

SMT. SAROJ AGGARWAL
v.
COMMISSIONER OF INCOME TAX, U.P.

SEPTEMBER 30, 1985

[V.D. TULZAPURKAR AND SABYASACHI MUKHARJI, JJ.]

Income Tax Act 1961 Sections 72, 73, 74 and 78.

Speculation business - Loss - Set off of partner's share -
Death of partner - Widow joining as partner in new partnership -
Set off of loss of deceased partner against profits earned by
widow - Whether permissible.

Interpretation of Deeds & Statutes

Partnership firm - Partner - Death of - Succession -
Whether could be inferred - Whether succession could be by
inheritance - Facts being viewed in natural perspective and
social milieu of country - Necessity for - Indicated.

The appellant is the assessee. Her husband was a partner in three partnership firms. A partnership deed dated 30th July 1957 was executed by him alongwith two other partners. He died on 24th July 1959 leaving behind the appellant. After his death another deed of partnership dated 12th August 1959 was executed by the assessee with the wife of the second partner in the first deed and also the first partner. This deed indicated the shares of the parties in the partnership firm and also recorded the death of the assessee's husband and that he had died leaving the assessee as his widow who had adopted the son of the second partner in the original partnership firm three days after his death.

The assessee's husband while he was a partner had an unabsorbed loss from the speculation business suffered by him as a partner in two firms as per the orders of the Income Tax Officer under Section 35 of the Income Tax Act 1922 for the assessment years 1958-59, 1959-60 and 1960-61. In the assessment year 1962-63 the appellant (assessee) was entitled to a share in the speculation profits made by the firms, and claimed that the speculation loss suffered by her husband in the earlier years should be set off against her speculation profits of the assessment year under appeal.

A The Income Tax Officer did not accept this contention and
his order was confirmed in appeal by the Appellate Assistant
Commissioner who held that there could be no succession or
inheritance in respect of membership of a firm, and that on the
death of a husband or a father the wife or the son might be
admitted into the partnership by the remaining partners not
B because they had inherited the right to join the firm but because
the remaining partners were agreeable to their joining the firm
and that on such death the wife or the son might inherit the
capital left by the deceased in the firm and the wife or the son
might have a right to take away such capital or to allow the same
to remain with the firm, but that they would not have the right
of inheritance to join the partnership on the basis of that
C capital and held that the assessee was therefore, not entitled to
claim set off of the speculation losses suffered by her husband.

From the decision of the Appellant Assistant Commissioner
both the assessee and the revenue went up in appeal before the
Tribunal, and the Tribunal held that reading the partnership deed
it was clear that the assessee and the minor adopted son were
D admitted to the various partnerships after the death of the
assessee's husband because they were his heirs and because of the
relationship between the assessee and the other partners, the
assessee had succeeded by inheritance to her husband in her
capacity as partner, and that it was not provided in the
partnership deed that after the death of any partner the firm
E would not be dissolved, and that the firm was not dissolved but
had continued, and allowed the assessee's appeal holding that the
assessee had succeeded to the deceased in her capacity as partner
by inheritance.

At the instance of the Revenue a reference under Section
F 256(2) of the Income Tax Act, 1961 was made to the High Court
which allowed the reference and held that the assessee was not
entitled to the set off of the speculation losses brought forward
from earlier years against the speculation profits of the asses-
sment year under appeal and that the right to carry forward and
set off losses in a business or profession is available under
G Sections 72 to 74 of the Income Tax Act, 1961 only to the person
who has suffered the loss and under Section 78(2) to the person
who succeeded in such capacity by inheritance and not otherwise.

In the appeal to this Court, on the question whether the
assessee became a partner and as such succeeded by inheritance,
H that is did the wife get her right by inheritance or by entering

into a fresh deed of partnership with the existing partners or other partners.

