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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.75 OF 2001

1) Mrs. Bindiya H. Malkani
2) Mr. Bharat H. Malkani
3) Mr. Pravin H. Malkani,
legal heirs of late Shri H. G. Malkani,
residing at Bindiya, Gandhi Gram Road,
Juhu, Mumbai-400 049.

..Appellants

Versus

The Commissioner of Income Tax
Mumbai City IX, Mumbai
having his office at
Piramal Chambers, Lalbaug, Parel,
Mumbai-400 012.

..Respondent

.....
Mr. Sameer Dalal a/w Subhash Shetty for the Appellant.
None for the Respondent.

.....
CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 29th JUNE, 2016

JUDGMENT (PER A. K. MENON, J.)

1. This appeal under Section 260A of the Income Tax Act, 1961(the Act) assails the order dated 30th August, 2001 passed by the Income Tax Appellate Tribunal (Tribunal). The appellants are heirs of the original assessee-appellant

("the appellant"). The impugned order relates to Assessment Year 1989-90.

2. This appeal was admitted on 1st April, 2004 on the following substantial question of law:-

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in coming to the conclusion that the capital gains arising to the appellant on the transfer of the impugned plot of land vide agreement dated 29th November, 1988 is short term capital gains and not long term capital gains as contended by the appellant?"

3. The revenue was represented at the time of admission and even waived service. However none appears today for the Revenue. The revenue has also not filed any affidavit in reply.

4. The issue that arises in this Petition lies within a narrow compass. The appellant had entered into an agreement on 18th May, 1980 with M/s. Shubhada Prints Pvt. Ltd. for acquiring leasehold rights of immovable property (said land) situated at Majas Village, Jogeshwari (E), Mumbai, for consideration set out therein. The appellant purchaser was required to file a Suit in this Court being Suit No.1077 of 1981 against the vendor Shubhada Prints Pvt. Ltd., inter alia, seeking specific performance of the agreement to assign the leasehold

rights in the said land. An earnest money of Rs.25,000/- had been paid at the time of execution of the agreement. During the pendency of the Suit, the parties arrived at Consent Terms on 11th March, 1988 pursuant to which the defendant - vendor agreed to assign the leasehold rights in the said land at a lump sum of Rs.4,50,000/- instead the lower consideration originally payable under the suit agreement.

5. The appellant thereafter sold the said land to one M/s. Associated Estate and Investment Corporation vide agreement dated 29th November, 1988 for a price of Rs.37,70,000/- resulting in capital gain to him. According to the appellant, he was holding the said land since 1980 i.e. from the date of the agreement dated 18th May, 1980 and hence the gain was long term in nature. The Assessing Officer, however, found that the appellant came into possession only pursuant to the Consent Terms and therefore the amount of consideration received on sale by the appellant is to be treated as short term capital gain and he was assessed accordingly.

6. In appeal the CIT(A) by order dated 25th March, 1991 allowed the appeal of the appellant. The CIT(A) directed the Assessing Officer to treat the gain on sale of the said land as long term capital gain.

7. Being aggrieved, the Revenue-Responent challenged the order dated 25th

March, 1991 of the CIT(A) before the Tribunal. By the impugned order dated 30th August, 2001 the Tribunal dismissed the assessee's appeal.

8. Mr. Dalal contended before us that the original appellant-assessee Mr. Malkani 'held' the property effectively from the date of the suit agreement. Mr. Dalal states that in order to constitute long term capital gain the assessee should have held the property for more than 3 years before the same was sold. In this case by virtue of the agreement dated 18th May, 1980 the assessee had interest in the said land from that date and the sale taking place in March 1988, it is eligible to benefit of long term capital gain in terms of Section 54 of the Act. Therefore, it is submitted that said land is held for more than 36 months. It is submitted that the Consent Terms only re-affirmed his pre-existing right under the agreement dated 19th May, 1980. Mr. Dalal submitted that the appellant came into the possession of the land only after the Consent Terms were filed. The Consent Terms as we have adverted to earlier, were dated 11th February, 1988 whereas the sale by the appellant to the new purchaser took place on 29th November, 1988 i.e. within a month of the same being acquired by the assessee.

9. In the present facts we find that consequent to the vendor not honouring the agreement dated 18th May, 1980, all that the appellant had was a right to seek specific performance which he sought to enforce by filing the

suit. The appellant did not have possession of the said land. It is only on the Consent Terms being filed in Court that the appellant got ownership and possession.

10. We find that the issue in question arose before this Court in *CIT v/s. Dr. D. A. Irani 234 ITR 850*. In the case of D.A. Irani (*supra*) it was held that where a sale of property took place within 5 months of acquiring ownership, the gains arising on sale were short term capital gains. The facts in D. A. Irani's case were that the assessee was a tenant who took a flat on a lease and later acquired ownership of such flat. The Court found that the tenancy was an inferior right which led to the assessee acquiring a superior right upon purchase and that the tenancy being inferior right merged into the superior right. Accordingly applying the doctrine of merger it resulted in the "drowning" and "sinking" of the inferior tenancy into the superior right of ownership and therefore this Court held in that case that the property could be said to be held only upon the purchase and the assessee could not be said to have held the premises during the period of tenancy. Similarly in these facts, the right to specific performance merged into the ownership rights on the order being passed in the suit upon filing of the Consent Terms. We put the above decision in the case of D.A. Irani(*supra*) to Mr. Dalal calling upon him to distinguish it in the facts of the present case. Mr. Dalal was unable to show any distinction which would warrant our taking a view different from that taken by this Court

in D.A. Irani(supra).

11. In the circumstances, we do not find any merit in the appeal. In our opinion, the assessee-appellant 'held' the property only upon the order being passed upon filing of the Consent Terms in Court on 11th March, 1988. The said land was sold on 29th November, 1988. Therefore it falls beyond the scope of long term capital gains and within the province of short term capital gain. Accordingly, we are of the view that the gains resulting from the sale of the said land in November 1988 would be a short term capital gain.

12. In the result, we answer the substantial question of law in the affirmative i.e. in favour of the Revenue and against the assessee. The appeal is dismissed. No order as to costs.

(A. K. MENON, J.)

(M. S. SANKLECHA, J.)