Thacker and Co. Vs. Commissioner of Income-tax, Gujarat

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Court : Gujarat

Decided On : Sep-16-1965

Reported in : [1966]61ITR540(Guj)

Judge : J.M. Shelat, C.J. and; B.P. Banerjee, J.

Acts : Income Tax Act, 1922 - Sections 26A

Appeal No. : Income-tax Reference No. 15 of 1964

Appellant : Thacker and Co.

Respondent : Commissioner of Income-tax, Gujarat

Advocate for Def. : J.M. Thakore, Adv.

Advocate for Pet/Ap. : K.H. Kaji, Adv.

Judgement :

Shelat, C.J.

1. Between November 14, 1957, and March 27, 1960, one Jayantilal Thacker and Pravinchandra Thacker carried on business in the firm name and style of Thacker & Company. The business of the firm was in mill-gin stores and spare parts. On March 27, 1960, Pravinchandra Thacker retired from the said business. On March 28, 1960, Jayantilal entered into an agreement with his brother, Kantilal, to carry on the same business in partnership in the name and style of Thacker & Company, and the two brothers agreed to admit their minor brother, Dilipkumar, to the benefits of that partnership. On August 1, 1960, Jayantilal, Kantilal and the said minor, Dilipkumar, through his guardian, Lalji Thacker, entered into an agreement acknowledging thereby that a partition of the said former business of Thacker & Company had taken place on March 26, 1960, and that the amount standing in the account of Jayantilal in that business was distributed in three accounts, namely, Jayantilal Rs. 11,919, Kantilal Rs. 11,919 and Dilipkumar Rs. 23,839. The firm of Thacker & Company as constituted under the deed of partnership dated March 28, 1960, was registered under the Partnership Act with the Registrar of Firms on October 3, 1960. The sales tax authorities were also informed on April 5, 1960, about the formation of the firm and accounts in the name of the new firm were opened with the Bank of India and the State Bank of India.

2. The deed of partnership dated March 28, 1960, recited that the parties had been carrying on business as partners since November 14, 1957, that the said Pravinchandra Thacker had retired from the said business on March 27, 1960, in

accordance with the deed of dissolution dated March 27, 1960, and that the remaining partner, i.e., Jayantilal, had taken over from March 28, 1960, all rights, interest, title, assets and liabilities of the said business and desired to form a new partnership between himself and his brother, Kantilal Thacker. It also recited that is was agreed that the parties, i.e., Jayantilal and Kantilal, shall be the partners in the new firm and that they were to enter into an agreement upon the terms and conditions therein contained. Clause 1 of the deed provided that the first and the second party, i.e., Jayantilal and Kantilal, agreed to admit their minor brother, Dilipkumar, to the benefits of partnership. Clause 3 provided that the partnership was to be at will, and clause 5 set out the shares of profits as follows :

'The partners shall be entitled to the net profits of the business in the following shares : 1. Shri Jayantilal Lalji Thacker ..... 25%2. Shri Kantilal Lalji Thacker ..... 25%3. Shri Dilipkumar Lalji Thacker 50%

3. For the assessment year 1961-62, of which the relevant previous year was Samvat year 2016 (November 2, 1959, to 20th October, 1960), the assessee-firm applied for registration under section 26A of the Income-tax Act, 1922. The Income-tax Officer rejected the application on three grounds, (1) that though the agreement purported to have been executed on March 28, 1960, the stamp-paper on which it was executed was actually purchased on March 31, 1960; (2) that the minor, Dilipkumar, was a full-fledged partner as he was made liable for losses also; and (3) that the said agreement dated August 1, 1960, was a family arrangement dividing the capital between the three brothers and that such division took place on August 6, 1960, and not on March 27, 1960, as recited therein. When the matter went before the Appellate Assistant Commissioner, he confirmed the order of the Income-tax Officer, though on different grounds. The Appellate Assistant Commissioner did not attach any importance with regard to the discrepancy of the dates as regards the execution and the purchase of the stamp-paper. He, however, held that the minor, Dilipkumar, was a full-fledged partner under the deed and that being so, the partnership agreement was void and could not bring into existence a genuine firm. He also agreed with the Income-tax Officer that the agreement dated August 1, 1960, was only a family arrangement and in that view did not admit that document to go into evidence. The assessee-firm carried the matter before the Tribunal in appeal where it was contended on its behalf that the said Dilipkumar was only admitted to the benefits of the partnership and, therefore, was not liable to share personally the losses, that only the two adult partners were liable to pay the losses and that their shares in those losses were equal. It was also contended that there was no ambiguity in the deed of partnership as regards the shares of the partners in profits and losses and that it was possible to know form the instrument itself that the shares in the losses of the major partners were equal. It was further contended that the firm which was constituted under the said deed of partnership was a genuine firm and that whatever may have been the object of Jayantilal in dividing and distributing the said capital, Jayantilal was entitled to dispose it of in the manner he liked. The contention before the Tribunal thus was that the assessee-firm was entitled to registration and the income-tax authorities were in error in refusing its application. In its order, the Tribunal held that the partnership was a genuine partnership between the two major partners, Jayantilal and Kantilal, and that the minor, Dilipkumar, was only admitted to the benefits of partnership. The Tribunal, however, held that the real difficulty in the way of registration of the firm was that there was no specification of the shares of the partners in the event of the firm suffering a loss. The Tribunal rejected the contention urged on behalf of the assessee-firm that the shares in the losses of the partners were

