Shri Chandra Prakash Jain vs Assistant Commissioner Of Income Tax ... on 22 May, 2014

Bench: Ashok Bhushan, Mahesh Chandra Tripathi

HIGH COURT OF JUDICATURE AT ALLAHABAD

Reserved on : 12.3.2014

Delivered on : 22.5.2014

Case :- INCOME TAX APPEAL No. - 99 of 2005

Appellant :- Shri Chandra Prakash Jain

Respondent :- Assistant Commissioner Of Income Tax (Inv.) Circle & Anr.

Counsel for Appellant :- Suyash Agarwal,Ashish Agarwal,R.B. Shukla,Rakesh Ranjan Agarwal

Counsel for Respondent :- C.S.C.,S.Chopra

With

Case :- INCOME TAX APPEAL No. - 92 of 2005

Appellant :- Shri Sharad Jain And Another

Respondent :- Assistant Comissioner Of Income Tax (Inv.) Circle & Another

Counsel for Appellant :- M.K. Gupta,Ashish Agarwal,R.R.Agarwal

Counsel for Respondent :- S.C.,A.N. Mahajan,B.J.Agarwal,D. Awasthi

With

Case :- INCOME TAX APPEAL No. - 98 of 2005

Appellant :- Vijay Prakash Jain

Respondent :- Assistant Commisioner Of Income Tax (Inv.) Cirle & Anr.

Counsel for Appellant :- Suyash Agarwal,R.B. Shukla,Rakesh Ranjan Agarwal

Counsel for Respondent :- S. Chopra,C.S.C.

With

Case :- INCOME TAX APPEAL No. - 97 of 2006

Appellant :- Chandra Prakash Jain

Respondent :- Commissioner Of Income Tax & Anr.

Counsel for Appellant :- R.B. Shukla

Counsel for Respondent :- S.C.,B.Agrawal,R.K. Upadhyaya

With

Case :- INCOME TAX APPEAL No. - 452 of 2007

Appellant :- Sharad Kumar Jain

Respondent :- Commissioner Income Tax

Counsel for Appellant :- R.B.Shukla

Counsel for Respondent :- A.N.Mahajan

With

Case :- INCOME TAX APPEAL No. - 453 of 2007

Appellant :- Sharad Kumar Jain

Respondent :- Commissioner Income Tax

Counsel for Appellant :- R.B.Shukla

Counsel for Respondent :- C.S.C.,S.Chopra.

Hon'ble Ashok Bhushan,J.

Hon'ble Mahesh Chandra Tripathi,J.

(Delivered by Ashok Bhushan,J.) All these Income Tax Appeals filed under Section 260-A of the Income Tax Act, 1961, arising out of order dated 28th December, 2004 of the Income Tax Appellate Tribunal, have been heard together and are being decided by this common judgement.

The first three appeals have been filed against the order of Income Tax Appellate Tribunal dated 28th December, 2004 and next three appeals have been filed challenging the order passed by the Income Tax Appellate Tribunal rejecting the miscellaneous application filed by the assessee for rectification of the order dated 28th December, 2004. The first three appeals have been admitted on following question of law :-

> "Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in holding that the agreement to sell dated 7.9.1991 amounts to transfer by virtue of Section 2 (47)(v) and (vi) of the Income Tax Act".

The last three appeals being Income Tax Appeal Nos. 97 of 2007, 452 of 2007 and 453 of 2007 have been admitted on following question of law :-

> "WHETHER on the facts and in the circumstances of the case the Appellate Tribunal, having recorded a categorical finding of fact that possession has not been delivered to the buyers as per agreement dated 7.9.1991 was legally justified in making out an altogether new case with reference to section 2(47)(vi) of the I.T. Act for the first time in favour of Revenue without allowing an opportunity to the appellant to meet it and thus holding contrary to the settled law by the Apex Court on the point and thereby illegally rejecting the Miscellaneous Application under section 254(2) of the Act with reference to the order in ITA No. 703/Del/1997?"

The facts giving rise to these appeals now need to be noted.

