

(1980) 02 GUJ CK 0022
In the Gujarat High Court

Case No : Special Civil Application No's. 1394 and 1481 of 1973

Sarabhai M. Chemicals Private Ltd. and Telerad Private Ltd. APPELLANT
Vs

P.N. Mittal, Competent Authority, Inspecting Assistant RESPONDENT
Commissioner of Income Tax, Acquisition Range-II and
Another

Date of Decision : 05-02-1980

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 269A, 269C, 269C(1), 269C(2), 269D

Citation : (1980) 126 ITR 1

Hon'ble Judges : B.J. Divan, C.J;S.B. Majmudar, J

Bench : Division Bench

Advocate : J.M. Thakore, General and B.R. Shah, for the Appellant; G.N. Desai, Government Pleader and R.P. Bhatt, for the Respondent

Judgement

Divan, C.J.—In both these special civil applications the respective petitioner-company challenges the notice of acquisition respectively issued to it by the first-respondent, the competent authority, under the provisions of Chap. XX-A of the I.T. Act, 1961. The notices initiating acquisition proceedings u/s 269D(2) of the Act have been issued in respect of a transfer. The petitioner in Special Civil Application No. 1394 of 1973 is the transferor and the petitioner in Special Civil Application No. 1481 of 1973 is the transferee in respect of the transaction which was by means of a conveyance of sale dated March 30, 1973. Since both these special civil applications arise from the same bundle of facts and raise the same questions of law, it will be convenient to dispose of both of them by this common judgment. The transferor company is, what is known in the language of company law, a holding company and the transferee company is its wholly-owned subsidiary. There is no dispute on this aspect of the case. The transferor company was incorporated on May 28, 1958, and its object was, inter alia, to manufacture chemicals, drugs, etc. In the month of March, 1971, the transferor company acquired all the shares of the transferee company. The objects of the

transferee company were, inter alia, to manufacture radios, television sets, etc. The transferor company appointed six nominees of its own to acquire one share each of the transferee company and the balance of the shares of the transferee company were acquired by the transferor company and thus the transferee company was from March, 1971, onwards, the wholly-owned subsidiary of the transferor company. In the month of December, 1971, a decision was taken by the transferor company with the object of restructuring and reorganising the transferee company and another wholly-owned subsidiary company. Under this decision, the scheme of amalgamation and reorganisation was to be effective from April 1, 1971. In the month of January, 1972, this scheme of reorganisation and restructuring which involved amalgamation was approved by the boards of directors and subsequently by the shareholders of all the three companies and the usual procedure of approaching the High Court concerned for approval of the scheme was to be followed. The Commission set up under the Monopolies and Restrictive Trade Practices Act (hereafter referred to as " M.R.T.P. Commission ") was asked to go into the scheme of the proposed amalgamation and the case was referred to the M.R.T.P. Commission by the Govt. of India. The report of the M.R.T.P. Commission made to the Government was forwarded to the companies concerned by the Govt. of India and the report of the Commission was against the proposed amalgamation and restructuring of the three companies.

2. Finding themselves unable to achieve the object of reorganising and restructuring by the process of amalgamation, it appears that the transferor company and the transferee company decided that the whole of the undertaking together with the business and all other assets pertaining thereto of the transferor company should be purchased and taken over by its wholly-owned subsidiary company and that the sale should be with effect from April 1, 1972. An agreement of sale in this connection was entered into between the transferor company and the transferee company on March 28, 1973, and a conveyance of sale was executed on March 30, 1973, and what was transferred was the industrial undertaking and the business of the transferor company and it was done as a going concern together with goodwill and all other assets thereof. The document of conveyance of sale was duly registered with the Sub-Registrar of Assurances and on June 8, 1973, the Valuation Officer functioning under the scheme of Chap. XX-A of the I.T. Act raised certain queries and asked for information from the transferor and the transferee. It appears that some correspondence took place and, in the course of that correspondence, the company tried to satisfy the Valuation Officer that the transferor company had sold all the assets of its business together with goodwill and other intangible rights as a going concern at a slump price and that the valuation which was mentioned, namely, Rs. 3,00,03,350, was at the book value so far as lands and buildings were concerned and also so far as plant, machinery and other current assets as reduced by the liabilities were concerned and also so far as investments were concerned. The goodwill which formed part of this aggregate amount of rupees three crores odd was valued by the auditors of the company, M/

s. Sorab S. Engineer & Co., at Rs. 1,10,00,000 and thus in the course of the correspondence with the Valuation Officer and also with the competent authority before the notices came to be issued and even thereafter, the stand of the transferor company and the transferee company has been that the provisions of Chap. XX-A could not be invoked so far as this transfer was concerned. Before the notices which are challenged came to be issued on September 17, 1973, an interview took place with the competent authority and in the course of that interview also, an attempt had been made to convince the competent authority that the transferee company was the wholly-owned subsidiary company of the transferor company. What transpired at that interview is reproduced in the letter dated September 7, 1973, part of annex. " D " to the petition in Special Civil Application No. 1394 of 1973. Ultimately, on September 17, 1973, notices were issued by the competent authority u/s 269D(1) of the I.T. Act and both the notices, namely, the notice to the transferor company as well as the notice to the transferee company, proceeded on the footing that the apparent consideration which was mentioned in the conveyance of sale, rupees three crores odd, was less than the fair market value of the properties and that the competent authority had reason to believe that the fair market value of the properties as aforesaid exceeded the apparent consideration therefore by more than fifteen per cent. of such apparent consideration and that the consideration for such transfer as agreed to between the transferor and the transferee had not been truly stated in the said instrument of transfer with the object of facilitating the reduction or evasion of the liability of the transferor to pay tax under the I.T. Act, 1961, in respect of any income arising from the transfer. It was also stated that the reason for initiating the proceedings for the acquisition of the aforesaid properties in terms of the Act had been recorded by the competent authority and, therefore, in pursuance of Section 269D, the competent authority was initiating the proceedings for the acquisition of the properties by the issue of the notice u/s 269D(1) of the Act to the transferor company and the transferee company and the schedule to the notice mentioned that the immovable property in respect of which these notices were issued was " all piece and parcel of land or ground and buildings and structures thereon, bearing Nos. 108/B1, 111/B and 112/B1 along with plant, machinery, current assets, investments and goodwill as per document registered at No. 1220/30-3-1973 (12 acres and 34 gunthas)".

