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(1986) 11 AP CK 0013

In the Andhra Pradesh High Court

Case No : R.C. No. 130 of 1982

S. Appala Narasamma APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 07-11-1986

Acts Referred:

Income Tax Act, 1961 — Section 45
Land Acquisition Act, 1894 — Section 16, 17(1), 17(2)

Citation : (1987) 63 CTR 148 : (1987) 168 ITR 17

Hon'ble Judges : P. Rama Rao, J;B.P. Jeevan Reddy, J

Bench : Division Bench

Advocate : Srirama Rao and D. Man Mohan, for M.J. Swamy, for the Appellant; M. Suryanarayana Murthy, for the Respondent

Judgement

Jeevan Reddy, J.—The Tribunal has stated the following question for our opinion u/s 256(1) of the Income Tax Act, 1961 :

"Whether, on the facts and in the circumstances of the case, the transfer giving rise to the liability to capital gains tax arose on March 25, 1970, when possession of the assessee''s lands was handed over to the Town Planning Trust, Visakhapatnam, or the transfer took place on March 22, 1971, when the award was passed by the Land Acquisition Officer, Visakhapatnam ?"

2. The facts relevant to the question are : The land of the assessee was acquired for the Town Planning Trust under the provisions of the Land Acquisition Act. During the course of the land acquisition proceedings, possession of the land was delivered voluntarily by the assessee to the Town Planning Trust on March 25, 1970. The award was passed on March 22, 1971. In the assessment proceedings, the question arose, in which year did the capital gain arise ? In other words, the question was whether the land must be deemed to have vested in the State on March 25, 1970, when the possession was taken with the consent of the landlord or on March 22, 1971, when the award was passed ? The Tribunal took the view that the vesting is on the date of the passing of the award, i.e., March 22, 1971,

which conclusion is questioned by the assessee before us.

3. Title to property can pass in two ways, i.e., either by the execution of a sale deed as contemplated by the Transfer of Property Act or by operation of law. This is a case of property passing by operation of law. In such a case, we must look to the provisions of the statute - Land Acquisition Act - to find out when does the property pass - to wit, when does the property vest in the State. There are two provisions in the Land Acquisition Act (hereinafter referred to as "the Act"), which are relevant on this aspect. They are section 16 and sub-section (1) and (2) of section 17. They read as follows :

"16. Power to take possession. - When the Collector has made an award u/s 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances.

17. Special powers in cases of urgency. - (1) In case of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), take possession of any land needed for public purposes. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

Explanation. - This sub-section shall apply to any waste or arable land, notwithstanding the existence thereon of scattered trees or temporary structures such as huts, pandals or sheds.

(2) In the following cases, that is to say, -

(a) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any railway administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a riverside or ghat station, or of providing convenient connection with or access to any such station :

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hours'' notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such building without unnecessary inconvenience.

(b) whenever in the opinion of the Collector it becomes necessary to acquire the immediate possession of any land -

(i) for the purpose of any library or educational institution, or

(ii) for the construction, extension or improvement of -

(a) any building or other structure in any village for the common use of the inhabitants of such village, or

(b) any godown for any society registered or deemed to be registered under the A.P. Co-operative Societies Act, 1964, or

(c) any dwelling house for the poor, or

(d) any irrigation tank, irrigation or drainage channel or any well, or

(e) any road,

The Collector may, immediately after the publication of notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government or the District Collector, as the case may be, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances."

4. Reference may also be made to section 48(1) which provides that "the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken".

5. A reading of the above provisions makes it clear that the land vests in the Government only when (a) possession is taken consequent upon the passing of the award (section 16), (b) when possession is taken in pursuance of a direction made u/s 17(1), or (c) when possession is taken u/s 17(2). There is no other provision in the Act which provides for vesting of the land in the Government. The situation provided by section 16 is the normal, i.e., generally adopted one, while the situations provided by sub-sections (1) and (2) of section 17 are special ones, where, in view of the urgency, possession is taken even prior to the passing of the award. In the present case, it is admitted, possession was not taken either under sub-section (1) or sub-section (2) of section 17. Nor was possession taken following the passing of award. It was a voluntary act on the part of the assessee; possession was given and taken with the mutual consent of both the parties before the award was passed.

6. It is contended by Sri Ch. Sreerama Rao, learned counsel for the assessee, that where possession is taken followed by initiation of land acquisition proceedings or where possession is taken during land acquisition proceedings with the consent of the landlord (without invoking the special provisions and power contained in section 17) and an award is passed ultimately, it must be held that the land vests in the Government on the date possession was taken. He wants to bring the situation within the four corners of section 16 by invoking the theory of relating back. We find it difficult to agree.

7. Vesting of title to the land is a matter of law, not a matter of inference. This is a case of transfer of property by operation of law and the relevant statute clearly provides the situations in which the land vests, viz., section 16, section 17(1) and section 17(2). According to these provisions, the taking of possession per se does not bring about vesting; the taking of possession must be consequent upon passing of an award (section 16) or an order contemplated by section 17(1), or in a situation contemplated by section 17(2). The Act does not provide for taking

of possession before the passing of the award, except in situations contemplated by section 17 (1) and (2). The question is what is the reasonable view to take in such a situation ? Should we relate back the award to the date of taking possession or should we relate the possession already taken to the date of the award ? We think it more reasonable, and consistent with the provisions of the Act, to adopt the latter view. Since possession taken before the award continues to be with the Government, we must say that the moment the award is passed, possession from that moment onwards should be related to the award. It is on that date that the land vests in the Government.

8. The matter can be examined from another point of view. Take a case, when possession is taken by the Government unlawfully, i.e., forcibly. Can it be said that even in such a case, the land vests in the Government on that date merely because acquisition proceedings are pending on that date. There may also be a case, where section 17 (1) and (2) are not properly followed and possession taken. Is the land-owner precluded from saying in such a case that since possession taken is invalid in law, there is no vesting and that the land should be restored to him. We may repeat that vesting of the land under the Act is a matter of law and not a matter of mutual consent or agreement.

9. We shall now refer to the decisions brought to our notice.

10. The Full Bench decision of this court in The Revenue Divisional Officer, Guntur Vs. Vasireddy Rama Bhanu Bhupal and Others, , may be noticed first. In this case, possession was taken with the consent of the landlord prior to the initiation of the land acquisition proceedings. Subsequently, an award was passed. The question arose, whether interest is payable from the date of taking possession of the land or only from the date of the award. The Full Bench held that on the land or only from the date of the award. The Full Bench held that on the language of section 28, interest is payable "from the date on which he took possession of the land.....". In the face of the express language of the provision, it was held that the interest is payable from the date of taking possession of the land and that in such a case, date of passing of the award is not relevant. The Full Bench further observed that section 28 of the Act does not say that the possession of the land should have been taken under the Act and, therefore, possession taken by private negotiations is also within section 28. It was also observed that though section 16 contemplates possession being taken after the passing of the award, there is nothing in the Act which prevents the Collector from taking possession even earlier with the consent of the land-owner. We, however, do not see the relevancy of the said principle to the question at issue. We are not saying that possession taken with the consent of the owner is unlawful and unauthorised. The possession may be lawful, but the question is whether it brings about "vesting", i.e., transfer of title to the Government. This question did not arise for consideration of the Full Bench, nor is it dealt with there. The Full Bench was concerned only with the question as to from which date the interest u/s 28 is payable.

11. The next decision cited is Lt. Governor of Himachal Pradesh and Another Vs. Avinash Sharma, . In this case, possession was taken on December 23, 1963. The notification u/s 4(1) of the Land Acquisition Act was issued on March 31, 1964, and a notification under sections 17(1) and 17(4) of the Act was made on May 16, 1964. Notices u/s 9 were issued after the publication of the declaration u/s 6. Later, on October 5, 1965, the Government issued a notification cancelling the notification u/s 4 which was questioned by the landowner by way of a writ petition. The contention was that possession having been taken from the land-owner, section 48(1) bars the withdrawal of acquisition and hence the notification of cancellation is void. The Judicial Commissioner allowed the writ petition which decision was confirmed by the Supreme Court. The following observations in paragraph 4 (p. 1577) are relevant for the present purpose :

"In the present case, a notification u/s 17 (1) and (4) was issued by the State Government and possession which had previously been taken must, from the date of expiry of fifteen days from the publication of the notice u/s 9(1), be deemed to be in the possession of the Government. We are unable to agree that where the Government has obtained possession illegally or under some unlawful transaction and a notification u/s 17(1) is issued, the land does not vest-in the Government free from all encumbrances. We are of the view that when a notification u/s 17(1) is issued, on the expiration of fifteen days from the publication of the notice mentioned in section 9(1), the possession previously obtained will be deemed to be the possession of the Government u/s 17(1) of the Act and the land will vest in the Government free from all encumbrances."

12. From the above paragraph, it appears that though possession was taken earlier, the Supreme Court was of the opinion that it should be related to the direction made u/s 17(1). They also held that the possession previously obtained will be deemed to be the possession of the Government u/s 17(1) of the Act which evidently means that the vesting took place on the expiry of fifteen days from the date of publication of the notice u/s 9(1). This aspect is made clearer in paragraph 7 (p. 1578), where it is observed :

"It is clearly implicit in the observations that after possession has been taken pursuant to a notification u/s 17(1), the land vests in the Government and the notification cannot be cancelled u/s 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers u/s 48 of the Land Acquisition Act."

13. This decision does not say that the vesting taken place on the date of taking possession of the land even where it is taken with the consent of the landlord. On the contrary, this decision supports the view taken by us herein, since it says that though possession is taken earlier, it should be related to and be deemed to be pursuant to the direction made u/s 17(1) of the Act with effect from the date on which the period prescribed in section 17(1) expires.

14. This decision was indeed explained in a subsequent decision in Jethmull

Bhojraj Vs. State of Bihar and Others, . In this case, the case of the land-owner was that possession was taken long prior to the initiation of acquisition proceedings, and that, in any event, after the acquisition proceedings were initiated and a direction was made u/s 17(1), possession was again taken in pursuance thereof. His contention, therefore, was that the withdrawal notification published u/s 48 of the Act is incompetent. The main question that arose in this case was when possession was, in fact, taken - whether before the initiation of acquisition proceedings or in pursuance of the direction made u/s 17(1). The court found as a fact that possession was not actually taken at any point of time. In the course of the judgment, however, the court referred to the earlier decision in Lt. Governor of Himachal Pradesh and Another Vs. Avinash Sharma, , which was relied upon for the land-owner. The following observations are relevant to show, as they do, the manner in which the court understood the earlier decision and distinguished it on the facts of the case before them. (Paragraph 13) Jethmull Bhojraj Vs. State of Bihar and Others, .

"Relying on the decision of this court in Lt. Governor of Himachal Pradesh and Another Vs. Avinash Sharma, , it was contended by Mr. R. K. Garg, learned counsel for the appellant, that once it is established that the possession of the land notified for the acquisition was taken in 1953 or 1954, it was unnecessary for his client to establish that any possession was taken u/s 17(1). According to him, on the expiration of 15 days after the issue of notices u/s 9(1), the lands in question vested in the Government. The decision in question does not lend any support for this contention. In that case, not only had the property been taken possession of by the Government even before the acquisition proceedings had started, but appropriate proceedings u/s 9(1) and section 17(1) were also taken though there was no actual taking of possession u/s 17(1). Under those circumstances, this court observed :

''In the present case, a notification u/s 17 (1) and (4) was issued by the State Government and possession which had previously been taken must, from the date of expiry of fifteen days from the publication of the notice u/s 9(1), be deemed to be the possession of the Government''."

15. We are, therefore, of the opinion that none of the cases cited by learned counsel for the assessee support his contention. Vesting takes place (a) when possession is taken consequent upon the passing of the award, or (b) when possession is taken consequent upon the direction made u/s 17(1) of the Act, or (c) where possession is taken as contemplated under sub-section (2) of section 17. Mere taking of possession by itself does not being about vesting. However, where possession is taken either before the initiation of the acquisition proceedings otherwise than by invoking sub-section (1) or sub-section (2) of section 17, and later and award is passed, the vesting of the land takes place on the date of the award, similarly, where possession is taken in the first instance and later section 17(1) or section 17(2) is invoked, vesting takes place after the expiry of the time specified in the appropriate sub-section.

16. For the above reasons, the Tribunal was right in holding in this case that vesting took place on March 22, 1971, and not on March 25, 1970. The question referred is answered in favour of the Revenue and against the assessee. No costs.

Rama Rao, J.

17. While agreeing with the conclusion of my learned brother, Jeevan Reddy J., I would like to touch upon the dimension projected by learned counsel for the assessee regarding relating back of vesting under the Land Acquisition Act. Sri Sreerama Rao contends that the vesting of the property in the Government envisaged under the Land Acquisition Act has to relate back to the date when possession is taken. The date of vesting is crucial for exigibility to capital gains tax as the chargeability to capital gains tax has to be made in the assessment year corresponding to the year in which the vesting or transfer took place. Subsequent to the notification u/s 4(1) of the Land Acquisition Act, the possession of the land was voluntarily given on March 25, 1970. The award was passed on March 22, 1971. Notwithstanding the award of March 22, 1971, learned counsel says that the vesting took place on March 25, 1970, when possession was delivered. Under sections 16 and 17 of the Land acquisition Act, possession looms large for the purpose of vesting. Section 16 provides that the vesting takes place on the passing of the award and the taking possession. The taking of possession may be contemporaneous with the award or subsequent to the date passing the award. Section 17 enables the Government to take possession in the event of urgency or in situations stated in section 17 and such possession result in vesting. The statutory vesting arises in two situations, namely, the passing of the award accompanied by taking possession u/s 16 and possession pursuant to a situation of urgency u/s 17 and the Land Acquisition Act does not provide for vesting on taking possession merely without reference to section 16 or 17. The contention of learned counsel is that on passing the award on March 22, 1971, the vesting should be shifted to March 25, 1970, on the day when possession was delivered. Section 16 or 17 does not accommodate such a situation. To reiterate, possession taken on March 25, 1970, cannot be connected to section 16 or section 17 and such bare possession does not have the effect of vesting. In The Revenue Divisional Officer, Guntur Vs. Vasireddy Rama Bhanu Bhupal and Others, , the Full Bench of this court while considering the issue of payment of interest from the date of taking possession highlighted the vital distinction between the factum of taking possession and taking possession pursuant to section 16 or section 17 of the Act and held that the payment of interest can be directed from the date of taking possession though such possession is taken under the provisions of the Act.

18. I agree with the answer proposed.

19. Learned counsel for the assessee makes and oral request for grant of certificate to appeal to the Supreme Court u/s 261 of the Income Tax Act on the ground that the present case is a fit one to appeal to the Supreme Court. We are not, however, satisfied that this is a fit case as such. The oral request is

accordingly rejected.

