

**IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCHES "A" : HYDERABAD  
(THROUGH VIDEO CONFERENCE)**

**BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER  
AND  
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

**I.T.A. No. 396/HYD/2014**

Assessment Year: 2009-10

Sri Bobba Prasad,  
HYDERABAD

Asst. Commissioner of  
Vs Income Tax,  
Central Circle-3,  
HYDERABAD

(Appellant)

(Respondent)

For Assessee : Ms.Lavanya for  
Shri M.Madhusudan, AR

For Revenue : Shri Sunil Kumar Pandey, DR

Date of Hearing : 20-04-2021

Date of Pronouncement : 11-06-2021

**ORDER**

**PER S.S.GODARA, J.M. :**

This assessee's appeal for AY.2009-10 arises from the CIT(A)-VII, Hyderabad's order dated 30-12-2013 passed in case No.2715/2011-12/CIT(A)-VII/Hyd, involving proceedings u/s.144 r.w.s.153C of the Income Tax Act, 1961 [in short, 'the Act'].

Heard both the parties. Case file perused.

2. The assessee has raised the following substantive grounds in the instant appeal:

“1. The order of the Ld. Commissioner of Income Tax (Appeals)-VII, Hyderabad in ITA No.2715/2011-12/CIT(A)-VII/HYD, dated 30-12-2013 passed for the Assessment year 2009-10 is erroneous both in law and also on facts of the case;

2. Taking note of the fact that the Realtor, viz., the GPA holder only paid an advance of Rs.50,00,000/- and failed to pay the balance consideration of Rs. 5.00 crores, the Ld Commissioner of Income Tax (Appeals) - VII, Hyderabad ought to have held that there was a breach of 'contractual obligation' on the part of the realtor, M/s Aashi Realtors and Mr Sukesh Gupta and thereby the Agreement of Sale referred to by the Ld Assessing Officer ought to have been regarded as VOID IN LAW;

3. Going by the fact that there was no DELIVERY OF POSSESSION of the Property by the Appellant to the Realtor, aforesaid, beyond any iota of dispute which is pending adjudication in a Court of Law, the Ld Commissioner of Income Tax (Appeals) - VII, Hyderabad ought to have noticed that there is no transfer within the meaning of Section 2(47)(v) of the Act read with Section 53A of the Transfer of Property Act, 1882 and this technical ground, he ought to have held that the addition made by the Ld Assessing Officer under the head 'Capital Gains' for the Assessment Year under review, viz., AY 2009-10 is DEVOID OF ANY MERIT AND VOID AB-INITIO;

4. Having held emphatically at para 12.0 of his order under dispute that the whole matter of sale is SUBJUDICE in a Court of Law, the Ld Commissioner of Income Tax (Appeals) - VII, Hyderabad ought not have confirmed the addition made by the Ld Assessing Officer under the head 'Capital Gain~ for the Assessment Year 2009-10;

5. Having noticed from the Copies of the Plaint in O.S.No. 1879/2012, LA.Nos 400/2012, 401/2012, filed with the Hon'ble Additional Chief Judge, Hyderabad and CMA No.239 of 2013 filed with the Hon'ble High Court of Judicature at Hyderabad, that there was a claim made by the Appellant that the 'Impugned Sale' was done behind the back of the Appellant and he was "CHEATED" by the GPA holder [vide para 11.0 of the impugned order of the Ld Commissioner of Income Tax (Appeals) - VII, Hyderabad], the Ld CIT(A) ought to have called for a 'REMAND REPORT' from the Assessing Officer after causing full-fledged verification of the suit proceedings as provided by Rule 46A of the Income Tax Rules, 1962 before confirming the impugned addition under the head 'Capital Gains'.

