

(1998) 03 DEL CK 0009
In the Delhi High Court
Case No : F.A.O. (OS) .No.39/93

Hansa Industries Pvt. Ltd. and Others	APPELLANT
Vs	
Kidarsons Industries P. Ltd. and Others	RESPONDENT

Date of Decision : 25-03-1998

Acts Referred:

Citation : (1998) 3 AD 27 : (1998) 94 CompCas 552 : (1998) 45 DRJ 149

Hon'ble Judges : Mahinder Narain, Acting C.J.;S.K. Mahajan, J

Bench : Division Bench

Advocate : Mr. S.K. Dholakia, Mr. A.C. Gulati and Mr. M.K. Arora, for the Appellant; Mr. V.P. Singh Mr. K.K. Jain and Ms. Anju Bhattacharya, for the Respondent

Judgement

This Judgment has been overruled by : Hansa Industries Pvt. Ltd. and Others Vs. Kidarsons Industries Pvt. Ltd., AIR 2007 SC 18 : (2006) 134 CompCas 1 : (2006) 9 JT 100 : (2006) 10 SCALE 170 : (2006) 8 SCC 531 : (2006) 72 SCL 117 : (2006) 7 SCR 235 Supp

S.K. Mahajan, J.—The appellants in this appeal have challenged the order dated 5th February, 1993 passed by Hon"ble the Single Judge dismissing their objections to the report of M/s. V. Shankar Aiyer & Company, Chartered Accountants valuing the shares of respondent No.1 company and directing the implementation of the settlement arrived at between the parties on 9th June, 1988 in accordance with the report of the Chartered Accountant. Certain other directions were also given by Hon"ble the Single Judge in the impugned order. Before we deal with the controversies raised in this appeal, a few facts relevant for its disposal are given hereinbelow :-

2. The respondent company is a closely held private company of the appellants and respondents 2 to 4. The entire shareholding of the company is held by the family except that a few shares are held by some of the relatives and friends of the parties. The family consist of four brothers and their mother. While the appellant No.4 and members of his family are on one side, the other three

brothers namely, Mohinder Nath, Virender Nath and Rajendra Nath and their mother were on the other side. The mother of the parties had died during the pendency of the proceedings. The appellant group is herein referred to as the "NN" group and the other group is referred to as the "MN" group.

3. The authorised capital of the company comprised of 20,000 equity shares of Rs.100/- each. Issued and paid up capital as on 30th June, 1988 was Rs.18,45,700/- i.e. 18,457 equity shares of Rs.100/- each. The NN group jointly held 5,564 equity shares in the company while the remaining issued and subscribed capital of the company belong to the MN group.

4. Till about 30th June, 1988 the main income of the company was the commission from the agency business of M/s. Thyssen Sthal Union of Germany (in short referred to as "TSU"). It appears that there arose certain disputes between the brothers, and the appellant No.4, Therefore, with his efforts got the TSU agency exclusively to himself. TSU, accordingly, served a notice on the company terminating their agency w.e.f. 30th June, 1988. From 1st July, 1988 the agency was given by TSU to Hansa Industries Private Limited, a company belonging to appellant No.4.

5. The appellants filed a petition for winding up of Kidarsons Industries Private Limited in this Court under Sections 433 and 439 of the Companies Act, 1956. The said petition was filed mainly on the ground that as the agency has been terminated by TSU, the main income of the company has gone and, Therefore, it was just and equitable to wind up the company. During the pendency of this petition, the respondents filed the present suit for declaration that the appellants hold the agency agreement of TSU for and on behalf of the company and for an injunction restraining the appellants from carrying on the agency business of TSU in India holding themselves out as their agent. During the pendency of these proceedings, the parties arrived at a compromise whereby Narender Nath Nanda and his group agreed to transfer their equity shares in Kidarsons Industry Private Limited Constituting 30.14% of the share capital of the company in favor of the respondents. The price of these shares was to be paid to NN Group or their nominees in specie by transferring to them 30.14% of the assets of the company. The TSU agency was to be retained by Narender Nath Nanda and his group. Some of the terms of the settlement are reproduced as under :-

