Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.4 OF 2012

P.P. Mahatme, Power of Attorney
Lorna Margaret Pinto,
Gabmar Apartments,
Vasco Da Gama. … Appellant.

V/s.

Asst. Commissioner of Income-tax
Circle-2, Margao. … Respondent.

Mr. Mihir Naniwadekar with Mr. Purushottam Karpe, Advocates for the Appellant.

Ms. Amira Abdul Razaq, Standing Counsel for the Respondent.

Coram : M.S. Sonak &
C.V. Bhadang, JJ.

Reserved on : 6th November, 2019.
Pronounced on : 8th November, 2019

J U D G M E N T : (Per M.S. Sonak, J.)

Heard Mr. Mihir Naniwadekar with Mr. Purushottam Karpe for the Appellant and Ms. Amira Razaq, Standing Counsel for the Respondent.

2. This Appeal was on board for final hearing, along with Tax Appeals No.3/2012, 9/2012 and 10/2012. All these appeals involve identical issues of both, law and fact. However, the learned Counsel for the parties requested that this Appeal be treated as the lead

Appeal. The learned Counsel for the parties agree that the decision in this Appeal will govern the fate of the remaining three appeals, as well.

3. This Appeal was admitted on 13.2.2012, on the following substantial questions of law :

> *i. Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in holding on a perverse view that the change of position by mere clarification by the Assessing Officer regarding status of the assessee, which is contrary to the reasons recorded under Section 148(2) and rule of law laid down by the jurisdictional High Court could give jurisdiction to issue the impugned notice under Section 148, which is otherwise barred by limitation?*
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> *ii. Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in dismissing the appeal based on* ***incorrect appreciation of facts and law and taking a perverse view*** *that the family arrangement approved by the Civil Court was not bonafide and consequently there was a transfer of assets attracting tax on capital gains ?*

4. The Appellant is a Power of Attorney holder to Lorna Margaret Pinto, who is a Non-Resident Indian (NRI), about which there is no serious dispute. The present Appellant and the Appellants in connected Appeals, are sisters, who were involved in a dispute relating to an immovable property in the State of Goa. It was the case of these Appellants that the said immovable property was sought

to be usurped by Cristovam and Alvaro, relatives of the Appellants. This led to the institution of Special Civil Suit No. 255/1999, which was ultimately disposed of by a Consent Decree dated 17.4.1998. In terms of the Consent Decree, the Appellants received an amount of Rs.5.50 crores during the Assessment Year 1999-2000.

5. In relation to the aforesaid amount, notices under Section 148 of the Income Tax Act, 1961 (IT Act) were issued to the Appellants, seeking to reopen the assessment, *inter alia,* on the ground that the aforesaid amount was taxable *"capital gains".* These notices were dated 14.03.2005 and were accompanied by reasons for reopening, in which, it was stated that Mr. Pradip P. Mahatme, the Power of Attorney holder was proposed to be treated as the agent of the Assessee as provided in Section 163 of the IT Act.

6. Upon the Power of Attorney seeking clarification, by a communication dated 22/03/2005, he was informed that he may file return in response to the notice under Section 148 as the *'representative assessee'* as per the provisions of Section 160(1) of the IT Act for the Assessee - Lorna Pinto.

7. The aforesaid was, however, followed by yet another communication dated 21.06.2005, in which, the Assessing Officer clarified that the notices under Section 148, dated 14.03.2005 may be read as being served upon Mr. P.P. Mahatme as the *'power of*

attorney holder' of Mrs. Lorna Margaret Pinto Wallworth.

8. The present Appellant, as well as the Appellants in the connected Appeals, instituted Writ Petitions No.70/2006, 71/2006, 72/2006 and 73/2006, before this Court, questioning the notices dated 14.03.2005, under Section 148 of the IT Act, *inter alia,* on the ground that the same were barred by limitation as prescribed under Section 149(3) of the IT Act. These petitions were dismissed by Judgment and Order dated 27/03/2006.