6. That in facts and circumstances of the case and legal background putforth by the appellant before the Ld CIT(A), he ought to have ordered deletion of the impugned addition towards the Capital Gains of Rs 5,84,34,495/ - holding that such addition is unfair, arbitrary

*and against all cannons of equity, justice and against the provisions of law.*

*7. For these grounds and other grounds which may be advanced during the course of hearing of the Appeal, it is prayed that the impugned addition referred to above may kindly be ordered to be deleted in the interests of equity and justice and also to be in conformity with the provisions of Law”.*

3. Both the learned representatives took us to the CIT(A)'s detailed discussion on the foregoing role of assessment of capital gains issue reading as under:

*“9.0 The arguments and the written submissions filed are considered. The order of the Hon'ble Addnl. Chief Judge, City Civil Court, Hyderabad was pursued. The findings in this Court Order (Order dt 12/10/2012 in I.A No 400 of 2012 and LA No 401 of 2012 in O.S No 96 of 2012) are significant and have a bearing on the appeal filed. The findings in the court order are:-*

*(a) I.A 400 was filed for granting injunction restraining the respondents (respondent being (1) M/s Aashi Realtors represented by Sri Sukesh Gupta, managing partner, (2) Sri Sukesh Gupta, (3) and (4) the buyers of land - Sri U.Pradeep Kumar, U Ravi Kumar) from alienating the suit scheduled property.*

*(b) The I.A 401 was was filed for restraining the respondents (above named persons) from interfering with the peaceful possession and enjoyment of the petitioner in respect of the suit schedule property.*

*(c) The points of determination set out by the Court in para 6 on 6 of the order were:-*

*“(1) whether the petitioner/plaintiff is entitled for temporary injunction restraining the respondents from alienating the petition/suit schedule premises to any third parties?*

*(2) Whether the petitioner/plaintiff is entitled for temporary injunction restraining the interference of respondents / defendants in respect of the petition/suit schedule property?*

*(3) What is the result of both petitions?”*

*(d) The inconsistencies, the prima facie evidences, the triable issues and the net result of/outcome of the I.A petition is given*

*in the court order from para lion page 9 to para 17 on page 14 is reproduced below for better appreciation.*

*"11) For deciding interlocutory application, prime facie case alone needs examination. Clause II (2) (1) of agreement of sale-cum-irrevocable power of attorney document dated 21.03.2009, is clearly indicating that physical possession of the property was delivered with mets and bounds. whereas in the heading of the document, there is addition of words "(without possession)". Learned Counsel for respondents seriously disputed these words. What is the effect of this addition can be adjudged only after collecting necessary oral or documentary evidence during trial the words "without possession" are in hand writing whereas the other words with the heading i.e. "agreement of sale-cum-irrevocable power of attorney" are computer typed. Clause XIV(L) shows that balance sale consideration of Rs.50 lakhs will be paid at the of execution of sale deed and the link documents along with possession will be handed over to the vendee at the time of execution of sale deed. In para 11 of the counter affidavit filed on behalf of respondents 3 and 4 signed by one P Pratap it is mentioned that petitioner/plaintiff was supposed to hand over link documents which were shown at the time of negotiation. But at the time of preparation of document, the petitioner/plaintiff expressed that said document was misplaced. Hence, Clause XIV(L) was added. Clause XIV(L) is dealing with delivery of possession. Learned counsel for petitioner argued that possession of property is not delivered. But learned counsel for respondents argued that Clause XIV(L) is relating to delivery of document but not possession of property. when total document is read, particularly, in the light of Clause II (2) (1) delivery of possession of property can be prima facie believed. Learned counsel for the petitioner/plaintiff argued that for the figure of Rs.5,00,000/- (five erores) figure Rs.50,00,000!- (fifty lakhs) is mentioned and to prove payment of amount, burden lies on the respondent/defendants, therefore, at this prima facie stage, it can be safely taken total sale consideration is not paid and respondents/defendants are not entitled to sell the property or interfere with the possession of the petitioner/plaintiff.*

*12) Agreement of sale-cum-irrevocable power of attorney document executed by petitioner in favour of first respondent is dated 21.03.2009. First respondent is constituted as irrevocable power of attorney agent by virtue of the said document. Under sale deed dated 3-4-2009, property was sold by first respondent to respondents 3 and 4. First respondent executed document in favour of respondents 3 and 4 representing the petitioner. It is not the case of the*

