REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

ITA No.1000 of 2009

Judgment Reserved On: 23rd April, 2010
% Judgment Delivered On: 17th May, 2010

S.M. WAHI **. . . Appellant**

through : Mr. O.S. Bajpai, Sr. Advocate with Mr. V.N. Jha, Advocate

VERSUS

DIRECTOR OF INCOME TAX & ANR. **. . .Respondents**

through: Mr. Sanjeev Sabharwal, Advocate

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. Though this appeal was admitted on a limited question formulated by the appellant as Question of Law No. (d), in order to appreciate that question, some broad factual narration would be needed.

2. The appellant is a Non- Resident Indian and Swiss National. He is the uncle of one Ms. Reeta Wahi. The property bearing No.13, Kautilaya Marg, Chanakyapuri, New Delhi (hereinafter referred to as 'the subject property) was purchased in March 1994 in the name of Reeta Wahi for a consideration of Rs.1.49 crores. The entire amount

as the 'VIMAR') to Reeta Wahi. This company, VIMAR, substantially owned by the appellant, who was holding 97% shares therein and 3% share holding was with Reeta Wahi.

3. The appellant made gifts certain amounts from time to time totaling Rs.1,44,62,500/- to Reeta Wahi. These moneys received by Reeta Wahi in the form of gift from the appellant were utilized for repayment of loan to M/s. VIMAR.

4. On 11.06.2004, Reeta Wahi entered into collaboration agreement for development of the subject property and thereafter entered into another agreement to sell qua this property with M/s. Dear Farms (Pvt.) Ltd., which was the company of the builder who had entered into the collaboration agreement with Reeta Wahi. On entering into this agreement, dispute between the appellant and Reeta Wahi started and series of litigations ensued in the form of various suits. The appellant was in possession of the subject property. When he was asked to vacate the same, he alongwith his wife (since deceased) filed a suit bearing CS (OS) No.690 of 2009 on the Original Side of this Court praying for decree of declaration stating that the plaintiffs were the owners of the subject property. They also made a prayer for permanent injunction seeking to restrain Reeta Wahi from leasing out portions of property belonging to the appellant or dispossessing the plaintiffs from the subject property. They also sought decree seeking cancellation of sale deed vide which property was purchased in the

owner. In this Suit, the plaintiffs also moved an application for interim injunction.

5. Reeta Wahi took the plea that she was the real owner and in any case prayer made by the appellant that plaintiffs were the owners of the property was barred by the Benami Transaction (Prohibition) Act, 1986. Number of issues were framed on the pleadings of the party. On the aforesaid objection taken by the defendants including Reeta Wahi, following two issues were framed:

> 1. Whether the suit is barred by the provisions of Benami Transaction (Prohibition) Act, 1986, as alleged in the written statement? If so, to what effect?
>
> 13. Whether the suit of the Plaintiff is barred under the provisions of Benami Transaction (Prohibition) Act, 1988 and the plaint is liable to be reject under Order 7 Rule 11 of the CPC?

6. We may also point out that interim injunction was earlier granted by the Court in favour of the plaintiffs against their dispossession. These were treated as preliminary issues and arguments were heard by the learned Single Judge on these issues. Learned Single Judge vide his order dated 01.05.2006 decided the aforesaid preliminary issues in favour of the appellant. The court accepted the submission of the appellant that in fact money was paid by the appellant for purchase of the subject property and Reeta Wahi who was his niece held the property in fiduciary capacity. Such a transaction was saved by the

view as to how there was fiduciary capacity between the appella and Reeta Wahi and Reeta Wahi held the property on behalf of the appellant in a fiduciary capacity. On this basis, issued No. 1 was decided in favour of the appellant and it was also held that the plaint could not rejected under Order VII Rule 11 of the Code of Civil Procedure.

7. After this decision of the learned Single Judge of this Court, the parties settled the disputes. Settlement Deed dated 25.11.2006 was signed between the appellant, Reeta Wahi and Sanjit Bakshi, the developer. It was agreed that out of a total consideration of Rs.15,76,05,316/- payable by the developer qua that property, Rs.4 Crores would be given to the appellant and remaining amount was to be paid to Reeta Wahi. Suit was decided by the Court in terms of the aforesaid settlement and other suits/appeals between the parties also stood settled.

