

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE****BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA Nos.1115 & 1116/Bang/2018
Assessment Year: 2011-12 & 2008-09

M/s. Godha Realtors Pvt. Ltd. #19-22, “Sandeep Nilayam” Ramaiah Reddy Colony Marathahalli Post Bengaluru 560 037 PAN NO :AACCG8736G	Vs.	ACIT Central Circle-2(2) Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Srinivasan, A.R.
Respondent by	:	Shri Sumer Singh Meena, D.R.

Date of Hearing	:	16.11.2021
Date of Pronouncement	:	02.02.2022

ORDER**PER B.R. BASKARAN, ACCOUNTANT MEMBER:**

Both the appeals filed by the assessee are directed against the orders passed by Ld. CIT(A)-11, Bengaluru and they relate to the assessment years 2008-09 & 2011-12. The only issue urged in both the appeals relate to the year of transfer of property and accrual of capital gain. While the assessee claims that the property was transferred in the year relevant to the assessment year 2011-12, the case of the A.O. is that the property has been transferred in the year relevant to the assessment year 2008-09.

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2. The facts relating to the case are stated in brief. The assessee is a private limited company and is engaged in the business of real estate development. During the financial year relevant to the assessment year 2008-09, the assessee won the bid for a property admeasuring 2 acres and 15 guntas in Hudi village in an auction conducted by Hon'ble High Court of Karnataka for a sum of Rs.9.00 crores. Accordingly, the Hon'ble High Court of Karnataka, vide its order dated 26.10.2007, directed the official liquidator to execute a registered sale deed in favour of the assessee. In compliance to the above directions, a registered sale deed was executed in the assessee's name on 20.10.2010.

3. The above said deed amount of Rs.9 crores was arranged by the assessee company as under:-

a) Own funds	-	Rs.1.80 crores
b) Advance received from Shri Ramaiah Reddy, a Director in the assessee company as per agreement for sale entered on 11.10.2007	-	<u>Rs.7.20 crores</u>
Total	-	<u>Rs.9.00 crores</u>

Since the assessee company did not have sufficient funds for satisfying the bid, it has approached Shri Ramaiah Reddy with an offer to sell 80% of undivided share in the auctioned property for a sum of Rs.7.20 crores and the same was accepted by Shri Ramaiah Reddy. It is pertinent to note that Shri Ramiah Reddy is one of the directors of the assessee company. Accordingly, he paid the amount of Rs.7.20 crores to the assessee. The A.O. noticed that the assessee has shown the cost of land at Rs.9.00 crores as its fixed asset in the Balance Sheet. The amount of Rs.7.20 crores received from Shri Ramaiah Reddy was shown as liability in the balance sheet as advance received from Shri Ramaiah Reddy.

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4. We notice earlier that the registered sale deed in respect of the above said land admeasuring 2 acres 15 guntas was executed in favour of the assessee on 20.10.2010. In the mean time, it appears that the assessee and Shri Ramaiah Reddy had also purchased adjacent lands in the same survey number. The entire parcel of the land i.e. above said land of 2 acres 15 guntas and other adjacent land was sold for a consideration of Rs.113 crores on 18.1.2021 to M/s. Total Environment Habitat Pvt. Ltd jointly by the assessee and Shri Ramaiah Reddy. The sale consideration pertaining to 2 acres and 15 guntas of land was Rs.18.05 crores, which was divided between the assessee and Shri Ramaiah Reddy, i.e., 20% sale consideration amounting to Rs.3.61 crores was taken by the assessee and remaining 80% sale consideration amounting to Rs.14.44 crores was given to Ramaiah Reddy. The assessee computed long term capital loss as under in assessment year 2011-12:-

CAPITAL GAINS

Gross sale consideration on sale of property Sy.No.170-2A-15G

- received from Ramaiah Reddy towards Sale of 80% of UDI

- received from M/s. Total Environment Habitat Pvt. Ltd. towards Sale of 80% of UDI

72,000,000

36,100,000

Total Sale Consideration

108,100,000

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Less: Expenditure of Transfer

108,100,000

Less: Indexed Cost of Acquisition

The aforesaid property was purchased for a sum of Rs.9,00,00,000/- in an auction and possession of the same was taken on 26.10.2007.

