

(1996) 02 GUJ CK 0008

In the Gujarat High Court

Case No : Special Civil Application No. 10405 of 1995

Smt. Varshaben Bharatbhai Shah

APPELLANT

Vs

Appropriate Authority

RESPONDENT

Date of Decision : 06-02-1996

Acts Referred:

Income Tax Act, 1961 — Section 26, 269UA, 269UC, 269UC(b), 269UD

Citation : (1996) 86 TAXMAN 195

Hon'ble Judges : R.M. Doshit, J;B.C. Patel, J

Bench : Division Bench

Advocate : J.P. Shah, for the Appellant; M.J. Thakore and M.J. Shah, for the Respondent

Judgement

B.C. Patel, J.—In this writ petition, the petitioner has challenged the order passed u/s 269UD(1) of the income tax Act, 1961 ("the Act").

Succinctly stated, the facts are as under :

2.1 The property sought to be transferred is a plot of land admeasuring 689.22 sq. mtrs. with a bungalow having built up area of 335.07 sq. mtrs. in the Society known as Satyagraha Chavani Co-operative Society. The said property is hereinafter referred to as PUC. The PUC has a frontage of 22.60 mtrs. and average depth of 28.57 mtrs. The bungalow on the plot was constructed in the year 1985. The apparent consideration of PUC as disclosed in the transfer agreement is Rs. 47 lakhs. The net discounted consideration in terms of section 269UC(b) of the Act, read with rule 48-1 of the income tax Rules, 1962 works out to Rs. 45,97,819. The Departmental Valuation Officer (DVO) has worked out the depreciated value of the building at Rs. 11,63,400 and the scrap value at Rs. 1,36,900. After deducting the depreciated value from the discounted consideration the land rate of PUC comes to Rs. 4,983 per sq. mtr. and after deducting scrap value, the same comes to Rs. 6,472 per sq. mtr. The impugned order indicates that Members visited the PUC and considering the relevant circumstances, viz., location of the property, size, potential use, general rate of

property prevailing in the area, etc., came to the conclusion that the apparent consideration of the PUC was sufficiently undervalued so as to justify its pre-emptive purchase under Chapter XXC of the Act. Accordingly, a show-cause notice was issued as contemplated u/s 269UD on 6-11-1995 to the interested persons, viz., the transferors and the transferee.

2.2 Details of sale instances of other properties were also communicated which are indicated in the order and we quote below relevant part from the order:

There is a comparable sale instance of property (for short SIP-1) in the same Satyagrah Chhavani being plot No. 36, Lane No. 23, Sector 5 admeasuring 418.06 sq. mtrs. with a bungalow constructed in 1991 and having built up area of 294.43 sq. mtrs. This SIP (as per this office file No. ADH-1099) was sought to be transferred for an apparent consideration of Rs. 46,00,000. The agreement of transfer is dated 12-5-1995. The discounted consideration was worked at Rs. 44,70,203. The depreciated value of the bungalow was estimated by the Departmental Valuation Officer at Rs. 11,33,000 and its scrap value at Rs. 1,33,000. The land rate from the discounted consideration, comes to Rs. 7,700 per sq. mtr. and the same, after deducting scrap value, comes to Rs. 10,375 per sq. mtr.

There is another comparable sale instance of property (for short SIP-2) in the same Satyagrah Chhavani S. No. 1127, S.P. No. 48, Sector 1, being plot of land admeasuring 836.12 sq. mtr. with a bungalow constructed in the year 1975 and having built up area of 417.74 sq. mtr. This SIP (as per this office file No. AHD-1128) was sought to be transferred vide agreement dated 26-6-1995 for an apparent consideration of Rs. 77,00,000. The discounted consideration was worked out at Rs. 75,65,052. The Departmental Valuation Officer estimated the depreciated value of the bungalow at Rs. 10,30,162 and its scrap value was estimated at Rs. 1,47,166. The land rate of SIP 2 (in June 1995) after deducting depreciated value from the discounted consideration, comes to Rs. 7,816 per sq. mtr. and the same after deducting scrap value, comes to Rs. 8,872 per sq. mtr.