3. At the hearing of these two special civil applications under Article 226 of the Constitution, Mr. G. N. Desai, learned Government Pleader, appearing for the respondents in each of these two petitions urged by way of preliminary objections that since these special civil applications were filed at the stage of notices u/s 269D(1) and these notices were sought to be quashed, the special civil applications should be held to be not maintainable. He contended that Chap. XX-A is a complete code and if after the objections were filed by the transferor and the transferee in response to the notice u/s 269D(1) an order of acquisition is passed by the competent authority in spite of the objections of the transferor and transferee companies, it would be open to either the transferor or the

transferee to go in appeal to the Income Tax Appellate Tribunal against the decision of the competent authority and there would be a further appeal by the aggrieved party against the decision of the Income Tax Appellate Tribunal to the High Court and from the decision of the High Court an appeal would be under the I.T. Act to the Supreme Court. It was, therefore, contended by Mr. Desai that the matter should not be gone into by this court at the stage of the mere issuance of notices u/s 269D(1). On the other hand, the learned Advocate-General appearing for the respective petitioner in each petition has contended that what he is challenging in these special civil applications is not on the merits of the case but what he is challenging is merely the exercise of jurisdiction by the competent authority to initiate proceedings for acquisition of the properties in question. He contends that the conditions precedent for the exercise of the powers of acquisition as set out in Section 269D of Chap. XX-A of the I.T. Act have not been satisfied in the instant case and since what is being challenged is the jurisdiction of the competent authority to initiate the proceedings, these special civil applications are maintainable even at the stage of issuance of notices under Section 269D(1).

4. In our opinion, the jurisdiction under Article 226 at the stage of notice u/s 269D is very restricted but it is well settled that if any particular authority proposes to take any action without satisfying the conditions precedent prescribed by law for the exercise of the jurisdiction by that particular authority, then the High Court can interfere even at the earlier stage of the initiation of proceedings. At that stage the question is not whether the order of acquisition that might ultimately be passed will be upheld or not upheld on merits but it is a question of the very exercise of the powers by the authority concerned. We are, therefore, examining the question before us only from this restricted point of view, namely, to ascertain whether the initiation of the proceedings for the acquisition of the properties in question under the provisions of Chap. XX-A has been done after satisfying the conditions precedent prescribed for the exercise of powers conferred upon the competent authority under Chap. XX-A of the Act.

5. Chapter XX-A which contains Sections 269A to 269S was inserted by the Taxation Laws (Amendment) Act, 1972, and the insertion took effect from November 15, 1972. In Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, , a Division Bench of this High Court has gone into the background against which the provisions of Chap. XX-A were enacted and the objects and reasons that weighed with the legislature in enacting Chap. XX-A and the provisions and the scheme of that chapter have been completely analysed by the Division Bench in that case of Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, . We respectfully agree with the analysis and the conclusions reached by the Division Bench in that case. However, in order to focus and pinpoint the questions which arise for decision in the instant case before us, we will briefly refer to some of the provisions of Chap. XX-A. This chapter deals with acquisition of immovable property in certain cases of transfer and the acquisition is to be

made to counteract evasion of tax. Section 269A is the definition section and we will go to some of the provisions of that section later on. Section 269B deals with the appointment of competent authority and, for the purposes of this judgment, what is material is Section 269C. That section provides as follows :

" 269C. (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 (hereafter in this Chapter referred to as the transferee) for an apparent consideration which is less than the fair market value of the property and that the consideration for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer with the object of-

(a) facilitating the reduction or evasion of the liability of the transferor to pay tax under this Act in respect of any income arising from the transfer ; or

(b) facilitating the concealment of any income or any moneys or other assets, which have not been or which ought to be disclosed by the transferee for the purposes of the Indian Income Tax Act, 1922 (11 of 1922), or this Act or the Wealth-tax Act, 1957 (27 of 1957),

the competent authority may, subject to the provisions of this Chapter, initiate proceedings for the acquisition of such property under this Chapter :

Provided that before initiating such proceedings, the competent authority shall record his reasons for doing so :

Provided further that no such proceedings shall be initiated unless the competent authority has reason to believe that the fair market value of the property exceeds the apparent consideration therefore by more than fifteen per cent. of such apparent consideration.

(2) In any proceedings under this Chapter in respect of any immovable property,--

(a) where the fair market value of such property exceeds the apparent consideration therefore by more than twenty-five per cent. of such apparent consideration, it shall be conclusive proof that the consideration for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer ;

(b) where the property has been transferred for an apparent consideration which is less than its fair market value, it shall be [presumed, unless the contrary is proved, that the consideration for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer with such object as is referred to in Clause (a) or Clause (b) of Sub-section (1)."

6. It is clear from an analysis of Sub-section (I) of Section 269C that before the competent authority can initiate proceedings for the acquisition of any

immovable property under the provisions of Chap. XX-A, he must have reason to believe, firstly, that any immovable property of a fair market value exceeding twenty-five thousand rupees has been transferred by the transferor to the transferee concerned ; secondly, that the transfer has been effected for an apparent consideration which is less than the fair market value of the property, and, thirdly, that the consideration for such transfer as agreed to between the parties had not been truly stated in the instrument of transfer with the object mentioned in Clause (a) or Clause (b) of Section 269C(1), u/s 269A(a), " apparent consideration " in relation to any immovable property transferred means, if the transfer is by way of sale, the consideration for such transfer as specified in the instrument of transfer. We are not concerned with Clause (ii) of this definition of " apparent consideration " since that clause deals with a case where the transfer is by way of exchange. In the instant case, it is obvious that the aggregate consideration is Rs. 3,00,03,350. It is necessary at this stage to refer to the definition of "immovable property" in Clause (e) of Section 269A. "Immovable property" means "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 " and the Explanation to the clause states :

" For the purposes of this clause, land, building, part of a building, machinery, plant, furniture, fittings and other things include any rights therein."

7. In Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, , the Division Bench has held that the satisfaction of the competent authority for the initiation of acquisition of an immovable property is the subjective satisfaction on the objective facts stated in the section. The reasons for the formation of the belief must have original or direct connection with the material coming to the notice of the competent authority though the question of sufficiency or adequacy of the material is not open to judicial review. It is clear from the decision in Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, that Section 269C prescribes the conditions precedent for initiating acquisition proceedings u/s 269D.

8. In the light of the above provisions of law and the facts which are not in dispute at the present stage before us as set out hereinabove, the learned Advocate-General on behalf of the respective petitioner in each of these two special civil applications urged the following submissions before us :

(1) Chapter XX-A is not attracted in the case of this particular transfer from the holding company to its wholly-owned subsidiary company at book value because the conditions enumerated in Section 269C(1)(a) have not been satisfied. His further submission in this connection is that the consideration agreed to and paid has been truly stated in the deed of transfer.

