HIGH COURT OF KERALA

Smt. Asha George

v.

Income-tax Officer, Ward 2(1), Thrissur

IT APPEAL NO. 114 OF 2012

Date of Pronouncement – 16.01.2013

JUDGMENT

K.M. Joseph, J. – Appellant returned nil income for the assessment year 2005- 2006. Acting on information that the assessee had transacted a property on 05.11.2004, the assessment was reopened. Appellant had 1/4th share in 1.10 acres of land in Ayyanthole Village. The same was sold for Rs. 44 lakhs on 14.11.2004. The assessee received Rs.11 lakhs as her share. In her return, she computed her capital gain at nil after claiming indexation on cost of acquisition and cost of improvement and further claiming exemption under Section 54F of the Income Tax Act (hereinafter referred to as the Act) on the basis of a property purchased at Koothattukulam, a farm house with 1.92 acres of land for Rs.11 lakhs on 28.3.2005. During the course of the assessment proceedings, the appellant took up the contention that she is entitled to exemption under Section 54B of the Act. The tribunal has affirmed the findings of the authorities that the appellant is not entitled to the benefit of Section 54B for the reason that the property at Ayyanthole Village which she sold was not used for agricultural purposes for a period of two years prior to the date of the sale as required under Section 54B of the Act. It is the further finding of the tribunal that the appellant is entitled only to take Rs.2 lakhs as the cost of acquisition over and above Rs.1 lakh allowed as value of super-structure under Section 54F of the Act. It is being aggrieved by the same that the appellant is before us.

2. The following substantial questions of law have been raised in the Appeal Memorandum:

"(*i*) Whether the sale proceeds of the land at Ayyanthole were within the scope of Section 54B of the Income Tax Act ?

(*ii*) Whether the cost of improvement of the land that was sold should have been determined at Rs.3,50,000/= ?

(*iii*) Whether the subsequent purchase of land (at Koothattukulam) in which a farm house is situated satisfied the requirements of Section 54F and/or Section 54B and thus there was no liability to pay any long term capital gains tax on the sale of land at Ayyanthole, in the Assessment Year 2005-06 ?".

3. We heard Shri G. Sarangan, learned senior counsel for the appellant and also Shri Jose Joseph, learned counsel appearing for the Department.

4. Learned senior counsel for the appellant would submit that the approach of the tribunal in denying the benefit of the exemption under Section 54B is unsupportable. There were materials before the authorities indicating that the land at Ayyanthole was indeed being put to agricultural use for a period of two years. In this regard, he drew our attention to certain photographs showing coconut trees. He also relied on the receipt for the water cess. Further more, he drew support from the certificate of the village officer. We find that the certificate from the agricultural officer is also referred to in the order of the tribunal. A copy of the certificate from the agricultural officer was made available to us by the appellant. It is further pointed out that a receipt was produced from the Electricity Board and it was contended that the connection was an agricultural one. He would point out further that the tribunal and the authorities have taken into consideration irrelevant facts. In this regard, he would point out that the fact that the purchaser of the property at Ayyanthole had converted the land and an apartment complex was set up, should not have weighed with the authority in denying the benefit under Section 54B of the Act. The assessing officer also finds that it cannot stand to reason that an agricultural property lying right under the nose of the District Administration could be converted into a commercial complex without any issues. According to the appellant, what is relevant is the use to which the land was put as provided. Still further more, he would submit that the fact that the appellant had not originally set up the claim under Section 54B could not disentitle her from claiming the benefit under Section 54B, if it is otherwise available. It is further contended that the authorities have been influenced by the fact that no agricultural income from the property at Ayyanthole was returned. The finding of the authorities is that neither the appellant, nor her family members have

shown any agricultural income in their returns. It is stated that her father was stated to be a business man dealing in supply of meat to the zoo and the mother, a Nurse by profession who earns income from salary and, therefore, they ought to have disclosed agricultural income, if there was any, in their returns.

