IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	19/09/2018
Delivered on	11/10/2018

CORAM

THE HON'BLE MR.JUSTICE HULUVADI G. RAMESH
AND
THE HON'BLE MR.JUSTICE K.KALYANASUNDARAM

Tax Case Appeal No.504 of 2018

Principal Commissioner of Income Tax 6
No.121, Mahatma Gandhi Road,
Chennai. .. Appellant / Respondent

Vs.

Shri.A.Lalichan .. Respondent / Appellant

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, Chennai, dated 05.12.2017 made in ITA No.1878/Mds/2016, against the order dated 18/03/2016 made in in ITA No.155/CIT(A)-15/14-15 passed by the Commissioner of Income Tax (Appeals)-15, Chennai and against the order dated 26/03/2014 passed by the Income Tax Officer, Busines Ward IV(1), Chennai for the Assessment Year 2007-08.

For Appellant : Mr.T.R.Senthil Kumar
Senior Standing Counsel

For Respondent : Mr.Muthumani Doraisami, Senior Counsel

For Mr.M.P.Senthilkumar

J U D G M E N T

HULUVADI G. RAMESH, J. &
K.KALYANASUNDARAM, J.

This Tax Case Appeal has been filed by the Revenue calling in question the correctness of the order passed by the Income Tax Appellate Tribunal, Madras 'B' Bench, Chennai, dated 05.12.2017 made in ITA No.1878/Mds/2016, by raising the following substantial questions of law:-

"(i) Whether the Appellate Tribunal is perverse by holding that the said land was an agricultural land under Section 2(14)(iii) of the Income Tax Act?

(ii) Whether mere payments of kisti will suffice to consider a land as agricultural, when no income from agriculture was offered in the return of income and no other evidence being available with the assessee?"

2. Brief facts necessary for disposal of the appeal would run thus:-

Lands measuring an extent of 301 cents at Kelambakkam was purchased through sale deeds dated 04.05.1998 for Rs.7,76,788/- inclusive of stamp duty. The assessee along with his brother viz., M.A.Antony and one Thilagan had entered into an agreement of sale on 21.08.2006 agreeing to sell the property for a sale consideration of Rs.2,50,00,000/- per acre and the assessee received a sum of Rs.8,61,41,416/-. On 17.07.2007, assessee filed Return of Income Tax for the assessment year 2007-08, admitting income of Rs.3,87,342/- and claimed exemption for payment of tax of sale of the land under Section 2(14)(iii) of the Income Tax Act. However, on 05.06.2012, an action under Section 133A of Income Tax Act (hereinafter referred to as "the Act") was taken and the Officials of the appellant conducted survey. After the proceedings under Section 133A of the Act, a notice under Section 148 of the Act was issued on 05.02.2013 to reopen the assessment for the assessment year 2007-08 on the ground Long Term capital gains chargeable to tax is escaped from assessment. Thereupon, on 04.04.2013, the assessee filed a Return declaring business loss of a sum of Rs.14.62 Lakhs. The Assessing Officer passed reassessment order dated 26.03.2014, charging Long Term Capital Gains of Rs.8,61,41,416/- and demanded tax of Rs.3,56,36,380/-. On appeal, the Commissioner of Income Tax, confirmed the reassessment order.

3. The Assessing Officer and the Commissioner of Income Tax have held that no agricultural activity was undertaken by the assessee in the land in question and hence, the nature of land cannot be considered as agriculture. The assessee had produced Chitta and Adangal to show that for the relevant period he cultivated the land. On the basis of the Chitta, Adangal and payment of kist, the Appellate Tribunal came to the conclusion that the assessee had proved the factum of agricultural activity being carried on during the relevant time and set aside the orders of imposing capital gain tax. Assailing the order, the Revenue is before this Court.

4. Mr.T.R.Senthilkumar, learned Senior Standing Counsel for the Revenue vehemently contended that the assessee had purchased the land in the year 1998 for a total sale consideration of Rs.7,76,788/, but sold the property by way of sale agreement to Vijay Shanthi Builders Ltd., for development of property as house sites and thereby he received Rs.8,61,41,416/- towards sale consideration. Though the assessee had produced Chitta, Adangal and Kist for the year 2005, the assessee has not shown any agricultural income during the earlier years and also for the assessment year 2007-08 under the Income Tax Act or Wealth Tax Act. Moreover, the details of crops said to have been cultivated by the assessee has not been mentioned in the Adangal and the portion relating to the crops and extent have been left blank and therefore, those documents cannot be relied upon to determine the character of the land.

