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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 01.12.2016

\+ **ITA 314/2003**

COMMISSIONER OF INCOME TAX DELHI-I ..... Appellant
Through: Mr. Rahul Chaudhary & Mr. Raghvendra Singh, Advs.

versus

M/S BHUSHAN STEELS & STRIPS LTD ..... Respondent
Through: Ms. Kavita Jha, Ms. Roopali Gupta and Mr. Bhuwan Dhoopar, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

S. RAVINDRA BHAT, J (Oral)

1. The question of law framed in this appeal is as follows:

> "*Whether the ITAT was correct in law in holding that the respondent-assessee is entitled to depreciation under Section 32 of the Income Tax Act even when the assessee was not the owner of the property in question and was in possession thereof as a lessee during the year under consideration*?"

2. The facts of the case are that the assessee for the Assessment Year (AY) 1994-95 had reported that it had entered into a lease agreement with M/s Nehru Place Hotels Limited on 16.04.1993. It also stated that on the next day i.e. 17.04.1993 an agreement between that owner/ vendor and the assessee was entered into. The lease deed,

which is prior in point of time, stated that the tenure of the lease was three years, renewable at the option of the assessee by another three years. Concededly, the document was unregistered. The assessee paid a security deposit of ₹ 3.16 crores, and in addition, agreed to pay rent at ₹ 5 per sq. ft. of the premises leased. The subsequent agreement dated 17.04.1993 recorded that the parties had entered into a lease arrangement, and that the assessee had the option to purchase the leased property on expiry of three years from the commencement of the lease i.e. within three years from the date it entered into possession of the premises upon payment of ₹ 3.36 crores. The agreement expressly recorded that ₹ 3.16 crores paid as security deposit is adjustable and the balance alone would have to be paid by the assessee in the event of it exercising option. In the event it chose not to exercise the option that amount would become refundable. The assessee claimed depreciation under Section 32(1) of the Income Tax Act, 1961 (in short the Act) contending that the improvements made and the cost of acquisition is depreciable.

3. In the assessment the Assessing Officer (AO) rejected the assessee's claim after noticing the relevant facts and held inter alia as follows:

> *"..... 4.2 This contention of the assessee is not legally correct. The term 'Owner' in the context of depreciation shall mean the full legal owner i.e. when the law recognises that the title has vested into such owner. Thus a mere possessor under the terms of agreement to purchase shall not be entitled to depreciation allowance even though he uses the asset for his business. This view has been taken in a number of judicial decisions like for example CIT Vs. Hindustan Cold Storage and*

Refrigeration Pvt. Ltd. (103 ITR 455 - Delhi), Addl. CIT Vs. Mercury General Corporation (P) Ltd. (133 ITR 525-Delhi) CIT Vs. T.N.Agro Industries Ltd. (163 ITR 61 - Madras). Thus, for recognising a transfer of title to an immovable property valuing Rs.l00/- and upward, a document in writing and duly registered is needed. In the absence of a registered deed conveying the ownership of the property, an assessee cannot be regarded as owner of that property (Kalpana Tourist Pvt. Ltd. Vs. CIT-172 ITR-364 Kerala and Parthas Trust Vs. CIT-169 ITR 334-Kerala Full Bench). The argument of the appellant that the term transfer u/s 2(47) has been amended to taken within its ambit even cases of possession u/s 53A of the Income-Tax Act is not of any avail because the term 'Ownership' appearing in section 32 has nothing to do with the definition of a 'Transfer' a/s 2 (47) which was introduced to rope in escaping capital gains under these circumstances. Secondly the assessee in this case is only a lessee and not owner at all.

4.3 In view of this background, depreciation of office building cannot be allowed. This position has been accepted by learned CIT(Appeals)-I, New Delhi vide his order dated 28-12-1995 in the case of M/s Freesia Investment Ltd. & Trading Co. Ltd. For the assessment year 1991-92....”

4. The Commissioner of Income Tax (Appeals) [CIT(A)], during the course of proceedings, was of the opinion that the assessee was disentitled to claim depreciation. The reasoning is as follows:

5.1 Meeting the decision relied upon by the Ld. counsel as enumerated in the preceding para, I am of the view that in all the judgements relied upon by the Ld. counsel, it has been held that an assessee will be considered to be the owner of the building u/s 32, if he is in position to exercise the rights of the owner on behalf of the persons

in whom the title vests but not in his own right. In the instant case, the appellant cannot exercise right of ownership such as (a) the power of enjoyment, i.e., the power to deal with the produce as he pleases and the power to destroy, (b) possession which includes the right to exclude others, (c) power to alienate inter vivos or to charge as security and (d) power to dispose off the property by Will. Thus I am of the view that one of the most important of these powers is the right to exclude others and in the instant case the appellant doss not have the right to exclude others because the appellant has not become the absolute owner of the property. Besides, the appellant also does not have the power to dispose off the property by will and is simply in the precious possession of the property for the beneficial use and it has been categorically stated by their Lordships in the judgment enumerated in the preceding paras that mere possessor of the property without exercising right of ownership cannot be termed as the owner of the property in the context of the phraseology used in Sec. 32(1) of the Act. Thus, the case laws relied upon by the Ld. counsel, in my opinion, will not bailout the appellant in the instant case.

5.2 Besides, it will not be out of place to refer to a decision of the Supreme Court in the case of Seth Banarsi Dams Gupta vs. CIT, 166 ITR 787, wherein their Lordships, though in a different context, have held that for the allowance of depreciation, the appellant has to be the absolute owner and the fractional ownership is beyond the ambit of Sec. 32. Deriving strength from the said decision of the Supreme Court, I believe that if the Apex court has ruled out the allowance of depreciation even in the case of fractional owner, where is the question of its being allowed in a case, where the appellant is not even a fractional owner of the said property. The appellant, on the other hand, in this case has been paying rent to the transferor of the property which has not been assigned to the appellant legally. It will not be out of place to make a mention of the case of Parthas Trust (supra) again wherein the full bench of

Kerala High Court have exacted the complete look into all the decisions even that of Supreme Court in the case of R.B. Jodha Mal Kuthiala vs. CIT, 82 ITR 570 and have come to a finding that the depreciation would be allowable only to the legal owner of the property and not to the fractional or beneficial owner. Their Lordships in the said case of Kerala High Court also observed that Supreme Court in the case of R.B. Jodha Mal Kuthiala (supra) essentially dealt with the effect and impact of the Pakistan Evacuee Property Vesting Act and hence the said decision has to be understood in that context only.

5.3 I would be failing in my duty if do not make a mention of the recent decision of the I.T.A.T., Delhi Bench 'A' decided on March 11, 1996 in the case of ACIT vs Chadha Wine Store Pvt. Ltd., reported in 57 lTD 567, in which they were considering the allowability of depreciation U/S 32(1) of the Act in respect of a mini truck and a car. The Revenue had disallowed the depreciation on the ground that the car was not registered in the name of the said assessee and for the same the Revenue had placed reliance on the decision of Kerala High Court in Parthas Trust (supra) and Kalpaga Tourist Pvt. Ltd. (supra). Distinguishing the said case laws relied upon by the Revenue the Hon'ble Members of the Delhi Tribunal in the said case held that the issue of property being registered in the name for imparting the concept of ownership is relevant in the case of immovable property only because in the case of transfer of immovable property, a registered deed is must if the valuation exceeds more than Rs.I00/-, both u/s 17 and 49 of the Indian Registration Act. In my opinion, the Hon'ble bench impliedly concluded that in the case of immovable property for becoming the owner for the purpose of Sec. 32(1) of the Act, legal right to the property was a must and the claimant of the depreciation must be one with much more than more threads of rights...."

5. The Income Tax Appellate Tribunal (in short the Tribunal),

which delivered the impugned judgment, reversed the reasoning of the authorities below taking note of the Supreme Court judgment in ***CIT vs. Podar Cement (P) Ltd. (1997) 226 ITR 625***. Apart from noticing the ratio in ***Podar Cement*** (supra), the Tribunal also held that non-registration of the agreement did not imply that the benefit otherwise available under Section 53A of the Transfer of Property Act, 1882 (in short TP Act) of being entitled to continue in possession in part performance of an agreement to sell, had to be denied.

6. Mr. Rahul Chaudhury, the learned counsel arguing on behalf of the Revenue, stated that the Tribunal fell into error in concluding that the lease deed in fact amounted to an agreement to sell. He relied extensively on the recital of the lease deed dated 16.04.1993 as well as its contents to say that the Tribunal should not have considered any another material since from the tenor of the document, the parties' intention was apparent. The learned counsel also relied upon the plain text of Explanation (1) to Section 32 to say that only capital expenditure incurred by the lessee in the improvement to the construction upon the premises leased would qualify for depreciation and nothing else. The learned counsel also relied upon the ruling of this Court in ***Commissioner of Income Tax vs Hindustan Cold Storage and Refrigeration P. Ltd. (1976) 103 ITR 455***. It was urged that the decision also took note of Section 53A of the TP Act and its legal effect, and relied upon previous rulings of the Supreme Court and Privy Council.

