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Further, it is submitted that there is no necessity to afford an opportunity of personal hearing.

I find that the information furnished by the Assessing Officer in the para-wise comments are not contained in the impugned order. The respondent cannot improve upon the impugned order by substituting fresh reasons in the form of a counter-affidavit. Thus, the information furnished to the learned standing counsel for the Revenue would clearly demonstrate that at the time of passing the impugned order, no such reasons weighed in the minds of the respondent and therefore, the respondent cannot justify his order by substituting fresh reasons, after the order is put to challenge. 8

Thus, for all the above reasons I am of the clear view that the impugned order calls for interference and the matter should be reconsidered by the respondent bearing in mind the observations made in this order. 9

In the result, the writ petition is allowed, the impugned order is set aside and the matter is remanded to the respondent for fresh consideration and to pass an order on merits and in accordance with law after affording an opportunity of personal hearing to the assessee. No costs. Consequently, connected miscellaneous petition is closed. 10

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[IN THE BOMBAY HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

TALWALKARS FITNESS CLUB

S. C. DHARMADHIKARI and B. P. COLABAWALLA JJ.

October 29, 2018.

SS ▶ ITA 1961, ss 45, 254

AY ▶ 2011-12

HF ▶ Assessee

CAPITAL GAINS—TRANSFER WHEN TAKES PLACE—AGREEMENT BETWEEN ASSESSEE AND PURCHASER THAT SUBJECT TO TIMELY OBSERVANCE AND PERFORMANCE OF TERMS AND CONDITIONS WITHIN TIME STIPULATED BY ASSESSEE, BALANCE CONSIDERATION TO BE PAID ON OR BEFORE DATE MENTIONED—AGREEMENT NOT COMPLETE ON DATE OF EXECUTION AND NOT A CONVEYANCE OR SALE DEED—THAT AGREEMENT REGISTERED AS REQUIRED BY LAW PREVAILING NOT MATERIAL—VENDOR IN POSSESSION TILL TOTAL CONSIDERATION PAID—TRANSFER NOT

COMPLETE AND GAINS DID NOT ARISE IN ASSESSMENT YEAR IN QUESTION—INCOME-TAX ACT, 1961, ss. 45, 254.

The assessee was the owner of immovable property. The assessee, under an agreement dated February 14, 2011, agreed to sell it to the purchasers and the purchasers agreed to acquire from the assessee, the premises and all the right, title and interest therein, free from all encumbrances for the consideration of Rs. 2,20,00,000. Identical agreements were executed in respect of other premises also. At the time of execution of the agreement, a token amount of Rs. 20 lakhs was paid. It was stated in the agreement itself that subject to the timely observance and performance of the terms and conditions or otherwise within the time stipulated, the balance consideration was to be paid on or before May 26, 2011 and subject to marketable title being made out by the assessee, handing over of vacant and peaceful possession to the purchasers and handing over of the original documents and deeds of title in respect of the premises. The agreement stipulated the date by which all this had to be done. It also contained a declaration of title and thereafter there were other covenants in the agreement which denoted that the assessee had to procure consent, permissions, extensions, exemptions and no objection certificates as might be required from all the persons and authorities necessary for completion of the transaction. The purchasers covenanted to pay the balance consideration within the stipulated date of May 26, 2011 and there were obligations to be complied with by the assessee and the purchasers. It was the contention of the Department that the Tribunal had erred in holding that the transaction was not complete in the assessment year 2011-12, and that the agreement was duly stamped and registered and resulted in creation of a title in favour of the transferee. On appeal :

Held, dismissing the appeal, that the sale or transfer was not complete on the date of the execution of the agreement. If the clauses, recitals and covenants in the agreement were read together harmoniously, as had been done by the Tribunal, it could not be contended that the Tribunal's findings were perverse or vitiated by any error of law apparent on the face of the record. The Tribunal was right in its conclusion that on the facts, the agreement executed on February 14, 2011 was only an agreement for sale of the immovable property. The law that prevailed then required such an agreement to be registered. Merely because it was registered, it did not partake of the character of a conveyance or a sale deed automatically. Possession was not handed over but was to be handed over on compliance with certain obligations by the vendor. The total consideration was received on June 16, 2011 and the vendor was in possession of the premises from February to June 2011 and carried on

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its business from those premises up to April 2011. The Tribunal had applied the correct legal principles and construed the clauses in the agreement. Such findings of fact were not perverse for they were in consonance with the materials produced before the Tribunal. No question of law arose.

Income Tax Appeal No. 589 of 2016.

Abhay Ahuja along with P. A. Narayanan and Ms. Sangeeta Yadav, for the appellant.

Ashok Jayawant Patil, for the respondent.

