

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 162 OF 2016

The Principal Commissioner of Income Tax-16 .. Appellant
v/s.
Mr. Fardeen Khan
(legal heir of late Mr. Feroz Khan) .. Respondent.

WITH
INCOME TAX APPEAL NO.285 OF 2016

The Pr. Commissioner of Income Tax-16 .. Appellant.
v/s.
Mr. Fardeen Khan .. Respondent.

Mr. P. C. Chhotaray, for the Appellant, in both the Appeals.
Mr. Porus Kaka, Sr. Advocate with Mr. Divesh Chawala i/b. Mr. A. K. Jasani, for the Respondent, in both the Appeals.

**CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE,JJ.**
DATE : 25th JULY, 2018.

P.C:-

These two Appeals under Section 260-A of the Income Tax Act, 1961 (the Act), challenge the order dated 25th February, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order dated 25th February, 2015 is in respect of Assessment Year 2008-09 of the two Respondents who are father and son, jointly owning property at Bangalore.

2 Mr. Chhotaray, learned Counsel appearing for the Revenue

urges the following identical re-framed questions of law, in both the appeals, for our consideration:

“(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in law in holding that there was no transfer of land within the meaning of Section 2(47)(v) of the Act and no capital gains arose?”

“(b) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in law in holding that there was no transfer of land within the meaning of Section 2(47)(vi) of the Act and no capital gains arose?”

“(c) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in law in holding that the full value of the property transferred was not Rs.55 Crores for the purposes of computing capital gains?”

“(d) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in law in holding that the assessee had converted capital asset into stock-in-trade?”

“(e) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in law in holding that the assessee had converted capital asset into stock-in-trade on the date when he made the application for conversion of agricultural land into non-agricultural land, particularly when that was not even the claim of the assessee?”

“(f) Without prejudice to the claim of the Revenue that there was no conversion of capital asset into stock-in-trade, whether the Tribunal, having held that there was conversion of capital asset into stock-in-trade, was justified in not simultaneously holding that the assessee was liable to tax on capital gains u/s. 45(2) of the Act when the capital asset was transferred to M/s. Godrej Properties Ltd.,?”

“(g) Whether on the facts and in the circumstances of the case and in law, the order of the Tribunal is perverse?”

3 The Respondent-Assessee (father and son) had during the previous year relevant to Assessment Year 2008-09 had, on 20th April, 2007 entered into a Development Agreement with M/s. Godrej Properties

Ltd. By the above agreement dated 20th April, 2007, 13 acres of land at Tumkur Road, Bangalore owned by the Respondent, was given for development to M/s. Godrej Properties Ltd., In terms of the Development Agreement dated 20th April, 2007, an amount of Rs.13.75 Crores was paid as a deposit to the Respondent by M/s. Godrej Properties Ltd., The above agreement, *inter alia*, gave powers to M/s. Godrej Properties Ltd., to obtain various permission, commence construction of homes and sell them. The agreement, *inter alia*, provided that Rs.55 Crores was to be the notional costs of the land and on sale of the constructed property, 30% of its sale proceeds, were to be received by Respondent from M/s. Godrej Properties Ltd. This, after having paid an amount of Rs.55 Crores being the costs of the land to the Respondent.

4 We shall refer to litigative facts from Income Tax Appeal No.162 of 2016. During the course of assessment proceedings for the subject Assessment Year, the Assessing Officer called upon the Respondent to explain why the transactions of developing homes/ villas on its land by M/s. Godrej Properties Ltd., should not be considered to be transfer in terms of Sections 2(47)(v) and 2 (47)(vi) of the Act. This is to levy capital gains tax on transfer of land under the Development Agreement.

5 The Respondents point out to the Assessing Officer that the land on which the houses are to be built, was agricultural land till 31st March, 2005 and, thereafter, it was converted into non-agricultural land. The land which was a subject of Development Agreement, was converted into stock-in-trade w.e.f. 1st April, 2007. The Development Agreement was in the nature of Memorandum of Understanding (MoU) and/or non-concluded agreement. In any event, it was pointed out that the Development Agreement not being registered under the Indian

Registration Act, there was no transfer in terms of Section 2(47)(v) of the Act. Similarly, it was contended that Section 2(47)(vi) of the Act, would also have no application in the present facts as there was no transfer of the land to M/s. Godrej Properties Ltd., and the possession of the land continued to be with the Respondent-Assessees.

6 However, the Assessing Officer placed reliance upon the decision of this Court in *Chaturbhaj Dwarkadas Kapadia v/s. CIT 260 ITR 491* to conclude that the transfer under Section 2(47)(v) of the Act had taken place when the Development Agreement dated 20th April, 2007 was executed. It was also held that the consideration received for the land on which homes are to be constructed, was Rs.55 Crores and the aforesaid land had been converted into stock-in-trade on 1st April, 2007. Thus, capital gains had arisen in the subject Assessment Year when the Development Agreement dated 20th April, 2007 itself, was executed.

