

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 2ND DAY OF FEBRUARY 2021

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

I.T.A. NO.70 OF 2015

BETWEEN:

V.S.CHANDRASHEKAR
PROP: M/S MADHURA DEVELOPERS
#46, 9TH CROSS 28TH MAIN
1ST PHASE
JP NAGAR
BENGALURU - 560 078.

... APPELLANT

(BY SRI.CHYTHANYA K.K., ADV.,)

AND:

ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE 4(1)
4TH FLOOR, UNITY BUILDING ANNEXE
P.KALINGA RAO ROAD
BENGALURU - 560 027.

... RESPONDENT

(BY SRI.K.V.ARAVIND, ADV.)

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THIS I.T.A. IS FILED UNDER SEC. 260-A OF INCOME TAX
ACT 1961, ARISING OUT OF ORDER DATED 28.11.2014 PASSED
IN ITA NO.243/BANG/2014 FOR THE ASSESSMENT YEAR 2010-11
PRAYING TO:

(i) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW
STATED ABOVE.

(ii) ALLOW THE APPEAL AND SET ASIDE THE IMPUGNED ORDER OF THE INCOME TAX APPELLATE TRIBUNAL, BENGALURU, 'A' BENCH BEARING IN ITA NO.243/BANG/2014.

THIS I.T.A. COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the assessee. The subject matter of the appeal pertains to the Assessment year 2010-11. The appeal was admitted by a bench of this Court vide order dated 22.06.2015 on the following substantial questions of law:

(i) *Whether on the facts and in the circumstances of the case, finding of the Hon'ble ITAT that the subject land sold is held by the appellant as investment and not as stock in trade is perverse?*

(ii) *Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in holding that the loss arising from sale of subject land is chargeable to tax under the head 'income from capital gains' and*

not under the head 'profit and gains from business or profession?

(iii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in holding that provisions of Section 50C are applicable to the instant case of sale of subject land by the appellant?

(iv) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in not allowing business loss of Rs.60,43,859/- for the impugned Assessment Year 2010-11?

2. Facts leading to filing of this appeal briefly stated are that the assessee is an individual and runs a proprietary concern in the name and style of M/s Madhura Developers. A survey under Section 133A of the Act was carried out in the premises of the assessee on 07.07.2010. The assessee filed the return of income on 15.10.2010 declaring a total income of Rs.3,00,75,130/-. The case of the assessee was selected for scrutiny and notice under Section 143(2)

was issued on 19.01.2011. The questionnaires under Section 142(1) of the Act were issued on several dates. In response to the aforesaid notice, the authorized representative of the assessee appeared and furnished the details. The Assessing Officer completed the assessment and by an order dated 30.12.2011 made an addition to total income of Rs.1,98,67,157/- i.e., Rs.1,65,26,955/- + Rs.33,42,202/-.

3. The assessee being aggrieved by the order of assessment filed an appeal before Commissioner of Income Tax (Appeals) who by an order dated 11.11.2013 partly allowed the appeal preferred by the assessee. The assessee thereupon approached the Income Tax Appellate Tribunal (hereinafter referred to as 'the tribunal' for short). The tribunal by an order dated 28.11.2014 dismissed the appeal preferred by the assessee. In the aforesaid factual background, the assessee has preferred this appeal.

4. Learned counsel for the assessee submitted that on 23.12.2005 the assessee had entered into an unregistered agreement i.e., an agreement to sale with M/s Namaste Exports Ltd. for purchase of land measuring 3639.60 square meters for a consideration of Rs.4.25 Crores. It was further submitted that under the agreement, the assessee was neither handed over the possession of the land in question nor Power Of Attorney was executed in his favour. It is further submitted that M/s Namaste Exports Ltd. sold the land in question by three sale deeds dated 26.03.2007, 26.03.2007 and 01.03.2010 in parts in respect of lands measuring 8550 square feet, 9500 square feet, 21157 square feet for a total consideration of Rs.3,26,37,550/-. It was further pointed out that in first two transactions viz., the sale deeds executed on 26.03.2007, the assessee was not a party to the deed, whereas, in the third transaction which was executed on 01.03.2010, the assessee was merely a consenting witness. Therefore, provisions of

Section 50C are not applicable to the case of the assessee. It is also urged that Section 50C being a deeming provision requires strict interpretation and applies to the transferor of the land i.e., Namaste Exports and not to the assessee who is a consenting party and not transferor / co owner of the property. It is also argued that since, the assessee is only a consenting witness therefore, he cannot take recourse to Section 50C of the Act as he has no locus standi. It is also pointed out that Section 50C uses the expression 'capital asset' as being 'land, building or both' and the expression 'being' is more like 'namely' and section 50C does not deal with interest in land but only deals with the land.

