

(2016) 09 KAR CK 0020

## KARNATAKA HIGH COURT

Case No: Income Tax Appeal No. 340 of 2009

Commissioner of Income-Tax

APPELLANT

Vs

Shakuntala Devi

RESPONDENT

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**Date of Decision:** Sept. 28, 2016**Acts Referred:**

- Income Tax Act, 1961 - Section 54

**Citation:** (2016) 389 ITR 366**Hon'ble Judges:** Jayant Patel and Aravind Kumar, JJ.**Bench:** Division Bench**Advocate:** A. Shankar, Advocate, for the Respondent No. 1(b); K. Arun Kumar, Advocate, for M/s. Crest Law Partners, for the Respondent No. 1(a); K.V. Aravind, Advocate, for the Appellants**Final Decision:** Dismissed

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**Judgement**

**Aravind Kumar, J.** - The Revenue has preferred this appeal questioning the correctness and legality of the order passed by the Income-tax Appellate Tribunal, Bangalore Bench "C" (for short "ITAT") in I.T.A. No. 1170/(BNG)/08, where under the Income-tax Appellate Tribunal has allowed the appeal filed by the assessee in-part by concluding that the assessee is entitled to exemption under section 54 of the Income-tax Act, 1961 (for short "Act") as assessee had fulfilled all the conditions prescribed under the said section.

2. Facts in brief which has led to filing of this Second appeal by the Revenue can be crystallised as under :

For the assessment year 2003-04 a return of income came to be filed by the assessee on July 17, 2003 declaring her total income as Rs. 34,59,390. The assessment came to be reopened under section 147 and in response to the notice issued under section 148, reply came to be filed by the assessee stating thereunder that the original return filed is to be treated as return filed in response to the notice

issued under section 148. Accordingly, assessment proceedings came to be framed.

3. The Assessing Officer has noticed that the assessee had sold a flat at Mumbai on February 4, 2003 for a total consideration of Rs. 1,71,00,000 and had worked out long-term capital gains of Rs. 1,44,68,032 and had claimed exemption under section 54 of the Act on the ground that the assessee had reinvested the said amount for purchasing another property at Mumbai by paying an advance of Rs. 1,60,00,000 as against total value of property at Rs. 3,25,00,000. The Assessing Officer has held that agreement to purchase the said property was entered on September 8, 2003 and between April, 2003 to September, 2003 Rs. 2,40,00,000 was paid by the assessee. By assessment order dated December 31, 2007 - annexure - C the Assessing Officer held that the sale transaction had not been concluded, no registration of sale deed had taken place and balance consideration amount was yet to be paid and as such, the deduction claimed under section 54 of the Act came to be disallowed.

4. Being aggrieved by the same, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The Appellate Authority held that there has been non-compliance of provision i.e., section 54 of the Act and as such, the assessee would not be entitled to claim deduction. Consequently, the appeal filed by the assessee came to be rejected by affirming the order of the Assessing Officer by order dated June 30, 2008 - annexure-B.

5. The assessee pursued her grievance before the Income-tax Appellate Tribunal in I.T.A. No. 1170(BNG)/2008. The Tribunal after considering the rival contentions held that the assessee was entitled to deduction since for the purposes of section 54 of the Act the date of purchase was to be taken as the basis namely, entering into an agreement for purchasing the new property. It also came to be held that payment made by the assessee to purchase new property fully covered the consideration of capital gains portion and as such, it came to be held that the assessee was eligible for claiming exemption under section 54 of the Act. It has been further held by the Tribunal taking of physical possession or for that matter registration of the sale deed would be immaterial. Hence, appeal filed by the assessee came to be allowed by order dated January 30, 2009 vide annexure-A. Hence, the Revenue is in appeal.

6. This court by order dated June 22, 2011 has admitted the appeal for considering the following substantial question of law :

"Whether the finding of the Tribunal that sale consideration received by the assessee would be entitled to benefit under section 54 of the Income-tax Act, even though the sale was not completed and possession handed over to the assessee within two years as per section 54 of the Income-tax Act, is perverse, arbitrary" and contrary to law ?"

7. We have heard the arguments of Sri K.V. Aravind, learned counsel appearing for the Revenue and Sri A. Shankar, learned counsel appearing for respondent No. 1(b) and Sri K. Arun, learned counsel appearing for respondent No. 1(a).

8. It is the contention of Sri K.V. Aravind, learned counsel appearing for the Revenue that the Tribunal committed an error in not considering the fact that the entire sale consideration had not been paid by the assessee for purchase of new property and what had been invested by her is only a portion of total sale consideration and as such, the assessee would not be entitled to the benefit of section 54 of the Act. He would also submit that possession of the property proposed to be purchased was also not delivered to the assessee within two years and as such, the assessee would not be entitled to claim benefit flowing from section 54 of the Act. Hence, he prays for answering the substantial question of law in favour of the appellant Revenue.

9. Per contra, Sri A. Shankar, learned counsel appearing for the assessee would support the order passed by the Tribunal and contend that it is the utilisation of amount, which was received by the assessee by sale of property, which had to be reinvested for the purposes of claiming benefit under section 54 of the Act and said exercise having been undertaken by the assessee, the Tribunal on appreciation of facts had found that the assessee had reinvested the amount and then by granted the benefit of claiming long-term capital gains as provided under section 54 of the Act. Hence, he prays for answering the substantial question of law in favour of the assessee. In support of his submission he would rely upon the judgment of this court in the case of **Principal CFT v. C. Gopalaswamy [2016] 384 ITR 307 (Karn)**.

