COMMISSIONER OF INCOME TAX

v.

BALBIR SINGH MAINI

(Civil Appeal No. 15619 of 2017)

OCTOBER 04, 2017

[R. F. NARIMAN AND SANJAY KISHAN KAUL, JJ.]

Income Tax Act, 1961:

ss.2(47)(v) and (vi), 45 and 48 – Capital gains tax – Exigibility to – Assessees were members of a Co-operative Housing Society – Societies entered into Joint Development Agreement (JDA) with Developers – Developers were required to make payment in four instalments – Developers made payments to the assessees only upto second instalment and 7.7 acres of land out of the total 21.2 acres of land was conveyed – The said paid amount suffered capital gains tax for assessment years 2007-2008 and 2008-2009 – Further instalments were never paid as the project got interdicted by judicial orders and no other conveyance of the remaining land took place as per the JDA – Assessing Officer held that the assessees were liable to capital gains tax also in respect of the remaining 13.5 acres of land for which no consideration had been received because physical and vacant possession of the land had been handed over and the same would tantamount to "transfer" within the meaning of ss.2(47)(ii), (v) and (vi) of Income Tax Act – Appellate Authority as well as Appellate Tribunal of Assessing Officer upheld the order of Assessing Officer – High Court decided in favour of the assessees holding that no possession had been given of the land in part performance of JDA so as to fall within the domain of s. 53A of Transfer of Property Act, 1882 and that in absence of registration of JDA, having been executed after 24.9.2001, the agreement did not fall u/s. 53A and consequently u/s. 2(47)(v) – On appeal, held: In order to qualify as a "transfer" of a capital asset u/s. 2(47)(v) of 1961 Act, there must be a "contract" enforceable in law u/s. 53A of 1882 Act – Under ss. 17(IA) and 49 of Registration Act, 1908, the contract (JDA) which was executed after 24.9.2001, since unregistered, cannot be taken cognizance of, for the purpose specified in s. 53A of 1882 Act – Therefore, no "transfer" can be said to have taken place under JDA – The assessees did not acquire

A *any right to receive income and hence there was no profit or gain arising from the transfer of a capital asset to be brought to tax u/s. 45 r/w. s. 48 – Transfer of Property Act, 1882 – s. 53A – Registration Act, 1908 – ss. 17(IA) and 49.*

Transfer of Property Act, 1882:

B *s.53A – Nature of – Held: Protection provided u/s. 53A is only a shield, to be resorted to as a right of defence.*

s. 53A [as amended by Registration and Other Related Laws (Amendment) Act, 2001] – Applicability of – Held: After the amendment, if any agreement/contract is not registered, it shall have
C *no effect in law enforceable under 53A – Registration Act, 1908 – ss.17(IA) and 49.*

Dismissing the appeals, the Court

HELD: 1. A reading of the Joint Development Agreement (JDA) shows that, it is essentially an agreement to facilitate
D **development of 21.2 acres so that the developers build at their own cost, after obtaining necessary approvals, flats of a given size, some of which were then to be handed over to the members of the society. Payments were also to be made by the developer to each member in addition to giving each member a certain number of flats depending upon the size of the member's plot**
E **that was handed over. Payments under the third instalment were only to be made after the grant of approvals and not otherwise, and that it is an admitted position that this was never done because no approvals could be obtained as the High Court ultimately interdicted the project. Also, the termination clause shows that**
F **in the event of the JDA being terminated, whatever parcels of land have already been conveyed, will stand conveyed, but that no other conveyances of the remaining land would take place. [Para 16] [1089-A-C]**

2. Section 53A was inserted by the Transfer of Property
G **(Amendment) Act, 1929 to import into India the equitable doctrine of part performance. The protection provided under Section 53A is only a shield, and can only be resorted to as a right of defence. [Paras 18, 19] [1091-A, E-F]**

Shrimant Shamrao Suryavanshi & Anr. v. Pralhad
H *Bhairoba Suryavanshi (D) by LRs. & Ors.* **(2002) 3 SCC**

676 at 682 : [2002] 1 SCR 393; *Rambhau Namdeo Gajre v. Narayan Bapuji Dhgotra (Dead) through LRs.* (2004) 8 SCC 614 : [2004] 3 Suppl. SCR 817 – referred to. A

3. Initially an agreement of sale which fulfilled the ingredients of Section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in Section 53A of the Transfer of Property Act, 1882 and Sections 17 and 49 of the Registration Act, 1908. By the aforesaid amendment, the words "the contract, though required to be registered, has not been registered, or" in Section 53A of the 1882 Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. [Para 19] [1091-F-H; 1092-A] B C D