specifically provided for in the instrument of partnership, the Tribunal observing that such shares must be specified in the instrument itself and must be capable of ascertainment without the aid of the provisions of the Partnership Act or any inference which one would have to draw from some of the other terms of the partnership. The Tribunal further held that if the contention on behalf of the assessee were to be accepted, it would have to resort, in order to ascertain the shares of the partners in losses, to the provisions of the Partnership Act or to a complicated process of inference from the terms of clause 5 of the partnership deed, and that it would have first to hold that because the minor was only admitted to the benefits of partnership, he could not be personally held liable for any part of the losses of the firm but that even if the Tribunal were to do that, there would still be a further difficulty in the sense that clause 5 of the instrument merely provided for the sharing of losses by the major partners to the extent of fifty per cent. Only and that, therefore, there was in any event no provision in respect of the remaining fifty per cent. of such losses. The Tribunal concluded that :

'When there is no specific provision about liability of partners, whether major or minor, there is vagueness in the partnership deed which is fatal to its claim for registration. In order to qualify for registration the shares in the losses as well as in the profits must be specified in the partnership deed itself. They must be ascertainable without any discussion or debate. They must leap to the eye so that he who runs may read them. Any uncertainty or fogginess as is evident in this case must clearly disqualify the firm for registration.'

4. Aggrieved by this decision, the assessee-firm applied for reference under section 66(1) of the Act and, on that application, the following question has been referred to us :

'Whether, on the facts and in the circumstances of the case, the firm constituted under the partnership deed dated 28th March, 1960, was entitled to registration under section 26A for the assessment year 1961-62 ?'

5. The Tribunal having held that the assessee-firm which was constituted under the said deed of partnership dated March 28, 1960, was genuine and further that the minor, Dilipkumar, was admitted only to the benefits of partnership with the consent of the two major partners, Jayantilal and Kantilal, the only question for determination is whether the assessee-firm was entitled to registration under section 26A. The point which has been canvassed before us is whether it was necessary that the deed of partnership should specifically set out not only the shares of the parties in profits but also the losses of the firm. The question is solely dependent upon the true construction of section 26A and the Rules made under the Act.

6. Section 26A provides that :

'(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed, and it shall be dealt with by the Income-tax Officer in

such manner as may be prescribed.'

