IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.200 of 2013 (O&M)
Date of decision: July 22, 2015

C.S.Atwal

……Appellant

Vs.

The Commissioner of Income Tax, Ludhiana and another

…..Respondents

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. Ajay Vohra, Sr. Advocate
with Mr. Rohit Jain, Advocate
(in ITA Nos.200 and 201 of 2013).

Ms. Radhika Suri, Sr. Advocate with
Mr. Tej Mohan Singh, Advocate and
Ms. Rinku Dahiya, Advocate.
(in ITA Nos.254,234,251, 306, 305, 240, 238, 242, 248, 244, 253, 255, 239, 236, 252, 271, 298, 294, 356, 333, 357, 304, 308, 237, 332, 233, 243, 361, 358, 232, 235, 286, 290, 287, 250, 307, 249, 288, 273, 272 and 303 of 2013 and
ITA Nos.10 to 16, 25, 26, 90 & 192 of 2014)

Mr. B.S.Sewak, Advocate (in ITA No.398 of 2014).

Mr. Keshav Kataria, Advocate (in ITA Nos.295 & 296 of 2013)
Mr. Rishab Kapoor, Advocate
Ms. Divya Suri, Advocate and
Mr. Sachin Bhardwaj, Advocate (in ITA No.110 of 2014)
for the appellant(s).

Ms. Urvashi Dhugga, Advocate.

Mr. Ashish Kashyap, Advocate for
Mr. Dinesh Goyal, Advocate.

Mr. Rajesh Katoch, Advocate.
Ms. Savita Saxena, Advocate
(in ITA Nos.307, 308 and 243 of 2013 and 278, 398 of 2014) and
Mr. G.S.Hooda, Advocate
(in ITA Nos.332, 296, 295, 292, 289, 284, 285, 272, 314, 315, 244, 245, 297, 313, 316 and 247 of 2013 and 11, 13, 15, 25, 26, 74, 110 and 136 of 2014) for the Revenue.

Ajay Kumar Mittal,J.

1. This order shall dispose of a bunch of 85 appeals bearing ITA Nos. 200, 201, 232 to 255, 271 to 273, 283 to 298, 303 to 308, 310 to 316, 332 to 334, 356 to 358 and 361 of 2013, 10 to 16, 25, 26, 73, 74, 90, 110, 136, 191, 192, 253, 254, 278 and 398 of 2014, as learned counsel for the parties are agreed that common substantial questions of law are involved therein in all these appeals. However, the facts are being extracted from ITA No.200 of 2013.

2. ITA No.200 of 2013 has been preferred by the appellant-assessee under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 29.7.2013 passed under Section 254(1) of the Act by the Income Tax Appellate Tribunal, Chandigarh 'B' Bench, Chandigarh (in short, "the Tribunal') in ITA No.448/Chd/2011 for the assessment year 2007-08. On 30.5.2014, these appeals were admitted which raise the following substantial questions of law:-

i) "Whether the transactions in hand envisage a "transfer" exigible to tax by reference to Section 2(47)(v) of the Income Tax Act, 1961 read with Section 53-A of the Transfer of Property Act, 1882?

ii) Whether the Income Tax Appellate Tribunal, has ignored rights emanating from the JDA, legal effect of non

registration of JDA, its alleged repudiation etc.?

iii) Whether "possession" as envisaged by Section 2(47)(v) and Section 53-A of the Transfer of Property Act, 1882 was delivered, and if so, its nature and legal effect?

iv) Whether there was any default on the part of the developers, and if so, its effect on the transactions and on exigibility to tax?

v) Whether amount yet to be received can be taxed on an hypothetical assumption arising from the amount to be received?"

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.200 of 2013 may be noticed. The appellant-assessee is an individual and one of the members of the Punjabi Cooperative Housing Building Society Limited (hereinafter referred to as "the Society"). The Society consisting of 95 members is owner of 21.2 acres of land in Village Kansal. It had allotted plots measuring 500 square yards to its 65 members, 1000 square yards to its 30 members and four plots of 500 square yards each were retained by it. It entered into a tripartite Joint Development Agreement dated 25.2.2007 (in short, "JDA") with Hash Builders Private Limited, Chandigarh (for brevity "HASH") and Tata Housing Development Company Limited, Mumbai (THDC). Under the JDA, it was agreed that HASH and THDC ("the developers') shall undertake development of 21.2 acres of land owned and registered in the name of the society in respect of which it would give development rights in lieu of consideration. The agreed consideration was to be disbursed by THDC through Hash to each individual member of the society having plot size of 500 square yards partly in monetary terms (₹ 82.50 lacs in cash) and balance in terms of built up property (one flat measuring 2250 square feet). Clause 4 of the JDA

provided the following schedule:-

a) Payment of ₹ 3 lacs per plot holder of 500 square yards and ₹ 6 lacs per plot holder of 1000 square yards upon execution of the JDA as adjustable advance.

b) Payment of ₹ 12 lacs per plot holder of 500 square yards and ₹24 lacs per plot holder of 1000 square yards to be made upon execution of the JDA against execution of a registered sale deed by the society in favour of THDC for land of equivalent value being 3.08 acres having specific Khasra nos. as mentioned in the JDA.

c) Payment of ₹ 18 lacs per plot holder of 500 square yards and ₹ 36 lacs per plot holder of 1000 square yards to be made within two months of execution of the JDA against execution of another registered sale deed by the society in favour of THDC for land of equivalent value being 4.62 acres.

d) Payment of ₹ 24.75 lacs per plot holder of 500 square yards and ₹ 49.50 lacs per plot holder of 1000 square yards to be made within six months from the date of execution of the JDA or within two months from the date of the approval of the plans/design and drawings and grant of final licence to develop whereupon construction can commence, whichever was later, against execution of another registered sale deed by the society in favour of THDC for land of equivalent value being 6.36 acres.

e) Balance payment of ₹ 24.75 lacs per plot holder of 500 square yards and ₹ 49.50 lacs per plot holder of 1000 square yards to be made within two months from the date of payment as per clause (d) above, towards full and final settlement of payments after adjustment of the advance/earnest money against execution of another registered sale deed by the society in favour of THDC for land of equivalent value being 7.14 acres.

f) Each member having plot of 500 square yards was entitled to

receive one built up apartment having super area of 2250 square feet and each member having plot of 1000 square yards was entitled to two built up apartments having super area of 2250 square feet after transfer of land in the name of THDC. Allotment letters were to be issued by THDC within two months from the date of obtaining approval to commence construction at the site. Copies of the minutes of the Executive Committee of the society dated 4.1.2007 and JDA dated 25.2.2007 are attached as Annexures A.1 and A.2 respectively with the appeal. Clause 14 of the agreement further provided that in case of termination of the JDA, lands registered in the name of THDC upto the date of termination shall remain with THDC and the balance lands to be transferred shall not be transferred in favour of THDC.

4. The developers made payments only upto clause (c) above i.e. upto second installment and till date only part of the land measuring 7.7 acres i.e. 3.08 acres plus 4.62 acres having specific khasra nos. as mentioned in the JDA and plan attached thereto have actually been registered in the name of THDC. Copy of the sale deed dated 2.3.2007 is attached as Annexure A.3 with the appeal. Subsequently, substantial disputes arose between the society on the one hand and the developers on the other with regard to further payments to be made in terms of the JDA i.e. from clause (d) onwards. The appellant, who had been allotted 1000 square yards of plot in the society was, as per the JDA, entitled to receive monetary consideration of ₹ 1,65,00,000/- and two furnished flats of 2250 square feet each. The appellant actually received proportionate amount of ₹ 66 lacs of which ₹ 30 lacs was received during the year under consideration and the balance amount of ₹ 36 lacs was received in the subsequent year relevant to the assessment year 2008-09.

5. For the previous year relevant to the assessment year 2007-08, the appellant filed original return of income on 7.12.2007 declaring income of ₹ 2,50,171/-. In the original return, the appellant did not offer to tax any amount under the JDA on the ground that there was no transfer to THDC during the year under consideration and also because ownership as well as possession of the land still vested in the society. The return of income for the relevant assessment year 2007-08 was later revised by the appellant on 7.10.2009 declaring income of ₹ 30,08,606/- which included capital gains of ₹ 27,58,436/-. In the said return, the appellant offered to tax ₹ 30 lacs under the head 'capital gains' received by him during the year under consideration qua that portion of land in respect of which sale deed was registered in favour of the developers. The Assessing Officer, however, treated the revised return filed by the appellant as *non est*. Copies of the return of income originally filed and revised return for the assessment year 2007-08 are attached as Annexures 4 (colly) with the appeal. According to the appellant, ₹ 36 lacs received in the subsequent year relevant to the assessment year 2008-09 were also offered for tax in the year under the head 'capital gains' (Annexure A.5).

6. The Assessing Officer vide order dated 30.12.2009, Annexure A.6 passed under Section 143(3) of the Act held that since as per the JDA, there was grant and assignment of various rights in the property by the appellant in favour of THDC alongwith handing over physical and vacant possession, the same tantamount to “transfer”. The Assessing Officer applied the provisions of Section 2(47)(v) of the Act read with Section 53A of the Transfer of Property Act, 1882 (in short, “the 1882 Act”) which

provides that any transaction involving allowing the possession of any immovable property to be taken or retained in part performance of contract of the nature referred to in Section 53A of the 1882 Act shall be treated as "transfer" for purposes of the Act. Since the JDA was signed on 25.2.2007 i.e. during the previous year relevant to assessment year 2007-08, the Assessing Officer computed chargeable capital gains in that year. It was also held that there was 'transfer' within the meaning of sub sections (ii) and (vi) of Section 2(47) of the Act. The Assessing Officer held that the following consideration receivable by the members of the society having plot size of 500 square yards under the JDA was to be taxable under the head 'capital gains' in the assessment year 2007-08 since JDA was signed in the said year:

a) monetary consideration receivable at ₹ 82.50 lacs (though only ₹ 15 lacs received during the relevant year) and;
b) fair market value of 2250 square feet flat (to be received in future) at the rate of ₹ 4500 per square feet = ₹ 1,01,25,000/-.

The Assessing Officer accordingly held that the appellant was liable to tax during the assessment year under consideration on the entire amount receivable in future under the head 'capital gains' and thus made net addition of ₹ 3,54,68,276/- on account of long term capital gains taxable in the hands of the appellant in terms of the JDA as under:-

Monetary consideration (₹ 82.50 lacs x2)	₹ 1,65,00,000
Two flats of 2250 square feet each valued at the rate of ₹ 4500 square feet.	₹ 2,02,50,000
Total consideration	₹ 3,67,50,000
Less Indexed cost of acquisition	₹ 12,81,724
Net addition	₹ 3,54,68,276

7. Aggrieved by the order, the appellant filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated

23.2.2011, Annexure A.7, the CIT(A) dismissed the appeal upholding the order passed by the Assessing Officer. The appellant filed appeal before the Tribunal. The appellant also produced following additional evidence under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 (in short, "the Rules") :-

i) THDC failed to strictly comply with the payment schedule in as much as it did not make payment of the installments mentioned in clauses (d) to (f) above;

ii) THDC further failed to discharge their part of obligation by failing to obtain various sanctions like site plan/drawings/designs etc. from appropriate authorities in order to commence and carry out development as stipulated under the agreement;

iii) Order dated 20.1.2011 passed by this Court staying the execution of the project under the JDA;

iv) Refusal by THDC vide letter dated 4.2.2011 to make payment of third installment.

v) Resolution dated 13.6.2011 passed by the society terminating the JDA and revocation of power of attorney on 31.10.2011, Annexure A.8 (Colly).

