

(1978) 03 CAL CK 0006
In the Calcutta High Court
Case No : Income-tax Reference No. 306 of 1974

A. Gasper

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 30-03-1978

Acts Referred:

Income Tax Act, 1961 — Section 2(14), 2(47), 45, 45(1)
West Bengal Premises Tenancy Act, 1956 — Section 14(1)

Citation : (1979) 117 ITR 581

Hon'ble Judges : Sudhindra Mohan Guha, J; S.C. Deb, J

Bench : Division Bench

Advocate : Meghnath Banerjee and D.K. Chatterjee, for the Appellant; Ajit Sen Gupta and Prabir Majumdar, for the Respondent

Judgement

Sudhindra Mohan Guha, J.—We are concerned with the following questions in this reference u/s 256(1) of the Income Tax Act, 1961 :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee's right of tenancy under the landlords constituted a capital asset within the meaning of Section 2(14) of the Income Tax Act ?

(2) If the answer to question No. (1) is in the affirmative, whether on the facts and in the circumstances of the case, the Tribunal was right in holding that there was a transfer of the assessee's right of tenancy under the landlords within the meaning of Section 2(47) of the said Act ?

(3) If the answer to question No. (2) is in the affirmative, whether on the facts and in the circumstances of the case, the Tribunal was correct in holding that the sum of Rs. 1,83,201 represented capital gains assessable u/s 45(1) of the said Act for the assessment year 1967-68 ?"

2. The assessment year is 1967-68 for which the previous year ended on 31st March, 1967. The assessee is an individual and derived income practically from

all sources including income from sub-letting premises No. 240E, Acharya Jagadish Bose Road, Calcutta (herein after referred to as the said "property").

3. In the course of the relevant assessment proceeding the ITO noticed in Part IV of the return of income reference to a sum of Rs. 2,25,000 received by the assessee from M/s. Associated Battery Makers (Eastern) Ltd. (here- inafter called "Associated Batteries"). On enquiry, he learnt that the assessee was a monthly tenant since 1940 of the said property under Kumar Biswanath Roy and others (hereinafter referred to as "the landlords"). He also found that the landlords entered into an agreement for lease dated March 27, 1967, with the Associated Batteries permitting them to construct a building on the said premises and the assessee was also a party to the said agreement.

4. The assessee contended before the ITO that the sum of Rs. 2,25,000 received by him was partly for the damages to be caused to the said property occupied by him and partly on an ad hoc basis and, therefore, the said receipt was in the nature of a solatium or windfall and not taxable under the head "Capital gains". The ITO held that the assessee relinquished his said tenancy under the landlords and became a monthly tenant on 15th March, 1967, under the Associated Batteries on a rent of Rs. 350 per month so long as the new building was not constructed and thereafter at a rent of Rs. 700 per month. The ITO also held that out of the total consideration amount of Rs. 4,50,000, the assessee received Rs. 2,25,000 from the Associated Batteries on that date and the balance amount on May 25, 1967. The ITO also held that the assessee's tenancy right was a capital asset u/s 2(14) of the I.T. Act, 1961, He further held that the assessee received the aforesaid amount for the extinguishment of his rights in the said capital assets and, therefore, u/s 45(1) read with Section 2(47) of the I.T. Act, 1961, Rs. 2,25,000 out of Rs. 4,45,000 being received by the assessee in the accounting year was taxable and after allowing certain deductions, included a sum of Rs. 1,83,201 as the net amount of capital gains arising out of the transactions and included the same in the total income of the assessee.

5. The assessee went up in appeal and argued before the AAC that the landlords felt some difficulties in transferring the premises by way of lease in favour of the Associated Batteries, because the properties were encumbered by monthly tenancy held by the assessee and sub-tenancy created fey him. It was further submitted that in order to remove this handicap the Associated Batteries after negotiation with the assessee agreed to pay Rs. 4,50,000 to him and, thereafter, the assessee allowed the Associated Batteries to proceed with the construction work. It was further, contended that no capital asset within the meaning of Section 2(14) of the Act was transferred as per the provisions of Section 2(47) read with Section 45(1) of the Act.

6. The AAC rejected the contentions and dismissed the appeal. The assessee then filed a further appeal before the Tribunal. The Tribunal accepted the case of the assessee that he was deriving income from this property by sub-letting certain portions of it. The Tribunal also accepted the case of the assessee that he

became a licensee under the Associated Batteries in support of which a receipt dated 15th March, 1967, granted by the Associated Batteries to him was produced by him before the Tribunal. The arguments made on his behalf before the AAC were also reiterated before the Tribunal. It was further contended that his previous monthly tenancy under the landlords was not a transferable property because, according to him, the said tenancy was governed by the West Bengal Premises Tenancy Act, 1956, and as such it was not a capital asset within the meaning of Section 2(14) of the I.T. Act, 1961, and was also not a transferable asset and accordingly no capital gains had arisen out of its transfer or extinguishment.

