

(1998) 03 CAL CK 0019
In the Calcutta High Court

Case No : Writ Petition No. 2886 of 1994 and G.A. No. 2066 of 1995

Digvijay Cement Co. Ltd.

APPELLANT

Vs

Appropriate Authority and Others

RESPONDENT

Date of Decision : 10-03-1998

Acts Referred:

Income Tax Act, 1961 — Section 269UA
Transfer of Property Act, 1882 — Section 53A

Citation : (2000) 158 CTR 448 : (1999) 235 ITR 725 : (1999) 106 TAXMAN
106 : (1998) 99 TAXMAN 32

Hon'ble Judges : Pinaki Chandra Ghose, J

Bench : Single Bench

Advocate : Bhattacharjee, for the Appellant; Pal, for the Respondent

Judgement

Pinaki Chandra Ghose, J.—This is an application filed by the writ petitioner, inter alia, challenging an order dated June 24, 1994, passed by the Appropriate Authority of Income Tax in proceedings bearing Case No. AA/CAL/1022 of March, 1994.

2. The case of the writ petitioner is that the writ petitioner submitted Form No. 37-1 in duplicate u/s 269UC(3) of the Income Tax Act, 1961, for permission of the concerned authorities to transfer the said property being the premises No. 15B, Hemanta Basu Sarani, Calcutta. Along with the said Form No. 37-1 the petitioner also filed the copy of the sale agreement which is also annexed to the writ petition being annexure-A. In this writ application, the writ petitioner prayed for a direction upon the respondents to issue the "no objection certificate" u/s 269UL(3) of the Income Tax Act in respect of the transfer of the industrial undertaking in terms of the agreement entered into between the writ petitioner and the private respondent being respondent No. 4.

3. Mr. Bhattacharjee, learned senior advocate, appearing on behalf of the writ petitioner, submitted that the order which has been passed by the concerned appropriate authorities is illegal and they have passed the said order in excess of

their jurisdiction. Furthermore, the said order specifically said that the transfer is null and void u/s 5(3) of the Urban Land (Ceiling and Regulation) Act, 1976. In passing the said order, the said authorities have acted in excess of their jurisdiction. He further submitted that the act of the appropriate authorities is illegal, mala fide and arbitrary.

4. The facts of the case are as follows :

By an order of this court in a company application the writ petitioner acquired all the properties, rights and interest of Hastings Jute Mill Limited which were transferred to and in favour of the petitioner under the provisions of Section 394(2) of the Companies Act, 1956, and thereby the petitioner became the owner of all properties, assets, machinery, stores, etc., of Hastings Jute Mills Ltd. He further submitted that no part of the said premises is vacant land within the meaning of the Urban Land (Ceiling and Regulation) Act, 1976. Since October 8, 1993, the said factory was lying closed. After careful consideration and in view of the continuous non-viability of Hastings Jute Mills, the board of directors of the writ petitioner decided to dispose of the said mill. After various proposals and negotiations amongst the parties the workers of the writ petitioner finalised the negotiations with respondent No. 4 to sell the said jute mill as a going concern on as is where is basis. The total sale price of the jute mill was fixed at Rs. 777.50 lakhs.

5. In view of the said negotiations on or about March 7, 1994, the petitioner entered into an agreement with respondent No. 4 where under it agreed to sell to respondent No. 4 the said factory excepting a division of the said company, including its lands and buildings, plant and machinery, etc., as a going concern at the said price. Respondent No. 4 by virtue of the said March 7, 1994 agreement, was in possession of the said mill on the same date as a monthly lessee and a power of attorney was executed in favour of respondent No. 4 by the writ petitioner and a lease was granted for three years to respondent No. 4. Thereafter, on March 22, the writ petitioner filed a statement in statutory Form No. 37-1 in terms of Chapter XXC of the Income Tax Act, 1961, before the Income Tax authorities for necessary permission and thereafter on July 4, 1994, the writ petitioner received the impugned order dated June 14, 1994, passed by respondent No. 1.

