
(1973) 08 DEL CK 0019

In the Delhi High Court

Case No : Wealth Tax Reference Appeal No. 3 of 1972

Commissioner of Wealth Tax

APPELLANT

Vs

P.N. Sikand

RESPONDENT

Date of Decision : 23-08-1973

Acts Referred:

Citation : (1973) ILR Delhi 730 : (1974) 94 ITR 571

Hon'ble Judges : P.N. Khanna, J; M.R.A Ansari, J

Bench : Division Bench

Advocate : B. Kirpal and J.K. Kohli, for the Appellant;

Judgement

P.N. Khanna, J.

(1) The following question of law arising out of the order of the Appellate Tribunal has been referred u/s 27(1) of the Wealth-tax Act, 1957, to this court for its opinion :

"WHETHER on the facts and in the circumstances of the case, the Tribunal was legally correct in holding that the right created by the release deed dated 13-11-67 was not a right on the relevant valuation date, within the meaning of sub-paragraph (c) of paragraph A of Part I of the Schedule to the Wealth-tax Act, 1957 ?"

(2) The valuation date relevant for the assessment year 1968-69 is December 31, 1967. We are required to determine, in reality, if the assessed had any right in the land and the building constructed by him, whether under the release deed dated 13-11-1967, or otherwise, on the relevant date, within the meaning of sub-paragraph (c) of Paragraph A of Part I of the Schedule to the Wealth-tax Act, 1957. As the wording of the question is rather vague, and does not bring out the true scope of the reference, we have reframed it as follows :-

" WHETHER on the facts and in the circumstances of the case. the Tribunal was legally correct in holding that On the valuation date, the assessed had acquired

no rights in the land or the building, within the meaning of sub-paragraph (c) of Paragraph A of Part I of the Schedule to the Wealth-tax Act, 1957?".

(3) This is neither a new nor a different question, but is well within the framework of the question as was originally referred to us. The learned counsel on both sides, have in fact, addressed their arguments on the basis of the question as reframed above. The relevant facts, in brief, are that R. B. Nathuram Friends Colony Cooperative House Building Society Limited, hereinafter referred to as "the society", agreed to allot plot No. 58, situated in Friends Colony, New Delhi, admeasuring 1927 sq. yds. to one Smt. Gurdevi on March 14, 1962. Smt. Gurdevi entered into an agreement with the assessed, whereby the latter undertook to construct a house on the said plot on the condition that in case Smt. Gurdevi failed to pay the cost of construction, etc. within ten day's on receipt of completion certificate, she would convey to the assessed her allotment rights as well as proprietary rights in the plot and the building constructed thereon. Smt. Gurdevi failed to comply with the said condition and executed a deed of release dated 13-11-1967, under which she released and disclaimed her rights to get the plot transferred by the Society in her name and the, house constructed thereon, in favor of the assessed. The said release deed was not registered. The land, however, was registered in the assessed's name on 4-5-1968, that is, subsequent to the relevant valuation date. The assessed contended that he was not the owner of the property on the valuation date and that the sum of Rs. 3,36,433 spent on the construction of the property was merely an advance made by him to Smt. Gurdevi. The Wealth-tax Officer, however, considered the sum of Rs. 3,36,434 as investment in property and charged the assessed to additional tax payable on urban Immovable property. The Appellate Assistant Commissioner of Wealth tax in appeal upheld this order as the additional tax leviable, according to him, not only on any building or land, but also in respect of any right in such building or land. In his opinion, certain rights had accrued to the assessed in the building and land, under the agreement dated 14-3-1962 and release deed dated 13-11-1967, which were caught within the mischief of sub-para (c) of Paragraph A of Part I of the Schedule to the Wealth-tax Act, 1957. The Appellate Tribunal in second appeal, was, however, of the view that the release deed dated 13-11-1967 not having been registered till the valuation date, the assessed acquired no interest or right in the land or the building. The only remedy of the assessed, in the case of default on the part of Smt. Gurdevi, was said to be to proceed against her by instituting a suit for specific performance of the contract and [or for the execution of the sale deed in his favor in respect of the property. There was no question of the assessed having acquired any rights in the building and land either under the construction agreement dated 14-3-1962 or release deed dated 13-11-1967. Sub-para (c) of paragraph A of Part I to the Schedule to the Wealth-tax Act, was, Therefore, held to be not applicable.

