IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.259 OF 2003

Sunil Pran Sikand)
Legal heir of Pran Kishan Sikand, Indian)
Inhabitant, a citizen of India, residing at Edenroc,)
25, Union Park, Khar (W), Mumbai - 400 052) ….Appellant

V/s.

1. The Assistant Commissioner of Income Tax,)
Circle 11(1), Mumbai, having his office at)
Aayakar Bhavan, 4th Floor, Maharshi Karve Road,)
Mumbai - 400 020.)

2. The Commissioner of Income Tax, Mumbai)
City - XI, Circle 11(1), Mumbai, having his office)
at Aayakar Bhavan, 4th Floor, Maharshi Karve)
Road, Mumbai - 400 020.) ….Respondents

Dr. K. Shivaram, Senior Advocate a/w. Mr. Shashi Bekal and Ms. Neelam Jadhav for appellant.
Mr. Suresh Kumar a/w. Dr. Dhanalakshmi Iyer for respondents.

CORAM : K.R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 19th APRIL 2024

ORAL JUDGMENT (PER K.R. SHRIRAM, J.) :

1 This is an appeal filed by the son of assessee under Section 260A of the Income Tax Act, 1961 (the Act) impugning an order dated 20th September 2002 passed by the Income Tax Appellate Tribunal, Mumbai Bench (ITAT).

2 The appeal was admitted on 13th June 2006 and two substantial questions of law were framed. By an order dated 23rd February

2024, an additional substantial question of law was framed. The three substantial questions of law are as under :

> *1. Whether the Tribunal was justified in interpreting the development agreement dated 29.9.1992 holding that after receipt of consideration the appellant ceased to be the owner of the property?*
>
> *2. Without prejudice to above, if the receipt of Rs.1,00,92,750/- is treated as compensation received for settlement of dispute in respect of allotment of Flat the same is not liable to tax being capital receipt?*
>
> *3. Whether on the facts and in the circumstances of the case, as the assessee had not incurred any cost to acquire the additional FSI, the amount of Rs.1,00,17,750/- received from the developer is not taxable?*

While framing the third substantial question of law, the rights of Revenue to argue that this was not even the case raised before the ITAT was kept open.

3 The father of appellant (hereinafter referred to as assessee) owned a land as also a building standing thereon at Khar, Mumbai (the said property). The building had ground plus two floors, the ground and first floor being in the possession of assessee and the second floor in the possession of his two sons, one of whom is now appellant. All three entered into a development agreement dated 29th September 1992 with one Gokul Construction Company Private Limited (developer). Assessee was paid Rs.1.55 Crores and the two sons were paid Rs.17,50,000/- each. Assessee declared the amount received under the head Long Term Capital Gain (LTCG) for Assessment Year 1994-1995 and admittedly the net LTCG of

Rs.57,12,080/- was taxed accordingly in that year. Assessee has also relied upon a commitment letter dated 29th September 1992 addressed by the developer to assessee and his sons by which the developer has committed to pay an amount of Rs.1000/- per sq. ft. to assessee in case the developer was able to obtain Transferable Development Rights (TDR) to be utilised for additional construction on the said property of assessee. During the course of development, the developer obtained TDR and paid an extra sum of Rs.1,00,92,750/- to assessee which was offered by assessee as LTCG in Assessment Year 1997-1998. Assessee deducted professional fees of Rs.75,000/- and offered net LTCG of Rs.1,00,17,750/-. The Assessing Officer did not accept assessee's declaration of LTCG on this amount of Rs.1,00,17,750/- despite assessee responding to the show cause notice and explaining assessee's case. The main objection that the Assessing Officer had was that this additional TDR was not mentioned in the said agreement and according to the Assessing Officer, the said property was already transferred and assessee had offered LTCG for Assessment Year 1994-1995 which was also assessed under Section 143(3) of the Act. According to the Assessing Officer that would show assessee was no longer owner of the said property and hence, the amount received by assessee on account of this loading of TDR was contingent in nature. The Assessing Officer proposed to disallow the claim of LTCG and charge the same as income from other sources. The Assessing Officer interpreted the development agreement

dated 29th September 1992 as transfer of the said property and, therefore, when this amount of Rs.1,00,17,750/- was received, there was no capital asset that belonged to assessee. The Assessing Officer did not accept the only evidence given by assessee being the letter dated 29th September 1992 from the developer committing to pay incase he could purchase additional TDR and load the same in the said property being developed. The Assessing Officer finally taxed this amount of Rs.1,00,17,750/- as income from other sources.

