Bombay High Court Chaturbhuj Dwarkadas Kapadia vs Commissioner Of Income-Tax on 13 February, 2003 Equivalent citations: 2003 (2) BomCR 449, (2003) 180 CTR Bom 107, 2003 260 ITR 491 Bom Author: S Kapadia Bench: S Kapadia, J Devadhar JUDGMENT S.H. Kapadia, J. 1. Being aggrieved by the order of the Tribunal dated July 29, 2002, the assessee has come by way of appeal under Section 260A of the Income-tax Act, 1961, raising the following questions of law for determination by this court : "(i) Whether on the facts and in the circumstances of the case, the Tribunal was justified in concluding that the appellant had transferred the property situated at Gamdevi during the previous year relevant to the assessment year 1996-97 ? (ii) Whether the Tribunal's conclusion that the appellant had transferred the property situated at Gamdevi during the previous year relevant to the assessment year 1996-97 was so unreasonable that no person properly instructed could ever have arrived at the same ? (iii) Whether, the Tribunal's conclusion that the appellant transferred the property situated in Gamdevi in the previous year relevant to the assessment year 1996-97 was arrived at by considering irrelevant circumstances and without appreciating and considering the relevant factual material and was contrary to the material and the evidence of record was thereby vitiated ?" 2. Facts : The assessee is an individual. He had 44/192 undivided share in an immovable property at Gamdevi in Greater Bombay. The entire property consisted of land and ten buildings. However, a building bearing No. 10 was under requisition by the State Government, which was later derequisitioned. That building was not occupied by tenants. By agreement dated August 18, 1994, the assessee herein agreed to sell to Floreat Investments Ltd. (hereinafter referred to, for the sake of brevity as "Floreat"), his share of the immovable property for total consideration of Rs. 1,85,63,220 with a right to the said Floreat to develop the property in accordance with the rules and regulations framed under the Maharashtra Housing and Area Development Act. For that purpose, the assessee agreed under Clause 8 to execute a limited power of attorney, authorising Floreat to deal with the property and also obtain permissions and approvals from the Urban Land Ceiling Authority, Bombay Municipal Corporation and CRZ authorities. Under Clause 9 of the agreement it was, inter alia, provided that on Floreat obtaining all necessary permissions and approvals and upon receipt of NOC under Chapter XX-C of the Income-tax Act, the assessee shall grant an irrevocable licence to enter upon the assessee's share of the property. Under Clause 11 of the agreement, it was provided that after Floreat was given an irrevocable licence to enter upon the assessee's share of the property and after Floreat having obtained all necessary approvals, Floreat was entitled to demolish buildings Nos. 1 to 3 and building No. 10 and any other buildings on the property, subject to Floreat settling the claims of the tenants. Under Clause 14 of the agreement, the assessee was entitled to receive proportionate rent till the payment of the last instalment and till that time, the assessee was bound to pay all outgoings. Under Clause 20 of the agreement, it was agreed that the sale shall be completed by execution of conveyance. Till date, there is no conveyance. Pursuant to the agreement, Floreat obtained the following permissions : (i)

Clearance from CRZ authority dated February 7, 1996 ; (ii) letter from ULC for redevelopment of the property dated April 26, 1995. These two permissions were amongst several other permissions obtained. These three permissions, however, are mentioned as they were obtained during the financial year ending March 31, 1996, relevant to the assessment year 1996-97. Similarly, by March 31, 1996, Floreat had paid almost the entire sale price of Rs. 1,85,63,220, except for the small amount of Rs. 9,98,000. However, the important point which is required to be noted is that BMC issued a commencement certificate permitting construction of a building up to the plinth level only on November 15, 1996. In the meantime, the plan came to be amended. Ultimately, the power of attorney was executed on March 12, 1999. The narrow dispute which arises for determination in this appeal is : Whether the liability of the assessee for capital gains accrued to the assessee during the assessment year 1996-97 or whether the assessee was liable to pay capital gains tax during the assessment year 1990-2000. According to the Department the transfer had taken place during the accounting year ending March 31, 1996, relevant to assessment year 1996-97, whereas according to the assessee, the transfer took place only when the assessee executed an irrevocable licence in favour of Floreat to enter upon the property and, therefore, according to the assessee the liability arose during the assessment year 1999-2000. 