The Firm shall continue to be as of old namely Sait Nagjee Purushotham & Co. Soap and Umbrella Merchants. The Firm shall continue to do business in the manufacture and sale of soaps under the name of the "Vegetable Soap Works" and in umbrellas under the name of "Sait Nagjee Purushotham & Co. Soap and Umbrella Merchants as aforesaid with Head Office at Calicut and branch at Madras under the same name and branch at Bombay under the name of "Sha Nagjee Purushotham & Co."

2. "The business of the Firm shall be carried on by Partner No. 4 Hemchand Virjee Sait according to the directions of Partners 1 to 3 and the said Hemchand Virjee Sait is to manage work and assist the business of the firm and he shall be called hereinafter the Working Partner;"

14. "The working Partner Hemchand Virjee Sait may draw on the First of each month the monthly sum of Rs. 400 only from out of the Firm's account on account of the share of his

profits for the current year, but if on taking the annual account it shall appear that the monthly sums drawn out by him exceed his share of profits he shall forthwith refund the excess."

15. "The Profits and Losses shall be divided and apportioned in the following proportion: Partner No. 1 shall have 3 annas 8 pies in the Rupee; Partner No. 2 shall have 3 annas 8 pies in the Rupee; Partner No. 3 shall have 3 annas 8 pies in the Rupee; and Partner No. 4 shall have 5 annas in the Rupee. On taking the accounts if it is found that the Firm has incurred a loss the aggregate of the monthly sums drawn by the Working Partner shall at once be refunded by the Working Partner to the Firm along with his share of the loss."

17. "It is hereby agreed that the working Partner should invest a sum of Rs. 15,000 as deposit in the Firm of Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn Merchants, Calicut and such money shall remain in deposit as long as he remains a Partner and such amount shall carry interest at such rates of interest as the Firm of Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn Merchants may agree from time to time."

In C2, the preamble was:

"..... .

Whereas the remaining partners (1) Nagjee Amersee Sait, (2) Narayanji Purushotham Sait and (3) Manecklal Purushotham Sait settled the claims in full of the partners who ceased to exist and agreed to carry on and continue and are continuing the existing partnership business under the name and style of "Sait Nagjee Purushotham & Co." Bankers, Piece-goods and Yarn Merchants, hereinafter called the "FIRM";"

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The relevant terms were:

"2. The Agreement of Partnership dated the 6th day of December 1918 is hereby revoked and the affairs of the Firm shall be regulated and governed by the Regulations agreed upon orally and reduced into writing in this Deed and the terms and conditions of the revoked deed shall not in future apply to the "Firm" except such as have been repeated in this Deed."

20. All the partners hereby agree that they in their individual capacity are and shall be Partners also along with Hemchand Veerji Sait in a Partnership business in Soaps and Umbrellas carried on in Calicut and Madras under the name and style of Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants and in Bombay under the name and style of Shah Nagjee Purushotham & Co. the terms and conditions whereof are embodied in an Agreement of Partnership dated 30-5-1939 signed by all the Partners."

Both deeds provided again that the partnerships would not be dissolved by the death or retirement of a partner.

Nagjee died in August 1943 and Hemchand retired on October 31, 1943. On October 30, 1943, a fresh deed of partnership was executed by Narayanjee and Manecklal who were continuing as partners from 1918 and two other members of the family namely Liladhar and Prabhulal and to the benefits of partnership Jayanand Nagjee who was a minor, was admitted. The preamble was as follows:

"..........

And whereas partner No. 4 Hemchand Veerjee Sait has decided to retire from the said partnership business as from 31-10-1943.....

And whereas the remaining partners are willing and have agreed to take as new partners Leeladhar Narayanjee Sait and Prabhulal Narayanjee Sait, sons of Narayanjee Purushotham Sait as from 31-10-1943.

And whereas the remaining partners along with the new partners now included in the Deed of Partnership, have agreed to carry on and continue as one single partnership business, the existing partnership businesses of "Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn merchants, "Sait Nagjee Purushotham & Co. Soap and Umbrella merchants".