2.3 It appears that PUC as well as SIPs were inspected by the members and they found that the SIPs are fully comparable with PUC being located in the same housing society, and on comparison, a chart is prepared indicating the land rate of PUC as compared to the two SIPs and the relevant part thereof from the order is quoted below :

P.U.C.

SIP 1

SIP 2

(a) Date of agreement

16-6-1995

12-5-1995

26-6-1995

(b) Rate per sq. mtr. considering depreciated value

4,983

7,700

7,816

(c12:55 PM 9/27/2012) Rate per sq. mtr. considering scrap value

6,472

10,375

8,872.

2.4 In reply to the show-cause notice, it was pointed out that the PUC is jointly owned by two transferors each, having half undivided share as separately reflected in their income tax returns. Hence, the share of each transferor in the transaction is Rs. 23,60,000, which is below the minimum prescribed limit at Rs. 25 lakh with effect from 1-8-1995. It was further pointed out that merely because Form No. 37-I is furnished, it would not clothe the appropriate authority with the jurisdiction to exercise powers under Chapter XXC. It was also pointed out that the transferee sold the residential property wherein she had 1/3rd share at a consideration of Rs. 1,81,20,000. The appropriate authority issued NOC in respect of this transaction on 5-9-1995 and transferee received her share of Rs. 63,33,000. Out of this amount, PUC is being purchased by the petitioner transferee. According to the petitioner, she would be required to pay capital gain on the remaining amount and if there was the slightest intention on her part, she would have shown consideration for the PUC at a price higher than Rs. 47 lakhs so as to save tax on capital gain. So far as the transferee is concerned, the contention is that there was no motive on her part to mislead the department for evasion of tax.

3. With regard to the size and shape of the PUC vis-a-vis the size and shape of the SIPs, various contentions were raised. It was pointed out that near the PUC, on one side there is a school as close as 100 ft.; there is Shivanand Ashram and there is a temple. Therefore, it was pointed out that the PUC cannot be said to be in a peaceful locality, and at least the occupier will not be in a position to enjoy peaceful atmosphere in comparison to other buildings in the society. From the record, we find that all the three buildings compared are situated in different sectors of the society. The appropriate authority rejected all these submissions and held in its order that:

We find ourselves unable to accept the argument that the presumption raised in the show-cause notice that the understatement of apparent consideration is with the object of evading taxes has been successfully rebutted.

Agreement of transfer? by co-owners under one agreement

4. The learned advocate for the petitioner drew our attention to the income tax returns filed by the transferors for the assessment year 1995- 96. Respondent No. 2, one of the transferors has indicated his property income as Rs. 36,960 being 1/2 share of the property in question. It is also placed on the record that in the return of respondent No. 3, one of the transferors, Rs. 36,960, towards property income being half share of the property which is sought to be transferred is shown. Our attention was drawn to the agreement by the learned advocate for the purpose of pointing out that two separate cheques each of Rs. 2,50,000 have been paid separately to the transferors.

5. In the petition also, it is clearly averred on oath that the respondent Nos. 2 and 3 are co-owners of the PUC and this aspect is not controverted. Submission of the petitioner is that had the transferors any intention to evade taxes, they would have executed two separate transfer documents and could have easily escaped from the provisions of Chapter XXC.

According to the submissions made by the learned advocate, the petitioners were not at all required to file Form No. 37-1 in view of the fact that share of each transferor comes to less than Rs. 25 lakh, to be precise Rs. 23,50,000. Therefore, filing of the Form itself is null and void and on such form, the appropriate authority would not have any jurisdiction to determine the question of under valuation or to exercise the powers.

6. The appropriate authority has accepted the case of co-ownership and it has held that :

It is true that the PUC is jointly owned by two transferors, but having entered into one single agreement to transfer and having filed Form No. 37-I. In our view, the transaction comes under the purview of Chapter XXC of the income tax Act and it cannot be said that merely on that account there cannot be any presumption regarding evasion of taxes.

