BETWEEN:

ALEXANDER COLE .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1964
June 25
June 30

Revenue—Income Tax—Purchase and sale of discounted second mortgages by association of which appellant a member—Whether association a partnership—Sale of appellant's interest in association—Income or capital gain—The Partnerships Act, R.S.O. 1960, c. 288.

In 1949 the appellant, a Toronto businessman, entered into an association with a Mr. Minden, a lawyer, and three other persons for the purpose of buying second mortgages at a discount. Each member contributed capital to the association but Minden purchased the mortgages and the accounting for the mortgages was done in his law office. The appellant took no part in selecting the mortgages to be purchased or in the allocation of funds and most of the mortgages were registered in Minden's name. There was no written document to indicate the nature of the association or the relationship existing between the members thereof.

In December 1956 the appellant withdrew from the association and in January 1957 he received payment from Minden in the amount of $32,200 for his interest therein. Of this amount it was agreed by appellant and respondent that $10,916.08 represented the actual accrued entitlement of the appellant to bonuses on the mortgages on a *pro rata* basis in respect of the second mortgages held by the association at the time the appellant withdrew therefrom. The respondent reassessed appellant's 1957 taxable income by adding thereto the sum of $10,916.08.

[1] (1956) 1 D.L.R. (2d) 497.
[2] [1955] 3 All E.R. 48 at 57 (letter F and foll.).
[3] [1957] 1 All E.R. 700 at 715 (letter F and foll.).

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Held: That the arrangement between the appellant, Mr. Minden, and the three other persons was not in law a partnership, Mr. Minden being merely the agent for each of the other parties to the arrangement.

2. That what the appellant sold in December 1956 to the two remaining members of the association was not a capital asset.

3. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Gibson at Ottawa.

Wolfe D. Goodman for appellant.

W. Z. Estey, Q.C. and *S. Silver* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

GIBSON J. now (June 30, 1964) delivered the following judgment:

This is an appeal from the assessments for income tax made by the respondent, dated March 28, 1962, wherein a tax in the sum of $8,255.56 was levied in respect of the income for the taxation year 1957 of the appellant.

The respondent by the said assessment re-assessed the appellant in such a manner as to include in his income for the taxation year 1957 the sum of $10,916.08 as being profit on the sale of certain second mortgages.

The appellant, at all material times, resided in the City of Toronto and is, and was, President of Aladdin Rug Co. Ltd., a rug company, and of Alexander Cole and Associates, Ltd., which is a managing and holding company. The appellant says that his employment with these companies constitutes his full-time business activities.

In the spring of 1949, the appellant, together with Arthur Minden, a lawyer of the City of Toronto, Zola Morgan, a business associate of the appellant in Aladdin Rug Co. Ltd., and Leon Pape and Ben Pape, accountants, commenced to buy second mortgages at a discount and associated themselves, according to the appellant, in what he described as a syndicate for such purpose.

Originally, the appellant and each of the other four persons put up $4,000 and commenced to buy second mortgages.

Thereafter, the interest earned on these mortgages and the principal sums when such fell due, together with additional capital advanced, were used for the purchase of additional mortgages. During the period of 1949 to 1956, 119 second mortgages having a face value in excess of $250,000 were purchased.

All these mortgages, except for one group of them which were sold *en bloc* in 1954, were held until maturity.

In December, 1954, Leon Pape and Ben Pape withdrew from this arrangement and certain of the mortgages above referred to were sold *en bloc* and they were paid the sums owing to them. This sum represented a figure which included not only the capital invested by these persons and the interest on the second mortgages representing their share in the same, but also a sum equivalent to their respective *pro rata* share, a bonus or discount which accrued to the date of such sale.

After December, 1954, and until December, 1956, the other three persons continued to purchase second mortgages in the same manner.

Then, in December, 1956, the appellant desired to have his interest purchased and he went to Mr. Arthur Minden who bought out his interest for $32,200 and gave him a cheque for this amount in January of 1957.

During the whole of the period, 1949 to 1956, the mortgages were purchased by Mr. Minden and the appellant had nothing to do with choosing any of the mortgages which were purchased or with allocating any particular funds for the purchase of any of these mortgages. The accounting for these mortgages was done in the law office of Mr. Minden, and Messrs. Pape prepared each year certain financial statements respecting these transactions which the appellant used for the purpose of preparing his income tax returns.

The appellant stated that some of the mortgages were registered in his name and in the name of others in the so-called syndicate other than Mr. Arthur Minden, but that, in the main, the mortgages were registered in Mr. Minden's name.

