A M/S. SESHASAYEE STEELS P. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME TAX,

COMPANY CIRCLE VI(2), CHENNAI

B (Civil Appeal No. 9209 of 2019)

DECEMBER 04, 2019

[R. F. NARIMAN, ANIRUDDHA BOSE AND V. RAMASUBRAMANIAN, JJ.]

C *Transfer of Property Act, 1882: s.53A – Applicability of – Essential ingredients – Held: In order that the provisions of s.53A be attracted, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof and the transferee must have performed or be willing to perform* D *his part of the agreement – In the instant case, as per agreement to sell, assessee gave permission to the builder company to start construction on the land – This showed that a license was given upon the land for the purpose of developing the land into flats and selling the same – Such license cannot be said to be 'possession' within the meaning of s.53A, which is a legal concept, and which* E *denotes control over the land and not actual physical occupation of the land – That being the case, s.53A was not attracted to the facts of this case – Income Tax Act, 1961 – s.2(47)(vi).*

Income Tax Act, 1961: s.2(47)(vi) – Applicability of – Appellant assessee entered into an agreement to sell with a builder F *company and granted permission to the builder company to start construction on the land – Pursuant to the agreement to sell, a Power of Attorney was executed by which assessee appointed a director of the Builder company to execute the necessary sale agreements in respect of the schedule property after developing the same into flats – Subsequently, a memo of compromise was also entered into between* G *them – Assessing officer treated entire sale consideration as a capital gain and brought to tax – Challenged by appellant-assessee – Held: Under s.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 expression "enabling the*

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enjoyment of" in s.2(47)(vi) must take colour from the earlier expression "transferring", so that it can be stated on the facts of a case, that a de facto transfer of immovable property has, in fact, taken place making it clear that the de facto owner's rights stand extinguished – In the instant case, as on the date of the agreement to sell, the owner's rights were completely intact both as to ownership and to possession even de facto, so that this Section equally, cannot be said to be attracted – A perusal of the compromise deed however showed that the agreement to sell and the Power of Attorney were confirmed, and a sum of Rs.50 lakhs was reduced from the total consideration of Rs.6.10 crores – Clause 3 of the said compromise deed confirmed that the appellant, received a sum of Rs.4.68 crores out of the agreed sale consideration and the balance Rs.1.05 crores towards full and final settlement in respect of the Agreement entered into was then to be paid by 7 post-dated cheques – All the cheques mentioned in the compromise deed were, in fact, encashed – This being the case, assessee's rights in the said immovable property were extinguished on the receipt of the last cheque, as also that the compromise deed could be stated to be a transaction which had the effect of transferring the immovable property in question – The pigeonhole, therefore, that would support the orders under appeal would be s.2(47)(ii) and (vi) of the I.T. Act in the facts of this case.

Dismissing the appeal, the Court

HELD: 1. In order that the provisions of Section 53A of the T.P. Act be attracted, first and foremost, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee must have performed or be willing to perform his part of the agreement. A reading of agreement to sell dated 15.05.1998 showed that that both the parties were entitled to specific performance. Clause 16 is crucial, and the expression used in Clause 16 is that the party of the first part hereby gives 'permission' to the party of the second part to start construction on the land. Clause 16 would, therefore, lead to the position that a license was given to another upon the land for the purpose of developing the land into flats and selling the same. Such license cannot be said to be 'possession' within the meaning of Section 53A, which is a legal concept, and which denotes control over the land and not actual

physical occupation of the land. This being the case, Section 53A of the T.P. Act cannot possibly be attracted to the facts of this case for this reason alone. [Paras 11-14][204-D-H]

2. The expression "enabling the enjoyment of" in Section 2(47)(vi) of the Income Tax Act must take colour from the earlier expression "transferring", so that it can be stated on the facts of a case, that a de facto transfer of immovable property has, in fact, taken place making it clear that the de facto owner's rights stand extinguished. It is clear that as on the date of the agreement to sell, the owner's rights were completely intact both as to ownership and to possession even de facto, so that this Section equally, cannot be said to be attracted. [Para 17][205-F-G]