Accordingly the Indexed Cost of Acquisition is calculated as :

[Rs.9,00,00,000/- x 711/551]

116,134,301

Less: Cost of Improvement

a) Stamp duty & Registration Charges: The aforesaid property was registered during the previous year by incurring a sum of Rs.70,20,000/- towards Stamp duty & Registration

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charges. It is submitted that Sri Ramaiah Reddy had agreed to bear 80% of the aforesaid expenditure and therefore only 20% of aforesaid expenditure is being claimed as Cost of Improvement

1,404,000

b) *BBMP Tax paid: the assessee has paid a sum of Rs.3,80,255/- towards BBMP tax for the aforesaid property during the year and accordingly the same is claimed herewith as Cost of Improvement*

380,255

Long Term Capital Loss

(9,818,556)

Less: Long Term Capital Loss carried forward for set off in future

(9,818,556)

5. The assessee was subjected to search operation u/s 132 of the Act on 05.07.2011. Accordingly the assessments of both AY 2011-12 and 2008-09 came to be reopened u/s 153A of the Act. With regard to the above said sale of land, the A.O. took the view that the assessee has transferred 80% i.e. undivided share in the land to Ramaiah Reddy in the assessment year 2008-09 itself. The AO so entertained the view on the reasoning that the transaction entered between the assessee and Shri Ramaiah Reddy is akin to “extinguishment of rights” in the capital asset as per the definition of the term “transfer” given in sec.2(47) of the Act. Accordingly, he took the view that the capital gain arising on transfer of 80% of land is assessable in AY 2008-09. Accordingly, the AO computed long term capital gain for the remaining portion of 20% of land only in assessment year 2011-12. In A.Y. 2008-09, the AO computed short term capital gain on sale of land to Shri Ramaiah Reddy. The amount of STCG computed by AO was Rs.32/-.

6. The assessee challenged assessment order passed for both AY 2008-09 & 2011-12 by filing appeals before Ld. CIT(A) in respect of the above said issue. The Ld. CIT(A) upheld the view of AO that transfer of land to Shri Ramaiah Reddy has taken place in the year

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relevant to AY 2008-09 and accordingly confirmed the computation of capital gain made by the A.O. in A.Y. 2011-12. With regard to computation of STCG made in AY 2008-09, the Ld. CIT(A) deleted the same citing clerical error. Aggrieved, the assessee has filed the appeals for both the years before us.

7. The Ld A.R submitted that the AO was not correct in law in stating that the 80% of Undivided share in the land has been sold to Shri Ramaiah Reddy in the year relevant to the AY 2008-09. He submitted that the assessee had entered into only "Agreement to Sell" with Shri Ramaiah Reddy and it will not transfer the title of the land to him. He submitted that only a registered sale deed will result in transfer of asset. He further submitted that the assessee was holding possession of land, but the land was registered in its name only on 20-10-2010. He submitted that the assessee did not hand over the possession to Shri Ramaiah Reddy, since the agreement to sell was entered for undivided share in land. Hence the provisions of sec.53A of Transfer of property Act also will not apply to this transaction. Accordingly, the Ld A.R submitted that the question of transfer of land does not arise in AY 2008-09. In support of his contentions, the Ld A.R took support of the decision rendered by Hon'ble Gujarat High Court in the case of Ushaben Jayantilal Sodhan vs. ITO (2018)(407 ITR 276)(Guj). The Ld A.R submitted that though the issue before the Hon'ble Gujarat High Court was pertaining to deduction claimed u/s 54 of the Act, yet the Court had to decide as to whether the "Agreement to sell" would result in transfer of property to the buyers. He submitted that the Hon'ble Gujarat High Court followed various decisions rendered by Hon'ble Supreme Court and held that the mere agreement to sell will not result in transfer the property to the prospective buyers, even under Income tax Act. Accordingly, the Ld A.R submitted that

