ANNEXURE A

Supreme Court of India

Commissioner Of Income-Tax

vs

M/S. Podar Cement Pvt. Ltd. Etc.

Date : 27 May, 1997

TAX REFERENCES CASE NOS. 9 AND 10 OF 1986 AND CA NOS. 4165 OF 1994 AND 4549 OF 1995

Equivalent citations: AIR 1997 SC 2523, 1997 226 ITR 625 SC

Author: K Venkataswami.

Bench: K Paripoornan, K Venkataswami, B Kirpal

ORDER

K. VENKATASWAMI. J.

In all these case the scope of a 22 of the Income-tax Act, 1961 (hereinafter called the "Act") arises for consideration.

The brief facts are necessary to appreciate the question that arises for our consideration.

THE RESPONDENT in Tax References Cases Nos. 9-10 of 1986 IS A COMPANY and an assessee under the Act (hereinafter called the "assessee"). IT OWNS FOUR FLATS bearing Nos. 231, 232, 241 and 242 in a building called "Silver Arch" on Nepean Sea Road, Bombay. The builders of the said building are Malabar Industries Pvt. Ltd. Out of the four aforesaid flats, TWO WERE DIRECTLY PURCHASED by the respondent-company from the builders and the OTHER TWO WERE PURCHASED BY ITS SISTER CONCERN AND SUBSEQUENTLY BY THE ASSESSEE. THE POSSESSION OF THE FLATS WAS TAKEN AFTER PAYMENT OF CONSIDERATION IN FULL sometime in August, 1973. It is common ground that all these flats have been let out to various persons. THE RENTAL INCOME FROM THESE FLATS WAS INCLUDED IN THE RETURN for the assessment years in question, namely, 1975-76 and 1976-77. IT WAS THE CASE OF THE ASSESSEE THAT THE RENTAL INCOME FROM THE FLATS WAS ASSESSABLE AS "INCOME FROM OTHER SOURCES" UNDER SECTION 56 OF THE ACT INASMUCH AS THE ASSESSEE-COMPANY WAS NOT THE "LEGAL OWNER" OF THE PROPERTY IN THE FLATS. Such a claim was put forward before the Assessing Officer MAINLY ON THE GROUND THAT THE TITLE TO THE PROPERTY (FOUR FLATS) HAD NOT BEEN CONVEYED TO THE CO-OPERATIVE SOCIETY WHICH WAS FORMED BY THE PURCHASERS OF THE FLATS AND THAT SO LONG AS THE OWNERSHIP WAS NOT TRANSFERRED IN THE NAME OF THE ASSESSEE, THE RENTAL INCOME FROM THE FLATS COULD NOT BE ASSESSED AS "INCOME

FROM HOUSE PROPERTY" (under section 22 of the Act).

One other subsidiary question was also raised by the assessee that the rental income should be calculated on the *bona fide* annual value and not the actual rent received. As a matter of fact, the assessee has shown Rs. 49,800 as chargeable rent. The Income-tax Officer, however, has taken the annual letting value of those flats at Rs. 1,31,268 on the basis of rent receivable in respect of flats in an adjoining building. The Income-tax Officer also rejected the claim of the assessee that the income from the flats should be assessed under section 56 of the Act.

Aggrieved by the orders of the Income-tax Officer, the assessee preferred appeals to the Commisiner of Income-tax (Appeals), who by an order dated April 9, 1981, upheld in to the views as stated above by the Income-tax Officer. After receiving the orders from the appellate authority, the assessee filed miscellaneous applications dated September 14, 1981, before the appellate authority purporting to be under section 154 of the Act. It was contended before the appellate authority that in view of the decision of this court in *Dewan Daulat Rai Kapoor* v. *New Delhi Municipal Committee* [1980] 122 ITR 700, the authorities were bound to take the annual letting value of those

flats on the basis of the standard rent chargeable and in any case not on the basis of the actual rent receivable with regard to some other flats. The appellate authority accepted the assessee's miscellaneous applications by order dated March 17, 1982, and rectified its earlier order dated April 9, 1981. Still not satisfied with the appellate order, the assessee preferred two appeals against the order of the appellate authority contending that the income from the four flats should have been assessed under section 56 of the Act and not under section 22. The Revenue preferred two appeals against the rectification order dated March 17, 1982.

Those four appeals were considered by the Income-tax Appellate Tribunal (Bombay Bench "A"), Bombay, and THE TRIBUNAL BY A COMMON ORDER DATED MAY 8, 1986, PURPORTING TO FOLLOW SEVERAL DECISIONS OF THE BOMBAY HIGH COURT ACCEPTED THE CASE OF THE ASSESSEE AND HELD THAT THE INCOME from the flats could not be taxed as "income from house property" under section 22, but SHOULD BE TAXED AS "INCOME FROM OTHER SOURCES" under section 56 of the Act. The Tribunal, however, did not decide the other question, namely, whether the actual rental income should be taken into account for the computation or the chargeable rental value. We are not concerned with the latter question here.

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THE TRIBUNAL, WHEN MOVED BY THE REVENUE UNDER SECTION 256(1) OF THE ACT, REFERRED THE CASE STRAIGHTAWAY TO THIS COURT UNDER SECTION 257 OF THE ACT IN VIEW OF THE CONFLICTING DECISIONS BETWEEN THE HIGH COURTS.

The question referred reads as follows:

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the income derived by the assessee-company from flats from the building known as 'Silver Arch' of Bombay is taxable under the head 'Income from other sources' under section 56 of the Income-tax Act and not income from 'house property' under section 22 of the Income-tax Act, 1961?"

Civil Appeal No. 4165 of 1994 :

In this case the respondent-assessee, an individual, returned for the assessment year 1983-84, the rental income from two flats bearing Nos. 406 and 407 at Kailash Building, Curzon Road, New Delhi, and also parking space and claimed that the said income must be assessed as "income from house property". However, the Income-tax Officer took the view that the assessee only had tenancy rights and, therefore, the income could be assessed under the head "Income from other sources", namely, under section 56 of the Act.

Aggrieved by the order of the Assessing Officer, an appeal was preferred to the Commissioner of Income-tax (Appeals), New Delhi, who has accepted the case of the assessee and directed the assessment under section 22 of the Act.

The Revenue aggrieved by the appellate order preferred an appeal to the Tribunal. The Tribunal held that the appellate authority was right in holding that the income from the flats should be assessed as income from house property and not as income from other sources. For coming to this conclusion, the Tribunal, as a matter of fact, found that the assessee is the owner of the flats as well as the parking space in question. The Tribunal rejected an application for reference under section 256(1) and the High Court also rejected the reference under section 256(2). Hence, the present appeal by special leave by the Revenue.

