

(1998) 08 CAL CK 0045

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction Original Side A.P.O. No. 198 of 1998, G.A. No. 1285 of 1998, A.P.O.T. No. 249 of 1998 and W.P. No. 2886 of 1994

Murlidhar Ratanlal Exports Ltd.

APPELLANT

Vs

The Appropriate Authority and Others

RESPONDENT

Date of Decision : 28-08-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 269UA(f), 269UB, 269UD, 269UL, 276
Transfer of Property Act, 1882 — Section 53A
Urban Land (Ceiling and Regulation) Act, 1976 — Section 5(3)

Citation : (1998) 3 CALLT 425 : (2000) 243 ITR 752 : (1998) 101 TAXMAN 562

Hon'ble Judges : Vinod Kumar Gupta, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Mr. Awani Kumar Roy and Mr. Rajesh Kumar Ganguly, for the Appellant; Mr. L.K. Chatterjee, for the Respondent

Judgement

V. K. Gupta, J.—This appeal under the Letters Patent is directed against a Judgment dated 10th March, 1998 by a learned Single Judge of this Court whereby the writ application filed by Respondent No. 4 in this appeal has been dismissed. Respondent No. 4 had filed writ petition No. 2886 of 1994 along with G.A. No. 2066 of 1995 wherein he had challenged the order dated 24-06-94 passed by Respondent No. 1, the Appropriate Authority constituted u/s 269UB of the Income Tax Act. In the writ application the appellant herein Murlidhar Ratanlal Exports Limited and Digvijay Cement Company Ltd.. Respondent No. 4 herein, had entered into an agreement of sale on 7th March, 1994 in their capacities as proposed Vendee and Vendor respectively in respect of the sale of a Mill known as "Hasting Jute Mill" situated at G.T. Road, Rishra as a going concern, inclusive of assets and liabilities as per the terms and conditions contained in the said Agreement. The property included land measuring 105 bighas and 18 estates and the structures raised thereon along with all erections etc.. inclusive of fixtures and fittings and various plants and machineries. The

total consideration by way of agreed sale price in respect of the entire property was fixed at Rs. 777.50 lacs free from all encumbrances and charges etc. Since the value of the proposed sale transaction exceeded the prescribed limit as per section 269UC of the Income Tax Act, 1961 (Act for short), Form No. 37-1 in terms of the said section and the Rules made under the Act was submitted before Respondent No. 1 on 22nd March, 1994 along with the copy of the aforesaid Agreement dated 7th March, 1994 seeking permission/no objection from Respondent No. 1 in respect of the sale of the said property. However, respondent No.1 neither granted the "no objection" certificate, nor passed any order of taking recourse to the exercise of the power of pre-emptive purchase of the property by the Central Government, as available to it u/s 269UD of the Act and instead disposed of the application of the vendor and the vendee by passing the following Order:

"Considering the facts and circumstances of the case that the transfer has already taken place according to the definition of transfer u/s 269UA(f) and it also comes under the purview of section 5(3) of Urban Land (Ceiling & Regulation) Act, 1976 we hold that the statement in Form No. 37-1 filed before Appropriate Authority, Calcutta is invalid and therefore it cannot be acted upon. The said Form No. 37-1 is treated as non-est and filed as such."

2. It was the aforesaid Order of respondent No. 1 which was the subject-matter of challenge in the writ application filed by respondent No. 4. the Vendor in the aforesaid agreement for sale which, as observed earlier, came to be dismissed by the learned Single Judge vide his judgment dated 10th March, 1988.