Allowing the appeal,

HELD: 1. "Set Off" or "carry forward and set off" are the subject matters of Section 70 to 80 of Chapter VI of the Income Tax Act 1961. Right to carry forward is available only to the persons who had suffered losses. Sub-s. (2) of section 78 stipulates that where any person carrying on any business or profession has been succeeded in such capacity by another person otherwise than by way of inheritance, nothing in Chapter VI shall entitle any person other than the person incurring the loss to have it carried forward and set off against his income. An analysis of the section indicates that mere succession will not permit or bestow the right to carry forward losses in speculation. It is only where succession is by inheritance that the right is given to that person to set off the loss against the profits. [218 E-G]

2. Though there was no formal partnership deed for four days, there was no vacuum in the succession. The wife, the assessee of the deceased partner, could not get out of the obligation to share in the partnership and she had indeed the right to share in the partnership. Similarly the other partners, did not have any right to deny her that right. [223H - 224A]

3. Succession does not remain in vacuum. Succession must be by inheritance. But it is possible in a particular case without any express provision either in the deed, or in writing to infer from the conduct of the parties that there was succession, and if such a view is possible in spite of the absence of express provision, such an inference could be and should be drawn. [223F]

4. Facts should be viewed in natural perspective, having regard to the compulsion of the circumstances of a case. Where it is possible to draw two inferences from the facts and where there is no evidence of any dishonest or improper motive on the part of the assessee, it would be just and equitable to draw such inference in such a manner that would lead to equity and justice. Too hypertechnical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered. [223 E]

5. Court should, whenever possible, unless prevented by the express language of any section or compelling circumstances of

- A any particular case, make a benevolent and justice oriented inference. Facts must be viewed in the social milieu of a country. [223 G]

- B In the instant case, the business carried on by the partnership firm was a family concern of the partners. The partners were brothers of the deceased. They were living in the same house. After the death of the assessee's husband the new partnership firm was constituted with the assessee's wife and the adopted son with necessary adjustment in the shares of the parties due to the adoption by her as well as the partners — his brothers. The new partnership deed was executed within four days after the death of the assessee's husband, and after the adoption of a son of his brother. There was no evidence that any business was carried on in these few days which, according to the social and religious customs of the country, were the days of mourning in a joint Hindu family and no business possibly could have been carried on these days. The new firm was also a joint family concern. There was no term in the old partnership deed nor was there any term in the deed dated 27th July, 1959 that the heirs of the deceased partners would be taken as partners in the new firm. It is possible to infer such a term from the conduct of the parties and the constitution of the firm. It is possible by the circumstantial evidence to establish or to infer that there was a binding obligation quasi legal that the other partners take the deceased partner's wife or heirs as a partner or partners and there was a right of the deceased partner's wife or heirs to join the partnership firm. [222H - 223D]
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- D
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Commissioner of Income Tax Bombay City v. Bai Maniben, 38 I.T.R. 80., relied on.

- F Gokul Krishna Dass & Ors. v. Shashimukhi Das, (1912) 16 C.W.N. 299., Ram Kumar v. Kishore Lal & Ors. I.L.R. (1946) All. 309., Jupudi Kesava Rao v. Commissioner of Income tax Madras, 3 I.T.R. 339, Executors of the Estate of J.K. Dubash v. Commissioner of Income Tax Bombay City, 19 I.T.R. 182., Commissioner of Income-Tax, West Bengal v. A.W. Figgies and Company and others, 24 I.T.R. 405., Commissioner of Income-Tax, Bombay City-I v. Shamsunder Juthalal 112 I.T.R. 927., referred to.
- G

Commissioner of Income Tax, Gujarat v. Madhukant M. Mehta, 132 I.T.R. 159., distinguished.

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CIVIL APPELLATE JURISDICTION : CIVIL APPEAL NO. 542 (NT) OF 1974.

From the Judgment and Order dated 21.5.1971 of the Allahabad High Court in Income Tax Reference No. 44 of 1965.

S.C. Manchanda, Mrs. Urmila Kapoor and Mrs. Amrita Kashyap for the Appellant.

V.S. Desai, and Miss A. Subhashini for the Respondent.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. This appeal by special leave is from the judgment and order of the Allahabad High Court dated 21st May, 1971 in Income Tax Reference No. 44 of 1965.

This reference arose in respect of the assessment year 1962-63. One Prem Shankar was a partner in three partnership firms namely (1) M/s Hari Shankar Gauri Shankar, (2) M/s Hari Shankar Gauri Shankar Rice and Dal Mill and (3) Sri Ram Mahadeo Mills. The said Prem Shankar died on or about 24th July, 1959 leaving his widow Smt. Saroj Agarwal who is the assessee in the present appeal. After the death of Prem Shankar, Smt. Saroj Agarwal, the assessee herein, joined the partnership in which her husband was a partner before his death. It is necessary, in view of the contention raised in this appeal, to refer to the partnership deed between the deceased husband of the assessee and his partners. The deed was dated 30th July 1957. It described the three partners - one being L. Hari Shankar and the others being L. Gauri Shankar and the third being L. Prem Shankar, the deceased husband of the assessee.