7. Rule 2 of the Income-tax Rules, 1922, made under the Act provides that any firm constituted under an instrument of partnership specifying the individual shares of the partners may, under the provisions of section 26A of the Indian Income-tax Act, 1922, register with the Income-tax Officer, the particulars contained in the said instrument on application made in this behalf. Such application shall be signed by all the partners (not being minors) personally and shall, for any year of assessment up to and including the assessment for the year ending on the 31st day of March, 1953, be made before the 28th February, 1963, and for any year of assessment subsequent thereto, be made '(b) where the firm is registered under the Indian Partnership Act, 1932, or where the deed of partnership is registered under the Indian Registration Act, 1908, before the end of the previous year of the firm.' Rule 3 provides that the application referred to in rule 2 shall be made in the form annexed to this rule and shall be accompanied by the original instrument of partnership under which the firm is constituted, together with a copy thereof; provided that if the Income-tax Officer is satisfied that for some sufficient reason the original instrument cannot be conveniently produced, he may accept a copy of it certified in writing by all the partners (not being minors), etc. Form I annexed to this rule is the prescribed form in which the application has to be made. Paragraph 2 of that form requires that the applicant must state that the original or a certified copy of the instrument of partnership under which the firm was constituted, specifying the individual shares of the partners together with a copy or a duplicate copy, as the case may be, has been enclosed, and they have further to state that the prescribed particulars are given in the Schedule annexed to the form. Paragraph 3 of the form requires the applicants to state that 'we do hereby certify that the profits (or loss, if any) of the previous year or the period up to the date of dissolution, as the case may be, will be or were divided or credited as shown in Section B of the Schedule and that the information given above and in the attached Schedule is correct.' The Schedule attached to the form requires certain particulars to be filled in as set out therein, and column 6, which is the relevant column for our purposes, thereof requires the following particulars, namely, 'share in the balance of profits (or loss) (annas and pies in the rupee).'

8. The question is whether the words 'the individual shares of the partners' in sub-section (1) of section 26A mean the individual shares of the partners both in profits and losses and, if so, whether the shares in both profits and losses have to be specified in the instrument of partnership order that an applicant firm becomes entitled to registration. Before we proceed to consider this question, we may first refer to certain other provisions of the Act. Section 2(6B) lays down that the expressions 'firm', 'partner' and 'partnership' shall have the same meanings respectively as in the Indian Partnership Act, 1932, except that the expression 'partner' in the Act includes any person who being a minor has been admitted to the benefits of partnership. Section 4 of the Partnership Act defines 'partnership' as a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm' and the name under which their business on is called 'Firm name.' Under section 4 of the Partnership Act, therefore, an agreement to share the profits of a business is an essential element in bringing about a partnership and forming a firm. Section 13 of that Act, inter alia, provides that, subject to a contract between the partners, the partners are entitled to share equally in the profits earned and shall contribute equally to the losses sustained by the firm. Therefore, if there is no agreement

between the parties as to the respective shares in the profits and losses of the firm, the rule laid down in section 13 is that the profits as also the losses are to be shared equally. Where the profits are not shared equally and there is no agreement as to how the losses are to be shared, the rule is that the losses should be shared in the same proportion as the profits of the firm. Section 30 of the Partnership Act deals with minors admitted to the benefits of partnership. Under this section and by reason of section 11 of the Contract Act, a minor cannot become a partner, though with the consent of the partners he may be admitted to the benefits of partnership. If that is done, such a minor would be entitled to his agreed share, but he would not be personally liable for the debts and liabilities of the firm, though his share in the properties and the profits of the firm would be liable for the same.

9. The contention of Mr. Kaji on behalf of the assessee-firm was that a partnership to be valid in law requires under section 4 of the Partnership Act an agreement to share profits. If that agreement does not provide for the individual shares of the partners in the losses, the overriding rule of law is provided in section 13 of that Act, and in that event, subject to a contract between the partners, the principle is that the losses should be shared either equally where the agreement does not also provide for the individual shares in profits, and where it does, in proportion to their respective shares in the profits. Mr. Kaji contended that the legislature had deliberately used the expression 'the individual shares of the partners' in section 26A of the Income-tax Act and not the individual shares in profits and losses, and that was done because the legislature had already provided in section 2(6B) of the Act that the expressions 'firm', 'partner' and 'partnership' should have the same meanings respectively as in the Partnership Act. Since the essential ingredient under section 4 of the Partnership Act is an agreement to share the profits, the only meaning which can be attached to the words 'the individual shares of the partners' in section 26A would be shares in the profits. He argued that if those words were to be construed as meaning shares in profits and losses, that would be tantamount to adding an additional condition to an instrument of partnership not required by section 4 of the Partnership Act. According to him, such a construction was not warranted in view of section 4 of the Partnership Act and section 2(6B) of the Income-tax Act, and it would mean inserting a further condition and thereby rewriting section 26A.

