

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**INCOME TAX APPEAL NO.24 OF 2013**

Commissioner of Income Tax-11 \*\*\*  
v/s. ...Appellant  
Ms.Bina Indrakumar ...Respondent

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Mr.P.C.Chhotaray for the Appellant.  
Mr.Sanjiv M. Shah for the Respondent.

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**CORAM : S.C.DHARMADHIKARI &**  
**A.A. SAYED, JJ.**

**DATED : 17 DECEMBER 2014**

**P.C.**

This Appeal by the Revenue challenges the order passed by the Income Tax Appellate Tribunal on 15 June 2012 in Income Tax Appeal No.4106/Mum/2011 for the Assessment Year 2006-07. The Tribunal was considering the challenge to the order passed by the Commissioner of Income Tax dated 29 March 2011. The Commissioner invoked his power under section 263 of the Income Tax Act, 1961 to set aside the assessment order dated 15 December 2008, as in the opinion of the Commissioner the same is erroneous and in so far as it is prejudicial to the interest of the Revenue.

2. The Tribunal, Mumbai Bench, found that the Commissioner's power under section 263 could not have been exercised in the given facts and circumstances. The exercise of powers was based merely on change of opinion. If the Commissioner held the particular opinion, but on the same transaction and same dealing, then that was not enough to enable him to exercise this power, is the conclusion reached.

3. Mr.Chhotaray, learned Counsel appearing on behalf of the Revenue, would submit that this conclusion of the Tribunal is vitiated by error of law apparent on the face of the record. He took us through the order of the Assessing Officer and that of the Commissioner. He showed us relevant dates. He submits that on 14 March 2001 three flats/immoveable property are stated to have been acquired by the Assessee, but that is incorrect. There was a deed of rectification dated 9 October 2002. There is another date, i.e. 24 October 2002, which is when the agreements were registered with the authorities for stamp duty purpose. In such circumstances, he submits that the Assessee is not entitled to claim long term capital gains if the asset was not held for the minimal period of 36 months. There is another date and which is the date of

the Occupation Certificate issued by the Municipal Corporation in this case and that is stated to be 20 January 2003. This only means that the flats were not ready for occupation and could never have been in possession of the Assessee.

4. The Tribunal held that this was not relevant consideration at all. If the requisite details and pertaining to the transaction of purchase and sale of three flats by the Assessee were placed on record before the Assessing Officer, then computation of capital gains by the Assessing Officer was a possible exercise. The Commissioner merely held a different opinion. In his opinion, what is relevant for the purpose of such inquiry and scrutiny is that the agreements should have been referred to in detail with their clauses. If they had been referred to, it would be apparent to the Assessing Officer that the first agreement dated 14 March 2001 is mere an agreement for sale. This means neither the property was handed over nor the transaction was registered. It contains number of dates regarding payment made or to be received, talks of possession by 31 December 2002. Then there is a Rectification Agreement dated 9 October 2002 and styled as Deed of Rectification, which not only changes number of flats

under the Agreement but also enhances the area. The additional consideration of Rs.32,87,000/- was also stated to be paid. Therefore, this is not extension of the earlier agreement but a fresh agreement. In any event, this does not talk of possession with the Assessee. There there is another date for registration of the agreement for the purpose of stamp duty, namely 22 October 2002. The rest of the dates are including a date of certificate styled as 'Occupation Certificate' issued by the Municipal Corporation.

5. If all these dates are taken together, then the property has not been held for the stipulated period. This inquiry was crucial and should have been made is the submission.

6. Having perused the Commissioner's order in its entirety, what we find is that firstly the Commissioner rendered a particular finding. In his opinion, an agreement for sale confers no title in the immoveable property. The Commissioner possibly is not aware of the nature of the transaction and in immoveable property in the city of Mumbai. This agreement for sale definitely confers rights and which are capable of being enforced. They have been statutorily recognized in a Legislation styled as Maharashtra

Ownership of Flats (Regulation of the Promotion of Construction Sale Management and Transfer) Act, 1963 ( in short `MoFA”) . Secondly, the consideration thereunder had been paid and what remained was a rectification or change in flat numbers and the area. The transaction or deal was, thus, complete, but when the area increased, additional consideration was paid. If there was no final or concluded contract, then possibly there was no requirement of styling subsequent document or agreement as `Rectification Deed'. The mere agreement for sale and without anything more would not require registration. However, when the agreement for sale with the Rectification Deed together were taken as a document conveying immovable property that the stamp authority or authorities under the Bombay Stamp Act, 1958 levy assess and recover stamp duty. The registration of the agreement is also, therefore, on the footing that it is a conveyance. In such circumstances, it is not clear as to why the Commissioner held another opinion. Apart therefrom only his view and opinion will not enable him to exercise the power u/s 263 of the I.T.Act, that is not found to be permissible in law by the Tribunal. Secondly, we find very strange mode of exercise of power by the Commissioner. In six paragraphs, he faults the Assessing Officer for not holding any inquiry or doing proper inquiry and

collecting the relevant information. In para 7, he holds that without prejudice to what has been observed by him earlier, even if the Assessee's version is to be accepted, the Assessing Officer failed to apply a proper indexation because separate indexation were needed for two separate sets of agreement, the original agreement to sale and the deed of rectification, which contained different areas and different negotiated prices. This is also nothing, but his view. If his view on the same set of facts pertaining to the transaction alone have gone into in the exercise undertaken by him and for invoking the power under section 263 of the Act, then, we do not find that the Tribunal was in error in reversing his order and not upholding his view. The Tribunal has considered the matter in its entirety and has held that the Assessing Officer's order is not erroneous and in so far as it is prejudicial to the interest of the Revenue, but the Commissioner proceeded to exercise his power on mere change of opinion. In these circumstances, the Tribunal was completely justified in reversing the Commissioner's view and allowing the Assessee's Appeal. Such an order of the Tribunal can hardly be termed as perverse or vitiated by any error of law apparent on the face of the record.

7. Reliance placed by Mr.Chhotaray on the Division Bench judgment of this Court in the case of **Commissioner of Income Tax vs. Smt.Beena K.Jain, 1996 (217) ITR 363** is completely misplaced. There the Court upheld the order of the Tribunal, because the residential house purchased by the Assessee could not have been said to be acquired and when the full consideration was not paid. The relevant date taken by the Court and namely payment of the consideration on 29 July 1988 and the subsequent date, that is immediately on the next day, the Assessee was put in possession, which enables it to uphold the conclusion of the Tribunal. It is, therefore, the Court dismissed the Revenue's Application. It is not laying down any principle of law. It is essentially on the facts and taken cumulatively that the Revenue's Appeal/Application was dismissed. In such circumstances, we do not find that this judgment can be of any assistance to the Revenue.

8. The Appeal is dismissed. No order as to costs.

**(A.A. SAYED, J.)**

**(S.C.DHARMADHIKARI,J.)**