And whereas it is thought advisable and prudent to reduce into writing the terms and conditions agreed upon orally by them the partners agree and have agreed to the following terms and conditions stipulated hereunder :—

The operative terms relevant to our purposes were the following:

"The Agreements of Partnerships dated 30th May 1939 entered into by (1) Nagjee Amersee Sait, (2) Narayanjee Purushotham Sait (3) Manecklal Purushotham Sait and (1) Nagjee Amersee Sait (2) Narayanji Purushotham Sait (3) Manecklal Purushotham Sait and (4) Hemchand Veerji Sait and registered as 98 and 97 in the Joint II Sub-Registrar's Office, Calicut respectively, are hereby revoked and the affairs of the firm shall be regulated and governed by the regulations agreed upon orally and reduced into writing in this deed of Partnership; and the terms and conditions of the revoked Deed shall not in future apply to the Firm except such as have been repeated in this Deed.

1. The firm name shall be "Sait Nagjee Purushotham & Co. Bankers, Piece-goods, Yarn, Soap and Umbrella merchants."

2. The partners of the firm are (1) Narayanjee Purushotham Sait, (2) Manecklal Purshotham Sait, (3) Jayanand Nagjee Sait (Minor) represented by guardian Manecklal Purushotham Sait (4) Leeladhar Narayanjee Sait and (5) Prabhulal Narayanjee Sait."

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The rest of the terms followed the same pattern as before.

In 1948, a limited liability company was formed under the name of Sait Nagjee Purushotham & Co., Ltd. and an agreement was made by which Sait Nagjee Purushotham & Co. represented by the then partners Manecklal, Liladhar, Jayanand and Prabhulal sold to the company the goodwill, assets etc. of the firm. The question in this case is whether the appellate firm was entitled to the benefits of s. 25(4) of the Income-tax Act, and if so, to what extent. The answer to the question depends on (a) whether the business on which tax was paid under the provisions of the Indian Income-tax Act, 1918 had discontinued at any time before 1948 or (b) whether there was a succession by another person for the person who was carrying on business on April 1, 1939. My learned brethren consider that there was a discontinuance in 1937-39 of the original business by reason of the division of the original business into two divisions and the admission of Hemchand as a partner in one of the divisions. The Department as respondent contends that there was a succession in 1939 and again in 1943, because in those years a different person succeeded to the person carrying on business on April 1, 1939. The contention of the Department has so far succeeded and I need not give the details of the decisions of the various Tribunals under the Indian Income-tax Act and the High Court, because my learned brother's judgment gives all such details. I shall therefore address myself to the questions (a) whether there was a succession in 1948 for the first time when the company succeeded the firm, to entitle the firm to the benefits of s. 25(4): (b) whether there was, prior to 1948, a discontinuance of the business on which tax was charged under the provisions of the Indian Income-tax Act and (c) whether there was, prior to 1948, succession by another person to the person who had paid the tax under the provisions of the Income-Tax Act, 1918 after April 1, 1939? If the answers to (b) and (c) be in the negative, (a) must be answered in the affirmative, but if the answer to either (b) or (c) be in the affirmative, (a) must be answered in the negative.

It is necessary at this stage to read s. 25 which deals with assessment in case of discontinued business. The first two

sub-sections deal with cases to which sub-s. 3 is not applicable. The first sub-section lays down how the business is to be assessed when it is discontinued in any year and sub-section 2 provides that any person discontinuing business must give a notice on pain of a penalty. We are not concerned with these sub-sections. Sub-s. (3) and sub-s. (4) in so far as it is relevant for our purpose, are as follows:

Sub-s. (3)

> "Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), is discontinued, *then unless there has been a succession by virtue of which the provisions of sub-section* (4) *have been rendered applicable* no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

Sub-section (4)

> "Where the person who was at the commencement of the Indian Income-tax(Amendment) Act, 1939 (VII of 1939), carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the

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first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference:

Provided....."