4 The assessment order was challenged by assessee in an appeal filed before the Commissioner of Income Tax (Appeals) [CIT(A)]. The CIT(A), though did not find anything wrong with the conclusions arrived at by the Assessing Officer, proceeded to hold that this amount of Rs.1,00,17,750/- will have to be taxed as Short Term Capital Gain (STCG) and taxed accordingly. At the same time, the CIT(A) also has observed that the tax computation will be similar if the income is assessed either as STCG or income from other sources. The reason for CIT(A) to say that the amount will attract STCG is that the payment depended on a contingency of the developer acquiring the TDR and deciding to mount the same on the said property. The Government of Maharashtra permitted transfer of TDR in the year 1991 by which if a person owning a property had some extra FSI which was not utilised, that FSI can be sold to the persons who wanted to

utilise that FSI in stipulated geographical areas. In view of this, the developer decided to purchase the TDR from the open market and utilised the same on the property of appellant just few months before the amount was paid. If the developer had not purchased the TDR and not decided to mount extra FSI on the property of appellant, appellant was not entitled to get any money. Since the whole thing depended upon a contingency, which crystallized, appellant had no enforceable right until then and, therefore, the enforceable right could be classified as capital asset only when the developer decided to purchase the TDR and utilise it in the said property being developed. Hence, it was a short term capital asset and does not relate back to the day of the contingent agreement.

Against this order, assessee preferred an appeal before the ITAT which came to be dismissed by the impugned order dated 20th September 2002. According to the ITAT there was only one agreement, i.e., the said agreement dated 29th September 1992, and the commitment letter also dated 29th September 1992 was not signed by both the parties but made unilaterally by the Director of the developer and no reasonable person would leave such important factors given in the commitment letter excluded from the agreement of sale. According to the ITAT, assessee had already transferred the property to the developer and, therefore, he had no right in the property when he received the amount of Rs.1,00,17,750/- and, therefore, the said amount should be treated as income from other sources.

5 The ITAT also raised a question, which we also ask, is if assessee had transferred the property and had no right in the property, why would the developer pay such a substantial amount to a person who had no right over the property. There is no exact reason given by the ITAT but according to the ITAT, this amount could have been paid to avoid hazards of litigation and to nullify the nuisance value. The payment was casual in nature not related to any specific asset. In the impugned order, the ITAT states "*However, a natural question arises under such circumstances that why the company has paid the substantial amount to a person who had no right over the property. To answer this question one has to keep in mind the other over all circumstances such as delay in construction of flats on account of some misunderstanding and long drown discussions leading towards hazards of litigation or encouraging nuisance value. Such circumstances also leads to a conclusion that the receipts were of casual in nature not related to any specific asset*".

6 In our view, if we find an answer to this question as to why would the developer pay this amount of Rs.1,00,92,750/- to assessee, it could answer the entire problem.

7 Admittedly, assessee and his sons have entered into development agreement dated 29th September 1992 to develop the property. It does appear on the very date, i.e., 29th September 1992, the

letter of commitment was issued by the developer addressed to assessee and his sons in respect of utilisation of TDR in future over the plot belonging to assessee. If the Revenue had serious doubts on the genuineness of the letter or the understanding as reflected in the letter or the intention of the parties, it should have summoned the developer to confirm the same. It does not appear that the Revenue had summoned the developer or tried to find the veracity of the letter. We should also note that admittedly the letter is signed by the developer. The genuineness of the letter is also confirmed by the fact that a substantial amount of Rs.1,00,92,750/- has also been paid to assessee. As per the letter, the developer committed to assessee that if in future the developer was able to obtain additional TDR and load it on the property being developed, an extra compensation at Rs.1000/- per sq. ft. of the TDR utilised for additional construction of floors will be paid to assessee. In our view, the development agreement dated 29th September 1992 and the commitment letter also dated 29th September 1992 should be read as one agreement. The amount of Rs.1,00,92,750/- paid should be considered as payment under the development agreement itself.

