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be construed with reference to clauses (*a*) and (*b*), and when these three clauses are read together it is plain that the intention of the Legislature was by these clauses to exempt from attachment such properties, and only such properties, as are necessary to enable judgment-debtors to live and carry on their ordinary trade or occupation. As pointed out in *Muthuvenkatarama Reddiar* v. *Official Receiver of South Arcot* (1), it would be manifestly absurd that, if for his own personal convenience an agriculturist lives in a mansion in a town, that mansion should be exempt from attachment.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Das.

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May 4.

C.T.A.C.T. NACHIAPPA CHETTYAR

v.

THE SECRETARY OF STATE FOR INDIA AND ANOTHER.*

Registration of a firm by Income-tax Officer—Income-tax Act (XI of 1922), ss. 2 (14), 55—S. 59 and rules 2, 3 and 6—Application for registration—Signature by agent—Registration contrary to statutory rules—Concurrent remedies—Application by a partner under s. 33 for cancellation of registration—Refusal of remedy by Income-tax authority—Declaratory suit—Income-tax Act, s. 67—Proceedings of Income-tax authority void—Jurisdiction.

The registration of a firm under s. 2 (*14*) of the Income-tax Act in the manner prescribed under the Act is a condition precedent to the right of the Income-tax Officer to refrain from levying super-tax upon the firm under s. 55. Under rules 2, 3 and 6, made pursuant to s. 59 of the Act, an application for registration must be signed by at least one of the partners of the firm. An application signed by an agent of the partners does not comply with the statutory rules, and the registration of the firm by the Income-tax Officer on such an application would be *ultra vires* and void.

M. A. Kureshi v. *Argus Footwear, Limited*, I.L.R. 9 Ran. 323—*followed.*

(1) (1925) I.L.R. 49 Mad. 227.

* Civil Second Appeal No. 120 of 1932 from the judgment of the District Court of Tharrawaddy in Civil Appeal No. 16 of 1932.

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Fricker v. *Van Grutten*, (1886), 2 Ch. D. 649; *Harendra Kumar Roy* v. *The Secretary of State for India*, I.L.R. 55 Cal. 1355; *Japan Cotton Trading Company, Limited* v. *Jajodia Cotton Mills*, I.L.R. 54 Cal. 345; *Reg.* v. *Justices of Kent*, 8 Q.B. 309; *Wilson* v. *Wallani*, 5 Ex. D. 155; *In re Whitley Partners, Limited*, 32 Ch.D. 337—*referred to.*

A suit will lie at the instance of a person claiming to be a partner of a firm for a declaration that the registration of his firm under s. 2 (*14*) of the Income-tax Act was *ultra vires* and void, notwithstanding any concurrent remedy in that behalf under the Income-tax Act that may be open to him.

O'Flaherty v. *M'Dowell*, 6 H.L.C. 142—*followed.*

Further, the suit is not barred by the provisions of s. 67 of the Act.

Where the registration of a firm is *ultra vires* and void a declaratory suit will lie, notwithstanding that the applicant pursued his remedy under s. 33 of the Income-tax Act, and failed therein.

Trustees for the Development of the City of Rangoon v. *G. S. Behara & Sons*, I.L.R. 10 Ran. 412—*followed.*

Balkishen Das v. *Simpson*, 25 I.A. 151; *Harendra Kumar Roy* v. *The Secretary of State for India*, I.L.R. 55 Cal. 1355; *Krishna Chandra* v. *Pabna Dhana Bhandar Company*, 36 C.W.N. 277; *Musammat Saraswati* v. *Surajnarayan*, 35 C.W.N. 444; *Sheikh Mahomed Jan* v. *Munshi Ganga Bishun Singh*, 38 I.A. 80—*referred to.*

Basu for the appellant. Under Rule 2 of the Income-tax Rules an application for registration of a firm must be made by the partners or any one of them on or before the date on which a return is due; and s. 2 (*14*) of the Act requires the production of an instrument of partnership specifying the individual shares of the partners in the profits. In 1927-28 when the application for registration was made in this case one of the partners had died; but his name was shown in the application for registration as a partner, and the original deed of partnership was produced in evidence. The person who presented the application for registration purported to act as the agent of the deceased partner without any authority from him. The registration therefore cannot be valid. A registration officer can obtain jurisdiction to register a document only if it is presented by a duly authorized person acting for a firm which is in existence.

