

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT: THE HON'BLE THE CHIEF JUSTICE DR. MANJULA CHELLUR &  
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 1ST DAY OF JANUARY 2014/11TH POUSHA, 1935

ITA.No. 93 of 2010

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[AGAINST THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL,  
COCHIN BENCH, IN I.T.A. NO.522/COCH/2008 DATED 17-06-2009.  
ASST. YEAR 2004-05]

APPELLANT/RESPONDENT:

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THE COMMISSIONER OF INCOME TAX, COCHIN.  
BY ADV. SRI.JOSE JOSEPH, S.C.

RESPONDENT: -----

M/S. COCHIN STOCK EXCHANGES LIMITED, 36/1565, 4TH FLOOR, JUDGES  
AVENUE, KALOOR, KOCHI - 17.

BY SRI. JOSEPH KODIANTHARA, SENIOR ADVOCATE, SRI.JOSEPH MARKOSE,  
SENIOR ADVOCATE, ADVS. SRI.V.ABRAHAM MARKOS, SRI.B.J.JOHN  
PRAKASH SRI.TERRY V.JAMES SRI.TOM THOMAS (KAKKUZHIYIL).

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 01-01-2014,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

SHAFFIQUE, J

This appeal is filed by the Revenue against the order passed by the Income Tax Appellate Tribunal, Cochin Bench with reference to I.T.A.No.522/Coch/2008 relating to the assessment year 2004-05. The issue involved is with reference to the assessment of capital gains.

2. The assessee, by virtue of an agreement dated 14/04/2003 handed over possession of 55.219 cents of land to M/s.Abad Builders for a consideration of Rs.8,83,50,400/-. The consideration was paid in a deferred manner starting from April 2003. M/s.Abad builders had constructed an apartment complex in the said property and on the basis of a power of attorney issued by the assessee the undivided share of land and the apartments were sold.

The assessee declared a consideration of Rs.3.81 crores during the assessment year for the purpose of computation of long term capital gain. The Assessing Officer held that the total consideration of the transaction was Rs.8,83,50,400/- and the entire consideration should be taken into account for the purpose of long term capital gains and not the installment alone. The assessment was completed under Section 143(3) on 29/10/2007 determining long term capital gain at Rs.2,22,65,601/-. Assessee preferred an appeal before the CIT (Appeals) which came to be dismissed. On further appeal before the Tribunal, the same came to be allowed which is impugned in the present appeal. The Tribunal deleted the addition of long term capital gain on the finding that the transfer takes place only when the assessee executes the sale deed. The revenue raises the following questions of law for consideration:

"1. Whether, on the facts and in the circumstances of the case and also in the light of section 2(47)(v) read with section 45, the Tribunal is right in law in holding that the capital gains assessment made for the impugned assessment year is not sustainable in law?

2. (a) Whether, on the facts and in the circumstances of the case does section 53A of the T.P.Act contemplates satisfaction of twin conditions, namely transfer of possession of property and payment of substantial portion of the consideration?

(b) If the answer to the above question is in the negative, is not the finding of non satisfaction of conditions perverse and the resultant conclusion and order against law."

3. Heard learned Standing Counsel appearing on behalf of the appellant and the learned senior counsel appearing on behalf of the respondent.

4. The main contention urged by the learned counsel for Revenue is that the agreement in question clearly fixes the consideration for the land transferred in favour of the builder and it also clearly indicates transfer of possession. When property is transferred after receiving substantial portion of consideration, the builder is entitled to invoke Section 53A of the Transfer of Property Act. Hence it amounts to a transfer as defined under Section 2(47) of the Income Tax Act and therefore the entire amount is liable to be taxed during the said assessment year itself. The Tribunal came to a finding that in order to attract Section 53A of the Transfer of Property Act, two conditions are to be fulfilled namely transfer of possession and secondly payment of substantial provision of consideration. Since only a part of the consideration was paid, the conditions have not been fulfilled and therefore it does not amount to a transfer.

5. Transfer is specifically defined under Section 2(47) of the Income Tax Act which reads as under:

"2(47) (i) "transfer", in relation to a capital asset, includes,-

(ii) the extinguishment of any rights therein; or

(iii) x x x x x

(iv) x x x x x

(iva) x x x x x

(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) x x x x x"

6. Section 53A of the Transfer of Property Act reads as under:

"53A. Part Performance.- Where any person contracts to transfer for consideration any immovable 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 therefore 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."