Smt. Pushpa Devi Jain, Sri C.P. Jain and Sri Ved Prakash Jain were co-owners of the property being Bungalow No. 210-B, West End Road, Meerut measuring about 45,000 sq. yards. Vide agreement dated 4.7.1974, all the co-owners agreed to transfer the entire property for a sum of Rs. 18 lacs to Sri M.P. Jain, Sri K.C. Verma, Sri Mangal Sain and Sri Manohar Lal. At the time of agreement, the co-owners received advance money of Rs. 2 lacs. As per agreement, a sum of Rs. 6 lacs was further received by the co-owners on the basis of agreement and possession of the property was handed over to the purchasers on 4.7.1974. The balance payment of Rs. 10 lacs was not paid to the

co-owners by the purchasers and thus, the deal remained incomplete. The co-owners entered into a written agreement dated 7.9.1991 with one M/s Agarwal' Associates for transferring the property being Bungalow No. 210-B for a consideration of Rs. 55 lacs. The agreement laid down certain conditions regarding modes of payment and responsibility of the purchasers for getting ceiling permission to sale.

A search was conducted in November, 1994 in the premises of the assessee and certain documents relating to sale of Bungalow No. 210-B were found and seized. Besides certain noting papers about the payments received by the owners were found. A copy of the agreement dated 7.9.1991 was also found. The agreement dated 7.9.1991 was registered on a stamp paper of Rs. 6/-. On inquiry assessee admitted that the deal was for Rs. 84 lacs and out of this amount, a sum of Rs. 21 lacs was left with the purchasers for setting old disputes about the land and for obtaining necessary permission from the concerned authorities. The deal was for "as is where is basis". The total sum of Rs. 63 lacs was to be received by the co-owners.

The Assessing Officer levied capital gain tax on the basis of the agreement dated 7.9.1991 in the assessment year 1992-93. Aggrieved by the assessment order dated 29.3.1996, the assessee filed an appeal before the Commissioner Income Tax (Appeal). The appeal filed by the assessee was allowed vide order dated 29.11.1996 by the Commissioner Income Tax (Appeal). Against the order passed by the Commissioner Income Tax (Appeal), the department filed appeals before the Income Tax Appellate Tribunal. The Income Tax Tribunal decided the appeals along with other appeals of the assessee.

We, however, in the present appeals are concerned only with I.T.A. Nos. 698 of 1997, 700 of 1997 and 703 of 1997 as registered before the Income Tax Appellate Tribunal. The department assailed the order of the Commissioner of Income Tax (Appeal) and contended that the Assessing Officer has rightly charged capital gain tax in the assessment year 1992-93. The tribunal vide its judgement and order dated 28th December, 2004 allowed the appeal and set aside the order of the C.I.T. (A). The tribunal held that Assessing Officer was fully justified in levying the capital gain in the assessment year 1992-93. Aggrieved by the said judgement dated 28th December, 2004, first three appeals have been filed by the assessee.

The miscellaneous application was preferred by the assessee Chandra Prakash Jain against the Tribunal's consolidated order 28th December, 2004 praying for rectification of the order dated 28th December, 2004. The application for rectification filed under Section 254(2) of the Act, was rejected with slight modification in the Assessing Officer's order. The order was passed by Tribunal on 20th January, 2006 against which order Income Tax Appeal No. 97 of 2006 has been filed.

Vijay Prakash Jain another assessee filed miscellaneous application for rectification of the order dated 28th December, 2004 which was rejected by the Tribunal vide its order dated 13th July, 1997 against which the assessee has filed Income Tax Appeal No. 452 of 2007.

The assessee Smt. Pushpa Devi Jain has also filed miscellaneous application against the Tribunal order's dated 28th December, 2004 seeking rectification in the order which application was rejected

by the Tribunal with slight modification vide order dated 23rd March, 2007 against which order Income Tax Appeal No. 453 of 2007 has been filed.

We have heard Sri R.B. Shukla and Sri Suyash Agarwal, learned counsel for the appellants and Sri Shambhu Chopra for the revenue.

