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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1763 Of 2022

Darshana Anand Damle,
(PAN; AAQPD6358N), aged 57 years, having her address at D/101, Shree Niwas Residency, Belavali, Badlapur (East) 421 503, Maharashtra, India. **...Petitioner**

~ versus ~

1. **Deputy Commissioner of Income Tax, Central Circle 3(4), Mumbai,**
   1915, 19th Floor, Air India Building, Nariman Point, Mumbai 400 021, Maharashtra, India.

2. **Pr. Commissioner of Income Tax (Central) – 2, Mumbai,**
   1915, 19th Floor, Air India Building, Nariman Point, Mumbai 400 021, Maharashtra, India.

3. **The Union of India,**
   Through the Secretary, Ministry of Finance, Government of India, North Block New Delhi 110 001. **...Respondents**

APPEARANCES

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for the petitioner Mr Devendra Jain a/w Ms. Namita Chandra & Mr. Ashwin Jain

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i/b Mr. Kumar Kale.

for respondents Mr. Suresh Kumar

CORAM : K. R. Shriram &
Dr.N.K. Gokhale, JJ.

DATED : 4th September 2023

ORAL JUDGMENT (*Per K.R. Shriram J)*:-

1. Pleadings are complete. With the consent of the Parties we decided to dispose this Petition at this admission stage. Therefore, Rule, made returnable forthwith.

2. Petitioner is an individual, who filed return of income on 13th January 2014 for Assessment Year 2013-14 declaring total income of Rs.2,32,81,270/-. Petitioner's case was selected for scrutiny and Petitioner received notice under section 143(2) of the Income Tax Act, 1961 ("**the Act**").

3. During Financial Year 2012-13 corresponding to Assessment Year 2013-14, Petitioner along with other co-owners had entered into a Development Agreement on 15th June 2012 with one Sai Ashray Developers ("**Sai Ashray**") for developing the land situated

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at Chikhloli, Ambernath. During the assessment proceedings under Section 143(3) of the Act, Petitioner, vide letter dated 17th March 2016, had filed a copy of the Development Agreement before the Assessing Officer ("**AO**"). The AO asked Petitioner as to why the Development Agreement should not be treated as 'transfer of the said land' resulting in capital gains and taxed accordingly. Petitioner filed a reply and in the reply Petitioner explained that by entering into the Development Agreement, Petitioner has not transferred the land to Sai Ashray and specific reference was made to provisions of Section 2(47)(v) of the Act and Section 53A of the Transfer of Property Act, 1882. Petitioner's explanation was accepted and the assessment order under Section 143(3) of the Act came to be passed on 31st March 2016 without making any addition on account of capital gains. Petitioner's income was, however, determined as Rs.3,32,85,240/- wherein other additions to the total income of Petitioner were made.

4. Petitioner received a notice dated 22nd March 2021 under Section 148 of the Act stating that Respondent No.1 had reasons to believe that Petitioner's income chargeable to tax for Assessment Year 2013-14 had escaped assessment within the meaning of

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Section 147 of the Act. Petitioner also received a notice dated 6th January 2022 under Section 142(1) of the Act. Petitioner was also served the reasons recorded for re-opening the assessment.

5. Petitioner filed detailed objections vide its communication dated 8th February 2022 that came to be disposed by an order dated 14th February 2022. It is this order along with notice issued under Section 148 of the Act which is impugned in this Petition.

6. It is Petitioner's case that since the notice under Section 148 of the Act has been issued after the expiry of four years from the end of the relevant assessment year, as provided in Section 147 of the Act, re-opening of the assessment was not permissible unless there was failure on the part of Petitioner to fully and truly disclose material facts required for assessment. Mr. Jain submitted that the reasons to believe does not indicate that there was any failure on the part of Petitioner to truly and fully disclose material facts.

7. Mr. Suresh Kumar submitted that Petitioner has filed original return of income treating the land in question as 'stock in trade' in the books of accounts and hence, not a 'capital asset' within the

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meaning of Section 2(47) of the Act. But the screenshot of the schedule of fixed assets held by Petitioner as seen in the balance sheet as on 31st March 2012 required for Assessment Year 2012-13, the land in question was treated as a 'capital asset' and, therefore, Petitioner had misrepresented the facts by treating the land as 'stock in trade' in her books of accounts instead of treating it as a 'capital asset' within the meaning of Section 2(47) of the Act.