Sub-s. (4) was inserted by the Indian Income-tax (Amendment) Act, 1939 (VII of 1939), which also introduced the words underlined in sub-s. (3). Sub-s. (4) and the amendment to sub-s. (3) were to come into force from April 1, 1939 by virtue of notification No. 7 of the Central Government dated March 18, 1939. Under s. 3 of the Indian Income-tax Act, 1918, the subject of the tax was not the income of the previous year of assessment, but the income of the assessment year. By the Act of 1922, a change was introduced and the tax was payable on the income of the previous year in the following year which was the year of assessment. Any business which was in existence and earning profits in the year 1921 and continued in the year 1922 was required to pay tax on its profits of 1921, once under the Act of 1918 and again under the Act of 1922. In the 1922 Act, a provision was made to give relief to any business which had paid such double tax when it discontinued business. When the 1939 amendment was made, relief was given by sub-s. (4) to a person who had paid tax under the Act of 1918 when he was succeeded in his business by another person. It will, however, be noticed that the two sub-sections were mutually exclusive. If there was a succession, then, sub-s. (4) was applicable. Sub-s. (3) was only applicable when the business was discontinued. It will further be noticed that the term "succession" was not

to include a change in the constitution of a partnership. In this case, the claim to the benefit of sub-s. (4) was made by the company on the basis of a succession either on November 13, 1947 or on February 13, 1948. The Income-tax Officer held that a succession had taken place in 1943 when on the retirement of Hemchand, the two separate businesses formed under Ex. C1 and C2 were amalgamated. The Appellate Assistant Commissioner agreed with this conclusion. The Tribunal also held that the business in soap and umbrella was different from the business of banking, piece-goods and yarn, and the amalgamation of these two businesses in 1943 amounted to a succession by a newly constituted firm. The High Court held on reference that *the firm* constituted under the deed of 1918 was dissolved in 1939 and *the firms* constituted under the two deeds of 1939 were dissolved in 1943. The High Court, therefore, held that succession had taken place in 1939 and again in 1943 and the claim on the basis of the transfer to the limited liability company in 1948 was too late. In coming to the conclusion that the firm constituted under the deed of 1918 was *dissolved,* the High Court relied upon cl. 2 of the deed Ex. C2.

The two sub-sections which have been quoted apply differently, because in sub-s. (3) the emphasis is on the discontinuance *of the business* which had paid tax under the 1918 Act while the emphasis in sub-s. (4) is on succession *to a person* who, on April 1, 1939, was carrying on *any business* on which tax was at any time charged under the Act of 1918. The former regards the *continuity of the business* which had paid tax under the Act of 1918 and the latter the *continuance of the person* who, on April 1, 1939, was carrying on *the business which had paid such tax.* There cannot, therefore, be a case in which both the sub-sections apply at the same time, because the intention is obviously to keep them separate and when sub-s. (4) was added, sub-s. (3) was amended by the addition of the words "unless there has been a succession by virtue of which the provisions of sub-s. (4) have been rendered applicable." The main idea is the continuance of business unless there has been a succession. The question that arises is whether there was at any time a dissolution of the partnership and if so, whether it

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amounted to "discontinuance" of business for the application of sub-s. (3) or a succession by the formation of an entirely new firm for the application of sub-s. (4). For this purpose, I shall first discuss what is the position of a partnership under the ordinary law of partnership and under the Income-tax Act. At the outset, I must draw attention to a few fundamental facts. It was pointed out by this Court in *Charandas* v. *Haridas*(1) that those whose duty it is to apply the provisions of the Income-tax Act must bear in mind that what may be the resulting position under the law of partnership and/or the Hindu Law is not necessarily the resulting position under the Income-tax Act. This case is another example of the difference of approach to the same facts under the law of partnership and the Income-tax law.

