

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

INCOME TAX APPEAL NO. 1126 OF 2000

M/s. Sterling construction & Investments, 9, Sujata Niwas, S. V. Road, Bandra Mumbai – 400 050	} } } }	Appellant
versus		
Assistant Commissioner of Income Tax (Inv.), Cir. 21(1), Aayakar Bhavan, M. K. Road, Mumbai – 400 020	} } } }	Respondent

Mr. Pankaj R. Toprani for the Appellant.
Mr. Arvind Pinto for the Respondent.

**CORAM :- S. C. DHARMADHIKARI &
A. K. MENON, JJ.**

**Reserved on :- 20th March, 2015
Pronounced on :- 9th April, 2015**

JUDGMENT:- (Per S.C.Dharmadhikari, J.)

This Income Tax Appeal challenges the order passed by the Income Tax Appellate Tribunal dated 12th June, 2000. The Tribunal's Mumbai Bench heard an Appeal of the Appellant/Assessee being Income Tax Appeal No. 2337/Mum/1999 for the assessment year 1995-96.

2) The Appeal of the Assessee before the Tribunal challenged the order of the Commissioner of Income Tax dated 31st March, 1999.

That order of the Commissioner was passed by invoking the powers conferred in him under section 263 of the Income Tax Act, 1961 (for short the “IT Act”).

3) This Appeal has been admitted on the following substantial questions of law:-

“(i) Whether the Tribunal was justified in holding that the Order passed by the AO under Section 143(3) read with Section 144A was erroneous and prejudicial to the interest of the revenue and, therefore, the CIT was justified in exercising the jurisdiction under Section 263 of the Act ?

(ii) Whether the Tribunal was justified in holding that the compensation received by the Appellant as per the Consent Terms dated 19.08.1994 was on account of relinquishment of the claim for specific performance and, therefore, the same was liable to capital gains tax ?

(iii) Whether the Tribunal was justified in holding that the Appellant's case was governed by the ratio laid down in the case of Vijay Flexible Containers (186 ITR 693) and not by the ratio laid down in Abbasbhoy A. Dehgamwalla (195 ITR 28) ?

(iv) Whether the Tribunal was justified giving in a judgment on the merits of the case in spite of the fact that the CIT had directed the AO to make fresh assessment as per law ?”

4) Somewhere around June, 1989, the Appellant had entered into an oral agreement with one M/s. Eastern Ceramics Limited (hereinafter referred to as “ECL”) to purchase a factory premises at Goregaon, Mumbai along with a vacant piece of land for a total consideration of Rs.5.80 crores and for that purpose, paid Rs.5 lacs as earnest money on 21st July, 1989. The main purpose for making this investment by the appellant was to give the property on lease and earn

lease rent. Around February, 1990, the Appellant entered into an agreement of lease with Classical Electric Limited (hereinafter referred to as “CEL”) for granting lease of the said property, which was purchased from the said ECL on terms and conditions contained in the Memorandum of Understanding (MOU) dated 23rd February, 1990.

5) During the period relating to the assessment year 1990-91, number of meetings took place between the Appellant and the said ECL for finalizing the Sale Agreement, but ultimately, the said ECL backed out of the said oral agreement. The Appellant filed a Suit in October, 1990 before this Court with a prayer, *inter alia*, for specific performance and in the alternative, for grant of damages for breach of the said agreement. After prolonged litigation between the Appellant and the said ECL, there was a settlement between the parties outside the Court and Consent Decree dated 19th August, 1994 was passed, under which, the said ECL agreed to pay Rs.5 crores to the Appellant by way of damages.

6) In the meanwhile, the said CEL was pressing the Appellant for the lease of the said property as per the said MOU dated 23rd February, 1990. A dispute arose between the Appellant and the CEL and the matter was referred to the Arbitrator. As per the Arbitration Award dated 30th September, 1995 by the Arbitrator, the Appellant was

required to pay Rs.15 lakhs to the said CEL as compensation or damages for breach of the said agreement.

7) The Appellant was advised by Mr. V. H. Patil, Advocate, vide his opinion dated 9th January, 1996 that the amount of Rs.5 crores received by them under the said Consent Decree from the said ECL was by way of damages after the breach of oral agreement and hence, the same represented a capital receipt, not liable to tax. Accordingly, the Appellant filed its return of income for the assessment year 1995-96 on 15th March, 1996 treating the said receipt on account of damages as capital receipt.