Sri R.B. Shukla, learned counsel for the appellant, in support of the appeals, submitted that by an agreement dated 7.9.1991, the appellants having not transferred the possession, there was no transfer of capital assets within the meaning of 2(47) of the Act. It is submitted that unless the possession is transferred there cannot be transfer of capital assets and Tribunal having noted that possession has not been delivered committed an error in confirming the order of the Assessing Officer charging capital gain in the assessment year 1992-93. It is submitted that the possession was not with the co-owners and which was with 1994 purchasers. He submits that dispute of possession arose after the agreement dated 7.9.1991 and thereafter, the matter was referred to arbitrator who gave the award on 12th March, 1998 and in pursuance of the award possession was given by purchasers of 1974 agreement to M/s Agarwal's Associates and thereafter, the assessee has shown capital gain in the assessment year 1999-2000. It is submitted that in the Wealth Tax for the year 1992-93 and 1993-94, the property was shown in the computation of net wealth. Further on the basis of recovery certificate issued by the Assessing Officer, a notice dated 16.1.1994 was issued attaching the property no. B-210 for recovery of arrears demanded of Rs. 4,82,378/- in respect of income Tax and Wealth Tax. It is further submitted that tribunal has made out a new case under Section 2(47) (vi) of the Act which was neither the case of Assessing Officer in the assessment order nor it was the case of the revenue as per ground of appeal. It is further submitted by Sri Shukla that there being apparent mistake in the order of the Tribunal and the Tribunal had jurisdiction under Section 254 (2) of the Act to correct the mistake and miscellaneous application filed by the assessee has wrongly been rejected.

Sri Shambhu Chopra, learned counsel for the revenue refuting the submissions of counsel for the appellant supported the order passed by the Income Tax Appellate Tribunal. He submitted that the definition of transfer of capital assets as given under Section 2(47) is very wide definition which has to be given a wide meaning. He submitted that tribunal has rightly relied on Section 2(47) (vi) of the Act for holding that transaction was covered by above provisions. He submitted that before the tribunal there was very much ground based on Section 2(47) and the submission of learned counsel for the appellant that tribunal made out a new case is wholly incorrect. He submitted that the owners i.e. assessee would be deemed to be in constructive possession and by transaction the purchasers were in constructive possession.

Learned counsel for the parties have placed reliance on various judgements of this Court, Apex Court and other High Courts which shall be referred while considering the submission in detail.

For answering the question framed in this appeals as quoted above, it is necessary to refer to relevant statutory provisions covering the fields.

Section 45 of the Act, 1961 relates to capital gains. Section 45(1) provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to the Income Tax under the head "Capital gains", Section 45(1) is quoted below : -

> "Capital gains.
>
> 45 [(1)] Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections be chargeable to the Income Tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place."

Section 2 of the Act contains the definition clause. Section 2(47) defines "transfer" in relation to a capital asset. The definition is an inclusive definition.

Section 2(47) is as follows : "transfer", in relation to a capital asset, includes, -

(i) .....

(ii).....

(iii).....

(iv).....

(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 53A of the Transfer of Property Act, 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."

[Explanation 1 :- For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of Section 269 U A.] As per explanation 1 of Section 2(47) of the Act "immovable property" shall have the same meaning as in clause (d).

Section 269 UA (d) which is relevant for the present case is as follows :-

> (d) "immovable property" means -
>
> (i) any land or building or part of a building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other

things also.

Explanation: For the purposes of this sub-clause, "land, building, part of a building, machinery, plant, furniture, fittings and other things" include any rights therein;

(ii) any rights in or with respect to any land or any building or a part of a building (whether or not including any machinery, plant, furniture, fittings or other things therein) which has been constructed or which is to be constructed, accruing or arising from 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 of whatever nature), not being a transaction by way of sale, exchange or lease of such land, building or part of a building;

The issue which has arisen in this appeal is as to whether by agreement dated 7.9.1991 there is a transfer of capital asset within the meaning of Section 2(47) read with Section 269 U A (d). Section 2(47) is definition clause pertaining to transfer in relation to capital asset. The Income Tax Act being a Special Act which consists specific definition clause in context of capital assets the general principals of transfer as contained in transfer of property Act, 1882 shall not be applicable. It is well settled that legislature can for the purposes of a special Act provide an artificial definition. Further more the definition being an inclusive definition it has to be given an expensive meaning. In this context reliance is placed on the judgement of the Apex Court in 2003 (1) SCC 433 Feroze N. Dotivala Vs. P.M. Wadhwani and others. The Apex Court has laid down the paragraph 13 which is quoted below :-

> "The Legislature, while defining a word or a term, is fully competent even to assign an artificial meaning to the word (see Kishan Lal v. State of Rajasthan, AIR (1990) SC 2269). It can also restrict the meaning of a word by defining it in that manner. Generally, when the definition of a word begins with "means" it is indicative of the fact that the meaning of the word has been restricted; that is to say, it would not mean anything else but what has been indicated in the definition itself. There can also be extensive definitions when the definition starts with "includes". This Court, in the case reported in P. Kasilingam and Ors. v. P.S.G. College of Technology observed at AIR p 1400 : (SCC p. 356 para 19).
>
> "A particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition." (See Gough v. Gough, (1891) 2 QB 665 and Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court).
>
> A reference may also be made to IRC v. Joiner All ER 1061".