10. In R. C. Mitter & Sons v. Commissioner of Income-tax, the Supreme Court had occasion to interpret section 26A and, while doing so, the court held that in order that a firm may be entitled to registration under section 26A of the Income-tax Act, the following essential conditions must be satisfied, viz., (i) the firm should be constituted under an instrument of partnership specifying the individual shares of the partners; (ii) an application on behalf of and signed by all the partners and containing all the particulars as set out in the Rules must be made; (iii) the application should be made before the assessment of the firm under section 23 for that particular year; (iv) the profit or loss, if any, of the business relating to the accounting year should have been divided or credited, as the case may be, in accordance with the terms of the instrument; and (v) the partnership must be genuine and must actually have existed in conformity with the terms and conditions of the instrument of partnership in the accounting year. At page 198 of the report, the Supreme Court observed that for a true and proper construction of the relevant provisions of the Act relating to registration of firms, sections 26, 26A and 28, and the rules set out in the decision had to be read together and, when so read, it was reasonably clear that those five essential conditions must be fulfilled in order that a firm could be said to be entitled to registration. Though a specific question did not arise before the Supreme Court in

this decision as regards the interpretation of the words 'the individual shares of the partners' as used in section 26A, the Supreme Court, while considering the provisions of that section, did state that one of the essential conditions was that the profit or loss, if any, of the business relating to the previous year, that is to say, the relevant accounting year, should have been divided or credited, as the case may be, in accordance with the terms of the instrument. That would prima facie mean that the terms and conditions of the deed of partnership submitted along with the application for registration must show the individual shares of the partners both in profits and losses, for otherwise if there was a loss in the relevant previous year such a loss cannot be shown as having been divided in accordance with the terms and conditions of the instrument of partnership. Mr. Kaji, however, argued that the question which arises in the present reference did not specifically arise before the Supreme Court in R. C. Mitter & Sons' case and that, therefore, that decision cannot be regarded as a pronouncement on the interpretation of the words 'the individual shares of the partners' contained in section 26A. Nevertheless, it cannot be gainsaid that the observation cited above was made by the Supreme Court while it was analysing the provisions of section 26A and stating while doing so the five essential conditions the fulfillment of which is necessary to enable an applicant-firm to obtain registration under that section. Mr. Kaji, however, drew our attention to a decision of the High Court of Maharashtra in In re Parekh Wadilal Jiwanbhai in which that High Court was concerned with a deed of partnership in which clauses 3 and 10 provided as follows :

'3. The capital of the partnership shall be Rs. 2,40,000 (rupees two lakhs forty thousand), divided into 15 shares of Rs. 16,000 each. The partners hereby agree that the shares allotted to different partners will be equal, i.e., each partner will get five shares....

10. After meeting all expenses, interest and other charges, the resulting net profit or loss shall be ascertained and shall be divided amongst all partners.'

11. The Income-tax Officer granted registration on the basis of this deed of partnership for the assessment years 1951-52 and 1952-53, but he refused to renew the registration for the assessment year 1953-54 on the ground that there was no clause in the deed specifying the individual shares of the partners as required by section 26A. One of the contentions raised before the High Court on behalf of the assessee-firm was that what sub-section (1) of section 26A required was that the individual shares of the partners should be specified but that the sub-section did not require that the individual shares of the partners in profits should be specified. That contention however, was repelled and the learned judges observed that it was true that section 26A(1) did not in express terms provide that the instrument of partnership should specify the individual shares of the partners in profits, but used the expression 'the individual shares of the partners' and, therefore, the meaning of those words had to be ascertained. The learned judges stated that if the firm were to be registered, the income of the firm was not taxed in the hands of the firm, but was allocated among its partners according to their shares and was taxed in their hands in accordance with their shares in the income of the firm. If the firm, on the other hand, were not to be registered, the entire income of the firm was taxed in the hands of the firm and that when the income of the firm was taxed in its hands, the rate at which it was taxed was high while, on the other hand, if the income of the firm was taxed in the hands of the partners according to their shares in its income, the rate of tax was lower. Therefore, they observed, the registration of the firm was normally connected with the assessment of the income of the firm, and, consequently, the

