

(1980) 05 CAL CK 0021
In the Calcutta High Court
Case No : C.R. No. 12056 (W) of 1975

Lalita Jabbar

APPELLANT

Vs

Competent Authority and Others

RESPONDENT

Date of Decision : 05-05-1980

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 269C, 269C(1), 269D(1)

Citation : (1982) 133 ITR 389

Hon'ble Judges : C.K. Banerji, J

Bench : Single Bench

Advocate : R.N. Bajoria and H.K. Bagaria, for the Appellant; Samar Banerjee, for the Respondent

Judgement

C.K. Banerji, J.—Premises No. 7/3, Burdwan Road, contains an area of one bigha, one cottah, eight chittaks and forty square-feet of land with a two-storeyed building built on a portion thereof which was leased out in June, 1967, by the then owners, Rabindranath Roy and Sudhindranath Roy, to M/s. W. S. Cresswell & Co. P. Ltd., at a rent of Rs. 1,000 per month and a further sum of Rs. 500 per month payable by the lessee as hiring charges of fixtures and fittings supplied by the lessors. The said lease was subject to the provisions of the West Bengal Premises Tenancy Act, 1956. The said premises was occupied by Sayeed Jabbar, a director of W. S. Cresswell & Co. P. Ltd., the husband of the petitioner, and the petitioner with her husband and other members of the family resided therein.

2. By a deed of conveyance dated 24th November, 1972, the petitioner purchased an undivided half-share of the said premises from the said Rabindranath Roy at or for the price of Rs. 1 lakh of which Rs. 10,000 was paid as and by way of earnest and the balance was paid by a cheque, Respondent No. 1 served on the petitioner a notice bearing No. AC-5/11/Cal/72-73, dated the 30th March, 1973, u/s 269D(1) of the I.T. Act, 1961, that the said respondent had reason to believe that the said, property was transferred for an apparent

consideration which was less than the fair market value thereof and the fair market value exceeded the apparent consideration by more than 15 per cent. and the consideration agreed to between the transferor and the transferee had not been stated in the instrument of transfer with the object of facilitating reduction or evasion of the liability of the transferor to pay Income Tax in respect of the income arising from the transfer and the concealment of income which had not been, but ought to have been disclosed by the transferee for the purposes of the I.T. and W.T. Acts. By the said notice it was stated that the reasons for initiating the proceeding for acquisition of the said property had been recorded by respondent No. 1, and the said proceeding for acquisition of the said property was initiated u/s 269C of the I.T. Act by the issue of the said notice. By the said notice the petitioner was asked to make her objections to the said acquisition within the period mentioned therein. The said acquisition proceeding related to the undivided half share of the said premises purchased by the petitioner. The petitioner has made this, writ petition under Article 226 of the Constitution challenging the said notice after objecting to the said notice in writing and stating that the said property was purchased by the petitioner at a fair and most reasonable market price.

3. Mr. Bajoria, learned advocate for the petitioner, urged that there was no material before respondent No. 1, for the formation of his belief u/s 269C of the I.T. Act, 1961, and he elaborated his contention that before a proceeding for acquisition could be initiated the competent authority must have the following materials in his possession :

(a) the consideration stated in the conveyance was less than the fair market value of the property ;

(b) the consideration agreed to between the parties was not truly stated in the document; and

(c) that the mis-statement of the consideration in the conveyance was with the object of evasion of tax or the concealment of undisclosed income or wealth.

4. Mr. Bajoria referred to the copy of the recorded reasons dated 30th March, 1973, produced before me at the hearing, and submitted that in making the valuation of the property, respondent No. 1 did not consider any comparable units. The properties which were considered by him were not on Burdwan Road at all and there is nothing in the recorded reasons to show that there could be any reason to believe that the consideration stated in the conveyance was less than the fair market value of the property or the consideration was not truly stated or there was a mis-statement with the object of evasion of tax or the concealment of undisclosed income or wealth. Respondent No. 1 is alleged to have made enquiries locally at Alipur and concluded that the price of land in the locality was Rs. 40,000 per cottah, He considered No. 7, Alipur Avenue, which was sold at Rs. 22,500 per cottah. He referred to an advertisement in the Statesman by Talbot & Co., advertising for a sale of 16 1/2 cottahs of land at old

