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**(1993) 12 BOM CK 0030**

**Bombay High Court**

**Case No:** Income-tax Reference No. 209 of 1981

Commissioner of Income Tax

APPELLANT

Vs

Indulal C. Kamdar

RESPONDENT

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**Date of Decision:** Dec. 1, 1993

**Acts Referred:**

- Income Tax Act, 1961 - Section 45, 53, 54

**Citation:** (1994) 116 CTR 523 : (1995) 214 ITR 143

**Hon'ble Judges:** Sujata V. Manohar, J; D.R. Dhanuka, J

**Bench:** Division Bench

**Advocate:** G.S. Jetley, K.B. Bhujle, for the Appellant;

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### **Judgement**

D.R. Dhanuka J.

1. This reference involves consideration of the interesting and important question of law as to the interpretation of section 54 of the Income Tax Act, 1961, as it stood prior to its amendment by the Finance Act, 1982. There is a sharp difference of opinion between the view taken by the High Courts of Madras and Gujarat on the one hand and the Karnataka High Court on the other hand as indicated in the later part of the judgment. The Delhi High Court has dissented from the Madras High Court view and has taken an altogether a different view on some of the facts concerning interpretation of the above referred provision as would be discussed in the later part of this judgment. The High Courts of Madras and Gujarat have taken the view that the assessee or his parents must have used the residential house for an unbroken and continuous period of two years prior to the date of the transfer thereof in order to be entitled to claim exemption from levy of capital gains tax u/s 54 as it then stood. The Karnataka High Court has taken the view that the user of the residential house by the assessee or his parents at any time within two years prior to the date of the transfer thereof was enough to entitle the assessee to claim such exemption. The Delhi High Court appears to have taken the view that the assessee

must have "mainly" used the house as his own residence during the relevant period and if the assessee or his parents had used the residential house "mainly" though not continuously within a period of two years prior to the transfer thereof, the assessee would be entitled to exemption from levy of capital gains tax to the extent provided in the said section.

2. By this reference made u/s 256(1) of the Act, at the instance of the Revenue, the Tribunal has referred the following question to this court, for its opinion :

"Whether, on the facts and in the circumstances of the case and on a proper interpretation of the words "in the two years", occurring in section 54, the Tribunal was justified in directing the Income Tax Officer to allow relief u/s 54 on the capital gains arising out of the sale of the flat even though the said property was used for less than two years prior to the assessment year 1975-76 ?"

3. The relevant assessment year is the assessment year 1975-76.

4. Prior to April 1, 1974, section 54 stood as under :

"54. Profit on sale or property used for residence. - Where a capital gain arises from the transfer of a capital asset to which the provisions of section 53 are not applicable, being buildings or lands appurtenant thereto the income of which is chargeable under the head "Income from house property", which in the two year immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his mainly for the purposes of his own or the parent's own residence, and the assessee has within a period of one year before or after that date purchased, or has within period of two years after that date constructed, a house property for the purposes of his own residence, 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 new asset, the difference between the amount of the capital gain and the cost of the new asset shall be charged u/s 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 u/s 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."

By section 10 of the Finance Act, 1978, the following changes were effected in the said section with retrospective effect from April 1, 1974 :

"(i) Section 54 was renumbered as sub-section (1) thereof, and in, sub-section (1) as so renumbered, after the words "for the purposes of his own or the parent"s own residence", the brackets and words " (hereafter in this section referred to as the original asset)" were inserted.

(ii) In clause (i), the words and brackets "is greater than the cost of the house property so purchased or constructed (hereafter in this section referred to as the new asset)", were substituted for the words "is greater than the cost of the new asset".

5. By the said Amending Act, sub-section (2) was inserted in the said section. The newly inserted sub-section (2) is of no relevance for our purpose. The above referred Amending Act did not make any significant change in section 54 as it stood prior to amendment in so far as the problem under consideration is concerned. Section 54 was amended further by the Finance Act, 1982. The said subsequent Amending Act is also not relevant for our purpose.

