1955

ISMAIL PAPAMIA v. LABOUR APPELLATE TRIBUNAL OF INDIA

Chagla C. J.

ing the Industrial Tribunal that it is a proper case for dismissing its employees.

The result is that the petition fails and must be dismissed. No order as to costs.

Rule discharged.

G. N. V.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

1955 *Sept.* 15

THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH, KUTCH AND SAURASHTRA, AHMEDABAD, APPLICANT *v.* MESSRS. WELJI DAMJI, PACHORA, RESPONDENT.*

Indian Income-tax Act (XI of 1922), s. 12 B, third proviso to s. 12 B (1); 41 (2)—Sale by receivers of capital assets of dissolved firm for making distribution among partners—Such sale realising gain—Whether such gain capital gain?—Whether such sale is sale by operation of law and not falling under s. 12 B?—Whether such sale saved by third proviso to s. 12 B (1)?—Open to Taxing Department to assess assessee on whose behalf capital gain received by receivers.

A sale effected by the Receivers appointed to sell the capital assets of a partnership on its dissolution realised a gain of Rs. 30,447 over the written-down value of the assets. On appeal against the order of the Taxing Department holding such gain liable to tax under s. 12 B of the Indian Income-tax Act, 1922, the Income-tax Appellate Tribunal upheld the assessee's contention that by reason of third proviso to s. 12 B (*1*) of the Act, the profits were not liable to tax. On reference to the High Court at the instance of the Commissioner of Income-tax, Bombay North, Kutch and Saurashtra it was contended on behalf of the assessee, firstly, that the sale by the Receivers was a sale by operation of law and, therefore s. 12 B was not applicable and secondly, that in any case the sale of capital assets was a sale for the purpose of distribution of capital assets on dissolution of the firm and as such saved by the third proviso to s. 12 B (*1*) of the Act and hence profits realised on sale were not liable to tax

Held, negativing both these contentions, that the sale of the capital assets of the firm by the Receivers was not a sale by operation of law but a sale as contemplated by the Transfer of Property Act, 1882, and was therefore a sale which fell within the meaning of s. 12 B of the Act and that the third proviso to s. 12 B (*1*) of the Act saved only distribution of capital assets *in specie;* it did not save the distribution of the proceeds realised on sale of capital assets.

The Commissioner of Income-tax, Bombay City v. *James Anderson,*[1] followed.

Held, therefore, that the gain on sale of capital assets by the Receivers was capital gain within the meaning of s. 12 B of the Act and was liable to tax.

* Income-tax Reference No. 7 of 1955.

1. [1955] Bom. 90.

Under s. 41 (*2*) of the Act it is open to the Taxing Department to assess the assessee on whose behalf the capital gains were received by the Receivers.

In a suit for dissolution of partnership a decree for dissolution of the firm was passed. Receivers were appointed to sell the property of the partnership and distribute the assets among the partners of the dissolved firm. In pursuance of the decree the receivers sold the partnership property on March 10, 1947 by public auction for Rs. 57,000. The Income-tax Officer found that the written-down value of the assets sold came to Rs. 13,633, and the sale therefore according to the Officer resulted in a capital gain of Rs. 43,367 which he held liable to tax under s. 12-B of the Indian Income-tax Act, 1922. On appeal the Appellate Assistant Commissioner computed the capital gains at Rs. 30,447 instead of Rs. 43,367. On appeal to the Income-tax Appellate Tribunal, the tribunal upheld the assessee's contention that the sale fell within the third proviso to s. 12B (*1*) of the Act and that therefore the profits realised on sale were not liable to tax. At the instance of the Commissioner of Income-tax, Bombay North, Kutch and Saurashtra, Ahmedabad, the following question was referred to the High Court of Judicature at Bombay:—

Whether on the facts and in the circumstances of the case the sum of Rs. 30,447 is exempt under s. 12 B (*1*) of the Indian Income-tax Act?

M. P. Amin, Advocate General, for the Applicant.

R. B. Kotwal, for the Respondent.

Chagla C. J.—The assessee is an unregistered firm and it was dissolved on June 15, 1944. Receivers were appointed to sell the partnership assets and they sold them on March 10, 1947. The partnership assets realised a gain of Rs. 30,447, and the Income Tax Department contended that this sale had resulted in a 'capital gain' within the meaning of s. 12-B and that the firm was liable to be assessed to tax on this capital gain. The contention of the assessee was that its case fell within the third proviso to s. 12-B. This contention was rejected by the Tribunal and the matter comes before us on this reference.