2. That the price of the aforesaid 5654 (later corrected as 5564) equity shares of Kidarsons Industries (P) Ltd., will be paid to Shri Narender Nath Nanda, and/or his nominees in specie by Company by transferring to him 30.14 per cent of the assets of the Company. Marginal amount not exceeding 5 lakhs may be paid by the company to Shri Narender Nath Nanda and/or his nominees as the case may be, in cash if found necessary. Similarly Shri Narender Nath Nanda may make similar compensatory equalisation payment to the company. Parties by consent can, however, agree to a larger amount.

6. That Shri P.N. Khanna, Retired Judge is at present acting as a Mediator. He will

act as a Commissioner, to separate 30.14% of the assets of the company to be given to Shri Narender Nath Nanda Group as set out hereinbefore.

10. Assets of the company will be valued as on 1.7.1988.

14. Shri Narender Nath Nanda will continue to occupy the portion of the property of the company in which he is at present residing as deemed owner/ owner, and the value of such portion will be taken into account for evaluating the assets of the company. The value of such part of the property as is occupied by Shri Narender Nath Nanda will be adjusted in the value of his share.

16. That for the purpose of valuation of share of Shri Narender Nath Nanda Group, the property No.K-72, Udyog Nagar, Rohtak Road, Delhi will be treated as the property of the company.

19. This agreement will be filed in the Suit No.1310 of 1988 and C.P.No.28 of 1988, and appropriate orders will be passed in the suit."

6. In terms of the settlement, Justice P.N. Khanna, after evaluating the assets of the property held that the NN group was entitled to get assets worth Rs.1.10 crores and on that basis he allotted Golf Links property to the said group, even though its value, according to Justice Khanna, was Rs.1.82 crores. However, the report was not agreeable to the parties and, accordingly, the matter was again taken up in the Court and on 9th August, 1990 the parties agreed that valuation of the shares of Kidarsons Industries Private Limited and the immovable properties owned by the company was required to be done. There was no agreement on the name of the Chartered Accountant for the purpose of evaluation and the Court, accordingly, vide order dated 30th August, 1990 appointed M/s. V. Shankar Aiyer & Company as the Chartered Accountants for purposes of valuation of the assets of the company. They were also required to give valuation of shares according to the valuation of the assets of the company. This order was subsequently rectified by order dated 4th September, 1990 by which the Chartered Accountants were required to give valuation of the assets as well as the liabilities of the company. The order dated 30th August, 1990 rectified by order dated 4th September, 1990 reads as under :-

"I have seen the list of Senior Chartered Accountants which is maintained by the Company Section. Parties have not agreed upon the name of any Chartered Accountant for the purpose of valuation. M/s. V. Shankar Aiyer & Company who are on the said panel are appointed as Chartered Accountant for the purposes of valuation of the assets of the company. They will also give valuation of the shares according to the valuation of the assets and liabilities of the company. This valuation of the shares is needed to determine value of 30.14 per cent of the assets of the company. The Chartered Accountant will determine the value of the shares keeping in view the provisions of clauses 2 and 14 of the agreement between the parties. The report of the Chartered Accountant shall be given in terms of order dated 9.6.1988 and 9.8.1990.

7. The report to be given by the Chartered Accountant within two months.

8. The Chartered Accountant will intimate the parties of their fees, which amount will be paid by the parties in equal shares.

The case to come on the date already fixed i.e. 12.11.1990."

9. The Chartered Accountants gave their report determining the assets and liabilities of the company and after deducting the liabilities from the assets, the nett assets were valued at Rs.1,68,95,570/-. That being the value of 18,445 equity shares of the company, value of each share on that basis was worked out at Rs.916/-. This Value was made after deduction of 20% of the said value of shares on account of restriction of transfer of the shares of the company and thus the value of each share of the company worked out by the Chartered Accountants was Rs.733/-.

