

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 2ND DAY OF JULY 2018 / 11TH ASHADHA, 1940

ITA.No. 99 of 2016

AGAINST THE ORDER/JUDGMENT IN ITA 456/COCH/2015 of I.T.A.TRIBUNAL, COCHIN
BENCH DATED 6.1.2016

APPELLANT(S)/APPELLANT/RESPONDENT/REVENUE

THE PRINCIPAL COMMISSIONER OF INCOME TAX
AAYAKAR BHAVAN, KOZHIKODE 673 001

BY ADVS.SRI.CHRISTOPHER ABRAHAM, SC, INCOME TAX DEPARTMENT
SRI.K.M.V.PANDALAI, SC, INCOME TAX DEPARTMENT

RESPONDENT(S)/RESPONDENT/APPELLANT/ASSESSEE:

KALATHINGAL FAIZAL RAHMAN
"ROSE VILLA", FEROKE
KOZHIKODE 673 631

R1 BY ADV. SRI.K.I.MAYANKUTTY MATHER
R1 BY ADV. SRI.R.JAIKRISHNA

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 02-07-2018,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S EXHIBITS

ANNEXURE-A : COPY OF THE ASSESSMENT ORDER DATED 26.3.2013.

ANNEXURE-B : COPY OF APPELLATE ORDER DATED 10.6.2015 PASSED BY THE COMMISSIONER OF INCOME TAX (APPEALS).

ANNEXURE-C : COPY OF ORDER DATED 6.1.2016 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL.

RESPONDENT'S EXHIBITS

EXHIBIT R1(a) : COPY OF CERTIFICATE FROM THE VILLAGE OFFICER, CHELAMBRA.

EXHIBIT R1(b) : COPY OF CERTIFICATE FROM THE VILLAGE OFFICER, CHELAMBRA.

EXHIBIT R1(c) : COPY OF CERTIFICATE FROM THE AGRICULTURAL OFFICER, KRISHI BHAVAN, CHELAMBRA.

EXHIBIT R1(d) : COPY OF CERTIFICATE FROM THE VILLAGE OFFICER, CHELAMBRA.

//TRUE COPY//

PS TO JUDGE.

'C.R.'

K.VINOD CHANDRAN & ASHOK MENON, JJ.

ITA No.99 of 2016

Dated this the 2nd day of July, 2018

J U D G M E N T

Vinod Chandran, J.

The Revenue is in appeal raising substantial questions of law against the order of the Income Tax Appellate Tribunal, which affirmed the order of the first appellate authority finding the sale of the assessee's land to be not assessable as capital gains under Section 45 of the Income Tax Act, 1961 ('Act', for short). The questions of law framed are the following, as seen from the memorandum :

“(i) Is not the decision of the Tribunal to treat the transferred property as agricultural land against law and facts as there is no conclusive evidence to prove that agricultural operations were being carried on in the transferred asset during the two years prior to the date of its transfer?

(ii) whether the Tribunal is justified in holding that agricultural operations were carried on in the transferred land relying on the certificate issued by the Village Officer, in view of the decision of the Hon'ble High Court of Kerala in the case of Smt. Asha George vs. Income Tax Officer [(2013) 351 ITR 123]?

(iii) was the Tribunal justified in holding that the transferred asset was an agricultural land in spite of the fact that there were four buildings therein?”

2. The learned Standing Counsel for the Revenue submitted that the assessee is a partner in various firms and has also substantial land holdings. The assessment as carried out for the year 2010-2011 was with respect to sale of a property having an extent of 2.42 acres in Survey No.485 and Re-survey No.146/2 of Chelembra Amsam. The property was sold for a total consideration of Rs.3,38,63,200/-. The said property was purchased in the year 1981 by the father of the assessee and devolved on the assessee on the death of his father. The property was purchased, from the assessee, by the owners of a newspaper, who have later made constructions thereon wherein the offices and press of their Calicut edition is now located.

3. The assessee had not declared any capital gains in the return of income filed for the year, and on scrutiny under Section 143 of the Act, the specific sale was sought to be assessed as capital gains. The only evidence produced by the assessee to prove that the land was agricultural land, was a certificate issued by the Village Officer, which was found to be not reliable. The learned Standing Counsel relies on

(2013) 351 ITR 123 (Ker) [Smt.Asha George v. Income Tax Officer] to contend that such certificates issued long after the sale cannot be the basis of a conclusion as to whether the property was agricultural land or not. The learned Standing Counsel has also relied on *(1993) 204 ITR 631 (SC) [Sarifabibi Mohmed Ibrahim and Others v. Commissioner of Income Tax]* in which certain tests were laid down, which were specifically looked into by the Assessing Officer (AO), to negative the claim of the assessee.