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See *Dottie Karan* v. *Lachmi Prasad* (1); *Mujib-Un-Nissa* v. *Abdur Rahim* (2); *Krishna Aiyar* v. *Commissioner of Income-tax, Madras* (3).

The appellant, who is the son of the deceased partner, was held liable to super-tax in Madras on the ground that he was in receipt of a share of the profits accruing to the Burma firm, the Madras High Court declining to go behind the finding of registration arrived at in Burma. The appellant now seeks a declaration that the registration is not binding on him.

[PAGE, C.J. The appellant was never registered as a partner. It is his father whose name was so registered.]

The deceased partner was regarded by the Income-tax authorities as acting on behalf of the joint family, whereas the partnership deed shows that he entered into the partnership in his personal capacity.

A suit for a declaration of this nature against the Secretary of State is not barred by s. 67 of the Act, because it is not a suit to set aside or modify an assessment. The assessment made on the appellant is *ultra vires*, and where an assessment is *ultra vires* no bar can operate to prevent the Civil Courts from entertaining the suit.

Haji Rehemtulla Haji Tarmahomed v. *Secretary of State for India* (4); *Dyson* v. *Attorney-General* (5).

Vexatious suits for declarations can be punished with costs, as was pointed out in *Dyson* v. *Attorney-General* (6).

(1) 58 I.A. 58.
(2) I.L.R. 27 All. 233.
(3) I.L.R. 52 Mad. 367.
(4) 27 Bom. L.R. 1507.
(5) (1912) 1 Ch. 158.
(6) (1911) 1 K.B. 410, 423.

The lower Court dismissed the suit on the ground that where a special remedy is open to the plaintiff the general remedy is barred. That rule cannot apply to a case where a proceeding from its inception is *ultra vires*. *Balkishen Das* v. *Simpson* (1); *Mian Jan* v. *Abdul* (2); *Balvant Ramchandra* v. *Secretary of State* (3); *Ganesh Mahadev* v. *Secretary of State for India* (4); also *Smeeton* v. *Attorney-General* (5).

Sheobaran Singh v. *Kulsun-Un-Nissa* (6), on which the lower Courts relied can have no application to the facts of the present case.

A. Eggar (Government Advocate) for the Crown. The appellant does not deny that he received a share in the profits of the firm after his father's death. It is also borne out by the evidence that the income on which the super-tax was levied was always treated as the income of the joint family of which the appellant is a member. The Income-tax authorities have proceeded on the assumption that the son succeeded to the father in the joint family business.

For the purposes of the Income-tax Act a joint Hindu family and a "firm" are entities. They are "persons" as defined by the General Clauses Act; and a joint Hindu family can enter into partnership with another person as a separate entity.

See *In the matter of Ha'roon Mahomed* (7); *Moti Ram* v. *Muhammad Abdul Jalil* (8); *Mewa Ram* v. *Ram Gopal* (9).

[PAGE, C.J. What is meant by a "joint family firm"? There can be no survivorship in a firm.]

(1) 25 I.A. 151.
(2) I.L.R. 27 All. 572.
(3) I.L.R. 29 Bom. 480.
(4) I.L.R. 43 Bom. 221.
(5) (1920) 1 Ch. 85.
(6) I.L.R. 49 All. 367, 375.
(7) I.L.R. 14 Bom. 189, 194.
(8) I.L.R. 46 All. 509.
(9) I.L.R. 48 All. 395.

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The law relating to partnership need not be applied when the status of a joint Hindu family is considered. It may be regulated by its own special laws.