10. To this report of the Chartered Accountants, the NN group filed their objections. These objections were dismissed by hon"ble the Single Judge by his judgment dated 5th February, 1993. Being aggrieved by the judgment of hon"ble the Single Judge, the appellants have preferred this appeal.

11. The challenge to the impugned judgment as well as to the report of the valuers by the appellants is mainly on the following grounds :-

1) The valuers did not take into account the value of the goodwill and tenancy rights while assessing the value of the assets of the company;

2) Value of Udyog Nagar plot has been taken at a very low figure;

3) As there was no transfer of properties by the company, the valuers could not have deducted the hypothetical capital gains allegedly payable to the Income Tax department from the value of the assets of the company;

4) Once the value of shares have been arrived at, the same could not have been reduced by 20% on the ground that the company being a private company, its shares were not marketable; and

5) As per clause 14 of the settlement, Narender Nath Nanda was to continue to occupy the Golf Links property and he could not be thrown out of the same.

12. Elaborating his arguments, it is submitted by Mr. Dholakia that the valuers ought to have taken the value of the goodwill of the company. He referred to page 2277 of the "Accountancy by William Pits" in support of his contention that goodwill of a business is the advantage, whatever may be, which a person gets by continuing to carry on, and being entitled to represent to the outside world that he is, carrying on a business, which has been carried on for some time previously. He submits that no formula can be laid down for accurate measurement of the value of the goodwill but it can be 2-3 years purchase of the annual average profits of the company.

13. It is also submitted by him that company had taken on rent the premises in

prime areas like the Allahabad Bank building at Parliament Street, New Delhi; the Utility building in Bangalore and the godown in Jhandewalan Extension, New Delhi. He, Therefore, states that these properties are quite valuable and the valuer has committed an error in ignoring to value the same while arriving at the value of the assets of the company.

14. The learned Single Judge while dealing with the objections of the appellants has considered the fact that the main business of the company was the agency business of TSU. This is stated to have been admitted by the appellants in the company petition and that was the main ground in the company petition for winding up of the company. That stand having been taken by the appellants, it could not be argued by the appellants that the company still continue to have the goodwill. It was stated by the appellants in the company petition that after the TSU agency goes, the business of the company could not be carried on except at a loss meaning thereby once the substratum of the company had gone it was not open to the appellants to argue that the company still has its goodwill. The valuer while valuing the assets of the company has taken into consideration as to whether the goodwill of the company had any value and while considering the value of the goodwill, it was held by him that :-

"A variety of elements goes into the making of goodwill and because of its intangible nature, it remains insubstantial in form and nebulous in character. "In a progressing business, goodwill tends to show progressive increase. And in a falling business, it may begin to wane. It is affected by everything relating to the business, the personality and business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact of the contemporary market, the prevailing socio economic ecology, introduction to old customers and agreed absence of competition." Applying the above principles, in our opinion, the valuation of goodwill in the above facts and circumstances would not arise."

15. In our view, sufficient reasons have been given by the valuer as to why the company did not have any goodwill and we do not see any reason to differ either with the opinion of the valuer or with the judgment of the learned Single Judge. In the present case, the main business of the company having been taken away by the appellants themselves, in our view, the company will not have any goodwill on account of its past performance. The company may have to start afresh to create a goodwill in respect of the business which it carries on after the agency was terminated by TSU. In our view, Therefore, there was no value of the goodwill and no error has been committed by the valuer in not assessing the value thereof.

16. In so far as the value of the tenancy rights of the company are concerned, nothing has been placed on record before us or before the learned Single Judge as to whether such tenancy rights can be transferred and if so what would have been the premium which could have been paid to the company in case of such transfer. In normal circumstances, tenancy rights are not transferable inasmuch

as the tenancy is governed by the relevant Rent Control Legislations. Under the Rent Control Legislations, the tenant is not authorised to sub-let, assign or part with possession of the tenanted area and if there is such a prohibition in transfer of the tenancy rights, in our view, there could not have been any value of the tenancy rights. Moreover, the appellants themselves have not stated as to in what manner the same could have been transferred or what could have been the value of such rights. In our view, Therefore, there is no error either in the judgment of hon"ble the Single Judge or in the valuation report of the valuer in not fixing any value for the tenancy rights of the company.