6. The assessee purchased an ownership flat in the building known as "Kamal Kunj" situated at Jamshed Road, Matunga, Bombay, for a total consideration of Rs. 38,805. Some time in May, 1974, the assessee took possession of the said flat. The said flat was used by the parents of the assessee for the purpose of their own residence for a period of about two months. On July 15, 1974, the assessee sold the said flat for a price of Rs. 70,000 as a result thereof the assessee made a capital gain of Rs. 31,195. On April 30, 1974, the assessee purchased another flat in the building, belonging to Paradise Co-operative Housing Society Ltd., Sion, on ownership basis for a price of Rs. 77,500. The said flat was used by the parents of the assessee for their own residence. The parents of the assessee had used the "original flat" only for a period of about two months prior to transfer thereof as aforesaid. During the course of the assessment proceedings, the assessee claimed that the entire capital gain of Rs. 31,195 was exempt from the capital gain tax u/s 54 as it then stood. The Income Tax Officer did not accept the claim of the assessee on the ground that the assessee or his parent had not used the said "original flat" for a period of who years immediately prior to the date of the transfer. In appeal, the Appellate Assistant Commissioner accepted the claim of the assessee placing reliance on the decision of the Tribunal in another case. The Revenue filed second appeal before the Tribunal. The Tribunal dismissed the appeal and upheld the claim of the assessee.

7. The basic question which arises for the consideration of the court is as to whether the assessee or his parents must have used the original flat (i.e., being the flat which was the subject-matter of transfer resulting in capital gains) for an unbroken and continuous period of two years immediately preceding the date of transfer in order to be entitled to avail of exemption from capital gains tax u/s 54 or whether the user of the said flat for "any time howsoever short within a period of two years" immediately prior to the date of the transfer was sufficient to entitle the assessee to claim the benefit of the said provision. While interpreting the above referred

section, the court shall have to concentrate on the language of section 54 and ascertain the legislative intent and the scheme of the provision therefrom. The entire section must be read as a whole. The court must attach the weightage to each word used in the section. The key words used in the said section are : (i) in the two years immediately preceding the date on which the transfer took place, (ii) was being used by the assessee or a parent of his, and (iii) mainly for the purposes of his own or his parent's own residence. The question before the court concerns the interpretation of the section pertaining to "nature and extent of user of the original asset" prior to transfer thereof which entitled the assessee to avail of the exemption from levy of capital gains tax at the relevant time. It is obvious to us from a plain reading of the section that the original asset must have been "mainly" used for personal residence of the assessee or of his parents "in two years" immediately prior to the date of transfer and such user must not be occasional, casual or for a short while. It is also obvious to us from a plain reading of the section that the requisite user of the original asset need not be continuous or unbroken for the entire period of two years. The section does not prescribe any such requirement expressly or by necessary implication.

8. After hearing learned counsel on either side and going through the relevant case law as discussed in the later part of the judgment, we have reached the conclusion that the view taken by the High Courts of Madras and Gujarat, on the one hand, and the view taken by the Karnataka High Court, on the other hand, are somewhat extreme views on the subject. With respect, we are not persuaded to concur with either of the two interpretations for the reasons indicated below.

9. Learned counsel for the assessee has contended that the words used in the said section are not "for two years immediately preceding the date of the transfer" so as to spell out the requirement of continuous user of the asset by the assessee or his parents for the entire period of two years immediately prior to date of the transfer. The words used in the said section are "in the two years immediately preceding the date on which the transfer took place was being used by the assessee or a parent of his". Learned counsel for the assessee submits that the relevant words used in the section can only mean "used for any time within two years" immediately preceding the transfer. Learned counsel for the assessee submits that the court should not stretch the language of the section in order to give effect to the supposed intention of the Legislature and if two views are possible, the court must lean in favour of the assessee. Learned counsel for the Revenue has emphasised that the legislative intent is quite clear and due weightage must be attached by the court to the requirement of user of the original asset, i.e., the buildings or the flat for a period of two years immediately prior to the transfer of the residential house by the assessee. Learned counsel for the Revenue has submitted that the expression "in the two years" must be construed by the court in conjunction with the further words "was being used by the assessee or a parent of his. . . ." Learned counsel for the Revenue has submitted that if the two expressions referred to hereinabove are construed

together, it would follow that the Legislature stipulated continuous user of the residential house for a period of two years immediately prior to the date of transfer as one of the qualifying conditions for exemption from the levy of capital gains tax under the said section. Both learned counsel have also emphasised the use of the expression "mainly" preceding the words "for the purposes of his own or the parent's own residence" in support of their respective interpretations of the section. Learned counsel for the Revenue has supported the interpretation of the relevant provision of the Act as done by the Madras High Court and the Gujarat High Court referred to hereinafter. Learned counsel for the assessee has supported the Karnataka High Court view as discussed below.

