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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.335 OF 2015
IN
INCOME TAX APPEAL NO.314 OF 2013

Rasiklal M. Parikh ...Appellant
Versus
ACIT 19(2) ..Respondent

....

Mr. Sanjiv Shah for the Applicant/Appellant.
Mrs. S. V. Bharucha for the Respondent.

....

CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 12th JANUARY, 2017

ORAL ORDER (PER A. K. MENON)

1. By this Chamber Summons taken out on behalf of the appellant in a pending Income Tax Appeal, the appellant seeks amendments as set out in Exhibit C and which read as follows:-

> *"1. After paragraph (xiv) at page 6, add following paragraphs:-*
>
> *(xv) After prolonged correspondence with builder as set out at page 115 to 118 of appeal, disputes arose and ultimately matter was amicably settled and compromised through*

arbitration award.

HERETO ANNEXED AND MARKED AS EXHIBIT 'L' IS COPY OF AWARD DATED 09.05.2014.

(xvi) Thereafter award is implemented by executing sale deeds of flats allotted."

APPELLANT CRAVES LEAVE TO REFER AND RELY UPON SALE DEEDS DATED 27.12.2014 WHEN PRODUCED."

In effect what the appellant also seeks is the inclusion in the appeal paper book of a copy of an Arbitral award dated 9th May, 2014.The Chamber Summons is opposed by Mrs. Bharucha on behalf of the Revenue.

2. It is the case of the appellant that before the Income Tax Appellate Tribunal the appellant had challenged the correctness of the order dated 7th January, 2011 passed by the Commissioner of Income Tax (Appeals) which upheld the order of Assessing Officer in relation to assessment year 2006-07. The appellant-assessee had been denied the benefit of exemption under Section 54F of the Income Tax Act (the Act). While disposing of the appeal, the Tribunal observed, as did the Commissioner that as per Section 54F the assessee was supposed to construct a residential house within three years or purchase a residential house within two years of receipt of sale

proceeds of a capital asset in order to avail the benefit of the said Section and to save himself from the payment from capital gains tax. The admitted position is that within the period allowed in law, the assessee had not entered into any agreement to purchase the flat(s) nor did he construct a residential house. It was not the case of the appellant-assessee that the consideration received from disposal of the asset had been appropriated towards purchase of new premises. The appellant–assessee merely relied upon a letter of allotment dated 7th October, 2005. No agreement was entered into during the period of three years contemplated by Section 54F. That apart, the amount of capital gain which would have accrued was not deposited in the designated capital gain account under the Scheme of the Act by the due date of filing his return.

3. It was the assesee's case before the Tribunal that having booked the flat on 9th floor of 'C' wing of the project known as Abrol Vastu Park, the building did not receive the necessary sanction and hence the flats were not constructed. The contention of the assessee that he had invested a sum of ₹1.33 crores before the due date for filing the return, was rejected since sub-clause (4) of Section 54 entailed that the amount of net consideration received (in this case pursuant to surrender of tenancy) would be required to be deposited in a

designated account before filing such a return. In conclusion the Tribunal observed that the construction was still under progress even on the date of the hearing before the Tribunal i.e. on 8th October, 2012. The Tribunal denied the benefit of exemption on the basis of the aforesaid set of facts.

4. On or about 9th July, 2012 the appellant-assessee made an application dated 5th July, 2012 to the Tribunal seeking permission to file a compilation described as "Additional Evidences Paper Book". The compilation enclosed inter alia the original commencement certificate dated 29th July, 2003 as updated on 7th September, 2010, Occupancy Certificate for wings 'A' and 'B', some correspondence and Sketch plan of flats. The said application came to be considered by the Tribunal at a hearing on 8th October, 2012 after which impugned order dismissing the appeal came to be passed. The present appeal in which the Chamber Summons has been taken out questions the validity of the aforesaid order dated 8th October, 2012 on the basis that the Tribunal had not passed any order on the application seeking to lead additional evidence contained in the Additional Evidences Paper Book but it proceeded to dismiss the appeal after considering the commencement certificate and the sketch plans in paragraph 9 and 10 of the order.

5. Mr. Shah, the learned counsel appearing in support of the Chamber Summons today submitted that the impugned order, without dealing with the fate of the application made by the appellant-asesse seeking inclusion of additional evidence could not have utilized the additional documents sought to be relied upon without expressly permitting such evidence to be filed as part of the appeal before the Tribunal. If the Tribunal were to allow the additional evidence, the appellant would have had the opportunity to explain how the appellant had complied with Section 54.

6. In the present Chamber Summons the appellant seeks to introduce further evidence by way of an Arbitral award which is in the nature of a consent award. Copy of the said award is annexed to the affidavit in support of the Chamber Summons as Exhibit-D. Mr. Shah submitted that the award effectively provides that in lieu of flat no.901 to 903 in wing 'C' (to which the appellant held an allotment letters) the appellant-assessee became entitled to receive flat no.2005 and 2006 admeasuring about 71 sq. mts each in Wing 'A' on the 20th floor of the building known as Abrol Vastu Park. The agreements for sale dated 20th November, 2008 in respect of flat no.901 to 903 in wing 'C' stood cancelled, terminated and revoked.

Mr. Shah further submitted that pursuant to the said award, agreements for sale in respect of the aforesaid alternate premises flat nos. 2005 and 2006 have been entered into. He therefore submitted that the transaction to acquire premises originally contemplated and in respect of which exemption had been sought has now been completed by virtue of the said Arbitral award. Mr. Shah urged that the appeal was a continuation of the original proceedings before the Tribunal and therefore the amendment can be allowed.

7. Having heard the submissions in support of the Chamber Summons and having perused the affidavit in support of the Chamber Summons and its annexures, we find that the award dated 9th May, 2014 is a Consent Award passed by a sole arbitrator appointed pursuant to an arbitration agreement dated 20th December. 2013. This agreement was not before the Court nor does the appellant-assessee seek to rely upon the same. This agreement is entered into more than a year after the impugned order has been pronounced by the Tribunal and provided for the parties to settle their disputes by reference to arbitration. The fact that the appellant assessee gave up his original claim under the agreements for sale dated 24th November, 2008 in respect of the three flats on the 9th floor of wing

‘C’ becomes evident from clause 7(b) of the award. Furthermore clause 7(f) the award declares that the claimant/appellant-assessee does not press for specific performance of the agreements by having given up the claim for specific performance under the agreement.

8. In the course of his submissions, Mr. Shah had relied upon the decision of the Supreme Court in the matter of ***M. M. Quasim v/s. Manohar Lal Sharma AIR 1981 SC 1113*** and relied upon the observations in paragraph 15 in support of the submission that the additional evidence can be lad under provisions of Order 41 Rule 27 of the Code of Civil Procedure, 1908 by inviting the Court's attention to a subsequent event of vital importance cutting at the root of the appellant's right to continue his appeal. He relied upon the passage in ***Patterson v/s. State of Alabama (1934) 295 US 600*** which was quoted with approval in ***Lachmeshwar Prasad Shukla v/s. Keshwar Lal Chaudhri 1940 FCR 84(85)*** and submitted that the document now sought to be introduced into this appeal and by way of this Chamber Summons is of vital importance and that it clearly established the appellant's right to claim exemption by a virtue of completion of the agreement to purchase the property.

9. Mr. Shah also relied upon the observations of Orissa High Court in the case of ***Gopal Chandra Chaudhary v/s. The Life Insurance Corporation of India AIR 1985 Orissa 120.*** Placing reliance on the observations in paragraph 9 wherein the Orissa High Court quotes from ***M. Laxmi & Co. v/s. Dr. Anant R. Deshpande (AIR 1973 SC 171),*** he submitted that Courts can take notice of subsequent events and if the Court finds that because of altered circumstances like devolution of interest, it is necessary to shorten litigation and if the original relief had become inappropriate, the Court can take notice of new developments. Mr. Shah submitted that in such a situation it is necessary to take notice of changed circumstances which will have the effect of doing complete justice between the parties.

10. In our view neither of these decisions can come to the assistance of the appellant-assessee for the reason that the arbitral award is a result of a conscious effort to settle the dispute between the builders and the appellant-assessee resulting in the award. It is not in any manner a continuation of the original transaction to acquire three flats by which appellant-assessee was seeking to ensure compliance with the requirements of the law, in particular the provisions of

Section 54F.

11. Mr. Shah then relied upon the decision of ***Assam Hindu Mission Upper Nawprem v/s. Smt. Elaboris Tron AIR 1999 Gauhati 39*** in support of his submission that when additional evidence is admitted the other side should be given an opportunity to review it. In this behalf he relied upon the observations of the Court in paragraph 10. However, we find that this decision is not relevant for the consideration of the present Chamber Summons since it deals with procedure before the Tribunal which had relied upon the document forming part of the additional evidences paper book without actually permitting the reliance sought to be placed on the said paper book but without rejecting the same.

12. Mr. Shah also relied upon a decision ***CIT v/s. Asian Techs Ltd. 233 ITR 715*** and the observations of the Kerala High Court that in principle, subsequent events can be taken into consideration by the Appellate Tribunal while granting relief to the parties. This decision does not, in our view, assist the appellant-assessee in support of his Chamber Summons.

13. Having considered these aspects, we find that the amendment now sought and which seeks to include the copy of the arbitral award as

well as certain correspondence the appellant seeks to extend reliance upon the additional evidence to these documents over and above the Additional Evidences Paper Book filed before the Tribunal. The documents have sought to be relied upon in the form of the Arbitral award is pursuant to an Arbitral agreement dated 20th December, 2013 as we have observed earlier which is more than a year after the impugned order was passed. Furthermore, the correspondence sought to be relied upon in the above present Chamber Summons as part of the amendment sought by at paragraph xv on page 6 of the appeal paper book are the very same documents which were filed before the Tribunal along with the Additional Evidences Paper Book. In our view, the amendment sought is impermissible. We are not inclined to allow the Chamber Summons and we therefore pass the following order:-

i) Chamber Summons is dismissed.

ii) No order as to costs.

(A. K. MENON, J.) **(M. S. SANKLECHA, J.)**