If the appellant is successful in obtaining the declaration he asks for the result would be that the assessment made on him will have to be set aside or modified. Then the bar under s. 67 will operate ; and the Court ought not to entertain this appeal.

If the assessment is *ultra vires* the jurisdiction of the Courts cannot be barred ; but where the assessment is *intra vires* but the authority concerned has proceeded on a mistaken notion of the law, the bar should operate. The Income-tax authorities in this case had ample evidence before them to come to the conclusion that the agent when he applied for registration was acting on behalf of the joint family, and if the registration is to be held invalid it can only be so on the ground that the registration officer has misunderstood the law.

Forbes v. *Secretary of State for India* (1) ; *Singha* v. *Secretary of State* (2).

Iyer for the second respondent. There is no cause of action against the second respondent, and he ought not to have been made a party to the suit.

However, the appellant has not exhausted all the remedies given to him by the Income-tax Act. An assessee is defined by the Act as a person by whom income-tax is payable, and in *Commissioner of Income-tax, Madras* v. *M.A.R.A.R. Arunachalam Chettiar* (3), it was held that each partner

(1) I.L.R. 42 Cal. 151. (2) I.L.R. 5 Ran. 825.
(3) I.L.R. 47 Mad. 660.

in a firm should be regarded as an assessee. Reading s. 63 of the Act with Order 5, Rule 13 of the Civil Procedure Code service of notice on the agent is service of notice on the principal. The appellant could, therefore, have proceeded on appeal, under s. 30 of the Income-tax Act to the Commissioner of Income-tax. Having failed to do so he cannot now move the Court for a declaration. Under s. 30, the effluxion of time fixed for an appeal will be condoned if sufficient reasons are given for the delay.

PAGE, C.J.—This appeal must be allowed. The appellant's income for the year 1926-27 was assessed for super-tax by the Income-tax Officer, Circle 1, Karaikudi, Madras, and a sum of Rs. 7,278-6-0 was claimed as super-tax on the basis of a total income of Rs. 1,58,227, made up as follows ;

	Rs.	Rs.
Taxable income already assessed to income-tax	...	25,659
Share of income from the Sitkwin firm	... 35,368	
Share of income from the Minhla firm	... 97,200	
		1,32,568
Total income	...	1,58,227

The appellant appealed to the Assistant Commissioner against the assessment. The assessment had been made *pro tanto* on the ground that the appellant was a partner in the firm of C.T.A.M., Minhla, which had been registered under s. 2 (*14*) of the Income-tax Act by the Income-tax Officer, Tharrawaddy. Upon the footing that the registration of the firm was valid and in accordance with law income-tax was assessed upon the profits and gains

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of the firm, but the Income-tax authorities in Burma did not levy super-tax upon the income of the firm by reason of the provisions of s. 55 of the Act.

Now, it was only upon the supposition that the C.T.A.M. Firm, Minhla, was a firm duly registered pursuant to the provisions of s. 2 (*14*) of the Act, that the Income-tax Officer was entitled or purported to refrain from levying super-tax upon the firm under s. 55; registration in the manner prescribed under the Act being a condition precedent to the right of the Income-tax Officer to proceed under s. 55.

S. 2 (*14*) runs as follows:

"(14) 'Registered firm' means a firm constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner;"

Under Rule 2, made pursuant to s. 59 of the Act,

"Any firm constituted under an instrument of partnership specifying the individual shares of the partners may, for the purpose of clause (*14*) of s. 2 of the Indian Income-tax Act, 1922 (***) register with the Income-tax Officer the particulars contained in the said instrument on application in this behalf made by the partners or any of them. *** ***"

Under Rule 3 the Income-tax Officer is entitled to accept a copy of the original instrument under which the firm was constituted in the circumstances therein set out, provided, *inter alia*, that the copy is

"Certified in writing by one of the partners to be a correct copy."