4. The effect of the amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act, 1908 shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A of Transfer of Property Act, 1882. [Para 20] [1092-F-H; 1093-A] E F G

5. Sub-clause (v) of Section 2(47) of the Income Tax Act is not attracted on the facts of the present case. The ITAT was not correct in referring to the expression "of the nature referred to H

A in Section 53A" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains B all the six features mentioned in **Shrimant Shamrao Suryavanshi* case that the Section applies, and this is what is meant by the expression "of the nature referred to in Section 53A". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though C registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "of the nature referred to in Section 53A" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. Since there is no contract in the eye of law in force under Section 53A after 2001, unless the said contract is D registered, and since the JDA was never registered and therefore has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document. [Para 20] [1093-A-D]

E **Shrimant Shamrao Suryavanshi & Anr. v. Pralhad Bhairoba Suryavanshi (D) by LRs. & Ors.* (2002) 3 SCC 676 at 682 : [2002] 1 SCR 393 – referred to.

6. However, the High Court was not correct in holding that Section 2(47)(vi) will not apply for the reason that there was no change in membership of the society. Under Section 2(47)(vi), F any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview. The High Court has not adverted to the expression "or in any other manner whatsoever" in sub-clause (vi), which would show that it is not necessary that the transaction refers to the G membership of a co-operative society. [Para 21] [1093-F-H]

7. The object of Section 2(47)(vi) appears to be to bring within the tax net a *de facto* transfer of any immovable property. The expression "enabling the enjoyment of" takes color from the earlier expression "transferring", so that it is clear that any H transaction which enables the enjoyment of immovable property

must be enjoyment as a purported owner thereof. The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact. [Para 22] [1094-A-B] A

Coastal Paper Limited v. Commissioner of Central Excise, Visakhapatnam (2015) 10 SCC 664 : [2015] 8 SCR 486 – referred to. B

8. A reading of the JDA in the present case would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership to the developer. At the highest, possession alone is given under the agreement, and that too for a specific purpose -the purpose being to develop the property, as envisaged by all the parties. Therefore, this clause will also not rope in the present transaction. [Para 23] [1094-C] C

9. It is correct that some some real income must "arise" on the assumption that there is transfer of a capital asset. This income must have been received or have "accrued" under Section 48 as a result of the transfer of the capital asset. In the present case, the income from capital gain on a transaction which never materialized is, at best, a hypothetical income. It is admitted that, for want of permissions, the entire transaction of development envisaged in the JDA fell through. The assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the necessary permissions being obtained. In point of fact, income did not result at all for the aforesaid reason. This being the case, it is clear that there is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under Section 45 read with Section 48 of the Income Tax Act. Thus, there was no debt owed to the assessees by the developers and therefore, the assessees have not acquired any right to receive income under the JDA. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract Sections 45 and 48 of the Income Tax Act. [Paras 24, 27] [1094-D-E; 1096-D-E, F-G] D E F G

E.D. Sassoon & Co. Ltd. v. CIT [1955] 1 SCR 313; *Commissioner of Income Tax v. Excel Industries*, (2014) 13 SCC 459 : [2013] 10 SCR 490 – relied on. H

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Case Law Reference

[2002] 1 SCR 393	**referred to**	**Para 18**
[2004] 3 Suppl. SCR 817	**referred to**	**Para 19**
[2015] 8 SCR 486	**referred to**	**Para 22**
[1955] 1 SCR 313	**relied on**	**Para 25**
[2013] 10 SCR 490	**relied on**	**Para 26**

B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 15619 of 2017.

From the Judgment and Order dated 22.07.2015 of the High Court C of Punjab and Haryana at Chandigarh in Income Tax Appeal No. 293 of 2013(O&M).

WITH

C. A. Nos. 15622, 15624, 15620, 15639, 15637, 15621, 15643, 15623, 15657, 15650, 15633, 15628, 15636, 15625, 15645, 15630, 15634, D 15626, 15627, 15644, 15641, 15631, 15635, 15649, 15640, 15651, 15638, 15629, 15632, 15642, 15646, 15648, 15667, 15653, 15656, 15663, 15665, 15647, 15666, 15662, 15655, 15658, 15669, 15661, 15652, 15672, 15664, 15654, 15660, 15659, 15673, 15676, 15671, 15674, 15675, 15677, 15668 and 15670 of 2017

E Rupesh Kumar, D. L. Chidanand, Manish Pushkarna, Ms. Rachna Shrivastava, Ms. Anil Katiyar, Advs. for the Appellant.

