CALCUTTA HIGH COURT

Sri Ganesh Properties Ltd

Vs

Commissioner of Income-Tax

(Lahiri C.J.)

10.02.1960

JUDGMENT

Lahiri C.J.

1. This is a reference under section 66 (1) of the Indian Income-tax Act and it arises out of the assessment of premises No. 12, Lower Chitpur Road, commonly known as Teiretta Bazar. The only question that arises for consideration in this reference is whether the assessment of the assessee under section 9 of the Indian Income-tax Act was proper. The assessee took a lease of premises No. 12, Lower Chitpur Road by an indenture dated February 14, 1948. The question referred to this court will have to be answered by a consideration of the different clauses of that indenture of lease. According to the assessee, it was a mere lease of the premises in question and as such it should have been assessed under section 12 of the Indian Income-tax Act. This contention of the assessee was overruled by the Income-tax Officer and that decision was confirmed on appeal by the Appellate Assistant Commissioner and by the Tribunal on second appeal. Against the decision of the Tribunal the assessee applied under section 66 (1) of the Indian Income-tax Act and the question which has been forwarded to this court by the Tribunal is in these terms :

> "Whether on the facts and in the circumstances of the case and on a proper construction of the lease deed dated 14th February, 1948, the income from the property which was covered by the said deed and which the applicant company purchased for Rs. 4,00,000 was assessable under section 9 or under section 12 of the Act ?" The question as framed assumes that the property covered by the indenture dated February 14, 1948, was purchased by the assessee for a sum of Rs. 4,00,000. If that were so, the answer to the question would be self-evident; but on hearing learned counsel on both sides, we have come to the conclusion that the question as framed does not bring out the real point in controversy between the parties, and, accordingly, we reframe the question in the following manner :

"Whether on the facts and in the circumstances of the case and on proper construction of the deed of lease dated February 14, 1948, the assessment of the assessee company under section 9 of the Indian Income-tax Act was correct ?"

This was the question suggested by the assessee company in its application under section 66 (1) of the Act and, in our opinion, that question brings out the real controversy between the parties. I would, accordingly, answer the question as reframed by us. In answering this question we shall have to construe the different clauses of the deed dated February 14, 1948, and come to a conclusion as to whether, upon a true construction of that deed, the assessee company can be said to be the owner of premises No. 12, Lower Chitpur Road (known as Teiretta Bazar). That document recites that the property belongs to Thakur Sri Radhaballav Jew at Burdwan represented by his Shebait Maharajadhiraj Bahadur Sir Uday Chand Mahatab of Burdwan. It purports to be a lease for 66 years with an option of renewal for a further term of 33 years. The Maharaja of Burdwan as Shebait is described as the lessor and the assessee company is described as the lessee. It is stated in the lease that the structures standing on the land are very old, mortars whereof had been loosened and dried up and were in a decaying condition; that the Corporation of Calcutta had served various notices under the Calcutta Municipal Act requiring the owner to adequately secure and strengthen the structures and also instituted certain proceedings against the lessor; that after consulting engineers the lessor had ascertained that a sum of about Rs. 12,00,000 would be necessary for the purpose of rebuilding and renovating the structures; that the lessor had no available funds out of which such rebuilding could be carried out and that it was necessary for the purpose of protecting and preserving the property to make immediate provisions for meeting the expenses required for effecting necessary repairs. For this purpose the lessor granted this lease to the assessee company for a period of 66 years, subject to the payment by the lessee of a sum of Rs. 4,00,000 "being the price of materials of the said old and existing structures including the foundation underneath the ground" and a progressive monthly rent of Rs. 2,000 for the first 25 years, Rs. 3,000 for the next 10 years, Rs. 3,500 for the next 5 years, Rs. 4,000 for the next 10 years, Rs. 5,000 for the next 10 years and Rs. 6,000 for the next 6 years which is the residue of the term. The lease contains various conditions to be observed by the lessee. The sum of Rs. 4,00,000 was to be paid by the lessee in the following manner : Rs. 1,00,000 was to be paid before the execution of the lease and the balance of Rs. 3,00,000 was to be paid in eight equal half-yearly installments of Rs. 37,500 each.

