case the Railway Administration had an indisputable power to suspend the petitioner and the said administration having duly suspended him in the exercise of that power the petitioner is not entitled to any salary for the period of suspension excepting the subsistence grant not exceeding 1/4th of his salary provided for in the rules which he has already received. In the circumstances, we are of the opinion that his claim, which has given rise to the present petition, is without any substance and has been rightly disallowed by the Courts below. We accordingly dismiss the petition with costs.

CIVIL REFERENCE

Before Falshaw and Kapur, JJ.

M/s KALSI MECHANICAL WORKS, NANDPUR,—
Petitioner

versus

THE COMMISSIONER OF INCOME-TAX, SIMLA,—
Respondent

Civil Reference No. 7 of 1953

July, 1st
1953

Income-tax Act (XI of 1922)—Sections 26, 26A, 28 and Rules 2, 3, 4 and 6A (framed under section 59)—Firm came into existence in June 1944 by oral agreement—Instrument of Partnership drawn up in May 1949, and registered before the Joint Sub-Registrar in August 1949—Application by the firm under section 26A for registration made to the Income-tax Office, during the assessment year 1949-50, for the purpose of the assessment of the accounting year 1949-50—Whether firm entitled to registration for the purpose of assessment for 1949-50.

The following question was referred under section 66(1) by the Income-tax Appellate Tribunal, Bombay, to the High Court :—

> " Whether a firm which is alleged to have come into existence by a verbal agreement in June, 1944, is entitled to be registered under section 26A, for the purpose of the assessment for 1949-50, where the Instrument of Partnership was drawn up only in May, 1949, after the expiry of the relevant previous year ? "

Held, that for the purpose of registration it is necessary that the firm should be constituted by an instrument of partnership and the rules read with sections 26 and 28 of the Act, indicate that such a firm as is constituted under an instrument of partnership should have been in existence during the account period and should not come into existence during the assessment year, and if it was not in existence during the account period it cannot be registered so as to affect the liabilities of the partners of income-tax accruing during the account period.

Case referred under section 66(1) of the Income-tax Act, 1922, by the Income-tax Appellate Tribunal, Bombay (Delhi Bench), consisting of Mr. Rajagopal Sastri, Judicial Member and Mr. A. L. Sahgal, Accountant Member, vide *their order, dated 17th February, 1953, for opinion on the following question :—*

> *"Whether a firm which is alleged to have come into existence by a verbal agreement in June, 1944, is entitled to be registered under section 26A for the purpose of the assessment for 1949-50, where the Instrument of Partnership was drawn up only in May, 1949, after the expiry of the relevant previous year ?"*

K. S. THAPAR and JAGDISH CHANDER, for Petitioner.

S. M. SIKRI, Advocate-General, H. R. MAHAJAN and RAJINDAR SACHAR, for Respondent.

JUDGMENT

Kapur, J.

KAPUR, J. This is a reference made by the Income-tax Appellate Tribunal, Delhi Bench, by their order, dated the 17th February, 1953, referring to this Court for opinion the following question :—

> "Whether a firm which is alleged to have come into existence by a verbal agreement in June, 1944, is entitled to be registered under section 26A, for the purpose of the assessment for 1949-50, where the Instrument of Partnership was drawn up only in May, 1949, after the expiry of the relevant previous year ?"

The case relates to the accounting year 1948-49 and assessment year 1949-50. The assessee firm alleges that it was brought into existence in June, 1944, with three persons as partners between whom there was no written deed of partnership drawn up. On the 9th May, 1949, a written deed of partnership was executed between the partners which is printed at page 4 of the paper-book. This instrument of partnership recites that two partners, Nauhria Singh and Ram Singh, started it in the year 1912 and in 1938, another partner Chanan Singh was taken into partnership and on the death of Ram Singh, Gurdial Singh his son became a partner; the shares of the partners remaining the same, only

M/s. Kalsi Mechanical Works, Nandpur
v.
The Commissioner of Income-tax, Simla

Kapur, J.

Gurdial Singh took the place of Ram Singh. This partnership deed provides—

> ".....the parties.....mutually covenant and agree to continue as partners in the said business upon and subject to the terms and conditions stated below.....
>
> 3. That the partnership business shall be deemed to have commenced in the present constitution on 23rd June, 1944.
>
> .....
>
> 7. That a statement of assets and liabilities of the partnership business as ending on 31st March, 1949, has been drawn up and the credits to the capital accounts of the parties hereto are accepted and confirmed.
>
> .....
>
> 11. That the parties hereof will be entitled to the following salaries, with effect from 1st April, 1949, which will be debitable to the Profit and Loss account of the partnership business :—
>
> 1. S. Nauhria Singh ... Rs. 300 per mensem
> 2. S. Gurdial Singh ... Rs. 200 per mensem
> 3. S. Chanan Singh ... Rs. 250 per mensem
>
> ....."