10. In [COMMISSIONER OF Income Tax, MADRAS Vs. R. MALA.](#), the Madras High Court held that for obtaining the benefit of section 54, the assessee must have been in occupation of the building for a continuous period of two years before the sale. In this judgment, the Madras High Court followed the view taken by the said High Court in the earlier case of [M. Viswanathan Vs. Commissioner of Income Tax](#). At page 306, Sethuraman J., speaking for the Bench, observed that if the words "in the two years immediately preceding" had stood by themselves some ambiguity would have arisen, because it is possible to say that when we speak of "in the two years", it can be any time during the period of two years. At the same page, the learned judge made observations to the effect that the above referred expression was liable to be construed in conjunction with the expression "which expression in the English language indicated "past continuous user" immediately prior to the date of transfer. Thus, in the above referred decisions, the Madras High Court took the view that the assessee must have continuously used the residential building or the flat for the entire period of two years immediately prior to the date of transfer in order to be entitled to claim exemption from levy of capital gains tax in terms of section 54.

11. In [Commissioner of Income Tax Vs. K.N. Srinivasan](#), the Madras High Court took the same view and. inter alia, observed as under (headnote) : "In order to claim exemption u/s 54 of the Income Tax Act, 1961, in respect of a residential house, the house in question should have been used by the assessee or his parents for an unbroken and continuous period of two years as residence". In this case, the attention of the Madras High Court was invited to the contrary decision rendered by the Delhi High Court in the case of [S. Harnam Singh Suri Vs. Central Board of Direct Taxes](#). Ramanujam J., speaking for the Division Bench of the Madras High Court, observed that the Madras High Court preferred to follow the decision earlier rendered by the same court in preference to the decision rendered by the Delhi High Court. We shall have occasion to discuss the above-referred decision of the Delhi High Court in the later part of this judgment.

12. In the case of [R. Krishnamurthy Vs. Commissioner of Income Tax](#), the Gujarat High Court has taken the same view as the Madras High Court and has in terms

dissented from the view taken by the Karnataka High Court in the above referred case of [M. Abdul Sattar Vs. Commissioner of Income Tax](#), to which we shall make a reference a little later.

13. In the case of [S. Harnam Singh Suri Vs. Central Board of Direct Taxes](#), the learned single judge of the Delhi High Court interpreted section 54 and quashed the impugned criminal prosecution. At page 165, the learned single judge of the Delhi High Court referred to the above referred decisions of the Madras High Court and held that he was not inclined to follow the view taken by the Madras High Court on the subject. At the same page, the learned judge observed that the expression "was being used" merely meant that whenever used in the preceding two years, the house should have been used as a residence. During the course of this judgment, the learned single judge of the Delhi High Court further observed as under (at page 165) : "that is, the house must have been used by the assessee or a parent of his mainly for the purpose of his own or parent's own residence during the period of two years immediately preceding the date of sale". The learned judge emphasised the expression "mainly" while interpreting the said section and gave a few illustrations having same bearing on the problem under consideration. There may be a case where the assessee may go out for some time. There may be a case where some of the relatives and friends of the assessee may have used the residential house for a few months with the permission of the assessee. At page 166, it was observed by the court that the assessee was not expected to use the building throughout the year or without any interruption whatsoever in order to be entitled to exemption from levy of capital gains tax. Thus, after taking a practical and pragmatic view of the said section and after attaching due weightage to the use of the word "mainly", the Delhi High Court reached the conclusion that the assessee need not have continuously used the flat or the building for an unbroken period of two years as observed by the Madras High Court. Thereafter the learned judge referred to a letter issued by the Central Board of Direct Taxes bearing No. 207(24)/76-UU(A-II), dated March 25, 1971, dealing with the situation where the assessee owned two residential houses both meant to be used for personal use by the assessee or his parents depending upon the exigency of the situation. It was in terms noted in the said judgment that the view taken by the Delhi High Court was in conformity with the view expressed by the Board in the said letter. The said letter was issued by the Board in pursuance of the representation made to it by the Federation of Indian Chamber of Commerce and Industry and is reproduced at pages 2216 and 2217 of Sampath Iyengar's Law of Income Tax, Seventh edition, volume 2, after emphasising the use of the expression "mainly" in section 54 coupled with absence of any requirement as to continuous residence in the relevant section. By the said letter, the Board expressed its opinion in the following words : "I am directed to refer to your letter No. 41204/Fin/43(1), dated November 23, 1976, on the above subject, and to say that section 54 lays emphasis on the use of the property mainly for the purpose of the assessee or his parent's own residence. If an

assessee has retained more than one house for the purpose of his own or the parent's own residence, and not for any other purpose, the capital gains arising on transfer of each of such houses would qualify for exemption, u/s 54, provided the other conditions spelt out therein are fulfilled."

14. The said letter indicates the view taken by the Board. The view taken by the high authority like the Central Board of Revenue does not bind this court but is certainly relevant to some extent while deciding the interpretation question. In the above referred Delhi High Court case, the assessee has used the flat for a period of one and half years prior to the date of transfer and not for the entire two years immediately prior to the date of transfer thereof.