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the transfer of 80% of property has taken place only in the year relevant to AY 2011-12, when the assessee along with Shri Ramaiah Reddy sold the property to M/s Total Environment. He further submitted that Shri Ramaiah Reddy has treated this transaction as his business transaction and accordingly offered the business income only in AY 2011-12, which has been accepted by the revenue.

8. The Ld D.R, on the contrary, strongly supported the orders passed by Ld CIT(A). Inviting our attention to some of the observations made by Hon'ble Gujarat High Court in the case of Ushaben Jayantilal Sodhan (supra), the Ld D.R submitted that the agreement to sell would also transfer the property.

9. We heard rival contentions and perused the record. In our view, the entire issue boils down to the question as to is whether the "Agreement to sell" entered by the assessee with Shri Ramaiah Reddy to sell 80% of undivided share in the land having an extent of 2 acres and 15 guntas would result in transfer of asset or not? The main contention of the assessee is that the mere entering of "Agreement to Sell" will not result in transfer of asset, while the case of the AO is that there was transfer of asset.

10. We notice that issue whether the "Agreement to sell" would result in transfer of asset or not was examined by Hon'ble Gujarat High Court in the case of Ushaben Jayantilal Sodhan (supra). For the sake of convenience, we extract below the relevant observations made by Hon'ble Gujarat High Court in the above said case:-

"15. It is, in this context, that both the sides had strenuously argued the case. Learned counsel for the assessee obviously contended that the capital asset, i.e. in the present case, the land of the assessee, should be treated to have been transferred on the date on which the agreement to sale took place. Counsel for the Revenue, for obvious reasons, opposed this proposition. Section 5 of the Transfer

of Property Act, 1882 defines the term "transfer of property" as to mean an act by which a living person conveys property in present or in future to one or more other living persons or to himself or to himself and one or more other living persons. Section 54 of the Transfer of Property Act defines "sale" as a transfer of ownership in exchange for a price paid or promised or part-paid or part-promised. It further provides that transfer in case of a tangible immovable property of a value of Rs. 100 and above or reversion of other intangible thing can be made only by a registered instrument. It is undisputable that an agreement to sale does not convey a property from one person to another, either in present or even in future. An agreement to sale an immovable property is a bilateral contract under which the two parties, i.e. the buyer and the seller, agree to certain terms and conditions, subject to which the property in question would be transferred by the seller to the buyer for a decided sale consideration. The terms and conditions of the agreement to sale are bound to be different in each case. However, the common thread would be the commitment of the owner of the property to convey to the purchaser the right, title and interest in such property upon the purchaser paying the agreed consideration in agreed manner. It is only after such bilateral obligations are discharged that the execution of the sale deed would take place and it is this sale deed, which is compulsorily registrable under Section 17 of the Registration Act, 1908, upon being registered, would transfer the right, title and interest in the property in question into the purchaser. It is only upon the execution of the sale deed that the title in the property would vest in the purchaser.

