
(1999) 09 BOM CK 0060

In the Bombay High Court

Case No : Writ Petition No's. 1918 of 1993 and 2818 of 1994

Shreyas Builders and Another and Laxman Ganesh
Tulshibaughwala and Others

APPELLANT

Vs

M.D. Kodnani and Others

RESPONDENT

Date of Decision : 30-09-1999

Acts Referred:

Income Tax Act, 1961 — Section 269UD

Citation : (2000) 161 CTR 527 : (2000) 242 ITR 320 : (2000) 2 MhLj 191 :
(2000) 109 TAXMAN 307

Hon'ble Judges : D.K. Deshmukh, J;B.P. Saraf, J

Bench : Division Bench

Advocate : Aspi Chinoy, Percy Pardiwala and V.P. Sawant, in W.P. No. 1918 of 1993 and Kiran Bhagalia, in W.P. No. 2818 of 1994 and V.G. Mujumdar, in W.P. No. 1918 of 1993, for the Appellant; Aspi Chinoy, Percy Pardiwala and V.P. Sawant in W.P. No. 2818 of 1994 and M.I. Sethna and Ashokan for respondents Nos. 1 to 4 and Kiran Bhagalia, for respondents Nos. 6, 7 and in W.P. No. 1918 of 1993 and V.G. Mujumdar, in W.P. No. 1918 of 1993, for the Respondent

Judgement

1. These two petitions take exception to the same order passed by the appropriate authority under Chapter XX-C of the Income Tax Act, 1961. Therefore, both these petitions can be conveniently disposed of by a common judgment.

2. The facts that are material and relevant for deciding the petitions are as follows :

The petitioners in Writ Petition No. 2818 of 1994, are the owners of land Survey No. 8990-91/2 C.T.S. 1325 admeasuring about 857.48 sq., meters situate at Parvati, Pune. By an agreement dated April 30, 1992, the owners of the land agreed to sell that land to Shreyas Builders, who is the petitioner in Writ Petition No. 1918 of 1993. It appears that the appropriate authority made an order dated July 31, 1992, for compulsory purchase of the property u/s 269UD of the Income Tax Act. That order was challenged before this court by filing Writ Petition No.

348 of 1993 by the transferees, who are the petitioners in Writ Petition No. 1918 of 1993 on the ground that the order was passed without giving any opportunity of being heard to the petitioners in that petition and without assigning any reason for making the order. Writ Petition No. 348 of 1993, was disposed of by this court by its order dated February 26, 1993. This court set aside the order of compulsory purchase made by the appropriate authority relying on the judgment of the Supreme Court in the case of C.B. Gautam Vs. Union of India and Others, . It appears that thereafter, the appropriate authority issued show-cause notice dated March 3, 1993, asking the petitioners in both these petitions to show cause as to why the property should not be purchased under Chapter XX-C of the Income Tax Act. This show-cause notice did not disclose the material on the basis of which the appropriate authority reached the tentative conclusion that the transaction has been undervalued and, therefore, the transferees addressed a letter to the appropriate authority dated March 10, 1993, making a grievance that in the show-cause notice the reasons for reaching the tentative conclusion that the transaction has been undervalued have not been disclosed. A grievance was made that in the absence of this material being disclosed the petitioners are not in a position to show cause effectively. There was no response, therefore, another letter dated March 18, 1993, was addressed making the same grievance. Still neither the reasons were disclosed nor was the material on the basis of which the show-cause notice was issued supplied, however, an explanation was submitted to the show cause notice dated March 23, 1993. Thereafter, the appropriate authority made an order dated April 28, 1993, for compulsory purchase of the property. It is this order which is impugned in this petition.

3. Learned counsel for the petitioners relying on the judgment of the Supreme Court in C.B. Gautam Vs. Union of India and Others, , referred to above as also the judgment of the Division Bench of this court in the case of Mrs. Nirmal Laxminarayan Grover Vs. Appropriate Authority and Others, , submitted that the order of compulsory purchase impugned in this petition is liable to be set aside, because the show-cause notice itself is defective. He submits that the appropriate authority was obliged to disclose the reasons on the basis of which it reached the tentative conclusion that the transaction was undervalued, as also the material on the basis of which this tentative conclusion was reached.

4. Learned counsel appearing for the respondents/appropriate authority, as observed by us in a separate order dated September 21, 1999, expressed his inability to argue the matter, because according to him a copy of the show-cause notice has not been annexed to this petition, though, as a matter of fact a copy of the show-cause notice has been annexed to Writ Petition No. 1918 of 1993. It is further to be pointed out that in the record, which was handed over to us by learned counsel for the appropriate authority, a copy of the show-cause notice was found by us, which is identical to the copy of the show-cause notice, which is filed in Writ Petition No. 1918 of 1993.

