

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28th DAY OF SEPTEMBER 2016

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MR.JUSTICE ARAVIND KUMAR

I.T.A.NO.340/2009

BETWEEN:

1. THE COMMISSIONER OF
INCOME TAX
C.R. BUILDING
QUEENS ROAD
BANGALORE.
2. THE DY. DIRECTOR OF
INCOME-TAX (INTL. TAXN.,)
CIRCLE-II (1)
C.R.BUILDING
QUEENS ROAD
BANGALORE.

... APPELLANTS

(BY SRI. K.V.ARAVIND, ADVOCATE)

AND:

MRS. SHAKUNTALA DEVI
SINCE DECEASED BY HER LR'S

1(a) MS. ANUPAMA BANERJI

W/O MR. AJAY,
AGED ABOUT 46 YEARS
NO.2, WHITE ACRES
CHIKKA-TIRUPATI ROAD
KADUGODI POST
WHITE FIELD
BANGALORE-560 067.

1(b) SHAKUNTHALA DEVI EDUCATIONAL
FOUNDATION PUBLIC TRUST
SHAKUNTHALA DEVI COLLEGE
NO.32/P3, 17TH MAIN
HSR LAYOUT,
NEAR BDA COMPLEX
BANGALORE-560 102.

... RESPONDENTS

(BY SRI. A.SHANKAR, ADVOCATE FOR R(1)(b);
SRI.K. ARUN KUMAR, ADVOCATE FOR
M/S CREST LAW PARTNERS R(1)(a)

THIS APPEAL IS FILED UNDER SECTION 260A OF
THE INCOME TAX ACT, 1961 PRAYING TO ALLOW THE
APPEAL AND SET ASIDE THE ORDERS PASSED BY THE
INCOME TAX APPELLATE TRIBUNAL, BANGALORE IN ITA
NO.1170/BANG/2008 DATED 30.01.2009 AND CONFIRM
THE ORDER OF THE APPELLATE COMMISSIONER
CONFIRMING THE ORDER PASSED BY THE DY. DIRECTOR
OF INCOME TAX, (INTL., TAXN.,) CIRCLE-II(1), BANGALORE
AND ETC.,

THIS APPEAL BEING HEARD AND RESERVED,
COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS
DAY, **ARAVIND KUMAR J.**, DELIVERED THE FOLLOWING:

JUDGMENT

Revenue has preferred this appeal questioning the correctness and legality of the order passed by Income Tax Appellate Tribunal, Bangalore Bench C' (for short '**ITAT**') in ITA No.1170(BNG)/08, whereunder ITAT has allowed the appeal filed by the assessee in-part by concluding that assessee is entitled to exemption under Section 54 of the Income Tax Act, 1961 (for short '**Act**') as assessee had fulfilled all the conditions prescribed under said section.

2. Facts in brief which has led to filing of this second appeal by the revenue can be crystallised as under:

For the assessment year 2003-04 a return of income came to be filed by the assessee on 17.07.2003

declaring her total income as ₹ 34,59,390/-.

Assessment came to be reopened under Section 147 and in response to the notice issued under Section 148, reply came to be filed by the assessee stating thereunder that original return filed is to be treated as return filed in response to the notice issued under Section 148. Accordingly, assessment proceedings came to be framed.

3. Assessing officer has noticed that assessee had sold a flat at Mumbai on 04.02.2003 for a total consideration of ₹1,71,00,000/- and had worked out long-term capital gain of ₹1,44,68,032/- and had claimed exemption under Section 54 of the Act on the ground that assessee had reinvested said amount for purchasing another property at Mumbai by paying an advance of ₹1,60,00,000/- as against total value of property at ₹3,25,00,000/-. Assessing officer has held that agreement to purchase the said property was

entered on 08.09.2003 and between April' 2003 to September' 2003 ₹2,40,00,000/- was paid by the assessee. By assessment order dated 31.12.2007 – Annexure – C assessing officer held that sale transaction had not been concluded, no registration of sale deed had taken place and balance consideration amount was yet to be paid and as such, deduction claimed under Section 54 of the Act came to be disallowed.

