(2007) 09 BOM CK 0082

In the Bombay High Court

Case No : Writ Petition No. 572 of 1993

Manohar T. Bhambani and Mrs. Rina Manohar Bhambani — APPELLANT

Vs

S.K. Laul, Chief Engineer, S.C. Tiwari, Commissioner Income Tax and C.M. Betgeri, Commissioner Income Tax, Union of India (UOI) and Mrs. Jayaben T. Veera — RESPONDENT

Date of Decision : 04-09-2007

Acts Referred:
Income Tax Act, 1961 — Section 269F, 269UD, 269UD(1)

Citation : (2008) 214 CTR 375 : (2008) 302 ITR 208

Hon'ble Judges : J.P. Devadhar, J;F.I. Rebello, J

Bench : Division Bench

Advocate : Shobha Jagtiani and Beena Pillai, instructed by D.M. Harish, for the Appellant; R. Ashokan and M.I. Sethna, for the Respondent

Final Decision : Allowed

Judgement

F.I. Rebello, J.—On 7th July, 1993, this Court issued rule and continued the interim relief, granted on 11/3/1993, restraining the respondents from taking possession of the property in question.

2. The petitioner herein had entered into an agreement on 26/11/1987 with respondent No.3 for purchase of flat No.201, on second floor of Samudra Gaurav Apartments, Khan Abdul Ghaffar Khan Road, Worli, Mumbai-400 025 for a consideration of Rs. 14,50,000/- of an area of 1131 sq. ft. which worked out to Rs. 1,283/- per sq ft. On 15/2/1998 the respondent No.1 passed an order u/s 269UD(1) of the I.T. Act exercising the right to purchase the subject property. The petitioners filed Writ Petition No.583 of 1988 before this Court. In the meantime, the Supreme Court in C.B. Gautam Vs. Union of India and Others, laid down various steps which had to be satisfied before an order was made u/s 269UD of the Income Tax Act. This included giving the intending purchaser and the intending seller a reasonable opportunity of showing cause against an order for compulsory purchase being made by the appropriate authority. In the instant

case, the members of the respondent No.1 are the appropriate authority. The Supreme Court further made it clear that the provisions of Chapter XX-C can be resorted to only where there is a significant under valuationof the property to the extent of 15% or more in the agreement of sale as evidenced by the apparent consideration being lower than the fair market value by 15% or more. The Court noted that although a presumption of an attempt to evade tax may be raised by the appropriate authority concerned in a case where the aforesaid circumstances are established, such a presumption is rebuttable and this would necessarily imply that the concerned parties must have an opportunity to show cause as to why such a presumption should not be drawn. It is not necessary to refer to various other directions issued in the said Judgment. Pursuant to this Judgment, by an order dated 16/2/1992 this Court set aside the order and remanded the matter to the appropriate authority to be decided in the light of the Judgment of the Supreme Court in the case of C.B. Gautam (supra).

3. Subsequent to the remand, the petitioners were issued a show cause notice dated 30/12/1992 by the appropriate authority. To the show cause notice dated 30/12/1992 was annexed, annexure "A". Part of Annexure "A " reads as under:

Please note that in accordance with the provisions of section 269UD(1) of the aforesaid Act, the said authority had in writing recorded on its file, at the time of making the said order, the reasons, for making the said order. In view of the facts and circumstances of this case and, without prejudice to its rights and contentions otherwise, the Appropriate Authority hereby conveys to you as per enclosed annexure hereto the reasons as recorded on the same date at the time of making the impugned order u/s 269UD(1) of the said Act. You may also deal with the same during the course of hearing on 12.1.1993.

4. The show cause notice included the very order which was set aside by this Court. However, it noted that the flat in question was inspected by the Valuation Officer on 2/2/1988 and later on by the Members of the appropriate authority on 12/2/1988. The report dated 4/2/1988 of the Valuation Officer and the notings dated 8/2/1988 of the I.A.C. have been considered by the Appropriate Authority. Four sale instances were cited as being on the same road and also in the vicinity of the building in question and further it was set out as "or in other equally posh and comparable localities". Two instances were on Abdul Gaffar Khan Road, Worli, being flat No.501, Pratiksha where the transfer was effected on 27/11/1987 at the rate of Rs. 2,128 per sq. ft. built- up area. The second instance was Flat No.24, Vijay Villa the transaction was 24/12/1986 and the rate was Rs. 1,883/ per sq. ft. built-up area. The other instances cited, one was flat in Alpha Apartments, Pochkhanwala Road and the transaction was of 27th June, 1987 and the rate was Rs. 1,709/- per sq. ft. built-up area and the last instance was flat No.34, Neelkanth Apartment, Acharya P.K.D.Road, the transaction was of 28th April, 1987 and the rate was Rs. 1,792/- per sq. ft. built-up area.

5. The petitioners replied the said notice by a letter dated 4th February, 1993. The petitioners contended that the respondent No.3 transferor has herself

purchased the flat by an agreement dated 7/1/1986 and had filed Form 37EE in respect of the said transaction. The price in January, 1986 was Rs. 9,75,000/-. This transaction was cleared by the authority by their order u/s 269F. It was pointed out that price in January, 1986 was Rs. 9,75,000/- and in August, 1987 it was Rs. 14,25,000/ i.e. an appreciation of 60% in just 19 months. It was then pointed out that in the reasons recorded the construction of the building was shown as rich in quality. It was submitted that it was not so. It was also contended that the building is long and narrow and the front portion is used by the Ruia family and they have their own private garden. The subject flat is on the back side of the building and even the entrance is towards the end of the building and for reaching the entrance one has to pass by the kitchen of the Ruia family and there is often noise and smoke from there. There was also leakage in the building. Similarly, the flat had negligible sea view and was not at all like other flats in the locality. There was no reserve parking space in the building. Similarly, there was no play ground or garden. Comparison was made of the other constructions cited by the respondent No.1 which according to the petitioners had seaview, had parking space, garden and various other features. It was next pointed out that the copy of the valuation officer''s report and the notings of the IAC had not been furnished and as such, they have been denied an opportunity. By subsequent notice on 17/2/1993 the petitioners gave information regarding the transactions of sale of flat No.14-A in Venus building and also another flat in the same building.

6. The appropriate authority passed its impugned order dated 24/2/1993 u/s 269UD(1) of the I.T. Act. Along with the order, the reasons recorded were also furnished. In dealing with the contention against comparing the subject flat with the other flats, it was noted that the records were considered and inspection was done. The appropriate authority noted that the said flats were by and large in the same class as Samudra Gaurav the subject flat. In so far as the Venus building was concerned, it was contended that full particulars were not given and further it is not a Worli Sea-face building. The contention that reliance was placed on the valuation report as also nothings were neither considered nor dealt with.

7. At the hearing of this petition, on behalf of the petitioners it is submitted that in the show cause notice it was mentioned that the site inspection had been done, the valuation has been done by the Valuer and further notings had been made by I.A.C. on 8/2/1988 which had been considered by the members of the appropriate authority. The grievance of the petitioners that the same were not made available to them or neither dealt with nor answered. It is, therefore, submitted that the order passed is in violation of the principles of natural justice and fair play and must be set aside. It is next submitted that the respondent No.1 had to arrive at a finding as to the fair market value of the flat to be compulsorily acquired. In then instance case, the respondents have not arrived at a fair market value. The object of determining the fair market value was to raise a presumption in favour of the revenue, that fair market value differs by 15% from the consideration as shown in the document of transfer and as such, it

is presumed that there is an attempt to evade tax and significant undervaluation. As no fair market value had been determined by respondent No.1, no such presumption can be raised and consequently, the order is liable to be set aside. Thirdly, it is contended that the petitioners have raised various objections to the sale instance and also relied on the sale instances. It is not disclosed on what basis the sale instance or sale was taken as the basis for holding that the price paid by the petitioners was undervalued with a view to evade tax. It is further submitted that so far as the sale instances relied upon by the petitioners though in the said locality was rejected merely by observing that it is not sea-face building and cannot be compared. Admittedly, it was submitted that in January, 1986 the application was granted u/s 269F for sale of the said flat at Rs. 9,75.000/-. It is also contended that while issuing show cause notice, the respondent No.1 annexed thereto a copy of its earlier order. It is submitted that this would show the respondent No.1 had already arrived at a decision and the issuing of the show cause notice was merely a formality to show that they had complied with the requisition of law, though respondent No.1 had already decided to compulsory purchase the petitioners'' flat.

Learned Counsel has relied on various judgments, which we shall consider in the course of our discussion.

8. On behalf of the department, an affidavit in reply was filed on 7th April, 1993 by Shri Sampat Kumar, Deputy Commissioner of Income Tax. The first six paras are general contentions. In para 7 of the reply however, the averments set out therein, would be relevant and are being reproduced:

I say that the Appropriate Authority consists of three very senior officers of the Department - two being Commissioners of Income -tax and one a Chief Engineer from the Central Public Works Department. The said authority is assisted by a team of technical experts including valuation Engineers. Prior to the Appropriate Authority even applying its mind, after the Form No.37-I (under Rule 48 I) is filed, the process commences with elaborate, though preliminary, enquiries by the experts attached to the Cell of Appropriate Authority. They record their findings, which include, inter alia, their observation about the physical fitment of the property in question. In arriving at this decision, such authority takes into account diverse factors - not only those which are connected with the technical features of the building, including its age, its soundness, its structural strength, but also takes into account the other relevant factors like the planning of the building, the let out of the building, the surrounding of the building, the view available from the buildings, as also demerits and / or disadvantages that are associated with any such buildings / flats. After such report is obtained, the three members of the Appropriate Authority individually go through the file and take a prima facie decision based upon their own experience, their own sources of market that they have acquired by virtue of their experience and knowledge of working in the field for atleast a couple of years and the knowledge about the area and the importance of the area in the life of the city - in brief all factors which are relevant though obviously may have a subjective colour which is inevitable. After this process of individual evaluation, a meeting is held of the three members of the Appropriate Authority, who are seized with the relevant material and documents, and, if the committee feels that there exists a prima facie case to suspect that the under valuation exceeds 15 per cent if not more, in that event, only a show cause notice is issued to the persons concerned....

The contention that the principles of natural justice were violated in not making available the valuation report and also the notings have not been dealt with generally or specifically, except to contend that there was no case made out to vitiate the impugned order on the ground of violation of principles of natural justice. Dealing with the sale instances, it is pointed out that the valuation of the comparable flats sold in the same locality as subject flat would show that they are higher by almost 50% considering the price per square feet of the flats relied upon the respondent No.1. It is contended that the appropriate authority has considered the fact that the building is located on the rear side so as to given some deduction to arrive at its marketable value. Dealing with the contention that in January, 1986 the flat was purchased for Rs. 9.75 lakhs and no objection was granted by the department, it is submitted that the same is not relevant. There are some other averments. For the various reasons set out, it is submitted that the petition should be dismissed.

Another affidavit-in-reply is filed 30th June, 1993 by Shri Sampat Kumar, Deputy Commissioner of Income Tax. There is nothing additional in this reply. A rejoinder has been filed on behalf of the petitioners herein.

9. As a preliminary argument it was sought to be contended that the petitioners being transferee would have no locus standi. It may be pointed out that the said contention was also raised before this Court in S. Krishnan Vs. U.V. Shahadadpuri and Others, , to which one of us (Rebello, J.) was a party. Considering the issue this Court held that the transferee has locus standing to maintain the petition. This Court observed as under " In view of the Judgment in C.B. Gautam''s case (supra) this Court has upheld the right of the transferee to challenge the order of purchase." In our opinion, therefore, the petitioners have locus standi to maintain the petition and consequently, the preliminary objection as to maintainability of the petition is rejected.

10. We shall now consider whether the impugned order is liable to be set aside on the ground that it suffers from violation of the principles of natural justice and fair play. In the show cause notice to which annexure ''A'' was added, specific reference was made to the earlier order passed. In that it was set out that Valuation officer had inspected the flat in question on 2/8/1988 and later on inspection was done by the members of appropriate authority on 12/2/1988. Those reports have been considered by the appropriate authority. A grievance was made that the valuation officer''s report and the notings of the I.A.C. have not been furnished to the petitioners. Petitioner had made a grievance in the reply to the show cause notice. As we have noted earlier, for an order u/s 269UD

