

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF DECEMBER, 2021

PRESENT

THE HON'BLE MRS.JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE S.RACHAIAH

I.T.A.No.254/2021

BETWEEN :

ANTONY PARAKAL KURIAN
AGED ABOUT 63 YEARS,
D 83, PRESTIGE OZONE,
WHITEFIELD MAIN ROAD,
VARTHUR KOLI,
BANGALORE-560 066,
PAN: AFMPK 3991 B

...APPELLANT

(BY SRI SUDHEENDRA B.R., ADV.)

AND :

ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE-5(3) (1), BANGALORE,
BMTC BUILDING, 80 FEET ROAD,
KORAMANGALA 6TH BLOCK,
BENGALURU-560 095.

...RESPONDENT

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

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 06.11.2020 PASSED IN ITA NO.1576/BANG/2018 AND THE ORDER DATED 22.06.2021 IN MP NO.163/BANG/2020 (ANNEXURE-F), FOR THE ASSESSMENT YEAR 2013-2014. PRAYING TO (A) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. (B) ALLOW THE APPEAL AND SET

ASIDE THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 06.11.2020 IN ITA NO.1576/BANG/2018 (ANNEXURE-E) AND THE ORDER OF THE TRIBUNAL DATED 22.06.2021 IN MP NO.163/BANG/2020 (ANNEXURE-F), FOR THE ASSESSMENT YEAR 2013-2014, TO THE EXTENT QUESTIONED HEREIN.

THIS APPEAL HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **S. SUJATHA, J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

This appeal is filed by the assessee under Section 260A of the Income Tax Act, 1961 ('Act' for short) assailing the order dated 06.11.2020 passed in ITA No.1576/Bang/2018 as well as the order dated 22.06.2021 in MP No.163/Bang/2020 by the Income Tax Appellate Tribunal, "C" Bench, Bangalore ('Tribunal' for short) relating to the assessment year 2013-14 raising the following substantial questions of law:-

1. *Whether, on the facts and circumstances of the case and law applicable, the Tribunal was correct in law in remanding the matter to CIT (A) to decide eligibility of exemption under Section 54 in respect of repayment of housing loan of Rs.60 lakhs and Rs.90 lakhs by the appellant?*

2. *Whether, the finding of the Tribunal that exemption under section 54F is not allowable if the assessee is in possession of a residential house on the date of transfer of the original asset is irrelevant and contrary to the provisions of section 54F and hence perverse and contrary to law?*
3. *Whether, the reasoning of the Tribunal that even though residential house at HAL 2nd Stage, Kodihalli extension, Bangalore was gifted vide registered gift deed by the assessee to his son and wife on 3.1.2012, assessee will be in possession of the said house on 10.4.2012 being date of transfer of land, is irrelevant for the purpose of exemption under Section 54F and hence perverse and contrary to law?*
4. *Whether, the reasoning of the Tribunal that exemption claimed by the appellant under section 54 for residential house purchased in the name of wife of the appellant and the decision in the case of CIT v M J Sivani (2014) 46 taxmann.com 170 (Karnataka), for denying exemption under section 54F, is perverse and contrary to law?*

2. The assessee, a salaried person working in M/s IGUS India Private Limited, had filed a return of income showing the capital gains for the assessment year under consideration.

CLAIM OF THE ASSESSEE:

3. During the relevant assessment year, the assessee had sold the land of Angamaly, Kerala [original asset] to M/s. Fashion Jewellery vide sale deed dated 10.04.2012 for a consideration of Rs.60 Lakhs. Long term capital gains resulting from this transaction was claimed as eligible for exemption under Section 54F of the Act. The assessee claimed that on the date of sale of land i.e., 10.04.2012, he was the owner of only one residential house at Angamaly, Kerala; prior to 10.04.2012, the appellant invested in a residential house – Flat No.3E, 3rd Floor, E Block, Orchard Green, Domlur, Bangalore-560071 purchased in the name of his wife vide sale deed registered on 08.12.2011. Another

residential house owned by the assessee at HAL 2nd Stage, Kodihalli Extension, Bangalore was gifted by the appellant to his wife and son vide gift deed registered on 03.01.2012. The appellant purchased a land at Erumad, Tamil Nadu vide sale deed registered on 05.09.2012 for Rs.1.4 Crores and constructed a residential house thereon within three years from the date of transfer of land i.e., original asset. On these factual grounds, assessee claimed exemption under Section 54F of the Act on the entire capital gains from sale of land amounting to Rs.49,08,708/-.