9. As against the aforesaid, the Appellants instituted Special Leave Petition before the Hon'ble Supreme Court, which came to be disposed of by order dated 17.07.2006, which reads as follows :

> *"The short question which is involved in this special leave petition is whether the petitioner herein is assessable under Income Tax Act as the agent of N.R.I. Assessee or whether the income tax assessment should be done only qua the N.R.I. Assessee. The order of assessment has been passed. It is the case of the N.R.I. Assessee that the assessment is time barred. However, the assessee has not moved in appeal before the appellate authority. Therefore, we direct the petitioner herein/ N.R.I. Assessee to move in appeal within four weeks. Delay, if any, stands condoned. The objection as to limitation will also be decided by the appellate authority."*

10. The Hon'ble Apex Court by the aforesaid order dated 17.07.2006, granted liberty to the Appellants to institute Appeals, because in the meanwhile, the Assessing Officer, vide Order dated

30/03/2006, had already made an assessment order, bringing to tax the aforesaid amount of Rs.5.50 crores as *'capital gains'*.

11. The Appellant then preferred an appeal before the Commissioner of Income -tax (Appeals), which was dismissed vide order dated 14.12.2007.

12. The Appellant then instituted further appeal before the Income Tax Appellate Tribunal (ITAT), which was also dismissed vide order dated 10.06.2011.

13. As against the order dated 10.06.2011 made by the ITAT, the Appellant has instituted the present appeal, which came to be admitted on the aforesaid substantial questions of law.

14. Mr. Mihir Naniwadekar, learned Counsel for the Appellant submits that the notices dated 14.03.2005, issued under Section 148 of the IT Act were clearly barred by limitation prescribed under Section 149(3) of the IT Act. He submits that the notices were issued to Mr. P.P. Mahatme, as the *'representative assessee'* as per the provisions of Section 160 of the IT Act. He submits that Section 149(3) of the IT Act clearly provides that if the person on whom a notice under section 148 is to be served is a person treated as the agent of a NIR under section 163, then, such notice shall not be issued after expiry of the period of 2 years. He submits that

therefore, the notice dated 14.03.2005 which was issued well beyond the period of 3 years from the end of relevant assessment year, was clearly barred by limitation, as then applicable.

15. Mr. Naniwadekar submits that merely because the provisions in Section 143(3) of the IT Act were amended with effect from 01/07/2012 so as to extend the period of limitation to six years, the Revenue cannot seek to derive any advantage from such amendment, which is basically prospective in nature. He submits that even the explanation to Section 149(3) of the IT Act, at the highest saves assessment for the Assessment Year 2010-11 and Assessment Year 2011-12. He submits that based upon the amendment of 2012, it was clearly impermissible for the Revenue to reopen the time barred assessment on the date when the notice dated 14.03.2005 came to be issued in the present matters. In support of this contention, Mr. Naniwadekar relies on ***Union of India and ors. vs. Uttam Steel Limited***[1]

16. Mr. Naniwadekar submits that the notices dated 14.03.2005 issued under Section 148 are vitiated because it is settled law that the reasons in support of such notice cannot be supplemented at a later stage, even by filing an affidavit or producing any additional material. He submits that the notice under Section 148 requires sanction and such a sanction is issued to the reasons recorded for reopening of the assessment which accompany the notice

[1] (2015) 13 SCC 209

under Section 148 of the IT Act. If such reasons are permitted to be supplemented, as has been done in the present matter by issuance of the communication dated 21.06.2005, then the principle that the reasons cannot be permitted to be supplemented or the principle that no fresh reasons can be stated, will stand breached. He submits that this is yet another reason for setting aside the notice dated 14.03.2005 issued under Section 148 of the IT Act. In support of this contention, he relies on ***Hindustan Lever Ltd. vs. R.B. Wadkar***[2]

17. Mr. Naniwadekar, without prejudice to the aforesaid, submits that even, otherwise, this is a clear case where the parties have entered into a *'family settlement'* or *'family arrangement'*, which is perfectly bonafide. He submits that the consideration received under the family settlement, even upon transfer of right and interest in the family property, is not taxable as capital gain under Section 145 of the IT Act. He submits that in fact, in such a situation there is really no transfer or relinquishment of any right to the immovable property as such. In any case, the proceeds received on the basis of such family settlement or family arrangement cannot be brought to tax as capital gains. He submits that from the material on record, it is more than apparent that there was a bona fide family settlement arrived at between the members of the Assessees's family who have received the amount of Rs.5.50 crores, as a consequence of such family settlement