It was further pointed out by the appellant that in the case of Shri Satpal Gosain, one of the co-members of the society, the CIT(A) in his appeal for the assessment year 2007-08 had admitted the aforesaid evidence and after considering the same deleted the addition made by the Assessing Officer on similar grounds. The Tribunal admitted the additional evidence. Vide order dated 29.7.2013, Annexure A.9-A impugned herein upheld the order passed by the Assessing officer bringing to tax the entire consideration receivable under the JDA as liable for tax under the head 'capital gains'. The Tribunal held that the provisions of section 2(47)(v) of the Act read with section 53A

of the 1882 Act were applicable for the following reasons:-

a) possession and original title deeds of the land were actually handed over by the society to the developers;

b) irrevocable power of attorney granting substantial rights to the developers was executed on 26.2.2007 which having been registered, it was not necessary to register the JDA;

c) through various clauses of the JDA and irrevocable power of attorney, the developer was in complete control of the property and was in possession thereof as contemplated in the aforesaid section;

d) there was no force in the contention of the assessee that possession was given only as permissive licensee under section 52 of the Indian Easement Act, 1882 since in the present case, all possible rights in the property including right to sell etc. had been given to the builder;

e) requirement of registration of agreement under section 53A of the TPA cannot be read into section 2(47)(v) of the Act since the said section only refers to the contract of the nature referred to in section 53A of the TPA without going into controversy whether such agreement is registered or not.

In nut shell, the Tribunal held that technically there was transfer in terms of Section 2(47)(v) of the Act read with Section 53A of the 1882 Act. The entire consideration receivable under the JDA was thus held to be taxable in the hands of the appellant. The Tribunal also affirmed the determination of notional value of flat by applying rate of ₹ 4500 per square feet. The issue of allowability of exemption under section 54F of the Act was however not considered as the grounds raised before the Tribunal referred to sections 54 and 54EC and not to section 54F of the Act. Hence the instant appeal by the assessee- appellant.

8. We have heard learned counsel for the parties and perused the

record.

9. The following issues emerge for consideration and adjudication:-

(i) scope and legislative intent of Section 2(47)(ii), (v) and (vi) of the Act;

(ii) the essential ingredients for applicability of Section 53A of 1882 Act;

(iii) meaning to be assigned to the term “possession”?

(iv) whether in the facts and circumstances, any taxable capital gains arises from the transaction entered by the assessee?

10. Taking up first issue, it may be noticed that Section 2(14) of the Act defines “capital asset” whereas Section 45 of the Act is the charging section in regard to capital gains. Section 48 of the Act provides for mode of computation of capital gains. Before delving into the controversy involved in the present case, it would be advantageous to refer to the relevant portion of Section 2(47) of the Act defining 'transfer', which reads thus:-

Section 2(47) of Income Tax Act, 1961 - Definition of Transfer

In this Act, unless the context otherwise requires-

"transfer", in relation to a capital asset, includes,—

(i) xx xx xx xx xx xx x

(ii) the extinguishment of any rights therein ; or

(iii), (iv) & (iva) x xx xx xx xx xx

(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 (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 characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India."

Clause (d) of Section 269UA of the Act which defines 'immovable property" for the purposes of Sub-clauses (v) and (vi) of Section 2(47) of the Act is in the following terms:-

"269UA. Definitions In this Chapter, unless the context otherwise requires,-

(1) to (c) xx xx xx xx xx xx xx

(d) " immovable property" means-

(i) any land or any building or part of a building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also. Explanation.- For the purposes of this sub- clause," land, building, part of a building, machinery, plant, furniture, fittings and other things" include any rights therein;

(ii) any rights in or with respect to any land or any building

> or a part of a building (whether or not including any machinery, plant, furniture, fittings or other things, therein) which has been constructed or which is to be constructed, accruing or arising from 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 of whatever nature), not being a transaction by way of sale, exchange or lease of such land, building or part of a building;
>
> (e) & (f) xx xx xx xx xx xx xx"

11. Finance Act, 1987 introduced Clauses (v) ands (vi) in Section 2 (47) of the Act with effect from April 1, 1988. It provides that 'transfer' includes (i) any transaction which allows possession to be taken/retained in part performance of a contract of the nature referred to in Section 53A of the 1882 Act and (ii) any transaction entered into in any manner which has the effect of transferring or enabling the enjoyment of any immovable property. Therefore, in these two eventualities, profits on account of capital gains would be taxable in the year in which such transactions are entered into, even if the transfer of the immovable property is not effective or complete under the general law. Under Section 2(47) (v) of the Act, any transaction involving allowing of possession referred to in Section 53A of the 1882 Act would come within the ambit of 'transfer'. Even arrangements confirming privileges of ownership without transfer of title could fall under Section 2 (47)(v) of the Act. Section 2(47)(v) read with Section 45 of the Act indicates that capital gains is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law. The purpose of introducing clause (v) in conjunction with clause (vi) in Section 2(47) of the Act, defining 'transfer'

is to widen the net of taxation of capital gains so as to include transactions that closely resembles transfers but are not treated as such under the general law. Avoidance or postponement of tax on capital gains by adopting devices such as the enjoyment of property in pursuance of irrevocable power of attorney or part performance of a contract of sale is also sought to be arrested by introducing the two clauses, clause (v) and (vi) in section 2(47) of the Act. According to Explanation to Section 2(47) of the Act, operative from 1.4.1988 (numbered as Explanation 1 by Finance Act, 2012) for the purposes of sub clauses (v) and (vi), the expression "immovable property" shall have the same meaning as in Section 269UA(d) of the Act.

12. The Central Board of Direct Taxes (CBDT) Circular No.495 dated 23.9.1987 (168 ITR (St.) 87 at Page 92) provides an insight into the background and objectives of the said clauses. The relevant portion is reproduced as under:-

> "Definition of "transfer" widened to include certain transactions – 11.1 The existing definition of the word "transfer" in section 2 (47) does not include transfer of certain rights accruing to a purchaser, by way of becoming a member of or acquiring shares in a cooperative society, company or association of persons or by way of any agreement or any arrangement whereby such person acquires any right in any building which is either being constructed or which is to be constructed. Transactions of the nature referred to above are not required to be registered under the Registration Act, 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and are a common mode of acquiring flats particularly in multistoreyed constructions in big cities. The definition also does not cover cases where possession is allowed 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. New sub clauses (v) and (vi) have been inserted in section 2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above.

11.2 The newly inserted sub clause (vi) of section 2(47) has brought into the ambit of "transfer", the practice of enjoyment of property rights through what is commonly known as Power of Attorney arrangements. The practice in such cases is adopted normally where transfer of ownership is legally not permitted. A person holding the power of attorney is authorised the powers of owner, including that of making construction. The legal ownership in such cases continues to be with the transferor.

11.3 These amendments shall come into force with effect from Ist April 1988 and will accordingly apply to the assessment year 1988-89 and subsequent years (Section 3(g) of the Finance Act, 1987)."

13. The legislative intent behind incorporating clause (v) to Section 2(47) of the Act from assessment year 1988-89 as discernible from CBDT circular is to embrace within its ambit those transactions of sale of property where assessee enters into agreements for developing properties with builders and the seller confers the rights and privileges of ownership to the buyer without executing/registering a formal conveyance deed in order to avoid capital gains tax. In order to thwart such tendencies, transactions where the possession is given or allowed to be retained in part performance of contract of the nature referred to in Section 53A of 1882 Act is held to be "transfer" by fiction of law though under general law it would not be considered to be "transfer". In other words, by deeming fiction, "transfer" is assigned extended meaning for taxation purposes by incorporating and including that where possession of any immovable property is taken or

retained in part performance of a contract of the nature referred to in Section 53A of 1882 Act.

14. In ***CIT vs. K.Jeelani Basha,*** (2002) 256 ITR 282, the Madras High Court held that once possession, even of a part of the property was handed over to the transferee, for the purpose of section 2 (47) (v) read with section 45 of the Act, the transfer was complete. It was held thus:-

> "In this case, possession was parted with whereas the assessee/vendor received the consideration therefor. Once the possession, even of a part of the property was handed over to the transferee for the purpose of section 2(47)(v) read with section 45, the transfer was complete and, therefore, the tax authorities and more particularly, the Tribunal was justified to calculate the consideration received in that particular year for that part of the property which was parted with. In fact, a reference can be made to the judgment of the Supreme Court in Alapati Venkataramaiah v. CIT (1963) 57 ITR 185 (SC), which Mr. Rajan relied upon and pointed out that before the amendment, the transfer was very strictly construed. In the said decision, the Supreme Court refused to accept the agreement to sell or the entries made in the account for the receipt of the consideration by the transferor as a completed transfer for the purpose of then section 12(b). The Supreme Court observed that the transfer means effective conveyance of capital asset to the transferee and delivery of possession of immovable could not by itself be treated as equivalent to conveyance of the immovable property. Relying on this judgment, the learned counsel pointed out that the amendment has effected a sea change in law, inasmuch as under section 2 (47), the delivery of possession provided it is in the nature as contemplated in section 53A of the Transfer of Property Act, would be enough to bring the transaction into the mischief of the word "transfer". The argument is undoubtedly correct.

> 18. Section 2(47)(v) has probably been introduced to meet the law laid down in this judgment, wherein there used to be a transfer for all the practical purposes, but the tax could be avoided only on the sole ground that the transaction was not completed by way of a sale deed. Now, the law having undergone the change, it would be clear that where there would be a transfer of possession in the nature as contemplated under section 53A of the Transfer of Property Act, the transaction would be covered as a transfer. By the necessary logic then, that transaction would be coverable in that particular assessment year as has been done by the Delhi High Court. The only question was as to whether a transaction could be considered for the purpose of calculation of capital gains in parts. The position in law has been indicated by the Delhi High Court that it can be so treated in parts, we respectfully agree with the Delhi High Court judgment. However, the only conditions would be that (1) such a delivery of possession should be in the nature of a doctrine of part-performance under section 53A for which there should be an agreement between the parties, (2) such agreement should be in writing, (3) a completed contract has to be spelt out from that agreement, and the most important (4) the transfer of possession of the property in pursuance of the said agreement. All these conditions undoubtedly and admittedly are completed here. If that is so, then there would be no question of interfering with the Tribunal's judgment. In our opinion, the Tribunal has correctly held that the assessee would have to be assessed on the basis of the transfer of the possession in proportionate to the consideration."

15. Similar provisions were considered by the Bombay High Court in ***Chaturbhuj Dwarkadas Kapadia vs. Commissioner of Income Tax,*** (2003) 260 ITR 491, wherein it was held that Section 2(47)(v) read with

Section 45 of the Act indicates that capital gains was taxable in the year in which such transactions were entered into even if the transfer of immovable property is not effective or complete under the general law. The relevant findings read thus:-

> "7. Under Section 2(47)(v), any transaction involving allowing of possession to be taken over or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act would come within the ambit of Section 2(47)(v). That, in order to attract Section 53A, the following conditions need to be fulfilled. There should be a contract for consideration ; it should be in writing ; it should be signed by the transferor ; it should pertain to transfer of immovable property ; the transferee should have taken possession of the property ; lastly, the transferee should be ready and willing to perform his part of the contract. That even arrangements confirming privileges of ownership without transfer of title could fall under Section 2(47)(v). Section 2(47)(v) was introduced in the Act from the assessment year 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Consequently, the assessees used to enter into agreements for developing properties with the builders and under the arrangement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loophole, Section 2(47)(v) came to be introduced in the Act.
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> 8. It was argued on behalf of the assessee that there was no effective transfer till grant of irrevocable licence. In this connection, the judgments of the Supreme Court were cited on behalf of the assessee, but all those judgments were prior to introduction of the concept of deemed transfer under section 2(47)(v). In this matter, the agreement in question is a

development agreement. Such development agreements do not constitute transfer in general law. They are spread over a period of time. They contemplate various stages. The Bombay High Court in various judgments has taken the view in several matters that the object of entering into a development agreement is to enable a professional builder/contractor to make profits by completing the building and selling the flats at a profit. That the aim of these professional contractors was only to make profits by completing the building and, therefore, no interest in the land stands created in their favour under such agreements. That such agreements are only a mode of remunerating the builder for his services of constructing the building (see Gurudev Developers v. Kurla Konkan Niwas Co-operative Housing Society [2000] 3 Mah LJ 131). It is precisely for this reason that the Legislature has introduced Section 2(47)(v) read with Section 45 which indicates that capital gains is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law. In this case that test has not been applied by the Department. No reason has been given why that test has not been applied, particularly when the agreement in question, read as a whole, shows that it is a development agreement. There is a difference between the contract on the one hand and the performance on the other hand. In this case, the Tribunal as well as the Department have come to the conclusion that the transfer took place during the accounting year ending March 31, 1996, as substantial payments were effected during that year and substantial permissions were obtained. In such cases of development agreements, one cannot go by substantial performance of a contract. In such cases, the year of chargeability is the year in which the contract is executed. This is in view of Section 2(47)(v) of the Act."

