(1997) 03 MAD CK 0112

In the Madras High Court

Case No : Writ Petition No''s. 4584 and 4700 of 1993

ASHOK LEYLAND FINANCE LTD. APPELLANT

Vs

APPROPRIATE AUTHORITY and Others (ALSO P. NATARAJA SASTRI v. UNION OF INDIA and Others). RESPONDENT

Date of Decision : 31-03-1997

Acts Referred:

Citation : (1997) 140 CTR 346

Hon'ble Judges : Jayasimha Babu, J

Bench : Division Bench

Judgement

JAYASIMHA BABU, J. :

An agreement styled as agreement for development was entered into between P. Nataraja Sastry and Ashok Leyland Finance Limited on 30th

April, 1990 wherein the subject matter of the agreement was described as ""88 per cent. of the undivided share and interest in the Schedule A

property to be conveyed to the party of the second part and or to its nominee or nominees"".

The Schedule A property was described as ""all that piece and parcel of vacant land being plot No. 164, present door No. 51, (old door No. 1)

First main road, Gandhi Nagar, Adayar, Madras-20 of an extent of 5 grounds and 1050 sq.ft. measuring north to south on either side 90 ft. and

east to west on either side 145 ft.

2. The agreement sets out that the owner is in possession of the property; that the property was self-acquired under a sale deed dt. 28th

September, 1965; that the owner had decided to develop the property by demolishing the existing bungalow on the land which was a very old and build a conglomeration of flats on the land; that the offer made by the party of the second part for development of the land had been accepted by

the owner; that the owner had secured eviction of the tenants who were in occupation of the building only with the intervention of the party of the

second part; that the party of the second part had agreed to develop the property even in the absence of the original of the parent document being

available; that the parties had earlier entered into an agreement on 23rd December, 1989 and had also filed Form 37-I before the appropriate

authority, the IT Department, Chennai, which form was rejected by the authority on 9th March, 1990; that thereafter, the parties agreed to enter

into this agreement in supersession of the earlier agreement; that the owner had retained for himself a portion only of the said conglomeration

together with the proportionate undivided share in the land amounting to 12 per cent. and sell the balance undivided 88 per cent. share in the land;

that the owner had decided to entrust the construction and sale of the flats apartments/garages/shops offices/etc. to be built on the land to the party

of the second part; that pursuant to the agreement reached between them the second party was authorised in the capacity of promoter to take

steps immediately for the preparation of the plan and after securing necessary approval proceed with the construction; that the second party was

authorised to sell constructed space together with the proportionate undivided share in the property for any consideration on terms and conditions

to be determined by the second party who was to receive and appropriate for itself all such considerations or moneys except for an area of 2740

sq.ft. of built up area which was to be constructed for the owner and delivered to the owner as part of the consideration for the sale of 88 per cent.

interest in the land to the second party or its nominees; that the owner would execute and register power of attorney in favour of the second party

to enable it to complete the construction and to sell all the constructed area excluding 2740 sq.ft. that the second party was to complete the

construction within 15 months; that the owner would not create any encumbrance in the property after the date of agreement; that the building to

be constructed excluding the area of 2740 sq.ft. was to vest absolutely in the second party or its nominees at all times; that the second party was

entitled to raise loans on the security of the building to be constructed on this property; and that the owner would execute and register sale deeds in favour of the nominees of the second party whenever called upon.

3. The consideration for the agreement was described in cl. 3 of the agreement, in the following terms :

In consideration of or the party of the second part/promoter agreeing to construct and deliver to the party of the first part and/or his nominee built

up area of 2740 sq.ft. (to be valued at Rs. 525 per sq.ft.) 1/3 to be earmarked by the party of the first part in such storeyed building for 12 per

cent. undivided share in the land retained by him as per the specifications annexed hereto, and also for the following cash considerations of an

aggregate sum of Rs. 20,63,489 (Rs. Twenty lakhs, sixty three thousand four hundred eighty nine only) paid and to be paid to him in the following

manner :

a. Rs. 8,00,000 (Rupees eight lakhs only)

Paid by cheques as advance.

b. Rs. 12,63,489 (Rs. Twelve lakhs sixty three thousand four hundred eighty nine only) to be paid within 15 days from the date of receipt of No.

objection certificate by both the parties"".

4. The payment of consideration was set out in cl. 4 of the agreement which reads as under :

The party of the first herein agrees to sell 88 per cent. of the undivided share and interest in the schedule A property which share is set out in

Schedule C hereunder to the party of the second part/promoter/and/or to its nominee or nominees either in parts or full under one or more deeds.

The apparent consideration in relation to this agreement is Rs. 30,81,700) (Rs. Thirty lakhs eighty one thousand and seven hundred only)

consisting of :

a. Rs. 10,18,211 (Rs. Ten lakhs eighteen thousand two hundred and eleven only) representing the value of 2740 sq.ft. of built up area (Rs. 525

per sq.ft. less 153.39 sq.ft. for proportionate undivided share of land) to be exchanged for part of the apparent consideration and

b. Rs. 20,63,489 (Rs. Twenty lakhs sixty three thousand four hundred and eighty nine only) being the cash consideration set out supra.

5. The Form 37-I filed by the parties before the appropriate authority together with this agreement having resulted in the impugned order, these

writ petitions have been filed by the owner as also by the proposed transferee challenging the impugned order.

6. It was contended that this agreement which is styled as development agreement does not fall within the scope of Chapter XX-C of the IT Act

and therefore, the impugned order is one without jurisdiction. Though it was contended for the Revenue that the petitioners are estopped from

raising such an argument/after having filed Form 37-I, I consider it just to permit this argument being raised, as jurisdiction cannot be conferred by

a party if it is not to be found, within the four corners of the statute.

7. Chapter XX-C of the Act was introduced with the avowed object of ensuring the payment of tax properly payable on the market value of the

immovable property transferred inter vivos. The Supreme Court in the case of C.B. Gautam Vs. Union of India and Others, , upheld the validity of

the provisions providing for pre-emptive purchase, after finding that the provision was intended to ensure the payment of tax properly payable on

the market value of the immovable properties transferred and that such transfers are not to be allowed to become means for evading substantial

part of the taxes lawfully payable on the market value. A rebuttable presumption that the parties intend evading tax would arise if the apparent

consideration for the transfer as set out in the agreement is found to be less by 15 per cent. or more of the market value of the property.

8. Petitioners contend that the restriction on transfer under s. 269UC is only in respect of transfer as it is defined in 269UA(f), and this transaction

does not fall within either sub-cl. (i) or (ii) of that clause. Petitioners do not dispute the fact that 88 per cent. undivided share in the land is to be

transferred. That such transfer is for a consideration is also not in dispute. It is however the form of consideration, according to the petitioners, that

makes it impossible to regard this transaction as a transfer for purpose of Chapter XX-C.

9. The consideration in substantial part is by way of cash payment - Rs. 20,63,489. In addition to this consideration, the transferee is required to

construct for the petitioners 2740 sq.ft. of built up space in a building to be put up on the entire plot including the undivided 12 per cent. retained

by the owner. The agreed value of this extent of 2740 sq.ft. has also been recorded in the agreement at Rs. 10,18,211. The apparent consideration as set out in Form 37-I filed by the parties has been stated as Rs. 30,81,700.

10. Counsel submitted that this was not an agreement for sale as part of the consideration is not money, and price referred to in the definition of

sale in s. 54 of Transfer of Property Act is only money consideration as held by the apex Court in the case of CIT vs. Motor & General Stores

AIR 1967 SC 200. Counsel contended that this was also not an exchange as the 2740 sq.ft. built up space is yet to be constructed.

11. ""Exchange"" is defined in s. 118 of the Transfer of Property Act as under : when two persons mutually transfer the ownership of one thing for

the ownership of another, neither thing nor both things being money only, the transaction is called an ""exchange"".

A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.

Apparent consideration"" in relation to an immovable property transferred by way of exchange is defined for the purposes of Chapter XX-C in s.

269UA (b)(1)(ii) of the Act to mean :

(A) in a case where the consideration for the transfer consists of a thing or things only, the price that such thing or things would ordinarily fetch on

sale in the open market on the date on which the agreement for transfer is made;

(B) in a case where the consideration for the transfer consists of a thing or things and a sum of money, the aggregate of the price that such thing or

things would ordinarily fetch on sale in the open market on the date on which the agreement for transfer is made, and such sum;

The word thing used in these definitions is not defined in either Act. The dictionary definition shows that it has a wide variety of meanings

depending upon the context. In the context in which this word is used in the definition of exchange and apparent consideration it means an object

or service which has value quantifiable in terms of money :

A transaction which is otherwise an exchange does not cease to be so, because a part of the consideration is future construction promised to be

done by the transferee. The market value of that construction as on the date of the agreement is the amount to be taken into account for the

purpose of determining the apparent consideration.