On behalf of the assessee it was stressed before us as was apparent from the deed that they all had the same address as described in the said partnership deed. This was pointed out to stress the point that they were members of a joint Hindu family. The recital of the said deed stated that they had been carrying on business since 9th July, 1956 and the partnership deed was executed on 9th July, 1956 and thereafter one Baijnath who was also a partner in the deed of July, 1956 had retired and the parties mentioned in the deed had decided and agreed to carry on business in partnership and the terms were reduced to writing. Clause 6 stated, inter alia, that the partnership was a partnership at will and the Indian Partnership Act, 1932 applied

- A to it. Clause 7 stated that shares of the parties in the profits (or losses, if any) should be as under:-

First party	-/5/3	in a rupee
Second party	-/5/3	in a rupee
Third party	-/5/6	in a rupee

B

The other clauses were the usual partnership clauses not very material for the present controversy.

- The next deed of partnership was dated 12th August, 1959 which was executed by the present assessee and the wife of L. Gauri Shankar, the second partner in the original deed and also
- C Shri Hari Shankar, the first partner. This deed was executed on 12th August 1959 while Prem Shankar had died on 24th July, 1959. All the executants to this deed were described as residents of the same old address as in the first mentioned deed indicating thereby that they came from a joint Hindu family residing at the same place. It recorded the death of Prem Shankar and he died leaving the present assessee as widow who had adopted one Sudhir
- D Kumar Agarwal s/o L. Gauri Shankar, the second partner in the original partnership firm as a son on 27th July, 1959 i.e. three days after the death of Prem Shankar. The present assessee had joined the partnership and Gauri Shankar retired from the partnership and his wife Smt. Shakuntala had joined the partnership 'in his place' and his minor son Ravi Agarwal under
- E the Guardianship of his father and Sudhir Kumar Agarwal under the Guardianship of his adoptive mother, the present assessee, had been admitted to the benefits of partnership with such rights and liabilities as were provided under Section 30 of the Indian Partnership Act. The deed further recited that due to the above changes it had become necessary for fresh deed of partnership to
- F be executed and set out the terms. Clause (2) and (7), inter alia, provided:

"(2) That the profits and losses of the said firm shall be shared by the partners and the minors since 27.7.59 as under:-

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	Profits	Loss
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(1) L. Hari Shankar Agarwal	-/5/4	-/5/4
(2) Smt. Shakuntala Agarwal	-/2/8	-/5/4
(3) Smt. Saroj Agarwal	-/2/8	-/5/4
(4) Ravi Agarwal	-/2/8	x

H

(5) Sudhir Kumar Agarwal -/2/8 x A

(7) That partnership shall not dissolve on the death of a partner. The legal representative of the deceased shall come in his place as partner."

This deed clearly stipulated that the firm would continue to be run under the above name and style and/or in such other names at Kanpur or at such other places as the parties might from time to time determine, and would not be dissolved on the death of a partner. It altered the proportionate share of profits and loss which became necessary due to admission to the benefits of partnership of some minor partners. There is another subsequent deed of partnership, which it is not material for our present purpose, to be referred to. B C

For the assessment year 1962-63, the Income Tax Officer while making the assessment of the assessee included under Section 64 of the Income Tax Act, 1961, in her total incomes the share income as well as the interest earned by the minor adopted son from the partnerships to the benefits of which the minor son was admitted. Prem Shankar, since deceased, while he was a partner had an unabsorbed loss of Rs. 25,914 from speculation suffered as a partner of the firm M/s Hari Shankar Gauri Shankar Rice & Dal Mills. It so appears from the order of the Appellate Assistant Commissioner. The Tribunal, in the statement for the present appeal, has however, stated that this statement by the Appellate Assistant Commissioner was not strictly correct and as per the orders of the Income Tax Officer passed under Section 35 of the Income Tax Act, 1922 for the assessment years 1958-59, 1959-60 and 1960-61, the speculation losses were from the firms of M/s Hari Shankar Gauri Shankar Rice & Dal Mills as well as from Hari Shankar Gauri Shankar. For the assessment year under appeal, the assessee was entitled to a share in the speculation profits made by the firm and it was contended on behalf of the assessee that the speculation losses of the earlier years should be allowed to be set off against the speculation profits of the assessment year under appeal. This was not permitted. There was an appeal from this order to the Appellate Assistant Commissioner. D E F G

