Supreme Court of India
Smt. Sarifabibi Mohmed Ibrahim ... vs Commissioner Of Income-Tax, ... on 14 September, 1993
Equivalent citations: AIR 1993 SC 2585, 204 (1993) BC 631 SC, 1993 204 ITR 631 SC, JT 1993 (5) SC 257, 1993 (3) SCALE 750, 1993 Supp (4) SCC 707, 1993 Supp 2 SCR 264
Author: B J Reddy
Bench: B J Reddy, S Bharucha
ORDER B.P. Jeevan Reddy, J.

1. Assessees are the appellants in these appeals preferred against the judgment of the Gujarat High court, answering the question referred to it in favour of the Revenue and against the assessees. The question referred under Section 256(1) of the Income-tax Act is to the following effect :

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the land in question admeasuring 3085 sq. yds. excluding 2607 sq. yds. which was admittedly non-agricultural land, was an agricultural land within the meaning of Section 2(14) of the Income-tax Act, 1961 and therefore on sale thereof tax on capital gains resulting therefrom was not leviable?

2. The assessees year concerned herein is 1970-71.

3. The appellants in these four appeals are co-owners of a plot of land admeasuring in all 30,885sq. yds., situated within the revenue limits of Navagaon village. It is situated within the municipal limits of Surat Municipality and is situated at the distance of one km. from the Surat railway station. This plot of land was purchased on 1st February, 1934 by the ancestor of the appellants for a consideration of Rs. 5,425. After the death of the said ancestor, the land as inherited by the father of the assessees, who died on 10th February, 1966.

4. On 28th March, 1958, a portion of the said plot to an extent of 2067 sq. yds. was converted to non-agricultural purposes after obtaining requisite permission under Section 65 of the Bombay Land Revenue Code. A chawl was built thereon. The remaining extent continued to be registered as agricultural land in the revenue records and land revenue was also being paid by the assessees father. In these appeals, we are concerned only with the said balance extent.

5. On 15th March, 1967, the assessees agreed to sell the said land to a Housing Co-operative Society. To enable them to complete the transaction, they applied, on 12th June, 1968 and 19th March, 1969 for permission under Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948. Such a permission is required where agricultural land is sought to be transferred for a non-agricultural purpose. The permission was granted on 22nd April, 1969. A number of sale-deeds were executed in respect of the said land between 9th and 30th of May, 1969. The purchaser (Housing Co-operative Society) applied thereafter under Section 65 of the Bombay Land Revenue Court for converting the said land to non-agricultural purposes i.e., for construction of buildings. Indeed, it appears that it started the construction activity within three days of the execution of the sale-deeds in its favour.

6. The Income-tax Authorities sought to levy capital gains tax on the consideration received by the appellants treating the said land as non-agricultural land. The appellants contested the same contending that the land sold is an agricultural land. The Income-tax Officer rejected the assessees' claim whereupon they approached the Appellate Assistant Commissioner by way of appeals but without success. The appellants then approached the Tribunal. Their appeals were heard by a Bench of two members who differed among themselves whereupon the matter was referred to third member who held that the said extent of land is agricultural land and, therefore, no capital gains tax is leviable thereon. The Revenue then obtained a reference under Section 256(1) of the Act which was answered in its favour by a Bench of Gujarat High Court. The High court set out the following facts militating against the appellants plea that the said land was an agricultural land on the date of sale :

(1) The land is situated a distance of 1 km. from Surat Railway Station.

(2) It is within municipal limits and within a Town Planning Scheme.

(3) It has been sold to a non-agriculturist for a non-agricultural purpose. It is sold to a co-operative housing society for constructing house and buildings.

(4) It is sold at a per sq. yds. basis at Rs. 23 per sq.yd. on May 30, 1969.

(5) No agricultural operations such as growing of wheat, Bajra, Juwar, rice, groundnuts or cotton crop have been carried on for the last 4 years. Only grass for fodder is grown in the last year.

(6) An application for permission to sell the land to a housing society under Section 63 of the Land Revenue Code was made in August 1968 some nine months before the actual sale effected in May 1969, and it was granted on February 24,1969, about a month prior to the actual sale.

(7) More than 15 years back a parcel of 2607 sq. yds. out of this very land was converted to non-agricultural user by constructing a chawl on it by the owners themselves after obtaining the requisite permission to convert the land to non-agricultural user under Section 65 of the Land Revenue Code.

(8) Application to convert the land under transaction to non-agricultural user was not made before the sale-deed was executed on 30th May 1969. It was subsequently made by the purchaser-housing society much latter. (But then permission could have been applied for if so desired and could not have been refused arbitrarily; it is common experience that it is granted almost as a matter of course. In fact it is on record that the purchaser society commenced actual construction on 2nd June 1969, that is to say, within 3 days of the execution of the sale-deed in it favour by the assessees in anticipation of the permission.

(9) No agricultural operations were carried on since 1964-65 till the sale in 1969.

7. The High Court also mentioned the factors which supported the appellants case. They are:

(1) It was still entered as agricultural land in the relevant records (2) It was till the date of sale not converted to non-agricultural user.

(3) Application for permission to convert necessary under Section 65 of the Land Revenue Code was not made till the date of Sale.

(4) Agricultural operations were carried on the past.

8. On a consideration of the contending factors the High Court held that it must be held to be as a non-agricultural land.

9. Shri B.K. Mehta, learned Counsel for the appellants assailed the correctness of the conclusion arrived at by the High Court. Learned Counsel submitted that (a) the land was registered as agricultural in the concerned revenue records till it was sold; (b) land revenue was being paid thereon till the date of sale; (c) the land was under actual cultivation till it was sold, as evidenced by Pahani Patraks. At any rate the land was fallow only during the years 1964-65 to 1967-68 on account of the illness and death of the appellant's father but it was cultivated again in the year 1968-69; (d) that the said land is surrounded by the agricultural lands. It was never put to any non-agricultural use. Only a portion of 2067 sq. was converted to non-residential purposes in the year 1958 whereupon a chawl was built. The remaining land remained and continued to be agricultural land; (e) the appellants and their father had no other income except the income from this land. The mere fact that the land was situated within municipal limits is of no consequence inasmuch as cultivation can be done even on lands situated within municipal limits. Similarly, the fact that the land was sold to a Housing Co-operative Society and the further fact that the said society used the land for housing purposes is irrelevant on the question whether the land was agricultural land on the date of its sale. The learned Counsel submitted that applying the several tests evolved by the Gujarat High Court, on a review of the entire case law on the subject, in Commissioner of Income-Tax, Gujarat-II v. Siddharth J. Desai (139 I.T.R. 628), the said land must be held to be an agricultural land on the date of its sale.

10. On the other hand, Sri Manchanda, learned Counsel appearing for the Revenue supported the reasoning and conclusion of the High Court. Counsel submitted that apart from the factors mentioned by the High Court in favour of its conclusion, there is the further fact that a town planning scheme (draft-scheme) was published in March, 1967 covering the said land and that by the date of the execution of the sale-deeds, the draft scheme was also declared.

11. The sale-deeds concerned herein were executed in the month of May 1969. By virtue of Clause (viii) in Section 47 - which clause was inserted by the Finance Act, 1970 with effect from April 1, 1970 - "any transfer of agricultural land in India effected before the 1st day of March 1970" is exempt from the levy of Capital Gains Tax. By the very same Finance Act, it may be mentioned, agricultural lands situated within the jurisdiction of municipalities and within a radius of 8 kms. of such municipalities as may be specified in that behalf by the Central Government [Sub-clauses (a) and (b) in Clause (iii) of the definition of "Capital Asset" in Section 2(14) of the Act] were excluded from the purview of agricultural land but again with effect from April 1, 1970. Inasmuch as the land

concerned herein was sold in May, 1969, it dies not fall within the mischief of the said Sub-clauses (a) and (b) in Clause (iii) of Section 2(14). If it was agricultural land, it is exempt from capital gains tax notwithstanding the fact that it is situated gains with the jurisdiction of Municipality.

12. Whether a land is an agricultural land or not is essentially a question of fact. Several tests have been evolved in the decisions of this Court and the High Courts, but all of them are more in the nature of guidelines. The question has to be answered in each case having regard to the facts and circumstances of that case. There may be factors both for and against a particular point of view. The Court has to answer the question on a consideration of all of them - a process of evaluation. The inference has to be drawn on a cumulative consideration of all the relevant facts.

13. The first decision of this Court which considered the meaning of the expression "agricultural land" is in Commissioner of Income Tax v. Raja Benoy Kumar Sahas Roy 32 I.T.R. 466. But the question there was whether the income from forest land derived from sal and piyasal trees, 'not grown by human skill and labour' constitutes agricultural income? The decision that directly considered the issue, though under the Wealth Tax Act, is in C.W.T., Andhra Pradesh v. Officer-in-charge (Court of Wards),Paigah (hereinafter referred to as to 'Begumpet Place case') reported in (105 I.T.R. 133). It was an appeal from a Full Bench decision of the Andhra Pradesh High Court. The High Court had taken the view, following a decision of the Madras High Court in Sarojini Devi v. Sri Krishna that the expression "agricultural land " should be given the widest meaning. It held that the fact that the land is assessed to land revenue as agricultural land under the State Revenue Law is a strong piece of evidence of its character as an agricultural land. On Appeal, a Constitution Bench of this Court held that; (a) inasmuch as agricultural land is exempted from the purview of the definition of the expression "assets", it is "impossible to adopt so wide a test as would obviously defeat the purpose of the exemption given". The idea behind exempting the agricultural land is to encourage cultivation of land and the agricultural operations. "In other words this exemption had to be necessarily given a more restricted meaning than the very wide ambit given to it by the Full Bench of the Andhra Pradesh High Court", (b) What is really required to be shown is the connection with an agricultural purpose and user and not the mere possibility of user of land by some possible further owner or possessor, for an agricultural purpose. It is not the mere potentiality but its actual condition and intended user which has to be seen for purposes of exemption, (emphasis added), (c) "The person claiming an exemption of any property of his from the scope of his assets must satisfy the conditions of the exemption." (d) "The determination of the character of land, according to the purpose for which it is meant or set apart and can he used, is a matter which ought to be determined on the facts of each particular case." (e) The fact that the land is assessed to the Land Revenue as agricultural land under the State Revenue Law is certainly a relevant fact but if is not conclusive.

14. That was a case where the question arose with respect to a large extent of 105 acres situated in the city of Hyderabad. The land was enclosed by a boundary wall, wherein there were two wells. The land was abutting Hussain Sagar Tank. The Full Bench of the Andhra Pradesh High Court evolved the following eight indicators to determine whether a land is in agricultural land, viz.,:

(1) The words 'agricultural land' occurring in Section 2(e)(i) of the Wealth-tax Act should be given the same meaning as the said expression bears in entry 86 of List I and given the widest meaning;

(2) the said expression not having been defined in the Constitution, it must be given the meaning which it ordinarily bears in the English language and as understood in ordinary parlance;

(3) the actual user of the land for agriculture is one of the indicia for determining the character of the land as agricultural land;

(4) land which is left barren but which is capable of being cultivated can also be 'agricultural land' unless the said land is actually put to some other non-agricultural purpose, like construction of buildings or an aerodrome, runway, etc., thereon, which alters the physical character of the land rendering it unfit for immediate cultivation;

(5) if land is assessed to land revenue as agricultural land under the State revenue law, it is a strong piece of evidence of its character as agricultural land;

(6) mere enclosure of the land does not by itself render it a non-agricultural land;

(7) the character of the land is not determined by the nature of the products raised, so long as the land is used or can be sued for raising valuable plants or crops or trees or for any other purpose of husbandry;

(8) the situation of the land in a village or in an urban area is not by itself determinative of its character.

15. The court characterised the indicator Nos. 6,7 and 8 as merely negative in character. It disagreed with (1) and (4) and observed that only the 5th indicator was a relevant one though not conclusive. There was no controversy regarding indicator No. 3. Inasmuch as the matter was not examined from the correct point of view, it was remitted to the High Court for a fresh decision.

16. The decision of Gujarat High court in Commissioner of Income Tax, Gujarat-II v. Siddharth J.Desai 139 I.T.R. 628, relied upon strongly by the learned Counsel for the appellant, reviewed the several earlier decisions of the Gujarat High Court as well as the decision of this Court in Begumpet Palace and has evolved the following 13 factors/indicators applying which the question has to be answered. The 13 factors are the following :

(1) Whether the land was classified in the revenue records as agricultural and whether it was subject to the payment of land revenue?

(2) Whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time?

(3) Whether such user of the land was for a long period or whether it was of a temporary character or by way of a stop-gap arrangement?

(4) Whether the income derived from the agricultural operations carried on in the land bore any rational proportion to the investment made in purchasing the land?

(5) Whether, the permission under Section 65 of the Bombay Land Revenue Code was obtained for the non-agricultural use of the land? If so, when and by whom (the vendor or the vendee)?

Whether such permission was in respect of the whole or a portion of the land? If the permission was in respect of a portion of the land and if it was obtained in the past, what was the nature of the user of the said portion of the land on the material date?

(6) Whether the land, on the relevant date, had ceased to be put to agricultural use? If so, whether it was put to an alternative use? Whether such cesser and/or alternative user was of a permanent or temporary nature?

(7) Whether the land, though entered in revenue records, had never been actually used for agriculture, that is, it had never been ploughed or tilled? Whether the owner meant or intended to use it for agricultural purposes?

(8) Whether the land was situate in a developed area? Whether its physical characteristics, surrounding situation and use of the lands in the adjoining area were such as would indicate that the land was agricultural?

(9) Whether the land itself was developed by plotting and providing roads and other facilities?

(10) Whether there were any previous sales of portions of the land for non-agricultural use?

(11) Whether permission under Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist was for non-agricultural or agricultural use?

(12) Whether the land was sold on yardage or on acreage basis?

(13) Whether an agriculturist would purchased the land for agricultural purposes at the price at which the land was sold and whether the owner would have ever sold the land valuing it as a property yielding agricultural produce on the basis of its yield?

At the risk of repetition, we may mention that not all of these factors would be present or absent in any case and that in each case one or more of those factors may make appearance and that the ultimate decision will have to be reached on a balanced consideration of the totality of circumstances.

17. In Commissioner of Income-Tax v. V.A. Trivedi 172 I.T.R. 95 a Division Bench of the Bombay High Court, of which one of us (S.P. Bharucha, J.) was a member, considered this question again. In this case the assessee had purchased the land of an extent of seven acres in February 1966. The land was covered by the Nagpur Improvement Trust Scheme. In August 1966 he obtained permission to convert the said land to non-agricultural use. In June 1968 he entered into an agreement with a Housing Cooperative Society to sell three acres out of it. The sale-deed was executed in October 1968. In this assessment proceedings the assessee claimed that the surplus income arising from the sale of land was exempt from tax inasmuch as it was agricultural land at the time of its sale. The matter reached the High Court. The Division Bench referred to several facts established from the record. Some of them supported the assessee's stand while some others militated against his contention. The facts found in favour of the assessee were: (1) at the time of its purchase by the assessee, the Ajni land was agricultural land; (2) it had been under cultivation by the assessee till the date of its sale, (3) it continued to be assessed to land revenue as agricultural land until it was sold, (4) the intention of the assessee, when he purchased it, was to acquire agricultural land for agricultural purposes, (5) the assessee's use of it was the normal use by an agriculturist, (6) it was nor within any Town Planning Scheme, and (7) no materials has been produced to show any development or building activity surrounding it. The facts which militated against the assessee's stand were three in number - namely: (1) the location or the Ajni land within the Corporation and the improvement trust limits; (2) the action of the assessee in obtaining on August 8, 1966, permission to convert the user of the Ajni land to non-agricultural purposes, and (3) the agreement to sell and the sale of the Ajni land for non-agricultural, i.e., building purposes.

18. The Bench observed that to ascertain the true character and the nature of the land, it must be seen whether it has been put to use for agricultural purposes for a reasonable span of time prior to the relevant date and further whether on the relevant date the land was intended to be put to use for agricultural purposes for a reasonable span of time the future. Examining the facts of the case from the said point of view, the Bench held that the agreement entered into by the assessee with the Housing Society is the crucial circumstance since it showed that the asses-see agreed to sell the land to Housing Society admittedly for utilisation for non-agricultural purposes. The sale-deeds were executed four months after the agreement of sale and even if any agricultural operations were carried on within the said span of four months, - the Bench held - it was evidently in the nature of a stop-gap arrangement. On the date the land was sold, the Bench held, the land was no longer agricultural land which is evident from the fact that the assessee had obtained permission even in August 1966 to convert the said land to non-agricultural purposes.