Under Rule 6,

"A certificate of registration granted under Rule 4 shall have effect up to the end of the financial year in which it is granted, but shall be renewed by the Income-tax Officer from year to year on application made to him in that behalf and accompanied by a

certificate signed by one of the partners of the firm that the constitution of the firm as specified in the instrument of partnership remains unaltered."

Having regard to the effect of the registration of a firm upon the incidence of super-tax, in my opinion it is essential that an application for registration should be signed by at least one of the partners of the firm. An application made in that behalf by an agent of the partners would not comply with the statutory rules prescribing the manner in which registration is to be effected, and the registration by the Income-tax Officer of such an application would be *ultra vires* and void. In *M. A. Kureshi* v. *Argus Footwear, Limited* (1) I restated the rule of construction in such a case as the present as follows ;

"Where the question is whether the act of an agent is to be deemed the act of his principal the Court will apply the common law rule *qui facit per alium facit per se*, unless it is satisfied, having regard to the terms of the particular statute or agreement under consideration, that it was the intention of the Legislature or of the parties, as the case may be, that the act should not be performed by an agent."

[*Reg.* v. *Justices of Kent* (2) ; *In re Whitley Partners, Limited* (3) ; *Fricker* v. *Van Grutten* (4) ; *Wilson and another* v. *Wallani and others* (5) ; *Japan Cotton Trading Company, Limited* v. *Jajodia Cotton Mills, Limited* (6) ; and *Harendra Kumar Roy Chowdhury* v. *The Secretary of State for India* (7).]

In the present case the instrument of partnership was executed on the 29th of July 1922, and is in the following form :

"Partnership agreement dated 29th July 1922 entered into between (1) C.T.A.C.T. Chithambaram Chetty, son of Annamalai

(1) (1931) I.L.R. 9 Ran. 323, at p. 326.
(2) L.R. 8 Q.B. 309.
(3) 32 Ch. D. 337.
(4) (1886) 2 Ch. D. 649.
(5) L.R. 5 Ex. D. 155.
(6) (1927) I.L.R. 54 Cal. 345.
(7) (1928) I.L.R. 55 Cal. 1355.

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Chetty of Alagapuri near Kottaiyur, Tirupattur Taluk, Ramnad District, South India, Nattukottai Chetty caste, money-lender, and (2) P.L.S.M. Muthukaruppan Chetty, son of Sellappa Chetty of Karaikudi, Tirupattur Taluk, aforesaid caste and profession. We both agreed to carry on money-lending business under the style or *vilasam* of C.T.A.M. (Cena Thena Ana Moona) at Minhla, Tharrawaddy District, Burma, and have been carrying on the said business from the month of *Panguni Rowdri* year. Now we hereby agree and bind ourselves to abide and act as follows :

(1) The business shall be confined to money-lending and banking only,

(2) The capital of the business shall be Rs. 20,010 consisting of three shares each of the value of Rs. 6,670 ; two of these shares valued at Rs. 13,340 shall be owned by S.T.A.S.T. Sithambaram Chetty (in vernacular) and the remaining one share at Rs. 6,670 shall be owned by P.L.S.M. Muthukaruppan Chetty (in vernacular),

(3) Each of us may invest in the said firm their respective *veynepanam* (Private Funds) in proportion to their shares in the firm, namely as two is to one,

(4) Interest for the said *veynepanam* shall be claimed by us respectively at one anna in excess of the rate of Rangoon interest,

(5) Agents to the said firm shall be appointed by both of us jointly and powers of attorney granted accordingly,

(6) The accounts of the said firm shall be closed once in three years and the profits realised at the end of the said period shall be divided between us in proportion of our respective shares in two-thirds of the profits to S.T.A.S.T. Sithambaram Chetty and one-third of the profits to P.L.S.M. Muthukaruppan Chetty. In witness whereof we the said S.T.A.S.T. Sithambaram Chetty and P.L.S.M. Muthukaruppan Chetty set our hands at Karaikudi *** ***."

