IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 21691 of 2016
With
SPECIAL CIVIL APPLICATION NO. 21741 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH sd/-
and
HONOURABLE MR.JUSTICE B.N. KARIA sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**NO**
2	To be referred to the Reporter or not ?	**NO**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

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VINODBHAI SHAMJIBHAI RAVANI....Petitioner(s)
Versus
DEPUTY COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE 1,....Respondent(s)

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Appearance:
MR. S.N. SOPARKAR, LD. SR. ADV WITH MR. HARDIK V VORA, ADVOCATE for the Petitioner(s) No. 1
MR SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 15/02/2017

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.0. As common question of law and facts arise in both these petitions, however with respect to different assessee, both these petitions are decided and disposed of together by this common judgment and order.

2.0. Feeling aggrieved and dissatisfied with the impugned notice dated 03.03.2016 under Section 148 of the Income Tax Act, by which, the Assessing Officer has sought to reopen the assessment for AY 2009-10 alleging inter alia that income chargeable to tax for AY 2009-10 has escaped assessment within the meaning of Section 147 of the Income Tax Act, the assessee has preferred present Special Civil Application under Article 226 of the Constitution of India.

2.1. A similar notice has been issued and the assessment year 2009-10 is sought to be reopened in the case of another assessee Alpesh Gokulbhai Kotadia, the said assessee Alpesh Gokulbhai Kotadia has preferred Special Civil Application No.21741 of 2016 challenging the impugned notice under Section 148 of the Income Tax Act.

3.0. For the sake of convenience, the facts of Special Civil Application No. 21691 of 2016 are narrated, which are as under:

3.1. That the assessee is partner in various firms and deriving income from business and other sources. The assessee filed return of income for AY 2009-10 declaring total income at Rs. 4,73,750/- on 22.03.2010.

3.2. A search under Section 132 was carried out at the business as well as residential premises of partnership firms of the Infrastructure Group of cases along with assessee on 19.01.2011. The assessee did not offered any additional income in the return filed in response to the notice under Section 153 A of the Act. That in the order passed under Section 143(3) r/w Section 153 A of the Act, returned income was accepted by the department after making detailed inquiry.

3.3. That subsequently a notice under Section 148 of the Act was issued on 3.3.2016 for reassessing the income of the petitioner whereby the AO has sought to reopen the assessment for AY 2009-10. That the petitioner vide communication dated 13.05.2016 requested the AO to treat the original return of income as return of income in response to the above notice and simultaneously also requested for copy of the reasons recorded. That vide communication dated 18.05.2016, the AO furnished the reasons recorded for reopening of the assessment for AY 2009-10. The reasons recorded to reopen the assessment for AY 2009-10, which read as under:

> *"During the course of search proceedings on 28.11.2013, in Vaishno Devi Group" of Surat a document marked as Page no.25 of Annexure A-7 was found and seized from the residence of Shri Rajesh Vaghani, one of the partners of the firm M/s. S. R. Corporation, which is a copy of "Sauda Chitthi" dated 12.03.2008 entered between Shri Alpesh G Kotadia, the assessee and Shri Vinod S Ravani on one hand as seller and Shri Sharad P Kakadia & Shri Rajesh Vaghani on other side of the deal as buyers for purchase of land situated at village-Vankala, Block No. 49 A, Dist. Surat having area of 30311 sq yard. Therefore, total sale consideration of for above land according to sauda chittihi comes to Rs. 18,79,58,511/-.*
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> *2. Further, another pieces of evidence were found and seized from same premises are pages no. 11 and 12 of seized documents given id mark Annexure A-2. The two pages under discussion are explained as "provisional" P & L Account of M/s. S.R. Corporation. On perusal of the provisional P & L Account, it was noticed that the major entry in the debit side is "Land Purchase" of Rs. 18,79,58,511/-.*
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> *4. The Investigation Wing had called for sale/ purchase deeds of the specific land at Village Vankala, Block No. 49 A, Dist. Surat., wherein it was found that Shri Prakash Vallabhbhai Sutariya, PAN - AKGPS9462A, Shri Chintanbhai Jadavbhai Patel and Shri Rajendrakumar Kantilal Patel and Shri Paraskumar Natwarlal Patel have sold land situated at Vankala, Block No. 49 A, Dist. Surat to purchaser- Shri Popat Harjibhai Kakadia. Shri Popat H Kakadia is father of Shri Sharad Kakadia who happens to be signatory of "sauda chittihi"(Document marked as Page no.25 of Annexure A-7*

referred above). Total transaction has recorded consideration of Rs. 56,39,500/- as apparent from the table below