According to the assessee, the lease is a single demise of the land together with all the structures standing thereon for a term of 66 years, whereas according to the Commissioner of Income-tax the lease can be divided into two parts, one part relating to the land underneath the structures and another part relating to the structures standing on the land. Mr. Mitra appearing for the assessed company, at one stage suggested that the assessee company had no opportunity to meet this case

and that the question that the assessee company is the lessee of the land but owner of the structures standing on the land, does not arise upon the order of the Tribunal. I am, however, unable to accept this argument. The finding of the Tribunal is a follows : "The lease deed read as a whole establish beyond doubt that the appellant company was the owner of the buildings during the subsistence of the leas." Question No. 2 as proposed by the assessee in its application under section 66 (1) also indicates that the point as to whether the assessee company was the owner of the "old structures" as distinguished from land underneath the structures was canvassed before the Appellate Tribunal. I shall now turn to the merits of the arguments advanced before us by Mr. Mitra on behalf of the assessee company. His first argument is that, prima facie, in a building lease the ownership remains with the lessor and there is nothing in the lease which takes away that presumption. There is no doubt that in the case of a building lease the presumption. The question before us is whether that presumption has been rebutted by the recitals in the lease itself. In the recitals of the lease is stated that subject to the payment to the lessor of the sum of Rs. 4,00,000 "represents the value of the materials of the structures standing of the land after they have been pulled down. In clause II (2), this sum of Rs. 4,00,000 is described as "purchase money for the materials of the existing old structures standing of the property." There can be no doubt that structures standing on the land consists of the component materials and if all the component materials are sold, the Structures themselves must be deemed to have been sold. Mr. Meyer, however, relied upon clause IV (5) of the lease where it is stated that if any "installment of price for the old and existing structures or any part thereof" remains unpaid, the lessor will have certain rights. On a proper construction of the recital portion and clauses II (2) and IV (5), I held that by the deed the lessor really intended to sell the existing structures for a sum of Rs. 4,00,000. This conclusion is also supported by the fact that in clause IV (3) of the lease it is provided that in case of compulsory acquisition of the premises the lessor will get the entire compensation in respect of the land and the lessee will get the entire compensation for the old and existing structures, buildings or erections. Clause IV (4) of the lease further provides that in case a betterment fee is levied within twenty-five years from the date of the lease in respect of the demised properties, the lessee will be able to pay such betterment fee. These provisions, in my opinion, leave no room for doubt that by the lease the lessor was conveying his title to the existing structure to the lessee. Mr. Mitra, however, relied upon certain other clauses in the lease which, according to him, are inconsistent with the right of ownership of the lessee. These clauses are clause II (4), clause II (6), clause II (7), clause II (11) and clause II (12). I shall take each of these clauses separately. Clause II (4) requires the lessee to erect on the site of the demised premises certain structures at its own cost and expenses and under first class supervision with the best available materials according to a plan annexed to the lease. It is argued that if the lessee was to be treated as the owner of the existing structures are to be rebuilt, will be the absolute property of the lessor. Therefore, the lessor new structures are to be rebuilt. This clause is not inconstant

with the lessees ownership of the old existing structures. Clause II (6) requires the lessee to keep all buildings and structures "to be constructed" on the land in good and substantial repair and in clean and sanitary condition land to effect thorough repairs every tenth year of the term. In view of the fact that the new structures to be rebuilt by the lessee are the property of the lessor, he had every right to impose the condition embodied in clause II (6) of the lease and this clause also is perfectly consistent with the lessees ownership of the old clause also is perfectly consistent with the lessees ownership of the old structures. Clause II (7) confers upon the lessor and his agents and surveyors from time to time during the currency of the lease "to enter upon the land and very part thereof an upon the new buildings and erections to be constructed by the lessee..... to view, examine and inspect the state and condition thereof and the progress of the work and whether the same are being done in accordance with the provisions of clause II (4)" of the lease. This right of entry, again, is conferred upon the lessor in respect of the new construction. In my opinion, this clause also is not inconstant with the lessees ownership of the old structures. Clause II (10) provides that the lessee shall to permit or suffer anything to be done on the demised premises which may become a nuisance or annoyance to the lessor or to the occupiers of neighbouring premises. It is to be noticed that although the lessor was parting with title to the existing structures, he retained his right to the land underneath the structures and he also retained the right re-entry upon the demised premises, in case the lessee did anything in contravention of the provision of clauses II (4) and II (9) of the lease and the lessor also retained his right to file a suit and to have a receiver appointed, in case the monthly rent reserved by the lease was not duly paid by the lessee and in case the installment of the price for the old and existing structures remained unpaid. Clause II (10) and clause II (11), which prohibit the lessee from storing any inflammable material on the demised premises without the previous consent in writing of the lessor, are, in may opinion, intended to protect the lessors right under the forfeiture clause which is clause IV (1) and also clause IV (5) of the lease. Clause II (12) of the lease takes away the lessees right to assign its interest in the demised premises without the consent in writing of the lessor. It is argued on behalf of the assessee that if the lessee became the owner of the existing structures, this provision against alienation would be avoid and it is argued that this restriction against alienation can be upheld only upon the hypothesis that the lessee was not the owner of the existing structures. Mr. Meyer appearing on behalf of the Commissioner of Income-tax has relied upon the decision of this court in the case of Nawab Bahadur of Murshidabad v. Commissioner of Income-tax for the proposition that the word "owner" in section 9 of the Indian Income-tax Act applies to owners, even though they are under certain restrictions with regard to the power of alienation of the properties. That was a case where the right of the Nawab Bahadur of Murshidabad to sell mortgage, devise or alienate his properties was taken away by a deed of settlement which was confirmed by Act XV of 1891 and, in spite of that, he was assessed under section 9 of the Indian Income-tax Act. In this court it was contended on behalf of the Nawab

Bahadur that since he had no power to transfer his properties, he could not be said to be an owner within the meaning of section 9 of the Indian Income-tax Act. This argument, however, was repelled by this court and it was held that in spite of the fact that the Nawab Bahadur had no power to alienate his properties except to a limited extent, he was rightly regarded as the owner of the properties and was rightly assessed under section 9 of the Indian Income-tax Act. This decision, in my opinion, is a complete answer to the point raised by Mr. Mitra to the effect that in view of the restriction on the power of alienation embodied in clause II (12) of the lease, the lessee cannot be regarded as the owner of the structures. I accordingly hold that the restrictive clause does not prevent the lessee from becoming an owner within the meaning of section 9. The Tribunal relied upon a decision of a Division Bench of this court in the case of Ballygunge Bank Ltd. v. Commissioner of Income-tax, for the purpose of coming to the conclusion that the assessee could, in the circumstances of the present case, be assessed under section 9 of the Indian Income-tax Act. Mr. Mitra has sought to distinguish that case from the present one on the ground that that was a case where the lease was in respect of bare land and the lessee constructed the structures standing on the land, whereas in the present case the lease is in respect of the land as well as the structures. This distinction, however, does not help the assessee. The decision in the Ballygunge Bank case is an authority for the proposition that if the land belongs to another person and the building belongs to the assessee, the assessment is properly made in respect of the building under section 9 of the Indian Income-tax Act. If on a construction of the indenture of lease in the present case, it is found that although the land remained under the ownership of the lessor and the editing structures became the property of the lessee, as I have already found, there can be no escape from the conclusion that the principle of the decision in the Ballygunge Bank case applies to the facts of the present case. I should mention at this stage that in the Ballygunge Bank case the lease was for a term of forty years and on the expiration of the period of forty years the lessor had the right to take possession of the entire land with all the structures built upon the land by the lessee. In the case before us the lease is for a term of sixty-six years in the first instance with a right of renewal for a further period of thirty-three years and the lessee is given a period for twenty-five years within which he is to pull down the old and existing structures and rebuild new structures and the new structures, as soon as they are rebuilt, are to become the property of the lessor. Mr. Mitra was fair enough to invite our attention to another decision of the Madras High Court in the case of Commissioner of Income-tax v. Madras Cricket Club although that decision is apparently against him. That was a case where the Madras Cricket Club after taking a long lease in respect of a certain plot of land from the Government, erected buildings thereon and under the terms of the lease the Cricket Club was entitled to remove the structures within a certain period after the termination of the lease. It was held that the Cricket Club was liable to be assessed under section 9 of the Indian Income-tax Act and that in order to be an owner of a building within the meaning of section 9 it was not necessary that a person

should also be the owner of the land on which the building stands. As I have held, upon a construction of the lease, that under its terms the assessee became the owner of the existing structures, although the land underneath the structures remained the property of the lessor subject to the lessees right, the principle laid down in the decisions in Ballygunge Bank and Madras Cricket Club will apply to the facts of the present case. I forgot to mention that Mr. Mitra also invited our attention to the provision in clause IV (6) of the lease which requires the lessee after the construction of the building to keep a suite of rooms for the crest of the Burdwan Raj Coat of Arms, which, according to his argument, is not consistent with the lessees right of ownership. This argument, in my opinion, is based on a misconception. Clause IV (6) clearly applies to a new construction after rebuilding which, according to the terms of the lease, will become the absolute property of the lessor. The lessor had, therefore, every right to impose any condition as to the user of the new building without in any way infringing the lessees right as owner of the existing structures. For the reasons given above, I would answer the question as reframed by us in the affirmative. The assessee will pay the costs of this reference. Certified for two counsel.

G. K. MITTER J. - I agree.

Question answered in the affirmative.