

**IN THE HIGH COURT OF BOMBAY
AT GOA (PANAJI)**

INCOME TAX APPEAL NO. 05 OF 2012

Dr. Joao Souza Proenca,
Porbavaddo, Calangute, Goa

...Appellant

vs.

Income Tax Officer,
Ward-2(2), Panaji

...Respondent

INCOME TAX APPEAL NO. 06 OF 2012

Ms. Sara Proenca w/o.
Dr. Joao Souza Proenca,
Porbavaddo, Calangute, Goa

...Appellant

vs.

Income Tax Officer,
Ward-2(2), Panaji

...Respondent

Mr. R. Srinivasan a/w. Mr. P. Karpe, Advocate for the Appellants.
Ms. Amira Razzaq, Advocate for the Respondent.

JUDGMENT RESERVED ON : 10TH JANUARY, 2018

JUDEGMENT PRONOUNCED ON: **17th JANUARY, 2018**

CORAM : **SHANTANU KEMKAR &
NUTAN D. SARDESSAI, JJ.**

JUDGMENT (Per Shantanu Kemkar, J.)

. These Appeals are filed under Section 260A of the Income Tax Act, 1961 (for short “the Act”) challenging the common order dated 29th June, 2011 passed by the Income Tax Appellate Tribunal (for short “the Tribunal”), Panaji Bench in Income Tax Appeal Nos. 185 and 186/PNJ/2007.

2. Both these Appeals were admitted on following substantial questions of law.

(i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in reversing the order of the Commissioner (Appeals) and holding that the transfer within the meaning of Section 2(47)(v) had taken place only in 2002-03 assessment year ignoring the development agreement by way of Power of Attorney, based on which transfer of possession and development have taken place much earlier and when the order of the Tribunal is contrary to facts and law ?

(ii) Whether the Appellate Tribunal is right in reversing the order of the Commissioner (Appeals) based on incorrect appreciation of facts and law and so its order is perverse in nature ?

3. The Appellants are husband and wife. Briefly stated, for the Assessment Year 2002-03 the Appellant of Appeal No. 5 of 2012 returned Income of Rs. 1,34,516/- on 2nd July, 2002 whereas the Appellant of Appeal No. 6 of 2012 returned income of Rs. 92,698/-. The returns were processed under Section 143 (1) of the Act. The Assessing Officer (for short "A.O.") having in possession of the information entertained a belief that the Appellants (assesseees) who are the owners of the property bearing Survey No. 186/6 situated at Nayakwada, Calangute, Bardez, Goa measuring 14,875 sq. mtrs. have entered into agreement on 30th April, 2001 with M/s. Braganza Construction, a partnership firm, for development and sale of property and flats for a consideration of Rs. 80 lacs and allotment of three flats on ownership basis having total built-up area of 170 sq. mtrs. According to the

A.O. income of these assesseees have escaped assessment as income from the capital gains which was not disclosed in the original return filed by them on 2nd July, 2002. In the circumstances, the A.O. issued notice under Section 148 of the Act of which reply was submitted by the Appellants. The notice under Section 142(1) of the Act was also issued of which also reply was submitted by the assesseees/Appellants. After considering the material on record and the reply to the notice, the A.O recorded a finding vide order dated 11th March, 2004 to the effect that there is transfer of property on 30th April, 2001 vide written agreement between the Appellants and the Developer viz. M/s. Braganza Construction within the meaning of Section 2(47)(v) of the Act as on the basis of the said agreement in writing, the possession of the property in question has been handed over by the Appellants to the Developer as also the part consideration was received by them and as such there was part performance of the contract within the meaning of Section 53A of the Transfer of Property Act.

4. Feeling aggrieved by the said common order passed by the A.O. on 11th March, 2004 under Section 148 of Act, the Appellants filed Appeals before the Commissioner of the Income Tax Appeals (for short "the Commissioner"), Panaji, Goa. The case of the Appellants was that no transfer was effected in the Assessment Year 2002-03. The same was effected in the

financial year 1993-94 when the two Power of Attorneys dated 14th March, 1993 and 29th April, 1994 were executed into by the Appellants in favour of M/s. Braganza Construction. It was also the case of the Appellants that the consideration was also received out of the agreed sum of Rs. 80 lacs in terms of the said two Power of Attorneys which according to the assessee are the Development Agreements.

5. The Commissioner accepted the contention of the Appellants and set aside the order of the A.O. vide order dated 10th August, 2007. The said order of the Commissioner was challenged by the Revenue by filing Appeals before the Tribunal. The Tribunal vide impugned order dated 29th June, 2011 allowed the Appeals filed by the Revenue and rejected the cross objections filed by the Appellants/assesseees. Feeling aggrieved, the assesseees have filed these Appeals. In regard to the dispute about the adoption of fair market value, as decided in the Appeals by the Tribunal, we have been informed that separate Appeals have been filed by both the Appellants before this Court. In the circumstances, that question is not involved and is not decided in these Appeals.

