

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'B' JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 138/JP/2018  
निर्धारण वर्ष/Assessment Year :2006-07

Sh. Govind Narayan Yadav Tagore Nagar Chowraha, Heerapura, Ajmer Road, Jaipur	बनाम Vs.	ITO, Ward 3(1), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. ACSPY4261B		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से/ Assessee by : Sh. P. C. Parwal (CA)  
राजस्व की ओर से/ Revenue by : Smt. Runi Pal (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 24/02/2021  
उदघोषणा की तारीख/Date of Pronouncement: 30/04/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)- 01, Jaipur dated 03.11.2017 wherein the assessee has raised the following grounds of appeal.

"1. The Ld. CIT(A) has erred on facts and in law in confirming the assessment of long term capital gain at Rs. 81,58,720/-.

(i) ignoring that assessee in substance has not sold the land under consideration rather the buyer by fraudulent means has got the sale deed registered in his favour.

(ii) by not allowing the indexed cost of acquisition in computing the alleged capital gain

*(iii) by substituting the actual consideration as per the sale deed by deemed consideration u/s 50C even when from the various legal proceedings available on record, it is proved that actual consideration is only what is recorded in the sale deed and therefore, the same could not be substituted by deemed consideration u/s 50C.*

*(iv) by not referring the determination of FMV of the property u/s 50C(2) of the Act."*

2. Briefly stated facts of the case are that the Assessing officer based on information that the assessee has sold his share of land situated at village Hirapura issued notice u/s 148 of the Act and thereafter, a show-cause was issued as to why long term capital gains may not be taken at Rs 81,58,722/- u/s 50C, being the value determined by the Stamp duty authority. In response, the assessee submitted that the transfer was carried out under fraudulent circumstances and no capital gains liability arises on such sham transaction and substance should prevail over form and infact, there was no transfer u/s 2(47) of the Act. It was submitted that the assessee and other aggrieved parties have also filed an FIR and a civil suit before the Hon'ble Court. The AO however didn't accept the assessee's contentions for the reason that a sham transaction has no relevance in Income tax Act and referring to provisions of section 2(47) of the Act, it was held that as per sale deed, the property has been transferred and possession has been handed over and where the transaction was made under fraudulent circumstances, the assessee should have filed a suit under civil court. The AO accordingly determined the full value of consideration at Rs 81,58,722/- under

section 50C and in absence of any proof regarding cost of acquisition, the long term capital gains were determined at Rs 81,58,722/- which has been confirmed by the Id CIT(A) and against the said findings, the assessee is in appeal before us.

3. During the course of hearing, the Id AR submitted that the assessee along with his three brothers, namely Sh. Madan Lal, Sh. Munna Lal and Sh. Lalu Lal owned an agricultural land measuring 3 bigha 17 biswa at village Hirapura, Ajmer Road, Jaipur. Thus each of the brothers were having 19.66 biswa (i.e. 2973.57 sq. yard). Smt. Krishna Devi, wife of Musaddi Lal Yadav approached the assessee and his brothers to develop the residential scheme on this land whereby she promised to give some cash consideration and some developed land. Accordingly Smt. Krishna Devi by misrepresenting to the applicant and his three brothers stated that since each of the brothers have a land holding of less than 1 bigha, therefore all of them should execute the sale deed in her favour and on that basis she would apply to JDA for conversion of agricultural land for residential use u/s 90A of the JDA Act. After the conversion and considering the land which would go into the facility area i.e. out of 1784 sq. yard land (2973.57 sq. yards-1189.43 sq. yards), she would pay for 1000 sq. yards and the remaining 784 sq. yards will be given back to them.

4. It was submitted that in view of the above understanding, Smt. Krishna Devi got executed four sale deeds from the assessee and his brothers on 30.07.2005, 07.07.2005, 03.08.2005 & 01.05.2006 in respect of 19.66 biswa each (i.e. 2,973.57 sq. yards.). Accordingly, the assessee executed a sale deed dt. 30.07.2005 in favour of Smt. Krishna Devi for

Rs. 5 lacs. Simultaneously, agreement dt. 03.08.2005 was executed with Sh. Munna Lal whereby on the developed land, Smt. Krishna Devi would be the owner for 1000 sq. yards and Munna Lal would be the owner of remaining 784 sq. yd. Similar agreement was entered with Sh. Madan Lal on 20.08.2005 for giving him 360 sq. yds. of developed land. However no written agreement was made with the assessee and Lalu Ram but assurance was given that after conversion, 784 sq. yard developed land would be given to them.

5. It was submitted that the Sub registrar for stamp duty purposes took the value of land for which the sale deed was executed by the assessee at actual consideration of Rs.5,00,000/- considering it to be an agriculture land. However, Collector Stamps vide order dt. 23.03.2006 for the purpose of levy of stamp duty determined the value of land at Rs.81,58,722/- by considering the same to be commercial land though in the revenue record, it is still a agriculture land. On the basis of this information, the AO initiated proceedings u/s 148. In course of assessment proceedings, the assessee explained that Smt. Krishna Devi got transferred the land under fraudulent circumstances. She misguided the assessee and put a condition that unless he and other family members execute a registered sale deed, the legal process at JDA cannot be completed. Accordingly, the assessee executed the sale deed for cash consideration of Rs.5 lacs. However, Smt. Krishna Devi did not fulfill her commitment and no conversion was done of the said agricultural land into residential colony. Thus, assessee and his brothers filed FIR against Smt. Krishna Devi. They also filed civil suit and obtained temporary stay/ relief from the Court. Thereafter, Smt. Krishna Devi, as full legal owner of the

said land applied to JDA for conversion into residential scheme which was rejected by JDA on ground that the land is under dispute at various courts.

