

(1998) 07 GUJ CK 0061
In the Gujarat High Court

Case No : Spl. Civil Application No. 8717 of 1991 3 July 1998

CHOKHAWALA ASSOCIATES and Another APPELLANT
Vs
APPROPRIATE AUTHORITY and Another RESPONDENT

Date of Decision : 03-07-1998

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 36
Income Tax Act, 1961 — Section 269UD, 269UD, 269UD

Citation : (1998) 150 CTR 59

Hon'ble Judges : M. C. Patel, J;C. K. Thakkar, J

Bench : Full Bench

Advocate : S. N. Soparkarwith Manish K. Kaji, for the Assessee and Bharat Naikwith R. P. Bhatt, for the Revenue, for the Appellant;

Judgement

By the Court

This petition is filed by the petitioners for an appropriate writ direction or order quashing and setting aside orders dated 30-9-1991 and 23-10-1991, passed by the Appropriate Authority-respondent No. 1 herein, u/s 269UD of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

2. It is the case of the petitioners that petitioner No. 1 is a registered partnership firm carrying on business in the name and style of M/s Chokhawala Associates. Petitioner No. 2 is one of the partners of the said firm. It is stated in the petition that the Saurashtra Trust is a public charitable trust registered under the Bombay Public Trusts Act, 1950. The Trust owned a property, known as Ranchhod Wadi, in Ward No. 11 at Surat, admeasuring 1122 sq. yards. Since the Trust wanted to sell it, an advertisement was issued on 20-2-1971, which was published in "Gujarat Samachar" dated 22-2-1991. A copy of the advertisement is annexed to the petition. The Trust invited offers from willing bidders. It is asserted by the petitioners that wide publicity was given to the said advertisement through various newspapers at Bombay in the State of Maharashtra as well as in the State of Gujarat. The publication was made in as many as 16 leading

newspapers. The names of the newspapers were also mentioned in Annexure "B" to the petition. The last date of receipt of offers was 2-4-1991. In response to the said advertisement, the petitioners submitted their bid in a sealed envelope. A meeting of the bidders was called. According to the petitioners, though their initial offer was Rs. 50,00,000, it was raised to Rs. 86,00,000. It was the highest offer which was accepted by the Trust on certain terms and conditions arrived at between the parties. Since the property belonged to a public trust, the transaction was subject to permission of the Charity Commissioner u/s 36 of the Bombay Public Trust Act.

The Trust was required to make an application in accordance with the provisions of section 269UC of the Act. Necessary information was sent to the Income Tax department by the Trust. It was stated that on 28-9-1991, the property was visited by the officers of the Appropriate Authority. It was inspected on 30-9-1991 and an order of compulsory purchase of property was passed on the same day by the Appropriate Authority for net consideration of Rs. 83,13,490 which is impugned in the present petition. Notice was served on the petitioners and since they were vitally affected by the order passed by the Appropriate Authority, they addressed letters dated 9-10-1991 and 12-11-1991 to the Appropriate Authority requesting him to rectify the mistakes committed by them. The Appropriate Authority by an order dated 23-10-1991 rejected the objection raised by the petitioners, which is also impugned in the petition. Since the order of compulsory purchase was passed u/s 269UD of the Act and an application for rectification was rejected, the present petition was filed by the petitioners, on 6-12-1991, Rule was issued and now the matter is placed for final hearing.

3. We have heard Mr. S.N. Soparkar, learned counsel for petitioners, and Mr. B.B. Naik, instructed by Mr. R.P. Bhatt, for respondent No. 1. Nobody appears on behalf of respondent No. 2, vendor.

4. Mr Soparkar raised various contentions. He stated that before passing impugned orders, no notice was issued to the petitioner, no opportunity of hearing was afforded to him. The orders are, therefore, violative of principles of natural justice and are liable to be set aside.

He submitted that neither allegation was made nor finding recorded by the Appropriate Authority that there was undervaluation in the transaction and with a view to evade payment of tax, the transaction had been entered into. Moreover, it was not the case of the authority and nothing was stated in the orders impugned in the petition that the undervaluation was to the extent of 15 per cent and hence an order was required to be passed in accordance with the provisions of section 269UD of the Act.