Ms. Ajay Vohra, Narender Hooda, Pankaj Jain, Ms. Kavita Jha, Rohit Jain, Vaibhav Kulkarni, Udit Naresh, Rajat Rathee, Aviral Dhirendra, Dr. Surender Singh Hooda, Divya Suri, Sachin Bhardwaj, Deepanshu F Jain, Gaurav Mittal, Ms. Manju Jaitley, Deepak Chopra, Harpreet Singh Ajmani, Sheel Vardhan, Kishore Kunal, A. N. Arora, Advs., for the Respondents.

The Judgment of the Court was delivered by

G **R. F. NARIMAN, J.** 1. Leave granted.

2. This judgment shall dispose of a batch of civil appeals, as learned counsel appearing for both sides have submitted that common substantial questions of law are involved in all these appeals.

3. The present appeals arise from a judgment of the Punjab and H Haryana High Court where a large number of appeals were disposed of

under Section 260A of the Income Tax Act, 1961. The following substantial questions of law were raised before the High Court:

"i) Whether the transactions in hand envisage a "transfer" exigible to tax by reference to Section 2(47)(v) of the Income Tax Act, 1961 read with Section 53-A of the Transfer of Property Act, 1882?

ii) Whether the Income Tax Appellate Tribunal, has ignored rights emanating from the JDA, legal effect of non registration of JDA, its alleged repudiation etc.?

iii) Whether "possession" as envisaged by Section 2(47)(v) and Section 53-A of the Transfer of Property Act, 1982 was delivered, and if so, its nature and legal effect?

iv) Whether there was any default on the part of the developers, and if so, its effect on the transactions and on exigibility to tax?

v) Whether amount yet to be received can be taxed on a hypothetical assumption arising from the amount to be received?"

4. For the sake of convenience, we have referred to the facts of Civil Appeal arising out of Special Leave Petition (Civil) No.1565 of 2016 (**Commissioner of Income Tax v. Charanjit Singh Atwal**).

5. The Respondents before us are members of the Punjabi Cooperative Housing Building Society Ltd. The society consisted of 95 members and was the owner of 21.2 acres, of which 500 square yards plots were held by 65 members, 1000 square yards plots by 30 members and the remaining 4 plots of 500 square yards each were being retained by it. The bone of contention in the present appeal is a tripartite Joint Development Agreement (JDA) dated 25.02.2007 for development of 21.2 acres of land in the village Kansal. This JDA was entered into between the owner i.e. Punjabi Cooperative Housing Building Society Ltd., Hash Builders Pvt. Ltd., Chandigarh (HASH) and Tata Housing Development Company Ltd. (THDC). Under the JDA, it was agreed that HASH and THDC viz., the developers, will undertake to develop 21.2 acres of land owned and registered in the name of the society. The agreed consideration was to be disbursed by THDC through HASH to each individual member of the society, and different amounts and flats

A were payable and allotable to members having different plot sizes. The developers were to make payments in four instalments. A sum of Rs.3.87 crores was paid on execution of the JDA. Rs.15.48 crores was to be paid against a registered sale deed for land of an equivalent value of 3.08 acres, earmarked on the demarcation plan annexed to the JDA, which was effected by a registered conveyance dated 02.03.2007. The B second instalment payment, being Rs. 23.22 crores, was for land of an equivalent value of 4.62 acres, also earmarked on the demarcation plan, which was effected by a registered deed of conveyance dated 25.04.2007. The third instalment payment of Rs.31.9275 crores was to be made within six months from the date of execution of the agreement or within C two months from the date of approval of plans/design and drawings and grant of the final license to develop, whichever was later. This was to be for land of an equivalent value of 6.36 acres, also earmarked on the demarcation plan. The balance payment of Rs.31.9275 crores was to be made within two months from the date of the last payment, towards full and final settlement of the entire payment of Rs. 106.425 crores, for D which a registered sale deed for land of an equivalent value being 7.14 acres, also earmarked on the demarcation plan, was to be conveyed.

6. The developers made payments only up to the 2nd instalment payment, and 7.7 acres of land was conveyed as mentioned, which we have been reliably informed, has since suffered payment of capital gains E tax for assessment years 2007-2008 & 2008-2009. The problem which arose for the subsequent assessment years was that, due to pending proceedings, first in the Punjab and Haryana High Court and thereafter in the Delhi High Court, the necessary permissions for development were not granted, as a result of which the JDA did not take off the F ground. For the previous year relevant to the assessment year 2007-08, the assessee filed an original return of income on 07.12.2007, declaring an income of Rs.2,50,171/-. The return of income tax for the assessment year was later revised, on 07.10.2009, declaring an income of Rs.30,08,606/-, which included capital gains of Rs.27,58,436/-. According to the assessee, Rs.36 lakhs received in the subsequent assessment year G 2008-09 were also offered for tax under the head "capital gains".