16. We must, however, view these transactions in the context of the provisions contained in the Act instead of confining its effect to the Transfer of Property Act and the Registration Act. As noted, Section 2(14) of the Act defines "capital asset" inter alia as a property of any kind held by an assessee. Section 2(47) of the Act defines "transfer" in relation to a capital asset to include sale, exchange or relinquishment of the asset or extinguishment of any rights therein. The term "transfer" defined u/s. 2(47) of the Act, thus, has a much wider connotation, as compared to the common parlance understanding or even under the Transfer of Property Act, under which the term "transfer of property", as noted earlier, has a narrower sweep. It is, perhaps, possible to argue that the agreement to sale gives rise to a capital asset. Upon execution of the agreement to sale, the intending purchaser gets a certain right to insist that the title of the property be transferred if he performs his part of the obligation arising out of the agreement. If the seller is unwilling to do so, the intending purchaser may also successfully bring a suit for specific performance by demonstrating that he was and had always been ready and willing to perform his part of the obligations arising out of the agreement. Under an agreement to sale, thus, the seller binds himself to do or not to do certain things in reciprocation of the purchaser performing his part of the obligations. Correspondingly, it may be stated that the seller's right to freely deal in the property in question gets curtailed. It may, therefore, also be possible to argue that upon execution of such an agreement, there was extinguishment of certain rights of the owner and to that extent, there was a transfer of capital asset. The crucial question, however, still begs the answer is can it be stated that the agreement to sale transfers the property in question within the meaning of Section 2(47) of the Act?

17. In our opinion, the answer has to be in the negative. As discussed earlier, the agreement to sale an immovable property is in the nature of bilateral contract between the seller and the buyer. Under such agreement, the seller agrees to transfer the title in the property to the buyer, upon the buyer performing his part of the obligations, mainly, revolving around the payment of sale consideration on agreed terms. Such agreement to sale, however, has to culminate into a registered sale deed, so as to transfer the title of property in question from the seller to the buyer. There may be multiple reasons why such eventuality may never arise and these reasons could be entirely different from the seller refusing to perform his part of the obligations arising out of the contract or for some such reason, the transaction running into legal controversies. Some of the imaginable reasons could be the inability of the seller to clear the title of the property due to which the contract may be frustrated or rescinded with mutual consent or the refusal or inability of the purchaser to pay the sale consideration.

18. An agreement to sale immovable property does not cast obligations only on the seller. It is based on reciprocal promises to be performed by both sides. If the purchaser fails to discharge his obligations arising out of the contract, then the agreement may as well not culminate into a final sale deed. Depending on the terms of agreement, the seller may either forfeit the earnest money, rescind the contract or in a given case, sue for specific performance or damages. These are but, a few illustrative examples to appreciate that there can be a wide gap between an agreement to sale and an actual instance of sale being evidenced under a sale deed. To therefore hold that upon mere execution of an agreement to sale of the immovable property itself gets transferred into the purchaser, even within the extended definition of Section 2(47) of the Act, would be incorrect.

19. In this context, we must first refer to the judgment of the Supreme Court in case of Sanjeev Lal (*supra*) on which heavy reliance was placed by counsel for the assessee. It was a case in which the assessee owned an immovable property, namely, a house, situated in Chandigarh. He decided to sell the house, for which an agreement to sale was executed on 27.12.2002 for a sale consideration of Rs. 1.32 Crores. Out of such amount, a sum of Rs. 15 Lakhs was received by the assessee by way of earnest money. The assessee also intended to purchase another house property in Chandigarh out of the sale proceeds. The house was purchased on 30.04.2003, which was within 01 year from the date of execution of the agreement to sale. Before the sale deed could be executed, the validity of the Will under which the assessee had received the property was called in question by another son of the deceased testator by filing a Civil Suit. The trial Court granted interim injunction restraining the assessee from dealing with the property. However, during the pendency of the suit, the plaintiff died leaving behind no heirs and the suit was dismissed in May 2004. It was due to the interim injunction that the assessee could not execute the sale deed. Upon dismissal of the suit, the sale deed was executed on 24.09.2004.