It was urged that irrelevant and extraneous considerations have been taken into account by the authorities. Though in the orders nothing was stated, even if affidavit-in-reply is read, sale instances which have been considered were not of Ward No. 11 wherein the property is situate. On the other hand, relevant and

germane considerations have been ignored by the Appropriate Authority in that a number of sale transactions took place of the properties situate in Ward No. 11, where the property in question is situate, between January, 1989 and December, 1990, and even though such sale instances have been brought to the notice of Appropriate Authority after the first order was passed when an application was made on 12-10- 1991, they were not considered by the Appropriate Authority. Even mention was not made about any of the sale instances in the order of rectification which was passed by the Appropriate Authority on 23-10-1991. Nothing is also stated in the affidavit-in-reply filed by the Commissioner about those sale instances, even though counter-affidavit is filed before two days, i.e., on 1-7-1998, after about eight years of the order passed by the Appropriate Authority.

5. Mr. Soparkar, submitted that the property was purchased not secretly or by a private negotiation from a private party. Respondent No. 2 is a public trust registered under the Bombay Public Trust Act. An advertisement was issued in as many as 16 newspapers having circulation in Gujarat and Maharashtra as the property is situate in Surat and offers were invited, bidders were personally called and the highest bid of the petitioners of Rs. 86,00,000 was accepted. The sale was subject to permission of the Charity Commissioner u/s 36 of the Bombay Public Trust Act. In these circumstances, there cannot be underhand dealing or undervaluation and no order could have been passed under the Act.

It was submitted that the Charity Commissioner was also satisfied that the apparent consideration fixed was adequate consideration, and by a communication dated 8-10-1991, he has informed the trust that he had no objection for sale of the property for consideration of Rs. 83,13,490 to the Appropriate Authority. Thus, permission was granted in favour of the department by the Charity Commissioner.

Mr. Soparkar, therefore, contended that the impugned orders are contrary to law. The petition, therefore, deserves to be allowed by quashing and setting aside the orders and by directing the respondent No. 1 to comply with necessary formalities.

6. Mr. Naik, for the Appropriate Authority-respondent No. 1, on the other hand, supported the order passed by the Authority. He submitted that in bona fide exercise of powers u/s 269UD of the Act, the authority, considering relevant facts and circumstances, passed an order, which cannot be said to be illegal or unlawful.

So far as difference of 15 per cent is concerned, he submitted that such difference came to be recognised by the Hon"ble Supreme Court for the first time in C.B. Gautam Vs. Union of India and Others, . The said case was decided on 17-11-1992, whereas the orders impugned in the present petition were passed in 1991 and hence they cannot be held to be invalid on the ground that in the orders it was not stated that there was difference of 15 per cent in apparent

and real consideration.

Regarding sale instances pointed out by the petitioners to the Appropriate Authority, he submitted that those instances were cited by the petitioners after the first order dated 30-9-1991 was passed and as there was no mistake in the said order passed by the Appropriate Authority, the provisions of section 269UD (rectification of mistakes) did not apply and by not making any mention of those sale instances, in rectification order, the Appropriate Authority had not committed any error of law.

It was finally submitted that even if the court is satisfied that the orders passed by Appropriate Authority are liable to be quashed and set aside, a writ may be issued directing the Appropriate Authority to apply its mind and to pass fresh orders after affording opportunity of being heard, as held in C.B. Gautam (supra) by recording reasons in support of such order.

7. Having considered the rival contentions of the parties, we are satisfied that the orders passed by the authorities are not in accordance with law and they deserve to be quashed and set aside. Though there is no provision in Chapter XX-C regarding issuing notice, calling for explanation or affording opportunity of hearing and making a reasoned order, the law is settled by a decision of the Supreme Court in C.B. Gautam (supra) wherein the provisions were held to be *intra vires* by the Supreme Court, observing that before taking an action under Chapter XX-C, it is obligatory on the part of the Appropriate Authority to comply with the principles of natural justice and to pass a speaking order. In the instant case, the principles of natural justice were not complied with and hence the orders are liable to be quashed.

