

(1987) 06 CAL CK 0026
In the Calcutta High Court

Case No : IT Appeal No. 1 of 1985 & Income-tax Appeal No. 1 of 1985

Commissioner of Income Tax

APPELLANT

Vs

Smt. Asha Devi Agarwal

RESPONDENT

Date of Decision : 02-06-1987

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 269C, 269C(1), 269D, 269D(1), 269F(6)

Citation : (1988) 37 TAXMAN 176

Hon'ble Judges : Shyamal Kumar Sen, J; Dipak Kumar Sen, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Dipak Kumar Sen, J.—The facts and proceedings on record leading up to this appeal are, inter alia, that Champa Gouri Ajmera, Lilam Mohta and Savita Motani, the owners of an undivided one-fifth share of premises No. 15, Cossipore Road, Calcutta (the said property), by a deed of conveyance executed and registered on 7-9-1977, conveyed the said property to Asha Devi Agarwal, the respondent herein, for a consideration of Rs. 90,000. By a notice dated 8-5-1978, issued u/s 269D(1) of the income tax Act, 1961 ("the Act"), the competent authority u/s 269D initiated proceedings for the acquisition of the said property. The said notice was printed in the Gazette of India on 10-6-1978. Copies of the said Gazette were received on 25-7-1978, and made available for sale to the public.

2. Prior to the issue of the said notice, a report had been submitted by the Valuation Officer, recording that the fair market value of the said property had been determined by him at Rs. 7,65,543 and, accordingly, the fair market value of one-fifth share thereof was Rs. 1,53,108 which exceeded the declared consideration of Rs. 90,000 by more than 25 per cent.

3. Asha Devi Agarwal, the respondent, filed her written objection before the IAC in the said proceedings u/s 269D(1) contending, inter alia, that the proceedings

were barred by limitation as the said notice u/s 269D(1) had been published after nine months from the date of the execution and registration of the deed of conveyance.

4. The said notice, it was contended, was not duly served on the respondent who received only a copy thereof certified by some other officers to be a true copy and the same did not bear the signature of the authority issuing the said notice.

5. The fair market value of the said property, it was contended, was only Rs. 87,360 as certified by the licenced valuer of the respondent in his report which was dated 11-8-1978, and if payments made on account of registration and other costs and charges aggregating to Rs. 12,916 were taken into account, the declared consideration would exceed the fair market value.

6. The respondent also appeared before the IAC through advocate and submitted that the said premises were more than 80 years" old and were owned by several co-owners having control over a limited part of the property. A part of the property had been let out under long-term leases with permission to sublet and option for renewal. A part of the said premises was also occupied by unauthorised persons. It was submitted that in view of the aforesaid, the fair market value of the property would be lower than that determined by the Valuation Officer.

7. The IAC disposed of the proceedings before him by an order dated 27-7-1984. Following a decision of the Gujarat High Court in COMMISSIONER OF Income Tax, GUJARAT-III Vs. SHILABEN KANCHANLAL RANA. COMMISSIONER OF Income Tax, GUJARAT-III v. BHAGWANDAS S. RESHAMWALA., , he held that publication of the said notice was complete on the date on which it was printed in the Official Gazette, that is, on 10-6-1978, which was within the prescribed period. He further held that the notice u/s 269D(1), had been duly issued and served. Assuming that the original notice issued had not reached the respondent, an authenticated copy was served subsequently.

8. On the question of valuation, it was noted that both the valuer of the respondent and the valuer of the department had determined the fair market value of the said premises on rental method. The difference in the respective determination arose because the valuer of the respondent proceeded on the basis of gross annual rent of Rs. 49,968 as appearing in the official records of the vendors, whereas the valuer of the department ascertained the same at Rs. 1,33,500 on the basis of actual rents received from the said property. It was held by the IAC that the fair market value of the said property determined on the basis of actual rents realised from the said premises was more scientific as the same reflected the yielding capacity of the property.

9. The IAC noted that in determining the fair market value of the said property, the valuer for the department had taken into account the various disadvantages of the said premises as contended by the respondent. The fair market value of the said property, it was held, had been rightly determined at Rs. 1,53,100.