Sr.No	Agreement No.	Name of the seller	Name of the Purchaser	Amount of consideration
1	No. SRT/1/ATV/ 11509/2008 Area 14397 sq yrds.	Shri Chintanbhai Jadavbhai Patel	Shri Popat Harjibhai Kakadia	30,09,500/-
2	No. SRT/1/ATV/ 13004/2008 Area 8336.051 sq yards	Shri Rajendrakumar Kantilal Patel & Shri Paraskumar Natwarlal Patel	Shri Popat Harjibhai Kakadia	10,25,000/-
3	No. SRT/1/ATV/ 13002/2008 Area 7577.793 sq yards	Shri Prakashbhai Vallabhbhai Sutaria	Shri Popat Harjibhai Kakadia	15,75,000/-

5. While recording the statement of Shri Rajesh Vaghani, one of the key person of Vaishno Devi Group was specifically asked to explain this entry found in provisional P & L Account of M/s. S.R. Corporation. In answer to this question, it was stated by him that this entry pertains to the land brought by one of partners of the firm Shri Shri Popat Harjibhai Kakadia as his capital in the firm M/s. S.R. Corporation, it was further stated that Shri Popat Harjibhai Kakadia has purchased this land from (1) Shri Chintanbhai Patel, (2) Shri Rajendrakumar Kantilal Patel and (3) Shri Prakashbhyai Vallabhbhai Sutaria for a consideration of Rs. 56,39,500/-. In addition to this, the firm has also spent an amount of Rs. 18,23,19,011/- towards conversion of agricultural land to Non Agricultural land and removing the unauthorized occupants of the property. However, when specifically asked to give name and address of the parties to whom such payments were made, he stated that all the payments were made in cash and he is not remembering the name and address of hte parties.

As mentioned in para 2 the "Sauda Chitty" was prepared by Shri Alpesh G Kotadia as evidenced by his signature and Shri Vinod S Ravani in the capacity of seller, but the deed was executed between persons mentioned in above table (sellers) and Shri Popta H Kakadia (purchaser) for consideration of Rs. 56,39,500/- only. In view of the above fact Shri Alpesh G Kotadia and Shri Vinod S Ravani has received balance amount of Rs.18,23,19,011/- in cash.

6. Assessment Order u/s 143(3) r.w.s. 153 A of the Income

Tax Act, 1961 in the case of the assessee- Shri Vinod Shamjibhai Ravani, has already been passed at an assessed income of Rs. 5,92,969/- on 21.03.2013. The assessee is a partner in M/s. Shrusti Corporation, Sarjan Corporation, Ravani Developers and Swapna Enterprise engaged in the business of real estate development .On further perusal of the "sauda chitthi" dated 12.03.2008, it is narrated therein that the period of total payment shall be 24 months which falls in hte FY 2008-09 relevant to AY 2009-10 as per the given percentage therein as follows:

(i) 1st Installment - 30% starting from the present date (i.e. 12.03.2008) to 31 days.

(ii). 2nd installment- 17.5%

(iii). 3rd installment- 17.5%

(iv) 4th installment- 17.5%

(v). 5th installment- 17.5%

7. In view of the above, I have reason to believe that the income of the assessee has escaped assessment to the extent of Rs. 18,23,19,011/- during the AY 2009-10. I am therefore, satisfied that this is fit case for invoking the provision of Section 147 of the Act for assessment year 2009-10.

Therefore, your income for the said assessment year has escaped assessment."

3.4. Thus, from the reasons recorded, it appears that the assessment for AY 2009-10 is sought to be reopened on the ground that during the search in the case of Shri Rajesh Vaghani, one Sauda Chitthi was found which was signed by assessee as one of the seller along with Mr. Alpesh Kotadia as other seller (petitioner of Special Civil Application No. 21741 of 2016)and total consideration as per sauda chitthi comes to Rs. 18,79,58,511/-. As per the reasons recorded as the sale deed which was made by different sellers sale consideration was less than what was recorded in sauda chitthi and recorded consideration of Rs. 56,39,500/- and therefore, AO was of the opinion that difference between Rs. 56,39,500/- (as mentioned in the sale deed) and Rs. 18,79,58,511/- (as per sauda chitthi) is received by the assessee i.e. Vinodbhai Ravani (Petitioner of Special Civil Application No.21691 of

2016) and Alpesh Kotadia (Petitioner of Special Civil Application No.21741 of 2016) in cash and therefore, according to the AO the income to the extent of Rs.18,79,58,511/- has escaped assessment.