8) In intimation made by the Assessing Officer under section 143(1), he treated the said damages of Rs.4.95 crores (net) as taxable by making *prima facie* adjustment. However, thereafter he felt that taxability of the said sum was highly debatable and cannot be subject matter of *prima facie* adjustment. Accordingly, he made a reference to the Commissioner of Income Tax, who confirmed his view and directed him to decide this issue in regular assessment proceedings after discussing the matter with Range Deputy Commissioner of Income tax.

9) The Appellant, vide his letter dated 24th May, 1996, made an application to the Deputy Commissioner of Income Tax (Range-21),

Mumbai, under section 144A of the IT Act, enclosing brief facts, case laws, opinion of Mr. V. H. Patil, Advocate and requested him to issue necessary directions to the Assessing Officer with regard to taxability of the receipt of Rs.4.95 crores received by way of damages as per the Consent Decree of this Court.

10) During the course of assessment proceedings, in reply to the query of the Assessing Officer, the Appellant submitted that the said receipt of Rs.4.95 crores was capital receipt not chargeable to tax in its hands.

11) The Deputy Commissioner of Income Tax (Range-21), Mumbai gave necessary directions to the Assessing officer vide his order dated 27th May, 1996 under section 144A of the IT Act which are reproduced by the Assessing Officer in his assessment order. As per the said directions, said receipt of damages was not taxable in the hands of the Appellant neither as business income nor as capital gains, nor as casual or non recurring receipt. Accordingly, the Assessing Officer completed the assessment.

12) The Assessing Officer passed order as per the directions of the Deputy Commissioner of Income Tax, treating the said damages as capital receipt not chargeable to tax. It appears that the Deputy

Commissioner of Income Tax before giving directions to the Assessing Officer had referred the matter to the Commissioner of Income Tax, then in office, who advised him to act as above.

13) The successor Commissioner of Income Tax, exercising his powers under section 263 of the IT Act, issued notice to the Appellant informing that while making the assessment, the Assessing Officer failed to consider the decision of the Bombay High Court in the case of *Commissioner of Income Tax vs. Vijay Flexible Containers*, reported in **(1990) 186 ITR 693** and therefore, the order passed by the Assessing Officer is erroneous as well as prejudicial to the interest of the Revenue. It needs to be appreciated that the documents filed by the Appellant before the Deputy Commissioner of Income Tax, contained reference to the said decision, but the Appellant urged that the said decision is not applicable to the facts of the Appellant's case.

14) The Commissioner of Income Tax passed the order under section 263 of the IT Act overturning assessment order holding that this Court's order in the case of *Vijay flexible Containers* (supra) applies to the facts of the Appellant's case and therefore the said damages are chargeable to tax in the Appellant's case.

15) The said order of the Commissioner of Income Tax was challenged by the Appellant in the Appeal filed before the Tribunal on various grounds, which has confirmed the order of the Commissioner of Income Tax.

16) Mr. Toprani, learned Advocate appearing for the Appellant submits that the impugned order is contrary to law. Mr. Toprani submits that on the available material, the Commissioner could not have concluded that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. The Assessing Officer made inquiries and arrived at certain conclusions which cannot be interfered with or upset merely because another view is possible. In the present case, the then Commissioner of Income Tax held that taxability of damages is highly debatable. If the issue is debatable, it means more than one view is possible. If that is the position, then, power under section 263 of the IT Act could not be invoked and exercised. The exercise thereof in such circumstances would be contrary to the settled principles.

17) Mr. Toprani submits that, in this case, there was no right to claim specific performance as this Court has held that the Appellant had no right, title or interest in the suit premises. The appellant had merely a right to sue for which it has been awarded damages. Section 6 of the

Transfer of Property Act which uses the same expression “property of any kind” in the context of transferability makes an exception in the case of a mere right to sue. It has made clear that the right to sue for damages is not an actionable claim and is not a capital asset, and therefore, damages received pursuant to right to sue is a capital receipt. The aforesaid view was taken in the case of *Commissioner of Income Tax vs. Abbasbhoy A. Dehgamwalla and Ors.* reported in **(1992) 195 ITR 28**. Therefore, on merits also, the Appellant’s case is covered by the decision of this Court in the case of *Abbasbhoy A. Dehgamwalla and Ors.* (supra).

