REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 6455-6460 OF 2017
(ARISING OUT OF SLP(C) NO(S). 17277-17282 OF 2015)

RAJ DADARKAR & ASSOCIATES .....APPELLANT(S)

VERSUS

ACIT – CC-46 .....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

The substantial questions of law which have been raised by the appellant in these appeals, which were also the questions before the High Court on which High Court has rendered the impugned judgment, are the following:

> "(1) Whether in the facts and circumstances of the case, and in law, the Tribunal erred in holding that the appellant was owner of the shopping centre within the meaning of Section 22 read with Section 27 of the Income Tax Act, 1961?

(2) Whether in the facts and circumstances of the case, and in law, the Tribunal was right in holding that the income earned by the appellant from the shopping centre was required to be taxed under the head "income from House Property" instead of the head "Profits and Gains from the Business or Profession" as claimed by the Appellant?

(3) Whether on the facts and circumstances of the case, and in law, the order of the Tribunal, confirming the action of the Respondent, is perverse inasmuch as the same is based on surmises, conjectures and suspicions by taking into account incorrect, irrelevant and extraneous consideration while ignoring relevant materials and considerations?"

2) Few facts giving the background in which aforesaid questions have arisen for consideration, may first be taken note of. These are recapitulated hereinafter:

The Maharashtra Housing and Developing Authority ("MHADA") had constructed buildings known as Shyam Sunder Cooperative Society, Ram Darshan Cooperative Society and Sindhu Cooperative Society at Jariwala Compound Market, Opposite Navjivan Post Office, Lamington Road, Mumbai – 400088. However, there was a reservation for Municipal retail market on the plot on which MHADA had put up the construction. Therefore, MHADA handed over the ground floor [stilt portion] of the above said buildings and admeasuring around 17,925 sq. ft.

(hereinafter referred to as the “market portion”) to Market Department of Municipal Corporation Greater Bombay (“MCGB”). This land was acquired by the MCGB from the MHADA by recovering the necessary cost.

3) In 1993, the Market Department of the MCGB auctioned the market portion on a monthly license [stallage charges] basis to run municipal market. The appellant firm participated in the auction to acquire the right to conduct the market on the market portion. The appellant was the successful bidder and was handed over possession of the market portion on 28.05.1993. The terms and conditions subject to which the appellant was given the said market portion to run and maintain municipal market contained in the terms and conditions of the auction dated 11.03.1993. The premises allotted to the appellant was a bare structure, on stilt, that is, pillar/column, sans even four walls. In terms of the auction, it was the appellant who had to make the entire premises fit to be used a market, including construction of walls, construction of entire common amenities like toilet blocks, etc. Accordingly, after taking possession of the premises, the appellant spent substantial amount on additions/alternations of the entire premises, including demolishing the existing platform

and, thereafter, reconstructing the same according to the new plan sanctioned by the MCGB. [Rs. 1,83,61,488/- spent from Financial Year 1993-1994 to 2001-2002] The appellant constructed 95 shops and 30 stalls of different carpet areas on the premises under the market name “Saibaba Shopping Centre”. The appellant also obtained, in terms of the conditions of the auction, necessary registration certificate for running a business under the Shop and Establishment Act and other licenses/permissions from MCGB and other Government and semi-Government bodies for carrying on trading activities on the said premises. The appellant firm was responsible for day-to-day maintenance, cleanliness and upkeep of the market premises. The appellant also had to incur/pay water charges, electricity charges, taxes and repair charges.

Essentially, the appellant collected the following types of receipt from the sub-licensees:

(a) Compensation from sub-licensees [same rate of stallage charges and on the same terms and condition as given to the appellant the MCGB].

(b) Leave & License fees.

(c) Service Charges for providing various services, including

security charges, utilities, etc.

4) The appellant filed the returns of income and right from the year 1999 till 2004, it had been offering the income from the aforesaid shops and stalls sub-licensed by it under the head “Profits and Gains of Business or Profession” of the Income Tax Act, 1961 (hereinafter referred to as the ‘Act’). The income was also assessed accordingly. However, the case of the appellant for the Financial Year 1999-2000 was reopened by the respondent by issuing notice under Section 148 of the Act and in response to the same the appellant filed its return on 12.12.2003. Thereafter, notice under Section 143(2) of the Act dated 10.01.2005 was issued and served by the respondent. Reassessment order was framed, computed the income from the shops, and the stalls under head “Income from House Property” of the Act. The reasons given by the respondent for so computing the income under the head “Income from House Property” were:

(i) By virtue of Section 27(iiib) of the Act, the appellant was “deemed owner” of the premises as it had acquired leasehold right in the land for more than 12 years;

(ii) In agreements for sub-licensing the words “lease compensation” were used instead of “license fees” and

deposits were referred as “sub-lease deposits”. Further, in some correspondence, like loan application, etc., the words, “lease” were used;

(iii) Property tax has been levied on the appellant.

Accordingly, the respondent held that the income received by the appellant from the market stalls was assessable as “Income from House Property” under the Act.

5) Being aggrieved by the above mentioned reassessment order dated 29.03.2005, the appellant filed an appeal before the Commissioner of Income Tax (Appeals) [“CIT (Appeals)”] on 13.04.2005. The CIT (Appeals) allowed the appeal of the appellant and reversed the action of the respondent on 30.12.2005. Aggrieved by the order dated 30.12.2005 of the CIT (Appeals), the respondent as well as appellant filed appeals before the Income Tax Appellate Tribunal (“ITAT”). The ITAT reversed the order of the CIT (Appeals) and confirmed the action of the Assessing Officer vide its decision dated 10.09.2009. Being aggrieved by the order of the ITAT, the appellant preferred an appeal before the High Court. The High Court, by the impugned order dated 19.09.2014, dismissed the appeal filed by the appellant.

6) It is this judgment of the High Court against which present appeals, via Special Leave to Appeal, have been filed.

7) The learned counsel for the appellant submitted that the High Court, or for that matter the ITAT, committed grave error in approaching the entire matter from an erroneous angle. Referring to the discussion contained in the impugned judgment, the learned counsel pointed out that the High Court confined its discussion only on one aspect viz. as to whether the appellant was 'deemed owner' of the properties in question within the meaning of Section 27(iiib) of the Act and after holding it to be so, it treated the income as "income from house property". The learned counsel argued that the entire focus of the High Court was on the aforesaid aspect and, in the process, it was totally ignored that the main business of the appellant was to take the premises on rent and to sub-let those premises. Thus, sub-letting the premises was the business of the appellant firm and income earned, as a result, was the business income.

8) In order to support the aforesaid contention, Mr. Agarwal, learned counsel for the appellant, referred to the deed of partnership firm

of appellant which was constituted on 02.04.1993 under the provisions of Indian Partnership Act. He referred to the object clause of the firm as per the partnership deed, which reads as under:

> "The Partnership shall take the premises on rent and to sub-let or any other business as may be mutually agreed by the parties from time to time."

According to him, it was in furtherance of the aforesaid object that, as a business activity, the appellant participated in the auction held by a Market Department of the MCGB. Thus, the sole intention of the appellant was to establish a retail hub wherein various small retailers could come together and carry on their business in an organised and systematic manner. Thus, sub-licensing the premises was only a part of this predominant object of the appellant. This was the sole and the only activity of the appellant. The appellant, being a partnership firm, maintained full and complete records of these business activities. Right from the year 1999 till 2004, the appellant had been offering the income from the shops and stalls sub-licensed by it under the head "Profits and Gains of Business or Profession" of the Act.

9) Mr. Maninder Singh, learned Additional Solicitor General, on the

other hand, refuted the aforesaid arguments by referring to the order of the Assessing Authority and submitted that the appellant had argued before the Assessing Officer that it was not the lessee of the market area but was only a licensee and, therefore, deeming provisions of Section 27(iiib) of the Act would not apply. This argument was rightly rejected by the Assessing Officer. He also referred to the order of the ITAT which had specifically repelled the argument that this income was business income. Therefore, no question of law arises for determination.

10) We have considered the aforesaid submissions of counsel for the parties in the light of legal provisions contained in the Act. We may remark at the outset that it is not in dispute that having regard to the terms and conditions on which the leasehold rights were taken by the appellant in auction, constructed the market area thereupon and gave the same to various persons on sub-licensing basis, the appellant would be treated as deemed owner of these premises in terms of Section 27(iiib) of the Act. We may point out that the High Court took note of the provisions of Section 27(iiib) as well as Section 269UA(f) of the Act which reads as under:

"Section 27(iiib) - a person who acquires any rights

(excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause (f) of section 269UA, shall be deemed to be the owner of that building or part thereof;

Section 269UA(f) - "transfer",—

(i) in relation to any immovable property referred to in sub-clause (*i*) of clause (*d*), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such 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).

Explanation.—For the purposes of this sub-clause, a lease which provides for the extension of the term thereof by a further term or terms shall be deemed to be a lease for a term of not less than twelve years, if the aggregate of the term for which such lease is to be granted and the further term or terms for which it can be so extended is not less than twelve years ;

(*ii*) in relation to any immovable property of the nature referred to in sub-clause (*ii*) of clause (*d*), means the doing of anything (whether by way of admitting as a member of or by way of transfer of shares in a co-operative society or company or other association of persons or by way of any agreement or arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, such property."

11) Thereafter, the High Court pointed out the circumstances under which the Market Department of MCGB had auctioned the market

area wherein the appellant was the successful tenderor; the BMC permitted sub-letting of the shops and stalls in stilt portion; the appellant was permitted to carry out additions and alterations which he did; the manner in which the appellant after making necessary constructions sub-licensed to various types of traders etc. On that basis, the High Court concluded that reading of various clauses harmoniously as per which the rights were given to the appellant in the said property, pointed out towards the appellant acquiring rights in or in respect of the building or part thereof, which rights were clearly traceable to Section 269UA(f) of the Act.

12) As pointed out above, the aforesaid conclusion is not even disputed by the learned counsel for the appellant. The submission was, as noted above, even if the appellant is deemed owner of the premises in question, since the letting out the place and earning rents therefrom is the main business activity of the appellant, then the income generated from sub-licensing the market area and earned by the appellant should be treated as income from business and not income from the house property. His submission was that the dominant test has to be applied and once it is found that dominant intention behind the activity was

that of a business, the rental income would be business income. In support, Mr. Agarwal referred to the following two judgments:

(i) ***Chennai Properties and Investments Limited, Chennai*** v. ***Commissioner of Income Tax Central III, Tamil Nadu & Anr.***, (2015) 14 SCC 793.

(ii) ***Rayala Corporation Private Limited*** v. ***Assistant Commissioner of Income Tax***, (2016) 15 SCC 201.

13) Before dealing with the respective contentions, we may state, in a summary form, scheme of the Act about the computation of the total income. Section 4 of the Act is the charging Section as per which the total income of an assessee, subject to statutory exemptions, is chargeable to tax. Section 14 of the Act enumerates five heads of income for the purpose of charge of income tax and computation of total income. These are: Salaries, Income from house property, Profits and gains of business or profession, Capital gains and Income from other sources. A particular income, therefore, has to be classified in one of the aforesaid heads. It is on that basis rules for computing income and permissible deductions which are contained in different provisions of the Act for each of the aforesaid heads, are to be applied. For example, provisions for computing the income from

house property are contained in Sections 22 to 27 of the Act and profits and gains of business or profession are to be computed as per the provisions contained in Sections 28 to 44DB of the Act. It is also to be borne in mind that income tax is only One Tax which is levied on the sum total of the income classified and chargeable under the various heads. It is not a collection of distinct taxes levied separately on each head of the income.

14) There may be instances where a particular income may appear to fall in more than one head. These kind of cases of overlapping have frequently arisen under the two heads with which we are concerned in the instant case as well, namely, income from the house property on the one hand and profits and gains from business on the other hand. On the facts of a particular case, income has to be either treated as income from the house property or as the business income. Tests which are to be applied for determining the real nature of income are laid down in judicial decisions, on the interpretation of the provisions of these two heads. Wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, in case provisions of Section 22 of the Act are satisfied with primary ingredient that the

assessee is the owner of the said building or lands appurtenant thereto. Section 22 of the Act makes 'annual value' of such a property as income chargeable to tax under this head. How annual value is to be determined is provided in Section 23 of the Act. 'Owner of the house property' is defined in Section 27 of the Act which includes certain situations where a person not actually the owner shall be treated as deemed owner of a building or part thereof. In the present case, the appellant is held to be "deemed owner" of the property in question by virtue of Section 27(iiib) of the Act. On the other hand, under certain circumstances, where the income may have been derived from letting out of the premises, it can still be treated as business income if letting out of the premises itself is the business of the assessee.

15) What is the test which has to be applied to determine whether the income would be chargeable under the head "income from the house property" or it would be chargeable under the head "Profits and gains from business or profession", is the question. It may be mentioned, in the first instance, that merely because there is an entry in the object clause of the business showing a particular object, would not be the determinative factor to arrive at a conclusion that the income is to be treated as income from

business. Such a question would depend upon the circumstances of each case. It is so held by the Constitution Bench of this Court in ***Sultan Bros. (P) Ltd.*** v. ***CIT***, (1964) 5 SCR 807 and we reproduce the relevant portion thereof:

> "7. … We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. We find nothing in the cases referred, to support the proposition that certain assets are commercial assets in their very nature."

16) In view thereof, the object clause, as contained in the partnership deed, would not be the conclusive factor. Matter has to be examined on the facts of each case as held in ***Sultan Bros. (P) Ltd.*** case. Even otherwise, the object clause which is contained in the partnership firm is to take the premises on rent and to sub-let. In the present case, reading of the object clause would bring out two discernible facts, which are as follows:

(a) The appellant which is a partnership firm is to take the premises on rent and to sub-let those premises. Thus, the business activity is of taking the premises on rent and sub-letting them.

In the instant case, by legal fiction contained in Section 27(iiib) of the Act, the appellant is treated as "deemed owner".

(b) The aforesaid clause also mentions that partnership firm may take any other business as may be mutually agreed upon by the partners.

