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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 3649 OF 2018

Ms Tarla Krishnakumar Shah ...Petitioner.
vs
Income Tax Officer & Ors. ...Respondents.

.....

Mr Madhuar Agrawal a/w Mr Upendra Lokegaonkar I/b Mint & Confreres for the Petitioner
Mr N.C.Mohanty for Respondent Nos.1 and 2.

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CORAM : AKIL KURESHI &
B.P.COLABAWALLA, JJ.
FEBRUARY 07, 2019.

P.C. :

The Petitioner has challenged a notice of reopening of the assessment issued by Respondent No.1 – Assessing Officer ("A.O." for short) on 30th October, 2018.

2 Brief facts are as under;

The Petitioner is an agriculturist. For the Assessment Year ("A.Y." for short) 2014-15, the Petitioner had not filed any return of income claiming that she had no taxable income. The A.O. issued a notice under Section 148 of the Income Tax Act, 1961 ("IT Act" for short) seeking to assess the Petitioner's income for the said A.Y. In order to do so, he had recorded the following reasons -

" The assessee has not filed the return of Income for A.Y. 2014-15.

2. In this case, information has been received from the Addl. Director of Income Tax (I & CI), Unit -2, Mumbai vide letter No.Adl.DIT (I&CI), Unit-2/F.Trans/SP/2016-17 dated 24.02.2017 stating that the assessor has sold immovable property situated at Village Acole, Taluka Nalasopara for consideration of Rs.3,51,00,000/- and sale deed was registered on 24/12/2013. As seen in Index II, the Market Value of the property as per Stamp Duty Authorities is taken Rs.40,62,50,000/- which attracts section 50C of the I.T.Act, 1961.

3. In view of the above, I have reason to believe that income to the tune of Rs.40,62,50,000/- has escaped assessment for the assessment year 2014-15 in view of the provisions of section 147 of the I.T.Act, 1961. Necessary approval from the Jt. CIT – 22(3), Mumbai is necessary under the provisions of section 151(2) of the I.T.Act, 1961. A proposal in the prescribed proforma is enclosed herewith."

3 Upon being supplied the reasons, the Petitioner raised the objections to the notice of reopening of the assessment under letter dated 12/09/2018. These objections were, however, rejected by the A.O. by an order dated 26th November, 2018. Thereupon this Petition has been filed.

4 Inviting our attention to the reasons recorded, the counsel for the Petitioner pointed out that the ground for reopening of the assessment cited by the A.O. was the registered sale-deed in relation to the immovable property (hereinafter referred to as "said property") executed on 24/12/2013 with a disclosed sale consideration of Rs.3.51 Crores. According to the A.O. as per the

Stamp Duty Authorities, the market value of the said property was Rs.40.62 Crores (rounded off) . In terms of Section 50C of the Act, the difference between the market value and the declared sale consideration would be the assessee's Long Term Capital Gain. The counsel for the Petitioner however pointed out that the Petitioner was the owner of 20 % of the said property. There were litigations and encroachments concerning the property. The Petitioner had executed an agreement-for-sale of the said property on 31/08/2007 with one M/s Hard Roak Construction Company Pvt. Ltd. (hereinafter referred to as “said company”) at which time the Petitioner had received full consideration of Rs.3.80 Crores. In the return filed for the year 2008-09, when the agreement was executed the Petitioner had not offered such sale consideration to tax, claiming that there was no transfer of the property. The A.O., however, passed the order of assessment holding that looking to the terms of the agreement, the transfer of the land was completed and that the assessee was liable to pay capital gain tax during the said year. The counsel submitted that the Petitioner had not filed appeal against such an order of the assessment. The A.O. now cannot go back on this position and claim that the transfer of the land was complete only upon execution of the sale-deed. He, therefore, submitted that the reasons recorded by the A.O. lack validity.

5 On the other hand, learned counsel for the department opposed the petition contending that the A.O. has recorded the proper reasons. The Petitioner had not filed the return of income for the said A.Y. 2014-15. He relied on the decision of the Supreme Court in the case of **Assistant CIT Vs Rajesh Jhaveri Stock Brokers (P) Ltd.** (**291 ITR 500**) to contend that in such a situation the A.O. has wide latitude to reopen the assessment. At this stage, the Court would not be concerned with the sufficiency of the reasons for reopening the assessment.

6 We have perused the documents and record minutely. On 31/08/2007 the Petitioner had executed an agreement to sell for 20 % share in the said property, for a consideration of Rs.3.80 Crores in favour of the said company. The agreement itself stated that the Petitioner had received such consideration at the time of execution of the agreement. The agreement also listed several disputes concerning the said property, pending before the Civil Courts at various stages. The agreement further recorded as under-

> "3. Payment of Purchase Price of Consideration.
>
> 3.1 The Purchaser has paid the aforesaid purchase price or consideration money of Rs.3,80,00,000/- (Rupees Three Crores Eighty Lakhs only) to the Vendor on or before the execution of this agreement the receipt whereof the

Vendor does hereby confirm, admit and acknowledge, and from the same does hereby release and discharge the Purchaser forever. The Vendor confirms that she has received the entire purchase price payable by the Purchaser and consequently the agreement herein shall not be revoked or cancelled by her under any circumstances.

3.2 The Purchaser confirms that it was agreed to purchase and acquire the Vendor's share right title and interest in the said Property subject to the aforesaid litigations and claims set out in clauses 2.1 and 2.2 above, at the Purchaser's own costs risk and consequences. The Purchaser alone shall be responsible and liable for settlement of all the aforesaid disputes and the acquisition of the shares of the other co-owners and the Vendor shall no be liable or responsible for resolving or settling the same. The Vendor has provided the Purchaser inspection of photocopies of all documents executed by her and pleadings of all proceedings to which she is a party, and the Purchaser has agreed to purchase the said Property on "as is where is" basis with all defects and pending proceedings, and the Purchaser shall not hold the Vendor liable or responsible in that behalf.

3.3 It is clearly agreed by and between the parties that in the event that the said property or any part thereof is found to be subject to be subject to any reservation or to any acquisition or requisition proceedings, the Purchaser shall not hold the Vendor liable or responsible for clearing the same.

3.4 The Vendor shall, simultaneously with the execution of this agreement, execute a comprehensive irrevocable Power of Attorney in favour of the Purchaser and its nominees, authorising them to do the various acts deeds matters and things in respect of the said Property as the Vendor himself could do as the co-owner of the said Property and another Power of Attorney in favour of Purchaser and its nominee or nominees authorising them inter alia to withdraw and settle the pending cases.

4. The stamp duty and registration charges payable on this agreement and/or the said consent terms and/or the said conveyance shall be borne and paid by the Purchaser alone and the Vendor shall not be liable or responsible for the same.

5. Neither party shall be entitled to terminate this agreement except on account of an express breach of the terms and conditions of this agreement. Each of the

parties hereto shall be entitled to seek specific performance of the agreement against the other.

6. The Vendor has made it clear to the Purchaser that the Vendor is not in possession of the said Property or any part thereof and it will be upto the Purchaser to negotiate with those found in possession thereof and obtain possession of the said Property from them.

In the event of any dispute arising between the parties hereto with regard to, relating to or arising out of this Agreement for Sale or the construction, interpretation or implementation of any provisions hereof, the same shall be referred to the arbitration of a sole arbitrator if the parties agree upon the appointment of the sole arbitrator, failing which the dispute shall be referred to arbitration in accordance with the provisions of Arbitration & Conciliation Act, 1996 or any statutory re-enactment or modification thereof. The arbitration shall take place in Mumbai."

7 In the return filed for the A.Y. 2008-09, as noted, the Petitioner did not offer such receipt of Rs.3.80 Crores stating the reason that there was no transfer of the immovable property, and therefore, the capital gain cannot be stated to have accrued. It was the A.O. who took the contrary stand. After giving an opportunity to the Petitioner to make representation, he passed the order of the assessment on 31/03/2008 in which he held that the assessee had sold her rights in the property to the purchaser and the assessee had no liability in respect of the said property since the purchaser had taken over the liabilities and purchased the property on "as is where is" basis. The relevant portion of the order of A.O. reads as under -

"(7) The submission made by the assessee is duly considered. As per section 2(47) of the Act, transfer in relation to a capital asset, includes, the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein. As per the agreement for sale dated 31/8/2007 the assessee has sold her 20 % share, right title and interest the property of a total consideration of Rs.3,80,00,000/- on "as is where is" basis. In the agreement the pending litigations in respect of the property is mentioned and the purchaser has been also made aware of it in clear terms. Further as per the terms and conditions included in the payment of purchase price or consideration as stated in para 3 of the agreement, it clearly shows that the assessee has relinquished her right in the property on execution of the agreement. The clauses as stated in para 3 of the agreement is reproduced as under:

"3.1 The purchaser has paid the aforesaid purchase price or consideration of Rs.3,80,00,000/- (Rupees Three Crores Eighty Lakhs only) to the Vendor on or before the execution of this agreement the receipt whereof the Vendor does hereby confirm, admit and acknowledge, and from the same does hereby release and discharge the Purchaser forever. **The Vendor confirm that she has received the entire purchase price payable by the Purchaser and consequently the agreement herein shall not be revoked or cancelled by her under any circumstances.**

3.2 The Purchaser confirms that it has agreed to purchase and acquire the Vendor's share right title and interest in the said property subject to the aforesaid litigations and claims set out in clauses 2.1 and 2.2 above, at the Purchaser's owns costs risk and consequences. The Purchaser alone shall be responsible and liable for settlement of all the aforesaid disputes and the acquisition of the shares of the other co-owners and the vendor shall not be liable or responsible for resolving or settling the same. **The Vendor has provided the Purchaser inspection of photocopies of all documents executed by her and pleadings of all proceedings to which she is a party, and the Purchaser has agreed to purchase the said Property on "as is where is" basis with all defects and pending proceedings,**

and the Purchaser shall not hold the Vendor liable or responsible in that behalf.

3.3 It is clearly agreed by and between the parties that in the event that the said Property or any part thereof is found to be subject to any reservation or to any acquisition or requisition proceedings, the Purchaser shall not hold the Vendor liable or responsible for clearing the same.

3.4 The Vendor shall, simultaneously, with the execution of this agreement, execute a comprehensive irrevocable Power of Attorney in favour of the Purchaser and its nominees, authorizing them to do the various acts deeds matters and things in respect of the said Property, and another Power of Attorney in favour of Purchaser and its nominee or nominees authorizing them inter alia to withdraw and settle the pending cases.

8 A plain reading of the terms and conditions as reproduced above clearly shows that the assessee has sold her rights to the property to the purchaser and has also given the purchaser a power of attorney to deal with the property in the capacity of having the rights of owner of the property. The assessee has no liability with respect to the said property since the purchaser has taken over all the liabilities and has purchased the property on "as is where is" basis. The assessee has also handed over the possession of the property to the purchaser. It is further seen that the assessee has been utilized the consideration received to give gifts amounting to Rs.40 Lakhs and loans amounting to Rs.1.30 Crores. The assessee has even paid advance tax of Rs.34,60,860/- treating the transaction as capital gains. Thus the assessee's argument that capital gains is not taxable since conveyance has not taken place, does not hold good."

8 The sale-deed came to be executed on the strength of the Power of Attorney given by the Petitioner. The sale-deed was executed in favour of the Directors of the said company, claiming to be the agriculturists. Upon registration of the sale-deed, the the A.O. now

seeks to invoke the provisions of Section 50-C of the Act giving rise to the 'deemed capital gain' in the hands of the Petitioner. In the reasons recorded, he had referred to the sale-deed in question and also pointed out that as per the Stamp Duty Authorities, the market value of the land in question was Rs. 40.62 Crores. He, therefore, believed that the 'capital gain' in the hands of the Petitioner should be taxed on the basis of such valuation instead of sale consideration of Rs.3.80 Crores, originally received by the Petitioner.

9 The Petitioner had brought to the notice of the A.O. of the previous facts concerning the assessment for the A.Y 2008-09 pointing out *inter alia* that the A.O. had held that the Petitioner's rights in the immovable property stood transferred upon execution of the agreement to sell. The A.O. now cannot take a contrary stand. This objection was rejected by the A.O. in the order, disposing of the objections by making following observations -

> "6. In this context, please note that while completing your original assessment u/s. 143(3) dated 02.12.2010, the A.O. held that you were in receipt of entire sale consideration as per agreement dated 31.08.2007 and therefore, the Long Term Capital Gains earned by you as a result of transfer of immovable was taxable in your hands. It may be stated that contrary to your submission towards objecting to re-opening, you had during the course of original assessment proceedings contested that though the assessee received entire sale consideration, no possession of property was given based on adverse possession and litigation. Therefore, it was claimed

> by you that transfer was not complete within the meaning of section 2(47) of the Act, even though the full consideration was received by you. You have not accepted that the capital gains are assessable in AY 2008-09 and you contested before the A.O. that only in order to buy peace you did not contest the order and paid the taxes."

10 In plain terms, the action of the A.O. to reopen the assessment is wholly impermissible. Since in the present case the assessee had not filed the return of income for the A.Y. 2014-15, as per the settled law, there would be no question of change of opinion since the A.O. had no occasion to form any opinion with respect to the issue at hand. However, in such a case, the requirement that the A.O. must have reason to believe that the income to tax has escaped the assessment must exist before the A.O. can issue a notice under Section 148 of the Act. In other words, if it is found that the reasons recorded by the A.O. for issuing the notice lack validity, such a notice would be invalid. In this context, we recall, the Petitioner had received entire sale consideration of Rs.3.80 Crores at the time of execution of the agreement-to-sell in the year 2007. The assessee contended that since there was no transfer of property, such a consideration cannot be taxed as a 'capital gain' in the hands of the Petitioner. The A.O. did not accept such contention. On the basis of the agreement-to-sell produced by the assessee, the A.O. came to the conclusion that the assessee had divested herself of all rights in the

property. The assessee had received full sale consideration. The assessee had handed over the possession of the property to the proposed purchasers. It was the purchasers who would be responsible for any defects in the title. The purchasers would deal with the pending litigations. The A.O., therefore, taxed the entire consideration in the hands of the assessee as her 'capital gain'. The assessee did not challenge this order and the order of the A.O. thus became final. Any action on the part of the A.O. to tax the 'capital gain' in the hands of the assessee for the A.Y. 2014-15, on the strength of the subsequent sale-deed, would amount to shifting his stand from transfer of property being complete upon execution of the agreement to sale to transfer of property taking place only now upon execution of the sale-deed. It is not the case of the revenue that at the time of execution of the sale-deed the Petitioner received any further sale consideration. Under these circumstances, the impugned notice is set aside. The Writ Petition is allowed and disposed of accordingly. No order as to costs.

(B.P.COLABAWALLA, J.) **(AKIL KURESHI, J.)**