(1981) 06 CAL CK 0001

Calcutta High Court

Case No: IT Reference No. 365 of 1976

Commissioner of Income Tax		APPELLANT
	Vs	
Land Corporation of Bengal (P.) Ltd.		RESPONDENT

Date of Decision: June 4, 1981

Acts Referred:

- Income Tax Act, 1922 - Section 10(2)(xv), 2(xv), 66, 66(5)
- Income Tax Act, 1961 - Section 143(3), 147, 147(a), 256(1), 41
- Transfer of Property Act, 1882 - Section 111

Citation: (1982) 8 TAXMAN 85

Hon'ble Judges: Sudhindra Mohan Gupta, J; Sabyasachi Mukharji, J

Bench: Division Bench

Advocate: S. Sen and Samar Banerji, for the Appellant; D. Pal and Miss. M. Seal, for the Respondent

Judgement

Sabyasachi Mukharji, J.
u/s 256(1) of the income tax Act, 1961, a somewhat peculiar question has been referred to this court for an answer. The question is as follows:

Whether, on the facts and in the circumstances of the case, and on a correct interpretation of the agreement for sale in respect of premises No. 163, Lower Circular Road, Calcutta, being dated 7th October, 1948 the Tribunal was justified in law in holding that the forfeiture of the sum of Rs. 5,00,000 being advance from the intending buyer took place or 1st November, 1951, and not 6th October, 1949, and accordingly the gains resulting therefrom, if any, could not be assessed for the assessment year 1952-53 ?

We shall presently explain why we characterised the question as somewhat peculiar. Before we do so, it is necessary in this case to refer to the history. This appears to be a question relevant-for the assessment year 1951-52. The accounting period for the

relevant assessment year was from 1st October, 1949, to 30th September, 1950. The method of accounting followed by the assessee was stated to be mercantile. The assessment order, out of which this question arose, related to the assessment made u/s 147(a) of the income tax Act, 1961, read with section 143(3) of the said Act. The question relates to the assessability of Rs. 5,00,000 and whether it arises out of the business of sale and purchase of land or property. The ITO in his assessment order stated as follows:

The assessee made an agreement on 7th October, 1948, with one Mozahar Hussain of Dacca (East Pakistan), for sale of the house property at 163, Lower Circular Road, Calcutta, for a sum of Rs. 11 lakhs Shri Hussain paid a sum of Rs. 5 lakhs on 7th October, 1948, by way of earnest money in part payment of the purchase money. The balance i.e. Rs. 6 lakhs, was to be paid within six months from the delivery of the deeds by the vendor to the purchaser''s solicitors. The time-limit for the delivery of relevant deeds, etc., to the purchaser''s solicitor was set within six months of the aforesaid agreement dated 7th October, 1948. The purchaser, therefore, was under an obligation to complete the purchase by paving the entire value of the property, i.e., Rs. 11 lakhs by 6th October, 1949, as per agreement. The time in this respect was strictly the essence of the contract.

It was is stipulated, vide clause 9 of the agreement, that in case the purchaser failed to complete the purchase within the time-limit then the earnest money was to be forfeited to the vendor or the vendor may sue the purchaser for specific performance. The purchaser eventually failed to complete the purchase as per terms of the agreement of sale and the board of directors resolved at a meeting held on 1st November, 1951, that the earnest money of Rs. 5 lakhs paid by the purchaser to the assessee be forfeited and accordingly forfeited the amount. It was further resolved that the amount forfeited should be continued to be shown in the account as ''deposit on sale of property''.

The assessee did not disclose the fact of the forfeiture clearly in its balance-sheet or statements of account nor was any enquiry made in this matter in course of the assessment proceedings for the assessment year 1951-52.

2. He thereafter referred to different contentions and concluded his finding with the following observations:

Regarding the date of forfeiture also I am unable to accept the arguments of the learned authorised representative. As per agreement referred to above the amount stood, automatically forfeited-within the accounting year itself on failure of the purchaser to complete the purchase (time being the essence of the contract). In the context it is not material to consider as to how the assesses treated this amount and when the resolution was formally passed.