7. The Assessing Officer vide an order dated 30.12.2009, passed under Section 143(3) of the Act, held that since physical and vacant possession had been handed over under the JDA, the same would tantamount to "transfer" within the meaning of Sections 2(47)(ii), (v)

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and (vi) of the Income Tax Act. He further held that, in the case of an assessee owning a 1000 square yards plot, the full value of consideration would be Rs.3.675 crores less cost of acquisition of Rs.12,81,724/-. The long term capital gain was, therefore, stated to be Rs.3,54,68,276/-.

8. The Commissioner (Appeals) dismissed the appeal upholding the order passed by the Assessing Officer. Aggrieved by the order, the assessee filed appeal before the Income Tax Appellate Tribunal (ITAT), which was also dismissed by the ITAT.

9. In the impugned judgment by the High Court under Section 260A of the Income Tax Act, the High Court allowed all the appeals of the assessees and held:

> "1. Perusal of the JDA dated 25.02.2007 read with sale deeds dated 02.03.2007 and 25.04.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties had agreed for pro-rata transfer of land.
>
> 2. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.02.2007 so as to fall within the domain of Section 53A of 1882 Act.
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> 3. The possession delivered, if at all, was as a licencee for the development of the property and not in the capacity of a transferee.
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> 4. Further Section 53A of 1882 Act, by incorporation, stood embodied in Section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.02.2007 having been executed after 24.09.2001, the agreement does not fall under Section 53A of 1882 Act and consequently Section 2(47)(v) of the Act does not apply.
>
> 5. It was submitted by learned counsel for the assessee-appellant that whatever amount was received from the developer, capital gains tax has already been paid on that and sale deeds have also been executed. In view of cancellation of JDA dated 25.02.2007, no further amount has been received and no action thereon has been taken. It was urged that as and when any amount is received, capital gains tax shall be discharged

A thereon in accordance with law. In view of the aforesaid stand, while disposing of the appeals, we observe that the assessee-appellants shall remain bound by their said stand.

6. The issue of exigibility to capital gains tax having been decided in favour of the assessee, the question of exemption under Section
B 54F of the Act would not survive any longer and has been rendered academic.

7. The Tribunal and the authorities below were not right in holding the assessee-appellant to be liable to capital gains tax in respect of remaining land measuring 13.5 acres for which no
C consideration had been received and which stood cancelled and incapable of performance at present due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the appeals are allowed."

10. Learned counsel for the revenue has argued that the Assessing
D Officer and the CIT (Appeals), as well as the ITAT, were all correct in bringing capital receipts under the JDA to tax as 'capital gains'. According to the learned counsel, the present case is squarely covered by Section 2(47)(v) as Section 53A of the Transfer of Property Act, 1882 is applicable to the transaction under the JDA. According to the learned counsel, the transferee in the present case has, as part
E performance of the contract, taken possession of the entire property under the JDA, and has done various acts in furtherance of the contract, such as paying the EMD and the first two instalments, and that the transferee was willing to perform his part of the contract which unfortunately could not ultimately be performed because of the orders
F passed by the High Court, because of which necessary permissions for development of the property could not be obtained. He further argued that the fact that, after 2001, registration of agreements under Section 53A is necessary in law would not stand in his way, as Section 2(47)(v) only refers to a contract "of the nature" of Section 53A of the Transfer of Property Act and that, therefore, the ITAT was right in stating that
G since Section 53A had been incorporated into Section 2(47)(v) of the Income Tax Act, it was unnecessary, for the purpose of the Income Tax Act, to have such an agreement registered. He further argued that the ITAT was correct in finding that possession had in fact been handed over under the JDA, as otherwise, THDC could not have been authorized
H to amalgamate the project with any other project in an adjacent or adjoining

area. As THDC was authorized to hand over possession of the property or portions thereof to the authority only for this purpose, it is clear that possession of the land had in fact been handed over. Further, all other ingredients of Section 53A of the Transfer of Property Act were met and the ITAT was also correct in stating that the developers were ready and willing to perform their part of the contract. He, therefore, urged us to uphold the ITAT order and set aside the High Court judgment.