5. It is also contended that Explanation 1 to Section 2(47) of the Act uses the expression 'immovable property', whereas, Section 50C does not use the expression immovable property and therefore, the legislature has used the term 'land' instead of

'immovable property'. It is also pointed out that wherever the legislature intended, it has expanded the meaning of the land to improve rights or interest in land. It is also argued that as per Explanation (i)(b) to Section 92B(2), the transfer of ownership, or the provision of use of rights regarding land use is treated as intangible property and as per sub clause (i) to Explanation (ii) to Section 92B(2), leasehold interest is an intangible property and therefore, Section 50C is not applicable to intangible rights associated with land or building or both and is applicable to transfer of land. It is further submitted that a right to specific performance is not a land but is merely a right to sue and under the agreement for sale dated 23.12.2005, there was no transfer of land and relief of specific performance of contract is an equitable relief granted by the court to enforce contractual obligations between the parties and Section 20(1) of the Specific Relief Act, 1963 clearly provides that it is not necessary to grant the relief of

specific performance merely because it is lawful to do so.

6. It is also urged that where the language of the statute is clear and unambiguous, there is no room for application of either the doctrine of 'causes omissus' and external aid for interpretation of the provision cannot also be taken recourse to. It is also urged that assessee cannot be taxed without clear words for that purpose and every Act of Parliament must be read according to its natural construction of words. Alternatively, it is urged that the assessee is a dealer in land / building and has never shown any capital gains in the past and the Assessing Officer has not changed head in his order and remand report. Therefore, the findings recorded by the tribunal that the assessee failed to bring any evidence on record to indicate that in past also, the income from the asset was also shown as business income, the assessee has filed revised returns for 2008-09 but, these returns have been filed after survey

operations i.e., 29.11.2010, the assessee himself has returned the income on earlier sale instances, returns were originally filed considering it as an investment and they were revised on 29.11.2010 i.e., after the survey and the assessee with regard to earlier two sale transactions has already offered the income under the head 'capital gains' but later on revised his stand are perverse. Therefore, the loss is a business loss and Chapter IV-E of the Act is not applicable. It is also contended that an asset is a stock in trade or capital asset is a question of law. Our attention has also been invited to Memorandum to Finance Bill, 2013 and it has also been contended that entries in the books of accounts are not inclusive to determine the nature of asset / transaction. It is also urged that the Assessing Officer cannot improvise his order and no profit can be recognized unless the land is fully sold and the profit can be determined only after completion of the venture. Alternatively, it is submitted that in the past years as

well as for the current impugned year the assessee is charged to tax at 30% Tax bracket and therefore, entire exercise of seeking to disturb the year of allowability of said loss would in any case would be revenue neutral. In support of aforesaid submissions, reliance has been placed on ***SESHASAYEE STEELS P. LTD. V. ACIT (2020) 421 ITR 46 (SC), SURAJ LAMP & INDUSTRIES (P.) LTD. V. STATE OF HARYANA [2012] 340 ITR 1 (SC), GOBIND RAM V. GIAN CHAND, (2000) 7 SCC 548 AT PAGE 550, CIT V. GREENFIELD HOTELS & ESTATES (P.) LTD. [2016] 389 ITR 68 (BOMBAY), ITO V. CH. ATCHAIAH [1996] 218 ITR 239 (SC) & PCIT V. IND SING DEVELOPERS (P.) LTD. [2016] 239 TAXMAN 350 (KARNATAKA), ADDL. COMMISSIONER OF INCOME TAX VS. MADAN LAL AHUJA [1982] 136 ITR 640 (ALLAHABAD),***

7. Learned counsel for the revenue submitted that the finding recorded with respect to the cost of

acquisition and consideration at Rs.1,400/- per square feet is a pure finding of fact recorded by the tribunal and the same is on the basis of value determined by the State Government for the purpose of stamp duty, which is permitted to be adopted under the provisions of the Act to determine the fair market value of the property. It is also argued that in the absence of any perversity, no substantial question of law arises for consideration. It is also submitted that the land cannot be sold for lesser than the value of the land purchased that too when the time period between the purchase and sale of the land is 4 to 5 years and therefore, the loss claimed by the assessee is incorrect and the same has been claimed in order to evade payment of tax on capital gains. It is also pointed out that when the assessee has sold 3 plots, without any justification, the assessee cannot reduce or declare the lesser consideration for the larger part of the land. It is further submitted that when the assessee sold two pieces of land during the year 2007-08, 2008-09,

the sale was reflected as capital gains and therefore, the assessee cannot be permitted to contend that land sold is stock in trade and not capital investment when books of accounts for the earlier years as well as current year reflect the land as investment. It is also urged that the findings recorded by the Commissioner of Income Tax (Appeals) and the tribunal on the aforesaid issue is a finding of fact and no substantial question of law arises for consideration. Alternatively it is submitted that even if the assessee is in the real estate business, the assessee is not prevented by any law to hold any investment. Therefore, the contention of the assessee to consider the land as stock in trade is incorrect and the same has rightly been rejected by the authorities. It is also contended that Section 50C of the Act would mandate adoption of consideration on the basis of guidance value prescribed by the State Government for the purposes of stamp duty as the consideration reflected by the assessee is much less than the guidance

value provided by Government of Karnataka. The authorities have rightly adopted the value of land sold equal to value determined by Government of Karnataka for the purpose of stamp duty in terms of Section 50C of the Act.

8. It is also contended that assessee had entered into an agreement and had paid substantial amount towards consideration to the extent of 80% and the aforesaid payment of consideration has been acknowledged in the sale deed, which is evident from the recitals contained in the sale deed. Thus, rights have accrued in favour of the purchaser, which have been extinguished by the execution of the sale deed and the same would amount to transfer under Section 2(47) of the Act. In this connection, reliance has been placed on decisions of the Supreme Court in '**SANJEEV LAL VS. COMMISSIONER OF INCOME TAX, CHANDIGARH**', **365 ITR 389** and therefore, the consideration has rightly been subjected to capital gains. It is further

submitted that assessee is not entitled to produce the documents before this court without appropriate application which is supported by an affidavit.

9. By way of rejoinder reply, learned counsel for the assessee submitted that this court may record a finding with regard to applicability of Section 50C in the fact situation of the case and may remit the matter to the tribunal to decide the issues arising out of substantial questions of law Nos.1 and 2.

10. We have considered the submissions made by learned counsel for the parties and have perused the record. Admittedly, the assessee has entered into an unregistered agreement viz., an agreement for sale on 23.12.2005 with M/s Namaste Exports Ltd. For purchase of land measuring 3639.60 square meters for a consideration of Rs.4.25 Crores. Before proceeding further, it is apposite to take note of relevant extract of Section 2(47) as well as Section 50C of the Act, which

read as under:

2(47)"transfer", in relation to a capital asset, includes,—

(i) the sale⁶³, exchange⁶³ or relinquishment⁶³ of the asset ; or

(ii) the extinguishment of any rights therein⁶³ ; or

(iii) the compulsory acquisition thereof under any law ; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment

(iva) the maturity or redemption of a zero coupon bond; or

(v) any transaction involving the 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 53A⁶⁷ of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other

association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Section 50C (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (hereinafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of Section 48 be deemed to be the full value of the consideration received or accruing as a result of such transfer.

Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the

stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer.

Provided further that the first proviso shall apply only in a case where the amount of consideration, or apart thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed on or before the date of the agreement for transfer.

11. Thus, from perusal of the aforesaid provisions, it is axiomatic that explanation 1 to Section 2(47) uses the term 'immovable property ' whereas, Section 50C uses the expression 'land' instead of immovable property. It is also pertinent to mention that wherever the legislature intended to expand the meaning of the land to include rights or interests in land, it has said so specifically viz., Section 35(1)(a), Section

54G(1), Section 54GA(1) and Section 269UA(d) and Explanation to Section 155(5A). Thus, Section 50C applies only in case of a transferor of land which in the instant case is M/s Namaste Exports and not the assessee who was only a consenting party and not a transferor / co-owner of the property. Undoubtedly, the assessee had certain rights under the agreement, however, from the clear plain and unambiguous language employed in Section 50C, it is evident that the same does not apply to a case of rights in land. It is equally well settled rule of statutory interpretation with regard to taxing statute that an assessee cannot be taxed without clear words for that purpose and every Act of the Parliament has to be read as per its natural construction of words. For the aforementioned reasons, in our considered opinion, the provisions of Section 50(c) are not applicable to the case of the assessee. In the result, the first substantial question of law is answered in the negative and in favour of the assessee.

12. However, since the substantial questions of law Nos.2 and 3 require adjudication of facts, therefore, the order of the tribunal dated 28.11.2014 insofar as it pertains to issues arising out of substantial question of law Nos.2 and 3, is hereby quashed and the matter is remitted to the tribunal for decision afresh in respect of the issues arising from substantial questions of law Nos.2 and 3. Therefore, it is not necessary for us to answer the substantial questions of law Nos.2 and 3.

In the result, the appeal is disposed of.

**Sd/-
JUDGE**

**Sd/-
JUDGE**