4. The learned counsel for the respondent-assessee would also rely on *Sarifabibi (supra)* to point out that what is urged before this Court are essentially questions of facts which this Court cannot go into in a revision wherein only substantial questions of law are to be considered. The learned counsel would take us to clause (iii) of section 2(14) of the Act and contend that only those lands which come under (a) and (b) of clause (iii), can be included as 'capital asset'. Profits and gains arising from sale of such property alone can be taken for assessment as income. The learned counsel would also refer to Annexure-R1(a) to

Annexure-R1(d) produced subsequently before this Court, to contend that this evidences the fact that the land is an agricultural land. The assessment order is read over to point out that the test as prescribed in *Sarifabibi* (*supra*) has been applied wrongly to the facts of the case. The AO proceeded on the premise that there was a building constructed in the said property subsequent to the purchase, which is not relevant for considering whether the land is exempted from the definition of “capital Gains” as an agricultural land. A Division Bench of the Madras High Court in (2016) 388 ITR 514 (Mad) [*Principal Commissioner of Income Tax v. Mansi Finance Chennai Ltd.*], which according to the assessee, is in similar circumstances and is heavily relied on. The decision in AIR 1957 SC 768 [*Commissioner of Income Tax, West Bengal v. Benoy Kumar Sahas Roy*] is relied on for the manner in which the fact of agricultural operations being carried on has to be ascertained.

5. At the outset, it has to be stated that the argument of the learned counsel for the assessee that an agricultural land could be deemed to have been

included for the purpose of assessment under Capital Gains, only if the land comes within the distance as specified in clauses (a) and (b) of section 2(14)(iii) of the Act, cannot be countenanced. Sub-section (14) of Section 2 of the Act is the definition of Capital Gains and this does not include those items enumerated under clauses (i) to (vi). Clause (iii) of section 2(14) reads as under:

“2(14) : Capital asset” means property of any kind held by an assessee, whether or not connected with his business or profession;

xxx

xxx

xxx

xxx

but does not include-

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) agricultural land in India, not being land situate-

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand; or

(b) in any area within the distance, measured aerially,-

(I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.

Explanation.- For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year."

6. Agricultural land in India, except those coming within (a) & (b) of the above provision is excluded from the definition of Capital Asset. As has been rightly noticed by the Tribunal, there is no definition for agricultural land in the subject statute and it has to be understood as in common parlance, for which evidence has to be produced to establish the fact. Since there is no definition of agricultural land in the Act *Sarifabibi* (supra) observed: "*whether a land is agricultural land or not is essentially a question of fact*" (sic para 12). On facts if a property of the assessee is found to be agricultural land, then it cannot be included in the definition of

'capital asset'. Even then, if such property is found to be within the description and distance specified, in sub-clauses (a) and (b) as extracted herein above; it cannot qualify for exclusion from being included as capital assets. Hence the ascertainment of the fact whether a property would qualify for exclusion has to be done independently.

7. We agree that the use to which the property was put to by the purchaser would not be relevant for ascertaining whether at the time of sale and in the hands of the purchaser it was an agricultural land. In the present case, before the AO, the assessee is said to have produced a certificate issued by the Village Officer. We also see other certificates issued by the Village Officer at Annexure-R1(a) and that issued by the Agricultural Officer at Annexure-R1(b). But, we do not think that either of these documents were produced before the AO, since the date of order itself is 26.3.2013, and Annexure-R1(a) is issued on 14.5.2013. Annexure-R1(b) though issued on 20.3.2013, the AO does not speak of such a certificate from the agricultural officer. We also do not see any signature or seal of

the officers in those certificates. Further documents produced are Annexures-R1(c) and R1(d) dated 23.1.2015 issued before the hearing by the Tribunal; which as seen from Annexure-C order, was on 15.12.2015. However, they are not seen produced before the Tribunal. None of the documents produced before us can be relied on to establish the fact and as is trite, there could be no determination of facts by this Court in a revision; based on documents not produced before the fact finding authorities.