17. The Udyog Nagar plot which belongs to Mohinder Nath Nanda was, by virtue of the settlement arrived at between the parties, agreed to be taken as an asset of the company and was to be valued accordingly. The objection to the valuation of the said property on behalf of the appellants is that the valuers have not assessed the said property at its market value. Though we are in agreement with the appellants that the property has not been assessed at its market value, however, we find that there is nothing on record to indicate as to what should have been the market value of this property. It is argued by Mr. Dholakia that no opportunity had been given by the valuer to the appellants to place before him the market value of the property. We are not in agreement with him, as the appellants were always at liberty to approach the valuer and inform him about the market value of a particular asset duly supported by some proof. Even assuming for the sake of argument that no opportunity had been given to the appellants to inform the valuer about the market value of the property, we find that neither before hon"ble the Single Judge nor before us any attempt has been made by the appellants to indicate with substantial evidence as to what would be the market value of the property. This Court is not to venture upon and guess the market value of a particular property. It is for the parties to place sufficient material on record to enable the Court to come to a finding as to what would have been the value of a property. In the absence of any such material before us, we are unable to say as to what would be the market value of the property and in our opinion there was nothing wrong in valuing the said property at the price shown in the books of accounts. We, Therefore, do not see any reason to differ with the report of the valuer in so far as the same relate to the valuation of the Udyog Nagar property.

18. The objection of the appellants to the reduction of the value of the assets of the company by the capital gains allegedly payable to the Income Tax department on the hypothetical transfer of the property at the time of its sale is that as the capital gains has not been paid nor is payable to the Income Tax department, the valuer could not have deducted the same from the value of the assets of the company.

19. u/s 45 of the Income Tax Act any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in Sections 54, 54(b), 54(d), 54(e), 54(f), 54(g) and 54(h), be chargeable to

income tax under the head "capital gains" and shall be deemed to be the income of the previous year in which transfer took place. Sub-section 3 of Section 45 states that the profit or gains arising from the transfer of a capital asset by a person to a firm in which he is or becomes a partner or member, by way of capital contribution or otherwise, shall be chargeable to tax as his income of the previous year in which such transfer takes place and, for the purposes of Section 48, the amount recorded in the books of accounts of the firm as the value of the capital asset, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset. Sub-section 4 of Section 45 states that the profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals (not being a company or a cooperative society) or otherwise, shall be chargeable to tax as the income of the firm, association or body, of the previous year in which the said transfer takes place and for the purposes of Section 48 the fair market value of the asset on the date of such transfer shall be deemed the full value of the consideration received or accruing as a result of the transfer.

20. u/s 46 of the Act where the assets of a company are distributed to its shareholders on its liquidation, such distribution shall not be regarded as a transfer by the company for the purposes of Section 45. However, under sub-Section 2 of Section 46 where a shareholder on the liquidation of a company receives any money or other assets from the company, he shall be chargeable to income tax under the head "capital gains", in respect of the money so received or the market value of the other assets on the date of distribution, as reduced by the amount assessed as dividend within the meaning of sub-clause "c" of Clause 22 of Section 2 and the sum so arrived at shall be deemed to be the full value of the consideration for purposes of Section 48.

21. The contention of Mr. Dholakia is that as the assets are being distributed to its shareholders on their transferring the shares in the company to the remaining shareholders, such transfer cannot be regarded as a transfer by the company for the purposes of Section 45 of the Act and consequently the capital gains could not have been deducted from the market value of the property before arriving at the value of shares. In support of his contention he has referred to the judgments reported as Commissioner of Income Tax, Gujarat Vs. Mohanbhai Pamabhai, and Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat, .