5. It is the further submission of the learned Senior Standing Counsel that though the land in dispute has been assessed to the land revenue as agricultural land under the State Revenue Law is certainly a relevant fact, but it is not conclusive. It is further argued that the Hon'ble Supreme Court in the case of Sarifabibi Mohmed Ibrahim & Others Vs. Commissioner of Income Tax reported in 1993 (204) ITR 0631, has affirmed the decision of Gujarat High Court in CIT Vs. Siddharth, wherein, the Gujarat High Court has evolved 13 factors / indicators applying to come to the conclusion that whether the land is an agricultural land under Section 2(14) of of the Act. According to the learned counsel, non-consideration of the relevant facts and findings of the Income Tax Appellate Tribunal on irrelevant and inadmissible documents are perverse, warrants interference of this Court.

6. Per contra Sri.K.Doraisami, learned Senior Counsel for the respondent-assessee by placing reliance upon the decisions of this Court reported in (2006) 284 ITR 511 [CWT v. E.Udayakumar], (2007) 292 ITR 481 [M.S.Srinivasa Naicker v. ITO], (2016) 388 ITR 514 [PCIT v. Mansi Finance Chennai Ltd.], (2014) 369 ITR 558 [Sakunthala Vedachalam v. ACIT], (2017) 99 CCH 185 [CIT v. Dr.N.Rangabashyam] and (2018) 404 ITR 173 [CIT v. Ashok Kumar Rathi] would argue that no substantial question of law arises for consideration in this appeal as, the Income Tax Appellate Tribunal, accepting the materials produced by the assessee viz., Chitta, Adangal and Kist arrived at the factual finding that the lands sold were agricultural lands. Learned Senior Counsel would urge that the assessee had established before the Authorities that the land in question was agriculture till it was sold and the factum that the purchaser would be using for different purpose cannot be a ground to interfere in the appeal filed under Section 260-A of the Act. Hence, the factum findings based on evidence have to be confirmed.

7. The sum and substance of the argument of the learned Senior Counsel for the respondent is that the issue whether the land is an agriculture or not was already decided by the Appellate Tribunal and the factual finding cannot be reopened or re-appreciated by this Court by exercising the power under Section 260A of the Income Tax Act. For convenience, Section 2 (14) of the Act is extracted below:-

"2 (14) "capital asset" means

(a) property of any kind held by an assessee, whether or not connected with his business or profession,

(b) any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992)

but does not include-

(i) ....

(ii) ...

(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, measures 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"

8. In the appeal, the issues that arise for consideration is whether the assessee had proved that the land sold was an agricultural land and it would not attract payment of capital gain tax and whether this Court can interfere with the findings of the Appellate Tribunal while exercising jurisdiction under Section 260A of the Act.

9. In the matter on hand , in the sale deed produced by the assessee, the land has been mentioned as agricultural land, however, in the agreement of sale dated 21.08.2006, wherein, the assessee had agreed to sell the property to Vijay Shanthi Builders Limited, the land was not mentioned as an agricultural land. Though the agreement of sale was entered into on 21.08.2006, the entire reading of the agreement would show that the purchaser, viz., Vijay Shanthi Builders Limited had almost paid the entire sale consideration to the vendors. The vendors have also executed a Power of Attorney in favour of the person named by the purchaser to enable them to sell the property. The relevant clauses are extracted below:-

> "13. The vendors through may execute a Power of Attorney in the name of the nominee of the purchaser to deal with the schedule mentioned property, the Vendor agrees, if necessary, in order to facilitate the process of obtaining necessary sanctions and approvals from the authorities, to extend all necessary co-operation to the purchaser as may be required by signing relevant papers / applications which are to be submitted to the authorities concerned including Director of Town and Country Planning and Local Planning Authority Chennai Development Authority for obtaining the plan sanction in respect of the development contemplated on the schedule mentioned property. The purchaser shall bear all the costs incidental to such survey, measurement, preparation of plan, sketches and drawings, etc., and also the fee involved for making necessary applications or for obtaining sanctions and approvals from the authorises concerned.
>
> 14. The vendors have agreed to permit the purchaser upon execution of this agreement for sale to undertake marketing operations in respect of the proposed development on the schedule mentioned property at the sole risk and cost of the purchaser. The marketing operations will specifically include the purchaser's right to put up a display board at the schedule mentioned property about the proposed development and also their right to negotiate, enter into agreement for sale and conclude transactions with the prospective buyers without any recourse to the vendors.

15. The parties hereto confirm and agree that this Agreement for sale is irrevocable and the vendors hereby agree that they will not revoke the Power of Attorney executed in respect of the properties in any circumstances and that the same is irrevocable since consideration as per the Agreement would have already been received by the Vendors. In spite of the above, in the event of that the vendors unilaterally or voluntarily revoke the Power of Attorney then the Vendors shall be liable to pay to the purchaser then prevailing market value of the schedule mentioned property together with compensation for improvements effected together with interest at the rate of 15% per annum on such amounts against surrender /re-conveyance of the schedule mentioned properties to the vendors with all improvements."

