

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPEAL No. 74 of 2002

RAJESH SURANA
V/S
C I T JODHPUR

Mr. VD KALLA & Mr. SANJEEV JOHARI, for the appellant /
petitioner

Mr. KK BISSA, for the respondent

Date of Order : 28.1.2008

HON'BLE SHRI N P GUPTA, J.
HON'BLE SHRI DEO NARAYAN THANVI, J.

REPORTABLE
ORDER

This appeal has been filed by the assessee,
seeking to challenge the orders of the authorities below,
i.e. the Assessing Authority, appellate order of
Commissioner of Income Tax, and further appellate order of
I.T.A.T.

The appeal was admitted on 4.4.2003 by framing
the following substantial question of law:-

"Whether in the facts and circumstances of the
case, the Tribunal was right in holding that
appellant - assessee was not entitled to
exemption for residential house under Section 53
of the I.T. Act.?"

The necessary facts, devoid of unnecessary details, are, that there existed a plot of land, being Plot No. 20 at Sector-A, Kamla Nehru Nagar, Jodhpur, having a boundary wall and a garage cum room constructed thereon. It was acquired by one Mr. Ajit Mal Bhandari, who bequeathed it to the two brothers, one being the assessee, and the other being Sanjay Surana. After death of testator, the entire plot of land was sold for Rs. 1,90,000/-, out of the sale proceeds, the assessee received his share being Rs. 95,000/-. The assessing authority assessed this income to tax, and found the assessee to be not entitled to the deduction claimed, by declining the claim for exemption raised by the assessee under Section 53 of the Income Tax Act, by treating it as a residential house. This was affirmed by all the authorities below.

So far the factual aspect of the matter is concerned, viz. the aforesaid plot no. 20 having been bequeathed by Ajit Mal Bhandari to the assessee and his brother Sanjay Surana vide Will dt. 4.4.1991, Shri Ajit Mal Bhandari having expired on 9.5.1991, and the property having been sold on 5.3.92, for a total consideration of Rs. 1,90,000/-, from out of which the assessee having received his share being Rs. 95,000/-, and the plot having the boundary wall and a garage cum room constructed thereon, are all not in dispute between the either side.

It is in the background of this factual matrix, which is not in dispute, that the question arises, as to whether the authorities below were right in holding the assessee to be not entitled to exemption on the ground of the property being a residential house, under Section 53.

We stand better advised to reproduce the provisions of Section 53, as they existed at the relevant time, as they have subsequently been omitted, by Finance Act of 1992, w.e.f. 1.4.93 which read as under:-

"53 Notwithstanding anything contained in section 45, where in the case of the assessee being an individual [or a Hindu undivided family], the capital gain arises from the transfer of [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", the capital gain arising from such transfer shall be dealt with in accordance with the following provisions of this section, that is to say;-

(a) in a case where the full value of the consideration received or accruing as a result of the transfer of such capital asset does not exceed two hundred thousand rupees the whole of the capital gain shall not be charged under section 45;

(b) in a case where the full value of such consideration exceeds two hundred thousand rupees, so much of the capital gain as bears to the whole of the capital gain the same proportion as the amount of two hundred thousand rupees bears to such consideration shall not be charged under section 45:

Provided that nothing contained in this section shall apply to a case where the assessee owns on the date of such transfer any other residential house.]

[Explanation: In this section and in sections 54, 54B, 54D, 54E, 54F and 54G, references to capital

gain shall be construed as references to the amount of capital gain as computed under clause (a) of sub-section (1) of section 48.]

From reading of Section 53 as above, it is clear, that it contemplates very many aspects. However, for the present purposes, the controversy relates to expression "building or land appurtenant thereto and being a residential house".

It was contended by the learned counsel for the appellant, that there was a boundary wall all around the plot, and a garage cum room was constructed, wherein the Chowkidar of the assessee was residing, and that being the position, the asset fulfill, the ingredients of "building or land appurtenant thereto and being a residential house", and the learned Tribunal fell into error in not treating it to be a residential house, simply because civic amenities was not there.

On the other hand, learned counsel for the Revenue supported the impugned judgments, by contending, that all the three authorities below have gone into the questions of fact, thread bare, and have come to the conclusion, that taken from any stand point, the property does not fall within the four corners of expression "residential house", which being a sine qua non for exemption under Section 53, exemption was rightly refused.

We have considered the submissions, and have gone through the provisions of Section 53. Admittedly the Income Tax Act does not define the expression "residential house", and Section 53 only comprehends "buildings or lands appurtenant thereto and being a residential house". Thus it does not exempt merely a building, nor does it exempt merely the land appurtenant thereto, but it exempts both of them, with the concomitant requirement of it being a residential house, obviously, as contra distinguished from residential building.

