FORM NO.(J2)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

Present:
Hon'ble Justice Girish Chandra Gupta
And
Hon'ble Justice Asha Arora.

ITA No.214 of 2004

SHRIMATI ROMA SENGUPTA
Versus
COMMISSIONER OF INCOME TAX – I KOLKATA & ANR.

Advocate for the appellant: Mr. J. P. Khaitan, Sr. Adv.
Mr. Ananda Sen, Adv.

Advocate for the State: Ms. Asha G. Gutgutia, Adv.
Ms. S. Keswani, Adv.

Hearing concluded on: January 27, 2016

Judgment delivered on:11/03/2016.

GIRISH CHANDRA GUPTA J. The assessee has come up in appeal u/s. 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') against an order dated 9th December, 2003 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the tribunal') 'E' Bench Kolkata in ITA No.461 (Kol.) of 2002 relating to the assessment year 1997-98. By an order dated 25th November, 2004 the appeal was admitted on the following substantial questions of law:-

" I) When the learned Members of the Tribunal themselves recorded that they refrain from commenting on the direction of the learned CIT (Appeals) on the issue of admissibility of deduction under Section 54 of the I. T. Act which the Revenue has not agitated before the Tribunal was justified in allowing the appeal on the issues raised by the Revenue and

in reversing the order of the CIT(Appeals) on the said issues and in doing so whether the Tribunal acted perversely?

II) Whether the Tribunal failed to appreciate that the Divorce petition and/or decree read with other agreements and/or documents clearly establish the intention of the parties therein that the assessee was a co-owner of the property in question providing 50% of the consideration for acquiring the said property and/or by virtue of mutual agreement the ex-husband of the assessee parted with 50% of the property in question in favour of the assessee by way of alimony and as such Section 49(1)(iii) of the I.T. Act will be applicable and whether the Tribunal was justified in holding that 50% of the cost of acquisition of capital gains in the hands of the assessee and whether the said findings of the Tribunal are perverse?

III) Whether the Tribunal is justified in upholding the disallowance made by the Assessing Officer of claim of the assessee for Rs.50,000/- as brokerage for computation of long term capital gains and in doing so whether the findings and/or reasoning and/or decisions of the Tribunal are based on irrelevant materials and/or evidence and/or by failing to take into consideration relevant materials and/or evidence and/or law and as such the same are perverse?"

After hearing the learned advocates we have formulated the following substantial question of law under the proviso to Sub-section (4) of Section 260A of the Act for the purpose of determining the real question in controversy between the parties.

IV) Whether 50% of the sale consideration received by the assessee with respect to the matrimonial house situated at 25, Mandeville Gardens, Calcutta was taxable in the hands of the assessee despite the

fact that the Tribunal arrived at a finding that the said amount was paid on account of alimony?

Briefly stated the facts and circumstances of the instant case are as follows:-

Shrimati Roma Sengupta the assessee herein married Mr D Chowdhury in the year 1966. The marriage was dissolved on 12th January 1994 by a decree of divorce passed in Mat Suit Number 626 of 1993. The assessee filed her return of income for the assessment year 1997-98 disclosing an income of Rs.44,870/- and long-term capital gain consequent to sale of 50% of her share in the matrimonial house at 25, Mandeville Gardens, Calcutta sold at Rs.22,81,500/- and sought to deduct 50% of the cost of acquisition amounting to Rs.5,18,002/-. The assessee claimed exemption u/s 54 of the Act with respect to the aforesaid long-term capital gain. The assessee further claimed deduction of brokerage amounting to Rs.50,000/- from the amount of capital gain. The return was processed u/s 143(1) later on the assessee received a notice u/s 148 alleging that income had escaped assessment.

In the course of the reassessment proceedings the assessee was asked to furnish inter alia evidence against the cost of acquisition of the matrimonial house. The assessee contended that the matrimonial house at 25, Mandeville Gardens was acquired using the sale proceeds of a flat situated at 9, Mandeville Gardens, Calcutta and that she was a co-owner of the said matrimonial house, having 50% share therein.