18) Without prejudice it is submitted by Mr. Toprani that as per the ratio laid down by this Court in the case of *Thane Electric Supply Company Ltd (206 ITR 727)* holding that if there are two decisions of the same High Court holding two different views, then, in that case, later decision has to be followed and therefore the later decision of this Court in the case of *Abbasbhoy Dehgamwalla and Ors.* (supra) should be followed. He therefore submits that the Appeal be allowed.

19) On the other hand, Mr. Pinto appearing for the Revenue supports the view taken by the Tribunal. He submits that the questions of law though termed as substantial, would have to be answered on the facts and circumstances of each case. In the present matter, the Assessee relinquished the claim for specific performance and received

only damages or compensation for breach thereof. In such circumstances, the right in the immovable property was given up. Therefore, the view taken by the Assessing Officer was unsustainable and rightly interfered with. Therefore, the law laid down by the Division Bench of this Court in the case of *Abbasbhoy A. Dehgamwalla and Ors.* (supra) is not applicable. The questions of law be answered accordingly.

20) We have heard both sides and with their assistance, we have perused the Appeal paper book. The facts are not in dispute, inasmuch as the Appellant had entered into an oral agreement with ECL to purchase an immovable property for total consideration of Rs.5.80 crores. He paid Rs.5 lacs as earnest money on 21st July, 1989. We are not concerned as much with the other agreement executed by the Appellant/Assessee. In the present case and concerning the assessment year in question 1990-91, some meetings took place, but the oral agreement, according to the Appellant/Assessee, was not honoured. Therefore, a Suit came to be filed in this Court in October, 1990 with a prayer, *inter alia*, for specific performance of the agreement for sale of the immovable property and alternatively for grant of damages/compensation in lieu thereof. It is stated that there were some interlocutory proceedings in this Suit. However, during the course of an

Appeal against certain interim orders, the matter was settled and Consent Terms came to be drawn between the parties. These Consent Terms, copy of which is at page 21 to 23 of the Appeal paper book, read as under:-

“CONSENT TERMS

1. Declared that the Plaintiffs have no right, title or interest in the property described in Ex. 'A' to the Plaint save and except as provided herein.
2. The Defendants do pay to the Plaintiffs the sum of Rs.5 Crores on or before 28th February, 1995.
3. In the event of the Defendant not paying the sum of Rs.5 Crores on or before February 28th, 1995 the Defendants to pay interest thereon at 18% per annum from March, 1 1995.
4. In the event of the Defendants committing default in payment of the decretal debt on or before February 28, 1995 the suit property described in Exhibit A to the Plaint be sold in execution in or towards the satisfaction of the decretal debt by the Commissioner for Taking Accounts by public auction. The surplus sale proceeds if any to be paid to the Defendants.
5. Till the decretal debt is paid the order dated July 10, 1994 to continue.
6. Save as above the Plaintiffs have to other claim against the Defendants.
7. No order as to costs.

Dated this 19th day of August, 1994.”

21) The Division Bench of this Court accepted these Consent Terms and decreed the Suit by Consent Decree dated 19th August, 1994. It was held that the Plaintiff, namely, the Appellant before us has no right, title or interest in the immovable property, save and except the right to receive a sum of Rs.5 crores and in the event that is not paid, the Decree to that extent can be executed. In the event the decretal

debt not being paid even the suit property could be sold in execution of the decretal debt.

22) This is not a matter, as held by the Commissioner of Income Tax, covered by the Judgment of this Court in the case of *Vijay Flexible Containers* (supra). In the said case, the Assessee firm entered into an agreement with one Captain B. V. Dhuru and others on 10th November, 1959, whereunder the Assessee agreed to purchase from the said Dhuru and others the immovable property described in the schedule thereto at the rate of Rs.35 per square yard to be paid in the manner set out. Upon the execution of the said agreement for sale, the Assessee paid to the vendors as required by the said agreement for sale, the sum of Rs.17,500/- as earnest money. The Assessee was constrained to file a Suit in this Court for specific performance of the said agreement for sale or, in the alternative, for damages for its breach. Consent Terms were arrived at in the Suit and a decree was passed in favour of the Assessee for the sum of Rs.1,17,500/- and interest. The Income Tax Officer held that the right that the Assessee had acquired under the said agreement for sale was a capital asset. Upon the extinguishment of that right the Assessee had received the sum of Rs.1,17,500/-. The Income Tax Officer found that deducting the cost of acquisition of the capital asset in the amount of Rs.17,500/- and expenses and legal charges in the sum

