BOMBAY HIGH COURT

Commissioner of Income-tax

Vs.

Messrs. Walji Damji Padhora

I.T.R. No. 7 of 1955

(Chagla, C.J. and Tendolkar, J.)

15.09.1955

ORDER

Chagla, C.J.

1. The assessee is an unregistered firm and it was dissolved on 15-6-1944. Receivers were appointed to sell the partnership assets and they sold them on 10-3-1947. 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 Section 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 Section 12B. This contention was rejected by the Tribunal and the matter comes before us on this reference.

2. 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 10-3-1947, they were distributing capital assets to the partner 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.

3. The position is identical with the position that arose in *'Commissioner of Income-tax, Bombay City v. James Anderson[1]',* 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.

4. 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 Section 41(2), 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 there own right but on behalf of the partnership firm.

[1] AIR 1955 Bom 224

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.

5. 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 Section 48, 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 Section 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.

6. 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 operation of law and, therefore Section 12B 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 'parimateria'. 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. 1. In order

to vest the title in the purchaser the receiver has to execute a conveyance in favor 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.

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

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

Answer in the negative.