

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.07.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Ms.JUSTICE P.T.ASHA

T.C. (A) No.293 of 2018

Principal Commissioner of Income Tax,
No.121, Mahatma Gandhi Road,
Chennai. .. Appellant/Appellant

-vs-

Smt.Charumathi Seshadri .. Respondent/Respondent

Appeal filed under Section 260A of the Income Tax Act, 1961, against the order dated 09.10.2017 of the Income Tax Appellate Tribunal passed in I.T.A.No.886/Mds/2017, for the Assessment Year 2011-12 against the order of the Commissioner of Income Tax (Appeals) -15, Chennai 34, dt.23/12/2016 made in ITA.No.186/CIT(A) -15/2014-15/A.Y.2011-12 against the Deputy Commissioner of Income Tax Business Circle III, Chennai -34, dt.13/3/14 made in PAN.BAYPS8008K Assessment year 2011-12.

For Appellant : Mr.T.R.Senthil Kumar

J U D G M E N T

(Delivered by Ms.Indira Banerjee, Chief Justice)

This appeal is against a judgment and order dated 09.10.2017 of the Income Tax Appellate Tribunal, 'C' Bench, Chennai, disposing of the appeal of the Revenue being I.T.A.No.886/Mds/2017, against an appellate order dated 23.12.2016 passed by the Commissioner of Income Tax (Appeals) - 15, allowing the appeal of the assessee, being I.T.A.No.186/CIT (A)-15/2014-15, against an order of assessment dated 13.03.2014, adding to the declared income of the respondent assessee Rs.2,15,56,250/- towards capital gains.

2.The assessee, an advocate by profession, filed her return of income electronically on 22.09.2011 for the Assessment Year 2011-12 declaring a total income of Rs.21,53,760/-. The return was processed under Section 143 (1) of the Income Tax Act, 1961, hereinafter referred to as 'the IT Act', on 12.11.2011.

3.Thereafter, the case was selected for scrutiny and

assessment was completed on 13.03.2014, assessing the income of the respondent assessee at Rs.2,37,10,011/-. It appears that in the previous year 2010-11, corresponding to the Assessment Year 2011-12, the assessee had sold immovable property at Neelangarai, Chennai 600041, being vacant land measuring 2.64 grounds for consideration of Rs.2,35,00,000/-.

4. In her income tax return, the assessee had claimed that the cost of acquisition of the land had been Rs.3,00,000/-. Taking into account the indexed cost as per the provision of Section 49 of the IT Act, the assessee had claimed Rs.44,43,750/- as deduction and computed the total capital gain at Rs.2,12,55,250/-. The respondent assessee had further claimed deduction under Section 54F of the IT Act, for an amount of Rs.2,15,56,250/-, which, according to the respondent assessee was on account of investment of Rs.2.6 crores in a new asset. The respondent assessee claimed that the capital gain chargeable to tax was 'Nil'.

5. In the course of assessment, the assessee furnished the sale deed of the old asset and the purchase deed of the new asset, as also her explanation on the claim of deduction under Section 54F of the IT Act.

6. The Assessing Officer observed that the respondent assessee had invested Rs.2,20,000/- on a vacant nanja land measuring 1.25 acres at Ottiambakkam village in Kancheepuram District, incurring an expenditure of Rs.17,20,167/- for the purpose of registration. The total amount of investment in the said nanja land was Rs.2,37,20,167/-. Further, the assessee had invested Rs.2,20,00,000/- in the capital gain account scheme. It appears that the Assessing Officer deputed an Inspector to inspect the premises acquired by the respondent assessee in order to verify whether any residential house had been built by the assessee within three years from the date of receipt of full consideration of the sale of asset, which gave rise to capital gain. After physical inspection, the Inspector submitted a report, the relevant part whereof is extracted hereinbelow:

"From the road side-the sprawling 1.25 acres of nanja land was fenced with barbed wire and in the balance three sides, compound wall was erected. From the entrance a rough road has been laid. To the right of the road, (facing the plot) a small thatched shed was available in which cement bags were arranged. To the far left hand end of the plot (facing the plot), there was one building which was under construction. No proper steps were provided. Fixtures like windows and doors were not there and no electric supply has been provided to the building yet. No flooring and

plastering of walls had been carried out. To have a correct view for passing scrutiny order, the entire place was neatly photographed and videographed, which shows the exact position of the so called residential house property. For the claim of deduction u/s 54F, the construction of residential house should have been completed by 06.1.2013, the place has been visited on 20.12.2013, beyond 45 days of the due date for completion of construction as per section 54F of the IT Act and found to be very much incomplete, and utilization of land is very minimal for the building, leaving a vast area of land unutilized. Hence it is evident that the claim of deduction u/s 54F of Rs.2.6 crores (which is the cost of 1.25 acres of nanja land itself) is untenable and needs to be disallowed soft copy of photos and video submitted."

7. Having regard to the aforesaid report, the Assessing Officer observed that there was no residential house in the nanja land and the incomplete structure in the said nanja land did not have any kind of resemblance to a completed residential house. Furthermore, a vast area of land had been kept unutilized and the incomplete structure was at one corner of the land. The Assessing Officer, thus, found that no residential house had been constructed and completed within three years from the date of sale of the old asset.

8. The Assessing Officer also took note of the fact that the respondent assessee had obtained supply of electricity from the Tamil Nadu Electricity Board under Tariff No.V, which is given in cases where more than 25% of the built-up area is utilised for commercial purpose. The Assessing Officer deduced that the intention of the respondent assessee was not to construct a wholly residential house, but a structure for commercial purpose. The Assessing Officer, thus, disallowed the claim to deduction under Section 54F of the IT Act and added Rs.2,15,56,250/- to the income of the assessee under the head 'Income from long term capital gain'.

9. Being aggrieved by the aforesaid order, the respondent assessee filed an appeal being I.T.A.No.186/CIT(A)-15/2014-15, before the Commissioner of Income (Appeals) - 15, which has been allowed by an order dated 23.12.2016. Before the Appellate Commissioner, the respondent assessee assailed the assessment order impugned on two major grounds. The first ground was that completion of construction within three years from the date of sale of the original asset was not a condition precedent for deduction under Section 54F. The only condition was that it should have been utilised before filing of the return of income

under Section 139 of the IT Act. The reason for the delay in completion of the construction was explained as unavoidable, as the respondent assessee had to hire the services of three different contractors to accomplish the construction.

10. The Appellate Commissioner found that there was genuine and bona fide reasons which resulted in the delay in completion of construction of the residential house, which were beyond the control of the respondent assessee. The Appellate Commissioner also took note of certain subsequent developments which indicated that the investment was for construction of a residential house. The residential house was completed on 24.03.2014, as certified by the concerned contractor. The electricity connection which was a temporary connection was later changed to a domestic connection. The relevant portion of findings of the Appellate Commissioner is extracted hereinbelow:

"16. During the course of the appellate proceeding on 07/12/2016, the Ld.A.R. was requested to furnish the details of investments towards purchase of land and construction of residential property. The Long Term capital asset was sold by the appellant on 04/11/2010 vide the registered Sale Deed for a consideration of Rs.2,35,00,000/-. The relevant return of income was filed by the appellant on 22/09/2011 which was within the due date for filing of return of income under section 139(1) for the relevant year under consideration. Accordingly, in view of the provisions of section 54F, the appellant was required to invest the capital gain in the construction of new house property or in the Capital Gain Scheme account after the date of sale of the original asset and before the date of filing of the return of income U/s 139(1). In the present case, the appellant had invested Rs.2,59,64,300/- in the purchase of the land (including registration charges and stamp duty) w.e.f. 06/05/2011 to 04/06/2011 which was invested after the date of sale of the original asset on 04/11/2010 and before the due date of filing of return of income u/s 139(1). The amount of Rs.20,20,000/- was deposited in Capital Gains Account Scheme before the date of filing of return of income u/s. 139(1) which was later withdrawn for construction of residential house property.