8. We see that the AO has dealt with the certificate of the Village Officer produced before him and has negatived the same as having been issued long after the sale. Without any substantiating material, the said document could not be relied on, was the finding of the AO, which we are inclined to accede to. The A.O also relied on the decision of the Supreme Court in *CWT Vs Officer-in-Charge (Court of Wards) Paigah 1976 3 SCC 864* the finding in which was noticed in *Sarifabibi* which portion we also deem appropriate to extract:

“On appeal, a Constitution Bench of this Court held that: (a) inasmuch as

agricultural land is exempted from the purview of the definition of the expression "assets", it is "impossible to adopt so wide a test as would obviously defeat the purpose of the exemption given". The idea behind exempting the agricultural land is to encourage cultivation of land and the agricultural operations. "In other words this exemption had to be necessarily given a more restricted meaning than the very wide ambit given to it by the Full Bench of the Andhra Pradesh High Court." (b) What is really required to be shown is the connection with an agricultural purpose and *user* and not the mere possibility of *user* of land by some possible future owner or possessor, for an agricultural purpose. It is not the mere potentiality but its actual condition and intended *user* which has to be seen for purposes of exemption. (emphasis added) (c) "The person claiming an exemption of any property of his from the scope of his assets must satisfy the conditions of the exemption." (d) "The determination of the character of land, according to the purpose for which it is meant or set apart and can be used, is a matter which ought to be determined on the facts of each particular case." (e) The fact that the land is assessed to the Land Revenue as agricultural land under the State Revenue Law is certainly a relevant fact but it is not conclusive."

9. *Sarifabibi* (supra) also referred to a Bench decision of the Bombay High Court, (1988) 172 ITR 95 [C.I.T Vs V.A. Trivedi], with approval, in the following manner:

“18. The Bench observed that to ascertain the true character and the nature of the land, it must be seen whether it has been put to use for agricultural purposes for a reasonable span of time prior to the relevant date and further whether on the relevant date the land was intended to be put to use for agricultural purposes for a reasonable span of time in the future. Examining the facts of the case from the said point of view, the Bench held that the agreement entered into by the assessee with the Housing Society is the crucial circumstance since it showed that the assessee agreed to sell the land to Housing Society admittedly for utilisation for non-agricultural purposes. The sale-deeds were executed four months after the agreement of sale and even if any agricultural operations were carried on within the said span of four months, – the Bench held – it was evidently in the nature of a stopgap arrangement. On the date the land was sold, the Bench held, the land was no longer agricultural land which is evident from the fact that the assessee had obtained permission even in August 1966 to convert the said land to non-agricultural purposes.”

The Court then examined the factors in favour of and against the assessee to hold that, those against far outweighed those in favour. Pertinently the fact of the sale having been made for an obvious non agricultural purpose along with the user of the land having not been proved are two grounds found against the assessee.

10. Now the question arises as to whether there was any evidence produced to show the land having been put to use for agricultural purpose. The village officer's certificate was the only document produced by the assessee before the AO, which as has been held in *Smt.Asha George (supra)* cannot be relevant. *Mansi Finance Chennai Ltd (supra)* and the decisions referred to therein according to the learned counsel are in similar circumstances. But on a reading of the decision we do not think so. In the said case there was a certificate by the Village Administrative officer produced by the assessee company. Its memorandum and articles of Association showed as the objects to be financing business and other businesses. The assessee company had admitted income from financing and from other sources, one of which was agricultural income by lease of the property to a third party. The agricultural income received were brought into the account books and was offered for income-tax. The overall circumstances were found to indicate that the assessee has purchased the property for the purpose of earning agricultural income, held the property for a

considerable time with routine agricultural activity being carried on and the subject sale was only to take advantage of the boom in real estate market. The assessing officer called for information from the Tahsildar and based on that report rejected the claim. Reliance placed on such report was faulted since the same was obtained behind the back of the assessee and without offering an opportunity to the assessee to controvert it by cross-examining the author of the report. We do not see any identity on facts.

11. Now we come to the other decisions cited in *Mansi Finance Chennai Ltd (supra)*. (2014) 369 ITR 558 (Mad) [*Mrs. Sakunthala Vedachalam Vs. Asst. Commissioner of Income Tax*] was a case in which the classification of the land in the revenue records showed it to be agricultural land. Here admittedly the classification was "garden land" which could be used for cultivation like coconut plantation, as claimed by the assessee, or for construction of any type of buildings; residential or commercial. Hence the classification in the revenue records in the instant case is not of any consequence. (1981) ITR 671 (Guj) [*Dr. Motibhai Patel Vs. CIT*] and