7 Being aggrieved, Respondent filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By order dated 27th December, 2012, the Respondent's appeal was dismissed by the CIT (A).

8 Being aggrieved with the order dated 27th December, 2012, Respondent filed a further appeal to the Tribunal. By the impugned order, the Tribunal held that there was no transfer within the meaning of Section 2(47)(v) of the Act. This was for the reason of an amendment made in 2001 to the Indian Registration Act, wherein a transfer for the purposes of Section 53A of the Transfer of Property Act, would not take effect, unless, such an agreement is registered. Admittedly, the Development Agreement dated 20th April, 2007 is not a registered document. It further held that the decision of this Court in *Chaturbhaj D. Kapadia (supra)*, would have

no application to the present facts in view of the change in law with regard to part performance w.e.f. 2001 onwards. So far as Section 2(47)(vi) of the Act is concerned, the impugned order held that there was no transfer in terms of Section 2(47)(vi) of the Act, as it is evident from the Development Agreement dated 20th April, 2007 which provides that there has been no grant of possession of the land to M/s. Godrej Properties Ltd., for the purposes of Sections 2(47)(v) and (vi) of the Act. Further, M/s. Godrej Properties Ltd., did not have exclusive possession of the land but had only permitted user/ license to the land from the Respondent. The impugned order further records the fact that no development activities was carried on the land owned by the Assessee and in view of the market conditions, it was found that the project was not viable and a second Development Agreement was entered into between the parties which was later on revised by Supplemental Agreement dated 27th July, 2012. Thus, the Development Agreement dated 20th April, 2007 was annulled.

9 It was in the aforesaid circumstances that the impugned order noted that no transfer had taken place in the previous year relevant to subject Assessment Year. It further notes that the Development Agreement, indicating the value/ costs of land at Rs.55 Crores as a notional cost and providing only a benchmark to compute the consideration payable to the Respondent on the probable sales of the houses to be built on the land, which would take place in future. Thus, in the subject Assessment Year, there was no consideration received and/or accrued. This, particularly, so as there was no certainty of quantum of sales of the homes built on the land.

10 In the context of the above fact, we shall now deal with each

of the proposed identical questions of law in both the Appeals urged on behalf of the Revenue:

11 **Re. Questions (a):-**

- (i) Mr. Kaka, learned Senior Counsel appearing for the Respondent-Assessee submits that this issue now stands concluded in favour of the Respondent-Assessee and against the Appellant- Revenue by the decision of the Apex Court in *CIT v/s. Balbir Singh Maini 398 ITR 531*.
- (ii) In the aforesaid case, the Supreme Court held that in terms of Section 2(47)(v) of the Act, transfer of any immovable property in part performance of a contract of the nature referred in Section 53A of the Transfer of Property Act will be completed only when the Agreement under Section 53A of the Transfer of Property Act is registered under the Indian Registration Act. Admittedly, the Agreement dated 20th April, 2007 has not been registered. Consequently, there is no transfer in terms of Section 2(47)(v) of the Act.
- (iii) The reliance by the Revenue upon the decision of this Court in *Chaturbhuj D. Kapadia (supra)* is misplaced. This is so, as it would have no application to the present facts, as the law prevailing at that time, did not require an Agreement of part performance under Section 53A of the Act, to be registered, as now required under the law for transfer to take place.
- (iv) In the above view, this question does not give rise to any substantial question of law. Thus, not entertained.

12 **Re. Question (b):-**

- (i) Mr. Chhotaray, learned Counsel appearing for the Revenue submits that there has been a transfer of land within the meaning of Section 2(47) (vi) of the Act and, according to him, the decision of this Court in Chaturbhuj D. Kapadia (supra) has considered transfer in an identical circumstances to be a transfer under Section 2(47)(vi) of the Act.
- (ii) We closely perused the decision of this Court in Chaturbhuj D. Kapadia (supra) and found that the finding in the above decision rests on Section 2(47)(v) of the Act and not on Section 2(47)(vi) of the Act, as submitted by the Revenue. Thus, the reliance upon the aforesaid decision is not correct.
- (iii) Mr. Kaka, learned Senior Counsel submits that this issue is no longer *res integra* for the reasons, it is concluded by the decision of the Apex Court in Balbir Singh Maini (supra). In the above case, it has been held that for Section 2(47)(vi) of the Act to be applicable, the transfer of the immovable property should enable its enjoyment as the purported owner thereof i.e. even though there is no transfer of title in law, there is a transfer of title in fact. In the facts before the Apex Court as in this case, the possession of the property which was given to the Developer for specific purposes to develop the property. It is not a right akin to the ownership of the land by the Respondent-Assessee. In fact, the clause of the Agreement as referred to, in the Assessment Order makes it clear that M/s. Godrej Properties Ltd., has been granted license to enter upon and develop the property. However, the possession of the said land continues to be with the Respondent-Assessee.

- (iv) Further, the proviso to clause (6) of the Development Agreement clearly provides that nothing contained in the agreement shall be construed as grant of possession in part performance of the Agreement under Sections 2(47)(v) and 2(47) (vi) of the Act.
- (v) In the above view, this question also does not give rise to any substantial question of law. Thus, not entertained.