Civil Appeal No. 4549 of 1995:

The appellant in this case is an individual and the relevant assessment year is 1970-71. The appellant is the owner of three flats in a multi-storeyed building known as "Akash Deep". This multi-storeyed building has been constructed on a piece of land at Barakhamba Road which belongs to the Government but has been given under perpetual

lease. The name of the original lessee was not known. However, the company known as Ansal and Sehgal Pvt. Ltd. entered into an agreement with the lessee and constructed a multi-storeyed building on the said piece of land. The assessee claimed, and it was not disputed, that he has paid the entire price thereof and got possession of the three flats. It is also the claim of the appellant that he had absolute rights of disposal over them and that he had let out these flats to different tenants and he was deriving income from the flats and was paying the municipal taxes in respect thereof. In the Income-tax return for the assessment year in question the appellant has shown a net income of Rs. 18,403 from these flats by way of rent. The said net income was arrived at after deducting the municipal taxes as well as the statutory deduction of one-sixth of the annual value on account of repairs as provided in section 24 of the Act. The Income-tax Officer while accepting the return denied the deduction for repairs claimed by the assessee on the ground that the income must be assessable under the head "Income from other sources" under section 56 of the Act.

Aggrieved by that, the appellant preferred an appeal to the Appellate Assistant Commissioner who was convinced by the claim of the appellant, directed the Income-tax Officer to assess the income under the head "Income from house

property" and to allow statutory relief on account of repairs.

The Revenue preferred an appeal before the Tribunal. The Tribunal found as a fact that there was no sale deed as such in respect of the flats in favour of the assessee. There was only an agreement to sell coupled with the payment of the purchase price and the handing over of occupation or possession. The Tribunal further found that the super-structure of the multi-storeyed building including the flats vested originally with the company which had constructed the same and the assessee had only entered into an agreement to purchase the flats, though actually the assessee had paid all the installments of purchase price. The Tribunal was of the view that till regular sale deeds were executed in favour of the assessee, the title in the flats remained vested in the company and, therefore, the assessee could not in law claim as legal owner of those flats. The Tribunal, applying a decision of the Delhi High Court, upset the view taken by the Appellate Assistant Commissioner and restored the order of the Income-tax Officer. The appellant was successful in getting a reference under section 256(1) of the Act and the High Court in detail considered the matter. However, the High Court, in view of its earlier decisions confirmed the view taken by the Tribunal and held that the income in question was assessable under section 56 of the

Act as income from other sources. Aggrieved by that, the present appeal is by the appellant by special leave.

IT WILL BE SEEN FROM THE NARRATION OF FACTS IN ALL THESE CASES THAT A COMMON QUESTION OF LAW ARISES AS REGARDS THE SCOPE OF SECTION 22 OF THE ACT *VIS-A-VIS* SECTION 56 OF THE ACT.

Mr. K.N. Shukla, learned senior counsel appearing for the Revenue, has advanced arguments in general, in view of the fact that the Revenue had not taken a uniform stand in assessing the owners of flats as seen from the facts given above. He submitted that the owners of flats as well as promoters are liable to be taxed under sections 56 and 22, respectively, of the Income-tax Act. In other words, the promoters are the legal owners and income from house property will have to be taxed at the hands of the promoters under section 22 of the Act and the owners of the flats being in beneficial enjoyment of the respective properties will have to pay tax under section 56 as "income from other sources". He invited our attention to a decision of this court in *R.B. Jodha Mal Kuthiala* v. *CIT* [1971] 82 ITR 570, rendered under the Income-tax Act and also a recent judgment in *Mohd. Noor* v. *Mohd. Ibrahim*, AIR 1995 SC 398; [1994] 5 SCC 562, rendered under the Rajasthan Tenancy Act, 1955. He also invited our attention to a judgment of the Bombay High Court in *CIT* v.

Zorostrian Building Society Ltd. [1976] 102 ITR 499. In general, he left it to the ultimate decision of the court on the issue in question without finally expressing his point of view in view of the conflicting stand taken by the Revenue while making the assessments under challenge.

MR. SHARMA, LEARNED SENIOR COUNSEL, ADVANCED THE LEADING ARGUMENTS AND ACCORDING TO HIM, SECTION 22 OF THE ACT CHARGES THE INCOME ARISING FROM HOUSE PROPERTY AND NOT THE OWNERSHIP OF HOUSE PROPERTY. SUCH INCOME FROM HOUSE PROPERTY CAN BE REAL OR NOTIONAL. HE ALSO ARGUED THAT INCOME UNDER THE HEAD "HOUSE PROPERTY", REAL OR NOTIONAL, CANNOT ESCAPE TAXATION WHOEVER MAY BE REGARDED AS THE OWNER, BUT CERTAINLY IT CANNOT HAVE TWO OWNERS AT THE SAME TIME. ACCORDING TO LEARNED COUNSEL, THE OWNER IS THE PERSON WHO IN HIS OWN RIGHT CAN USE THE HOUSE PROPERTY OR DERIVE INCOME FROM IT. ONLY SUCH OWNER HAS TO BE TAXED UNDER THE HEAD "INCOME FROM HOUSE PROPERTY". HE ALONE HAS TO BE TAXED UNDER THIS HEAD. IF HE CANNOT BE TAXED UNDER THIS HEAD, HE CANNOT BE TAXED AT ALL. IN OTHER WORDS, HE CANNOT BE TAXED UNDER THE HEAD "INCOME FROM OTHER SOURCES" UNDER SECTION 56 OF THE ACT. He also contended that income from house property cannot be taxed doubly, once in the hands of the legal owner under section 22 and again in the hands of the actual user and recipient of income under section 56 of the Act. Permitting such assessment would be opposed to equity and justice, which is not normally allowed by the courts. As a corollary from the last contention

he submitted that it is well settled that the interpretation, which would avoid hardship and double taxation, should be preferred to the interpretation which would result in hardship and double taxation. Lastly, it was contended by Mr. Sharma that wherever Parliament found it necessary it had provided for avoidance of double taxation expressly like in sections 64(2), 69D, 93(2) and 94(4) but no such express provision was considered necessary as regards sections 22 to 27 as they thought in their wisdom that no authority of Income-tax would assess the same income twice, once in the hands of the legal owner on notional basis and again in the hands of the buyer on actual receipt of rent.

MR. SHARMA, LEARNED SENIOR COUNSEL, IN SUPPORT OF THESE ARGUMENTS WHILE PLACING HEAVY RELIANCE ON THE JUDGMENT OF THIS COURT IN *JODHA MAL KUTHIALA'S* CASE [1971] 82 ITR 570, ALSO CITED NUMEROUS JUDGMENTS OF THE HIGH COURT WHICH HAVE APPLIED THE PRINCIPLES ENUNCIATED IN THE JUDGMENT OF THIS COURT IN *JODHA MAL KUTHIALA'S* CASE [1971] 82 ITR 570. The judgments on which reliance was placed are the following:

1. *Addl. CIT* v. *U.P. State Agro Industrial Corporation Ltd.* [1981] 127 ITR 97 (All).

2. *Smt. Kala Rani* v. *CIT* [1981] 130 ITR 321 (P&H).

3. *Addl. CIT* v. *Sahay Properties and Investment Co. (P.) Ltd.* [1983] 144 ITR 357 (Patna).

4. *Saiffuddin* v. *CIT* [1985] 156 ITR 127 (Raj).

5. *Madgul Udyog* v. *CIT* [1990] 184 ITR 484 (Cal).

6. *Maharani Yogeshwari Kumari* v. *CIT* [1995] 213 ITR 541 (Raj).

7. *CIT* v. *General Mktg. and Mfg. Co. Ltd.* [1996] 222 ITR 574 (Cal).

8. *CIT* v. *Krishna Lal Ajmani* [1996] 222 ITR 653 (Patna).

Mr. H.N. Salve, learned senior counsel appearing for the respondent assessee in Tax References Cases Nos. 9-10 of 1986, took a different stand from that of Mr. Sharma and contended that the word "owner" in section 22 of the Income-tax Act should be understood in its general sense and not in the sense in which it was understood by this court in *Jodha Mal Kuthiala's* case [1971] 82 ITR 570. According to learned counsel, the word "owner" can only refer to the legal owner and none else, as the concept of dual ownership is unknown in Indian jurisprudence. He invited our attention to the language of section 9(1) of the old Income-tax Act which corresponds to section 22 of the present Act and contended that the assessment does not depend on actual receipt of income from house property.

He also submitted that the view taken by some of the High Courts that the owners of the flats even in the absence of any registered document of sale in their favour can be treated as owners in view of section 53A of the Transfer of Property Act is wholly wrong and unsustainable. That view, according to him, is contrary to the well settled position in law as laid down in several judgments of this court. Learned senior counsel submitted that the ownership is paramount title and it cannot be otherwise interpreted. Mr. Salve submitted that even if the interpretation suggested by him to section 22 results in double taxation, even then that has to be accepted as being the correct position in law. There is no equity in taxation law. In support of his arguments, he placed reliance on the following judgments of this court:

1. *Balkrishan Gupta* v. *Swadeshi Polytex Ltd.* [1985] 58 Comp. Cas. 563; AIR 1985 SC 520; [1985] 2 SCC 167.

2. *Narandas Karsondas* v. *S.A. Kamtam,* AIR 1977 SC 774; [1977] 2 SCR 341.

3. *Bai Dosabai* v. *Mathurdas Govinddas,* AIR 1980 SC 1334; [1980] 3 SCR 762.

4. *Chhatra Kumari Devi* v. *Mohan Bikram Shah,* AIR 1931 PC 196; [1931] 58 IA 279.

We are given to understand that an identical issue is pending before a Full Bench of the Delhi High Court and Mr. Syali, learned counsel appearing in that case, sought our permission to place his arguments. The question being of some importance, we permitted him to submit his arguments.

MR. SYALI, LEARNED COUNSEL, SUBMITTED THAT THE INCOME-TAX ACT IS A SELF-CONTAINED CODE, EXHAUSTIVE OF ALL MATTERS DEALT WITH THEREIN AND ITS PROVISIONS SHOW AN INTENTION TO DEPART FROM THE COMMON RULE. IN SUPPORT OF THAT, HE PLACED RELIANCE ON A JUDGMENT OF THIS COURT IN *RAO BAHADUR RAVULU SUBBA RAO* V. *CIT* [1956] 30 ITR 163. ACCORDING TO LEARNED COUNSEL, THE MEANING OF THE WORD "OWNER" OCCURRING IN SECTION 22 HAS TO BE UNDERSTOOD CONTEXTUALLY, PURPOSIVELY AND ONLY WITHIN THE FOUR CORNERS OF THE INCOME-TAX ACT. ADOPTING A WIDER MEANING, ACCORDING TO HIM, WILL NOT AND CANNOT LEAD TO REWRITING THE CIVIL LAW. IN A WAY, HE SUPPORTED THE STAND TAKEN BY MR. SHARMA, LEARNED SENIOR COUNSEL, AND **HE ALSO PLACED HEAVY RELIANCE ON THE JUDGMENT OF *JODHA MAL KUTHIALA'S* CASE [1971] 82 ITR 570 (SC).** In addition to the cases cited by Mr. Sharma, learned counsel, Mr. Syali, invited our attention to a case in *Nawab Sir Mir Osman Ali Khan* (*Late*) v. *CWT* [1986] 162 ITR 888 (SC). He also invited our attention to a recent judgment of this court in *State* v. *S.J. Choudhary,* AIR 1996 SC 1491; [1996] 2 SCC 428, to support his contention that words occurring in a statute should be so construed as to

continuously update the wording in accordance with the changes in social conditions.

To appreciate the submissions made at the Bar, it is necessary to set out the relevant sections from the Act. We set out hereunder section 9(1) of the old Act, and sections 22, 27 and 56 of the new Act.

"9. (1) The tax shall be payable by an assessee under the head "Income from property" in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax.

22. *Income from house property.*— The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to Income-tax, shall be chargeable to Income-tax under the head 'Income from house property'.

27. *'Owner of house property', 'annual charge', etc., defined.*—For the purposes of sections 22 to 26—…

(*iii*) a member of a co-operative society to whom a building or part thereof is allotted or leased under a house building scheme of the society shall be deemed to be the owner of that building or part thereof.

[before amendment]

(*iii*) a member of a co-operative society, company or other association of persons to whom a building or part thereof is allotted or leased under a house building scheme of the society, company or association, as the case may be, shall be deemed to be the owner of that building or part thereof;

(*III A*) A PERSON WHO IS ALLOWED TO TAKE OR RETAIN POSSESSION OF ANY BUILDING OR PART THEREOF IN PART PERFORMANCE OF A CONTRACT OF THE NATURE REFERRED TO IN SECTION 53A OF THE TRANSFER OF PROPERTY ACT, 1882 (4 OF 1882), SHALL BE DEEMED TO BE THE OWNER OF THAT BUILDING OR PART THEREOF;

(*iii b*) 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…

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56. *Income from other sources.*—(1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to Income-tax under the head 'Income from other sources', if it is not chargeable to Income-tax under any of the heads specified in section 14, items A to E.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes shall be chargeable to Income-tax under the head "Income from other sources", namely:—…

(*iii*) where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, the income from such letting, if it is not chargeable to Income-tax under the head 'Profits and gains of business or profession'".

From the narration of the facts and the rival submissions it will be seen that the controversy revolves around the meaning to be given to the word "of which the assessee is the owner' occurring in section 22 of the Act. We may point out that section 9(1) of the old Act was substantially the same as section 22 of the new Act. We may also state that the whole of section 9 of

the old Act has been split up and redrafted into several separate sections, namely, sections 22 to 27 under the new Act.

We have noticed the reliance placed by the Bar on the decision of this court in *Jodha Mal Kuthiala's* case [1971] 82 ITR 570 which was concerned with the old section 9(1) of the Act. In that case, this court had occasion to consider the meaning to be given to the words 'of which he is the owner'. Of course, on the 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 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 of 82 ITR:

"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".

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".

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In our opinion, the above observations of this court clearly fix 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 uniformly 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 KUTHIALA'S* CASE [1971] 82 ITR 570 (SC), AND THE HIGH COURTS OF BOMBAY, DELHI AND ANDHRA PRADESH HAVE TAKEN A DIFFERENT VIEW WRONGLY DISTINGUISHING ON FACTS *JODHA MAL KUTHIALA'S* CASE [1971] 82 ITR 570 (SC).

In *Kala Rani's* case [1981] 130 ITR 321, the Punjab and Haryana High Court, after referring to the judgment of this court in *Jodha Mal Kuthiala's* case [1971] 82 ITR 570, observed as follows (page 325):

"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".

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 of the Act.

The High Court of Patna in *Sahay Properties and Investment Co. P. Ltd.'s* case [1983] 144 ITR 357 has elaborately dealt with this case. As a matter of fact, civil appeals were preferred by special leave against the judgment of the Patna High Court in Civil Appeals Nos. 5874-76 of 1983 (see [1983] 143 ITR (St.) 60). However, those appeals were dismissed as withdrawn on March 20, 1996, without deciding the issue.

The brief facts in that case were, the assessee-company acquired certain immovable property in February, 1962. The assessee paid the entire consideration and was in actual physical possession of the entire properties contracted to be sold. The assessee was empowered by the vendor to use the properties in whatsoever manner the assessee liked and to receive and enjoy the entire usufructs thereof, with the only reservation that a formal

deed of conveyance with registration in conformity with the Indian Registration Act would follow at the request of the assessee and once that request was made, it was incumbent upon the transferor to execute such a deed of conveyance and to get it registered. The assessee was assessed under section 22 in respect of the income from the property but the Tribunal held that the assessee was not the owner of the property and was not liable to be assessed as such.

The Patna High Court has cited this court's judgment in *Jodha Mal Kuthiala's* case [1971] 82 ITR 570, and also a number of other judgments of different High Courts. The High Court had also gone into the concept of "ownership" and referred to passages from G.W. Paton on Jurisprudence, Dias on Jurisprudence, Stroud's Judicial Dictionary and Pollock on Jurisprudence. WE MAY USEFULLY EXTRACT CERTAIN PASSAGES FROM THE JUDGMENT OF THE PATNA HIGH COURT.

THE LEARNED JUDGES OBSERVED AT PAGE 361:

"THE EMPHASIS, THEREFORE, IN THIS STATUTORY PROVISION IS THAT THE TAX UNDER THE SECTION IS IN RESPECT OF OWNERSHIP. BUT THIS MATTER IS NOT AS SIMPLE AS IT LOOKS. THIS LEADS US TO A MORE VEXED QUESTION AS TO WHAT IS OWNERSHIP. SHOULD THE ASSESSMENT BE MADE AT THE HANDS OF THE PERSON WHO HAS THE BARE HUSK OF THE LEGAL TITLE OR AT THE HANDS OF THE PERSON WHO HAS THE RIGHTS OF AN OWNER OF A PROPERTY IN A PRACTICAL SENSE?

ENJOYMENT AS AN OWNER ONLY IN A PRACTICAL SENSE CAN BE ATTRIBUTED TO THE TERM 'OWNER' IN THE CONTEXT OF THIS SECTION — A PERSON WHO CAN EXERCISE THE RIGHTS OF THE OWNER AND IS ENTITLED TO THE INCOME FROM THE PROPERTY FOR HIS OWN BENEFIT. IT IS WELL-SETTLED, AND LEARNED COUNSEL FOR EITHER SIDE WERE NOT AT LOGGERHEADS, THAT THE SECTION CANNOT BE SO CONSTRUED AS TO MAKE IT AN INSTRUMENT OF OPPRESSION, TO USE THE LANGUAGE OF HEGDE J., IN THE CASE OF *JODHA MAL KUTHIALA'S* CASE [1971] 82 ITR 570 (SC).

WE ARE VERY MUCH ALIVE TO THE LEGAL POSITION THAT IT IS TRUE THAT THERE IS NO EQUITY ABOUT A TAX. THERE IS NO PRESUMPTION AS TO A TAX. NOTHING IS TO BE READ IN—NOTHING IS TO BE IMPLIED. WE CAN LOOK ONLY FAIRLY AT THE LANGUAGE USED. NONE THE LESS, THE TAX LAWS HAVE TO BE INTERPRETED REASONABLY AND IN CONSONANCE WITH JUSTICE. THIS IS WELL-SETTLED BY NUMEROUS DECISIONS OF THE SUPREME COURT ITSELF.

We have, therefore, to judge and interpret the language of section 22 of the Act in the context of that particular section, and that context we shall come back to hereinafter at a more appropriate place.

In the meantime, it would not be irrelevant to go into the concept of 'ownership'. What is ownership after all? Read from the Roman law up to the English law at the present stage, medieval stage having been interspersed with different formulae, the position that now juristically emerges is this. The full rights of an owner as now recognised are:

(*a*) The power of enjoyment (*e.g.,* the determination of the use to which the res is to be put, the power to deal with produce as he pleases, the power to destroy);

(*b*) POSSESSION WHICH INCLUDES THE RIGHT TO EXCLUDE OTHERS;

(*c*) power to alienate inter vivos, or to charge as security;

(*d*) power to leave the res by will.

ONE OF THE MOST IMPORTANT OF THESE POWERS IS THE RIGHT TO EXCLUDE OTHERS. THE PROPERTY RIGHT IS ESSENTIALLY A GUARANTEE OF THE EXCLUSION OF OTHER PERSONS FROM THE USE OR HANDLING OF THE THING...BUT EVERY OWNER DOES NOT POSSESS ALL THE RIGHTS SET OUT ABOVE—A PARTICULAR OWNER'S POWERS MAY BE RESTRICTED BY LAW OR BY AN AGREEMENT HE HAS MADE WITH ANOTHER' (REFER TO G.W. PATON ON JURISPRUDENCE, 4TH EDN., PP. 517-18)".

While dealing with the concept of possession and enumerating the illustrative cases and rules in this respect, Paton says at p. 577 in clause (*x*):

'To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of, and to evince an intention to exclude others:…'

Reference in this connection has been made to the case of *Tubantia: Young* v. *Hichens* and of *Pierson* v. *Post* [1805] 3 Caines 175 (Supreme Court of New York)…

It would thus be seen that where the possession of a property is acquired, with a right to exercise such necessary control over the property acquired which it is capable of, it is the intention to exclude others which evinces an element of ownership.

To the same effect and with a more vigorous impact is the subject dealt with by Dias on Jurisprudence, (4th edn., at page 400):

'The position, therefore, seems to be that the idea of ownership of land is essentially one of the "better right" to be in possession and to obtain it, whereas with chattels the concept is a more, absolute one. ACTUAL POSSESSION IMPLIES A RIGHT TO RETAIN IT UNTIL THE CONTRARY IS PROVED, AND TO THAT EXTENT A POSSESSOR IS PRESUMED TO BE OWNER.'

Source - http://taxguru.in/income-tax-case-laws/law-and-vs-case-law-on-flats-a-critical-study.html

'Again, at page 404, the learned author says:

"Special attention should also be drawn to the distinction between 'legal' ownership recognised at common law and 'equitable' ownership recognised at equity. This occurs principally when there is a trust, which is purely the result of the peculiar historical development of English law. A trust implies the existence of two kinds of concurrent ownerships, that of the trustee at law and that of the beneficiary at equity".

We are not concerned in this case with any case of trust either under the equitable principles or under the law as engrafted in the Indian Trusts Act. Because, the 'beneficiary might himself be a trustee of his interest for a third person, in which case his equitable ownership is as devoid of advantage to him as the legal ownership is to the trustee. So, when described in terms of ownership, the distinction between legal and equitable ownership lies in the historical factors that govern their creation and function; in terms of advantage, the distinction is between the bare right, whether legal or equitable, and the beneficial right' (vide pp. 404405 of Dias on Jurisprudence, 4th edn.).