(1984) 145 ITR 208 (Bom) [CWT Vs. H.V. Mungale] noticed the decision in *Officer in Charge (Court of wards)* to find that if there is evidence of agricultural operations being carried on and the land is classified so in the revenue records then that raises a presumption in favour of the assessee which has to be rebutted by the Department to disallow the exemption from being taxed as sale of capital asset. Such a presumption does not arise here for reason of no such evidence being placed by the assessee before any of the fact finding authorities. *(1976) 106 ITR 917 (Guj) [CIT Vs Manilal Somnath]* and *(1994) 209 ITR 946 (Bom) [Gopal C. Sharma Vs. CIT]* both observed that the potential value of the property, on non-agricultural considerations and large price, obtained by reason of the market conditions would not detract from the essential nature of the land at the time of the sale and the use to which it was put, prior to the sale. *(2006) 284 ITR 511 (Mad) [CIT Vs. Udayakumar]* and *(2004) 270 ITR 40 (P&H) [CIT Vs. Smt. Savita Rani]* were both on Section 54B, which is not applicable here. *(2012) 208 Taxman 394 (Karn) [CIT*

Vs. Madhukumar.N (HUF)] interpreted Section 2(14) (iii); just as we did herein above.

12. We cannot but observe that ***Mansi Finance Chennai Ltd (supra)*** quoted with approval certain paragraphs of the Tribunal order, which principle we agree with. Of vital significance is the intention of the assessee at the time of purchase and the use to which the land is put to in the interregnum; before the sale. This would reveal the nature of the land and whether it was an adventure in the nature of trade. The intention would be revealed from the use to which the land is put to and the enhanced profit received on sale cannot be the sole consideration. In proving such intention the assessee should lead evidence and at the first instance the burden is squarely on the assessee as has been held in ***(1990) 185 ITR 318 (Ker) [Kalpetta Estates Ltd. Vs. CIT]***. Once the burden is discharged as has been held in the cited decisions, the onus to prove otherwise shifts to the Revenue. We do not see the assessee in the subject case having discharged the burden.

13. The contention of the assessee itself was that the income derived from the property was not such that a return under the Agricultural Income Tax Act could be filed. We have, in this context, to notice that the property itself was having an extent more than 2.42 acres and the limit of exemption as available under the Agricultural Income Tax Act is for an amount of Rs.5,000/-. The claim of the assessee was that there was a coconut plantation in the land. The assessee also had a claim that there was an adjacent property having a still larger extent of 4.71 acres, which too was agricultural land having coconut plantation. The devolution of the said lands was; as of the subject land; on the death of the assessee's father, who was the prior owner who purchased it. If the claim is accepted, then necessarily, there would have been a return filed, since the large extent would definitely raise a presumption that the income obtained would be above Rs.5,000/-. The Inspector who visited the site reported that this adjacent property also did not show a routine agricultural operation and was merely dotted with certain coconut trees. Though the use to which the

subject property is put to after sale may not be relevant; the nature of the adjacent property which remained still with the assessee; on which a similar claim was raised is definitely relevant. If at all the assessee's claim was that there was more expenditure than income, then at least for aggregation purposes, the assessee would have claimed the losses under the individual return filed under the Act, which has also not been done.

14. We have already held that the mere fact that the land does not come under clauses (a) or (b) of section 2(14)(iii) would not lead to exclusion of the property from the definition of capital asset when it is sold. Inclusion made under sub-clauses (a) and (b) is to include even agricultural lands situated within a particular distance from a municipality or a cantonment board, in the definition of Capital Asset. Whether the land is eligible to be excluded as agricultural lands essentially is a question of fact which has to be established by the assessee. The sole evidence placed on record by the assessee is the certificate of the village officer long after the sale; which as held by

the AO; going by the binding precedent in *Asha George (supra)* cannot be relied on. The Tribunal too relied on this sole piece of evidence; which according to us is not sufficient to raise a presumption in favour of the assessee. The First Appellate Authority relied on the certificate holding that the Inspector of Income Tax also reported the facts existing after three years of sale. We agree that the Inspector's report of the developments in the subject land after sale cannot be of any consequence. But the lie and nature of the adjacent property which also is asserted to be agricultural land; goes a long way in understanding the intention of the assessee. The assessee has failed to establish the land to be an agricultural land. We cannot also accede to the argument of the learned counsel that in setting aside the Tribunal's order, we would be deciding on a question of fact. The question of fact was decided by the AO which was interfered with by the appellate authority and the Tribunal solely for reason of the certificate issued by the Village Officer; which is against the binding declaration in *Asha George (supra)*.