6. We have heard the learned counsel for the parties.

7. Shri R. Srinivasan, learned counsel for the Appellants has argued that the Tribunal has failed to consider that two Power of Attorneys entered between the Petitioner and the Developer M/s. Braganza Construction by which the possession was also handed over by the assesseees to the Developer in addition to the power to develop the property. He also argued that in terms of the said Power of Attorneys, the Developer carried out part of the development of the property and the Appellants have received substantial amount out of the agreed sum of Rs. 80 lacs. In the circumstances, according to him the Tribunal had committed grave error in holding that the transfer within the meaning of Section 2(47)(v) of the Act had taken place only in the Assessment Year 2002-03 when the agreement dated 30th April, 2001 was executed. He submits that the reliance of the A.O. as also by the Tribunal on the agreement dated 30th April, 2001 to hold that on the basis of the said agreement, the physical possession of the property was handed over by the Appellants to the Developer and therefore the tax liability accrued for the Assessment Year 2002-03 is misconceived. According to him as there was dispute between the Appellants and the Developer M/s. Braganza Construction, the Appellants had issued a public notice revoking the Power of Attorneys, but then the dispute between them was settled and therefore another agreement was executed on 30th April, 2001. Thus according to the learned counsel for the Appellants, the Tribunal having misconstrued the

agreement dated 30th April, 2001 as also the Power of Attorney executed in the year 1993 and 1994, the impugned order deserves to be set aside and the order of the Commissioner be maintained.

8. On the other hand, Ms. Amira Razzaq, learned counsel for the Revenue has supported the order passed by the Tribunal. She has taken us through two Power of Attorneys dated 14th December, 1993 and 29th April, 1994. She has also drawn out attention to the reply of the Appellants to the notice issued by the Respondent-Revenue stating therein that the Power of Attorneys were executed only for the purpose of empowering the holder of Power of Attorney to do the necessary acts for constructing the buildings, shops and garriages and for furtherance of the same. She read over the Power of Attorney to demonstrate that there was specific mention that the Appellants are in possession of the property and that it nowhere records that the possession has been handed over to the Developer. By pointing out to the reply filed by the Appellants to the notice as extracted at page 7 of the order passed by the A.O, Ms. Amira Razzaq, learned counsel has argued that the specific case of the Appellants before the A.O was to the effect that they have not given possession of the property to the Developer but only an access to do survey on their behalf was given and that they continued to be the owner of the property and that there is no transfer of property under the liberalized

definition of “transfer” under Section 2(47)(v) of the Act. Thus according to her, in view the aforesaid specific mention in the Power of Attorney about the possession being not handed over and the Appellants' reply making a clear statement that the possession has not been given and the recital in the agreement dated 30th April, 2001 about giving of the possession on the basis of this agreement, learned counsel for the Revenue submits that the impugned order passed by the Tribunal is based on correct appreciation of the evidence and needs no interference.

9. For deciding the controversy involved in the matter, we feel it proper to extract the relevant portions of the Power of Attorneys dated 14th December, 1993 and 29th April, 1994. The agreement dated 30th April, 2001 and the reply filed by the Appellants to the notice issued by the A.O under Section 148 of the Act are also need to be extracted.

The relevant portion of the Power of Attorney dated 14th December, 1993 reads thus :

“Know All Men By These Presents, that we, (1) Mr. Joao De Souza Proenca alias Joao Proenca, son of Antonio Proenca, landlord, of 65 years of age, residing at Calangute, Bardez, Goa and (2) Mrs. Maria Sara Proenca alias Sara Proenca wife of Joao Proenca of 57 years of age, housewife, residing at Calangute, Bardez, Goa do hereby nominate, constitute and appoint Mr. Mathew Braoanza, major of age, married, businessman residing at Mapusa, Bardez, Goa to be our true and lawful attorney with respect to the property described in

the Schedule herein below, for the purpose of constructing a building/s with flats, shops and garages thereon and in this connection in our names and on our behalf do the following acts, deeds and things, that is to say."

The portion of the Power of Attorney dated 29th April, 1994 which is relevant for the purpose of deciding the questions, reads as under:

"Whereas we are the owners in possession of the property registered in the Record of Rights under Survey No. 186 sub division 6 of Calangute, Bardez, Goa and better described in the Schedule annexed hereunder."