5. Per contra, the learned counsel for the Revenue would contend that the findings of the tribunal are unexceptionable. No substantial question of law has been made out. He would point out that a perusal of the substantial questions of law would show that there is no substantial question of law raised that the findings rendered are perverse so as to warrant interference under Section 260A of the Act. He would further contend that no reliance can be placed on the photographs. The photographs were not even produced before the assessing officer. The order of the assessing officer is dated 10.12.2009 and it is only before the appellate authority that some photographs were produced. There is no material to indicate as to whether the photographs related to the property in question. He would also reiterate that the conduct of the appellant in not raising the claim under Section 54B of the Act may be borne in mind and the claim under Section 54B of the Act is only raised as an after-thought.

6. Learned senior counsel for the appellant sought to buttress his contentions with the aid of the following case law:

(*i*) The Apex Court in *CIT* v. *Raja Benoy Kumar Sahas Roy* [1957] 32 ITR 466 held as follows:

" 'Agriculture' in its primary sense denotes the cultivation of the field and is restricted to cultivation of the land in the strict sense of the term, meaning thereby tilling of the land, sowing of the seeds, planting and similar operations on the land. These are basic operations and require the expenditure of human skill and labour upon the land itself.

Those operations which the agriculturist has to resort to and which are absolutely necessary for the purpose of effectively raising produce from the land, operations which are to be performed after the produce sprouts from the land, e.g., weeding, digging the soil around the growth, removal of undesirable undergrowth, and all operations which foster the growth and preservation of the same not only from insects and pests but also from depredation from outside, tending, pruning, cutting, harvesting and rendering the produce fit for the market, would all be

agricultural operations when taken in conjunction with the basic operations. The human labour and skill spent in the performance of these subsequent operations cannot be said to have been spent on the land itself.

The mere performance of these subsequent operations on the products of the land, where such products have not been raised on the land by the performance of the basic operations, would not be enough to characterize them as agricultural operations; in order to invest them with the character of agricultural operations, these subsequent operations must necessarily be in conjunction with and in continuation of the basic operations which are the effective cause of the products being raised from the land. The subsequent operations divorced from the basic operations cannot constitute by themselves agricultural operations.

Only if this integrated activity which constitutes agriculture is undertaken and performed in regard to any land, can that land be said to have been used for "agricultural purposes" and the income derived therefrom be said to be "agricultural income" derived from the land by agriculture, under Section 2(I) of the Indian Income-tax Act, 1922."

(*ii*) Next, he would rely on the decision of the Punjab and Haryana High Court in *CIT* v. *Smt. Savita Rani* [2004] 270 ITR 40. Therein, the Court held as follows, inter alia:

"The exemption is available to the seller of "a capital asset being land". It does not restrict the benefit to agricultural land only. However, the land against which the benefit is sought must have been used by the assessee or his parent for agricultural purposes in the two years immediately preceding the date of sale. From the facts stated by the Assessing Officer himself, it is evident that this condition is clearly fulfilled. It has been observed that poplar plantation stood on this land till 1988-89. It has also been stated that fodder grass and vegetables were grown in the kharif season. The khasra girdwari produced by the assessee also shows that agricultural operations on this land were being carried on by the assessee and other co-owners till its sale. Even the records of the Income-tax Department also show that the assessee had declared agricultural income from this land in her returns of the preceding two years.

In the light of this factual position, there is no merit in the contention of Shri Sawhney that no agricultural operations had been carried on in this land in the preceding two years and that the

agricultural income shown in the returns by the assessee was not genuine. At any rate, the findings of the Tribunal that there was material on record to show that the land had been used for agricultural purposes is based on cogent and relevant material. The Revenue record supports the claim. Thus, the Tribunal was justified in holding that the conditions laid down for claiming relief under Section 54B of the Act stood satisfied. Once it is so, the other contentions about the land being located in the commercial area or the land having been partially utilised for non-agricultural purposes or that the vendees have also purchased it for non-agricultural purposes, are totally irrelevant considerations for the purposes of application of Section 54B of the Act." (Emphasis supplied)

(*iii*) Still further, the learned senior counsel sought to draw support from the decision of the Allahabad High Court in *CIT* v. *Janardhan Dass* [2008] 299 ITR 210 essentially for the proposition that Section 54B is a beneficial provision for an assessee who is otherwise liable to pay tax under the head "capital gains".