The distinction between the residential building and residential house is very significant, and not far to seek, inasmuch as the "residential building" would be any structure existing on land, which has been constructed with intention of being used as a residential house, whether by the assessee, or by any other human being, and it is not necessary, that the building should ever be, or ever have been, occupied as a residential house. The pre-dominant intention of the nature of construction can be decisive factor, as to whether it is a residential building, as contra distinguished from a commercial building, or any industrial building. But then, every "residential building" would not be "residential house". Though every residential house has to be residential building but not vice a versa.

If considered from this aspect, one thing that steers on the forefront is, that nobody was treating the property to be even a residential building, much less a residential house, till before the controversy arose before the income tax authorities. In this regard it is significant to note, that the testator in the Will has not described the property as a residential building, or a house, but the property bequeathed was described only as Plot No. 20, Sector-A, Kamla Nehru Nagar, Jodhpur. We need not dilate much on the aspect, that a plot can obviously, by itself, not be residential building, much less residential house. It is while describing the property as plot, it is only mentioned, that there exists a boundary wall and a garage cum room on the plot. Even while giving this part of description also, it has never been described as a residential building, or residential house. Then, admittedly the assessee has sold the asset on 5.3.92, and even the assessee has not produced the sale deed, nor has he examined the purchaser, to depose, or even show, that the seller and the purchaser, even at the time of sale, were ad idem, about the asset being residential building, or residential house. Thus, from the description of the property, as given in the Will, and in absence of anything else to show otherwise, on the face of it, it cannot be said that the asset was a residential building, or a residential house, rather it was a plot, having boundary

wall and a garage cum room. This is one aspect of the matter.

The other aspect of the matter is, that the word "residence" has been defined in the Blacks Law Dictionary, Sixth Edition, at page-1308, as "Place where one actually lives or has his house; a person's dwelling place or place of habitation; an abode, house where one's home is, a dwelling house". It has further been described that Residence implies something more than mere physical presence, and something less than domicile. Then, for the present purposes the term "house" has been defined at page-739 to mean "structure that serves as living quarters for one or more persons or families". Then, the Shorter Oxford Dictionary Thumb Index Edition, defines the word "house" for the present purposes, to mean "building for human habitation; a dwelling, a home, a self contained unit having a ground floor and one or more upper storeys; or part of a building occupied by one tenant or family, and so on. Then, the expression "residence" has been defined in the said Shorter Oxford Dictionary to mean, a certain place used as residence suitable for or characterized as private house, and so on.

In our view, even without any invocation of much logic, on the face of the dictionary meaning also, the construction can possibly not be said to be fulfilling the

character of residential house. May be that some person might be living there, being Chowkidar, but then he cannot mean to be dwelling therein, even if considered on the common sense, to the effect, that any person could have lived anywhere under compulsion, or circumstances, and at times such residence even may not require building, or even a structure, as footpath dwellers are not in scarcity in India, but thereby the footpath would not be their residential house. Likewise Nomads do live in their mobile bullock cart, but then the bullock cart cannot be said to be falling within expression "residential house". Thus, in absence of any statutory definition in the Act, even employing dictionary meaning, and/or the common sense approach, in order to describe the asset as residential house, it should be fulfilling the characteristics of a residential house as defined above. Admittedly there is only one garage cum room, with no kitchen or toilet etc. May be that the assessee might not be physically living there at a given point of time, but then the construction is not even fit for dwelling by the assessee. In our view, the language of Section 53 comprehends, that the assets should be pre-dominantly residential building, and may have land appurtenant thereto, and not, that it be a open plot of land, having some insignificant structure, which might under some constraints, be used for residence, or which might be actually used by some employee, as a person taking care of protection of the plot. Thus considering from any

standpoint, it cannot be said, that the asset fulfills the character of residential house, within the meaning of Section 53 of the Act.

There is yet another aspect, which has not been gone into by the learned authorities below, but it cannot be lost sight off. That being, that the purpose of Section 53 was not to entirely exempt the long term capital gain, derived from the residential building. If the interpretation as suggested by the assessee were taken, a person may engage himself, in property dealing, and would be disposing of the property after allowing it to become a long term asset, and then, may be that he might be raising construction, as found in the present case, or even may be, he might be working as a regular builder, having more than one plots, and constructing more than one houses on such plots, and then selling them, and thereby earning income. May be a smart dealer might be living for a short while in each of such building, but then, the question that would arise is, as to whether Section 53 at all comprehends providing absolute holiday in payment of tax to such person, and in our view, the answer has to be in the negative. Inasmuch as the purpose of provisions of Section 53 clearly is, to provide relief to the assessee, who might like to shift residence from one place to another, may be for variety of reasons, as may be thought proper by the assessee, and which need not be put in any straight jacket

formulae. It is not intended to provide exemption to the assessee, who is residing somewhere else, acquires some other residential building, retains it, so as to allow it to become long term asset, and then sale it.

Thus, considering from any standpoint, in our view, the question as framed is required to be, and is, answered against the assessee, and in favour of the Revenue.

The appeal thus has no force, and is dismissed. The parties shall bear their own costs.

(DEO NARAYAN THANVI), J.
/Sushil/

(N P GUPTA), J.