The English translation of agreement have been filed in the paper book at page no. 20. The agreement reads as follows :-

> "WHEREAS total and complete Bungalow No. 210-B, area of which is 40,000 (Forty Thousand) Sq. yards or thereabout with complete building outer and inside every type meaning thereby all the property of bungalow no. 210-B shall include in this agreement situated at West End Road, Meerut Cantt, bounded as follows, is in the ownership and possession of the first party without any share of other person. Complete property above is free from all kind of encumbrances, lien of every kind or without any legal defect etc. and clear without any legal defect and first party have a right to transfer and sale and there is no legal defect in this. Now first party have made this agreement to sale with second party for whole of the above property for a consideration of Rs. 55,00,000/- (Rs. Fifty Five Lac only) and total consideration of Rs. 55,00,000/- is received by the first party from second party as per details below before the Sub-Registrar at the time of execution of this agreement. Now both the parties shall be bound by the terms and conditions details below :-"

After mentioning the above, 15 conditions have been agreed between the parties. Details of the amount paid in cash, by cheque and by post dated cheque have also been mentioned in the agreement.

The tribunal referring to material on record has found the possession of the premises was with 1974 purchasers and the said possession was handed over after the arbitration award which was given in the year, 1998. The tribunal has rightly observed that CIT Appeal has miss-directed himself in invoking the provisions of Section 2(47) (v) of the Income Tax Act, since possession was not delivered in pursuance of the agreement. In the present case, there is no applicability of Section 2(47) (v). Sub-section (v) applies to the transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of the contract. The possession having not been transferred by the agreement dated 7.9.1991, there is no applicability of Section 2(47) (v).

The provision which has been relied on and referred to by the Income Tax Appellate Tribunal for its judgement dated 28th December, 2004 is Section 2(47) (vi). Sub-section (v) and (vi) of Section 2(47) were inserted with object of including certain more category of transaction. Bombay High Court in Chaturbhuj Dwarkadas Vs. C.I.T. (2003) 260 I.T.R. 491 while referring to provisions of sub-section (v) and sub-section (vi) inserted by Section 2(47) by Finance Act, 1987 made following observations :-

> "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 269 UA(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. This test is important to decide the year of changeability of the capital gains."

The transaction contemplated by Section 2(47) (vi) are transaction covering a very wide range of transaction. Sri Shukla submitted that the transaction contemplated under Sub-clause (vi) are transaction pertaining to becoming a member of, or acquiring shares in, a co-operative society, company or other association by way of agreement or any arrangement only. No such restrictive meaning can be given to sub-clause (vi). The last two portion of the bracketed clause reads "or by way of any agreement or any arrangement or in any other manner whatsoever". Thus, the transaction contemplated under sub-clause (vi) may be by any agreement; what is the essential for falling transaction under sub-clause (vi) is provided in the end of sub-clause (vi) ; "which has the effect of transferring, or enabling the enjoyment of, any immovable property." If we revert to Section 269 UA (d), it is clear that the word immovable property includes any right in or with respect to land or any building. The assessee were full owner of the property, since owner-ship was retained by the assessee even after the agreement to sell was executed in 1974 parting of possession in 1974 did not tantamount parting of owner-ship which remained with the assessee. By agreement dated 7.9.1991, the assessee transferred their right of owner-ship in favour of M/s Agarwal's Associates. The tribunal has noted that no further transaction after agreement dated 7.9.1991 took between the assessee and purchasers and that was the only transaction, on the basis of which M/s Agarwal's Associates sold two shops in the year, 1995 and obtained possession in the year, 1998 and carried out all developments. The agreement dated 7.9.1991 was thus, clearly covered by the definition under Section 2(47) (vi).

