

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 28TH DAY OF AUGUST 2012

PRESENT

THE HON'BLE MR. JUSTICE K.SREEDHAR RAO

AND

THE HON'BLE MR. JUSTICE B.MANCHAR

ITA No.1081/2006

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX,
CENTRAL CIRCLE,
C.R.BUILDING,
QUEENS ROAD,
BANGALORE.
2. THE INCOME TAX OFFICER,
WARD – 6 (4),
C.R.BUIDLING,
QUEENS ROAD,
BANGALORE.

...APPELLANTS

(BY SRI.M.THIRUMALESH, ADV)

AND:

SRI.VED PRAKASH RAKHRA,
NO.44/2, 2ND MAIN ROAD,
VYALIKAVAL,
BANGALORE.

...RESPONDENT

(BY SRI.A.SHANKAR, ADV)

ITA FILED U/S. 260-A OF I.T.ACT, 1961 ARISING OUT OF
ORDER DATED 28-02-2006 PASSED IN ITA.NO.3782/BANG/2004
FOR THE ASSESSMENT YEAR 2001-2002, PRAYING TO

FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN AND TO ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT, BANGALORE IN ITA.NO.3782/BANG/2004 DATED 28-02-2006 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE INCOME TAX OFFICER, WARD-6(4) BANGALORE, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS ITA HAVING BEEN HEARD AND RESERVED AND COMING ON FOR PRONOUNCEMENT OF JUDGEMENT THIS DAY, **B.MANOHAR J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is by the Revenue, being aggrieved by the order dated 28-2-2006 made in ITA No.3782/Bang/2004 passed by the Income Tax Appellate Tribunal, Bangalore 'B' Bench partly allowing the appeal setting aside the order dated 09-11-2004 made in ITA No.14/W 6(4)/CIT(A)III/2004-05 passed by the CIT (Appeals)-III, Bangalore.

2. The respondent-assessee filed his return of income for the assessment year 2001-2002 on 01-02-2012 declaring a total income of Rs.8,98,127/-. The same was processed and subsequently selected for scrutiny. Accordingly, notice under Section 143(2) was issued. The authorised representative of the respondent appeared and filed the documents. The Assessing Officer noticed that assessee has shown 1/3rd

share of long term capital gain on sale of J.P.Nagar property site of Rs.8,53,470/-. The said site was jointly held by the assessee along with his two brothers. The long term capital gain has been calculated at Rs.8,26,500/- taking into consideration the fair market value as on 01-04-1981. However, the appellant got the ownership over the property on 11-11-1987. The Assessing Officer found that adopting fair market value as on 01-04-1981 for calculating the capital gain is contrary to law and assessed the said property arriving at the long term capital income of the assessee at Rs.18,88,736/-. Further, insofar as the property situated at Aga Abba Ali Road, the assessee claimed that he was a co-owner of the said property along with his two brothers. The said property was sought to be jointly developed with M/s.Embassy Investment. As per the development agreement, the land was handed over to the Developer in the year 1995 and superstructure was built in the year 2000 consisting of multistoried building. As per the agreement, 50% of the flats, 50% of the car parking space and 50% of saleable terrace were given to the assessee and two of his brothers. In that, the assessee is entitled for 1/3 share. The property value has been fixed at Rs.66,00,000/- taking into consideration the fair market value as on 01-04-1981. The long term capital gain has been shown as NIL. However, the Assessing Authority not accepting the long term capital gain shown by the assessee, worked out the capital gain based on the actual cost of construction reported by the Developer vide

letter dated 01-02-2004 as Rs.2,86,22,931/- and 50% has to be reckoned as the value of site received by the assessee and his brothers would come about Rs.1,43,11,465/-. The share of the assessee is 1/3. Taking into consideration the said value, the Assessing Officer assessed the capital gain in respect of the property situated at Aga Abba Ali road at Rs.47,64,821/- and assessed the income for the assessment year 2001-2002 as Rs.20,96,614/- including the interest and surcharge, issued demand notice as per the Assessment Order dated 26-3-2004. The assessee being aggrieved by the Assessment Order dated 26-3-2004 preferred an appeal before the CIT (Appeals), Bangalore contending that the order passed by the Assessing Authority is contrary to law. The CIT (Appeals) by its order dated 9-11-2004 partly allowed the appeal and deducted a sum of Rs.1,82,720/- towards unexplained expenditure and confirmed the order in all other respects. The assessee being aggrieved by the order passed by the Appellate Authority approached the Income Tax Appellate Tribunal in ITA No.3782/2004. The Appellate Tribunal after examining the matter in detail by its order dated 28-2-2006 partly allowed the appeal setting aside the order passed by the Assessing Authority and issued directions to the Assessing Authority to give exemption under Section 54 of the Income Tax Act. The Appellate Authority clearly held that the market value of the property has to be taken into consideration as on the date of grant of land in respect of the J.P.Nagar property and also

market value of the property as on the date of development agreement entered into between the parties in respect of Aga Abba Ali Road. The Revenue being aggrieved by the order dated 28-2-2006 passed by the Appellate Tribunal preferred this appeal.