19.1 In this context, the assessee's claim for deduction of capital gain arose. The Revenue argued that the assessee was not entitled to benefit of Section 54 of the

Act since the transfer of the capital asset took place on 24.09.2004 whereas, the assessee had purchased another residential house on 30.04.2003, i.e. more than 01 year prior to the sale of the asset. The Supreme Court noted that Section 54 of the Act clearly provides that in order to avail benefit under the said Section, one must purchase a residential house or a new asset, within 01 year prior to or 02 years after the date on which the transfer of residential house in respect of which the long term capital gain had arisen, has taken place. The Court, therefore, noted that looking to the relevant dates, if one considers the date on which the assessee had decided to sell the property as the date of transfer or sale, then the appellant-assessee would be entitled to benefits under Section 54 of the Act. The Court, therefore, posed a question to itself whether the agreement to sale, which was executed on 27.12.2002, can be considered as a date on which the property, i.e. the residential house, had been transferred. The Court observed that in normal circumstances, by executing an agreement to sale of an immovable property, a right in personam is created in favour of the transferer. In such situation, the vendee is restrained from selling the property to anyone else. However, the question still remains whether the entire property can be said to have been sold at the time when the agreement to sale was entered into. The Court was of the opinion that in normal circumstances, such question had to be answered in the negative. The Court, thereafter, referred to the provisions of Section 2(47) of the Act giving expanded meaning to the term "transfer" and further observed in light of the said definition that one can come to the conclusion that some right in respect of the capital asset in question had been transferred and that such right with respect to the capital asset had been extinguished, after execution of the agreement to sale. The Court also observed that, no doubt, such contractual right can be surrendered and neutralized by the parties by subsequent contract or conduct. But, such was not the case on hand. The Court also noted that the sale deed could not be executed for the reason that the assessee had been prevented from dealing with the residential house by an order of the competent Court. The Court, in view of such peculiar facts of the case and looking to the definition of "transfer" u/s. 2(47) of the Act, was of the view that the assessee was entitled to relief u/s. 54 of the Act.

20. This judgment, contrary to what was strenuously canvassed before us, does not lay down a blanket proposition that without there being anything else, upon execution of an agreement to sale of an immovable property, the asset, i.e. the property in question, itself stands transferred. Main thrust in the said case was that the assessee, after having executed an agreement to sale the property, was prevented from executing the sale deed by an injunction of the Court. In the meantime, he had already purchased the new property. These were the peculiar facts of that case.

21. We may recall, the Supreme Court in case of Suraj Lamp & Industries (P) Ltd. (supra) had occasion to extensively deal with the nature of agreement to sale of immovable properties and the requirement of compulsory registration of sale deeds in order to transfer right, title and interest in immovable properties. In this judgment, of course, the Supreme Court was not concerned with the provisions of the Act. Nevertheless, some of the observations of the Supreme Court in the said judgment would be apposite. The Court, after referring to the provisions of the

Transfer of Property Act and Registration Act, noted with approval the observations of the judgment in case of Narandas Karsondas v. S.A. Kamtam and another reported in 1977 (3) SCC 247 that a contract of sale itself does not create any interest or charge in the property, which is expressly declared u/s. 54 of the Transfer of Property Act. The Court, in this context, concluded as under;

"12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of sections 54 and 55 of the TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted u/s. 53A of TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of movable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge no its subject matter."

11. In the instant case, it is not the case of the AO that the provisions of sec. 53A of the Transfer of Property Act would apply to the impugned transaction. In fact, it is the submission of the assessee that the possession was never given to Shri Ramaiah Reddy. Hence, what was entered by the assessee with the above said person was mere "Agreement to sell". In the above said decision, the Hon'ble Gujarat High Court has held that the agreement to sell will not result in transfer of asset. In that case, there is no question of any extinguishment of right, as held by the AO and confirmed by Ld CIT(A). Hence the question of assessing any capital gain in AY 2008-09 does not arise. In that view of the matter, we are unable to approve the computation of capital gain made by the AO in AY 2011-12 also. Accordingly, the computation of capital gain made by the assessee in AY 2011-12 is upheld.

12. In view of the foregoing discussions, we set aside the order passed by Ld CIT(A) and AO in both the years under consideration with regard to the computation of capital gain.

13. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 2nd Feb, 2022.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 2nd Feb, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.