4. The appellant sold a residential house at Angamaly, Kerala i.e., House property in favour of M/s. Fashion Jewellery for Rs.2.42 Crores vide sale deed registered on 08.10.2012. Capital gains amounting to Rs.2,23,47,434/- was claimed as an exemption under Section 54 of the Act and Rs.25 Lakhs is claimed as an exemption for making investment in REC bonds under Section 54EC of the Act. The contention of the appellant

was that out of the advance amount of Rs.50 lakhs received from M/s. Fashion Jewellery for sale of residential house at Angamaly, Kerala on 15.10.2011, sale deed was registered, an advance amount of Rs.40 Lakhs was made on 24.11.2011 for purchase of a residential house – Flat No.3E, 3rd Floor, E Block, Orchard Green, Domlur, Bangalore-560071. The assessee and his wife also applied for housing loan at Citibank for purchase of the said residential house. Rs.40 Lakhs was paid as advance and the balance amount of Rs.1.5 Crores was paid to Citibank loan and the sale deed for purchase of residential house was registered in the name of his wife on 08.12.2011. On receipt of the advance amount of Rs.1.5 Crores from M/s. Fashion Jewellery for sale of residential house at Angamaly, Kerala – sale deed registered on 08.10.2012, the assessee repaid housing loan to the extent of Rs.60 Lakhs on the very same day. The remaining housing loan was repaid by the assessee from his bank account.

5. The Assessing Authority denied the claim made under Section 54 and 54F of the Act and an order under Section 143(3) of the Act was passed by disallowing exemption claimed under Sections 54 and 54F of the Act amounting to Rs.1,98,47,434/- and Rs.49,08,708/- respectively. Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), which came to be partly allowed, allowing the exemption partly under Section 54 to the extent of Rs.44,61,555/-, confirming the denial of exemption under Section 54F of the Act. On further appeal before the Tribunal, appeal under Section 54 of the Act came to be allowed inasmuch as the investment made in the name of the assessee's wife but was remanded to CIT[A] regarding eligibility of Rs.60 lakhs and the payment towards the expenses claimed to the Assessing Officer. In the miscellaneous petition

eligibility of Rs.90 lakhs was also directed to be examined by the Commissioner of Income Tax [Appeals].

6. As regards payment towards stamp duty amounting to Rs.12,76,800/- paid by way of Demand Drafts from State Bank of India, Bangalore and City Bank, it has been observed that the Tribunal is not able to identify to whom these accounts belong to and accordingly, directed the assessee to file all requisite details before the Assessing Officer, who shall ascertain the payment and if such payments are found to be made by the assessee from his account, the benefit should be given to the assessee by permitting deduction under Section 54 of the Act. Claim of brokerage of Rs.5,00,000/- was disallowed. As regards the claim made under Section 54F of the Act, the same came to be rejected. M.P.No.163/Bang/2020 was preferred by the assessee, the same came to be allowed in part directing Commissioner of Income Tax [Appeals] to decide

regarding eligibility of Rs.90 lakhs also under Section 54 of the Act, rejecting the other contentions raised.

7. Learned counsel for the appellant/assessee would submit that the Tribunal has not given any finding regarding eligibility of the payment for housing loan of Rs.60.00 lakhs for exemption under Section 54 of the Act; the Tribunal has grossly erred in remanding the issue to the Commissioner of Income Tax (Appeals) to decide eligibility of payment of housing loan of Rs.60.00 lakhs and Rs.90.00 lakhs by the appellant even after recording the undisputed fact that the repayment of housing loan of Rs.60.00 lakhs and the balance sum was made by the appellant.

8. Learned counsel further argued that the Tribunal failed to appreciate the finding of the Commissioner of Income Tax (Appeals) that the assessee is no more the legal owner of the residential house at Kodihalli Extension, Bangalore. Placing reliance on the

proviso (a)(i) to Section 54F of the Act, it was argued that exemption under Section 54F shall not apply if the assessee owns more than one residential house, other than the new asset, on the transfer of the original asset.