Tribunal in its judgement noted the various conditions as contained in the agreement dated 7.9.1991 and had concluded the transfer of owner-ship by the agreement. It is useful to refer to the observations and facts as noted by the Tribunal in paragraph nos. xi, xii and xiii to the following effect :-

> "On perusal of the main para of the agreement, which has been reproduced above, it is found that the co-owners treated themselves to be absolute owners of the property irrespective of the possession being not with them and declared and represented that they had the right to transfer and sale and that there was no legal defect in this. In this para, it is also mentioned that the total consideration of Rs. 55 lacs was received by the co-owners before the Sub-Registrar at the time of execution of the agreement. In para 2 of the agreement, it was mentioned that first party has received post-dated cheques and nothing is in balance. In para 4 of the agreement, it is stated that the first party will not return any amount to any type to the second party for the above property and in future second party shall be responsible to pay to all the persons, whatsoever amount payable or whatsoever compromise will be and second party shall be responsible to pay all the amounts received by the signatures of the first party. In paras 6 and 7 of the agreement, the second party is made responsible for obtaining the requisite permissions for sale. In para 11, it is clearly mentioned that, "if the first party object to execute and register the sale deed or agreement etc. as per direction of the second party then the second party have a right to sue for specific performance and get the registration through court, in this condition all the expenses of court will be the liability of the first party."

(xii) In view of the various conditions and stipulations in he above agreement and on reading the agreement as a whole, it is found that the owners had done everything on their part to transfer the rights in the property. It may be pointed out again that this agreement has been treated to be binding by the parties and both the parties have acted upon the same. The owners do not deny that the propery was not transferred to M/s Agarwal's Associate. In fact, the version of the assessee is that the transfer took place in the year 1999 when delivery of possession was given to the purchaser, this contention is not acceptable because the only basis for transferring the rights of ownership by the owners is the deed of 1991 and not the delivery of possession and as the possession was not in their hands, it was not to be delivered by them. The owners had already made arrangements for delivery of the possession and for all other necessary acts under the agreement. Thus, the transfer of rights of ownership by the owners stood concluded by this agreement. From the above, it is clear that the transferors i.e. the co-owners had done everything on their part to convey the title to the transferor. The intention of the parties to the agreement has also to be seen while construing the document. In the present case, clear intention of parties was to change hands over the property.

(xiii) So far as the present matter is concerned in view of clause (vi) of section 2(47) read with section 269 UA (d) that capital gain would be taxable in the year in which the transaction is made in any manner which has the effect of transferring or enabling the enjoyment of any immovable property even if the transfer of property is not effected or completed under the general law. As the owners made arrangement by irrevocable agreement and gave the transferees complete control over the title to property to the purchasers, the date of contract between the owner of the purchaser becomes relevant and not the date of delivery of possession."

The tribunal had given cogent reasons for setting aside the order of C.I.T.(A). As observed above, the question which is to be answered is as to whether transaction is covered by the definition under Section 2(47) (vi). As observed above, the concept of transaction of capital gain has to be interpreted in the light of the statutory definition as provided by the legislature.

Sri Shukla submits that the tribunal has made out a new case i.e. transaction was covered by Section 2(47) (vi) whereas there was no such ground urged before the Assessing Officer or before the Tribunal. The Tribunal in its judgement has noted the grounds on the basis of which the appeals were filed. It is useful to note the said grounds as quoted in para 3 of the judgement which is to the following effect : -

> "3. In these three appeals, the revenue have taken the following common grounds :
>
> "1. Ld. CIT (A) has erred in law and on facts in holding that capital gain is not taxable in respect of sale agreement dated 7.9.1991 in pursuance of which possession over property was transferred to the buyer who constructed shops and payments of Rs. 55,00,000/- was received through cheques.
>
> 2. Ld. CIT (A) has erred in law and on facts in holding that there was no transfer of property whereas A.O. had sufficient material on record to substantial that there was transfer of property within the provisions of Section 2(47) and 53A of I.T. Act, 1961.

> 3. Ld. CIT (A) has erred in law and on facts in deleting capital gain without appreciating material available on record."

Grounds of Section 2(47) has been taken in grounds of appeal. Section 2(47) obviously includes Section 2(47) (v) as well as 2(47) (vi). The CIT (A) has referred to Section 2(47) (v) and has held that the transaction cannot be covered under Section 2(47) (v).

We do not find any illegality in the tribunal's proceeding to examine the case in the light of Section 2(47) (vi). All the facts being on record whether transaction is covered by Section 2(47)(v) or 2(47) (vi) was well within the domain of the tribunal while deciding the appeal filed by the department. Thus, the submission of Sri Shukla made a new case was made out by the Tribunal cannot be accepted.