8. The question which arises for our consideration is whether it was necessary on the part of the Appropriate Authority to satisfy itself before taking an action u/s 269UD that there was difference of 15 per cent in apparent and real considerations. In this connection, it was strenuously argued by Mr. Naik that this court is dealing with an order passed in September, 1991, whereas the decision in C.B. Gautam (supra) saw that light of the day on 17-11-1992 in which the court observed that for such compulsory purchase, there must be 15 per cent difference in apparent and real consideration. The ratio laid down in C.B. Gautam (supra), therefore, according to the counsel for the first respondent, does not apply to the case on hand. Mr. Soparkar, on the other hand, submitted that the decision in C.B. Gautam (supra) was no doubt pronounced in November, 1992. But even before, the said consideration of difference of 15 per cent was very much present not only before the court but before the department as well. In this connection, our attention was invited to certain observations in C.B. Gautam (supra).

9. Dealing with the provisions of Chapter XX-C, the Apex Court observed:

"We shall first discuss the question whether the provisions of Chapter XX-C confer an unfettered discretion on the Appropriate Authorities concerned to

acquire immovable properties which are agreed to be sold in the areas to which the provisions of the Chapter are applicable. In this regard, as we have already pointed out, the very historical setting in which the provisions of this Chapter were enacted suggests that it was intended to be resorted to only in cases where there is an attempt at tax evasion by significant undervaluation of immovable property agreed to be sold. This conclusion is strengthened by Instruction No. IA88 issued by the Central Board of Direct Taxes of the Government of India, Ministry of Finance, Department of revenue, which was filed in the court by the learned Attorney General. In the said document, it is emphasised by the Central Board or Direct Taxes that the main objective of the provisions of Chapter XX-C is to check proliferation of black money in real estate transactions and to enforce declaration of the true value of immovable properties that are the subject of transfer between the parties. The Central Board of Direct Taxes has pointed out in the said instructions that, in administering the provisions of the said Chapter, it has to be ensured that no harassment is caused to bona fide and honest purchasers or sellers of immovable property and there is no erosion of the confidence of the public in the sense of justice and fair play of the Income Tax department. Paragraph 3 of the instruction makes it clear that the right of pre-emptive purchase has to be exercised by the Appropriate Authority only when it has good reason for acquiring the property. When the property purchased by the Central Government by an order of an Appropriate Authority is put up for sale, the reserve price is required to be fixed at a minimum of 15 per cent above the purchase price shown as the apparent consideration under the Agreement between the parties. Thus, it is pointed out by the Board that the right of pre-emptive purchase has to be exercised only if the fair market value is found to be at least 15 per cent more than the apparent consideration. The instruction further provides that, in coming to a conclusion as aforesaid, a reasonable margin of probable errors in intimation needs to be kept in view particularly as the law does not provide for any opportunity of being heard. The contents of the affidavit filed by one H.K. Sarangi. Under Secretary, Central Board or Direct Taxes, department of revenue, is also to the effect that the provisions of said Chapter ought to be resorted to only in cases of under valuation of immovable properties in agreements of sale to the extent of 15 per cent or more. The said H.K. Sarangi has further pointed out that, right from the time when the provisions of the said Chapter were brought into force, they are being applied in such manner that the rights and interests of the third parties unconnected with the tax evasion are not affected".

(Emphasis, italicised in print, supplied)

10. Thus, according to Mr. Soparkar, not only when the property is to be put up for sale by Appropriate Authority that there should be difference of 15 per cent, but the provisions of section 269UD can be invoked only in those cases where there is difference of 15 per cent or more between apparent and real consideration. Neither in the order of compulsory purchase, dated 30-9-1991 nor in the order of rectification dated 23-10-1991, nor even in affidavit-in-reply filed

on 1-7-1998, it was stated that the Appropriate Authority was satisfied that there was difference of 15 per cent or more between apparent and real consideration and that the Appropriate Authority was satisfied on that aspect and, hence, an order of compulsory purchase was passed under Chapter XX-C of the Act. It is also not stated in any of the above two orders or in the counter-affidavit that with a view to evade tax, property was undervalued. In the absence of averments and positive finding to that effect, in our opinion, the orders must be quashed and set aside.