The third proviso would only apply if the transfer is made on the dissolution of a firm or other association of persons, and the transfer is in the nature of distribution of capital assets. It is difficult to accept the contention that when the receivers sold the partnership assets on March 10, 1947 they were distributing capital assets to the partners on the dissolution of the partnership firm. It was only after the partnership assets had been sold that the question of distribution of these capital assets to the partners would arise. What the receivers did was to sell the capital assets before the distribution of capital assets of the partnership. Therefore, in our opinion, the third proviso has no application to the facts of this case.

1955

COMMISSIONER OF INCOME-TAX, BOMBAY v. MESSRS. WELJI DAMJI PACHORA

Chagla C. J.

The position is identical with the position that arose in *Commissioner of Income-tax, Bombay City* v. *James Anderson*[2] which we had to consider. There it was a case of an executor selling the assets of the testator and then distributing the sale proceeds to the legatees, and we pointed out in that case that the proviso does not apply where the testator or executor sells the capital assets and distributes the sale proceeds.

It was first contended that the tax is imposed not upon the Receivers but upon the unregistered firm, and the answer to that contention is to be found in s. 42 (2) of the Income Tax Act which permits the taxing authorities to assess directly the person or persons on whose behalf income, profits or gains are received, and the amount in question was received by the Receivers not in their own right but on behalf of the partnership firm. Therefore it was open to the taxing authorities either to proceed against the receivers and assess them to tax in respect of this capital gain or to assess this unregistered firm on whose behalf the capital gain was received by the receivers.

The next contention of Mr. Kotwal is that under the partnership law a sale of partnership assets is part of the distribution of the assets, and therefore the case falls under the third proviso, and he has relied for this purpose on s. 48 of the Partnership Act. Sub-section (*b*) of that section provides:

> "The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner—"

and then the order is set out: payment of debts, payment of partnership dues to the partners for advances made by them by way of capital and so on; and Mr. Kotwal contends that in order to give effect to the provisions of this sub-section in the case of every dissolution the partnership assets have of necessity to be sold, and therefore the sale of the partnership assets is part of the distribution of the partnership assets. In our opinion that contention is not tenable. All that s. 48 lays down is that the order in which the assets of a firm have to be applied on dissolution. The section does not require that the assets of the firm should of necessity be sold. There may be a case where on a dissolution of the partnership there may be no debts and the partners may agree instead of selling partnership assets to divide them between themselves *in specie*. Therefore it would not be correct to say that the partnership law requires that in the case of every dissolution partnership assets must be sold as a part of the machinery for distributing the partnership assets on dissolution.

The next contention urged by Mr. Kotwal is that the sale effected by the receivers here is not a sale contemplated by the Transfer of Property Act and that this sale is the result of the

2. [1955] Bom. 90.

operation of law and therefore s. 12-B would not have any application to such a sale. It is pointed out by Mr. Kotwal that the Court directed the sale and it was under the order of the Court that the receivers sold the partnership assets, and Mr. Kotwal has drawn analogy between this sale and a sale effected by the Court in execution of a decree. In our opinion the two cases are not *in pari materia*. In the case of a court sale the sale is effected by the Court and the Court issues a sale certificate when the sale becomes complete and the title vests in the auction purchaser. In the case of a sale by a receiver, although it may be a result of an order of the Court, it is not the order of the Court that vests the title in the purchaser. In order to vest the title in the purchaser the receiver has to execute a conveyance in favour of the purchaser and it would be that conveyance which would ultimately vest the title in the purchaser. Therefore the sale effected by the receivers was a sale as contemplated by the Transfer of Property Act. It was not a compulsory transfer of title as a result of any provision of the law.

In our opinion, therefore, the Tribunal was in error when it took the view that this case fell within the third proviso to s. 12-B.

We, therefore, answer the question submitted to us in the negative. The assessee to pay the costs.

Attorneys for Applicant: *N. K. Petigara.*

Attorneys for Respondents: *S. B. Sukthankar.*

Answer accordingly.

P. M. P.

APPELLATE CIVIL.

Before Mr. Justice Dixit and Mr. Justice Vyas.

GANPATI JOTI KUMBHARE, PETITIONER *v.* SHRIMANT JAYASINGRAO ABASAHEB AND OTHERS, OPPONENTS.*

1955 *Sept.* 22

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), ss. 3, 88 (1) (b)—Transfer of Property Act (IV of 1882), ss. 5, 105, 109 —Bombay Land Revenue Code (V of 1879), s. 3 (11)—Lease of Agricultural Lands in Kolhapur—Lease dated Feb. 19, 1949 in favour of an Industrial or Commercial undertaking—Lease comprising some lands in possession of tenants, entitled to continue in possession for some years after 1949—Whether the lease, effective with respect to lands in possession of tenants —Whether it is saved from the provisions of the Bombay Tenancy and Agricultural Lands Act under s. 88 (1) (b).

* Special Civil Application No. 1449 of 1955 (with Sp. Ci. A. Nos. 1450 and 1546 of 1955).