[2] 268 ITR 332

alone. He submits that the Revenue has exceeded its jurisdiction in treating such amount as capital gains and bringing the same to tax. In support of this contention, Mr. Naniwadekar relies on the following decisions :

i) ***Commissioner of Income-tax, Mumbai vs. Schin P. Ambulkar***[3]***;***

ii) ***Kale and others vs. Deputy Director of Consolidation and others***[4]***;***

iii) ***Commissioner of Income-tax vs. Kay Arr Enterprises*** [5]***.***

18. Ms. Razaq, learned Standing Counsel for the Respondent defends the impugned order on the basis of the reasoning reflected therein. She points out that the Appellants had actually challenged the notice dated 14.03.2005 by instituting writ petitions before this Court, which writ petitions came to be dismissed vide Judgment and Order dated 27/03/2006. She submits that the order made by the Hon'ble Apex Court on 17.07.2006, at the highest leaves open the point of limitation. However, it is not permissible for the Appellant to once again question the notices under Section 148 of the IT Act on any ground other than limitation.

19. Ms. Razaq submits that in any case, the principle in *Hindustan Lever Ltd.* (supra) will clearly not apply in the present case, because, the Revenue has neither added to, nor supplemented

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3 [2014] 42 taxmann.com 22 (Bom)
4 [1976] 3 SCC 119
5 299 ITR 348 (Mad)

the reasons accompanying the notice dated 14.03.2005 under Section 148 of the IT Act. She points out that the reasons remained the same and the communication dated 21.06.2005 merely clarified that the notices were served upon Mr. P.P. Mahatme in his capacity as the power of attorney holder for the Assessee and not as the representative assessee. She, therefore, submits that there is no any infirmity whatsoever in the notice dated 14.03.2005 issued under Section 148 of the IT Act.

20. Ms. Razaq submits that once it is accepted that the notices were issued to Mr. P.P. Mahatme only as the power of attorney holder on behalf of Assessees who are NRIs, the period of limitation which will apply, is six years and not merely two years as urged on behalf of the Appellant. She submits that in any case, the amendment of 2012, when read with the Explanation, makes it clear that the notice issued on 14.03.2005, was well within the prescribed period of limitation. She submits that the explanation makes it clear that the amendment of 2012 will be applicable for any assessment year beginning on or before the 1st day of April 2012. She, accordingly, submits that the first substantial question of law be decided against the Appellant and in favour of the Revenue.

21. Ms. Razaq submits that this is not at all a case of any bonafide family settlement, because the material on record overwhelmingly establishes that the parties with whom the Assessees

have chosen to settle the dispute had no preexisting right in the immovable property which was the subject matter of the dispute. She points out that the decisions relied upon by the Appellant are in the context of family settlements, in which preexisting rights of the parties were realigned or adjudicated upon. She submits that this is an essential distinguishing feature which has been noted by not less than three authorities, who have recorded the concurrent findings of fact. She submits that the concurrent findings of fact so recorded, suffer from no perversities and, therefore, warrant no interference in exercise of limited jurisdiction under Section 260A of the IT Act. She relies on the following decisions in support of her contentions :

a) ***Union of India vs. Playworld Electronics (P.) Ltd.***[6] ;

b) ***Banarsi Lal Aggarwal vs. Commissioner of Gift-tax***[7]

c) ***B.A. Mohota Textiles Traders (P.) Ltd. vs. Deputy Commissioner of Income-tax, Special Range-2***[8]; and

d) ***Commissioner of Income-tax vs. B.M. Kharwar***[9]

22. Rival contentions now fall for our determination.

23. The first point which arises for determination is in the context of the first substantial question of law, namely whether on the facts and in the circumstances of the present case, the ITAT was

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6 1989 taxmann.com 651 (SC)
7 230 ITR 114 (Punjab & Haryana)
8 397 ITR 616 (Bombay)
9 72 ITR 603 (SC)

right in holding that the notice dated 14.03.2005 issued under Section 148 of the IT Act, was legal and valid.

