

IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD

TUESDAY, THE SEVENTH DAY OF JANUARY
TWO THOUSAND AND TWENTY FIVE

PRESENT

THE HONOURABLE THE CHIEF JUSTICE ALOK ARADHE
AND
THE HONOURABLE SRI JUSTICE J SREENIVAS RAO

INCOME TAX TRIBUNAL APPEAL NO: 527 OF 2006

Appeal filed under Section 260-A of the Income Tax Act, 1961 against the Order dated 09-06-2006 passed in I.T.A.No. 885/Hyd/2003 for Assessment year 1997-98 on the file of the Income Tax Appellate Tribunal, Hyderabad 'A' Bench, Hyderabad preferred against the Assessment Order dated 21-02-2002 passed in PAN/GIR No. ACHPA5446M/S-1759/Wd.4(2) on the file of the Income Tax Officer, Ward 4(2), Hyderabad.

Between:

Smt. Shantha Vidyasagar Annam, 3-4-612, Narayanaguda, Hyderabad

...Appellant

AND

Income Tax Officer, Ward-4(2), Hyderabad

...Respondent

Counsel for the Appellant : Mr S Ravi, Senior Counsel
Rep. M/s R S Associates

Counsel for the Respondent : Mr J V Prasad
Sr. SC for Income Tax Department

The Court delivered the following Judgment :

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

AND

THE HON'BLE SRI JUSTICE J.SREENIVAS RAO

I.T.T.A. No.527 OF 2006

JUDGMENT: *(Per the Hon'ble the Chief Justice Alok Aradhe)*

Mr. S.Ravi, learned Senior Counsel representing M/s.R.S.Associates for the appellant.

Mr. J.V.Prasad, learned Senior Standing Counsel for Income Tax Department for the respondent.

2. This Appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') has been filed by the assessee against the order dated 09.06.2006 passed by the Income Tax Appellate Tribunal, Hyderabad Bench 'A', Hyderabad (hereinafter referred to as 'the Appellate Tribunal'). The subject matter of the appeal pertains to assessment year 1997-98. The appeal was admitted on the following substantial questions of law:

"i) Whether on the facts and circumstances of the case, the findings of the Income Tax Appellate Tribunal that the appellant has handed over possession of the entire property enabling the developer to enjoy 60% of the constructed area of the building is not perverse?

ii) Whether on the facts and circumstances of the case, the appellate authority was correct in law in holding

that the appellant is liable to capital gains tax during the assessment year 1997-98?"

3. Facts leading to filing of this appeal in nutshell are that the assessee is a Non Resident Indian (NRI). A notice under Section 148 of the Act was issued to her. In response to the said notice, assessee filed return of income on 27.11.2000, wherein the assessee declared her income as Nil. However, in the note accompanying the return, the assessee stated that she had entered into a development agreement on 04.05.1996 with a builder for construction of residential flats on sharing basis. A copy of the agreement along with the return was enclosed. According to the assessee, the possession of the land owned by her was handed over to the builder only for the purposes of construction and the builder did not get any right to transfer the property or to execute sale deeds. Therefore, according to the assessee, the same was not a transfer within the meaning of Section 2(47)(v) of the Act read with Section 53 of the Transfer of Property Act, 1882. In reply, it was stated that consideration was to be received, after completion of construction and only on receipt of possession of built up area, the property could be said to have been transferred. Thus, according to the assessee, she did not have any liability for capital gain for the year ending 31.03.1997.

4. The assessing officer disagreed with the assessee and a show cause notice dated 23.03.2001 was issued to her proposing to complete the assessment under Section 144 of the Act after determination of the long term capital gain arising out of the transaction at Rs.13,78,900/-. The assessee submitted a reply on 03.04.2001, wherein it was stated that the built-up area was received from the builder from the year 1999 onwards and therefore, the relevant financial year through which capital gain arose was 1998-99, relevant for the assessment year 1999-2000. It was also stated that the assessee received 6560 square feet of residential built-up area on surrender of her land measuring 570 square yards. According to the assessee, she is eligible to claim exemption under Section 54F of the Act as consideration can be said to have been re-invested in residential house property.
5. The assessing officer by an order dated 21.02.2002 *inter alia* held that the development agreement dated 04.05.1996 is a transfer within the meaning of Section 2(47) of the Act. The assessing officer further held that the assessee is not entitled to benefit of Section 54F of the Act. The assessing officer, therefore, determined the taxable capital gain at Rs.13,78,900/- and held that the assessee is liable to pay a total tax of Rs.7,50,673/- along with interest under Sections 234A and 234B of the Act.