In the later part of the order, the appropriate authority has considered the judgment delivered by this Court, but the learned counsel for the appropriate authority fairly stated that the appropriate authority has not correctly appreciated the law laid down by the Court, and on assumption a decision is taken that the High Court has held that it had jurisdiction in such a situation.

7. Mr. Thakore, the learned counsel for the revenue submitted that in the instant case, there is only one agreement. According to him, had it been the case of two agreements for the apparent consideration of the property each having value at less than Rs. 25 lakhs, the question would be different.

8. There may be one agreement for transfer of property where transferors may be co-owners or joint owners. It may be that the share of the transferor is not specified. It may happen that there may be one transferee or more than one. The question to be examined is whether provisions of Chapter XXC would be attracted or not in a case where co-owners have agreed to transfer their property

rights and each co-owner is to be paid an amount of consideration which is less than the amount specified, i.e., each co-owner-transferor will get less than Rs. 25 lakhs as per the agreement. Mr. Thakore, the learned advocate drew our attention to provisions contained in Chapter XXC and particularly referred to section 269UA of the Act : (a) referring to agreement for transfer, (b) apparent consideration, (c) immovable property, and (d) transfer. In view of these provisions, Mr. Thakore submitted that there is an agreement of transfer of immovable property having a fair market value of Rs. 25 lakhs and the apparent consideration for that immovable property is undervalued, the appropriate authority will have jurisdiction.

9. In the case of K.V. Kishore and another Vs. Appropriate Authority and others OVERRULED, , it was contended that in effect and in law, though one single agreement had been entered into, respondent Nos. 4 to 8 were individual parties and, under that agreement, each one of the respondents had agreed to convey his/her absolute interest in the immovable property and the conveyance should be understood as conveyance by each one of the sharers. If viewed from that angle, the value of the share so conveyed being less than Rs. 10 lakhs (the amount applicable at the relevant time) the provisions of Chapter XXC would not be attracted. The Court, considering the rival contentions, held that :

... As owners of their respective shares, they were competent to enter into a family arrangement which they did on April 8, 1987, under the terms of which, each one of respondent Nos. 4 to 8 were allotted a definite share in the property. After April 8, 1987, they were individual owners of definite shares in the property. Each one could deal with only his respective share and he cannot deal with the share of another. The property which so fell to the share of each individual will come definitely within the definition of the words 'immovable property'. Such a sharer was entitled to transfer his immovable property to a third person. Merely because a plurality of such individual owners joined together to enter into one single agreement to transfer their respective shares in favour of one or more persons, that would not make any difference to the main issue that what each transferred is his definite share in the property.... [Emphasis supplied] (p. 269)

10 In the instant case, it is clear that what is agreed for transfer is the individual undivided share in the property. It is also not in dispute that the value of each share is less than Rs. 25 lakhs. It is also accepted by the appropriate authority that transferors are co-owners. Therefore, in view of the decision rendered in the case of K.V. Kishore (supra), it cannot be said that merely because there is only one agreement, the provisions of Chapter XX-C can be attracted. Thus, where there are co-owners and each co-owner is getting apparent consideration less than the limit prescribed for his share, i.e., less than Rs. 25 lakhs, provisions of Chapter XX-C cannot be attracted, even though the amount if calculated of all the co-owners together may exceed Rs. 25 lakhs. The same view is also taken in the case of N.C. Rangesh and others Vs. Inspector General of Registration and

others,

11. Mr. Shah, the learned advocate has placed reliance on the decision rendered by the Kerala High Court in the case of P.K. Yusuf and Another Vs. Income Tax Officer and Another, . The Court considered the provisions contained in section 269UC in Chapter XX-C and provisions contained in rule 48K of the Rules and held as under :

... The immovable property dealt with by each of the petitioners belongs to him and he has got the right to transfer it separately and without reference to the other co-owner. Its value is less than the prescribed limit. Section 269UC has therefore no application to the sale though the total consideration for the transfer along with the other co-owner exceeds Rs. 10 lakhs [the limit at the relevant time]. The fact that a consolidated sale deed or the rights of both the co-owners is proposed to be executed is irrelevant in this context, so long as the separate, though undivided, share of each of the co-owners is of value less than Rs. 10 lakhs. The contention of standing counsel for the revenue that the co-owners constitute an assessable entity as an association of persons appears feeble and does not appeal to me as each of the petitioners has got a separate defined right, and in any case, the status of association of persons appears irrelevant so far as a building is concerned by virtue of section 26 of the Act. (p. 733)

12. In view of the aforesaid decision, it is clear that where there is a property owned by co-owners and that owners are transferring their property rights then in that case, the amount of consideration received by a co-owner, if less than the prescribed limits, provisions of Chapter XX-C cannot be attracted.

13. As against this, Mr. Thakore, the learned counsel for the revenue relied on the decision rendered by the Bombay High Court in the case of Jodhram Daulatram Arora v. M.B. Kodnani [1994] 75 Taxman 521 and canvassed before us that a view taken by the Madras High Court referred in the earlier part of the judgment is not followed by the Bombay High Court. In the case before the Bombay High Court, contention was that each petitioner individually agreed to buy undivided 1/3rd share from the vendor for a total consideration of Rs. 14,06,000. It was contended that consideration for purchase of each of the petitioners' interest in the property could be valued at Rs. 4,68,667 which is less than Rs. 10 lakhs and in the circumstances, it was submitted that the appropriate authority has no jurisdiction to proceed under Chapter XXC and that section 269UD was not applicable. The Court found that there was a composite agreement. There was nothing in the agreement which would indicate that the petitioners-purchasers agreed to buy individually undivided 1/3rd share in the property from the vendor. There was nothing on the record to indicate that the consideration for the purchase of each of their interest in the property was Rs. 4,68,667 as alleged. The Valuation Report dated 20-6-1993 did not support the petitioner's factual contention. From the record it was clear that the petitioners purchased the property in joint ownership and that their shares were undivided. It was also found by the Court that in the questionnaire, petitioners were

specifically questioned whether the property is purchased under the joint ownership or co-ownership and whether the shares purchased are undivided? It was categorically declared that the property is purchased in joint ownership and shares are undivided. This was the factual position. No doubt, in that case the form was submitted before the authority. The Court considering the aforesaid facts held that the contentions have no merits and Chapter XXC is applicable. The Hon"ble Court was aware about the decision rendered by the Madras High Court. In the decision rendered by the Bombay High Court it was specifically pointed out that there was a quantified share in the property and thereafter there was an arrangement under which a definite share was allotted in the immovable property and accordingly each one of the heir became absolute owner of the undivided share. The Court also pointed out that in that case each sharer was entitled to deal with his share without any restrain or concerned from other sharers. The Division Bench of the Bombay High Court specifically held that in the facts and circumstances of the case, the judgment delivered by the Madras High Court is not applicable to the case. Thus, on facts, the Bombay High Court took the decision.

14. In the case before us each individual sharer was entitled to convey his/her own share and each of the sharer had agreed to transfer his/her absolute interest in the immovable property. Despite the conveyance being only one, the value of such share of each sharer being below Rs. 25 lakhs. Chapter XX-C would not be attracted. In the facts and circumstances, the decision rendered by the Madras and Kerala High Courts are followed by us.

Non-observance of principles of natural justice

15. The appropriate authority exercising powers under Chapter XX-C issued a show-cause notice indicating two comparable sale instances. The relevant part of the notice reads as under :

There is a comparable sale instance of property (for short SIP-1) in the same Satyagrah Chhavani being Plot No. 36, Lane No. 23, Sector 5 admeasuring 418.06 sq. mtrs. with a bungalow constructed in 1991 and having built up area of 294.43 sq. mtrs. This SIP (as per this office file No. ADH-1099) was sought to be transferred for an apparent consideration of Rs. 46,00,000. The agreement of transfer is dated 12-5-1995. The discounted consideration was worked at Rs. 44,70,203. The depreciated value of the bungalow was estimated by the Departmental Valuation Officer at Rs. 11,33,000 and its scrap value at Rs. 1,33,000. The land rate of SIP-1 (in May, 1995) after deducting depreciated value from the discounted consideration, comes to Rs. 7,700 per sq. mtr. and the same, after deducting scrap value, comes to Rs. 10,375 per sq. mtr. (photocopy of Valuation Officer"s report is enclosed herewith.)