This document was registered before the Joint Sub-Registrar, on the 26th August, 1949.

During the assessment year 1949-50, the firm applied to the Income-tax Officer for registration of the firm under section 26A of the Income-tax Act, for the purpose of assessment of the accounting year 1949-50.This was rejected by the Income-tax Officer and ultimately by the Income-tax Appellate Tribunal, who held that as the partnership had come into existence by an oral agreement in June 1944, and the instrument of partnership was not executed till May 1949, i.e., after the year of the account relevant for the assessment year 1949-50, the assessee firm was not entitled to get the registration effected under section 26A of the Income-tax Act.

The learned Advocate for the assessee submitted that under section 26A, read with the rules he was entitled to get the registration done even

M/s. Kalsi Mechanical Works, Nandpur
v.
The Commissioner of Income-tax, Simla

Kapur, J.

though the instrument of partnership had come into existence during the assessment year. Section 26A provides—

> "26A. (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.
> ....."

Mr. Jagdish Chandra relied strongly on the rules which have been made under section 59 of the Indian Income-tax Act. By rule 2, any firm constituted under an instrument of partnership..... may, under the provisions of section 26A of the Act, register with the Income-tax Officer.....in the said instrument..... Such an application has to be signed by all the partners and has to be made before or after the dissolution of the firm in respect of the assessment to be made on its income up to the date of dissolution and if the application is made after the dissolution it has to be signed by all the persons or their legal representatives who were partners in the firm. Under rule 3, the application has to be accompanied by the original instrument of partnership "under which the firm is constituted....."

Rule 4 prescribes the powers of the Income-tax Officer in regard to registration. It says—

> "4. (1) If, on receipt of the application referred to in Rule 3, the Income-tax

Officer is satisfied that there is or was a firm in existence constituted as shown in the instrument of partnership and that the application has been properly made, he shall enter in writing at the foot of the instrument or certified copy, as the case may be, a certificate in the following form, namely :—

'This instrument of partnership
certified copy of an instrument of partnership
has this day been registered with me, the Income-tax Officer, for.....in the Province of.....under section 26A of the Indian Income-tax Act, 1922, and this certificate of registration shall have effect for the assessment for the year ending on the 31st day of March, 19—'.
....."

Again in rule 6A, it is stated—

"6A. On receipt of an application under Rule 6, the Income-tax Officer may, if he is satisfied that the application is in order and that there is or was a firm in existence constituted as shown in the instrument of partnership ....."

It is to be noted that Rule 2(e) mentions the words 'in respect of the assessment or assessments to be made on its income up to the date of dissolution.' It presupposes that the instrument of partnership was in existence during the period ending the date up to which the assessment is to be made. In Rule 4 the words used are 'is or was a firm in existence.' Similarly, in Rule 6A the words used are 'that there is or was a firm.'

There are no words used in section 26A which would indicate that this section is meant to be retrospective or that a firm constituted by an instrument of partnership after the last day of the accounting period can be registered for the purpose of affecting the income-tax of that period. This

M/s. Kalsi Mechanical Works, Nandpur
v.
The Commissioner of Income-tax, Simla

Kapur, J.

is supported by the language used in sections 26 and 28 of the Income-tax Act. Section 26 shows that the object of registration is to assess individually the total income of the partners who in the account year were entitled to receive the same and there would be no point in producing an instrument for registration during the assessment year. In Sampath Iyengar on Indian Income-tax Act, Volume 2, at page 846, a very good discussion on this point has been given. The instance given there is in my opinion quite apt. If there were two partners A and B sharing equally the profits say up to the 31st March 1950, and, thereafter, the share of profits was 3 to 1 and the income for 1949-50 or for the year 1950-51 was Rs. 50,000. A deed of partnership registered for the former accounting period would show the income of each to be Rs. 25,000 and an instrument registered for the next accounting period would show the income to be Rs. 37,500 and Rs. 12,500, respectively, and these last figures would be useless for the purpose of assessment proceedings for the year 1950-51.