The second contention, which is relevant for the present purpose, raised before the Appellate Assistant Commissioner on behalf of the assessee was that the assessee was entitled to have the speculation losses of the earlier years set off against her H

A share of speculation profits from the firm for the assessment year under appeal as per the provisions of Section 78(2) of the Income Tax Act, 1961 (hereinafter referred to as the Act). Section 78 of the Act is as follows:-

B "78. Carry forward and set off of losses in case of change in constitution of firm or on succession. - (1) Where a change has occurred in the constitution of a firm, nothing in this Chapter shall entitle the firm to have carried forward and set off so much of the loss proportionate to the share of a retired or deceased partner computed in accordance with section C 67 as exceeds his share of profits, if any, of the previous year in the firm, or entitle any partner to the benefit of any portion of the said loss which is not apportionable to him under section 67.

D (2) Where any person carrying on any business or profession has been succeeded in such capacity by another person otherwise than by inheritance, nothing in this Chapter shall entitle any person other than the person incurring the loss to have it carried forward and set off against his income."

E A similar claim was also made in respect of Sudhir Kumar who had a share of speculation profits from the firms. The contention of the assessee was that the assessee had succeeded her husband as a partner and her son had also succeeded his father as he was admitted to the benefits of partnership on his father's death and, therefore, the share of speculation losses of Prem Shankar should have been set off against the assessee's and minor son's share of speculation profits in the assessment year under appeal. F In the alternative it was contended that in any case as the minor's share of speculation profits had been considered as the assessee's share and since the assessee had succeeded her deceased husband, the set off was allowable against the minor's share profits too. The Appellate Assistant Commissioner while G dealing with this contention of the assessee held that there could be no succession or inheritance in respect of membership of a firm and that on the death of a husband or a father, the wife or the son might be admitted into the partnership by the remaining partners not because they had inherited right to join the firm but because the remaining partners were agreeable to their joining the firm and that on such death the wife or the son H might inherit the capital left by the deceased in the firm and

the wife or the son might have a right to take away such capital or to allow the same to remain in the firm but that they would not have the right of inheritance to join the partnership on the basis of that capital.

The Appellate Assistant Commissioner rejected the contentions of the assessee so far as this contention with which this appeal is concerned and held that the assessee was not entitled to set off the speculation losses suffered by her husband against her speculation profits of the assessment year under appeal.

From the decision of the Appellate Assistant Commissioner, both the assessee and the revenue went up in appeal before the Tribunal.

Regarding the contention involved in this appeal, the attention of the Tribunal was drawn to the decision of the Bombay High Court in the case of **Commissioner of Income Tax Bombay City v. Bai Maniben**, 38 I.T.R. 80. It was urged that the said decision covered the situation in the instant case. It was contended on the other hand on behalf of the revenue with reference to the said partnership deed and other relevant documents that the facts were otherwise. It was urged specifically that the new partnership deed of the firm of M/s Hari Shankar Gauri Shankar Rice & Dal Mills was executed after the death of Prem Shankar which is dated 12th August, 1959. In the preamble it was stated that the assessee had joined the partnership which meant according to the revenue, that she had joined the partnership voluntarily and had not come in place of her husband by way of inheritance. It was also pointed out that the shares were also altered. It was urged on behalf of the revenue that the facts of this case were essentially different from those that were before the Bombay High Court in the above mentioned case.

The Tribunal accepted the assessee's contention and held that reading the partnership deed it was clear that the assessee and the minor adopted son were admitted to the various partnerships after the death of Prem Shankar because they were the heirs of Prem Shankar and because of the relationship which subsisted between the assessee and the other partners, the assessee had succeeded by inheritance to her husband in her capacity as partner. The Tribunal noted and it was not provided in the partnership deed that after the death of any partner the firm would not be dissolved but it appears that actually after the death of the partner, the firm was not dissolved but had

A continued. It appears not only was that the factual position but it was intended to be so because of the natural inference that follows from the relationship of the parties. The Tribunal allowed the assessee's appeal.