10. It was held that the fair market value of the said property exceeded the apparent consideration for which the same had been sold by more than 70 per cent that the consideration for such transfer had not been truly stated in the instrument of transfer with objects as referred to in clauses (a) and (b) of section 269C(1) of the said Act, and, therefore, the property was liable to be acquired under Chapter XXA of the said Act. With the previous approval of the Commissioner, it was ordered that the said property would stand acquired u/s 269F(6) of the said Act with effect from the date of the service of his order upon the vendors and the transferee.

11. Being aggrieved by the order of the IAC the assessee preferred an appeal therefrom before the Tribunal. It was reiterated on behalf of the assessee before the Tribunal that the proceedings under Chapter XXA, were barred by limitation on the grounds noted hereinbefore. On the authority of a decision of the Allahabad High Court in the case of Kishan Lal Vs. Inspecting Assistant Commissioner of Income Tax (Acquisition Range) and Others, , it was submitted that the date of publication was the date on which the publication, viz., the Official Gazette, became available to the public and not the date of printing.

12. It was contended on behalf of the revenue that, in any event, the notice had been sent to the respondent earlier to the publication. It was contended on the authority of Shilaben Kanchanlal Rana's case (supra) that the proceedings had been initiated within time.

13. The Tribunal noted the decisions of the Allahabad High Court and the Gujarat High Court which were in conflict and held that there being two different views on the question, the view which was more favourable to the assessee would have to be adopted. The Tribunal followed the decision of the Allahabad High Court and held that as the copies of the Official Gazette had been received at Calcutta on 25-7-1978, and was made available to the public on and from that date, the date of the publication of the notice would have to be taken to be 25-7-1978. The proceedings u/s 269D(1), it was held, were therefore, barred by limitation.

14. On the question of valuation, it was contended on behalf of the assessee before the Tribunal that taking into account the registration fee and other charges and expenses, the actual consideration for the transaction was Rs. 1,02,916. It was contended further that in determining the gross annual rent of the said premises, only the rents received by the vendors at the time of the transaction should be taken into account as there were unauthorised persons in occupation of parts of the said premises who did not pay any rent to the vendors. It was also contended that the tenants in the said premises had sublet portions of the property in their occupation to others without surrendering their tenancy. Portions of the said premises were occupied by trespassers from whom collection of rent was difficult and there were several title suits pending. It was contended further that the valuation of the said property as suggested by the respondent had been more or less accepted in the wealth-tax assessment of the respondent.

15. It was contended on behalf of the revenue that the gross annual rent of the said premises had been computed after taking into account the agreements of tenancy of the various occupiers of the said premises and that the Valuation Officer had taken into consideration other disadvantages also of the said premises.

16. The Tribunal held that on the totality of the facts and circumstances, the contentions of the assessee should be accepted. The case of the assessee, it was held, was supported further by the fact that litigation involving the said premises was pending and that the same was admittedly in the occupation of a number of persons some of whom may not be authorised persons. The report of the Valuation Officer of the department, it was held, could not be taken to be conclusive.

17. The contention of the respondent that the notice u/s 269D(1) had not been received by her, was not accepted by the Tribunal which held that the provision for service of such notice were merely directory and procedural. The fact that the subsequent notice served on the transferee was not signed was also an irregularity and would not vitiate the proceedings nor affect the assumption of jurisdiction by the IAC. The appeal of the respondent was allowed.

18. The present appeal by the revenue is against, the said order of the Tribunal u/s 269H of the said Act.

19. At the hearing of this appeal, it was contended on behalf of the appellant that the Tribunal erred in law in holding that the said notice u/s 269D(1) had not been published within the prescribed time. It was submitted that the Tribunal should have followed the decision of the Gujarat High Court in *Shilabcn Kancharilal liana's case* (supra) inasmuch as the High Court in the said decision had followed and applied the decision of the Supreme Court in *State of Maharashtra Vs. Hans George*, . It was submitted that the Karnataka High Court in *Girnar Builders (P.) Ltd. Vs. Inspecting Assistant Commissioner of Income Tax, and Others*, had also followed the decision of the Supreme Court in *Mayer Hans George's case* (supra) and held that the date of publication of a notice was the date on which it was published in the Official Gazette and not the date on which the persons concerned are intimated of the same.

