

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
 (समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 1356/Kol/2017
Assessment Year: 2012-13

Gautam Jhunhunwala (PAN: ACVPJ5088N)	Vs.	Income-tax Officer, Wd-25(4), Kolkata
Appellant		Respondent

Date of Hearing	04.09.2018
Date of Pronouncement	07.09.2018
For the Appellant	Shri P. R. Kothari, FCA
For the Respondent	Shri Rabin Choudhury, Addl. CIT. Sr. DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of Ld. CIT(A)-7, Kolkata dated 12.01.2017 for AY 2012-13.

2. The sole issue is against the decision of the Ld. CIT(A) confirming the action of AO in disallowing the claim of assessee for exemption u/s. 54 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) to its LTCG of Rs.15,04,361/-.

3. Brief facts of the case are that the assessee is an individual, who had sold a flat vide registered Deed of Conveyance dated 26/27.12.2011. The sale deed has been executed in pursuance of an agreement to sale which has been executed on 16.09.2011 and out of the consideration of Rs. 30 lacs, Rs. 1 lac has been received by the assessee by way of advance/earnest money when the agreement to sale has been executed and a new residential flat has been purchased by the assessee on 04.10.2010. The AO has taken the date of

registration of the property sold as date of transfer and since the new property has been purchased on 04.10.2010, therefore, the AO has held that since the new property has not been purchased within one year from the date of transfer of the old asset, the AO denied the assessee benefit of sec. 54 of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who vide the impugned order has confirmed the action of the AO, and therefore, the assessee is before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the dates of transaction stated therein are not disputed and, therefore, are not repeated for the sake of brevity. The assessee's claim for exemption of his capital gain as per sec 54(1) of the Act has been denied by the AO on the ground that the assessee did not purchase the residential flat within one year of sale of the old asset. In the instant case, the old house has been transferred by the assessee on 27.12.2011 whereas they had purchased new flat on 04.10.2010. Thus the new asset was purchased more than one year prior to the date on which the transaction in respect of the old residential house had been effected. For the said reason the AO did not grant benefit u/s. 54 of the Act. On appeal, the Ld. CIT(A) confirmed the order of the AO. Before us, the Ld. AR contended that as per the provision of section 2(47) of the Act which defines the term 'transaction' which has been given an inclusive definition and as per the said definition, whenever there is an extinction of any right in respect of a capital asset such an extinction would mean transfer of the property. He, therefore, submitted that by executing the agreement to sale, a right has been created in favour of the buyer of the property and certain right in respect of the old residential house which the assessee enjoyed had been extinguished and, therefore, the agreement dated 16.09.2011 ought to have been considered as the date of transfer and not the registration date 27.12.2011 as taken by the AO/Ld. CIT(A). For the said proposition, the Ld. AR cited the decision of the Hon'ble Supreme Court in Sanjiv Lal in Civil Appeal No. 5899-5900 of 2014 (SC) which is placed from pages 1 to 16 of the paper book (PB).

5. We note that in order to avail the benefit of sec. 54 of the Act, one must purchase a residential house/new asset within one year before or two years after the date on which

transfer of the old residential house in respect of which the long term capital gain had arisen. In the instant case, the residential house was transferred by the assessee vide sale deed registered on 27.12.2011. The sale deed has been executed in pursuance of an agreement to sell which had been executed on 16.09.2011 and out of the total sale consideration of Rs. 30 lacs, Rs. 1 lac has been received by the assessee by way of advance/earnest money (cheque dated 16.09.2011 though encashed on 21.11.2011). So we note that when the agreement to sale has been executed a new residential flat had been purchased by the assessee on 04.10.2010 within one year from the date of agreement to sell the old asset. As per sec. 2(47) of the Act which defines the word 'transfer' in relation to a capital asset it can be said that if a right in the property is extinguished by an agreement to sell, the capital asset can be deemed to have been transferred. Relevant portion of sec. 2(47) of the Act defined the word 'transfer' is as under:

“2(47) 'transfer', in relation to a capital asset includes

(i).....

(ii) the extinguishment of any rights therein, or”

6. So, in the light of the definition of 'transfer' as defined u/s. 2(47) of the Act it is clear that when any right in respect of any capital assets 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 and taking into consideration the facts of the present case we note that the assessee executed an agreement to sell for Rs. 30 lacs consideration in respect of its capital asset on 16.09.2011 for transferring the old residential house/original asset in question and a sum of Rs. 1 lac in cheque was received as advance consideration though encashed only on 21.11.2011, we note that the said cheque has not bounced/dishonoured. So, as per the ratio decidendi of the Hon'ble Supreme Court decision in Sanjeev Lal, supra, we note that in the light of the aforesaid facts and in view of the definition of the term 'transfer' it can be concluded that some right in respect of capital asset (old asset) in question had been transferred in favour of the vendee and, therefore, some right which the assessee had in respect of the capital asset in question had been extinguished because after execution of the agreement to sell, it would not open to the assessee to sell the property to