The relevant portion of the agreement dated 30th April, 2001 is as under:

"Whereas the First party herein is the owner in possession of a property known as Rampachem Batta, bearing survey No. 186/6 situated at Naikvado, Calangute, Bardez, Goa and more particularly described in the Schedule hereunder written."

The relevant portion of the reply filed by the Appellants/assesseees before A.O. reads thus:

"I have entered into an agreement with M/s. Braganza constructions on 30th April, 2001, but this is to be examined in the light of the earlier documents regarding power of attorney etc. The agreement if read, fairly would show that, I have not given up any of my rights in the impugned land. I have given a power of attorney of the same type as I did earlier i.e. revocable in case of breach. The power of attorney dated 30th April, 2001 is exactly on par and as the conditions imposed on Braganza have not been fulfilled particularly regarding payments of Rs. 80 lacs, actual receipts till to date being only

56.75 lacs, the agreement dated 30th April, 2001 cannot be said to have resulted in transfer of any of my rights even after considering the impact of section 2(47)(v) of the Income Tax Act, 1961. Kindly note that I have not given possession to the contractee, but only an access to enable him to do certain jobs on my behalf. In spite of the agreement, I continued to be the owner even deriving income from the land, which I have shown in the respective returns. The first condition for applying section 2(47)(v) is not fulfilled (possession). The second condition of the said section is that the agreement should be in the nature of part performance as provided in section 53A of the Transfer of Property Act. The said section clearly provides that proposed buyer if he could be so called, should have fulfilled all the conditions including the payment. The said section 53A is applicable, if I am barred from repudiating the contract. In my case, I am not so barred and hence this condition is also not fulfilled. I continue to be the full owner of the property and consequently there is no transfer even under the liberalized definition of transfer under Section 2(47)(v). The question of assessing the capital Gains does not arise. The amount of Rs. 56.75 lacs received till today retains the character of originally debt owned by me. The factum of receipt mentioned in para 3 of your letter does not change the basic situation. Again it is not correct to say that, I have allowed to construct. I have not allowed, but directed Braganzas to proceed with the construction on my behalf. The reference is made to the decision of the Bombay High Court in the case of Dwarkadas Kapadia. The ratio of this judgment is not applicable. In fact the Hon'ble High Court has allowed the appeal in favour of the original holder of the land. This is not only on the basis of the date of transfer falling outside the accounting period, but also on the basis of other facts. The observations are as under;

Para 8 – Taking into consideration the totality of circumstances the appeal of the assessee was allowed.

The judgment does not deal with ingredient of section 2(47)(v) of the Income Tax Act, 1961 regarding possession. Besides as mentioned above no possession in the eyes of law has been given the right upto the end of the accounting period and even later till this date. There is thus no transfer. It may be mentioned here that on 30th April, 2001 section 230A of the

Income Tax Act, 1961, was a condition precedent for all types of transfer of immovable properties and no such certificate was applied for or given. Further all transfers even in part, require compulsory registration and as the above agreement has not been registered, that is one more reason, why there is no transfer on any date during the accounting year viz. 1st April, 2001 to 31st March, 2002.

For all the above reasons, I request not to change capital gains in the accounting period for which notice under Section 148 of the Income Tax Act, 1961 was issued. As I have already filed the return, I request you to kindly supply me the reasons recorded in terms of section 148(2) of the Income Tax Act, 1961 so as to enable me to make further submissions, if necessary.

Further it is urged that not to change any capital gain in the accounting period for which notice u/s. 148 was issued."

10. On a close scrutiny of the Power of Attorneys, agreement and the reply, the A.O recorded a finding that only the agreement dated 30th April, 2001 gives rise to the transfer within the meaning of Section 2(47)(v) of the Act, attracting the capital gain arising out of the said transfer. This finding of fact though set aside by the Commissioner but upheld by the Tribunal after elaborate discussion.

11. The agreement dated 30th April, 2001 no doubt refers to some oral agreement and Power of Attorneys executed between the Appellants and the Developer but the fact remains that the agreement dated 30th April, 2001 in clear terms records that the Appellants are the owner and in possession of the property. The Power of Attorney of the year 1993-94 does not disclose

that the possession has been given to the Developer in pursuance to the said Power of Attorney. Moreover, the Appellants in their reply to the notice in unequivocal term have stated that the Appellants have not given possession to the Developer but had given only access to him to enable to do certain jobs on their behalf. It has also been clearly stated in the reply that the Appellants continued to be full owner of the property and there is no transfer.