6. It was submitted that the AO, however, did not accept the contention of assessee by holding that in the sale deed executed on 30.07.2005, it is clearly mentioned that the said property has been transferred to the purchaser with title & physical possession and the purchaser had become sole owner of the said property w.e.f. 30.07.2005 and payment of the same has been received by the seller. Further, if the transaction was made under the fraudulent circumstances, then assessee should have gone to file suit under Civil Court. Accordingly, he determined the long term capital gain on sale of land at Rs. 81,58,722/-.

7. It was submitted that in appeal, the Ld. CIT(A) observed that as per the registered sale deed dt. 30.07.2005, assessee has stated to receive Rs. 5 lacs in cash from Smt. Krishna Devi and nothing remained outstanding. The possession of land was also handed over to Smt. Krishna Devi. The assessee along with his brothers has filed a suit for issue of temporary injunction in Court of Civil Judge which was denied by the Civil Judge vide order dt. 03.07.2013. Against the order of Civil Judge, the assessee filed a civil appeal before Addl. District Judge who vide its order dt. 21.05.2013 confirmed the order of Civil Judge. Against the order of Addl. District Judge, the assessee filed writ petition before Hon'ble Rajasthan High Court who vide its order dt. 31.01.2014 directed to maintain status quo as regards the possession, alienation, construction and creation of third party interest in the suit lands. Pending the writ petition, the stay application was disposed off. Accordingly, the Ld. CIT(A) held that the registered sale deed executed by the assessee for sale of

land has not been cancelled till date of this order. The two judicial authorities have held that the possession of land was with Smt. Krishna Devi and no temporary injunction was issued thereof. Thus, the assessee has transferred its land to Smt. Krishna Devi during the year under consideration and is liable for capital gain tax.

8. In the above factual background, it was submitted by the Id AR that the buyers of the land fraudulently got the sale deed executed from the assessee in her favour without complying with the promises they made at the time of the transaction taking place. As per the promise, they will get the scheme approved from JDA and will get pattas of the residential land in favour of the assessee as agreed by them. As per the agreement, assessee got hold of the plot of lands, constructed boundary wall and the remaining land was used by him as per his convenience. But Smt. Krishna Devi with the intention of cheating want to sale the entire land breaching the terms of actual agreement, in view of the sale deed executed in her favour. Therefore, the assessee has filed a civil writ petition before the High Court of Rajasthan. The Hon'ble High Court vide order dt. 31.01.2014 directed to maintain the status quo. The matter is still pending before Hon'ble High Court.

9. It was submitted that from the above, it can be noted that though the assessee has executed the sale deed, he has not parted with the possession and the matter is pending before the Hon'ble High Court. Thus, when the entire transaction is under dispute, simply on the basis of sale deed, it cannot be presumed that a transfer has taken place so as to attract the capital gain tax liability on the assessee. The Hon'ble Punjab & Haryana High Court in case of Hira Lal Ram Dayal Vs. CIT 122 ITR 461 has

held that registration of sale deed, though has evidentiary value but is not conclusive. If the assessee despite registration of sale deed is able to prove that no sale has in fact taken place and the transaction is sham, capital gains tax is not chargeable. The Tribunal not justified in refusing to look into the material produced by assessee to prove that the sale transaction was sham. The Ld. CIT(A) though refer to the fact that Hon'ble High Court has directed to maintain the status quo as regard the possession, alienation, construction and creation of third party interest in the suit land but still held that the two lower judicial authorities have held that the possession of the land was with Smt. Krishna Devi and no temporary injunction was issued, therefore, assessee is liable to capital gain tax. In holding so he failed to verify whether the possession of land is with the assessee or not particularly when High Court has directed to maintain the status quo with regard to the possession of land. Therefore, the decision of Hon'ble P&H High Court is fully applicable and the assessee is not liable to capital gain tax.

10. It was submitted that in case of brother of the assessee, Shri Lalu Ram Yadav, there also he executed the sale deed for consideration of Rs. 10 lakhs in favour of Smt. Krishna Devi on 01.05.2006, the same was accepted by the sub registrar. However the AO in his case also adopted the value u/s 50C at Rs.81,58,722/-. This was confirmed by CIT(A) for the same reason as in the case of the assessee. However the Hon'ble ITAT in ITA No. 1034/JP/18 dt.12.07.2018 has held that since the value adopted by the sub-registrar is the same, section 50C is not applicable and thus allowed the appeal of the assessee. Thus when in respect of the same transaction, the actual consideration is accepted by the sub registrar and also by the Hon'ble ITAT, no capital gains can be assessed in the hands of

the assessee by adopting the value adopted by the collector stamp considering it to be a residential land instead of the agricultural land.