4. Being aggrieved by the same, assessee preferred an appeal before the Commissioner of Income Tax (Appeals). Appellate authority held that there has been non-compliance of provision i.e., Section 54 of the Act and as such, assessee would not be entitled to claim deduction. Consequently, appeal filed by the assessee came to be rejected by affirming the order of Assessing Officer by order dated 30.06.2008 – Annexure-B.

5. Assessee pursued her grievance before ITAT in ITA No.1170(BNG)/2008. Tribunal after considering the rival contentions held that assessee was entitled to deduction since for the purposes of Section 54 of the Act the date of purchase was to be taken as the basis namely, entering into a agreement for purchasing the new property. It also came to be held that payment made by assessee to purchase new property fully covered the consideration of capital gains portion and as such, it came to be held that assessee was eligible for claiming exemption under Section 54 of the Act. It has been further held by the Tribunal taking of physical possession or for that matter registration of the sale deed would be immaterial. Hence, appeal filed by the assessee came to be allowed by order dated 30.01.2009 vide Annexure-A. Hence, revenue is in appeal.

6. This Court by order dated 22.06.2011 has admitted the appeal for considering the following substantial question of law;

“Whether the finding of the Tribunal that sale consideration received by the assessee would be entitled to benefit under Sec.54 of the Income Tax Act, even though the sale was not completed and possession handed over to the assessee within two years as per Sec.54 of the Income Tax Act, is perverse, arbitrary and contrary to law?”

7. We have heard the arguments of Sri K.V.Aravind, learned counsel appearing for revenue and Sri. A. Shankar, learned counsel appearing for respondent No.1(b) and Sri. K.Arun, learned counsel appearing for respondent No.1(a) .

8. It is the contention of Sri. K.V.Aravind, learned counsel appearing for revenue that Tribunal

committed an error in not considering the fact that entire sale consideration had not been paid by the assessee for purchase of new property and what had been invested by her is only a portion of total sale consideration and as such, assessee would not be entitled to the benefit of Section 54 of the Act. He would also submit that possession of the property proposed to be purchased was also not delivered to the assessee within two years and as such, assessee would not be entitled to claim benefit flowing from Section 54 of the Act. Hence, he prays for answering the substantial question of law in favour of the appellant-revenue.

9. Per contra, Sri. A. Shankar, learned counsel appearing for assessee would support the order passed by the Tribunal and contends that it is the utilization of amount, which was received by the assessee by sale of property, which had to be reinvested for the purposes of claiming benefit under Section 54 of the Act and said

exercise having been undertaken by the assessee, Tribunal on appreciation of facts had found that assessee had reinvested the amount and thereby granted the benefit of claiming Long Term Capital Gain as provided under Section 54 of the Act. Hence, he prays for answering the substantial question of law in favour of the assessee. In support of his submission he would rely upon the judgment of this Court in the case of **PRINCIPAL COMMISSIONER OF INCOME-TAX AND ANOTHER vs. C. GOPALASWAMY** reported in [2016] 384 ITR 307 (KAR).

10. Facts on hand would clearly indicate that assessee had sold a flat at Mumbai for a total consideration of Rs.1,71,00,000/- on 04.02.2003 and thereby Long Term Capital Gains was arrived at Rs.1,44,68,032/-. In the return of income assessee claimed exemption under Section 54 of the Act, contending interalia that said amount had been

reinvested by her for purchase of another residential property namely, a flat at Mumbai itself for a total consideration of Rs.3,25,00,000/- as per Memorandum of Understanding entered on 08.09.2003. It is also not in dispute that assessee had been paid a sum of Rs.2,40,00,000/- as advance between 12.04.2003 to 24.09.2003 as against the total consideration of Rs.3,25,00,000/-. The Assessing Officer, as already noticed hereinabove, denied the exemption and brought the entire capital gain to tax. Section 54 of the Act which provides for claiming exemption reads as under:

“54. (1) Subject to the provision 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, a residential house, 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 the 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.

