

(2012) 06 MAD CK 0218

In the Madras High Court

Case No : Tax Case Appeal No's. 635 to 637 of 2005

CIT

APPELLANT

Vs

P. Srinivasan

RESPONDENT

Date of Decision : 11-06-2012

Acts Referred:

Income Tax Act, 1961 — Section 142(1), 143(2), 2(47)(v), 54
Transfer of Property Act, 1882 — Section 53A

Citation : (2012) 06 MAD CK 0218

Hon'ble Judges : K. Ravichanorabaabu, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : T. Ravikumar, for the Appellant; P.J. Rishi Kesh and Philip George, for the Respondent

Final Decision : Allowed

Judgement

Chitra Venkataraman, J.—The Revenue is on appeal as against the order of the Income Tax Appellate Tribunal relating to the assessment years 1993-94 and 1995-96. The following are the substantial questions of law raised in these appeals:-

1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee had transferred the entire land to M/s. Emerald under the agreement dated 23-10-1991 for a sale consideration of Rs. 4,50,000?
2. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the sale proceeds under the tripartite agreement dated 27-10-1994 executed by the assessee, M/s. Emerald and M/s. Sudsun cannot be brought to tax at the hands of the assessee?

Since the issues raised in all these appeals are common and the Tribunal had also considered the issues in respect of assessment years under a common order we feel, it is better that the entire case is dealt with under a common order.

2. The assessees are individuals. One P. Srinivasan, the respondent in T.C.A. No.

635 of 2005 purchased a piece of land measuring about 46 cents at Mogappair village for a sale consideration of Rs. 92,000 under Registered Sale deed and T.R. Harikrishnan, the respondent assessee in T.C.A. No. 636 and 637 of 2005 purchased the land to an extent of 43.50 cents in Mogappair village for a sale consideration of Rs. 87,000 under a registered sale deed. Incidentally, it is pointed out that P. Srinivasan, the respondent in T.C. No. 635 of 2005 is the Managing Director of the Emerald Promoter Pvt. Ltd. It is seen from the facts herein that the assesseees agreed to sell the property for a sale consideration of Rs. 4,50,000 in the case of P. Srinivasan and Rs. 4,00,000 in the case of Mr. T.R. Harikrishnan in favour of Emerald Promoter Pvt. Ltd. Accordingly, after receiving the entire sale consideration an agreement dated 23-10-1991 and a general power of attorney dated 5-11-1991 were executed by the assesseees, T.R. Harikrishnan and P. Srinivasan respectively and in terms of which possession was handed over to M/s. Emerald Promoter Pvt. Ltd. Apart from these two assesseees, there were other neighbouring land holders, who had also entered into similar agreement with M/s. Emerald Promoter Pvt. Ltd. for sale of their plots. They also executed the power of attorney in favour of M/s. Emerald Promoters Pvt. Ltd. under document dated 5-11-1991.

3. A perusal of the power of attorney executed by the assessee T.R. Harikrishnan which is placed before us shows that M/s. Emerald Promoters Pvt. Ltd. has been authorised to sell the property in part or full, or sub-divide or undivided share and to receive sale consideration on behalf of the assessee T.R. Harikrishnan. The said Power of Attorney also pointed out that M/s. Emerald Promoters Pvt. Ltd. was authorised to take possession of the Schedule property and administer the same, to make house plots, construct houses/flats develop the schedule property, to apply for housing/Residential flats/commercial flats, building plan before all the statutory housing authorities. However, subsequent to this General power of attorney, the assesseees herein along with other owners entered into a tripartite agreement with M/s. Sudsun Housing Development (I) Ltd. and M/s. Emerald Promoters Pvt. Limited, the assesseees General power of attorney as the confirming party under the deed of agreement dated 27-10-1994 wherein it is stated that the confirming party due to paucity of funds, desired to relinquish their role as contractors of vendors 1 to 5, which included the assesseees before this court and the vendors desired to develop the Schedule A Property through the purchaser viz., M/s. Sudsun Housing Development (I) Ltd. The said deed of agreement also referred to sale of undivided share of 0.4650%, 0.4650% and 0.4636% undivided shares in favour of three other vendors, who are parties to this agreement. Accordingly, the sale deeds were executed through power of attorney on behalf, of the vendors 1 to 5. As already pointed out the assesseees before this court are two among the five vendors. The deed also refers to the sale consideration of Rs. 90 lakhs and the mode of payment of Rs. 90 lakhs as follows:

(a) Rs. 20.00 lakhs paid by cheque as per following details as advance, the receipt whereof, the vendors 1 to 5 do hereby admit and acknowledge;

(i) Rs. 10.00 lakhs paid by Cheque No. 962122 dated 7-10-94 drawn on Bank of Madura payable at Madras.

