IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

I.T.A. No.129 of 2010 (O&M)
Date of decision: 13.8.2010

Shashi Kiran.

-----Appellant.

Vs.

Commissioner of Income Tax.

-----Respondent.

CORAM:- HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present:- Mr. Ravi Shankar, Advocate
for the assessee.

Mr. Yogesh Putney, Advocate
for the revenue.

ADARSH KUMAR GOEL, J.

1. This appeal has been preferred by the assessee under Section 260-A of the Income Tax Act, 1961 (for short, "the Act") against the order dated 24.6.2009 in I.T.A. No.341/CHANDI /2009 for the assessment year 2005-06, passed by the Income Tax Appellate Tribunal, Chandigarh, proposing to raise following substantial questions of law:-

(i) Whether the Tribunal has misdirected itself in law as well as on facts in affirming the orders passed both by the CIT(A) as well as by the Assessing Officer, which orders are totally illegal and without jurisdiction, while sustaining the addition in the hands of the assessee-appellant.

(ii) Whether the notice issued under Section 153C of the Act, in the absence of the satisfaction note of the Assessing Officer of the seller, whose premises have been searched and the incriminating material i.e. Ikrarnama, having not been brought on the record and/or confronted to the assessee-appellant, is illegal and without jurisdiction, in view of the judgment rendered by the Hon'ble Supreme Court in the case of Manish Maheshwari Vs. ACIT (2007) 289 ITR 341 (SC)?

(iii) Whether the Tribunal has traveled beyond the scope of its jurisdiction and the assessment records including the reasons recorded by the Assessing Officer while sustaining the addition merely on the returned higher sale price shown by the seller in his computation of income as compared to the sale consideration shown in the registered sale deed, which sale deed was duly admitted to have been executed on his own volition by the seller?

(iv) Whether the impugned order passed by the Tribunal confirming the order of assessment passed by the Assessing Officer, in utter violation of the mandatory provisions of Section 153C of the Income Tax Act, 1961, is totally illegal and without jurisdiction and therefore, void ab-initio?

(v) Whether the Tribunal acted illegally and perversely in confirming the addition made by the Assessing Officer on the basis of the self serving statement of the seller contrary to the amount of sale consideration, which was shown in the Registered sale deed, much prior in point of time that too in the absence of any corroborative material having been brought on record by the Department/Revenue ?

2. The assessee purchased a piece of land alongwith her sister-in-law from one Inder Pal Garg vide sale deed dated 18.6.2004 for ostensible consideration of Rs.5 lac. The Assessing Officer served notice under Section 153-C of the Act on the basis of information received from Assistant Commissioner of Income Tax, Karnal that the value of land was shown to be less than the actual sale price which was Rs.11,90,000/-. The source of information was survey under Section 133A of the Act on the premises of the firm of the seller on 7.9.2005 by the ADI Wing alongwith search in the premises of sons of the seller. After due consideration, the Assessing Officer passed order making addition of Rs.5,34,333/- in the hands of the assessee being difference in actual sale consideration and declared sale consideration. This was affirmed on appeal by the CIT(A) as well as by the Tribunal. The finding recorded by the Tribunal is as under:-

"In this connection, no doubt the uniform view of the Courts and also held by the Hon'ble Supreme Court in the case of K.P.Virgese V ITO 131 ITR 597 is that the burden of proving actual consideration in such transactions is that of the Revenue. Admittedly, in this case, the consideration stated in the Deed of Registration is Rs. 5 lacs. However, having regard to the return of income filed by the seller, in our consideration opinion, burden cast on the Revenue to establish the actual consideration for the sale of the property at Rs.11,90,000/-stands discharged. In fact, even the subsequent investigations carried out as a sequel to the assessment proceedings in assessee's case also show that the Revenue has been successful in discharging the burden cast on it. The only material which is sought to be relied upon by the assessee is an affidavit of Shri Inderpal dated 12.12.2008 stating that the said property has been sold for Rs.5 lacs only. This affidavit was filed before the CIT (Appeals), which has been a matter of verification by the Assessing Officer during the remand proceedings. The seller Shri Inderpal was examined by the Assessing Officer with reference to the impugned affidavit and cross examination was also allowed. In the cross examination proceedings, the seller clearly disowned the affidavit dated 12.12.2008. Further more, there is no contradiction or inconsistency in the stand of the seller Shri Inderpal Garg. No doubt, the consideration recorded in the Sale Deed dated 18.6.2004 is Rs. 5 lacs, which was also confirmed by the seller in affidavit dated 29.6.2004, which was before the Assessing Officer in the assessment proceedings. However, subsequent

