

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

I.T.T.A.NO.145 OF 2018

JUDGMENT: {Per the Hon'ble Sri Justice Ramesh Ranganathan}

This appeal, under Section 260A of the Income Tax Act, 1961 ("the Act" for brevity), is preferred against the order passed by the Income Tax Appellate Tribunal, Hyderabad Bench in I.T.A.No.1424/HYD/2015 dated 07.04.2016 for the assessment year 2009-10.

The appellant herein offered capital gains claiming deduction under Section 54EC and 54F of the Act. An assessment order was initially passed, under Section 143(3) of the Act on 29.12.2011, accepting the appellant's return of income of Rs.2,57,230/-. On noticing that the order, passed under Section 143(3) of the Act, was erroneous and prejudicial to the interests of revenue, the Commissioner of Income Tax (Appeals) initiated proceedings under Section 263 of the Act, and set aside the assessment order on 04.02.2014. Consequent thereto, the assessing authority passed an order afresh, under Section 143(3) of the Act, on 07.07.2014.

In his assessment order dated 07.07.2014, the assessing authority held that the assessee was not the owner of the property under consideration, but had received Rs.1 crore from M/s. team One builders as per the receipt issued by the assessee to them, along with his three brothers, which was available on record; since the assessee was not the owner of the property as per the sale deed, the amount of Rs.1 crore received

by the assessee could not be termed as sale consideration; therefore the question of computation of Long Term Capital gains did not arise in this case; the contention that the assessee had interest/title in the said property, by virtue of the sale agreement dated 04.07.1994, was not legally tenable as the property was subsequently registered in favour of others, and the agreement had ceased to exist; though it was an undisputed fact that the assessee had received Rs.40 lakhs and, as per his own admission, was entitled to a constructed area worth Rs.60 lakhs, this receipt of money and the constructed area did not pre-suppose that the assessee was having interest/title over the property along with his brothers; there may be umpteen reasons for payment of money, and for giving constructed area to the assessee by the developer; the fact remained that the assessee received Rs.1 crore from the developer though he was not the owner of the property; hence the amount receivable by the assessee was not assessable under the head "capital gains"; deduction under Section 54F and 54EC could not be allowed; and the amount of Rs.1 crore, received by the assessee, was to be assessed under the head "Income from other sources". Aggrieved thereby, the assessee preferred an appeal to the CIT (Appeals).

The case of the appellant-assessee, before the Commissioner of Income Tax (Appeals), was that he had entered into an agreement with Smt. Kotha Janamma in the year 1994 for purchase of Acs.2.07 gts which forms part of Survey No.215 of Kondapur Village, Serilingampally; this property was registered by Smt. K.Janamma in the names of Shri N.Chandra Sekhar

Rao, Sri R.Madhusudhan and Sri N.R.Murali Krishna vide registered sale deed dated 27.03.1995; these three parties, along with the assessee, had entered into a development agreement with M/s. Team One Builders, a partnership firm; they had received Rs.1,60,00,000/- by way of cheque i.e. Rs.40 lakhs each plus the constructed area of an extent of 6050 square feet for each one of them; this was valued at Rs.60 lakhs for the purpose of capital gains; on the transfer of property, the assessee had received Rs.1 crore; he had offered capital gains of Rs.92,40,479/-, and had claimed deduction under Section 54EC of the Act for an extent of Rs.39,30,000/-, and proportionate claim under Section 54F of the Act for an extent of Rs.54,98,085/-; and this computation was not accepted by the assessing officer in the assessment made under Section 143(3) of the Act.

In her appellate order dated 13.10.2015, the Commissioner of Income Tax (Appeals) observed that the entire capital gains was of Rs.92,40,479/- arising out of the transactions; the appellant's share was only 1/4th of the total transaction of Rs.4 crores i.e., Rs.1 crore only (Rs.40 lakhs by cash + Rs.60 lakhs in the form of constructed area of 6,050 square feet); the appellant claimed total capital gains received in cash of Rs.1 crore only; during the course of appeal proceedings all the details filed before the assessing officer were also filed, which included a copy of the Additional District & Sessions Judge order dated 25.06.2018; as per the Court order dated 25.06.2018, the Court had decided that the three plaintiffs, namely Sri N. Chandra Sekhar Rao, Sri R. Madhusudhan and

Sri N.R. Murali Krishna, were the owners; the Court had considered the appellant as a plaintiff, but had not considered him as the owner; the appellant had not explained how it established his ownership of the property, as the sale deed was registered in favour of appellant's three brothers, and the appellant was not a party to the sale deed; as per the receipt, enclosed along with sale deed copy dated 27.03.1995, the appellant also received the amount along with the other three brothers; and as the appellant had received Rs.1 crore, he himself had disclosed it in his return of income, and he had claimed only Rs.39 lakhs under Section 54EC, the amount disclosed by the appellant could not be treated as sale consideration. Thereby the assessment made by the assessing officer, by treating the said amount under the head income from other sources, was confirmed. Aggrieved thereby, the assessee carried the matter in appeal to the Income Tax Appellate Tribunal.

In the order under appeal, the Tribunal noted the contentions, urged on behalf of the appellant-assessee, that he had originally entered into an oral agreement of sale, and also became a plaintiff in the proceedings before the Additional District and Sessions Judge indicating that he was the owner of the property; a ratification deed was executed between the parties and the developer, which also included the appellant-assessee; the assessee received consideration towards his share of 1/4th in the property; and the Commissioner of Income Tax (Appeals) had erred in rejecting the appellant's contention, and in holding that, since he was not the owner, the income was

liable to be assessed under the head “income from other sources”.