16. Further, the Madras High Court in ***Commissioner of Income***

Tax vs. G.Saroja, (2008) 301 ITR 124 had noticed as under:-

> "Section 2(47)(v) of the Income-tax Act comes into the aid of the Department only if the conditions of Section 53A of the Transfer of Property Act are satisfied. From a reading of the above provisions, it is clear that unless there is a written agreement, Section 53A of the Transfer of Property Act will not come into operation. In the present case, there is no written agreement and no sale consideration was received during the relevant period. The Revenue is also unable to prove that the assessee had put the developer in possession of the property by receiving the consideration partly or in full. The fact remains that there is no sale agreement between the assessee and the builder and also the assessee had not received the sale consideration. Hence, the Tribunal is right in holding that there is no transfer of property, as contemplated under Section 2(47(v) of the Act. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference."

17. Adverting to clause (vi) of Section 2(47) of the Act, it may be noticed that the scope and ambit of this clause as explained by CBDT in its circular No.495 dated 23.9.1987 has already been reproduced above. On perusal of this clause, it would be clear that it was intended to cover those cases of transfer of ownership where the prospective buyer becomes owner of the property by becoming a member of a company, cooperative society etc. In the present case, JDA was executed between the society and the developers and there was no transaction involving the developer becoming member of a cooperative society/company etc. in terms of Section 2(47) (vi) of the Act. The surrender of right to obtain plot by the members was for facilitating the society to enter into the JDA with the developers. There was

no change in the membership of the society as contemplated under Section 2 (47)(vi) of the Act. Equally Clause (ii) of Section 2(47) of the Act has no applicability in as much as there was no extinguishment of any rights of the assessee in the capital asset at the time of execution of JDA in the absence of any registered conveyance deed in favour of the transferee in view of judgments in ***Alapati Venkataramiah vs. CIT,*** (1965) 57 ITR 185 (SC) and ***Additional CIT vs. Mercury General Corporation (P) Limited,*** (1982) 133 ITR 525 (Delhi).

18. For determining the ingredients for applicability of Section 53A of 1882 Act, it would be essential to reproduce the relevant provision which reads as under:-

Section 53A of 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 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, 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 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."

19. Analyzing the scope of Section 53A of 1882 Act, necessarily, the legislative history of the provision is required to be scrutinized. Section 53-A was inserted in 1929 by the Transfer of Property (Amendment) Act, 1929, and imports into India in a modified form the equity of part performance as it developed in England over the years. Doctrine of part performance as enshrined in Section 53-A of the 1882 Act is an equitable doctrine which creates a bar of estoppel in favour of the transferee against the transferor. Section 53A of 1882 Act provides protection to a transferee to retain his possession where in part performance of the contract, he had taken possession of the property even if the limitation to bring a suit for specific performance had expired. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the 1882 Act. The Supreme Court in ***Shrimant Shamrao Suryavanshi and another vs. Pralhad Bhairoba Suryavanshi (dead) by LRs and others,*** AIR 2002 SC 960 had reiterated the following to be necessary conditions for applicability of Section 53A of 1882 Act :

"1) there must be a contract to transfer for consideration any immovable property;

2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;

> 5) the transferee must have done some act in furtherance of the contract; and
>
> 6) the transferee must have performed or be willing to perform his part of the contract."

20. Following the aforesaid pronouncement, the Apex Court in ***Rambhau Namdeo Gajre vs. Narayan Bapuji Dhgotra (dead) through Lrs,*** (2004) 8 SCC 614 observed as under:-

> "Protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party.

An agreement of sale which fulfilled the ingredients of Section 53A of 1882 Act was not required to be executed through a registered instrument either under 1882 Act or the Indian Registration Act, 1908 (in short, "the 1908 Act") as originally enacted.

21. The Registration and Other Related Laws (Amendment) Act, 2001 (in short, "the 2001 Act") has brought about a radical change in the rights flowing on the basis of agreements executed in part performance of the contract under Section 53A of the 1882 Act. The amendments have been made in Section 53A of 1882 Act and Sections 17 and 49 of the 1908 Act. The amendment vide 2001 Act which stood enforced with effect from 24.9.2001, the words "the contract, though required to be registered, has

not been registered, or" in Section 53A of 1882 Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended clarifying that unless the document containing contract to transfer for consideration any immovable property for the purpose of Section 53A of 1882 Act is registered, it shall not have effect for purposes of Section 53A of 1882 Act. Section 17(1A) as incorporated and Section 49 of the 1908 Act as amended read thus:-

> **"17(1A).** The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A."
>
> **"49. Effect of non-registration of documents required to be registered.**—No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—
>
> (a) affect any immovable property comprised therein, or
>
> (b) confer any power to adopt, or
>
> (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:
>
> Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

The words “or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882” have been omitted from the Proviso to Section 49.

22. Section 17(1A) of the 1908 Act introduced by the 2001 Act provides that no benefit would be admissible on the basis of unregistered contract for the purposes of Section 53A of 1882 Act. Equally, deletion of the words “or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act” from Proviso to Section 49 of 1908 Act clarifies the effect of non-registration of a contract executed in terms of Section 53A of 1882 Act. A Division Bench of this Court interpreting the aforesaid provisions in ***Ram Kishan and another vs. Bijender Mann alias Vijender Mann and others,*** (2013) 1 PLR 195 had succinctly laid down as under:-

> “7. A contract/agreement that satisfies the ingredients of Section 53A of 1882 Act was not compulsory registrable whether under the Transfer of Property Act or the Indian Registration Act, 1908.
>
> 8. The Registration and Other Related laws (Amendment) Act, 2001(hereinafter referred to as the 'Amendment Act of 2001') has, however, brought about a paradigm shift in rights flowing from agreements executed under Section 53-A of the Transfer of Property Act. Section 17(1A) of the Indian Registration Act introduced by theAmendment Act of 2001, provides that contracts to transfer for consideration any immovable property for the purpose of Section 53Aof the Transfer of Property Act, 1882, shall be registered if they have been executed on or after the commencement of the Registration and Other Related Law (Amendment) Act, 2001. Section 17(1A)further provides that, in case, such a document is not registered, it shall have no effect,

for the purpose of Section 53A. A combined reading of Sections 53A and 17(1A), reveals that a contract that evidences part performance, as envisaged by Section 53A of the Transfer of Property Act shall, after enactment of Section 17(1A), be compulsorily registrable and if not so registered, shall have no effect for the purpose of Section 53A of the 1882 Act. Section 17(1A) reads as follows:-

> "Section 17(1A) of Indian Registration Act, 1908 The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Law (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said Section 53A.

9. Section 17(1A) of the 1908 Act declares in no uncertain terms if a contract executed in part performance of an agreement is unregistered, it shall have no effect for the purpose of Section 53A of the 1882 Act. Section 17(1A) does not refer to much less prohibit the filing of a suit for specific performance or leading of such a contractinto evidence.

10. The Amendment Act also introduced a proviso to Section 49 of the Indian Registration Act, to clarify the effect of non-registration of a contract executed in terms of Section 53-A of the Transfer of Property Act. Section 49 of the Registration Act 1908, reads as follows:-

> "49. Effect of non-registration of documents required to be registered.-- No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall-
>
> (a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power; unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property or as evidence of any collateral transaction not required to be effected by registered instrument."

11. A conjoint appraisal of Sections 53A of the Transfer of Property Act, 1882, Sections 17(1A) and 49 of the Indian Registration Act, 1908, particularly the proviso to Section 49 of the Indian Registration Act, in our considered opinion, leaves no ambiguity that, though, a contract accompanied by delivery of possession or executed in favour of a person in possession, is compulsorily registrable under Section 17(1A) of the Registration Act, 1908, but the failure to register such a contract would only deprive the person in possession of any benefit conferred by Section 53A of the 1882 Act. The proviso to Section 49 of the Indian Registration Act clearly postulates that non-registration of such a contract would not prohibit the filing of a suit for specific performance based upon such an agreement or the leading of such an unregistered agreement into evidence.

12. A suit for specific performance based upon an unregistered agreement to sell accompanied by delivery of possession or executed in favour of a person who is already in possession, cannot, therefore, be said to be barred by Section 17 (1A) of the Registration Act, 1908.

13. Section 17(1A) merely declares that such an unregistered

contract shall not be pressed into service for the purpose of Section 53(A) of the Transfer of Property Act, 1882. Section 17 (1A) of the Registration Act, 1908, does not, whether in specific terms or by necessary intent, prohibit the filing of a suit for specific performance based upon an unregistered agreement to sell, that records delivery of possession or is executed in favour of a person to whom possession is delivered and the proviso to Section 49 of the Indian Registration Act, 1908 put paid to any argument to the contrary.

14. We, therefore, hold that:

(a) a suit for specific performance, based upon an unregistered contract/agreement to sell that contains a clause recording part performance of the contract by delivery of possession or has been executed with a person, who is already in possession shall not be dismissed for want of registration of the contract/agreement;

(b) the proviso to Section 49 of the Registration Act, legitimises such a contract to the extent that, even though unregistered, it can form the basis of a suit for specific performance and be led into evidence as proof of the agreement or part performance of a contract."

In ***Sukhwinder Kaur vs. Amarjit Singh and others,*** (2012) ILR 2 Punjab and Haryana 718, a single Bench of this Court observed as follows:-

"8. Section 53-A of the TPA before amendment prescribed that where in pursuance to part performance of the contract, the transferee has taken possession of the property and has done some act in furtherance of the contract, and the transferor has performed or is will to perform his part of the contact then despite the fact that the contract was required to be registered and has not been registered, the transferrer shall be debarred from enforcing against the transferee any right other than a right expressly provided by the contract. Meaning thereby, Section 53-A of the TPA recognized part performance of the

> contract even though the contract used to be unregistered and the transferee's rights to remain in possession was protected. By the amendment Act No.48 of 2001 (w.e.f. 24.9.2001), the words "the contract, though required to be registered, has not been registered, or" have been omitted from the provision. The effect of the amendment is that now if any person takes possession in pursuance to a contract which is required to be registered but has not been registered, the transferee has no right to remain in possession of the property. To give effect to this principle,Section 17(1A) has accordingly been inserted in the Act which mandates that such contract is now required to be registered. If such a contract entered into after the amendment is not registered then per Section 49 of the Act, the same can neither affect any immovable property comprised therein nor will it be received as evidence of any transaction affecting such property or conferring such power."

Similarly, Delhi High Court in ***MAC Associates vs. S.P. Singh Chandel and another,*** RFA No.518 of 2011 decided on 7.2.2013, dealing with essential requirements of registration in an agreement under Section 53A of 1882 Act after 24.9.2001 noticed as under:-

> "13. If the matter is viewed from another angle then also suit for possession on the basis of Collaboration Agreement, which at best can be taken at par with the Agreement to Sell, is not maintainable even if, for the sake of arguments, it is accepted that the respondent was agent of appellant. Agreement to Sell does not vest any right in favour of a person to the possession of property. Even if a person is put in possession of property through an Agreement to Sell, he cannot protect his possession on the pretext of part performance under Section 53-A of the Transfer of Property Act, 1882 unless such an agreement is a registered document. Section 17 (1A) of the Registration Act, 1908, which has come into force with effect from 24th

September, 2001, reads as under:-

> 'Documents containing contracts to transfer for consideration, any immoveable property for purpose of Section 53-A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, they shall have no effect for the purpose of the said Section 53-A.'

Once a person cannot even protect the possession, which he is holding, in absence of an unregistered Agreement to Sell, then how such a person can seek possession on the basis of such a document. In Sunil Kapoor v/s Himmat Singh & Ors. 167 (2010) Delhi Law Times 806, a Single Judge of this Court has held thus "a mere agreement to sell of immovable property does not create any right in the property save the right to enforce the said agreement. Thus, even if the respondents/plaintiffs are found to have agreed to sell the property, the petitioner/defendant would not get any right to occupy that property as an agreement purchaser. This Court in Jiwan Das v/s Narain Das, AIR 1981 Delhi 291 has held that in fact no right inure to the agreement purchaser, not even after the passing of a decree for specific performance and till conveyance in accordance with law and in pursuance thereto is executed."