In *Dulichand* v. *The Commissioner of Income-tax, Nagpur*(2), it was pointed out by this Court that commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, that is, as a body distinct from the members composing it, and such a separate existence has been recognised under the Scottish law. But under the English Common Law, a firm is not regarded as a separate entity from the members composing it. The Indian Partnership Act has accepted the English Common Law though mercantile usages have crept into business accountancy and the Civil Procedure Code allows a firm to sue or be sued in the firm's name provided the names of the partners are disclosed. Under the Income-tax Act, however, a firm is by s. 3 made a unit or assessment, but this personality does not make the firm a person in every sense of the word. It only makes it an assessable unit. A firm is not a "person" and cannot enter into partnership with an individual, with another firm or with Hindu Undivided family.

Section 26 recognises the existence of a firm as an assessable unit and provides for taxation in the event of changes in the constitution of firms. The first sub-section deals with a change in the constitution of the firm or where a firm has been newly constituted and the second sub-section where there is a succession to the person (which includes a firm)

(1) [1960] 39 I. T. R. 202.

(2) [1956] S. C. R. 154.

by another person. This sub-section deals with all cases of succession except those dealt with under sub-section (4) of s. 25 already set out. Section 25 provides for discontinuance of business. Discontinuance is thus not a mere change in the constitution of the firm nor even succession where, though the business changes hands, the business itself is carried on. It was recently pointed out by us in *Shivram Poddar* v. *Income-tax Officer, Calcutta and another*(1) thus:

> "Under the ordinary law governing partnerships, modification in the constitution of the firm in the absence of a special agreement to the contrary amounts to dissolution of the firm and reconsitution thereof, a firm at common law being a group of individuals who have agreed to share the profits of a business carried on by all or any of them acting for all, and supersession of the agreement brings about an end of the relation. But the Income-tax Act recognises a firm for purposes of assessment as a unit independent of the partners constituting it; it invests the firm with a personality which survives reconstitution. A firm discontinuing its business may be assessed in the manner provided by s. 25 (1) in the year of account in which it discontinues its business; it may also be assessed in the year of assessment. In either case it is the assessment of the income of the firm. Where the firm is dissolved, but the business is not discontinued, there being change in the constitution of the firm, assessment has to be made under s. 26(1), and if there be succession to the business, assessment has to be made under s. 26(2)."

Therefore when in sub-s. (4) the word 'person' is used, it is intended to include not only an individual but also a firm. This is also clear from the words "not being merely a change in the constitution of a partnership." Since the Income-tax Act assesses a partnership as a unit and such units

(1) Civil Appeal No. 455 of 1963 decided on Dec. 13, 1963.

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must, in the past, have been assessed to tax under the Act of 1918, sub-s. (4) allows a partnership to obtain the benefits of sub-s. (4) when there is a succession and a partnership does not loose this benefit if there has been a mere change in the constitution of the partnership without there being a succession. The business, if it continues, obtains a similar benefit when it is discontinued. In this way all cases of discontinuance of business are treated under the 3rd sub-section and all cases of succession under the fourth sub-section and all cases of mere change in the constitution of the firm are neither cases under the third nor under the fourth subsections.

In this case, we have, therefore, to find out firstly what is meant by discontinuance of a business. Next, we have to find out what is comprehended within the expression "a change in the constitution of a partnership". It is only if there was a discontinuance of the business before 1948 or a succession not amounting to a mere change in the constitution of the partnership between 1939 and 1948 that the appellants can be denied the benefit of s. 25. The expressions, that is to say, "discontinuance" and "succession not amounting to a change of the constitution of a firm" have received exposition in the past. It is hardly necessary to refer to the large number of cases in which the matter has been discussed, because the leading case on the subject of discontinuance is *Commissioner of Income-tax, Bombay* v. *P. E. Polson*(1) and on the subject of succession *Commissioner of Income-tax, West Bengal* v. *A. W. Figgies & Co. and others*(2). It will be sufficient to refer to these two cases.

