(2007) 06 MAD CK 0168

In the Madras High Court

Case No : Tax Case (Appeal) No. 217 of 2004

Commissioner of Income Tax APPELLANT

Vs

G. Saroja RESPONDENT

Date of Decision : 18-06-2007

Acts Referred:

Income Tax Act, 1961 — Section 158BA, 158BD, 2(47), 260A
Transfer of Property Act, 1882 — Section 53A

Citation : (2008) 301 ITR 124

Hon'ble Judges : P.P.S. Janarthana Raja, J;P.D. Dinakaran, J

Bench : Division Bench

Advocate : T. Ravi Kumar, for the Appellant; Ashok Pathy, for the Respondent

Final Decision : Dismissed

Judgement

P.P.S. Janarthana Raja, J.—This appeal is filed u/s 260A of the Income Tax Act, 1961, by the Revenue, against the order of the Income Tax Appellate Tribunal, Chennai Bench "C", Chennai in I.T.(SS)A. No. 169/Mds/2000, dated November 5, 2003, for the block assessment period April 1, 1988, to August 20, 1998. On July 22, 2004, this Court admitted the appeal and formulated the following substantial question of law:

Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that there was no transfer of property by the assessee to M/s. Kalpaga Builders on February 10, 1995, i.e., within the block period ending August 20, 1998, within the meaning of Section 2(47)(v) of the Income Tax Act and no capital gains were assessable for the block period?

2. The facts leading to the above substantial question of law are as under:

3. The assessee is an individual. There was a raid in the premises of M/s. Kalpaga Builders and its partners on August 20, 1998. The assessee is the mother-in-law of the partners of the said partnership firm. During the raid, it was noticed that the assessee was the owner of the premises. The said firm had

promoted a housing project which came up on the land belonging to the assessee. There was no written agreement between the Kalpaga Builders and the assessee for this developmental work as the builder was a family concern. The property situated at No. 5, Mounasamy Mutt Street was acquired by the assessee in March, 1992. M/s. Kalpaga Builders started construction of the residential flats on this property on February 10, 1995. For effecting the sale of flats and registration of documents, sale deeds documents were executed by the assessee in favour of the various purchasers from November onwards. The assessee had received a sum of Rs. 5,80,346 out of the transfer of the total property and six residential flats towards consideration which were found to be subsequently let out to six tenants. The total consideration received by the assessee was Rs. 32,32,383. The assessee filed her block return for the period from April 1, 1988, to March 31, 1999, on November 19, 1999, before the initiation of proceedings u/ s 158BD of the Income Tax Act ("the Act" in short), by the Revenue. On August 13, 2001, the assessee was asked as to why she had filed the return in Form No. 2B voluntarily before the proceedings in that behalf initiated by the Department. By letter dated August 17, 2001, the assessee requested the Assessing Officer to consider the block return already filed as the one filed in response to the notice u/ s 158BD issued by the Revenue. The Assessing Officer completed the block assessment for the said block period u/s 158BA of the Act read with Section 158BD. The computation under the block assessment are as follows:

Rs. Assessment year 1995-96 22,02,723 Assessment year 1996-97 27,718 Assessment year 1997-98 79,768 ------------- Total income 23,10,209 -------------

4. The Assessing Officer computed the short-term capital gains and long term capital gains in the block period for the assessment year 1995-96 at Rs. 7,73,413 and Rs. 14,29,310, thus totalling to Rs. 22,02,723 and the same was added in the block assessment. Aggrieved by the order, the assessee filed an appeal to the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) dismissed the appeal and confirmed the order of assessment. Aggrieved, the assessee filed an appeal to the Income Tax Appellate Tribunal ("the Tribunal" in short). The Tribunal allowed the appeal and set aside the orders of the lower authorities. Hence, the present appeal by the Revenue.

5. Learned standing Counsel appearing for the Revenue submitted that, as per the sale deed between the assessee and an ultimate purchaser of the flat, one of the clauses in the said sale deed stipulates that the assessee was selling the undivided share to the purchaser subject to the condition that the purchaser should construct and own the flat allotted in his favour only through M/s. Kalpaga Builders and would enjoy the flat in terms of covenants agreed with the said promoter. M/s. Kalpaga Builders started construction on the impugned land with effect from February 10, 1995, and also the said builder had taken over possession and full control over the impugned land by February 10, 1995.

6. Hence the transfer of land should be reckoned for the assessment year

1995-96 within the meaning of Section 2(47)(v) of the Act. Hence the profit of sale of the land would automatically become short-term capital gains assessable in the block period and more specifically pertaining to the assessment year 1995-96. Hence the Assessing Officer is right in assessing it for the assessment year 1995-96 for the block period.

7. Learned Counsel appearing for the assessee submitted that once the ingredients of Section 53A of the Transfer of Property Act, 1882, is not satisfied, Section 2(47)(v) of the Income Tax Act cannot be invoked. It is further submitted that there is no written agreement between the assessee and the builder, which is the basic requirement for invoking the provision of Section 53A of the Transfer of Property Act. It is also further submitted that the assessee is yet to receive the amount and the assessee had shown the amount only as receivables and there is no actual receipt of the amount. Therefore, the question of transfer followed by capital gain will not arise for this block assessment period. Hence, the order passed by the Tribunal is in conformity with law.

8. Heard counsel. The dispute in this case is regarding the assessment year in which the transfer of land has to be assessed. It is not in dispute that there is no written agreement between the assessee and the builder. A written agreement is a basic requirement for invoking the provision of Section 53A of the Transfer of Property Act. Section 53A of the Transfer of Property Act, reads as under:

53A. Part performance.--Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

9. In the case of Nathulal Vs. Phoolchand, , the apex court considered the scope

of Section 53A of the Transfer of Property Act and held as follows (page 548):

(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee had performed or is willing to perform his part of the contract.

10. Section 2(47)(v) of the Income Tax Act reads as follows:

''transfer'', in relation to a capital asset, includes,-....

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882); or

11. Section 2(47)(v) of the Income Tax Act comes to the aid of the Department only if the conditions of Section 53A of the Transfer of Property Act are satisfied. From a reading of the above provisions, it is clear that unless there is a written agreement, Section 53A of the Transfer of Property Act will not come into operation. In the present case, there is no written agreement and no sale consideration was received during the relevant period. The Revenue is also unable to prove that the assessee had put the developer in possession of the property by receiving the consideration partly or in full. The fact remains that there is no sale agreement between the assessee and the builder and also the assessee had not received the sale consideration. Hence, the Tribunal is right in holding that there is no transfer of property, as contemplated u/s 2(47)(v) of the Act. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference.

12. In view of the foregoing reasons, we answer the question in favour of the assessee and against the Revenue. Accordingly, the tax case is dismissed. No costs.