

(2014) 11 MAD CK 0441

Madras High Court

Case No: Tax Case (Appeal) No. 840 of 2014

The Commissioner of Income

APPELLANT

Vs

C. Sugumaran

RESPONDENT

Date of Decision: Nov. 3, 2014

Acts Referred:

- Income Tax Act, 1961 - Section 2(47), 2(47)(vi)
- Transfer of Property Act, 1882 - Section 53A

Citation: (2015) 281 CTR 115 : (2015) 231 TAXMAN 468

Hon'ble Judges: R. Sudhakar, J; R. Karuppiah, J

Bench: Division Bench

Judgement

R. Sudhakar, J.

1. This Tax Case (Appeal) is filed by the Revenue as against the order of the Income Tax Appellate Tribunal raising the following substantial questions of law:

"1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee could not be treated as owner of the property sold on 23.10.2008 while computing capital gains in his hands?

2. Whether the Tribunal was legally justified in not taking cognizant of the letter of the seller of the property to M. Viswanathan to the effect that he had received a sum of Rs. 25 lakhs for executing a power of attorney on 01.09.2006 in favour of the assessee?

3. Whether the finding of the Tribunal is correct especially when Section 2(47)(vi) of the Income Tax Act brings within its ambit of the transfer, enjoyment of the property right through power of attorney agreements?"

2. The assessment in this case relates to the assessment year 2009-10. The assessee is an individual. He is a power agent of one Mr.M. Viswanathan, who is the actual

owner and vendor of the property. The said Viswanathan entered into a registered power of attorney on 01.09.2006 in favour of the assessee without any consideration. For deciding this case, the relevant clauses in the power of attorney agreement, as extracted by the Tribunal, reads as follows:

01) to negotiate the sale of the schedule mentioned property in whole or undivided shares.

02) to execute any agreement/s for sale or other document/s necessary to effectuate the aforesaid purposes to cause the same to the stamped registered or authenticated including purchase of stamp paper as the case may be.

03) to receive or agree to receive the consideration for the said sale or sales in respect thereof.

04) to appear before sub registrar, Registrar or other authority for the purpose of the said sale or transfer.

05) to cause mutation where necessary effected in revenue records and to make such statements personally or through pleader or other agents to effectuate the aforesaid purpose.

06) to deliver vacant possession of the property sold to the purchaser/s to be sold.

07) to apply for demolition and demolish the existing building in the schedule mentioned property.

08) to execute sale deed/s in favour of the purchaser/s for the said property as a whole or an undivided shares and also rectification deed/s if necessary.

09).....

10) to sign patta transfer forms, land ceiling forms and other declarations etc., that may be necessary and incidental fee effectively transferring the land in favour of the purchaser/s.

11 to 16).....

17) in case of any dispute to institute legal proceedings and or defend suits or cases filed and in that connection to engage advocate, to sign vaklaths, plaints, affidavits, petitions, pleadings, statement and also to give evidence before competent court.

18 & 19).....

20) to advertise for sale of the schedule mentioned property either as whole or as undivided share.

21) to do all things necessary and essential for proper management of our property including disposal and completion of sale of the schedule property. And generally to do the such act are necessary and incidental in this regard. No consideration is

received from power agent for giving this power of Attorney. The power agent shall maintain proper accounts and render the same. The property right has not been handed over the Power Agent."

3. After the execution of power of attorney, the property was registered in the name of the assessee's wife Dr.Meera Bai for a sum of Rs. 25.00 lakhs by a sale deed dated 23.10.2008. The Assessing Officer took the view that it is the assessee who sold the plot to his wife Dr.Meera Bai for a sum of Rs. 25.00 lakhs, whereas, the guideline value of the property was Rs. 60.00 lakhs at that point of time by adopting the fair market value of the property at Rs. 60.00 lakhs based on index cost at Rs. 11.00 lakhs as on 01.04.1981.

4. The assessee/power of attorney holder contested the assessment of capital gains at his hands by pleading that he had acted only as a power of attorney holder of the actual owner Mr.Viswanathan, which plea was rejected by the Assessing Officer and the total income was computed at Rs. 61,25,290/- resulting in the demand of tax at Rs. 16,94,560/-. Aggrieved by the said order of the Assessing Officer, the assessee has filed an appeal before the Commissioner of Income Tax (Appeals), who rejected the plea of the assessee, thereby dismissed the appeal. As against the said order, the assessee filed an appeal before the Income Tax Appellate Tribunal.

5. The Tribunal placing reliance on the various clauses in the power of attorney, the relevant portion of which we have referred supra and also after considering the letter of the owner Mr.Viswanathan, who had stated in his letter that he had received a sum of Rs. 25.00 lakhs from Mr.C.Sugumaran, in the year 2006 itself, held that the recital contained in the registered power of attorney dated 01.09.2006 does not show that any consideration was paid to the actual owner and the assessee had acted merely as an agent. The letter of the owner that he had received only Rs. 25.00 lakhs at the time of executing the power of attorney, which is a subsequent statement by the said owner did not inspire the confidence of the Tribunal to accept the Department's plea. The Tribunal laid emphasis on the registered document, namely, Power of Attorney, in letter and spirit holding that there was no consideration paid at the time of executing the power of attorney. The Tribunal also gave a finding that there was no supporting evidence except the letter of the said owner to disbelieve the claim of the assessee. One other factor that the Tribunal relied upon was that the owner had earlier executed a power of attorney and revoked the same, meaning thereby, that it was a transaction entered into by the land owner to his own benefit by choosing the appropriate person as power of attorney to suit his requirement. The Tribunal was of the view that the assessee could not be treated as owner of the property sold on 23.10.2008 and therefore there was no question of computing capital gains in the hands of the assessee. Accordingly, the Tribunal allowed the appeal filed by the assessee. As against the said order of the Tribunal, the present Tax Case (Appeal) has been filed by the Revenue.