To begin with, it must be remembered that the soap business commenced in the year 1932 and did not pay tax under the Act of 1918. Though there is nothing to show when the umbrella business commenced, it is almost certain that it did not pay tax under the Act of 1918. In any event the burden was on the assessee firm to prove this before claiming relief. These facts are fundamental, because, if the umbrella and soap business were never assessed to tax under the Act of 1918, they are out of the picture and in respect of these businesses, the assessee firm was not at all entit-

(1) [1945] I. T. R. 384. (2) [1954] S. C. R. 171.

led to relief. Section 25(3) and (4) do not apply where the business was not in existence before the Act of 1922 came into force. A clear authority for this proposition is to be found in the decision of the Bombay High Court in *Ambalal Himatlal* v. *Commissioner of Income-tax and Excess Profits Tax, Bombay North*(1). In that case, a Hindu Undivided family was carrying on three separate businesses, namely money lending, running a ginning factory and a share business. This family disrupted in 1943 and divided the business among its members, and claimed the benefit of s. 25(4) in respect of all the three businesses. It was found that only the money lending business had paid tax under the Indian Income-tax Act of 1918. It was held by Chagla C.J. and Tendolkar J. that the assessee was entitled to the benefit mentioned in s. 25(4) only in respect of the money lending business. Chief Justice Chagla observed at p. 287 thus:

> "But before us we have a clear and categorical finding that the three businesses of the assessee were distinct businesses and, therefore, it cannot be stated that the relief which was intended for the money-lending business which was carried on by the assessee and which was subjected to tax under the Act of 1918 should be extended to the business of running the ginning factory and the share business which were not in existence and which were not subjected to tax under the Act of 1918. The answer, therefore, to the question put to us will be that the assessee is entitled to the benefit mentioned in s. 25(4) only in respect of the money-lending business."

No finding in the present case is necessary, because the clear fact is that the soap business was not even in contemplation, much less in existence before 1922 and the same is true of the umbrella business also. The relief could therefore be claimed only in respect of the remaining businesses namely in piece-goods, yarn and banking which were started in 1902 and which admittedly continued without break till 1948. Since no claim in respect of the business of umbrellas and soaps could at all be entertained, any dealing with that part

(1) (1951) 20 I.T.R. 280.

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of the business by the assessee firm would not affect the questions in this case. Indeed, the agreement to separate the umbrella and soap business when Hemchand was admitted as a partner in 1939 was in keeping with the continuance of the original business as an entity by itself and emphasised its separate character. From the record it appears that the old and the new businesses were also separately assessed. It is only this one entity to which the provisions of s. 25 must be applied and in respect of which it must be considered whether there was a discontinuance or a succession at an earlier period.

I shall first examine the question of discontinuance. The Judicial Committee in *Polson's* case considered what was the meaning of the word "discontinuance". In that case, Polson who was carrying on business assigned it to a limited company on January 1, 1939. He had paid tax in respect of the business under the Act of 1918. In the assessment year 1939-40, he claimed that in view of the provisions of s. 25 (3) of the Act of 1922, as amended in 1939, his income from the business made during the year 1938 was not taxable. It was held that he was not entitled to the benefit of s. 25(3) as the business was not discontinued. The High Court of Bombay upheld the contention of Polson, but the Privy Council reversed the decision approving the decision of the Madras High Court in *Meyyappa* v. *Commissioner of Income-tax, Madras*(1). Lord Simonds pointed out that on January 1, 1939, Polson had ceased to be the owner of the business and therefore he was not carrying it on "at the commencement of" the amending Act. Since those words meant the date when the Act came into force on April 1, 1939, they could not be carried back to a date anterior to April 1, 1939 and on that date Polson ceased to be the owner of the business. As regards the words "discontinued" and "discontinuance" in s. 25, Lord Simonds pointed out that they had been the subject of numerous decisions and that it had been uniformly decided that the words did not cover a mere change of ownership but referred only to *complete cessation of the business.* Lord Simonds further observed "Their Lordships entertain no doubt of the correctness of these decisions, which appear to be in accord with the plain

(1) (1943) 11 I.T.R. 247; I.L.R. (1944) Mad. 166.