3.5. On receipt of the reasons recorded to reopen the assessment for AY 2009-10, the petitioner - assessee by letter dated 1.6.2016 objected to the reassessment proceedings and requested for sized material / documents and statements recorded for raising detailed objections. On receiving the details, thereafter the petitioner raised the objection to the reassessment proceedings with detailed submissions. The reassessment proceedings were objected by the assessee mainly on the following grounds:

(i) Land never belonged to either assessee or his family members of related parties;

(ii) Sauda Chitthi is dated 12.03.2008 and got cancelled immediately as confirmed by the person from whom copy of the same was found. Further final sale deed was made by altogether different buyers and sellers on 27 and 28 March 2008. Thus, the transaction is pertaining to AY 2008-09 whereas the reopening is made for AY 2009-10;

(iii) There is no corroborative or any other evidence to show that the payment has been received by assessee:

(iv) In the statement recorded under section 132(4) buyer, from whose possession copy of sauda chitthi was found has confirmed the fact that said sauda chitthi was cancelled and no payment was ever made to assessee and they have directly purchased the land from farmers;

(v) Loose paper alone cannot be made the basis of addition without any evidence;

(vi) Reasons recorded clearly suggest that it was based on outside information and assessing officer has neither applied his mind nor satisfied himself before recording reasons to the effect that income of assessee was actually escaped assessment during the year under consideration. When both sauda chitthi and sale deed were not made in the year under consideration, there cannot be any income escaped from those transactions during the year under consideration;

(vii) There is no failure on assessee's part to disclose any material facts for assessment;

(viii) Reopening is sought to be invoked beyond the period of four years from the last date of assessment year and in absence of any failure on part of assessee, it is time barred.

3.6. That by communication/ order dated 20.12.2016 AO has overruled the objection raised by the petitioner. Hence, petitioner has preferred present Special Civil Applications under Article 226 of the Constitution of India challenging the impugned notice under Section 148 of the Act and impugned reassessment proceedings for AY 2009-10.

4.0. Shri S.N. Soparkar, learned Senior Advocate has appeared on behalf of respective assessee and Shri Sudhir Mehta, learned advocate for the revenue.

5.0. It is vehemently submitted by Shri S.N. Soparkar, learned counsel for the assessee that impugned notice under Section 148 of the Income Tax Act and impugned reassessment proceedings for AY 2009-10 are bad in law and contrary to the provision Section 147 of the Act.

5.1. It is vehemently submitted by Shri S.N. Soparkar, learned counsel for the assessee that the assessment for AY 2009-10 is sought to be reopened by the AO solely relying upon the sauda chitthi recovered at the time of search of the premises of one Shri Rajesh Vaghani and that the statement of Shri Rajesh Vaghani, recorded during the course of search. It is vehemently submitted that as such the sauda chitthi was made on 12.03.2008 by the assessee as one of the seller which was immediately got cancelled on 26.03.2008. It is submitted that even thereafter also no transaction has taken place between the petitioner-assessee and any other person and it has come on record that subsequently the sale deed was executed by the original lands owners in favour of one Shri Popat Kakadiya. It is submitted that entire sale consideration was received by the original land owners Shri Chintan Patel, Shri Rajendra Patel and another. It is submitted that therefore, as such no sale consideration was received by the petitioner-assessee. It is submitted that as such there is no material / tangible material available with the AO to form any belief that any amount was received by the petitioner-assessee with respect to land in question, for which, sauda chitthi was made on 12.03.2008. It is submitted that even from the statement of Shri Rajesh Vaghani during the course of search, the person from whose possession sauda chitthi was found, had categorically stated on oath in the statement recorded under Section 132(4) of the Act that the said sauda chitthi was cancelled and the transaction of sale of the property was made subsequently on 27.03.2008 between two buyers and sellers. It is submitted that therefore in absence of any tangible material available with the AO to form a reasonable belief that any income by cash was received by the assessee, the AO is not justified in reopening the concluded the assessment under Section 143(3) of the Act on mere suspicious and surmise and conjectures.

5.2. It is further submitted by Shri Soparkar, learned counsel for the petitioner-assessee that even the land never belonged to either of the assessee or his family members or related parties. Even the assessee is also not party to the actual sale transaction of land. It is submitted that therefore, there is no corroborative or any other evidence to show that any payment has been received by the assessee.