8 Let us assume on the plot of land, when the agreement was entered into on 29th September 1992, the developer could have utilised its potential to build six floors. By the commitment letter issued separately by

the developer, he has committed to assessee that if he is able to buy TDR and load it and thereby build additional four floors in the building, he would pay Rs.1000/- per sq. ft. of the TDR being loaded. This was because on the date of the agreement this was uncertain. The developer was able to acquire TDR rights of 500 sq. mtr. and 450 sq. mtr. on or about 16th October 1993 and 27th September 1996, respectively. As agreed, the developer paid assessee Rs.52,48,950/- on 27th September 1996 and Rs.48,43,800/- on 2nd February 1997 totaling to Rs.1,00,92,750/-. Therefore, in our view, this amount which was paid should be considered as payment for the development rights of the property which assessee always had. Assessee's arguments that even the Government records showed assessee to be the owner of the property and there has been no transfer of the capital asset has been dismissed by the ITAT by saying that it takes time to get names changed due to which owner continued in such official records or simply the name of assessee might have continued. The agreement reflects the intention of the parties to the agreement. Neither the developer has come forward and told the Assessing Officer nor was he called to come and depose that the intentions of the parties were different from what assessee informed the Income Tax Department. Therefore, in our view, the ITAT was not correct in confirming the view of the Assessing Officer that this amount of Rs.1,00,92,750/- should be treated as income from other sources. In our view, this amount should also be treated as consideration being paid for the

developmental rights entered into on 29th September 1992 and treated as LTCG to be assessed in the year the amount was received. Assessee, we are informed, has paid LTCG on this amount of Rs.1,00,92,750/- in Assessment Year 1997-1998.

9 In the circumstances, we answer the question no.1 in negative. In view of our answer to question no.1 above, Dr. Shivaram states that appellant is not pressing question no.2 which was originally framed and question no.3 which was later framed.

10 Appeal disposed accordingly.

(DR. NEELA GOKHALE, J.) (K.R. SHRIRAM, J.)

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Dr. K. Shivaram, Senior Advocate i/b. Mr. Shashi Bekal for appellant.
Mr. Suresh Kumar for respondents.

CORAM : K. R. SHRIRAM &
SHARMILA U. DESHMUKH, JJ.
DATED : 23rd FEBRUARY 2024

P.C. :

1 At the outset, Dr. Shivaram submitted that after the impugned order was passed and the appeal was admitted on 13th June 2006 and substantial questions of law were framed, this Court in ***CIT v/s. Sambhaji Nagar Co-operative Housing Society Limited***[1] has held that where the assessee had not incurred any cost to acquire TDR attached to the land owned by the society, transfer of same to the developer for consideration for construction as floor space index would not be liable to capital gains tax. Dr. Shivaram further submitted that the view of this Court in *Sambhaji Nagar Co-operative Housing Society Limited* (Supra) has been followed by this Court in the case of ***CIT V/s. Maheshwar Prakash – 2 Co-operative Housing Society Limited***[2]. Dr. Shivaram submitted, relying on ***Ventura Textiles Limited V/s. CIT***[3], that since the law has developed subsequently,

1 (2015) 370 ITR 325 (Bom)
2 ITXA No.2346 of 2009 dated 24th April 2015 (Bom)
3 (2020) 426 ITR 478 (Bom)

this Court should frame an additional substantial question of law as under :

> *"Whether on the facts and in the circumstances of the case, as the assessee had not incurred any cost to acquire the additional FSI, the amount of Rs.1,00,17,750/- received from the developer is not taxable?"*

2 Mr. Suresh Kumar submitted that this was not argued before the Income Tax Appellate Tribunal (ITAT) and, therefore, this Court should not frame this substantial question of law proposed.

3 In our view, since the judgments in *Sambhaji Nagar Co-operative Housing Society Limited* (Supra) and *Maheshwar Prakash – 2 Co-operative Housing Society Limited* (Supra) came to be delivered only subsequently, in the facts and circumstances of the case, we would frame the additional substantial question of law as proposed. At the same time, we keep open the rights of the Revenue to argue that this was not even the case raised before the ITAT and, therefore, in any case, the Court should not hold in favour of the assessee.

4 In view of the above order passed by this Court, Mr. Suresh Kumar requests the matter be stood over to 1st March 2024 so that he could consider this point afresh.

5 Stand over to 1st March 2024.

(SHARMILA U. DESHMUKH, J.) **(K. R. SHRIRAM, J.)**

Gauri Gaekwad