3. This appeal was admitted 11.9.2007, to consider the following substantial questions of law:

(i) Whether the Tribunal was right in holding that for the purpose of computation of long term capital gain in respect of J.P.nagar Property sold by the assessee indexation in order to determine the cost element should be as on 1-4-1981 by ignoring the law declared by this Hon'ble Court in the case of CIT v/s Dr.V.D.Modi?

(ii) Whether the Tribunal was right in holding that the estimated cost of construction of Rs.66 lakhs shown in the Joint Development Agreement for development of the property situated at Aga Abba Ali Road, Bangalore should be taken into account and not 50% (1.43 crores) of Rs.2.86 Crores actually spent by the building in working out the sale consideration for the purpose of Section 45 of the Act?

(iii) Whether the Tribunal was correct in holding that the assessee is exempted to exemption u/s.54 of the Act in respect of capital gains arising out of transfer of vacant land and also to consider the assessment's alternative claim of being entitled to exemption u/s.54F of the Act?

4. Sri.M.Thirumalesh, learned counsel appearing for the revenue contended that the order passed by the Income Tax Appellate Tribunal is

contrary to law. Though the erstwhile CITB allotted the land on 05-11-1975 absolute sale deed was executed on 08-08-1987. In view of the judgment of this Court in the case of *COMMISSIONER OF INCOME TAX v/s Dr.V.V.MODY* reported in 218 ITR page 1 (KAR), the fair market value as on 01-04-1981 cannot be adopted since the assessee gets the ownership only on 08-08-1987. The capital gain assessed by the Assessing Authority and confirmed by the CIT (appeal) is in accordance with law. Further insofar as the property situated at Aga Abba Ali Road is concerned, the assessee along with his brothers entered into a development agreement and pursuant to the same, the building situated in the said property was demolished and vacant site was handed over to the developer. As per the Development Agreement, 50% of the flats have to be given to the owners of the property along with car parking space and saleable terrace. The remaining 50% would go to the Developer. The joint development agreement was entered into between the parties in the year 1995 and construction of the residential apartment was completed in the year 2000. Hence, the property value of the year 2000 has to be taken into consideration and not the property value as on the date of agreement. Further, 50% of the total cost of construction has to be taken into consideration to assess the capital gain of the assessee. The reasoning of the Appellate Tribunal to set aside the order passed by the CIT (Appeals) is contrary to law. Further the assessee is entitled for exemption only

under Section 54F of the Act. The direction issued by the Appellate Tribunal to extend the exemption under Section 54 of the Act is contrary to law and sought for setting aside the same by allowing the appeal.

5. On the other hand, Sri.A.Shankar, learned counsel appearing for the respondent contended that there is no infirmity or irregularity in the order passed by the Appellate Tribunal. The Tribunal after considering the entire material on record passed the order impugned and the same is not liable to be interfered with by this court. The judgment made in Dr.V.V.Mody's cited supra is not applicable to the facts of this case in view of the amendment to Section 2(47) of the Income Tax Act. He also contended that the first issue raised by the assessee is fully covered by the order passed by the Division Bench of this court in ITA No.25/2001(*INCOME TAX OFFICER v/s R.SATHYARAJ*) disposed off on 17-12-2007. Further in respect of the property situated at Aga Abba Ali Road, the assessee and his brothers entered into a Joint Development Agreement with M/s.Embassy Investments and the said property was handed over to the Developer on 06-05-1995 itself for construction of the residential apartment. As per the Development Agreement, 50% of the apartment shall be handed over to the owners of the property. In that the assessee is entitled to 1/3 share. Hence, the fair market value as on 01-04-1981 has to be adopted though the construction of the apartment

was completed in the year 2000. As per the Development Agreement, the value of the apartment was fixed at Rs.66,00,000/-. Taking into consideration 50% of the cost of construction, the Assessing Authority has arrived at the capital gain, which is totally incorrect. Further after demolishing the residential house, new residential apartment has been constructed. Hence, the assessee is entitled for exemption under Section 54 of the Act and sought for dismissal of the appeal confirming the order passed by the Appellate Authority.

6. We have carefully considered the arguments addressed by the learned counsel for the parties and perused the orders impugned passed by the authorities below.