23. Having elaborated the scope and legislative intent of Section 2 (47)(ii), (v) and (vi) of the Act and also the mandatory ingredients for applicability of Section 53A of 1882 Act, it would be essential to notice that the provisions of section 53A of 1882 Act have been introduced in Section 2 (47)(v) of the Act by incorporation. The concept of inclusion of a provision

of another statute by incorporation has been dealt with by the Apex Court in detail in ***Surana Steels Pvt. Limited vs. DCIT,*** (1999) 237 ITR 777. The issue before the Apex Court in ***Surana Steels Pvt. Limited***'s case (supra) was relating to computation of book profit under Section 115J of the Income Tax Act, 1961. Section 205 of the Companies Act, 1956 provided that past losses or unabsorbed depreciation, whichever is loss shall be allowed as set off against the book profits of the current year for determining profits for the purpose of declaring dividend. Explanation clause (iv) to Section 115J of the Act incorporated that book profits shall be reduced by the amount of the loss or the amount of depreciation which would be required to be set off against the profit of the relevant previous year as if the provisions of clause (6) of the first proviso to sub section (1) of Section 205 of the Companies Act, 1956 are applicable. It was pronounced that there is no reason to assign to the term "loss" as occurring in Section 205, Proviso clause (b) of the Companies Act, a meaning different from the one in which it is understood therein solely because it is being read alongwith Section 115J of the Act. While dealing with the principles relating to interpretation of taxing statute where there was inclusion of a provision of another statute, it was held that provision must be construed in the sense it bore in statute from which it is taken. It was recorded as under:-

> "Section 115J, Explanation clause (iv), is a piece of legislation by incorporation. Dealing with the subject, Justice G.P. Singh states in Principles of Statutory Interpretation (7th edition,1999)-
>
> "Incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid

verbatim reproduction of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been "bodily transposed into it". The effect of incorporation is admirably stated by LORD ESHER, M.R. "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it. " (p.233) "Even though only particular sections of an earlier Act are incorporated into later, in construing the incorporated sections it may be at times necessary and permissible to refer to other parts of the earlier statute which are not incorporated. As was stated by LORD BLACKBURN: "When a single section of an Act of Parliament is introduced into another Act. I think it must be read in the sense it bore in the original Act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the sections meant, though those other sections are not incorporated in the new Act".

24. Similarly, following the Apex Court judgment in ***Surana Steels Pvt. Limited's*** case (supra), the Gauhati High Court in ***Assam Bengal Carriers Limited vs. CIT***, (1999) 239 ITR 862 (Gauhati), observed that when a legal fiction is created for an obvious purpose, full effect of it is to be given. The relevant observations read thus:-

"xxxxxx When a legal fiction is created for an obvious purpose full effect of it is to be given--there is no half way house, In this regard it would be advantageous to rehearse the following passage from Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council, [1951] 2 All ER 587 (HL) "If you are bidden to treat an imaginary state of affairs as real, you

> must surely, unless prohibited from doing so, also imagine as real, the consequences and incidents which if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. ... The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs." While interpreting the deeming provision contained in Section 43 of the Indian Income-tax Act, 1922, the Privy Council hold that under the circumstances sot out therein an agent was also chargeable to income-tax as of an assessee. In CIT v. Bombay Trust Corporation, AIR 1930 PC 54, Viscount Dunedin in the aforesaid case observed (page 55): "Now when a person is 'deemed to be' something the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were." The Supreme Court also dealt in a similar manner indicated also for giving full effect to a legal fiction ref. State of Bombay v. Pandurang Vinayak, AIR 1953 SC 244 ; CIT v. S. Teja Singh, [1959] 35 ITR 408 (SC) ; Rajputna Trading Co. Ltd. v. CIT [1969] 72 ITR 286 (SC) ; A. S. Glittre D/5 I/S Garonne v. CIT, [1997] 225 ITR 739 (SC). There is also no statutory exception excluding the operation of Section 115J of the Act."

Thus, it would mean that Section 53A of 1882 Act has been bodily transposed into Section 2(47)(v) of the Act and the effect of it would be that Section 53A of 1882 Act shall be taken to be an integral part of Section 2 (47)(v) of the Act. In other words, the legal requirements of Section 53A of 1882 Act are required to be fulfilled so as to attract the provisions of Section 2(47)(v) of the Act.

25. Examining the question of possession, one of the essential conditions for enforceability of Section 53A of 1882 Act is that the

transferee must in part performance of the contract take possession of the property or any part thereof. There is a serious dispute with regard to the nature of possession contemplated by Section 53A of 1882 Act. It was contended on behalf of the appellant-assessee that reference to the possession of the transferee as postulated under Section 53A of 1882 Act is that it must have been delivered in furtherance to the contract and should be sole, exclusive and cannot be concurrent. The possession is not to be in any other capacity to invoke Section 53A of 1882 Act. On the other hand, learned counsel for the revenue, drawing support from the judgment delivered by Authority for Advance Ruling (AAR) in ***Re Jasbir Singh Sarkaria,*** (2007) 294 ITR 196 (AAR) submitted that there can be concurrent possession of the transferor as well as of the transferee and it would be enough if the transferee has, by virtue of the transaction, a right to enter upon and exercise acts of possession effectively pursuant to the covenants in the contract. Reliance was placed upon following observations for meaning of possession and how should it be understood in the context of clause (v) of Section 2(47) of the Act:-

> "24. The next question is, in what sense we have to understand the term 'possession' in the context of clause (v) of section 2 (47). Should it only mean the right to exclusive possession - which the transferee can maintain in his own right to the exclusion of everyone including the transferor from whom he derived the possession? Such a criterion will be satisfied only after the entire sale consideration is paid and the transferor has forfeited his right to exercise acts of possession over the land or to resume possession. In our view, there is no warrant to place such a restricted interpretation on the word 'possession' occurring in clause (v) of section 2(47). Possession is an

abstract concept. It has different shades of meaning. It is variously described as "a polymorphous term having different meanings in different contexts" (per R.S. Sarkaria, J in Supdt and Legal Remebrancer, W.B. v. Anil Kumar) and as a word of "open texture" (see Salmond on Jurisprudence, Para 51, Twelth Edition, Indian reprint). Salmond observed : "to look for a definition that will summarize the meanings of the term "possession" in ordinary language, in all areas of law and in all legal systems, is to ask for the impossible". In the above case of Anil Kumar, Sarkaria, J. speaking for a 3 Judge Bench also referred to the comments of Dias and Hughes in their book on Jurisprudence that "if a topic ever suffered too much theorizing it is that of "possession". Much of the difficulty is caused by the fact that possession is not a pure legal concept, as pointed out by Salmond. The learned Judge then explained the connotation of the expression "possession" by referring to the well known treatises on Jurisprudence:

> "Possession", implies a right and a fact : the right to enjoy annexed to the right to property and the fact of the real intention. It involves power of control and intent to control. (see Dias and Huges)
>
> 14. ...
>
> 15. While recognizing that 'possession' is not a purely legal concept but also a matter of fact, Salmond (12th Ed., 52) describes possession, in fact", as a relationship between a person and a thing. According to the learned author, the test for determining 'whether a person is in possession of anything is whether he is in general control of it.:

25. In Salmond's Jurisprudence, at para 54, we find an illuminating discussion on "immediate" and "mediate possession". The learned author states "in law one person may possess a thing for and on account of some one else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one

man through another may be termed mediate, while that which is acquired or retained directly or personally may be distinguished as "immediate or direct"." Salmond makes reference to three types of mediate possession. In all cases of "mediate possession", two persons are in possession of the same thing at the same time. An allied concept of concurrent possession has also been explained in para 55 of Salmond's Jurisprudence in the following words:

It was a maxim of the civil law that two persons could not be in possession of the same thing at the same time. As a general proposition this is true : for exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realized at the same time. Claims, however, which are not adverse, and which are not, therefore, mutually destructive, admit of concurrent realization. Hence, there are several possible cases of duplicate possession.

1. Mediate and immediate possession coexist in respect of the same thing as already explained.

2. Two or more persons may posses the same thing in common, just as they may owe it in common....

26. On a fair and reasonable interpretation and on adopting the principle of purposive construction, it must be held that possession contemplated by clause (v) need not necessarily be sole and exclusive possession. So long as the transferee is, by virtue of the possession given, enabled to exercise general control over the property and to make use of it for the intended purpose, the mere fact that the owner has also the right to enter the property to oversee the development work or to ensure performance of the terms of agreement does not introduce any incompatibility. The concurrent possession of the owner who can exercise possessory rights to a limited extent and for a limited purpose and that of the buyer/developer who has general control and custody of the land can very well be reconciled. Clause (v) of section 2(47) will have its full play

even in such a situation. There is no warrant to postpone the operation of clause (v) and the resultant accrual of capital gain to a point of time when the concurrent possession will become exclusive possession of developer/transferee after he pays full consideration.

27. Further, if 'possession' referred to in clause (v) is to be understood as exclusive possession of the transferee/developer, then, the very purpose of the amendment expanding the definition of transfer for the purpose of capital gains may be defeated. The reason is this: the owner of the property can very well contend, as is being contended in the present case, that the developer will have such exclusive possession in his own right only after the entire amount is paid to the owner to the last pie. There is then a possibility of staggering the last installment of a small amount to a distant date, may be, when the entire building complex gets ready. Even if some amount, say 10 per cent, remains to be paid and the developer/transferee fails to pay, leading to a dispute between the parties, the right to exclusive and indefeasible possession may be in jeopardy. In this state of affairs, the transaction within the meaning of clause (v) cannot be said to have been effected and the liability to pay capital gains may be indefinitely postponed. True, it may not be profitable for the developer to allow this situation to linger for long as the process of transfer of flats to the prospective purchasers will get delayed. At the same time, the other side of the picture cannot be over-looked. There is a possibility of the owner with the connivance of the transferee postponing the payment of capital gain tax on the ostensible ground that the entire consideration has not been received and some balance is left. The mischief sought to be remedied, will then perpetuate. We are, therefore of the view that possession given to the developers need not ripen itself into exclusive possession on payment of all the instalments in entirety for the purpose of determining the date of transfer.

> 28. While on the point of possession, we would like to clarify one more aspect. What is spoken to in clause (v) of section 2 (47) is the 'transaction' which involves allowing the possession to be taken. By means of such transaction, a transferee like a developer is allowed to undertake development work on the land by assuming general control over the property in part performance of the contract. The date of that transaction determines the date of transfer. The actual date of taking physical possession or the instances of possessory acts exercised is not very relevant. The ascertainment of such date, if called for, leads to complicated inquiries, which may frustrate the objective of the legislative provision. It is enough if the transferee has, by virtue of that transaction, a right to enter upon and exercise acts of possession effectively pursuant to the covenants in the contract. That tantamounts to legal possession. We are referring to this aspect because the authorized representative has submitted when he appeared before us in the last week of May, 2007 that even by that date the development work could not be commenced for want of certain approvals, and therefore, the developer was " not willing to take possession of the land". Such an unsubstantiated statement which is not found in the original application or even written submissions filed earlier need not be probed into especially when it is not his case that the developer was not allowed to take possession in terms of the agreement."