11. On the other hand, Shri Vohra, learned counsel for the Respondents, argued that the High Court was correct in holding that Section 2(47)(v) would not apply in the absence of registration of the JDA, which admittedly was not done. According to him, no possession was ever handed over, as only a license to develop the property was given by the JDA to the developers. According to the learned counsel, the High Court was also correct in stating that the developers were not ready and willing to perform their part of the agreement and that, therefore, none of the ingredients of Section 53A of the Transfer of Property Act were met on the facts of this case. According to the learned counsel, what was appreciated by the High Court and missed by the ITAT was the fact that only two parcels of land, admeasuring 7.7 acres, were conveyed, for which capital gains tax has been paid. Since the rest of the project could not go through for want of various permissions, it is clear that no capital gain, in fact, arose or accrued to the assessees. According to the learned counsel, under Section 45 read with Section 48 of the Income Tax Act, profits and gains should "arise" from the transfer of a capital asset and income should be computed after full value of the consideration has been received or accrued. Since no income was received or had accrued, as the project was finally terminated by the owners on 13.06.2011, it was clear that the High Court judgment was correct. Further, sub-clause (vi) of Section 2(47) also would not apply for the reason stated by the High Court, which is that it was not attracted because there was no change in membership of the society.

12. Having heard learned counsel for the parties, it is important to first set out the important clauses of the JDA dated 25.02.2007.

13. The JDA, as has been stated above, was between the housing society, who was referred to as the owner, and two developers, namely Hash Builders Pvt. Ltd., Chandigarh and Tata Housing Development Company Ltd. Strewn throughout the agreement is the fact that the owner, being absolutely seized and possessed of the property, was

A desirous of assigning its development rights for developing the same. This is clear, *inter alia,* from sub-clause (E) of the agreement which reads as under:

> "E. The Owner being absolutely seized and possessed of and otherwise well and sufficiently entitled to the property and is
B desirous of assigning its Development Rights in the Property for developing the same including transferring the title in the property, by utilizing the available Floor Space Index (FSI) for group housing commercial and retail development as per the applicable municipal building bye laws in force, but has no expertise or means to do so and had invited/ quotations from builders/
C contractors/ developers to Develop the property vide advertisements published in The Tribune dated 31-05-06 HASH approached the Owner and submitted the proposal to the owners for development of the Property and after prolonged negotiations finalized the term of development. Since HASH did not have the
D sufficient means to develop the Property, HASH have approached THDC for developing the property by constructing thereupon buildings and / or structures to be used for inter-alia residential public use, commercial use, institutional use, club house, parking and other amenities, utilities, services and any other kinds of structures/ and necessary amenities, infrastructure thereto as
E may be decided by THDC (hereinafter referred as the 'Premises') and all work including survey, investigations, studies, design, planning, financing, constructing, operating, maintenance and marketing for sale/ lease/transfer to prospective purchasers/ lessees/transferees for residential and / or any other authorized
F user as may be determined by the THDC(hereinafter referred to as the 'Project'). It is expressly agreed to between the parties that the role of HASH as a developer shall be as specifically set out in this Agreement. It is expressly agreed to between the parties that the role THDC as a developer shall be to execute, implement, develop and complete the project on the Property."

G Under cause 2, the project is stated to be:

> "2.1 The Owner herby irrevocably and unequivocally grants and assigns in perpetuity all its rights to develop, construct, mortgage, lease, license, sell and transfer the Property

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alongwith any and all the construction, Premises, hereditament, easements, trees thereon in favour of THDC for the purpose of development, construction, mortgage, Sale, transfer, lease, license and /or exploitation for full utilization of the Property ('Right') and to execute all the documents necessary to carry out, facilitate and enforce the Right in the Property including to execute Lease Agreement, License Agreements, Construction Contracts, Supplier Contracts, Agreement for Sale, Conveyance, Mortgage Deed, Finance document and all documents and Agreements necessary to create and register the mortgage, conveyance, lease deeds, License agreement, Power of Attorneys, affidavits, declarations, indemnities and all such other documents, letters as may be necessary to carry out, facilitate and enforce the Right and to register the same with the revenue/ Competent authorities and to appear on our behalf before all authorities, statutory or otherwise, and before any court of law (the 'Development Rights'). The owner hereby hands over the original title deeds of the Property as mentioned in the list Annexed hereto and marked as Annexure IV and physical, vacant possession of the Property has been handed over to THDC simultaneous to the execution and registration of this Agreement to develop the same as set out herein.

It is hereby agreed and confirmed that what is stated in the recitals hereinabove, shall be deemed to be declarations and representations on the part of the Owner as if the same were set out herein in verbatim and forming an integral part of this Agreement.

2.2 The Project shall comprise of development/ construction of the Property into the Premises as permissible under Punjab Municipal Building Bye-laws/Punjab Urban Development Authority or any other Competent authority by the Developer at them own cost and expense. The project shall be developed as may be sanctioned by the concerned local authority i.e. Department of Local Bodies, Punjab/ Punjab Urban Planning and Development Authority (PUDA) or any other Competent Authority.