In this document the appellant's name is not mentioned. The two partners are stated to be (1) C.T.A.C.T. Chithambaram Chetty, who is the father of the appellant, and (2) P.L.S.M. Muthukaruppan Chetty. The appellant's father died on the 20th of August 1926, and on the 1st of September 1926 in the assessment proceedings in Burma for the year

1926-27, one Chokkalingam Chettyar deposed that he was the agent of the C.T.A.M. Firm, Minhla, and that there were only two partners in the firm, *viz.* those whose names appear in the instrument of partnership. He further stated,

"I hold a power of attorney from C.T.A.C.T. Chithambaram Chettyar for his private business as well. *** He died about ten days ago. His son C.T.A.C.T.N. Nachiappa Chettyar succeeds him. I hold a power of attorney from the latter as well."

It is obvious that during the course of the assessment proceedings in respect of the year 1926-27, the Income-tax authorities in Burma were made aware of the death of the appellant's father, who in the instrument of partnership was stated to be one of the two partners of the C.T.A.M. Firm. On the 8th of September 1927, for the purpose of the income-tax assessment for the then current year an application in writing for the registration of the instrument of partnership stating the names of the partners of the firm and the other necessary particulars was signed and forwarded to the Income-tax Officer by Chokkalingam Chettyar. The application was in the following terms;

"To

THE INCOME-TAX OFFICER, THARRAWADDY.

Dated 8th September 1927.

Sir,

The undersigned begs to apply for registration of my firm under s. 2 (*14*) of the Indian Income-tax Act, 1922.

The original deed of partnership under which the firm is constituted specifying the individual shares of the partners together with a copy is enclosed.

I do hereby certify that the profits for the year ending 30th *panguni* of *ashaya* year have been actually divided in

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accordance with the shares shown in this partnership deed by way of creditings in account books.

Signature (in Tamil).

Name and Address.—C.T.A.M., Minhla (Tharrawaddy District).

Names of the Partners in the firm with the share of each in the business.—(1) C.T.A.C.T. Sithambaram Chettyar 2/3 share of profits and (2) P.L.S.M. Muthukaruppan Chettyar 1/3 share of profits.

Date on which the instrument was executed.—29th July 1922.

Date if any on which the instrument of partnership was last registered in the Income-tax Office.—7th May 1925.

Remarks.—I, Chokkalingam Chettyar do hereby certify that the informations are correct.

(Sd.) C.T.A.M. Power holder Chokkalingam Chettyar."

It is to be observed that the names of the partners appear to be the names of the same two men who were stated to be the partners in the original instrument of partnership, and that in the application no mention is made of the appellant. This application for registration was entertained and accepted by the Income-tax Officer, Tharrawaddy; who on the 7th of March 1928 endorsed thereon the following memorandum:

"This instrument of partnership has this day been registered with me, the Income-tax Officer, for the Tharrawaddy District, in the Province of Burma, under clause 14 of s. 2 of the Indian Income-tax Act, 1922. This certificate of registration has effect from the 1st day of April 1927 up to the 31st day of March 1928."

Now, it is not pretended or contended that this application for registration, which was presented by Chokkalingam Chettyar, was made by the partners or any of them. Applying the principles of law that I have enunciated it follows, therefore, that the registration of this firm was *ultra vires* and null and void, and that the condition precedent to the right of the Income-tax Officer to proceed under s. 55 was not fulfilled.

In the course of the assessment proceedings in Karaikudi the appellant applied to the Commissioner of Income-tax, Madras, that the Commissioner should refer the following two questions of law, which he stated arose out of the Assistant Commissioner's order, for determination by the High Court ;

"(*a*) Whether, in the circumstances stated above, the registration of the firm in Minhla alleged to have been made in Burma under s. 2 (*14*) of the Act is legally valid and operative. If the registration is held to be invalid, is it not incumbent on the Income-tax Officer under the Act to assess the firm to super-tax as a separate entity.

(*b*) Whether, in the course of the assessment of your petitioner, he is estopped by law from questioning the validity of the registration and raising the plea of his non-liability to super-tax in respect of the share income of the firm ?"