20. It was next contended that the Tribunal in its order did not give any reasons as to why the valuation made by the valuer of the department should not be accepted. The Tribunal did not note or consider the contention of the appellant that the valuer of the respondent took into account only the rents which were in the records of the vendors whereas the valuer of the department had valued the said property on the basis of the actual rents realised from the said premises. It was submitted that the valuer of the department had valued the said property correctly on the basis of the yielding capacity of the said premises taking into account not only the actual rental income payable to the owner but also of other incomes which the property might yield even from the unauthorised occupiers in

the premises. It was submitted that the valuation made by the valuer of the department was a more correct estimate of the value of the said property and should have been accepted by the Tribunal.

21. In support of his contentions, the learned advocate for the appellant relied on and cited the following decisions:

(a) Mayer Hans George's case (supra): This decision has been referred to earlier. In this case, one of the questions raised before the Supreme Court in a criminal proceeding was whether a notification of the RBI was in force and in operation on the date on which an accused was supposed to have committed a violation of the same. It was found that the said notification had been published in the Official Gazette prior to the date of the alleged offence. The Supreme Court observed as follows:

...Where there is a statutory requirement as to the mode or form of publication and they are such that, in the circumstances, the Court holds it to be mandatory, a failure to comply with those requirements might result in there being no effective order the contravention of which could be the subject of prosecution but where there is no statutory requirement, we conceive the rule to be that it is necessary that it should be published in the usual form i.e., by publication within the country in such media as generally adopted to notify to all the persons concerned the making of rules. In most of the Indian statutes, including the Act now under consideration, there is provision for the rules made being published in the Official Gazette. It, therefore, stands to reason that publication in the Official Gazette, vis., the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned.... The argument, therefore, that the notification dated November 8, 1962, was not effective, because it was not properly published in the sense of having been brought to the actual notice of the respondent must be rejected." (p. 743)

(b) Shilaben Kanchanlal Rana's case (supra) : In this case, a notice u/s 269D(1), was published in the Official Gazette on 31-8-1974. The property involved had been conveyed by a deed dated 26-11-1973. It was held by the Tribunal that though the said notice was published on 31-8-1974, the same could not have been immediately available to the interested or affected persons and, therefore, there was no valid publication of the said notice. A Division Bench of the Gujarat High Court followed and applied the decision of the Supreme Court in the case of Mayer Hans George (supra) and held that the said notice had been published within the prescribed period. It was held further that if the statute prescribed the mode of publication and if such mode was adopted, it could not be contended that there was no publication as the matter was not brought to the actual notice of the persons affected.

(c) Girnar Builders (P.) Ltd.'s case (supra) : In this case, in an application under article 226 of the Constitution, an acquisition proceeding under Chapter XXA, was sought to be challenged, inter alia, on the ground that the notice u/s 259D(1)

was published in the Official Gazette dated 6-3-1982, but the fact of such publication was communicated to the party only on 5-4-1982, and, therefore, the proceedings were barred by limitation. A learned Judge of the Karnataka High Court following the decision of the Supreme Court in the case of Mayer Hans George (supra) and the decision of the Gujarat High Court in Shilaben Kanchanlal Rana's case (supra) held that the said notice u/s 269D(1) was duly published on 6-3-1982, and the proceedings were not barred by limitation.

22. The learned advocate for the respondent contended on the other hand that the acquisition proceedings in the instant case were barred by limitation. He submitted that the decision of the Supreme Court in Mayer Hans George's case (supra) was in a criminal proceeding where the question involved was whether statutory notification had come into operation or not by publication in the Official Gazette. In the instant case, the question involved was the determination of the actual date of publication of a notice u/s 269D(1). The Supreme Court, it was contended, had subsequently pronounced on the meaning of the expression "publication" and had held that a mere communication of a matter to the Government department concerned would not be a valid publication if the matter was not brought to the notice of the parties interested or affected. The learned advocate for the respondent, however, invited us to determine this appeal on merits and not on the technical point of limitation particularly when there were conflicting decisions of the High Courts on the question.

On the question of valuation of the said property, the learned advocate for the respondent submitted that the Tribunal had taken into consideration all the material facts and evidence on record including the reports of the two valuers. On a consideration of the aforesaid, the Tribunal made its estimation of the value of the said property. This was a finding of fact by the Tribunal and not a question of law. In an appeal u/s 269H, the High. Court was only called upon to decide questions of law arising out of the order of the Tribunal and not to sit in appeal on disputed questions of fact.

