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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 822 OF 2016

The Pr. Commissioner of Income Tax-17 ...Appellant
vs
Shri Manohar H. Kakwani ...Respondent.

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Mr P.C.Chhotaray for the Appellant.
Dr. K. Shivram, Sr. Counsel a/w Mr Rahul Hakani a/w Ms Neelam Jadhav for the Respondent.

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CORAM : AKIL KURESHI &
B.P.COLABAWALLA, JJ.
JANUARY 07, 2019.

P.C. :

1. This appeal is filed by the Revenue to challenge the judgment of the Income Tax Appellate Tribunal (“**ITAT**” for short) dated 9th October, 2016. The following questions are presented for our consideration.

> “(A) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal was justified in holding that the compensation received by the assessee from transfer of development rights is not taxable under the provisions of long term capital gains in the Income-Tax Act?
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> (B) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal was justified in holding that there was no cost of acquisition of the TDR when there was a cost of acquisition and when the assessee himself had furnished the cost of acquisition and computation of the long term capital gains to the Assessing Officer in

course of the hearing ?

(C) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Income-tax Appellate Tribunal was justified in not adjudicating on the other very important component of the transaction, involving exemption under section 54 of the Act and substantial enhancement made by the CIT(A), discussed elaborately by the CIT(A) in his order, and therefore, giving substantial relief to the assessee without any discussion on those issues?”

2 The brief facts are as under-

While scrutinizing the return filed by the assessee for the Assessment Year (“**A.Y.**” for short), the Assessment Officer (“**A.O.**” for short) questioned the assessee for not offering a sum of Rs.3.80 Crores to capital gain. Rejecting the assessee's contention, the A.O. taxed such receipt as a capital gain in the hands of the assessee after granting statutory adjustments. This question arises on the background of the assessee having sold the development rights referred to as TDR for the sale consideration of Rs.3.80 Crores. The contention of the assessee was that in absence of any cost of acquisition of the development right, the capital gain tax cannot be charged.

3 In appeal, after one round, the Commissioner proposed to enhance the assessment. The Commissioner was of the opinion that, not only the said consideration of Rs.3.80 Crores but also the value of 3 ½ flats which the builder had provided to the assessee would invite

capital gain tax.

4 The Commissioner (Appeals) rejected the assessee's contention that in absence of any cost of acquisition of the development rights, capital gain tax cannot be levied. He also rejected the assessee's contention that 3 ½ flats were not provided by the builder to the assessee by way of exchange as part of sale consideration. The contention of the assessee was that the FSI of 5580 sq.ft. which was in relation to the said constructed 3 ½ flats was never transferred to the builder and the assessee had paid cost of Rs.80 Lacs for such construction. The Commissioner further was of the opinion that the value of these flats which he estimated at Rs.7 Crores was also part of the assessee's capital gain in addition to the sum of Rs.3.80 Crores received by him.

5 The Tribunal was of the opinion that in absence of the cost of acquisition of the development rights, the TDR cannot be taxed as a capital gain. The Tribunal referred to and relied on a decision of Division Bench of this Court in the case of **Sambhaji Nagar Co-op. Hsg. Society Ltd.** reported in **(2015) 370 ITR 325 (Bom)** and accepted the assessee's contention. In this view of the matter, the Tribunal did not find it necessary to examine the subsequent question of transfer of constructed area by the builder to the assessee.

6 Appearing before us the Counsel for Revenue vehemently contended that the Tribunal has committed an error in applying the decision of this Court in the case of **Sambhaji Nagar Co-op. Hsg. Society Ltd.** (supra) since the facts are different. He relied on a decision of the Tribunal in the case of **Chiranjeev Lal Khanna Vs. ITO** in support of his contentions. He submitted that the Tribunal committed an error in not examining the question of transfer of 3 ½ flats to the assessee.

7 On the other hand, learned counsel for the assessee opposed the appeal contending that there has been consistent view of this Court starting from the decision in the case of **Sambhaji Nagar Co-op.Hsg. Society Ltd.** (supra) that upon transfer of the development rights capital gain tax cannot be levied. He pointed out that subsequently several appeals on this ground have been dismissed. Learned counsel further submitted that the Tribunal in case of **Chiranjeev Lal Khanna Vs. ITO** (supra) was considering the case where the assessee had transferred the land and the building to the developer and it was not the case where transfer was only of additional construction rights. In the present case the assessee had not transferred the land or the building but only the right of further development accruing by virtue of Development Control Rules.