24. Challenge to the notice dated 14.03.2005 issued under Section 148 of the IT Act is based upon the following two grounds :
(i) that the issuance of communication dated 21.6.2005, in which, it is stated that the notice dated 14.03.2005 should be read as addressed to Mr. P.P. Mahatme, as power of attorney holder of the Assessee, instead of *'representative assessee'* of Mrs. Lorna Pinto, amounts to adding or supplementing the reasons originally accompanying the notice dated 14.03.2005 and it is urged that such supplementing of reasons is impermissible, in terms of the law laid down in *Hindustan Lever Ltd.* (supra).
(ii) In any case, the issuance of notice dated 14.03.2005 under Section 148 of the IT Act is barred by limitation prescribed under Section 149(3) of the IT Act. It is further urged that the notice, which was already barred by limitation in terms of law in force in the year 2005, cannot be revived by virtue of an amendment which came into force on 1.7.2012, in which the period of limitation was extended from two years to six years. In support of this precise contention, reliance was placed on *Uttam Steel Limited* (supra).

25. On the first aspect as aforesaid, we note that this was precisely the challenge raised by the Appellants by instituting Writ Petitions No.70/2006, 71/2006, 72/2006 and 73/2006, in which, the

notice dated 14.03.2005 was squarely challenged. This ground was specifically rejected in the Judgment and Order dated 27/03/2006. Thereafter, the Appellants instituted Special Leave Petition, in which, liberty was granted to the Appellants to raise the issue of limitation. There was no specific liberty granted to the Appellants to question the notice dated 14.03.2005 on the ground that the communication dated 21.6.2005 amounts to supplementing or adding to the reasons accompanying the notice dated 14.03.2005. Thus, we are not too sure whether the Appellant was justified once again in raising the aforesaid ground before the authorities or for that matter, before this Court.

26. In any case, even, upon evaluation of such ground, we are satisfied that the view taken by the authorities, warrants no interference. This is because the communication dated 21.06.2005 nowhere supplements or adds to the reasons accompanying the notice dated 14.03.2005. All that communication dated 21.6.2005 clarifies is that the notice was issued to Mr. P.P. Mahatme in his capacity as the power of attorney holder of the Assessee. There is really no dispute that Mr. P.P. Mahatme was indeed the power of attorney holder of the Assessee. In these circumstances, the principle in *Hindustan Lever Ltd* (supra) is certainly not attracted. In the said decision, reasons which found no place in the notice proposing to reopen the assessment, were sought to be introduced by means of an affidavit or making oral submissions in response to the challenge to

such notice. It is, in these circumstances that the Hon'ble Apex Court, held that the reasons cannot be supplemented by filing an affidavit or oral submissions, so as to supply material particulars in which the said notice was lacking. Therefore, even on merits, we see no ground to differ from the view taken by the authorities on the issue of validity of the notice dated 14.03.2005, issued under Section 148 of the IT Act.

27. On the second aspect again, we are satisfied that the notice dated 14.03.2005 under Section 148 of the IT Act was issued within the prescribed period of limitation as obtained on the date of its issuance. Section 149(3) of the IT Act, *inter alia,* provides that if the person on whom a notice under section 148 is to be served is a person treated as the agent of the NRI under section 163, then, the notice on such agent of the NRI, shall not be issued after the expiry of a period of two years from the end of the relevant assessment year. In this case, however, from the clarification contained in the communication dated 21.6.2006, it is apparent that the notice issued to Mr. P.P. Mahatme, was not in his capacity as the agent of the NRI-Assessee, but the same was issued to him as the power of attorney holder of the NRI-Assessee. In such a situation, the period of limitation for issuance of the notice was always 6 years. Therefore, the notice dated 14.03.2005 being within 6 years from the end of relevant assessment year, which is 1999-2000, was well within the period of limitation, as then prevalent.

28. The provisions of Section 149(3) of the IT Act were amended by the Finance Act, 2012 with effect from 1/7/2012. The amendment extended the period of limitation for issuance of notice under Section 148, even upon the agent of the NRI, from 2 years to 6 years.