3. A perusal of the compromise deed showed that the agreement to sell and the Power of Attorney are confirmed, and a sum of Rs.50 lakhs is reduced from the total consideration of Rs.6.10 crores. Clause 3 of the said compromise deed confirms that the party of the first part, this is the appellant, has received a sum of Rs.4,68,25,644/- out of the agreed sale consideration. Clause 4 records that the balance Rs.1.05 crores towards full and final settlement in respect of the Agreement entered into would then be paid by 7 post-dated cheques. A finding of the ITAT was that all the cheques mentioned in the compromise deed have, in fact, been encashed. This being the case, the assessee's rights in the said immovable property were extinguished on the receipt of the last cheque, as also that the compromise deed could be stated to be a transaction which had the effect of transferring the immovable property in question. The pigeonhole, therefore, that would support the orders under appeal would be Section 2(47)(ii) and (vi) of the I.T. Act in the facts of the instant case. [Paras 18-21][206-A-E]

Commissioner of Income Tax v. Balbir Singh Maini **(2018) 12 SCC 354 : [2017] 10 SCR 1073 – relied on**

Case Law Reference

[2017] 10 SCR 1073	relied on	Para 16

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9209 of 2019.

From the Judgment and Order dated 25.01.2012 of the High Court of Judicature at Madras in Tax Case (Appeal) No. 461 of 2011.

R. V. Easwar, Sr. Adv., Rubal Bansal, V. Ramasubramanian, P. Bala Senthil Kumar, Advs. for the Appellant. A

K. Radhakrishnan, Sr. Adv., Ms. Seema Bengani, Ms. Purnima Bhat Kak, Prem Prakash, Anas Zaidi, Mrs. Anil Katiyar, Advs. the Respondent.

The Judgment of the Court was delivered by B

R. F. NARIMAN, J.

1. The appellant-assessee entered into an agreement to sell, on 15.05.1998, with one Vijay Santhi Builders Limited for a total sale consideration of Rs.5.5 crores.

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2. The important clauses of the sale agreement are set out hereinbelow:

> "1. The consideration for the sale of the property shall be Rs. 5,50,000/- (Rupees Five Lakhs Fifty Thousand only) per ground. The total area of the property to be sold is around 100 grounds and the total sale consideration of Rs.5,50,00,000/-(Rupees Five Crores Fifty Lakhs only) will be paid directly by the nominees/ members on behalf of PARTY OF THE SECOND PART or by the PARTY OF THE SECOND PART, whichever is earlier. The property shall be free of all encumbrances at the time of registration. D E
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> 2. It is agreed that the total extent of the property is 100 grounds approximately including the areas allotted for road and other amenities, plus the actual extent available for flats.
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> 12. THE PARTY OF THE FIRST PART has already handed over to the PARTY OF THE SECOND PART Xerox copies of all land documents of the schedule mentioned property for their legal counsel's scrutiny and opinion. THE PARTY OF THE SECOND PART have also satisfied themselves about the title deeds. The PARTY OF THE FIRST PART agree to show the original title deed which are kept with them to the nominees of the second part as and when required after fixing prior appointment. F G
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> 14. Both the parties are entitled to specific performance of this agreement.

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16. THE PARTY OF THE FIRST PART hereby gives permission to the PARTY OF THE SECOND PART to start advertising, selling, construction on the land herein mentioned. Advertisements, sales catalogues and leaflets shall be approved by the PARTY OF THE FIRST PART before publication or circulation.

SCHEDULE OF PROPERTY

Sl. No.	Patta No.	Village	Area in Acres
4	117	Perungudi	2.52
1	117	Perungudi	1.66
320/1	469	Perungudi	1.44
			5.62

3. Pursuant to this agreement to sell, a Power of Attorney was executed on 27.11.1998, by which, the assessee appointed one Chandan Kumar, Director of M/s. Vijay Santhi Builders Ltd. to execute and join in execution the necessary number of sale agreements and/or sale deeds in respect of the schedule mentioned property after developing the same into flats. The Power of Attorney also enabled the Builder to present before all the competent authorities such documents as were necessary to enable development on the property and sale thereof to persons.