expression 'shares of the partners' occurring in sub-section (1) of section 26A would only relate to the share of the partners in the profits of the firm and not in anything else. They also relied upon section 2(6B) of the Act and section 4 of the Partnership Act, and concluded that it was clear that one of the essential elements to constitute a partnership was an agreement amongst the partners to share the profits of the business and, therefore, the share of a partner in the partnership meant his share in the profits of the business of the partnership. Mr. Kaji urged that this decision was a clear authority in support of his contention that the expression 'the individual shares of the partners' occurring in section 26A(1) at best meant the individual shares of the partners in the profits and that, therefore, it would not be necessary to specify the individual shares of the partners in losses as well in an instrument of the partnership for the purpose of complying with the conditions of section 26A. In our view, Mr. Kaji is not entitled to use this decision as an authority in support of his contention, for the question that has been raised before us was never canvassed before the High Court of Maharashtra. The interpretation which the High Court gave to the expression 'the individual shares of the partners' occurring in section 26A was in answer to the contention raised on behalf of the assessee firm there, namely, that it was not even necessary to specify in the deed of partnership the respective shares of the partners in profits. At best, therefore, this decision would be an authority for the limited question only that the words 'individual shares' in section 26A do not mean the respective shares of the partners in the assets and properties of the partnership, but mean the individual shares in the profits from the business of that firm and such shares must be specifically stated in the instrument of partnership. This decision in any event cannot be used to mean that individual shares of partners in losses have not to be specifically stated in the deed of partnership. Mr. Kaji then relied upon two decisions of the Supreme Court in Kylasa Sarabhaiah v. Commissioner of Income-tax, and Commissioner of Income-tax v. Shah Mohandas Sadhuram. But in these two decisions also, the real principle laid down was that an instruments of partnership must be reasonably construed while considering the question whether an applicant-firm was entitled to registration under section 26A. The principle, however, postulates that there is something in the instrument itself which must be read along with the rest of the provisions of the instrument. The two decisions, however, had not to deal with the question as to the correct interpretation which should be given to the words 'individual shares' occurring in section 26A and, therefore, they would not assist us. The result, therefore, is that there is no direct authority on the question and, therefore, we must construe the words in question unaided by any authority and in the context in which those words are used and the object with which section 26A was enacted.

12. As against the contentions of Mr. Kaji, the learned Advocate-General argued that sub-section (2) of section 26A requires that an application is registration has to contain such particulars and the application has to be in such form as may be prescribed. Both the particulars necessary for such an application as also the form for it have been prescribed by the Rules as already pointed out. The contention was that Form A, which is the prescribed form of application, requires that particulars as set out in the Schedule thereto are to be furnished before a firm can be entitled to registration. The learned Advocate-General relied on column 6 in that Schedule, and argued that since that column requires shares in the net balance of profits (or loss), the words 'the individual shares of the partners' must mean shares in profits and losses and that such shares require to be specified in the deed of partnership. We have carefully looked at all the columns in that Schedule and have come to the conclusion that on a reasonable reading of that Form, the prticulars which are

required to be set out in that Schedule are not the particulars to be specified in the deed of partnership but over and above those which are required to be specified in such deed. Columns 3 and 4 of that Schedule clearly show that this contention cannot be sustained and also make it clear that those particulars would not be found, nor can be required to be specified in the deed of partnership.

13. But the more substantial contention of the learned Advocate-General which requires consideration is that if section 26A were to be read in the light of the object for which it was enacted, it would be clear that the words 'shares of the partners' must mean the shares in the profits and losses and which shares have to be specified in the instrument of partnership. We may observe in this connection that there is nothing in the Income-tax Act which prevents a firm carrying on its business without being registered under section 26A. Section 26A was enacted for giving to the firms a certain benefit in assessment and that benefit is the lower rate of assessment than that which would apply to the whole of the income of the firm if the firm were to be charged as a unit of assessment. The object of section 26A was that if such a firm wishes to have this benefit, it must get itself registered under this section. If it gets registered, no tax, apart from the income-tax at special law rates after 1956, would be levied on the firm as a unit of assessment, but instead, each of the partners would be taxed under section 23(5) in respect of his share in the firm's profits. If the firm, therefore, wants to derive this benefit, it has to comply with the conditions; there are two conditions, namely, (1) that though a firm can be taxed under the Partnership Act by an oral agreement, section 26A requires that it should be under a written instrument, and (2) that that instrument must specify the individual shares of the partners. From this, it is fairly clear that the contention urged at one stage by Mr. Kaji that we should not read section 26A, as laying down any further condition over and above those required by section 4 of the Partniship Act becomes at once untenable. Section 26A, as we have already seen, does lay down conditions over and above those required under the Partnership Act and that section, therefore, has to be read in that light. Sub-section (5) of section 23 provides that when the assessee is a firm and the total income of the firm has been assessed under sub-section (1) or sub-section (3) or sub-section (4), as the case may be, in the case of a registered firm the income-tax payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined. The first proviso to clause (a) of sub-section (5) of section 13 provides that if such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions of section 24. Sub-section (6) of section 23 provides that whenever the Income-tax Officer makes a determination in accordance with the provisions of sub-section (5), he shall notify to the firm by an order in writing the amount of the total income on which the determination has been based and the apportionment thereof between the several partners. Though a firm is an assessee under section 2(2) whether it is registered or not under section 26A, in the case of a registered firm the registration affects the assessment proceedings in the matter of the determination of the tax payable as also the demand for the tax so found due. It is thus clear from the provisions of section 23(5) that in the case of a registered firm, after its profits or loss have been ascertained, it is apportioned amongst its various partners according to their respective shares and their respective shares in the profits are added to their total income. The result, therefore, is that in the case of a registered firm, the rate of assessment would be lower than the one applicable to an unregistered firm which is assessed as a unit and the rate would be higher in such a case than that applicable to

