IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:27.2.2002

CORAM

THE HONOURABLE MR.JUSTICE V.S.SIRPURKAR
AND
THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

Tax Case No.241 of 1996

Commissioner of Income Tax
Tamil Nadu V, Madras. .. Applicant

-Vs-

Shri N.R.Bhusanraj .. Respondent

Petition under Section 256(1) of the Income Tax Act, 1961 against the order in R.A.No.288(Mds)/1995 in I.T.A.No.517 (Mds)/1989 on the file of the Income Tax Appellate Tribunal, Madras Bench 'A', Madras.

! For Applicant : Mrs.Chitra Venkataraman
Senior Standing Counsel for
Income Tax

^ For Respondent : Mr.P.Veeraraghavan

: O R D E R

(Order of the Court was made by V.S.SIRPURKAR, J.)

The question referred before us is as follows:-

"Whether the Tribunal was right in law and had valid materials in holding that no transfer took place as per the first sale deed dated 11.6.1981 read with another instrument of resale dated 22.6.1981 for the purpose of levying tax under the head 'Capital Gains'?

2. Following factual matrix will help us understand the controversy.
The assessee sold the property at No.2, Barracks Maidan Road, Vellore for Rs.2,00,000/- by a sale deed dated 11.6.1981 to one Smt.D. Narmada. This sale deed was, however, not presented for registration though it was executed on that date. Instead, another deed came to be executed on 22.6.1981 between the assessee and the said D.Narmada under the heading 'Deed of resale agreement'. Under this, it was specifically mentioned that there was a sale of the concerned property for Rs.2,00,000/- on 11.6.1981 and since the

assessee herein had requested to resell the aforesaid property for the aforesaid amount, the vendee D.Narmada consented and agreed to sell on the following conditions. In those conditions, it was stated that the sale deed shall be got registered at the instance of the assessee after the payment of the balance amount of sale consideration of Rs.1,99,500/- as the amount of Rs.500/- was received by the assessee by way of an earnest. It was then agreed by the said vendee D.Narmada that in default of the payment of the sale consideration of Rs.1,99,500/-, the resale agreement would be rendered invalid. It was also agreed that this sale deed was to be got executed after a period of two years i.e., after 21.6.1983, but within a period of three years i.e., before 21.6.1984. It is also agreed that if the vendee Narmada failed to execute the sale deed, the assessee shall be at liberty to file a suit in the Court and obtain the resale. Both the documents were got registered on 22.6.1981.

3. On this basis, the Revenue authorities, treating this to be a transaction inviting capital gains under Section 45 of the Income Tax Act, assessed the assessee. Before the assessing officer, it was tried to be stated that the first document was a conditional sale and since both the documents i.e., the sale deed and the agreement of sale were registered together, there was no transfer in the eye of law for the purpose of capital gains. The assessing officer, however, did not agree and came to the conclusion that the assessee was liable to pay the capital gains tax. Since we are not concerned with the calculation thereof, we are not referring to the figures. Dissatisfied by this, an appeal came to be filed before the Commissioner of Income Tax (Appeals), who took the view that the assessing authority was correct in taking the view that he did, of treating the transaction dated 11 .6.1981 registered on 22.6.1981 as a transfer and assessing the assessee to the capital gains tax. Before the Commissioner, a decision of the Punjab and Haryana High Court reported in 122 ITR 461 (HIRA LAL RAM DAYAL -VS- C.I.T) was cited. However, the Commissioner, Income Tax came to the conclusion that the facts in that case were altogether different and that the transaction in question was nothing else but the transfer, and as such, invited the application of Section 45 of the Income Tax Act.

4. A further appeal came to be filed before the Income Tax Appellate Tribunal. The Tribunal, however, found in favour of the assessee holding that the transaction could not be viewed to be a transfer as there was no intention between the parties to transfer the asset. The Tribunal, more or the less, came to the conclusion that since the sale deed was registered on 22.6.1981, on the very same day when even the agreement of sale was executed and registered between the parties wherein the vendee had agreed to sell back the same property for the same consideration within three years, there would be no question of any intention on the part of the assessee to transfer the property. The Tribunal has held thus,

" It has been rightly held by the Punjab and Haryana High Court in 12 2 ITR 461 (HIRA LAL RAM DAYAL -vs- C.I.T), that though evidentiary value is to be attached to a registered document, but the said document cannot be taken as being conclusive in the matter"

The Tribunal, therefore, found that there was no transfer and as such there is no liability for capital gains tax. The Tribunal, therefore, approached this Court and ultimately a reference came to be made of the question referred by us earlier.