19. Now let us examine the facts of the case before us in the light of the principles flowing from the above decision. But before we do that, it would be appropriate to clear the ground regarding the user of of the land till the date of sale. The land was undoubtedly under cultivation upto and inclusive of the agricultural year 1964-65. For the years 1965-66,1966-67 and 1967-68 the land was admittedly not cultivated. Certain grass naturally growing thereon appears to have been utilised. So far as the year 1968-69 is concerned, there exists a good amount of doubt whether it was or was not cultivated. The appellant's case was that they raised 'loni' grass said to be used as fodder for horses. They relied upon the entry in Pahani Patrak in this behalf. The third member of the Tribunal (to whom the matter was referred on a difference of opinion arising between two members who first heard the

appeal) found the following facts which are mutually inconsistent: (a) there were unprecedented floods in the Tapti river in the Year 1968 which rendered the said land useless for cultivation for a couple of months because of heavy accumulated layers of mud and slush; (b) the next monsoon sowing soon would have started in June, 1969 but even before that the land was sold in May, 1969; (c) there is evidence of agricultural cultivation and raising of 'loni' grass during the year 1968-69; (d) for a period of seven months from October 1968 to April 1969, the land remained uncultivated. In our opinion the above findings considered together do negative the theory of actual cultivation of the said land during any part of the year 1968-69. If there were floods in the Tapti river in the year 1968 - this must be during the months June to September - and there was no cultivation during the period October, 1968 to April, 1969, it is difficult to see when was the grass raised in the said land. We conclude, on the basis the facts found by the learned third Member, that there was no cultivation even during the year 1968-69.

20. Now, we may consider the various circumstances appearing for and against the appellant's case. The facts in their favour are: land being registered as agricultural land in the Revenue records; payment of land revenue in respect thereof till the year 1968-69; absence of any evidence that it was put to any non-agricultural use by the appellants; that the land was actually cultivated till and including the agricultural year 1964-65; that there were agricultural lands abutting the said land and that the appellants had no other source of income except the income from the said land. As against the above facts, the fact appearing against their case: the land was situated within the municipal limits - it was situated at a distance of one kilometer from the Surat railway station; the land was not being cultivated from the year 1965-66 until it was sold in 1969; the appellants had entered into an agreement sale with a Housing Cooperative Society to sell the said land for an avowed non-agricultural purposes namely construction of houses; they had applied in June, 1968 and March, 1969 for permission to sell the said land for non-agricultural purposes under Section 63 of the Bombay Tenancy and Agricultural lands Act and obtained the same on 22nd April; soon after obtaining the said permission they executed sale-deeds in the following month i.e., in May 1969; the land was sold at the rate of Rs. 23 per sq. yd. and the purchaser-society commenced construction operations within three days of purchase. What is the inference that flows from a cumulative consideration of all the aforesaid contending facts? This question has to be answered keeping the criteria evolved in Bequmpet Palace case set out hereinbefore. In our opinion, the entering into the agreement to sell the land for housing purposes, the applying and obtaining the permission to sell the land for non-agricultural purposes under Section 63 of the Bombay Tenancy and Agricultural Lands Act an its sale soon thereafter and the fact that the land was not cultivated for a period of four years prior to its sale coupled with its location, the price at which it was sold do outweigh the circumstances appearing in favour of the appellants' case. The aforesaid facts do establish that the land was not an agricultural land when it was sold. The appellants had no intention to bring it under cultivation at any time after 1965-66 - certainly not after they entered into the agreement to sell the same to a Housing Cooperative Society. Though a formal permission under Section 65 of the Land Revenue Court was not obtained by the appellants, yet their intention is clear from the fact of their application for permission to sell it for a non-agricultural purpose under Section 63 of the Bombay Tenancy and Agricultural Land Act.

21. We are, therefore, of the opinion that the High Court was right in holding that the said land was not an agricultural land at the lime of its sale and that the income arising from its sale was not exempt from the Capital Gains Tax. The appeals accordingly fail and are dismissed. No costs.