Alipur at Rs. 25,000 per cottah and he, therefore, assessed that the value of the land of this property was at Rs. 25,000 per cottah and valued the property at more than Rs. 2,50,000 apart from the building and concluded that the property being transferred at Rs. 1 lakh was less than the fair market value thereof estimated by him at Rs. 3,50,000 and from this alone he purported to deduce that the consideration had not been truly stated in the conveyance with the object of reduction or evasion of tax liability or concealment of income. Mr. Bajoria referred to Section 269C of the Act, the relevant portion thereof is set out below :

"269C. Immovable property in respect of which proceedings for acquisition may be taken.--(1) Where the competent authority has reason to believe that any immovable property of a fair market value exceeding twenty-five thousand rupees has been transferred by a person (hereafter in this Chapter referred to as the transferor) to another person (hereinafter in this Chapter referred to as the transferee) for an apparent consideration which is less than the fair market value of the property....."

5. Mr. Bajoria urged that respondent No. 1, before initiating any proceeding for acquisition, was required to find out the fair market value of the very property which was sought to be acquired but this was not done by respondent No. 1. Mr. Bajoria referred to the affidavit-in- opposition on behalf of the respondents affirmed by Ralte Van Lalmawia, respondent No. 1, on the 21st October, 1979, in para. 3, sub-para, (c), whereof it is categorically stated that at the time when the proceedings for acquisition were started there was nothing before the competent authority to show that the premises was tenanted. The respondent No. 1, therefore, did not know that the property was tenanted and, therefore, he could not have determined its fair market value which was the basis of the formation of his belief u/s 269C of the Act. Mr. Bajoria referred to the definition of fair market value given in Clause (d) of Section 269A which reads as under :

""Fair market value", in relation to any immovable property transferred, means the price that the immovable property would ordinarily fetch on sale in the open market on the date of execution of the instrument of transfer of such property."

6. Mr. Bajoria urged that a tenanted property could not fetch the same price if sold in the open market as that of a property which was vacant or not tenanted. Thus, in considering the fair market value of the property, that the property was tenanted is one of the most vital factors, of which respondent No. 1 admittedly had no knowledge and the said aspect was not considered by him at all. Respondent No. 1 was not powerless to make such enquiry and u/s 269M he was invested with all the powers of the Commissioner u/s 131 of the Act, which gave him power of discovery, inspection, enforcing attendance of any person and examining him on oath, compelling production of books of account and other documents and issuing commission but nothing was done by him. u/s 269D a period of 9 months was given to the competent authority to initiate proceedings from the end of the month in which the instrument of transfer was registered.

This period, Mr. Bajoria urged, was given to enable the authority to gather necessary information and make all the enquiries that were needed before initiating a proceeding for acquisition but nothing was done by respondent No. 1. Mr. Bajoria referred to the copy of the report of the departmental Valuation Officer dated 30th April, 1973, produced before me at the hearing. The Valuation Officer, admittedly, did not take any measurement of the property. Admittedly, the property was situate not on Burdwan Road proper but in a branch road. He valued the land of the property at Rs. 13,000 per cottah and thus valued half of the land area at Rs. 1,40,000 and the salvaged value of the existing structure including services were valued at Rs. 30,000 for the full share and taking the half share of the said salvaged value along with the half share of the land value, he valued the property transferred to the petitioner at Rs. 1,55,000. This was entirely an erroneous approach. The fair market value of an undivided half share of a property could not be determined by taking half of the entire valuation of the entire property particularly when the property was tenanted. In the case of a tenanted property the principle of valuation was not the land and building method as was sought to be done but the yield method. In support of his contention, Mr. Bajoria cited the following decisions which are dealt with chronologically.

7. Commissioner of Income Tax Vs. Mangolia Dairy Products, . This was a case of acquisition of property u/s 269C of the I.T. Act, 1961. The property was sold by the respondents in equal undivided shares to two ladies by two separate conveyances for Rs. 40,000 each. The property, consisted of a partly two and partly three-storeyed building together with one storied out-houses which were entirely let out to tenants and the total rent realised was Rs. 620.37 per month. The departmental Valuation Officer inspected the property and valued the same on the basis of structural value of the building and land value on reversion on the expiry of the presumed life of the building and the salvaged value of the building at Rs. 1,16,000 and on the basis of the said valuation, proceedings for acquisition u/s 269C of the Act was initiated. The Competent Authority held that the proper consideration had not been truly stated in the instrument of transfer and the transaction was designed to facilitate concealment of liability to capital gains tax. On an appeal by the transferor to the Income Tax Appellate Tribunal against the said findings of the Competent Authority, the Tribunal allowed the appeal and set aside the order of acquisition, following the decision of this court in CONTROLLER OF ESTATE DUTY, WEST BENGAL Vs. RADHA DEVI JALAN., , holding that by reason of the provisions of the rent control statutes, the only proper method of valuation was by application of a multiple to the net yield of the property at 12 1/2 times and the property having been sold in two undivided half shares, a further deduction of 10 per cent. should be made. The Commissioner came up in appeal before this court. A Division Bench of this court, to which I was a party, observed as under (p. 38 of 116 ITR):

"We entirely agree with the principles laid down in CONTROLLER OF ESTATE DUTY, WEST BENGAL Vs. RADHA DEVI JALAN., and find that the Tribunal has

correctly applied the same in the instant case. If a statutory control is imposed on the commodity, restricting the price, or transfer, or distribution of the same, then, in our opinion, the commodity ceases to be a commercial commodity as understood in common parlance and becomes a controlled commodity and its effective value is its controlled value and not an imaginary commercial value. If the State chooses to impose the statutory control in respect of terms and conditions for tenancies in properties and such control is statutorily enforced then during the subsistence of such control, such properties would necessarily have a value which is controlled. The State cannot then turn round and say that for other purposes the properties would have a notional commercial value. To hold otherwise would be to ignore the realities."

8. Commissioner of Income Tax Vs. Panchanan Das, . This was also an appeal to this court in a proceeding for the acquisition of a tenanted property u/s 269C of the I.T. Act, 1961. A Division Bench of this court, to which I was a party, observed (pp. 281, 282) :

"Normally commercial income of the property must be understood in that sense if the prevalent statutes control the return from the property, then normal commercial return must be held within the framework or within the control of such statute and not return unfettered by such statutes.....In the facts and circumstances of the instant case, it appears to us that the rental method is correct to apply. All other methods applied by the other valuers appear to be misconceived."

9. Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, . This was an appeal to the Gujarat High Court in a proceeding for the acquisition of a property u/s 269C of the I.T. Act, 1961. The High Court observed that in fixing the fair market value of immovable property it was incumbent on the competent authority to apply two or all of the recognised methods of valuation so that he may resort to checks and counter-checks in arriving at the fair market value and it was too hazardous to prefer one of the recognised methods of valuation and arrive at an estimation of fair market value of a property on that basis. Such a lopsided approach would not be in consonance with the burden of proof required to be discharged in such quasi-criminal proceedings as it would be virtually act on too slender a material.

10. SUBHKARAN CHOWDHURY AND OTHERS Vs. INSPECTING ASSISTANT COMMISSIONER OF Income Tax, ACQUISITION RANGE I, AND OTHERS., . This was a case of acquisition of property u/s 269C of the I.T. Act, 1961. Sabyasachi Mukharji J. observed as follows (p. 784):

"I have to proceed by the definition provided under Clause (d) of Section 269A of the Act, which says "fair market value" is the value which a property would fetch in sale in open market. The value of a property to a particular purchaser or to a particular person is not the fair market value of the property. A particular purchaser or a particular tenant may have a particular value for the property.

But, in respect of the entirety of the tenanted premises, that value to the particular tenant may be different from the fair market value and for the purpose of this section one has to proceed on the basis of fair market value, that is to say, the value which a tenanted premises would fetch in open market and on that basis the fact that the entirety of the premises was tenanted was a factor relevant in determining whether there has been under-valuation and that factor does not seem to have entered into the consideration of the IAC before inflation of the proceeding.