Secondly, there is no object such as is referred to in Clause (a) of Section 269C(1), namely, there was no object of facilitating reduction or evasion of liability of the transferor to pay tax under the I.T. Act in respect of any income arising from the transfer and in connection with this submission, the learned Advocate-General has emphasized the words " any income arising from the transfer ".

(2) He next contended that undoubtedly, u/s 269C(2)(a), provision has been made for conclusive proof if the requirements of Clause (a) of Section 269C(2) are satisfied. But he contends that the presumption arising u/s 269C(2)(a) is a limited presumption and is rebuttable when that Clause (a) is read in conjunction with Section 269E(3) and Section 269F, Clause (a). He contended that Clause (a) of Section 269C deals with apparent consideration, not truly stating the agreed consideration between the parties. He contended that Clause (a) does not cover the object of the transfer and the object is dealt with by Clause (b) of Section 269C(2) and the presumption regarding the object under Clause (b) is rebuttable. The learned Advocate-General's further contention is that the two presumptions--one under Clause (a) and the other under Clause (b), are available to the competent authority after proceedings have been initiated and not at the stage of the formation of the belief contemplated by Section 269C(1) (a).

(3) The third contention of the learned Advocate-General is that Section 269C is applicable to immovable property as defined by Section 269A(e) but a sale of an undertaking together with all its assets as a going concern with goodwill and all its assets is not a sale of an immovable property since the undertaking is not immovable property as denned by Section 269A(3). He further contended in this connection that the goodwill of the business, current assets, investments, licences, etc., are not immovable property even under the inclusive part of the definition u/s 269A(e) since goodwill, current assets, investments, licenses, etc., are intangible assets.

(4) He lastly contended that Section 269C(2)(a) is violative of Articles 14 and 19 of the Constitution and is liable to be struck down for that reason.

9. It must be pointed out that in the main petition itself, there is no submission or contention that sale of an undertaking as a going concern together with goodwill and assets, etc., is not sale of immovable property and to that extent Mr. Desai for the respondents was right in pointing out to us that that contention has not been taken in the main petition. It is only in the affidavit-in-rejoinder in para. 5.6 that it has been urged on behalf of the transferor company that by the conveyance dated March 30, 1973, the petitioner has transferred and assigned its undertaking and business as a going concern along with its goodwill, all assets and liabilities for an aggregate consideration of Rs. 3,00,03,050. The whole undertaking was valued as a unit. There was no separate sale of land, buildings, plant, machinery, furniture, fixtures, stock-in-trade, goodwill, etc., item by item. In fact, it was a slump transaction. The mere fact that itemwise price is stated in

the conveyance deed does not lead to a conclusion that a slump price of an item is necessarily attributable to the item in question. The assets were transferred at a block value and no attempt is made to evaluate each item separately as on the date of transfer. Therefore, according to the affidavit-in-rejoinder in para. 5.6, it is not possible to say that the petitioner has made any business profit as a result of the transfer of stock-in-trade, plant, machinery, furniture, fixtures, etc., and the profit, if any, resulting from the transfer can be attributed to appreciation of capital and the excess, if any, can be considered only as a capital gain chargeable to tax and not a business profit chargeable to tax as such. In transferring the undertaking and business to Telerad at a book value, the SMCL has not realised any capital gains as a result of the transfer. Even in this affidavit-in-rejoinder, there is no contention urged on behalf of the transferor company that when the undertaking is sold together with goodwill and all its assets, there is no sale of immovable property. The precise form, in which the submission is made before us at the time of hearing does not find a place either in the petition or in the affidavit-in-rejoinder. The learned Advocate-General tried to meet the objection of the learned Government Pleader regarding the third submission by relying on the decision of the Supreme Court in *Sri-La-Sri Subramania Desika Gnanasambanda Pandarasannadhi Vs. State of Madras and Another*, . He relied on the following observations occurring in para. 17 at page 1582. There the Supreme Court observed :

" ...the High Court thought that the plea in question had not been raised by the appellant in his writ petition. This reason is no doubt technically right in the sense that this plea was not mentioned in the first affidavit filed by the appellant in support of his petition ; but in the affidavit-in-rejoinder filed by the appellant this plea has been expressly taken. This is not disputed by Mr. Chetty, and so, when the matter was argued before the High Court, the respondents had full notice of the fact that one of the grounds on which the appellant challenged the validity of the impugned order was that he had not been given a chance to show cause why the said notification should not be issued. We are, therefore, satisfied that the High Court was in error in assuming that the ground in question had not been taken at any stage by the appellant before the matter was argued before the High Court."

10. It is not necessary for us to consider this aspect regarding the pleading and at what stage the assessee should have taken it because even in the affidavit-in-rejoinder there is no contention specifically taken that the sale of an undertaking as a whole together with goodwill and all its assets, when what is sold is a going concern, is not sale of immovable property. We, therefore, will not go into this question raised by the learned Advocate-General in his third submission.

11. It may also be further stated that as regards point No. (4), namely, challenge to the constitutional validity of Section 269C(2)(a), the learned Advocate-General did not press this particular submission in view of the conclusion which has been reached by this High Court in *Commissioner of Income Tax, Gujarat II Vs.*

Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, , namely, that Section 269C(2)(a) though in language purporting to raise a presumption as to conclusive proof, the section can only be said to raise a rebuttable presumption. In view of the fact that according to the decision in Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, , the presumption u/s 269C(2)(a) is a rebuttable presumption, the challenge to the constitutional validity of that clause has not been pressed.