Now the cases relied by Sri Shukla needs to be noted. Sri Shukla has placed reliance on the judgement of High Court of Madras reported in (2008) 301 ITR 124 (Madras) COMMISSIONER OF INCOME TAX VS. G. SAROJA, the said case was a case where the High Court considered the provisions of Section 2(47)(v). The Madras High Court held following in paragraph 5 which is quoted below : -

> 5. Heard the counsel. The dispute in this case is regarding the assessment year in which the transfer of land has to be assessed. It is not in dispute that there is no written agreement between the assessee and the builder. A written agreement is a basic requirement for invoking the provision of Section 53A of the Transfer of Property Act. Section 53A of the Transfer of Property Act, reads as under:-
>
> "53A. Part performance.- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
>
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

In the case of Nathulal Vs. Phoolchand, AIR 1970 SC 546, the Apex Court considered the scope of Section 53A of the Transfer of Property Act and held as follows:-

> "(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty; (2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract; (3) that the transferee has done some act in furtherance of the contract; and (4) that the transferee had performed or is willing to perform his part of the contract."

Section 2(47)(v) of the Income-tax Act reads as follows:-

> ""transfer", in relation to a capital asset, includes, -
>
> (i) ...
>
> (ii) ...
>
> (iii)...
>
> (iv) ...
>
> (iva)...
>
> (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 53A of the Transfer of Property Act, 1882 (4 of 1882); or"

Section 2(47)(v) of the Income-tax Act comes into the aid of the Department only if the conditions of Section 53A of the Transfer of Property Act are satisfied. From a reading of the above provisions, it is clear that unless there is a written agreement, Section 53A of the Transfer of Property Act will not come into operation. In the present case, there is no written agreement and no sale consideration was received during the relevant period. The Revenue is also unable to prove that the assessee had put the developer in possession of the property by receiving the consideration partly or in full. The fact remains that there is no sale agreement between the assessee and the builder and also the assessee had not received the sale consideration. Hence, the Tribunal is right in holding that there is no transfer of property, as contemplated under Section 2(47(v) of the Act. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference.

The present case is not a case which is covered by Section 2(47), hence the said judgement does not help the counsel for the assessee.

Another judgement relied by Sri Shukla is judgement of Bombay High Court reported in (2009) 17 DTR (Bom) 280 COMMISISONER OF INCOME TAX VS. GEETADEVI PASARI. The Division Bench held in the said case that relevant assessment year for the purposes of computation of capital gain will be the assessment in which purchaser was actually physically put in possession. The said case considered the question which has been framed and noted in para 2 of the judgement. Question 2(b) as framed was to the following effect :

> "2.(b) whether on the facts and the circumstances of the case and in law, the Hon'ble Tribunal was justified in concluding that the said property was not transferred by the assessee to the purchaser within the meaning of s.2(47)(v) of the IT Act in the asst. yr. 1994-95 in spite of there being glaring evidence to rebut the claim of the assessee that the possession was given on 10th April, 1998?"

While answering the above question, the Division Bench held that the relevant assessment year for the purpose of computation of capital gain will the assessment year in which the assessee was put in actual physical possession.

The present case is not a case where the applicability of Section 2(47)(v) is made out, hence, the said judgement also does not help the appellant.

Another judgement relied by Sri Shukla is the Division Bench judgement of this Court in Income Tax Appeal No. 65 of 2008, The Commissioner Income Tax Vs. Smt. Najoo Dara Deboo decided on 16.9.2013. The questions which were framed in the said appeal have been reproduced in the judgement which were following question :-

> "1. Whether on the fact and circumstances of the case Income Tax Appellate Tribunal was justified in concluding that there was no extinguishment of right in the property, in question, by the assessee and no transfer of capital asset within the meaning of Section 2(47)(ii) of the Income Tax Act, 1961 during the previous year relevant to the assessment year 1995-96.
>
> 2. Whether on the fact and circumstances of the case income Tax Appellate Tribunal has not erred in law in holding that vide original agreement dated 29.12.1994 registered on 4.1.1995 it was only intended to transfer the impugned property and the transfer took place after March, 1997, only, on the basis of a certificate dated 29.8.2000 issued by the builder to this effect, in total disregard to the provisions of Registration Act, 1908.
>
> 3. Whether on the fact and circumstances of the case Income Tax Appellate Tribunal was right in law in holding that the impugned property had been converted into stock in trade and thus CBDT Circular No. 791 was applicable, without rebutting the merits of the finding of facts recorded by the Assessing Officer in this respect."