7. It is therefore clear that if a transaction involves allowing of possession of any immovable property to be retained in part performance of a contract of a nature referred to in Section 53A of Transfer of Property Act it amounts to transfer. The only question is whether such a transfer is evident from the agreement executed between the assessee and Abad Builders. A copy of the agreement has been placed before us. Clauses 1 and 2(i) of the agreement reads as under:

"1. The parties hereto agree that this agreement is entered into between the parties with the specific understanding by both parties that necessary approval will be granted by GCDA, Governmental, statutory, local authorities for the construction of a multi storied building, in the said property, with a built up area of at least 14,511 square meter as per GCDA Control Drawings. The parties further agree that the project itself will not be commercially viable in the event of any of the above authorities not agreeing to the above construction, and in such event both parties agree that the terms of this agreement hereinafter provided will not be binding on either party and both parties will proceed as if this agreement was not entered into and CSE will return all monies will then received from ABAD, and ABAD will hand over the possession of the said property to CSE in as near a condition as is reasonably possible to that in which ABAD was put in possession of the said property by CSE. In the aforesaid event neither party is liable to pay or

entitled to claim from the other party any amounts by way of damages, cost, interest or of such other or similar kind.

2. In consideration of ABAD making payments to CSE in the manner hereinafter specified, the said consideration being the total consideration to be paid by ABAD for being granted the right to construct and sell the built up space in the proposed building, CSE undertakes the following:

(i) that CSE will hand over possession of the said property to ABAD, free of all encumbrance, charges, liens etc, immediately on receipt of the first instalment of payment from ABAD for the purpose of construction and sale of the multi storied building as per this Agreement."

8. On a reading of the above provision itself, it is clear that possession of the property has been handed over to the builder immediately on receipt of the first installment of the payment from the builder. As per clause (3), the total consideration is mentioned as Rs.8,83,50,400/- and Rs.3,00,00,000/- was to be paid as advance on the date of the agreement. The balance amounts were to be paid in instalments. These provisions categorically indicate the existence of an agreement by which the substantial portion of sale consideration is paid and possession of the property is handed over to the builder.

9. It is argued on behalf of the respondent that this is not a sale agreement at all. It is an agreement between owner of the land and the builder. It is argued that Clause (1) itself would show that if the project is not viable the property has to be returned back and the assessee will return all the money till then received. That apart, when a power of attorney is executed, the factum of sale arises only when the property is sold by the builder in favour of third parties. Only at that stage, that is when the sale deeds are executed, transfer as defined under Section 2(47) takes place.

10. On going through the materials on record and the documents made available, we do not think that the Tribunal has correctly appreciated the question on hand. When transfer is defined under the Income Tax Act and it includes a transaction involving possession to be handed over in part performance of a contract in the nature referred to in Section 53A of Transfer of Property Act, it amounts to transfer. Section 53A clearly explains the concept of part performance of a contract of sale of immovable property. If a buyer is put in possession of a property in part performance of the obligations under the agreement on the buyer paying a substantial portion of the sale consideration, the contract of sale is treated to be in part performance. Perusal of the agreement in the case clearly indicates such a contract of part performance. The assessee cannot take a contention that the builder is not the buyer. In fact, the terms and conditions of the agreement clearly indicates that the intention of the parties is to sell the property as such to the buyer, or their nominees and a power of attorney is given to enable the buyer to sell the undivided share of land in favour of purchasers of apartments to be constructed by the buyer of the land. The execution of the sale deed is deferred as at the time when the possession of the property is transferred to the builder, there is no purchaser for the property. In other words, the builder himself has crept into the shoes of the purchaser of the property and

the registered instruments were created subsequently and the idea of keeping alive the agreement and execution of power of attorney in favour of the builder is only for the purpose of avoiding duplication of registered instruments and payment of stamp duty. In this case, the assessee themselves executes the sale deed after several years on the request of the builder. Therefore, in principle, the actual transfer takes place between the assessee and the builder and it is thereafter the builder transfers possession to the purchaser of the apartments.

11. In the said circumstances, we are of the opinion, capital gains is to be computed at the time when the transfer takes place which has to be during the assessment year when a substantial portion of the amount was received by the assessee, that is when Rs.3.81 crores was received by the assessee during the assessment year 2004-05. Hence the said question is to be answered in favour of the department.

12. The learned senior counsel appearing for the respondent however would contend that they are entitled for exemption under Section 11 (1A) of the Act. The Assessing Officer granted exemption under Section 11(1A) of the Act for the investment made under Section 11(1A)(a)(ii) for Rs.3,73,14,836/-. It is argued that in subsequent years also, depending upon the amount received, appropriate investments have been made by the assessee.

13. Having regard to the aforesaid factual situation, we are of the view that the order passed by the Assessing Officer has to be confirmed. However, if the assessee is entitled for any further benefit arising under Section 11A of the Act, necessary provision shall be made in accordance with law.

With the above observation, the appeal is allowed. The order passed by the Tribunal is set aside thereby confirming the computation of capital gains made by the Assessing Officer. The Assessing Officer is therefore directed to pass appropriate orders after considering whether the assessee is entitled for any further benefit with reference to the claim of the assessee under Section 11A of the Income Tax Act.

(sd/-)

(MANJULA CHELLUR,  
CHIEF JUSTICE)

(sd/-)

(A.M.SHAFIQU, JUDGE)