

CASE NO.:
Appeal (civil) 665-666 of 2008

PETITIONER:
AJAY KUMAR SHAH JAGATI

RESPONDENT:
COMMNR. OF INCOME TAX

DATE OF JUDGMENT: 24/01/2008

BENCH:
S.H. KAPADIA & B. SUDERSHAN REDDY

JUDGMENT:
JUDGMENT

O R D E R

Leave granted.

In these civil appeals we are concerned with the scope of Sec.2(47)(v) read with Sec.53A of the T.P.Act.

Assessee entered into an agreement to sell 7000 sq.ms. vacant land to M/s. Kumaon Constructions Ltd., Nainital, for Rs.25.00 lacs. The agreement was registered with Sub-Registrar, Nainital, and Rs. 2.00 lacs were received as advance.

In the period relevant to Assessment Year 1989-90 assessee claims to have transferred 24 plots to the nominees of M/s. Kumaon Construction Ltd. for total consideration of Rs. 15,20,900/- inclusive of Rs. 2.00 lacs as advance.

-2-

The Assessing Officer called upon the assessee to show cause why capital gains should not be assessed with reference to total consideration of Rs. 25.00 lacs fixed in the agreement for sale. In his reply assessee submitted that he has not given possession of the entire area of 7000 sq.ms. of vacant land; that he continues to be in possession of the land not transferred and therefore Sec. 2(47)(v) was not applicable. The AO did not agree with the contention of the assessee and accordingly worked out capital gains liability on the entire consideration of Rs. 25.00 lacs principally on the ground that major portion of total land has already been sold and thus a part of contract was performed and accordingly the case stood covered by Sec. 53A of the T.P. Act. This view was confirmed by the CIT (A).

The assessee then preferred second appeal before the Tribunal which was allowed by the Tribunal observing that the approach of Revenue was erroneous. According to the Tribunal the order of AO was based upon mis-conception of legal principles. According to the Tribunal in the period relevant to the Assessment Year under consideration, assessee had transferred 24 plots to different persons

-3-
(nominees of M/s. Kumaon Construction Ltd.) for total consideration of Rs.15,20,900/- and therefore the assessee was not liable to return capital gains on the sum of Rs.25.00 lacs. This appears to be the reason given by the Tribunal for upholding the contention advanced on behalf of the assessee.

Aggrieved by the said decision, the Department carried the matter in appeal under Sec. 260A to the Uttaranchal High Court which has upheld the judgment of the Tribunal. Hence these civil appeals.

Unfortunately, in the present civil appeals the basic facts are not on the record. It appears from the agreement dated 25.4.1988 that the assessee had agreed to sell to M/s. Kumaon Construction Ltd., Nainital, land admeasuring 7000 sq.ms.. That agreement is subsequently rescinded. However, between 25.4.1988 and the date of rescission (22.10.1990) the plot admeasuring 7000 sq.ms. stood sub-divided. The sub-divided 24 plots were conveyed by the assessee to the nominees of M/s. Kumaon Construction Ltd.. None of the saledeeds have been produced by the assessee before the Department. In such cases it is very essential to look into the recitals mentioned in the sale deeds.

-4-
Briefly, it may be stated that in order that the case would fall under the extended meaning of the word 'transfer', possession is essential element to be considered. That is the crux of the matter.

In the present case no finding qua possession has been recorded by the Tribunal. It may also be noted that there is nothing on record to indicate the name of the applicant who had applied for sub-division. No revenue or municipal records have been produced which could have indicated as to whether the area admeasuring 7000 sq.ms. or a part thereof stood conveyed and delivered to M/s. Kumaon Construction Ltd. at the relevant time. It is not clear as to how many plots stood conveyed and how many plots remained. In the absence of these basic facts which are primary facts, we are of the view that the Tribunal could not have allowed the appeal in favour of the assessee. What is the indexed cost of each plot is not mentioned. Unfortunately, none of the above aspects have been considered even by the High Court in its impugned judgment.

For the aforesaid reasons, we remit the matters to the Tribunal for fresh consideration in accordance with law. We make it clear that the assessee shall file all

-5-
relevant documents including conveyance(s) in favour of the nominees of M/s. Kumaon Construction Ltd., the relevant plan indicating sub-division of plots, copy of the application made to the competent authority for sub-division of the plots and lastly the Municipal and Revenue records in which the relevant entries made regarding possession. Basically, the question would be how many plots have been conveyed, how many are retained, whether possession of the entire land was ever handed over to Kumaon Construction and how was cost calculated by the assessee.

For the aforesaid reasons, the appeals stand allowed and the impugned judgments of the High Court and the Tribunal are set aside. The matters are remitted to the Tribunal for fresh consideration in accordance with law.