3. At the outset we may observe that in the impugned order of 24-06-94 passed by the respondent No. 1, one ground for not granting the no objection certificate was the so called violation of the provisions of Urban Land (Ceiling & Regulation) Act, 1976 since, according to respondent No. 1. the land in question exceeded the limit/ceiling prescribed u/s 5(3) of the Act. However, it was very fairly and very frankly conceded before us by the learned advocate appearing for respondent No. 1 that this part of the Order dated 24-06-94 is not sustainable in law at all and he would not press for the same. It may also be noted that the learned Single Judge also in the judgment under appeal did not deal with this part of the Order at all and restricted himself only to the question of the transfer of ownership /possession of the land, which actually was the reason for dismissing the writ application. 4. The only point which therefore arises for consideration in this appeal is, as to whether upon the submission of Form 37-1 in terms of section 269UC of the Act does the Appropriate Authority have any option to pass an Order, the like of which it has done in the present case. In other words, under the Scheme of Chapter XX-C of the Act, particularly with reference to sections 269UC, 269UD and 269UL read with section 276AB of the Act. whether the Appropriate Authority is legally bound and obliged, upon submission of Form 37-1 only to pass order either granting "no objection" certificate to the parties or to direct the pre-emptive purchase of the property in

terms of Section 269UD of the Act, and not-to pass any other Order whatsoever. In effect and substance therefore, the Appropriate Authority has only two options, either to grant no objection certificate or to invoke section 269UD of the Act, would be the issue that we shall consider in this appeal.

5. The sale agreement in this case was executed on 7th March, 1994 and Form 37-1 was submitted to the Appropriate Authority on 22nd March, 1994. However, it is the admitted case of the Parties before us that the possession of the property had been handed over by the vendor to the vendee prior to 22nd March, 1994. the date when Form 37-1 was submitted by them to the Appropriate Authority. The case of the vendor and the vendee before us as also in the court is that the possession of the property was handed over by the vendor to the vendee in pursuance of a stipulation in the sale agreement that, before the sale actually takes effect, the property would be given on lease for a period of three years with powers granted to the vendee to run and manage the Industrial Undertaking as lessee and pending the execution and registration of the Lease Deed for this purpose, the parties had agreed to execute an agreement to grant lease on the terms and conditions incorporated in the draft lease which was annexed to the said agreement. The following recitals in the agreement dated 7th March, 1994 are relevant:

"AND WHEREAS it has been agreed between the vendor and the purchaser that pending the completion of sale under this agreement the vendor has agreed to grant a lease for period of three years containing all the powers and authorities in favour of the purchaser to run and manage the said industrial undertaking as lessee of the said Industrial Undertaking and pending the execution and registration of the lease for three years the vendor has agreed to execute an agreement to grant lease on the terms and conditions incorporated in the draft lease which annexed to the said agreement to lease containing the provision that pending the completion of sale under this agreement the said Industrial Undertaking will be run and managed by the purchaser as a monthly Lessee. It is ago agreed that the vendor will grant an irrevocable power-of-attorney in favour of the purchaser and/or in the name of two persons nominated by the purchaser to act jointly and/or severally on behalf of the vendor for exercising all the powers and authorities as could have been exercised by the vendor and/or as may be required to be exercised by the purchaser in respect of the said Industrial Undertaking."

Similarly the following recital may also be quoted:

"With effect from the date of handing over of the actual possession, the arrangement and running of the business and operation of the said Industrial Undertaking shall be carried on by the purchaser who shall run the same in its own account and/or in its own name as lessee of the vendor and shall arrange for all insurances....."

At another place in the agreement, the following terms have also been stipulated:

"The vendor has on or before the signing of this agreement agreed to deliver to the purchaser vacant and peaceful possession of the said Industrial Undertaking and all papers, registers and documents necessary for working of the said Industrial Undertaking."

6. On 7th March, 1994 itself the aforesaid parties also executed an agreement for execution of a Lease Deed with respect to the property in question wherein it was mentioned that the lease would be granted for a period of 3 years and that upon completion of sale by the execution and registration of the Sale Deed and agreement of lease and the Lease Deed itself would merge in the vendee's right under the Sale Deed/Conveyance.

7. The ground and reason for passing the order by the Appropriate Authority on 24-06-94 manifestly and clearly stated in the Order itself was that the transfer of the property had already taken place and such transfer being within the purview, scope and meaning of section 269-UA(I) of the Act, the furnishing of the Statement in Form 37-1 was not a valid act in the eyes of law and hence it could not be acted upon. The Appropriate Authority therefore treated Form 37-1 as non-est and ordered it is being "filed". Para 7 of the Order being relevant for this purpose needs to be quoted verbatim hereinbelow. This para reads thus:

"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 eyewash to regularise the transaction for which prior permission was necessary. We therefore hold that the statement in Form No. 37-1 as furnished to Appropriate Authority is not a valid statement in the eye of law as this Chapter deals with the cases of intended transfer and not in the cases where the transfer has already been taken place as in this instant case."