to be passed the authority must come to a prima facie conclusion that there is under valuationof the consideration to the extent of 15% of the fair market value so as to raise a presumption that it was being undervalued for the purpose of tax evasion. Admittedly, in the instant case, it was informed to the petitioners that they have a valuation report and also the report of the site inspection. There is nothing in the order which will indicate as to the fair market value which was arrived at by the respondent No.1 though four sale instances were set out. The contention urged on behalf of the respondents is that it is only after the Judgment of this Court in Vimal Agarwal Vs. Appropriate Authority and others, that fair market value was determined and before that such procedure was not being followed. We may only point out that the show cause notice is dated 30/12/1992. The Supreme Court in C.B. Gautam (supra) had noted that the fair market value has to be determined. The valuation report and the notes of the inspection would be aids for the purpose of deciding the fair market value. Apart from that, we have also reproduced para 7 of the affidavit dated 7th April, 1993 filed by Mr.Sampat Kumar in which the procedure before issuing show cause notice has been set out. It would thus be clear that the respondents for the purpose of issuing the show cause notice relied on report prepared and subsequent thereto whilst passing the order the valuation report and the notes of inspection. Even after bringing to the notice of the respondent No.1, that the later two documents were not made available to the petitioner, the respondent No.1 proceeded to pass an order without making the documents available to the petitioner. In the same affidavit, Mr.Sampat Kumar in para 10 (b) itself set out that the appropriate authority had given a finding that the flat is in very good condition and the specifications therein are very rich. It is further set out that the appropriate authority has also considered the fact that the building is located in rear side so as to give some deduction to arrive at its marketable value. The note of inspection done by the Committee is not made available to the petitioners nor do we have any material before us, except the order to examine on what basis the committee arrived at a conclusion that the flat is in very good condition and that the specifications therein are very rich. If the appropriate authority had to rely on the said inspection report, the least would have been to make available to the petitioners the said report. In the instant case, in our opinion, the failure to furnish the relevant documents which were relied upon by the appropriate authority has prejudicially affected the petitioners of their right to show cause. The order involves civil consequences and consequently, in our opinion, the impugned order having being passed without making available the documents relied upon by the appropriate authority renders the order arbitrary, being passed contrary to the principles of natural justice and fair play and must consequently be set

11. We may now deal with the next contention as to the fair market value. We earlier explained, considering the Judgment of C.B. Gautam (supra) the need to determine fair market value. It may not be out of context to reproduce the following words of the Supreme Court "Although a presumption of an attempt to

evade tax may be raised by the appropriate authority concerned in a case where the aforesaid circumstances are established, such a presumption is rebuttable and this would necessarily imply that the concerned parties must have an opportunity to show cause as to why a presumption should not be drawn." In the instant case, admittedly, fair market value was not determined. However, reference was made to four sale instances. There is nothing before us to indicate the nature of these four transaction. We have similarly nothing before us as to why the appropriate authority arrived at a conclusion that the sale instances relied upon were not comparable to the sale instance relied upon by the petitioners except that it is not a Worli Sea-face property and what were the relevant factors and reasons which they addressed themselves to. As noted by this Court in the case of Shrichand Raheja and another Vs. S.C. Prasad, (Appropriate Authority) and others, , the most comparable instances or genuine instances have to be identified on the consideration of the proximity from the time angle and the proximity from the situation angle. After identifying instances which provide the index of market value, the price reflected therein may be taken as a norm and the value of the land in question may be deduced by making suitable adjustment for the plus and minus factors. We find that the appropriate authority has not at addressed itself to these aspects. Similarly, there is nothing to show which sale instance was considered as the Bench mark to vis a vis the subject property. There is only a general observation that the sale instance cited by the appropriate authority are much less one of the test to be followed in determining fair market value is the test which would be applicable on the principles adopted while determining the market value in respect of an acquisition under the Land Acquisition Act. In the instant case, from the sale instances considered no specific sale was considered for comparison with the subject flat in terms of proximity from the time angle and the proximity from the situation angle. In our opinion, on this count also, the order is liable to be quashed and set aside.

12. It was also submitted relying on the Judgment in the case of Karsanbhai Patel in Writ Petition No.568 of 1993 which had relied on the Judgment in the case of Mrs. Nirmal Laxminarayan Grover Vs. Appropriate Authority and Others, Nagpur Bench that as the previous order was annexed to the show cause notice, it discloses predetermined mind set and consequently also the order has to be set aside on that count also. We have considered the Judgment of this Court in the case of Karsanbhai Patel (supra). In our opinion, it is not possible to accept the contention as urged on behalf of the petitioner. A perusal of the Judgment would indicate that the learned Division Bench though had made a reference to this aspect, ultimately on the merits of the matter for non compliance with the other requirements while passing order u/s 269UD has set aside the said order. Considering the above, in our opinion, that contention is not available.

13. For all the aforesaid reasons, the petition will have to be allowed. In the light of that. Rule is made absolute in terms of prayer Clauses (a) & (b) with no order as to costs.