(*iv*) Lastly, support is sought from the Judgment of the of Punjab and Haryana High Court in *CIT* v. *Lal Singh* [2010] 325 ITR 588. Therein, the tribunal dealing with a case where the question arose whether the land was beyond eight kilo metres from the Municipal limit, took the view that the Commissioner (Appeals) had rightly relied on the report of the Tahsildar, and that too, on the application of the assessing officer himself and thereafter the Court also proceeded to note that the finding rendered was a pure finding of fact which was not perverse, illegal or contrary to the evidence on record.

7. Learned senior counsel for the appellant would also submit that the contention of the Revenue that no substantial question of law was raised regarding the finding of the tribunal being perverse, may not hold good in the light of the powers available to the Court under Section 260A of the Act. He would point out that it is for the Court to formulate the substantial question of law. In fact, the proviso indicates that a substantial question of law which was not formulated could still be decided upon if it arose. Learned senior counsel for the appellant would also submit that as far as the land at Koothattukulam along with the farm house admeasuring 1 acre 92 cents is concerned, the finding of the tribunal estimating and limiting the value of the plot on which the farm house is located and the value of the land appurtenant thereto and thus the estimating the

value of the plot and the land at Rs.2 lakhs and allowing the same in addition to the value of the super structure, may not be the correct view. He would submit that the farm is connected with the enjoyment of the house being an integral part and, therefore, the value of the entire land should have been considered.

8. We notice from the order of assessment that the appellant's late father had applied for sanction for construction of a compound wall before the Thrissur Urban Development Authority. The appellant had claimed in the return, exemption on the basis of Section 54F of the Act. But, during the assessment proceedings, the appellant relied on Section 54B of the Act. In other words, initially the appellant even did not have a case that the land at Ayyanthole was used for agricultural purposes. A perusal of the order of assessment would show that the appellant had produced tax receipt of property and a receipt from the KSEB. The assessing officer has found that no power charge is payable on the basis of the receipt. It is true that the connection was an agricultural one. But, the officer notes that the opening and closing meter reading, as per the receipt, is the same. It is also found that tax receipt does not throw light on the nature of the property. It does not say that the tax is levied in respect of agricultural property. No doubt, the learned senior counsel for the appellant may be right in complaining that the assessing officer should not have relied on the circumstance that the subsequent purchaser converted the property into an apartment complex. Going by the decisions cited by the appellant, it may also be true that unless there is a surplus, a person may not show agricultural income in the return. But, it is equally true that had the agricultural income been declared in the return, it would have been a circumstance to assist the authorities to conclude that the appellant is entitled to the benefit of Section 54B of the Act. It is true that for the applicability of Section 54B, what the purchaser of the land does with it, may not be relevant. If he puts a land falling under Section 54B of the Act for a non-agricultural use, that cannot be a circumstance to deprive the previous owner of his right to claim under Section 54B of the Act. Equally, the emphasis under Section 54B is the use to which the land is put (In fact, the tribunal has correctly held that it is the user of the land and not the nature of the land that is relevant). In other words, it is not necessary that the land which is transferred, must be an agricultural land as such. The fact that the land is located in an urban area, cannot by itself be relevant to deny the benefit under Section 54B. What is essential is that it must be used for agricultural purposes for a period of two years prior to the date of the transfer.

9. Even while we accept the complaint of the appellant that certain irrelevant aspects were also considered by the tribunal and the officers, we are inclined to pose the question as to what would be the result if those irrelevant aspects are eschewed from consideration. In other words, what are the other materials which the appellant can persuade us to rely on to hold that the land was put to agricultural use ? We, thought the sheet-anchor of the appellant's case was projected to be the photographs showing coconut trees and the water tank. But there, we must notice certain circumstances. We notice that even in the Appeal Memorandum, the appellant would say that the photographs were taken in April, 2004 and the property was sold on 14.11.2004. The appellant filed return on 03.01.2006, where she does not set up a case under Section 54B of the Act. The assessment order was passed on 10.12.2009. We are at a loss as to why the appellant did not choose to produce the photographs before the assessing officer when the matter was pending for such a long time and admittedly according to the appellant, the photographs were taken in 2004. At this juncture, it is also necessary for us to deal with the argument of the learned senior counsel for the appellant that the appellant has done all she could do and it was incumbent on the part of the officer to conduct a local inspection and conduct an enquiry. In this regard, if at all, we must blame the appellant herself for not having staked a claim based on the photographs. Nothing, as we see, stood in the way of the appellant producing the photographs before him. We must also not forget that the property in the hands of the purchaser was used for putting up an apartment complex. Therefore, we cannot certainly blame the officer for not conducting any inspection. At least, the appellant has not posted us with sufficient materials with reference to which we could have formed an opinion that the nature of the property continued to be such that the officer could have conducted an inspection. The photographs were, no doubt, produced before the appellate authority. But, as rightly pointed out by the learned counsel for the Revenue, the photographs, we must remind ourselves, could be relied on only if it is established that it related to the property. Therefore, it may not be safe for us to overturn a finding of fact in a proceeding under Section 260A of the Act which is premised on a substantial question of law being made out. The other material produced by the appellant before the assessing officer appear to be a self-defeating act, as the receipt of the electric connection, though shown to be for agricultural one, related to the meter which reveals that the opening and closing reading is the same. No charges were seen levied other than the fixed charges. Therefore, the said document, far from establishing the appellant's case, militates against the case set up by the appellant. We must remind ourselves