17. From the above, it is evident that the amount of capital gain was invested by the appellant towards purchase of the land on which residential house was constructed and deposited in Capital Gain Scheme Account within the stipulated time period as envisaged in section 54F. The decisions of the Hon'ble

jurisdictional High Court in the case of Mrs. Seetha Subramanian vs. ACIT (1996) 59 ITD 94 and CIT vs Sardamal Kothari (2008) 302 ITR 286 wherein it has been held that the assessee need not complete the construction of the house and occupy the same within three years from the date of sale of the original asset if the construction had commenced within the period of three years. In the present case of the appellant, not only the capital gains amounts were invested in the purchase of land for construction of residential house and invested in the capital gain scheme account, the construction of the residential house had also commenced within the period of three years from the date of sale of the original asset.

18. Therefore, in view of the above facts and circumstances of the case and also relying on the decisions of the Hon'ble jurisdictional High Court, I am of the considered opinion that the appellant was eligible to claim the benefit of section 54F of the Act. Accordingly, the AO is directed to grant the relief. Hence, the addition is deleted."

11. Being aggrieved by the appellate order, the Revenue, as stated above, appealed before the Income Tax Appellate Tribunal. The learned Tribunal found that on 28.06.2011, the assessee had purchased 1 acre and 25 cents of nanja land. On 22.07.2011, she deposited Rs.20,20,000/- in a capital gain scheme account, the total investment as on 22.07.2011 was Rs.2.6 crores. Planning permission had been obtained on 04.07.2012 before the due date for filing return. The Tribunal, considering the report of the inspection, found that the assessee was entitled to deduction under Section 54F of the IT Act. The learned Tribunal, in effect and substance, found that the extent of land appurtenant to a building in a case involving sale of land and buildings was not a determining factor.

12. Under Section 260A of the IT Act, an appeal from an order of the Tribunal lies only on a substantial question of law. An appeal is not automatic. There is no right to appeal except under and to the extent provided by statute. If the right to appeal is limited, the right of a party is debarred from filing an appeal, unless the conditions precedent for an appeal exist.

13. In *Sir Chunilal V. Mehta & Sons Ltd. vs Century Spg. & Mfg. Co. Ltd.*, reported in AIR 1962 SC 1314, the Supreme Court agreed with and approved a Full Bench Judgment of this Court in *Rimmalapudi Subba Rao vs Noony Veeraju And Ors* reported in AIR 1951 Mad 969 and laid down the principles for deciding when a

question of law becomes a substantial question of law.

14. In *Hero Vinoth Vs. Seshammal* reported in (2006) 5 SCC 545, the Supreme Court followed *Sir Chunilal V. Mehta & Sons* (supra) and other judgments and summarized the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law.

15. The relevant paragraphs of the judgment of the Supreme Court in *Hero Vinoth* (supra) are set out herein below :

"21. The phrase "substantial question of law", as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying "question of law", means—of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with—technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. Ram Ditta* [(1927-28) 55 IA 235 : AIR 1928 PC 172] the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In *Sir Chunilal* case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* [AIR 1951 Mad 969 : (1951) 2 MLJ 222 (FB)] : (*Sir Chunilal* case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR p. 557)

"When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with

that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."

This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial: (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR pp. 557-58)

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

22. In *Dy. Commr. v. Rama Krishna Narain* [1954 SCR 506 : AIR 1953 SC 521] also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 100 CPC.

23. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a

question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See Santosh Hazari v. Purushottam Tiwari [(2001) 3 SCC 179] .)

24. The principles relating to Section 100 CPC relevant for this case may be summarised thus :

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the

substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law .

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

16. In *M. Janardhana Rao Vs. Joint Commissioner of Income Tax* [2005 273 ITR 50 (SC)], the Hon'ble Supreme Court held that the principles contemplated under Section 100 of the Code of Civil Procedure would apply to Section 260-A of the IT Act too.

