

(1992) 03 CAL CK 0011

In the Calcutta High Court

Case No : Income-tax Reference No. 221 of 1987

K.N. Razdan

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 12-03-1992

Acts Referred:

Income Tax Act, 1961 — Section 56, 63
Transfer of Property Act, 1882 — Section 111

Citation : (1993) 204 ITR 83 : (1994) 75 TAXMAN 203

Hon'ble Judges : K.M. Yusuf, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : N.K. Poddar, for the Appellant;S.K. Mitra and R.C. Prasad, for the Respondent

Judgement

Ajit K. Sengupta, J.—This reference u/s 256(1) of the Income Tax Act, 1961, relates to the assessment years 1979-80, 1981-82 and 1982-83. The facts leading to this reference are that the assessee, an individual, purchased two office flats bearing Nos. 13A and 12F in premises No. 46C, Chowringhee Road, Calcutta, in terms of an agreement for sale dated December 4, 1972, from Western Building Corporation which had constructed the said property. The assessee took possession of both these office flats and let these out to two different tenants and received rents from such tenants. No conveyance deed in respect of either of these said two flats has been executed by Western Building Corporation in favour of the assessee so far. The assessee did not offer the aforesaid rental income for taxation in his own hands from the very beginning on the ground that, in the absence of any conveyance deeds, he was not the legal owner of either of these two flats. The flats being immovable property, no title in respect thereof could pass in favour of the assessee without a deed of conveyance being executed by Western Building Corporation and duly registered with the Registrar of Assurances. Since such deed was not executed and/or registered in favour of the assessee, it was submitted on behalf of the assessee that the said rental income could not be assessed in the hands of the assessee

and the same was assessable in the hands of the builder, Western Building Corporation. The assessee placed reliance on the decision of this court in Commissioner of Income Tax Vs. Ganga Properties Ltd., In addition to the aforesaid submissions in the course of the assessment proceeding, it was also, inter alia, contended on behalf of the assessee that various clauses of the agreement dated December 4, 1972, when read as a whole, clearly show that the transfer in question was revocable within the meaning of Section 63 of the Income Tax Act, 1961, and in view of the provisions of Sections 60 and 61 of the said Act, the aforesaid rental income, though received by the assessee, was assessable in the hands of the Western Building Corporation. The Income Tax Officer did not accept the aforesaid contentions and assessed the rental income in the hands of the assessee under the head "Income from other sources". The Income Tax Officer was of the view that the assessee had duly paid the agreed consideration to the Western Building Corporation and had received possession of the said flats from the seller. The assessee had thereafter let out these two flats to Security Services and Personnel (P.) Ltd. and Messrs. Jypti Ltd. and was actually deriving rental income therefrom and he was, therefore, assessable in respect of the rental income. It may be noted that the rental income was assessed by the Income Tax Officer under the head "Income from other sources" in the assessment year 1979-80 and under the head "Income from house property" in the assessment years 1981-82 and 1982-83.

2. In appeals filed by the assessee against the aforesaid assessments, the Appellate Assistant Commissioner of Income Tax, following the decision of the Tribunal in the case of the assessee in the earlier years, upheld the assessee's contention and held that the rental income could not be assessed in the hands of the assessee. It may be noted that, in the earlier years, the Tribunal had upheld the contention of the assessee based on the decision of this court in the case of Commissioner of Income Tax Vs. Ganga Properties Ltd.,

3. The Department filed an appeal against the aforesaid order of the Appellate Assistant Commissioner to the Income Tax Appellate Tribunal, Calcutta, and contended that, since the assessee was not the legal owner of the two office flats in question, the rental income, in view of the decision of this court in Commissioner of Income Tax Vs. Ganga Properties Ltd., and of the Supreme Court in Late Nawab Sir Mir Osman Ali Khan Vs. Commissioner of Wealth Tax, Hyderabad, was not assessable as "Income from house property" ; but the same was assessable under the head "Income from other sources". On behalf of the assessee, reliance was, inter alia, placed on the decision of the Bombay High Court in Commissioner of Income Tax, Bombay City-III Vs. Smt. T.P. Sidhwa, . The Tribunal, however, following the principles laid down by the Delhi High Court in the case of Sushil Ansal Vs. Commissioner of Income Tax, upheld the contention of the Department and held that the rental income received by the assessee was assessable in his hands under the head "Income from other sources".

4. On the facts, the following question of law has been referred to this court :

"Whether, on the facts and in the circumstances of the case, the rental income derived by the assessee was assessable in the hands of the assessee as income from other sources u/s 56 of the Income Tax Act, 1961 ?"