7. The Tribunal found that the assessee with the consent of the landlords had transferred, his monthly tenancy and his leasehold interests in the said property to the Associated Batteries on 15th March, 1967, on receiving Rs. 2,25,000 from the Associated Batteries, out of the total consideration money of Rs. 4,50,000 on that date and ceased to be a tenant under the landlords on the same date and became a licensee under the Associated Batteries which was apparent from the aforesaid receipt. The Tribunal also found that the quantum of the aforesaid consideration money was settled outside the aforesaid agreement dated 27th March, 1967.

8. The Tribunal rejected the aforesaid contention of the assessee based on the West Bengal Premises Tenancy Act, 1956, in view of its aforesaid findings. It further held that the assessee's rights in the monthly tenancy and the interests in the leasehold estate were transferable properties and were also capital assets. The Tribunal further held that the aforesaid interests of the assessee in the said assets were extinguished by transferring them to the Associated Batteries and, accordingly, the authorities below were justified in treating Rs. 4,50,000 as capital gains. Since the sum of Rs. 2,25,000 was received by the assessee in the accounting year, the Tribunal sustained the order of the ITO and dismissed the appeal.

9. Before us Mr. Megnath Banerjee, learned counsel for the assessee, has placed reliance on the following relevant clauses of the aforesaid agreement dated March 27, 1967 :

"2. During such period commencing from the date of this agreement as may be found necessary for the carrying out of the new works Associated Batteries shall have licence and authority from the landlords and Mr. Gasper for Associated Batteries and all officers, engineers, surveyors, workmen and agents appointed or employed by them for the purpose to enter upon the red bordered land and all parts thereof (subject nevertheless as to the yellow-hatched land and the tea shop building to the tenant rights in the same which are vested in the present occupier thereof) for the purpose of carrying out of the new works and otherwise carrying this agreement into full and complete execution and effect."

"5. (1) Simultaneously with the execution of these presents Mr. Gasper will

assign and transfer to the Associated Batteries all his present leasehold estate and interest in the said property described in the first schedule for such consideration as may be agreed upon between them before the execution of this agreement but subject to the sub-tenancy now existing in relation to the yellow-hatched land and the tea shop and to the payment of the monthly rent payable to the landlords in relation to Mr. Gasper's lease and the observance and performance of all stipulations and conditions affecting such lease and on the part of the lessee to be observed and performed..... ".

"5. (4) Mr. Gasper will continue to occupy the remaining portion of the ground floor of the said premises as a licensee under Associated Batteries until such time as the under-lease mentioned in Clause 7(ii) hereafter is granted. He will pay such fees as compensation to Associated Batteries as may be agreed between him and Associated Batteries".

"7. It is agreed between the parties hereto that as soon as the architect shall certify that the entire new building is fit and ready for occupation the following grants shall be executed and accepted, that is to say:

(i) the landlords will grant to Associated Batteries a lease of the land and portion of the new building described in and otherwise in the form and terms of the draft set forth in the second schedule hereto;

(ii) Associated Batteries will grant to Mr. Gasper an under-lease of the portion of the new building described in and otherwise in the form and terms of the draft set forth in the third schedule hereto."

10. Mr. Banerjee, who also appeared before both the appellate authorities, argues before us that the aforesaid clauses of the agreement conclusively show that on 15th March, 1967, the assessee was a tenant under the landlords and was not a licensee under the Associated Batteries and, therefore, the finding of the Tribunal, namely, that the assessee became a licensee under the Associated Batteries on that date is perverse.

11. In our opinion, Mr. Banerjee is not entitled to take this plea, for the assessee has not challenged the aforesaid finding of the Tribunal on the ground of perversity; Yet, on the wrongful assumption that he is entitled to take this plea, we would like to deal with it.

12. The clauses, quoted earlier from the aforesaid agreement, in our opinion must be understood in the background of the facts and circumstances of the case. It is an admitted fact that on 15th March, 1967, the assessee received Rs. 2,25,000 from the Associated Batteries. Clause 5(1) also shows that the amount of the consideration money for the transfer of the assessee's leasehold interest and estate to the Associated Batteries was to be agreed upon between the assessee and the Associate Batteries before the execution of the said agreement dated 27th March, 1967. The case of the assessee before the Tribunal was that the assessee became a licensee under the Associated Batteries and, as already

stated, the Tribunal accepted this case of the assessee and in this behalf the Tribunal also says as follows:

"On our query the learned counsel for the assessee produced before us the receipt given by the Associated Batteries wherefrom we find that the assessee became a licensee under the Associated Batteries on and from 15-3-67, and on that very date he received part of the consideration, that is, Rs. 2,25,000."

13. We, therefore, reject the aforesaid contention of Mr. Banerjee who then argues that the assessee was a monthly tenant under the landlords and that it was governed by the West Bengal Premises Tenancy Act, 1956, and, therefore, it is not a transferable property and as such it is not a capital asset under the I.T. Act, 1961. He also argues that the interest of a monthly tenant in a monthly tenancy is not an asset at all.

14. Mr. Ajit Sengupta, learned counsel for the revenue, argues that Clause 5(1) of the agreement shows that the assessee was not a monthly tenant and that he had a leasehold interest in the property. According to him, a leasehold interest is a capital asset because Section 2(14) of the I.T. Act, 1961, lays down that capital asset means "property of any kind" and the word "property" is of the widest amplitude. He also argued that the finding of the Tribunal, namely, that the tenancy of the assessee was governed by the Transfer of Property Act and not by the West Bengal Premises Tenancy Act, 1956, is a mixed question of law and fact. It has not been challenged by the assessee by raising an appropriate question; therefore, Mr. Sengupta argues, that it is binding on the assessee.

15. Mr. Sengupta further argues that the creation and determination of a monthly tenancy are governed by the Transfer of Property Act and not by the West Bengal Premises Tenancy Act, 1956, which confers certain rights and liabilities on the landlords and tenants regarding the tenancy. It is his submission that the West Bengal Premises Tenancy Act, 1956, does not prohibit the transfer of any tenancy and that it merely imposes a condition to be fulfilled by the tenant before transferring his tenancy. He also argues that, the assessee claimed before the Tribunal that he had no right to transfer his tenancy in view of Section 14 of the West Bengal Premises Tenancy Act, but he has utterly failed to discharge the onus in this regard which lay on him. Mr. Sengupta further argues that it has been found by the Tribunal as a fact that the assessee had the consent of the landlords to transfer his tenancy to the Associated Batteries. He concluded by saying that the tenancy of the assessee must be held to be a transferable property and a capital asset too.

16. In support of his aforesaid contentions Mr. Sengupta has cited several decisions. In *Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others*, , it has been held by the Supreme Court at page 422 of the report, that the right of a lessee is an estate or interest in the premises and that, in the absence of a contract to the contrary, it is a transferable property. In *Arshad Waliullah Vs. Controller of Estate Duty*, , it has been held by the Allahabad High Court that the

interest of a tenant in the tenancy is a transferable property, and in *RAJENDRA MINING SYNDICATE Vs. COMMISSIONER OF Income Tax, ANDHRA PRADESH.*, , it has been held by the Andhra Pradesh High Court that the leasehold right is a capital asset, and further in *TRADERS AND MINERS LTD. Vs. COMMISSIONER OF Income Tax, BIHAR AND ORISSA.*, , it has been held by the Patna High Court that the leasehold interest is not only a capital asset but also the gains arising from its transfer are exigible to tax.

17. In *Dipti Kumar Basu Vs. Commissioner of Wealth Tax*, , this court has held that, unless the context otherwise indicates, the word "asset" must include property. of every description in view of the decision of the Supreme Court in the case of *Ahmed G.H. Ariff and Others Vs. Commissioner of Wealth Tax, Calcutta*, , in which it has been held that the word "property" is a term of the widest import and subject to any limitation which the context may require, it signifies every possible interest which a person can clearly hold and enjoy.

18. In *Commissioner of Income Tax Vs. All India Tea and Trading Co. Ltd.*, , this court says as follows :

"It is beyond dispute that where compensation is paid for acquisition of a non-agricultural leasehold land both to the lessor and lessee in accordance with their respective interests in such land, such compensation is assessable to capital gains in their respective hands, although the actual or physical possession remained with the lessee and the constructive possession remained with the lessor at the time of such acquisition."

19. The West Bengal Premises Tenancy Act, 1956, does not create any tenancy. It merely protects the tenant whose tenancy has been lawfully determined, from eviction if he fulfils certain conditions specified in it. Where a tenant has obtained the previous consent in writing of the landlord to transfer his rights and interests" in the tenancy, he is entitled to transfer it in view of Section 14(l)(b) of the West Bengal Premises Tenancy Act, 1956. Hence, transfer of the rights and interests of a tenant in the tenancy is not absolutely prohibited and, therefore, it must be held that even where a tenancy is governed by the West Bengal Premises Tenancy Act, 1956, such tenancy is a transferable property. The West Bengal Premises Tenancy Act, 1956, does not also take away the right of the landlord and the tenant to agree to determine or extinguish the tenancy.