A 2.3 The Owner hereby irrevocably and unequivocally grants and assigns all its Development Rights in the Property to THDC to develop the Property and undertake the Project at its own costs, efforts and expenses whereupon the Developers shall be entitled to apply for and obtain necessary sanctions, licenses and permissions from all the Concerned Authorities for the commencement, development and completion of the Project on the Property."

14. The consideration clause in the agreement is Clause 4, by which a sum of Rs.106.425 crores, plus 129 flats consisting of a super area of 2250 square feet, was to be made over to the society and its members. As stated hereinabove, Rs.3.87 crores was paid as earnest money on execution of the agreement, and Rs.15.48 crores was paid soon thereafter. The next instalment of Rs.23.22 crores was also paid by 25.04.2007. As consideration for both instalments, land admeasuring 7.7 acres was ultimately conveyed. The third instalment, and the balance payment, were payable in the following terms.

"(iv) Payment being Rs. 31,92,75,000/- (Rupees Thirty one crores ninety two lacs seventy five thousand only) calculated @ Rs 24,75,000/- (Rs. Twenty four lacs seventy five thousand only) per plot holder of 500 Sq. yard and Rs 49,50,000/-(Rupees Forty nine lacs fifty thousand only) per plot holder of 1000 Sq. yards, to be made to the Owner and / or the respective members of the Owner (as the case may be), within six (6) months from the date of execution of this Agreement or within two (2) months from the date of approval of the plans/ Design and Drawings and grant of the final license to develop whereupon the construction can commence, whichever is later against which the Owner shall execute a registered sale deed for land of equivalent value being 6.36 Acres out of the Property as demarcated in green colour (also hatched in green colour) in the Demarcation Plan annexed hereto as Annexure V and bearing Khasra nos. 123/15, 123/6, 123/7 (balance part), 123/3 (part), 123//4//1/1, 123///4//1/2, 123//4/2, 123//5/1, 123//5/2, 123//5/3, 112/24 (part);

(v) And the Balance Payment being Rs. 31,92,75,000/- (Rupees Thirty one crore ninety two lacs seventy five thousand only) calculated @ Rs. 24,75,000/- (Rs. Twenty four lacs seventy five

thousand only) per plot holder of 500 Sq. yards and Rs. 49,50,000/-,(Rupees Forty nine lacs fifty thousand only) per plot holder of 1000 Sq yards, to be made to the Owner and /or the respective members of the Owner (as the case may be), within two (2) months from the date of the Payment made as per Clause 4.1 (iv) mentioned hereinabove, towards full and final settlement of payment, after adjustment of the above said Rs. 3,87,00,000/- (Rupees Three Crores eighty seven lacs only) paid as adjustable Advance/ Earnest Money as mentioned hereinabove, against which the Owner shall execute a registered sale deed for land of equivalent value being 7.14 Acres being the balance out of the Property as demarcated in orange colour (also hatched in orange colour) in the Demarcation Plan annexed hereto as Annexure V and bearing Khasra nos. 123/3 (balance part), 112/24 (balance part), 112/25,113///21//1, 122//1/1, 122//1/2, 122//1/3, 122//10/1, 122//10/2, 122//11/1, 122//11/2, 122//12, 122/19, 122//22/1, 122//22/2, 122//23//2/1 (bal. part), 122//17/3/2 (balance part)."

Under clause 9, transfer of ownership/rights of property are stated as follows:

"9.2 The owner shall execute in favor of THDC, the sale deeds in accordance with the provisions of Clause 4.1(ii) to Clause 4.1 (v) of this Agreement and execute all other necessary documents and papers to complete the aforesaid transaction.

9.3 That all the original title deeds pertaining to property as mentioned in Annexure IV has been handed over to THDC by the Owner at the time of signing of this Agreement and in furtherance of the Common interest of the Parties for the development of the Project and except the Sale Transaction Made by the Owner in favour of THDC as set out in Clause 4.1 above. THDC hereby undertake and assure the Owner that they shall use the title deeds only for the purpose of furtherance of the Project in the manner that it does not adversely effect the Owner/ Allottee in any manner whatsoever."