5. The learned counsel for the Department Mrs.Chitra Venkataraman pointed out that here was a case where there was a complete transfer of the concerned immovable property for which there was a registered sale deed. She further pointed out that not only was the sale deed executed between the parties on 11.6.1981, but on that date itself the possession of the said immovable property was also transferred. The learned counsel further pointed out that the subsequent agreement dated 22.6.1981 wherein the vendee Narmada had agreed to sell back the property to the assessee was of no consequence, as it could not efface away the effect of transfer which had already taken place on 11.6.1 981. The learned counsel invites our attention to Section 47 of the Indian Registration Act and points out that it is settled law that even if there is an unregistered sale deed earlier, the transfer would take effect from the date on which it has been executed, provided there is a subsequent registration of that document under the required provisions. The learned counsel further says that the Tribunal has gone absolutely in error in holding that there was no intention to transfer and that there was no circumstance made available before the Tribunal excepting the so called agreement of sale.

6. The learned counsel also relied heavily on the reported decision in 2001 (7) S.C.C.617 (V.PECHIMUTHU -VS- GOURAMMAL, wherein the Supreme Court has labeled such subsequent or even contemporary agreement as only an agreement of sale. The learned counsel also invited our attention to Section 2(47)(v) of the Income Tax Act and pointed out that under that provision even where there was no complete sale in the strict sense of the term, if there is a delivery of possession by the vendor in favour of the vendee, then the transaction would be viewed as a transfer. The learned counsel pointed out that the Revenue was on a strong wicket here, inasmuch as, here was a case of completed transaction in the nature of sale deed, which was later on registered and even before the registration, on the date of execution of the sale deed itself there was also delivery of possession. According to the learned counsel, therefore, the subsequent agreement would be of no consequence insofar as Section 45 of the Act is concerned.

7. As against this, the learned counsel on behalf of the assessee very strongly suggested that this was not in reality a sale at all. The learned counsel goes on the language of Section 45 of the Income Tax Act and points out that the Section contemplates transfer of a capital asset by way of sale. The learned counsel, for that purpose, strongly relies on Section 2(47) and invites our attention to Section 2 (47)(i), which suggests the sale, exchange or relinquishment of the asset. The further argument is that the word 'sale' is not defined in the Income Tax Act anywhere and, therefore, by necessary implication we would have to go to the Transfer of Property Act and more particularly Section 54, where sale is defined as follows:-

"Sale is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised."

8. From this phraseology, the learned counsel says that one of the essential ingredients of sale is the transfer of ownership and there could be no transfer of ownership in this case because essentially the vendee had agreed to sell that property to the assessee within three years. The learned counsel has invited our attention to the principles of ownership and suggests that the ownership would suggest,

1)Right to possession,
2)Right to enjoy the property, and;
3)Right to dispose of the property.

9. According to the learned counsel, since the assessee had not parted with or at any rate had controlled the rights of the vendee in disposing of the property, it could not be said to be an out and out sale within the meaning of Section 54 of the Transfer of Property Act. The learned counsel wants to read the word 'ownership' with a specific stress on that word, and wants to contend that in this case the ownership was not intended to be transferred which was apparent from the agreement dated 22.6.1981. The other argument is that the agreement dated 22.6.1981 was registered along with the earlier document dated 11.6.1981 on that day itself. The learned counsel further suggests a clearest possible intention on the part of the assessee not to part with the ownership. The learned counsel further argues that the transaction could, at the most, be called as a 'conditional sale'. The learned counsel was fair enough to suggest that he did not want to contend that this was a transaction under Section 58(c) of the Transfer of Property Act, as admittedly the resale clause was not the part and parcel of the sale deed. However, the learned counsel wanted to put the transaction on a slightly higher pedestal by naming it as a ' conditional sale', and in that view the learned counsel argues that a conditional sale meant a clear intention on the part of the vendor i.e., the assessee herein not to part with the ownership.