7. It is not in dispute that the property situated at J.P.Nagar was originally allotted by the then CITB (Now known as 'BDA') on 05-11-1975 in favour of the father of the assessee Sri.B.L.Rakhra on lease-cum-sale basis and put the allottee in possession of the property. In the meantime, the father of the appellant died. In view of that, the BDA executed the registered sale deed in favour of the assessee and his two brothers as per the sale deed dated 08-08-1987. Further, the assessee has put up construction and compound wall to the said property. While computing the capital gain from the said property, the assessee claimed indexation benefit in respect of the cost of acquisition right from the date of original allotment by the BDA. The allotment has been made and put the allottee

in possession in the year 1977 itself. The fair market value has been taken as on 01-04-1981. The assessee is entitled for 1/3 share in the said property. Since the allotment has been made and put the allottee in possession prior to 01-04-1981, the fair market value as on 01-04-1981 has been taken into consideration for arriving at capital gain of Rs.8,53,000/-. The issue No.1 raised in this appeal is fully covered by the judgment of the Division Bench of this court made in ITA No. 25/2001 (cited supra). Paragraph 7 of the judgment reads as follows:

“It is not in dispute that the lease-cum-sale deed was executed by the BDA on 19-6-1992. The assessee was put in possession of the property on 19-6-1992. He was enjoying the property as an absolute owner except to fulfil the terms and conditions of the lease-cum-sale deed. In other words, the assessee was enjoying the property as a owner and that he was put in possession of the property in terms of the agreement and such possession has to be treated as if he was enjoying the property under the part performance of the contract as defined under Section 53A of the Transfer of Property Act. If the assessee was enjoying the property under the provision of Transfer of Property Act, we have to consider the date of ownership from the date on which he was put in possession of the property. As a matter of fact in a similar circumstances this Court in ITA 328/2003 dated 13-12-2007 in the case of COMMISSIONER OF INCOME TAX v/s SAROJA B.K. we have held that when a party is put in possession of the property under the part performance of the agreement as contemplated under Section 53A of the Transfer of Property Act, the person who is in possession in such capacity has to be treated as a owner from the date on which he was put in possession. If the same is taken into account, when the BDA has allotted the site and put

the possession of the property, if the property is sold on 8-5-1997 it has to be treated as a long term capital gains as he was enjoying for more than 36 months as contemplated under Section 2(42) of the Income Tax Act.”

8. Further under Section 2(47), the term ‘transfer’ has undergone change w.e.f. 01-04-1988 by insertion of sub-clause (v) to Section 2(47) which provides that any transaction involving 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 Transfer of Property Act, will also come within the ambit of transfer is relevant. When the possession of the immovable property in pursuance to the said agreement is given in part performance of the said agreement, it is to be considered that there is a transfer for the purpose of computing capital gain. Hence, we find that the assessee is entitled to adopt fair market value of the property as on 01-04-1981 and accordingly, entitled to indexation while computing the capital gain in respect of J.P.Nagar property. Hence, issue No.1 is answered against the Revenue.

9. Insofar as the property situated at Aga Abba Ali road is concerned, as per the Development agreement of the year 1994, the Developer was put in possession of the property on 6-3-1995 for construction of the Apartment and construction of the apartment was completed in the year

2000. Clause 1.1 of the agreement reads as under:

“The owner shall sell 50% of undivided right and interest in the schedule-A property to developer and/or their nominee/s in all equivalent to 8,250 sq.ft. approximately (hereinafter called the ‘saleable undivided right and interest in the schedule property’ in consideration of the development).

- A. Paying non-refundable deposit of Rs.21,00,000/- (Rupees twenty one lakhs only) as set out in para 11.3;*
- B. The construction and handing over to the owners 50% of the super built area to be constructed on the scheduled property;*
- C. Construction and handing over to the owners 50% basement, car parking units;*
- D. Allotment of 50% of saleable garden/terrace area;*
- E. Providing rent free accommodation as set out in clause (1.4).*

The exchange value in consideration of 50% of the land was agreed to be conveyed to the Developer and/or his nominee/s valued at Rs.1,16,70,000/-. The fair market value as on 01-04-1981 as per the Sub-Registrar valuation has to be taken into consideration. However, the Assessing Authority has not taken into consideration this aspect of the matter. Taking into consideration the project cost incurred by the developer on the basis of their letter dated 01-02-2004, which includes all expenditure connected with the construction of the Residential Apartment.

The exchange value as specified in the project development agreement can be taken as the basis for computation of the construction in joint

development. The cost incurred by the developer need not necessarily represent only a cost of construction. The detailed particulars are not given. The transaction of Joint development is one of exchange. The consideration specified in the said document represents the market value on the date of entering into the agreement. The assessment made by assessing authority is contrary to law. Hence, we hold issue No.2 against the Revenue.

10. Insofar as issue No.3 is concerned, as per the Development Agreement entered into between the parties, the assessee and his brothers have demolished the existing residential building and handed over the vacant space to an extent of 16800 sq ft. to the Developer for construction of the apartment. Since the residential building has already been demolished by the assessee and his brothers themselves, they are not entitled to claim benefit under section 54 of the Act. At the most they are entitled to benefit under Section 54F of the Act. The order passed by the Appellate Authority directing the Assessing Authority to allow the deduction under Section 54 of the Income Tax Act is contrary to law and the same cannot be sustained. Hence, issue No.3 is held against the assessee.

11. Accordingly, we pass the following:

ORDER

The appeal is allowed in part. The order passed by the Appellate Tribunal insofar as directing the Assessing Authority to give deduction under Section 54 of Income Tax Act is set aside. In all other respects, the appeal is dismissed.

Sd/-
JUDGE

Sd/-
JUDGE

mpk/-*