

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

D.B. Income Tax Appeal No. 52 / 2018

Pr. Commissioner of Income Tax-I, Jodhpur.

----Appellant

Versus

Shri Prakash Chand Modi, D-128, Shastri Nagar, Jodhpur.

----Respondent



For Appellant(s) : Mr. K.K. Bissa.

For Respondent(s) : Mr. Anjay Kothari.

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

HON'BLE MR. JUSTICE RAMCHANDRA SINGH JHALA

Order

11/05/2018

After hearing learned counsel for the parties, we have perused the finding given by the learned ITAT, Jodhpur in the impugned judgment dated 12.07.2017, in which following finding is given by the ITAT, which reads as under:-

5. *On consideration of the entire factual position we are of the view that the CIT (A) was justified in granting the benefit claimed u/s 54 by the assessee as the property sold was a residential house and there is no dispute that the assessee had made investment in the new residential house for which the deduction is being claimed. The section no where defines the quantum of construction on the land so as to be eligible to be defined as a residential unit. The only condition is that there should be a residential house capable of being used as a residence by any person. There is no even no condition that the same should be in*



occupation of the assessee himself and it can be used as residence even by any other person also. The registered sale deed also speaks about the residential house and there is reference of the constructed building thereon. There had been room, bathroom, kitchen area in the said property which are the important ingredient of the residential house. The photograph of the property attached with the registered sale deed, also indicate that there is constructed residential house over the said property. The plot in question was being acquired in financial year 1982-83 and the construction and other development work was being carried out in 2006-07 and 2008-09, and the approval of the concerned authorities and charges being paid had also been submitted and there is electricity connection for which regular chcharges are being paid. There were four adjacent plot and a common residential house consisting of six rooms was made thereon. The other three plots belonged to the assessee's father and two brothers. There was a complete residential house. The assessee had invested the entire capital gains in the construction of new residential house. We therefore, uphold the finding of the CIT(A) in deleting the said addition so made and dismiss the appeal filed by the department."

The aforesaid finding of learned ITAT is in consonance with the adjudication by the Hon'ble Supreme Court in case of Sanjeev Lal Etc. Vs. Commissioner of Income Tax & Anr., reported in 365 ITR 389 (SC), which reads as under:-

"22. In addition to the fact that the term "transfer" has been defined under [Section 2\(47\)](#) of the Act, even if looked at the provisions of [Section 54](#) of the Act which



gives relief to a person who has transferred his one residential house and is purchasing another residential house either before one year of the transfer or even two years after the transfer, the intention of the Legislature is to give him relief in the matter of payment of tax on the long term capital gain. If a person, who gets some excess amount upon transfer of his old residential premises and thereafter purchases or constructs a new premises within the time stipulated under [Section 54](#) of the Act, the Legislature does not want him to be burdened with tax on the long term capital gain and therefore, relief has been given to him in respect of paying income tax on the long term capital gain. The intention of the Legislature or the purpose with which the said provision has been incorporated in the Act, is also very clear that the assessee should be given some relief. Though it has been very often said that common sense is a stranger and an incompatible partner to the [Income Tax Act](#) and it is also said that equity and tax are strangers to each other, still this Court has often observed that purposive interpretation should be given to the provisions of the Act. In the case of [Oxford University Press v. Commissioner of Income Tax \[\(2001\) 3 SCC 359\]](#) this Court has observed that a purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax. It has also been said that harmonious construction of the provisions which subserve the object and purpose should also be made while construing any of the provisions of the Act and more particularly when one is concerned with exemption from payment of tax. Considering the aforesaid observations and the principles with regard to the interpretation of Statute pertaining to the tax laws, one can very well interpret the provisions of [Section 54](#) read with [Section 2\(47\)](#) of

the Act, i.e. definition of "transfer", which would enable the appellants to get the benefit under [Section 54](#) of the Act.



23. Consequences of execution of the agreement to sell are also very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immovable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed.

24. Thus, a right in respect of the capital asset, viz. the property in question had been transferred by the appellants in favour of the vendee/transferee on 27th December, 2002. The sale deed could not be executed for the reason that the appellants had been prevented from dealing with the residential house by an order of a competent court, which they could not have violated.

25. In view of the aforestated peculiar facts of the case and looking at the definition of the term "transfer" as defined under [Section 2\(47\)](#) of the Act, we are of the view that the appellants were entitled to relief under [Section 54](#) of the Act in respect of the long term

capital gain which they had earned in pursuance of transfer of their residential property being House No. 267, Sector 9-C, situated in Chandigarh and used for purchase of a new asset/residential house.

26. The appeals are, therefore, allowed with no order as to costs. The impugned judgments are quashed and set aside and the Authorities are directed to re-assess the income of the appellants for the Assessment Year 2005-2006, after taking into account the fact that the appellants were entitled to the relief, subject to fulfilment of other conditions."



In view of above facts no substantial question of law emerges for consideration. Consequently the instant income tax appeal is hereby dismissed while following the aforesaid judgment.

(RAMCHANDRA SINGH JHALA)J.

(GOPAL KRISHAN VYAS) J.