11. Without prejudice to above, it was further submitted that the Ld. CIT(A) has failed to consider that when it is proved that actual consideration is only what is recorded in the sale deed, the same cannot be substituted by deemed consideration u/s 50C and that too without referring the determination of FMV of the property to DVO u/s 50C(2) of the Act, more particularly when assessee has not filed any appeal or revision or reference to any authority or court against the value assessed by the stamp valuation authorities. Further, the AO has not allowed any deduction of indexed cost of acquisition in computing the long term capital gain which is against the provisions of the Act.

In view of above, it was submitted that the income on account of long term capital gain assessed by the AO be directed to be deleted.

12. Per contra, the Id. DR relied on the order of the lower authorities and our reference was drawn to the findings of the Id. CIT(A) which read as under:-

*"3.1.2 Determination:*

*(i) The brief facts of the case are that during the year under consideration, the appellant along with his brothers namely S/Shri Madan Lal, Lallu Ram Yadav and Munna Lal had sold land at Tagore Nagar, Heerapura to Smt. Krishna Devi wife of Shri Mussadi Lal Yadav vide four separate sale deeds. It may be mentioned that the Collector (Stamps), Jaipur vide its order dated 23.03.2006 has determined the value of the land sold by the appellant and two brothers of the*

*appellant for the purposes of charging stamp duty at Rs. 81,58,722/-. It may be mentioned that in the assessment order, the AO has stated the sale consideration at Rs. 10 Lac, whereas, as per the copy of the registered sale deed dated 30.07.2005 placed on record, the sale consideration was stated at Rs. 5 Lac only.*

*(ii) The appellant has not filed any return of income for the year under consideration u/s 139 of the Act and in view of the information available on record, the AO, has initiated proceedings u/s 147 of the Act and has issued notice u/s 148 of the Act on 01.05.2012 which was duly served upon the appellant. However, no return of income was filed by the appellant even in response to notice issued u/s 148 of the Act. In the assessment order, after considering the submission of the appellant, the AO has adopted the sum of Rs. 81,58,722/- as sale consideration u/s 50C of the Act. Further, since, no compliance was made by the appellant before the AO, the AO in the absence of non-availability of the cost of the acquisition of the property under consideration, has taken the cost of acquisition at Rs. Nil and has determined the long term capital gains on sale of the land under consideration at Rs. 81,58,720/- i.e. the entire amount adopted by the Collector (Stamps), Jaipur for the purpose of charging stamp duty.*

*(ii) In the grounds of appeals, it was stated by the appellant that Smt. Krishna Devi, the purchaser of the land has fraudulently got registered the land in its favour and thus, the deal under consideration, for sale of land had also become disputed and the case is pending for disposal in the court of law and it was still having the*

*possession of the land. It was further submitted that the sale consideration was Rs. 5 Lac only.*

*(iv) I have duly considered the submissions of the appellant, assessment order and the material placed on record. It is noted from the registered sale deed dated 30.07.2005 that the appellant has stated to receive a sum of Rs. 5 Lac in cash and nothing remained outstanding from the buyer Smt. Krishna Devi. It was further stated in the sale deed that the possession of the land was also handed over by the appellant to Smt. Krishna Devi. It is noted from the material placed on record that some dispute has arisen between the appellant, his brothers on the one hand and Smt. Krishna Devi on the other hand which is pending before the court of law. It is noted from the material placed on record that a suit for issue of temporary injunction was filed by appellant along with his brothers in relation to their dispute with Smt. Krishna Devi in the Court of Civil Judge (A & B) and Metropolitan Magistrate (East), Jaipur and vide order dated 03.07.2013 in case No. Misc.(Temporary Injunction)/ 332/2012, the temporary injunction as prayed by the petitioners was denied by the Civil Judge, a part of the relevant extract of the above referred order of Civil Judge is reproduced as under:*

"सुविधा का संतुलन व अपूरणीय श्रुति

10. चूंकि वाद ग्रस्त भूमि के संबंध में वादीगण का प्रथम दृष्टया कोई स्वामित्व व कब्जा नहीं पाया गया है। अतः वादीगण के पक्ष में यदि कोई निषेधाज्ञा जारी नहीं की गई, तो उन्हें अधिक असुविधा व अपूरणीय क्षति हो, ऐसा प्रकट नहीं होता है। अतः दोनों बिन्दू भी प्रार्थीगण के पक्ष में प्रमाणित नहीं पाये जाते हैं।

11. चूंकि प्रथमदृष्टया केस, सुविधा का संतुलन व अपूरणीय क्षति के बिन्दू प्रार्थीगण के विरुद्ध प्रमाणित पाये गए हैं। अतः प्रार्थीगण का प्रार्थना पत्र अस्वीकार किए जाने योग्य पाया जाता है।

आदेश

12 अतः प्रार्थीगणका यह प्रार्थना-पत्र बाबत अस्थायी निषेधाज्ञा विरुद्ध अप्रार्थीया अस्वीकार कर खारिज किया जाता है।”