6. Mr. Bhattacharjee, appearing on behalf of the writ petitioner, also submitted that the only right of respondent No. 1 under the said Chapter XXC of the said Act was either to make an order of purchase of the immovable property for an amount equal to the amount of apparent consideration or to grant the "no objection certificate". He further submitted that the said Act did not give any jurisdiction to respondent No. 1 to adjudicate upon the legality of the transaction which is proposed to be entered into by the writ petitioner. He further submitted that if the said order of purchase is not passed by respondent No. 1, then it is obligatory and imperative upon respondent No. 1 to issue the certificate u/s 269UL(3) of the said Act which would only indicate that the Government is not

interested in purchasing the said property. He further submitted that u/s 53A of the Transfer of Property Act, 1882, the protection given to the transferee which has taken possession of the property in part performance of the contract was only against the transferor or any person claiming under him and he submitted that the impugned order thereby is illegal. In support of his submissions, he relied upon the following judgments :

1. Shantivan Corporation Vs. Sub-registrar and Others, .
2. Tanvi Trading and Credits P. Ltd. and Others Vs. Appropriate Authority and Others, .
3. Satwant Nakang Vs. Appropriate Authority, Income Tax Department, New Delhi, .
4. Moi Engineering Ltd. and Another Vs. Appropriate Authority and Others, .
5. Hari Krishna Kanoi and Another Vs. Appropriate Authority and Others, .
6. C.B. Gautam Vs. Union of India and Others, .
7. Hindustan Lever Ltd. and Another Vs. Appropriate Authority and Others, .
8. RAJASTHAN PATRIKA LTD. Vs. UNION OF INDIA AND OTHERS., .
9. Dwarkanath Chatterjee and Others Vs. Union of India (UOI) and Others, .
10. Appropriate Authority and Another Vs. Tanvi Trading and Credits P. Ltd. and Others, .

7. It appears that the Supreme Court has held that two alternatives are open under the scheme of the legislation :

(i) the Union of India through the appropriate authority could buy the property ;
or

(ii) in the event of its decision not to buy, it has to issue a "no objection certificate" leaving it open to the parties to deal with the property.

8. Mr. Pal, appearing on behalf of the appropriate authority, submitted that the said order has been passed by the appropriate authority after considering the facts of this case. It would be evident from the order which has been passed by the appropriate authority that the appropriate authority has held :

"Clause 7. It is, therefore, clear that "transfer" within the meaning of Chapter XXC has already taken place by handing over physical possession of the property in part performance of the agreement for sale. The submission of Form No. 37-1 before the appropriate authority for obtaining a clearance under the said Act therefore now becomes a matter of eye wash to regularise the transaction for which prior permission was necessary. We therefore hold that the statement in Form No. 37-1 as furnished to the appropriate authority is not a valid statement in the eye of law in cases where the transfer has already taken place as in the

instant case."

9. He also drew my attention to Section 269UL(2) and further to Section 269UA(f) and submitted that if the transfer has already taken place in that case, they will be liable to be prosecuted under Sections 276A and 276B. He also drew my attention to the averments made in the said writ petition where it appears that possession has already been handed over before filing of the application u/s 269UDC. Mr. Pal relied upon a judgment reported in RAJASTHAN PATRIKA LTD. Vs. UNION OF INDIA AND OTHERS., , and submitted that the transfer has already taken place. Thus Chapter XXC would not be applicable to that.

10. Contravention of the provisions of Sections 269UC, 269UE and 269UL is punishable u/s 276AB read with Section 278AA. The said Section 276AB runs as follows :

"276AB. Whoever fails to comply with the provisions of Section 269UC or fails to surrender or deliver possession of the property under Sub-section (2) of Section 269UE or contravenes the provisions of Sub-section (2) of Section 269UL shall be punishable with rigorous imprisonment for a term which may extend to two years and shall also be liable to fine :

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than six months."

