

R.M. AMBERKAR
(Private Secretary)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION NO. 3548 OF 2018

Amarjeet Thapar

.. Petitioner

Versus

Income Tax Officer, Ward 24(1)(1) & Ors. .. Respondents

-
- Mr. Mihir Naniwadekar a/w Mr. Rohan Deshpande i/by Alisha Pinto for the Petitioner
 - Mr. Sham Walve for the Respondents
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**CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.**

DATE : DECEMBER 14, 2018.

ORAL JUDGMENT (Per Akil Kureshi, J.):

1. We have heard learned counsel for the parties for final disposal of the petition by consent.

2. Petitioner has challenged a notice of reopening of assessment dated 28.3.2018. The petition arises in following backgrounds:-

The petitioner is an individual. For the assessment year 2013-14, the petitioner had filed return of income declaring total income of Rs. 65,51,360/-. The return was accepted by the assessing officer under Section 143(1) of the Income Tax

Act, 1961 (“**the Act**” for short). In order to reopen the assessment, impugned notice came to be issued. The assessing officer had recorded reasons for reopening of assessment. The reasons read as under:-

The assessee has filed the return of income for A.Y. 2013-2014 on 27.07.2013, declaring total income at Rs. 65,51,362/-. The return was processed u/S. 143(1) of the Act and returned income was accepted.

2. On verification of the ITR for A.Y. 2013-14 it is seen that the assessee has worked out LTGC on sale of Flat as under:

Sr. No.	Particulars	
1	Date of sale	27.12.2012
2	Sale Consideration	Rs. 6,42,05,500
3	Date of purchase / acquisition	30.10.1992
4	Cost of acquisition	62,63,227
5	Cost inflation index for F.Y. 2012-13	852
6	Year of acquisition	1992
7	Cost inflation index for year of acquisition	223
8	Indexed cost of acquisition	2,39,29,459
9	Indexed cost of purchase	36,27,459
<u>9</u>	<u>Capital gain</u>	3,66,48,582

Thus, the assessee has shown the year of acquisition as 1992 and based on this worked out the indexed cost of acquisition at Rs. 2,39,29,459/-.

3. During the assessment proceedings for A.Y. 2014-15, the assessee was requested to provide the sources of investments made during the year. The assessee had submitted that she had in the previous year sold one property and through its proceeds made investment during the year. The assessee had given the details of

purchase of the said property and submitted the following:-

3. Copy of purchase agreement dated 30.10.1992 for purchase of house No. D 1 at Mandar Co-operative Housing Society Ltd., Juhu Mumbai for Rs. 64,00,000/- by Ms. Amarjeet Thapar (Transferee) from Ms. Clare M. Fernandes (Transferor)

a. The said house property was acquired by Appropriate Authority (AA) constituted under the provisions of Chapter XX-C of the Income Tax Act, 1961 in the year 1993.

b. The assessee filed writ petition No.289 of 1993 in the High Court of Bombay for challenging the said acquisition by AA.

c. By order dated 04.06.2017 issued by Division Bench of the Bombay High Court the said property was allowed and the said acquisition by the AA was set aside and assessee was directed to pay a sum of Rs. 56,13,227/- to AA being the amount of AA had paid to transferor on the said acquisition (copy of High Court order dated 04.06.2007 is enclosed).

d. The assessee deposited the said sum of Rs. 56,13,227/- with the Prothonotary and Senior Master of the Bombay High Court as per the order dated 29.06.2007 issued by Justice S. Radhakrishnan of the Bombay High Court (copy of said order is enclosed)

e. Against the order dated 04.06.2007 of the Division Bench, the ITD preferred a SLP to Supreme Court bearing CC No. 8872/2008. By an order dated 14.07.2008 issued by Justice S.H. Kapadia and Justice B. Sudershan Reddy of Hon'ble Supreme Court of India, the SLP filed by ITD was

dismissed. (copy of the said order is enclosed).

f. Hence the cost of house property is Rs. 62,63,227/- (Rs. 6,50,500/- advance given as per purchase agreement dated 30.10.1992 + Rs. 56,13,227/- consideration as per order dated 04.06.2007 of the Bombay High Court.

g. The Income Tax Department **handed over possession on 16.11.2009 which was taken by the AA in 1993.**

h. In order to get the clear title of the property, the assessee registered the **deed of transfer dated 26.04.2011** and paid the stamp duty of Rs. 30,60,700/- and registration fees of Rs. 31,500/-.