6. The assessee challenged the aforesaid order in an appeal. The Commissioner of Income Tax (Appeals) by order dated 21.03.2003 *inter alia* held that the development agreement dated 04.05.1996 amounts to transfer as all other conditions mentioned in Section 53A of the Transfer of Property Act, 1882 except the condition of receipt of consideration were satisfied. It was further held that the receipt of consideration is not mandatory condition to be specified under Section 2(47)(v) of the Act. The Commissioner of Income Tax (Appeals), therefore, affirmed the order passed by the assessing officer. The assessee challenged the aforesaid order of Commissioner of Income Tax (Appeals) before the Appellate Tribunal. The Appellate Tribunal, by order dated 09.06.2006 held that the development agreement amounts to transfer as the same is covered under Section 2(47)(vi) of the Act. In the result, the appeal preferred by the assessee was dismissed. In the aforesaid factual background, this appeal has been filed.

7. Learned Senior Counsel for the assessee submitted that the Appellate Tribunal ought to have appreciated that under the development agreement, the assessee has handed over the vacant possession of the land for the purposes of carrying out development only and there was no transfer of ownership in the year 1996 and the same, therefore, would not be covered in terms

of Section 2(47) of the Act. It is contended that from perusal of the development agreement dated 04.05.1996, it is evident that the transfer of title has been contemplated only after construction of the building. It is also contended that the transfer of possession in part performance of any agreement to sell cannot be treated as transfer of ownership under Section 53A of the Transfer of Property Act, 1882. It is pointed out that there is no transfer of capital asset in the assessment year 1997-98 and consequently no profit or gain accrued to the assessee in order to attract Sections 45 and Section 48 of the Act. In support of the aforesaid submissions, reliance has been placed on decision of the Supreme Court in **Seshasayee Steels Private Limited vs. Assistant Commissioner of Income Tax, Chennai**¹ and decisions on **Principal Commissioner of Income Tax, Kolkata-1 vs. Infinity Infotech Parks Limited**² and **Chaganlal Mulji Dholu vs. Joint Commissioner of Income Tax, JCIT (OSD) Circle**³ rendered by the Calcutta and Gujarat High Courts respectively.

8. Learned Senior Standing Counsel for the Revenue has invited the attention of this Court to various clauses of the development agreement and has submitted that the same

¹{2020} 14 SCC 774 : [2020] 421 ITR 46 (SC)

²[2018] 407 ITR 137 (Cal)

³[2023] 291 Taxmann.com 304 (Guj)

amounts to transfer within the meaning of Section 2(47)(v) of the Act. It is further submitted that in pursuance of the development agreement, the possession was handed over to the developer. In support of his submissions, reliance has been placed on the Division Bench decisions of the erstwhile High Court of Andhra Pradesh in **Potla Nageswara Rao vs. Deputy Commissioner of Income Tax**⁴, High Court of Bombay in **Commissioner of Income Tax, Pune vs. Arvind S Phake**⁵, Kerala High Court in **Commissioner of Income Tax vs. Harbour View**⁶ and the order of the Supreme Court in **Harbour View vs. Commissioner of Income Tax**⁷.

9. By way of rejoinder, learned Senior Counsel for the assessee has invited the attention of this Court to substantial questions of law framed in **P.T.Narasimhachar vs. the Assistant Settlement Officer, Chittoor**⁸ and has submitted that the aforesaid substantial questions of law do not pertain to the issue involved in this appeal and therefore, the aforesaid decision has no application to the fact situation of the case. It is contended that even if the decision in **Potla Nageswara Rao vs. Deputy**

⁴ 2014 LawSuit (AP) 377

⁵ 2017 LawSuit (Bom) 2871

⁶ [2018] 409 ITR 599 (Ker)

⁷ [2024] 460 ITR 493 (SC)

⁸ 1970 SCC OnLine AP 117 : 1971 (2) ALT 17

Commissioner of Income Tax (supra), is held applicable to the fact situation of the case, the same has been impliedly overruled in view of the decision of the Supreme Court in **Seshasayee Steels Private Limited vs. Assistant Commissioner of Income Tax, Chennai** (supra). In support of the aforesaid submission, reliance has been placed on the Division Bench decision of the erstwhile Andhra Pradesh High Court in **P.T.Narasimhachar vs. The Assistant Settlement Officer, Chittoor**⁹. It is also urged that the decision in **Commissioner of Income Tax vs. Harbour View** (supra) and **the Commissioner of Income Tax vs. T.K.Dayalu**¹⁰ rendered by the Kerala and Karnataka High Courts respectively have no application to the fact situation of the case. It is contended that in the instant case, agreement was executed without any consideration. It is therefore argued that in view of the decision of the Supreme Court in **Seshasayee Steels Private Limited vs. Assistant Commissioner of Income Tax, Chennai** (supra), the substantial questions of law deserve to be answered in favour of the assessee.

10. We have considered the rival submissions on both sides and have perused the record.

⁹ 1970 SCC OnLine AP 117

¹⁰ 2011 (202) taxman 531

11. Before proceeding further, it is apposite to take note of relevant statutory provisions of the Income Tax Act, 1961. Section 2(47) defines the expression 'transfer' in relation to capital assets. The aforesaid definition is inclusive in nature and reads as under:

- "2(47) "transfer", in relation to a capital asset, includes-
- (i) the sale, exchange or relinquishment of the asset; or
 - (ii) the extinguishment of any rights therein; or
 - (iii) the compulsory acquisition thereof under any law; or
 - (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or
 - (iva) the maturity or redemption of a zero coupon bond; or
 - (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53-A of the Transfer of Property Act, 1882 (4 of 1882); or
 - (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a cooperative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation-1.—For the purposes of sub-clauses (v) and (vi) "immovable property" shall have the same meaning as in clause (d) of Section 269-1'A.

Explanation-2.—For the removal of doubts, it is hereby clarified that “transfer” includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;”

12. In Section 2(47)(v) of the Act, reference has been made to Section 53A of the Transfer of Property Act, 1882, which incorporates the doctrine of equity of part performance of contract. Section 53A introduces in limited form the doctrine of equity of part performance in India where requirements mentioned in the provisions are satisfied (see **Ramachandrayya vs. Satyanarayana**¹¹). Section 53A of the Transfer of Property Act, 1882 reads as under:

“53A. Part Performance:- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from

¹¹ AIR 1964 SC 877

which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

13. Thus, it is evident that in order to attract the applicability of Section 53A of the Transfer of Property Act, 1882, as held by the Supreme Court in **Shrimant Shamrao Suryavanshi vs. Prahlad**

Bhairoba Suryavanshi¹², the following conditions are required to be fulfilled:

(1) there must be a contract to transfer for consideration of any immovable property;

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;

(5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract."

14. Now we may advert to the facts of the case in hand. Clauses 4, 6 and 8 of the development agreement dated 04.05.1996 read as under:

"4. That 60% of the constructed portion along with 60% undivided share in land would be retained by the Second Party in lieu of their developing the total area of the schedule property with their funds and the other 40% constructed portion along with 40% undivided share in land with all the amenities will be delivered to the First Party in lieu of utilization of the owner's land by the

¹²(2002) 3 SCC 676

Second Party for construction. The total super built up area to be delivered to the First Party will not be less than 6000 sq.ft. spread over Ground, First and Second Floors for the first revised sanction or in any other manner agreed upon by both parties. It is agreed that the ratio of 40% will apply for further floors, if constructed, according to the sanction for construction granted by the Municipal Corporation of Hyderabad or Government which shall include a pent house in the owner's portion with 40% terrace rights.

6. That as a performance guarantee the Second Party have deposited an amount of Rs.2,00,000/- (Rupees two lakhs only) with First Party vide Pay Order No.002314 dated 04.05.1996 for Rs.2,00,000/- (Rupees two lakhs only) drawn on Bank of Bahrain and Kuwait B.S.C., Somajiguda, Hyderabad. The receipt of which the First Party hereby admits and acknowledged, which is returnable to the Second Party without any interest after the execution of the work entrusted to the Second Party under this agreement and after completion of all further floors. It is hereby clarified that 40% of the builtup portion includes usable area i.e., floor area as also the other areas like Balcony, Staircase, Lifts, Corridors, and other common spaces etc. Similarly, apart from this, 40% of the Car Park area shall be given to the First Party, all these will be clearly demarcated on the plan after obtaining sanction from the MCH or Government.

8. The owner shall be liable to pay Municipal taxes, non-agriculture and other charges and duties relating to

the schedule property upto the date of delivery of possession to the developers.”

15. The assessee vide letter dated 11.05.1996 handed over the possession of the land to the developer. The relevant extract of the aforesaid letter, which is referred to by the assessing officer in para 5.5 of the order reads as under:

“5.5 By virtue of a Possession Letter dated 11.05.1996 the assessee handed over possession of the said land to the Developer, which reads as under:

“In pursuance of the ‘DEVELOPMENT AGREEMENT’ dated 4th May, 1996, at Hyderabad by and between, I have handed over this day vacant possession of the schedule land mentioned below to the Developers for the purpose of carrying out the development works.””

16. Thereafter, a supplementary agreement dated 26.12.1996 was executed between the parties, which contains a recital that developer had obtained municipal sanction for construction of residential complex under permit No.6 of 1959, dated 26.07.16 and has commenced construction work.

17. Thus, from the aforementioned facts, it is evident that even though there is a contract to transfer the immovable property, which is signed by the parties, yet the contract has not been

executed for consideration. A sum of Rs.2,00,000/- mentioned in paragraph 6 of the development agreement is only the performance guarantee which is refundable. The aforesaid amount of Rs.2,00,000/- has not been paid by way of consideration of the transaction. The developer has been handed over the possession for the limited purpose of carrying out the development work. Therefore, in pursuance of the development agreement, the possession of the immovable property has not been handed over to the developer as contemplated under Section 53A of the Transfer of the Property Act, 1882. Therefore, the same does not fall within the definition of 'transfer' under Section 2(47) of the Act.

18. Insofar as reliance placed by the learned Senior Standing Counsel for the Revenue in **Potla Nageswara Rao vs. Deputy Commissioner of Income Tax** (supra) is concerned, the same is an authority for the proposition that element of factual possession and agreement are contemplated as transfer within the meaning of Section 2(47) of the Act. It has further been held that when the transfer is complete, the consideration mentioned in the agreement for sale has to be taken into consideration for the purpose of assessment of income. In the instant case, under the development agreement there is no transfer and the consideration has also not been paid. Therefore, the aforesaid decision of the

Division Bench has no application to the fact situation of the case. Similarly, in the case of **Commissioner of Income Tax vs. Arvind S Phake** (supra), the possession was handed over to the developer and the entire consideration was paid. In the instant case, consideration has not been paid. Therefore, the Division Bench decision of the Bombay High Court also does not apply to the fact situation of the case. In **Commissioner of Income Tax vs. Harbour View** (supra), the Division Bench of Kerala High Court on the facts of the case found that the possession of the property was handed over under Section 53A of the Transfer of Property Act, 1882. Therefore, the aforesaid decision also has no application to the fact situation of the case.

19. However, the finding has been recorded by the Tribunal that the appellant has handed over the possession of the entire property enabling the developer to enjoy 60% of the constructed area of the building cannot, but be said to be perverse. Similarly, the finding that the assessee is liable to pay capital gains tax during the assessment year 1997-98 also cannot be sustained.

20. For the aforementioned reasons, the substantial questions of law framed in this appeal are answered in favour of the assessee and against the revenue.

21. In the result, the orders dated 09.06.2006 passed by the Income Tax Appellate Tribunal, dated 21.03.2003 passed by the Commissioner of Income Tax (Appeals)-V, Hyderabad and dated 21.02.2002 passed by the Assessing Officer are quashed. The appeal is accordingly allowed. There shall be no order as to costs.

Miscellaneous petitions, pending if any, shall stand closed.

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Sd/- K. SRINIVASA RAO
JOINT REGISTRAR


SECTION OFFICER

To,

1. The Income Tax Appellate Tribunal, Hyderabad 'A' Bench, Hyderabad
2. The Income Tax Officer, Ward 4(2), Hyderabad
3. One CC to M/s R.S. Associates, Advocate [OPUC]
4. One CC to Mr J.V. Prasad, Senior Standing Counsel for Income Tax Department [OPUC]
5. Two CD Copies

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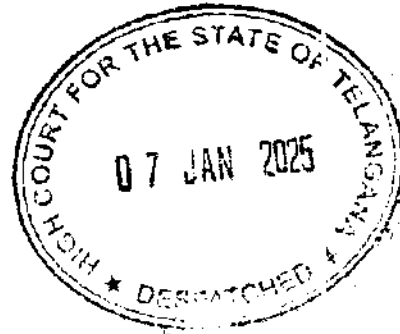
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HIGH COURT

DATED:07/01/2025

JUDGMENT

ITTA.No.527 of 2006



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