4. The appellant did not file any Return for Assessment Year 2004-2005. Apparently, it was detected later by the Assessing Officer, that the agreement to Sell had been entered into and that, subsequently, a Memo of Compromise had also been entered into between the parties dated 19.07.2003. Based on the discovery of this fact, Notice dated 04.11.2008 issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'I.T. Act' for brevity) was served on the appellant. Even in response to this notice, no Income Tax Return was filed. A notice dated 08.09.2009 was issued under Section 142(1) fixing the case for hearing on 20.09.2009. Here again, the appellant did not turn-up, as a result of which, another notice was issued dated 23.10.2009, but this time again the assessee did not turn-up, so a third letter was issued on 11.12.2009 fixing the case for hearing on 22.12.2009. In

response to the aforesaid letter, the assessee, by letter dated 29.12.2009 stated as follows: -

> "I refer to your letter dated 11.12.2009. I request you humbly and sincerely not to pass any order u/s 144 and to give me time for one month from today. I shall positively submit all necessary statements and documents within 30 days of today to your satisfaction. I seek this time only because of my very serious illness after an abdominal surgery."

5. Since time bar was foremost in the mind of the Assessing Officer, limitation falling on this transaction by 31.12.2009, a Best Judgment Assessment Order was then passed under Section 144 of the I.T. Act dated 31.12.2009. Vide this Order, the entire sale consideration was treated as a capital gain and brought to tax.

6. An appeal was preferred against this Order. The Commissioner of Income Tax (Appeals) (hereinafter referred to as 'CIT (A)' for brevity) by Order dated 28.10.2010 examined the three documents in question and ultimately dismissed the appeal. The Income Tax Appellate Tribunal (hereinafter referred to as 'ITAT' for brevity) by Order dated 24.06.2011 agreed with the CIT(A) and found that on or about the date of the agreement to sell, the conditions mentioned in Section 2(47)(v) of the I.T. Act could not be stated to have been complied with, in that, the very fact that the compromise deed was entered into on 19.07.2003 would show that the obligations under the agreement to sell were not carried out in their true letter and spirit. As a result of this, Section 53A of the Transfer of Property Act, 1882, (hereinafter referred to as 'T.P. Act' for brevity) could not possibly be said to be attracted. What was then referred to was the Memo of Compromise dated 19.07.2003 under which various amounts had to be paid by the Builder to the owner so that a complete extinguishment of the owner's rights in the property would then take place. The last two payments under the compromise deed were contingent upon M/s.Pioneer Homes also being paid off, which apparently was done, as the Appellate Tribunal held:

> "Further on the specific query from the Bench as to whether all the cheques as mentioned in the compromise deed have been encashed, the answer to which was "Yes". This further supports that the transfer took place during the assessment year 2004-05 as the last cheque is dated 25.01.2004."

A 7. The High Court, by the impugned judgment dated 25.01.2012, adverted to the concurrent findings of the authorities, and stated that the three questions of law that were set out were all answered in favour of the Revenue and against the assessee.

8. Shri R. V. Easwar, learned senior counsel appearing on behalf
B of the appellant, read to us in copious detail the three documents in question. His first argument was that Section 2(47)(v) of the I.T. Act was attracted on the facts of this case, on a reading of the agreement to sell together with the Power of Attorney. The alternative argument was that, assuming that this argument fails, in any case, this case would fall within Section 2(47)(vi), as on this date, there could be said to be a
C transaction which has the effect of "enabling the enjoyment of any immovably property". The third submission made before us was that, in any event, what is relevant to bringing to tax the capital gain in Assessment Year 2004-2005 is whether the compromise deed of 19.07.2003, when read, could be said to fall within any of the clauses under Section 2(47).
D According to the learned senior counsel, this could not be said to be the case, as a result of which, in any event, there would be no transfer of a capital asset within the meaning of Section 2(47), so far as this Assessment Year is concerned.

