(1994) 01 CAL CK 0025

In the Calcutta High Court

Case No : Matter No. 2552 of 1986

Chandravadan Desai and Others APPELLANT

Vs

Appropriate Authority and Others RESPONDENT

Date of Decision : 13-01-1994

Acts Referred:
Income Tax Act, 1961 — Section 269AB(1), 269UA, 269UC

Citation : (1995) 126 CTR 351 : (1995) 213 ITR 744

Hon'ble Judges : Ajoy Nath Ray, J

Bench : Single Bench

Advocate : R. Murarka, S. Baid and V. Murarka, for the Appellant; P.K. Pal, M.L. Bhattacharya and M. Seal, for the Respondent

Judgement

Ajoy Nath Ray, J.—The petitioners in this case entered into an agreement in June, 1985, with three parties who are conveniently called Thirani, Lansdowne Properties and Onyx Estates.

2. The substance of the agreement, which is annexed in extenso to the writ petition, was that the petitioners would pay to Thirani Rs. 13.03 lakhs (approximately), that they would pay to Onyx Rs. 99,150 and to Lansdowne Rs. 33,000 (approximately). By reason of such payments, the possession of four of the flats to be constructed in the building as Surat Bose Road would be given to the petitioners. The builders were Lansdowne. They were to construct and hand over possession. The land owner Onyx would transfer the undivided proportionate share of the land to the petitioners for the said consideration.

3. In so far as Thirani is concerned, I construe the said agreement as an irrevocable and final grant to the petitioners of all the right, title and interest of Thirani in the said four future flats ; he was only a Sub-lessee in the old building. The petitioners were, however, still to pay to Thirani the balance consideration sum in the phased manner mentioned in the agreement. Rupees 2.60 lakhs (approximately) was to be paid to Thirani on execution and thereafter ten per cent. by six successive stages, of floor completion and the last instalment only

upon possession. Thirani, however, was not to give possession but possession would be given by Lansdowne without any objection from Onyx. The petitioners claim in the writ petition to have paid out already a sum of Rs. 13 lakhs.

4. The petitioners filed Form No. 37EE in respect of Chapter XX-A of the Income Tax Act, 1961. That Chapter was operative until September 30, 1986, when the operation of the Chapter ceased by reason of the provisions of Section 269RR of the said Act.

5. Chapter XX-C of the said Act was inserted into the book from October 1, 1986. However, there is no clear provision like Section 269RR which mentions the date of commencement of the operation of Chapter XX-C as on any specific date. On the other hand, the beginning of the Chapter starting with Section 269U, directs the Chapter to come into operation as the Central Government might notify.

6. In relation to Calcutta, Bombay, Madras and Delhi, the Government notification was issued in August, 1986, and the commencement of the operation of Chapter XX-C was from October 1, 1986.

7. For these metropolitan cities there was thus no holiday in between the cessation of the operation of Chapter XX-A and the commencement of the operation of Chapter XX-C.

8. The whole of the country, however, was not in the same position. To mention but one instance, Surat had a holiday from these Sub-Chapters for about three years and Chapter XX-C commenced there only from the 1st of June, 1989.

9. Chapter XX-C contains a stringent penal provision u/s 276AB, in that a defaulting person is compulsorily to go to prison if the default is duly proved and prosecuted. The petitioners filed Form No. 37-I under Chapter XX-C also in respect of the said very same agreement dated June, 1985. In view of the stringent provision for default, I do not blame them for having done so, out of abundant, caution.

10. An order for pre-emption has been passed under Chapter XX-C. The petitioners now challenge the said order and also want it declared that Chapter XX-C is inapplicable in the facts and circumstances of this case and the authorities are to proceed, if at all, under Chapter XX-A on the basis of Form No. 37EE filed by the petitioners earlier.

11. Both, Mr. Murarka, for the petitioners, and Mr. Pat, for the respondents, have argued the case at great length and have cited many authorities, I have been greatly assisted by the experience and expertise of both of them. It is not, in my opinion, however, necessary to dwell upon all the authorities cited by learned counsel or to deal with all the points which were touched upon by them. I shall accordingly deal with only those parts of the arguments which will suffice for me to come to a just and rational conclusion upon the instant case.

12. It is in my opinion, indisputable that the authorities cannot proceed upon

both the Chapters XX-A and XX-C, or upon both Forms Nos. 37EE and 37-I. Mr. Paul submitted that Chapter XX-C is applicable in the instant case, but Chapter XX-A is inapplicable, even though the petitioners purported to fill up a form and submit the same under the said Chapter.