The assessing officer deputed an inspector to verify the claims. Relying upon a report filed by the inspector the assessing officer held by his order dated 28th March, 2001 that Mr. D. Chowdhury, the ex-husband of the assessee was the exclusive owner of the flat at 9, Mandeville Gardens and the assessee was his nominee. The assessing officer also observed that since the flat at 9, Mandeville Gardens was

owned exclusively by the former husband of the assessee and the sale proceeds from the said property were utilized to purchase the matrimonial house at 25, Mandeville Gardens, therefore the former husband of the assessee was the full owner of the newly purchased matrimonial house. The assessing officer on the aforesaid basis held as follows:-

"…In the circumstances, the assessee could not get the benefit of cost of acquisition u/s 48 of the I.T. Act, 1961, as she did not contribute any investment to purchase the flat at 25, Mandeville Gardens, Calcutta.

In Section 49(2) it was cleared that the self generated acquired property's cost of acquisition is taken to be nil."

The assessing officer by the aforesaid order also disallowed the claim for brokerage. The assessee preferred an appeal before the Commissioner of Income Tax (Appeals) (hereinafter referred to as 'the CIT(A)') against the order of the assessing officer. The CIT(A) by his order dated 14th February, 2002 allowed the appeal of the assessee and held as follows:-

"He has further disallowed the claim of brokerage paid to 4 different parties totaling Rs.50,000/- on the ground that his Inspector could not find these persons.

In his written submission dt. 14.2.2002 Sri A. Sinha who attended on behalf of the appellant has stated that the A.O. has taken the cost of acquisition of the said house property at nil without appreciating the fact that the legislature had inserted a specific section namely 49(1)(iii) of the Act to arrive at the cost of acquisition of any capital asset acquired by an assessee by succession, inheritance or devolution. In the instant case the appellant received the property from her ex-husband at the time of divorce and such an acquisition certainly can be ---------- as having been received by devolution. Secondly the AO. has disallowed the brokerage paid to various parties for disposal of house property merely relying on the Inspector's report that he could not find the said parties. The appellant was not given any opportunity to rebut the Inspector's report. It was also ignored by the A.O. that the amount was paid through account a cheque and lastly the A.O. had not allowed deduction claimed by the appellant u/s. 54 of the I.T. after correctly computing the cost incurred by the appellant to purchase new property on 11.6.96. The A.O. has given no reason for this action on his part.

It is a fact that the A.O. has not bothered to write a single line on why the appellant's claim was not admissible u/s 54 of the Act.

Thus on the facts and circumstances of the case I am in full agreement with the appellant in this regard. The A.O. is hereby directed to compute the long term capital gain as per the computation of the appellant and also to allow the benefit of deduction U/s 54 of the Act."

Aggrieved by the order of the CIT(A) the Revenue appealed before the Tribunal. The Tribunal by an order dated 9th December 2003 reversed the order of the CIT(A) and held as follows:-

"In the case before us the divorce resulted in mutual agreement of a decree and the marriage between the husband and wife was dissolved by decree of dated 12.1.94. Nowhere in this decree could the property be said to have been acquired by the assessee as a co-owner and neither have the intentions of the erstwhile husband wife team had ever suggested the same. ***The facts as brought out by the A.O. clearly indicate the intention of the parties hereto inasmuch as the occurrence of divorce resulted in splitting the sale consideration and the rent received if let out to be split during the intervening period….*** *We are unable to convince ourselves that the assessee who did not participate in the acquisition of the said property and was merely a nominee in the happier days could get the liability of the cost of acquisition subsequent to divorce for which she never contributed. The word 'devolution' has to be understood in the manner it was for the purpose of changing "hands from one owner to another even inter vivos without disturbing the status of the entity which becomes owner thereof without having to undergo corresponding devolution.* ***In other words, the assessee in this case having parted from her husband was afforded 50% of the consideration which in fact could not be termed as asset entitled to capital gains.*** *The learned CIT(A) proceeded to consider the application of the provisions of section 49(1)(iii) by holding that the property was acquired by the assessee from her ex-husband.* ***It was on account of alimony that the husband mutually agreed to part with 50% thereof as is noted in the decree of divorce dated 12.01.94.*** *There was no intention before the A.O. to include the same till the date of divorce either by way of co-owner of the house property and neither at the time of acquisition of the said property in the year 1992 when it was acquired by disposing of another property by the husband when the wife remained a legal nominee totally excluding her from the ownership thereof…."*

The Tribunal thus rejected the contention of the assessee as regards capital gains on the basis that 50% of the sale proceeds were received by the assessee on account of alimony from her former husband.

