(2005) 09 BOM CK 0083

In the Bombay High Court

Case No : Writ Petition No. 2178 of 1993

Parasrampuria Estate Developers Pvt. Ltd. and Mr. Hemant Parasrampuria, a Director and Shareholder of the abovenamed company	APPELLANT
Vs	
S.C. Prasad and Others	RESPONDENT

Date of Decision : 26-09-2005

Acts Referred:
Income Tax Act, 1961 — Section 269UD, 269UD(1), 269UD(1A), 269UG, 269UH

Citation : (2005) 199 CTR 143 : (2006) 282 ITR 110

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : M.M. Jaykar, Neha Bhide and Shreyas Mehta, instructed by Khaitan and Jayakar, for the Appellant; R. Asokan and M.I. Sethna, s, for the Respondent

Final Decision : Allowed

Judgement

J.P. Devadhar, J.—This petition is directed against the order dated 21st September, 1993 passed by the appropriate authority u/s 269UD(1) of the Income Tax Act, 1961. By the said order, the appropriate authority has held that the apparent consideration in respect of the property agreed to be sold by the petitioners to the respondent No. 5 was less than the market value by 15% or more and accordingly ordered pre-emptive purchase of the said flat.

2. Petitioner No. 1 is a Private Limited Company carrying on business as builders and contractors. The petitioner No. 2 is a director and shareholder of the petitioner No. 1 company. By an agreement dated June 7, 1993 the petitioners agreed to sell to the respondent No. 5 a flat admeasuring 1112 square feet bearing No. 1102/1202 in Parasrampuria Tower No. 6, Oshiwara Village, Near Millat Nagar, Lokhandwala Complex, Andheri (W), Bombay - 400 058 for a lumpsum price of Rs. 28,56,000/-. Admittedly, the said building was under construction and the payment schedule as per the said agreement was as follows :

(i) Rs. 1,50,000/- on execution of the agreement.

(ii) Rs. 5,00,000/- within 45 days of the execution of the agreement.

(iii) Rs. 22,56,000/- on completion of the internal and external plaster.

(iv) Rs. 1,50,000/- at the time of possession.

3. On June 18, 1993 the petitioners filed form No. 37-I as required under the provisions of the Income Tax Act read with Income Tax Rules, 1962. On inspection of the property, the appropriate authority issued a show cause notice dated August 26, 1993 u/s 269UD(1A) of the Income Tax Act, 1961 calling upon the petitioners to show cause as to why an order should not be made u/s 269UD(1) of the Income Tax Act. In the show cause notice, it was stated that in the light of the prices at which similar flats were sold in the building known as ''Green Acres'' situated at Lokhandwala Complex, Andheri (W), Bombay -400 058, the appropriate authority has reached to a prima-facie or tentative conclusion that the sale of the flat by petitioners to the respondent No. 5 is undervalued and, therefore, liable to be purchased u/s 269UD of the Act.

4. In their reply dated September 14, 1993, the petitioners stated that comparison of the sale instances at Green Acres is not proper because that property is situated about 3 km. away from the property belonging to the petitioners and that unlike the flat sold by the petitioners, the Green Acres is a highly luxurious complex with facilities like Gymnasium, health club, play ground etc. In their reply, the petitioners further stated that similar flats in Parasrampuria Tower No. 5 which is adjacent to Parasrampuria Tower No. 6, have been sold at the material time at the rate approximately Rs. 2,000/- per square feet whereas flat in question has been sold by the petitioners at a higher value of Rs. 2,259/-per square feet. Since the appropriate authority has granted no-objection certificate to the flats sold at Parasrampuria Tower No. 5, it was stated that the flat sold by the petitioners in Parasrampuria Tower No. 6 at a higher price could not be said to be undervalued and, accordingly requested that the show cause notice be dropped.

5. By the impugned order dated September 21, 1993, the appropriate authority rejected the contention of the petitioners and held that it is a fit case to exercise powers u/s 269UD(1) of the Income Tax Act to order pre-emptive purchase of the subject property by the Central Government. Since the agreement for sale dated June 7, 1993 did not fix specific date for payment of the balance amount, it was held that it is not possible, at present, to determine the discounted value of the flat and accordingly ordered that the amounts payable by the Central Government pursuant to the order dated September 21, 1993 should be deposited in the account of the appropriate authority for payment in future. Challenging the aforesaid order, the petitioners have filed the present petition.

6. Mr. Jaykar, learned counsel appearing on behalf of the petitioners submitted three fold arguments. Firstly, he submitted that the appropriate authority was in

