(1994) 07 CAL CK 0010

In the Calcutta High Court

Case No : Matter No. 2501 of 1986

Multi Rise Towers (P.) Ltd. APPELLANT

Vs

Appropriate Authority and Others RESPONDENT

Date of Decision : 11-07-1994

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 269A, 269AB, 269AB(1), 269RR, 269UD
Transfer of Property Act, 1882 — Section 40

Citation : (1995) 124 CTR 391 : (1995) 211 ITR 102 : (1995) 81 TAXMAN 577

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : R.N. Bajoria and J.P. Khaitan, for the Appellant; Pranab K. Pal and Manisha Sil, for the Respondent

Judgement

Ruma Pal, J.—The issue involved in this writ application is whether the provisions of Chapter XX-A of the Income Tax Act, 1961 (referred to as "the Act"), or Chapter XX-C of the said Act would apply to the transaction entered into between the petitioner and the owners of the premises No. 16, Raja Santosh Road, Calcutta (referred to as "the premises").

2. On September 1, 1986, and September 15, 1986, two several agreements were entered into by Surajit Ganguli and Ratna Ganguli, respectively, in respect of their undivided half share in the premises with the petitioner. Under each of the agreements, the owners agreed to sell and transfer their undivided share or interest in the premises to the petitioner or its nominee or nominees free from all encumbrances and charges at and for an amount of Rs. 61 lakhs each. The agreements record that a sum of Rs. 10 lakhs had been paid by the petitioner to each of the owners as and by way of earnest money and in part payment of the agreed price.

3. Chapter XX-A deals with the acquisition of immovable property in certain cases of transfer to counteract evasion of tax. On September 19, 1986, the petitioner

submitted two statements in Form No. 37EE u/s 269AB(2) of the Act to the competent authority under Chapter XX-A of the Act. The statements set out particulars of the transaction. Against the entry 7(i) : Whether the transfer of property involves transaction of the nature referred to in Section 269AB(1)(b)--(i) the nature of the act having the effect of transferring or enabling the enjoyment of a property : in one it was mentioned "The agreement for sale dated September 1, 1986" and in the other "The agreement for sale dated September 15, 1986". On September 26, 1986, the statements in Form No. 37EE were registered with the competent authority.

4. On October 1, 1986, Chapter XX-C of the Act came into force. Chapter XX-C deals with purchase by the Central Government of immovable property in certain cases of transfer. u/s 269RR of Chapter XX-A, it is provided that the provisions of Chapter XX-A shall not apply to or in relation to the transfer of any immovable property made after September 30, 1986.

5. On October 15, 1986, the two owners of the premises filed a statement of transfer of immovable property with the appropriate authority u/s 269UC of the Act in Form No. 37-I. Each of the Forms in 37-I refers to the agreements dated September 15, 1986, and the premises has immovable property intended to be transferred by way of sale. Against item No. 8 of Form No. 37-I which provides for the nature of interest or right proposed to be transferred, it has been said "ownership".

6. On November 12, 1986, it is said by the petitioners that the competent authority under Chapter XX-A made certain requisitions with reference to the agreements registered u/s 269AB. The requisitions are in the following language :

"Whereas a reference has been made to me u/s 269L(1)(a) of the Income Tax Act, 1961, for determining the fair market value as on May 26, 1986, of the property prescribed in the schedule below as per the statement in Form No. 37EE registered with the competent authority u/s 269AB(2) of the Income Tax Act, 1961, vide Registration No. .... dated .... and in exercise of the power vested in me u/s 269L(2) of the Income Tax Act, 1961, and u/s 38A(1) of the Wealth-tax Act, 1957, you are hereby requested to produce or cause to be produced through your authorised representative, before me on September 1, 1986, at 11 a.m. the following documents :

(1) Registered statement in Form No. 37EE in original with a copy and the accompanying contract (the original will be returned after comparison).

(2) Lay out plan and full set of drawings (i.e., plan, cross section and structural details) as approved by the Corporation of Calcutta/local body.

(3) List of tenants, if any, together with lease agreements and details of rents and other charges.

(4) Corporation/Municipal tax bill paid.

(5) Any other charges on the property.

You are further requested to afford facility for inspection of the above property by the undersigned along with J. E.-cum-assessor authorised by me. The date of inspection will be communicated."