22. In Commissioner of Income Tax, Gujarat Vs. Mohanbhai Pamabhai (Supra), a division Bench of the Gujarat High Court was considering the question as to whether the receipt of an amount in respect of a share in the partnership by an assessed on retirement is assessable to capital gains tax u/s 45 of the Income Tax Act and it was held by the Court that there is no transfer of interest in the partnership assets involved when a partner retires from a partnership and consequently he is not liable to be assessed to the capital gains tax under the

Act. It was held by the Court as under :-

"The charging provision in section 45 is not confined to those cases where the capital asset has cost something to the assessed in terms of money in acquiring it. There is nothing in any of the sections relating to capital gains which indicates that the charging provision should be construed in a narrow manner by excluding self-created capital assets or capital assets which have cost nothing to the assessed in terms of money in acquiring it. Section 48 provides for deduction from the value of the capital asset of "the cost of acquisition of the capital asset". The word "acquire", according to its plain natural meaning, is a word of very wide import. It is not confined to the obtaining of a thing from a third party. Creation or production of a capital asset is not foreign to the concept of acquisition. Even where a capital asset is self-created it would be covered by Section 48. Goodwill of a business is such a capital asset.

23. Section 2(47) defines "transfer" in relation to a capital asset. This definition gives an artificially extended meaning to the term by including within its scope and ambit two kinds of transactions which would not ordinarily constitute "transfer" in the accepted connotation of that word, namely, relinquishment of the capital asset and extinguishment of any rights in it. But, even in this artificially extended sense, there is no transfer of interest in the partnership assets involved when a partner retires from the partnership.

24. The interest of a partner in a partnership is not interest in any specific item of the partnership property. It is a right to obtain his share of profits from time to time during the subsistence of the partnership and on dissolution of the partnership or on his retirement from the partnership to get the value of his share in the net partnership assets which remain after satisfying the debts and liabilities of the partnership. When, Therefore, a partner retires from a partnership and the amount of his share in the net partnership assets after deduction of liabilities and prior charges is determined on taking accounts on the footing of notional sale of the partnership assets and given to him, what he receives is his share in the partnership and not any consideration for transfer of his interest in the partnership to the continuing partners. His share in the partnership is worked out by taking accounts in the manner prescribed by the relevant provisions of the partnership law and it is this, namely, his share in the partnership which he receives in terms of money. There is in this transaction no element of transfer of interest in the partnership assets by the retiring partner to the continuing partners.

25. The transfer of a capital asset in order to attract capital gains tax must be one as a result of which consideration is received by the assessed or accrues to the assessee. When a partner retires from a partnership what he receives is his share in the partnership which is worked out and realised and does not represent consideration received by him as a result of the extinguishment of his interest in the partnership assets.

26. Hence, when an assessed retires from a firm and receives an amount in respect of his share in the partnership there is no transfer of interest of the assessed in the goodwill of the firm and no part of the amount received by him would be assessable to capital gains tax u/s 45."

27. The Commissioner of Income Tax not being satisfied with the judgment of the Gujarat High Court filed an appeal in the Supreme Court of India. However, the Supreme Court by judgment reported as Addl. CIT v. Mohanbhai Pamabhai, (1987) 165 ITR 166 (SC) dismissed the appeal and confirmed the judgment of the Gujarat High Court.

28. In Sunil Siddharthbhai Vs. Commissioner of Income Tax (Supra), the Supreme Court held that where a partner of a firm transfers capital assets which are held by him to a firm as his contribution towards capital, there is a transfer of a capital asset within the meaning of Section 45 of the Income Tax Act 1961 because an exclusive interest of the partner in personal assets is reduced, on their entry into a firm, into a share interest and after dissolution of the firm or with his retirement from the partnership he is entitled to get the value of the shares in the net partnership assets as on the date of dissolution or retirement. However, this transfer by the partner of his personal assets into the partnership firm cannot fall within the meaning of Section 48 and was such outside the scope of the capital gains altogether. The relevant paragraph of the judgment is as under :-