26. The Supreme Court considering the requirement of delivery of possession for a case to be falling under the provisions of Section 53A of 1882 Act, in ***Sardar Govindrao Mahadik and another vs. Devi Sahai and others,*** AIR 1982 SC 989 had dealt as follows:-

> "31. While text book writers and English decisions may shed some light to illuminate the blurred areas as to whether part payment of purchase money or even the whole of the

consideration would not be sufficient act of part performance, it is necessary that this aspect may be examined in the background of statutory requirement as enacted in section 53A. To qualify for the protection of the doctrine of part performance it must be shown that there is a contract to transfer for consideration immovable property and the contract is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. These are pre-requisites to invoke the equitable doctrine of part performance. After establishing the aforementioned circumstances it must be further shown that a transferee had in part performance of the contract either taken possession of the property or any part thereof or the transferee being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract. The acts claimed to be in part performance must be unequivocally referable to the pre-existing contract and the acts of part performance must unequivocally point in the direction of the existence of contract and evidencing implementation or performance of contract. There must be a real nexus between the contract and the acts done in pursuance of the contract or in furtherance of the contract and must be unequivocally referable to the contract. When series of acts are done in part performance, one such may be payment of consideration. Any one act by itself may or may not be of such a conclusive nature as to conclude the point one way or the other but when taken with many others payment of part of the consideration or the whole of the consideration may as well be shown to be in furtherance of contract. The correct approach would be what Lord Reid said in Steadman's case that one must not first took at the oral contract and then see whether the alleged acts of part performance are consistent with it. One must first look at the alleged acts of part performance and see whether they prove

that there must have been a contract and it is only if they do so prove that one can bring in the oral contract. This view may not be wholly applicable to the situation in India because an oral contract is not envisaged by section 53A. Even for invoking the equitable doctrine of part performance there has to be a contract in writing from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. Therefore, the correct view in India would be, look at that writing that is offered as a contract for transfer for consideration of any immovable property and then examine the acts said to have been done in furtherance of the contract and find out whether there is a real nexus between the contract and the acts pleaded as in part performance so that to refuse relief would be perpetuating the fraud of the party who after having taken advantage or benefit of the contract backs out and pleads non registration as defence, a defence analogous to section 4 of the Statute of Frauds.

32. We may recall here that the acts preliminary to the contract would be hardly of any assistance in ascertaining whether they were in furtherance of the contract. Anything done in furtherance of the contract postulates the pre- existing contract and the acts done in furtherance thereof. Therefore, the acts interior to the contract or merely incidental to the contract would hardly provide any evidence of part performance."

27. Applying the principle of law laid down in ***Sardar Govindrao Mahadik's*** case (supra), the Apex Court in ***D.S.Parvathamma vs. A.Srinivasan,*** AIR 2003 SC 3542 reiterated as under:-

"9. Secondly, the appellant has failed to allege and prove that he was delivered possession in part performance of the contract or he, being already in possession as lessee, continued in possession in part performance of the agreement to purchase, i.e. by mutual agreement between the parties his possession as

lessee ceased and commenced as that of a transferee under the contract. On the contrary, there is a finding recorded in the earlier suit that in spite of his having entered into a contract to purchase the property he had not disowned his character as lessee and he was treated as such by the parties. The judgment dated 1.9.1999 in the Civil Suit notes the conduct of the plaintiff inconsistent with his conduct as vendee in possession. When a person already in possession of the property in some other capacity enters into a contract to purchase the property, to confer the benefit of protecting possession under the plea of part performance his act effective from that day must be consistent with the contract alleged and also such as cannot be referred to the preceding title. The High Court of Madhya Pradesh had an occasion to deal with the facts very near to the facts before us in Bhagwandas Parsadilal Vs. Surajmal& Anr., AIR 1961 M.P. 237. A tenant in possession entered into an agreement to purchase the house forming subject matter of tenancy. However, he failed to show his nature of possession having altered from that of a tenant into that of a transferee. In a suit of ejectment based on landlord-tenant relationship, the tenant sought to protect his possession by raising the plea of part performance as against subsequent purchaser of the property. Referring to Section 91 of Indian Trust Act, the High Court held that a subsequent purchaser of the property with notice of an existing contract affecting that property must hold the property for the benefit of the person in whose favour the prior agreement to sell has been executed to the extent it is necessary to give effect to that contract. But that does not mean that till a final decision has been reached the contract creates a right in the person in possession, i.e. the tenant, to refuse to surrender possession of the premises even if such possession was obtained by him not in part performance of the contract but in his capacity as a tenant. Having entered into possession as a tenant and having continued to remain in possession in that

capacity he cannot be heard to say that by reason of the agreement to sell his possession was no longer that of a tenant. (Also see Dakshinamurthi Mudaliar (Dead) & Ors. Vs. Dhanakoti Ammal, AIR 1925 Madras 965 and A.M.A. Sultan (deceased by LRs) & Ors. Vs. Seydu Zohra Beevi, AIR 1990 Kerala 186) In our opinion the law has been correctly stated by the High Court of Madhya Pradesh in the abovesaid decision."

28. In ***Thota Rambabu alias Ramu vs. Cherukuri Venkateswara Rao alias Pedababu and others,*** AIR 2006 AP 114, the Andhra Pradesh High Court while considering the question of requirement of delivery of possession for claiming benefits of Section 53A of 1882 Act in a suit for relief of specific performance of an agreement of sale, observed as under:-

"30. Now the third point: The plaintiff raised a plea, as to his entitlement for the benefit under Section 53-A of the Act. Specific issue was framed and extensive discussion was undertaken by the Trial Court on this. It is true that Section 53-A of the Act is basically a legal weapon to be used in defence to protect the possession, under an agreement of transfer, if the person in possession is ready and willing to perform his part of contract. In the recent past, Courts have recognized that this provision can be treated as a source of independent right, and that it can be enforced by filing a suit.

31. One of the most important ingredients of Section 53-A of the Act is that the person claiming the benefit under it, must be in possession of the property, which is the subject-matter of the contemplated transfer. By its very nature, possession is a fluid concept, and is not susceptible to any precise definition. For the most part of it, possession was treated as a question of fact, and was held to depend upon the purpose, as well as the connection with which it arises. Shartel, in his Article "Meanings of Possession" [(1932) 16 Minnesota Law Review 611], observed as under:

> "I want to make the point that there are many meanings of the word 'possession'; that possession can only be usefully defined with reference to the purpose in hand; and that possession may have one meaning in one connection and another meaning in another".

32. Jurists hailing from various legal systems have pointed out that possession, as a legal concept, has two components, viz., corpus possessions, physical possession of the property and animus possidendi, i.e. the intention to hold it as of right. Their difference of approach was only as to the emphasis on these ingredients, to constitute a position in law. In his treatise on the Common Law, O.W. Holmes [Holmes The Common Law Ch 6,], observed as under:

> "To gain possession, then, a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent. These relations and this intent are the facts of which we are in search".

33. Opinions drastically varied, as to whether possession is a question of fact, or of law. While some jurists treated it as a pure question of fact, others held it to be matter of law. Dias, in his treatise on 'Jurisprudence', struck a balance and observed, as under (Dias Jurisprudence Fifth Edition Page-290):

> "Possession has three aspects: firstly, the relation between a person and a thing is a fact. Secondly, the advantages attached by law to that relation is a matter of law. Thirdly, these advantages are also attributed to a person when certain other facts exist. What they are in any given type of case is a matter of law".

34. Where the possession of a property, movable or immovable, is physically delivered to another, it is not difficult to discern, as to who exactly is in possession of such property. Difficulty, however, arises, where the delivery is implied or symbolical. It is only an examination of a bunch of

facts, that would yield an answer to this. In the instant case, the plaintiff pleaded that symbolical delivery of possession was affected to him. Admittedly, the 1st defendant is owner of only 1/4th share of the rice mill and that the mill, as a whole, was under lease to a third party.

35. Section 53-A of Act is clear to the effect that the person claiming benefit under it, must have "taken possession of the property". This can happen, if the transferee was delivered physical possession of the property. It can also happen when a symbolical delivery of possession was effected, such as by attornment of the existing lease over such property. Where the contemplated transfer relates to an undivided share, Section 53-A takes a different colour. The reason is that, there cannot be delivery of possession of property by a co-owner, of an undivided property, or the corresponding taking possession of such property by the transferee. Section 44 of the Act makes this abundantly clear. It reads as under:

> "Sec. Transfer by one co-owner :--Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.
>
> Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house".

It mandates that, what a transferee, from a co-owner of an undivided property, gets, is a right, to enforce a partition, that

too, subject to conditions and liabilities, in relation to the property, by the date of transfer.

36. The phenomena of co-ownership of an undivided property, on the one hand, and delivering of physical or symbolical possession thereof do not co-exist. In fact, they are mutually exclusive. In Saleem, S/o. Yaseen v. I Additional Civil Judge, Senior Division, Saharanpur, , it was held that the right of a transferee under Section 53-A of the Act does not have the effect of superceding, or frustrating the provisions of Section 44 of the Act. To the same effect is the judgment of the Supreme Court in Dorab Cawasji Warden v. Coomi Sorab Warden, . Though they related to the second limb of Section 44, by and large, the principle remains the same.

37. In Smt. Lalita James v. Ajit Kumar, and Ashim Ranjandas v. Smt. Bimala Ghosh, , it was held that a transferee from a co-owner of a portion of undivided property is not entitled to right of exclusive possession, and that he can, at the best, enforce a partition of joint estate. The Himachal Pradesh High Court in its judgment in Paldev Singh v. Smt. Darshani Devi, , observed that a co-owner cannot be said to be in actual physical or exclusive possession of any parcel, till a partition takes place, and the question of his delivering the possession of such an undivided share does not arise. Authorities can be multiplied on this aspect. The gist is that the transferee from a co-owner of an undivided property gets nothing more than a right to seek partition, and thereafter, secure possession of the share of property purchased by him, and he cannot claim any exclusive possession, on the basis of such transfer till the partitions takes place. Resultantly, such a transferee cannot claim the benefit of Section 53-A, since he does not gain or take possession of I the subject-matter of transfer.

38. Even if we assume that the 1st defendant was in exclusive

possession of the suit schedule property, it is difficult to invoke Section 53-A in favour of the plaintiff. The reason is that, except pleading that a symbolic delivery of possession was effected to him, the plaintiff would not prove its ingredients. One of the most well-recognized methods of symbolic delivery of possession of immovable property is, by attorning existing lease in favour of the transferee. Such attornment can take place either with the direct participation of the lessee, in a tripartite transaction, or through intimation by the transferor to the lessee about the latter's obligations to pay the rents to the transferee, henceforth. Even where no such specific steps are taken, an implied symbolic, delivery of possession can be culled out, if the transferee is able to prove to the satisfaction of the Court, that he is started receiving the rents of the property, subsequent to the agreement, as of right.

39. In the absence of any of the circumstances referred to above, the Court cannot infer delivery of possession in favour of a transferee. Taking of possession, being one of the most important ingredients of Section 53-A, the plaintiff cannot derive the benefit of that provision, once he failed to prove that he has taken possession of the suit schedule property."

29. Similarly, Delhi High Court in ***M/s R.K.Apartments Pvt. Limited and another vs. Smt.Aruna Bahree and others***, (1998) 2 ILR 727 (Del.), delving into the issue of possession under Section 53A of 1882 Act, had recorded as under:-

"14. From the aforesaid statements made in both the Articles it is manifest that the legal position enunciated in Hounslow London Borough's case (supra), is no more a good law. Possession of the suit land delivered to defendants 1 & 2 at the time of the execution of the agreements dated 1st/11th March, 1985 was only by way of temporary measure for undertaking the construction work by them and the exclusive

possession thereof in legal sense remained with the executants of the said agreements. Thus, defendants 1 & 2 prima facie are not entitled to protect their possession over the suit land under said Section 53-A of the Transfer of Property Act."

30. The concept of possession to be defined is an enormous task to be precisely elaborated. "Possession" is a word of open texture. It is an abstract notion. It implies a right to enjoy which is attached to the right to property. It is not purely a legal concept but is a matter of fact. The issue of ownership depends on rule of law whereas possession is a question dependent upon fact without reference to law. To put it differently, ownership is strictly a legal concept and possession is both a legal and a non-legal or pre-legal concept. The test for determining whether any person is in possession of anything is to see whether it is under his general control. He should be actually holding, using and enjoying it, without interference on the part of others. The AAR in ***Jasbir Singh Sarkaria's*** case (supra) had observed that there can be concurrent possession of the owner who can exercise possessory rights to a limited extent and for a limited purpose and that of the buyer/developer who has general control and custody of the land. It was also noticed that possession contemplated by clause (v) of Section 2 (47) of the Act need not necessarily be sole and exclusive possession. The legality of these conclusions was, however questioned by learned counsel for the assessee. In our opinion, broadly speaking, the aforesaid proposition enunciated by AAR may not be faulted as it would depend upon facts and circumstances of individual cases on the construction of combined documents executed between the parties. The primary issue before AAR

was the year of chargeability of the income to capital gain tax. Integrally connected to it was the identification of the previous year in which the deemed transfer within the meaning of clause (v) of Section 2(47) of the Act had taken place. It was observed that once it was held that the transaction of the nature referred to in clause (v) of section 2(47) of the Act had taken place on a particular date, the actual date of taking physical possession need not be probed into. It is enough if the transferee has by virtue of that transaction a right to enter upon and exercise the acts of possession effectively. It was further held in that case that the capital gains which arose during the financial year 2006-07 shall be subjected to tax for the assessment year 2007-08. The aforesaid observations were recorded in that context on the facts involved therein. It would have to be ascertained in each case independently whether a transferee has been delivered possession in furtherance of the contract in order to fall under Section 53A of the 1882 Act and thus amenable to tax by virtue of Section 2(47)(v) read with Section 45 of the Act.