5. A perusal of the show-cause notice shows that it neither discloses the material

nor the reasons. It is a cryptic notice. It does not indicate the material on the basis of which the appropriate authority reached the tentative conclusion that the transaction is undervalued. It also does not disclose any reason why the appropriate authority has reached the tentative conclusion that the transaction has been undervalued. It is further to be seen here that in ground (b) of the petition, a grievance in this regard has been made by the petitioners in Writ Petition No. 2818 of 1994 and in the affidavit in reply filed by the respondent/competent authority, the competent authority does not state the reasons for non-disclosure of the material as also the reasons in the show-cause notice. The Supreme Court in its judgment in C.B. Gautam Vs. Union of India and Others, , dealing with this aspect of the show-cause notice, has observed thus (page 553) :

"It is true that the time-frame within which the order for compulsory purchase has to be made is a fairly tight one but, in our view, the urgency is not such as would preclude a reasonable opportunity of being heard or to show cause being given to the parties likely to be adversely affected by an order of purchase u/s 269UD(1). The enquiry pursuant to the explanation given by the intending purchaser or the intending seller might be a somewhat limited one or a summary one but we decline to accept the submission that the time limit provided is so short as to preclude an enquiry or show cause altogether.

In the light of what we have observed above, we are clearly of the view that the requirement of a reasonable opportunity being given to the concerned parties, particularly, the intending purchaser and the intending seller must be read into the provisions of Chapter XX-C. In our opinion, before an order for compulsory purchase is made u/s 269UD, the intending purchaser and the intending seller must be given a reasonable opportunity of showing cause against an order for compulsory purchase being made by the appropriate authority concerned. As we have already pointed out, the provisions of Chapter XX-C can be resorted to only where there is a significant under valuation of property to the extent of 15 per cent, or more in the agreement of sale, as evidenced by the apparent consideration being lower than the fair market value by 15 per cent, or more. We have further pointed out that, although a presumption of an attempt to evade tax may be raised by the appropriate authority concerned in case of the aforesaid circumstances being established, such a presumption is rebuttable and this would necessarily imply that the concerned parties must have an opportunity to show cause as to why such a presumption should not be drawn. Moreover, in a given transaction of an agreement to sell, there might be several bona fide considerations which might induce a seller to sell his immovable property at less than what might be considered to be the fair market value. For example : he might be in immediate need of money and unable to wait till a buyer is found who is willing to pay the fair market value for the property. There might be some dispute as to the title of the immovable property as a result of which it might have to be sold at a price lower than the fair market value or a subsisting lease in favour of the intending purchaser. There might similarly be other genuine reasons which might have led the seller to agree to sell the property to a

particular purchaser at less than the market value even in cases where the purchaser might not be his relative. Unless an intending purchaser or intending seller is given an opportunity to show cause against the proposed order for compulsory purchase, he would not be in a position to rebut the presumption of tax evasion and to give an interpretation to the provisions which would lead to such a result would be utterly unwarranted. The very fact that an imputation of tax evasion arises where an order for compulsory purchase is made and such an imputation casts a slur on the parties to the agreement to sell leads to the conclusion that, before such an imputation can be made against the parties concerned, they must be given an opportunity to show cause that the under valuation in the agreement for sale was not with a view to evade tax. Although Chapter XX-C does not contain any express provision for the affected parties being given an opportunity to be heard before an order for purchase is made u/s 269UD, not to read the requirement of such an opportunity would be to give too literal and strict an interpretation to the provisions of Chapter XX-C and, in the words of Judge Learned Hand of the United States of America "to make a fortress out of the dictionary". Again, there is no express provision in Chapter XX-C barring the giving of a show-cause notice or reasonable opportunity to show cause nor is there anything in the language of Chapter XX-C which could lead to such an implication. The observance of the principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, the requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by an appropriate authority u/s 269UD must be read into the provisions of Chapter XX-C. There is nothing in the language of Section 269UD or any other provision in the said Chapter which would negate such an opportunity being given. Moreover, if such a requirement were not read into the provisions of the said Chapter, they would be seriously open to challenge on the ground of violation of the provisions of article 14 on the ground of non-compliance with the principles of natural justice. The provision that, when an order for purchase is made u/s 269UD, reasons must be recorded in writing is no substitute for a provision requiring a reasonable opportunity of being heard before such an order is made."