The Commissioner, in referring the case to the High Court *inter alia* observed :

"So long as the registration remains uncancelled the profits of the firm are not liable to super-tax assessment according to Part II, Schedule II of the Indian Finance Act of 1927, while the petitioner's share of the firm's income is liable to super-tax assessment in his hands according to s. 14 (*2*) read with s. 58 of the Income-tax Act."

The question which the Commissioner referred was as follows :

"Whether in the circumstances the Income-tax Officer was justified in assessing to super-tax the petitioner's share of the profits or gains of the Minhla firm, seeing that (whether or not it ought legally to be regarded as an unregistered firm) they had not as a matter of fact been assessed to super-tax."

The Commissioner added :

"If the registration of the firm were to be cancelled by the Burma authorities, and the profits of the firm were to be subjected by them to super-tax, the question of amending the assessment now complained of would necessarily receive my attention. But as the facts stand at present it appears to me that the petitioner is entitled to no relief."

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Beasley C.J., Sundaram Chetty and Stone JJ., in the course of their judgment, proceeded upon the footing that the appellant was in fact a partner of the firm of C.T.A.M., Minhla, and observed :

"We have not got before us here one of the interested parties, namely, the other partner. He it was who presented the application through his agent for registration of the firm in Burma and he is thus a person very much interested, and from what we understand about his attitude, he is opposed to the view taken by the petitioner here."

It would appear, therefore, that the learned Judges who decided the reference were of the opinion that the two partners of the firm were the appellant and Muthukaruppan Chettyar. Their Lordships continued as follows :

"Obviously we cannot here decide such an important question as this in his absence, and there is no provision for his being made a party to this reference. Clearly, the proper remedy lying to the hand of the petitioner is for him to file a suit in Burma for a declaration that for the reasons he has given, the registration of the firm is invalid. We must take things as they are, and as they are this is a registered firm, and we are therefore bound to answer the question referred to us in the affirmative."

Two issues appear to have been raised in Madras in the course of the assessment proceedings before the Income-tax Officer :

(1) Whether the appellant was a partner in the firm ; and

(2) whether the registration of the firm was *ultra vires* and null and void.

With all respect to the Income-tax authorities in Madras, it appears to me that it was the duty of the Income-tax Officer to determine :

(1) Whether the appellant was in fact a partner of the firm and as such an assessee within the meaning of that term under section 2 (2) of the Income-tax Act ; and

(2) whether the registration was *ultra vires* or not.

The Income-tax authorities did not determine the first issue, and adopted the attitude with respect to the second issue that they were not competent to challenge the validity of the registration of the firm by the Income-tax authorities in Burma. It does not appear, however, from the form in which the reference was made to the High Court, and the judgment of the High Court, that in Madras the matter was regarded as concluded, and it may be that it was not considered that the matter could not be re-opened in the event of the assessee succeeding in establishing that the registration of the firm was invalid.

Having regard to the observations that fell from the learned Judges who decided the reference at Madras, the appellant filed the present suit in the Subdivisional Court of Tharrawaddy, in which he prayed *inter alia* for a declaration

> "That the registration of the instrument of partnership dated the 29th of July 1922 by the Income-tax Officer, Tharrawaddy, on the 7th of March 1928 is outside his jurisdiction and void."

We are of opinion that the application for registration was not presented in the manner prescribed under the Act, and that the registration was made without jurisdiction.

A further question arises, however, whether the Court is competent to pass a decree for a declaration as prayed by the appellant. On behalf of the respondent it is contended that the present suit is barred by s. 67 of the Income-tax Act, which runs as follows :

> "No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any Government Officer for anything in good faith done or intended to be done under this Act."

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The learned trial Judge held that the present suit was not within the ambit of s. 67. I agree with him. It is not contended that this is a suit brought to set aside any assessment made under the Act, and although the learned Government Advocate urged that the ultimate object of the appellant in praying for this declaration was to obtain a modification of an assessment under the Act, in my opinion it cannot reasonably be contended that this suit, in which the relief claimed is merely a declaration that the registration of the instrument of partnership was *ultra vires* and void, is a suit to modify an assessment made under the Act. In my opinion this suit is not barred by s. 67 of the Act.