meaning of the section and to be in line with similar decisions upon the English Income Tax Acts." It would therefore follow that by discontinuance in sub-s. (3) is meant complete cessation of the business. This cannot be said to have taken place in the present case in respect of all the businesses and *a fortiori* in respect of the business in piece goods, yarn and banking. These businesses might have been managed by persons other than those who had paid the tax under the Act of 1918 a matter to be considered under the fourth sub-section but they were not discontinued for the application of sub-s. (3). The Judicial Committee was not required to consider the matter from the point of view of succession, because sub-s. (4) did not then exist. The Privy Council case has been approved of by this Court in *Figgies's* case to which I shall refer presently. From this, it follows that there was no discontinuance of the business at any time between 1921 and 1948 or even thereafter.

The next question to consider is whether there has been a succession or a mere change in the constitution of the assessee firm in the years 1939 and 1948. If we were to go by the original business, excluding the newly started business of manufacture of umbrella and soap, I must say at once that there has been no succession and this case falls squarely within the rule of this Court in *Figgies's* case. But even if one were to include the umbrella and soap business, I am of opinion that this case does not cease to be covered by *Figgies's* case. I shall examine both the aspects of the matters separately.

I shall pass on immediately to the facts of *Figgies's* case. In that case, a partnership was formed in 1918 between Figgies, Mathews and Notley. In 1924, Mathews retired. In 1926, one Squire was taken as partner. In 1932, Figgies retired. In 1939, one Hillman was taken as a partner. In 1943, Notley retired. In 1945, one Gilbert was taken as a partner. By that time, all the original partners had ceased to be partners and new ones had come in their place. At every change, new deeds of partnership were executed and the shares were readjusted. No doubt, the later deeds did not say that the earlier deeds were revoked but a glance at those deeds (which I have seen in the original brief of the

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case) shows that they could not have existed side by side. In any case, there was no incorporation of the earlier documents by reference and they must be taken to have been superseded. In this case there is a definite statement that the earlier documents were 'revoked'. But whether the word 'revoked' is used or not, the resulting position is the same. Some partners went out and others came in till the identity of the original partners was completely lost. The question was whether, in these circumstances, there was a succession within the meaning of sub-s. (4) of s. 25. This court observed:

> "The section does not regard a mere change in the personnel of the partners as amounting to succession and disregards such a change. It follows from the provisions of the section that a mere change in the constitution of the partnership does not necessarily bring into existence a new assessable unit or a distinct assessable entity and in such a case there is no devolution of the business as a whole."

This court pointed out that though under the law of Partnership a firm has no legal existence apart from its partners and it is merely a name to describe its partners compendiously, it is equally true that under that law also there is ordinarily no dissolution of the firm by the mere incoming or outgoing of partners. This Court also pointed out that the position is a little different under the Income-tax Act where a firm is charged as an assessable entity distinct from its partners who can also be assessed individually. It was for this reason that sub-s. (4) of s. 25 expressly mentioned that a case of succession was not to be found where there was a mere change in the constitution of the firm. In other words, though a firm was to be regarded as an entity for the purpose of the Income-tax Act, that entity was not to be taken to be disturbed by the coming in or going out of partners any more than that entity could be disturbed under the law of Partnership.

Applying this test to the present case, it is quite clear that the identity of the entity was never lost and there was never a succession till the year 1948. It must be remembered that this was initially a business of a family but not in the