7. On December 11, 1986, two separate orders were passed by the appropriate authority u/s 269UD (Chapter XX-C of the Act). These are the orders which have been challenged in these proceedings. In each of the orders the appropriate authority has ordered the Central Government to buy the subject-matter of the two separate statements in Form 37-I at an amount of Rs. 61 lakhs being the amount equal to the apparent consideration with regard to the separate owners.

8. On December 22, 1986, this writ application was filed challenging the impugned orders. The directions were given for filing of affidavits but no affidavit-in-opposition was filed. In any event, the facts are not in dispute. The points raised are pure questions of law.

9. The first submission is one which is not opposed by the respondents. That submission stems from the decision of the Supreme Court in the case of C.B. Gautam Vs. Union of India and Others, By that judgment, the Supreme Court had held that the provisions of natural justice were to be read into Section 269UD of the Act. The impugned orders admittedly not having been passed after giving the parties concerned an opportunity of being heard cannot be sustained.

10. However, the petitioner has raised a more fundamental contention. According to the petitioner, the provisions of Chapter XX-C are not at all attracted as the transaction in question was covered by the provision of Chapter XX-A of the Act. It is not in dispute that both Chapters XX-A and XX-C cannot be applied to the same transaction. The petitioner contends that Chapter XX-A is applicable because, u/s 269RR, only transfer of immovable property which had taken place after October 1, 1986, would go out of the purview of Chapter XX-A. The petitioner contended that the transaction in question was in fact a transfer within the meaning of Section 269RR.

11. It is said that the transaction covered by Chapter XX-A was not limited to transfers by way of sale or exchange or lease. The transactions covered would, according to the petitioner, include an agreement for transfer and part performance, if any. Reference has been made to the provisions of Sections 40 and 54 of the Transfer of Property Act to submit that there is a distinction between interest in property and rights in or with respect to such property. It is stated that although the agreement of sale did not create any interest in property nevertheless they created a right with respect thereto. The petitioner has relied upon an unreported decision of this court in Matter No. 3110 of 1987 in Hari Krishna Kanoi and Another Vs. Appropriate Authority and Others, (judgment dated September 11, 1992) in respect of such contention.

12. Secondly, it is submitted that the provisions of Chapter XX-A and Section

269AB would show that what was sought to be covered were contractual rights which would result in a complete transaction of sale. In other words, contracts still to be performed would be a transfer. Reliance has been placed on an instruction issued by the Central Board of Direct Taxes being instruction No. 1793 dated August 11, 1988, which, according to the petitioner, shows that the authorities are of the view that transactions involving construction of property in future are covered by the word "transfer" in Section 269RR. It is submitted that these instructions should be relied upon for construing the statutory provisions. The decision of the Supreme Court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, has been cited in this context.

13. Finally, it is said that Section 269A(f), as amended, defines instrument of transfer to include the statement u/s 269AB by the competent authority. It is said that both statements filed under Form No. 37EE were registered on September 26, 1986, prior to the coming into force of Chapter XX-C of the Act.

14. The submission of the respondents briefly stated is that under Chapter XX-A of the Act transfer of immovable property within the meaning of Section 269A(e)(i) of the Act connotates a situation when there is a registered conveyance, i.e., registered under the Registration Act, 1908. The transfer of immovable property u/s 269A(e)(ii) read with Section 269AB of the Act would connote a transfer to enjoy the property in praesenti. In this case, the instrument being neither registered under the Registration Act nor granting a right of enjoyment in praesenti, would not be a transfer u/s 269RR of the Act.

15. Section 269RR reads as follows :

"269RR. Chapter not to apply where transfer of immovable property made after a certain date.--The provisions of this Chapter shall not apply to or in relation to the transfer of any immovable property made after the 30th day of September, 1986."

16. As already noted, Section 269RR is contained in Chapter XX-A and the reference to "this Chapter" refers to Chapter XXVIII (sic). The applicability of the Chapter will depend upon the meaning ascribed to the words "transfer" and "immovable property" in the Chapter itself.

17. "Immovable property" has been defined in Section 269A(e) as meaning :

"(i) any land or any building or part of a building, and includes, where any land or any building or part of a building is transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also ;

18. Explanation.--For the purposes of this sub-clause, land, building, part of a building, machinery, plant, furniture, fittings and other things include any rights therein ;

(ii) any rights of the nature referred to in Clause (b) of Sub-section (1) of Section

269AB."

19. The petitioner''s case clearly does not come within the definition of immovable property as contained in Section 269A(e)(i).