We, therefore, need not go into the questions involving trusts where a person holds the property and receives the income in trust for others who are

the legal beneficiaries. The crux of the matter is as to whether, as already stated above, the actual possession in a given particular case gives a right to retain such a possession until the contrary is proved and so long as that is not done, to that extent a possessor is presumed to be the owner.

Incidentally, although the Supreme Court in the case of *Jodha Mal Kuthiala's* case [1971] 82 ITR 570, merely mentioned that Stroud's Judicial Dictionary had given several definitions and illustrations of ownership, it refrained from going into the details on account of the practical approach that was made in that case, to which we shall hereinafter refer and dilate upon. We think it worthwhile, the matter having been canvassed at length at the Bar, to give a full illustration of the definitions of 'ownership' as Stroud puts it. One such definition is that the 'owner' or 'proprietor' of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct, of it, *e.g,* a lessee is, during the term, the owner of the property demised. Yet another definition that has been given by Stroud is that:

'"Owner applies to every person in possession or receipt either of the whole, or of any part, of the rents or profits of any land or tenement, or in the occupation of such land or tenement, other than as

a tenant from year to year or for any less term or as a tenant at will' (Stroud's Judicial Dictionary, 3rd edn., Vol. 3, page 2060).

Thus, the juristic principle from the view-point of each one is to determine the true connotation of the term 'owner' within the meaning of section 22 of the Act in its practical sense, leaving the husk of the legal title beyond the domain of ownership for the purpose of this statutory provision. The reason is obvious. After all, who is to be taxed or assessed to be taxed more accurately—a person in receipt of money having actual control over the property with no person having better right to defeat his claim of possession or a person in legal parlance who may remain a remainder man, say, at the end or extinction of the period of occupation after, again say, a thousand years? The answer to this question in favour of the assessee would not merely be doing palpable injustice but would cause absurd inconvenience and would make the Legislature to be dubbed as being a party to a nonsensical legislation. One cannot reasonably and logically visualise as to when a person in actual physical control of the property realising the entire income and usufructs of the property for his own use and not for the use of any other person, having the absolute power of disposal of the income so received, should be held not liable to tax merely because a vestige of legal ownership or a husk of

title in the long run may yet clothe another person with the power of a residual ownership when such contingency arises which is not a case even here. A plain reading of clause 4 of the agreement, as extracted above, clearly goes to show that the physical possession of the properties has passed on or is deemed to have passed on to the assessee to have and to hold forever and absolutely with the power to use the same in whatsoever manner it thinks best and the assessee shall derive all income and benefits together with full power of disposal of the properties as well as the income thereof. Can it then be said that the recipient of the income being the assessee only having an absolute and exclusive control over the property without any let or hindrance on the part of the so-called vendor which, indeed, under law it was not entitled to do, as we shall presently show, shall be immune from the taxing provision in section 22 of the Act? The answer in our view is clearly in the negative. The reason is simple. The consideration money has been paid in full. The assessee has been put in exclusive and absolute possession of the property. It has been empowered to deal with the income as it likes. It has been empowered to dispose of and even to alienate the property. Reference to section 54 or, for that matter, section 55 of the Transfer of Property Act by the Tribunal merely emphasises the fact that the legal title does not pass unless

there is a deed of conveyance duly registered. The agreement is in writing and the value of the property is admittedly worth more than hundred rupees. Section 54 of the Transfer of Property Act would, therefore, exclude the conferment of absolute title by transfer to the assessee. That, however, would not take away the right of the assessee to remain in possession of the property, to realise and receive the rents and profits there from and to appropriate the entire income for its own use. The so-called vendor is not permitted in law to dispossess or to question the title of the assessee (the so-called vendee). IT WAS FOR THIS VERY PRACTICAL PURPOSE THAT THE DOCTRINE OF THE EQUITY OF PART PERFORMANCE WAS INTRODUCED IN THE TRANSFER OF PROPERTY ACT, 1882, BY INSERTING SECTION 53A THEREIN. THE SECTION SPECIFICALLY ALLOWS THE DOCTRINE OF PART PERFORMANCE TO BE APPLIED TO THE AGREEMENTS WHICH, THOUGH REQUIRED TO BE REGISTERED, ARE NOT REGISTERED AND TO TRANSFERS NOT COMPLETED IN THE MANNER PRESCRIBED THEREFORE BY ANY LAW. THE SECTION IS, THEREFORE, APPLICABLE TO CASES WHERE THE TRANSFER IS NOT COMPLETED IN A MANNER REQUIRED BY LAW UNLESS SUCH A NON-COMPLIANCE WITH THE PROCEDURE RESULTS IN THE TRANSFER BEING VOID. THERE

IS, HOWEVER, A DISTINCTION BETWEEN AN AGREEMENT VOID AS SUCH AND AN AGREEMENT VOID IN THE ABSENCE OF SOMETHING WHICH THE VENDOR COULD DO AND HAD EXPRESSLY OR IMPLIEDLY CONTRACTED TO DO, AND WHERE A VENDOR AGREES TO SELL HIS SHARE OF PROPERTY, INCLUDING SIR LAND, THERE IS AN IMPLIED TERM IN THE CONTRACT THAT HE WILL APPLY FOR SANCTION TO THE REVENUE AUTHORITIES NECESSARY FOR SUCH TRANSFERS AND THE COURT WILL DIRECT HIM TO DO SO. IT CANNOT BE SAID THAT SUCH AN AGREEMENT IS VOID BECAUSE NO SANCTION HAS BEEN OBTAINED. **IN THE INSTANT CASE, HAVING REFERENCE TO CLAUS**E 5 OF THE AGREEMENT, IT WOULD BE SEEN THAT THE OPTION WAS GIVEN TO THE ASSESSEE TO DEMAND AT ITS PLEASURE A CONVEYANCE DULY REGISTERED BEING EXECUTED IN ITS FAVOUR BY THE SAHAY FAMILY (THE VENDOR) AND TO GET ITS NAME MUTATED IN THE OFFICIAL RECORDS. THE ASSESSEE HAS NOT EXERCISED ITS OPTION FOR REASONS BEST KNOWN TO IT—PRESUMABLY TO HAVE A DOUBLE WEAPON IN ITS HANDS TO BE USED AS AND WHEN CIRCUMSTANCES SO DEMANDED. CAN IT YET BE SAID THAT FOR THE DEFAULT ON THE PART OF THE ASSESSEE ITSELF IT WOULD BE ENTITLED TO SAY THAT IT IS NOT THE OWNER OF THE PROPERTY FOR ALL PRACTICAL PURPOSES, RECEIVING THE RENT ALL THE TIME, APPROPRIATING THE USUFRUCTS FOR ITS OWN PURPOSES ALL THE TIME AND HAVING NO INTERFERENCE AT THE INSTANCE OF THE VENDOR? CAN THAT BE A PRACTICAL AND LOGICAL APPROACH TO

