

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 15TH DAY OF DECEMBER 2015

PRESENT

THE HON'BLE MR.JUSTICE VINEET SARAN

AND

THE HON'BLE MRS.JUSTICE S SUJATHA

ITA NO.169/2010

BETWEEN

SHRI LAHAR SINGH SIROYA
NO.145, 9TH CROSS, 3RD MAIN
RMV EXTENSION, 2ND STAGE
DOLLAR'S COLONY
BANGALORE.

....APPELLANT

(BY SRI A SHANKAR, ADV. & M LAVA, ADV.)

AND

THE ASSISTANT COMMISSIONER OF
INCOME-TAX
CIRCLE-8(1), LIC BUILDING
1/1, SAMPIGE ROAD
MALLESHWARAM,
BANGALORE-560 003

...RESPONDENT

(BY SRI JEEVAN J NEERALGI, ADV.)

THIS APPEAL FILED UNDER SECTION.260-A OF
I.T.ACT, 1961, PRAYING TO SET ASIDE THE ORDER
PASSED BY THE ITAT BANGALORE IN ITA
NO.705/BNG/2009, DATED 18.12.2009, IN THE
INTEREST OF JUSTICE AND EQUITY.

THIS APPEAL COMING ON FOR ADMISSION THIS
DAY, **VINEET SARAN J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed by the assessee challenging the order of the Income Tax Appellate Tribunal (ITAT) relating to the assessment year 2006-07.

2. The brief facts are that by an agreement dated 1.4.1995 the appellant/assessee had agreed to purchase 3 acres 39 guntas of land from one H R Gurappa @ Rs.310/- Sq. Ft. (according to which the total price of land came to approximately Rs.4.80 crores) for which an advance of Rs.40.00 lakhs was paid by the assessee to the seller in terms of the agreement. However, because of certain disputes between the seller and one Vikas Housing, with whom also the seller and his brother had agreed to sell a large chunk of their land, including the land regarding which the agreement had been entered into with the assessee/appellant, and as an Original Suit No.3950/95-96 had been filed relating to the said land, the sale deed could not be executed. The litigation between the parties relating to the land in

question went up to the High Court and ultimately, a compromise was entered into between the parties, and in terms of the said compromise, instead of 3 acres 39 guntas of land which was to be sold in favour of the appellant for approximately Rs.4.80 crores, only 27 guntas of land was agreed to be sold to the assessee.

3. In terms of the said compromise, two sale deeds were executed in favour of the assessee for a sum of Rs.41.00 lakhs, and after adjusting the advance of Rs.40.00 lakhs already paid to the seller in terms of the agreement dated 01.04.1995, the balance amount of Rs.1 lakh was paid by the assessee at the time of execution of sale deed. The assessee thereafter sold the aforesaid 27 guntas land to a third party on 20.05.2005 for a sum of Rs.1,02,50,000/- and paid tax on the same after claiming benefit of long term capital gains as defined in Section 2(42A) read with Section 2(29A) of the Income Tax Act (hereinafter referred to as 'the Act').

The returns filed by the assessee was processed under Section 143(1) of the Act but the Assessing Officer subsequently issued notice under Section 148 of the Act, and the assessment was finalized by an assessment order dated 31.12.2008 wherein the sale amount was treated as short term capital gains, instead of long term capital gains as had been claimed by the assessee. The appeal filed by the assessee was dismissed by CIT (A) vide order dated 13.5.2009. The further appeal filed by the assessee was also dismissed by the Tribunal on 18.12.2009. Aggrieved by the same, this appeal has been filed.

4. We have heard Sri A Shankar, learned counsel for the appellant as well as Sri Jeevan J Neeralgi, learned counsel for the respondent/revenue, and perused the records. By agreement of the learned counsel for the parties, we have reframed the question of law to be determined in this appeal, which is as follows:

“Whether the Tribunal was justified in law in holding that the income has to be treated as short term capital gains

when the assessee had entered into an agreement to sell on 1.4.1995 and had paid a substantial advance of Rs.40.00 lakhs even though the sale deed may have been executed on 5.12.2002 on payment of further sum of Rs.1.00 lakh?”

5. The submission of Sri Shankar, learned counsel for the appellant/assessee is that in the facts of the present case, the authorities ought to have considered the date of agreement to sell (i.e., 1.4.1995) for the purpose of determining the capital gains, as according to the assessee he had come in possession of the property on 01.06.1995, shortly after the agreement and had also paid a substantial advance of Rs.40.00 lakhs at the time of agreement. It is contended that the sale deed could not be executed because of the pending litigation, which had been initiated immediately after the agreement was entered into on 01.04.1995, and it was only after the parties had entered into a compromise that 27 guntas of land was transferred in favour of the assessee on 5.12.2002 on payment of a further sum of Rs.1.00 lakh only, after adjusting Rs.40.00 lakhs

already been paid in terms of the agreement dated 01.04.1995.

6. It is further contended that the benefit of Section 2(42A) of the Act would be available to the assessee, as the land was held by the assessee ever since after the agreement dated 01.04.1995 and in terms of the aforesaid Section, it is not necessary that the land was to be owned by the assessee, as long as it was held by the assessee. In support of his submission, learned counsel has relied on a decision of the Apex Court rendered in the case of **SANJEEV LAL vs COMMISSIONER OF INCOME-TAX AND ANOTHER** ((2014) 365 ITR 389), which shall be dealt with at the time of considering the arguments of the parties.