the total income of a partner. The first proviso to clause (a) of section 23(5) enacts that where such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions of section 24. Such a right given to a partner of a registered firm by the first proviso to clause (a) is denied to the partners of an unregistered firm. This is a benefit conferred on registered firms, and if this benefit is desired by a firm, it has to comply with the conditions laid down in section 26A. Since under section 23(5) profits of a firm are to be apportioned and allocated according to the respective shares of the partners in profits and added to the total income of each of the partners and assessed, the share in profits of each of the partners has to be specified in the instrument of partnership, so that the Income-tax Officer before granting the certificate of registration would at once know what their respective share are. This is also necessary in order to give give effect to the provisions of section 23(5) as also the first proviso to clause (a) thereof. Therefore, the Income-tax Officer must also know from the instrument of partnership itself before he issued such certificate what the shares of the partners in losses are, for under the first proviso to clause (a) of section 23(5), a partner of a registered firm, as already stated, is entitled to set off his share of loss against his other income and is further entitled to carry forward that loss and set it off in accordance with the provisions of section 24. If section 26A were read in the context of the object with which it was enacted and in the context of section 23(5), section 24 and section 16(1)(b) of the Act, it is clear that the condition of specifying the individual shares of the partners was enacted with a view to enable the Income-tax Officer to give effect to the provisions of section 23(5) and in doing so to ascertain what are the individual shares of the partners and to what extent they are entitled to profits or liable to contribute to the losses in the business of the firm. Unless the Income-tax Officer can find this out from the instrument itself, how is he to allocated the shares in profits and add such share to the total income of a partner, and similarly, how would he be able to allow a set-off in a particular year against such loss Since these sections deal with the share both in the profits and losses and both are to be dealt with in computing the total income of a partner, the legislature deliberately used the words 'the individual shares in profits' would have been obviously inadequate. The words 'the individual shares in the profits and losses' would have been superfluous, because both the losses and profits are dealt with in section 23(5). That being so, we must uphold the contention of the learned Advocate-General that the words 'the individual shares of the partners' in section 26A(1) must necessarily mean shares in profits and losses and therefore both have to be specifically stated in the instrument in order to comply with the conditions laid down by the legislature in that section to obtain registration.

14. Mr. Kaji's next contention was that even if this construction were to be right, the instrument of partnership must be read as a whole and reasonably, and he argued that, if so read, it would mean that since the two adult major partners had each 25 per cent. share in profits, they would have to share the losses equally. The infirmity in this argument, however, is obvious. In order to apply the rule of equal share in losses by each partner, one has to have resort to either section 13 or section 48 of the Partnership Act. The latter cannot apply in any event and one cannot resort to section 13, for resorting to section 13 must necessarily mean that the instrument is silent about the individual shares of the partners in losses and if the instrument is silent, clearly it does not comply with the condition in section 26A. That was why the learned judges of the Maharashtra High Court in In re Parekh Wadilal Jiwanbhai, held that in order to comply with section 26A, one cannot have resort to section 13 of the Partnership Act and call in aid that section. In this view, we are of the opinion that the

relevant deed of partnership must specify not only the individual shares of the partners in profits but also in losses.

15. Consequently, our answer to the question referred to us is in the negative. The petitioner will pay to the respondent the costs of this reference.

16. Question answered in the negative.