10. On these rival backgrounds, we have to see as to whether the concerned transaction amounted to a transfer as contemplated under Section 45 of the Income Tax Act. It must be stated at the outset that a transfer which is coverable under the provisions of Section 45 invites invariably the capital gains tax unless it is specifically exempted under Section 47. That is the clear scheme of the Act. There is no dispute and there cannot be any that the so called transaction of a 'conditional sale' does not find a place in that exalted list under Section 47 and, therefore, by itself would not be exempted from the capital gains tax. However, the learned counsel for the respondent seeks to suggest that it will not be necessary for us to go to Section 47 of the Income Tax Act, as according to him there is no sale in the sense of

Section 54 of the Transfer of Property Act in the transaction and, therefore, Section 47(i) will not itself be attracted and if that is not attracted, then there could be no question of a transfer.

11. The learned counsel for the respondent has further tried to suggest that here the execution of the sale deed was on 11.6.1981, however

there was no registration and as such, there was no question of transfer of the ownership till such time as the registration was done. He, therefore, suggests that from 11.6.1981 right upto 22.6.1981 it was the assessee who continued to be the owner of the premises, and as such, if there was a fresh agreement on 22.6.1981, though separate and dehorse of the sale deed, should be read as a part and parcel of the same transaction.

12. Firstly, it is an accepted principle of law that even if the transaction takes place earlier and the deed therefor is executed earlier, unless the said deed is registered, there would be no completion of the transaction in the legal sense. However, the essential effect of Section 47 is that once the registration of that instrument takes place, then the transaction would necessarily date back to the date of execution of the instrument. There is no dearth of case law for this proposition. The proposition is settled.
13. The learned counsel, however, contends that till such time the sale deed dated 11.6.1981 was not registered, the ownership continued to be with the assessee. In support of his contention, the learned counsel sought to rely on the reported decisions in,
1.G.SRINIVASULU NAIDU AND OTHERS (VS) RAJU NAICKER AND OTHERS (AIR 19 55 MADRAS 635)
2.LALTA PRASAD (VS) JAGDISH NARAIN AND OTHERS (AIR 1927 ALLAHABAD 137 )
3.SITAL CHANDRA KOLLEY AND ANOTHER (VS) HEIRS OF MIHILAL KOLLEY AND OTHERS (AIR 1955 CALCUTTA 21)
4.BAI DOSABAI (VS) MATHURDAS GOVIND DAS AND OTHERS (AIR 1980 SC 1334)

From this, the learned counsel sought to argue that the ownership till the date of registration continued with the assessee and, therefore, if the vendee agreed to sell back the property on the date when the instrument was got registered and if the said agreement of sale was also registered along with the sale deed, then it was clear that the assessee did not intend to sell the property or did not intend to transfer the property in favour of the vendee.

14. In the first place, in tax jurisprudence "intention" would be irrelevant. If therefore any action is done with contrary intention but comes within the mischief of a taxing statute, it would still apply. A transfer of capital asset which is complete in itself cannot escape merely because the intention of the assessee was otherwise. The case law would have to be tested on this backdrop.

14A. Insofar as the first decision reported in AIR 1955 MADRAS 635 (G.SRINIVASULU NAIDU AND OTHERS (VS) RAJU NAICKER AND OTHERS) is concerned, we do not find that the decision is in any way apposite to the present controversy. The learned counsel wants to rely on the observations made in the judgment that an agreement to re-convey which was a part of the arrangement under which the sale deed was executed should not be treated distinct and separate from the sale itself. We have no reason, in fact, to go into this decision particularly because we are not dealing with a problem under the Transfer of Property Act. The decision nowhere says that if there is such a transaction along with the re-conveyance deed, then the transaction itself ceases to be a sale. We are unable to see as to how this decision

helps the assessee.

15. The second decision reported in AIR 1927 ALLAHABAD 137(LALTA PRASAD -vs- JAGDISH NARAIN AND OTHERS) cannot possibly apply because the law laid down therein was prior to the advent of the proviso to Section 58. Here was a case of the mortgage by conditional sale and the learned Judges were considering the construction of the instrument as to whether the language indicating a sale was inconsistent with the transaction being a mortgage by conditional sale. Ultimately, the learned Judges came to the conclusion that it was a case of the mortgage with conditional sale though the sale deed was couched in the language which suggested a straight sale. We do not think that this decision also would be apposite to the controversy because we are not considering as to whether the present sale is a mortgage by conditional sale under Section 58(c) of the Transfer of Property Act. This is apart from the fact that the language of the sale deed is extremely clear to suggest that the parties meant to transfer the property.