"Where a partner of a firm makes other capital assets which are held by him to a firm as his contribution towards capital, there is a transfer of a capital asset within the terms of Section 45 of the Income Tax Act because an exclusive interest of the partner in personal assets is reduced, on their entry into a firm, into a share interest and after dissolution of the firm or with his retirement from the partnership he is entitled to get the value of the shares in the net partnership assets as on the date of dissolution or retirement after deduction of liabilities and prior charges. The credit entry made in the partner's capital account in the books of the partnership firm does not represent the true value of the consideration. It is a notional value only, intended to be taken into account at the time of determining the value of the partner's share in the net partnership assets on the date of dissolution or on his retirement, a share which will depend upon deduction of the liabilities and prior charges existing on the date of dissolution or retirement. It is not possible to predicate beforehand what will be the position in terms of monetary value of a partner's share on that date. At the time when the partner transfers his personal asset to the partnership firm, there can be no reckoning of the liabilities and losses which the firm may suffer in the years to come. All that lies within the womb of the future. It is impossible to conceive of evaluating the consideration acquired by the partner when he brings his personal asset into the partnership firm when neither can the date of dissolution or retirement be envisaged nor can there be any ascertainment of liabilities and prior charges which may not have even arisen yet. Therefore, the

consideration which a partner acquires on making over his personal asset to the firm as his contribution to its capital cannot fall within the terms of section 48. And as that provision is fundamental to the computation machinery incorporated in the scheme relating to the determination of the charge provided in section 45, such a case must be regarded as falling outside the scope of capital gains taxation altogether."

29. It is, Therefore, the contention of Mr. Dholakia that payment of the value of the shares to the appellants in specie viz. in the shape of the property, was neither sale nor transfer of immovable property from the company to the appellant and as such the capital gains tax could not have been deducted from the value of the shares.

30. In our view, reliance by Mr. Dholakia upon the judgments referred to above is of no assistance to him. The judgments referred to by Mr. Dholakia relate to the transfer of assets by the partnership firm and not by a company. It has been held by the Supreme Court that the interest of a partner in a partnership is not interest in any specific item of the partnership property but is a right to obtain share or profits from time to time during the subsistence of the partnership and on dissolution of the partnership or his retirement from the partnership to get the value of his share in the net partnership assets which remain after satisfying the debts and liabilities of the partnership. On his retirement or dissolution of the firm, Therefore, what he receives is his share in the partnership and not any consideration for transfer of his interest in the partnership to the continuing partners. His share in the partnership is worked out by taking accounts in the manner prescribed by the relevant provisions of the partnership law and it is this viz. his share in the partnership which he receives in terms of money. There is in this transaction no element of transfer of interest in the partnership assets by the retiring partner to the continuing partners.

31. In our view, the analogy of a partner retiring from partnership or receiving assets on dissolution of the firm cannot be extended to the transfer of capital assets by the company to a shareholder of the company, who has agreed to transfer his shares to the remaining shareholders and in consideration thereof has received capital assets of the company.

32. In the present case, the appellants had under the settlement agreed to transfer or sell their 5,564 equity shares in the company and in consideration thereof receive 30.14 per cent of the assets of the company. In case, the appellants had sold these shares in the market, they would have been liable to pay long term capital gains under the provisions of the Income Tax Act. Merely because shares were being transferred to the other share-holders of the company and the payment is being made in specie, namely, in the form of the assets of the company, it would not mean that no capital gains will be payable on such transfer of shares and consequent transfer of assets by the company to the appellants.

