

Form No.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

**ITAT NO: 60 OF 2020
Arising out of
IA NO: GA 2 OF 2020**

**With
ITAT NO: 60 OF 2020
Arising out of
IA NO: GA 1 OF 2020**

**PRINCIPAL COMMISSIONER OF INCOME TAX- 4, KOLKATA
VS.
M/S. SHELTER PROJECT LTD.**

For the appellant: Mr. S. N. Dutta, Adv.
Mr. Soumen Bhattacharjee, Adv.

For the respondent: Mr. J. P. Khaitan, Sr. Adv.
Mr. Sourav Chunder, Adv.
Ms. Swapna Das, Adv.

Heard on : 04.02.2022

Judgment on :04.02.2022

Re: IA NO: GA 1 OF 2020

T.S.SIVAGNANAM, J.: Heard Mr. S. N. Dutta duly assisted by
Mr. Soumen Bhattacharjee, Counsel appearing for the
appellant/revenue and Mr. J. P. Khaitan, learned Senior Counsel duly
assisted by Mr. Sourav Chunder and Ms. Swapna Das, Counsel

appearing for the respondent/assessee. There is a delay of 324 days in filing the appeal. We are satisfied with the reasons given in the affidavit filed in support of the delay condone petition. Since we are inclined to take up the main appeal itself for hearing, we exercise discretion and condone the delay in filing the appeal. Accordingly, the delay in filing this appeal is condoned.

The application being IA No. GA/1/2020 for condonation of delay stands allowed.

Re: ITAT/60/2020

We have perused this appeal filed under Section 260A of the Income Tax Act, 1961(the Act) as directed against the order dated 17th October, 2018 passed by the Income Tax Appellate Tribunal, A Bench, Kolkata in ITA No.737/Kol/2014 for the assessment year 2009-10. The revenue has raised the following substantial question of law for consideration:

- A. Whether the Learned Tribunal has committed substantial error in law in deleting the addition of consideration received on Transfer of land for Development of Rs.49,92,73,606/- on a completely misinterpreting Section 53A of the Transfer of Property Act as well as Section 2(47) of the Income Tax Act, 1961?

We have heard Mr. S. N. Dutta, learned Counsel appearing for the appellant/revenue. The short question which falls for

consideration is as to whether the Tribunal has rightly interpreted the provision of Section 2(47)(v) of the Act. The question which arose for consideration before the Assessing Officer was whether pursuant to an un-registered agreement, possession of the property was handed over by the assessee to a company engaged in development of housing projects wholly owned by the State of West Bengal. The Assessing Officer completed the assessment vide order dated 29th December, 2011 holding that the assessee has accepted that possession was handed over. Challenging the said finding, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-XII, Kolkata [CIT(A)] specifically contending that possession was not handed over and also the fact that subsequently in the year 2011 the agreement stood cancelled and whatever amounts which were paid were returned by the assessee. However, CIT(A) did not proceed on the basis of any concession being given by the assessee stating that possession of the property was handed over to the developer but proceeded to hold that in the agreement payment has been received by the assessee from the developer and the agreement also stipulates that the developer has legally enforceable right to take possession of the said land from the assessee on payment of the balance amount. Therefore, the CIT(A) held that the full amount payable under the agreement has accrued to the assessee in the relevant assessment year, 2009-10. Challenging the said finding the assessee preferred an appeal before the Tribunal. The Tribunal took note of the factual position and, more particularly, that the case arose much after the amendment to Section 53A of the

Transfer of Property Act which was amended by the Amendment Act, 2001 which stipulates that if an agreement like the joint development agreement is not registered, then it shall have no effect in law for the purposes of Section 53A of the TP Act. Accordingly, the assessee's appeal was allowed. The legal position is no longer res integra and it would be beneficial to refer to the decision of the Hon'ble Supreme Court in Commissioner of Income Tax Vs. Balbir Singh Maini reported in (2017) 398 ITR 531 (SC) wherein the Hon'ble Supreme Court on the very same issue has held as follows:

“The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of section 53A. In short, there is no agreement in the eyes of law which can be enforced under section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under section 53A of the Transfer of Property Act. A reading of section 17(1A) and section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in section 53A. The Income-tax Appellate Tribunal was not correct in referring to the expression "of the nature referred to in Section 53A" in section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was

inserted by the Finance Act of 1987 with effect from April 1, 1988. All that is meant by this expression is to refer to the ingredients of applicability of section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in Shrimant Shamrao Suryavanshi(supra), that the section applies, and this is what is meant by the expression "of the nature referred to in section 53A". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "of the nature referred to in Section 53A" would somehow refer only to the nature of contract mentioned in section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted to the facts of this case, we need not go into any other factual question.

21. However, the High Court has held that section 2(47)(vi) will not apply for the reason that there was no change in membership of the society, as contemplated. We are afraid that we cannot agree with the High Court on this score. Under section 2(47)(vi), any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview. The High Court has not adverted to the expression "or in any other manner whatsoever" in sub-clause (vi), which would show that it is not necessary that the transaction refers to the membership of a cooperative society. We have, therefore, to see whether the impugned transaction can fall within this provision.

22. The object of Section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression "enabling the enjoyment of" takes color from the earlier expression "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof. The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact."

In the light of the law laid down under the Hon'ble Supreme Court, if the development agreement is not registered, it shall have no effect in law for the purposes of Section 53A which bodily stood incorporated in Section 2(47)(v) of the Income Tax Act, 1961. Thus,

the Tribunal was right in allowing the assessee's appeal and granting the relief sought for.

Thus, we find that there is no error in the conclusion arrived at by the Tribunal.

The appeal fails and stands dismissed. The substantial question of law is answered against the revenue.

The application being IA No. GA/2/2020 for stay also stands dismissed.

(T. S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