12. At this point of time, it is relevant to refer the Judgment of the Division Bench of this Court in the case of **Chaturbhuj Dwarkadas Kapadia vs. Commissioner of Income Tax, (2003) 180 CTR 0107** on which reliance has been placed by Ms. Amira Razzaq, learned Counsel for the Revenue as also the judgment dated 20th November, 2017 passed by the Division Bench of this Court in the case of **The Commissioner of Income Tax-111, Pune vs. Dr. Arvind S. Phake, (2003) 260 ITR 491.**

In the case of **Chaturbhuj Kapadia** (supra) it has been held as under:

“Under [Section 2\(47\)\(v\)](#), any transaction involving allowing of possession to be taken over or retained in part performance of a contract of the nature referred to in [Section 53A](#) of the Transfer of Property Act would come within the ambit of [Section 2\(47\)\(v\)](#). That, in order to attract [Section 53A](#), the following conditions need to be fulfilled. There should be a contract for consideration ; it should be in writing ; it should be signed by the transferor ; it should pertain to transfer of immovable property ; the transferee should have

taken possession of the property; lastly, the transferee should be ready and willing to perform his part of the contract. That even arrangements confirming privileges of ownership without transfer of title could fall under [Section 2\(47\)\(v\)](#). [Section 2\(47\)\(v\)](#) was introduced in the Act from the assessment year 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Consequently, the assessees used to enter into agreements for developing properties with the builders and under the arrangement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loophole, [Section 2\(47\)\(v\)](#) came to be introduced in the Act.”

It is precisely for this reason that the Legislature has introduced [Section 2\(47\)\(v\)](#) read with [Section 45](#) which indicates that capital gains is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law. In this case that test has not been applied by the Department. No reason has been given why that test has not been applied, particularly when the agreement in question, read as a whole, shows that it is a development agreement. There is a difference between the contract on the one hand and the performance on the other hand. In this case, the Tribunal as well as the Department have come to the conclusion that the transfer took place during the accounting year ending March 31, 1996, as substantial payments were effected during that year and substantial permissions were obtained. In such cases of development agreements, one cannot go by substantial performance of a contract. In such cases, the year of chargeability is the year in which the contract is executed. This is in view of [Section 2\(47\)\(v\)](#) of the Act.”

In the case of **Dr. Arvind Phake** (supra) the Division Bench of this Court in Paragraph 6 has observed thus:

“We have carefully considered the submissions. What binds this Court is that the judgment of the Division Bench in the case of Chaturbhuj Dwarkadas Kapadia v/s. Commissioner of Income Tax (2003) 260 ITR 491 (Bom). The Division Bench held that the date of contract is relevant provided the terms of the contract indicate passing off or transferring of complete control over the property in favour of the developer. The Division Bench laid down the test for determining the date which should be taken into account for

determining the relevant accounting year in which the liability accrues. In the present case, the Appellate Tribunal has taken into consideration various clauses in the development agreement. Sub clause (d) of clause (3) of the agreement provides that after full payment of consideration, the construction shall be undertaken by the developer. Admittedly, on the date of execution of the development agreement, the entire consideration was not received by the respondent assessee. The physical possession of the property subject matter of development agreement was parted with by the respondent assessee on 1st March, 2008. It was held that on that day, complete control over the property was passed on to the developer. After having perused the various clauses in the agreement and the aforesaid factual aspects, the Tribunal has taken 1st March, 2008 as the date of transfer. This finding is fully consistent with the law laid down by the Division Bench in the case of Chaturbhuj Dwarkadas Kapadia (supra). Therefore, no fault can be found with the impugned judgment of the Tribunal when it was held that the investment made in the sum of Rs.50,00,000/by the respondent assessee on 22nd August, 2008 was within the period specified under Section 54EC of the said Act.

13. Keeping in view the aforesaid clear factual aspect of the matter and the legal position emerging, we have no hesitation to hold that the Tribunal has committed no illegality in reversing the order of the Commissioner by holding that the transfer within the meaning of Section 2(47)(v) had taken place only in the Assessment Year 2002-2003 as we find that vide agreement dated 30th April, 2001, the actual possession was given to the Developer and it was not given the basis of Power of Attorneys and so called oral agreement entered into between the Appellants and the Developer in the year 1993-94.

14. Thus, in our considered view the A.O. as also the Tribunal have

correctly appreciated and interpreted the Power of Attorney/s the agreement dated 30th April, 2001 and the stand taken by the Appellants in reply to the notice under Section 148 of the Act.

15. In the circumstances, we affirm the order passed by the Tribunal by holding that the Tribunal has rightly reversed the order of the Commissioner and while reversing the order of the Commissioner, it has correctly appreciated the facts and law and there is no illegality or perversity in the order of the Tribunal warranting interference.

16. In view of the aforesaid, both the Appeals are dismissed.

(Nutan D. Sardesai, J.)

(Shantanu S. Kemkar, J.)