to the search on the seller on 7.9.2005, there is no material to suggest any inconsistency in the stand of the seller in support of the sale consideration of Rs.11,90,000/-. The Assessing Officer has referred to the income declared by the seller in his return for the assessment year 2005-06 based on the sale consideration of Rs.11,90,000/-. Even during the examination by the Assessing Officer conducted on the directions of the CIT(Appeals) during remand proceedings, the seller confirmed the total consideration at Rs.11,90,000/-. Therefore, we are inclined to uphold the stand of the Revenue in this regard. In any case, on the side of the assessee, there is no material to negate the admission made by the seller except the Sale Deed which showed the stated consideration of Rs. 5 lacs. However, it was for this reason the CIT(Appeals) had allowed the assessee to cross examine Shri Inderpal Garg in the remand proceedings, which the assessee carried out. In the cross examination also, we find nothing which would require rejection of the statement tendered by Shri Inderpal Garg in support of the actual sale consideration of Rs.11,90,000/-. Considering the material on record, in our view, the consideration for the purchase of the impugned property has been correctly taken by the Assessing Officer based on the admission of the seller in his Income Tax Return. The addition made is hereby affirmed. The assessee has to fail in her appeal".

3. We have heard learned counsel for the assessee.

4. Learned counsel for the assessee submitted that mere fact that the seller declared the sale consideration to be

higher in his return, was not enough to accept the said sale consideration when the sale deed mentioned the consideration to be lesser. The sale consideration mentioned in the sale deed has to accepted finally and conclusively, in absence of evidence to the contrary. Burden of proving higher consideration was on the revenue which was not discharged. Reliance has been placed on judgment of this Court dated 10.2.2010 in ***Paramjit Singh v. ITO, Phagwara*** I.T.A. No.401, holding that oral evidence could not be led to contradict terms of a document.

5. We are unable to accept the submission.

6. There is no doubt that burden of proving higher consideration is on the revenue but the same can shift to the assessee by presumption of law and facts having regard to facts and circumstances of the case. The Assessing Authority may presume existence of facts which may appear to have happened, having regard to common course of events or human conduct in the facts of a particular case.

7. It may be worthwhile to refer to formulation of legal position by the Hon'ble Supreme Court in ***Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay*** AIR 1961 SC 1316, para 5:-

> "5.....The rules of evidence pertaining to burden of proof are embodied in Chapter VII of the Evidence Act. The phrase "burden of proof" has two meaning - one the burden of proof as a matter of law and pleading and the other the burden of establishing a

case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e. oral or documentary evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact. To illustrate how this doctrine works in practice, we may take a suit on a promissory note. Under S. 101 of the Evidence Act, "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist." Therefore, the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the execution of the promissory note is proved the rule of presumption laid down in S. 118 of the Negotiable Instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff; but as soon as the execution is proved, S. 118 of the Negotiable Instruments Act imposes a duty on the court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and if he adduced acceptable evidence, the burden again shifts to the plaintiff, and

> so on. The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff. He may also rely upon presumptions of fact, for instance those mentioned in S. 114 and other sections of the Evidence Act. Under S. 114 of the Evidence Act, "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." Illustration (g) to that section shows that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. A plaintiff, who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, should produce the said account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents.....”

8. In the present case, the seller declared the sale consideration to be Rs.11,90,000/- in his return, as noticed above in the finding recorded by the Tribunal. The seller confirmed the said consideration. The assessee was allowed to cross-examine the said seller and the stand about valuation could not be shown to be wrong. The assessee did not lead any evidence to show

the probable value of the property on the date in question. In these circumstances, there is no error in the view consecutively taken by all the authorities that the revenue was able to discharge the burden that sale consideration mentioned in the sale deed was not real.

9. As regards judgment of this Court in ***Paramjit Singh,*** the observations therein are on facts of that case. Section 92 of the Evidence Act excluded oral evidence with regard to contents of a document in relation to a *lis* between the parties and cannot bind any third person. This principle cannot be applied where it can be inferred in the facts and circumstances that the parties have by mutual self-serving agreement concealed taxable income, which income could be found to be assessable on the basis of material which may be available. In ***Bai Hira Devi & ors.*** v. ***Official Assignee of Bombay*** AIR 1958 SC 448, it was observed:-

> "5.....There is no doubt that S. 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives in interest that the rule enunciated by S. 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of S. 99 itself. Section 99 provides that "persons who are not parties to a document or their

representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document." Though it is only variation which is specifically mentioned in S. 99, there can be no doubt that the third party's right to lead evidence which is recognized by S. 99 would include a right to lead evidence not only to vary the terms of the document, but to contradict the said terms or to add to or subtract from them. If that be the true position, before considering the effect of the provisions of S. 92 in regard to the appellants' right to lead oral evidence, it would be necessary to examine whether S. 92 applies at all to the present proceedings between the official assignee who is the respondent and the donees from the insolvent who are the appellants before us."

10. Contention raised on behalf of the appellant cannot, thus, be accepted.

11. No substantial question of law arises.

12. The appeal is dismissed.

(ADARSH KUMAR GOEL)
JUDGE

August 13, 2010 **(AJAY KUMAR MITTAL)**
ashwani **JUDGE**