(4) In compliance with the directions of the High Court, asking for a supplementary statement of case, the Tribunal has forwarded copies of the

agreement dated 14-3-1962 and the release deed dated 13-11- 1967. The agreement of construction dated 14-3-1962, annexure "E" to the supplementary statement, recites in its preamble that Smt. Gurdevi had entered into an agreement of allotment dated January 7, 1952, with the society in respect of the land in question and had deposited with it a sum of Rs. 11,644/1.00 being the amount agreed to be paid as premium, that the said allottee (Smt. Gurdevi) was bound to erect a residential building on the land on the completion of which she was entitled to the grant of completion certificate from the Society, that on her approaching the assessed the latter had undertaken to erect the building for and on her behalf, and that the assessed had deposited a sum of Rs. 1,11,766 with her as security for the due performance of the terms of the agreement between her and the society. In the operative part of the agreement, it was stated that on completion of the building, the assesses will obtain the necessary completion certificate and will give intimation of the same to Smt. Gurdevi, who shall within ten days of such intimation, pay to the assessed a sum of Rs. 5,10,000 as charges for construction of the building inclusive of 20 per cent on account of profit of the assessed for his labour and investment and shall also refund the said security deposit of Rs. 1,11,766. The assesses was to remain in occupation and actual possession of the plot of land and the building constructed thereon "as of right" for such time as the aforesaid charges including cost of the building plus 20 per cent of the cost as profits and the security money was not paid back by Smt. Gurdevi to the assessed in the aforesaid manner. Smt. Gurdevi further had no right to demand from the assessed any rent for the land on which the building was to be constructed and was bound to pay the aforesaid charges including costs of the building plus 20 per cent profit and the security money to the assessed in lump-sum within the aforesaid period, whereupon the assessed was to put Smt. Gurdevi back in possession of the land and the building standing thereon. The most important condition of the agreement was that should Smt. Gurdevi fail to make the aforesaid payments within the said time, she (Smt. Gurdevi) would not be entitled to claim possession of the land and the building constructed thereon from the assessed. She on the other hand, bound herself, on being asked by the assessed, to convey to him the allotment rights and] or proprietary rights in the said land and the building constructed thereon along with all rights and privileges appurtenant thereto, in lieu of the security money without claiming any further amount whatsoever. Smt. Gurdevi further gave the right to the assessed to have the deed of conveyance duly executed and registered by a suit for specific performance, if necessary. She also covenanted to execute an irrevocable power of attorney in favor of Shri Premnath Sikand, son of L. Durga Dass, authorising him to sell, transfer and convey to and in favor of the assessed or his nominee, all the rights in the said land and the building" constructed thereon. Against the above mentioned security money already received by her and to execute all such documents, deeds and papers including the final sale deed, as may be considered necessary and expedient by her said attorney. The said attorney was not to exercise the powers under the said power of attorney unless he received instruction from her in. writing to so act.

(5) The aforesaid agreement, Therefore, was not a mere agreement of construction, but was in effect an agreement of conveyance in favor of the assessed, subject to the condition that the assessed constructed the building and Smt. Gurdevi failed to pay the stipulated amount within the stipulated days. This document, thus, being a contract of sale of property did not require registration. In accordance with section 54 of the Transfer of Property Act, it did "not, of itself, create any interest in or charge on such property".

(6) The deed of release dated November 13, 1967, which has been annexed to the supplementary statement of the case, as annexure "D", has certain recitals more or less in the following words (i) Smt. Gurdevi has received notice of the completion of substantially the whole of the house and that she has released and discharged the assessed from all liabilities under the agreement dated 14th March 1962 in respect of the completion of the house and obtaining the completion certificate; (ii) that she is not in a position to obtain transfer of building in her favor on her paying the amounts mentioned in the agreement dated the 14th March, 1962; (iii) that the Society is at liberty to transfer the plot to the assessed on such terms and conditions as the Society may impose; and (iv) that Smt. Gurdevi disclaims all her rights to get delivery of possession of the house constructed thereon and releases the same in favor of the assessed. The documents under which the Society granted allotment rights to Smt. Gurdevi, is not before us and we do not know its nature. The case has been argued before us, as well as before the Income Tax authorities throughout on the basis that the rights of Smt. Gurdevi are immovable property and we are assuming that to be so. The recitals summarised in (iii) and (iv) above from the deed of release, purport to limit or extinguish the right, title or interest of Smt. Gurdevi, in immovable property of the value of more than Rs. 100. The document of release, Therefore, requires to be registered u/s 17 of the Registration Act. u/s 49 of the said Act, no document so required to be registered can affect any immovable property comprised therein or can be received as evidence of any transaction affecting such property, unless it has been registered. This document, Therefore, can neither limit nor extinguish the rights of Smt. Gurdevi, nor can create any rights in the assessed in the immovable property. Under proviso to section 49 of the Registration Act, such an unregistered document may, however, be received as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act or as evidence of any collateral transaction not required to be effected by registered instrument. This document, Therefore, does provide evidence of the fact that Smt. Gurdevi has received the requisite notice of completion of the house and that the assessed is no longer liable to furnish the completion certificate. This document can also be received in evidence of the fact that she was not in a position to make payment to the assessed and obtain the transfer of the building in her favor. The conditions, subject to which, the assessed was to have the property conveyed to him, were thus fulfilled .