12. It is contended by the learned Advocate-General that since the material words in Section 269C(1)(a) which deal with the conditions precedent regarding the object of transfer are " any income arising from the transfer ", the object must be to facilitate the reduction of Income Tax in respect of any income arising from the transfer or the evasion of the liability of the transferor to pay tax in respect of any income arising from the transfer. The learned Advocate-General's contention is that so far as Income Tax in respect of any income arising from the transfer is concerned, there are only two provisions under the I.T. Act which deal with tax on such income arising from a transfer. Those provisions are balancing charge u/s 41(2) of the I.T. Act and capital gains u/s 45(1) of the Act. u/s 41(2) :

" Where any building, machinery, plant or furniture which is owned by the assessee and which was or has been used for the purposes of business or profession is sold.....and the moneys payable in respect of such building, machinery, plant or furniture, as the case may be, together with the amount of scrap value, if any, exceed the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chargeable to Income Tax as income of the business or profession of the previous year in which the moneys payable for the building, machinery, plant or furniture became due. "

13. and it is well-settled that tax on the income which is referred to in Section 41(2) is what is known as balancing charge in the language of accountancy u/s 45(1) any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to Income Tax under the head " Capital gains " and shall be deemed to be the income of the previous year in which the transfer took place. The learned Advocate-General contended that barring Section 41(2) and Section 45(1), there is no provision in the I.T. Act for any tax on income arising from transfer of immovable property. On the other hand, Mr. G. N. Desai for the respondents in each of the special civil applications contended that, apart from these two categories of Income Tax, namely, tax on capital gains and tax on balancing charge, when the business is sold as a whole and the stock-in-trade and other movables are sold since they are sold as movable property by virtue of the extended definition in Section 269A(e), they would be covered by the provisions of Section 269C(1) and further if any apparent consideration is less than the fair market value there will be a profit occurring to the transferor and if the apparent consideration is less than the fair market value, even such stock-in-trade which is deemed to be immovable property by virtue of the

definition clause in Section 269A(e) will yield income arising from the transfer because there is in fact a profit derived from this particular transaction of sale of stock-in-trade. For this purpose Mr. Desai relied upon Section 28 of the I.T. Act and the ensuing sections in the provisions relating to profits and gains from business or profession. It must be pointed out that in the affidavit-in-reply filed by respondents, no reliance has been placed on this ground of evasion of tax or reduction of liability of tax in respect of profits or gains from business or profession. A copy of the reasons which are required to be recorded u/s 269C(1) and which were in fact recorded by the competent authority on September 17, 1973, has been furnished to us and even in the reasons, no reliance was placed on this aspect of the evasion of tax or reduction of liability to tax in respect of profits of business or profession under the group of sections commencing from Section 28 onwards. In our opinion, it is not open to the respondents at this stage to rely on this aspect of the case, namely, possible profits or gains under the head " Profits or gains from business or profession " and tax on such profits or gains as income arising from the transfer when considering the question of object u/s 269A(a). Therefore, we have only to consider whether the competent authority had reason to believe that the consideration for such transfer as agreed to between the parties had not been truly stated in the instrument of transfer with the object of facilitating reduction or evasion of the liability of the transferor to pay tax, (a) in respect of capital gains, or (b) in respect of balancing charge u/s 41(2). No other contention or ground for the purpose of showing that the conditions precedent regarding the object were satisfied, can be allowed to be urged at the present stage in view of what has been stated in the reasons recorded by the competent authority and in view of the affidavit-in-reply filed in this case.

14. As regards capital gains, it is clear that in view of Section 47, Clause (iv), any profits or gains arising from the transfer of capital assets by a holding company for any consideration to its wholly-owned subsidiary company does not amount to capital gains within the meaning of Section 45(1) of the Act. Section 47, Clause (iv) provides as follows :

" 47. Nothing contained in Section 45 shall apply to the following transfers :--.....

(iv) any transfer of a capital asset by a company to its subsidiary company, if-

(a) the parent company or its nominees hold the whole of the share capital of the subsidiary company, and

(b) the subsidiary company is an Indian company." It is common ground between the parties before us that both these requirements of Sub-clauses (a) and (b) of Clause (iv) of Section 47 are satisfied in the instant case, and hence in our opinion it is obvious that tax on capital gains arising from this particular transfer of March 30, 1973, between the transferor and the transferee company could never be taxed as capital gains and, therefore, the object of the transfer could

never have been to facilitate reduction or evasion of the liability of the transferor to pay tax on capital gains arising from this transaction of March 30, 1973.

15. Therefore, it is only if the provisions of Section 41(2) can be said to be attracted to the instant case that the condition precedent regarding the object of transfer can be said to be met.

16. We have already referred to the provisions of Section 41 but for the purposes of, inter alia, Section 41, Section 43 lays down special definitions. Under Sub-section (1) of Section 43, " actual cost " means the actual cost of the assets, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. Under Expln. 6 to Sub-section (1) of Section 43 :

"When any capital asset is transferred by a holding company to its subsidiary company, or by a subsidiary company to its holding company, then, if the conditions of Clause (iv) or, as the case may be, of Clause (v) of Section 47 are satisfied, the actual cost of the transferred capital asset to the transferee company shall be taken to be the same as it would have been if the transferor company had continued to hold the capital asset for the purposes of its business."

17. Sub-section (6) of Section 43 defines " written down value " to mean :

" (a) in the case of assets acquired in the previous year the actual cost to the assessee ;

(b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income Tax Act, 1922 (11 of 1922), or any Act repealed by that Act, or under any executive orders issued when the Indian Income Tax Act, 1886 (2 of 1886) was in force : "

18. Explanation 2 to Section 43(6) provides :

" When any capital asset is transferred by a holding company to its subsidiary company or by a subsidiary company to its holding company, then, if the conditions of Clause (iv), or, as the case may be, of Clause (v) of Section 47, are satisfied, the written down value of the transferred capital asset to the transferee company shall be taken to be the same as it would have been if the transferor company had continued to hold the capital asset for the purposes of its business."

19. In the instant case, as we have indicated above, Clause (iv) of Section 47 applies to the transferor company and the transferee company and the conditions of Section 47, Clause (iv), are satisfied and, hence, in the light of Expln. 6 to Section 43(1) and Expln. 2 to Section 43(6), the actual cost of the transferred capital asset to the transferee company must be deemed to be the actual cost of the transferor company as it stood immediately prior to the transfer of the capital asset and in the same manner, the written down value of the capital asset in the hands of the transferor company must be deemed to be the same as it was

before the transfer took place. Thus, the law enjoins on all concerned to treat the actual cost of the parent Company as the capital asset of the transferee company when the transferee is the wholly owned subsidiary company and the same applies to the written down value as well. Under these circumstances, it is obvious that if the sale is effected at the written down value the capital asset is required by law to be valued so far as the actual cost and the written down value are concerned at what they were in the hands of the transferor, the parent company, and are treated as if the capital asset continued to be the property, of the transferor, the parent company.