[(2) The amount of the capital gain which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139 in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset:

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of

the new asset within the period specified in sub-section (1), then,--

(i) the amount not so utilised shall be charged under section 45 as the income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and

(ii) the assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid.”

11. A reading of the above Section would make it explicitly clear that proceeds of sale of the property is to be reinvested within a period of two years, which would not be chargeable to tax. The intention of Legislature was to encourage the investment in the acquisition of residential house or construction thereof. The condition precedent for claiming benefit under said provision is that the capital gains realized from sale of a capital asset should be reinvested either in purchasing a residential house or utilised for constructing a

residential building. If it is established that consideration so received on alienation of property has been invested in either purchasing a residential building or spent on construction of residential building, an assessee would be entitled to the benefit flowing from Section 54 of the Act irrespective of the fact that transaction not being complete in all respects. In other words, it has to be examined or discerned from the facts of each case as to whether the assessee had undertaken such an exercise or not?

12. The main purpose of Section 54 of the Act is to give relief in respect of profits on the sale of a residential house. Necessary conditions to be fulfilled for the applicability of Section 54 are:

- (i) Assessee should be an individual or a Hindu Undivided Family;

- (ii) Capital assets should result from the transfer of a long term capital asset;
- (iii) Capital gain must arise from transfer of building which is chargeable as 'income from house property';
- (iv) Property should be a residential house;
- (v) Assessee must have within a period of two years after that date purchased another property;
- (vi) Property purchased must be residential;
- (vii) Exemption would be available only to the extent the sale proceeds are utilised;

- (viii) Where re-investment in a residential property is not made before due date for filing report, amount not so utilised till such date is required to be deposited in Capital Gain Account Scheme.

Thus, if the above conditions are satisfied, assessee is entitled to claim benefit of the provision of Section 54.

13. Facts on hand would disclose that assessee had owned a flat at Mumbai and sold the same on 04.02.2003 for a total consideration of ₹ 1,70,00,000/-. Subsequent to such sale she entered into an agreement for purchasing another property for a total consideration of ₹ 3,25,00,000/- by agreement dated 08.09.2003. Said agreement came to be entered into within six months from the date of sale i.e., 04.02.2003 and assessee had paid a total consideration of ₹2,40,00,000/- between April' 2003 to September' 2003. After making the payment, a registered sale deed had

not been executed in favour of the assessee before completion of two years period pursuant to Memorandum of Understanding dated 08.09.2003. The consideration received by her under sale dated 04.02.2003 has been paid by the assessee for purchasing another property and reinvestment has been made within two years as contemplated under Section 54 of the Act. These facts are not in dispute. Thus, long-term capital gains computed by virtue of sale deed stood adjusted by virtue of payment made by assessee for purchasing another property under Memorandum of Understanding dated 08.09.2003. As such, Tribunal has rightly held that date of purchase was to be taken as the basis for reckoning the period of two years prescribed under Section 54 of the Act for extending the benefit flowing therefrom. In the instant case

consideration paid by assessee under Memorandum of Understanding dated 08.09.2003 would fully cover the consideration of capital gains portion for being eligible to claim exemption under Section 54 of the Act.

14. Coordinate Bench of this Court in the case of ***PRINCIPAL COMMISSIONER OF INCOME-TAX vs. C. GOPALASWAMY*** reported in [2016] 384 ITR 307 (KAR) has held that utilization of capital gains in construction of residential house would suffice to claim the benefit of Section 54 of the Act.

15. Following the same and for the reasons aforestated, we are of the considered view that substantial question of law is to be answered in the affirmative i.e., in favour of assessee and against the revenue and accordingly, it is answered.

Hence, the following order is passed:

ORDER

- (i) Appeal is hereby dismissed.
- (ii) Order dated 30.01.2009 passed by Income-Tax Appellate Tribunal in ITA No.1170(BNG)/08 - Annexure-A, is hereby affirmed.
- (iii) No order as to costs.

**SD/-
JUDGE**

**SD/-
JUDGE**

DR