that the requirement of Section 54B of the Act is that the assessee must establish that the land was being used for agricultural purpose for a period of two years prior to the date of the transfer. Certainly, this material does not in any way establish the said facts. Then, there is the certificate by the village officer showing that the land is “Nilam” (paddy land). Learned counsel for the Revenue points out that it is incongruous that the claim that the land being put to agricultural use, should be built up on the basis of there being sixtyfour coconut trees and arecanut trees, when even going by the photographs, the land is claimed to be “Nilam”. The crucial question is whether the land was actually being used for agricultural purpose during the two years prior to the date of the transfer. We do not think that we can overturn a finding of fact, at any rate, based on our re-appreciating the material which was considered by the tribunal which is the final fact finding authority.

10. As far as the certificate issued by the Agricultural Officer, a copy of which was handed over to us is concerned, we notice that it is seen issued in the year 2012. We do not know on what basis the officer could have given such a certificate. Admittedly, the land was already converted for the construction of an apartment complex. We must also remind ourselves that unlike the decision in the Punjab and Haryana High Court (supra), where one of the materials was the inclusion of agricultural income in the return, there is no such return filed. At any rate, we cannot on a re- appreciation of all these materials, overturn the findings of facts entered by the tribunal. Unless the finding of fact is perverse or contrary to the weight of the evidence, the law does not permit us to re-appreciate the evidence and interfere. It is no doubt true that no substantial question of law about the finding be perverse is raised. We do not doubt our power to frame an additional substantial question of law, provided one such question arose. But, we are not inclined to think that the finding of fact rendered under Section 54B is perverse. We therefore repel the case under Section 54B of the Act.

11. Next, it is contended that the officer should have granted, at any rate, the benefit of exemption under Section 54F of the Act in regard to the value of the property, namely the officer should have deducted the entire Rs.11 lakhs paid for purchasing 1 acre 92 cents with the farm house.

12. Section 54F is intended to encourage construction of or acquisition of residential house with the aid of the proceeds from the transfer of any long term capital asset, which is not a residencial house. The provision contemplates computing the cost of the residential building, but the value of the plot on which the farm house stands and the land appurtenant could also be considered. The tribunal has categorically found that the appellant has not produced material to show that the entire area of 1.92 acres should be considered as land appurtenant to it. It is in such circumstances, the tribunal made an estimation and directed that the value of the plot on which the farm house is located and the land appurtenant be fixed as Rs.2 lakhs. We are unable to accept the contention of the appellant that the value of the entire land must be considered in arriving at the value of the residential building. We find no illegality committed by the tribunal. It is not open to the appellant to invoke Section 54B of the Act in regard to the rest of the land at Koothattukulam. This is for the reason that the appellant has not been able to satisfy the requirements of Section 54B as already noted by us in regard to the land at Ayyanthole. Therefore, at any rate, there can be no basis for invoking Section 54B of the Act for deducting the value of the land purchased at Koothattukulam. Therefore, we reject the contention of the appellant. Accordingly, we answer the substantial question of law Nos. 1 and 3 against the appellant.

13. No arguments were addressed before us in regard to the question of law No.2. We see no merit in this Appeal and the Appeal will stand dismissed.