The Tribunal further observed that the documents placed on record included the original sale deed executed by Smt.K.Janamma in the name of three persons, which did not include the appellant-assessee; the sale deed was registered for Rs.1,80,000/- in the year 1995; the assessee had not placed any evidence regarding the sale consideration (purchase consideration) paid by the assessee, nor was any evidence adduced to show that he had contributed 1/4th share for purchase of the property; the parties to the suit, filed before the Additional District and Sessions Judge, were Sri N.Chandra Sekhar Rao, Sri R.Madhusudhan, Sri N.R.Murali Krishna and Sri N.R.Krishna Murthy; the suit was filed seeking a declaration that plaintiffs 1 to 3 were the absolute owners, and possessors of the suit schedule property and for a consequential order of injunction directing the defendants, their agents, their henchmen and their assignees etc., not to interfere in the suit schedule property; the assessee, as the fourth plaintiff, did not claim ownership of the property; both the authorities were correct in rejecting the assessee’s claim to be the owner of the property; the ratification deed, placed on record, did not confer ownership on the assessee, except indicating that the assessee was also a party to the transactions with M/s. Team One Builders; how the assessee acquired ownership was not established either before the Commissioner of Income Tax (Appeals) or before the other authorities; except for the fact that the assessee had received 1/4th share of the total consideration,

there was no indication of the assessee's claim of ownership of the property, either to the full extent or to 1/4th extent; with respect to the assessee's claim that he had entered into an agreement of sale in his name, but had got the property registered in the name of his three brothers, the Commissioner of Income Tax (Appeals) had proposed that the entire capital gains should be assessed in the assessee's hands which was objected to by the assessee; this indicated that the three brothers of the assessee were not the *benami* owners of assessee; why the assessee was included as the plaintiff, and how he received consideration, was not explained; the fact, however, remained that the assessee received Rs.1 crore in the said transaction; and since ownership was not established to be that of the assessee, either at 1/4th or fully, the authorities had erred in treating it as "income from other sources", and in denying the deductions claimed under Sections 54EC and 54F of the Act which was applicable only when there were capital gains.

Sri Avinash Desai, learned counsel for the appellant, would submit that the definition of "transfer", under Section 2(47) of the Act, is extremely wide; it is not necessary that the transfer should be effected only by the owner; the fact that the appellant was a party to the ratification deed, in terms of which he was paid Rs.1 crore was not in dispute; Section 2(47)(ii) of the Act brings, within the ambit of "transfer", even extinguishment of any right in the capital asset; the appellant's right, under Section 55(6)(b) of the Transfer of Property Act, 1882, stood extinguished on the execution of a ratification deed; the

consideration received, on extinguishment of such a right, would fall within the ambit of “transfer” under the provisions of Section 2(47)(ii) of the Act; such a transfer would also be subjected to capital gains under Section 45 of the Act; and the assessee was entitled to the benefit of Section 54E of the Act.

It is no doubt true that Section 2(47) of the Act, which defines “transfer”, is an inclusive definition, and is wide in nature. Under clause (ii) thereof, extinguishment of any right therein (i.e., with respect to a capital asset) also falls within the definition of “transfer”. The question which arises for consideration is whether any right of the petitioner stood extinguished by the ratification deed in terms of which the assessee was paid Rs.1 crore.

As the right which the appellant-assessee claims is under Section 55(6)(b) of the Transfer of Property Act, it is necessary to take note of its contents. Thereunder a borrower of a property is entitled, unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him to the extent of the seller’s interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of delivery and for interest on such amount; and when he declines to accept delivery, also for the earnest, if any, and for the costs, if any, awarded to him in a suit to compel specific performance of the contract or to obtain a decree for its rescission.

The right conferred, under Section 55(6)(b) of the Transfer of Property Act, is a charge on the property of the seller to the extent of the seller’s interest for the amount of any purchase-

money paid by the appellant-assessee. The right, conferred under Section 55(6)(b) of the Transfer of Property Act, is confined to the amount of purchase-money paid by the appellant-assessee. While the appellant claims that the oral agreement of sale was followed by a written agreement of sale, it has not been contended, before any of the authorities below, that the appellant-assessee had paid purchase-money to the seller in anticipation of delivery of the property to him.

While Sri Avinash Desai, learned counsel for the appellant, would contend that a sum of Rs.3 lakhs was paid by the appellant under the agreement of sale, learned counsel is not in a position to show, from any one of orders passed by the authorities below i.e., by the assessing authority or the Commissioner of Income Tax (Appeals) or the Income Tax Appellate Tribunal, that purchase-money was paid by the appellant in anticipation of delivery, resulting in creation of a right, of charge over the property, in his favour under Section 55(6)(b) of the Transfer of Property Act.

The Tribunal is the final Court of fact, and the appeal to this Court, under Section 260A of the Act, is only on a substantial question of law. Questions of fact as to whether the appellant-assessee had paid Rs.3 lakhs as purchase-money under the agreement of sale cannot, therefore, be urged for the first time before this Court in proceedings under Section 260A of the Act. In the absence of any purchase-money having been paid, no right of charge over the property accrued to the appellant under Section 55(6)(b) of the Transfer of Property Act. While Section 2(47)(ii) of the Act would bring extinguishment of

any right, in a capital asset, within the ambit of “transfer”, it is only if the appellant-assessee has a right, which stood extinguished by the ratification deed, can it be said that there has been a transfer of a capital asset, under Section 2(47)(ii) of the Act, which is liable to tax under Section 45 of the Act. We are satisfied, therefore, that the Tribunal has not committed any error much less an error, which gives rise to a substantial question of law necessitating interference in proceedings under Section 260A of the Act.

The appeal fails and is, accordingly, dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand dismissed.

(RAMESH RANGANATHAN, J)

(D.V.S.S.SOMAYAJULU, J)

22nd October 2018
RRB