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IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.39 OF 2016

M/s. Prithvi Consultants Pvt. Ltd.
No.407, 4th Floor, Shiv Towers,
Patto Plaza, Panaji Goa.

....APPELLANT

Versus

Deputy Commissioner of Income Tax,
Central Circle, Pundalik Niwas,
Rua-de-Ourem, Panaji, Goa.

....RESPONDENT

Mr Shivan Desai with Mr A. Sardessai, Advocates the Appellant.

Ms Susan Linhares with Ms E. Fernandes, Advocates for the Respondents.

CORAM:	M. S. SONAK & BHARAT P. DESHPANDE, JJ.
Reserved on :	4th SEPTEMBER 2023
Pronounced on :	5th SEPTEMBER 2023

JUDGMENT : (*Per M.S. Sonak, J.*)

1. Heard Mr Shivan Desai, who appears along with Mr A. Sardessai for the appellant and Ms Susan Linhares, who appears along with Ms E. Fernandes for the respondent.
2. This appeal was admitted on 21.06.2016 on the following substantial questions of law:

“Whether the learned Income Tax Appellate Tribunal has misconstrued the agreement dated 31.12.2008 to come to the conclusion that the transaction therein was a “Transfer” in terms of Section 2(47)(v) of the Income Tax Act and as such make the appellant liable to pay the capital gains?”

3. Later on, by order dated 19.07.2021, this Court framed the following two additional substantial questions of law after being satisfied that they were involved in this appeal:

“(2) Whether in light of S.17(1)-A r/w S.49 of the Registration Act, 1908 the unregistered agreement dated 31/12/2008, can be construed as a document effecting transfer of the subject properties in terms of S.2(47) of Income Tax Act?

(3) Whether in the absence of income having accrued to the Appellant in terms of the Agreement dated 31/12/2008, Appellant can be made liable to pay tax on capital gains in terms of S.45 r/w S.48 of the Income Tax Act?”

4. Basic facts in which the above substantial questions of law arise for determination are set out hereafter.

5. On 31.12.2008, the appellant entered into two Joint Development Agreements in respect of two plots measuring 13,178 sq. mtrs. and 37,500 sq. mtrs. surveyed under no.20/1 of Village Bainguinim. These agreements were styled as *“Joint Development Agreements”*. Admittedly, these agreements were not registered as

required under Section 17(1-A) of the Registration Act, 1908 (Registration Act).

6. On 16.04.2010, the Revenue claimed to have come across the above two agreements during search and seizure operations in the case of Mr Prakash Kittur and others. Based upon the same, the Revenue issued notice dated 27.11.2012 to the appellant under Section 153-C of the Income Tax Act, 1961 (IT Act), calling upon the appellant to file a return of income for the Assessment Year 2009-10.

7. The appellant responded on 15.01.2013 by reiterating the contents of the return of income filed on 31.03.2010. However, on 16.01.2013, the appellant was issued notices under Sections 153-A and 142(1) for Assessment Years 2005-06 to 2010-11 and notice under Section 143(2) for Assessment Year 2011-12 for holding an inquiry and the assessment of the appellant's income for the relevant years.

8. The appellant filed a detailed response on 04.02.2013, pointing out that the appellant had not received any consideration under the two Joint Development Agreements. The appellant also contended that the two Joint Development Agreements did not constitute any "transfer" under Section 2(47) of the IT Act. On 08.03.2013, the appellant cancelled the two Joint Development Agreements dated 31.12.2008 because of non-performance by M/s. Unicorn Developers. By communication dated 14.03.2013, the appellant informed about this development to the Revenue.

9. The Assessing Officer (AO) made an assessment order dated 28.03.2013 under Section 153-C read with Section 143(3) of the IT Act, making an addition of ₹23,66,81,942/- (Rupees Twenty Three Crores Sixty Six Lakhs Eighty One Thousand Nine Hundred and Forty Two only) to the appellant's returned income under the head "Capital Gains". The Assessing Officer held that the two Joint Development Agreements constituted a "transfer" in terms of Section 2(47) of the IT Act and, by reference to the minimum guaranteed return amounts reflected in the Development Agreements, concluded that this additional income had accrued to the appellant, even though, the appellant may have actually received no amount.

10. Based upon the assessment order dated 28.03.2013, a demand notice dated 28.03.2013 was issued to the appellant, calling upon the appellant to pay a sum of ₹8,29,34,446/- (Rupees Eight Crores Twenty-Nine Lakhs Thirty-Four Thousand Four Hundred and Forty Six only) towards a tax on capital gains for Assessment Year 2009-10.

11. Aggrieved by the assessment order and the tax demand notice dated 28.03.2013, the appellant appealed before the Commissioner of Income Tax (Appeals). This appeal was allowed by order dated 24.03.2015, and an assessment order/demand notice dated 28.03.2013 was set aside.