23. There was no apparent error of law in the order of the Tribunal on which this Court was called upon to adjudicate. This Court was not called upon to revalue the said property on the evidence on record and substitute its own estimation for that of the Tribunal. In support of his contentions, the learned advocate for the respondent relied on and cited the following decisions:

(a) State of Madhya Pradesh v. Ram Ragubir Prasad Agarwal AIR 1979 SC 888 : In this, one of the questions before the Supreme Court was whether the conditions of publication of syllabus of the courses prescribed for the secondary schools in the State of Madhya Pradesh had been complied with. In this connection, the Supreme Court observed as follows:

...Contextually speaking, we are satisfied that "publication" means more than mere communication to concerned officials or departments. To publish a news item is to make known to people in general; "an advising of the public or making

known of something to the public for a purpose" (Black's Legal Dictionary, p. 1386). In our view, the purpose of section 3 animates the meaning of the expression "publish". "Publication" is the act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny... an advising of the public; a making known of something to them for a purpose...." (p. 895)

It was held on the facts of that case that mere communication to the department concerned of the syllabus was not proper publication and that the conditions prescribed for the publication of the syllabus had not been complied with.

(b) Kishan Lal's case (supra) : The facts in this case were that a registered sale deed was executed on 18-3-1974. A notice u/s 269D(1), was printed in the Official Gazette dated 21-12-1974. Copies of the said Gazette were, however, made available to the public on 16-1-1975. On these facts, it was held by a Division Bench of the Allahabad High Court following its earlier decision in the case of U.S. Awasthi and Another Vs. Inspecting Assistant Commissioner of Income Tax (Acquisition Range) and Another, , that the publication of such a notice was complete only when the Gazette containing the notification became available to the public. In the facts, the publication was made beyond the period prescribed u/s 269D and, therefore, the proceedings for acquisition of the property under Chapter XXA were without jurisdiction.

(c) Commissioner of Income Tax Vs. Trilokinath, : This decision of a Division Bench of the Madhya Pradesh High Court was cited for the following observations :

It is well recognised that the determination of fair market value of a capital asset is generally a matter of estimate based to some extent on guess work and despite the utmost bona fides, the estimate of the fair market value is bound to vary from individual to individual. There-fore, unless a clear error of law is discernible in the finding reached by the Tribunal on the question of fair market value no interference can be made in an appeal u/s 269H which lies on a point of law alone." (p. 613)

24. The learned advocate for the respondent also drew our attention to a circular issued by the CBDT in Circular No. 455 dated 16-5-1986-see 26 Tax Mag. 69, which provides, inter alia, as follows :

With a view to achieve early finalisation of proceedings under the existing Chapter XXA of the income tax Act, 1961, the Board has decided that with effect from April 1, 1986 acquisition proceedings u/s 269C will not be initiated in respect of an immovable property for which the apparent consideration is Rs. 5 lakhs or less and that where acquisition proceedings have been initiated by issue of notice u/s 269D, the proceedings will be dropped if the apparent consideration of the immovable property is below Rs. 5 lakhs." ([1986] 159 ITR (St.) 105).

25. The learned advocate for the respondent cited Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, ,

where it was held by the Supreme Court that a circular issued by the CBR would be binding on all officers and persons employed in the execution of the Act.

26. The learned advocate for the appellant submitted that the subject- matter of the acquisition proceedings was the entire premises, as apart from the undivided share of the respondent, proceedings had been initiated to acquire the balance undivided share belonging to the other co- owners of the said premises under Chapter XXA on grounds similar to those as in the instant case and the apparent consideration for transfer of the entire premises would exceed Rs. 5 lakhs.

27. We first take up for consideration the question whether the acquisition proceedings in the instant case are barred by limitation. If it is held that the notice u/s 269D(1) issued in the instant case was published in the Official Gazette on 10-6-1978, then it cannot be said that the said proceedings are barred by limitation. On the other hand, if it is held that the publication of the Official Gazette took place when the same was received at Calcutta for sale and distribution on 25-7-1978, then it cannot be said that the publication was effected within nine months from the end of September 1977, the month in which the trans action in respect of the said property was affected. In the latter case, the proceedings were not initiated within the prescribed time. The decisions cited on this point of different High Courts are conflicting. In U.S. Awasthi's case (supra) and in Kishan Lal's case (supra), the Allahabad High Court has taken the view that publication of such a notice would be complete only when the Gazette containing the notice would be made available to the public. The Gujarat High Court in Shilaben Kanchanlal Rana's case (supra) following the Supreme Court in Mayer Hans George's case (supra), has taken the view that the date of publication would be as appearing in the Official Gazette as prescribed in the statutes and whether the same was made available or brought to the notice of the persons concerned was not of any relevance. A learned Judge of the Karnataka High Court has taken the same view as that of the Gujarat High Court in Girnar Builders (P.) Ltd's case (supra).