12. Neither the IT Act or the Transfer of Property Act recognises, what counsel

termed as ""development agreement"" as a special mode of transfer

of the property. Any such agreement depending upon its scheme and contents has necessarily to fall within the recognised modes of transfer though

the modes of transfer envisaged in such agreement may be more than one.

13. These definitions of apparent consideration transfer and immovable property r/w s. 269UC which restricts the transfer of immovable property,

indicate the legislative intention to bring within the ambit of Chapter XX-C of the Act, all arrangements involving the divestment of rights of

immovable property which may be land, building or part of a building constructed or to be constructed, whether with or without machinery, plant

furniture, fittings or other things for a tangible or intangible consideration, capable of being computed in terms of money and exceeding the amount

prescribed under s. 269UC, subject to the exemption provided for s. 269UO, viz., transfer to a relative on account of natural love and affection.

14. The fact that a part of the consideration for the transfer of the undivided share in the immovable property is to be by way of construction to be

put up on the land transferred as also on the land retained, does not take away such an arrangement from the purview of the Chapter XX-C of the

Act. All arrangements involving the divestment of rights in immovable property in favour of another for a consideration, the amount of which

exceeds the limit prescribed are meant to be covered by Chapter XX-C unless specifically exempted. There is no exemption provided for

development agreement even when such agreement is in respect of transfer of the rights in the immovable property for a consideration.

15. Learned counsel referred to two judgments rendered by two learned single judges of the Calcutta High Court as also to a judgment rendered

by a Division Bench of the Patna High Court in support of their submission that development agreement is not covered by Chapter XX-C.

16. In the case of Hari Krishna Kanoi and Another Vs. Appropriate Authority and Others, , the Court held that the Appropriate Authority had

travelled beyond the limits of the prescribed jurisdiction under s. 269UD for determining the apparent consideration, and directing the purchase by

the Central Government of lot A at an amount which cannot be considered to be equal to the amount of apparent consideration. The Court held

that the apparent consideration was determined on a wrong appreciation of the law and therefore, remanded the matter back to the Authority to

determine consideration afresh. This decision is not of any assistance to the petitioner.

17. In the case of Mahabodhi Society of India and Another Vs. Union of India (UOI) and Others, , rendered by another learned single judge of

the Calcutta High Court, after having held that the authority had acted with malafides in directing the pre-emptive purchase of the property

belonging to the religious institution entitled to protection under Arts. 25 and 26 of the Constitution, and that the order of compulsory purchase was

made beyond the period of limitation, it was further held that if consideration for transfer is not monetary consideration or non-existing things or is

future things not having a workable present market value, the machinery for computation of the compensation fails, and, therefore, such transaction

would fall outside the purview of the Chapter XX-C of the Act. These observations are in the nature of obiter as that question could not survive

after the Court had found that the action of the authority was ultra vires Art. 25 and 26 of the Constitution and also barred by limitation.

18. Sec. 269UA clearly provides for cases where consideration comprises money and thing. It cannot therefore be said that the computation

provision must fail in a case where consideration is money and thing or things to be brought into existence in future.

19. Learned counsel lastly relied upon the case of Ashis Mukerji Vs. Union of India (UOI) and Others wherein a Division Bench of the Patna High

Court held in the penultimate paragraph of the judgment thus :

Thus, though we hold that the provisions of Chapter XX-C would apply to the nature of the agreement for transfer of immovable property called

the development agreement to the present case, there has been violations of the provisions of s. 269UE(3) and 269UG(1) of the Act falling under

this Chapter. The order under s. 269UD(1) is itself bad as it purports to acquire property which is not exactly the subject-matter of the agreement

and then that property is sought to be vested in the Central Government under s. 269UE(6) of the Act"". The Court did not invalidate the order for

pre-emptive purchase on the ground that the statutory provisions are inapplicable to development agreement. The decision rested on the ground

that the order impugned therein sought to acquire property which was not the subject matter of the agreement.