31. Lastly, both the parties had hotly and with great vehemence contested the question of delivery of possession under the JDA dated 25.2.2007 and also the registered special power of attorney dated 26.2.2007. It would be expedient to notice the respective submissions of the learned counsel for the parties. Firstly, noting the arguments of the assessee, reliance was placed on Section 52 of the Indian Easement Act, 1882 which defines 'licence' in the following terms:-

> "**52. "License" defined.-** Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the

> grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

It was contended that possession was handed over to the transferee as a licencee to carry out development of the property. No possession was ever given by the transferor to the transferee in part performance of the JDA dated 25.2.2007. JDA had not conferred any right to own the property on the transferee but only to develop it. Even registered irrevocable special power of attorney nowhere specified granting possession in part performance of JDA dated 25.2.2007 as required under Section 53A of the 1882 Act.

32. Further, in order to demonstrate that no absolute possession as required under section 53A of the 1882 Act had been delivered by the transferor to the transferee, learned counsel for the assessee-appellant extensively drew the attention of the court to various relevant clauses of the JDA dated 25.2.2007 and also the registered special power of attorney dated 26.2.2007 as under:-

> (I) **Clauses of JDA dated 25.2.2007**
>
> 2. **Project**
>
> 2.1. The owner hereby irrevocably and unequivocally grants and assigns in perpetuity all its rights to develop, construct, mortgage, lease, licence, sell and transfer the property alongwith any and all the construction, premises, hereditaments, easements, trees thereon in favour of THDC for the purpose of development, construction, mortgage, sale, transfer, lease, licence and/or exploitation for full utilization of the property ('rights') and to execute all the documents necessary to carry out, facilitates and enforce the Rights in the property including to execute lease agreement, licence agreements,Construction Contracts, Supplier Contracts, Agreement for sale, Conveyance,

Mortgage Deeds, finance documents and all documents and agreements necessary to create and register the mortgage, conveyance, lease deeds, licence agreement, Power of Attorneys, affidavits, declarations, indemnities and all such other documents, letters as may be necessary to carry out, facilitate and enforce the rights and to register the same with the revenue/competent authorities and to appear on our behalf before all authorities, statutory or otherwise, and before any court of law (the Development Rights). The owner hereby hands over the original title deeds of the property as mentioned in the list annexed hereto and marked as Annexure IV and physical, vacant possession of the property has been handed over to THDC simultaneous to the execution and registration of this agreement to develop the same as set out herein.

It is hereby agreed and confirmed that what is stated in the recitals hereinabove, shall be deemed to be declarations and representations on the part of the owner as if the same were set out herein in verbatim and forming an integral part of this agreement.

4. **Consideration**

4.1.It is specifically understood and agreed amongst the parties that THDC shall use its expertise and its Brand name and/or any other brand name at its discretion to develop the property into the premises as per applicable building bye-laws of the competent authority and the owner shall have no objection to the same in whatsoever manner. In consideration of the owner granting and signing, its development rights in the property, irrevocably and in perpetuity to THDC to develop the property and for transfer of the property upon the surrender of allotment rights of 500 sq. yards and/or 1000 sq. yards (as the case may be) by its members to the owner, vide resolution dated 4.1.2007 and 25.2.2007 (copy attached as per Annexures I & II), HASH is committed to pay to the owner and/or the respective members of the owner (as the

case may be) a total amount of Rs.106,42,50,000/- (Rupees one hundred six crores forty two lacs fifty thousand only) calculated @ Rs.82,50,000/- (Rupees eighty two lacs fifty thousand only) payable to 65 members having plot of 500 square yards each, Rs.1,654,00,000/- (Rupees one crore sixty five lacs only) payable to 30 members having plot of 1000 square yards each and Rs.3,33,00,000/- (Rupees three crores thirty lacs only) payable to the owner for the 4 plots of 500 square yards each which shall tantamount to the full and final payment to the owner and/or the respective members of the owner (as the cas may be) in a manner set out herein below (Payment). Further, the transfer, sale and conveyance of 21.2 acres of land of the property shall be made by the owner in favour of THDC pro rata to the payment received by the owner and/or the respective members of the owner (as the case may be) from HASH by executing sale deeds and registering the same. It is expressly provided that as resolved by the owner, the total amount payable by HASH to the owner and/or the respective members of the owner (as the cas may be) for assignment of the Development rights and for transfer and sale of 21.2 acres of land of the property shall be Rs.106,42,50,000/- (Rupees one hundred six crores forty two lacs fifty thousand only) and one hundred and twenty nine (129) flats consisting of super area of 2250 square feet (Flats) one flat each for sixty five (65) members having a plot of 500 square yards, two flats for the (thirty) 30 members having a plot of 1000 square yards and 4 flats to the owner for the 4 plots of 500 square yards each as per list annexed with this agreement as Schedule B (sale transaction).

4.2.It is expressly agreed between the developers that HASH shall be responsible for making all payments to the owner and/or the respective members of the owner (as the case may be) as per the negotiated and agreed terms between the owner and HASH. HASH expressly undertakes to make timely

payments of the payment to the owner and/or the respective members of the owner (as the case may be) as under:"

(The schedule of payment referred in clause 4.1 herein has already been reproduced in the earlier part of the judgment).

9. **Transfer of ownership/rights**

9.1. The owner shall simultaneously on receipt of payment as set out in Clause 4.1 above, execute an irrevocable special power of attorney in favour of THDC for development of the property, authorizing THDC to do all lawful acts, deeds, matters and things pertaining to the development of the property for the project alongwith inter alia right to mortgage the property and/or premises, sell, lease, licence the premises and receive/collect monies in its name in respect of the same and approach, interact, communicate with the competent authorities and for doing all acts, deeds, matters and things to be done or incurred by THDC in that behalf as also to sign all letters, applications, agreements and register the same if necessary, documents, court proceedings, affidavits and such other papers containing true facts and correct particulars as may from time to time be required in this behalf.

9.2 The owner shall execute in favour of THDC, the sale deeds in accordance with the provisions of clause 4.1(ii) to clause 4.1(v) of this agreement and execute all other necessary documents and papers to complete the aforesaid transaction.

9.3 That all the original title deeds pertaining to property as mentioned in Annexure IV have been handed over to THDC by the owner at the time of signing of this agreement and in furtherance of the common interest of the parties for the development of the project and except the sale transaction made by the owner in favour of THDC as set out in Clause 4.1 above. THDC hereby undertake and assure the owner that they shall use the title deeds only for the purpose of furtherance of the project in the manner that it does not

adversely effect the owner/allottee in any manner whatsoever.

14. **Termination**

(i) Save and except the provisions of clause 26, THDC shall at all times have the right to terminate this agreement in the event there is any material breach of the representations, warranties, undertakings, declarations, covenants and/or obligations given by the owner under this agreement after giving thirty(30) days written notice for rectification of such breach. In the event the agreement is terminated by THDC, all the lands registered in the name of THDC as per the terms of this agreement upto the date of the termination shall remain with THDC and the balance lands to be transferred to THDC as per the terms of this agreement shall not be transferred by the owner in favour of THDC. Upon the termination, the owner shall refund to THDC the adjustable advance/earnest money mentioned in clause 4.1(i) above within one month of such termination. In the event of failure of the owner to refund the said amount, the owner hereby agrees to execute a registered sale deed for land of equivalent value in favour of THDC.

(ii) In the event all the requisite governmental and statutory approvals, authorizations, consents, licences, approvals of all the plans/design and drawings as may be required for the development of this property in relation to the project and to undertake the project are not granted within nine (9) months of the submission of the final plans/design and drawings to the competent authority for approval, then THDC may at its sole discretion either decide that it does not desire to undertake and complete the project and hence terminate this agreement after giving thirty (30) days written notice in this regard or decide to wait for any further time as deemed fit by THDC for the grant of the aforesaid approvals and licences. In the event the agreement is terminated by THDC, all the lands registered in the name of THDC as per the terms of this

agreement upto the date of the termination shall remain with THDC and the balance lands to be transferred to THDC as per the terms of this agreement shall not be transferred by the owner in favour of THDC. Upon the termination, the owner shall refund to THDC the adjustable advance/earnest money mentioned in clause 4.1(i) above within one month of such termination. In the event of failure of the owner to refund the said amount, the owner hereby agrees to execute a registered sale deed for land of equivalent value in favour of THDC.

(iii) In the event THDC is unable to develop the property due to refusal/non grant of approvals, consents, permissions, licenses or revocation of the same by the appropriate statutory authority, then THDC may at its sole discretion terminate this agreement. In the event the agreement is terminated by THDC, all the lands registered in the name of THDC as per the terms of this agreement upto the date of the termination shall remain with THDC and the balance lands to be transferred to THDC as per the terms of this agreement shall not be transferred by the owner in favour of THDC. Upon the termination, the owner shall refund to THDC the adjustable advance/earnest money mentioned in clause 4.1(i) above within one month of such termination. In he event of failure of the owner to refund the said amount,the owner hereby agrees to execute a registered sale deed for land of equivalent value in favour of THDC.

(iv) The owner shall have the right to terminate the agreement only in the event of default by the developers for making the payment in accordance with the terms of this agreement and the allotment of flats within the time period as mentioned in this agreement after giving thirty (30) days written notice for rectification of such breach or any further time as may be desired by the owner. In the event the agreement is terminated by owner, all the lands registered in the name of THDC as per the terms of this agreement upto the date of the

termination shall remain with THDC and the balance lands to be transferred to THDC as per the terms of this agreement shall not be transferred by the owner in favour of THDC. Upon the termination, the owner shall forfeit the adjustable advance/earnest money mentioned in clause 4(i).

26. **Force Majeure**

(i) None of the parties shall be liable to the other party or be deemed to be in breach of this agreement by reason of any delay in performing, or any failure to perform, any of its own obligations in relation to the agreement, if the delay or failure is due to any event of force majeure. Event of Force Majeure is any event caused beyond the parties' reasonable control. The following shall be regarded as causes beyond the parties reasonable control.

(ii) For the purposes of this clause, an event of Force Majeure shall mean events of war, war like conditions, blockades, embargoes, insurrection, governmental direction, riots, strikes, acts of terrorism, civil commotion, lock outs, sabotage,plagues or other epidemics, acts of God including fire, floods, volcanic eruptions, typhoons, hurricanes, storms, tidal waves, earthquake, landslides, lightning, explosions, and other natural calamities,prolonged failure of energy, court orders/injunctions, change of laws, action and/or order by statutory and/or government authority, third party actions affecting the development of the project, acquisition/requisition of the property or any part thereof by the government or any other statutory authority and such other circumstances affecting the development of the project (Event of Force Majeure).

(iii) Any party claiming restriction on the performance of any of its obligations under this agreement due to the happening or arising of an event of force Majeure hereof shall notify the other party of the happening or arising and the ending or ceasing of such event or circumstance within three (3)

days of determining that an event of force Majeure has occurred. In the event any party anticipates the happening of an event of Force Majeure, such party shall promptly notify the other party.

(iv) The party claiming event of force Majeure conditions shall, in all instances and to the extent it is capable of doing so, use its best efforts to remove or remedy the cause thereof and minimize the economic damage arising thereof.

