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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
R-145
\+ **<u>ITA 299/2003</u>**

SHANTI BANERJEE (deceased) by LRs. ..... Appellant
Through: Mr Rajat Navet, Advocate with Mr Kushagra Pandit, Advocate.

versus

DY. COMMISSIONER OF INCOME TAX ..... Respondent
Through: Ms Suruchi Aggarwal, Senior Standing Counsel with Ms Lakshmi Gurung, Junior Standing Counsel with Ms Radhika Gupta, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R
% **17.11.2015**

S.Muralidhar, J:

1. This is an appeal by the Assessee against the order dated 20th March, 2003 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 3626/D/98 for the Assessment Year 1993-94.

2. While admitting this appeal on 12th November, 2003, the following question was framed the Court for consideration:

> "Whether in the facts and in the circumstances of the case, the Tribunal was correct in law in holding that income from sale of flats in question was to be assessed as business profits and not as long term capital gains?"

3. The facts of the case are that the Assessee, (who died during the pendency

of this appeal and is substituted by her legal representatives) was a housewife, having no source of income other than the pension of her deceased husband. The Assessee was the owner of property No. F-23, Hauz Khas, New Delhi wherein she was residing since 1956.

4. The Assessee entered into an agreement with M/s Exclusive Properties (hereinafter 'the Builder') on 27th May, 1991 to construct flats on 985 sq. yards of land on her property. In terms of the said agreement the Builder was to develop and construct at its own costs and resources and in lieu thereof the Builder was to be allotted proprietary rights of 40% in the built up area and 60% was to be retained by the Assessee.

5. In the return filed for Assessment year 1992-93 the Assessee claimed that she did not have any residential house. She offered to tax capital gains arising from the transfer of the 40% rights to the builder in terms of Section 54 F read with Section 45 of the Act. This was on the basis that in lieu of the consideration in terms of money, the Builder had constructed the new residential house.

6. On 17th December, 1992 the Assessee entered into an agreement for sale of two of the flats from her share in the property to close family friends. In the return filed for the AY 1993-94 she declared Rs. 11,55,802/- as long term capital gain in terms of Section 54 F (3) of the Act. It is not in dispute that she paid the long term capital gains tax computed on the above basis.

7. The return was picked up for scrutiny and on 18th March, 1996 the

Assessing Officer (AO) passed an assessment order in which, after setting out the clauses of the agreement entered into with the Builder, the AO concluded that the agreement was "in the nature of adventure for trade on the property". The AO proceeded to treat the sum received by the Assessee pursuant to the agreement for sale dated 27th May, 1992 not as long term capital gain but as a business income.

8. After dismissal of the appeals of the Assessee by the Commissioner of Income Tax (Appeals) and the ITAT by orders dated 13th January, 1998 and 20th March, 2003 respectively the Assessee filed the present appeal.

9. The Court has heard the learned counsel for the parties.

10. The principal question to be decided is whether in the facts and circumstances of the case, it may be said that having sold two flats that fell to her share pursuant to the collaboration agreement with the Builder, the Assessee had undertaken an 'adventure' in the nature of trade warranting the receipt to be treated as business income.

11. The issue, it appears, is no longer *res integra*. In ***G. Venkataswami Naidu and Co. v. CIT [1959] 35 ITR 594***, the Supreme Court observed that while a single "plunge" in the waters of trade may be enough, a mere purchase of property "if that is all that is involved in the plunge may fall short of anything in the nature of trade". It was emphasised that what might be in the nature of trade would depend on the facts and circumstances of a particular case.

12.The expression 'adventure in the nature of trade' was again considered by the Supreme Court in ***Raja Bahadur Kamakhya Narain Singh v CIT [1970] 77 ITR 253***. It was observed that if a transaction was in the ordinary line of the assessee's business, there would be no difficulty in concluding that it was a trading transaction. But where it was not, the facts had to be carefully assessed to determine if it was in the nature of trade.

13. On more or less similar facts, this Court held in favour of the Assessee in ***Commissioner of Income Tax v R.V. Gupta [2002]261 (Del)***. In that case the Assessee was a senior IAS officer and was allotted a plot of land admeasuring 664 sq. m by the Delhi Development Authority (DDA) in a group housing society in New Delhi. The Assessee constructed six flats on the said plot and for meeting cost of construction he and his brother entered into agreement to sell with friends in respect of four of them and retained the remaining two for their own use. The question was whether the transaction was an adventure in the nature of trade and therefore the profits accruing therefrom were to be taxed under the head "income from business or profession." This Court was of the view that there was no change in the character of the said plot from the year of its allotment till the year the flats were constructed thereon. There was no material on record from which it could be said that the assessee ever had the intention to exploit the plot as a commercial venture. Merely because six flats had been constructed out of which four were sold to friends it would not show that it was 'an adventure in the nature of trade'.

14. The facts of the present case are no different. Merely, because the Assessee sold two plots that fell to her share pursuant to collaboration agreement in respect of the property owned by her since 1956, it would not render the transaction as an 'adventure in the nature of trade' leading to the resultant receipt as business income in her hand. Further the Assessee offered the long term capital gains arising out from the same flats to tax and filed her return on that basis.

15. Consequently, the question is answered in the negative i.e. in favour of the Assessee and against the Revenue. The impugned order dated 20th March, 2003 of the ITAT and the corresponding orders of the CIT (A) and the AO hereby set aside. The appeal is allowed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

NOVEMBER 17, 2015
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HIGH COURT OF DELHI
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