29. Explanation to Section 149(3) again introduced by the Finance Act, 2012, reads as follows :

> *"Explanation.—For the removal of doubts, it is hereby clarified that the provisions of sub-sections (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012".*

30. Looking to the width of the aforesaid explanation, it is not possible to accept Mr. Naniwadekar's contention that the extended period of limitation will apply only to the assessments for the Assessment Year 2010-11 or 2011-12. The explanation refers to *any assessment year beginning on or before the 1st day of April, 2012.* The explanation has been introduced specifically for the purpose of removal of doubts or to clarify the position with regard to the applicability of the amended provisions.

31. Mr. Naniwadekar had placed reliance upon paragraph 10.1 in *Uttam Steel Limited* (supra) which, in turn, refers to the

decision in ***S.S. Gadgil vs. Lal and Co.*** reported in AIR 1965 SC 171. In the said decision, it is true that the Hon'ble Apex Court held that the subsequent amendment will not assist the Revenue to commence a proceeding even though at the date on which the notice for commencement was issued, when such notice was barred by limitation. However, Hon'ble Apex Court added that such *provision must be read subject to the rule that in the absence of an express provision or clear implication, the legislature does not intend to attribute to the amending provision a greater retrospectivity than is expressly mentioned, nor to authorise the Income Tax Officer to commence proceedings which before the new Act came into force had by the expiry of the period provided, become barred.*

32. In the present case, the explanation to Section 149 of the IT Act makes all the difference. The explanation, is an express provision that the legislature intended the amendment to apply for any assessment year, beginning on or before 1st day of April, 2012. The ruling in *Uttam Steel Limited* (supra), or for that matter, in *S.S. Gadgil* (supra) is, therefore, distinguishable.

33. In any case, it is clarified that even, without resort to the amendment of 2012, in the facts and circumstances of the present case, it is quite clear that the notice dated 14.3.2005 was issued well within the period of limitation, as prevalent on the date of issuance of such notice.

34. For the aforesaid reasons, the first substantial question of law is required to be answered against the Appellant and in favour of the Revenue.

35. In so far as the second substantial question of law is concerned, it is necessary to note that the Assessing Officer, Commissioner of Income-tax (Appeals) and the ITAT have concurrently held that notwithstanding the nomenclature of the settlement, or the fact that the settlement is incorporated in the Consent Decree, the same is not a family settlement as such, the principle in *Sachin Ambulkar* (supra) is inapplicable. This means that the three authorities have basically returned a finding of fact that the settlement in this case, is not a family settlement as such, so as to regard the income derived therefrom by the Appellant as inexigible to capital gains tax.

36. The family settlement referred to in *Sachin Ambulkar* (supra) was a settlement amongst family members in the context of their *'preexisting right'.* In this context, the ITAT whose decision was questioned by the Revenue in the case of *Sachin Ambulkar* (supra), had held that since the settlement *'only defines a preexisting joint interest as separate interests, there is no conveyance, if the arrangement is bonafide'*. Since there is no conveyance, there is no need for registration of such arrangements, when orally made, even if

later on reduced to writing. The ITAT, thereafter, followed the decision of the Hon'ble Apex Court in the case of ***Maturi Pullaiah vs. Maturi Narasinham***, reported in AIR 1966 SC 1836 and held that where there is no transfer of assets in the family arrangement and the amount received by the Assessee is part of the family arrangement and not towards the transfer of any capital assets, such amount cannot be regarded as a capital gain and no capital gains tax liability arises. In *Sachin Ambulkar* (supra), this Court declined to interfere with the view taken by the ITAT by observing that the decision of the ITAT *'is based on facts. Hence no question of law arises'*.