9. Shri K. Radhkrishnan, learned senior counsel appearing for the Revenue, took us through the Assessment Order, Order of the CIT (A)
E and the ITAT as well as the High Court's judgment, and supported these judgments stating that clearly Section 2(47)(v) could not be made out on the facts of this case and, therefore, in any case, this appeal should be dismissed. No other point had been argued before the forums below, and need not therefore be entertained.

F 10. Having heard learned counsel for both the parties, it is necessary to first set out the statutory provisions:

Section 2(47) of the Income Tax Act, 1961:

2. In this Act, unless the context otherwise requires,-

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(47) "transfer", in relation to a capital asset, includes,-

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(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 53A of the Transfer of Property Act, 1882 1 (4 of 1882); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation 1.- For the purposes of sub- clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA;]

Explanation 2. - For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;)

Section 53A of the Transfer of Property Act, 1882:

53A. Part performance.— Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in

A part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

B then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee C has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

D 11. In order that the provisions of Section 53A of the T.P. Act be attracted, first and foremost, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee must have performed or be willing to perform his part of the agreement. It is only if these two important conditions, E among others, are satisfied that the provisions of Section 53A can be said to be attracted on the facts of a given case.

12. On a reading of the agreement to sell dated 15.05.1998, what is clear is that both the parties are entitled to specific performance. (See Clause 14)

F 13. Clause 16 is crucial, and the expression used in Clause 16 is that the party of the first part hereby gives 'permission' to the party of the second part to start construction on the land.

14. Clause 16 would, therefore, lead to the position that a license was given to another upon the land for the purpose of developing the G land into flats and selling the same. Such license cannot be said to be 'possession' within the meaning of Section 53A, which is a legal concept, and which denotes control over the land and not actual physical occupation of the land. This being the case, Section 53A of the T.P. Act cannot possibly be attracted to the facts of this case for this reason alone.

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15. We now turn to the argument of the learned senior counsel appearing on behalf of the assessee based on Section 2(47)(vi) of the Income Tax Act.

16. This Court in *Commissioner of Income Tax* v. *Balbir Singh Maini* (2018) 12 SCC 354 adverted to the provisions of this sub-Section in the following terms:

> 24. 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.
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> 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 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.

17. Given the test stated in paragraph 25 of the aforesaid judgment, it is clear that the expression "enabling the enjoyment of" must take colour from the earlier expression "transferring", so that it can be stated on the facts of a case, that a *de facto* transfer of immovable property has, in fact, taken place making it clear that the *de facto* owner's rights stand extinguished. It is clear that as on the date of the agreement to sell, the owner's rights were completely intact both as to ownership and to possession even *de facto,* so that this Section equally, cannot be said to be attracted.

18. Coming to the third argument of the learned senior counsel on behalf of the appellant, what has to be seen is the compromise deed and

A as to which pigeonhole such deed can possibly be said to fall under Section 2(47) of the Income Tax Act. A perusal of the compromise deed shows that the agreement to sell and the Power of Attorney are confirmed, and a sum of Rs.50 lakhs is reduced from the total consideration of Rs.6.10 crores. Clause 3 of the said compromise deed confirms that the party of the first part, this is the appellant, has received
B a sum of Rs.4,68,25,644/- out of the agreed sale consideration. Clause 4 records that the balance Rs.1.05 crores towards full and final settlement in respect of the Agreement entered into would then be paid by 7 post-dated cheques. Clause 5 then states that the last two cheques will be presented only upon due receipt of the discharge certificate from one
C M/s. Pioneer Homes.

19. In this context, it is important to advert to a finding of the ITAT, which was that all the cheques mentioned in the compromise deed have, in fact, been encashed.

D 20. This being the case, it is clear that the assessee's rights in the said immovable property were extinguished on the receipt of the last cheque, as also that the compromise deed could be stated to be a transaction which had the effect of transferring the immovable property in question.

E 21. The pigeonhole, therefore, that would support the orders under appeal would be Section 2(47)(ii) and (vi) of the I.T. Act in the facts of the present case.

22. This being the case, we dismiss this appeal but for the reasons stated by this judgment.

Devika Gujral Appeal dismissed.