33. The Institute of Chartered Accountants in "Study on Shares Valuation" prepared by its research committee, while dealing with the question as to how the shares should be valued on the basis of the valuation of assets, has laid down three steps which are to be followed : i) valuation of assets; ii) ascertain of liabilities; and iii) fixation of value of different types of equity shares. We, in the present case, are concerned only with the first step as there is no dispute about the liabilities and as there are only one type of equity shares, Therefore, third step is not necessary. While dealing with valuation of assets it says that two problems which present themselves in valuing the assets of the company are : whether they should be taken from the book value or realisable value. In these times of changing price levels, it is unrealistic to take book values of different assets of a company - particularly fixed assets, if the values have changed materially since the date of their acquisition. In such cases, Therefore, realisable value of the assets should be ascertained, if necessary, with the help of expert valuers. Normally such value of assets would be taken after taking into account the cost of realisation, as well as the capital gains and other taxes which the company may have to pay on such realisation. An important departure from this principle is found in the Wealth-Tax Rules for valuation of unquoted equity shares, which specifically require the assets to be taken at their book value. Generally, the value of the assets will have to be taken on a going concern basis. But there may be cases where it would be reasonable to take the liquidation value of assets. The points arising from the judgment given in New Zealand Insurance Co.Ltd. Vs. Commissioner of Inland Revenue, are very illuminating in this regard. There is always a notional liquidation underlying asset valuation, and in principle, that method is generally used to ascertain what would be the net value of the shareholder if liquidation were carried out. Consequently, a deduction equal to the amount of expenses of liquidation is proper in the application of this method.

34. In this case, there is necessarily transfer of assets by the company to the appellants inasmuch as the defense Colony property is being actually transferred to the appellant No.1 by the company. In case of such transfer, in our view, capital gains will have to be paid. It is the contention of the appellants that though the capital gains has been deducted from the value of this property as well as from the value of the Golf Links property, the same has not been deposited with the Income Tax department. In our view, the capital gains which the company will have to pay on the transfer of defense Colony property has to be deposited by the company with the Income Tax department. Though, in the present case we are concerned only with the valuation of shares and not the payment of capital gains, however, we feel that the respondent company cannot be allowed to keep the capital gains tax with itself. In case, the appellants feel that no capital gains is payable it will be open for them to approach the Income Tax department for appropriate relief and if it is ultimately held by the department that no capital gains was payable on the transfer of defense Colony property by the company to the appellants, in our view, the benefit of refund, if

any, will accrue only to the appellants. In so far as Golf Links property is concerned, in our view, as the company will have to pay capital gains taxes as and when that property is transferred by it, the valuers have rightly deducted such tax from the value of assets while arriving at the value of shares of the company.

35. We cannot accept the contention of the appellants that at the time of valuing the shares, the valuer ought not to have deducted the capital gains from the value of the assets of the company. In our view, not only that the valuers were within their right to deduct the capital gains from the value of the assets of the company but every deduction made by the valuers like the cost of realisation, etc. has also been rightly deducted and we find nothing wrong in the same. We, Therefore, see no reason to differ with the judgment of the learned Single Judge on this aspect of the matter.

36. Assailing the report, it has lastly been argued by Mr. Dholakia that the valuers ought not to have reduced the value of the share by 20 per cent on the ground that the shares belong to a private limited company which were not easily marketable and the shares were subject to restrictions on their transfer in accordance with the Memorandum and Articles of Association of the company.

37. The company is admittedly a private limited company and as per its Articles of Association, there is a restriction on the transfer of its shares and its shares are not sold in the open market nor are they quoted in the stock exchange.

38. The usual rule in valuation of shares is that the market value of shares as on the date of transfer is taken as the value. There may not be any difficulty in arriving at market value of shares which are quoted in the stock exchange. However, difficulty may arise in valuing the shares of the companies which are either not listed in the stock exchange or are companies where shares are not freely transferable. Private companies by their very definition are required to restrict the transfer of their shares. Such restrictions may vary much in their scope and nature from a general power of the Board to refuse registration of transfer, to a preemptive power of the existing shareholders to acquire the shares of a member desirous of selling them at a stated price. Restrictions on transfer of shares generally have a depressing effect on their fair value inasmuch as the ready market for the sale is restrictive. It is, Therefore, not unusual that the value of the shares arrived at in normal course is reduced by certain percentage in the case of a private limited company. Prior to its omission by the Wealth Tax (Second Amendment) Rules, 1989, Rule 1(d) of the Wealth Tax Rules, 1957, also laid down that the market value of an unquoted equity share of a company shall be 80 per cent of the break up value so determined in accordance with the procedure mentioned in the said Rules. In our view, Therefore, the valuer by making a deduction at the rate of 20 per cent from the value of the shares has not committed any error and the same cannot be objected to. We do not find any infirmity in the order of the learned Single Judge on this aspect as well.