*petitioner/plaintiff that power of attorney was cancelled before execution of the sale deed by the first respondent in favour of respondents 3 and 4. Legal notice was got issued by the petitioner on 14.01.2012. As per the recitals in the teoe! notice, transaction between the petitioner and respondents ought to have been completed within 30 days. Further, a close reading of legal notice dated 14-01-2012 testifies that petitioner/plaintiff woke up on receipt of notice from Income Tax Department. petitioner/plaintiff remained silent till January, 2012. When agreement of sale cum irrevocable general power of attorney document was not acted upon by respondent no.1 as per schedule why there was no action by plaintiff is a million dollar worth question left unanswered. Sale deed executed by first respondent in favour of respondents 3 and 4 is a registered document. Constructive notice u/s 3 of Transfer of Property Act can be imputed to the petitioner.*

*13) What is the effect of recital a to delivery of possession and as to balance sale consideration at Rs.50,00,000/- are triable issues but they are prima facie running against the petitioner. Likewise, why link documents are not collected? Why original agreement of sale cum general power of attorney document not filed into Court by respondents? why the respondents allowed adding of words "(without possession)"? And why there 'ere no legal steps for payment of balance of Rs.50,00,00/- and for recovery of link documents are the important questions need answer from the respondents.*

*14) At the best, petitioner/plaintiff can be considered as an unpaid vendor for the present. Right of an unpaid vendor is to claim payment of unpaid part of consideration. Now petitioner is seeking cancellation of document on the grounds of breach of contract and non-payment of entire agreed sale consideration. This is a matter to be decided after full trial. to the extent of preservation of status quo in respect of alienation the prime facie case, balance of convenience and irreparable loss are found favouring petitioner. But with regard to possession there are contradictory recitals "in the document relied on by the petitioner and there is no clarify with regard to the stands of both sides burden cannot be thrown completely on respondents/defendants and petitioner/plaintiff shall succeed or fail on the strength of merits in his own case. There is long silence on the part of the petitioner/plaintiff. There is no material showing that petitioner/plaintiff is still in possession of the property. On the contrary, registered document executed by first respondent in favour of respondents 3 and 4 on behalf of petitioner and in the capacity of general power of attorney is showing delivery of possession. When all the facts and*

*circumstances are considered, prime facie case for granting injunction restraining interference in response of the petitioner's possession is not found at petitioner failed to prove his exclusion possession over the property.*

*15) Observations made above in respect of the points framed are limited only to the extent of considering the prima facie case and for the disposal of the present applications alone. Since there are many other triable questions as to what is the total sale consideration paid by first respondent to the petitioner? Whether there is any breach of trust? and how the property was enjoyed by the parties after transactions covered by the questioned documents, at this juncture, this Court finds that there is no prime facie case or balance of convenience in favour of the petitioner for granting injunction concerning possession of the suit schedule property, however, to the extent of injunction restraining alienation, this court finds that the respondents can be restrained from further alienating the property in order to preserve status quo and to avoid multiplicity of litigation and also to protect the interest of third party bonafide purchasers.*

*16) In view of the discussion made above, Point no.1 is decided in favour of the petitioner/plaintiff concluding that petitioner/plaintiff is entitled for temporary injunction restraining the respondents from alienating the petition/suit schedule property to any third parties and Point no.2 is decided against the petitioner/plaintiff concluding that petitioner/plaintiff failed to make out prime facie case, balance of convenience and irreparable loss in respect of interference over the petition/suit schedule property”.*

*17) In the result, I.A. No. 00/2012 is allowed. Temporary injunction is granted restraining the respondents from alienating suit/petition schedule property till the disposal of suit”.*

*(e) The appellant had filed a further petition seeking stay of the above order of the Addnl. Chief Judge of City Civil Court before the Hon'ble A.P. High Court in C.M.A No 239 of 2013 on 27/02/2013. .*

*10.0 It is clear from the above that the appellant's claims were not accepted and allowing of the first I.A was only to avoid further entanglement and litigation with avoidable complications to bonafide third parties (para 15 of the order).*

*It is also clear that in the opinion of the Hon'ble Addnl. Chief Judge, the appellant at best can be considered as an unpaid vendor and his right is to claim the unpaid portion of consideration (para 14 of the order).*