16. The third decision reported in AIR 1955 CALCUTTA 21 (SITAL CHANDRA KOLLEY AND ANOTHER (VS) HEIRS OF MIHILAL KOLLEY AND OTHERS) would also be no different. The learned counsel seems to have stressed on the observations in Para 13, which suggests that the parties were at liberty to enter into simultaneous agreements of sale and resale or into one compact or composite agreement for such purposes and the two may be inter-dependent in the sense that the agreement upon one part of the bargain may well have promoted agreement as to the rest. The Court's observation therein was as follows:-
"The determining factor lies in the ultimate shape of the agreement rather than in the process by which it is reached and, although the agreement for sale and re-sale may have been entered into at one and the same time and being inter-dependent, as stated above, may be broadly looked at as forming parts of the same transaction, if the sale and the re-sale can be separated and can be held to have been intended to be effected separately or as separate and independent transactions, namely, an outright sale to be followed by a re-conveyance, whether oral or written or registered or unregistered, having full effect in law."

We have absolutely no difficulty with the liberty of the assessee to enter into an agreement of sale, but the question really is as to whether such sale is a transfer of ownership. We do not find in this decision anything to suggest that a transaction of sale which is also accompanied with by an agreement for resale does not convey the title or is not a sale in the sense of sale under Section 54 of the Act. The decision, therefore, is of no use to the assessee.

17. The last decision is the decision reported in 'BAI DOSABAI (VS) MATHURDAS GOVINDA DAS AND OTHERS (AIR 1980 SC 1334)'. This decision was pressed into service because the learned counsel sought to suggest that the agreement dated 22.6.1981 would create an obligation against the vendee of the nature as to be found in Section 40 of the Transfer of Property Act. The learned counsel pointed out that such obligation was recognised by the Supreme Court in the aforementioned decision. We have no dispute with the proposition

at all. The question still is as to whether because of this obligation created vide the agreement dated 22.6.1981, it could be said that there was no transfer of the asset in favour of the vendee as envisaged by Section 45. We do not find anything in this decision to suggest that there would be no transfer if the sale deed accompanies any such obligation created by the vendor as against the vendee. In our opinion, the sale would still be completed.

18. The learned counsel for the respondent also pressed into service a decision in 'INDU KAKKAR -Vs- HARYANA STATE I.D.C. LTD.,' reported in AIR 1999 S.C.296. However, we find that the facts in that case are entirely different. That was a case regarding the enforceability of the agreement. There was no question of any complete sale as in the present case. The decision is of no consequence.

19. Another decision pressed into service is "SANTAKUMARI (Vs) LAKSHMI AMMA JANAKI AMMA", reported in AIR 2000 S.C.3009, where the question was regarding the mortgage by conditional sale. There was also an agreement on the same day of sale to retransfer the property to the close relative of the vendor after 10 years. The Supreme Court has held that there was an intention to re-convey the property from the facts in that case. It cannot be disputed that in this case also, the agreement was on the same day of registration, but we cannot forget the fact that the sale deed was executed on 11.6.1981 and it was only registered on 22.6.1981 along with the agreement of sale dated 22.6.1981. Therefore, this case turns on different facts. In our case, admittedly the transfer would date back to 11.6.1981, once the sale deed which was executed earlier was presented for registration and got registered. That apart, even if there was any such intention to reconvey, it cannot take the transaction out of the clutches of Section 45 because there is no finding even in this case that the earlier sale was not a transfer. The decision is, therefore, of no consequence.

20. The learned counsel for the respondent also invited our attention to the decision in "THAKUR RAGHUNATH JI MAHARAJ (Vs) RAMESH CHANDRA" reported in AIR 2001 S.C.2340 and suggested that there were two instruments, one a gift and another an agreement binding the donee with a condition that the donee would construct a particular house within a particular time. We have no quarrel with this proposition also. The Supreme Court ultimately held that the two documents could be read together and though the condition was in a different document than the instrument of transfer, yet it could be imposed upon the transferee. We have no difficulty in this case that the condition of resale could be imposed upon the transferee, but that does not stop the earlier sale deed from being a sale deed. This is particularly because in the present sale deed, not only is there a clear mention about the valuable consideration of Rs.2,00,000/- having been received by the vendor, but there is also a clear cut recital regarding the delivery of possession on the part of the vendor in favour of the vendee. The sale deed, if it is read independently, would undoubtedly convey a full and absolute title in favour of the vendee. Therefore, even if there is a contemporaneous agreement dated 22.6.1981, the sale deed cannot be viewed as a bogus and sham transaction. In fact, it has never been the case of the assessee that the sale deed was a