B From the said decision of the Tribunal, there was a reference before the Allahabad High Court under Section 256(2) of the Act, at the instance of the revenue, referring the following question for the opinion of the High Court:-

C "Whether, on the facts and in the circumstances of this case, the assessee was entitled to the set-off of speculation losses brought forward from earlier years against the speculation profits of the assessment year under appeal?"

D The High Court set out the facts which counsel for the assessee sought to challenge on the ground that most of the facts were not those as found by the Tribunal. We do not find any material or any significant difference between the facts found by the Tribunal and the facts narrated by the High Court so far as the material question involved in this case. That is the reason, the facts as found in statement of the case have been set out hereinbefore in such extensive manner, even though these do not appear in that manner in the judgment of the High Court.

E "Set off" or "carry forward and set off" are the subject matters of Section 70 to 80 of Chapter VI of the Act. Right to carry forward is available only to the persons who had suffered losses. Sub-section (1) of Section 78 is not material for our present purpose. Sub-section (2) of Section 78 as noticed before stipulates that where any person carrying on any business or profession has been succeeded in such capacity by another person otherwise than by inheritance, nothing in this Chapter i.e. the Chapter containing provisions for carry forward and set off of losses in the case of change in the constitution of the firm or on succession, shall entitle any person other than the person incurring the loss to have it carried forward and set off against his income. It is evident on an analysis of the section that mere succession will not permit or bestow the right to carry forward losses in speculation. It is only where succession is by **inheritance** (emphasis supplied) that the right is given to that person to set off the loss against the profits.

H Therefore the sole and moot question involved in this

appeal, is whether the assessee became a partner and as such succeeded by inheritance i.e. did the wife get her right by inheritance or by entering into a fresh deed of partnership with the existing partners or other partners? As noted by the Tribunal as well as by the High Court that more or less identical question fell for consideration by the Bombay High Court in the case of **Commissioner of Income Tax, Bombay City v. Bai Maniben** (supra). In that case H and his nephew J were partners with equal shares in a partnership which conducted business in cloth. H died on 14th August, 1953 leaving him only his widow, the assessee. On 15th August 1953, a partnership deed was executed between J and the assessee and under that partnership agreement the business was continued. In the assessment year 1955-56 the assessee claimed to set off against her share of the profits her share of the loss of the year 1954-55 as well as the share of the loss incurred prior to 14th August, 1953, when her husband H was alive. The Tribunal, on the facts, came to the conclusion that the assessee had succeeded by inheritance to her husband H in his capacity as a partner, having regard to the quantum of the interest that H had, the extent of the capital he had brought into the partnership, the relation which subsisted between H & J, and the conduct of J and the assessee. The Tribunal gave the benefit of Section 24(2) of the Indian Income Tax Act, 1922 which is in the material respect with reference to the controversy in the present case is similar to Section 78(2) of the Act and allowed the set off claimed by her. The Bombay High Court on a reference held that the assessee had succeeded by inheritance to H's capacity as partner. It further held that the Tribunal's conclusion was one on a question of fact and having regard to the evidence, the court would not be justified in interfering with that conclusion. The assessee was, therefore, entitled to set off against her share of the profits the losses suffered by the assessee's husband in 1953-54 and 1954-55. The Bombay High Court noted that the sole question decided in that case was whether Bai Maniben had by inheritance succeeded to her husband, Hiralal in the firm. The High Court noted the significant facts noted by the Tribunal.

There are significant similarities and there are significant dissimilarities also with the facts of the present case and the facts of **Bai Maniben**, upon which reliance was placed respectively by the assessee as well as the revenue. It was contended on behalf of the assessee that this decision is a stare decisis which has stood the test of time, was never doubted until the instant judgment of the Allahabad High Court under appeal and should be made applicable in the present case.

