

Real Infra

An e-newsletter from

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NON-REGISTRATION OF JOINT DEVELOPMENT AGREEMENT – WHETHER THERE IS A TRANSFER FOR THE PURPOSE OF CAPITAL GAINS

A JDA is executed between landowners and developers and in some cases, between the society of owners and the developers. In a typical model, the owners would enter into a joint development agreement in terms of which the developer would be responsible for carrying out the development and the owners would be entitled to a certain percentage of built up area or certain number of units or apartments.

Whether there is a transfer of a capital asset or not has been the subject matter of litigation and interpretation at various levels. Section 2(47) of the Income Tax Act defines 'transfer'. Clause (v) refers to *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.*

Decision of the Supreme Court in the case of **CIT Vs. Balbir Singh Maini** – Decided on 04.10.2017

The Supreme Court has held that

- (i) 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.
- (ii) This Court in the case of ***Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi (2002) 3 SCC 676***, has held that certain conditions have to be fulfilled if the transferee wants to defend or protect his possession under Section 53A. The conditions are:
 - There must be a contract to transfer for consideration of any immoveable property;
 - The contract must be in writing, signed by the transferor or by someone on his behalf;
 - The writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

- The transferee must in part performance of the contract take possession of the property or any part thereof;
 - The transferee must have done some act in furtherance of the contract; and
 - The transferee must have performed or be willing to perform his part of the contract.
- (iii) The amendments made to Section 53A of the Transfer of Property Act; Section 17 and Section 49 of the Indian Registration Act is to the effect that if an agreement like the JDA in the present case, is not registered, then it shall have no effect in law for the purpose 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.
- (iv) The High Court was right in stating that in order to qualify as ‘transfer’ of capital asset under Section 2(47)(v) of the Income Tax Act, 1961, there must be a ‘contract’ which can be enforced in law under Section 53A of the Transfer of Property Act.
- (v) A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eye of law there is no contract which can be taken cognizance of for the purpose specified in Section 53A.
- (vi) Only where the contract contains all the 6 features mentions in *Shrimant Shamrao* case, Section 2(47)(v) applies and this is what is meant by the expression ‘of the nature referred to in Section 53A’.
- (vii) There is no contract in the eye of law in force under Section 53A after 2001 unless the said contract is registered.
- (viii) Since, the JDA was never registered, no transfer can be said to have taken place under the aforesaid document.
- (ix) The object of Section 2(47)(vi) appears 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 enjoyment of immovable property must be enjoyment as a purported owner thereof.
- (x) A reading of the JDA 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 to for a specific purpose – the purpose being to develop the property. This clause will also not rope in the present transaction.

Impact

This decision will have a significant impact on cases pending across the country where demands have been raised based on possession being granted or power of attorney being executed even though the Joint Development Agreement has not been registered. This decision has explained the requirements of Section 53A of the Transfer of Property Act and has categorically held that in the absence of registration, it is not a contract in the eyes of law for the purpose of Section 53A.

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