8. We have carefully considered this aspect of the matter. In our view reliance placed upon section 269-UA(f) by the Appropriate Authority is wholly misplaced. It defines "transfer" in the following terms:

"(f) "transfer".-

(i) in relation to any immovable property referred to in sub-clause (1) 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."

9. Recitals in the agreement for sale and in the agreement for lease clearly suggests and establish beyond any doubt that the possession of the property in question was handed over by the vendor to the vendee not in pursuance of the sale agreement, but only as a consequence of the agreement for lease. The vendee had taken over the possession of the property in his capacity as a lessee of the property and not as its pure owner. The two agreements, one for sale and the other for lease are distinct from each other. Nothing in law prevented the parties, pending finalisation of the agreement to execute a lease deed between themselves. What is to be noted is that the lease period was for three years. Section 269-UC(f) clearly suggests that only such lease would be for a period of twelve years or more, would come within the definition of the expression "transfer" and hence may attract the mischief of section 269UC of the Act. In our view, the Appropriate Authority misconstrued in scope of the expression "transfer" and wrongly took an untenable position in law that submission of form 37-1 was an inappropriate act and that this Form was non-est in the eyes of law and thus not liable to be acted upon.

10. The scheme of Chapter XX-C of the Act, more particularly sections 269UC, 269UD and 269UL leave the Appropriate Authority with no choice or option but to either issue "No Objection" Certificate to the parties submitting Form 37-1 or to pass an order in terms of section 269UD of the Act resorting to pre-emptive purchase of the property. No other option is available to the Appropriate Authority.

11. In the cases of *Tempi Trading & Creditors P. Ltd. and Others v. Appropriate Authority and Others* reported in 188 (TR 623 a Division Bench of Delhi High Court clearly held that once a statement u/s 269-UC(3) is received, the provisions of section 269UD come into play and that the Appropriate Authority has only the option either to pass orders in terms of section 269UD or to issue "No Objection" Certificate to the parties. The following observations are pertinent which, we quote:

"Section 269UL(1) refers to a no-objection certificate being granted by the appropriate authority to the transfer of the property for an amount equal to the apparent consideration. This presupposes that when the statement is filed in Form No. 37-1, if a decision is taken not to purchase a property, then a specified certificate to this effect can be issued. When no order at all is passed u/s 269UD(1), then the provisions of sub-section (3) of section 269UL come into play. This sub-section, *inter alia*, provides that where no order for purchase has been passed, then the appropriate authority shall issue a certificate of no

objection referred to in sub-section (1) of section 269UL. The language of section 269UL(3) is mandatory and this also shows that the only order which can be passed u/s 269UD is an order of purchase and no other order. If an order of purchase is not passed, then it is imperative and obligatory on the appropriate authority to issue the certificate u/s 269UL(3). We do not find any provision in this Chapter which can enable the appropriate authority to create a situation whereby neither the Government decides to purchase nor does it issue a certificate u/s 269UL(3)."

12. Similarly in the case of *Satwant Nakang Vs. Appropriate Authority, Income Tax Department, New Delhi*, their Lordship of Delhi High Court while examining the question held as under:

"A bare perusal of the abovesaid provisions of the Act indicate that the jurisdiction of the Appropriate Authority is only limited to either passing an order within the specified period for purchase of property by the Central Government for consideration recorded in the agreement or issue of a no objection certificate for transfer at that consideration. While considering the statement in Form No. 37-1, the appropriate authority is only to examine the adequacy of the consideration and to decide whether to order purchase or to grant a no objection certificate. It certainly has no jurisdiction to go into the object or the purpose of the transaction or its legality and validity. Furthermore, the appropriate authority has no jurisdiction to club one property with another with a view to find faults in the validity of the transaction which, otherwise, has been cleared by the Competent Authority under the Urban Land (Ceiling and Regulation) Act."