In the present case none of the question which arose for consideration in the above appeal has arisen, hence, the said judgement does not come to the rescue of the appellant.

The judgement of learned Single Judge reported in A.I.R. 2004 (Allahabad) 335 Surendra Kumar Vs. Amarjeet Singh and others have been relied by Sri Shukla. In the said judgement learned Single Judge held that a contract for sale in respect of immovable property is compulsorily registered in State of U.P. In the present case, agreement was registered. The said case is also has no relevance.

Learned counsel for the appellant has also referred to the CBDT circular dated 22.9.1987. The circular only highlighted certain aspect of clause (v) and (vi) as inserted in Section 2(47), the circular does not fully explain the meaning of sub-clause (v) and (vi) nor can control the interpretation of the said sub-clause.

In view of the foregoing discussions, we are of the view that in the facts of the present case, Income Tax Appellate Tribunal was fully justified in holding that agreement of sale dated 7.9.1991 amounts to transfer of capital assets by virtue of Section 2(47) (vi) of the Act.

Now we come to the last three appeals which have been filed by the assessee against the order of the Tribunal for rectification. The miscellaneous applications were filed by the assessee praying for rectification in the order dated 28th December, 2004 alleging that there is a mistake apparent on the record.

Sri Shukla has placed reliance on the judgement of the Apex Court reported in Honda Siel Power Products Ltd. Vs. Commissioner of Income Tax. In the said case an application for rectification was filed before the tribunal on the ground that a judgement of the coordinate bench of the tribunal relied by the assessee escaped the attention of the tribunal. The tribunal allowed the rectification application holding that it was a mistake committed by the tribunal. The order on appeal filed by the department was set aside by the High Court. The assessee approached the Supreme Court. The Axpex Court laid down following in paragraph 12 which is to the following effect :

> "12. As stated above, in this case we are concerned with the application under section 254(2) of the 1961 Act. As stated above, the expression "rectification of mistake from the record" occurs in section 154. It also finds place in section 254(2). The purpose behind the enactment of section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. Thus fundamental principle has nothing to do with the inherent powers of the Tribunal. In the present case, the Tribunal in its order dated September 10, 2003 allowing the rectification application has given a finding that Samtel Color Ltd. (supra) was cited before it by the assessee but through oversight it had mised out the said judgement while dismissing the appeal filed by the assessee on the question of admissibility / allowability of the claim of the assessee for enhanced depreciation under section 43A. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its

decision based on a mistake apparent from the record.

"Rule of precedent" is an important aspect of legal certainty in rule of law. That principle is not obliterated by Section 254(2) of the Income Tax Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atornement to the wronged party by the court or the Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the present case, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the co-ordinate Bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record. The Tribunal has acknowledged its mistake, it has accordingly rectified its order. In our view, the High Court was not justified in interfering with the said order. We are not going by the doctrine or concept of inherent power. We are simply proceeding on the basis that if prejudice had resulted to the party, which prejudice is attributable to the Tribunal's mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its mistake, which had been done in the present case.

Conclusion For the aforesaid reasons, the impugned judgement of the High Court is set aside and the order passed by the tribunal allowing the rectification application filed by the assessee is restored. Consequently, the appeal is allowed with no order as to costs."

There cannot be any dispute to the preposition as laid down by the Apex Court in the aforesaid judgement. It is well established that no party appearing before the tribunal should suffer on account of mistake committed by the tribunal. In the said case, the tribunal admitted its mistake and rectified the order which order was upheld by the Apex Court. In the present case the tribunal has recorded the categorical finding that no apparent mistake has been committed by the tribunal and no case is made out for rectification.

We are satisfied that tribunal did not commit any error in rejecting the rectification application. All the three questions framed in the appeal no. 97 of 2006, 452 of 2007 and 453 of 2007 have to be answered in favour of the assessee and against the revenue. In the result, all the questions in above noted six appeals are answered in favour of the assessee and against the revenue.

All the appeals are dismissed.

Order Date :-22.5.2014 Manoj