(v) Against the above referred order of Civil Judge, the appellant along with his brothers (the petitioners) filed a civil appeal before the Addl. District Judge No. 16, Jaipur and vide order dated 21.05.2013, in Civil Misc. Appeal No. 08/2013, the Addl. District Judge confirmed the above referred order dated 07.03.2013 of Civil Judge and thus, no temporary injunction was granted, even by Addl. District Judge, Jaipur. A part of the relevant extract of the same is reproduced as under:

"सुविधा का संतुलन व अपूरणीय क्षति

चूंकि विवादित भूमि के बारे में अपीलार्थीगण का कोई प्रथम दृष्टया स्वत्व और कब्जा नहीं पाया है और प्रथम दृष्टया स्वामित्व और कब्जा नहीं पाये जाने के कारण अगर कोई स्थायी निषेधाज्ञा जानी जाती है तो अपीलार्थीगण को कोई ऐसे असुविधा होने वाली नहीं है बल्कि असुविधा प्रत्यर्थी को होगी कि जो जायदा उसने पंजीकृत विक्रय पत्र से खरीदी है, उसका उपयोग करने से वंचित हो जाएगी और अपीलार्थीगण ऐसे कोई अपूरणीय क्षति का बिन्दू भी स्पष्ट नहीं कर पाये कि आखिर किस प्रकार से उन्हें क्षति होगी और ऐसे क्षति का आंकलन नहीं किया जा सकेगा बल्कि अपूरणीय क्षति का बिन्दू भी प्रत्यर्थी के पक्ष में है कि उसने पंजीकृत विक्रय विलेख से जायदाद खरीदी और अब अस्थायी निषेधाज्ञा का आदेश जारी कर दिया तो उसे अपूरणीय क्षति होगी।

अपीलार्थीगण/प्रार्थीगण अपना दृष्टया मामला, सुविधा का संतुलन और अपूरणी क्षति के बिन्दू तीनों ही स्थापित नहीं कर पाये है। अतः अपीलार्थीगण/प्रार्थीगण का आवेदन विद्वान अधीनस्थ न्यायालय द्वारा खारिज करने में कोई त्रुटि नहीं की गई है और प्रार्थना- पत्र खारिज होने योग्य होने से खारिज किया गया है। अपीलार्थीगण की अपील खारिज किये जाने योग्य होने और विद्वान अधीनस्थ न्यायालय द्वारा पारित आदेश की पुष्टि किये जाने योग्य है।

आदेश

फलस्वरूप अपीलार्थीगण / प्रार्थीगण द्वारा प्रस्तुत अपील खारिज की जाती है तथा आदेश दिनांक 07.03.2013 विविध दीवानी प्रार्थना-पत्र संख्या 332/12 प्रार्थना पत्र अस्थायी निषेधाज्ञा, लल्लूराम वर्ग,

बनाम कृष्णादेवी, न्यायलय सिविल न्यायाधिश (कनिक खण्ड) पूर्व, जयपुर नगर द्वारा पारित की पुष्टि की जाती है।

निर्णय की प्रति के साथ विचारण न्यायालय की पत्रावली अविलम्ब लौटाई जाए।”

*(vi) Thus, it could be seen from the above decisions of Civil Judge and the Addl. District Judge that the possession of the property under consideration was found to be with Smt. Krishna Devi and not with the appellant and his brothers. It may be mentioned that against the order of ADJ Jaipur, the appellant and his brothers filed a writ petition before the Hon'ble High Court of Rajasthan and vide order dated 31.01.2014 in S.B. Civil Misc. Stay Application No. 18755/2013 in S.B. Civil Writ Petition No. 21812/2013 in the case of Shri Lallu Ram Yadav & Others - Petitioners and ADJ & Others - Responders, it was directed by the Hon'ble High Court of Rajasthan to maintain status quo as regards the possession, alienation, construction and creation of third party interest in the suit lands, pending the writ petition and the stay application was disposed off. It may further be mentioned that the registered sale deed executed by the appellant for sale of the land has not been cancelled till the date of this order.*

*(vii) During the appellate proceedings, the reliance has been placed on the case of Hira Lal Ram Dayal vs. CIT [1979] 2 Taxman 579 (P & H), wherein it was held that if the assessee, even in the face of the registered sale deed, is able to prove by cogent evidence and satisfy the Tribunal that no sale, in fact, took place, the Tribunal has to necessary conclude that there was no capital gain'. It is to be noted that in the instant case under consideration, the facts are distinguishable as those of the above referred case. Further, it has been held by two judicial authorities that possession of the land was*

*with Smt. Krishna Devi and in fact, no temporary injunction was issued thereof.*

*(viii) Therefore, in view of the above discussion and looking to the totality of facts and circumstances of the case, it is held that the appellant has transferred its land to Smt. Krishna Devi during the year under consideration and thus, is liable for capital gains tax. Thus, these grounds of appeal are hereby rejected."*

13. We have heard the rival contentions and perused the material available on record. The case of the assessee is that the subject transaction has been carried out under fraudulent circumstances and on the pretext of certain promises and agreement between the parties which have not been fulfilled by the buyer. Given the non-fulfillment of such promises and agreement, the assessee has taken series of steps permissible under law against the buyer from time to time by way of filing an FIR, thereafter, suit for injunction in court of civil judge, thereafter civil appeal before the Add. Judge and lastly, by way of filing a civil writ before the Hon'ble Rajasthan High Court where the Hon'ble Court has directed to maintain a status quo pending disposal of the writ petition. It was submitted that where the whole transaction is under dispute, it cannot be presumed that merely by entering into a sale deed, the transfer has taken place so as to attract capital gains tax. Per contra, the case of the Revenue is that the assessee has executed a sale deed for sale of the land which has been duly registered and has not been cancelled till date and as per sale deed, the property has been transferred and possession has been handed over to the buyer and therefore, it is clear that a transfer has taken place which is liable for capital gains.