(ii) Rs. 10 lakhs paid by Cheque No. 086851 dated 27-10-1994 drawn on Bharat Overseas Bank payable at Madras.

(b) Rs. 17,00,000 (Rupees Seventeen Lakhs only) paid to the vendors 1 to 5 through the Confirming Party, by the Purchaser within two months from the date of receipt of No Objection Certificate from the appropriate authority, Income Tax Department or within six months from this date whichever is later.

(c) The balance sum of Rs. 53,00,000 (Rupees Fifty Three Lakhs only) will be paid by the Purchaser to the Vendors 1 to 5 through the confirming party in three equal instalments to be paid on or before the end of 9th, 12th and 15 th month from this date.

4. The agreement pointed out that the confirming party viz., M/s. Emerald Promoters Pvt. Ltd. are entitled to market the existing incomplete constructions, after completion together with 16.04 % undivided share in the Schedule A lands to third parties for such considerations that the confirming party would fix to its own account, and the vendors 1 to 5 had agreed to reconstitute their respective holdings in the Schedule A lands as one bit and further agreed to execute all documents etc., as and when required by the purchaser. Clause 6 of the agreement points out that the Vendors 1 to 5 and Confirming party would deliver vacant possession to the purchaser within one week of receipt of No Objection Certificate from the Income Tax Department.

5. With these background of facts, the Assessing Authority pointed out that Notices under sections 143(2) and 142(1) were issued to the assesseees to explain as to why the profit on sale of land by the assesseees to M/s. Sudsun Housing Development Private Ltd. should not be assessed to tax as income which has escaped assessment. The assessing authority in the case of P. Srinivasan pointed out that the return of income filed for the Assessment Year 1996-97 on 7-3-1997 would show that the assessee had admitted capital gain on sale of the land at Mogappair for a consideration of Rs. 4,50,000 and a capital gain of Rs. 1,32,822 and claimed exemption u/s 54.

6. In the assessment order relating to the assessee Harikrishnan, the Assessing Authority pointed out that during the assessment proceedings for the assessment year 1992-93, the assessee filed the receipt for cash of Rs. 4/- lakhs as sale consideration and considering the major development work done to the tune of Rs. 3 lakhs, the transactions resulted in a capital loss. After giving opportunity to the assesseees representative, the Assessing Authority came to the conclusion that 83.96% of the undivided share was sold by the assesseees and four other land owners in favour of M/s. Sudsun Housing Development. The agreement dated 27-10-1994 made no reference to the first of the sale agreements dated 23-10-1991 relating to the sale consideration of Rs. 4,50,000 and Rs. 4,00,000 as the case may be. The agreement dated 27-10-1994 clearly mentioned that

the assessees were the owners and vendors of the property. M/s. Sudsun Housing Development (I) Ltd. had confirmed the above transaction in their letter dated 14-3-2002 by stating that they had taken possession of the lands during November 1994 soon after the execution of agreement in their favour. On 30-10-1995 the assessee P. Srinivasan and four others had executed a sale deed in favour of one Mrs. Mary Bala Gowri D Almeida conveying 546 sq. ft undivided share out of the 83.96% undivided share in the lands described in Schedule C. However, the said sale deed referred to the agreement dated 27-10-1994 entered into with Sudsun Housing (I) Ltd. Thus going by the said agreement, the Assessing Authority held that the assessees were to be assessed on the capital gains arising under the consideration for the sale of the assessees interest of 83.96% of undivided share in the property. Aggrieved by the said assessment, the assessees went on appeal before the Commissioner of Income Tax (Appeals) who held that the assessees had allowed M/s. Emerald Promoters Pvt. Ltd. to build flat in 16.04% of each undivided share of interest for which they had received Rs. 4.5 lakhs and Rs. 4 lakhs respectively, on 13-11-92 and the balance land of 83.96% has been transferred as part performance of agreement dated 27-10-1994 to Sudsun Housing (I) Ltd. for a consideration of Rs. 18,30,370 and hence the consideration received in respect of this transfer is liable to be assessed to tax. Thus, the Commissioner of Income Tax (Appeals) dismissed the appeals. Aggrieved by the said order, the Revenue went on appeal before the Income Tax Appellate Tribunal.

7. On a consideration of the materials placed before the Tribunal, it held that the assessees were to be assessed in respect of the sale consideration received relating to 16.04% of undivided share of the property only in which M/s. Emerald Promoter Pvt. Ltd. put up a construction. It also pointed out that in November 1991 itself there was a transfer between the assessees and M/s. Emerald Promoter Pvt. Ltd. in respect of the very same land. Going by the agreement dated 23-10-1991, the Tribunal pointed out that the assessee had agreed to sell the entire land of 46 cents of land to M/s. Emerald Promoter Pvt. Ltd. and accordingly the possession of the said land was given to the M/s. Emerald Promoter Pvt. Ltd. Subsequently, M/s. Emerald Promoter Ltd. wanted to release the remaining 83.96% of undivided share in favour of M/s. Sudsun Housing Development (I) Ltd. which is very clear from the agreement dated 27-10-1994. Therefore, there is no justification in the contention of the Revenue that the entire sale consideration in respect of 83.96% of the undivided share should be assessed at the hands of the assessee. Referring to section 2(47)(v) of the Income Tax Act the Tribunal held that when physical possession was handed over to M/s. Emerald Promoter Pvt. Ltd. by the assessees in the year 1991 as part performance of the agreement, after receiving the entire sale consideration, no amount arising out of sale consideration could be assessed at the hands of the assessees.

8. As regards Mr. P. Srinivasan, the Managing Director of M/s. Emerald Promoter Pvt. Ltd. the Tribunal held that the company being an artificial person is also

assessable as an independent unit under the Income Tax Act. After the agreement was entered into P. Srinivasan handed over possession of the land along with other owners. Thus when Emerald Promoter Pvt. Ltd. took possession of the land from the assesseees the question of the vendors retaining possession did not arise. The Tribunal also referred to the decision of this court reported in D. Kasturi Vs. Commissioner of Income Tax and Another, and held that when possession was handed over in pursuance of an agreement of sale and the ingredients of section 53A of the Transfer of Property Act stood satisfied, after payment of sale consideration, the assessee could no longer claim possessory rights over the land as against the claim of the purchaser. The Tribunal further referring to the confirmation letter written by the M/s. Emerald Promoter Pvt. Ltd. pointed out that the entire sale consideration was received by them from M/s. Sudsun Housing Development (I) Ltd.. In the facts of the admitted case, the Tribunal agreed with the assessee and thereby allowed the appeal holding that no capital gain arose in the hands of the assesseees. Aggrieved by the said order, the present appeals have been filed by the Revenue before this court.

9. As far as the decision of this court reported in D. Kasturi (supra) is concerned the same was confirmed by the Division Bench of this court in the decision reported in Smt. D. Kasturi Vs. Commissioner of Income Tax and Another,) wherein this court held that for application of section 53A of the Transfer of Property Act, the relevant consideration would be the clauses in the agreement between the parties to the agreement and their performance in terms of the agreement. The subsequent act of the assessee in executing the power of attorney and the sale deeds executed by the power holder on the basis of such power of attorney would not in any way alter the status of the parties to the agreement dated 29-3-1993 for applicability of section 53-A as has been rightly held by the learned single Judge. The assessee could not longer assert possessory rights against the firm to which possession was already given pursuant to the agreement and that too after receiving the full sale consideration.