There is another comparable sale instance of property (for short SIP-2) in the same Satyagrah Chhavani S. No. 1127, S.P. No. 48, Sector 1, being plot of land admeasuring 836.12 sq. mtr. with a bungalow constructed in the year 1975 and

having built up area of 417.74 sq. mtr. This SIP (as per this office file No. AHD-1128) was sought to be transferred vide agreement dated 26-6-1995 for an apparent consideration of Rs. 77,00,000. The discounted consideration was worked out at Rs. 75,65,052.

The Departmental Valuation Officer estimated the depreciated value of the bungalow at Rs. 10,30,162 and its scrap value was estimated at Rs. 1,47,166. The land rate of SIP-2 (in June 1995) after deducting depreciated value from the discounted consideration, comes to Rs. 7,816 per sq. mtr. and the same after deducting scrap value, comes to Rs. 8,872 per sq. mtr?." (photo copy of Valuation Officer's report enclosed herewith.)

With regard to property sought to be transferred, show-cause notice reads as under :

The property sought to be transferred (for short PUC) consists of a plot of land admeasuring 689.22 sq. mtrs. with a bungalow having built up area of 335.07 sq. mtrs. located in the peaceful and prestigious Satyagraha Chhavani which is a co-operative housing society having bungalow type constructions. The PUC has a frontage of 22.60 mtrs. and average depth of 28.57 mtrs. There is a bungalow on the plot was constructed in the year 1985. The apparent consideration of PUC as disclosed in the transfer agreement is Rs. 47,00,000. The net discounted consideration in terms of section 269UC(b) read with rule 48-I works out to Rs. 45,97,819. The Departmental Valuation Officer has worked out the depreciated value of the building at Rs. 11,63,400 and the scrap value at Rs. 1,36,900. After deducting the depreciated value from the discounted consideration the land rate of PUC comes to Rs. 4,983 per sq. mtr. and after deducting scrap value, the same comes to Rs. 6,472 per sq. mtr." (A photo copy of valuation report giving relevant details is enclosed herewith.)

16. For valuation of properties statements are made that "photocopy of Valuation Officer's report giving relevant details is enclosed herewith". Petitioner has placed on record the copies of documents, i.e., detailed scrutiny at pages 48 to 54. The detailed scrutiny refers to location of property, name of transferor(s) and transferee(s), consideration, land area, rate, land particulars, location and situation. So far as building particulars are concerned, it conveys the built-up area, year of construction, type of parking provided, availability of lift and orientation. However, for general specification of property (PUC) it is stated that "separately mentioned in scrutiny file". With regard to property SIP-1, it is stated ordinary, while with regard to SIP-2, it is stated as per separate sheet attached. At the time of hearing considering the cost of each building and built-up area of each building, question arose as to how the same is calculated? Considering the cost of each building and its built up area, cost per sq. mtr. should be as under :

PUC:

Rs. 3,472.11

SIP-1:

Rs. 4,248.88

SIP-2 :

Rs. 2,466.03

17. The learned counsel for respondent placed before us 3 reports out of which one is for PUC and one for SIP-1 while the remaining one is for a different property. (By mistake it is produced). These reports were drawn by Valuation Officer of appropriate authority for consideration and comparison. In three foolscap sheets (handwritten) cost of PUC is calculated giving all the details of property. In two foolscap typed pages, cost of SIP-1 is calculated. These details are relevant as on the basis of these details valuation is determined. What is conveyed to the petitioner is value of all the three properties but how and on what basis the value is determined is not communicated by the appropriate authority though the same material is used by the appropriate authority in comparing the value of properties and drawing the presumption against the petitioner. What is got conveyed is structure i.e., single or double storied, load bearing structure, height, availability of a servant room, whether it is with RCC construction, extra items, i.e., material used for flooring, type of tiles used, either polished kota stone, spartex or glaze tiles, type of grill, type of stair case, roof (whether RCC or RCC covered with Mangalore tiles, whether it has superior specification or architectural features, type of doors, simple or decorative, slopping roof, nature of external plaster, material used in pavement, i.e., red sand stone or unpolished stone, water tanks, underground/overhead. Type of compound wall, etc. No measurements of rooms are furnished. There may be more details, but we have referred these details which are found in the reports prepared by the Valuation Officer on the basis of which value is determined. There is a map with each plot indicating situation of the plot and roads nearby with each report. The appropriate authority took into consideration the material provided by the Valuation Officer in detail but the same is not supplied to the petitioner.