8 Having heard learned counsel for parties and having perused the documents on record, we have no hesitation in coming to the conclusion that the entire issue is squarely covered by the Judgment of Division Bench of this Court in the case of **Sambhaji Nagar Co-op.Hsg. Society Ltd.** (supra). In the said decision the Court after referring to and relying on a decision of the Supreme Court in the case of **CIT** Vs. **B.C. Srinivasa Setty (1981) 128 ITR 294 (SC)** and in case of **Union of India** Vs **Cadell Weaving Mill Co. P. Ltd.** Reported in **(2005) 273 ITR 1 (SC)** held and observed as under:-

> "11. Thus, the conclusion of the Hon'ble Supreme Court is that an asset which is capable of acquisition at a cost would be included within the provisions pertaining to the head "Capital gains" as opposed to assets in the acquisition of which no cost at all can be conceived. In the present case as well, the situation was that the FSI/TDR was generated by the plot itself. There was no cost of acquisition, which has been determined and on the basis of which the Assessing Officer could have proceeded to levy and assess the gains derived as capital gains. It may be that sub-section (2) of section 55 clause (a) having been amended, there is a stipulation with regard to the tenancy rights. However, even in the case of tenancy right, the view taken by the Hon'ble Supreme Court, after the provision was substituted with effect from 1st April, 1995, is as above. The further argument is that the tenancy rights now can be brought within the tax net and in the present case the asset or the benefit is attached to the property. It is capable of being transferred. All this may be true but as the Hon'ble Supreme Court holds it must be capable of being acquired at a cost or that has to be ascertainable. In the present case, additional FSI/TDR is

generated by change in the D. C. Rules. A specific insertion would therefore be necessary so as to ascertain its cost for computing the capital gains. Therefore, the Tribunal was in no error in concluding that the TDR which was generated by the plot/property/land and came to be transferred under a document in favour of the purchaser would not result in the gains being assessed to capital gains. The factual backdrop is noted by the Tribunal in para 3 and thereafter the rival contentions. The Tribunal concluded and relying upon its order passed in two other cases that what the Assessee sold was TDR received as additional FSI as per the D. C. Regulations. It was not a case of sale of development rights already embedded in the land acquired and owned by the Assessee. The Tribunal's conclusion and further to be found in para 11 is based on its view taken in the case of *New Shailaja Co-operative Housing Society Ltd.* The Tribunal has reproduced that conclusion. The Tribunal's conclusion arrived at in the case of *New Shailaja Co-operative Housing Society Ltd.,* is based on the Hon'ble Supreme Court's decision in the case of *B. C. Srinivasa Shetty* (supra). The Tribunal concluded that the Assessee had not incurred any cost of acquisition in respect of the right which emanated from 1991 Rules, making the Assessee eligible to additional FSI. The land and building earlier in the possession of the Assessee continued to remain with it. Even after the transfer of the right or the additional FSI, the position did not undergo any change. The Revenue could not point out any particular asset as specified in sub-section (2) of section 55. The conclusion of the Tribunal is imminently possible and in the given facts. That is also possible in the light of the legal position as noted by language of section 55(2) and the Judgment of the Hon'ble Supreme Court, which is in the field."

9 We notice that this view was followed in later appeals presenting similar questions. In common order dated 24th April, 2015

in Income Tax Appeal No. 1607 of 2013 and connected appeals, the Court had dismissed Revenue's appeals on same issue. The decision of the Tribunal in the case of **Chiranjeev Lal Khanna Vs. ITO** (supra), in any case, would not persuade us to take a view different from a decision of Division Bench of this Court. Even otherwise as correctly pointed out by respondent's counsel, it was the case in which the society had transferred the land and the building and not mere further development rights.

10 Taxing the value of 3 ½ flats as a capital gain, the Revenue has proceeded on completely erroneous basis. The assessee had withheld portion of available FSI for 3 ½ flats which was constructed by the builder at the cost of the assessee and the flats were thus acquired by the assessee. All this was part of argument between the assessee and the builder. In any case, once we hold that any receipt from transfer of TDR in the present case cannot be taxed as a capital gain and this question would itself become academic. In the result, Tax Appeal is dismissed.

(B.P.COLABAWALLA, J.) **(AKIL KURESHI, J.)**