THE TRUE CONSTRUCTION AND PURPORT OF THE SUBSTANCE AND SPIRIT OF SECTION 22 OF THE ACT? THE ANSWER, IN OUR VIEW, IS CLEARLY IN THE NEGATIVE AND AGAINST THE ASSESSEE. Having taken all the advantages and still taking all the advantages under the contract without any hindrance or obstruction on the part of anyone including the vendor which the vendor could not do in view of section 53A of the Transfer of Property Act, the assessee cannot now turn back and say that because of its default in having a deed registered at its sweet will it was not an owner within the meaning of section 22 of the Act. It may bear repetition to say that it was on account of these facts that juristic principles have now emerged saying that one of the most important of the powers of ownership is the right to exclude others from possession and the property right is essentially a guarantee of the exclusion of other persons from the use or handling of the thing. In that sense, therefore, the assessee itself became the owner of the property in question. In our view, any decision to the contrary would not be in consonance with the juristic principle either at common law or in equity. In either case, it would not be subservient to the intent and purpose of section 22 of the Act, with regard to which, as we have already stated, we can fairly look at the language used and the tax laws have to be interpreted reasonably and in consonance with justice. So far we have dealt with

the case in this respect on juristic principles as if it were a matter of first impression. We have, therefore, now to refer to the case law on the subject".

Ultimately, the learned judges held that the assessee in that case will fall under the true meaning of the term "owner" as used in section 22 of the Act and, therefore, liable to tax from income out of the house properly as owner thereof. This judgment of the Patna High Court was followed by the same High Court in the judgment in *Krishna Lal Ajmani's* case [1996] 222 ITR 653.

The Rajasthan High Court in *Maharani Yogeshwari Kumari's* case [1995] 213 ITR 541, again considered the same question and, after referring to various judgments, held as follows (page 548):

"Section 22 of the Income-tax Act has created a charge on the income in respect of annual value of the property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to Income-tax under the head 'Income from house property'. THE QUESTION, THEREFORE, ARISES AS TO WHETHER THE WORDS 'OF WHICH THE ASSESSEE IS THE

OWNER' CAN BE APPLICABLE ONLY TO A REGISTERED OWNER OR ALSO TO SUCH PERSON IN WHOSE FAVOUR THE REGISTERED SALE DEED HAS NOT BEEN EXECUTED BUT A SALE AGREEMENT HAS BEEN EXECUTED, POSSESSION OF THE PROPERTY HAS BEEN GIVEN AND CONSIDERATION FOR SALE HAS BEEN PAID. SECTION 53A OF THE TRANSFER OF PROPERTY ACT CONTEMPLATES THAT WHEN ANY PERSON CONTRACTS TO TRANSFER FOR CONSIDERATION ANY IMMOVABLE 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 THE CONTRACT, THOUGH REQUIRED TO BE REGISTERED, HAS NOT BEEN REGISTERED, OR 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 CONTINUED IN POSSESSION, OTHER THAN A RIGHT EXPRESSLY PROVIDED BY THE TERMS OF THE CONTRACT. THE PROVISO TO THE AFORESAID SECTION CONTEMPLATES THAT NOTHING IN THAT SECTION SHALL AFFECT THE RIGHTS OF A TRANSFEREE FOR CONSIDERATION WHO HAS NO NOTICE OF THE CONTRACT OR OF THE PART PERFORMANCE THEREOF. IF THE VIEW THAT WITHOUT THERE BEING CONVEYANCE, the transferor continues to be the owner is taken, still a question arises that the income has not been received by the owner and, therefore, whether the assessment of the transferee could be made by considering that there was diversion of income or the transferor has ceased to have any right in respect of the income received? This section debars the transferor from enforcing his right to the property. In the case of *Hamda Ammal* v. *Avadiappa Pathar* [1991] 1 SCC 715, it was held by the apex court that the document after its registration relates back to the

date of execution of the sale deed. Though under the Income-tax law, the benefit of ownership is unknown, but still if the income is assessed in the hands of the transferor who has not received the income from the property whether such a transferor can be made liable to make the payment of tax. Various decisions given by the different High Courts have taken different views. The view of the Calcutta, Bombay, Delhi and Allahabad High Courts as mentioned above is on one hand, whereas the view of the Andhra Pradesh Court in the case of *CIT* v. *Nawab Mir Barkat Ali Khan* [1974] TLR 90 and the Karnataka High Court in the case of *Ramkumar Mills P. Ltd.* v. *CIT* [1989] 180 ITR 464, is different. So far as the view taken by the apex court in the case of *Nawab Sir Mir Osman Ali Khan* [1986] 162 ITR 888 is concerned that was in the context of the Wealth-tax Act where the language of the section was different. Section 53A debars a transferor from exercising the rights of an owner after he has received full consideration and handed over possession under the contract. The transferor in a case where he has executed the document and received consideration and even handed over possession of the property cannot exercise any right of an owner. This court in the case of *Rajputana Hotels Pvt. Ltd.* v. *State of Rajasthan* (D.B. Civil Writ Petition No. 511 of 1989— decided on May 27, 1992), while interpreting the provisions

of the Rajasthan Land and Building Tax Act, 1964, has held that the person who is entitled to receive the rent is assessable in respect of a property even if it is not registered in his name.

The matter can be considered from another angle. Under the Income-tax Act, the assessing authority has power to assess the income in the hands of the real owner. If 'A' purchases the property in the name of 'X', simply because the property is registered in the name of 'X', 'A' cannot escape his liability. Secondly, there can be a partnership where the partners have contributed the property and the property has become the partnership property, then no registration is required, the income in such a case has to be assessed in the hands of the partnership firm and not the individuals who have contributed the property. Thirdly, the transferee who has received the income has already been assessed in respect of income derived from such property as income from the property, whether section 22 can again be invoked against the transferor in respect of such income, fourthly, in respect of a co-operative society the members thereof are given the property on the basis of allotment letters which may or may not be registered. The members thereafter transfer the property from one hand to another and if it is considered that it is only the registered owner or the society who can be assessed to tax, then the

person who has enjoyed the income would escape liability to tax. Fifthly, if it is considered that the registered owner alone is liable to pay tax while the income is received by the transferee, the transferee would enjoy the income but the tax will be levied from the registered owner who may or may not be in a position to make the payment of tax. Sixthly, there could be diversion of income by overriding title as was considered in the case of *Savita Mohan* [1985] 154 ITR 449 (Raj), seventhly, if the property is in the name of a trust and the beneficiary is entitled to a specific share of the income, whether the other provisions of the Act can be said to be inoperative and, eighthly, there may be some similar other instances".

We do not think that it is necessary to set out extracts from the judgments of other High Courts taking a similar view.

THE CONTRARY VIEW TAKEN BY THE OTHER HIGH COURTS WAS MAINLY BASED ON THE FACT 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.

THE LAW LAID DOWN BY THIS COURT IN *JODHA MAL KUTHIALA'S* CASE [1971] 82 ITR 570, 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 SECTION 22 IS NOT WARRANTED.