Regarding the authorised representative''s plea that a case, was tiled by the purchaser for recovery of the advance in 1957, it may be stated that adequate,

particulars in this regard have not been produced. It is not clear how the suit has been filed beyond the limitation period and what subsequently happened to the case during the 13 subsequent years. In the absence of these particulars and in view of the facts that the money was forfeited in terms of a solemn agreement entered into between the two contracting parties any objection on this ground cannot be accepted.

3. There was an appeal before the AAC. The AAC noted the contentions and arguments regarding the addition of Rs. 5,00,000 and, inter alia, observed as fallows:

Regarding the addition of Rs. 5,00,000 as profit it is found that the assessee made an agreement n 7th October, 1948, with one Mezahar Hussain of Dacca (East Pakistan), for sale of the house property at 163, Lower Circular Road, Calcutta, for a sum of Rs. 11,00,000. Sri Hussain paid a sum of Rs. 5,00,000 on 7th October, 1948, by way of earnest money in part payment of the purchase money. The balance, i.e., Rs. 6,00,000 was to be paid 6 mouths from the delivery of the deeds by the vendor to the purchaser''s solicitors. The time-limit for the delivery of relevant deeds, etc., to the purchaser''s solicitors was set within 6 months of the aforesaid agreement dated 7th October, 1948. The purchaser, therefore, was under an obligation to complete the purchase by paying the entire value of the property, i.e., Rs. 11,00,000 by 6th October, 1949, as per agreement. The time in this respect was strictly the essence of the contract. The ITO states that it was stipulated, vide clause 9 of the agreement, that in case that purchaser failed to complete the purchase within the time limit then the earnest money was to be forfeited to the vendor or the vendor would sue the purchaser for specific performance. The purchaser eventually failed to complete the purchase as per terms of the agreement of sale and the board of directors resolved at a meeting held on 1st November, 1951, that the earnest money of Rs. 5,00,000 paid by the purchaser to the assessee be forfeited and accordingly forfeited the amount. It was further resolved that the amount forfeited should be continued to be shown in the account as ''deposit on sale of property''.
The appellant argued before the ITO and also before me as below:

(a) That the property was purchased after paying the value as approved by the court by an order dated 6th July, 1943. There were difficulties in getting the possession of the property. In these circum stances the assessee offered to sell the property to Mozahar Hussain. As the purchaser failed to complete the purchase within the time limit as stipulated in the agreement the deposit money was forfeited. The sum of forfeited money should not be treated as revenue receipts.

(b) That the property was part of the capital of the company and not its stock-in-trade.

(c) That the amount of deposit money was not forfeited within the relevant accounting year. The assessee is said to have urged the purchaser to honour the

agreement and letters were issued to this effect on 17th June, 1949 and 28th September, 1951, respectively. As the purchaser did not comply with these letters, the amount was forfeited, vide a resolution passed on 1st November, 1951.

(d) That the appellant was informed by the solicitor of the purchaser in 1957 that a case had been filed by the latter for the recovery of the deposit.

5. The ITO states that the property was not meant for sale. It was offered for sale only because the possession could not readily be taken and subsequently no further attempts have been made to sell the property. The property in question is the capital asset and not stock-in-trade in the hands of the assessee. The assessee had already made a very substantial gain out of the agreement made with M. Hussian, by forfeiting the deposit money which amounts to more than 45 per cent of the total value agreed upon. The assessee is, therefore, in no hurry to re-sell the property. The assessee had been systematically selling the fixtures and fittings of the building during the subsequent years. The ITO further points out that it is clearly stated in the memorandum of association, vide clause 2, that the objects r for which the company-is established are:

''To purchase for investment or re-sale and to traffic in land and house and other property...whether real or personal.''

In other words, dealings in land and properties have been stated as one of the main objects of the company. The ITO has, therefore, considered the property as the stock-in-trade and the forfeited amount as revenue receipts, and the ITO has correctly held that the date of forfeiture is 6th October, 1949. The appellant''s counsel has not been able to substantiate his claim that the property should not be held as stock-in-trade and he has not been able to satisfy why it should not be assessed in the assessment year 1951-52. Under the circumstances, I feel that the ITO was quite justified in treating the sum of Rs. 5,00,000 as business profit of the appellant.