20. The learned Advocate-General urged before us that looking to the provisions of Section 41(2) read in the light of Section 43(1), Expln. 6, and Section 43(6), Expln. 2, since in the instant case the capital assets have been transferred by the parent company to its wholly-owned subsidiary company at the book value, that is the written down value, as on the date of transfer, so far as depreciable assets in respect of which depreciation has been allowed in the past are concerned, there was no question of any object of avoiding the liability to pay tax on the balancing charge u/s 41(2) or to reduce the liability in respect of that balancing charge. He contended that in the instant case the transaction is being effected at book value because that is what the law contemplates and what the law enjoins and even if higher consideration had been shown in the deed of transfer, in the eye of the law, the written down value would have been deemed to be the same so far as the transferee company was concerned. He contended that since what has been done in the instant case is what the law deems to be done, there could not be any object of avoiding the liability in respect of tax on the balancing charge u/s 41(2) or evasion of tax or reduction of tax in respect of the balancing charge u/s 41(2).

21. He further pointed out that in respect of the transfer of assets by a parent company to its wholly owned subsidiary company, even under the Indian Stamp Act there has been an exemption by virtue of a notification and u/s 20 of the Gujarat Sales Tax Act, an exemption in respect of such transfer has been carved out. He, therefore, contended that there could not be any such nefarious object and no such nefarious object could ever be attributed in respect of the present transaction and hence the requirements of Section 269C(1)(a) can never be said to have been satisfied in the instant case.

22. In further support of this contention of his, the learned Advocate-General relied upon the decision of the Supreme Court in Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department), and contended that where a going business and undertaking as a whole is transferred as a going business together with all its assets, what arises for consideration from the point of view of taxation is only capital gains in respect of that transaction and nothing else, particularly when the consideration is a slump price. On the other hand, Mr. Desai for the respondents relied on the decision in Commissioner of Income Tax, Gujarat Vs. B.M. Kharwar, in support of his

contention that, in such an event, even tax on balancing charge u/s 41(2) of the Act would arise. It is, therefore, necessary for us to examine the facts of each of these two cases decided by the Supreme Court and to find out the principles arising from these two decisions.

23. In *Mugneeram Bangur's* case [1965] 57 ITR 297 the facts were I A firm which carried on the business of buying land, developing it and then selling it, pursuant to an agreement, sold the business as a going concern with its goodwill and all stock-in-trade, etc., to a company promoted by the partners of the firm, the company undertaking to discharge all debts and liabilities, development expenses, and the liability in respect of deposits made by the intending purchasers. The consideration of Rs. 34,99,300 was paid by the allotment of shares of the face value of Rs. 34,99,300 to the partners or their nominees. The schedule in the agreement indicated that the sum of Rs. 34,99,300 was arrived at by itemwise different sums against each of the items mentioned in the items. Item No. 2 was goodwill and goodwill was valued at Rs. 2,50,000. The Appellate Tribunal held that the firm had no goodwill and that the sum of Rs. 2,50,000, although shown as the value of the goodwill, was really the excess value of the land, which was its stock-in-trade, and that although the sale was that of a business as a going concern, the value of its stock-in-trade could be traded ; but that the transaction was a mere adjustment of the business position of the partners and the department was not entitled to take the book-keeping entries as evidence of any profit. The Supreme Court held that the sale was the sale of a whole concern and no part of the price was attributable to the cost of the land and no part of the price was taxable. The fact that in the schedule to the agreement the price of the land was stated did not lead to the conclusion that part of the slump price was necessarily attributable to the land sold. What was given in the schedule was the cost price of the land as it stood in the books of the vendor and even if the sum of Rs. 2,50,000 attributed to the goodwill could be added to the cost of the land, there was nothing to show that this represented the market value of the land. Question No. 3, which was referred to the High Court by the Income Tax Appellate Tribunal was : " Whether, on the facts and circumstances of this case, by the sale of the whole business concern it could be held that there was taxable profit in the sum of Rs. 2,50,000 ? "

24. At pages 303 and 304 of the report, Sikri J., as he then was, speaking for the Supreme Court, stated I

" As we are inclined to answer the third question in favour of the vendors, it is not necessary to deal with the other questions and the arguments addressed in respect of them.

The Appellate Tribunal held in this case that the sale was a sale of business as a going concern. This is also apparent from Clause I of the agreement set out above. If this is so, *Doughty's* case [1927] AC 327 applies. The facts in *Doughty's* case may be conveniently taken from the headnote in that case. " In 1920, two partners carrying on business in New Zealand as general merchants

and drapers sold the partnership business to a limited company in which they became the only shareholders. The sale was of the entire assets, including goodwill, the consideration being fully paid shares, and an agreement by the company to discharge all the liabilities. The nominal value of the shares being more than the sum to the credit of the capital account of the partnership, in its last balance-sheet, a new balance-sheet was prepared showing a larger value for the stock-in-trade. The Commissioner of Taxes treated the increase in value so shown as a profit on the sale of the stock-in-trade, and assessed the appellant upon it for Income Tax under the Land and Income Tax Act, 1916, of New Zealand, which imposes the tax on all profits or gains derived from any business.

"

The Privy Council decided the case in favour of the appellant on two grounds, the first being that " if the transaction is to be treated as a sale, there was no separate sale of the stock, and no valuation of the stock as an item forming part of the aggregate which was sold ". In connection with this ground, Lord Phillimore observed that " Income Tax being a tax upon income, it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books does not give rise to a profit taxable to Income Tax ". He further observed that " where, however, the business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realisation sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. The fact that large blocks of stocks are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in one sale. Even in the case of a realisation sale, if there were an item which could be treated as representing the stock sold, the profit obtained by that sale, though made in conjunction with the sale of the whole concern, might conceivably be treated as taxable income. " Lord Phillimore concluded with the following observations I

" If a business be one of purely buying and selling, like the present, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to Income Tax ; but their view of the facts (if it be open to them to consider the facts) is the same as that of Stout C.J., that is, that this was a slump transaction ". "

25. Sikri J. pointed out that the Supreme Court itself in COMMISSIONER OF Income Tax, KERALA Vs. WEST COAST CHEMICALS AND INDUSTRIES LTD. (IN LIQUIDATION)., , had understood Doughty's case as follows (p. 305 of 57 ITR) :

" This case shows that where a slump price is paid and no portion is attributable to the stock-in-trade, it may not be possible to hold that there is a profit other than what results from the appreciation of capital. The essence of the matter, however, is not that an extra amount has been gained by the selling out or the

exchange but whether it can fairly be said that there was a trading from which alone profits can arise in business. "

26. Sikri J. continued :

" It follows from the above that once it is accepted that there was a slump transaction in this case, i.e., that the business was sold as a going concern, the only question that remains is whether any portion of the slump price is attributable to the stock-in-trade.