A According to Section 42 of the Partnership Act, subject to contract between the partners a firm is dissolved inter alia, by the death of a partner. There was no express contract to the contrary in this case, it was urged. On the other hand it was urged on behalf of the assessee that contract under Section 42 of the Partnership Act need not be in writing and it might be
B inferred from the conduct of the parties. If it was found that on the death of a partner, the remaining partners and heirs of the deceased acted in any manner which indicated that the old firm was not dissolved and they had continued to carry on the business, it was possible to infer that the original partners had entered into an agreement that on the death of one of them, the firm would not be dissolved. Reliance was placed on the Calcutta
C High Court in the case of **Gokul, Krishna Das & Ors. v. Shashimukhi Das**, (1912) 16 C.W.N. 299, where such inference was drawn from the conduct of the parties. Such was also the case in the Bench decision of the Allahabad High Court in the case of **Ram Kumar v. Kishore Lal & Ors.** 1.L.R. (1946) All. 309. There was no express contract, but inference to continue the firm was inferred from the fact that the firm was continued.

D The Full Bench of Madras High Court in the case of **Jupudi Kesava Rao v. Commissioner of Income Tax, Madras**, 3 I.T.R. 339, held that the word "succession" as used in Section 26(2) of the Indian Income Tax Act, 1922 meant a transfer of ownership and the person who succeeded another must have by such succession become
E the owner of the business which his predecessor was carrying on and which he, after the succession, carried on in such capacity. Consequently, it was held that there was no "succession" within the meaning of Section 26(2) of the Indian Income Tax Act, 1922 where the business of a joint Hindu family devolved on a co-parcener by survivorship under Hindu Law. In that case A and
F his son B constituted a Hindu undivided family. A died after filing a return but before assessment and the family business devolved on B by survivorship. Held that B did not 'succeed' to the business within the meaning of Section 26(2) of the Income Tax Act and B was not liable to be assessed as successor under Section 26(2), what happened was that a co-owner became full
G owner by survivorship.

In the case of **Executors of the Estate of J.K. Dubash v. Commissioner of Income Tax, Bombay City**, 19 I.T.R. 182, this Court had to consider the provisions of Section 25(4) and Section 26(2) of the Indian Income Tax Act, 1922. In view of the facts
H involved in that case it is not material to discuss in detail that decision.

In the case of **Commissioner of Income Tax, West Bengal v. A.W. Figgies and Company and others**, 24 I.T.R. 405, the provisions of Section 25(4) of the Indian Income Tax Act, 1922 came for consideration by this Court and it was held that mere change in the constitution of a partnership did not necessarily being into existence a new assessable unit or a distinct assessable entity and in such a case there was no devolution of the business as a whole. The assessee a partnership firm carrying on a business consisted of three partners when it paid tax under the Indian Income Tax Act, 1918. There were several changes in the constitution of the firm since then resulting in changes in the shares of the partners. In 1947 the partnership was converted into a limited company and the assessee claimed relief under Section 25(4) of the Indian Income Tax Act, 1922. The Income Tax Officer disallowed the claim on the ground that the partners of the firm in 1939 being different from the partners of the firm in 1947, no relief could be given to the assessee. The Appellate Tribunal and the High Court allowed the assessee's claim on the ground that in spite of the mere changes in the constitution of the firm, the business of the firm as originally constituted continued right from its inception till the time it was succeeded by the limited company and that it was the same all through, carrying on the same business at the same place and there was no cesser of that business or any change in the unit. It was held that the Tribunal and the High Court were right and the assessee was entitled to the relief under Section 25(4).

The Division bench of the Bombay High Court in the case of **Commissioner of Income Tax, Bombay City-I v. Shamsunder Juthalal**, 112 I.T.R. 927, had occasion to consider this question. There the firm consisted of three partners, J, V, and M. Clause 6 of the partnership deed provided that "the death of any partner shall not dissolve the partnership. On the death of any partner, unless the surviving partners otherwise decide the share of the deceased partner shall be continued up to the end of the accounting year in which he dies after which it shall cease and determine." On the death of J on 22nd October, 1955, the major heirs of J were taken in as partners and one of the heirs who was a minor was admitted to the benefits of the partnership. J's share was apportioned equally among the heirs. The new partnership agreement stated that the parties to the new agreement agreed to continue with effect from 23rd October, 1955, the business together in partnership. On the question whether J's sons could carry forward and set off the share of loss of J in the firm, it was held that clause 6 of the original partnership agreement