28. On consideration of the decisions cited above, we are inclined to take the same view as that of the Gujarat High Court but as we intend to dispose of this appeal on merits, we do not express a final opinion on this point.

29. We next take up for consideration whether the Tribunal erred in law in accepting the contentions of the respondent in respect of the valuation of the said property and rejecting the valuation as made by the valuer for the department. In the order under appeal, the Tribunal has noted the following contentions of the respondent:

(a) only the rent received by the vendors at the time of the sale should be taken into account;

(b) there were persons in unauthorised occupation of the said property who did not pay rent to the vendors;

(c) tenants in the property had sublet portions in their occupation to others without surrendering their own tenancy;

(d) there were several title suits pending in respect of the said property for a long time;

(e) the property in question was a joint property;

(f) the items of deductions from the rent received on account of repairs, municipal rates and collection charges were not computed or estimated by the IAC.

30. The Tribunal has recorded in its order that it had considered the totality of the facts and in the circumstances of the case after which it came to the conclusion that the valuation of the said property as urged by the respondent should be accepted.

31. We note that the order of the Tribunal is silent on the question whether in estimating the value of a property on rental basis, only the rent which is payable by the tenants to the owners of the property as the landlord should be taken into account or whether the rent which was being collected by tenants of the said property from their sub tenants should also be taken into account. If we assume that the Tribunal proceeded on the basis that the rent paid by the sub-tenants in the said property to the tenants in such property should not be taken into account in computing the value of such property on rental basis, it cannot be said that the Tribunal's approach was erroneous. The property involved in the instant case is, admittedly, a tenanted property. In law, the owner is entitled to collect only the rent payable by the tenants. The owner has no right or claim over the rent paid by the sub-tenants to the tenants. Only if a tenant is evicted under due process of law, the question of a sub-tenant becoming a direct tenant of the owner might arise. A purchaser of such a tenanted property would be in the same position as the vendor, the original owner. A purchaser would also be restricted to collection of rent only from the tenants and not from the sub-tenants and the value of such property in the hands of the owner of transferee, if calculated on the rental basis, would have to be determined by the rent which is available to them for collection and not on the rent which is being collected by the tenants on their own from the sub-tenants. No authority was cited on behalf of the appellant for the proposition that in valuing a tenanted property on rental basis, the rent collected by the tenants from their sub tenants would have to be taken into account.

32. Apart from the aforesaid, the Tribunal has taken into account the other facts and circumstances relevant to the question of valuation as also the various disadvantages pertaining to the said property and has arrived at its own conclusion. It cannot be said that the decision of the Tribunal is perverse or based on no relevant evidence. On the same facts, it may be possible for us to come to a different conclusion but we should not be called upon to do so in an appeal on a question of law.

33. For the reasons as above, we see no reason to interfere with the order of the Tribunal and we affirm the same.

34. We also note that in the circular of the CBDT referred to herein before, the revenue has been directed to drop the acquisition proceedings if the apparent consideration of the property involved was below Rs. 5 lakhs. In the instant case, the apparent consideration of the one-fifth share was only Rs. 90,000. Therefore, the apparent consideration for the entire premises on the said basis would be only Rs. 4,50,000. The apparent consideration for which the balance four fifths share of the said premises was being sought to be transferred has not been disclosed by the revenue. There is no reason why the circular should not be implemented in the instant case. This point, however, was not agitated in the proceedings below and it is not necessary for us to deal with this aspect any further.

35. For the above reasons, the appeal is dismissed. There will be no order as to costs.

36. The learned advocate for the appellant prayed for a stay of operation of this judgment and order. The learned advocate for the respondent stated on instruction that he will not alienate the property in dispute before 14 7-1987. In that view, we do not pass any order as prayed for by the appellant.

Shyamal Kumar Sen, J.

I agree.