17) In the instant case, therefore, it is to be seen as to whether the activity in question was in the nature of business by which it could be said that income received by the appellant was to be treated as income from the business. Before us, apart from relying upon the aforesaid clause in the partnership deed to show its objective, the learned counsel for the appellant has not produced or referred to any material. On the other hand, we find that ITAT had specifically adverted to this issue and recorded the findings on this aspect in the following manner:

> "26. …On this issue facts available on record are that the assessee let out shops/stalls to various occupants on a monthly rent. The assessee collected charges for minor repairs, maintenance, water and electricity. As per the terms of allotment by the BMC, the assessee was bound to incur all these expenses. The assessee, in turn, collected extra money from the allottees. The assessee collected 20% of monthly rent as service charges. Such service charges were also used for providing services like watch and ward, electricity, water etc. This in our opinion was inseparable from basic charges of rent. The assessee has made bifurcation of the receipt from the, occupiers of the shops/stalls as rent and service charges. As rightly held by the Assessing Officer, decision of Hon'ble Supreme Court in the case of Shambu Investment Pvt. Ltd., 263 ITR 143 will apply. The assessee has not established that he was engaged in any systematic or organized activity of providing service to the occupiers of the shops/stalls so as to constitute the receipts from them as business income. In our opinion, the assessee received income by letting out shops/stalls; and therefore, the same has to be held as income from house property."

18) The ITAT being the last forum insofar as factual determination is concerned, these findings have attained finality. In any case, as mentioned above, the learned counsel for the appellant did not argue on this aspect and did not make any efforts to show as to how the aforesaid findings were perverse. It was for the appellant to produce sufficient material on record to show that its entire income or substantial income was from letting out of the property which was the principal business activity of the appellant. No

such effort was made.

19) Reliance placed by the appellant on the judgments of this Court in ***Chennai Properties & Investments Ltd.*** and ***Rayala Corporation (P) Ltd.*** would be of no avail. In ***Chennai Properties & Investments Ltd.*** where one of us (Sikri, J.) was a part of the Bench found that the entire income of the appellant was through letting out of the two properties it owned and there was no other income of the assessee except the income from letting out of the said properties, which was the business of the assessee. On those facts, this Court came to the conclusion that judgment of this Court in ***Karanpura Development Co. Ltd.*** v. ***CIT***, (1962) 44 ITR 362 was applicable and the judgment of this Court in ***East India Housing and Land Development Trust Ltd.*** v. ***CIT***, (1961) 42 ITR 49 was held to be distinguishable. In the present case, we find that situation is just the reverse. The judgment in ***East India Housing and Land Development Trust Ltd.*** which would be applicable which is discussed in para 8 of ***Chennai Properties & Investments Ltd.*** case and the reproduction thereof would bring home the point we are canvassing:

> "8. With this background, we first refer to the judgment of this Court in *East India Housing and Land Development Trust Ltd. case* [*East India Housing and Land Development Trust Ltd.* v. *CIT*, (1961) 42 ITR 49 (SC)] which has been relied upon by the High Court. That was a case where the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls. In those facts, the question which arose for consideration was: whether the rental income that is received was to be treated as income from the house property or the income from the business? This Court while holding that the income shall be treated as income from the house property, rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object of the company at all. The Court was therefore, of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties."

20) In ***Rayala Corporation (P) Ltd.***, fact situation was identical to the case of ***Chennai Properties & Investments Ltd.*** and for this reason, ***Rayala Corporation (P) Ltd.*** followed ***Chennai Properties & Investments Ltd.***, which is held to be inapplicable in the instant case.

21) For the aforesaid reasons, we are of the opinion that these appeals lack merit and are, accordingly, dismissed with cost.

.....J.
(A.K. SIKRI)

.....J.
(ASHOK BHUSHAN)

NEW DELHI;
MAY 09, 2017.

ITEM NO.1C COURT NO.7 SECTION IIIA
(For judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

C.A. Nos.6455-6460 of 2017
(Arising out of SLP (C) Nos. 17277-17282 of 2015)

(Arising out of impugned final judgment and order dated 19/09/2014 in ITA No. 588/2012, ITA No. 713/2012, ITA No. 720/2012, ITA No. 721/2012, ITA No. 722/2012 and ITA No. 723/2012 passed by the High Court of Bombay)

RAJ DADARKAR & ASSOCIATES ... Appellant(s)

VERSUS

ACIT - CC-46 ... Respondent(s)

Date : 09/05/2017
This matter was called on for pronouncement of judgment today.

For Petitioner(s)
Mr. Bhargava V. Desai, Adv.

For Respondent(s)
Mrs. Anil Katiyar, Adv.

Hon'ble Mr. Justice A. K. Sikri pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Ashok Bhushan.

The appeals are dismissed in terms of the signed reportable judgment.

(Nidhi Ahuja) **(Mala Kumari Sharma)**
Court Master **Court Master**

[Signed reportable judgment is placed on the file.]