13. The object and purpose of inserting Chapter XX-C in the Income Tax Act was clearly to discourage the proliferations of black money into the transaction relating to the purchase and sale of immovable properties, and with this in view the Legislature had enacted the aforesaid legislative provision insisting for the parties intending to effect sale and purchase of properties to submit the requisite information to the Appropriate Authority so that the Appropriate Authority may be in a position to examine and find out whether the consideration for which the property was being sold was adequate or not. If it found that the consideration was adequate and proper, it was supposed to issue "No Objection" Certificate. If, however, in the opinion of the Appropriate Authority the stated consideration was inadequate, it could resort to the power of pre-emptive purchase u/s 269UD of the Act. The language employed in section 269UD is amply clear to suggest that the only right which is conferred upon the Appropriate Authority is to enable it to make an order for purchase of the immovable property at an amount equal to the amount of the apparent consideration. This section therefore does not give any discretion to the Appropriate Authority to adjudicate upon the legality of the transaction which is proposed to be entered into by the parties.

An Authority constituted under a statute can exercise only those powers which are, expressly, or by necessary implication conferred upon it. The only power which we therefore find in Chapter XX-C of the Act is either to issue "No

Objection" Certificate (See sec. 269UL and sec. 269UD) or to pass an Order in Terms of section 269UD. Undoubtedly, in the exercise of this power the Authority will have Jurisdiction to embark upon the exercise of investigating as to whether the apparent consideration on which the transaction is founded is appropriate, genuine and proper or not. It would be entitled to see that the material made available to it and whatever else comes its way to satisfy itself about the "genuineness of the apparent consideration". The purpose of the investigation of course would be to determine whether the pre-emptive right of the purchase should be exercised or not. If, upon such consideration the Appropriate Authority has reservations or doubts with regard to the legality of the proposed sale it is open to It not to exercise its right to purchase. In our view, therefore, section 269UD does not contemplate the rejection of any statement by the Appropriate Authority. It speaks of the passing of only one type of order and that is, the order of pre-emptive purchase. If, therefore, the Appropriate Authority chooses not to purchase the property in question, section 269UD does not contemplate the passing of an Order treating in Form 37-1 to be non-est in the eyes of law and/or for not at all acting upon such a statement. That is wholly impermissible. We totally disapprove of the act of the Appropriate Authority and disagree with the reasoning given by it in support of the Order that it has passed.

14. After having thus found that the Appropriate Authority acted in violation of law and beyond the jurisdiction vested in it we have no hesitation in holding that it has lost the right to adjudication upon the issue of the genuineness or otherwise on the apparent consideration, particularly because the time during which this had to be done has since expired. Since the Appropriate Authority failed to exercise the jurisdiction vested in it by law and because we are proposing to set aside the Order dated 24-06-94, no purpose would be served by sending the matter back to the Appropriate Authority for re-consideration on the question of the appropriateness or otherwise of the apparent consideration. As no decision was taken by the Appropriate Authority within the time envisaged u/s 269UD with regard to the apparent consideration and, because of the reason that we have set aside that order, the time limit cannot be extended by us and therefore the Appropriate Authority is bound to issue the Certificate of "No Objection" to the parties. We are fortified in our view by two judgments of Calcutta High Court in the cases of *Moi Engineering Ltd. and Another Vs. Appropriate Authority and Others*, and *Hindustan Lever Ltd. and Another Vs. Appropriate Authority and Others*, .

15. For the foregoing reasons therefore the Appeal is allowed. The judgment of the learned Single Judge is set aside. Consequently therefore, the order of the Appropriate Authority dated 24-06-94 impugned in the writ application is quashed and set aside. The Appropriate Authority is directed to issue "No Objection" Certificate In favour of the appellant and respondent No. 4 without any delay.

No order as to costs.

D. Bhattacharya, J.

I agree.

Later: 16. The total prayer of the learned advocate for the Appropriate Authority for staying the operation of this Judgment, upon consideration is rejected.

17. All parties are to act on a signed copy of the operative part of this judgment on the usual undertaking.

18. Appeal allowed