5. The reference was earlier disposed of by this court on October 3, 1988, and the said question was answered in the negative and in favour of the assessee on the concessions made by the learned advocates, following the decision of this court in the case of Commissioner of Income Tax Vs. Ganga Properties Ltd., . Subsequently, the judgment delivered in this case was recalled by the order dated August 31, 1989, and this case, along with other cases of the assessee and his wife, Smt. Bilas Razdan, were set down for further hearing.

6. We have heard at length the submissions of the learned advocates of the parties. Learned counsel for the assessee, Mr. Poddar, made lengthy submissions to persuade us to hold that the assessee has no assessability in respect of the income derived from the flats by way of letting. His argument is two-pronged. In the first instance, he contended that the assessee being in possession of the flats under a sale agreement without a registered deed of conveyance is not the owner thereof and could not be assessed in respect of the rental income under the head "Income from house property". In support of his proposition, he cited the following decisions : (i) Commissioner of Income Tax Vs. Ganga Properties Ltd., (ii) S.B. (House and Land) Pvt. Ltd. Vs. Commissioner of Income Tax, , (iii) Commissioner of Income Tax, Bombay City-III Vs. Smt. T.P. Sidhwa, (iv) The Commissioner of Income Tax, Delhi-1 Vs. Hans Raj Gupta, , (v) Commissioner of Income Tax Vs. Trustees of H.E.H. The Nizam's Miscellaneous Trust, (vi) Commissioner of Income Tax, Bombay City III Vs. Zorostrian Building Society Ltd., and (vii) Commissioner of Income Tax Vs. Prabhabati Bansali, .

7. We are quite aware of the ratio decidendi in the said cases. But, for a fairer view, it is necessary to note that the decisions to the contrary though fewer are not any the less appealing, (i) Smt. Kala Rani Vs. Commissioner of Income Tax, (ii) Addl. Commissioner of Income Tax Vs. Sahay Properties and Investment Co. (P.) Ltd., , (iii) Additional Commissioner of Income Tax Vs. U.P. State Agro Industrial Corporation Ltd., and (iv) Commissioner of Income Tax Vs. Sahney Steel and Press Works (P.) Ltd., .

8. This group of decisions drew inspiration from the decision of the Supreme Court in R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala, In that case, the Supreme Court held that the expression ownership has to be given a wide and flexible construction so as to include equitable or beneficial rights as well. We are not impressed with Mr. Poddar's contention that a purchaser of a house property, in the absence of a registered conveyance, should not be and cannot be treated as the owner of the property. We have already held in Madgul Udyog Vs. Commissioner of Income Tax, that, after delivery of possession and payment of

the consideration under a sale agreement, the vendor is left with no right, title or interest in the property except an obligation like a trustee to execute and register the conveyance deed in favour of the buyer who, in such case, is a beneficiary in exclusive possession of the property. There, the seller in such a situation could, at the worst, be assessed in like manner and to the same extent as the beneficiary who is the buyer of the flats. At this stage, we may mention that this issue regarding ownership does not arise for our determination since the question centres on the assessability of the assessee in respect of the rents from the flats which he holds under a sale agreement on payment of the consideration for sale, i.e., a holder on part performance u/s 53A of the Transfer of Property Act, 1882. Still this issue bears on the question : If the assessee is the owner, the Tribunal should have held him assessable in respect of the rents under the head "Income from house property".

9. The expression "owner" is a many-shaded word and can also include an occupant of the property enjoying all the benefits of an owner in the properties. It is worthy of note that the Legislature itself inserted a new Clause (iiia) in Section 27 which says "that a person allowed to retain possession of a building or part thereof in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882, shall be deemed to be the owner of that building or part thereof". The debate that learned counsel has raised is perhaps guided by the apprehension of our taking a view that the case is one that attracts Section 23 for the purpose of assessment of the rental income in the hands of the assessee.

