IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 15TH DAY OF JULY, 2021

PRESENT

THE HON'BLE MRS. JUSTICE B.V.NAGARATHNA

AND

THE HON'BLE MR. JUSTICE HANCHATE SANJEEVKUMAR

WRIT APPEAL No.1078/2018 (T-IT)

BETWEEN:

1. Nataraju (HUF)
   S/o late Madappa
   Aged about 50 years.

2. S.Jeevan.
3. S.Pavan.
   Aged about 11 and 9 years
   S/o late Siddaraju (HUF)
   Rep. by their
   Natural Guardian
   Mrs.Geetha
   W/o late Siddaraju.

All residing at
Vajamangala Village,
Varuna Hobli,
Mysuru – 570 010.

...APPELLANTS

(By Smt.Vanaja M.R. Advocate)

AND:

1. Pr. Commissioner of Income-Tax,
   Mysuru, 21/16,
   Residency Road,
   Nazerbad, Mysuru – 570 010.

2. Income-Tax Officer
   Ward – 1(1), Mysuru – 570 010.

... RESPONDENTS

(By Sri.Jeevan J.Neeralgi, Advocate)

This writ appeal is filed under Section 4 of the Karnataka High Court Act, praying to set aside the order dated 20/02/2018 in the Writ Petition Nos.54836-837/2017 (T-IT), passed by the Single Judge and allow the appeal.

This appeal coming on for 'Preliminary Hearing' this day, ***NAGARATHNA J.,*** delivered the following:

J U D G M E N T

Though this appeal is listed for preliminary hearing, with the consent of learned counsel for the appellants and learned standing counsel for the respondent-Revenue, it is heard finally.

2. The legality and correctness of the order dated 20.2.2018, passed by the learned Single Judge, in Writ Petition Nos.54836-387/2017, is called in question in this intra-court appeal.

3. By the impugned order, learned Single Judge in the first instance has observed that the appellants/assessees had by-passed the remedy available to them under Section 246A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act' for the sake of brevity) and had availed the revisional remedy under Section 264 of the Act. Further, learned Single Judge while considering

the order of the revisional Authority passed under Section 264 of the Act, has extracted paragraph Nos.6 to 9 of the said order and concluded that there was no infirmity in the said order and accordingly dismissed the writ petition. Being aggrieved, the assessees have preferred this appeal.

4. We have heard learned counsel, Smt.Vanaja M.R., for the appellants and learned counsel Sri.Jeevan J.Neeralgi, for the respondent-Revenue and perused the material on record.

5. At the outset, we wish to clarify that, if an assessee is aggrieved by the assessment order, then he could either prefer an appeal before the Commissioner (Appeals) under Section 246A of the Act, which is a statutory appellate remedy or, in the alternative, could also prefer a revision petition under Section 264 of the Act. Admittedly, in the instant case, the appellants/assessees did not choose to file an appeal. However, they filed a revision petition under Section 264 of the Act before the revisional Authority, as they were aggrieved by the order of the Assessing Officer. Therefore, the assessees were well within their right to have opted for the remedy by way of a revision. Hence, we find that, the learned Single Judge

was not right in making observations with regard to the fact that, the assessees choose to file a revision under Section 264 of the Act, instead of filing an appeal under Section 246A of the Act.

6. As already observed, it is the option of the assessee either to file an appeal or to file a revision. Therefore, all the observations made with regard to the assessees herein exercising their option to file a revision under Section 264 of the Act and not file an appeal under Section 246A of the Act, cannot be sustained.

7. Coming to the merits of the case, the grievance of the assessees was, the lands in question bearing Sy.No.119, Part, measuring 1 Acre 22½ Guntas and Sy.No.213/1, Part, 3 Acres and 4½ Guntas, situated at Vajamangala village, Varuna Hobli, Mysore Taluk, which was the subject matter of a joint development agreement between the assessees and M/S. Skill Tech Engineers and Contractors Pvt. Ltd., attracted tax on capital gains, inasmuch as the said lands were capital assets. In this context, it is necessary to observe that, Chapter-IV of the Act deals with computation of income from capital gains. In that chapter, Section 48 deals with mode of

computation. The income chargeable under the head 'capital gains' has to be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset, certain amounts namely expenditure incurred wholly and exclusively in connection with such transfer and the cost of acquisition of the asset and the cost of any improvement thereto, as detailed in the said provision.

8. Af-course, there are provisos to Section 48 of the Act, which may not be applicable in the instant appeal. But, what is significant to note is, the expression "transfer of capital asset". The expression 'transfer' and the expression 'capital asset', are both defined under the Act. The expression 'capital asset' is defined under Section 2(14) of the Act. While defining capital asset under the said provision, agricultural land in India is not included. However, by way of exception, certain agricultural lands are included which are stated in Section 2(14)(iii)(a) or (b) of the Act. Therefore, before applying Section 48 of the Act, it is necessary to ascertain whether the subject matter of transfer, namely immovable property or land is agricultural land or not. If it is to be construed to be agricultural land, then the parameters as stipulated under

Section 2(14) of the Act has to be applied. In the instant case, we find that the Assessing Officer has not applied the parameters as stipulated under Section 2(14)(iii), inasmuch as either sub-clause (a) or sub-clause (b) would apply. Even while applying the said sub-clauses, there are certain criteria mentioned within the sub-clauses, which have been applied to the subject matter of transfer before demanding tax on capital gains on the transfer of land.

9. Further, Section 2(47) defines "transfer" in relation to a capital asset. Therefore, there has to be a transfer of a capital asset within the meaning of Section 2(47) of the Act, also before the said tax is attracted.

10. Hence, if there is (i) transfer and (ii) of a capital asset, as defined under the provisions of Section 2 of the Act, then it would attract Section 48 and other related provisions of Chapter-IV of the Act, for the purpose of raising a demand with regard to 'capital gains'.

11. In the instant case, on perusal of the order of the Assessing Officer, we find that the aforesaid provisions have not been applied to the facts of the case. Although, there is a detailed discussion with regard to the nature of the transaction, as to whether it is a transfer or not, we

find there is no application of mind as to whether the subject lands are capital asset or not. We reiterate that unless the subject matter of transfer are capital assets, there cannot be any demand under Chapter-IV of the Act. Therefore, the assessees herein preferred a revision under Section 264 of the Act.

12. Admittedly, the revision petition was filed in time, as the limitation period is one year from the date on which the order in question was communicated or the date on which the assessee otherwise came to know of it. There is no controversy with regard to the revision petition being belated in the instant case. However, we find that the revisional Authority had to consider the revision in light of the observations we have made above, as the Assessing Officer has not considered the case in that light.

13. Learned Single Judge has simply extracted paragraphs 6 to 9 of the revisional order and has not considered whether subject lands were indeed capital asset or not, which was the subject matter of transfer in the instant case.

14. In the circumstances, we set aside the order of the revisional Authority, as well as the order of the

Assessing Authority, dated 27.3.2017 and 21.3.2014 respectively. We remand the matter to the concerned Assessing Officer to consider the case of the assessees in light of the observations made above and in accordance with law and within the time stipulated after issuing notice to the appellants/assessees.

15. In the circumstances, the order of the learned Single Judge is set aside. The appeal is ***allowed and disposed*** in the aforesaid terms.

Parties to bear their respective costs.

Sd/-
JUDGE

Sd/-
JUDGE

*AP**