3. Arguments : Mr. Dastur, learned senior counsel appearing on behalf of the assessee, contended that the only question which is required to be decided in this case is : Whether the Department was right in inferring possession in favour of Floreat during the accounting year ending March 31, 1996, relevant to the assessment year 1996-97. He submitted that in this case, the assessee has paid capital gains tax for assessment year 1999-2000. That, this is not a case where the assessee denies transfer of property. He contended that the only issue which is required to be decided in this appeal was as to whether the transfer, as contemplated by Section 2(47)(v), had taken place during the assessment year 1996-97 or whether it had taken place during the assessment year 1999-2000. He pointed out that the decision of the Tribunal was perverse in the sense that reliance was being placed on documents which do not even exist. He submitted that the Tribunal has come to the conclusion of possession being handed over by the assessee to Floreat during the assessment year 1996-97 on basis of seven permissions obtained from various authorities. However, he submitted that item No. (vi) was a repetition of item No. (iii), whereas item No. (vii) was a repetition of item No. (i). He further submitted that the permission under item No. (iii) did not even exist. He, therefore, submitted that the Tribunal has drawn inferences purely on the basis of conjectures. In this connection, he relied upon the finding of the Tribunal to the effect that Floreat was put in possession for which the Tribunal had relied upon recovery of water charges. In this connection, he invited our attention to the findings of the Tribunal which states that possession of Floreat stood established by letter dated February 18, 1999, written to the co-owners' attorneys in connection with reimbursement of water charges from Floreat for the period April 1, 1997, to January 31, 1999. The Tribunal has stated in its findings that since reimbursement took place from

April 1, 1997, Floreat was put in possession with effect from April 1, 1997, i.e., from the end of the financial year March 31, 1996. Mr. Dastur points out that this finding is perverse ; that in this case we are concerned with the accounting year ending March 31, 1996. He pointed out that the day after March 31, 1996, is April 1, 1996, and not April 1, 1997, and if April 1, 1997, is the date on which Floreat was put in possession then Floreat enters upon possession during the accounting year 1997-98 and not during the accounting year 1996-97 with which we are concerned. It is for these two reasons mainly that Mr. Dastur has criticized the judgment of the Tribunal as perverse. Mr. Dastur further submitted that even the commencement certificate came to be issued by BMC in December, 1998, and he submitted that under Clause 9 of the contract, the parties had specifically agreed that Floreat will not be put into possession till full payment was effected and till all permissions from various authorities were obtained. He contended that the above facts clearly indicated that Floreat was not put in possession during the assessment year 1996-97. He contended that the building permission was not obtained during the assessment year 1996-97. That the development agreement was dated August 18, 1994, and, therefore, that agreement also did not come within the purview of the assessment year 1996-97. He further pointed out that even IOD was granted by BMC during the period September to November 1996, and, therefore, even the IOD did not come within the purview of the assessment year 1996-97. He submitted that even the power of attorney was given on March 16, 1999, in favour of Floreat. He, therefore, contended that in this case, there was no transfer of possession during the accounting year ending March 31, 1996, relevant to the assessment year 1996-97. Mr. Dastur contended that under Section 45 of the Income-tax Act, capital gains was chargeable to tax in the previous year in which a transfer takes place and that unless such transfer takes place, there was no liability to pay capital gains tax. He contended that the assessee stood divested of his proprietary rights only during the accounting year ending March 31, 1999, relevant to the assessment year 1999-2000 as the assessee granted irrevocable licence to Floreat only in that year. That till such date, the assessee had not parted with possession. He, therefore, contended that in this case Section 2(47)(v) was not attracted during the assessment year 1996-97. He contended that there is no evidence whatsoever to indicate that Floreat was put in possession during the financial year 1995-96. He contended that even under the development agreement, possession to Floreat could not have been given without payment of the full purchase price and without obtaining all relevant permissions. He contended that the last instalment was paid during the financial year 1998-99 corresponding to the assessment year 1999-2000. He contended that under the agreement, irrevocable licence was required to be given to Floreat only on Floreat obtaining all the permissions from various authorities. He submitted that on February 7, 1996, permission was obtained from CRZ authorities. That only a letter of intent for redevelopment was obtained from the Maharashtra Housing and Area Development Act, on February 14, 1995. He, however, pointed out that the Tribunal has, in its order, referred to the permission being obtained for redevelopment from the