of Rs.17,904/- the capital gain to be Rs.82,086/-. The Assessee was aggrieved by this order or view of the Assessing Officer and therefore, preferred an Appeal and in which he succeeded. The First Appellate Authority held that the Agreement for Sale did not bring a capital asset into existence. The Revenue preferred an Appeal against this decision, before the Tribunal and it was upheld.

23) The question of law was, “*whether the right conferred upon the Assessee by the sale agreement of “property of any kind?”*” It is in that context that the Division Bench arrived at the conclusion that the right acquired is not a mere right to sue. The Assessee acquired under the said agreement for sale the right to have the immovable property conveyed to him. He was, under the law, entitled to exercise that right not only against his vendors but also against a transferee with notice or a gratuitous transferee. He could assign that right. What he acquired under the said agreement for sale was, therefore property within the meaning of the IT Act and consequently a capital asset. In the Suit that he filed, a settlement was arrived at, at which point of time, the Assessee gave up his right to claim specific performance and took only damages. His giving up of the right to claim specific performance by conveyance to him of the immovable property was relinquishment of the capital asset. There was, therefore, a transfer of a capital asset

within the meaning of the IT Act. It is this view which was placed before this Court in the case of *Abbasbhoy A. Dehgamwalla and Ors.* (supra).

24) However, the Division Bench deciding the issue in the case of *Abbasbhoy A. Dehgamwalla and Ors.* (supra) noted that once the Assessee's claim to specific performance of the agreement was rejected, then, the alternative claim for damages for breach of agreement even if worded the receipt of that sum could be taxed as the Assessee's income under the head capital gains. That could not have been taxed as such after the Assessee's right to obtain specific performance was extinguished when the Court refused to grant such a relief.

25) Thereafter, the alternate argument of the Revenue that the right to receive damages for breach of contract represented the consideration of the original right has been dealt with. The Division Bench concluded that even if the widest possible interpretation accepted, still the amount of damages cannot be taxed as capital gains. That has been held to be a compensation in money for breach of the contract. That, as appearing in this case, is something which will be the substitution for the original relief. It is in lieu of specific performance. There is no right then to claim the property but to be compensated for breach of an agreement to transfer the immovable property and in

future. Once such a transfer cannot be obtained as the Decree for specific performance has been refused, then, the receipt of monetary sum cannot be taxed as claimed by the Revenue. This is apparent from a reading of paras 8 and 9 of the Division Bench Judgment. In these circumstances, the reliance placed on another Division Bench Judgment of this Court need not be considered.

26) In the present Appeal, the Tribunal failed to note that in this case as well the specific performance of the agreement was refused. It is erroneously held that the claim of the Assessee regarding specific performance had never been rejected by this Court. A reading of the order passed by the Division Bench leaves us in no manner of doubt that such a Decree was expressly denied. The Consent Terms may constitute an agreement or contract between the parties, however, a Consent Decree is passed after the agreement is placed before the Court and the Court applies its mind and records a satisfaction that the terms are not contrary to law or public policy. That they can be accepted and based on that a Decree can be passed. Therefore, it is not an agreement between the parties, by which the Suit was disposed of but on that agreement there is a seal of approval or satisfaction of the Court and in terms of Order XXIII Rule 3 of the Civil Procedure Code, 1908. In such circumstances, even if there was any interim order in favour of the

