

R.M. AMBERKAR
(Private Secretary)

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

INCOME TAX APPEAL NO. 53 OF 2017

Pr. Commissioner of Income Tax -23, Mumbai .. Appellant
Versus
Jaya Uday Tuljapurkar .. Respondent

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• Mr. P. C. Chhotaray for the Appellant
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CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.

DATE : APRIL 22, 2019.

P.C.:

1. This appeal is filed by the Revenue to challenge the judgment of the Income Tax Appellate Tribunal, Mumbai ("the Tribunal" for short) dated 28.9.2015.

2. Following questions are presented for our consideration:-

- (a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in accepting the claim of the assessee and holding that the cost of acquisition of the property would be taken as the market value of the property as on 1st April, 1981 and the indexation will be applied from 1st April, 1981 with this base?"
- (b) Whether on the facts and in the circumstances of the case and in law, the definition of the expression 'previous owner of the

property' occurring in the Explanation to sub-section 49(1) would be applicable to sub-clause 55(2)(b)(ii) since the definition is confined to sub-section 49(1) only ?

- (c) Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in holding that the assessee is entitled to exemption under Section 54 of the Act ?

3. We notice that identical issue came up for consideration in case of the son of this assessee arising out of the same transaction and decided by the Tribunal by common judgment, in case of Revenue's Appeal No. 416 of 2017. The said appeal was dismissed by making following observations:-

"2. Insofar as Questions (A) and (B) are concerned, concededly both the issues are squarely covered against the Revenue by the Judgment of this Court in the case of **Commissioner of Income Tax Vs. Manjula J. Shah**¹ In the said Judgment, this Court has held as under :

"In the result, we hold that the Income Tax Appellate Tribunal was justified in holding that while computing the capital gains arising on transfer of a capital asset acquired by the assessee under a gift, the indexed cost of acquisition has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset."

¹ [2013] 355 ITR 474 (Bom)

3. Coming to Question (C), the same arises in the following background.

The Respondent - Assessee is an individual. The Assessee was a joint owner of a residential property in the nature of a flat situated at 61C, 6th floor, Rambha Building, 66 Napean Sea Road, Mumbai. The Assessee received the said property under a Will dated 15/10/2006 made by his father. The flat complex was owned by a Co-operative Housing Society on a piece of land which was granted under a long term lease. Father of the Assessee was a member of the Co-operative Housing Society and owned the said flat. After his death, the Assessee received half share, other half going to his mother. These co-owners sold the flat under a registered deed dated 18/07/2008 for a sale consideration of Rs.23 Crores. The Assessee, after sale of the flat, had invested a part of the sale consideration of Rs.2.89 Crores (rounded of) in purchase of a new residential unit. In the return of income that he filed for the Assessment Year 2009-2010, he had shown the sale consideration of Rs.11.50 Crores which was his share of the sale proceeds by way of capital gain. He claimed the benefit of cost indexation and also claimed exemption of the sum of Rs.2.89 Crores while computing his capital gain tax liability in terms of Section 54 of the Income Tax Act, 1961 ('the Act', for short).

4. The Assessing Officer rejected his claim on the ground that the Assessee had not transferred the building and the land appurtenant thereto. In the opinion of the Assessing Officer, since this was a pre-condition for application of Section 54 of the Act, the Assessee was not entitled to the benefit of exemption as per the said provision.

5. The Assessee carried the matter in appeal. The Commissioner of Income Tax (Appeals), in a detailed order, allowed the appeal. He held that the fact that residential building in which the flat was situated was constructed on a leased land, would not change

the nature of transaction. He accepted the Assessee's contention that as per the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, the Assessee would be the owner of the flat in law. The Commissioner (Appeals) also held that for applicability of Section 54, the Assessee had to sell a capital asset in the nature of building or land appurtenant thereto. The word 'or' cannot be read as 'and' in the context of the said provision.

6. The Revenue carried the matter in appeal before the Tribunal. The Tribunal, by the impugned Judgment, dismissed the Revenue's appeal upon which the present appeal has been filed.

7. Learned Counsel Mr. Chhotaray appearing for the Department argued that for availing benefit of Section 54 of the Act, the Assessee has to sell a capital asset in the nature of building and land appurtenant thereto. In the present case, the complex was situated on the land which itself was granted on lease. The Co-operative Housing Society was therefore not the owner of the land. What the Assessee therefore transferred under a registered sale deed was mere building and not land appurtenant thereto. In support of his contention that in the context of Section 54 of the Act, the word 'or' should be read as 'and', he relied on the commentaries of certain renowned authorities on income tax law. We may, however, record that the commentaries presented before us were in the context of taxing Assessee's income from house properties and the question was whether the income arising from land appurtenant thereto should also be taxed as the income from house property. These commentaries therefore would be of no help in deciding the present issue.

8. The facts noted above are not in dispute. The father of the Assessee was allotted a flat in a residential complex in a Co-operative Housing Society. The complex was constructed on a land which was not owned by the society but was being enjoyed on long

term lease. According to the Revenue, the sale of a flat in such a society and investing any sale proceeds for acquisition of a new residential unit, would not satisfy the requirements of Section 54 of the Act. In our opinion, the Revenue is wholly incorrect in the contention. Sub-Section (1) of Section 54 of the Act reads as under :

“54. [(1)] Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head “Income from house property” (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, one residential house in India, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,-

(i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil, or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain.”

9. In terms of this provision, therefore, where in case of an Assessee who is an individual or Hindu Undivided Family, the capital gain arises from transfer of a long term capital asset being buildings or lands appurtenant thereto and being a residential house, the Assessee could claim exemption under the said provision by either

constructing or acquiring a residential unit within prescribed time. In the context of our case, what is important is that there should be a transfer of capital asset being a building or land appurtenant thereto and being a residential house. The requirements of this Section would be satisfied if these conditions are met with. The Revenue strangely argued that the transferrer of a capital asset of a residential unit, in order to claim benefit of Section 54, must also transfer the land appurtenant thereto. Firstly, there is no such prescription under Section 54(1) of the Act. Secondly, such a rigid interpretation would disallow every claim in case of transfer of a residential unit in a Co-operative Housing Society.

The very concept of Co-operative Housing Society is that the society is the owner of the land and continues to be so irrespective of the incomings and outgoings of its members. A member of Co-operative Housing Societies has possessory right over the plot of land which is allotted to him. In case of a constructed building of a Co-operative Housing Society, the member owns the constructed property and along with other members enjoys the possessory rights over the land on which such building is situated. In either case, a member of the Co-operative Housing Society even when he sells his house, never transfers the title in land to the purchaser.

10. The present case is no different. Merely because the housing complex in the present case is situated on a piece of land which is occupied by the Co-operative Housing Society under a long term lease, would make no difference.

11. In the result, the Income Tax Appeal is dismissed.”

4. In view of above, this Income Tax Appeal is also dismissed.

[SARANG V. KOTWAL, J.]

[AKIL KURESHI, J]