20. That conclusion was reached by the Court even though in the body of the judgment, the Court had expressed the view that it is difficult to see

how the development agreement before it could be termed as a sale of 60 per cent. of the land of the owner as well as of the construction portion

of the building. The Court after having observed thus, also observed that no doubt in the ultimate analysis, the agreement has the effect of

transferring or enabling enjoyment of the property in question to the developer.

The Court had also found after considering the definition immovable property and transfer that "".... agreement will squarely fall under cl. (d)(ii) and

cl. (f)(ii) of s. 269UA of the Act"".

21. Though that Court had made several other observations, the Court did not ultimately hold that the Chapter XX-C was not attracted to that

case. The Court held that the agreement before it was for transfer of 60 per cent. of the undivided share in the land; that the order made by the

authority which also provided for transfer of 60 per cent. of the shares in the constructed space was unwarranted and that therefore, the order

impugned therein could not be sustained. This decision also is not of any assistance to the petitioner.

22. The observations made in the judgment which indicate a view that Chapter XX-C cannot be applied to a case where the consideration for the

transfer of undivided share in the land is construction of whole of part of a building, is a view with which, with great respect, I cannot agree. Where

consideration consists of thing or things only, or thing or things and money, the manner in which the thing/s is/are to be valued has been indicated in

the statutory provisions, and merely by stating that the consideration is a thing only or as thing of any agreed amount would not take such an

agreement out of the purview of the Chapter XX-C of the Act.

23. In this case, the parties themselves had valued the construction to be put up for the owner as part of the consideration for sale of 88 per cent.

share in the land, and the Appropriate Authority has rightly adopted that value, for the construction while determining the discounted apparent

consideration.

24. Learned counsel for the owner contended that the value placed by the parties for the extent to be constructed was admittedly not undervalued

but was found to be in fact higher than the cost of construction, such excess being determined as per the guideline value adopted by Central Public

Works Department, and therefore, the entire impugned order has to be set aside. This argument proceeds on the fallacy that the agreement is to be

read as if it consists of two parts one for construction of flats and another for payment of cash consideration.

The flats to be constructed is part of consideration for the sale of 88 per cent. interest in the land. The aggregate of the monetary consideration and

the value of the flat being less by well over 15 per cent. of the market value, there is no error in the Appropriate Authority taking that aggregate

value for determining the conclusion that there has been undervaluation.

25. It must therefore be held that notwithstanding the description of the document as development agreement, the subject-matter of the transfer

being undivided share in the land, and the consideration being partly in money and partly in a thing which was not in existence, that the thing being a

flat which the transferee was required to construct, the provisions of Chapter XX-C of the Act are attracted and the petitioners had rightly filed

Form 37-I. The impugned order cannot be set aside on the ground that the order is one made without jurisdiction.

26. On the merits of the impugned order, it was contended by counsel that the order is based on irrelevant considerations, that relevant

considerations have been omitted, and that the order has taken into account facts regarding which the petitioners were not called upon to answer in

the show cause notice.

27. There is no dispute about the fact that in the show cause notice issued to the parties, it had been stated that the apparent consideration of Rs.

30,52,891 is less than the fair market value of the property by more than 15 per cent. for the reason that there was previous instance on record of

sale of the property immediately next door at No. 52, Ist Main Road, Gandhi Nagar, Adayar nearly 15120 sq.ft. approximately 6.3 grounds for a

consideration of Rs. 68 lakhs, for which statement had been filed before the Appropriate Authority in August, 1989. The discounted value of that

sale was Rs. 66,15,529 which worked out to the rate of Rs. 10.39 lakhs per ground. After adding 9 per cent. for inflation for the period of 9

months between the dates of two agreements, the rate worked out for this property was Rs. 11.33 lakhs per ground. At the rate of Rs. 11.33

lakhs per ground the value of the petitioners land would work out to Rs. 54.21 lakhs. As against that sum, the apparent consideration under the

agreement between the parties after discounting worked out to only Rs. 30,52,891 which was less than the estimated fair market value by nearly

37.60%.

28. After setting out the aforementioned facts in the show cause notice, the petitioners were informed that a presumption had arisen that

understatement of the consideration in the agreement of sale was with a view to evade tax. Petitioners were therefore called upon to show cause as

to why the order for the purchase of the property should not be made under s. 269UD(1) for the discounted apparent consideration of Rs.