18. The learned advocate for petitioner fairly stated that the petitioner believed that the material which is supplied is the only material considered by the appropriate authority before issuance of notice and no material behind the back is to be taken into consideration by the appropriate authority in arriving at a conclusion. It is not disputed that the reports in details are not supplied to the petitioner.

19. The Apex Court in the case of C.B. Gautam Vs. Union of India and Others, considering the aspect of natural justice and the order which would have adverse civil consequences for the parties affected, held that before an order of compulsory purchase is made u/s 269UD, the intending purchaser and the intending seller must be given a reason able opportunity of showing cause against an order for compulsory purchase being made by the appropriate

authority concerned.

20. It is also required to be noted that presumption is rebuttable and intended seller or purchaser can lead evidence to rebut such presumption as held by the Apex Court in the case of C.B. Gautam (supra). The appropriate authority has drawn the presumption on the basis of Valuation reports, copies of which are not supplied to the parties.

21. Mr. Thakore, the learned counsel for the respondent No. 1 submitted that value of all the properties, location, constructed area, year of construction, etc., are conveyed and according to him substance is indicated to the petitioner. It is clear that all these details which Mr. Thakore is referring is already given in the show-cause notice and, therefore, the documents which are supplied are of no importance. For all these properties in the show-cause notice, there is specific reference of working out the depreciated value of the building by the DVO. There is a reference to the effect that photo copy of Valuation Officer's report is enclosed but with regard to each property the report supplied is not a full report. Material part, i.e., details of property, with regard to each property is not forwarded to the petitioner. The petitioner at the time of hearing before the appropriate authority took it for granted that the material supplied is the only material considered by the authority. It is only when reports are produced before the Court it has come to light that full report with regard to each property is not forwarded but only part which is otherwise referred in the show-cause notice is supplied.

22. Can it be said that sufficient opportunity is afforded even when parties are called upon to contradict the conclusion arrived at for valuation without providing the reports of the Valuation Officer consisting details of the properties, with detailed measurements and the cost?. Is it sufficient to inform the conclusions based on report ?

23. As held by a catena of decisions that if the adjudicator is going to rely on any material, evidence or document for basing his decision against the individual, then the same must be placed before him for comments and rebuttal. It is regarded as a fundamental principle of natural justice that no material should be relied on against a party without giving him an opportunity of explaining the same. The right to know the materials on which authority is going to take a decision is a part of the right to defend oneself. Non-disclosure of evidence to the affected party had been held to be fatal to the hearing proceedings.

24. Mr. Thakore, the learned counsel for respondent submitted that details are provided, and it was open to the petitioner to call upon the authority to supply the material. We have indicated earlier that as the authority acting in accordance with law has supplied the material, the petitioner may not presume that some other material on which reliance is placed is considered and, therefore, there is no question to call upon the authority to supply the material. As stated by the learned advocate for petitioner the petitioner had no reason to believe that some

other material collected by the authority is considered and petitioner believed that nothing more has been considered than what was supplied to the parties. The question is: whether the party was adequately informed ?

25. The appropriate authority has collected the evidence relying on which the presumption is drawn and has issued a show-cause notice then principles of natural justice demands that material or the gist of the material is disclosed and the party is made aware as to what exactly it has to meet with. Providing incomplete material is not sufficient. A proper hearing must include a fair opportunity to those who are parties in controversy for correcting or contradicting anything prejudicial to their views. If the right to be heard is to be a real right then not only he should know the case which is made against him but he must know what evidence has been considered for drawing a presumption affecting him and he must be given a fair and real opportunity to rebut the presumption.