Under Clause 10, financial assistance can be raised by mortgaging the property. Clause 10 reads as follows:

A "10. LOANS/ FINANCIAL ASSISTANCE

The Owner hereby gives their express consent to THDC to raise finance of the development and completion of the Project on the Property by way of mortgaging the Property and the proposed structures to the lending banks/ financial institutions by deposit
B of the title deeds with the lending bank and / or financial institution. The Owner shall, in no way, be liable for the repayment of the loan. THDC shall have the right to negotiate, create and sign necessary forms, deeds or documents for the variation of mortgage, charge or encumbrance on the Property by depositing the original title deeds of the Property with any financial institution/
C bank etc. THDC undertakes that the finance raise by way of mortgage of the Property of the Owner, with the bank/financial institutions shall be utilized only for the purpose of development of the project and shall keep the Owner informed in writing about the charge created on the Property and keep the Owner
D indemnified against all claims, costs for the bank / financial institutions from when. THDC may have availed loan facility in respect of the Project, in case, the Project is not completed in terms of this Agreement."

15. The JDA could, under clause 14, be terminated under certain
E circumstances by all the parties thereto. Since the owner alone terminated the aforesaid JDA, the relevant clause is clause 14(iv), which reads as under:

"14(iv). The Owner shall have the right to terminate the Agreement only in the event of default by the Developers for
F making the Payment in accordance with the terms of this Agreement and the allotment of Flats within the time period as mentioned in this Agreement after giving Thirty (30) days written notice for rectification of such breach or any further time as may be desired by the Owner. In the event the Agreement is terminated by Owner, all the lands registered in the name of
G THDC as per the terms of this Agreement up to the date of the termination shall remain with THDC and the balance lands to be transferred to THDC as per the terms of this agreement shall not to be transferred by the Owner as per the terms of this agreement. Upon the termination, the Owner shall forfeit the
H Adjustable Advance/ Earnest Money mentioned in clause 4(i)."

16. A reading of the JDA shows that, it is essentially an agreement to facilitate development of 21.2 acres so that the developers build at their own cost, after obtaining necessary approvals, flats of a given size, some of which were then to be handed over to the members of the society. Payments were also to be made by the developer to each member in addition to giving each member a certain number of flats depending upon the size of the member's plot that was handed over. What is important to bear in mind is that payments under the third instalment were only to be made after the grant of approvals and not otherwise, and that it is an admitted position that this was never done because no approvals could be obtained as the High Court ultimately interdicted the project. Also, the termination clause is of great significance because it shows that in the event of the JDA being terminated, whatever parcels of land have already been conveyed, will stand conveyed, but that no other conveyances of the remaining land would take place.

17. The relevant sections that are necessary for us to decide the present matter are as under:

Transfer of Property Act

"53A. Part performance. - Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or

A continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

B **Income Tax Act**

Section 2 - Definitions

In this Act, unless the context otherwise requires, –

(47) "transfer", in relation to a capital asset, includes, -

C (i) to (iv) xxx xxx xxx

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

D (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

E **45. Capital gains** - (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, 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.

F **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:

G (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:"

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18. Section 53A, as is well known, was inserted by the Transfer of Property Amendment Act, 1929 to import into India the equitable doctrine of part performance. This Court has in **Shrimant Shamrao Suryavanshi & Anr. v. Pralhad Bhairoba Suryavanshi (D) by LRs. & Ors.,** (2002) 3 SCC 676 at 682 stated as follows: A

> "16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are: B
>
> (*1*) there must be a contract to transfer for consideration of any immovable property;
>
> (*2*) the contract must be in writing, signed by the transferor, or by someone on his behalf; C
>
> (*3*) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
>
> (*4*) the transferee must in part-performance of the contract take possession of the property, or of any part thereof; D
>
> (*5*) the transferee must have done some act in furtherance of the contract; and
>
> (*6*) the transferee must have performed or be willing to perform his part of the contract." E

19. It is also well-settled by this Court that the protection provided under Section 53A is only a shield, and can only be resorted to as a right of defence. See **Rambhau Namdeo Gajre v. Narayan Bapuji Dhgotra (Dead) through LRs.** (2004) 8 SCC 614 at 619, para 10. An agreement of sale which fulfilled the ingredients of Section 53A was not required to F be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in Section 53A of the Transfer of Property Act and Sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words "the contract, though required to be registered, has not been registered, or" in Section 53A of the 1882 G Act have been omitted. Simultaneously, Sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of Section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in H

A a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. Section 17(1A) and Section 49 of the Registration Act, 1908 Act, as amended, read thus:

> "17(1A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section
B 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said Section 53A."
C
> "49. Effect of non-registration of documents required to be registered. No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall-
>
> (a) affect any immovable property comprised therein, or
D
> (b) confer any power to adopt, or
>
> (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:
>
> Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property
E Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1887 (1 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

F 20. The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A
G of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no
H contract which can be taken cognizance of, for the purpose specified in

Section 53A. The ITAT was not correct in referring to the expression "of the nature referred to in Section 53A" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in **Shrimant Shamrao Suryavanshi** (supra), that the Section applies, and this is what is meant by the expression "of the nature referred to in Section 53A". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "of the nature referred to in Section 53A" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question.