The learned counsel for the appellant relies on two grounds to support the contention that there is profit attributable to the sale of land which was the stock-in-trade of the vendors. He says that in the schedule to the agreement the value of land and the value of goodwill and other items is specified. He says that although the amount of Rs. 2,50,000 was shown as price of goodwill, it was really excess value of the land sold along with the other assets. Secondly, he says relying on the passage already cited above from Doughty's case [1927] AC 327 , that the vendor's business was a business of purely buying and selling land. In our opinion, on the facts of this case, it cannot be said that the vendors were carrying on the business of purely buying and selling land. In this case, the vendors were engaged in buying land, developing it and then selling it. The agreement itself shows that the vendors had already incurred debts and liabilities for development expenses such as opening out roads, laying out drains and sanitary arrangements, providing electricity and providing for a school.

It seems to us that in the case of a concern carrying on the business of buying land, developing it and then selling it, it is easy to distinguish a realisation sale from an ordinary sale, and it is very difficult to attribute part of the slump price to the cost of land sold in the realisation sale. The mere fact that in the schedule the price of land is stated does not lead to the conclusion that part of the slump price is necessarily attributable to the land sold. There is no evidence that any attempt was made to evaluate the land on the date of sale. As the vendors were transferring the concern to a company, constituted by the vendors themselves, no effort would ordinarily have been made to evaluate the land as on the date of sale. What was put in the schedule was the cost price, as it stood in the books of the vendors. Even if the sum of Rs. 2,50,000 attributed to goodwill is added to the cost of land, it is nobody's case that this represented the market value of the land.

In our view the sale was the sale of the whole concern and no part of the slump price is attributable to the cost of land. If this is so, it is clear from the decision of this court in COMMISSIONER OF Income Tax, KERALA Vs. WEST COAST CHEMICALS AND INDUSTRIES LTD. (IN LIQUIDATION),, and Doughty's case [1927] AC 327 that no part of the slump price is taxable." (Emphasis* supplied).

27. It must be pointed out that the Supreme Court was dealing with the provisions of law as they stood before capital gains became taxable under the Indian I.T. Act, 1922. The case before the High Court arose out of Income Tax

Reference No. 74 of 1956 COMMISSIONER OF Income Tax (CENTRAL), CALCUTTA Vs. MUGNEERAM BANGUR AND COMPANY., and it is well known that capital gains became taxable under the Indian I.T. Act, 1922, from 1956 onwards. What is material in the present case is that, according to the Supreme Court in Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department), , when the sale is of the whole concern and for a slump price, particularly, when the price is as it stood in the books of account of the vendors and the transaction is between inter-connected parties, namely, persons selling to a company of which the partners themselves were shareholders or a parent-company selling property to its wholly-owned subsidiary company, no effort would ordinarily be made to evaluate immovable property as on the date of sale. If the sale is of the whole concern and no part of the agreed price is attributable to definite items mentioned in the schedule and the date of sale was the date of the agreement of sale, it cannot be said that there is any profit arising from the transaction. It is obvious that if tax on capital gains had been leviable at the time when the transaction which was the subject-matter of decision in Commissioner of Income Tax (Central), Calcutta Vs. Mugneeram Bangur and Co. (Land Department), took place, the Supreme Court would certainly have held that tax on capital gains could be levied in that particular case if any profit could be said to have arisen in that particular case from the transfer of that particular capital asset.

28. In Killick Nixon and Co. Vs. Commissioner of Income Tax, Bombay City I, , a Division Bench of the Bombay High Court dealt with a transaction where a partnership firm sold all its assets and liabilities including goodwill and other contracts to two companies in consideration of the allotment of shares of the value of rupees ninety lakhs. The firm was dissolved and its business was discontinued with effect from February 1, 1948. In determining the capital gains on the sale of its assets it was common ground that the full value of the consideration arising to the assessee from the transfer of its assets was Rs. 1,16,75/108, but the assessee claimed that there was no capital gain, as the value of the business as a whole as on January 1, 1939, was more than the full value of the consideration which it had received in 1948, and in support of its claim the assessee placed considerable material before the I.T. authorities. At page 258 of the report, V. S. Desai J., speaking for the Division Bench of the Bombay High Court, referred to question No. 2, which was as follows : " Whether, on the facts and in the circumstances of the case, the assessee-firm is liable to pay capital gains tax in respect of profits and gains arising from the sale of its assets to the limited companies ? " and the answer of the Bombay High Court was that the assessee was not saved from paying capital gains tax in respect of the profits and gains arising from the sale of its assets to the limited companies by reason of the provisions of the third proviso to Section 12B(1), as it then stood. The third proviso to Section 12B(1) dealt with a situation where the assets of a partnership were distributed in species amongst the partners on the dissolution of the firm. The Supreme Court has pointed out in James Anderson,

Administrator of The Estate of The Late Henry Gannon, Bombay Vs. The Commissioner of Income Tax, Bombay, that the distribution of capital assets under the third proviso to Section 12B(1) meant distribution of the capital assets in specie and not distribution of the sale proceeds. At page 259 of the report (49 ITR), it has been pointed out by V. S. Desai J. :

" Capital assets, as defined in Section 2(4A) is " property of any kind held by an assessee whether or not connected with his business, profession or vocation" with the exception of certain specific items as are specified in the said definition. Capital gains u/s 12B(1) is gain, which arises on the sale, exchange or transfer of a capital asset, i.e., on the sale, exchange or transfer of property of any kind as specified in Section 2(4A). The fact that the property is connected with business or unconnected with the business is immaterial. It is the existence of the property and the gain arising on its disposal by sale, exchange or transfer that alone is necessary for the purpose of constituting a capital gain whether the assets are sold along with the business or as a part of the business as a going concern or without the business and separately would not make any difference. // the sale even of the business as a whole included a sale of the capital assets of the business, the gain arising on such sale as is attributable to the capital assets would be a capital gain." (Emphasis* supplied.)

29. We respectfully agree with the learned judges of the Bombay High Court that in such a situation, it would be a capital gain.