sense in which a Hindu Joint Family is said to have a business. From the very start, certain members of the family alongwith a stranger (Bhagwanjee) carried on the business in piece-goods etc. In 1918, and in 1934 different deeds were executed but the basic deed was that of 1918. By that time, Bhagwanjee had retired and the business was in the hands of only the members of the family. Hemchand was then taken on in 1937 and in 1939, the original business was separated from the businesses newly started after 1922. Hemchand was given a share only in the newly started businesses to which s. 25 could not possibly apply. When Hemchand retired, those businesses were also taken over and merged with the original business. In other words, the original business continued till 1943 in the hands of Narayanjee and Manecklal who were partners as far back as 1918 and three younger members of the family. In 1948, Manecklal and those three other members of the family sold this business to the company. It cannot be said these changes were not covered by the expression "a change in the constitution of the firm" and were comprehended in the term 'succession'. No question of the dissolution of the firm Sait Nagjee Purushotham & Co. ever arose. It continued right through; even the newly started businesses were owned by it and though for a time the newly started businesses and the other business were kept distinct so that the stranger Hemchand could not get the benefit of partnership in the Head Firm, it cannot be said that the old firm had either discontinued or had been succeeded to by another person. Hemchand was merely taken on as a working partner. His rights in the firm were extremely slender; he had to make a deposit of Rs. 15,000 with the head firm and he was to get a remuneration of Rs. 400 p.m. which was to go up or down according to the profits. In other words, he was a mere employee though described as a working partner. As was pointed out by Chagla C.J. in *Commissioner of Income-tax, Bombay City* v. *Kolhia Hirdagarh Co. Ltd., Bombay*(1) and again in *Commissioner of Income-tax, Bombay City* v. *Sir Homi Mehta's Executors*(2), such documents must be interpreted not in a legalistic way

(1) (1949) 17 I.T.R. 545.

(2) (1955) 28 I.T.R. 928.

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but on their true business aspect. Says the learned Chief Justice in the former case:

> "It is open to us not merely to look at the documents themselves, but also to consider the surrounding circumstances so as to arrive at a conclusion as to what was the real nature of the transaction from the point of view of two businessmen who were carrying out this transaction. In all taxation matters more emphasis must be placed upon the business aspect of the transaction rather than on the purely legal and technical aspect;..."

Judged from this standpoint, the entry of Hemchand was not a dissolution of the firm of Sait Nagjee Purushotham and Co. He was brought in merely to do the business at one of the branches and to receive remuneration for doing the work. No doubt he was described as a working partner, but this term did not mean much. The very fact that he was not taken on in the original business also shows that the original business in respect of which alone the benefit of s. 25(3) and (4) can be claimed, continued uninterrupted. The changes in 1939 and 1943 therefore had no effect upon this claim.

Reliance was placed upon a decision of the Madras High Court in *S.N.A.S.A. Annamalai Chettiar* v. *Commissioner of Income-tax, Madras*(1) as to the meaning of the word "discontinuance". In that case, a Hindu Undivided family consisting of a father and son were carrying on money-lending business under different vilasams. On March 28, 1939, there was a family partition and some vilasams were allotted to the father and the rest to the son, and he was the assessee. In the assessment year 1939-40, the son claimed that there was a discontinuance of the business within the meaning of s. 25(3) of the Income-tax Act, 1922 and claimed the benefit of that sub-section on the ground that the business of the joint family was taxed under the Act of 1918 and he was not liable to pay tax for the period between April 13, 1938 and March 28, 1939. It was held by Satyanarayana Rao and Raghava Rao JJ. that as the joint family was split up, the

(1) (1951) 20 I.T.R.38.

business no longer continued in existence, but was terminated and there was a "discontinuance" within the meaning of s. 25(3) and the family was entitled to the benefit of that subsection. Satyanarayana Rao, J. held that as the unit had disintegrated into its component parts so as to annihilate the unity of the business, each part which was thus divided was not identical with the whole, even though all the parts taken together constituted the whole and that, when the unifying principle of that whole no longer existed, the parts gained their individuality and became separate and distinct. The learned Judge held that there was discontinuance. Looked at from the point of view of Hindu Law, all these results may be said to follow. But, looked at from the point of view of s. 25(3), the business could be said to have ceased. The Income-tax Act thinks, not in terms of joint family business, but in terms of business in a business sense, and it is the business which was taxed under the Act of 1918 which must cease to exist before the benefit of s. 25(3) can be obtained. It is possible that the decision might be justified on the ground that the benefit was being claimed by one of the members of the erstwhile family and not by the whole family, though I express no opinion upon it, but even so that would be a case of succession rather than of discontinuance. The Madras case cannot, however, be made applicable to the present facts, because, as pointed out already by me, there was no cessation of business in so far as the original business of piece-goods, yarn and banking was concerned. That business continued in the hands of the same person who had paid tax under the Act of 1918 though there were changes in the constitution of the partnership in the years that passed.