4. Being aggrieved by the aforesaid order of the AAC, there was a further appeal before the Tribunal. The Tribunal referred to the arguments made on behalf of the assessee. The Tribunal observed that it was first, inter alia, argued that the reopening u/s 147 was bad because the condition precedent had not been fulfilled. We are not concerned with this aspect of the matter. Secondly, it was contended, inter alia, that the property in question was the capital asset and not stock-in-trade and, therefore, the gain arising therefrom was not taxable as revenue receipt. It was further urged that even assuming the forfeiture of the deposit made by the intending buyer was assessable to tax, it was not assessable for the assessment year 1951-52. The Tribunal noted the relevant dates, which, we are of the opinion, are relevant for the purpose of adjudicating the controversy before us. The said relevant dates are as fallows:

19-6-1943	:	Rs. 1,00,000 was paid by the assessee as earnest money for the purchase of the property at 163.
21-5-1945	:	Rs. 4,00,000 was deposited with the court in full payment for the property.
31-5-1945	:	A conveyance for sale of the property to the assessee was registered.
7-9-1948	:	In the directors' report for the year ended 30th September, 1947, it was stated in respect of this property that owing to legal difficulties we have not been able to gain possession of the premises.
7-10-1948	:	An agreement for the sale of the property to one Mozahar Hussain, son of Mozaffar Hussain of Mogaltuli, was entered into. Rs. 5,00,000 was paid in cash by the buyer on the same date, the balance being payable at the time of the completion of the sale in the manner stipulated in the sale agreement.
22-6-1949	:	In the directors' report for the year ended 30th September, 1948, the same observations regarding the assessee's inability to gain possession of the premises at 163, Lower Circular Road, were made.
30-9-1949	:	The assessee's balance-sheet showed Rs. 5,00,000 received from, the intending buyer as 'advance deposit on property'.
30-9-1950	:	The same narration was given in the balance sheet as on 30th September, 1949, regarding the earnest money of Rs. 5,00,000 received from the intending buyer.
28-9-1951	:	A notice of forfeiture of the earnest money paid by the intending buyer was posted to him at his Dacca address.
1-11-1951	:	By a resolution of the board of directors the earnest money of Rs. 5,00,000 was forfeited by the assessee-company but the amount was to be continued to be shown in the accounts as ' deposit on sale of property'.

5. In this connection it is also important to refer to the agreement dated 7th October, 1948, out of which the question of assessability of the amount of Rs. 5,00,000 arose. The relevant clauses of the aid agreement wen1, as follows:

3. The vendor shall within six months from the date hereof deliver to the purchaser''s solicitors documents of title relating to the said premises as are in possession of the vendor and on their accountable receipt (sic) fur investigation of the vendor''s title and the sale and purchase shall be completed within six months from the delivery of the deeds and documents a aforesaid, time in this respect being strictly the essence of the contract.

4. The vendor shall at its own cost make out a marketable title to the said premises and render the same free from all encumbrances.

5. The vendor shall on receipt of the balance of the purchase money duly execute and register in favour of the purchaser or of such person or persons as he may direct a proper conveyance of the said premises and shall at its own cost cause all necessary parties to join in such conveyance and shall immediately thereafter put the purchaser or his nominee or nominees in vacant and peaceful possession of the said premises if the vendor can in the meantime recover possession thereof from the present occupiers.

7. If the title of the vendor be not found marketable or the vendor fails to render the said premises free from all encumbrances, attachments, liens and lis pendens then the purchaser shall not be bound to complete the purchase and the vendor shall on demand refund to the purchaser the earnest money this day paid and shall also pay to the purchaser all his costs incurred for investigation of title and for the costs of this agreement but not exceeding Rs. 64.

9. If notwithstanding the vendor''s title being marketable and the vendor rendering the said premises free from all encumbrances within the time aforesaid the purchaser fails to complete the purchase then the earnest money this day paid shall be forfeited to the vendor or the vendor shall sue the purchaser for specific performance of this contract.