11. The meaning of "transfer" as provided u/s 269UA(f) which is as follows :

"269UA. (f) "transfer", --

(i) in relation to any immovable property referred to in Sub-clause (i) of Clause (d), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882) :

Explanation.--For the purposes of this sub-clause, a lease which provides for the extension of the term thereof by a further term or terms shall be deemed to be a lease for a term of not less than twelve years, if the aggregate of the term for which such lease is to be granted and the further term or terms for which it can be so.-extended is not less than twelve years ;

(ii) in relation to any immovable property of the nature referred to in Sub-clause (ii) of Clause (d), means the doing of anything (whether by way of admitting as a member of or by way of transfer of shares in a co-operative society or company or other association of persons or by way of any agreement or arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, such property."

12. The Division Bench of the Rajasthan High Court in the case reported as RAJASTHAN PATRIKA LTD. Vs. UNION OF INDIA AND OTHERS., held as follows

(at page 457) :

"It would thus appear that in the scheme of the Act while defining the term "transfer", if possession of the property has been allowed to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, it has to be understood accordingly. Therefore, the nature referred to in Section 53A of the Transfer of Property Act has been incorporated while defining the term "transfer, in order to ascertain as to whether a transfer has been effected or not if possession of any property has been given and taken for the purposes of the Income Tax Act. The nature referred to in Section 53A cannot be given a complete go-by. Section 53A of the Transfer of Property Act is reproduced as under :

"53A. Part performance.--Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has p taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this Section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

13. The very definition of the term "transfer" as contained in Section 269UA{f) read with the provisions of Section 53A of the Transfer of Property Act shows that the factum of transfer has to be ascertained with reasonable certainty and in case the transferee has in part performance of the contract taken possession of the property or any part thereof, it would constitute a transfer. The petitioner himself has come with the case that possession of part of the property in question has been taken over by him in part performance of the contract. In view of this admitted factual position, there is no escape from the logical conclusion in the light of the definition of the term "transfer" as given in the Income Tax Act that in the case at hand part of the property in question had already been

transferred to the petitioner by respondent No. 4 before the filing of the statement in Form No. 37-1 and it cannot be said that the statement which was made by the petitioner and respondent No. 4 in Form No. 37-1 was a statement of intended transfer. There is a lot of difference between actual transfer and intended transfer and the statute has taken due care to prohibit the actual transfer before the filing of the statement in Form No. 37-1 and the only stage which has been permitted to be reached is to enter into an agreement for transfer and to act upon such an agreement even for a limited purpose beyond the intention to transfer is forbidden. In view of this position of law, we do not find any substance in the argument of Shri N. M. Ranka that the present one is only a case of permissive possession for restrictive use and occupation not amounting to transfer. Mr. Ranka may be right in his submission that we have to look at the whole instrument and the meaning of the instrument has to be taken as a whole, but we fail to understand as to how this proposition helps the case of the petitioner for the simple reason, that the agreement on which the whole case of the petitioner is based itself mentions that the petitioner shall be entitled to use, occupy, hold and enjoy the portion described in schedule "A1 and it is the petitioner's own case that he took over possession of the portion detailed in Schedule "A" on March 7, 1991, and, in our opinion, it constitutes a definite case of transfer of part of the property in question within the meaning of Section 269UA(f) for the purposes of the Income Tax Act. Submissions Nos. 1 and 2 made by Shri N. M. Ranka are, therefore, devoid of any force in view of the admitted factual position and the same are, therefore, rejected."

14. Similarly in the instant case it is an admitted fact that the transferee has already taken possession of the said mill which is an act to be performed under the agreement in question, for which the application has been made under Form No. 37-1. Therefore, the application has been made after the transfer took place.

15. After considering all these facts and circumstances of this case, I am of the opinion that the cases relied upon by Mr. Bhattacharjee have no application in the facts and circumstances of this case ; on the contrary the contention of Mr. Pal, learned senior counsel for the respondent, has been accepted by me. It is a fact that the transfer has been effected before submission of the statement in Form No. 37-1 and the appropriate authority has, in my opinion, acted fairly and exercised its jurisdiction properly.

16. By reason of the premises I am of the opinion, that the writ petition has no merit and is liable to be dismissed.

17. Accordingly, the writ petition is dismissed. All interim orders, if any, stand automatically vacated.