Assessee in the present case eventually the Suit ended in the Assessee's claim for specific performance being refused and he being entitled to receive the sum stipulated in this Court's order in lieu of the specific performance. In these circumstances, the Assessee was right in urging that he has no right, title or interest in the immovable property. The Tribunal completely misread and misconstrued this Court's order. In the Consent Terms, which are drawn up and based on which the Suit is decreed by the Court, it does not deal with the rival cases on merits. There is no requirement of the Court then passing an order and Judgment on merits of the claim of the parties. The Court is required to apply its mind and consider as to whether the arrangement reached by the parties can be accepted by it. Once it is accepted and an order or decree is passed in terms thereof, then, it is an order of the Court. Thus, the Court has not undertaken any mechanical exercise or has not casually and lightly accepted the terms and approved the same. It has performed a conscious act and in terms of Order XXIII Rule 3 of the Civil Procedure Code, 1908. This clearly means that the relief was refused. One cannot then pick up a stray sentence or observation from the Judgment of this Court and apply it to the given fact situation. We find that the present case was similar to that of *Abbasbhoy A. Dehgamwalla and Ors.* (supra). In this case this Court declared that the Plaintiff/Assessee has no right, title or interest in the immovable

property. That specific performance is therefore clearly refused. The other observations of the Division Bench deciding the case of *Abbasbhoy A. Dehgamwalla and Ors.* (supra) and *Vijay Flexible Containers* (supra) need not be considered. We do not think that the Assessee had any right left or remaining in him to claim the immovable property, which is subject matter of the oral agreement. That right got extinguished once the specific performance was refused. Even if the refund of earnest money or compensation is the relief granted, it is apparent on a reading of the Specific Relief Act, 1963 that the Court has power to grant relief of possession, partition or refund of earnest money if any person sues for specific performance of a contract for the transfer of immovable property. That power is to be found in section 22 of the Specific Relief Act, 1963. By section 21, the Court has a power to award compensation in certain cases and by sub-section (1) thereof, it is clarified that in a Suit for specific performance of a contract, the Plaintiff may also claim compensation for its breach, either in addition to, or in substitution of such performance. When such relief is claimed in substitution of performance, then, by virtue of sub-section (2) of section 21, the Court can award the Plaintiff compensation even if it decides the specific performance ought not be granted. However, there are specific provisions which the Plaintiff must comply with. Eventually, the jurisdiction to decree specific performance conferred in a Court is

discretionary and it is not bound to grant such relief merely because it is lawful to do so (see section 20 of the Specific Relief Act, 1963).

27) The agreement for sale of immovable property itself does not create any right, title or interest in the immovable property, which is subject matter of such agreement but creates a right to obtain performance of the agreement by approaching Court of law and seeking a Decree of specific performance in terms of the Specific Relief Act, 1963. It is that limited right which is recognised by law and the difference between contract for sale of an immovable property and sale as emerging from section 54 of the Transfer of property Act, 1882 is thus explained.

28) In this context, the following observations of the Hon'ble Supreme Court in the case of *Bai Dosabai vs. Mathurdas Govinddas and Ors.* Reported in **AIR 1980 SC 1334** are pertinent.

“..... The ultimate paragraph of Section 54 of the Transfer of Property Act, expressly enunciates that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. But the ultimate and penultimate paragraphs of Section 40 of the Transfer of Property Act make it clear that such a contract creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property. Thus, the Equitable ownership in property recognised by Equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee.”

29) In such circumstances, we do not think that the Tribunal's finding and from paras 6 to 11 need to be referred to. In this case as well, the specific performance was refused by this Court. In any event, there was enough doubt and the legal position was not clear. This was not a case where power under section 263 of the Income Tax Act could have been exercised.

30) In view of the above, we are of the opinion that the Appeal must succeed. The substantial questions of law, as framed and on debatable issues need to be answered as under:-

“Answers to Question Nos. :-

(i) – The Tribunal was not justified in holding that the order passed by the Assessing Officer under section 143(3) read with section 144 A was erroneous and prejudicial to the interest of the Revenue and, therefore, the Commissioner of Income Tax was justified in exercising the jurisdiction under section 263 of the IT Act.

(ii) – The answer is in favour of the Assessee and against the Revenue by holding that the amount of compensation received by the Assessee/Appellant was not liable to capital gains tax.

(iii) – It is held that the Appellant's case was covered by the ratio of this Court in the case of *Commissioner of Income Tax vs. Abbasbhoy A. Dehgamwalla and Ors.* reported in **(1992) 195 ITR 28.**

(iv) - Once we have answered the issue on merits against the Revenue and in favour of the Assessee, question No. 4 will not survive.”

31) The Appeal is accordingly allowed. No order as to costs.

(A.K.MENON, J.)

(S.C.DHARMADHIKARI, J.)