6. The short issue involved in this Tax Case (Appeal) is whether capital gains should be assessed at the hands of the assessee, who is a power of attorney holder.

7. We have heard Mr.T.Ravikumar, learned standing counsel appearing for the Revenue at length.

8. Learned standing counsel appearing for the Revenue laid emphasis on the definition of the word "transfer" as contained in sub-clause (vi) of Section 2(47) of the Income Tax Act, which reads as follows:

"Definitions.

2. In this Act, unless the context otherwise requires-

(47) "transfer", in relation to a capital asset, includes-

(vi) any transaction (whether by way of becoming a member of, or acquiring shares, in a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property."

9. To support his plea, he also relied upon circular No. 495 dated 22.9.1987, to submit that the arrangements by way of power of attorney would also come within the purview of Section 2(47) of the Income Tax Act. The relevant portion of the circular reads as follows:

"11.1 The existing definition of the word "transfer" in s. 2(47) does not include transfer of certain rights accruing to a purchaser, by way of becoming a member of or acquiring shares in a co-operative society, company, or association of persons or by way of any agreement or any arrangement whereby such person acquires any right in any building which is either being constructed or which is to be constructed. Transactions of the nature referred to above are not required to be registered under the Registration Act, 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and are a common mode of acquiring flats particularly in multi-storeyed constructions in big cities. The definition also does not cover cases where possession is allowed to be taken or retained in part performance of a contract, of the nature referred to in s. 53A of the Transfer of Property Act, 1882. New sub-cl.(v) & (vi) have been inserted in s. 2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above.

11.2 The newly inserted sub-cl.(vi) of s. 2(47) has brought into the ambit of "transfer", the practice of enjoyment of property rights through what is commonly known as Power of Attorney arrangements. The practice in such cases is adopted normally where transfer of ownership is legally not permitted. A person holding the power of attorney is authorised the powers of owner, including that of making construction. The legal ownership in such cases continues to be with the transferor."

10. A careful reading of sub-clause (vi) of Section 2(47) of the Income Tax Act reveals that any transaction by way of agreement or arrangement or in any manner whatsoever, which has the effect of transferring or enabling the enjoyment of any immovable property would get the character of transfer.

11. In the present case, we find that there is no transfer to or enabling enjoyment of property in favour of the assessee in any manner and therefore, sub-clause (vi) of Section 2(47) of the Income Tax Act does not get attracted. Clause 21 of the power of attorney, which has been already referred to supra, clearly reveals that no consideration was received from the power agent for appointing him as power of attorney. It also emphasised therein that the property right has not been handed over to the power agent. We are, therefore, unable to accept the plea of the Revenue that there was an element of transfer or enabling enjoyment in favour of the assessee. The letter of the land owner subsequently issued does not come to the aid of the Department. It is the duty of the power of attorney holder to deliver the amount received for the purpose of transfer of property. Therefore, no fault could be found on the part of the assessee. Assuming that he had delivered certain sum to the land owner, it is but the lawful duty of the power of attorney to deliver payment to the land owner. The sale to Dr.Meera Bai is also for the same value. Hence, nothing turns on the letter of the erstwhile owner, in favour of the Department.

12. We, therefore, now proceed to analyse the meaning behind circular No. 495 dated 22.9.1987. The interpretation of the circular as put forward by Sri.T.Ravikumar, learned standing counsel appearing for the Revenue, we are not in agreement. The provisions of sub-clause (vi) of Section 2(47) of the Income Tax Act make it clear that the transaction, which has the effect of transferring or enabling the enjoyment of immovable property alone would come within the ambit of transfer. The circular reads something more into the provision. We are not inclined to accept such an interpretation. The circular also states that the legal ownership would continue with the transferor; but the property rights if it is transferred by way of power of attorney would come within the ambit of sub-clause (vi) of Section 2(47) of the Income Tax Act. Assuming we accept the intention behind the circular, then there should be an element of transfer or enabling enjoyment of property right as stated in paragraph 11.2 of the circular by the power of attorney holder.

13. We find no such recital in the power of attorney as extracted by the Tribunal and referred to by us. On the contrary, the terms of the power of attorney clearly show that property rights has not been transferred to the power of attorney holder and there is also no provision for enabling enjoyment. It is not the case of the Department that the power of attorney is sham. If they accept the power of attorney is valid, then the plea of capital gains at the hands of the assessee has no legs to stand. Accordingly, we find no merits in this Tax Case (Appeal).

14. In the result, this Tax Case (Appeal) stands dismissed. No costs.