21. However, the High Court has held that Section 2(47)(vi) will not apply for the reason that there was no change in membership of the society, as contemplated. We are afraid that we cannot agree with the High Court on this score. Under Section 2(47)(vi), any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview. The High Court has not adverted to the expression "or in any other manner whatsoever" in sub-clause (vi), which would show that it is not necessary that the transaction refers to the membership of a cooperative society. We have, therefore, to see whether the impugned transaction can fall within this provision.

A 22. The object of Section 2(47)(vi) appears to be to bring within the tax net a *de facto* transfer of any immovable property. The expression "enabling the enjoyment of" takes color from the earlier expression "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof.[1] The idea is to bring within the tax net, transactions, B where, though title may not be transferred in law, there is, in substance, a transfer of title in fact.

23. A reading of the JDA in the present case would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership to the developer. C At the highest, possession alone is given under the agreement, and that too for a specific purpose - the purpose being to develop the property, as envisaged by all the parties. We are, therefore, of the view that this clause will also not rope in the present transaction.

24. The matter can also be viewed from a slightly different angle. D Shri Vohra is right when he has referred to Sections 45 and 48 of the Income Tax Act and has then argued that some real income must "arise" on the assumption that there is transfer of a capital asset. This income must have been received or have "accrued" under Section 48 as a result of the transfer of the capital asset.

E 25. This Court in **E.D. Sassoon & Co. Ltd.** v. **CIT**, (1955) 1 SCR 313 at 343 held:

> "It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have F accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed *debitum in presenti, solvendum in futuro*; See *W.S. Try Ltd.* v. *Johnson (Inspector of Taxes)* [(1946) 1 AER 532 at p. 539], G

[1] The maxim "noscitur a sociis" has been repeatedly applied by this Court. A recent application of the maxim is contained in **Coastal Paper Limited v. Commissioner of Central Excise, Visakhapatnam**, (2015) 10 SCC 664 at 677, para 25. This maxim is best explained as birds of a feather flocking together. The maxim only means that a word is to be judged by the company it keeps.

H

and *Webb* v. *Stenton, Garnishees* [11 QBD 518 at p. 522 and 527]. Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him." A

26. This Court, in **Commissioner of Income Tax** v. **Excel Industries**, (2014) 13 SCC 459 at 463-464 referred to various judgments on the expression "accrues", and then held: B

"14. *First of all*, it is now well settled that income tax cannot be levied on hypothetical income. In *CIT* v. *Shoorji Vallabhdas and Co.* [*CIT* v. *Shoorji Vallabhdas and Co.*, (1962) 46 ITR 144 (SC)] it was held as follows: (ITR p. 148) C

"... Income tax is a levy on income. No doubt, the Income Tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in D bookkeeping, an entry is made about a 'hypothetical income', which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither E accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

15. The above passage was cited with approval in *Morvi Industries Ltd.* v. *CIT* [*Morvi Industries Ltd.* v. *CIT*, (1972) 4 F SCC 451 : 1974 SCC (Tax) 140 : (1971) 82 ITR 835] in which this Court also considered the dictionary meaning of the word "accrue" and held that income can be said to accrue when it becomes due. It was then observed that: (SCC p. 454, para 11)

"*11.* ... the date of payment ... does not affect the accrual of G income. The moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately."

16. This Court further held, and in our opinion more importantly, that income accrues when there "arises a corresponding liability H

A of the other party from whom the income becomes due to pay that amount".

17. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be B said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee.

18. Insofar as the present case is concerned, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement passbook, there C was no corresponding liability on the Customs Authorities to pass on the benefit of duty-free imports to the assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is, therefore, not the income of the assessee."

D

27. In the facts of the present case, it is clear that the income from capital gain on a transaction which never materialized is, at best, a hypothetical income. It is admitted that, for want of permissions, the entire transaction of development envisaged in the JDA fell through. In point of fact, income did not result at all for the aforesaid reason. This E being the case, it is clear that there is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under Section 45 read with Section 48 of the Income Tax Act.

28. In the present case, the assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the F necessary permissions being obtained. This being the case, in the circumstances, there was no debt owed to the assessees by the developers and therefore, the assessees have not acquired any right to receive income under the JDA. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract Sections 45 and 48 of G the Income Tax Act.

29. We are, therefore, of the view that the High Court was correct in its conclusion, but for the reasons stated by us hereinabove. The appeals are dismissed with no order as to costs.

H Kalpana K. Tripathy Appeals dismissed.