14. In this regard, we refer to the decision of the **Hon'ble Punjab & Haryana High Court** in case of **Hira Lal Ram Dayal vs CIT** (supra) wherein the question for consideration before the Hon'ble High Court was "whether it is open to the assessee to prove that the sale transaction evidenced by the registered sale deed was sham transaction and no sale in fact took place." The Hon'ble High Court while answering the said question held that the Tribunal fell in legal error where it says that it cannot ignore a document which is duly executed and registered with the Sub-Registrar and the findings of Hon'ble High Court read as under:

*"It is no doubt true that the evidentiary value has to be attached to a registered document but the said document cannot be a final word in the matter. It has to be remembered that capital gains accrue only if there is a sale or any other transfer of the capital asset and if the assessee is able to prove that in fact no sale took place in that case no capital gain accrued which could be assessed to income-tax. If the assessee, even in the face of the registered sale deed, is able to prove by cogent evidence and satisfy the Tribunal that no sale in fact took place, in that case, the Tribunal has to come to the conclusion that there was no capital gain. As is apparent from the observations made in the order of the Tribunal, the Tribunal was under the misapprehension that the registered sale deed was final and, therefore, refused to look into the other material produced by the assessee with a view to prove its case that the sale transaction was a sham transaction. It is, however, a different matter that the Tribunal may not feel convinced that*

*the sale transaction was a sham transaction and refuse to rely on the material produced by the assessee for good reasons, but the said material had to be taken into consideration and could not be ignored. As already observed, the enquiry before the Tribunal was to be directed to find out whether there had been a sale and if the Tribunal comes to the conclusion that the sale had taken place, in that case, the capital gains tax would become payable. The matter can be viewed from another angle. It is a matter of daily happening that people, who want to avoid payment of tax, would sell the property by getting the sale deeds registered at an under-estimated value. If it is held that the sale deed is final, in that case, the Income-tax authorities will be debarred from looking into as to how much sale consideration passed under the transaction, which is not the law. The factum of sale and the sale proceeds are the real questions to be determined by the Income-tax authorities. From what has been stated above, it is clear that the Tribunal fell into an error in refusing to examine the material put forth by the assessee to prove that the sale was a sham transaction."*

15. We refer to the decision of the **Hon'ble Patna High Court** in case of **Smt. Raj Rani Devi Ramna vs CIT** (1992) 201 ITR 1032 (Pat.) where the questions framed for consideration before the Hon'ble High Court read as under:

*"(1) Whether, on the facts and in the circumstances of the case, the learned Income-tax Officer was justified in including the sum of Rs. 42,000 pertaining to three deeds of sale in the gross receipts for the purposes of computation of capital gains?"*

*(2) Whether, on the facts and in the circumstances of the case, the learned Income-tax Officer was legally correct in coming to a finding that once the sale deed was registered, the transfer was complete and any stipulation in the deed of sale to the contrary was irrelevant ?*

*(3) Whether by mere execution of a deed of sale and registration thereof, there could be transfer of an immovable property without effective conveyance of the same to the transferee ?*

*(4) Whether, 'transfer' according to section 2(47) of the Income-tax Act, 1961, must mean effective conveyance of the capital asset to the transferee ?"*

And the findings of the Hon'ble High Court read as under:

*"After hearing learned counsel for the parties, I have no hesitation in holding that the properties do not necessarily pass as soon as the instrument is registered, for the true test is the intention of the parties. Registration is prima facie proof of an intention to transfer, but it is no proof of an operative transfer if there is a condition precedent as to the payment of consideration or delivery of the deed. Thus the seller may retain the deed pending payment of price and, in that case, there is no transfer until the price is paid and the deed is delivered.*

*To substantiate my above view, I may first refer to a Bench decision of the Calcutta High Court in the case of Nitai Chandra Naskar v. Smt. Champaklata Debi reported in [1919] 29 CLJ 250, wherein while referring to section 54 of the Transfer of Property*

*Act, it has been held that, "sale is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised. The true test is, what is the intention of the parties to the transaction. If the intention is that title should pass immediately, even though the consideration has not been paid, title passes, that is, failure to pay the consideration for a conveyance does not defeat the conveyance except where there is an agreement that it should take effect only if the consideration is first paid." In the case of Panchoo Sahu v. Janki Mandar, reported in AIR 1952 Patna 263, it has been held that title does not pass on the mere execution and registration of the sale deed and the answer to the question regarding passing of the title lies in the intention of the parties, which is to be gathered from the sale deed itself. A similar view has been taken in the case of Shiva Narayan Sah v. Baidya Nath Prasad Tiwary, reported in AIR 1973 Patna 386. There is a catena of decisions of this court as well as of other High Courts taking a similar view.*