At this juncture, we can also refer to the judgment cited by Mr. Syali regarding updating construction of the words used in the statute. In *State* (*Through CBI/New Delhi*) v. *S.J. Choudhary,* AIR 1996 SC 1491, 1494; [1996] 2 SCC 428, THIS COURT HAS QUOTED THE FOLLOWING PASSAGE WITH APPROVAL IN SUPPORT OF UPDATING CONSTRUCTION (PAGE 433 OF [1996] 2 SCC):

"STATUTORY INTERPRETATION BY FRANCIS BENNION, 2ND EDN. SECTION 288 WITH THE HEADING 'PRESUMPTION THAT UPDATING CONSTRUCTION TO BE GIVEN' STATES ONE OF THE RULES THUS (PAGE 617):

(2) IT IS PRESUMED THAT PARLIAMENT INTENDS THE COURT TO APPLY TO AN ONGOING ACT A CONSTRUCTION THAT CONTINUOUSLY UPDATES ITS WORDING TO ALLOW FOR CHANGES SINCE THE ACT WAS INITIALLY FRAMED (AN UPDATING CONSTRUCTION). WHILE IT REMAINS LAW, IT IS TO BE TREATED AS ALWAYS SPEAKING. THIS MEANS THAT IN ITS APPLICATION ON ANY DATE, THE LANGUAGE OF THE ACT, THOUGH NECESSARILY EMBEDDED IN ITS OWN TIME, IS NEVERTHELESS TO BE CONSTRUED IN ACCORDANCE WITH THE NEED TO TREAT IT AS CURRENT LAW.

In the comments that follow it is pointed out that an ongoing Act is taken to be always speaking. It is also, further, stated thus (pp. 618-19):

'IN CONSTRUING AN ONGOING ACT, THE INTERPRETER IS TO PRESUME THAT PARLIAMENT INTENDED THE ACT TO BE APPLIED AT ANY FUTURE TIME IN SUCH A WAY AS TO GIVE EFFECT TO THE TRUE ORIGINAL INTENTION. ACCORDINGLY THE INTERPRETER IS TO MAKE ALLOWANCES FOR ANY RELEVANT CHANGES THAT HAVE OCCURRED, SINCE THE ACT'S PASSING, IN LAW, SOCIAL CONDITIONS, TECHNOLOGY, THE MEANING OF WORDS, AND OTHER MATTERS. Just as the US Constitution is regarded as "a living Constitution", so an ongoing British Act is regarded as "a living Act". That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will try to foresee the future, and allow for it in the wording.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials'".

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Applying the above principle also, the view taken by the High Courts of Patna, Punjab and Haryana, etc., can be supported.

Assuming that there are two possible interpretations on section 22 of the Act, which is akin to a charging section, it is well settled, that the one which is favourable to the assessee has to be preferred. Even on that principle the view taken by the High Courts of Patna, Punjab and Haryana, etc., has to be preferred rather than the contrary view taken by the High Courts of Delhi and Andhra Pradesh.

Accordingly, we hold that the views taken by the High Courts of Allahabad, Patna, Rajasthan, Punjab and Haryana are the correct views. The contrary view taken by the Delhi High Court is not correct.

It may not be out of place to extract a passage from the judgment of the Delhi High Court (see [1986] 160 ITR 308) under appeal (C.A. No. 4549 of 1995). The High Court in a way conceded the correctness of the Patna view by observing as follows (page 314 of [1986] 160 ITR):

"It can be contended, in view of the agreements of sale and the handing over of the possession to various persons who are, in fact, entitled to enjoy these flats and the income there from in any manner they like and against whom the company

has lost all rights of recourse because of the provisions of section 53A of the Transfer of Property Act, that the company is the owner of nothing but the husk of title over the property and should not be assessed on the principle of the decision of the Supreme Court and this contention may perhaps have to be accepted".

In spite of the above observation, the Delhi High Court took a contrary view mainly on the ground that the earlier decisions of that court have consistently taken such a contrary view which has to be followed.

THE VIEW EXPRESSED SUPRA BY US IS STRENGTHENED /SUPPORTED BY A SUBSEQUENT AMENDMENT TO SECTION 27 OF THE ACT. The said amendment was introduced to section 27 of the Act by the Finance Act, 1987, by substituting clauses (*iii*), (*iii a*) and (*iii b*) in the place of old clause (*iii*) with effect from April 1, 1988.

IN OUR VIEW, THE CIRCUMSTANCES UNDER WHICH THE AMENDMENT WAS BROUGHT INTO EXISTENCE AND THE CONSEQUENCES OF THE AMENDMENTS WILL HAVE A GREATER BEARING IN DECIDING THE ISSUE PLACED BEFORE US. IN OTHER WORDS, IF AFTER DISCUSSION WE COME TO A CONCLUSION THAT THE AMENDMENT WAS CLARIFICATORY / DECLARATORY IN NATURE AND, THEREFORE, IT WILL HAVE RETROSPECTIVE EFFECT, THEN IT WILL SET AT REST THE CONTROVERSY FINALLY.

We have seen that the High Courts are sharply divided on this issue, one set of High Courts taking the view that the promoters/contractors after

parting with possession on receipt of full consideration thereby enabling the "purchasers" to enjoy the fruits of the property, even though no registered document as required under section 54 of the Transfer of Property Act was executed, can be "owners" for the purpose of section 22 of the Act. The other set of High Courts had taken a contrary view holding that unless there is a registered sale document transferring the ownership as required under the Transfer of Property Act, the so-called purchasers cannot become owners for the purpose of section 22 of the Act. As a matter of fact, the judgment of the Delhi High Court in Income-tax Reference No. 84 of 1977 in *Sushil Ansal* v. *CIT* [1986] 160 ITR 308, the appeal against which is C.A. No. 4549 of 1995, the learned judge has made the following observation (page 317):

"Before we conclude, we may mention that, during the course of the hearing, we suggested to the standing counsel for the Department that the Central Board should consider various practical aspects of this problem and formulate guidelines which would be equitable to the various classes of persons concerned. PERHAPS, AS SUGGESTED BY THIS COURT IN *CIT* V. *HANS RAJ GUPTA* [1982] 137 ITR 195, THE TIME HAS EVEN COME FOR LEGISLATIVE AMENDMENT, IF NECESSARY, POSSIBLY WITH RETROSPECTIVE EFFECT. Serious consideration at

the highest administrative level was warranted in view of the recurrent nature of the problem, its magnitude and the conflict of judicial decisions. However, after taking sufficiently long adjournments, counsel informed us that no decision could be taken by the Board and requested that we should decide the reference. We have, therefore, proceeded to do so".

May be this is one of the reasons for Parliament to bring in the amendment referred to above to section 27 of the Act. At any rate the admitted position when the amendment was brought in, was that there was divergence of opinion between the High Courts on the issue at hand.

In the Memorandum Explaining the Provisions in the Finance Bill, 1987, concerning section 27 reads as follows (see [1987] 165 ITR (St.) 161):

"SIMPLIFICATION AND RATIONALISATION OF PROVISIONS"

ENLARGING THE MEANING OF 'OWNER OF HOUSE PROPERTY'

27. UNDER THE EXISTING PROVISIONS OF SECTION 22 OF THE INCOME-TAX ACT, ANY INCOME FROM HOUSE PROPERTY IS CHARGEABLE TO TAX ONLY IN THE HANDS OF THE LEGAL OWNER. AS PER SECTION 27 OF THE INCOME-TAX ACT, CERTAIN PERSONS WHO ARE NOT OTHERWISE LEGAL OWNERS ARE DEEMED TO BE THE OWNERS FOR THE PURPOSES OF THESE PROVISIONS.