someone else in accordance with law. As observed by the Hon'ble Supreme Court a right in personam had been created in favour of the vendee in whose favour the agreement to sale had been executed and who had also paid Rs. 1 lac by way of advance/earnest money. It is not the case of the AO/Ld. CIT(A) that the vendee as per agreement to sale is not the vendee when the registration of conveyance deed was executed on 26.12.2011 and, therefore, as per the ratio laid by the Hon'ble Supreme Court in Sanjeev Lal (supra), we find force in the claim made by the assessee to claim exemption u/s. 54 of the Act and we hold that once an agreement to sale is executed in favour of vendee, the said vendee gets a right to get the property transferred in his favour by filing a suit under Specific Performance Act and, therefore, some right in respect of the said property (old residential property) belonging to the assessee had extinguished and some rights have been created in favour of the vendee/transferee when the agreement to sale has been executed. Thus, a right in respect of the capital asset (old residential property in question) has been transferred by the assessee in favour of the vendee/transferee on 16.09.2011 and, therefore, since purchase of the new property on 04.10.2010 which fact has been disputed by the AO/Ld. CIT(A) the purchase of the property is well within one year from the date of transfer as per sec. 2(47) of the Act, therefore, we allow the appeal of the assessee. We also note that the Ld. CIT(A) erred in understanding the ratio decidendi laid by the Hon'ble Supreme Court in Sanjeev Lal, supra and, therefore, he erred in passing the impugned order, so we set aside the order of the Ld. CIT(A) and we allow the appeal of the assessee and direct AO to grant exemption u/s. 54 of the Act in accordance to law.

7. Before we part for the sake of completeness, we note that the agreement to sell is an unregistered documents and a question may arise as to whether the said unregistered document is admissible in evidence in a suit for specific performance in the light of the provision of sec. 17(1)(a) of the Registration Act, 1908. We note that an unregistered agreement to sell cannot be looked into for seeking benefit of part performance u/s. 53A of Transfer of property Act, 1882 in view of Amendment of sec. 53A by Act 48 of 2001 with effect from 24.09.2001, *however, an unregistered agreement to sell can always be a basis for a suit for specific performance in view of sec. 49 of Registration Act.* The Hon'ble

Supreme Court in the case of S. Kadevi Vs. V. R. Somasundaram 2013 (4) MPHT has held in para 11, 12 and 16 of the said decision in particular, which reads thus –

"11. The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the [Transfer of Property Act](#), 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to [Section 49](#) of 1908 Act.

12. Recently in the case of [K.B. Saha and Sons Private Limited v. Development Consultant Limited](#), (2008) 8 SCC 564 this Court noticed the following statement of Mulla in his Indian Registration Act, 7th Edition, at page 189:-

".....The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under [Section 17](#) and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it....."

This Court then culled out the following principles:-

"1. A document required to be registered, if unregistered is not admissible into evidence under [Section 49](#) of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to [Section 49](#) of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance.

.....

16. The argument of learned counsel for the respondents with regard to [Section 3\(b\)](#) of 1963 Act is noted to be rejected. We fail to understand how the said provision helps the respondents as the said provision provides that nothing in 1963 Act shall be deemed to affect the operation of 1908 Act, on documents. By admission of an unregistered sale deed in evidence in a suit for specific performance as evidence of contract, none of the provisions of 1908 Act is affected; rather court acts in consonance with proviso appended to [Section 49](#) of 1908 Act.

8. The Hon'ble Supreme Court has opined that when an unregistered document is tendered in evidence, not as evidence of a completed sale, but as proof of an agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to [Section 49](#) of the Act of 1908. The Hon'ble Apex Court went on to observe that admission of an unregistered sale deed by the Court in such cases would be in consonance with the proviso appended to [Section 49](#) of the Act of 1908.

9. In the light of the discussion, we are of the opinion that though the agreement to sell is not registered, the vendee can seek decree of specific performance on the basis of unregistered agreement to sell in accordance to law as laid by the Hon'ble Delhi High Court in Devinder Singh Vs. Hari Singh (decision on 26.04.2017) and Hon'ble M.P. High Court in Akshay Doogad Vs. Dr. Laxmanrao Dhole (decision on 18.08.2015). So as discussed in para 5 & 6 supra, in the facts and circumstances of the case, we allow the appeal of the assessee and direct grant of exemption u/s. 54 of the Act.

10. In the result, the appeal of assessee is allowed

Order is pronounced in the open court on 7th September, 2018

Sd/-
(Dr. A. L. Saini)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 7th September, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Shri Gautam Jhunjhunwala, Flat No. 23L, tower-3, South City, 375, Prince Anwar Shah Road, Kolkata-700 068.
2. Respondent – ITO, Ward-25(4), Kolkata
3. CIT(A)-7, Kolkata. (sent through e-mail)
4. CIT – , Durgapur.
5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary