(2014) 10 KAR CK 0249

In the Karnataka High Court

Case No : IT Appeal No. 1012 of 2008

C.N. Anantharam APPELLANT

Vs

Assistant Commissioner of Income Tax RESPONDENT

Date of Decision : 10-10-2014

Acts Referred:

Income Tax Act, 1961 — Section 22, 54, 54(1)

Citation : (2015) 275 CTR 329 : (2015) 230 TAXMAN 34

Hon'ble Judges : N. Kumar, J;B. Manohar, J

Bench : Division Bench

Advocate : A. Shankar and M. Lava, Advocates for the Appellant; Jeevan J. Neeralgi, Advocates for the Respondent

Judgement

N. Kumar, J.—The assessee has preferred this appeal challenging the finding recorded by the authorities below wherein they have held that the assessee is not entitled to benefit of s. 54(1) of the IT Act, 1961 in respect of the land sold by him. The assessee obtained the site on settlement and constructed a three storied building i.e., ground plus two floors. The first and second floors of the building together with the proportionate share in the land on which the building stands is the subject matter of transaction in question. There is no dispute that the building as such was held by the assessee for a period of less than 36 months prior to the date of transfer. However the land was a long-term capital asset. The computation of capital gains as is attributable to the building and the land as set out in the assessment order is not disputed. The land has been treated as long-term capital asset and the capital gains treated accordingly. There is no dispute about the cost of construction of another residential house and such residential house has been constructed within the period stipulated under s. 54. The only dispute relates to the availability of s. 54.

2. The ITO is of the view that the capital gains as is attributable to long-term capital asset viz. land will not qualify for relief under s. 54 even though it is a long-term capital asset as the building which stood on the same and which was

the subject matter of transfer was a short-term capital asset.

3. Aggrieved by the order, the assessee initially preferred an appeal which came to be dismissed. The second appeal preferred by the assessee also came to be dismissed by the Tribunal holding that any used buildings or lands appurtenant thereto as mentioned in s. 54 is also appeared in s. 22 of the Act. Thus the meaning of the word building in s. 54 has to be construed in the same way as to be considered in the way considered for the purpose of s. 22. The rental income from the land is not taxable under s. 22.

4. The Tribunal held as follows :

"The word or'' in law relating to statutory interpretation need not be disjunctive, though it is normally so. The word ''and'' is normally used where the intention is not disjunctive but it is not unusual to use the word ''or'' to mean ''and'' in a statute. ''Or'' can be disjunctive word. The clear intention elsewhere in the provision requires to be so understood as "and" in the context of s. 54, the reasoning is that section does not contemplate two separate sales of building and appurtenant land. If appurtenant land can be sold independently, it ceases to be appurtenant which goes with the building. Hence the deduction under s. 54 will be admissible in case the capital asset is a residential house. Such capital asset must be a long-term capital asset. A house consists of building and land appurtenant thereto. Hence building as well as appurtenant land should be long-term capital asset. In the instant case, land is long-term capital asset while the building constructed on it is a short-term capital asset. Hence, the house, which was transferred, is not a long-term capital asset because part of it is short term. Sec. 54 does not provide bifurcation of capital gain arising from the sale of land and building separately and to allow deduction in case any one of them as long-term capital asset."

5. The Tribunal relied on the judgment of the Kerala High Court in the case of T.N. Vasavan Vs. Commissioner of Income Tax, to substantiate its contentions and thus the appeal filed by the assessee came to be dismissed. Aggrieved by the said order the assessee is in appeal.

6. This appeal is admitted to consider the following substantial questions of law:

"1. Whether the Tribunal is justified in law under the facts and circumstances of the case in negating the appellant claim under s. 54(1) of the IT Act, 1961 ?

2. Whether the Tribunal is justified in law in holding that capital gains is chargeable under s. 54(1) on the facts and circumstances of the case ?"

7. Learned counsel for the assessee assailing the impugned order contends that it is clear from s. 54(1) of the Act, the benefit under the said provision is available to a 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 the house property''. Therefore, the said section cannot be confined only to a residential house and cannot be interpreted

to mean it has no application to the land appurtenant to a residential building when the legislature has confirmed the said benefit of an individual family or an HUF in respect of the buildings or lands appurtenant thereto. The said provision being a beneficiary provision, should be liberally and harmoniously interpreted so as to give the benefit even in respect of land which is appurtenant to residential house. If a land appurtenant to a residential land is entitled to the said benefit, the land on which the residential house is put up is also should be gaining benefit. Otherwise section looks absurd.

8. Per contra, learned counsel appearing for the Revenue submitted the word "or" should be read as "and" as held by the Tribunal. The benefit is not available to sale of lands independent of the buildings, and therefore, he submits no cause for interference with the impugned orders is made out.

9. In fact, it is useful to refer to a judgment of this Court in the case of Smt. Azra Abdulla v. CIT IT Ref. Case No. 146 of 1995 decided on 9th April, 1997 where the question which arose for consideration was whether land appurtenant thereto the sale of land appurtenant is entitled to the benefit of s. 54(1) of the Act ?

This Court after referring to several judgments has held as under :

"Sec. 54 of the Act deals with capital gain arising from transfer of a long-term capital asset being building or lands appurtenant thereto and being a residential house the income of which is chargeable under the head Income from house property'', in the present case, it is not in dispute that entire property held by the assessee prior to sale was subject matter of assessment under the head ''Income from house property''. What was sold was a part of that property now which is contiguous to the same. The test whether the sale is in relation to a residential house is satisfied. The sale is in relation to a residential house and what was sold was land contiguous thereto. If land is contiguous to the house, it cannot be taken to be separate and apart from the residential house. When land and house form one contiguous whole, the two cannot be separated for purpose of taxation. If that is so, a part of such property which is now sold, even though it may not be a residential house still it must be held it was a land appurtenant to a residential house. Understood in that manner we think the authorities below and the Tribunal were not justified in the view taken by them. We are fortified in our view by the decision of the Andhra Pradesh High Court in Commissioner of Income Tax, Andhra Pradesh, Hyderabad Vs. Zaibunnisa Begum, . The land appurtenant thereto has not been defined under the Act and it is understood in popular non-technical sense. The definition given to the same either under the WT Act or Urban Land (Ceiling & Regulation) Act are not relevant. In that decision, however, certain tests were laid down to find out whether the vast extent of land sold therein was part of the residential unit so that it may be treated as land appurtenant thereto. Indeed, it was noticed there that in deciding as to whether any land is appurtenant thereto a residential house, the requirements of the persons occupying the building, consistent with their social standing etc., are relevant for the purpose. Thereafter, certain other tests were set out. In Bangalore City, years ago, the style of life was such that persons would purchase property with bungalows having sprawling ground around it and the bungalow and grounds thereto formed one unit. The land around it would not be put to any separate use for that would invade their privacy. If these aspects are borne in mind, we do not think any point is made out in this case to apply the tests laid down in the decision in Zaibunnisa Begum''s case (supra). In that case, the Andhra Pradesh High Court was dealing with a land spread over a vast area of about 13,029 sq. yards; whereas in the present case we are concerned with only 56,000 sq. feet i.e. 200'' x 280'' in which there is more than 56 squares house. As stated earlier that house was situate in the centre of the property. Thus, the intention of the owner was to enjoy the entire land as appurtenant thereto."

10. When the legislature has used the word ''or'' which means the word buildings or lands appurtenant thereto should be understood disjunctively having regard to the context in which it is used. It cannot be read as ''and''. If it is read as and'', it amounts to Court rewriting the section by substituting the word and'' in place of the word "or" which is not permissible in law. A person may be residing in a residential house and the land pertinent thereto. That house he may be using it for his benefit. As long as the said land is not used for any commercial or nonresidential purpose, the user of the land by the resident is for residential purpose only. If such a person chooses to sell only the land which he was using for residential purpose, the legislature has conferred the benefit in respect of/to the capital gains arising therefrom under s. 54(1) of the Act. If a land appurtenant to a residential house is entitled to the said benefit, we find it difficult to accept that the land on which the residential building is constructed is not entitled to the said benefit.

11. When a property, residential house is sold, the sale consideration includes the value of the land and the value of the construction. Though there is no two sale transactions involved for the purpose of the Act, in order to calculate the capital gains as rightly done by the assessing authority, he has treated the sale of land on which the residential house is constructed as a long-term capital gain and he has treated the building as short-term capital gain. If, for levying tax under the Act, such a distinction could be made, we fail to understand why that distinction should not be kept in mind in extending the benefit under s. 54(1) of the Act. If the land on which the building is constructed is a long-term capital gain and the amount received towards the sale of such land when it is assessed as a long-term capital gain and taxed. In view of s. 54(1) if that consideration from the sale of the land is utilized in acquiring a residential house, the benefit from exemption is to be extended. Otherwise, the section looks absurd. The land which is adjoining the residential house is entitled to benefit under s. 54(1) of the Act but the land on which the residential house would not be entitled to such benefit, we cannot impute any such intention to the legislature. On the contrary, the legislative intent is manifest. The assessee is entitled to the benefit of s. 54(1) of the Act in respect of land and building. That land may be the land on

which the residential house is constructed or the land appurtenant to the residential house.

In that view of the matter, the impugned orders passed by the authorities cannot be sustained. Accordingly they are hereby set aside. The appeal is allowed. The substantial questions of law in this appeal are answered in favour of the assessee and against the Revenue.