6. The Tribunal was of the view that the reopening was valid. The Tribunal, however, rejected the assessee''s contention that the property in question was a capital asset and not a stock-in-trade and so the gain arising therefrom was not assessable as a revenue receipt. The Tribunal then addressed itself to the question whether the gain relating to the property at No. 163, Lower Circular Road, was at all assessable for the assessment year 1952-53. In this connection, after setting out the relevant contentions, the Tribunal noted, inter alia, as follows:

His third point is that if the forfeiture is taken to have been secured automatically on 6th October, 1949, as held by the income tax Officer, it would be assessable for the assessment year 1950-51 on the basis of the previous year ended 31st March, 1950. He vehemently contends that there was no scope for an automatic forfeiture on the expiry of a year from the date of the agreement. In this connection, he refers to clauses 4, 5, 7 & 9 of the agreement which have also been reproduced at paragraph 4 above. Before invoking the forfeiture clause (viz., clause 3), the vendor would have to he sure about his title being marketable and the premises being free from all encumbrances. So the forfeiture could not have been an automatic affair. Besides, clause 9 provided for the vendor suing the purchaser for specific performance of the contract. In this Connection, he points out that the resolution for forfeiture of the earnest money was passed by the directors on 1st November, 1951, only after duly issuing a registered notice first on the 19th June, 1949, and later on 28th September,

1951. Unless these formalities had been gone through, the forfeiture was liable to be challenged. In fact, he points out that the purchaser did file a suit before the Calcutta High Court in 1957 for return, of the forfeited money but did not ultimately pursue it.

The departmental representative has argued that the assessee''s plea regarding the year ended 31st March, being taken as a previous year for assessing the gain relating to the property is beside the point; for all sources of income the company has been following the year ended 30th September as its previous year. He further argues that the forfeiture did become effective on 6th October, 1949, which relates to the assessment year 1951-52, though it might have been formally recorded by the company as late as 1st November, 1951.

After carefully going through the relevant clauses of the agreement dated 7th October, 1948, in the light of the events in their chronological order, as recorded by us in para 3 above, we are satisfied that the assessee-company was not in a position to forfeit the earnest money immediately at the end of one year of the date of the agreement dated 7th October, 1948. The formalities that the assessee has gone through were very necessary and till their completion no forfeiture would have been safe from legal assault. Hence, we accept the contention of the assessee that the forfeiture took place only on 1st November, 1951, and the gain resulting therefrom might have been assessed for the assessment year 1953-54 (on the basis of the previous year ended 30th September, 1952) and not for the assessment year 1951-52. As such, we delete the addition of Rs. 5,00,000 from the assessment for the assessment year 1951-52.

7. The Tribunal in its order, as quoted hereinbefore, observed, inter alia, that the "gain resulting therefrom might have been assessed for the assessment year 1953-54 (on the basis of the previous year ended 30th September, 1952) and not for the assessment year 1951-52". Now, in none of these orders, viz., the order of the ITO, the order of the AAC and the Tribunal, there is any categorical finding that the amount which is described as a gain was a revenue receipt assessable to tax. Secondly, we have to observe that neither the ITO nor any of the authorities concerned have addressed themselves to the question whether under clause 3 the title to the property was, in fact, handed over to the vendee, and if so, at what point of time. Even if there was an obligation to complete the transaction in question within the stipulated time, and time being of the essence of the contract, that stipulated time could be the obligation of the vendee to pay the balance sum of the purchase price within six months from the delivery of the documents of title. Strangely enough, neither the ITO nor the AAC nor the Tribunal had thought it right to address themselves as to on which day, if at all, there was any delivery of title as stipulated under clause 3. As we have mentioned before, there has certainly been no finding by either of these three authorities that the receipt in question was revenue in character. In this peculiar circumstance, it appears that the assessee made an

application before the Tribunal and in that application the assessee stated, inter alia, as follows:

The Tribunal, it is submitted, did not determine the amount of the income as a result of the said forfeiture. The amount forfeited was Rs. 5,00,000. As against this, the appellant had incurred a cost of Rs. 5,00,000. If the cost is to be deducted, there will be no question of any gains resulting for the forfeiture. There is nothing in the Tribunal''s order to show that the said cost was not to be taken into account.

The earnest money received by the appellant was its liability to the purchaser which liability continued till the date of the forfeiture. As a result of the forfeiture, the said liability ceased but the benefit arising from the cessation of the liability did not fall to be assessed u/s 41 of the income tax Act, as the provisions of that section had no application.