12. The Revenue appealed to the Income Tax Appellate Tribunal (ITAT) against the order dated 24.03.2015 made by the Commissioner (Appeals). By impugned order dated 03.12.2016, the ITAT has allowed

the Revenue's appeal, set aside the Commissioner's order dated 24.03.2015 and restored the assessment order dated 28.03.2013. Hence, this appeal under Section 260-A of the IT Act on the above-referred substantial questions of law.

13. Mr Desai pointed out that the dispute between the appellant and M/s. Unicorn Developers was referred to arbitration. The parties arrived at a settlement, and a consent award was made by the arbitral Tribunal on 22.08.2015. By this, it was agreed that the appellant would sell a smaller plot for a total consideration of ₹9,00,00,000/- (Rupees Nine Crores only). This was recorded in the consent award dated 22.08.2015. In October 2015, the tax was paid by the appellant on the capital gains from the sale of the smaller plot.

14. Mr Desai learned Counsel for the appellant, submitted that the Joint Development Agreements cannot be regarded as agreements for transfer even considering the legal fiction in Section 2(47) of the IT Act. He submitted that these were Joint Development Agreements, and the clauses relating to possession, at the highest, indicated that possession was to be handed over for the limited purpose of undertaking development. The developed areas were to be shared by the co-developers. He, therefore, submits that there was no transfer as defined under Section 2(47) of the IT Act and, consequently, there was no question of any capital gains.

15. Mr Desai submitted that the appellant received no amounts whatsoever under the two Joint Development Agreements dated

31.12.2008. He submitted that no amounts accrued favouring the appellant. Therefore, the ITAT erred in reserving the Commissioner's reasoned order dated 24.03.2015.

16. Mr Desai finally submitted that the two Joint Development Agreements dated 31.12.2008 were admittedly not registered. He submitted that in the absence of compliance with the mandatory requirement of registration, the Joint Development Agreements could not have been regarded as contracts of the nature referred in Section 53A of the Transfer of Property Act, 1882. He submitted that since this crucial predicate under Section 2(47)(v) was never fulfilled, there was no transfer under Section 2(47) of the IT Act. In the absence of any transfer, there was no question of any capital gains or income from capital gains. He submitted that this issue stands in favour of the appellant in *Commissioner of Income Tax V/s. Balbir Singh Maini*¹. Mr Desai submitted that even the decision in *Ashan Devi and Anr. V/s. Phulwasi Devi and Ors.*² supports the appellant's case, particularly in explaining the concept of "possession" under Section 2(47)(v) of the IT Act.

17. For all the above reasons, Mr Desai submitted that the substantial questions of law may be answered favouring the appellant.

¹ (2018) 12 SCC 354

² (2003) 12 SCC 219

18. Ms Linhares, however, countered Mr Desai's submissions by pointing out that possession of the properties was transferred to M/s. Unicorn Developers under the agreements dated 31.12.2008. She submitted that this was the distinguishing feature of the present case and such a feature was not present in *Balbir Singh Maini* (supra). She, therefore, submitted that *Balbir Singh Maini* (supra) would not apply to the facts of the present case.

19. Ms Linhares submitted that this case would be governed by the decision of the Division Bench of this Court in *Dr. Joao Souza Proenca V/s. Income Tax Officer, Ward-2(2), Panaji*³ and *Chaturbhuj Dwarkadas Kapadia V/s. Commissioner of Income Tax*⁴. She submitted that even the decision in *Commissioner of Income Tax, Bangalore V/s. Dr. T.K. Dayalu*⁵ supports the ITAT's judgment and order.

20. Ms Linhares submitted that for all the above reasons, this appeal may be dismissed.

21. The rival contentions now fall for determination.

22. In our judgment, the appellant must succeed on the second substantial question of law, given the decision of the Hon'ble Supreme Court in the case of *Balbir Singh Maini* (supra). Accordingly, there is

³ (2018) 90 taxmann.com 83 (Bombay)

⁴ (2003) 129 Taxman 497 (Bombay)

⁵ (2011) 14 taxmann.com 120 (Karnataka)

no necessity to decide the other two substantial questions of law that are involved in this appeal.

23. Section 2(47)(v) of the IT Act reads as follows:

“2. Definitions - In this Act, unless the context otherwise requires-
(47) “transfer”, in relation to a capital asset, includes-
(i) -(iv)
(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part-performance of a contract of the nature referred to in Section 53-A of the Transfer of Property Act, 1882 (4 of 1882); or”

24. Admittedly, the Joint Development Agreements dated 31.12.2008 were not registered, though they were required to be compulsorily registered under Section 17(1-A) of the Registration Act post the introduction of this provision by the Registration and Other Related Laws (Amendment) Act, 2001.

25. The Amendment Act of 2001 made simultaneous amendments in Section 53(A) of the Transfer of Property Act and Sections 17 and 49 of the Registration Act. By these amendments, the words *"the contract, though required to be registered, has not been registered, or"* in Section 53(A) of the IT Act have been omitted. Simultaneously, Sections 17 and 49 of the Registration Act were also amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of the TP Act)

is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument.