The appellant stated that there was no particular proportion of mortgages registered in the name of any one of the persons who constituted this so-called syndicate.

There was no formal document drawn or executed of any kind evidencing what was the precise nature of this so-called

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syndicate; and there was no such document drawn either when Messrs. Pape withdrew from the arrangement or when the appellant withdrew.

After the appellant received his cheque for $32,200 in January, 1957, he was called upon to sign certain discharges of mortgages which had been registered in his name, and copies of certain of these were filed as exhibits on this appeal. Counsel for the appellant and the respondent agreed that the document which is filed as Exhibit A-1 and which is set out hereunder represents a calculation of the profit made by the appellant on the sale of these mortgages and is in the sum of $10,916.08:

MR. ALEXANDER COLE
650 BRIAR HILL AVENUE
TORONTO 12, ONTARIO

Calculation of Profit:		
Capital invested by taxpayer in 1949		$ 8,700.00
Add: Net Mortgage interest earned by taxpayer in years 1949 to 1956 inclusive—		
1949, 1950	$ 559.13	
1951	563.06	
1952	1,420.29	
1953	2,187 38	
1954	2,012.47	
1955	2,505.40	
1956	2,244 51	11,492.24
Additional capital invested—1951	$ 1,300.00	
—1952	18,000 00	
—1955	2,547.45	21,847.45
		$42,039.69
Deduct: Withdrawals of Capital—1953	$ 1,500 00	
—1954	13,000.00	
—1956	16,500.00	$31,000 00
		$11,039 69
Proceeds of Sale		32,200 00
		$21,160.31
Deduct: Mortgage bonuses and discounts taxed in hands of taxpayer —1953	$ 236.37	
—1954	3,479.83	
—1955	2,440.71	
Mortgage bonuses and discounts not taxed in hands of taxpayer due to Statutory Limitations under Section 46 (4) of the Income Tax Act	$ 4,087.32	$10,244 23
Profit		$10,916 08

It was agreed that the figure $10,916.08 corresponded to the actual accrued entitlement of the appellant of bonuses on the mortgages on a *pro rata* basis in respect to the second mortgages held by this so-called syndicate at this material time.

Exhibit A-2 filed in this appeal was a memorandum, prepared by certain officials of the Department of National Revenue, of all mortgages owned by this so-called syndicate during the period 1949 to 1956; and, as indicated, these mortgages were all registered in the name of one or other of the members of the so-called syndicate and were all held to maturity except the group of mortgages which were sold to pay off or buy out the interests of Messrs. Pape who retired from the syndicate in December, 1954.

It was the contention of the appellant on this appeal that what he sold in December, 1956, to the remaining members of the syndicate, Messrs. Minden and Morgan, was a capital asset in that the syndicate was in law a partnership which was not dissolved at that time but rather continued; and that what was sold was not property *in specie* but rather a *chose in action.*

It was the contention of the respondent firstly, that this arrangement which was called a syndicate was not a partnership in law but that Mr. Arthur Minden was merely the common agent of Messrs. Morgan, Pape and the appellant for the purchase of these mortgages and the carrying on of the business of earning money on these mortgage transactions and also in the liquidation of their respective interests in these mortgages.

In other words, the principals Messrs. Pape were the first to have their agent, Mr. Minden, liquidate their interest; then followed the appellant and finally, Mr. Morgan had Mr. Minden dispose of his interest as his agent (which occurred, according to the evidence, also in the year 1957).

The respondent contends that if this syndicate was in law a partnership, then it was a partnership at will and what took place in December, 1956, or January, 1957, resulted in the dissolution of that partnership among Messrs. Minden, Morgan and the appellant, and the reconstituting of a partnership consisting of only two partners, Messrs. Minden and Morgan.

I am of opinion that the arrangement which is referred to as a syndicate herein was not in law a partnership.

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Instead, Mr. Minden was merely the agent for each of the persons in this arrangement which included the appellant and he acted as such in acquiring these second mortgages throughout the period 1949 to 1956 and the eventual disposition of the appellant's interest in the same in December, 1956.

Arthur Minden's connection with the so-called syndicate and details of the relationship of these members of it with each other during the years 1949 to 1956 are fully set out in the judgment of Cattanach, J. in *Minister of National Revenue v. Minden*[1]. (In this connection, it is relevant to note that there was no mention of partnership in that case).

The fact that more than one person in this group at any one time may have had an interest in each of the said mortgages is immaterial and is not in itself evidence that this was a partnership. Such an arrangement is merely neutral in so far as its legal consequences in this matter are concerned.