8. The assessee further stated, inter alia, as follows:

As the appellant is seriously prejudiced by the Tribunal''s omission to deal with, refer to or to take into (sic) the appellant hereby humbly prays that the order dated 29th September, 1973, passed by the Tribunal may be modified having regard to the above aspects of the case.

9. The Tribunal in its order passed on 4th October, 1974, made the following orders:

6. We have carefully considered the contentions of the learned representative of the assessee. The decision on the point whether the forfeited amount really constituted income or not was not necessary for deriding the appeal. In view of the final decision of the Tribunal that it was not assessable in the year under consideration, the point about the effect of the order of the High Court on any particular point referred to the High Court is to be determined after the decision of the High Court. We are of the opinion that there is no rectifiable mistake from the record as urged by the learned representative of the assessee. There is no merit in this application and it is accordingly dismissed.

10. Upon this there was another miscellaneous petition filed by the revenue. Therein it was stated, inter alia, as follows:

It is submitted that the question whether the impugned sum of Rs. 5,00,000 was assessable in 1951-52 or in some other year would arise only if it is a receipt of income nature. If it is not, the question of its consideration for inclusion in the total income would not arise at all. Hence, in view of the categorical finding in para. 7.3 of the original order and the final view expressed in the order on the miscellaneous petition that the said sum of Rs. 5 lakhs was not includible in the total income of the assessee for the assessment year 1951-52, which clearly implies that it is a receipt of income nature, it is respectfully submitted that the observations in para 5 of the order dated 4th September, 1974, on the miscellaneous petition that it was not necessary for the Appellate Tribunal to give a finding that the amount was a receipts

income nature, appears to be contradictory and based on facts as on record.

It is, therefore, prayed that the said observations in para 5 of the order on the order on the assessee''s miscellaneous petition be expunged for the sake of the record.

11. By an order dated 31st January, 1975, the Tribunal ordered as follows:

This is an application by the Department for deleting certain observations made by the Tribunal in its order dated 4th October, 1974, on the miscellaneous application of the assessee. The appeal involved two points for determination, firstly, whether the forfeited amount was an income and, secondly, whether the forfeiture took place in the year under consideration. It did not decide the other point but observed that the gains resulting therefrom might have been assessed for the assessment year 1953-54. The assessee in its miscellaneous application desired the deletion of the above observation. The Tribunal by its order dated 4th October, 1974, decided not to do so, as it was of opinion that it was not necessary to decide the question of assessability and the observation was only incidental for its conclusion that the forfeited amount could not be assessed in the year under consideration. In its application, the Department''s contention is that the Tribunal had impliedly decided that the receipt was of income, nature and on that account the observation in its order of 4th October, 1974, that it was not necessary to decide the assessability run counter to that finding in the appellate, order.
2. We have heard the learned representatives of the parties. As his been pointed out in the order dated 4th October, 1974, the Tribunal did not pronounce upon the assessability of the forfeited amount; its impugned observations in the order of 4th October, 1974, do not run counter to its decision in the appeal. The application is accordingly dismissed.

12. Therefore, it appears to us that in the first order disposing of the appeal there is no finding that the receipt was revenue in character or was an assessable income at all. As a result of two subsequent miscellaneous petitions, the Tribunal has categorically observed that they had not decided whether the receipt was an assessable income at all. It is in that background that the Tribunal has referred the question as we have indicated before and for this reason we have mentioned that it was a peculiar question, because if there was no gain, the receipt could not be an assessable income a such and the Tribunal''s question proceeds on the assumption that if it was a gain, whether it was assessable or not. The basic and the fundamental question is if this was a gain or income assessable, the question will arise as to in which year it will be assessable. The Tribunal in none of its orders has come to a fining on this aspect. Therefore, whatever answer we give at this stage to the question posed would be of purely an academic nature. We are constrained to say that it was unfortunate that the Ito had found in a perfunctory manner, as he did, not only on the question whether the income was assessable or not but also on the question whether the condition precedent for getting the amount had factually

been fulfilled. Whether question is of an academic nature then the court can certainly decline too answer such a question. If any authority is needed for that proposition we may refer to the observations of the Division Bench of this court in the case of Commissioner of Income Tax Vs. Birla Gwalior P. Ltd., , which decision has subsequently been approved by the Supreme Court.