10. As stated above that the Assessing Officer and the Commissioner of Income Tax had come to the conclusion the land in question was not agricultural land and rejected Chitta and Adangal produced by the assessee. A perusal of the Chitta and Adangal annexed in the typed-set of paper furnished by the respondent would reveal that for the Fasali No.1415 (Corresponding year 2005) in the adangal, except mentioning the name of the asessee, survey number and extent, the other relevant columns i.e., crop and extent said to have been cultivated by the assessee are left blank. As rightly contended by the learned Senior Standing Counsel for the appellant, the Adangal produced by the assessee creates a serious doubt whether the assesee was in fact was cultivating the land at the relevant point of time.

11. The Hon'ble Supreme Court in the case of Sarifabibi Mohmed Ibrahim & Others Vs. Commissioner of Income Tax (referred supra), has held that 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. It is further observed that the Madras High Court in Sarojini Devi v. T. Sri Krishna [AIR 1944 Mad 401] held that the exception "agricultural land" should be given the widest meaning and the land is assessed to land revenue as agricultural land under the State Revenue Law is a strong piece of evidence of its character as an agricultural land, but on appeal, the Constitution Bench of the Hon'ble Supreme Court held that inasmuch as, the 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”. It is also observed that the idea behind exempting the agricultural land is to encourage cultivation of land and the agricultural operations.

12. The Gujarat High Court in CIT Vs. Siddharth, has evolved the following 13 facts to determine the character of the land, which would run thus:-

"(1) Whether the land was classified in the revenue records as agricultural and whether it was subject to the payment of land revenue?

(2) Whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time?

(3) Whether such user of the land was for a long period or whether it was of a temporary character or by way of a stopgap arrangement?

(4) Whether the income derived from the agricultural operations carried on in the land bore any rational proportion to the investment made in purchasing the land?

(5) Whether, the permission under Section 65 of the Bombay Land Revenue Code was obtained for the non-agricultural use of the land? If so, when and by whom (the vendor or the vendee)? Whether such permission was in respect of the whole or a portion of the land? If the permission was in respect of a portion of the land and if it was obtained in the past, what was the nature of the user of the said portion of the land on the material date?

(6) Whether the land, on the relevant date, had ceased to be put to agricultural use? If so, whether it was put to an alternative use? Whether such cesser and/or alternative user was of a permanent or temporary nature?

(7) Whether the land, though entered in revenue records, had never been actually used for agriculture, that is, it had never been ploughed or tilled? Whether the owner meant or intended to use it for agricultural purposes?

(8) Whether the land was situate in a developed area? Whether its physical characteristics, surrounding situation and use of the lands in the adjoining area were such as would indicate that the land was agricultural?

(9) Whether the land itself was developed by plotting and providing roads and other facilities?

(10) Whether there were any previous sales of portions of the land for non-agricultural use?

(11) Whether permission under Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist? If so, whether the sale or intended sale to such non-agriculturist was for non-agricultural or agricultural user?

(12) Whether the land was sold on yardage or on acreage basis?

(13) Whether an agriculturist would purchase the land for agricultural purposes at the price at which the land was sold and whether the owner would have ever sold the land valuing it as a property yielding agricultural produce on the basis of its yield?"

The Hon'ble Supreme Court in the case of Sarifabibi held that not of all these factors would be present or absent in any case and that in each case one or more of those factors may make appearance and that the ultimate decision will have to be reached on an balanced consideration of the totality of the circumstances.

13. Further, we would like to make it clear that the burden of proof that the land is an agricultural land is always on the assessee, who seeks exemption under Section 2(14)(iii) of the Income Tax Act, because, the Revenue cannot be expected to produce negative evidence. The Constitution Bench of Hon'ble Supreme Court in (1976) 105 ITR 133 (SC) [Commissioner of Wealth Tax vs. Officer-in-Charge (Court of Wards) while considering the issue of granting exemption to the agricultural land under the provisions of the Wealth Tax Act, has held as follows:-

"We also think that the Full Bench was not correct in adopting view expressed in Sarojini Devi's case (supra) by the Madras High Court where it was held that it was enough to show that the land under consideration was capable of being used for agricultural purpose. This erroneous view also seems to us to have affected the conclusion of the Full Bench on what was essentially a question of fact. It has led the Full Bench into giving excessive weight to considerations which had a bearing only on potentialities of the land for use for agriculture purposes.