error in relying upon the sale instances at Green Acres for ascertaining the fair market value of the flats prevailing at the relevant time. He submitted that the Green Acres Complex was situated almost 3 km. away from the flat sold by the petitioners. Moreover, the said complex was a highly luxurious complex with facilities like swimming pool, health club, play ground etc. and, therefore, the price of the flats sold in that complex could not be taken as the basis of the fair market value. Secondly, he submitted that the sale instances furnished by the petitioners were comparable instances because the flats sold in Parasrampuria Tower Nos. 5 and that flat sold by the petitioners in Tower No. 6 were situate in the same complex and in fact the price of the flat sold in Parasrampuria Tower No. 5 was less than the price at which the petitioners have sold the subject flat. Therefore, it was not open to the appropriate authority to hold that the flats sold by the petitioners to the respondent No. 5 was under valued. Thirdly, he submitted that u/s 269UG of the Income Tax Act, it was obligatory on the part of the Central Government to tender the amount of apparent consideration to the petitioners within the period set out therein, failing which, u/s 269UH of the Income Tax Act, the property purchased u/s 269UD(1) would re-vest in the petitioners. In the present case, after the order passed u/s 269UD(1), the amount payable thereon has not been tendered to the petitioners till date and, therefore, in terms of Section 269UH of the Act, the order passed u/s 269UD(1) of the Act would stand abrogated and the flat would re-vest in the petitioners. In this connection, he relied upon the judgment of the Apex Court in the case of Union of India (UOI) and Another Vs. Dr. A.K. Garg and Others, .

7. Mr. Asokan, learned counsel appearing for the respondents, on the other hand, supported the order of the appropriate authority. He submitted that the appropriate authority was justified in rejecting the sale instances pointed out by the petitioners, because, there was a time gap of about two months. He submitted that on the date of purchase order, admittedly the building was incomplete and the possession of the said flat could not be taken and, therefore, the appropriate authority was justified in depositing the amount in the account of the appropriate authority instead of tendering it to the petitioners.

8. On careful consideration of the rival submissions, we are of the opinion that the impugned order passed u/s 269UD(1) of the Income Tax Act deserves to be quashed and set aside. It is now well settled by the decision of the Apex Court in the case of C.B. Gautam Vs. Union of India and Others, that the appropriate authority can draw presumption of under valuation if the apparent consideration shown in the agreement for sale is less than the fair market value by 15% or more. In the present case, the proceedings for pre-emptive purchase of the flat in question were initiated presuming under valuation on the basis of the sale instances at Green Acres, as more particularly referred to in the show cause notice. However, in the impugned order, the appropriate authority has accepted the contention of the petitioners that the sale instances at Green Acres are not comparable as that flats in Green Acres are luxurious flats with facilities like swimming pool, health club, play ground etc. Once the very basis on which the

tentative belief of under valuation entertained by the appropriate authority has vanished, there being no other material available to the appropriate authority to hold that flat sold by the petitioners was undervalued, an order to purchase the property u/s 269UD(1) could not be passed.

9. In the present case, the sale instances pointed out by the petitioners clearly show that the sale instances in the adjoining Parasrampuria Tower No. 5 are comparable and the flats sold at the relevant time in Parasrampuria Tower No. 5 at lesser price have been found to be fair by the appropriate authority and, accordingly no objection certificate has been granted. Although the buildings Parasrampuria Tower No. 5 and Parasrampuria Tower No. 6 are situate in the same complex, the flats sold in Parasrampuria Tower No. 5 at the rate of Rs. 1,900/- 2,000/-per square feet in the month of May, 1993 have been held to fair, whereas the flat in Parasrampuria Tower No. 6 sold by the petitioners at the rate of Rs. 2,259/- per square feet in June, 1993 has been held to be undervalued. The appropriate authority has declined to consider the sale instances in Parasrampuria Tower No. 5 solely on the ground that there is a time gap of two months. This finding of the appropriate authority, in our opinion cannot be sustained because there is no material on record to show that within these two months the prices in the locality where the flat sold by the petitioners is situated had increased considerably. Moreover, the flat sold by the petitioners in June 1993 was much higher than the price at which flats at Parasrampuria Tower No. 5 were sold in May, 1993. Therefore, in the facts of the present case, in our opinion the appropriate authority was not justified in rejecting the sale instances pointed out by the petitioners and holding that the flat sold by the petitioners was undervalued.

10. Apart from the above, in the present case admittedly the apparent consideration determined under the impugned order has not been tendered to the petitioners and the same has been deposited in the account of the appropriate authority. The only reason given by the respondents for not tendering the amount is that, on the date of purchase the building was incomplete and, therefore, the amount has not been tendered to the petitioners. As held by the Apex Court in the case of Dr. A.K. Garg (supra) it was mandatory on the part of the appropriate authority to tender the amount of apparent consideration within the period of limitation prescribed under the Act. Having purchased the flat under construction, it is not open to the appropriate authority to contend that there is no obligation to tender the apparent consideration till the flat is fully constructed. Counsel for the Revenue could not point out any provision of law which permits the appropriate authority not to tender the apparent consideration within the period prescribed u/s 269UD of the Income Tax Act on the ground that the flat purchased u/s 269UD(1) is under construction. Therefore, in the present case, even if it is accepted that the order passed u/s 269UD(1) is proper, in view of the failure on the part of the appropriate authority to tender the apparent consideration within the period set out in Section 269UG of the Act, it has to be held that the order passed u/s 269UD(1) of the Act stood

abrogated and the property has re-vested in the petitioners. Thus, viewed from any angle, the impugned order passed u/s 269UD(1) cannot be sustained.

11. For all the aforesaid reasons, we quash and set aside the impugned order dated September 21, 1993 passed u/s 269UD(1) of the Income Tax Act.

12. The petition, accordingly, succeeds. Rule is made absolute in terms of prayer clause (a), with no order as to costs.