*The relevant provisions under the Act for the present purpose are sections 45 and 2(47). Section 45, inter alia, provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall, subject to certain exceptions, be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. The word "transfer" has been defined under section 2(47) of the Act which provides that, in relation to a capital asset, transfer includes the sale, exchange or*

*relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law.*

*In the present case, we are concerned with the transfer of an immovable property by way of sale. In the absence of any provision to the contrary, the concept of sale of an immovable property which is included in the expression "capital asset" as defined under section 2(14) of the Act, has to be gathered from section 54 of the Transfer of Property Act, 1882. In the present case, from the statement of case itself as drawn up and sent to this court by the Tribunal, it is apparent that the parties had clearly intended that despite the execution and registration of sale deeds, transfer by way of sale will become effective only on payment of the entire consideration amount and in this background of facts, it has to be held that there was no transfer of land covered by the three sale deeds in question during the period under consideration making the assessee liable for capital gains tax under section 45 of the Act.*

*Keeping in view the discussions made above, question No. 4 is answered in the affirmative, that is to say, the transfer under section 2(47) of the Act must mean an effective conveyance of the capital assets to the transferee. Questions Nos. 1, 2 and 3 are answered in the negative and in favour of the assessee. In the facts and circumstances of this case, there shall be no order as to costs."*

16. The legal proposition which emerges from reading of aforesaid decisions is that that a registered sale deed does carry an evidentiary

value. At the same time, where the assessee is able to prove by cogent evidence brought on record that it is a case of sham transaction or no sale has in fact taken place, then, in such a scenario, the taxing and appellate authorities should consider these evidences brought on record by the assessee and basis examination thereof, decide as to whether sale has taken place or not in the given case. Further, it has been held that the title in the property does not necessarily pass as soon as instrument of transfer is registered and the answer to the question regarding passing of title lies in the intention of the parties executing such an instrument. The Registration is no proof of an operative transfer and where the parties had intended that despite execution and registration of sale deed, transfer by way of sale will become effective on fulfillment of certain conditions, then in such a scenario, the transfer will be effected only on fulfillment thereof and not at the time of execution and registration of sale deed. In the instant case, as we have noted above, subsequent to entering into the sale deed, the assessee has taken series of steps against the buyer from time to time by way of filing an FIR, thereafter, suit for injunction in court of civil judge, thereafter civil appeal before the Add. Judge and lastly, by way of filing a civil writ before the Hon'ble Rajasthan High Court where the Hon'ble Court has directed to maintain a status quo and the case of the assessee before the Hon'ble Court is that the subject transaction has been carried out under fraudulent circumstances and on the pretext of certain promises and agreement between the parties which have not been fulfilled by the buyer and the **Hon'ble Rajasthan High Court** vide its order dated 31.01.2014 in S.B. Civil Misc. Stay Application No. 18755/2013 in S.B. Civil Writ Petition No. 21812/2013 has directed as under:

*"Heard the learned counsel Mr. Vishwajeet Mantri for the petitioners and the learned counsel Mr. A.K. Dubey appearing for the respondent No. 3 on caveat.*

*Having regard to the submissions made by the learned counsels for the parties, and to the impugned orders passed by the courts below, the parties are directed to maintain status-quo as regards the possession, alienation, construction and creation of third party interest in the suit lands, pending the writ petition. The Stay application stands disposed of."*

17. We therefore, find that the outcome of these proceedings before the Hon'ble High Court would have a direct bearing on the subject transaction in terms of intention of the parties, fulfillment or non-fulfillment of various promises and agreement and in short, the substance and real purport of the whole transaction and resultant taxability thereof as it evident from the grounds so taken in the aforesaid writ petition filed by the assessee along with others which read as under:

*"Grounds:*

*(A) Because the impugned order suffers from legal errors apparent on the face of record which has resulted in gross failure of justice and therefore the same deserves to be quashed and set aside.*

*(B) Because the learned Courts below erred in not considering the fact that the contemporaneously executed documents with regard to the same transaction between the parties shall be read*

*together to ascertain the true nature of the transaction mentioned in the registered sale deed and sale deed cannot be read in isolation. The petitioners submitted several judgments in this regard which have not at all considered by the learned courts below. Even the judgment consider has wrongly been distinguished. It is therefore submitted that the courts below committed serious legal error in ascertaining as to wither there is prima facie case in favour of the petitioners or not.*

*(c) Because it is submitted that the agreements executed between the parties simultaneously with the sale deeds can be read in evidence for ascertaining true intent of the parties and the nature of the transaction between them is a question which can be decided only after trail and adjudication in the case. The fact remains that the petitioner raised bonafide issues requiring trial and therefore as per the law settled in this regard the courts below must have consider that the prima facie case is in the favour of the petitioners.*