10. It is actually this premonition which led learned counsel for the assessee to take another line of argument and he argued more strenuously on this alternative part of the plea. The plea is that the sale agreement in the assessee's case falls within the description of "revocable transfer" in Section 63 of the Act, because various clauses of the agreement for sale dated December 4, 1972, clearly show that the transferor has the right to re-enter upon and reassume possession of the property in the contingency of some failure on the part of the assessee as the buyer. He pointed out the following facts :

The assessee is required to make from time to time various other payments to the vendor, Western Building Corporation as also observe other covenants as laid down in the said agreement. Under Clause 10, the assessee is liable to pay to the vendor, after taking possession of the office flats regularly and every month in advance by the first week a sum of Rs. 150 per flat towards taxes, outgoings and expenses mentioned in the second schedule to the said agreement and/or any other taxes or outgoings to be levied hereafter and not covered by the said schedule. Under Clause 11, the assessee is liable to contribute and/or pay to the vendor his proportionate share towards the cost, expenses and outgoings in respect of matters specified in the second schedule and also any other taxes or outgoings to be levied thereafter. Under Clause 12, the assessee is liable to pay a proportionate share of the municipal taxes, rates and water tax assessed on the

whole building as may be apportioned to him by the vendor. Under Clause 13, the assessee is liable to reimburse to the vendor any amount paid by the vendor by way of premium or any other account whatsoever to the municipality or to the Central or State Government by way of betterment fees, charges or development tax in proportion to the area of his office space. Under Clause 15, the assessee must make payment of all amounts payable under this agreement to the vendor without the same being demanded by the vendor and even without receipt of any notice from the vendor. Under Clause 17, the buyer must ensure and keep insured his office space against any loss or damage by fire for the full value thereof in the joint names of the vendor and the buyer with such insurance company as the vendors shall determine and the buyer shall pay the premium thereof and shall not surrender or allow the insurance policy to lapse or to be forfeited. The assessee as the buyer is also required to produce to the vendors the policy or policies of such insurance and the receipt for the last premium paid in respect thereof. Under Clause 18, the assessee must become a member of a co-operative housing society or a limited company to be formed at the instance of the vendor in the manner laid down in the agreement and the buyer must sign all papers and documents and must do all other acts, deeds and things as the vendor may require of him for safeguarding the interest of the vendor and all the other purchasers of the office rooms in the said building. Clause 18 clearly lays down that violation to comply with any of the provisions of the agreement would mean determination of the agreement and that the earnest money paid by the assessee shall stand forfeited to the vendors.

11. In Clause 35 of the said agreement for sale, it has been mentioned that, if the buyer neglects, omits or fails for any reason whatsoever to pay to the sellers any of the amounts, as and when the same would become due and payable by the buyer, under the terms and conditions of this agreement (whether before or after taking delivery of possession) within the time specified or if the buyer fails to perform or observe any of the covenants or stipulations contained in the said agreement, the seller shall be entitled to re-enter upon and reassume possession of the office/showrooms and the said agreement shall cease and stand terminated and the earnest money and all other amounts already paid -by the buyer to the sellers including deposit money shall stand absolutely forfeited to the sellers. The clause further provides that the buyer has agreed under this agreement to forfeiture of his right, title and interest in the said office room and all amounts already paid by him and the buyer shall also be liable to immediate ejectment as trespasser.

12. The expressions "revocable transfer" and "transfer" have been defined in Section 63 of the Income Tax Act, 1961, in the following manner :

"(a) a transfer shall be deemed to be revocable if-

(i) it contains any provision for the retransfer directly or indirectly of the whole or any part of the income or assets to the transferor, or

(ii) it, in any way, gives the transferor a right to reassume power directly or indirectly over the whole or any part of the income or assets ;

(b) "transfer" includes any settlement, trust, covenant, agreement or arrangement."

13. In this particular case, Clause 35 of the agreement for sale clearly stipulates that the seller has a right to reassume power over the office space which has been the subject-matter of sale under the said agreement and, therefore, on a plain reading of Section 63, it is clear that this was a revocable transfer. Section 61 clearly states that all income arising to any person by virtue of a revocable transfer of assets shall be chargeable to Income Tax as the income of the transferor and shall be included in his total income. It is, therefore, submitted that, in view of Section 61 read with Section 63 of the Income Tax Act, 1961, it is clear that the assessee cannot be assessed to tax in respect of the rental income, even when the same is received by him, inasmuch as such rental income arises out of the two office flats which are acquired by him in terms of a "revocable transfer" as contained in the said agreement dated December 4, 1972. Reliance in this connection is placed on the decision in *TARUNENDRA NATH TAGORE AND OTHERS Vs. COMMISSIONER OF Income Tax, WEST BENGAL.*, .

