

itl104.13

1

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
NAGPUR BENCH

INCOME TAX APPEAL NO. 104 OF 2013

Assistant Commissioner of Income Tax,  
Circle – 3, 3<sup>rd</sup> Floor, Saraf Chambers,  
Sadar, Nagpur.

... APPELLANT

Versus

Shri Kamlakar Moghe,  
4, Canal Road, Ramdaspath,  
Nagpur.

... RESPONDENT

Shri Anand Parchure, Advocate for the appellant.  
S/Shri N.S. & S.N. Bhattad & A.M. Nabira, Advocates for the  
respondent.

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**CORAM :** B.P. DHARMADHIKARI &  
P.N. DESHMUKH, JJ.

**DATE OF RESERVE :** AUGUST 28, 2015.  
**DATE OF PRONOUNCEMENT :** SEPTEMBER 04, 2015.

**JUDGMENT :** (PER B.P. DHARMADHIKARI, J.)

After hearing Shri Parchure, learned counsel for the appellant – revenue and Shri Bhattad, learned counsel for the respondent – assessee, it was felt that no substantial questions of law arise for determination in this appeal. In view of this, we have heard the respective counsel at length and disposed of the appeal by this judgment.

2. The following two questions of law are sought to be

itl104.13

2

raised by the Revenue in this appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as the Act).

*“1. Whether in the facts and circumstances of the case and in law, the ITAT was justified in allowing deduction of Rs.45 lacs claimed u/s. 48(1) of the Act ?*

*2. Whether in the facts and circumstances of the case and in law, the ITAT was justified in allowing deduction of Rs.22 lacs claimed under Section 54-EC for investment in purchase of REC Bonds ?”*

The facts which are necessary for this adjudication can be briefly stated below. The mother of assessee viz. Mrs. Kamlabai Moghe executed a Will on 17.12.1978 and she expired on 18.05.1988. By that Will she divided her residential bungalow in Ramdaspath area of Nagpur into two parts. Ground floor, garage, garden and out house of her residential bungalow were given to her son – assessee while first floor with staircase of the residential bungalow was given to her other son Shri P.M. Moghe. Shri P.M. Moghe expired on 20.03.1996. He made a Will and bequeathed his share i.e. first floor premises mentioned supra excluding undivided share of land in the name of his sisters viz. Mrs. Wadekar, Mrs. Sinha and Mrs. Kale. The assessee then purchased construction of first floor for Rs.90,000/-. This sale price did not include value of

undivided share of land on which bungalow was built. As per Clause No. 7 of said Will of Kamlabai Moghe, assessee did not receive property absolutely. Kamlabai Moghe had provided a share for her daughters i.e. sisters of assessee if assessee or his brother does not have a son alive at the relevant time. This clause is not in dispute. In that event she gave life interest to her two daughter-in-laws and it was thereafter to go to her daughters. Assessee had only one daughter while his brother P.M. Moghe had one son and three daughters. The said son of P.M. Moghe expired in the year 1985 i.e. before death of Kamlabai Moghe. The assessee, therefore, received property with clause providing overriding title in favour of his three sisters. In this situation, assessee decided to pay Rs.15 lakh each to his three sisters so that in future they should not claim any right in the property. He also paid an amount of Rs. Five lakh each to his three niece i.e. daughters of late brother P.M. Moghe. Those three nieces are Mrs. Deo, Ms. Moghe and Mrs. Jathar. Thus, he paid an amount of Rs.45 lakh + 15 lakh, total amount of Rs.60 lakh and a family settlement was accordingly reduced into writing. The assessee, after sale of said property claimed an amount of Rs.60 lakh under Section 49 of the Act and deducted it while working out Capital Gains. The assessee also invested an amount of Rs. 22 lakh in Rural Electrification Corporation Limited Bonds (REC Bonds) and sought its deduction under Section 54EC of the Act. The

itl104.13

4

Assessment Officer does not accept these claims and the assessee, therefore, approached CIT in appeal. On 04.11.2010, CIT partly allowed his appeal and claim towards amount of Rs. Five lakh each i.e. total Rs.15 lakh paid to three nieces was not accepted. Similarly, addition of Rs. 20 lakh made under Section 69 of the Income Tax Act by the Assessment Officer was sustained. However, the claim of the assessee for deducting amount of Rs.15 lakh each paid to three sisters under Section 48(i) and an amount of Rs.22 lakh towards REC Bonds in terms of Section 54EC was accepted.