7. The learned counsel for the respondent/ assessee urged that the lease deed of 16.04.1993 cannot be read in isolation and has to be

conjointly considered with the agreement to sell dated 17.04.1993. So considered, the parties intention clearly was to show the transaction as a lease but with condition that the property would be ultimately purchased by the assessee. To that end, substantial part of the consideration agreed, for the sale itself had been paid when the lease deed was entered into – by way of a security deposit. Clause (1) and (2) of the agreement dated 17.04.1993 in fact recognized that the security deposit would be adjusted towards the total consideration and a small balance of ₹ 20 lacs was payable when the sale deed was executed. Given these factors and the important circumstance that possession was handed over immediately to the lessee/ assessee, in fact the transfer in terms of Section 53A of the TP Act was completed. The learned counsel emphasized, therefore, that the decision in ***Podar Cement*** (supra) was correctly applied having regard to the overall circumstances of the case. The learned counsel also relied upon the judgement of the Supreme Court in ***Mysore Minerals Ltd. vs CIT (1999) 239 ITR 775 (SC)***.

7.1 The relevant part of Section 32 of the Act reads as follows:

> ***"..... Depreciation.***
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> ***32.*** *(1) In respect of depreciation of—*
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> *(i) buildings, machinery, plant or furniture, being tangible assets;*
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> *(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—*
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> *xxxx*

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Explanation 1.—Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee....."

8. In the present case the assessee claimed depreciation for AY 1994-95 urging that it had paid a sum of ₹ 3.16 crores. The AO rejected the claim as is evident from the preceding discussion and a reading of his order would reveal that he confined his scrutiny to the lease agreement of 16.04.1993. The AO's order is forthright with the subsequent agreement of 17.04.1993 which was in fact shown in the course of the proceeding and the assessee had made submissions based on its effect. Nevertheless, the AO's order is singularly silent on the effect of this document. The order was premised and almost entirely on the basis that the lease agreement conferred the rights of a lessee/ occupant and in the circumstances the benefit of depreciation for the sum of ₹ 3.16 crores could not have been derived. The CIT(A) too proceeded on a similar tangent. At the same time we also notice that the AO did consider the effect of the ruling of this Court in ***Hindustan Cold Storage*** (supra) which appears to have some background on what was then perceived to be the correct interpretation of Section 53A. The Tribunal, however, had the benefit

of the ruling of the Supreme Court in ***Podar Cement*** (supra).

9. To rewind a bit, the AO's order was made on 30.08.1996. The decision in ***Podar Cement*** (supra) was delivered on 27.05.1997. ***Podar Cement*** (supra) examined various decisions of the High Courts; one set of High Courts holding that the benefits under Section 53A of the TP Act could be considered for the purposes of income tax and permissibility of depreciation, whereas the other set of High Courts had held otherwise. The relevant discussion in ***Podar Cement*** (supra) is as follows:

> *"....23 We have noticed the reliance placed by the bar on the decision of this Court in Jodha Mal's case which was concerned with the old Section 9(i) of the Act. In that case, this Court had occasioned to consider the meaning to be given to the words 'of which he is the owner'. Of course, on facts the Court was called upon to decide whether the erstwhile admitted owner of the property is liable to pay income-tax on the house property under Section 9 even after the said property has been vested in the Custodian of Evacuee Property by virtue of Section 6(1) of the Pakistan (Administration of Evacuee Property) Ordinance, 1949. The contention of the Revenue in that was that notwithstanding the vesting of the house property in the Custodian the legal ownership remained with the assessee therein and, therefore, Section 9(1) of the old Act was attracted. This contention was repelled by this Court. Hegde, J. speaking for the Bench observed at page 575 :*
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> > *"The question is who is the "owner" referred to in this Section? Is it the person in whom the property vests or is it he who is entitled to some beneficial interest in the property? It must be remembered that Section 9 brings to tax the income from property and not the interest of a person in the property. A property cannot be owned by two*

persons, each one having independent and exclusive right over it. Hence, for the purpose of Section 9, the owner must be that person who can exercise the rights of the owner, not on behalf of the owner but in his own right."

24. The learned Judge observed that "it is true that equitable considerations are irrelevant in interpreting tax laws. But, those laws, like all other laws, have to be interpreted reasonably and in consonance with justice". Again at page 577, it was held that "for determining the person liable to pay tax, the test laid down by the Court was to find out the person entitled to that income". Again at page 578 it was observed: "No one denies that an evacuee from Pakistan has a residual right in the property that he left in Pakistan. But the real question is, can that right be considered as ownership within the meaning of Section 9 of the Act. As mentioned earlier that Section seeks to bring to tax income of the property in the hands of the owner. Hence, the focus of that Section is on the receipt of the income. The meaning that we give to the word "owner" in Section 9 must not be such as to make that provision capable of being made an instrument of oppression. It must be in consonance with the principles underlying the Act."