9. Learned counsel argued that the assessee owns only one residential property i.e., property at No.541, Sy.No.405/24/3, Angamaly Municipality, Kerala and no other property on the date of transfer of the land i.e., on 10.04.2012. The assessee had gifted, by registered gift deed, the property at No.26, PID-74-6-26, HAL II Stage, Kodihalli Extension, Bangalore, to his wife on 03.01.2012 well before the transfer of land and thus he was no more a legal owner of the same on 10.04.2012. The residential house purchased in the name of his wife, vide registered sale deed dated 08.12.2011, was not owned by the assessee as on 10.04.2012 and these vital aspects have been lost sight of, by the Tribunal in denying exemption under Section

54F of the Act, relying on the Co-ordinate Bench decision of this Court in the case of ***CIT v M J Siwani, [(2014) 56 taxmann.com 170]***, without appreciating that the said decision is not applicable to the case on hand.

10. Learned counsel for the Revenue submitted that the Tribunal has given a liberal interpretation to Section 54 of the Act in coming to a conclusion as regards the investment made by the assessee in a new asset purchased in the name of his wife is concerned that there is no requirement that investment should be made in the name of the assessee only. There being no substantial material to identify to whom the payment of stamp duty was made by the assessee, the matter was remanded to the Assessing Officer for verification of the facts, which cannot be found fault with. As regards Section 54F of the Act, it was argued that the assessee having claimed the benefit under Section 54 of the Act

on the premise that the investment was made by him in the new asset purchased in the name of his wife, cannot take a contradictory stand in respect of the claim made under Section 54F of the Act. The phrase "owns" employed in proviso (a)(i) of Section 54F(1) of the Act has to be interpreted analogous to Section 54 of the Act, no different analogy could be applied with respect to Section 54F of the Act.

11. We have carefully considered the rival submissions made by the learned counsel appearing for the parties and perused the material on record.

12. The undisputed facts are that the assessee sold a land at Angamaly, Kerala [original asset] to M/s. Fashion Jewellery vide sale deed dated 10.04.2012 for a consideration of Rs.60 Lakhs. The residential house at Angamaly, Kerala was sold in favour of M/s. Fashion Jewellery for Rs.2.42 Crores vide sale deed registered on 08.10.2012. The residential house owned by the

assessee at HAL 2nd Stage, Kodiahlli Extension, Bangalore was gifted by the appellant to his wife and minor son vide gift deed registered on 03.01.2012. The assessee invested the capital gains arising from the sale of the land in a residential house – Flat No.3E, 3rd Floor, E Block, Orchard Green, Bangalore – 560071 purchased in the name of his wife vide sale deed registered on 08.12.2011 [Rs.40 Lakhs paid as advance out of Rs.50 lakhs received as advance for sale of residential house, Rs.1.5 Crores paid through Citibank loan]. A residential house was constructed in the land purchased at Erumad, Tamil Nadu vide sale deed registered on 05.09.2012 within three years from the date of transfer of the land at Angamaly, Kerala.

13. Assessing Officer rejected the claim of the assessee for exemption of capital gains under Sections 54 and 54F of the Act as aforesaid. Commissioner of Income Tax [Appeals] accepted the contentions of the

assessee regarding the property at Kodihalli which was gifted through gift deed to the wife and son of the assessee prior to the transfer of the original asset. However, held that the investment in the new asset in the name of the wife of the assessee could be treated as investment made by the assessee only to the extent of Rs.40 lakhs and his ownership also in that proportion. Regarding the registration and other expenses claimed, an amount of Rs.4,61,565/- was allowed. Accordingly, the claim under Section 54 was restricted to Rs.44,61,565/-. The claim made under Section 54F of the Act was rejected.

14. On further appeal before the Tribunal by the assessee, the same was partly allowed holding that the total capital gains of Rs.2,23,47,434/- earned by the assessee from sale of original asset, a sum of Rs.1.00 Crore invested in purchase of the new asset that stands in the name of assessee's wife and a sum of Rs.25.00 lakhs invested in REC bonds regarding eligibility of

Rs.60 lakhs and Rs.90 lakhs under Section 54 requires to be decided by the Commissioner of Income Tax (Appeals).