The question is whether it would be included within Section 269A(e)(ii). The right referred to in Section 269AB(1)(b) is a right- " . . . in or with respect to any building or part of a building (whether or not including any machinery, plant, furniture, fittings or other things therein) which has been constructed or which is to be constructed [not being a transaction by way of sale, exchange or lease of such building or part of a building which is required to be registered under the Registration Act, 1908 (16 of 1908)]." On an analysis, the rights u/s 269AB(1)(b) are not under a sale, exchange or lease or any transaction which is required to be registered under the Registration Act, 1908. Secondly, the rights may be not only with respect to any existent building or part of a building which has been constructed but may also be with regard to buildings to be constructed in future. There is no basis for the submission of the respondents that the immovable property u/s 269A(e)(ii) is restricted to rights which are enjoyable in praesenti. Section 269A(e)(ii) has further widened the scope of the rights which are considered to be immovable property under Chapter XX-A by referring to the rights "of the nature" referred to in Section 269AB(1)(b). The next word which is to be defined is the word "transfer". "Transfer" has been defined in Section 269A(h) as meaning-- "(h) ''transfer'',-- (i) in relation to any immovable property referred to in Sub-clause (i) of Clause (e), 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 has been 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 (e), means the doing of anything (whether by way of transfer of shares in a co-operative society or company 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." An instrument of transfer has been defined in Section 269A(f) as meaning-- ".... the instrument of transfer registered under the Registration Act, 1908 (16 of 1908), or, as the case may be, the statement registered u/s 269AB with the competent authority," The word "right" is to be distinguished from "interest" and the enforcement of the right or the remedy. Right in respect of property is again to be distinguished from a right in the property. Interest is a species of right. It is that right which is in the nature of ownership but does not necessarily connote title. An interest is a right in rem in respect of the property or a right which is enforceable against the world. A right may also be one which is enforceable against a person, for example, by virtue of an agreement in personam with a corresponding obligation or duty on such person, vis-?-vis. the person in whom the right is vested. The obligation on the part of this person relates to some property or thing. Breach of the obligation may be enforced with reference to such property or thing. This nature of right is recognised in Section 40 of the Transfer of Property Act, 1882. Applying this test to the facts of this case, it would appear that the agreements between the petitioner and the owners created a right in the petitioner in respect of the premises. The idea behind the enactment of the provisions of Chapter XX-A was to bring within the net of taxation any kind of transfer. The definition of the word "instrument of transfer" shows that the word "transfer" has been used in a manner wider than "transfer" as meaning "conveyance of interest". In the decision of Sanjeev Sethi Vs. Union of India and Others, , a similar issue had arisen. An agreement had been entered into prior to October 1, 1986, by which a multi-storeyed residential building was to be constructed on a plot of land under the agreement between the owner and the builders. Flats were to be allotted to purchasers. Subsequent to September 30, 1986, by reason of certain disputes between the parties, fresh letters of allotments were issued. It was contended by one of the allottees that the agreement for purchase of a flat by him was covered by Chapter XX-A and not Chapter XX-C. The Division Bench of the Delhi High Court upheld the submission of the allottee and allowed the writ application and quashed the order which had been passed u/s 269UD(1) of Chapter XX-C of the Act. Apart from the literal construction of the statutory provision and the authority on the aspect, seen from the point of view of the intention of the Legislature, there can be no doubt that the transaction in question is covered by Chapter XX-A of the Act. Initially, when Chapter XX-A was introduced into the Act, it covered only transactions by way of sale or exchange. In 1982, the definitions of "immovable property", "transfer" and "instrument of transfer" noted above were amended. Section 269AB was introduced. The object of the amendment clearly was to widen the scope of the Chapter. Now, even the entering into the agreement of transfer and part performance would be included within the transactions covered by Chapter XX-A and amount to a transfer of immovable property within the meaning of that Chapter. An argument was made by the respondents that because the petitioner in Form No. 37-I had described the nature of the interest or right proposed to be transferred as ownership, this meant that no transfer of immovable property could be said to have already taken place as argued by the petitioner at the hearing. This is unacceptable. If the law is that a transfer of immovable property had already taken place under Chapter XX-A and within the meaning of Section 269RR, the fact that the petitioner may have contended that such transfer had not taken place would not alter the legal position. For all the reasons aforesaid the writ application is allowed and the impugned order u/s 269UD of the Act is quashed. There will be no order as to costs.