It was further contended—and this view found favour with the learned trial Judge—that, inasmuch as the appellant possessed and has pursued the remedy for obtaining the cancellation of the registration provided under the Income-tax Act, he was precluded on general principles of law from filing the present suit. In my opinion this question is concluded against the respondents by well settled authority: *Balkishen Das* v. *Simpson* (1), *Sheikh Mahomed Jan* v. *Munshi Ganga Bishun Singh* (2), *Harendra Kumar Roy Chowdhury* v. *The Secretary of State for India* (3), *Musammat Saraswati Bahuria* v. *Surajinarayan Chaudhuri* (4), *Krishna Chandra Bhowmic* v. *Pabna Dhana Bhandar Company, Limited* (5), *Trustees for the Development of the City of Rangoon* v. *G. S. Behara & Sons* (6).

I am of opinion that, in the circumstances of the present case, it is competent for a Civil Court to make a declaration that the registration of the

(1) (1898) 25 I.A. 151.
(2) (1911) 38 I.A. 80.
(3) (1928) I.L.R. 55 Cal. 1355.
(4) (1931) 35 C.W.N. 444.
(5) (1931) 36 C.W.N. 277.
(6) (1932) I.L.R. 10 Ran. 412.

partnership instrument was null and void, and that this course may be taken by the Court, notwithstanding any concurrent remedy in that behalf under the Income-tax Act that may be open to the plaintiff. In *O'Flaherty* v. *M'Dowell* (1) Lord Cranworth L.C. laid down that the general rule is that

"an affirmative statute giving a new right does not of itself and of necessity destroy a previously existing right. But it has that effect if the apparent intention of the Legislature is that the two rights should not exist together."

In the present case, notwithstanding the fact that the appellant applied as assessee to the Commissioner of Income-tax for cancellation of the registration under s. 33 of the Income-tax Act and that the application was rejected, in my opinion the Court is entitled to make the declaration to obtain which the present suit has been brought.

I do not think that it is expedient or desirable in the present suit that we should do more than grant the prayer sought by the appellant, and we do not propose to determine whether for the purpose of the assessment for 1927-28 the appellant is or is not to be treated as a partner in the firm. We do not express any opinion as to what the effect of granting this declaration may be upon the merits of the assessment, and we do not affect to determine whether, in the circumstances, the assessment ought to be re-opened or the plaintiff granted other relief. Those are questions which may have to be considered by the proper authorities, and we express no opinion on them.

The result is that the appeal is allowed, the decree from which the appeal is brought set aside, and a decree will be passed for a declaration as prayed.

(1) (1857) 6 H.L.C. 142, at p. 157.

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As regards costs, it has been contended on behalf of the second respondent that he was not properly made a party to the proceedings, and ought not to have been impleaded in the suit. The answer appears to be two-fold (1) that unless the appellant had made him a party to the suit, in the event of the suit succeeding or if he had been dismissed from the suit, there would have been two inconsistent decisions as to the validity of the registration of this instrument, and (2) that in fact the second respondent not only filed a written statement denying the right of the plaintiff to obtain this declaration upon various grounds, but he contended through his learned advocate that the suit did not lie, and in any event that it possessed no merits and ought to be dismissed. In my opinion the second respondent was a necessary and proper party to the suit. The circumstances in which this suit is brought are such that the outcome of the granting of this declaration is uncertain, and it may be, as the Commissioner of Income-tax for Burma stated in the order in which he refused to cancel the registration of the partnership instrument, that it was brought merely in order to saddle the second respondent with super-tax which in fairness ought to be borne by the appellant as one of the heirs of C.T.A.C.T. Chitambaram Chettyar.

In my opinion each party should bear their own costs, both of the trial Court and of this appeal.

DAS, J.—I agree.