15. Section 54 and Section 54F of the Act reads as under;

“54. (1) *Subject to the provisions of subsection (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,—*

xxxxxxx

54F. (1) *Subject to the provisions of subsection (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (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 (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,—*

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45 ;

(b) xxxxxx

Provided *that nothing contained in this subsection shall apply where—*

(a) the assessee,—

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or”

16. As regards the claim made under Section 54 of the Act, relating to the investment made by the assessee in a new asset purchased in the name of his wife is concerned, the Tribunal has extended the relief placing reliance on the Coordinate Bench decision of this Court in the case of ***DIT v. Mrs. Jennifer Bhide, (2012) 349 ITR 30 (Kar.)***. We have no reason to differ from the same.

17. Coming to the payments said to have been made by the assessee towards stamp duty by way of Demand Drafts, no adequate material being available to identify to whom these accounts belong to, the Tribunal has remanded the matter to the Assessing Officer to ascertain the payments, hence, no exception can be found with this finding of the Tribunal. Accordingly, we confirm the same.

18. As regards Section 54F of the Act is concerned, it is apt to refer to both the provisions i.e., Sections 54 and 54F of the Act. On a comparative study of these two provisions, it would indicate that Section 54 deals with profit on sale of property used for residence, whereas Section 54F of the Act deals with capital gain on transfer of certain capital assets not to be charged in case of investment for residential use. The proviso (a)(i) to Section 54F(1) of the Act makes a distinction from Section 54, inasmuch as the language employed, more particularly, the phrase “owns”.

19. Section 27 of the Act defines “Owner of house property” for the purposes of Sections 22 to 26 of the Act. Sections 22 to 26 found in Chapter IV-C postulates the income from house property.

20. Section 27(i) is extracted hereunder for ready reference;

“27. *For the purposes of Sections 22 to 26-*

(i) an individual who transfers otherwise than for adequate consideration any house property to his or her spouse, not being a transfer in connection with an agreement to live apart, or to a minor child not being a married daughter, shall be deemed to be the owner of the house property so transferred;

21. This provision would not assist the Revenue to consider the assessee as the owner of the house property purchased in the name of his wife. Even otherwise, the provision makes it clear that it is defined only for the purposes of Sections 22 to 26 of the Act.

22. In the case of **Jennifer Bhide**, supra, this Court has held that to attract Section 54 as well as Section 54EC what is material is, the investment of sale consideration in acquiring the residential premises or constructing the residential premises or investing the amount in bonds set out in Section 54EC. Once the sale consideration is utilized for the purpose mentioned under Sections 54 and 54EC, the assessee is entitled to

the benefit of the said provisions. Thus, it has been categorically observed that the assessee cannot be denied the benefit of deduction under Section 54/54EC of the Act notwithstanding the fact that the assessee has purchased the property or invested the money in REC Bonds jointly with her spouse.

23. The relevant paragraph of **Mrs. Jennifer Bhide** supra, is quoted hereunder for ready reference:

“7. On a careful reading of section 54 as well as section 54EC on which reliance is placed makes it clear that when capital gains arise from the transfer of long-term capital asset to an assessee and the assessee has within the period of one year before or two years after the date on which the transfer took place purchases or has within a period of three years after the date of construction of residential house then instead of 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 provision made under the section

which grants exemption from payment of capital gains as set out thereunder. Therefore in the entire section 54, the purchase to be made or the construction to be put up by the assessee, should be there in the name of the assessee, in not expressly stated. Similarly, even in respect of section 54EC, the assessee has at any time within a period of six months after the date of such transfer invested the whole or any part of the capital gains in the long-term specified asset then she would be entitled to the benefit mentioned in the said section. There also it is not expressly stated that the investment should be in the name of the assessee. Therefore, to attract section 54 and section 54EC of the Act, what is material is the investment of the sale consideration in acquiring the residential premises or constructing a residential premises or investing the amounts in bonds set out in section 54EC. Once the sale consideration is invested in any of these manner the assessee would be entitled to the benefit conferred under this provisions. In the absence of an express provision contained in these sections

that the investment should be in the name of the assessee only any such interpretation were to be placed, it amounts to the court introducing the said word in the provision which is not there. It amounts the court legislating when Parliament has deliberately not used those words in the said section. That is the view taken by the hon'ble Madras High Court and the hon'ble Punjab and Haryana High Court and we respectfully agree with the view expressed in the aforesaid judgments.”