Again a reference to section 28(2), which relates to the imposition of penalties makes this matter clearer. This section mentions the registration of an instrument of partnership governing the distribution of profits which shows clearly that the instrument which has to be registered is the one relating to the accounting period. The matter has been put by Sampath Iyengar at page 846, in the following words :—

> "The language of subsection (2) of section 28, relating to the levy of penalty makes the matter yet clearer. It speaks of registration of the instrument of partnership governing the distribution, which unmistakably indicates that the deed that has to be registered is the deed relating to the accounting year. The new clause (e) to Rule 2, with its proviso, along with the corresponding amendments made in Rules 3 to 6 refer to the registration of a firm after dissolution at the instance of the ex-partners or the legal representatives of

any deceased partner. This shows that there need be no firm in existence at the time of the application for registration. Rules 4 and 6A also enable registration of a firm that "is or was" in existence. If it is registration of a firm that was in existence, the deed to be registered could only be that of the previous year and not the assessment year. All these considerations point to the conclusion that though a change has occurred in the constitution of the firm, the deed that has to be registered is the deed governing the distribution of the accounting year."

In my opinion, the law has been correctly stated by this author.

If reference is made to form I under Rule 3 of the Rules it shows that application is to be made for the assessment for the income-tax year and in the third paragraph of this form the partners have to certify—

"We do hereby certify that the profits (or loss, if any) of the $\frac{\text{previous year}}{\text{period}}$ were up to date of _____ dissolution were/will be divided or credited as shown in section B of the schedule and that the information given above and in the attached schedule is correct."

All this indicates that the registration to be applied for is of a firm which had been constituted by an instrument of partnership previous to the assessment year and not that it should come into existence during the year of assessment which under the Indian law is always the year following the year in which the income has accrued.

The words used in section 26A are "any firm constituted under an instrument of partnership."

M/s. Kalsi Mechanical Works, Nandpur
v.
The Commissioner of Income-tax, Simla

Kapur, J.

The Queen v. *The Registrar of Joint Stock Companies* (1), is of some assistance in this connection where it was held that a partnership formed not for carrying on a business but simply for the purpose of being incorporated under the Companies Act, in order that it may be forthwith wound up, cannot be registered as a company under Part VII of the Companies Act of 1862. At page 612, Fry, L. J., said—

> "I am inclined to think that the true meaning of these words is confined to a company which is constituted in some manner analogous to those with which this section begins, namely, constituted by registration under some Act of Parliament, or in pursuance of an Act of Parliament, or under letters patent—I am inclined to think it must be some constitution *ejusdem generis* with those —that those words refer to cases in which the constitution of the company does not arise merely from the consensual agreement of the parties, but in which that constitution is either determined or modified, or affected in some way by something other than mere consent—by something which the law imposes—something, I say, like an Act of Parliament or letters patent..."

Lopes, L. J., was of the same opinion and said at page 614—

> "I am inclined to think that the true meaning of these words is this, that they refer to companies constituted by the intervention of the legislature or other tribunal competent to constitute companies, and do not refer to consensual contracts such as the present."

The learned Advocate-General has relied on three cases in support of his argument. He submits that the assessees were not constituted under an

(1) (1891) 2 Q.B. 598

instrument of partnership in the account year and, therefore, they are not entitled to registration under section 26A. He refers to a passage from Lindley on Partnership, eleventh edition, at page 116, where it is stated—

> "Again, persons may agree that as between themselves, the partnership between them shall be deemed to have commenced at some time before its actual commencement. Proof of such an agreement as this would not enable a stranger to make the parties to it liable to him as partners for what took place before the partnership in point of fact began. As to third parties, such an agreement is *res inter alios acta*, which does not affect them in any way....."

This statement of the law shows that strangers are not affected by an agreement between the partners where the partnership is deemed to have commenced at a date before the date of its commencement.

Reference was then made to *Krishan Aiyer and Sons*, v. *Commissioner of Income-tax, Madras*, (1). In this case the partners of a firm constituted in August, 1923, under a partnership deed for a term of three years continued the partnership after the expiry of that term but without a fresh deed of agreement. For the assessment year 1927-28, a return of the previous year was submitted together with an application for registration of the firm under section 2(14) of the Income-tax Act, which was refused and it was held that the contractual nexus between the partners after the expiry of the original term being a new implied oral agreement, there was no instrument of partnership operative at the time of the application which could be registered under Rule 2 of the Registration Rules.

(1) 3 I.T.C. 286=I.L.R. 52 Mad. 367

M/s. Kalsi Mechanical Works, Nandpur
v.
The Commissioner of Income-tax, Simla

Kapur, J.