25. In our opinion, the above observations of this Court clearly fixes the liability on a person who receives - or is entitled to receive the income from the property in his own right. In spite of this, the assessing officers of various circles instead of uniformally following the ratio laid down in this case have taken different diametrically opposite views depending upon the pronouncements of the concerned High Courts in the circles on the scope of Section 22 of the Act. The High Courts of Allahabad. Punjab and Haryana, Rajasthan, Calcutta and Patna have taken the view by correctly understanding the ratio laid down in Jodha Mal's case and the High Courts of Bombay, Delhi and Andhra Pradesh have taken a different view wrongly distinguishing on facts in Jodha

Mal's case.

26. In the Kala Rani's case (supra), the Punjab and Haryana High Court after referring to the judgment of this Court in Jodha Mal's case observed as follows:

> *"Thus, it cannot be accepted that before a person can be assessed under Section 22 of the Act, he must be the owner by virtue of a sale deed in his favour. As a matter of fact, what is being taxed under Section 22 of the Act is the income from house property or the annual value of the property of which the assessee is the owner."*

27. The High Court rejected the contention that the mere possession of the property in pursuance of an agreement to sell was not sufficient to burden the assessee with tax on any income under Section 22..."

10. The view of the Patna High Court ***in Addl. CIT vs Sahay Properties & Investment Co. (P) Ltd. (1983) 144 ITR 357*** and Rajasthan High Court in ***Saiffuddin vs CIT (1985) 156 ITR 127*** and ***Maharani Yogeshwari Kumari vs. CIT (1995) 213 ITR 541*** was approved:

> *"...33. We do not think that it is necessary to set out extracts from the judgments of other High Courts taking similar view.*
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> *34. The contrary view taken by the other High Courts was mainly based on the facts that unless there is a registered deed conveying the property, the person in possession/enjoyment of the property cannot be considered as legal owner and, therefore, he cannot be called upon to pay the tax under Section 22 of the Act.*
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> *35. The law laid down by this Court in Jodha Mal's case according to us, has been rightly understood by the High Courts of Punjab and Haryana, Patna, Rajasthan, etc.*

The requirement of registration of the sale-deed in the context of the Section 22is not warranted...."

11. The effect of the ruling in ***Podar Cement*** (supra) was considered again in ***Mysore Minerals Ltd. vs CIT (1999) 239 ITR 775 (SC)*** in the context of Section 32 of the Act itself. The Court declared the law as follows:

"....14. It is well-settled that there cannot be two owners of the property simultaneously and in the same sense of the term. The intention of the Legislature in enacting Section 32 of the Act would be best fulfilled by allowing deduction in respect of depreciation to the person in whom for the time being vests the dominion over the building and who is entitled to use it in his own right and is using the same for the purposes of his business or profession. Assigning any different meaning would not subserve the legislative intent. To take the case at hand it is the appellant-assessee who having paid part of the price, has been placed in possession of the houses as an owner and is using the buildings, for the purpose of its business in its own right. Still the assessee has been denied the benefit of Section 32. On the other hand, the Housing Board would be denied the benefit of Section 32 because in spite of its being the legal owner it was not using the building for its business or profession. We do not think such a benefit-to-none situation could have been intended by the Legislature. The finding of fact arrived at in the case at hand' is that though a document of title was not executed by the Housing Board in favour of the assessee, but the houses were allotted to the assessee by the Housing Board, part payment received and possession delivered so as to confer dominion over the property on the assessee whereafter the assessee had in its own right allotted the quarters to the staff and they were being actually used by the staff of the assessee. It

is common knowledge, under the various schemes floated by bodies like housing boards, houses are constructed on a large scale and allotted on part payment to those who have booked. Possession is also delivered to the allottee so as to enable enjoyment of the property. Execution of documents transferring title necessarily follows if the schedule of payment is observed by the allottee. If only the allottee may default the property may revert back to the Board. That is a matter only between the Housing Board and the allottee. No third person intervenes. The part payments made by allottee are with the intention of acquiring title. The delivery of possession by the Housing Board to the allottee is also a step towards conferring ownership. Documentation is delayed only with the idea of compelling the allottee to observe the schedule of payment...."

12. Having regard to the clear declaration of law by the Supreme Court in the two judgments discussed above, we are of the opinion that the view expressed by the Tribunal in favour of the assessee does not call for any disturbance. Consequently, the question of law framed is answered against the Revenue. The appeal is dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

DECEMBER 01, 2016/kk