5.3. It is further submitted by Shri Soparkar, learned counsel for the petitioner-assessee that even in the statement recorded under Section 132(4), Shri Rajesh Vaghani from whose possession copy of sauda chitthi was found has confirmed the fact that said sauda chitthi was cancelled and no payment was ever made to assessee and they have directly purchased the land from farmers. It is submitted that therefore, once the sauda chitthi was cancelled, there is no question of any income derived and / or no income accrued on cacelled transaction. In support of his above submission, Shri Soparkar, learned counsel for the petitioner has heavily relief upon the decision of the Bombay High Court in the case of Commissioner of Income Tax-9, Mumbai vs. Lok Housing and Construction Ltd reported (2015) 232 Taxman 159 (Bom), against which SLP has been filed and same came to be dismissed.

5.4. It is further submitted by Shri Soparkar, learned counsel for the petitioner-assessee that even otherwise the sauda chitthi was not made in the year under consideration, it is submitted that even according to the AO the sauda chitthi has dated 12.03.2008 i.e AY 2008-09. Therefore, when the sauda chitthi is not made in the year under consideration, there cannot be any income escaped from those transactions during the year under consideration. It is submitted that the assessee is following mercantile system of accounting as is clear from the assessment order. It is submitted that therefore, also learned AO has materially erred in reopening the assessment for AY 2009-10 on the ground that income chargeable to tax has escaped assessment for AY 2009-10 within the meaning of Section 147 of the Act.

Making above submissions and relying upon the above decision, it is requested to allow the present petitions.

6.0. Present petition is vehemently opposed by Shri Sudhir Mehta, learned counsel for the revenue. It is submitted that the sauda chitthi dated 12.03.2008 was signed by the respective petitioners-assessee, in which, sale consideration was stated to be Rs. 18,79,58,511/-. It is submitted that however, subsequently when sale deed was executed it has been found that sale deed is executed for sale consideration of Rs. 56,39,500/- only. It is submitted that therefore, even Shri Rajesh Vaghani one of the key person of the Vaishno Devi Group from whose possession sauda chitthi was recovered has categorically admitted that firm has also spent an amount of Rs. 18,23,19,011/- towards conversion of agricultural land to non agricultural land and removing unauthorized occupant of the property. However, when he was asked to give the name and address of the parties to whom such payments were made, he has categorically admitted that all the payments were made in cash and he not remembering the name and address of the parties. It is submitted that therefore, there was huge difference with respect to sale consideration mentioned in the sauda chitthi signed by the petitioners-assessee signed in the capacity of seller, the AO has rightly formed the belief that the petitioners-assessee have received the balance amount of Rs. 18,23,19,011/- in cash.

6.1. Now, so far as contention on behalf of the petitioners-assessee that as the sauda chitthi dated 12.03.2008 falls within the AY 2008-09 and therefore, the AO is not justified in reopening the assessment for AY 2009-10 on the ground that the income chargeable to tax has escaped assessment for AY 2009-10, it is vehemently submitted that in the sauda chitthi it is stated that the period of total payment shall be 24 months which falls in the FY 2008-09 relevant to AY 2009-10. It is submitted that therefore, the AO has rightly formed the belief /

reason to believe that the income of the assessee has escaped assessment to the extent of Rs. 18,23,19,011/- during the AY 2009-10. It is submitted that therefore, it cannot be said that the impugned notices under Section 148 of the Act are illegal and / or bad in law and / or contrary to the provision of Section 147 of the Act.

Making above submissions, it is requested to dismiss the present petition.

7.0. Heard the learned counsel for the respective parties at length.

7.0. At the outset, it is required to be noted that respective petitioners have challenged the reopening of the assessment for AY 2009-10. The reasons recorded for reopening of the assessment for AY 2009-10 are reproduced herein above. We have considered and gone through the reasons recorded for reopening of the assessment for AY 2009-10. We have also considered and gone through the statement of Shri Rajesh Vaghani as well as sauda chitthi recovered during the search, on the basis of which the assessment for AY 2009-10 have been reopened, from the file produced by Shri Sudhir Mehta, learned counsel for the revenue.