17. Right of appeal is not automatic. Right of appeal is conferred by statute. When statute confers a limited right of appeal only in a case which involves substantial questions of law, it is not open to this Court to sit in appeal over the factual findings arrived at by the Appellate Tribunal.

18. In this case, the learned Tribunal as also the Appellate Commissioner have concurred in their factual finding with which interference is not warranted under Section 260A of the Income Tax Act, 1961. The judgment relied upon by the learned counsel for the Revenue of the High Court of Punjab and Haryana in *Jagwinder Singh vs. Commissioner of Income-tax, Appeals-II, Ludhiana*, reported in (2014) 50 taxmann.com 145 (Punjab & Haryana), is distinguishable on facts. In the aforesaid case, there was no evidence of construction of a new house property.

The appeal is, thus, not entertained and the same is dismissed. No costs.

Sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

sra

To

1.The Asst. Registrar,
Income Tax Appellate Tribunal
'C' Bench, Chennai.

2.The Commissioner of Income Tax
(Appeals)-15, 213, 2nd Floor,
Main Building, 121, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034.

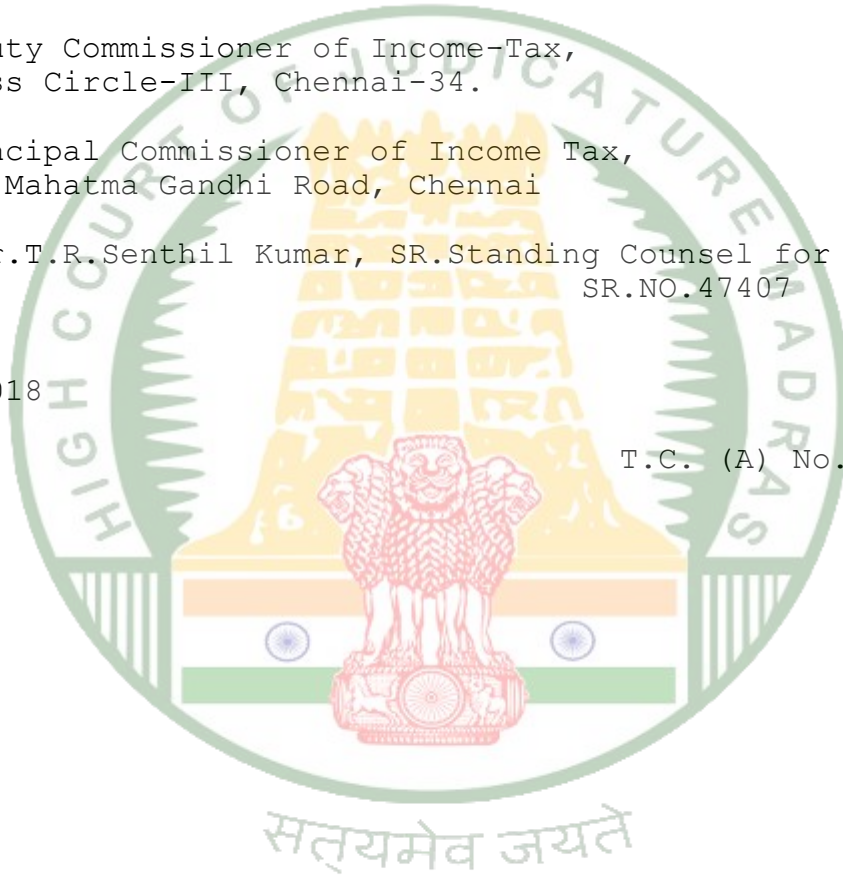
3.The Deputy Commissioner of Income-Tax,
Business Circle-III, Chennai-34.

4.The Principal Commissioner of Income Tax,
No.121, Mahatma Gandhi Road, Chennai

+1cc to Mr.T.R.Senthil Kumar, SR.Standing Counsel for (IT)
SR.NO.47407

CA(CO)
sm:21.8.2018

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