13. Learned advocate for the Revenue drew our attention to the decision of the Supreme Court in the case of Commissioner of Income Tax, Bombay City I Vs. Greaves Cotton and Co. Ltd., . There, the Supreme Court found that the question referred could not be properly answered without a particular finding of fact and, therefore, the Supreme Court remanded the case for making a finding of fact. The Supreme Court observed that it was well established that the High Court was not a court of appeal in a reference u/s 66 of the Indian income tax Act, 1922, and it was not open to the High Court in such a reference to embark upon a reappraisal of the evidence and to arrive at findings of fact contrary to those of the Appellate Tribunal. There, the question was whether a certain expenditure was laid out or expended wholly or exclusively for the purpose of the assessee''s business, which the Supreme Court felt was a question which involved, in the first place, the ascertainment of facts by the Appellate Tribunal and, in the second place, the application of the correct principle of law to the facts so found. There, the question was whether a sum of Rs. 18 lakhs appropriated by the assessee-company in its accounts as compensation payable to its managing agents for termination of the managing agency agreement was admissible as an expenditure wholly and exclusively laid out by the assessee for the purpose of its business u/s 10(2)(xv) of the Indian income tax Act, 1922. The Appellate Tribunal had arrived at the finding that the termination of the managing agency was not a bona fide transaction and it was done for an improper or oblique motive, and on a reference of the question whether the amount of Rs. 18 lakhs was an admissible deduction u/s 2(xv) of the Indian income tax Act, 1922, the High Court had held that the termination of the managing agency agreement was in the interest of commercial expediency and there was no evidence which lead to the inference that the termination of the managing agency agreement was done with any oblique motive. In those circumstances, the Supreme Court held that the question whether the termination of the managing agency agreement by the assessee-company was not a bona fide one and was done for an oblique or improper purpose was essentially a question of fact and the High Court had no jurisdiction to embark upon a reappraisal of the evidence before the Appellate Tribunal and interfere with the finding of fact that the termination of the managing agency agreement was not a bona fide transaction. The Supreme Court, therefore, set aside the finding of the Tribunal as defective in law as it was arrived at without taking into account all relevant material adduced by the parties and remanded the case for disposal by the Appellate Tribunal after recording a clear finding on the question, it being open to it to rehear the appeal u/s 66(5) of the Indian income tax Act, 1922. In the instant case, as would be evident from the narration of the facts,

just before us, the facts are entirely different. Here, not only it is a question that the Tribunal had arrived at a defective finding, the Tribunal had not found as a fact that the receipt in question was income. As a matter of fact, in the two subsequent orders the Tribunal has clearly clarified the position. Not only no other evidence was adduced before the authorities and no authority--neither the ITO nor the AAC--has found that basic fact. In those circumstances, there is no scope of invoking the principle enunciated by the Supreme Court in the case of Commissioner of Income Tax, Bombay City I Vs. Greaves Cotton and Co. Ltd., , to remand the case to the Tribunal.

14. Quite apart from this, in our opinion, it cannot be said that the Tribunal was in error on the basis of the facts as found, because under clause 9 of the agreement, which we have set out hereinbefore, the assessee had an option to forfeit the earnest money or sue the vendee for specific performance of the contract. Now, there is no evidence that in the year in question such an option was exercised either by writing to the vendee or by passing any resolution. If such an option was at all exercised, such an option was exercised subsequent to the year in question. Quite apart from that, there is no finding of fact by any of the authorities that under clause 3 of the agreement the documents of title required to be given to the vendee had been given to the assessee and six months elapsed from that time which fell within the year relevant for our present purpose. If in that background the Tribunal had come to the conclusion that in reality there is no accrual of any income, if the receipt was income at all in the year in question, it cannot be said that the Tribunal was in error. Learned advocate for the Revenue argued that a vendor had a right after the relevant date to treat the amount as accrued to it. But the question is--which is the relevant date? Firstly, when were the documents of title delivered, upon which none of the authorities have addressed themselves. This primarily is the responsibility of the ITO to do so, specially when he was assessing after a reopening and there is no clear finding that the option was exercised in the year in question.