UNDER THE TRANSFER OF PROPERTY ACT, THE TRANSFER OF OWNERSHIP CAN BE AFFECTED ONLY BY

MEANS OF A REGISTERED INSTRUMENT. HOWEVER, IN RECENT TIMES VARIOUS OTHER DEVICES ARE SOUGHT TO BE EMPLOYED FOR TRANSFERRING ONE'S OWNERSHIP IN PROPERTY. AS A RESULT, THERE ARE SITUATIONS IN WHICH THE ACTUAL OWNER, SAY, OF AN APARTMENT IN A MULTI-STOREYED BUILDING, OR A HOLDER OF A POWER OF ATTORNEY IS NOT THE LEGAL OWNER OF A PROPERTY. IN SOME CASES, PENDING RESOLUTION OF DISPUTES, THE LEGAL AS WELL AS THE BENEFICIAL OWNERS ARE ASSESSED TO TAX IN RESPECT OF THE SAME INCOME.

AS A MEASURE OF RATIONALISATION, THE BILL SEEKS TO ENLARGE FURTHER THE MEANING OF THE EXPRESSION 'OWNER OF HOUSE PROPERTY', GIVEN IN CLAUSE (*III*) OF SECTION 27 BY PROVIDING THAT A PERSON WHO COMES TO HAVE CONTROL OVER THE PROPERTY BY VIRTUE OF SUCH TRANSACTIONS AS ARE REFERRED TO IN CLAUSE (*F*) OF SECTION 269UA WILL ALSO BE DEEMED TO BE THE OWNER OF THE PROPERTY. THE AMENDMENT ALSO SEEKS TO ENLARGE THE APPLICABILITY OF THIS CLAUSE TO A MEMBER OF A COMPANY OR OTHER ASSOCIATION OF PERSONS.

CORRESPONDING AMENDMENTS HAVE ALSO BEEN PROPOSED IN REGARD TO THE DEFINITION OF 'TRANSFER' IN SECTION 2(47) OF THE INCOME-TAX ACT, SECTION 2(*M*) OF THE WEALTH-TAX ACT DEFINING 'NET WEALTH' AND SECTION 2(*XII*) OF THE GIFT-TAX ACT DEFINING 'GIFT'.

THESE AMENDMENTS WILL TAKE EFFECT FROM APRIL 1, 1988, AND WILL, ACCORDINGLY, APPLY IN RELATION TO THE ASSESSMENT YEAR 1988-89 AND SUBSEQUENT YEARS".

If this much is clear, the next thing to be considered is what the effect of the amendment is.

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In Crawford's Statutory Construction, at page 107, paragraph 74, reads as follows:

"74. Declaratory statutes. — Generally speaking, declaratory statutes can be divided into two classes: (1) those declaratory of the common law, and (2) those declaring the meaning of an existing statute. Obviously, those declaratory of the common law should be construed according to the common law. Those of the second class are to be construed as intended to lay down a rule for future cases and to act retrospectively. They closely resemble interpretation clauses, and their paramount purpose is to remove doubt as to the meaning of existing law, or to correct a construction considered erroneous by the Legislature."

In Francis Bennion's Statutory Interpretation (Second edition) 1992, page 105, the learned author says "Declaratory Acts—A declaratory Act or enactment declares what the law is on a particular point, often 'for the avoidance of doubt'".

In Justice G.P. Singh's (Sixth edition 1996) "Principles of Statutory Interpretation", under the heading "declaratory statutes", the learned author has summed up as follows:

"Declaratory statutes:

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies and approved by the Supreme Court: 'for modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word "declared" as well as the word "enacted"'. But the use of the words "it is declared" is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall

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be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law".

The above summing up is factually based on the judgments of this court as well as English decisions.

A Constitution Bench of this court in *Keshavlal Jethalal Shah* v. *Mohanlal Bhagwandas,* AIR 1968 SC 1336; [1968] 3 SCR 623, while considering the nature of amendment to section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows (page 1339):

"The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was

before the amendment derived from section 115 of the Code of Civil Procedure, and the Legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act".

FROM THE CIRCUMSTANCES NARRATED ABOVE AND FROM THE MEMORANDUM EXPLAINING THE FINANCE BILL, 1987 (SEE [1987] 165 ITR (ST.) 161), IT IS CRYSTAL CLEAR THAT THE AMENDMENT WAS INTENDED TO SUPPLY AN OBVIOUS OMISSION OR TO CLEAR UP DOUBTS AS TO THE MEANING OF THE WORD "OWNER" IN SECTION 22 OF THE ACT. WE DO NOT THINK THAT IN THE LIGHT OF THE CLEAR EXPOSITION OF THE POSITION OF A DECLARATORY/CLARIFICATORY ACT, IT IS NECESSARY TO MULTIPLY THE AUTHORITIES ON THIS POINT. WE HAVE, THEREFORE, NO HESITATION TO HOLD THAT THE AMENDMENT INTRODUCED BY THE FINANCE BILL, 1987, WAS DECLARATORY/CLARIFICATORY IN NATURE SO FAR AS IT RELATES TO SECTION 27(*III*), (*III A*) AND (*III B*). CONSEQUENTLY, THESE PROVISIONS ARE RETROSPECTIVE IN OPERATION. IF SO, THE VIEW TAKEN BY THE HIGH COURTS OF PATNA, RAJASTHAN, AND CALCUTTA, AS NOTICED ABOVE, GETS ADDED SUPPORT AND CONSEQUENTLY THE CONTRARY VIEW TAKEN BY THE DELHI, BOMBAY AND ANDHRA PRADESH HIGH COURTS IS NOT GOOD LAW.

WE ARE CONSCIOUS OF THE SETTLED POSITION THAT **UNDER THE COMMON LAW, "OWNER" MEANS A PERSON WHO HAS GOT VALID TITLE LEGALLY CONVEYED TO HIM AFTER COMPLYING WITH THE REQUIREMENTS OF LAW SUCH AS THE TRANSFER OF PROPERTY ACT, REGISTRATION ACT, ETC.** BUT, IN THE CONTEXT OF

SECTION 22 OF THE INCOME-TAX ACT, HAVING REGARD TO THE GROUND REALITIES AND FURTHER HAVING REGARD TO THE OBJECT OF THE INCOME-TAX ACT, NAMELY, "TO TAX THE INCOME", WE ARE OF THE VIEW, "**OWNER" IS A PERSON WHO IS ENTITLED TO RECEIVE INCOME FROM THE PROPERTY IN HIS OWN RIGHT**.

In the light of the above narration and discussion, we do not think it necessary to discuss any more separately the submissions advanced across the Bar.

IN FINE, WE ANSWER THE QUESTION REFERRED TO THIS COURT IN T.R.C. NOS. 9-10 OF 1986 IN THE NEGATIVE AND IN FAVOUR OF THE REVENUE. Civil Appeal No. 4165 of 1994 filed by the Revenue stands dismissed and Civil Appeal No. 4549 of 1995 by the assessee stands allowed. However, there will be no order as to costs.