JUDGMENT

By this appeal, the Revenue challenges the order passed by the Income-tax Appellate Tribunal allowing the assessee's appeal for the assessment year 2011-12. 1

Mr. Ahuja appearing in support of this appeal submits that the questions at page 6 of this appeal memo squarely arise out of the order dated May 27, 2015 of the Tribunal. They are substantial questions of law. 2

Mr. Ahuja would submit that the Tribunal grossly erred in holding that the transaction or sale was not complete in the year under consideration. A bare look at the relevant clauses of the agreement would denote that nothing was left to be done and the properties could be conveyed and transferred on the date of the agreement itself. This was not a case where a contract of sale was executed and a sale deed culminating in the sale was to follow. Hence, the Tribunal grossly erred in reversing the concurrent findings of fact. It is clear from the agreement that it was duly stamped and registered. That resulted in disposing off and creation of a title in favour of the transferee. 3

Further, because of the view taken by the Tribunal, the gains were offered in the subsequent assessment year resulting in loss of the revenue to the extent of Rs. 49 lakhs. 4

On a perusal of the entire paper book including the impugned order, we are unable to agree with Mr. Ahuja. The agreement which has been the subject matter of this controversy is dated February 14, 2011. A copy thereof is to be found at page 19 onwards of the paper book. The recitals are that the assessee are the owners of immovable property more particularly described in the agreement. This is referred to as the said premises. The assessee/vendor agreed to sell it to the purchasers and the purchasers agreed to acquire from the vendor, the said premises and all their right, title and interest of the assessee therein, free from all encumbrances for the consideration of Rs. 2,20,00,000. 5

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- 6 This is an agreement in relation to one flat/premises and identical agreement is also executed in relation to the other premises. Clause (2) of this agreement has been relied upon but it is evident from a reading thereof that the sale/transfer would take effect on consideration of Rs. 2,20,00,000 being paid. The consideration was to be paid in terms of clause (3). At the time of execution of this agreement, a token amount of Rs. 20,00,000 was paid.
- 7 It is stated in the agreement itself that subject to the timely observance and performance of the terms and conditions or otherwise within the time stipulated, the balance consideration shall be paid. The consideration has to be paid on or before May 26, 2011 and subject to marketable title being made out by the vendors, handing over of vacant and peaceful possession to the purchasers and handing over of the original documents and deeds of title in relation to these premises. Clause (4) of the agreement stipulates the date by which all this has to be done. Clause (5) contains a declaration of the title and thereafter there are other clauses/covenants in the agreement which denote that the vendor had to procure consent, permissions, extensions, exemptions and no-objection certificates as may be required from all the persons and authorities necessary for completion of transaction. The vendors have also confirmed by clause (12) that they have paid the property taxes, maintenance charges, other dues and nothing is due and payable. However, the vendors agreed to continue to pay the charges and other outgoings to the authorities till they handover the possession of the premises to the purchasers. The purchasers shall be liable to pay the same from the date of possession of the said premises. The purchasers covenanted to pay the amount/balance consideration within the time stipulated. By clause (14), it is agreed that a letter of consent would be executed so as to transfer the electricity meter and in any event if that is not enough, necessary forms for effectively transferring the electric meter connected to the said premises and for transfer of the electric meter deposit would be signed.
- 8 Clause (15) says that in the event the amount is not paid by May 26, 2011, the damages to the extent of Rs. 25,000 per day shall be paid till all the obligations are complied with by the vendors. This is an obligation of the vendors to the purchasers.
- 9 Then comes clause (16) and which says that if the vendors have complied with all their obligations incorporated in clause (4) of the agreement within the time stipulated, but the purchaser failed to pay balance consideration of Rs. 2 crores to the vendors on or before May 26, 2011, then correspondingly, the purchasers shall pay damages of Rs. 25,000 per day to the vendors till they pay the balance consideration.

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Then, clause (17) inserts and incorporates the usual stipulation with regard to the purchasers availing of the remedy of seeking specific performance of this agreement. 10

If the clauses, recitals and covenants in the agreement are read together and harmoniously, as has been done by the Tribunal, then, we do not see how the Revenue can complain and particularly urge that the Tribunal's findings are perverse or vitiated by any error of law apparent on the face of the record. A reading of the agreement in the above manner would falsify the Revenue's case as raised before us. The sale or transfer was not complete on the date of the execution of the agreement as is now urged and erroneously understood by the Assessing Officer and the Commissioner. The Tribunal was right in its conclusion that on facts, the agreement executed on February 14, 2011 is but an agreement for sale of immovable property. The law then prevailing required such an agreement to be registered. In any event merely because it is registered, that does not partake the character of a conveyance or a sale deed automatically. Thus, the possession also was not handed over but was to be handed over on compliance with certain obligations by the vendor. It is in these circumstances that the total consideration was received on June 16, 2011. It is evident that the vendor was in possession of the premises from February to June 2011. It was carrying on its business from these premises up to April 2011. This would indicate as to how the Tribunal applied the correct legal principles and construed the clauses in the agreement, otherwise than as understood by the Assessing Officer and the Commissioner. Such findings of fact can never be termed as perverse for they are in consonance with the materials produced before the Tribunal. Further, the application of correct legal principles enables us to hold that the impugned order does not give rise to any substantial questions of law. The appeal is devoid of merits and is dismissed. No costs. 11