6. It is to be seen here that in the present case, the material and the reasons were not disclosed in the show-cause notice. The petitioners made a demand for the same after receiving the show-cause notice. Then also it was not supplied. However, in the reasons which were given for the final order, the appropriate authority observed thus :

"So far the contention No. 1 regarding non-communicating reasons with show-cause notice is concerned, it is stated that since the prima facie case existed for pre-emptive purchase, a show-cause notice was issued to the transferor and no reason or finding are required to be given for issue of show-cause notice, since the apparent conclusion for under valuation arrived at that stage was prima facie and not final. Thus the appropriate authority has discharged the onus placed on it by the judgment of the Supreme Court in the case of C.B. Gautam Vs. Union of

India and Others, , wherein it is held that the enquiry pursuant to the explanation given by the intending purchaser or intending seller might be a somewhat limited one and summary one, but it must be required by principle of natural justice."

7. It is clear from the above quoted statements that, according to the appropriate authority, it is not necessary to disclose in the show-cause notice the reason why the authority has reached the prima facie conclusion that the transaction has been undervalued. In our opinion, the basic approach of the authority is erroneous. Unless the appropriate authority discloses the reasons why it prima facie finds that the transaction is undervalued, the person to whom the show-cause notice is issued would not be able to put up a defence. Thus issuance of such show-cause notice would defeat the very purpose for which the show-cause notice is required to be issued.

8. This court considering this aspect of the matter in its judgment in Mrs. Nirmal Laxminarayan Grover Vs. Appropriate Authority and Others, , referred to above has observed thus (page 593) :

"There is also force in the contention raised on behalf of the petitioner that in the absence of the particulars of the material or the reason(s) being disclosed in the show-cause notice for entertaining a tentative or a prima facie view that the value of the suit land is grossly understated in the agreement of sale between the parties, the transferor and the transferee have no real opportunity to meet the case of the appropriate authority or the Income Tax Department concerned in that regard and hence there is non-compliance with the basic principles of natural justice. The show-cause notice issued by the Department for pre-emptive purchase by the Central Government under Chapter XX-C of the Act must disclose how the tentative or prima facie conclusion is arrived at by the appropriate authority that the property sought to be compulsorily purchased is significantly undervalued which means that if any particular sale instance(s) is/are relied upon to show how the property in question is significantly undervalued, it is necessary for the appropriate authority to refer to the said details in the show-cause notice so that the transferor and/or the transferee have real and proper opportunity to meet the case of the Department. It is necessary to see that issuing a show-cause notice is not merely an empty formality which is incorporated in Section 269UD(1) of the Act to save it from its invalidity but the opportunity to show cause has to be real and substantial which means that the transferor and the transferee concerned must know as to why the appropriate authority is holding that their immovable property under the agreement of sale is significantly undervalued.

When an obligation is cast upon an authority to give a notice to show cause before reaching any final conclusion against the person affected by its action, the purpose and the requirement of such a show-cause notice is two-fold, (i) the notice must get an opportunity to meet the case against him and (ii) he must have an opportunity to set forth his own case to show why an order adverse to

him should not be passed. In this regard, de Smith in his Judicial Review of Administrative Action (fourth edition) has observed at page 196 as follows :

"Natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position :

- (a) to make representations on their own behalf; or
- (b) to appear at a hearing or inquiry (if one is to be held) ; and
- (c) effectively to prepare their own case and to answer the case (if any) they have to meet."

It must be then seen that the conclusions of the authority at the stage of giving a show-cause notice are always prima facie or tentative conclusions for if it is not so, its ultimate order would suffer from its bias, i.e., its pre-determined mind. However, because its conclusions at the stage of show-cause notice are only prima facie or tentative conclusions, it would not mean that they are not required to be disclosed in the show-cause notice. The above stand taken by the respondents in their return is thus wholly misconceived and is untenable. In fact, it betrays the ignorance of the respondents about the basic tenets of the principles of natural justice which we have referred to above as requirements of a proper show-cause notice."

9. It is clear from the observations quoted above that a show-cause notice which does not disclose the material on the basis of which the appropriate authority has reached the tentative conclusion that the transaction has been undervalued and the reasons for reaching that tentative conclusion is a defective show-cause notice and, therefore, an order made on the basis of that show-cause notice would be an incompetent order and, therefore, liable to be set aside.

10. In the result, therefore, both the petitions succeed and are allowed. Rule is made absolute in terms of prayer Clauses (a) and (b) with no order as to costs.