(v)Either party may terminate this agreement after giving the other party a prior notice of fifteen (15) days in writing if the event of Force Majeure continues for a period of ninety (90) days. In the event of termination of this agreement all obligations of the parties until such date shall be fulfilled.

(II) **Clauses of special Power of Attorney dated 26.2.2007**

A). The owner is absolutely seized and possessed of 169 kanals 7 marlas equivalent to 21.2 acres (approx) of free hold land situated in village Kansal, Tehsil Kharar, District Mohali, registered in tis name vide various sale deeds duly registered with Sub Registrar Majri, District Rupnagar (now within District Mohali) and more particularly described in the Schedule A hereunder written and delineated in green colour boundary line in the plan attached hereto, annexed as Annexure I (hereinafter referred to as the 'Property').

B). The owner is the absolute and undisputed owner of the property and has assigned and transferred all its righst to plan, develop, construct, sell, lease, mortgage the property as more particularly set out in the Joint Development Agreement dated 25.2.2007 (Joint Development Agreement) entered into by the owner with Hash Builders Private Limited having its registered office at SCO No.311-12, 2nd Floor, Sector 40-D, Chandigarh, hereinafter referred to as “Hash” and THDC Limited having their registered office at Eruchshaw Building, Fourth Floor, 249, Dr. D.N.Road, Mumbai 400 001, hereinafter referred to as “THDC” wherein the owner assigned its development rights (as

defined in the Joint Development Agreement in favour of THDC, who possesses the relevant and required skills and other expertise for developing the property by constructing thereupon buildings and/or structure to be used for inter alia residential, public use, commercial use, institutional use, club use, parking and any other kind of structures, and necessary amenities, utilities, infrastructure thereto as may be decided by THDC and all work including investigations, studies, design, planning, financing, constructing, operations, maintenance and marketing for sale/lease/transfer to purchasers/lessees/transferees for residential and/or any other authorized user to be determined by THDC (hereinafter referred to as the 'Project'). Further the S....to execute an irrevocable special power of attorney in favour of THDC authorized nominee.

xx xx xx xx xx xx

D). Under the terms and conditions of the Joint Development Agreement, the owner is required to execute and register an irrevocable special power of attorney (Irrevocable special power of attorney) in favour of THDC and/or its authorized nominee to facilitate THDC to carry out its duties and obligations for the execution, coordination and implementation of the project under the Joint Development Agreement. In pursuance thereof, the owner hereby nominates and appoints THDC and/or its authorized nominee to act for and in the name of and on the behalf of the owner and to do all acts and things relating to the property.

Now know all and these presents witness that the owner hereby nominates, constitutes and appoints THDC Limited and/or its authorised nominees (the attorneys) to be the owner's true and lawful attorneys and to do the following acts, deeds, matters and things on behalf of and in the name of the owner in relation to the property that is to say.

1. To make, sign, execute, file, do, perform and/or get registered all acts, deeds, documents, applications and other

papers, petitions and all proceeds whatsoever and matters and things whatsoever as shall or may be required from time to time to enable the development of the property and for undertaking, executing and completing the project and without prejudice to the aforegoing to jointly and severally do and perform the following acts, deeds, matters and things, namely:

(a) to (l) xx xx xxx xx xx xx

(m) To apply to the competent authority and/or any other body (ies) and/or any other relevant statutory and/or government authority(ies) for the time being concerned therewith for the permanent or temporary connection of power, light, water, sewerage, gas and/or other facilities to the property for the construction of the premises or any party thereof and in connection therewith to make all deposits as shall or may be necessary and to do all other acts, deeds, matters and things which the owner can do.

(n) to enter upon the property either alone or with others for the purpose of development, coordination, execution, implementation of the project and commercialization of the property/premises.

(o) to (s) xxxx xx xx xx xx

(t) To amalgamate the property with any other contiguous, adjacent and adjoining lands and properties wherein developmental and/or other rights, benefits and interests are acquired and/or proposed to be acquired and developed or proposed to be developed by THDC and/or their associate and/or group concern/s and/or utilize the FSI, FAR, DR and TDR of the contiguous, adjacent and adjoining lands for the purpose of constructing buildings and/or structures thereon and/or on the property or utilize such lands and properties for making provision of parking spaces thereon, and/or may utilize the same for any other lawful purpose, as THDC and/or their associate and/or group concern/s may in their sale,

absolute and unfettered discretion think fit.

(aa) To sell, transfer, lease, licence the premises that may be constructed on the property on ownership basis, lease, licence and/or in any other manner for such price as the attorneys may deem fit and proper. To collect and receive from the purchasers, transferees, lessees, licencees of the premises, monies/price and/or consideration and/or maintenance charges and to sign and execute and/or give proper and lawful discharge for the receipts.

(bb) to (hh) xx xx xxx xx xx xx

33. Conversely, learned counsel for the revenue, argued that where the intention and facts are contained in more than one document between the same parties, they are required to be read and interpreted together by taking them to be one document. To garner support, reliance was placed on the following observations in the judgment of the Supreme Court in ***S.Chathanatha Karayalar vs. The Central Bank of India Limited and others,*** AIR 1965 SC 1856:-

> "The first question presented for determination in this case is whether the status of the 3rd defendant in regard to the transaction of overdraft account is that of a surety or of a co-obligant. It was argued by Mr. Desai on behalf of the appellant that the High Court has misconstrued the contents of Exs. A and B in holding that the 3rd defendant has undertaken the liability as a co-obligant. It was submitted that there was an integrated transaction constituted by the various documents---Exs. A, B and G executed between the parties on the same day and the legal effect of the documents was to confer on the 3rd defendant the status of a surety and not of a co-obligant. In our opinion, the argument put forward on behalf of the appellant is well-rounded and must be accepted as correct. It is true that in the promissory note--Ex. B all the three defendants have

"jointly and severally promised to pay the Central Bank of India Ltd. or order a sum of Rs. 4 lakhs only together with interest on such sum from this date", but the transaction between the parties is contained not merely in the promissory note--Ex. B--but also in the letter of continuity dated November 26, 1946--Ex. A which was sent by the defendants to the plaintiff-bank along with promissory note--Ex. B on the same date. There is another document executed by defendant No. 1 on November 26, 1946---Ex. G-Hypothecation agreement. The principle is well- established that if the transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In Manks v. Whiteley,(1) Moulton, L.J. stated:

"Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole."

34. It was contended that irrevocable power of attorney had been registered wherein power to sell the property as owners to third parties had been given to the developers and thus, it partakes the colour of contract under Section 202 of Indian Contract Act, 1872. Therefore, termination of agency in the present case could not be effected by the transferor in view of Section 202 of the Indian Contract Act, 1872 which is in the following terms:-

“202. Termination of agency, where agent has an interest in subject-matter.—Where the agent has himself an interest in

the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest."

Illustrations

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death. "(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death."

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death. "(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death."

To buttress her submissions, support was gathered from following observations in the judgment rendered by Delhi High Court in ***Harbans Singh vs. Shanti Devi,*** 1977(13) DLT 369:-

"(7) For the purposes of the Law of Contract, therefore, it would not be useful to restrict the meaning of the word "interest" by the narrow compass in which this world is used at times in relation to immovable property. For instance, the last sentence of section 54 of the Transfer of Property Act states that a contract for sale of itself does not create any interest in or charge on immovable property. Similarly, section 17(1)(b) of the Registration Act makes only those documents

> compulsorily registerable which create, declare, assign, limit or extinguish any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immovable property. Since an agreement for sale does not create such a right, title or interest, it may not be compulsorily registerable. But in the context of the Contract Act, it cannot be said that a person who is the beneficiary of an agreement of sale has no right or interest in the subject-matter of the sale. He has a legally enforceable right and interest in enforcing the contract of sale by the execution of a sale deed and in getting possession of the property agreed to be sold under the provisions of the Specific Relief Act. In the English Common Law, the specific performance of contracts was a part of the law of contract. This is why Chapter Iv of the Contract Act deals with the performance of contracts which includes the performance of contracts relating to immovable property also. In fact, section 4 of the Transfer of Property Act says that the chapters and sections of that Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872. Therefore, the respondent in whose favor the appellant had executed an agreement for the sale of an immovable property had an interest in the subject-matter of the contract, namely, the shop, turn the purposes of section 202 of the Contract Act if not for the purposes of the Transfer of Property and the Registration Acts."

35. Principle of law enunciated in Haydon's case was pressed into service to urge that while interpreting a statute, the mischief and the defect which was sought to be removed by the enactment, full meaning should be assigned to it and such construction is required to be put as shall suppress the mischief. It was strongly put forward that the JDA executed on 25.2.2007 followed by registered special power of attorney dated 26.2.2007

when read together supported the view of the revenue that provisions of Section 53A of 1882 Act stood fulfilled and as a necessary corollary transaction was exigible to capital gains tax under Section 2(47)(v) read with Section 45 of the Act in the hands of the assessee-appellant. The following observations recorded by the Apex Court in ***Bengal Immunity Co. Limited vs. State of Bihar and others,*** 1955(2) SCR 603 were referred:-

> "It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case(1) was decided that-
>
> "..... for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:-
>
> 1st. What was the common law before the making of the Act., 2nd. What was the mischief and defect for which the common law did not provide., 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth., and (1) 3 Co. Rep. 7a; 76 ElR. 637, 6334th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico".
>
> In In re Mayfair Property Company(1) Lindley, M.R. in 1898 found the rule "as necessary now as it was when Lord Coke reported Heydon's case". In Eastman Photographic Material Company v. Comptroller General of Patents, Designs and Trade Marks(2) Earl of Halsbury re-affirmed

the rule as follows: "My Lords,, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy' These three being compared I cannot doubt the conclusion".

36. Reliance was placed on the conclusion of the Apex Court in ***Dr. Baliram Waman Hiray vs. Mr. Justice B.Lentin and another,*** (1988) 176 ITR 1, wherein following the ***Bengal Immunity's*** case (supra), it was observed as under:-

"No rule is more firmly established than the principles enunciated in Heydon's case. which have been continually cited with approval not only by the English Courts but also by the Privy Council as well as this Court. The principles laid down in Heydon's case have been enunciated in Craies on Statute Law, 6th edn. at p. 96 as follows:

"That for the sure and true interpretation of all statutes in general (be they penal or beneficial restrictive or enlarging of the common law), four things are to be discerned and considered: (1) what was the common law before the making of the Act (2) What was the mischief and defect for which the common law did not provide (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and pro privato commodo, and to add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono publico."

These rules are still in full force and effect, with the addition

> that regard must now be had not only to the existing law but also to prior legislation and to the judicial interpretation thereof. The Court applied the rule in Heydon's case in The Bengal Immunity Company Limited v. The State of Bihar & Ors., [1955] 2 SCR 603 in the construction of Art. 286 of the Constitution."

37. The claim of the assessee was also contested relying upon judgment in ***Suraj Lamp and Industries Private Limited's*** case (supra) by urging that while interpreting Sections 54, 55, 53-A of the 1882 Act, the Apex Court held that transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance duly stamped and registered as required by law, no right, title or interest in an immovable property can be transferred. Any contract of sale which is not a registered deed of conveyance would fall short of the requirements of Sections 54 and 55 of the 1882 Act and will not confer any title nor transfer any interest in an immovable property except to the limited right granted under section 53-A of the 1882. The following observations were referred to:-

> "24. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of `GPA sales' or `SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized as valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of section 53A of the TP Act. Such transactions cannot be relied upon or made the basis

for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.

Xx xx xx xx xx xx xx xx x

26. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not `transfers' or `sales' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said `SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession under section 53A of TP Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to SA/GPA/WILL transactions' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision.

27. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney empowering the developer

> to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding `SA/GPA/WILL transactions' are not intended to apply to such bonafide/genuine transactions."

38. In so far as enunciation of legal principles in various pronouncements relied upon by learned counsel for the revenue are concerned, they are well recognized but their applicability has to be judged in the facts and circumstances of the present case.