A contemplated that the death of a partner would not automatically dissolve the partnership and that the surviving partners could decide to continue the firm in such manner as they liked. The facts showed that the surviving partners had exercised their option to continue the partnership by taking the heirs of the deceased partners by way of inheritance. In such a case, Section 24(2)(iii)(e) of the Indian Income Tax Act, 1922, applied and the heirs of J could set off the losses suffered by their father for the assessment year 1958-59. The decision of the Bombay High Court in **C.I.T. v. Bai Maniben** was followed. It was urged on behalf of the revenue that in that case the partnership deed provided in specific terms that the death of a partner would not dissolve the partnership and option was given to the partners to continue the partnership on the death of one of the partners. It was urged that such is not the position in the instant case. But in our opinion that does not make any significant difference. In the instant case the conduct of the parties in the absence of any specific clause preventing such a construction would not prevent the court from drawing such an inference if the facts so warrant.

D In the case of **Commissioner of Income Tax, Gujarat v. Madhukant M. Mehta**, 132 I.T.R. 159, the question involved was different. The decision under appeal was referred to by the Gujarat High Court at page 182 of the report. It was observed that the said decision was not reconcilable with the decision of the Bombay High Court in **C.I.T. v. Bai Maniben** and it was further commented that **Bai Mani** case was sought to be distinguished in the decision of the Allahabad High Court under appeal but P.D. Desai, J. who delivered the judgment of the court expressed the opinion that the court was not satisfied that the distinction made any difference in that case.

F The main point which was stressed on behalf of the revenue was did the wife, the assessee, had a right to join by inheritance or could she refuse to join or were the other partners were obliged to take her as partner or had option not to take her. Succession does not remain in vacuum. After the death of Prem Shankar, did the assessee become a partner as a matter of course or acquired any right to succeed or was it further necessary that she should enter into fresh agreement? But in this case from the facts narrated before, it was evident that the business carried on by the partnership firm was a family concern of the partners. The partners were brothers of the deceased Prem Shankar. They were living in the same house. The new partnership firm was constituted with Prem Shankar's wife and the adopted son

with necessary adjustment in the shares of the parties due to the adoption by her as well as the partners - his brothers. The new partnership deed was executed within four days of the death of Prem Shankar after the adoption of a son of his brother. There was no evidence that any business was carried on in these few days which, according to the social and religious customs of the country, were the days of mourning in a joint Hindu family and no business possibly could have been carried on these days. The new firm was also a joint family concern. Though there was no term in the old partnership deed nor was there any term in the deed dated 27th July, 1959 unlike the deed which has been referred hereinbefore that the heirs of the deceased partners would be taken as partners in the new firm, it was possible to infer such a term from the conduct of the parties and the constitution of the firm. It is possible by the circumstantial evidence to establish or to infer that there was a binding obligation quasi legal in this case for the other partners to take the deceased partner's wife or heirs as a partner or partners and there was a right of the deceased partner's wife or heirs to join the partnership firm. If that is the position then in such a case the facts of this case stand on the same footing as the facts in C.I.T. v. Bai Mani. Facts should be viewed in natural perspective, having regard to the compulsion of the circumstances of a case. Where it is possible to draw two inferences from the facts and where there is no evidence of any dishonest or improper motive on the part of the assessee, it would be just and equitable to draw such inference in such a manner that would lead to equity and justice. Too hypertechnical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered. It is true that there must be succession by inheritance. But it is possible in a particular case without any express provision either in the deed or in writing to infer from the conduct of the parties that there was succession, and if such a view is possible in spite of the absence of express provision, in our opinion such an inference could be and should be drawn. Courts should, whenever possible, unless prevented by the express language of any section or compelling circumstances of any particular case, make a benevolent and justice oriented inference. Facts must be viewed in the social milieu of a country.

In the facts and circumstances of this case, we therefore hold that though there was no formal deed for four days, there was no vacuum in the succession. The wife, the assessee, of the deceased partner Prem Shankar could not get out of the obligation

- A to share in the partnership and she had indeed the right to share in the partnership. Similarly the other partners did not have any right to deny her that right.

- B In the circumstances we would answer the question in the affirmative and in favour of the assessee. The appeal is accordingly allowed. In the facts and circumstances of the case, parties will pay and bear their own costs.

N.V.K.

Appeal allowed