*(D) Because the petitioners also sought injunction with regard to the land over which admittedly they have got possession and the possession admittedly has not been handed over for portion of the land for which the sale deed has been executed. In such the situation the defendants respondent No. 3 has no authority to dispossess the petitioners from the suit land by force and the petitioners will be entitled to protection of their possession during pendency of the suit. This aspect of the matter has not at all been considered by the respondents No. 1 and 2.*

*(E) Because the learned court below has also seriously erred in recording findings with regard to actual possession over the suit land. It has not at all properly considered rather has ignored the relevant documents which were submitted on record of the court below. Hence the impugned orders deserves to be quashed and set aside.*

*(F) Because the learned court below has stated that the agreements produced on record are not registered documents whereas there is compulsion under section 17 and 49 of the Registration Act for registration of such documents. It is most humbly submitted that in the instant case the documents which are agreements are not at all for conveyance of the immovable property by the defendant respondent No. 3. The courts below have clearly erred in not at all appreciating the true nature of the transaction between the parties.*

*(G) Because the case of the petitioners before the learned court below is for specific performance of the terms of agreements in question which are mere memorandum of agreements conveying no property. The agreement is to the effect that the respondent No. 3 will get a residential scheme sanction and will thereafter get lease deeds of residential plots executed by JDA in favour of the petitioners. The conveyance will take place at the time of execution of lease deeds and the stamp duty as well as registration of documents for conveyance will be attracted at that stage. Thus the learned court below seriously erred in misconstruing the terms of the contract, the nature of the*

*document and the nature of the transaction and therefore the impugned orders deserves to be quashed and set aside.*

*(H) Because the learned court below has also not examined and considered the judgments in this regard submitted by the petitioners before them.*

*(I) Because the learned Courts below erred in not considering the fact that the agreements were made and executed on the very same day when the registered Sale Deeds were executed. It is important to mention here that and it is also clear from the subsequent events, that the true intent for execution of the sale deed was only to transfer the entire agricultural land only for the mentioned cash consideration, but it was clearly for development of a residential scheme upon the conveyed agricultural land after getting the same converted for the said purpose and in consideration thereof the cash consideration as well as the getting of lease deeds of residential land in favour of the petitioners was clearly intended.*

*(J) Because the orders passed by registering authorities clearly fortifies the fact that the cash consideration mentioned in the sale deed was not the only market value of the property sold. The valuation which has been made by the registering authority and accepted by the respondent No. 3 by making payment of additional stamp duty leaves no manner of doubt about the facts stated by the petitioners with regard to true nature of the transaction.*

*(K) Because from the facts and circumstances it is evidently clear that if the sale deeds are taken on their face value ignoring the contemporaneous execution of documents and considering the value of the land so transferred through sale deed, it would be evidently clear that the respondent No. 3 has fraudulently attempted to get valuable property of the petitioners for meager price by getting the sale deeds executed and subsequently disowning the premises which were actually made to the petitioners at the time of the transaction taking place.*

*(L) Because fraud vitiates everything and the facts and circumstances of the case clearly demonstrates the fraudulent intentions of the respondent No. 3 which has resulted in gross injustice to the poor agriculturist petitioners. The petitioners are entitled to prove all these aspects on trial of the suit which they have successfully demonstrated for prima facie establishment of their case. In such situation the rejection of the injunction prayed would clearly result in irreparable injury which cannot be compensated in terms of money. The courts below have considered this aspect of the matter in a very cursory manner.*

*(M) Because in the facts and circumstances of the case the balance of convenience is also in favour of the petitioners. However the learned court below has considered this aspect of the matter also in a very cursory manner.*

*(N) Because it is settled law of construction of documents that the true intent of parties can be gathered from the surrounding circumstances and if the evidence available suggests that what is*

*expressed in the document is not the only thing which has taken place between the parties, the meaning to the document has to be given by considering the entire set of circumstances. The courts below have not taken into account the true principle in this regard and decided the matters without considering the law and principles applicable in this regard.*

*(O) Because the learned Courts below erred in not considering the fact that it is well settled principle that when one document is executed after the another both the documents should be read in toto and not as a separate agreements, so that in the present case if the agreements were made after the registered Sales Deeds the agreements so made should be read along with the registered Sale Deed and the interpretation of both the documents should be done looking after each other and the conditions on which the agreements were made either party are bound to them.*

*(P) Because the learned Courts below failed to consider the question of law that while interpreting the agreement in between the parties, it is necessary to the intention of the parties while arriving into the agreements and from the interpretation of the agreements it is found that the plaintiffs have no intention to sold the entire land and the purpose of the agreement was to provide the land for residential scheme and that the defendant do necessary work for converting the same from the JDA and issue pattas from JDA and give them to the plaintiffs. If this is not the intention of the parties, then there is no need of the plaintiffs to sell their ancestral land to the defendant.*

*(Q) Because the courts have also not considered fact that as far as the possession of the land is concerned the plaintiffs have specifically mentioned in their plaints that the respective share of land which is not sold to the defendant and which is in their possession and which is also evident from the various documents filed by the plaintiffs along with the plaint were sufficient to show that the land in question is in the possession of the plaintiffs. It is also pertinent to mention here that the defendant herself stated in her reply that certain boundary and kachcha houses were already there in the land in question and which belongs to the plaintiffs. So, claiming the land in his possession is untrue and which is evident from the bare perusal of the written statement of the defendant.*