For the reasons already given, we do not think that the term "agricultural land" had such a wide scope as the Full Bench appears 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 shown is the connection with an agricultural rural 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 use which has to be seen for purposes of exemption from wealth tax. On the objects of the exemption seemed to be to encourage cultivation 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 purses 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 deciding the question of fact which was really for the assessing authorities to determine having regard to all the relevant evidence and law laid down by this Court."

14. In the decisions relied on by the learned Senior Counsel for the respondent, this Court, on facts, came to the conclusion that the assessee had in fact established their case that they were carrying agriculture activities. Some of the assessees have shown their agricultural income in the Returns submitted by them under the Income Tax Act and the Wealth Tax Act. Hence, the decisions have no application to the case on hand. Further, we are not able to agree with the proposition stated therein for the reason that the guidelines / factors framed by the Gujarat High Court and got approval of the Apex Court in Sarifabibi Mohmed Ibrahim & Others Vs. Commissioner of Income Tax (referred supra), were not taken note of.

15. In the present case, no materials have been produced by the assessee for the period between 1998 and 2006 to show that he was carrying on agricultural activities in the land at any point of time except producing Chitta and Adangal for the year 2005. Since relevant columns in the Adangal with regard to crop and extent are left blank, it would not be proper to record a finding on those documents and they have to be discarded. It is an undisputed fact that no genuine agriculturist would purchase a land Rs.2,50,00,000/- per acre. In our considered opinion, the factors 2, 7, 8 and 13 evolved by the Gujarat High

Court (supra) are relevant factors to be taken into consideration for deciding the nature of the land. However, the appellate Tribunal overlooking the above material factors and on the basis of Chitta and Adangal, granted exemption of payment of capital gain. Hence, this is the case of finding on no evidence and it is perverse.

16. The Hon'ble Supreme Court in the following decisions have held that if the finding is based on no evidence or misreading of evidence and non consideration of material evidence would be perverse and they are liable to be set aside.

(i) Ramlal v. Phagua [2005 (5) CTC 282]:-

"22. The case of Indira Kaur v. Sheo Lal Kapoor [(1988) 2 SCC 488] was cited by the learned Senior Counsel appearing for Respondent 1 in regard to the scope of Article 136. In the above judgment, this Court in para 7 held that Article 136 does not expressly forge any fetters on the power of this Court to interfere with the concurrent findings of fact. Though, this power has to be exercised sparingly but if and when the Court is satisfied that grave injustice has been done it is not only the right but also the duty of the Court to reverse the error and the injustice and to upset the finding notwithstanding the fact that it has been affirmed earlier. This Court also held that it is not the number of times that a finding has been reiterated that matters. What really matters is whether the finding is a manifestly unreasonable and unjust one in the context of the evidence on record. This judgment squarely applies to the case on hand. In the instant case, the High Court has rightly exercised its right and discharged its duty to reverse the error and removed the injustice done by the courts below. The High Court is right in exercising its duty, rightly so in interfering with unreasonable and unjust findings by both the courts below.

23. On a careful perusal of the materials on record, it will be clear that both the courts below did not appreciate the evidence on record both oral and documentary and, therefore, the findings arrived at by the High Court, in our opinion, do not call for any interference under Article 136 of the Constitution and the civil appeal deserves to be dismissed."

(ii) Bharatha Matha v. R. Vijaya Renganathan [2010 (3) CTC 654]

"11. In Rajappa Hanamantha Ranoji v. Mahadev Channabasappa [(2000) 6 SCC 120] this Court held that it is not permissible for the High Court to decide the second appeal by re-appreciating the evidence as if it was deciding the first appeal unless it comes to the conclusion that the findings recorded by the court below were perverse."

17. It is to be noted that before the appellate Tribunal, it was contended by the assessee that the entire extent of 301 cents does not belong to him. It is evident from the records produced by the assessee that the entire sale consideration was Rs.15,30,00,000/- and the share of the assessee was Rs.8,61,41,416/-.

18. Keeping in view the principles laid down in the above decisions and for the foregoing reasons, the order of Income Tax Appellate Tribunal, Madras 'B' Bench, Chennai, dated 05.12.2017 is liable to be set aside and accordingly, set aside. The questions of law are answered in favour of the Revenue and the Tax Case Appeal is allowed. There is no order as to costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1.The Income Tax Appellate Tribunal,
Madras 'B' Bench, Chennai.

2.The Commissioner of Income Tax (Apeals-15),
Chennai.

3.The Income Tax Officer,
Business Ward IV (1), Chennai.

4.The Principal Commissioner of Income Tax-6,
No.121, Mahatma Gandhi Road, Chennai.

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