37. The findings of fact, in the present case, concurrently recorded by all the three authorities indicate that there was no issue of any *'preexisting right'* as between the Appellants, Cristovam and Alvaro, who are alleged to have usurped the immovable property belonging to the Appellants. In fact, the record which has been assessed in detail by the the Commissioner of Income-tax (Appeals), establishes that the properties of Xavier Pinto were allocated to his three sons Jose, Rosario and Antonio who, in turn, had one son each by name of Alvaro, Cristovam and Anthony. Anthony migrated to England along with his father Antonio. Margaret (present assessee) is the wife of Anthony. They had three daughters Lorna, Julia and Siobhan who are the Appellants in the connected Appeals. Since there was already a partition of the properties owned by Xavier Pinto

between his three sons Jose, Rosario and Antonio sometime in 1950s, obviously Alvaro and Cristovam had no right whatsoever in the immovable properties exclusively belonging to Antonio and after his demise, his son Anthony. After demise of Anthony, the properties were exclusively inherited by the present Appellants, who are the wife and daughter of said Anthony.

38. In fact, it was the case of the Appellants that Alvaro and Cristovam had no right whatsoever to the immovable property in question, which was partitioned in favour of their predecessor-in-title for almost three generations. Since, there was no issue of any *'preexisting right'* as such between the Appellants and the said Cristovam and Alvaro, it can really not be said that the settlement arrived at between the Appellants and the said two persons qualify the same as bonafide family settlement, in order to infer therefrom that the consideration received was not some capital gains. These are all findings of fact, recorded by the three authorities. These findings are duly borne from the material on record and even the interferences drawn cannot be said to be vitiated by any perversity as such.

39. The decision in *Kale and others* (supra) is quite distinguishable, because in the present case, there is clear and cogent material available on record to establish that Cristovam and Alvaro had no right in the immovable property which was the subject matter of dispute and consequently the settlement between the Appellant

and the said two persons can hardly be described as a family settlement. The settlement may be enforceable inter-parties now that the same is incorporated in the consent terms, based upon a consent decree may have been issued. However such settlement, cannot be called as a family settlement or family arrangement, as is understood in the case of *Kale and others* (supra) or in the case of *Sachin Ambulkar* (supra). Merely because dispute involved some family members and such dispute is ultimately settled by filing consent terms, the same cannot be styled as a family arrangement or family settlement and on such basis, it cannot be held that the consideration received as a result of such settlement, does not constitute capital gain.

40. The decision in the case of *Kay Arr Enterprises* (supra), also relies upon the decisions in *Kale and others* (supra), and *Maturi Pullaiah* (supra). Again, in the said case as well, the view taken is that the family settlement was nothing, but a realignment of preexisting right and thus, there was no liability for payment of any capital gains tax .

41. This Court, in the case of *B.A. Mohota Textiles Traders (P.) Ltd.* (supra) has, however, taken a view different from the view taken by Madras High Court in *Kay Arr Enterprises* (supra). This Court has held that a family settlement through the Court which required the Assessee Company to transfer shares held by it in another

company in favour of certain family members, will be required to pay the capital gains tax, since the Assessee was a separate legal entity being incorporated as a limited company. The substantial question of law was, accordingly, decided in favour of the Revenue and against the Assessee.

42. In *Banarsi Lal Aggarwal* (supra), the Assessee constructed a property by taking loans from his family members. As he failed to repay the loan, the family members claimed a share in the property. The Assessee gave them 3/4th share in a family settlement by way of a Court Decree and claimed that this being a family settlement, no gift tax was chargeable. The Division Bench of Punjab and Haryana High Court, however, held that merely because the loans were not repaid by the Assessee to his family members, it could not create a title in them in the property which would entitle them to claim partition by way of family settlement of the property in question. Based upon such reasoning, the High Court upheld the view taken by the ITAT that there was no valid family settlement amongst the members of the family and based upon such settlement, levy of gift tax could not have been avoided. The High Court considered and distinguished the decision in *Kale and others* (supra).

43. For all the aforesaid reasons, we are satisfied that the findings of fact recorded concurrently by the three authorities suffer from no infirmity, so as to give rise to the second substantial question

of law framed in this matter. Accordingly, even the second substantial question of law is required to be answered against the Appellant and in favour of the Revenue.

44. As a result, this Appeal fails and is, hereby, dismissed. There shall be no order as to costs.

C.V. Bhadang, J. ***M.S. Sonak, J.***