11. The question then remains whether the matter should be sent back to the Appropriate Authority directing him to pass an appropriate order in accordance with law in the light of the observations made by the Supreme Court in C.B. Gautam (supra) and in subsequent cases decided by the Supreme Court as well as by this court or to issue an appropriate writ directing him to comply with necessary formalities consequent upon the order being quashed and set aside. Mr. Naik, in this connection, submitted that when the court is allowing the petition on the ground that principles of natural justice were not complied with and the order was not a speaking order, as reasons were not recorded, it would be proper if the Appropriate Authority is directed to reconsider the matter in accordance with law and pass a fresh order after extending opportunity of hearing and by recording reasons in support of the order.

12. Mr. Soparkar, however, submitted that as observed by the Supreme Court in C.B. Gautam (supra) and by this court in various cases, a positive finding of under-valuation of apparent consideration and evasion of tax can be said to be primary facts and if no such allegations have been made nor such satisfaction is recorded by Appropriate Authority, there is no question of sending back the matter to the Appropriate Authority and consequential direction should be issued to the authority to comply with its statutory duty in accordance with law.

Relying on *Om Shri Jigar Association v. Union of India & Ors.* (1995) 209 ITR 608 it was submitted that respondent No. 2 is a public trust and any sale by such trust is subject to permission by the Charity Commissioner u/s 36 of the Bombay Public Trust Act. Such action is a relevant factor which will have to be taken into account by the Appropriate Authority. When a permission is granted by the Charity Commissioner in exercise of statutory power u/s 36, unless there are circumstances showing that there was undervaluation and/or underhand dealing and/or evasion of tax, the court would not on the basis of an order of compulsory purchase, presume that there was undervaluation of property which was done with a view to avoid payment of tax.

13. Mr. Naik, no doubt, submitted that, no permission was granted by the Charity Commissioner in favour of the petitioner at any time. But Mr. Soparkar has rightly urged that the relevant and pertinent fact which is clear from the affidavit-in-reply on behalf of the respondent-authority is a letter written by the office of the Charity Commissioner to respondent No. 2 wherein it was stated that the Charity Commissioner had no objection if the trust sells immovable property as

mentioned in the schedule (property in question) to the Appropriate Authority at Ahmedabad for total consideration of Rs. 83,13,490.

14. In these circumstances, without laying down as a proposition of law that in no case the provisions of section 269UD of the Act would apply, in the facts and circumstances of the case, the submission of the petitioners deserves to be accepted. Reliance, therefore, placed on *Om Shri Jigar Association v. Union of India & Ors.* (supra), in the instant case, is well-founded and the argument deserves to be upheld.

Moreover, Annexure `F to the petition is an application made by the petitioners, wherein certain sale instances of Ward No. 11 have been mentioned. Over and above the property in question, six sale instances have been cited by the petitioners which took place between January, 1989 and December, 1990 and the consideration ranges from Rs. 2016.14 ps. to Rs. 4430 per sq. yard. The transaction in question is of May, 1991 at the rate of Rs. 8600 sq. yard. These sale instances have not at all been dealt with by the Appropriate Authority in rectification order. No reference to those transactions has been made by the deponent in the counter-affidavit. Thus, the relevant and germane material was altogether ignored which was contrary to law. In these circumstances also, in our opinion, it cannot be said that the provisions of section 269UD of the Act could be invoked by the Appropriate Authority.

For the foregoing reasons, in our opinion, the petition deserves to be allowed and is accordingly allowed. The impugned orders dated 30-9-1991 and 23-10-1991, at Annexure `E and "G", respectively, passed by the Appropriate Authority, are hereby quashed and set aside. Respondent No. 1 is directed to complete necessary formalities within a period of six weeks from the date of receipt of the order of the court, including issuance of the clearance certificate. Rule made absolute. No order as to costs.