39. The last submission made by Mr. Dholakia is that under clause 14 of the settlement, Mr. Narender Nath Nanda had to remain owner/deemed owner of that portion of the Golf Links property which was in his possession and he could not be asked to leave the same. As held by the learned Single Judge, on a plain reading of this clause, there may be some force in the arguments of Mr. Dholakia however, clause 14 of the settlement cannot be read in isolation and the Court has to see whether to give effect to the entire settlement, will it be possible to permit Mr. Narender Nath Nanda to continue to occupy that portion of the Golf Links property which was in his occupation on the date of settlement.

40. Mr. Narender Nath Nanda had in his occupation three bedrooms in the Golf Links property besides having the right to use the common areas in the house. The other areas of the property as well as the common area were being used by the other brothers of Mr. Narender Nath Nanda. Sub-division of the property on the basis of its occupation was not legally possible. The Golf Links property being the lease hold property, sub-division of the property was not permitted. The property, Therefore, could not be divided between different co-owners. Moreover, there was so much acrimony between the parties that it was practically impossible for them to live in the same house. There had been various instances of violence and the matter, we have been informed, had even been reported to the police. In our view, Therefore, to give effect to the settlement, it was not possible to allow both the parties to live in the same house. Under the settlement, the payment of the equity shares held by the appellants was to be paid to Mr. Narender Nath Nanda or his nominee in specie by the company by transferring to him 30.14 per cent of the assets of the company. Marginal amount not exceeding Rs.5,00,000/- could have been paid by the company in cash if the same was found necessary. Similarly, Mr. Narender Nath Nanda could make similar compensatory equalisation payment to the company. In case, the entire Golf Link property was to be transferred to Mr. Narender Nath Nanda, as had been claimed by him, he was liable to pay much more than the aforesaid figure of Rs.5,00,000/- which unless the parties had consented could not have been paid by him. In these circumstances, in our view, the learned Single Judge was right in holding that the interpretation put forth on clause 14 of the settlement by the objector was not acceptable and Golf Links property could not in any manner be given to Mr. Narender Nath Nanda.

41. The only question which now remains to be decided is whether Mr. Narender Nath Nanda and his group in terms of clause 8 of the settlement has been paid the arrears of salary/commission and dividend declared so far. The said salary/commission and dividend was agreed to be paid within one month from the date of the settlement. After the judgment had been reserved by us on 18th December, 1997, the respondent filed an affidavit of one Mr. Man,ohan Lal Narang, the Finance Manager of Kidarsons Industries Private Limited, stating inter alias that as per records of the company, Mr. Narender Nath Nanda has been paid his salary for the period 1985 to 30th May, 1987 and tax amounting to rs.36,500/- and Rs.78,500/- had been deducted from out of his salary at source

from the years 1986-87 and 1987-88 respectively. Certain record has also been filed along with this affidavit. On filing of the said affidavit, the appellant filed an application on 12th January, 1998 refuting the allegations made in the affidavit filed by the respondent and stating that salary and commission was due to Mr. Narender Nath Nanda for three years up to 30th June, 1988 and dividend was also payable to him up to the said period. On our direction, the respondent had placed on record not only the ledger entries of the company but has also the vouchers through which the payment has been made to Mr. Narender Nath Nanda. We find that some of these vouchers have not only signed and prepared by Mr. Narender Nath Nanda but he has also received the amount from the company. In appeal, we, however, will not like to go into this question as to whether any amount was due and payable from the respondent and we leave it open to Mr. Narender Nath Nanda to make appropriate application for claiming the arrears, if any, before the executing court.

42. In view of the foregoing, we do not find any merits in this appeal and the same is, accordingly, dismissed. However, in the facts and circumstances of the case, we leave the parties to bear their own costs.