13. Mr. Pal said that the agreement of June, 1985, is no more than an agreement for sale. According to him, the provisions of Chapter XX-A were not attracted to a mere agreement for sale which did not have coupled with it the giving away of possession or enjoyment of the real property itself. But, he said. Chapter XX-C envisages just such an agreement, and Section 269UC contemplates such a preliminary agreement prior to actual transfer.

14. Mr. Pal relied in this regard upon a case of the Gujarat High Court in Shantivan Corporation Vs. Sub-registrar and Others,

15. In that case an agreement was sought to be entered into (or dated) just one or two days before the commencement of the Chapter XX-C in Surat, that is, some time in the very last day in the month of May, 1989. It was contended that, inter alia, because of such a date on the agreement. Chapter XX-C would not have any application.

16. A Division Bench of the Gujarat High Court was unimpressed with the facts in that case and came to the conclusion that the delivery of possession prior to the commencement of Chapter XX-C could not be said to have been sufficiently established. It also held that a mere agreement for sale does not come within even the extended definition given in these Sub-chapters of "immovable property". It was held that an agreement for sale did not, in the general law, pass any property but that it merely gave the purchaser a right to obtain a later conveyance from the seller by enforcement of the agreement by way of a proceeding in specific performance.

17. It was held by the Division Bench that this right would not be one such as was contemplated under Chapter XX-C.

18. I respectfully agree with and follow the said judgment. In my opinion also, a mere agreement for sale would not be a right "in or in respect of" immovable property. If it were so, Section 269UC would require parties to enter into a prior agreement in the form mentioned in the Sub-sections of that section before even entering into an agreement for sale. This would be an absurd construction, for the law does not recognise an agreement to agree;

19. However, on the basis of the above construction, I have put upon the agreement of June, 1985. I am of the opinion that the said transaction as mentioned in the said document was ah acquirement by the petitioners of the full rights of Thirani in respect of the flats to be constructed by Lansdowne on the real property of Onyx. That makes the document and the transaction sufficiently complete so as to take it out of the description of a mere agreement for sale, and bring it within the express words of Section 269AB(1)(b). Also, the agreement of

June, 1985, could not be entered into in the form contemplated in Section 269UC of Chapter XX-C, because Chapter XX-C was not in the statute book at all till October 1, 1986.

20. Form No. 37EE was, therefore, appropriately filed by the petitioners. The consideration mentioned in respect of Lansdowne or Onyx was entirely for executory jobs to be performed or deeds to be done by Lansdowne and Onyx, and the sums fell short even of the rupees one lakh limit of Chapter XX-A, not to speak of the larger limit of rupees ten lakhs of Chapter XX-C.

21. In regard to the consideration of above rupees ten lakhs to be paid to Thirani, the transaction definitely fell within Chapter XX-A and thus the respondents will be free to proceed under Chapter XX-A for and in respect of Form No. 37EE already filed prior to the expiry of September 30, 1986.

22. The Board framed a rule, namely, Rule 48L u/s 295 of the Income Tax Act, and later amended it, whereby it was provided that for agreements for transfer which had been entered into before October 1, 1986, Form No. 37-I would be filed on or before October 16, 1986. Since I have held that the transaction was not a mere agreement for transfer as between the petitioners and Thirani, the question of applicability of Rule 48L does not arise.

23. u/s 269AB(1)(b), which was a part of Chapter XX-A, a right. "with respect to" even a building still "to be constructed" was covered. Such a right could never be a right in immovable property under the general law, for the immovable property is still to be. The words "with respect to" in this Sub-section and the same words in Section 269UA(d)(ii) were inserted to cover transactions of sale of buildings which are still to be a common occurrence in the modern system of dividing a building into flats, in place of what used to be a division of land into plots. The sale by Thirani is thus a complete sale, although the thing sold is yet to be, according to the scheme, adopted by Chapter XX-A and left untouched by Chapter XX-C.

24. Under these circumstances, the following order is passed :

The order of pre-emption dated December 12, 1986, passed by the respondents under Chapter XX-C is quashed. The respondents shall not hereafter proceed any further upon Form No. 37-I purportedly filed by the petitioners under Chapter XX-C who shall not be treated as bound by the said filing or any of the statements contained therein. The respondents and specially respondent No. 3A, however, will be at liberty to proceed upon Form No. 37EE filed by the petitioners earlier and take any decision or action thereupon in accordance with law.

25. All parties and others concerned to act on a signed xerox copy of this dictated order upon the usual undertaking.

26. Stay of operation of this order is prayed for by Mr. Pal, but the same is refused.