*As regards the claim for cancellation of document on the grounds of breach of contract and nonpayment, the judge felt it can be only decided after a full trial. The judge had also felt that prima facie the appellant failed to prove his exclusive possession over the property (para 14 of the order).*

*11.0 The appellant's plea that the assessment made be annulled is now considered. The asst. order is legally correct and was based on material available in course of search. The rate difference between 5.50 crores and 6 crores that the appellant is making much issue of, is not a flaw at all. In fact, between an agreement rate of 5.50 crore and the actual regd. sale deed rate of Rs 6 crores, the actual sale deed rate always has to be accepted and considered. The value mentioned in the sale agreement ceded ground to the actual rate mentioned in the regd sale deed. Any Assessing officer would examine further only when the actual-value in the registered sale deed is less than the value in the sale agreement-not otherwise.*

*As regards the claim that the sale was done behind the back of the appellant and he was "cheated" by the GPA holder, M/s Aashi realtors, the AO was never even aware of such claims since no one represented before him either in person or even in written submissions. Thus there is nothing wrong in the assessment perse to be annulled as submitted.*

*12.0 The whole matter of sale is subjudice now. However, as the Addnl. Chief Judge remarked, the appellant (petitioner before the court) is at best an unpaid vendor and can make a claim for settlement of his dues".*

4. We have given our thoughtful consideration to rival contentions against and in support of the correctness of the impugned addition. Case file sufficiently indicates that the Revenue's endeavour all along has been to treat the assessee's general power of attorney "GPA" document dt.21-03-2009 as "transfer" within the meaning of Section 2(47) of the Act giving rise to the capital gains addition of Rs.5,84,34,495/- The taxpayer, on the other hand, has been all along been claiming

that the said power of attorney is an instance of alleged cheating the transferee namely M/s.Aashi Realtors, wherein the latter has paid only Rs.50 lakhs and therefore, on the balance consideration itself has not been received till date, both the lower authorities have erred in law and on facts in treating it as a valid "transfer" within the meaning of the Act. Learned counsel further invited our attention to the pendency of civil proceedings between the assessee and the vendee (supra).

5. We have given our thoughtful consideration to foregoing rival pleadings. We *prima facie* notice that the assessee's vendee herein has not paid the full amount of Rs.5.50 crores since only an amount of Rs.50 lakhs has been received. There is no material to the contrary in the case records. We make it clear that this is not the Revenue's case that the assessee has in fact received the balance sum post-facto the CIT(A)'s order passed way back on 30-12-2013 under challenge as well. And the clinching fact further remains that once the assessee has not even received the balance consideration, the said entire amount could not be brought to tax in his hands. We thus confirm learned lower authorities' action to the extent of the actual receipt sum of Rs.50 lakhs only which deserves assessment being non-refundable in nature.

Faced with this situation, we deem it appropriate to restore the instant sole issue of long term capital gains addition to the tune of Rs.5,34,34,495/-; back to the CIT(A) for his afresh detailed adjudication keeping in mind not only the relevant facts and circumstances of the transferee's alleged failure in not paying the balance consideration but also the

final outcome of the civil proceedings to this effect as per law, within three effective opportunities of hearing. The assessee or his learned authorised representative shall appear before the CIT(A) on or before 30-09-2021 with all the relevant details to be subjected to necessary factual verification within three effective opportunities of hearing.

6. This assessee's appeal is treated as allowed for statistical purposes in above terms.

*Order pronounced in the open court on 11<sup>th</sup> June, 2021*

Sd/-  
**(LAXMI PRASAD SAHU)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(S.S.GODARA)**  
**JUDICIAL MEMBER**

Hyderabad,  
Dated: 11-06-2021

TNMM

*Copy to :*

*1.Sri Bobba Prasad, 6-3-354/8/2/B, Hindi Nagar, Punjagutta, Hyderabad.*

*2.The Asst.Commissioner of Income Tax, Central Circle-3, Hyderabad.*

*3.CIT(Appeals)-VII, Hyderabad.*

*4.CIT-Central, Hyderabad.*

*5.D.R. ITAT, Hyderabad.*

*6.Guard File.*