8. Two aspects clearly emerge from the aforesaid factual matrix:

a) This Court in its orders dated 01.05.2006 had accepted the plea of the appellant that he was the owner of the property, which was held and purchased in the name of Reeta Wahi, who was holding the same as fiduciary of the appellant.

b) Settlement dated 25.11.2006 entered into between the parties, as per which the appellant was ultimately paid Rs.4 Crores qua this property, was accepted by this Court.

9. Receipt of this amount was treated as capital gain by the Assessi Officer (AO). The appellant resisted this move of the AO contending that he was not the owner of the property nor had any tenancy rights therein. He was only staying in the said property for the last more than 45 years and sum of Rs.4 crores was received by the appellant for handing over the vacant possession of the property in question in terms of Settlement Deed dated 25.11.2006. Therefore, this amount was not received against transfer of any capital asset as defined under Section 2(14) of the Income Tax Act (hereinafter referred to as 'the Act') and was thus not taxable as capital gain. The AO rejected this contention taking note of the facts narrated above. The appeals preferred by the appellant before the CIT (Appeals) as well as Income Tax Appellant Tribunal (hereinafter referred to as 'the Tribunal') also failed on this aspect. This Court also refused to entertain this appeal under Section 260A in respect of this aspect in view of the concurrent findings of fact of the three authorities below. More particularly when the case of the appellant himself in the Suit filed by him in this Court was that he was the actual owner of the property and Reeta Wahi was only Benami owner as property was purchased out of the funds given by him and Reeta Wahi was holding the same only in fiduciary capacity being her niece and this stand of the appellant was accepted by this Court. Thus, settlement was arrived at only after the aforesaid orders were passed in his favour, which prompted Reeta Wahi as well as developer to settle the matter with the appellant. The

10. So far so good. However, the appellant had also raised another iss before the AO, *viz.*, exact amount which was to be deducted from the aforesaid receipt of Rs.4 crores to arrive at actual capital gain. The contention of the appellant was that cost of acquisition of the aforesaid property was to be deducted. Property was purchased at Rs.1.49 crore, indexed cost of acquisition as per formula under the Act was Rs.2,25,00,731/-. The appellant wanted entire amount of acquisition, viz., Rs.2.25 Crores to be deducted from Rs.4 Crores received by him to make him liable to pay him capital gain on the net amount arrived in the aforesaid manner. The AO, however, did not accept this plea of the appellant and held that since total consideration was Rs.15.76 crores, the appellant would be entitled to only proportionate deduction. In this manner, he allowed deduction of Rs.57.10 lakhs and held that capital gain would be Rs.3,42,89,377/-. Calculation arrived at by the AO in his aspect is as under:

> "Capital Gain in respect of the property in question
>
> | | |
> |---|---|
> | "Total Sale consideration | 15,76,05,316 |
> | Less: Indexed cost of acquisition | 2,25,00,731 |
> | | 13,51,04,545 |
>
> Income under the head Capital Gains from the property in question attributable to the assessee is worked out to follow:
>
> | | |
> |---|---|
> | Sale consideration | 4,00,00,000 |
> | Deduct proportionate cost of acquisition | 57,10,623 |
> | Capital Gains | 3,42,89,377" |

11. Thus, the dispute is as to whether the appellant is to be allowed

against the appellant. Finding it to be a substantial question of la the appeal was admitted qua this question of law, which reads as under:

> "(d) Whether on the facts and circumstance of the case and in law, the Tribunal committed a mistake in not giving the set off of the entire cost of acquisition (Index Cost of the acquisition of Rs.2.25 Crores) to the Appellant against the Receipt of Rs.4 Crores in respect of the property in question while computing the capital gain?"

12. The order of the AO reveals that after holding that the appellant was, in fact, the real owner of the property, while allowing proportionate deduction only, he did not give any specific reasons, and rested his order with the aforesaid calculations alone.