24. The object of Section 54F of the Act is to provide impetus to the house construction. The word ‘assessee’ under Section 54 of the Act having been given wide and liberal interpretation so as to include his legal heirs also by judicial pronouncements, it cannot be held Section 54F also should be construed liberally.

25. Insofar as the proviso (a)(i) to Section 54F(1) is concerned, the phrase “owns” plays a significant role. What is relevant is the assessee should not own more than one residential house, other than the new asset,

on the date of transfer of the original asset. This phrase “owns” is conspicuously absent in Section 54.

26. In our considered view, Section 54F of the Act which deals with capital gain and transfer of certain capital assets not to be charged in case of investment in residential house cannot be treated on par with Section 54. For qualifying for the exemption under Section 54F of the Act, what is mandatory is the investment to be made in residential house in the name of the assessee only. Section 54F encourages investment in a residential house. In the present case, indisputably, the property in Domlur is standing in the name of the assessee's wife as per the registered sale deed dated 08.12. 2011. For all practical purposes, and even as per Section 14 of the Hindu Succession Act, 1956, the property standing in the name of a female heir becomes her absolute property. The income derived by that property could be the income in the hands of the

assessee's wife under the Act. In our considered opinion, notwithstanding the property standing in the name of the assessee's wife was held to be eligible for exemption under Section 54 of the Act, while considering the exemption under Section 54F of the Act, the residential house purchased in the name of the assessee's wife cannot be construed as the property owned by the assessee. Excluding this property standing in the name of the assessee's wife, the property at Kodihalli bequeathed to the wife and son of the assessee being considered as justifiable by the Commissioner of Income Tax [Appeals] which has attained finality, what was owned by the assessee on the date of transfer of the original asset – land i.e., 10.04.2012, is the residential property in Angamaly, Kerala which is subsequently sold on 08.10.2012. The Tribunal has placed reliance on the Co-ordinate Bench ruling of this Court in the case of **M.J.Siwani** supra, to deny the exemption to the assessee under

Section 54F of the Act. In the said case, during the relevant assessment year, assessee therein sold their undivided interest in land to several purchasers. The assessee claimed deduction under Section 54 and 54F in respect of long term capital gain arising from the said sale of land. The Authorities observed that the assessee [therein] had two residential houses having one half share each therein on the date of sale of the land, thereby rejected assessee's claim. The Tribunal held that on date of sale of long term assets meant complete residential house and would not include shared interest in a residential house. On appeal by the Revenue before this Court, it was held that co-owner is the owner of a house in which he has share and that his right, title and interest is exclusive to that extent of his share and that he is the owner of the entire undivided house till it is partitioned. The right of a person, may be one half, in the residential house cannot be taken away without due process of law or it continues till there is a partition of

such residential house. With great respect, this judgment would not be of any assistance to the Revenue to deny the benefit to the assessee since there is no such co-ownership or share in the property of Domlur house by the assessee. Even Section 27 of the Act could be of little assistance to the Department since the said definition contemplated is only for the purposes of Section 22 to 26 of the Act. Thus, we cannot subscribe to the findings of the Tribunal confirming the order of the Authorities on this point.

27. For the reasons aforesaid, we set aside the order of the Tribunal as well as the Authorities impugned herein.

28. Hence, the following:

ORDER

i] Appeal is allowed in part.

- ii] Substantial question of law No.1 is answered against the assessee and in favour of the revenue.
- iii] Substantial questions of law 2 to 4 are answered in favour of the assessee and against the revenue.
- iv] The assessee is entitled to the exemption under Section 54F of the Act subject to fulfilling other conditions.
- v] Assessing Officer shall re-compute the income accordingly.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

nd/NC.