3. The assessee filed ITA No.9/NAG/2011 while Revenue filed ITA No. 20/NAG/2011 against this adjudication. The ITAT by impugned order dated 23.01.2013 dismissed both the appeals. Thus, Income-tax Department is before this Court challenging dismissal of its appeal. It has raised two questions mentioned supra as substantial questions of law.

4. Shri Parchure, learned counsel submitted that payment made to sisters was not necessary and it cannot be treated as cost for acquiring the title to property. It is not an expenditure which can be connected with transfer of property. He has taken us through reasons recorded by the Assessment Officer as also by CIT and by ITAT for the said purpose. Insofar as claim under Section

itl104.13

5

54EC of the Act is concerned, he submits that the amount has not been invested within prescribed period of six months and as such the purchase of REC Bonds could not have been looked into and Section 54EC of the Act, was not applicable in present facts.

5. Shri Bhattad, learned counsel, on the other hand, submits that in view of the Will of late mother Smt. Moghe and thereafter Will of P.M. Moghe, three sisters had a right in property and without extinguishing it or without providing for its adjustment, the assessee could not have sold property. As such, the amount of Rs.45 lakh paid to three sisters is correctly found to be an expenditure incurred in connection with transfer of property. He submits that the issue has been correctly appreciated by CIT(A) and ITAT has upheld it. The arrangement worked out by three sisters and brothers as also three daughters of the deceased Shri P.M. Moghe, is bonafide one and revenue, therefore, cannot question it. The order of ITAT does not give rise to any substantial question of law in this connection and hence the appeal to that extent is liable to be dismissed.

6. Insofar as investment under Section 54EC of the Act is concerned, Shri Bhattad, learned counsel, points out that vide Cheque issued on 24.01.2007 REC Bonds were purchased on

itl104.13

6

27.01.2007. The assessee had received sale consideration on 07.07.2006 and period of six months available for such investment, therefore, expired on 06.01.2007. From that date onwards till 24.01.2007, REC Bonds were not available, as such purchase vide cheque dated 24.01.2007 is in accordance with law. He has invited our attention to the provisions of Section 54EC of the Act to urge that the said provision even contemplates this situation and enables extension of time for purchase of such bonds. He has placed reliance upon a Division Bench judgment of this Court in Income Tax Appeal No. 3731 of 2010 decided on 27.07.2012 (*Commissioner of Income-tax, Central III vs. M/s. Cello Plast, Mumbai*), at Bombay.

7. The facts noted supra show a provision in Will by original owner and mother of the assessee Smt. Kamlabai Moghe which gave only Ground Floor to the assessee. First Floor was given to his brother Shri P.M. Moghe. Shri P.M. Moghe was not alive when the property was sold on 07.07.2006 for Rs.1,30,00,000/-. Smt. Kamlabai had provided an overriding title in favour of her daughters i.e. three sisters of the assessee. Kamlabai expired on 18.05.1988 and her Will dated 17.12.1978 became effective. The owner of first portion Shri P.M. Moghe had a son who expired in 1985 i.e. before death of Kamlabai. Thus, on

itl104.13

7

the date of death of Kamlabai, P.M. Moghe had only three daughters surviving him. Shri P.M. Moghe in turn made a Will and bequeathed his share in the name of his sisters. The assessee only had one daughter. Clause No. 7 in Will dated 17.12.1978 executed by Smt. Kamlakar is reproduced in para 4 of the Assessment order.

It reads as under :

*“7. The house is apportioned between Shri Purushottam and Shri Kamlakar as detailed above and accordingly they will become owner of their respective portions. Each one will take care of his portion and will maintain the said property. The portion owned by each of them can be sold to third party for Rs.50,000/-. No one out of these two sons should mortgage his portion without the consent of other son. Finally, I sincerely desire that this property which is constructed by my husband Dr. Mahadeo Atmaram Moghe out of his hard earned money should go to only my two sons namely Shri Purushottam and Shri Kamlakar and their sons. If anybody out of both the sons does not have son or if son is not alive, then his portion will go to the other brother. If both of them do not have any son and if their son is not alive, then my daughter-in-law Mrs. Usha w/o Purushottam Moghe and Mrs. Leela w/o Kamlakar Moghe will enjoy the property. But they will never get ownership of property. My daughters-in-law will not have any right to mortgage, sale or gift such property. This property should be given to my legal heirs – two sons, their sons or to my daughters. On this condition,*