14. In that case, the court held that, even where there is an out and out sale, there will be a revocable transfer within the meaning of Section 16(1)(c) of the Indian Income Tax Act, 1922, corresponding to Section 61 of the Income Tax Act, 1961, if the transaction provides for retransfer of the income or the assets to the transferor or even if it merely gives him a right to reassume power over the income or the assets ; and this will be so in both cases whether the retransfer or resumption of power is direct or indirect. The qualification that the power to cause a retransfer of the assets is not to be exercised by the seller except in certain contingencies is a normal provision, and does not have the effect of taking the transaction out of the first proviso to Section 16(1)(c) of the 1922 Act corresponding to Section 63(a) of the Income Tax Act, 1961. The proviso says nothing about an absolute or unqualified provision, but covers all provisions whether or not the retransfer or resumption of power is made dependent on a contingency.

15. The agreement for sale, in the case, clearly contains a provision which, according to Mr. Poddar, makes the said agreement a revocable transfer within the meaning of Section 63(a) of the Income Tax Act, 1961, and, therefore, the rental income, though received by the assessee is, in fact, assessable in law in the hands of the Western Building Corporation.

16. Mr. Poddar further referred to the decision of the Supreme Court in *Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh, Patiala Vs. Raghbir Singh.* . There the Supreme Court, inter alia, observed at page 413 of the Reports as under :

"The terms of Section 16(1)(c), first proviso, are reasonably plain. A settlement

or disposition is deemed to be statutorily revocable if there is a provision therein for retransfer of the income or assets or which confers a right to reassume power over the income or assets. The provision may even be for retransfer indirectly or for conferring power to reassume indirectly over the income or the assets. But the actual retransfer or exercise of the power to resumption is not necessary ; if there be a provision of the nature contemplated, the proviso operates."

17. Our attention was also drawn to the decision in COMMISSIONER OF Income Tax, PATNA Vs. RANI BHUWANESHWARI KUER TEKARI RAJ., . There the Patna High Court held and observed that the words of the first proviso to Section 16(1) (c) of the 1922 Act are wide enough to cover even a provision for retransfer which is contingent in its nature. This was also the view taken by their Lordships of the Bombay High Court in RAMJI KESHAVJI Vs. COMMISSIONER OF Income Tax, BOMBAY., . Both these decisions were subsequently affirmed and approved by their Lordships of the Supreme Court in Commissioner of Income Tax, Bihar and Orissa Vs. Rani Bhuwaneshwari Kuer, .

18. We are not, however, impressed with the line of argument so laboriously advanced by learned counsel. The pith and substance of his argument is that, under the sale agreement, the assessee has to pay to the vendor for perpetuity certain sums towards taxes, outgoing expenses, municipal levies, cost of insuring the flats and has other obligations such as the requirement of the assessee becoming a member of a co-operative housing society or a limited company, if formed, at the instance of the vendor in the manner laid down in the agreement. Failure of any of the obligations shall entitle the vendor to re-enter upon and reassume possession of the flats. These rights, in our view, are only the incidents of a lease. It is only open to a lessor to re-enter upon the property and reassume possession upon breach of any of the conditions of the lease. The nomenclature of the agreement as sale agreement is immaterial. The clauses as mentioned by learned counsel only show that the right which the assessee has purchased under the sale agreement is in substance a lease right governed by Section 111 of the Transfer of Property Act, 1882. The right of the lessor to re-enter may arise under Clause (g) of Section 111 *ibid*.

19. A lease may be for perpetuity. Whether a transaction is a lease in perpetuity or not shall have to be inferred from the construction of the various clauses of the instrument. The clauses particularly referred to by him only poignantly show that the right that the assessee had bought was in the nature of a leasehold right. The income derived by letting out the flats held on a lease subordinate to the vendor's right as the lessor shall be income not assessable under the head "Income from house property" but under the head "Income from other sources".

20. On perusal of some other clauses of the agreement for sale besides those referred to by learned counsel, we find that the agreement is not in substance one for sale. Clause (5) of the agreement states, "Nothing contained shall be construed to confer upon the buyer interest of any kind whatsoever into or over the said land or building". Again, Clause (6) excludes the buyer from "any right

of any nature or kind over or in respect of all open spaces, parking spaces, lobbies, staircases, lifts, terraces, etc., which will remain the property of the seller". Thus, it is not a case of sale but in true effect and import one of lease with the lessor's right to re-entry upon breach of any of the covenants in the agreement and the lease is of the portion of the superstructure, referred to in the agreement.

21. The definition of revocable transfer in Section 63 of the Income Tax Act, 1961, is not material. Where the transfer is in the nature of a lease for perpetuity, Section 63 does not operate. A transfer in the nature of lease for valuable consideration as is the case before us stands clear of Section 63. We, therefore, answer the question in the affirmative and against the assessee.

22. There will be no order as to costs.

K.M. YUSUF J.

23. I agree.