26. The impact of the amendments to the Registration Act and the TP Act on the provisions of Section 2(47) of the IT Act was explained by the Hon'ble Supreme Court in *Balbir Singh Maini* (supra) *inter alia* in paragraphs 23 and 25 which are transcribed below for the convenience of reference:

*“23. 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 the 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 ITAT 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 w.e.f. 01.04.1988. 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 V/s. Pralhad Bhairoba Suryavanshi*⁶, 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*

⁶ (2002) 3 SCC 676

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.

25. 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 enjoyed 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.”

27. Section 2(47) of the IT Act makes it clear that any transaction involving the allowing of the possession of any immovable property to be taken or retained in part-performance of a contract of the nature referred to in Section 53A of the TP Act will amount to a transfer in relation to a capital asset. The Court reasoned that since an unregistered agreement involving the transfer of possession of an immovable property would not qualify as a contract of the nature referred to under Section 53A of the TP Act, no transfer could be presumed based upon an unregistered agreement. The Court held that in order to qualify as

a transfer of a capital asset under Section 2(47)(v) of the IT Act, there must be a contract that could be enforced in law under Section 53A of the TP Act. This reasoning would squarely apply to the facts of the present case.

28. Ms Linhares's argument that in *Balbair Singh Maini* (supra) there was no clause in the Joint Development Agreement (JDA) for the transfer of possession or handing over of possession of the developer and that there was such a clause in the Joint Development Agreement dated 31.12.2008 is not correct and cannot be accepted. Even in *Balbair Singh Maini* (supra), the Revenue, based upon clauses of JDA, had contended that there was transfer of possession. However, in paragraph 26, the Hon'ble Supreme Court rejected this contention by pointing out that the reading of the JDA would show that the owner continues to be the owner throughout the agreement and has at no stage purported to transfer rights akin to ownership to the developer. The Court noted that "*At the highest, possession alone is given under the agreement and that too for a specific purpose-the purpose being to develop the property, as envisaged by all the parties*". Based upon this reasoning, the Court concluded: "*We are, therefore, of the view that this clause will also not rope in the present transaction*".

29. Therefore, it is clear that even in the JDA with which the Hon'ble Supreme Court was concerned in the case of *Balbair Singh Maini* (supra), there was a clause for transfer of possession for the limited purpose of development. In the Joint Development Agreements dated 31.12.2008,

the ownership of the capital asset was retained by the appellant throughout. The clauses relating to parting of possession, besides being unclear, suggest that at the highest, possession was to be parted for the limited purpose of development. Accordingly, no case is made to distinguish *Balbir Singh Maini* (supra) or to urge that the principle in *Balbir Singh Maini* (supra) would not apply to the facts of the present case.

30. In *Dr. Joao Souza Proenca* (supra), the issue of non-registration of the contract either did not arise or was not considered. Besides, it appears that the decision of the Hon'ble Supreme Court in *Balbir Singh Maini* (supra), which was decided on 04.10.2017, was not brought to the notice of the Division Bench which decided *Dr. Joao Souza Proenca* (supra). The same is the position in *Chaturbhuj Dwarkadas Kapadia* (supra), which was in fact relied upon in *Dr. Joao Souza Proenca* (supra). *Chaturbhuj Dwarkadas Kapadia* (supra) was decided on 13.02.2003, and, therefore, did not have the benefit of *Balbir Singh Maini* (supra), which was decided only on 04.10.2017. The same is the position in *Dr. T.K. Dayalu* (supra), wherein even the facts were different from the facts in the present case. Therefore, based on the decisions relied upon by Ms Linhares, no case is made out to non-suit the appellant or to distinguish the decision in *Balbir Singh Maini* (supra).

31. Mr Desai urged that no income was either actually received or was accrued to the appellant under the Joint Development Agreements

dated 31.12.2008. He submitted that the discussion in paragraphs 27 to 31 of *Balbir Singh Maini* (supra) supports the appellant's contention about there being no capital gains income where such income was neither received nor the same accrued to the Assessee. However, as noted earlier, we do not propose to go into the other two substantial questions of law, including the question as regards accrual, because we are satisfied that the appellant must succeed on the second substantial question of law, given the decision of the Hon'ble Supreme Court in *Balbir Singh Maini* (Supra).

32. Accordingly, we answer the second substantial question of law in favour of the appellant and against the Revenue. Based upon this answer, the ITAT's impugned order 03.02.2016 is set aside and the order dated 24.03.2015 made by the Commissioner of Income Tax (Appeals) is restored.

33. The appeal is allowed in the above terms.

34. However, there shall be no order for costs.

BHARAT P. DESHPANDE, J.

M. S. SONAK, J.

NITI K
HALDANKAR

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