13 **Re. Question (c):-**

- (i) In view of our answer to Questions (a) and (b), as no transfer of the said land had taken place under the Development Agreement, the occasion to compute capital gains as proposed, would not arise.
- (ii) In the above view, no occasion arises to consider the submissions on behalf of the Revenue. However, at this, Mr. Chhotaray, learned Counsel for the Revenue states that Rs.13.75 Crores which was paid to the Respondent should be brought to tax in the subject Assessment Year. We note that, the Agreement itself records an amount of Rs.13.75 Crores is received as a deposit from M/s. Godrej Properties Ltd. Therefore, it is not an income. In any event, it is a settled position in law that every receipt is not necessarily income. It is for the Revenue to establish that the receipts constitutes the income (see CIT v/s. Parimisetti Seetharamamma 57 ITR 532 [SC]). This is so, as no transfer of land has taken place under the Development Agreement dated 20th April, 2007. Therefore, the Revenue must make out a case that the receipt is an income and under what head would it fall. In the absence of any such an exercise, this submission does not assist the Revenue.

- (iii) Thus, this Question being academic in the present facts, does not give rise to any substantial question of law. Thus, not entertained.

14 **Re. Questions (d), (e) and (f):-**

- (i) All these questions are academic in the present facts. The issue of the value and the date on which the capital assets was converted into stock-in-trade, arises for consideration only when stock-in-trade is transferred/ sold by the Assessee. This is as provided under Section 45(2) of the Act.
- (ii) We have in our answer to Questions (a) & (b) above, held that no transfer of land has taken place under the Development Agreement dated 20th April, 2007. Consequently, the occasion to arrive at the value at which the capital assets was converted into stock-in-trade and the date when it was so done, becomes academic.
- (iii) Therefore, Mr. Chhotaray's contention that this appeal requires admission as the impugned order dated 25th February, 2015 of the Tribunal placed reliance upon the decision of its Co-ordinate Bench and he relied upon the Appeal therefrom being *CIT v/s. Shri Ramesh A. Walavalkar* (Income Tax Appeal (L) No.1823 of 2012) having been admitted on 12th March, 2013. The aforesaid admission is of no assistance to the Revenue, as in the present case, on facts, we have found that there is no transfer of the stock-in-trade i.e. land that has taken place in the previous year relevant to the subject Assessment Year. Therefore, the issue of determining the date of conversion of capital asset into stock-in-trade for the purposes of

bringing it to tax under Section 45(2) of the Act, would become academic in this Assessment Year.

- (iv) Thus, the three questions do not give rise to any substantial questions of law. Thus, not entertained.

15 **Re. Question (g):-**

- (i) The grievance of the Revenue before us that, the impugned order is perverse, as it has not properly taken into account the date of conversion of its capital assets i.e. land into stock-in-trade. According to the Revenue the date taken by the impugned order, is contrary to the facts on record. This issue has become academic in view of the fact that no transfer has taken place in the previous year relevant to the subject Assessment Year. Therefore, the date of conversion of the capital assets into stock-in-trade is rendered academic in the present proceedings.
- (ii) Besides the above, nothing has been even remotely suggested to allege that the impugned order of the Tribunal is otherwise perverse.
- (iii) In view of the above, this question also does not give rise to any substantial question of law. Thus, not entertained.

16 We may point out that so far as Questions (d), (e), (f) and (g) are concerned, there is no occasion in the present proceedings to examine the correctness of the date and value of conversion of capital assets into stock-in-trade as taken by the Tribunal. This, in view of our

upholding the finding of the Tribunal that no transfer had taken place in the previous year relevant to the Assessment Year 2008-09. It is, therefore, made clear that the year in which the authorities hold transfer of land as stock-in-trade has taken place, the date of conversion of capital assets into stock-in-trade and also its value at that point of time would be examined by the Authority, independently of the finding on this issue by the Tribunal. Our not entertaining this Appeal, should not be deemed to be taken as our approving the impugned order of the Tribunal with regard to the date and valuation of the conversion of the capital assets into stock-in-trade.

17 Therefore, the Assessment Year, when the authority hold that the transfer/ sale of the land has taken place, the authorities in that year would determine independently of the impugned order of the Tribunal as well as our order, the date of conversion of capital assets into stock-in-trade and its value. This particularly so, as Questions (d), (e), (f) and (g) have not been entertained in the present facts, as they are academic. However, they could arise in some subsequent years and, if they do arise, while assessing the Respondent for Assessment Year in which it holds transfer has taken place, the authorities will determine the date and value of conversion of capital assets into stock-in-trade, after considering the Respondent's submission.

18 Accordingly, both the **Appeals** are **dismissed**. No order as to costs.

(SANDEEP K. SHINDE,J.)

(M.S.SANKLECHA,J.)

Smita
Rajnikant
Joshi

Digitally signed
by Smita
Rajnikant Joshi
Date:
2018.07.31
10:57:42 +0530