39. It would be apt to notice undisputed facts as discernible from the record of the case. The assessee is a member of Punjabi Cooperative House Building Society Limited who owned 21.2 acres of land in Village Kansal, District Mohali. Certain members were owning plots measuring 500 square yards whereas others were holding plots of 1000 square yards. On advertisement having been floated by the Society to develop a Group Housing Commercial project and do development as per the municipal building bye-laws, HASH – a developer approached them with proposal for the development of the property. HASH in turn due to paucity of funds with it for constructing the building and/or structures entered into an agreement with THDC for the said purpose. The Executive Committee of the society decided to appoint HASH alongwith the Joint Developer THDC in terms of JDA. It was resolved that members of the society owning plots measuring 500 square yards would receive ₹ 82,50,000/- each to be paid by HASH in four instalments and one flat with super area of 2250 square feet to be

constructed by THDC. The members owning plots of 1000 square yards were to receive double the amount of settlement of plot holders of 500 square yards. For this purpose, irrevocable power of attorney was also agreed to be executed for this purpose. The resolution of the Executive Committee was ratified in the General Body meeting held on 25.2.2007 pursuant to which tripartite JDA was executed on the same day. The possession of the owners on land measuring 21.2 acres was recognized vide this JDA. HASH was responsible to make the payment failing which it was the responsibility of THDC. A copy of JDA dated 25.2.2007 has been annexed as Annexure A.2 with ITA No.200 of 2013. It may be advantageous to broadly refer to various clauses of JDA dated 25.2.2007 and irrevocable special power of attorney dated 26.2.2007. A plain reading of JDA dated 25.2.2007 spells out that clause 1 thereof has defined various expressions. Clause 2 enumerates the description of the project. Clause 3 describes the obligations of the developers for getting building plans, designs, drawings etc. sanctioned from competent authority. Clause 4 deals with consideration whereas Clauses 5 to 8 are relating to various aspects of project and obligations of Society and Developers. Under Clause 9 of JDA, the method of transfer of ownership and rights have been prescribed. Clause 10 speaks about consent given by the society to THDC for raising finance for development and completion of project. Other clauses provide for general provisions, disclaimer partial invalidity, formation of maintenance society for the project after its completion, transfer of rights, notices and jurisdiction whereas termination under Clause 14 and Force Majeure under Clause 26 are also material clauses which had been strenuously referred by

the appellants. In addition to JDA dated 25.2.2007, irrevocable registered special power of attorney dated 26.2.2007 had also been executed by the society in favour of THDC. Various relevant clauses A, B, D and other conditions relied upon by the parties have already been reproduced in the earlier part of the judgment.

40. Under Clause 2.1 of JDA, the possession of the property was to be handed over simultaneously with the execution and registration of the said agreement. The JDA dated 25.2.2007 was never registered and therefore, the presumption of delivery of possession to the developers cannot be assumed. The delivery of title deeds would not necessarily raise presumption of delivery of possession as these are two distinct actions. Further, the irrevocable registered special power of attorney also records that on 26.2.2007 (i.e. the date of its execution and registration), the possession continued to be with the members of the society. Still further, even the two sale deeds executed between the parties on 2.3.2007 and 25.4.2007 in respect of 3.08 acres and 4.62 acres respectively clearly stipulates that possession was delivered under the said instruments which would show that the parties had agreed for pro-rata transfer of land. A combined reading of the various clauses of JDA dated 25.2.2007 and irrevocable registered special power of attorney dated 26.2.2007 clearly shows that the developer was entitled to enter upon the property for the purposes of development etc. For invoking Section 53A of 1882 Act, it was mandatory to establish that possession in part performance of an agreement was delivered by the transferor to the transferee. Section 53A of 1882 Act does not define any contract but relates to a particular nature of contract

where transferee is entitled to protect his possession when he has been delivered the same in part performance of a contract. In other words, the society or its members had never parted possession of the property though under JDA and the special power of attorney, the developer was given power to raise finance by mortgaging the property and for the purpose of registration of the charge thereon. If at all, it is to be held that possession was delivered to the developers then it would be as a licencee only. The developer was authorized to amalgamate the project and in the event of termination of JDA, provisions of Clause 6 thereof were agreed to be surviving. The environmental clearance was the responsibility of the developer THDC/HASH out of its own sources. The Tribunal had sought to raise presumption of delivery of possession which on the basis of preceding analysis of factual matrix involved herein was legally not permissible. The JDA dated 25.2.2007 to be covered under Section 53A of 1882 Act was required to be a registered instrument even for purposes of enforcing civil law rights. Once it was embodied in Section 2(47)(v) of the Act by incorporation, all the legal requirements of Section 53A of 1882 Act had to be complied with. In the absence of registration of such an agreement, the same was not enforceable under general law keeping in view the provisions of Sections 17(1A) and 49 of the 1908 Act and at the same time, the transaction would not fall under Section 2(47)(v) of the Act.

41. Under JDA dated 25.2.2007, it was the obligation of the developers to prepare, submit and obtain sanction of the plans, designs and drawings for construction of the project from the competent authority which was to be within the prescribed time. The costs for necessary approvals were

also to be borne by them. It was also the obligation of the developers to make timely payment of the consideration in the manner set out therein which was an essence of the JDA. Additionally, it was the responsibility of the developers to obtain requisite government and statutory approvals, sanctions of all drawings and plans required for development of the project and also to undertake the project within six months of the handing over of the final plans, designs and drawings to the developer for submission of the same to the competent authority for obtaining the approval which was to be done by HASH and THDC within the prescribed time schedule. The External development charges, licence fee, CLU charges and any other related charges were the liability of THDC.

42. Apart from above, HASH/THDC had made payment of adjustable advance of ₹ 3 lakhs to the plot holder of 500 square yards besides making payment of ₹ 12 lakhs and ₹ 18 lakhs as first and second instalments respectively. THDC defaulted in making payment of third instalment of ₹ 24.75 lakhs as required under clause 4.1(iv) of the JDA. It was double the aforesaid amount for plot holder of 1000 square yards. The project was delayed due to various subsequent developments. A Public Interest Litigation bearing CWP No.20425 of 2010 was filed in this court where construction/development of the project was stayed vide order dated 20th January 2011. On 26.3.2012, this Court had directed the developers to obtain additional permission under the Punjab New Capital (Periphery) Control Act, 1952. Subsequently, in CWP No.18253 of 2009 titled '***Court on its own motion vs. UT, Chandigarh and others***, this Court vide order dated 14.5.2012 directed stay of construction in the entire catchment area of

Sukhna lake as per survey of India record including the project under consideration. Demolition of the existing structure after 11.3.2011 was also ordered. However, the Apex Court vide order dated 22.5.2012 granted status quo and directed that no construction should be undertaken in the area and stayed demolition of the existing structure. The developers who were not party in CWP No.18253 of 2009 were also impleaded therein. The Society in the meantime issued letter dated 28.1.2011 to HASH for payment of third instalment as per clause 4.1(iv) of the JDA. Vide letter dated 4.2.2011, HASH stated that the third installment would become due only after obtaining permission to commence construction which was still pending with the Ministry of Environment and Forests. The High Court vide order dated 28.1.2011 had already restrained the developers to start construction. The Society not satisfied with the stand taken by the developers sent legal notice dated 11.5.2011 to them stating therein that time was the essence of JDA and there was delay on their part to obtain necessary approval from the competent authority. The society gave 30 days time to the developers to make payment of the third instalment failing which the JDA was liable to be terminated. On failure of the developers to pay the instalment, the society decided to terminate the JDA vide resolution dated 13.6.2011 and cancelled the special power of attorney on 31.10.2011 which was earlier executed in favour of the developers. Thus, willingness to perform their part of the contract was absent on the part of the developers or it could not be performed by them which was one of the condition precedent for applying Section 53A of the 1882 Act. Under Clause 26 of the JDA dated 25.2.2007, principle of Force Majeure had been provided for, which

would be applicable with full vigour in the circumstances noticed earlier. However, the Haydon's rule, in the facts as narrated hereinbefore, would not be attracted.

43. In view of preceding analysis, it is reiterated that from the cumulative effect of covenants contained in JDA dated 25.2.2007 read with registered special power of attorney dated 26.2.2007, it cannot be held that the mandatory requirements of Section 53A of 1882 Act were complied with which stood incorporated in Section 2(47) (v) of the Act. Once that was so, it could not be said that the assessee-appellants were liable to capital gains tax in respect of remaining land which was not transferred by them to the developer/builder because of supervening event not on account of any volition on their part.

44. Viewed from another angle, it cannot be said that any income chargeable to capital gains tax in respect of remaining land had accrued or arisen to the appellant-assessee in the facts of the case. Considering the issue of taxability of income with regard to its accrual or receipt as the basis for charging income tax, the Apex Court in ***Commissioner of Income Tax, Bombay City vs. Messrs Shoorji Vallabhdas & Co.*** (1962) 46 ITR 144 (SC) observed that income tax is a levy on income and where no income results either under accrual system or on the basis of receipt, no income tax is exigible. The relevant observations read thus:-

> "Income tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income, if income does not result at all, there cannot be a tax, even tough in book-keeping, an entry is made about a " hypothetical income "

> which does not materialize. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that, effect might, incineration circumstances, have been made in the books of account."

This pronouncement was applied by the Supreme Court in ***Godhra Electricity Co. Limited vs. CIT,*** (1997) 225 ITR 746 (SC) and followed by the Calcutta High Court in ***CIT vs. Balarampur Commercial Enterprises Limited,*** (2003) 262 ITR 439 (Cal.).

45. Relying upon decision in ***Messrs Shoorji Vallabhdas & Co.'s*** case (supra), the Supreme Court in ***CIT vs. Excel Industries Limited*** (2013) 358 ITR 295 (SC) held that income tax cannot be levied on hypothetical income. Income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability, the income is not hypothetical and it has really accrued to the assessee. It was observed as under:-

> "17. First of all, it is now well settled that income tax cannot be levied on hypothetical income. In ***Commissioner of Income Tax v. Shoorji Vallabhdas and Co., [1962] 46 ITR 144 (SC)*** it was held as follows:-
>
> > "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a

tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

18. The above passage was cited with approval in ***Morvi Industries Ltd. v. Commissioner of Income-Tax (Central), [1971] 82 ITR 835 (SC)*** in which this Court also considered the dictionary meaning of the word "accrue" and held that income can be said to accrue when it becomes due. It was then observed that:

"..... the date of payment ..... does not affect the accrual of income. The moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately."

19. This Court further held, and in our opinion more importantly, that income accrues when there "arises a corresponding liability of the other party from whom the income becomes due to pay that amount."

20. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee."

46. We summarize our conclusions as under:-

1. Perusal of the JDA dated 25.2.2007 read with sale deeds dated 2.3.007 and 25.4.2007 in respect of 3.08 acres and

4.62 acres respectively would reveal that the parties had agreed for pro-rata transfer of land.

2. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.2.2007 so as to fall within the domain of Section 53A of 1882 Act.

3. The possession delivered, if at all, was as a licencee for the development of the property and not in the capacity of a transferee.

4. Further Section 53A of 1882 Act, by incorporation, stood embodied in section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.2.2007 having been executed after 24.9.2001, the agreement does not fall under Section 53A of 1882 Act and consequently Section 2(47)(v) of the Act does not apply.

5. It was submitted by learned counsel for the assessee-appellant that whatever amount was received from the developer, capital gains tax has already been paid on that and sale deeds have also been executed. In view of cancellation of JDA dated 25.2.2007, no further amount has been received and no action thereon has been taken. It was urged that as and when any amount is received, capital gains tax shall be discharged thereon in accordance

with law. In view of the aforesaid stand, while disposing of the appeals, we observe that the assessee appellants shall remain bound by their said stand.

6. The issue of exigibility to capital gains tax having been decided in favour of the assessee, the question of exemption under Section 54F of the Act would not survive any longer and has been rendered academic.

7. The Tribunal and the authorities below were not right in holding the assessee-appellant to be liable to capital gains tax in respect of remaining land measuring 13.5 acres for which no consideration had been received and which stood cancelled and incapable of performance at present due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the appeals are allowed.

47. Consequently, the substantial questions of law as reproduced in the beginning of the judgment are answered in the manner indicated hereinbefore and the appeals of the assessee are disposed of accordingly.

(Ajay Kumar Mittal)
Judge

July 22, 2015 **(Fateh Deep Singh)**
'gs' **Judge**