Maharashtra Housing and Area Development Act on June 25, 1995, which is not in existence. He further submitted that the Urban Land Ceiling authority granted permission for development, on April 26, 1995. He, however, further pointed out that there are various discrepancies in the list of permissions given by the Tribunal, as stated above. That, under the agreement, large number of permissions are required to be obtained and only on those permissions being obtained, supported by full payment of consideration, Floreat was to be put in possession. Mr. Dastur accordingly contended that there is no basis for coming to the conclusion that possession was given to Floreat during the assessment year 1996-97. He submitted that the layout plan was approved on September 5, 1996 ; that IOD was issued during September to November 1996 ; that the building plan was amended on March 30, 1998. He, therefore, contended that there was no reason for the Tribunal to infer possession in favour of Floreat during the assessment year 1996-97. He contended that in this case, the assessee has not denied transfer of property; that the assessee has paid the capital gains tax for the assessment year 1999-2000. However, the assessee is told by the Assessing Officer that the transfer has taken place during the assessment year 1996-97 and as a result, the assessee is now faced with the consequence of payment of interest of almost Rs. 16 lakhs on a tax demand of Rs. 12 lakhs. That, this was apart from the penalty proceedings. He contended that payment of substantial price will not amount to transfer. That, the asses-see offered the amount to tax during the assessment year 1999-2000 as it was during that year that an irrevocable licence came to be executed in favour of Floreat. That the assessee had possessory rights on March 31, 1996. That till March 31, 996, the assessee had not obtained BMC permission for constructing the building. That till March 31, 1996, the assessee had not executed the power of attorney in favour of Floreat. That till March 31, 1996, the assessee had collected rent. That till March 31, 1996, the property had not been demolished. That till March 31, 1996, the assessee has paid all outgoings. That till March 31, 1996, the assessee has recovered water charges. He, therefore, contended that possession was given only during the year ending March 31, 1999, when irrevocable licence came to be executed in favour of Floreat. Mr. R.V. Desai, learned senior counsel appearing on behalf of the Department, contended that in this case the agreement dated August 18, 1994, was a development agreement. He contended that the agreement, on execution, gave complete control of development over the property to Floreat. He submitted that under Clause 4 there was no forfeiture or termination of the agreement mentioned. He contended that the last payment payable by Floreat was on May 15, 1995. That, substantial payment was made during the financial year 1995-96. That, the CRZ permission was granted on February 7, 1996. He contended that ULC permission was granted on April 26, 1995, and in the circumstances, most of the permissions were granted during the accounting year 1995-96 and substantial payment was also made during that year and, therefore, it was permissible for the Assessing Officer to infer possession in favour of Floreat during the accounting year 1995-96. He contended that if one reads the agreement plus payments plus permissions obtained, then Section 53A of the Transfer of

Property Act would apply and in the circumstances, the Department was right in inferring possession in favour of Floreat from substantial compliance of the agreement during the accounting year 1995-96. He, therefore, contended that no interference is called for to the impugned judgment given by the Tribunal. 4. Scope of Section 2(47)(v) : Clauses (v) and (vi) of Section 2(47) reads as under : "2(47) ... (v) (with effect from April 1, 1988) any transaction involving the allowing of the possession of any immovable property (as defined) to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882); or (vi) (with effect from April 1, 1988) 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 (as defined)." 5. The above two clauses were introduced with effect from April 1, 1988. They provide that "transfer" includes (i) any transaction which allows possession to be taken/retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, and (ii) any transaction entered into in any manner which has the effect of transferring or enabling the enjoyment of any immovable property (see Section 269UA(d)). Therefore, in these two cases capital gains would be taxable in the year in which such transactions are entered into, even if the transfer of the immovable property is not effective or complete under the general law (see Kanga and Palkhivala's Law and Practice of Income-tax–VIII edition, page 766). This test is important to decide the year of chargeability of the capital gains. 6. Findings : At the outset, we may point out that in this case, the assessee does not deny transfer. The only dispute in this case, is whether the transfer took place during the accounting year ending March 31, 1996, or whether it took place during the accounting year ending March 31, 1999. In other words, the dispute is confined to the year of chargeability. 7. Under Section 2(47)(v), any transaction involving allowing of possession to be taken over or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act would come within the ambit of Section 2(47)(v). That, in order to attract Section 53A, the following conditions need to be fulfilled. There should be a contract for consideration ; it should be in writing ; it should be signed by the transferor ; it should pertain to transfer of immovable property ; the transferee should have taken possession of the property ; lastly, the transferee should be ready and willing to perform his part of the contract. That even arrangements confirming privileges of ownership without transfer of title could fall under Section 2(47)(v). Section 2(47)(v) was introduced in the Act from the assessment year 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Consequently, the assessees used to enter into agreements for developing properties with the builders and under the arrangement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loophole, Section 2(47)(v) came to be introduced in the Act. 8. It was argued on behalf of the