13. The Tribunal while holding that AO rightly determined the capital gain by allowing proportionate deduction of the cost of acquisition has made following observations:

> "15. As far as the next alternative contention of the assessee that benefit of cost of acquisition should be granted only to the assessee are concerned, the learned Assessing Officer has rightly computed the total capital gain arisen on the sale of the property because the capital gain has arisen on transfer of a capital assets. He has set off the cost of acquisition against the sale consideration and thereafter determine the total capital gain arisen on transfer of the property. Since the dispute of ownership was involved in this case and the parties have compromised by bifurcating the sale proceeds, in the same ratio Assessing Officer has computed the gain arisen to each individual/entity. The steps taken by the Assessing Officer in determining the capital gain is a reasonable one and, therefore, no interference is called for in the computation also. In this way, we do not find any merit in ground No. 1 to 7 of the appeals raised by the assessee."

property while holding that the amount of Rs.4 crores received by t appellant is exigible to tax as capital gain and this was not capital receipt. For this purpose, the authorities below heavily relied upon the judgment dated 18.14.2006 of this Court in CS (OS) No.690 of 2004 holding that the entire sale consideration was given by the appellant while purchasing the property in the name of Reeta Wahi, who held the same in fiduciary capacity. Thus, when entire sale consideration is treated to have been treated capital gain, it defies common sense as to how the appellant would be given only proportionate deduction and not the entire cost of acquisition when the entire money was spent by the appellant and on that basis he was treated as the real owner of the property in question.

15. Section 45 of the Act makes income from capital gains exigible to tax. Section 48 thereof stipulates the 'Mode of Computation'. It reads as under:

> "**Section 48**
>
> **MODE OF COMPUTATION.**
>
> The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :-
>
> (i) Expenditure incurred wholly and exclusively in connection with such transfer;
>
> (ii) The cost of acquisition of the asset and the cost of any improvement thereto :
>
> Provided that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be

same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company :

Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted.

Provided also that nothing contained in the second proviso shall apply to the long-term capital gain arising from the transfer of a long-term capital asset being bond or debenture other than capital indexed bonds issued by the Government.

Explanation : For the purposes of this section, - (i) "Foreign currency" and "Indian currency" shall have the meanings respectively assigned to them in section 2 of the Foreign Exchange Regulation Act, 1973 (46 of 1973);

(ii) The conversion of Indian currency into foreign currency and the reconversion of foreign currency into Indian currency shall be at the rate of exchange prescribed in this behalf;

(iii) "Indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;

(iv) "Indexed cost of any improvement" means an amount which bears to the cost of improvement the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the year in which the improvement to the asset took place;

(v) "Cost Inflation Index" for any year means such Index as the Central Government may, having regard to seventy-five per cent of average rise in the Consumer Price Index for urban non-manual employees for that year, by notification in the Official Gazette, specify 759 in this behalf."

As per this Section cost of acquisition of asset and cost of any

Court in the case of ***Commissioner of Income Tax*** Vs. ***Shakunta*** **Kantilal** [(1991) 190 ITR 56] that the expression used in Section 48 of the Act, viz., "expenditure incurred wholly and exclusively in connection with such transfer" has wider connotation than the expression, "for the transfer". This view has been accepted by the Madras High Court in the case of ***Commissioner of Income Tax*** Vs. ***Bradford Trading Co. P. Ltd.*** [261 ITR 222]. We are in agreement with the aforesaid interpretation given to Section 48 of the Act.

16. Another aspect of the matter (though not taken note of by the Tribunal), would clinch the issue. We put a pertinent query to the learned counsel for the Revenue as to whether the benefit of deduction of balance cost of acquisition is given to Reeta Wahi against the amount received by her. To our surprise, Mr. Sabharwal stated, after obtaining instruction, that Reeta Wahi was not even taxed qua her share received by her in respect of that property. Be as it may, what follows is that though the appellant is given proportionate deduction in the sum of Rs.57.10 lakhs only, balance cost of acquisition has not enured to anybody's benefit. This also shows that insofar as capital gain is concerned, it is only the receipts of Rs.4 crores at the hand of the appellant, which is treated as capital gain. On that reckoning also entire indexed cost of acquisition has to be deducted from the amount received by the appellant.

17. We, thus, decide the question of law in favour of the assessee and

(A.K. SIKRI)
JUDGE

(AJIT BHARIHOKE)
JUDGE

May 17, 2010.
pmc