bogus and sham transaction. The consideration has actually passed and in pursuance thereof even the possession as well as the ownership have been transferred by the vendor in favour of the vendee in this case. It is for this reason that the decision in 122 ITR 461 "HIRA LAL RAM DAYAL Vs- C.I.T." cannot be relied on. There the case pleaded was that of sham and bogus sale. It is not disputed before us that the actual possession has passed to vendee under the sale deed and also the consideration was received therefor.

21. The learned counsel tried to argue that the very fact that the said agreement dated 22.6.1981 was registered along with the sale deed dated 11.6.1981 should be viewed as that the execution of the agreement dated 22.6.1981 was a consideration for registration of the sale deed dated 11.6.1981. We have gone through the sale deed dated 11.6.1 981, which the learned counsel made us available. Even reading the said sale deed as widely as possible, it cannot be said that the agreement dated 22.6.1981 was to be treated as consideration for the registration of the sale deed dated 11.6.1981. We cannot persuade ourselves, therefore, to accept the contention that the sale deed was presented for registration on 22.6.1981 because the vendee agreed to sell the said property before three years after the sale deed was executed. If these facts are to be found against the vendor, the assessee herein, then there would be no question of holding the sale not to be a transfer.

22. The plain language of Section 45 would suggest that there has to be a transfer of capital asset. The word 'transfer' as has already been clarified, has been defined in Section 2(47) and more particularly in Section 2(47)(i), which means a 'sale' also. It will be going beyond all the canons of interpretation to hold that the present transaction was not a sale.

23. The learned counsel for the respondent very earnestly argued that the said agreement would bring cloud on the right of the vendee to dispose of the property. That may be. But, that does not mean that the vendor has not transferred his interest by way of the sale deed. In fact, according to us there would be no question of consideration of this aspect of the argument particularly because this is a complete sale with effect from 11.6.1981 itself. Between 11.6.1981 and 22 .6.1981 there was no agreeent. Therefore, by a subsequent agreement no such cloud could have been brought and even if it had actually been brought and is considered to be brought in law, even then the earlier sale deed does not stop being a transfer or sale, as the case may be, within the meaning of Section 2(47)(i). Once it is held as a transfer, then there would be no question of this not being covered under Section 45 unless and until such a transfer can be covered within the ambit of Section 47. That clearly is not the case of the learned counsel for the respondent, who very fairly suggested that he did not wish to go to Section 47 as from the beginning his case was that the transaction dated 11.6.1981 was not a sale at all.

24. Number of other decisions have been relied upon by the learned Standing Counsel for the Department to suggest that the subsequent registration relates back to the execution of the sale deed. We do not find it necessary to refer to them under the circumstances of the present case. We

would only refer to one judgment reported in 248 ITR 323 (COMMISSIONER OF INCOME TAX (Vs) MRS.GRACE COLLIS AND OTHERS), by the Supreme Court, wherein the Supreme Court has held that the expression 'transfer' includes the extinguishment of the right in a capital asset independent of and otherwise than on account of transfer. Such situation would not arise in our case because the extinguishment of the right by way of a sale deed is clear enough as already found.

25. For all these reasons stated above, we are of the opinion that the sale deed dated 11.6.1981 registered on 22.6.1981 cannot be covered as such within Section 45 of the Income Tax Act. We accordingly answer the reference against the assessee and in favour of the Revenue.

(V.S.S, J.) (K.R.P, J.)

27.2.2002
Index : Yes
Website : Yes

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To:

1.The Assistant Registrar
Income Tax Appellate Tribunal
Madras Bench 'A', Madras.
2.The Central Board of Revenue, New Delhi.
3.The Commissioner of Income Tax (Appeals) II
Madras 600 034.
4.The Income Tax Officer
Circle I(2), Vellore.
5.The Commissioner of Income Tax, Tamil Nadu V, Madras.

V.S.SIRPURKAR, J.
and
K.RAVIRAJA PANDIAN,J.

27.2.2002