30. The decision of the Supreme Court in Commissioner of Income Tax, Gujarat Vs. B.M. Kharwar, , dealt with a situation where the entire business was not transferred by the partnership firm to a newly floated company. Shah J., as he then was, has pointed out at page 605 of the report that the firm carried on business of manufacturing, purchasing and selling cloth and the firm closed its manufacturing side of the business and transferred its machinery to a private limited company in the shape of capital in which the partners of the firm had the same interest as they had in the assets and profits of the partnership. It is clear, therefore, that before the Supreme Court it was not a case of the whole undertaking being sold or the entire undertaking together with goodwill, etc., being sold but merely the machinery which the partnership owned for the purpose of its manufacturing activity was sold to the private limited company, and on these facts, the Supreme Court dealt with the question of balancing charge u/s 41(2). At page 610 of the report, it has been pointed out by Shah J. :

" This court pointed out in Commissioner of Income Tax, Kerala Vs. R.R. Ramakrishna Pillai, , that, a transaction by which a person carrying on business transfers the assets of that business to another assessable entity may take different forms and may have different legal effects. The assets of a business may be sold at a fixed price to a company promoted by a person who carried on the business; if the price paid for or attributable to an asset exceeds the written down value of the asset, proviso (ii) to Section 10(2)(vii) of the Indian Income Tax Act, 1922, would ex facie be attracted. Where the person carrying on the

business transfers the assets to a company in consideration of allotment of shares, it would be a case of exchange, and not of sale, and the true nature of the transaction will not be altered, because for the purpose of stamp duty or other reasons the value of the assets transferred is shown as equivalent to the face value of the shares allotted. A person carrying on business may agree with a company that the assets belonging to him shall be transferred to the company for a certain money consideration and that in satisfaction of the liability to pay that money consideration, shares of a certain face value shall be allotted to him. In that case there are in truth two transactions--one a transaction of sale and the other a contract under which the shares are allotted in satisfaction of the liability to pay the price.

The court further observed that Section 10(2)(vii), prov. (ii), on the plain terms used therein, is attracted if there be a sale of the building, machinery or plant and the amount for which the sale takes place, exceeds the written down value of the assets transferred. If there be no sale, the proviso has no application. "

31. It is clear, therefore, that such a question of balancing charge would arise only if there is sale of a particular asset of the business or particular building, plant or machinery. For the purpose of Section 41(2), all that we are concerned with is certain special types of assets, namely, building, plant, machinery, furniture or fixture. The extended meaning of "immovable property " u/s 269A(e) is not to be applied when considering the question of balancing charge u/s 41(2). In the instant case, since the prices mentioned in the deed of conveyance are merely the book value mentioned in the books of account of the transferor company as on the date of transfer, it cannot be said that the transferor company was seeking to avoid payment of tax on the balancing charge or was seeking to reduce its liability to pay tax in respect of the balancing charge u/s 41(2) by stating the mere book value.

32. In our opinion, if the contention of the learned advocate for the revenue were to be accepted, it would mean penalising the parties for doing something exactly on the lines on which the law requires the parties to effect their transaction; when the transaction is between the parent company and a wholly-owned subsidiary company, namely, sale price being the written down value, and it would render otiose the concepts set out in Sections 41(2) and 43(6), Explan. 2. In our opinion, if the apparent consideration mentioned in the deed of conveyance complied with the provisions of and was exactly in accordance with the requirements of Section 41(2) and 43(6), Explan. 2, it cannot be said that the object of not truly stating the agreed value in the deed of conveyance was the nefarious object referred to in Section 269C(1)(a) of the Act.

33. There is another aspect on the basis of which the principal questions can be approached. It is well settled that business is property and the undertaking of a business is a capital asset of the owner of the undertaking. When an undertaking as a whole is transferred as a going concern together with its goodwill and all other assets, what is sold is not the individual itemised property but what is sold

is the capital asset consisting of the business of the undertaking and any tax that can be attracted to such a transaction for a slump price at book value would be merely capital gains tax and nothing else but capital gains tax. Plant or machinery or any fixture or furniture is not being sold as such. What is sold is the business of the undertaking for a slump price. If the capital asset, namely, the business of the undertaking, has a greater value than its original cost of acquisition, then, capital gains may be attracted in the ordinary case of a sale of an undertaking and that is precisely what has been indicated in Doughty's case [1927] AC 327 (PC) and in Mugneeram Bangur's case [1965] 57 ITR 299 (SC). In Commissioner of Income Tax, Gujarat Vs. B.M. Kharwar, , in our opinion, relied upon by Mr. Desai for the respondents, deals with a different situation where out of the total assets of the business only machinery was sold -and then it was a clear case of Section 41(2) or equivalent provisions of the Indian I.T. Act, 1922, being attracted to such a transaction.

34. In our opinion, therefore, the condition precedent as to the nefarious object cannot be said to be satisfied in view of the provisions of Section 269C(1)(a) on the facts before us since the sale is by a parent company to its wholly- owned subsidiary company and the apparent consideration is at the book value, that is, written down value of such parts of the assets of the business as were depreciable and in respect of which depreciation had been allowed in the past. It is because of this peculiar feature of the transaction that we hold in the instant case that the nefarious object can never be said to exist, objectively speaking, so far as the facts of this case are concerned and hence one of the conditions precedent for the exercise of jurisdiction u/s 269C(1)(a) cannot be said to have been satisfied.

35. This conclusion of ours would be sufficient to dispose of the case before us, but we are dealing with another aspect which was also urged before us and which has considerable substance. The learned Advocate-General pointed out that as disclosed by the reasons recorded by the competent authority, even at the stage of initiation of proceedings, reliance was being placed on the presumptions u/s 269C(2)(a) and (b). He pointed out that it is only u/s 269C(2) (a) that the question of margin of twenty-five per cent. or more between the fair market value and the apparent consideration at all arises for consideration of the authorities concerned, and in para. 10 of the reasons recorded by the competent authority it has been in terms observed :

" I have, therefore, reason to believe that the immovable property mentioned in the instrument of transfer dated 30th March, 1973, having fair market value exceeding Rs. 25,000 has been transferred by M/s. Sarabhai M. Chemicals (P.) Ltd. to M/s. Telerad Pvt. Ltd., transferor and transferee respectively for a consideration which is less than the fair market value of property by more than 25 per cent. and that the consideration of such transfer as agreed to between the parties has not been truly stated in the instrument of transfer with the object of-

(a) facilitating the reduction or evasion of the liability of the transferor to pay the

tax under this Act in respect of any income arising from the transfer. "

36. The learned Advocate-General pointed out that prior to the decision of this court in Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, , the department proceeded on the footing that the presumption u/s 269C(2) would be available even at the stage of initiation of proceedings. In Income Tax Circular No. 96 dated November 25, 1972 Commissioner of Income Tax and Controller of Estate Duty, Madras Vs. N.R. Ramarathnam and Others, , which dealt with the provisions of the Taxation Laws (Amendment) Act, 1972, and the newly added Chap. XX-A, in para. 11, it was observed (91 ITR (St.) 15) :

" The competent authority will have the power to initiate proceedings for the acquisition of any immovable property which has been transferred by way of sale or exchange on or after 15th November, 1972, only if the following three distinct conditions are fulfilled, namely :--

(i) he has reason to believe that the immovable property is of a fair market value exceeding Rs. 25,000 ;

(ii) he has reason to believe that the fair market value of such property exceeds the apparent consideration therefore by more than 15% of such apparent consideration ; and

(iii) he has reason to believe that the consideration for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer with the object of either facilitating the reduction or evasion of the liability of the transferor to tax in respect of any income (including capital gains) arising from the transfer or facilitating the concealment of any income or any moneys or other assets which have not been or which ought to be disclosed by the transferee for purposes of the Indian Income Tax Act, 1922, the Income Tax Act, 1961, or the Wealth-tax Act, 1957.