7. Per contra, Sri Jeevan J Neeralgi, learned counsel for the respondent-revenue has supported the order of the Tribunal, as well as the Appellate Commissioner and the Assessing Officer. He submitted that the sale deed was executed in favour of the assessee

on 05.12.2002, which property he sold on 20.05.2005, which was within 36 months from the date of its purchase, hence the assessee would not be entitled to the benefit of long term capital gains and the authorities have thus rightly given the benefit of short term capital gains, which is perfectly justified in law. It is further contended that the agreement entered into on 01.04.1995, on the basis of which advance of Rs.40.00 lakhs had been given by the assessee, did not refer to the assessee being given possession of the land in question and as such, the authorities have rightly denied the benefit of long term capital gains to the assessee.

8. Having heard learned counsel for the parties and considering the facts and circumstances of the case, and also keeping in view the decision of the Apex Court in the case of **Sanjeev Lal** (supra), we are of the opinion that the assessee would be entitled to the benefit of long term capital gains, as had been claimed by him.

9. In the case of **Sanjeev Lal** (supra), the Apex Court was considering a case where an agreement to sell his property was entered into by the assessee therein on

27.12.2002 for a consideration of Rs.1.32 crores, out of which only Rs.15.00 lakhs had been paid to the assessee as earnest money. The assessee-therein then purchased another house on 30.04.2003. However, since there was litigation initiated with regard to the property after the assessee had entered into an agreement to sell it, the sale deed could not be executed by him till the matter was settled, and ultimately the sale deed was executed by the assessee only on 24.09.2004. The assessee therein claimed the benefit of Section 54 on the ground that the property had been purchased by him within two years of the agreement to sell his property, which was entered into on 27.12.2002. After considering the fact that the sale deed could not be executed immediately after the agreement because of pending litigation, the Apex Court, in the facts of that case, held that the, *“the authorities ought to have considered the date on which the agreement to sell had been effected by the appellants for transfer of property in question as the date of transfer of the house/original asset”*.

10. The benefit of Section 54 of the Act is to be given only when the assessee purchases a property one

year prior to the sale of his property or two years after such sale. In the case before the Apex Court, even though the purchase of the property by the assessee was on 30.04.2003, which was not within one year prior to the execution of the sale deed dated 24.09.2004, yet the benefit was given by the Apex Court to the assessee on the ground that it was within two years of the agreement to sell executed on 27.12.2002. While coming to such a conclusion, the Apex Court had, in paragraphs 20, 21 and 23 of the Judgment observed as under:

20. *“The question to be considered by this court is whether the agreement to sell which had been executed on December 27, 2002, can be considered as a date on which the property, i.e., the residential house had been transferred. In normal circumstances by executing an agreement to sell in respect of an immovable property, a right in personam is created in favour of the transferee/vendee. When such a right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because the vendee, in whose favour the right in personam is created, has a legitimate right to enforce specific performance of the agreement, if the vendor, for some reason*

is not executing the sale deed. Thus, by virtue of the agreement to sell some right is given by the vendor to the vendee. The question is whether the entire property can be said to have been sold at the time when an agreement to sell is entered into. In normal circumstances, the aforesaid question has to be answered in the negative. However, looking at the provisions of section 2(47) of the Act, which defines the word “transfer” in relation to a capital asset, one can say that if a right in the property is extinguished by execution of an agreement to sell, the capital asset can be deemed to have been transferred. Relevant portion of section 2(47), defining the word “transfer” is as under:

“2(47) ‘transfer’, in relation to a capital asset, includes,-

(ii) the extinguishment of any rights therein; or

21. Now, in the light of the definition of “transfer” as defined under section 2(47) of the Act, it is clear that when any right in respect of any capital asset is extinguished and that right is transferred to someone, it would amount to transfer of a capital asset. In the light of the aforesaid 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 December 27, 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 the 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 September 24, 2004, after the suit filed by Shri Ranjeet Lal, challenging the validity of the will, had been dismissed. In the "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.

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23. 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.

In the aforesaid facts, the Apex Court in paragraph 25, held as under:

25. In view of the aforestated 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.

11. The facts of the present case are similar, if not on a stronger footing than that in the case of **Sanjeev Lal** (supra). In the said case, while entering into an agreement to sell, an advance of only Rs.15.00 lakhs, out of Rs.1.32 crores, had been paid; whereas in the case at hand, an advance of Rs.40.00 lakhs had been given at the time of agreement entered into on 1.4.1995 out of the total sale price of Rs.41.00 lakhs, for which the sale deed was executed on 5.12.2002.

12. Providing for short term and long term capital gains is a beneficial piece of legislation, whereby certain benefit in taxation is given to the assessee on fulfillment of certain conditions. Every such legislation is to be construed liberally in favour of the assessee, as it is for the benefit of the assessee. When the purpose is to give a benefit, then technicalities in law should not come in the way of such benefit being given. In the facts of the present case, applying the ratio of the decision of the Apex Court in the case of **Sanjeev Lal** (supra), in our opinion, the assessee would be entitled to the benefit of long term capital gain.

13. We thus answer the question of law as has been raised in this appeal, in favour of the assessee and against the revenue.

14. The appeal stands allowed. There shall be no order as to costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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