15. Apart from that, learned advocate for the assessee drew our attention to certain observations in Cheshire & Fifoot. on the Law of Contract, 7th edn., p. 534, in support of the proposition that even in a case where there was no option specifically given in a contract, the right to forfeit did not automatically follow, but an intention to forfeit had still to be attributed to the vendor. We need not go as per that opinion. But in this case the option was categorically given by clause 9 of the agreement.

16. Learned advocate for the Revenue drew our attention to the observations of the Division Bench of this court in the case of Shree Hanuman Cotton Mills v. Tata Aircraft Ltd. [1964] 68 CWN 476, at p. 478, and also to the observations in the case Howe v. Smith [1884] 27 Ch D 89 (CA). There it was held by the Court of Appeal in England that on a sale of real estate the purchaser paid &#65533; 500, which was stated in the contract to be paid "as a deposit, and in part payment of the purchase money". The contract provided that the purchase should be completed on a day named, and

that if the purchaser should fail to comply with the agreement the vendor should be at liberty to re-sell and to recover any deficiency in the price as liquidated damages. The purchaser was not ready with his purchase money, and, after repeated delays, the vendor re-sold the property for the same price. The original purchaser having brought an action for specific performance, it was held by the Court of Appeal, affirming the decision of Kay J., that the purchaser had lost, by his delay, his right to enforce specific performance. It was further held that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. He drew our attention to certain observations of Cotton L.J. and Bowen L.J. in aid of the proposition that money paid in part of the price as the earnest money, in case of non-performance by the vendee, could never be claimed to be returned by the vendee. That may be so, but it has to be borne in mind that the facts of that case were entirely different from our present case. Here, there is no question of any reasonable time. Here the Revenue seems to have proceeded on an academic theory of forfeiture. Even that question of law-could not be applied, because of the lack of finding in clause 3 of the agreement as to when the documents of title were delivered to the vendee, if at all, and, furthermore, in view of clause 9 of the agreement, which we have referred to hereinbefore.

17. Reliance was placed on the observations of the Supreme Court in the case of Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited, , which affirmed the observations made by the Division Bench of this court, as we have referred to hereinbefore. These observations, however, in the background of the peculiar facts and circumstances of this case, which we have pointed out, cannot be of any assistance to us.

18. On behalf of the assessee reliance was placed on the observations of the Supreme Court in the case of Namdeo Lokman Lodhi Vs. Narmadabai and Others, , where the Supreme Court was dealing with whether the notice of intention to determine a lease on forfeiture prior to the amendment of clause (g) of section 111 of the Transfer of Property Act, 1882, was necessary at all and also on the observations of the Supreme Court in the case of Shri Rattan Lal Vs. Shri Vardesh Chander and Others, , in aid of the proposition that even where it was not expressly so provided it was necessary to give a notice of the intention to forfeit the amount before the amount could be treated as a forfeited amount. We need not, in view of the specific clauses and the peculiar nature of the facts of clause 3 and clause 9 of the agreement, further examine this aspect of the question. If the amount is retained as a forfeited amount, then the character of the amount would be different. The character may be a revenue character. But if the amount is utilised as a part of the price for the purchase of the property, then whether the entirety would be revenue receipt or not would depend upon various other considerations. Therefore, these vital facts had not been found, and if clause 3 of the agreement

would have been necessary for us, we would have remanded the case to the Tribunal for a decision as to whether any documents of title had been made out or not. As to clause 9 of the agreement we are clearly of the opinion that had it been necessary for us to decide this theoretical question, we could not say that the Tribunal, in the facts and circumstances of the case, was wrong in saving that in reality there was no accrual of a right to forfeit, in view of the absence of intimation to the vendee in the year in question.

19. In that view of the matter, we decline to answer the question, as the answer to this question would be academic an the facts of this case. We must observe, secondly, that had it been necessary for us, however, to decide the question, we would have answered the question in the affirmative and in favour of the assesses. In any event, we decline to answer the question, in the facts and circumstances of the case. There will be no order as to costs.

Sudhindra Mohan Gupta, J.

I agree.