The rules of evidence set forth in the preceding paragraph will apply at the stage of initiation of proceedings also. Under one of these rules, the fact that the fair market value of any immovable property exceeds its apparent consideration by more than 25% of such apparent consideration shall be conclusive proof of the fact that the consideration for such transfer, as agreed to between the parties, has not been truly stated in the instrument of transfer. It, therefore, follows that where the competent authority has reason believe that the difference between the apparent consideration and the fair market value of the immovable property exceeds the aforesaid margin, he must proceed on the basis that the instrument of transfer does not correctly represent the consideration that has actually passed. "

37. This court has held in Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, that the presumptions prescribed in Clauses. (a) and (b) of Sub-section (2) of Section 269C would not

operate at any stage prior to the decision of the competent authority for initiation of the proceedings. Therefore, since the reason to believe referred to in Section 269C(1) is the stage prior to the decision of the competent authority for initiation of proceedings, the presumptions under Clauses (a) and (b) of Section 269C(2) were not available to the competent authority when he decided to initiate proceedings and issue the notices u/s 269D. If the presumptions u/s 269C(2), Clauses (a) and (b), were not available to the competent authority at any stage prior to the initiation of proceedings, it would not be open to him to draw an inference and seek to do indirectly that which he cannot do directly. Mr. Desai for the respondents urged before us that though the presumptions are not available at the stage of formation of the belief contemplated by Section 269C(1), it would be open to the competent authority to draw an inference on the same lines as the presumption set out in Clauses (a) and (b) of Section 269C(2). We are unable to accept that contention of Mr. Desai and it must be held that in the instant case, in the light of what has been stated in the reasons recorded by the competent authority and in the light of the affidavit-in-reply, there was nothing before the competent authority to show that the consideration for the transfer as agreed to between the parties had not been truly stated in the instrument of transfer with the object as mentioned in Section 269C(1)(a). In view of the valuer's report, which was before him, the competent authority could say that the apparent consideration was less than the fair market value of the property. The property which was involved in this transaction was of a fair market value exceeding twenty-five thousand rupees and, therefore, two other conditions precedent were in fact satisfied but, in the absence of the presumption arising u/s 269C(2)(a), there was no material to show that the consideration for such transfer as agreed to between the parties had not been truly stated in the instrument of transfer. Mr. Desai for the revenue urged before us that if this interpretation were to be put on the requirements of Section 269C(1), in no case would the competent authority be in a position to show that he had reason to believe that the consideration for a particular transfer as agreed to between the parties had not been truly stated in the instrument of transfer for the purpose of Section 269C(1). We are not concerned with the so-called practical difficulties pointed out by Mr. Dasai. It may be pointed out that u/s 269M of the Act :

" The competent authority shall have, for the purposes of this Chapter, all the powers that a Commissioner has, for the purposes of this Act, u/s 131."

38. Section 131 provides that the ITO, the AAC, the I AC and the Commissioner shall, for the purposes of the Act, have the same powers as are vested in a court under the CPC when trying a suit in respect of the following matters, namely, (a) discovery and inspection ; (b) enforcing the attendance of any person including any officer of a banking company and examining him on oath ; (c) compelling the production of books of account and other documents ; and (d) issuing commissions. Thus, all the powers of a civil court under the CPC as for recording evidence are available to the competent authority functioning under Chap. XX-A in the light of Section 269M read with Section 131. Section 269M deals with not

merely the proceedings under the chapter but speaks of " the purposes of Chap. XX-A " and, therefore, in an appropriate case, before the formation of the belief u/s 269C(1) the competent authority can exercise the powers referred to in Section 131 and ascertain for himself as to whether in the absence of the presumption u/s 269C(2) there was anything to show that the consideration for the transfer as agreed to between the parties had not been truly stated in the instrument of transfer as referred to in Section 269C(1).

39. The learned Advocate-General has relied upon several decisions u/s 52(2) of the I.T. Act where also the I.T. Act deals with the difference between the fair market value and the consideration stated in the deed of transfer and the consequences flowing from such discrepancy u/s 52(2) where the ITO forms an opinion that the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of such capital asset by an amount of not less than fifteen per cent. of the value so declared, the full value of the consideration for such capital asset shall, with the previous approval of the IAC, be taken to be its fair market value on the date of its transfer. Though the provisions of Section 52(2) deal with situations similar to the situations or identical with the situations which Chap. XX-A deals with, the prospective of Chap. XX-A, as pointed out by this High Court in Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, , is penal as levying a penalty and that being the case, we have refrained from deriving any support from the authorities dealing with Section 52(2) of the I.T. Act. We may point out that the Karnataka, Madras, Andhra Pradesh and Bombay High Courts have taken one view of these provisions of Section 52(2), whereas a Full Bench of the Kerala High Court and a Division Bench of the Punjab and Haryana High Court have taken a contrary view regarding Section 52(2), but it is not necessary for us to enter into that controversy.

40. In view of our conclusions set out hereinabove, we hold that the conditions precedent for the exercise of jurisdiction did not exist as regards the object of not truly stating the consideration for the transfer as agreed to between the parties so far as the instrument of transfer was concerned. If our conclusion regarding the object remains, the conditions precedent cannot be said to be satisfied. We, therefore, allow these two special civil applications and quash and set aside the notices dated 17th September, 1973, issued to the respective petitioner, the transferor company and the transferee company, in each of these two special civil applications. Accordingly, the notices are held to be illegal, void and inoperative. We further issue a direction to the respondents to forbear and desist from taking any action pursuant to the notice dated September 17, 1973, issued to the respective petitioner in these two special civil applications. Rule is made absolute in each matter accordingly. The respondents in each of these two special civil applications will pay the costs of the petitioner concerned in these two cases.