I may refer here to a case decided by the Rangoon High Court in *Commissioner of Income-tax Burma* v. *A.L.V.R.P. Firm*(1). In that case, a Hindu undivided family of Rangoon which consisted of two brothers carried on money-lending business under a single vilasam but with shops at several places including a shop at Rangoon. The shops at each of these places had separate capital and there were separate agents to manage the shops but there was a central system of accounts at one place showing the financial position of

(1) (1940) 8 I.T.R. 531.

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the family. In 1938-1939, the two brothers effected a partition and the Rangoon shop was thereafter conducted by the two brothers in partnership. On these facts, it was held by a Full Bench of the Rangoon High Court that there was no succession within the meaning of s. 26(2) of the Income-tax Act. It was pointed out that the family did not carry on separate businesses at each of the five places but had only a number of branches at these places of the same business and in order that there might be a succession, it was necessary that the person succeeding should have succeeded his predecessor in carrying on the business as a whole. The case was under s. 26(2) and slightly different considerations govern s. 25(4) which have induced the legislature to keep the two sections separate. While it is possible that there may be a succesion only to the business which had paid tax under the Act of 1918 for purposes of s. 25(4), as is the case here, a complete change of ownership of all the businesses is necessary for purposes of s. 26(2) before it can be said that there is succession. In both sections, change does not mean that every one who owned the former business should leave it and go away. The identity of the person who owned it before and the identity of the person who owned it later must, however, be distinct. In the present case this has not happened. All the facts have, perhaps, not come on the record with that clarity with which they should have, but as pointed out by Chagla C.J. in *Jesingbhai Ujamshi* v. *Commissioner of Income-tax, Bombay Moffusil*(1), there is nothing in law to preclude common partners constituting two entirely separate firms in respect of different businesses carried on by them for the purpose of the Indian Income-tax Act. Where they do this, it is mainly a question of fact whether there has been a succession to one of such partnership or not, whether for the purpose of s. 26 or for the purpose of s. 25(4). But it must be remembered that under s. 25(4), a mere change in the constitution of the partnership does not count and ss. 25(4) and 26(2) do not apply at the same time. I am not prepared to say that in this case in respect of the original business there was anything more than a mere change in the constitution of the partnership. The business of

(1) (1950) 18 I.T.R. 23.

umbrella and soap which never paid tax under the Act of 1918 could be dealt with by the partners as they liked without affecting the question of relief under s. 25 in respect of the head business.

In my judgment, these appeals must be allowed and the question answered in favour of the assessee firm but only in respect of the business in piece-goods, yarn and banking which alone had paid tax under the Income-tax Act of 1918. I would therefore allow the appeals with costs here and in the High Court.

ORDER BY COURT

In accordance with the opinion of the majority the appeals are dismissed with costs.

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(B. P. SINHA, C.J., K. SUBBA RAO, RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR JJ.)

Election—Appeal to High Court under s. 116-A—Whether in computing period of limitation for filing an appeal to High Court, time provided by s. 12 of Limitation Act for getting a copy of the order can be excluded—Whether s. 29(2)(a) applied to cases of appeal preferred under s. 116-A—Relationship between the two limbs of s. 29(2) of Limitation Act—Limitation Act, 1908 (9 of 1908), ss. 12, 29(2), First Schedule, Art, 156—Representation of the People Act, 1951 (43 of 1951), s. 116-A.

The appellant was elected to the House of the People from a constituency in the State of Madhya Pradesh. The respondents were the other contesting candidates. Respondent No. 1 filed an election petition challenging the election of the appellant. That election petition was dismissed by the Election Tribunal. Against the order of the Tribunal the first respondent preferred an appeal to the High Court under s. 116-A