In this case there were no formal arrangements of any type and at no time in any public or private document was this arrangement among these persons described as a partnership in law.

Having in mind the provisions of s. 3 of the *Partnerships Act*, R.S.O. 1960, c. 288, there is nothing in this arrangement which would lead one to the conclusion that by virtue of this section of this Act the arrangement was a partnership.

Mr. Justice Duff as he then was, in the case of *Porter and Sons Ltd. v. J. H. Armstrong*[2], laid down a test, which is not met in this subject case, viz:

> Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing It is not sufficient there should be community of interest; there must be contract.

In this particular case, in my view, there is no evidence of any contract, expressed or implied, and any of the evidence adduced from which it might be argued that some of the elements of partnership were present was at best equivocal.

I do not think that it could be said that there was a true intent here on the part of the parties to be partners in law

[1] 63 D.T C. 1235-6. [2] [1926] S C R. 328 at 329.

in this particular arrangement and thereby attract to themselves not only the advantages in law but all the disadvantages which are the burden of partnerships. If the case were in a different form involving some substantial sort of liability on these persons, including the appellant, by reason of a claim by a third party that it was a partnership, I am sure that the appellant and a court would find no difficulty in holding that no partnership in law existed.

If, however, this was in law a partnership at will, then the sole question arises whether there was dissolution of the partnership at the time the appellant alleges he assigned his interest to the other partners in December, 1956.

The assignment was not put in any formal document but was merely verbal and the appellant received a cheque and it was his allegation that the remaining partners received all rights in the assets constituting the partnership including the right to receive the profit.

If the partnership was dissolved in December, 1956, by what was done, and re-constituted with the remaining three partners, then it would be clear that the profit obtained by the appellant of $10,916.08 would be income in his hands. This was so held in *Minister of National Revenue v. Sedgwick*[1].

If the partnership was not dissolved then it is arguable that this receipt was a capital receipt.

The *Partnerships Act*, R.S.O. 1960, c. 288, is silent as to any provisions which in law constitute dissolution when the partnership is a partnership at will. Section 31 may be applicable in any event but it does not touch on the issue of whether or not the partnership is dissolved.

This matter was considered and left open in the case of *Emanuel v. Symon*[2], and I quote from the judgment of Channell J.

> Whether the assignment of his share by one partner to another operates to dissolve the partnership may be said to be at the present time a matter of very considerable doubt. It is stated at p. 583 of the 5th edition of Lindley on Partnership, which was published before the Partnership Act, in 1890, that in the case of a partnership at will the assignment by a member of an ordinary firm of his share in it operates as a dissolution of the partnership; but in the editions published since the Act the editors indicate that it is their opinion that the Act has made a difference in this respect, because the Act mentions certain specific cases in which a partnership is to be considered to be dissolved, and the

[1] (1964) 42 D L R (2d) 492. [2] [1907] 1 K.B 235 at 241.

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assignment of partnership shares is not included amongst them. I was referred to a case of *Sturgeon v. Salmon*, 22 Times L.R. 584, in which it was suggested that the point had been decided by Ridley and Darling JJ. in the Divisional Court, but when that case is examined it will be found that the point was not decided, the decision of the Court having proceeded on the special terms of the particular agreement between the parties. There seems to be no real authority on the question where there are more than two partners, though where there are only two partners there is authority: *Heath v. Sansom* (1832) 4 B. & Ad. 172, which shows that an assignment by one partner of his share to the other does put an end to the partnership, as indeed must obviously be the case. Where there are more than two partners and there is an assignment from one to another so that no new partner is introduced, the question is so doubtful that I do not like to express an opinion on it. The Partnership Act, 1890, leaves the matter in doubt, because the Act provides by s. 46 that the rules of equity and common law applicable to partnership shall continue in force except in so far as they are inconsistent with the express provisions of the Act, and it is very arguable whether the addition of other causes of dissolution is inconsistent with a section which expresses certain causes.

Apparently, the sections regarding dissolution of partnership which were included in the English *Partnership Act*, in 1890, have been transposed unchanged into *The Partnerships Act*, R.S.O. 1960, c. 288, and so the statutory enactments are identical in this matter.

If it was necessary to decide this point, which I have held it is not, I would be prepared to hold that a partnership at will is dissolved by a partner assigning his interest in the partnership to the remaining partners, when there are at least two remaining partners.

In the result, therefore, the appeal is dismissed with costs.

Judgment accordingly.