assessee that there was no effective transfer till grant of irrevocable licence. In this connection, the judgments of the Supreme Court were cited on behalf of the assessee, but all those judgments were prior to introduction of the concept of deemed transfer under section 2(47)(v). In this matter, the agreement in question is a development agreement. Such development agreements do not constitute transfer in general law. They are spread over a period of time. They contemplate various stages. The Bombay High Court in various judgments has taken the view in several matters that the object of entering into a development agreement is to enable a professional builder/contractor to make profits by completing the building and selling the flats at a profit. That the aim of these professional contractors was only to make profits by completing the building and, therefore, no interest in the land stands created in their favour under such agreements. That such agreements are only a mode of remunerating the builder for his services of constructing the building (see Gurudev Developers v. Kurla Konkan Niwas Co-operative Housing Society [2000] 3 Mah LJ 131). It is precisely for this reason that the Legislature has introduced Section 2(47)(v) read with Section 45 which indicates that capital gains is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law. In this case that test has not been applied by the Department. No reason has been given why that test has not been applied, particularly when the agreement in question, read as a whole, shows that it is a development agreement. There is a difference between the contract on the one hand and the performance on the other hand. In this case, the Tribunal as well as the Department have come to the conclusion that the transfer took place during the accounting year ending March 31, 1996, as substantial payments were effected during that year and substantial permissions were obtained. In such cases of development agreements, one cannot go by substantial performance of a contract. In such cases, the year of chargeability is the year in which the contract is executed. This is in view of Section 2(47)(v) of the Act. 9. Before us, it was argued on behalf of the assessee that the date on which possession is parted with by the transferor is the date which should be taken into account for determining the relevant accounting year in which the liability accrues. It was argued on behalf of the assessee that in this case, irrevocable licence was given in terms of the contract only during the financial year ending March 31, 1999, and, therefore, there was no transfer during the financial year ending March 31, 1996. On the other hand, it was argued on behalf of the Revenue that one has to go by the date on which the developer substantially performed the contract. It was argued on behalf of the Department that since substantial payments were made during the financial year ending March 31, 1996, and since majority of permissions were obtained during that year, the liability to pay capital gains tax accrued during the assessment year 1996-97. In this case, the agreement is a development agreement and in our view, the test to be applied to decide the year of chargeability is the year in which the transaction was entered into. We have taken this view for the reason that the development agreement does not transfer the interest in the property to the

developer in general law and, therefore, Section 2(47)(v) has been enacted and in such cases, even entering into such a contract could amount to transfer from the date of the agreement itself. We have taken this view for a precise reason. Firstly, we find in numerous matters where the Assessing Officer and the Department generally proceed on the basis of substantial compliance of the contract. For example, in this very case, the Department has contended that because of substantial compliance of the contract during the financial year ending March 31, 1996, the transfer is deemed to have taken place in that year. Such interpretation would result in anomaly because what is substantial compliance would differ from officer to officer. Therefore, if on a bare reading of a contract in its entirety, an Assessing Officer comes to the conclusion that in the guise of the agreement for sale, a development agreement is contemplated, under which the developer applies for permissions from various authorities, either under power of attorney or otherwise and in the name of the assessee, then the Assessing Officer is entitled to take the date of the contract as the date of transfer in view of Section 2(47)(v). In this very case, the date on