26. Mr. Thakore submitted that in the absence of valuation report there is no prejudice to the party and hence non-supply of the report would not vitiate the decision rendered. In a case where relevant and material documents are not supplied on which valuation of property is determined for comparison, actual prejudice is not to be seen but even the risk of prejudice is sufficient, to hold that non-supply of valuation report vitiates the decision.

27. The Apex Court in the case of Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal, considered the question amongst others. Whether the Tribunal acted without jurisdiction in relying on the data supplied by the income tax Department behind the back of the appellant company, and without giving it an opportunity to rebut or explain the same? The Court considered the case decided by the Full Bench of Lahore High Court in the case of AIR 1944 33 (Lahore) wherein it is held that ITO though not bound to rely on evidence provided by the assessee as he considers to be false; yet, if he proposes to make an estimate in disregard of that evidence, he should in fairness disclose to the assessee the material on which he is going to found that estimate and that in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilised to such an extent as to put the assessee in possession of full particulars of the case as he is expected to meet and that he should be further given ample opportunity to meet it.

28. In the instant case, appropriate authority did not disclose to the petitioner the valuation report submitted by its subordinate officer and in absence of furnishing such report, it cannot be said to be a real hearing or a fair hearing but can be said to be an empty formality.

Location/Situation, size and shape of plots

29. Petitioner pointed out that SIP-1 and SIP-2 cannot be compared with PUC. Shape of the plot of PUC is not regular but it is trapezium. Though the size of the

plot is approximately 689.22 sq. mts. but its regular shape is of approximately 500 sq. mtrs. while shape of SIP-1 and SIP-2 is regular. It was pointed out that PUC is situated at the dead end of the 20 ft. side road while SIP-1 and SIP-2 are not situated at the dead end. From the report it is clear that all the three plots though in the same locality/area, but are situated in different sectors. PUC is situated in Sector No. 2 and the plan of the sector is placed on record SIP-1 is situated in Sector No. 5 while SIP- 2 is situated in Sector No. 1. It was also pointed out that SIP-1 and SIP-2 are situated in the midst of the society while that is not the case with PUC.

30. It was specifically pointed out that to the east of the PUC there is "Shajanand Ashram" and campus of Ashram, a temple, a school and other things to the south. It was pointed out that school campus is hardly 100 mtrs. south of the PUC. During the school, it becomes too noisy. On account of activities in Ashram and temple, the place cannot be said to be peaceful. In view of all these factors, one would not pay the price which is paid by others (SIP-1 and SIP-2).

31. According to the counsel for the petitioners, not only throughout the day on account of the school nearby, but in view of temple and Ashram even mornings and evenings would not be peaceful and price would be naturally lower than in other sectors or for properties away from school, temple and Ashram.

32. The appropriate authority was very much mindful and alive about this aspect, and though held that these are relevant factors but only minor factors and such factors will not substantially affect the market value of PUC.

33. The appropriate authority valued the PUC at Rs. 8,000 and held that even if liberal view is taken and all minor factors are considered fair, land rate in any case would not be less than Rs. 6,200 per sq. mtr.

34. The question is: on what basis the fair land rate is calculated at the rate of Rs. 6,200 per sq. mtr.? There is nothing in the order to show as to how and on what basis the fair land rate is reduced to Rs. 6,200. The submission made by the learned advocate for the petitioner is that this is a case where appropriate authority without giving reasons determined the price so as to attract the provisions. The order passed is without giving reasons and, therefore, also is not sustainable as submitted by the learned advocate. For valuation of a property, our attention is drawn by the learned advocate to several decisions including Commissioner of Income Tax, Gujarat II Vs. Vimlaben Bhagwandas Patel and Kamlaben Kanjibhai Patel, and Smt. Tribeni Devi and Others Vs. Collector of Ranchi, which are considered in the case of COMMISSIONER OF Income Tax Vs. P. I. GEORGE AND OTHERS., . It appears that only comparable sales method is adopted for determination of the value.