Apart from this, the IAC must have before him material that the fair market value had not been stated either in order to facilitate the reduction or evasion of liability of the transferor to pay tax under the Act or for facilitating the concealment of any income or any moneys or other assets as contemplated under Clause (b) of Section 269C(1). The evidentiary value of presumptions which Sub-section (2) of Section 269C postulates are not attracted at the time of the initiation, because if that is so then there is no question of rebutting those presumptions upon which basis the Division Bench of the Delhi High Court proceeded and, in my opinion, with great respect, that must be the correct position, as otherwise there was no scope for Clause (b) in Sub-section (2) of Section 269 providing that it shall be open for the party to say that the correct value has been stated. This has also been the view taken by Mr. Justice R. M. Dutta in the decision in the case of Smt. Bani Roy Chowdhury Vs. Competent Authority, Inspecting Assistant Commissioner of Income Tax, Acquisition Range II and Others, . On this aspect of the matter, I respectfully agree with the aforesaid view of the learned judge. If that is the position then there was no material--at least no material has been indicated by the IAC to form the belief as required by the Act. In that view of the matter, the conditions precedent for the initiation of the proceedings were not fulfilled and, therefore, in my opinion, the proceedings are without jurisdiction."

11. An unreported decision of B. C. Basak J. dated 21st June, 1979, in C.R. No. 7696 (W) of 1974, instituted Jai Kumar Kankaria Vs. Competent Authority and Others, . This was a case of acquisition by the issue of a notice u/s 269D(1) of the I.T. 1961, of 1/9th share of a property purchased by the petitioner. His Lordship held that the expression "conclusive proof" and the presumptions, contemplated existence of the parties or of a Us. At the stage of formation of opinion there is no lis and thus the question of conclusive proof or presumption could not arise at that stage. For the initiation of proceedings there must be materials for the formation of the opinion as contemplated by Section 269C irrespective of the provisions at the proceeding stage and Sub-section (2) of Section 269C made it clear that the conclusive proof or presumptions was not applicable prior to the initiation of the proceeding by issue of a notice u/s 269D.

12. Mr. Samar Banerjee, learned advocate for the respondents, urged on the other hand that respondent No. 1 did not proceed on the presumption or conclusive proof u/s 269C(2) and, therefore, the decisions in SUBHKARAN

CHOWDHURY AND OTHERS Vs. INSPECTING ASSISTANT COMMISSIONER OF Income Tax, ACQUISITION RANGE I, AND OTHERS., and Jai Kumar Kankaria Vs. Competent Authority and Others, had no application to this case. Mr. Banerjee urged that when the property was inspected and reasons were recorded, respondent No. 1 did not have any knowledge that the property was tenanted and he relied on the statements made in para. 3(c) of the affidavit-in-opposition. Respondent No. 1 made personal enquiry and visited the site. The question of valuation cannot be gone into in the writ petition and the same could be gone into only at the hearing of the acquisition proceedings. The writ petition was premature inasmuch as the petitioner might very well prove at the hearing that the value of the property at which she purchased was the fair market value "of the property.

13. Admittedly, the entire property was tenanted. The petitioner purchased an undivided half share of the property which would not and could not be half of the value of the entire property if sold in the open market. A purchaser of an undivided share of a property cannot enjoy a property in the same way as the full owner of the entire property. For the enjoyment of what he has purchased he will have to partition the property which may be by mutual consent or by a partition suit. This aspect of the matter does not appear to have been considered by respondent No. 1 in determining the fair market value of the property in question. Secondly, that the property was wholly tenanted was admittedly not known to respondent No. 1 and, therefore he did not advert to this aspect in determining the fair market value of the property. The tenancy in the said property was within the purview of the rent restriction legislations and, therefore, if the property was sold in the open market it would not fetch such price as it would have fetched had it not been wholly tenanted. Respondent No. 1 not knowing that the property was wholly tenanted did not consider this aspect in determining the fair market value of the property. Thus, in my opinion, respondent No. 1 had no material to form his belief as required u/s 269C(1) of the Act and the conditions precedent for the initiation of the proceedings for acquisition of the property were not satisfied and the proceeding, was, therefore, without jurisdiction. In that view of the matter, it is not necessary to consider or decide the other points raised by Mr. Bajoria. The proceeding initiated by the notice bearing No. AC-5/R-1/-Cal/72-73, dated the 30th March, 1973, u/s 269D(1) of the I.T. Act, 1961, issued by respondent No. 1 is, therefore, quashed and the rule is made absolute. There will be no order as to costs.