7.1. From the reasons recorded, it appears that on the basis of the statement of Shri Rajesh Vaghani recorded during the course of search proceeding on 28.11.2013 in Vaishno Devi Group and on the basis of one sauda chitthi dated 12.03.2008 signed by the respective petitioners, according to the AO, the sale consideration for the land in question comes of Rs.18,79,58,511/- and subsequently when the sale deed has been executed, the same is for sale consideration of Rs. 56,39,500/- and therefore, the balance amount of Rs. 18,23,19,011/-

can be said to have been received by the petitioners - assessee in cash as on money and therefore, the same is required to be added into their income and therefore, AO has formed a belief that the income of the assessee has escaped assessment to the extent of Rs. 18,23,19,011/- during the AY 2009-10.

7.2. However, it is required to be noted that the respective petitioners- assessee were never owners of the land in question. It is also required to be noted that in fact the subsequently sale deeds are executed by the original land owners in favour of one Shri Popatbhai Kakadia. It is an admitted position that the respective petitioners - assessee have never executed any sale deeds. Therefore, nothing is on record that any sale consideration was received by the respective petitioners- assessee. Therefore, merely on the basis of the sauda chitthi dated 12.03.2008 signed by the respective petitioners- assessee (signed and executed though admittedly they were not owners of land for which the sauda chitthi was executed / signed), it cannot be said that any amount is received by the petitioners- assessee.

7.3. Even considering the statement of Shri Rajesh Vaghani, upon which much reliance has been placed by the revenue /AO, he has categorically stated that the sauda chitthi dated 12.03.2008 was subsequently immediately cancelled. From the statement of the said Shri Rajesh Vaghani, it does not appear that he has stated that he paid any amount to the respective petitioners. Under the circumstances, as such there is no tangible material available with the AO to form a reasonable belief that the amount of Rs. 18,23,19,011/- has been received by the respective petitioners - assessee in cash. As observed herein above, as such there is no material whatsoever with the AO that any amount of sale consideration has been received by the respective petitioners -

assessee. The formation of opinion by the AO thus seems to be on surmise and conjecture, which cannot be the basis for reopening the assessment of concluded assessment, in exercise of powers under Section 147 of the Income Tax Act.

7.4. Even otherwise, it is required to be noted that according to the AO, the valuation as per the sauda chitthi dated 12.03.2008 signed by the respective petitioners - assessee would come to Rs. 18,79,58,511/- and the sale deeds have been executed for total consideration of Rs.56,39,500/- and therefore, the balance amount of Rs. 18,23,19,011/- is considered to be on money received by them in cash. As observed herein above,. according to the AO the said sauda Chitthi was signed by both the petitioners. In case of both the petitioners- assessee, the AO has reopened assessement for AY 2009-10 on the ground that the income chargeable to tax has escaped assessment to the extent of Rs.18,23,19,011/- during the year 2009-10. If the sauda chitthi was signed by both the petitioners-assessee, in that case, in case of both the petitioners- assessee, it cannot be said that the income to the extent of Rs.18,23,19,011/- has escaped assessment during AY 2009-10. In case of both the assessee the resultant effect would be that according to the AO Rs.36,46,38,222/- is received in cash. If the difference is found to be Rs. 18,23,19,011/- (in case of each petitioners), it can be said to be non application of mind. No reasonable and prudent person would form such a belief. Under the circumstances also, on the aforesaid ground alone, the impugned reassessment proceedings cannot be sustained. On the aforesaid ground, the present petitions are required to be allowed by quashing and setting aside the impugned notices under Section 148 of the Act.

7.5. As observed herein above, even as per the statement of Shri

Rajesh Vaghani, the sauda chitthi was immediately cancelled. There is no tangible material along with the sauda chitthi that any sale consideration is received by the respective assessee. As observed herein above, subsequently the sale deeds have been executed by the original land owners in favour of one Shri Popat Kakadiya and the original land owners have received full sale consideration of Rs. 56,39,500/-. Under the circumstances, it cannot be said that any income had accrued to the assessee. Once no income had accrued to the assessee, the formation of opinion by the AO that the assessee have received Rs.18,23,19,011/- in cash has been vitiated and as such, for which, there is no basis. Under the circumstances also, the impugned notice to reopen the assessment for AY 2009-10 deserves to be quashed and set aside.

8.0. In view of the above and for the reasons stated above, both the petitions succeed. The impugned notices dated 03.03.2016 and the impugned reassessment proceeding in case of respective petitioners for AY 2009-10 are hereby quashed and set aside. Rule is made absolute to the aforesaid extent in each of the petitions. No costs.

sd/-

(M.R. SHAH, J.)

sd/-

(B.N. KARIA, J.)

Kaushik