*this property is apportioned by me by this WILL.”*

8. This situation, therefore, shows that after expiry of Shri P.M. Moghe on 20.03.1996, the assessee and his three daughters were faced in a peculiar position. They resolved the situation and a family settlement was reduced into writing. It was agreed that at the time of sale, each sister shall be given Rs.15 lakh and each niece shall be given Rs. Five lakh. Accordingly, when the property was sold on 07.07.2006, this family settlement has been given effect to. It is, therefore, obvious that in the absence of such family settlement and payment, the sale of property on 07.07.2006 by the assessee could not have materialized. The CIT(A) in the Appeal filed by the assessee has not accepted payment of Rs. Five lakh each given to three nieces and that finding has been maintained even by the ITAT. The assessee has not questioned it in further appeal. As such, the only question is whether amount of Rs.45 lakh paid to his sisters has been rightly accepted as expenditure in connection with transfer of property. The sisters had a title in property and without their cooperation there could not have been any sale. In this situation, we do not find any error in concurrent findings reached by the CIT as also by the ITAT. In the light of arguments advanced before us, we find that Question No. 1 attempted to be raised by the revenue before us does not



itl104.13

9

arise here for determination as the substantial question of law.

9. Section 54EC of the Act needs to be looked into while considering the second question sought to be raised by the Revenue. A substantive provision under Section 54EC(1) mandates investment within a period of six months after the date of transfer. Its sub-section (3) explanation (b) defines long term specified assets for making investment for the period from 01.04.2006 till 31.03.2007. The National Highway Authority Bonds and bonds issued by Rural Electrification Corporation Limited are specified to be such assets. The assessee has transferred the premises on 07.07.2006 and, therefore, was duty bound to invest within six months i.e. by 06.01.2007. Thus, statutorily, he had time of six months to make investment and the fact that he did not make this investment at any time during this period when bonds were available is, therefore, not relevant. The law gives assessee right to choose. Here, the assessee wanted to invest in REC Bonds and has in fact invested in those bonds on 24/27.01.2007. His specific stand that bonds were not available during this period, is not found to be incorrect or false by any of the authorities.

10. A show cause notice dated 03.12.2009 was issued to the assessee in connection with this investment and to it assessee

itl104.13

10

replied on 15.12.2009 stating that the issue No. VI of said Bonds was on top from 01.07.2006 to 02.08.2006. Issue No. VI-A opened on 22.01.2007 and the assessee who was waiting for making investment in REC Bonds only, invested Rs.22 lakh on opening date i.e. on 22.01.2007. It is claimed that the assessee was thus prevented by reasonable cause from making investment within six months. Though the issue has been looked into by the Assessing Officer, he has not found the statement that the issue No. VI-A opened on 22.01.2007 incorrect.

11. The Division Bench of this Court at Bombay, while deciding Income-tax Appeal No. 3731 of 2010 (supra) has considered almost identical facts. Those facts are given in paragraph 9 of said judgment. The period of six months in said matter expired on 21.09.2006. Bonds were purchased by the assessee on 31.01.2007. As this investment was beyond the period of six months, the Assessing Officer disallowed it on 26.09.2008. CIT(A) by the order dated 05.02.2009 maintained this order. The ITAT on 19.06.2010 allowed the assessee's appeal. This order of ITAT was questioned before the High Court. In paragraph 17, this Court has observed - "Thus, the availability of the bonds only for a limited period during this period cannot prejudice the assessee's right to exercise the same up to last date. The bonds were

admittedly not available during the said period.” More reasons are given in paragraph 21 by the Division Bench.

12. Shri Parchure, learned counsel, has however argued that the Bonds issued by the National Highway Authority of India were available and hence the assessee ought to have invested in those bonds within the stipulated period of six months. We find this contention difficult to accept. Section 54EC gives assessee an option to invest either in bonds of National Highway Authority of India or then in bonds of Rural Electrification Corporation Limited. The said provision does not stipulate that the investment has to be in any bond whichever is available. Both bonds carry different benefits and hence deliberately the Parliament has given option to the assessee to invest in any one out of two as per his choice. In a given case, the assessee may choose to invest in both. However, discretion is conferred upon the assessee, who is the best judge of his own needs and interests. He cannot be forced to invest in the bond whichever is available because period of six months is about to expire. This option or discretion given by the Parliament to the assessee needs to be honoured here. If said option was available when period of six months was to expire and could have been expressed by the assessee when said period was about to expire, the situation would have been otherwise. In present matter, the

itl104.13

12

REC Bonds became available in VI-A issue on 22.01.2007 and, therefore, investment made therein cannot be said to be after an undue or unreasonable delay. The investment has been made at the earliest possible opportunity. We, therefore, do not find that Question No. 2 sought to be raised also arises in the present matter as a substantial question of law.

13. In the light of this discussion, we find no merit in this appeal. It is accordingly dismissed. However, without any orders as to costs.

**JUDGE**

**JUDGE**

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