30,52,891.

29. There is no dispute about the fact that the petitioners were heard thereafter on the objections which they had filed to the show cause notice.

30. The impugned order sets out all the objections raised by the petitioners, the same having been dealt with by the Appropriate Authority in

seriatum in the impugned order.

31. Counsel however contended that the order does not give reasons for rejecting the objections raised. Having perused that order, I am unable to

agree with this submission.

32. Petitioners do not dispute the fact that the adjoining property at door No. 52 Ist Main Road, Gandhi Nagar, Adayar measuring an extent of

about 6.3 grounds had been sold pursuant to the agreement dt. 1st March, 1989 at the rate of Rs. 10.39 lakhs per ground. The rate per ground

under the agreement between the petitioners for an extent of about 5.4 grounds works out to Rs. 6.38 lakhs. The difference is about Rs. 4 lakhs

per ground.

33. As on the date of the agreement, the owner was in possession and there was no impediment to the proposed construction being commenced

on the land subject to the necessary licence and permission being obtained. The size of the two plots that of the petitioners plot and of the adjoining

land at No. 52, Gandhi Nagar, Adayar, are certainly comparable. The plot of the petitioners measures about 5.4 grounds while the adjoining plot measures about 6.3 grounds. Both are situated on the same road first main Road, Gandhi Nagar. The FSI available for the two plots under

applicable regulations is one and the same namely 1.5 though in fact, the building put up on the adjoining plot by its owner namely Malar Hospitals

now has an FSI of 2.5 which appears to have been obtained by way of special permission after the purchase of the plot.

34. Petitioners had apparently realised the fact that the apparent consideration in their agreement is less than the market value and had sought to

provide justification for the sale at a lower price by stating that there was a tenant in the property whose eviction was secured with the good offices

of the proposed transferee and that the title deeds of the property were lost and despite such loss, the transferee had come forward to develop the

property.

35. These factors had been reiterated before the authority along with the further objections that the sale of the adjoining plot was not comparable

because the construction put up thereon had an FSI 2.5. It was also contended by the owner that here was an urgent need of money and therefore

lower price was justified.

36. As pointed out in the impugned order, the loss of the original title deed which is alleged to have occurred in the bank to which property had

been mortgaged by the owner, was not found to be an impediment to the title of the owner being accepted. The agreement recites the fact that the

property had been acquired by way of purchase by the petitioner under a registered sale deed. Obviously certified copy of the registered deed

was available. The encumbrance certificate was also available from which the existence of prior encumbrances and alienations could be

ascertained. The owner was in the normal course required to give indemnity regarding the prior encumbrance if any, and the sale was to be free of

any encumbrances. Counsel for the proposed transferee had after scrutinising the documents, satisfied himself that the petitioner-owner had

marketable title to the property. The transferee did not intend to use the property for itself but only to construct residential cum commercial

complex for sale to others. Without being satisfied about the marketable title of the petitioner/owner to the property, it could not possibly

undertake the risk of selling the property to others. The authority has held that the absence of the original document by itself did not afford a

justification for the difference of more than Rs. 4 lakhs per ground. That finding cannot be regarded as perverse.

37. At the time of agreement, the property was admittedly in the possession of the owner. There was no tenant. The tenant who was in occupation

is said to be Animal Welfare Board. That tenant had vacated the premises before the date of agreement. The agreement states that the transferee

had helped to secure vacant possession of the building from that tenant. No material was placed by the owner before the authority to show the

nature of the efforts made by the proposed transferee, or the cost incurred by it, or the circumstances in which the tenant vacated the premises.

The Authority rightly did not regard the alleged effort made by the transferee to secure vacant possession of a Central Government body as

affording justification for the difference of Rs. 4 lakhs per ground.

38. As regards the alleged urgent need of the owner for funds, no material was produced to substantiate the alleged urgent need. No compelling

circumstance necessitating the acceptance of a lower price by the owner was disclosed. No fault can be found with the authority for not accepting

such unsubstantiated assertion of urgent need for funds. The owner had apparently purchased the property as an investment, as it is the case of the

owner that he purchased the property in 1965 and thereafter for 20 years or more, Animal Welfare Board was his tenant.