10. In the decision in Commissioner of Income Tax Vs. K. Jeelani Basha, which was referred to by the learned Standing Counsel this court also considered section 53A of the Transfer of Property Act and section 2(47)(v) of the Income Tax Act and held that the conditions which would warrant application of section 53A are that (1) such a delivery of possession should be in the nature of a doctrine of part performance u/s 53A for which there should be an agreement between the parties, (2) such agreement should be in writing (3) a completed contract has to be spelt out from that agreement and the most important (4) the transfer of possession of the property in pursuance of the said agreement. Keeping these conditions in mind, learned Standing Counsel appearing for the Revenue pointed out that even in the background of the decision of the Apex Court in Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another, the transactions of the nature of general power of attorney sales or sale agreements, do not convey title and do not amount to transfer nor could be recognised as valid modes of transfer of immovable property. In the general

power of attorney dated 5-11-1991 there is no reference at all as to M/s. Emerald Promoters Private Limited having entered an agreement of sale on 23-10-1991 in pursuance of which the possession was taken up by them. The Commissioner of Income Tax (Appeals) has gone into the recitals contained in the general power of attorney and rendered a finding that there is no reference in the general power of attorney about the agreement dated 23-10-1991.

11. Learned Standing Counsel for the Revenue submitted that the question of applicability of section 53A of the Transfer of Property Act does not arise in the facts and circumstances of the case. Secondly, he also referred to the General Power of Attorney executed by the assessee in favour of M/s. Emerald Promoter Pvt. Ltd. dated 5-11-1991, where there is hardly any reference at all to the agreement dated 23-10-1991. Further, the possession given in the power of attorney never contemplated any transfer of interest in favour of M/s. Emerald Promoters Pvt. Ltd. Learned Standing Counsel also submitted that the tripartite agreement dated 27-10-1994 entered into between the assessee herein through the Power of Attorney M/s. Emerald Promoters Pvt. Ltd. with M/s. Sudsun Housing Development (I) Ltd. as a purchaser includes Emerald Promoters P) Ltd. as a confirming party for the purpose of giving sale of undivided share of 83.96%. Going by the conduct of the assessee, it is clear that the document of the year October 1991 is only a created one and no reliance can be placed on this. Consequently, the receipt produced by assessee, evidencing the payment of sale consideration also could not be accepted in the background of the facts available through the documents. The Tribunal had committed a serious error in holding that the assessee could not be mulcted with any liability on account of sale in favour of M/s. Sudsun Housing Development (I) Ltd.

12. Countering the said submission and supporting the order of the Tribunal learned counsel for the assessee made legal submissions in the context of section 53A of the Transfer of Property Act. He pointed out that when the agreement dated October 1991 contemplated possession being given to the promoter for the purpose of giving sale of the property a fact, which has not been denied by the Revenue, the assessment could not be sustained. Even though a copy of the said agreement is not placed before this court nevertheless the same were placed before the authorities below for their consideration and going by this sale agreement dated 23-10-1991 possession had been handed over to M/s. Emerald Promoters Pvt. Ltd. which fulfils the requirements contemplated u/s 53A of Act and consequently the assessee could not be held liable for any capital gains.

13. Learned counsel for the assessee in respect of T.C.A. 636 of 2005 taking us through the documents emphasised that the letter from the Emerald Promoters Pvt. Ltd. dated 18-11-2003 to the Commissioner of Income Tax (Appeals) clearly pointed out that the consideration of Rs. 90 lakhs in respect of 83.96% undivided share was received by them and they were retained by them only. Thus, the consideration of Rs. 90 lakhs was never passed on to any of the

persons. The transactions are recorded in the books of account. The sale agreement pertaining to sales made to M/s. Sudsun Housing was only executed by them. The registration was done only by Emerald Promoters Pvt. Ltd. as they had the power of attorney. The name of the assessee was included in the sale agreement and the Form 371 for obtaining NOC only for the reason that he is the owner as per the registered documents. Except this letter, no other document was filed to establish and prove that the sale of the entire land was made in favour of M/s. Emerald Promoters Pvt. Ltd. even during November 1991.

14. Except the agreement dated 23-10-1991 entered into with M/s. Emerald Promoters Pvt. Ltd., the documents such as General Power of Attorney executed by the assessee in favour of M/s. Emerald Promoters Pvt. Ltd. dated 5-11-1991, the receipt issued by the assessee, the second agreement executed by the assessee and M/s. Emerald Promoters Pvt. Ltd. as a conforming party in favour of M/s. Sudsun Housing Development Limited dated 27-10-1994 are placed before us for consideration. The absence of the deed dated 23-10-1991, however, does not stand in the way of our agreeing with the Revenue as regards the sale effected by the assessee. As already pointed out on 5-11-1991 the assessee executed a power of attorney in favour of M/s. Emerald Promoters P. Ltd. A reading of the said document would show that there was no reference therein about the so called sale agreement dated 23-10-1991. Thus, reading the power of attorney, we do not find any justification to accept the claim of the assessee that he had entered into an agreement with M/s. Emerald Promoters Pvt. Ltd. for sale of the entire land in pursuance of which the possession was handed over to the said M/s. Emerald Promoters Pvt. Ltd.

15. Clauses 1 to 5 of the power of attorney contemplated that M/s. Emerald Promoters Pvt. Ltd. shall act to sell the property in part or full and issue receipts. The said clauses read as follows:-

(1) to sell the property in part or full, or sub-divide or un-divide share and to receive consideration on my behalf and issue receipts.

(2) to enter into contracts for sale, lease, mortgage and to receive the consideration.

(3) to execute all documents, deeds, papers in regard to sale, lease and mortgage of the Schedule Property and present before the Registration Office and do necessary acts on my behalf.

(4) to take possession of the Schedule property and administer the same.

(5) to make house plots, construct houses/flats develop the schedule property.

The rest of the clauses in the General Power of Attorney relate to applying for residential flats/commercial flats, building plan etc., The General Power of Attorney shows no reference at all to the alleged sale consideration paid under the document dated 23-10-1991. All that we have is the copy of the receipt placed before us indicating the receipt of the payment towards the cost of the

undeveloped land at Rs. 4 lakhs by way of cash on three different dates i.e., 23-10-1992, 26-2-1992 and 13-11-1992. There is absolutely no clue as to whether the said receipt was issued under the execution of the General Power of attorney. The receipt further reads that the vendor has no right over the property and the same is in possession of M/s. Emerald Promoters Pvt. Ltd.

16. Subsequently, a tripartite agreement was entered into on 27-10-1994 between the vendors P. Srinivasan, R. Dhanapal, T.T.V. Dhinakaran T.R. Harikrishnan G. Balasundaram, R. Annamalai, K. Sadagopal and M.K. Saravanan represented by the Power of Attorney M/s. Emerald Promoters Pvt. Ltd., who in turn also appeared as a confirming party and M/s. Sudsun Housing I Ltd. as a purchaser, wherein the above said vendors agreed to convey the balance of 83.96% undivided share of the lands in favour of the purchaser. The agreement states that the Confirming Party due to paucity of funds desired to relinquish their role as contractors of vendors 1 to 5 and the vendors desired to develop the Schedule A property through the purchaser. The agreement also refers to the construction put up by the confirming party of an extent of 20718.75 sq. ft which in turn would require 16.04% undivided share of the property and the confirming party as power of attorney of the vendors 1 to 5 executed the registered sale deeds in respect of 0.4650%, 0.4650% and 0.4636% undivided shares in the Schedule A lands in favour of the vendors 6, 7, and 8 to enable them to hold their respective apartments in their own names.

17. Clause 6 of the agreement states that the vendors 1 to 5 and the confirming party shall deliver vacant possession of the lands to the purchaser within one week of receipt of No Objection Certificate from the Income Tax Department. As already pointed out, the agreement speaks about the mode of payment. Based on the said agreement, possession was handed over to Sudsun Housing Development (I) Limited. A scrutiny of all these documents enables us to come to the conclusion that Emerald Promoters Pvt. Ltd. as a power agent of the vendors, the assessee herein and others had acted on the said agreement to sell an undivided share of an extent of 83.96% in favour of Sudsun Housing (I) Limited for a consideration of Rs. 90 lakhs. It is no doubt true that the said consideration was to be shared by more than one vendor. However, there are hardly any materials available before this court as to when the assessee along with the other vendors had executed the sale deed in favour of the vendors 6, 7, 8 for which there is no reference in the agreement dated 27-10-1994.