20. It has been found by the Tribunal as a fact that by a tripartite agreement on 15th March, 1967, the tenancy of the assessee under the landlords was extinguished and he became a licensee under the Associated Batteries. It was also the case of the assessee that he was no longer a tenant under the landlords and became a licensee of the Associated Batteries and remained in possession as such licensee by paying Rs. 350 per month to the Associated Batteries. The Tribunal has also found it as a fact that on 15th March, 1967, the assessee received the part of the consideration money from the Associated Batteries with the consent of the landlords for transferring his leasehold estate and interest in

the premises to the Associated Batteries and simultaneously with it he ceased to be a monthly tenant under the landlords and this amount was also received by the" assessee for this change in his status and extinguishment of his right as a monthly tenant under the landlords. Further finding of the Tribunal is that the assessee was deriving income from this property by sub-letting certain portions of it.

21. In view of the aforesaid facts, the contention of Mr, Banerjee, namely, that the monthly tenancy of the assessee was not a transferable property must fail both in law and in fact. It must also be held that the monthly tenancy of the assessee was a capital asset as defined in Section 2(14) of the I.T. Act, 1961.

22. Section 2(47) of the I.T. Act, 1961, says that "transfer, in relation to capital asset, includes the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law". Therefore, the contention of Mr. Banerjee that no capital asset has been transferred must be rejected because the assessee's monthly tenancy right or the leasehold right is a capital asset and it has been transferred to the Associated Batteries with the consent of the landlords and on such transfer his rights in it stood extinguished.

23. Mr. Banerjee then argues that the transfer of the monthly tenancy or the leasehold estate and interest of the assessee in favour of the Associated Batteries was invalid because, according to him, the assessee did not execute any registered document transferring his monthly tenancy or leasehold estate and interest in favour of the Associated Batteries. He cites the cases of K.A. Subramaniam, Ambi's Cafe Vs. Controller of Estate Duty, Madras, , Commissioner of Income Tax Vs. Bhurangya Coal Co., and Alapati Venkataramiah Vs. Commissioner of Income Tax Hyderabad, , in support of his contention that the right, title and interest in an immovable property can only be transferred by a registered conveyance.

24. But the aforesaid cases have no application to the facts and circumstances of the case. It was not even the case of the assessee before the Tribunal that no such registered document was executed by him, nor was it contended on his behalf that the transfer of his monthly tenancy or leasehold estate and interest was invalid. The Tribunal also did not express any opinion in this behalf. Therefore, the aforesaid plea is a new plea and it does not arise out of the order of the Tribunal, nor is it another aspect of any one of the questions before us. In the premises, Mr. Banerjee cannot take the aforesaid new plea.

25. That apart, Mr. Banerjee cannot be heard to say that no such document was executed by the assessee nor has this court any power to hold that no such document was executed by the assessee. The assessee is bound by the facts stated and found by the Tribunal which is the final fact-finding authority. It is also settled law that the High Court in their advisory jurisdiction must proceed on the basis of the facts found and stated by the Tribunal.

26. The finding of the Tribunal is that the assessee had received the afore-said amount for transferring his leasehold interest and the monthly tenancy to the Associated Batteries with the consent of the landlords. This finding has not been challenged by the assessee by raising an appropriate question and, therefore, it is binding on the assessee and this court as well. Accordingly, the contention of Mr. Banerjee must be rejected.

27. Mr. Banerjee finally argues that the aforesaid amounts received by the assessee cannot be held to be capital gains because it was not received from the landlords for the extinguishment of his monthly tenancy under them. But there is no merit in his contention. Section 45(1) of the Act is wholly silent as to the person from whom the consideration money for transferring a capital asset is to be received by the assessee. Moreover, it, inter alia, provides that any profits or gains arising from the transfer of a capital asset shall be chargeable to Income Tax under the head "Capital gains". The assessee has transferred this capital asset to the Associated Batteries from whom it has received the aforesaid amount and, therefore, it must be held that this receipt is assessable to tax as the capital gains in the hands of the assessee.

28. Further, simultaneously with the aforesaid transfer the right of the assessee in the monthly tenancy under the landlords or his leasehold interest was extinguished and, therefore, it does not matter in the least that the aforesaid amount was not received from the landlords for the extinguishment of his aforesaid rights in the aforesaid capital asset, for, as already stated, Section 45(1) of the Act does not say from whom the consideration money is to be received for transfer of a capital asset and, further, Section 2(47) of the Act says that the word "transfer", in relation to a capital asset, includes "the extinguishment of any rights therein".

29. Having disposed of all the contentions of Mr. Banerjee, we now answer all the questions in the affirmative and in favour of the revenue.

30. The parties shall pay and bear their own costs.

Deb, J.

31. I agree.