39. As regards the FSI, it is not in dispute that under the applicable regulations, the FSI is 1.5. The fact that after purchasing the plot, the purchaser

of the adjoining plot was able to get special sanction for FSI of 2.5 cannot be regarded as a material factor which had affected the price at which

the plot had been purchased by that purchaser. Even if one were to accept that the FSI that the purchaser of the adjoining plot was able to secure

subsequent to purchase and the purpose for which the plot was put to use namely for constructing and running a Hospital, had affected the price to

some extent, the difference of Rs. 4 lakhs per ground cannot be regarded as being attributable to those factors. The view taken by the Authority

that the FSI for two plots being the same, the fact that the purchaser of the adjoining, plot had, subsequent to the purchase, obtained exemption

from the normal FSI would not render that plot non-comparable, cannot be said to be a perverse conclusion. The impugned order is therefore not

liable to be set aside on the ground that this plot was not comparable to the adjoining plot and the value of that plot as set out in an agreement

which is 9 months anterior to that of the agreement between the petitioners herein, is not comparable.

40. Counsel also contended that the guideline value for the plot in the area was only Rs. 5 lakhs per ground and therefore, the value of Rs. 6.38

lakhs per ground in the agreement between the petitioners cannot by any means be regarded as a case of undervaluation. Chapter XX-C of the

Act requires the authority to take into account the market value and not the guideline value.

Where the fair market value is available the question of adopting the guideline value does not arise. Guideline value is relevant only in the absence

of any other basis for ascertaining the market value. In such a case, the guideline value can be adopted as also representing the market value.

41. The authority has not erred in not adopting the guideline value as the basis of comparison, as the transaction relating to the adjoining land which

was comparable in size with comparable relative advantages and which transaction was also proximate in point of time being nine months earlier,

was available to the authority.

42. It was also contended that the authority has taken into account irrelevant factors in asmuch as it had, towards the end of the order, referred to

two other transactions regarding which the petitioners had not been put on notice. Those two transactions are one in relation to another plot on the

same road at 47, I Main Road, Gandhi Nagar in which 92-1/4 per cent. of undivided shares in 13719 sq.ft. or 5.72 grounds was agreed to be

transferred under an agreement dt. 10th April, 1989 at the rate of Rs. 8.62 lakhs per ground, and in the second, the sale of extent of 4.90 grounds

comprised in No. 12, Gandhi Nagar I Main Road, Kasturba Nagar, pursuant to an agreement dt. 7th September, 1989 at the rate of Rs. 8.42

lakhs per ground.

43. The Authority has not relied upon these transactions to reach the conclusion that there has been undervaluation. As noted by the Authority, the

other two transactions if looked into only support the conclusion already reached by it after comparing this plot with the adjacent one which had been sold nine months earlier. Interestingly, the owner, along with the writ petition, has produced a certificate from a valuer which certificate is dt.

6th March, 1993 and in which after recording at the outset that the certificate is given at the request of the owner regarding the fair market value of

the property as in April, 1989, it is stated thus :

.... We have taken two sales which have taken place in 1989 and 1990 in and around the locality. One land rate is at Rs. 8,62,000 per ground

and the other land rate is at Rs. 10,39,000 per ground ....

This valuation report has been referred to only to undercore the fact that even the transactions referred to by the Authority towards the end of its

order in relation to the property at No. 47, Ist Main Road, though not mentioned in the show cause notice is a transaction which even according to

the owner is a genuine transaction. It is not the case of the petitioners that there was no transaction as stated in the order in relation to the property

at No. 47, Ist Main Road or that the property was in any way not comparable to the property of the owner.

44. Even ignoring the transactions relating to that property at No. 47, Ist Main Road on the basis of the comparison made by the authority

between the petitioners plot and that of the adjoining plot, the two being comparable and the finding of the authority on such comparison that there

had been substantial undervaluation by the petitioner which was in excess of 15 per cent. of the market value cannot in any way be said to be

vitiated on account of the reference made to two other properties with a view to underscore that conclusion. Petitioners have failed to rebut the

presumption that arose as a consequence, that such undervaluation was with intent to evade the payment of tax properly payable on the market

value.

45. All the contentions urged for the petitioners thus fail and the petitions are therefore dismissed.