4. From the above submission, it is seen that the assessee had received possession of the Flat on 16.11.2009 i.e in F.Y. 2009-10 and paid the consideration of Rs. 56,13,227/- in pursuance to the order of the Hon'ble Bombay High Court dated 04.06.2007 in F.Y. 2007-08. The order of the Hon'ble Bombay High Court dated 29.06.2007 in WP No. 289 of 1993 in para No. 2 reads as under:-

Paragraph No. 34 of our order dated 4th June 2007 stands deleted and substituted by the following paragraph:-

34. The Income Tax Department shall hand over the possession of the premises and also execute necessary deed of sale and convey the property and register the same immediately on receipt of the said sum of Rs. 56,13,227/-.

5. From the plain reading of the above para, it is clear that as per the order of the Hon'ble High Court, the assessee became the owner of the property in F.Y. 2007-08. However, for the purpose of computing the indexed cost of acquisition the assessee has taken F.Y. 1992-93 as year of acquisition, which is erroneous as the

property was transferred to the assessee in 2007-08. Therefore, the assessee has wrongly computed the indexed cost of acquisition and thereby wrongly computed the capital gains. As per the order of the Hon'ble Bombay High Court the assessee became the owner of the property only in F.Y. 2007-08. Therefore, the indexed cost of acquisition has to be computed after taking the year of acquisition as F.Y. 2007-08.

6. In view of the above the LTCG ought to be worked out as under:

Sr. No.	Particulars	
1	Date of sale	27.12.2012
2	Sale Consideration	Rs. 6,42,05,500
3	Date of purchase / acquisition	04.07.2007
4	Cost of acquisition	56,13,227
5	Cost inflation index for F.Y. 2012-13	852
6	Year of acquisition	2007
7	Cost inflation index for year of acquisition	551
8	Indexed cost of acquisition	86,79,617
9	Indexed cost of purchase	36,27,459
<u>10</u>	<u>Total indexed cost</u>	<u>1,23,07,076</u>
<u>10</u>	<u>Capital gain</u>	<u>5,18,98,424</u>

7. From the above working, it is clear that the assessee ought to have offered capital gains of Rs. 5,18,98,424/-, however in the return of income the assessee by making wrong claim of cost of indexation offered LTCG of Rs. 3,66,48,582/- only. Thus, the assessee has suppressed her LTCG by an amount of Rs. 1,52,49,842/-.

8. In view of the above facts, I have reason to believe that income chargeable to tax of Rs. 1,52,49,842/- has escaped assessment within the meaning of Section 147 of the I.T. Act, 1961 in the case of assessee for A.Y. 2013-14. Hence, it is a fit case for initiation of proceedings u/S. 147 of the Income Tax Act, 1961 by issuing notice u/S. 148 of the Income Tax Act, 1961

3. The petitioner filed objections to the notice of reopening on 20.9.2018 and 3.10.2018. The said objections were, however, rejected by the assessing officer by an order dated 10.11.2018. Thereupon, the present petition has been filed.

4. Learned counsel for the petitioner submitted that the reasons recorded by the assessing officer lack validity. The assessing officer has also proceeded on incorrect factual premises. He further submitted that the assessing officer has not taken into account settled legal position in relation to the question of computation of capital gain arising out of sale of immovable property by the assessee.

5. On the other hand, Mr. Walve, the learned counsel for the department, opposed the petition contending that the original return was accepted without scrutiny. The assessing officer, therefore, after recording proper reasons had issued the notice of reopening of assessment. There is no illegality in the impugned notice. The petition may, therefore, be dismissed.

6. Having heard the learned counsel for the parties and having perused the documents on record, we are conscious that the return filed by the assessee having been accepted without scrutiny, the assessing officer would enjoy a greater latitude in reopening of the assessment as is held by the Supreme Court in the case of **ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., 291 ITR 500 (SC)**. Nevertheless, it is well settled that even in such a case, the requirement that the assessing officer must have reason to believe that income chargeable to tax has escaped assessment, must be satisfied. In other words, within the narrow confine, it is always open for the Court to verify whether in fact, the reasons recorded demonstrate prima facie material suggesting the escapement of income chargeable to tax.

7. In this background, we have examined the facts on record and the reasons recorded by the assessing officer. The entire controversy revolves around the computation of capital gain arising out of a sale of residential property of the assessee. The admitted facts are that the previous owner

one Mrs. Clare Fernandes had executed an agreement to sale the said property in favour of the petitioner on 30.10.1992 for agreed sale consideration of Rs. 64,00,000/-. At the time of execution of this agreement, the petitioner had paid sum of Rs. 6,50,000/- towards earnest money. The balance amount of Rs. 57,50,000/- would be paid upon issuance of no objection certificate by the appropriate authority as referred to in Chapter XX-C of the Income Tax Act, 1961. The appropriate authority by an order dated 15.1.1993 refused to grant such NOC and ordered deemed purchase of the same by the Central Government. The petitioner challenged such order before the High Court by filing Writ Petition No. 289 of 1993. Interim orders were passed in favour of the petitioner. Eventually, this petition came to be disposed of by a judgment dated 4.6.2007. Operative portion of the judgment reads as under:-

“33. In the circumstances, the impugned order passed by the Appropriate Authority is liable to be quashed and set aside holding it to be in breach of principles of natural justice and bad in law. The view taken by the Appropriate Authority is palpably erroneous and cannot stand to the scrutiny of law.

34. The Income Tax Department shall hand over the possession of the premises and also execute necessary Deed of Sale and convey the property and register the same immediately, on receipt of

the said sum of Rs. 56,13,227/-. The petitioners are permitted to deposit the same within a period of four weeks from today. In the event, the Income Tax Department does not accept the said amount, the petitioners are permitted to deposit the same with the Prothonotary and Senior Master of this Court.”

In the judgment dated 4.6.2007, thus, the High Court had declared the impugned order of the Appropriate Authority as invalid and ab initio void. Pursuant to the judgment of the High Court, the sale deed was executed in favour of the petitioner upon the petition depositing remaining sale consideration with the department.

8. The said property was sold by the petitioner on 27.12.2012 for a sale consideration of Rs. 6.42 crores. In the return filed for the A.Y. 2012-13, therefore, the petitioner offered capital gain arising out of the sale of this property by treating the date of acquisition as 30.10.1992 i.e the date of agreement to sale and accordingly worked out the indexed cost of acquisition. According to the department, as per the reasons recorded, the assessee had wrongly taken the date of acquisition of the property as 30.10.1992 instead of correct date of 4.6.2007 i.e the date of judgment of the High Court. This is the only controversy raised by the assessing

officer in the reasons recorded.

9. In this context, learned counsel for the petitioner submitted that the agreement to sale did not culminate into a final sale only because the competent authority under Chapter XX-C of the Act refused to grant NOC and instead ordered compulsory acquisition of the property by the Central Government. This order was declared as ab initio void by the Bombay High Court. In that view of the matter, the transfer of the property in question would relate back to the original date of agreement to sale since, but for the illegal intervention by the Income Tax Authorities, the sale would have taken place as envisaged in the agreement to sale. He submitted that at no stage, the original owner, the proposed seller of the property had raised any dispute about the agreement to sale or the terms thereof. In this context, he has placed heavy reliance on the judgment of the Supreme Court in the case of **Sanjeev Lal & Ors. Vs. CIT** reported in **(2015) 5 SCC 775**.

10. Mr. Walve, the learned counsel for the department, had argued that such an issue can always be examined by the assessing officer during the assessment proceedings and further in the present case, the working out of the indexed cost of acquisition would create a problem if the petitioner's contentions were to be accepted.

11. If the issue is legally concluded, there would be no point in allowing the assessing officer to resort to full fledged reassessment since the reopening of assessment would suffer from the fundamental defect of the assessing officer in having the material to form a reasonable belief that income chargeable to tax had escaped assessment. In this context, we would examine the petitioner's contention of the transfer of the capital asset in her favour on 30.10.1992. Before we do that, we may dispose of Mr. Walve's second objection of difficulty in computing the indexed cost of acquisition. Apart from such an issue having answer in law, no such objection was raised by the assessing officer in the reasons recorded. In absence of any such reference in the reasons recorded, we cannot allow the assessing officer to improve upon the

reasons in order to support the notice of reassessment. So much is all too well settled through series of judgments of various High Courts. A reference in this respect can be made to the decision of this Court in the case of **Hindustan Lever Ltd Vs. ACIT** reported in **268 ITR 332**.

12. We may now take note of the decision of the Supreme Court in the case of Sanjeev Lal (supra) minutely. It was a case in which the appellant-assessee had inherited a residential house under a Will which was a self acquired property of his grandfather. The property was bequeathed to the appellant under a will by his grandfather. He entered into an agreement to sell the property on 27.12.2012 and received sizable earnest money at that time. Before the sale deed could be executed, one of the relatives challenged the will before the Civil Court. The Civil Court granted injunction against the execution of sale. This litigation eventually resulted in favour of the appellant as the plaintiff died and no substitution was carried out. After the injunction was vacated, the sale deed was executed on 24.9.2004. In the meantime, the appellant had purchased a residential house

on 30.4.2003 and claimed exemption from capital gain tax on the amount invested by him in purchase of new asset. The department objected contending that the acquisition of the new asset was before the sale of the capital asset by the assessee. In this context, the issue reached the Supreme Court at the hands of the assessee. The Supreme Court referred to the provisions of Section 54 of the Act and Section 2(47) which defines a term transfer in relation to capital assets and observed as under:

“22. In the light of the aforestated definition, let us look at the facts of the present case where an agreement to sell in respect of a capital asset had been executed on 27.12.2002 for transferring the residential house/original asset in question and a sum of Rs. 15 lakhs had been received by way of earnest money. It is also not in dispute that the sale deed could not be executed because of pendency of the litigation between Shri Ranjeet Lal on one hand and the appellants on the other as Shri Ranjeet Lal had challenged the validity of the will under which the property had devolved upon the appellants. By virtue of an order passed in the suit filed by Shri Ranjeet Lal, the appellants were restrained from dealing with the said residential house and a law-abiding citizen cannot be expected to violate the direction of a court by executing a sale deed in favour of a third party while being restrained from doing so. In the circumstances, for a justifiable reason, which was not within the control of the appellants, they could not execute the sale deed and the sale deed had been registered only on 24-9-2004, after the suit filed by Shri Ranjeet Lal, challenging the validity of the Will, had been dismissed. In the light of the aforestated facts and in view of the definition of the term “transfer”,

one can come to a conclusion that some right in respect of the capital asset in question had been transferred in favour of the vendee and therefore, some right which the appellants had, in respect of the capital asset in question, had been extinguished because after execution of the agreement to sell it was not open to the appellants to sell the property to someone else in accordance with law. A right in personam had been created in favour of the vendee, in whose favour the agreement to sell had been executed and who had also paid Rs.15 lakhs by way of earnest money. No doubt, such contractual right can be surrendered or neutralized by the parties through subsequent contract or conduct leading to no transfer of the property to the proposed vendee but that is not the case at hand.

23. In addition to the fact that the term “transfer” has been defined under [Section 2\(47\)](#) of the Act, even if looked at the provisions of [Section 54](#) of the Act which gives relief to a person who has transferred his one residential house and is purchasing another residential house either before one year of the transfer or even two years after the transfer, the intention of the Legislature is to give him relief in the matter of payment of tax on the long term capital gain. If a person, who gets some excess amount upon transfer of his old residential premises and thereafter purchases or constructs a new premises within the time stipulated under [Section 54](#) of the Act, the Legislature does not want him to be burdened with tax on the long term capital gain and therefore, relief has been given to him in respect of paying income tax on the long term capital gain. The intention of the Legislature or the purpose with which the said provision has been incorporated in the Act, is also very clear that the assessee should be given some relief.

24. Though it has been very often said that common sense is a stranger and an incompatible partner to the [Income Tax Act](#) and it is also said that equity and tax are strangers to each other, still this Court has often observed that purposive interpretation should be given to the provisions of the Act. In the case of [Oxford University](#)

[Press v. Commissioner of Income Tax](#) [(2001) 3 SCC 359] this Court has observed that a purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax. It has also been said that harmonious construction of the provisions which subserve the object and purpose should also be made while construing any of the provisions of the Act and more particularly when one is concerned with exemption from payment of tax. Considering the aforesaid observations and the principles with regard to the interpretation of Statute pertaining to the tax laws, one can very well interpret the provisions of [Section 54](#) read with [Section 2\(47\)](#) of the Act, i.e. definition of “transfer”, which would enable the appellants to get the benefit under [Section 54](#) of the Act.

25. Consequences of execution of the agreement to sell are also very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immovable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed.

26. Thus, a right in respect of the capital asset, viz. the property in question had been transferred by the appellants in favour of the vendee/transferee on 27-12-2002. The sale deed could not be executed for the reason that the appellants had been prevented from dealing with the residential house by an order of a competent court, which they could not have violated.

27. In view of the aforesaid peculiar facts of the case and

looking at the definition of the term ‘transfer’ as defined under [Section 2\(47\)](#) of the Act, we are of the view that the appellants were entitled to relief under [Section 54](#) of the Act in respect of the long term capital gain which they had earned in pursuance of transfer of their residential property being House No. 267, Sector 9-C, situated in Chandigarh and used for purchase of a new asset/residential house.

13. Though not identical, the facts in the present case are somewhat similar. As noted, the assessee had entered into an agreement for purchase of the property in the year 1992. The sale deed could not be executed only because the appropriate authority refused to grant no objection certificate and instead, ordered compulsory acquisition thereof. This order was declared as illegal and ab initio void by the High Court. The sale deed was ordered to be executed in favour of the petitioner. There is no reason for us not to accept the petitioner's contention that the execution of the sale deed by virtue of the judgment of the High Court would relate back to the original agreement to sale. The petitioner was, thus, entitled to claim the benefit of cost indexation from the said date. The entire basis of the department in the reasons recorded in order to dispute the petitioner's computation of the capital gain, therefore, is rendered invalid. In the result,

the impugned notice is set aside. In peculiar facts of this case, therefore, we have adopted the logic as was done by the Supreme Court in case of Sanjeev Lal (supra). The petition allowed and disposed of.

[M.S. SANKLECHA, J.]

[AKIL KURESHI, J]