10. Facts on hand would clearly indicate that the assessee had sold a flat at Mumbai for a total consideration of Rs. 1,71,00,000 on February 4, 2003 and thereby long-term capital gains was arrived at Rs. 1,44,68,032. In the return of income the assessee claimed exemption under section 54 of the Act, contending inter alia that the said amount had been reinvested by her for purchase of another residential property namely, a flat at Mumbai itself for a total consideration of Rs. 3.25,00,000 as per memorandum of understanding entered on September 3, 2003. It is also not in dispute that the assessee had been paid a sum of Rs. 2,40,00,000 as advance between April 12, 2003 to September 24, 2003 as against the total consideration of Rs. 3,25,00,000. The Assessing Officer, as already noticed herein above, denied the exemption and brought the entire capital gain to tax. Section 54 of the Act which provides for claiming exemption reads as under :

"54. (1) Subject to the provision of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a 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 house property" (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions

of this section, that is to say, -

(i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in the section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain.

(2) The amount of the capital gain which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139 in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit; and, for the purposes of subsection (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset :

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then, -

(i) the amount not so utilised shall be charged under section 45 as the income of the previous year in which the period of three years from the date of the transfer of the original asset expires ; and

(ii) the assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid."

11. A reading of the above section would make it explicitly clear that proceeds of sale of the property is to be reinvested within a period of two years, which would not be chargeable to tax. The intention of the Legislature was to encourage the investment in the acquisition of residential house or construction thereof. The

condition precedent for claiming benefit under the said provision is that the capital gains realised from sale of a capital asset should be reinvested either in purchasing a residential house or utilised for constructing a residential building. If it is established that consideration so received on alienation of property has been invested in either purchasing a residential building or spent on construction of residential building, an assessee would be entitled to the benefit flowing from section 54 of the Act irrespective of the fact that transaction not being complete in all respects. In other words, it has to be examined or discerned from the facts of each case as to whether the assessee had undertaken such an exercise or not.

12. The main purpose of section 54 of the Act is to give relief in respect of profits on the sale of a residential house. Necessary conditions to be fulfilled for the applicability of section 54 are :

- (i) Assessee should be an individual or a Hindu undivided family ;
- (ii) Capital assets should result from the transfer of a long-term capital asset ;
- (iii) Capital gain must arise from transfer of building which is chargeable as "income from house property" ;
- (iv) Property should be a residential house ;
- (v) Assessee must have within a period of two years after that date purchased another property;
- (vi) Property purchased must be residential ;
- (vii) Exemption would be available only to the extent the sale proceeds are utilised ;
- (viii) Where reinvestment in a residential property is not made before due date for filing report, amount not so utilised till such date is required to be deposited in Capital Gains Account Scheme.

Thus, if the above conditions are satisfied, the assessee is entitled to claim benefit of the provision of section 54.

13. Facts on hand would disclose that the assessee had owned a flat at Mumbai and sold the same on February 4, 2003 for a total consideration of Rs. 1,70,00,000. Subsequent to such sale she entered into an agreement for purchasing another property for a total consideration of Rs. 3,25,00,000 by agreement dated September 8, 2003. The said agreement came to be entered into within six months from the date of sale, i.e., February 4, 2003 and the assessee had paid a total consideration of Rs. 2,40,00,000 between April" 2003 to September" 2003. After making the payment, a registered sale deed had not been executed in favour of the assessee before completion of two years" period pursuant to the memorandum of understanding dated September 8, 2003. The consideration received by her under sale dated February 4, 2003 has been paid by the assessee for purchasing another property

and reinvestment has been made within two years as contemplated under section 54 of the Act. These facts are not in dispute. Thus, long-term capital gains computed by virtue of sale deed stood adjusted by virtue of payment made by the assessee for purchasing another property under the memorandum of understanding dated September 8, 2003. As such, the Tribunal has rightly held that the date of purchase was to be taken as the basis for reckoning the period of two years prescribed under section 54 of the Act for extending the benefit flowing therefrom. In the instant case consideration paid by the assessee under the memorandum of understanding dated September 8, 2003 would fully cover the consideration of capital gains portion for being eligible to claim exemption under section 54 of the Act.

14. The co-ordinate Bench of this court in the case of **Principal CIT v. C. Gopalaswamy [2016] 384 ITR 307 (Karn)** has held that utilisation of capital gains in construction of residential house would suffice to claim the benefit of section 54 of the Act.

15. Following the same and for the reasons afore-stated, we are of the considered view that substantial question of law is to be answered in the affirmative i.e., in favour of the assessee and against the Revenue and accordingly, it is answered.

Hence, the following order is passed :

ORDER

(i) Appeal is hereby dismissed.

(ii) Order dated January 30, 2009 passed by Income-tax Appellate Tribunal in I.T.A. No. 1170/(BNG)/08 - annexure-A, is hereby affirmed.

(iii) No order as to costs.