15. In [M. Abdul Sattar Vs. Commissioner of Income Tax](#), the Karnataka High Court interpreted the relevant expression used in section 54, i.e., "in the two years immediately preceding the date of transfer" so as to mean "for any period within the period of two years immediately prior to the date of transfer". The Karnataka High Court in terms dissented from the Madras High Court view expressed in the above referred judgments and held that the court was not expected to stretch the language of the section in favour of the Revenue.

16. We have carefully considered the relevant provisions of the Act and the relevant case law cited by learned counsel on either side. Having regard to the legislative intent and the language used in the section, we have no doubt in our mind that the benefit of section 54 cannot be availed of by the assessee merely because the assessee has used the building or the flat at any time (i.e., however occasional and even for a short while) within a period of two years immediately preceding the transfer at the asset. If such an interpretation is upheld, the very purpose of using the expression in the two years immediately preceding the date of transfer and the object of the section would be defeated. Merely because the expression used is "in the two years" and not "for the two years", the court cannot interpret the provision so as to nullify the effect of the key words used in the section". In our opinion, the Legislature never intended to confer exemption from levy of capital gains tax on an assessee who used the residential house by himself or his parents casually-say for a day or for an extremely short period prior to the date of transfer thereof. It is well-settled that the section must be read as a whole and none of the words used in the section can be ignored or omitted from consideration. With respect, we are unable to concur with the view taken by the Karnataka High Court. It is not open to us to rewrite the section by adding the words "continuously used for an unbroken period of two years" when the section does not prescribe any such requirement and no such words are to be found in the section. We are conscious of the situation when the assessee might have kept the flat or the building locked for some reason or the other. The assessee might have gone abroad. The assessee might be in hospital as an indoor patient. There may be situations in which the assessee may have permitted his friends or relatives to use the residential building or the flat for a

few months. It is possible that the assessee might be using one of the residential houses only at a time. It is possible that the assessee might be using the other residential house of his own during the weekend or from time to time according to the need or exigency of the situation. It is not possible to hold that the Legislature intended to deprive the assessee of their entitlement to claim exemption from levy of capital gains tax merely because of the house or the flat not having been used "continuously" for an unbroken period of two years. The principal question to be asked by the court is as to whether the residential house was the "personal residential house of the assessee" and whether the same was meant to be used by the assessee or his parents "mainly" for his or their residence. With respect, we are unable to agree with the view taken by the High Courts of Madras and Gujarat to the effect that the assessee must have continuously used the building or flat for an unbroken period of two years immediately prior to the date of the transfer in order to avail of the benefit conferred by section 54. In our opinion, the use of the words "mainly" u/s 54 furnishes guidance for a fair and reasonable interpretation of the provision. The use of the said expression in the section provides practical content to the provision. The said section construed as a whole with due emphasis on the words "mainly" and all other words must mean that a substantial portion of the building or the house must have been used for residence during the period of two years immediately prior to the date of the transfer and the premises must have been used mainly (if not entirely) as a residential house by the assessee or his parents during the said period. In our opinion, the assessee is entitled to avail of the exemption from the levy of capital gains tax subject to all other conditions prescribed by the section being satisfied provided the house (i.e., the original asset) was meant to be used and was actually used by the assessee or his parents "mainly" during the period of two years immediately prior to the date of transfer. We find that our view concerning the interpretation of section 54 gets support from the view taken by the Delhi High Court in the case of [S. Harnam Singh Suri Vs. Central Board of Direct Taxes](#), and the above referred letter issued by the Board reproduced at pages 2216 and 2217 of Sampath Iyengar's commentary referred to hereinabove.

17. In view of the above analysis, we respectfully differ from the view taken by the High Courts of Madras, Gujarat and Karnataka in the above-referred cases. It shall have to be decided in each case as to whether the assessee fulfilled the conditions of eligibility for exemption as discussed above.

18. Having regard to the admitted and proved facts of this case, it is obvious that the assessee did not use the original house "mainly" as a residential house for himself or his parents during the period of two years immediately prior to the date of the transfer. The parents of the assessee used the said flat only for a period of two months prior to the date of the transfer. The assessee did not satisfy the requirement of the said section as interpreted by us. The assessee was, thus, not entitled to avail of the exemption in terms of section 54 as it then stood.



19. In view of the above discussion, we answer the question referred to us in the negative and in favour of the Revenue.

20. Having regard to the facts and circumstances of the case, there shall be no order as to costs.