(1994) 10 BOM CK 0042

In the Bombay High Court

Case No : Writ Petition No. 1868 of 1986

Forbes Forbes Campbell and Co. Ltd. and another APPELLANT

Vs

Nishar Ahmed, Iac and another RESPONDENT

Date of Decision : 12-10-1994

Acts Referred:

Income Tax Act, 1961 — Section 269AB, 269C, 269D(1), 28

Citation : (1995) 124 CTR 91 : (1996) 217 ITR 103

Hon'ble Judges : S.M. Jhunjhunwala, J;M.L. Pendse, J

Bench : Division Bench

Advocate : Deokinandan, K.M.L. Majele, S.E. Dastur and A.V. Sonde, instructed by M/s Crawford Bailey and Co, for the Appellant; G.S. Jetley and P.S. Jetley, for the Respondent

Judgement

M.L. Pendse, J.—Gokak Patel Volkart Ltd., a company registered under the Companies Act, was in occupation as tenant of flat No. 15 on the fourth floor of Meherabad Building, situated at Bhulabhai Desai Road, Bombay - 400 026. The lease was secured from one Farrokh Adi Ghandhy. The flat is situated in a co-operative society. From the year 1976, the flat is in occupation of petitioner No. 1-company which is a sister concern of Gokak Patel Volkart Ltd. On July 23, 1992, the order of amalgamation of petitioner No. 1-company with Gokak Patel Volkart Ltd. was passed by this court. The petitioner-company, while in the occupation of the flat since the year 1976, was reimbursing Gokak Patel Volkart Ltd., the rent of Rs. 1,200 per month together with the society charges which Gokak Patel Volkart Ltd. was required to pay to Farrokh Adi Ghandhy. On March 1, 1983, Farrokh Adi Ghandhy sold the flat to Gokak Patel Volkart Ltd., for a consideration of Rs. 4,00,000.

2. Gokak Patel Volkart Ltd. entered into an agreement dated June 29, 1984, with petitioner No. 1-company to sell the flat for a consideration of Rs. 17,00,000. Along with the flat, petitioner No. 1-company was to secure transfer of seven shares of Meherabad Co-operative Housing Society Ltd. Chapter XX-A of the

Income Tax Act, 1961, provides for acquisition of immovable properties in certain cases of transfer to counteract evasion of tax. Section 269AB, inter alia, provides that every transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract and every transaction whereby a person acquires any rights in or with respect to any building or part of a building, shall be reduced to writing. Sub-section (2) of section 269AB, inter alia, provides that every statement in respect of a transaction of sale shall be registered with the competent authority. Section 269C provides that where the competent authority has reason to believe that any immovable property of a fair market value exceeding Rs. 1,00,000 has been transferred by a person to another person for an apparent consideration which is less than the fair market value of the property and where the consideration has not been truly stated in the instrument of transfer with the object of (a) facilitating the reduction or evasion of the liability of the transferor to pay tax; or (b) facilitating the concealment of any income or any moneys or other assets which ought to be disclosed by the transferee for the purposes of the Indian Income Tax Act or the Wealth-tax Act, then the competent authority shall initiate the proceedings for acquisition of such property.

3. The petitioner-company filed the requisite statement in respect of the transfer of the flat with the competent authority on September 20, 1984. The competent authority issued a show-cause notice dated May 10, 1985, in exercise of the powers u/s 269D(1) of the Income Tax Act. The show-cause notice, inter alia, recites that the competent authority has reason to believe that the fair market value of the property exceeds the apparent consideration by more than 15 per cent. of the consideration of such transfer as agreed between the parties and, therefore, the same has not been truly stated. The show-cause notice further recites that the consideration was not truly stated with the object of avoiding tax both by the transferors and the transferees. The show-cause notice calls upon the transferors and the transferees to explain why proceedings for the acquisition of the property should not be initiated. The petitioners filed their replies and claimed that the requisite conditions for initiation of proceedings were not in existence and, consequently, the competent authority lacks jurisdiction to issue notice. Having failed to receive any positive response from the authority, the petitioners have filed the present petition under article 226 of the Constitution to challenge the validity of issuance of the notice.

4. Shri Dastur, learned counsel appearing on behalf of the petitioners, submitted that there was no material before the competent authority at the time of issuance of the show-cause notice to come to the conclusion that the consideration of Rs. 17,00,000 for transfer of the flat was not the fair market value. Learned counsel urged that there was equally no material to indicate that the consideration of Rs. 17,00,000 was not the true consideration and the proper consideration was not mentioned only with the object of avoiding tax both by the transferors and the transferees. Learned counsel relied upon a decision of one of us (Pendse J.) reported in Unique Associates Co-operative Housing Society Ltd.

Vs. Union of India and others, . There is considerable merit in the submission urged by learned counsel.

5. The competent authority, at the time of initiation of the proceedings by issuance of the impugned show-cause notice dated May 10, 1985, had prepared a note and the copy of which is annexed at exhibit "A" to the petition. The note recites that the property in dispute is a residential flat situated on the fourth floor of Meherabad Building, Warden Road, Bombay. The competent authority refers to an instance of sale of flat No. F-4, Palacimo, Silver Oake Estate, Bhulabhai Desai Road, Bombay 400 026. The agreement for sale in this instance was executed on February 15, 1984, and the area agreed to be sold was 1,782 sq. ft. built-up and the consideration was Rs. 21,00,000. Relying upon this instance, the competent authority felt that the fair market rate is Rs. 1,200 per sq. ft. Only on this basis, the competent authority recites that the authority was satisfied that : (a) the immovable property is of a fair market value exceeding Rs. 1,00,000; (b) the fair market value of such property exceeds the apparent consideration by more than 15 per cent.; and (c) the consideration of such transfer as agreed between the parties has not been truly stated in the instrument of transfer with the object of avoiding deduction (?) and the liability of the transferors to tax.

6. A perusal of the not prepared by the competent authority leaves on manner of doubt that the competent authority did not have any material to exercise the powers u/s 269C of Act. As held in the judgment in Unique Associates Co-operative Housing Society Ltd. Vs. Union of India and others, , the powers u/s 269C could be exercised provided the requisite conditions for the exercise of the powers are satisfied. We have not examined as to whether the sale instance referred to in the note of the competent authority is a comparable instance because that exercise cannot be carried out at this juncture. In our judgment, the initiation of the proceedings by the competent authority was without jurisdiction because there was no material whatsoever to come to the conclusion that the consideration for transfer in the agreement was not truly stated and, therefore, with the object of facilitating the reduction or evasion of the liability of the transferors in respect of payment of tax. A plain reading of the note does not indicate any material to arrive at such a conclusion. Shri Dastur is right in submitting that the fact that the flat in dispute was in the occupation of petitioner No. 1-company right from the year 1976 was a relevant circumstance to ascertain whether the consideration mentioned in the agreement was fair or otherwise. Even assuming that the competent authority comes to a conclusion that the consideration is not truly stated in the document, still in the absence of any material, the competent authority could not have been satisfied that the consideration was not truly stated only with a view to evade the liability of tax. In our judgment, in the absence of any material, the initiation of proceedings was without jurisdiction and the petitioners are entitled to relief.

7. Accordingly, the petition succeeds and rule is made absolute in terms of prayer clause (b). In the circumstances of the case, there will be no order as to costs.