Coutts Trotter C. J. referred to a speech of Westbury, L. C., in *Clarke* v. *Leach* (1), where the Lord Chancellor said—

> "Ordinarily a contract for a term constituted by a written agreement must be considered as having come to an end at the expiration of the period for which it was entered into: and the contract during the term differs from that which arises from the continuance of the relation by the mutual consensus of the parties after the term has expired. The one is to last for a certain term; the other only for so long a time as they both shall choose. Am I then by any principle of law bound to assume or justified in assuming that all the special articles and conditions in the original written deed of partnership for a term are at once transferred by law to this new contract, which has no particular limit to the term of its duration? That would be a strong and extravagant assumption and one that is not warranted by any principle or authority."

The learned Chief Justice, then observed—

> "That passage appears to me to make it clear that Lord Westbury considered the contractual *nexus* of the parties after the expiry of the deed to rest upon the new implied oral agreement, and that the articles of the deed which are to be considered as preserved are preserved not by virtue of the original deed which had ceased to operate but of the new agreement."

He then referred to the speech of Lord Selborne in *Nellson* v. *Mossend Iron Co.* (2), and observed—

> "These pronouncements of the highest tribunal do not turn on any special provision

(1) 1 De. G. J. & S. 144
(2) 11 A.C. 298

> of any statute but are based on the principles of the law of partnership and we should, we think, endeavour respectfully to follow those high authorities."

Reference was next made to *Commissioner of Income-tax, Madras* v. *Gelli Krishnamurthy and others* (1), where the facts were similar in that a partnership deed which was for a term of five years was not renewed by a fresh instrument but the business was carried on and during the assessment year 1937-38 the assessees applied for the renewal of the certificate. It was held that the partnership deed not having been renewed by a written instrument, there was no instrument of partnership within the meaning of Rule 2 of the Income-tax Rules.

In a later case *Commissioner of Income-tax, Madras* v. *D. Arokiaswami Chetti and Co.* (2), it was held that for a renewal of registration of a firm under section 26A of the Indian Income-tax Act, the existence of an instrument of partnership operative at the time of the application or relevant to the accounting period is necessary. At page 409, Rajamannar, C. J., observed—

> "We do not agree with the view of the Tribunal that for a renewal of registration there is no necessity for the existence of an instrument of partnership operative at the time of the application or relating to the accounting period. Section 26A does not refer in terms to renewal of registration. It follows that every renewal of registration is in effect a registration under that section."

The sections of the Income-tax Act show that for the purpose of registration it is necessary that the firm should be constituted by an instrument of partnership and in my opinion the Rules read with sections 26 and 28 of the Act, indicate that such

(1) 8 I.T.R. 121

(2) 16 I.T.R. 404

M/s. Kalsi Mechanical Works, Nandpur
v.
The Commissioner of Income-tax, Simla

Kapur, J.

a firm as is constituted under an instrument of partnership should have been in existence during the account period and should not come into existence during the assessment year, and if, it was not in existence during the account period it cannot be registered so as to affect the liabilities of the partners of income-tax accruing during the account period. I would, therefore, answer the question referred to us in the negative. The Commissioner of Income-tax will have his costs. Counsel's fee Rs. 250.

Falshaw, J.

FALSHAW, J.—I agree.

APPELLATE CIVIL

Before Bhandari, C. J., and Khosla, J.

1953

July, 15th

RATTAN SINGH AND OTHERS,—*Defendants-Appellants*

versus

BELI RAM AND OTHERS,—*Plaintiffs-Respondents*

Letters Patent Appeal No. 85 of 1951

Code of Civil Procedure (Act V of 1908)—Section 9—Civil Suit—Whether maintainable to enforce the right to enter a temple for worship bare-headed—Conditions precedent to the filing of a suit stated.

The plaintiffs claimed to enter a temple for worship bare-headed to which the defendants objected. It was not denied that the plaintiffs had a right to worship in the temple but they were not allowed to enter the temple whenever they went there bare-headed. The plaintiffs filed a suit for an injunction restraining the defendants from preventing them from entering the temple bare-headed. Objection was raised that such a suit was not maintainable.

Held, that the plaintiffs had admittedly the right to worship in the temple and that the defendants were preventing them from exercising their right. They had thus a good cause of action and were entitled to bring the present suit. The matter whether the plaintiffs can worship in the temple when their heads are not covered can be decided after an appropriate issue has been framed and the entire evidence in the case recorded.

Held further, that a person's right to sue can be established if, and only if, the following conditions concur :—

(i) There should be good cause of action. A cause of action consists of three factors, viz. (1) the