*(R) Because the learned Courts below erred in not considering the documents on which the plaintiffs are relying wherein the show these site plans of the residential scheme where specifically it was shown the area or the plots in which the plaintiffs are in possession and in which electricity connection were taken by them which is also evident from the document filed with the plaint. The learned Courts below not looked even the photographs of the concerned residential schemes in which the plaintiffs are in possession and decided the Temporary Injunction Application without applying the judicious mind.*

*(S) Because the learned Courts below have only to see prima-facie there is a case of plaintiffs or not. But the Courts below without appreciating the evidence came before the Court arrived out over a finding that the subsequent agreements between the*

*plaintiffs and defendant are forged and that the plaintiffs had sold the entire land to the defendant which is a question of evidence and without going through the evidence with regard to the documents concerned arriving out to such conclusion cause gross injustice to the plaintiffs.*

*(T) Because the learned Courts below erred in not considering the facts with regard to the irreparable loss to the plaintiffs and no finding was given with regard to the fact whether the plaintiffs having continue possession over the land and if they were remove from their respective portion of land it will cause gross irreparable loss to the plaintiffs and which cannot be compensated with any other relief.*

*(U) Because the learned Courts below erred in not considering the fact that if the defendant sold the land to any third party it will cause multiplicity of the party and irreparable loss to the plaintiffs.*

*(V) Because the courts below have not appreciate that for showing prima facie case the petitioners were not required to conclusively prove their case at the stage of grant of temporary injunction. It is the reasonable likelihood of existence of rights is sufficient for grant of temporary injunction, particularly in a situation in which documentary evidence are shown regarding the possession over the land.*

*(W) Because the impugned orders have resulted in irreparable injuries to the petitioners which cannot be compensated in terms of money.*

*(X) Because the petitioners crave leave to urge other legal grounds at the time of Admission/ Hearing of the writ petition."*

18. In light of aforesaid discussions and in the entirety of facts and circumstances of the case and in the fitness of things, we are of the considered view that the matter need to be set-aside and remanded to the file of the Assessing officer who is hereby directed to decide the same afresh after taking into consideration the decision of the Hon'ble Rajasthan High Court in the aforesaid writ petition which has a direct bearing on the matter.

19. Now, coming to the case of brother of the assessee, Shri Lalu Ram Yadav (supra) which has been decided by the Coordinate Bench and relied upon by the Id AR. We find that in the said case, the Coordinate Bench had held that provisions of section 50C cannot be invoked where was no difference between the sale consideration and valued adopted by Sub-Registrar (Stamps) as the sale consideration declared by the assessee of Rs 10 lacs was accepted and adopted by the Sub-Registrar, Jaipur and in assessee's own case, there was no reference to the Collector's (stamps) and no enhancement made in the valuation of the property by the Collector (Stamps). However, in the present case, as against the declared sale consideration of Rs 5 lacs, in assessee's own case, the Collector (Stamps) has determined and assessed the value at Rs 81,58,722/- which has been made the basis by AO for determining sale consideration U/s 50C of the Act and therefore, the said decision was rendered in peculiar facts and circumstances of the said case. At the same time, we note that during the course of assessment proceedings, in response to the show-cause notice issued by the AO, the assessee had objected to adoption of such value of Rs 81,58,722/- as against declared sale consideration of Rs 5,00,000/- and in such circumstances, the AO should have taken steps

by referring the matter to the DVO u/s 50C(2) of the Act and should have taken into consideration the report of the DVO before substituting the sale consideration as per Collector (Stamps) order as against the declared sale consideration. And we believe that in light of differential approach and valuation adopted by the stamp duty authorities in case of assessee and in case of brother of the assessee in respect of similar situated property as so claimed, the reference to DVO becomes imperative to take the same into consideration and determine the fair market value of the property. Given that the AO had go ahead in the matter without referring the matter to DVO, it gives rise to another reason why we are of the considered view that the matter deserve to be set-aside to the file of the Assessing officer who is hereby directed to refer the matter to DVO and decide as per law.

20. Since we are setting aside the matter, the Assessing officer is also directed to consider other contentions raised by the Id AR regarding non-allowance of indexed cost of acquisition while determining capital gains in the hands of the assessee and decide as per law.

21. The assessee is also hereby directed to place on record of the Assessing officer developments and status of the proceedings before the Hon'ble Rajasthan High Court in the matter on regular basis and a copy of the order/directions so passed by the Hon'ble Rajasthan High Court in aforesaid writ petition as soon as copy of the order is received or made available on the official website of the Hon'ble Rajasthan High Court and other information/documents as so desired by the Assessing officer. Needless to say, the assessee be allowed a reasonable opportunity before deciding the matter.

In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 30/04/2021.

Sd/-  
( संदीप गोसाई )  
(Sandeep Gosain)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(विक्रम सिंह यादव)  
(Vikram Singh Yadav)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 30/04/2021

\*Ganesh Kr.

आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Sh. Govind Narayan Yadav, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 3(1), Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 138/JP/2018}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar