

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

WRIT PETITION NO.1612 OF 2022

Late Bharat Jayantilal Patel
(since deceased) through Legal
Heir Smt. Minal Bharat Patel
(PAN:AAAPP6652R), aged 62
years, having her address at
602, Boston House, Suren Road,
Andheri (East), Mumbai-400 093
Maharashtra, India

... Petitioner

Versus

1. Deputy Commissioner of Income Tax
Central Circle, 3(4), Mumbai 1915, 19th
Floor, Air India Building,
Nariman Point, Mumbai-400 021.
Maharashtra, India

2. Pr. Commissioner of Income Tax
(Central)-2, Mumbai,
1920, 19th Floor, Air India Building,
Nariman Point, Mumbai-400 021.
Maharashtra, India.

3. The Union of India
Through the Secretary, Ministry of
Finance, Government of India,
North Block, New Delhi-110 001.

... Respondents

Mr. Vasudev Ginde a/w Mr. Kumar U. Kale for the Petitioner.
Mr. Suresh Kumar for the Respondents.

**CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, JJ.**

**RESERVED ON : 17 JANUARY 2023
PRONOUNCED ON : 10 FEBRUARY 2023**

JUDGEMENT

(Per DHIRAJ SINGH THAKUR, J.)

. The Petitioner in the present Petition challenges *inter alia* the notice issued under Section 148 of the Income Tax Act, 1961 (“the Act”) dated 22 March 2021 relevant to the assessment year 2013-14. By virtue of the said notice, assessment for the year 2013-14 is sought to be reopened, on the ground that the assessing officer had reason to believe that income chargeable to tax for the assessment year 2013-14 had escaped assessment within the meaning of Section 147 of the Act.

2 The reasons for reopening as furnished to the Petitioner are as under :

“Reasons for reopening of the assessment

1. Brief details of the assessee : The assessee is an individual.
2. Brief details of the information collected/received by the AO : Information has been received from ADIT (Inv.) Unit-IV(2), Thane about assessee that assessee has given his land at Chikhloli for development to Sai Ashray Developers Pvt. Ltd.

During the year, assessee Mr. Bharat J. Patel and two other co-owners have granted development rights in respect of their Land at Village Chikhloli located within Municipal Limits of Ambernath of

SaiAshray Developers Pvt. Ltd., vide agreement dated 15.06.2012. As per Index II of the development agreement, the sale consideration is Rs.3 crore and the market value is 9.5994 crore. They have also executed a power of attorney dated 15-06.2012 authorizing the Builder to enter upon the said property for development. Further,

1. As per the development agreement, developer shall develop the said properties at its own cost and shall give directly to the owners 36 % of the total constructed saleable area admeasuring 541556 sq. ft. total consideration for grant of development rights.
2. As per the development agreement, developer paid 40 crore to land owners as refundable interest free deposit as on 15..06.2012 out of which 21 core has been paid to co-owners Darshana Anand Damle and Ashish Anand Damle.

From facts mentioned above, it is clear that assessee transferred, as defined u/s 2(47) of the Act, land to the builder during FY 2012-13. Reliance is also placed on judgment by Honourable Bombay High Court in case of Dwarkadas Chaturbhujdas Kapadia & Others Vs. CIT 260 ITR 491 wherein it was held that transfer of property u/s 2(47)(v) of the Act is complete in the year in which builder is given irrevocable license by the land owner to enter upon the land to carry out construction.

Further, it is also stated that the land in question is situated within municipal limits of Ambernath Municipality hence constitutes capital assets as per section 2(14) of the Act. Further, as per order dated 9 April 2012, issued by the O/o District Collector, Thane the said land has been granted the status of Non-agricultural land.

In view of facts mentioned above, it is clear that

profit arising from transfer of the land is taxable in hands of assessee during FY 2012-13. Market value of Rs.9.5994 corore or the market value of constructed saleable area of 541556 sq. ft. constitutes the consideration received by land owners.

3. Analysis of information collected/received : Records of assessee available in the office has been perused. It is found that as on 31.03.2014, assessee has received loan/deposit of Rs.24,60,00,000/- from Sai Ashray Developers Pvt. Ltd. Further, assessee has land plots in Chikhloli as per his details of immovable properties. Moreover, it is also seen that assessee has not offered capital gain during the year under consideration. Since assessee transferred, as defined u/s 2(47) of the Act, land to the builder during FY 2012-13, assessee should have offered capital gain on transfer of land during the year. On perusal of these facts and information received, prima facie, it is clear that profit arising from the said land transfer is chargeable to tax under capital gain during FY 2012-13. Thus, by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment of income which resulted into understatement of his income by more than 1 lakh.
4. Enquiries made by the AO as sequel to information collected/received : As mentioned above.
5. Basis of forming reasons to believe and details of escapement of income. As mentioned above.
6. Escapement of income chargeable to tax in relation to any asset located outside India : N/A
7. Applicability of the provisions of Section 147/151 to the facts of the case : As mentioned above, the provisions of Section 147 are applicable to facts of the case and the assessment year under

consideration is deemed to be a case where income chargeable to tax has escaped assessment.”

3 Objections to the reopening were filed by the Petitioner. One of the objections raised by the Petitioner before the assessing officer was that Section 2(47)(v), which was invoked for the purpose of reopening had no application inasmuch as granting a license to the developer, who entered into the assessee’s land for the purpose of development did not amount to ‘allowing the possession of the land’ as contemplated under Section 53A of the Transfer of Property Act, 1882, and, therefore, Section 2(47)(v) would not apply. Reliance was also placed upon the Apex Court judgment rendered in the case of **Seshasayee Steels (P.) Ltd. Vs. Assistant Commissioner of Income Tax Vs. Company Circle VI(2), Chennai**¹.

4 Objections raised by the Petitioner were, however, rejected by the Assessing Officer vide Order dated 27 January 2022. Reliance was placed on a judgment rendered by this Court in the case of **Dwarkadas Chaturbhujdas Kapadia Vs. Commissioner of Income Tax**² which held that transfer of property under Section 2(47)(v) of the Act was complete in the year in which the builder is given irrevocable license by the land owner to enter upon the land to

1 [2020] 115 taxmann.com 5(SC)

2 260 ITR 491

carry out construction.

5 As regards the Apex Court judgment in the case of **Seshasayee Steels (P.) Ltd.** (*supra*), the Assessment Officer held the same as not applicable in the present set of facts.

6 Before us today, learned Counsel for the Petitioner has only urged one point from out of various grounds otherwise urged before the Assessing Officer and in the present writ petition and that has its basis in the ratio of the judgment in Seshasayee Steels (P.) Ltd. It was urged that the agreement between the Petitioner along with other owners and developers was a development agreement – according to which the developer was given rights only as a licensee. That such a licensee could not be said to be in ‘possession’ within the meaning of Section 53A of the T.P. Act and that ‘possession’ was otherwise necessary and an integral ingredient for purposes of bringing a transaction within the purview of Section 2(47)(v) of the Act.

Section 2(47) of the Act defines a ‘transfer’ in relation to a capital asset as under :

- (i) the sale, exchange or relinquishment of the assets ; or

- (ii) the extinguishment of any rights herein ; 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 him, such conversion or treatment ; [or]
- (iva) the maturity or redemption of a zero coupon bond; or
- (v) any transaction involving the allowing 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)

[*Explanation 1*] –

[*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 affected or dependent upon or <owing from the transfer of a share or shares of a company registered or incorporated outside India;]

Section 53A, which finds a mention in Section 2(47)(v) of the Act envisages as under :

53A. *Part performance* – Where any person contract to transfer for consideration any immovable property by writing signed by him or on his behalf from 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.

7 The Apex Court in **Seshasayee Steels (P.) Ltd.** (*supra*), held that Section 53A of the Transfer of Property Act, 1882 would not be attracted in a case where a license was given to another for purposes of development of the <ats and selling the same and that granting such a license could not be said to be granting possession within the meaning of Section 53A. It was held :

“11. In order that the provisions of Section 53A of the T.P. Act be attracted, first and foremost, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee must have performed or be willing to perform his part of the agreement. It is only if these two important conditions, among others, are satisfied that the provisions of Section 53A can be said to be attracted on the facts of a given case.

12. On a reading of the agreement to sell dated 15-5-1998, what is clear is that both the parties are entitled to specific performance. (See clause 14)

13. Clause 16 is crucial, and the expression used in clause 16 is that the party of the first part hereby gives ‘permission’ to the party of the second part to start construction on the land.

14. Clause 16 would, therefore, lead to the position that a license was given to another upon the land for the purpose of developing the land into flats and selling the same. Such license cannot be said to be 'possession' within the meaning of Section 53A, which is a legal concept, and which denotes control over the land and not actual physical occupation of the land. This being the case, Section 53A of the T.P. Act cannot possibly be attracted to the facts of this case for this reason alone.

8 Learned Counsel for the Petitioner, vehemently, urged that even in the present case there was a development agreement executed between the owners including the Petitioner and the developer, namely, Sai Ashray Developers Pvt Ltd., which had permitted the said developer to develop the property belonging to the owners only as a 'licensee'. Reliance in this regard was placed upon the clause 10(i) of the development agreement, which reads as under :

“10. DEVELOPERS' RIGHTS, ENTITLEMENTS, DECLARATIONS AND OBLIGATIONS

On and from execution hereof and subject to the fulfillment of all the terms and conditions to be performed and complied with by them under this Agreement, the Developers shall have rights and be entitled to do the following, at its own costs and expenses :-

- (i) To enter into the said properties as an exclusive licensee for the purpose of development of the said Properties thereon with their own sources and cost as per the permission/NOC that may be given by the Local Authorities and the Applicable law;

9 Applying the principle as crystallized by the Apex Court reproduced herein above, to the facts of the present case, it can be seen that the development agreement permitted construction on the land in question only as a licensee which did not have the effect of transmitting possession in favour of the licensee within the meaning and spirit of Section 53A of T.P. Act. If that is so, then there would be neither any tangible material nor any reason for the assessing officer to believe that ‘any income chargeable to tax had escaped assessment’ and the action of the assessing officer, therefore, would be without jurisdiction.

10 Be that as it may, the Petition is allowed. The notice impugned dated 27 March 2021 issued under Section 148 of the Act as also the Order dated 27 January 2022 are set aside.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)

RAJESH
VASANT
CHITTEWAN

Digitally signed by
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