35. In valuation if property is owned by more than one, in case of co- owners where there is undivided right of ownership, it calls for an allowance of discount. In valuation of property, the Kerala High Court in the case of P.I. George (supra) held as under :

It cannot be forgotten that the building is one which is jointly owned and what is transferable in each case is the undivided right of ownership and, therefore, a discount has to be given for that aspect. Though there are cases in which the valuers had given a discount of 20 per cent for an undivided share in a property, the Tribunal, on the facts of this case, held that though the value of each undivided share would be Rs. 2 lakhs, taking into consideration the fact that a discount is called for,... (p. 626)

In fact, the Tribunal allowed such deduction and the Kerala High Court in the above decision held as under :

... The Tribunal worked out the average value at Rs. 8 lakhs. Since the value to be computed in the instant case is an undivided share, it called for an allowance of discount.... (p. 631)

36. Mr. Shah, the learned counsel submitted that in view of this decision, if 20 per cent discount is given as there are co-owners, two in numbers, the difference would not be more than 15 per cent which is required under the statute. We would only say that as held by the Kerala High Court in the case of P.I. George (supra) it would not be possible to import the principles laid down by the Courts in ascertaining the market value in the context of one statute while determining the amount of compensation of market value under a different statute. In that judgment, the Kerala High Court has considered in detail various principles for determining the market value of a property. In the instant case, after determining the cost of property, the Valuation Officer has allowed a deduction considering the year of construction and the figure so arrived at after deduction is deducted from that land value and thereafter the value so arrived is compared with other instances, i.e., the market value considered by the appropriate authority for comparison, but in view of what is stated earlier by the Kerala High Court, it would not be possible to consider the principle of one statute in ascertaining the market value in context of determining the market value under different statute. However, we would say that there is no reasoned order for arriving at a price of Rs. 6,200 per sq. mtr. and on this ground also, the order is required to be quashed.

Perversity

37. Surprisingly, we find that so far as the transferee is concerned, in earlier transaction which is referred to in para 3 of the order, a residential property of the transferee situated in Ahmedabad was agreed to be sold at a consideration of Rs. 1,81,21,000. The appropriate authority issued NOC in respect of this transaction on 5-9-1995. The transferee received her share of Rs. 66,33,000. The present PUC is being purchased by the transferee from the said amount. The appropriate authority, at page 91 of this compilation, has observed :

Further if the transferees have received any unaccounted money from an earlier transaction of sale of property, there would be greater temptation for them to understate the consideration of a subsequent purchase transaction so that the

unaccounted money, or part thereof finds a proper and productive outlet. Therefore, in our view there is no merit in this submission.

38. The appropriate authority, having held that there was no under valuation of the property of the transferee and was entitled to have a share of Rs. 66,33,000, there cannot be a question or any doubt in the mind of the appropriate authority that the transferee received any unaccounted money from the earlier transaction of sale of property. The fact about earlier transactions were before the appropriate authority. In our view, this is nothing but a perverse finding. If this very authority has approved transaction earlier wherein the transferee got her share referred to hereinabove, it is known to the appropriate authority as to what is the amount received, and, therefore, there is no question of understating the consideration. Hence, to think that with a temptation must have under stated the considerations that unaccounted money or part thereof finds a proper and productive outlet, as nothing but a perverse thinking.

39. Thus, in our view, from what we have stated earlier, it is clear that the share of each transferor being less than Rs. 25 lakhs. Therefore, even if form is submitted, the authority will have no jurisdiction. The authority has decided the issue with perversity. The authority while granting concession and fixing the rate at Rs. 6,200 per sq. mtr. has not given any cogent reasons and as the documents on which reliance is placed are not supplied to the parties concerned, it cannot be said that an effective hearing is given and in our view, the totality of all these would be that the conclusion arrived at by the appropriate authority is vitiated and the conclusion that the apparent consideration of PUC is understated by more than 15 per cent of market value is without any basis and the presumption could not have been drawn and the presumption of intention to evade the tax is not justified.

40. In the result, the order passed by the appropriate authority on 24-11-1995 (Annexure ?J?) is hereby quashed and set aside. Rule made absolute, with no order as to costs.