(7) Mr. B. N. Kirpal, the learned counsel for the Revenue, submitted that although a registered deed conveying rights in the property in favor of the

assessed has not been executed, yet the assessed being a buyer and having already paid the purchase money and being in possession is entitled to a charge on the property by virtue of subsection (6) (b) of section 55 of the Transfer of Property Act. Mr. J. K. Kohli, the learned counsel for the assessed, on the other hand, submitted that the requirements of this sub-section of section 55 have not been met. No charge has, Therefore, been created, and in any case, creation of a charge is of no effect, because such a charge cannot be said to create any right in the property, which alone could be considered as an asset for the purposes of sub-paragraph (c) of paragraph A of Part I the Schedule to the Wealth-tax Act. Sub-section (6) of section 55 of the Transfer of Property Act reads as follows:

"(6)The buyer is entitled- (a) (b) Unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount, and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its recession "

(8) Now, in this case, there is no question of the assessed having declined to accept the delivery of the property. He, in fact, is in possession of the property; and has paid the entire purchase money. He, under sub-section (6) of section 55, Therefore, is entitled to a charge on the property as against the seller, viz. Smt. Gurdevi and all persons claiming under her, to the extent of her interest in the property for the amount of purchase money paid by him.

(9) Mr. Kohli submitted that this purchase money was not paid in anticipation of delivery of possession. The amount was spent by the assessed on the construction of the house and was, according to him, in the nature of a mere advance to Smt. Gurdevi and was not purchase-money. It became purchase money only after she signified her inability to purchase, which was when she executed the release deed. And then the assessed was already in possession. Mr. Kohli submitted that section 55 of the Transfer of Property Act was. Therefore, not attracted. This contention of the learned counsel, however, is not well-founded. In Jibhaoo Harisingh Rajput Vs. Ajab Singh Fakira Rajput, , it was held that a charge u/s 55(6)(b) of the Transfer of Property Act, arises immediately the purchase price is paid by the buyer to the seller, even though the former was in possession. In Dagadu Dhondu Patil Vs. Trakadu Motiram Patil and Another, the expression "to accept delivery" in clause (b) of section 55(6) was held not to mean "to accept delivery of possession of the property" but "to accept completion of the contract of the sale by the execution of sale deed where such deed is necessary." Even if the buyer had entered into possession, in anticipation of completion of the contract, he was held to be entitled to a charge upon the property for the price paid by him.

(10) Even otherwise, we find that Mr. Kohli's contention is erroneous. His

argument rests on that part of the agreement which deals with the construction of the house only. But, the several provisions in the agreement dated the 14th March, 1962, are integral parts of the whole transaction and have to be viewed together. The amount that was paid by the assessed as security and the amount that was being spent by him on the construction of the house, which may appear to be mere advances, if the part of agreement dealing with construction is viewed in isolation, were in fact nothing but payments in anticipation of the delivery of the property to the assessed. The assessed made the payments and was incurring expenses of construction only because he was under the agreement entitled to get and to remain in possession of the property, which was to be ultimately purchased by him. Without the ultimate right to purchase, the assessed, as appears from the agreement, would not have agreed to undertake construction of the house. Even if the right to purchase arose in favor of the assessed, when Smt. Gurdevi declined to make the stipulated payment and to take over the property, the assessed had paid the sum styled as security and had been engaged in constructing the house and incurring expenses for this purpose, only because he, under the agreement, had the right to treat these payments and expenses as purchase-money for the purchase of the property, which was the ultimate and principal object of the said agreement. This purchase money was being paid, thus, in anticipation of the delivery of property. The agreement between the parties was not an agreement of construction at all. It was, as already noticed, a contract for sale of property subject to certain conditions. The amounts paid by the assessed, by whatever name called, were payment of purchase-money in anticipation of delivery of possession, as becomes clear when the whole contract is taken and read together. It is thus a case covered by section 55(6)(b) of the Transfer of Property Act and the assessed is entitled to a charge on the said property to the extent of the interest of Smt. Gurdevi in the property, for the amount paid or spent by him, which was the purchase-money.

(11) Mr. Kohli contended that a charge does not create any right in favor of the assessed in the property in question, as a mortgage would create. According to him a mortgage is a transfer of an interest in the property in favor of the mortgagee, while a charge gives a mere right to the charge-holder to payment out of the property without transfer of any interest in it. The distinction sought to be drawn by Mr. Kohli, however, is unreal.