15. As held in **Benoy Kumar Sahas Roy's** case, the basic conception which is the *sine qua non* of a land being classified as agricultural; is the cultivation carried on; which implies the expenditure of human skill and labour. A coconut plantation would not require regular tilling of land or sowing of seeds; as is required for paddy or wheat. But the trees are to be tended and the land prepared for better yield. A proper coconut plantation requires the opening of a basin, around the root of the tree, by mere arrangement of earth; for retention of water and application of fertilizer or manure. The trees also have to be regularly pruned at its crown since pest infestation occurs at the top which is the yielding end. Crown cleaning involves removal of dried inflorescent spikes and spathe and application of pesticides; all of which involves human labour and skill. In addition to these plant protection measures like weed management has to be carried out and for this there is always an inter-crop of vegetables or spices like clove, nutmeg etc. These are all routine agricultural operations required for a concerted effort of coconut plantation. Coconut trees

yield even otherwise but that is not an agricultural operation intended at consumption or for trade and commerce as has been held in **Benoy Kumar Sahas Roy** (*supra*). The specific case of the assessee as seen from his objection as extracted in the AO's order is:

“it is stated that it is a coconut garden and in these days it is difficult to get a person to pluck coconuts..most of the time the nuts fall and collected by the neighbourhood. Eventually the plucking and other charges like manure, etc will only be sufficient from the income arising out of sale of coconuts. So there is nothing to offer as agricultural income.”

Such casual consumption of nuts is not the result of agricultural operations. The said submission of the assessee stands against his claim.

16. On the question of law framed as (i), we find that the decision to treat the transferred property as agricultural land is against law and facts, especially since the assessee has not established that the land in his possession and sold by him was an agricultural land put to use for agricultural purposes. There could not have been any reliance placed on the certificate issued by the Village Officer and it did not raise a valid presumption in favour of the assessee. The reliance so

placed was also against the binding precedent in ***Asha George***. The second question of law framed is also answered against the assessee and in favour of the Revenue. The third question of law is on facts and the report of the Inspector as relied on by the AO spoke of two factory buildings in the adjacent property. We do not find any relevance to that fact. The orders of the first appellate authority and the Tribunal are set aside.

When judgment was delivered, the learned counsel for the assessee as a last ditch effort relied again on ***Officer-in-Charge (court of wards)*** to pray for a remand; as was granted there. That was a case in which a remand was made in the appeal by the Revenue for reason of the High court having held in favour of the assessee finding the land sold to be a agricultural land by reason only of the categorisation of land in the revenue records, which was held to be inconclusive. There is no such cause agitated here and there is no further evidence adduced by the assessee before any of the fact finding authorities. Even before us; self serving documents have been produced, issued by

Government officials long after the sale. It is not clear how the State officials were persuaded to issue such certificates; when at that point of time the land stood converted to use for an industry. Yet again we draw further sustenance to our reasoning from the judgment of the Constitution Bench of the Hon'ble Supreme Court. We extract a paragraph from the decision in *Officer-in-Charge (court of wards)*:

“24. For the reasons already given, we do not think that the term “agricultural land” had such a wide scope as the Full Bench appears to have given it for the purposes of the Act we have before us. We agree that the determination of the character of land, according to the purpose for which it is meant or set apart and can be used, is a matter which ought to be determined on the facts of each particular case. What is really required to be shewn is the connection with an agricultural purpose and user and not the mere possibility of user of land, by some possible future owner or possessor, for an agricultural purpose. It is not the mere potentiality, which will only affect its valuation as part of “assets”, but its actual condition and intended user which has to be seen for purposes of exemption from wealth tax. One of the objects of the exemption seemed to be to encourage cultivation or actual utilisation of land for agricultural purposes. If there is neither anything in its condition, nor anything in evidence to indicate the intention of its owners or possessors, so as to connect it with an agricultural purpose, the land could not

be “agricultural land” for the purposes of earning an exemption under the Act. Entries in revenue records are, however, good prima facie evidence. We do not think that all these considerations were kept in view by the taxing authorities in deciding the question of fact which was really for the assessing authorities to determine having regard to all the relevant evidence and the law laid down by this Court. The High Court should have sent back the case to the assessing authorities for deciding the question of fact after stating the law correctly.”

We do not find any way to remand the issue and the principle behind the exemption; succinctly stated by their Lordships, equally apply in the case of the Income Tax Act. The Appeal is allowed. No order on costs.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
ASHOK MENON
JUDGE