Mr. J. P. Khaitan, learned senior advocate appearing for the assessee contended that the lump sum alimony is a capital receipt and therefore not taxable. In support of his submission he relied on a judgement of the Bombay High Court in the case of Princess Maheshwari Devi of Pratapgarh, Poona -Vs- CIT reported in 147 ITR 258. In this case the assessee was married to the Maharaja of Kotah. The marriage was annulled by a decree of nullity of marriage. Under the decree the assessee was granted monthly alimony and lump sum alimony. The Bombay High Court held that the monthly alimony amounted to taxable income in the hands of the assessee. However, the lump sum alimony was in the nature of capital receipt. To be precise the Court held as follows:-

" In our view, from the point of view of taxability, the decree must be regarded as a transaction in which the right of the assessee to get maintenance from her ex-husband was recognized and given effect to. That right was undoubtedly a capital asset. By the decree that right has been diminished or partly extinguished by the payment of the lump sum of Rs.25,000 and balance of that right has been worked out in the shape of monthly payments of alimony of Rs.750 which, as we have pointed out, could be regarded as income. It is, in our view, beyond doubt that, had the amount of Rs.25,000 not been awarded in a lump sum under the decree to the assessee, a larger monthly sum would have been awarded to her on account of alimony. It is not as if the payment of Rs.25,000 can be looked upon as a commutation of any future monthly or annual payments because there was no pre-existing right in the assessee to obtain any monthly payment at all. Nor is there anything in the decree to indicate that Rs.25,000 were paid in commutation of any right to any periodic payment. In these circumstances, in our view, the receipt of that amount must be looked upon as a capital receipt. In view of this, we do not think it necessary to consider whether the said receipt could be regarded as casual receipt or in the nature of a windfall."

Ms. Asha Ghutghutia learned counsel appearing on behalf of the revenue contended that the Tribunal did not hold that the 50% of the sale consideration given to the wife was on account of alimony.

We are not impressed by the submission advanced by the learned counsel for the revenue. The Tribunal has categorically held that:-

"It was on account of alimony that the husband mutually agreed to part with 50% thereof as is noted in the decree of divorce dated 12.01.1994."

She contended that the assessee cannot make out a new case. We are unable to agree with this contention either. It was open to the assessee to contend that the receipt was capital in nature and therefore not taxable. She must have been advised to claim benefit on the basis of capital gains. When the alternative case, which the assessee could have made, has not only been found against her but has also been put forward as an answer to her claim, it is not improper to grant her the benefit on that basis. The revenue cannot also in that case be heard to contend that it has been taken by surprise.

We are supported in our view by the judgement of the Apex Court in the case of Firm Sriniwas Ram Kumar -Vs- Mahabir Prasad, reported in AIR 1951 SC 177 wherein their Lordships held as follows:-

"The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a

separate suit. As an illustration of this principle, reference may be made to the pronouncement of the Judicial Committee in Babu Raja Mohan Manucha v. Babu Manzoor [(70) IA 1] . This appeal arose out of a suit commenced by the plaintiff appellant to enforce a mortgage security. The plea of the defendant was that the mortgage was void. This plea was given effect to by both the lower courts as well as by the Privy Council. But the Privy Council held that it was open in such circumstances to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under Section 65 of the Indian Contract Act. Although no such alternative claim was made in the plaint, the Privy Council allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the appellant even though the appeal was heard ex parte in the absence of the respondent."

When the revenue did not prefer any appeal against the finding of the learned Tribunal that the payment was "on account of alimony" the revenue must be deemed to have been satisfied by such finding.

Reference in this regard may be made to a Division Bench judgement of the Bombay High Court in the case of Motor Union Insurance Co. Ltd. –vs- Commissioner of Income Tax, Bombay, reported in (1994) 13 ITR 272, wherein the following views were expressed:-

"Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross appeal or cross-objections. But if no such thing is done, the other party, in law, is deemed to be satisfied with the decision."

The judicial principle pressed into service by the Division Bench of the Bombay High Court was later followed by another Division Bench of the Bombay High Court in the case of New India Life Assurance Co. Ltd. –vs- Commissioner of Income Tax, reported in (1957) 31 ITR 844, and the same view was also endorsed by the Apex Court in the case of State of Kerala –vs- Vijaya Stores, reported in (1979) 116 ITR 15.

For the aforesaid reasons, the amount received by the assessee was a capital receipt and hence not taxable. It is, therefore, not necessary for us to answer the questions No.1, 2 and 3.

The question No.4 is answered in the negative and in favour of the assessee.

The appeal is, thus allowed.

(**GIRISH CHANDRA GUPTA, J.)**

I agree. **(ASHA ARORA, J.)**