8. The entire basis as we could gather from the reason for reopening which prompted the AO to conclude that there was reason to believe escapement of income is that Petitioner along with two other co-owners had granted development rights in respect of land at Chikhloli, Ambernath to Sai Ashray. As per the Development Agreement, Sai Ashray shall develop the property at its own cost and shall give directly to owners 36% of the total constructed saleable area as total consideration for grant of development rights. As per the Development Agreement, Sai Ashray paid Rs.40 Crores to land owners as refundable interest free deposit out of which Rs.21 Crore has been paid to Petitioner and her co-owner one Ashish Anand Damale. From those facts, according to AO, it is clear that Petitioner has transferred, as

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defined under Section 2(47) of the Act, land to Sai Ashray during Financial Year 2012-13. According to AO, the market value of the constructed saleable area was Rs.9.5994 Crores and Petitioner has only shown consideration of Rs.3 Crores in the Development Agreement. Therefore, Petitioner should have offered capital gain during the Assessment Year 2013-14.

9. At the outset, we have to note that during the assessment proceedings a query had been raised by the AO and Petitioner had submitted copy of agreement relating to joint development at Chikhloli vide its Chartered Account's letter dated 17th March 2016. By a further undated letter, Petitioner, after referring to the ongoing scrutiny assessment proceedings and referring to the query that was raised during the assessment proceedings as to why the Development Agreement entered into by Petitioner with Sai Ashray should not be treated as 'transfer of land' and taxed accordingly, explained in detail as to why there was no 'transfer of land'. Subsequently, the assessment order 31st March 2016 has been passed in which there is even a reference to the Joint Development Agreement between Petitioner and Sai Ashray of land at Chikhloli village. Therefore, it is clear that the issue as to

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whether there was a transfer of land or otherwise was the subject of consideration before the AO during the assessment proceedings. As seen in ***Aroni Commercials Ltd. v Deputy Commissioner of Income Tax 2(1), Mumbai & Anr.*** [1] once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was the subject of consideration of the AO while computing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Paragraph 14 of *Aroni Commercial* (supra) reads as under:

> *"14. We find that during the assessment proceedings the petitioner had by a letter dated 9 July 2010 pointed out that they were engaged in the business of financing trading and investement in shares and securities. Further, by a letter dated 8 September 2010 during the course of assessment proceedings on a specific query made by the Assessing Officer, the petitioner has disclosed in detail as to why its profit on sale of investments should not be taxed as business profits but charged to tax under the head capital gain. In support of its contention the petitioner had also relied upon CBDT Circular No.4/2007 dated 15 June 2007. (The reasons for reopening furnished by the Assessing Officer also places reliance upon CBDT Circular dated 15 June 2007). It would therefore, be noticed that the very ground on which the notice dated 28 March 2013 seeks to reopen the assessment for assessment year 2008-09 was considered by the Assessing Officer while originally passing assessment order dated 12 October 2010. This by itself demonstrates the fact that notice dated 28 March 2013 under Section 148 of the Act seeking to reopen assessment for A.Y.2008-09 is based on mere change of opinion. However, according to Mr. Chhotaray, learned*

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> *Counsel for the revenue the aforesaid issue now raised has not been considered earlier as the same is not referred to in the assessment order dated 12 October 2010 passed for A.Y.2008-09. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceedings even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment"*

10. This would also indicate that there was no failure to disclose any material fact. On that ground alone the notice dated 22nd March 2021 issued under Section 148 of the Act has to be quashed and set side. So also the impugned order dated 14th February 2022 disposing Petitioner's objections.

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Moreover, the other co-owner's case was also proposed to be reopened. The other co-owner Late Bharat Jayantilal Patel (since deceased) through legal heir Smt. Minal Bharat Patel had filed Writ Petition No.1612 of 2022 which came to be disposed on 10th February 2023. In that case, we could say identical reasons for reopening of the assessment was recorded. The Court after considering the submissions made and relying upon the judgment of the Apex Court in the case of ***Seshasayee Steels (P) Ltd. V Assistant Commissioner of Income Tax VI(2), Chennai***[2] held that the assessee had only granted a licence to Developer who entered into assessee's land for the purpose of development and that did not amount to 'allowing the possession of the land' as contemplated under Section 53A of the Transfer of Property Act, 1882 and therefore Section 2(47)(v) of the Act would not apply. The Court held that granting of a licence for the purpose of development of the flats and selling the same could not be said to be granting possession. The findings of the Court in Writ Petition No. 1612 of 2022 will squarely apply to the facts of this case as well.

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11. Accordingly, we make the rule absolute in terms of prayer clause (a) which reads as under:

> "(a) that this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction, calling for the records of the Petitioner's case and after going to the legality and propriety thereof, to quash and set aside the notice u/s 148 dated 22.03.2021 ("**Exhibit D**") and the Order dated 14.02.2022 ("**Exhibit I**") disposing of Petitioner's objections to the issue of impugned notice."

12. Petition disposed.

(DR. N. K. GOKHALE, J.) **(K. R. SHRIRAM, J.)**

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