which the developer obtained a commencement certificate is not within the accounting year ending March 31, 1996. At the same time, if one reads the contract as a whole, it is clear that a dichotomy is contemplated between the limited power of attorney authorising the developer to deal with the property vide para. 8 and an irrevocable licence to enter upon the property after the developer obtains the requisite approvals of various authorities. In fact, the limited power of attorney may not be actually given, but once under Clause 8 of the agreement a limited power of attorney is intended to be given to the developer to deal with the property, then we are of the view that the date of the contract, viz., August 18, 1994, would be the relevant date to decide the date of transfer under Section 2(47)(v) and, in which event, the question of substantial performance of the contract thereafter does not arise. This point has not been considered by any of the authorities below. No judgment has been shown to us on this point. Therefore, although there is a concurrent finding of fact in this case, we have enunciated the principles for applicability of Section 2(47)(v). We do not find merit in the argument of the assessee that the court should go only by the date of actual possession and that in this particular case, the court should go by the date on which irrevocable licence was given. If the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability. 10. Having laid down the broad principles we now come to the facts of this case. This is not a case where the assessee denies transfer. In this case, the assessee has paid capital gains tax for the assessment year 1999-2000. However, the assessee is told that the year of chargeability is the assessment year 1996-97 and not the assessment year 1999-2000. Moreover, this is the first time that we have laid down the guidelines. Further, the assessee has paid the tax for the assessment year 1999-2000. Generally, this court does not interfere in concurrent findings of facts. However, in this case, a substantial question of law has arisen on interpretation of Section 2(47)(v). It is for this reason that we have given the

guidelines, which may be followed by the Department in all future cases. We have gone through the compilation of documents and from mere substantial compliance of the agreement, one cannot infer transfer in the accounting year ending March 31, 1996. We may also mention that there are mistakes apparent on the face of the record, in the order of the Tribunal. The Tribunal has relied upon the assessee obtaining seven permissions. We find that item (vi) and item (vii) are mere repetitions of item (iii) and item (i), respectively, Similarly, the Tribunal has referred to the permissions obtained during the financial years other than the concerned financial year ending March 31, 1996, to come to the conclusion that the transfer had taken place during that year. Lastly, the Tribunal has referred to the permission dated June 25, 1995, for redevelopment of the property vide item (iii). However, in the compilation given by the assessee there is no such permission. The assessee has disputed the existence of this document. Office is directed to take the assessee's compilation on record and mark "X". It is for this reason that vide order dated January 29, 2003, we called upon the Commissioner of Income-tax (Judicial) to forward to us the R & P. However, learned counsel for the Department has informed us that R & P is not available. There are other apparent errors in the order of the Tribunal. At page 144 of the paper book, the Tribunal has stated as under : "From the dates it is evident that from the very next day, i.e., April 1, 1997, from the end of the financial year ending on March 31, 1996, the builder was using the well water against payment of relevant charges to the assessee." 11. The above quoted findings of the Tribunal is apparently an error because the financial year ended on March 31, 1996, and the first day of the next financial year was April 1, 1996, and not April 1, 1997. According to the Tribunal, the letter dated February 18, 1999, shows that Floreat came into possession on the day next to March 31, 1996, i.e., April 1, 1997. As stated above, the day next to March 31, 1996, would be April 1, 1996, and not April 1, 1997, and even if April 1, 1997, is taken as a typing mistake, it could only be read as April 1, 1996, and if April 1, 1996, is the date on which Floreat/developer came into possession, then the possession was received by the developer during the financial year 1996-97 corresponding to the assessment year 1997-98. Therefore, this finding of the Tribunal is erroneous because in this case we are concerned with the assessment year 1996-97 and not the assessment year 1997-98. 12. Taking into account the totality of circumstances, on the facts, we allow the appeal of the assessee. We answer the above questions accordingly. Question No. (i) is answered in the negative, i.e., in favour of the assessee and against the Department. In view of our answer to question No. (i), it is not necessary to answer question No. (ii) quoted above. As far as question No. (iii) is concerned, we answer the said question in the affirmative, i.e., in favour of the assessee and against the Department. 13. Subject to what is stated above, the appeal stands allowed. No order as to costs.