18. Quite apart, the assessment order passed in the case of P. Srinivasan would show that a sale deed was executed on 30-10-1994 by the assessee P. Srinivasan and four others in favour of one Mary Bala Gowri D Almeida in respect of a plot in an extent of 546 sq. ft out of 83.96% undivided share transferred to Sudsun Housing (I) Ltd. and the sale deed refers to the tripartite agreement dated 27-10-1994. Thus, whatever be the rights the assessee may claim in respect of the agreement dated 23-10-1991, we do not find any materials, existing as on today, to hold that the assessee, in fact, put the alleged purchaser

viz. Emerald Promoters Pvt. Ltd. in possession of the property so as to substantiate the claim in the context of section 53A of the Transfer of Property Act.

19. It is a matter of record that Harikrishnan is stated to have purchased the property on 2-9-1991. The receipts are filed before this court. The stamped receipt from Emerald Promoters Pvt. Ltd. would show the date of purchase of the stamp paper as 3-4-1990. The said receipt shows that M/s. Emerald Promoters Pvt. Ltd. had made cash payment of Rs. 4,00,000 on 23-10-1992, 26-10-1992 and 13-11-1992 towards the full cost of the undeveloped land. Except for this, we have no materials placed before this court to show that as to whether the assessee had subsequently put M/s. Emerald Promoters Pvt. Ltd. into possession in pursuance of the agreement of sale at all. On the contrary, the Power of Attorney dated 5-11-1991, executed by the said Harikrishnan in favour of M/s. Emerald Promoters Pvt. Ltd. shows that the Power of attorney was to take possession of the property and administer the same in and on behalf of the assessee herein to make house plots, construct houses/flats develop the schedule property, to enter into contracts for sale, lease mortgage and to receive the consideration on behalf of the assessee. Beyond this, learned counsel for the assessee could not produce any material to show that in pursuance of the alleged sale agreement, the assessee had put the said Emerald Promoters Pvt. Ltd. into possession of the property. Even in the agreement dated 27-10-1994, it is stated that the vendors 1 to 5 and confirming party assure the purchaser that they would deliver vacant possession of the schedule property to the purchaser within one week from the receipt of No Objection Certificate from the Income Tax Department.

20. As regards the so called construction put up by the confirming party is concerned, one has to see whether any rights flow from the assessee to the confirming party under the Power of attorney executed by the assessee on 5-11-1991. As already seen, if the power of attorney holder is already having any interest in the property as per the deed dated 2-9-1991, then the deed of power of attorney must carry some reference to the first of the agreements to accept the contention of the assessee that they had divested their rights over the property in favour of the power of attorney holder and that they had handed over the property in part performance of the agreement and hence the sale consideration could not be assessed to capital gains at the hands of the respective assessee.

21. Going by the above facts, we have no hesitation in accepting the plea of the Revenue that the one and only agreement on which the assessee had divested its interest to atleast to the extent of 83.96% in favour of M/s. Sundsun Housing Development (I) Ltd. for which consideration of Rs. 90 lakhs was fixed is the agreement dated 29-10-1994 and that Emerald Promoters Private Limited acted only as a power of attorney holder on behalf of the vendors.

22. As regards the reliance placed on the letter addressed to the Commissioner

of Income Tax (Appeals), that the sale consideration of Rs. 90/- lakhs was retained by Emerald Promoters Pvt. Ltd. except treating as statement that the consideration received was never passed on to any of the vendors, we do not think any weightage could be given to the letter sent by the said Emerald Promoters Pvt. Ltd. Going by the above said findings, we have no hesitation in agreeing with the Revenues contention that the Tribunal has committed serious error in not analysing the documents in proper perspective, particularly, in the face of the power of attorney and the tripartite agreement not making any reference at all to the first of the agreements dated 23-10-1991 entered into by the assessee with M/s. Emerald Promoters Pvt. Ltd. to accept the contention of the assessee that possession was handed over to Emerald Promoters Pvt. Ltd. in November 1991 itself. In the light of the above discussions, we set aside the order of the Tribunal and confirm the assessment orders. Accordingly, the Tax Case Appeals are allowed. No costs.