(12) Charge has been defined in section 100 of the Transfer of Property Act, the relevant portion of which reads as follows:

"100. Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

(13) A mortgage, on the other hand, is defined in section 58(a), the relevant portion of which reads as follows:

"(A) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

(14) Simple mortgage has been defined in section 58(b) of the Transfer of Property Act, which reads as follows:-

"(B) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee".

(15) It will, thus, be seen that although there is a transfer of interest in immovable property in the case of a mortgage, that interest in the case of simple mortgage consists merely in the mortgagee's right to cause the mortgaged property to be sold and to apply the sale proceeds in payment of the mortgage money and nothing else. A charge-holder likewise has the right to have the property charged, sold for realisation of his dues. There is, thus, hardly much difference between the two.

(16) Mr. Kohli relied on Shiv Prasad Singh v. Bani Madhab Chawdhury Air 1922 Pat 5290) and U.P. Government Vs. L. Manmohan Das and Others, to urge his contention that charge did not create any rights in the property. We, however, do not find in the said authorities any support for the proposition urged by Mr. Kohli. The distinction between charge and mortgage was held in both these cases to be very insignificant. In the case of Shiv Prasad Singh the Patna High Court observed as follows:-

"NOW the broad distinction between a mortgage and a charge is this: that whereas a charge only gives right to payment out of a particular fund or property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property. The line of division in England between a charge and a mortgage is a very clear one, but in this country, the division is not so- well-marked."

(17) It was pointed out to the Bench dealing with this case that interest transferred -in the case of a simple mortgage, was the right to have the property sold and it was, Therefore, a question of some nicety to distinguish between simple mortgage and a charge. The Bench did not reject this plea. On the other hand, it relied on the case of Dalip Singh v. Bahadur Ram (1912) 34 All 446 (*), where three essentials were said to constitute a simple mortgage, viz. (a) a transfer of an interest in specific immovable property, (b) a personal undertaking by the mortgagor to pay the mortgage money, and (c) an agreement that in the event of the mortgagor failing to pay according to his contract, the mortgagee

shall have a right to cause the mortgaged property to be sold. Essentials (b) and (c) were seen to be present even in the case of a charge. Elaborating the first essential (a), it was observed : "In a simple mortgage the interest transferred is the right to have the property sold" (underlying ours) Essential (a) was Therefore, nothing else than essential (c). There was, Therefore, hardly any difference, according to the Patna and Allahabad High Court between a charge and a simple mortgage.

(18) In the case of U.P. Government Vs. L. Manmohan Das and Others, , the Full Bench of the Allahabad High Court was of the view that the creation of a charge in specific property gives the charge-holder a right to recover a certain sum of money from the value of the property charged and to that extent reduces the interest of the creator of the charge in the property. A charge, Therefore, is a transfer of an interest in property in the sense that an interest which had existed in the creator of the charge passes to the holder of the charge and creates an interest almost the same as on interest created by a simple mortgage, Iqbal Ahmad, C.J. observed on page 346, that "the right created by a charge is something more than a personal obligation, for it is a jus ad rem, i.e. a right to payment out of the property specified. There is very little difference between a charge and a simple mortgage." AUsop J. in a separate judgment observed that "a simple mortgage of immovable property is a transfer of in interest in that property which must be specific and the mortgagee has a right to get the proper put to sale by the court of law. A mortgage is created by act of parties. A charge, on the other hand, may not be on immovable property at all. It may not be, while it is floating, on any specific property and may be created not only by act of parties but by process of law. That seems to be the distinction between a simple mortgage and a charge. When a charge becomes fixed on specific immovable property, it is to all intents and purposes a mortgage as if it is created by the parties."

(19) Charge holder in the case of a charge and the mortgagee in the case of a simple mortgage, thus, acquire the right to payment out of a particular property. It is to this extent, that there occurs, in effect, a transfer of interest in specific immovable property in favor of the charge holder or the mortgagee as the case may be. In the instant case, the assessed is in possession of the property, "as of right" and cannot be dispossessed by Smt. Gurdevi or any one claiming under her. Even if the release deed, by itself, did not create any right or interest in the assessed, the assessed did get a right in the property by operation of law, because he was entitled to a charge on the property u/s 55(6) of the Transfer of Property Act. The charge on the property in favor of the assessed, which amounts to a transfer to him of some interest in the property, as discussed above, is thus, a right within the meaning of sub-paragraph (c) of paragraph A of Part 1 of the Schedule to the Wealth-tax Act, 1957. The Tribunal was, Therefore, in error in holding that sub-paragraph (c) referred to above was inapplicable to the facts of this case and as such the assessed could not be called upon to bear the burden of the additional tax. The answer to the question as reframed by us,

Therefore, has to be given in the negative, i.e. in favor of the Revenue and against the assessed.

(20) In the peculiar circumstances of the case, however, there shall be no order as to costs.