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(1997) 04 CAL CK 0030

In the Calcutta High Court

Case No : F.M.A. No. 525 of 1990

Union of India (UOI) and Others APPELLANT

Vs

Alok Kumar Chamaria and Others RESPONDENT

Date of Decision : 11-04-1997

Acts Referred:

Constitution of India, 1950 — Article 14
Income Tax Act, 1961 — Section 269UC(1), 269UD, 269UD(1), 269UE, 269UE(1)

Citation : (1997) 2 CALLT 101 : (1998) 231 ITR 674

Hon'ble Judges : Nirendra Krishna Mitra, J;Debi Prosad Sarkar-II, J

Bench : Division Bench

Advocate : Pal, for the Appellant;

Judgement

Debi Prosad Sarkar, J.—The stay petition arises out of an injunction order passed by the learned trial judge, 13th Bench, City Civil Court, Calcutta, in Title Suit No. 1705 of 1989 leading to F. M. A. No. 525 of 1990. The stay petition has been filed by the defendant-appellants against the plaintiff-respondent No. 1 and others.

2. The facts, in short, leading to this appeal are as follows :

It is undisputed that the suit property is premises No. 9, Weston Street, Calcutta. It was leased out originally by Ram Protap Chamaria in favour of Lipton India Limited by an indenture dated March 21, 1925. In course of time, the said property by way of a decree of partition came to the plaintiff-respondent No. 1, namely, Alok Kr. Chamaria, who executed a deed of modification in favour of Lipton India Limited by a fresh indenture dated December 29, 1973. Thus, the 40 per cent. of Alok Kumar Chamaria''s undivided interest in the disputed property was leased out to Lipton India Limited. On February 2, 1979, Alok Kumar Chamaria transferred undivided 10 per cent. of his right, title and interest of the said property to his wife, i.e., respondent No. 3.

3. On April 26, 1979, and June 1, 1983, Alok Kr. Chamaria by two separate

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documents transferred his undivided 40 per cent. right, title and interest in question to M/s. Parijat Investment Limited, i.e., respondent No. 2. On January 6, 1989, a form, i.e., 37-I was filed u/s 269UC of the Income Tax Act, 1961, read with Rule 48L of the Income Tax Rules before the appropriate authority. That form was signed by Lipton India Limited, Alok Kr. Chamaria, Smt. Prativa Chamaria and Parijat Investment Limited as transferors and Consolidated Consultancy Services Private Limited as the transferee in respect of the disputed premises, i. e., No. 9, Weston Street, Calcutta. There was one agreement for head lease between Alok Kr. Chamaria, Smt. Prativa Chamaria, Parijat Investment Limited and Consolidated Consultancy Services Private Limited intending to transfer the lessors'' interest for Rs. 60,00,000 and the other agreement between Consolidated Consultancy Services Private Limited and Lipton India Limited proposing to transfer the lessee''s interest for a sum of Rs. 1.80 crores. On receipt of this return, the Income Tax authority passed an order u/s 269UD(1) of the Act and exercised the option to purchase only the lessee''s interest, i.e., the interest of Lipton India Limited on behalf of the Central Government for an apparent consideration of Rs. 1,74,90,375.

4. On April 19, 1989, the Deputy Commissioner (Special) Range-12, Income Tax Department, informed the Chief Commissioner of Income Tax that several crores of rupees were due and outstanding as Income Tax from Lipton India Limited and the Chief Commissioner was requested to pay that apparent consideration amount of Rs. 1,74,90,375 towards discharge of the tax liability of Lipton India Limited and, accordingly, the said amount was attached u/s 226(3) of the Income Tax Act, and, ultimately, the said consideration amount was paid for liquidation of the Income Tax dues from Lipton India Limited. Thereafter, on May 17, 1989, the Central Government took possession of the property.

5. Subsequently, the Income Tax Department issued a notification for auction sale of the disputed property along with other properties and published in the daily newspaper The Telegraph on August 19, 1989. The said notification was challenged by the plaintiff-respondent No. 1 in the title suit in question before the learned Judge, XIII Bench, City Civil Court, Calcutta, inter alia, on the ground that the indenture of lease executed in favour of Lipton India Limited on March 21, 1925, as modified by the subsequent deed dated December 29, 1973, contains a clause, namely, clause No. 7, to the effect that prior permission of the lessor would be required in order to transfer, assign or otherwise part with the possession of the property under lease, in case where the intended transferee or assignee is an outsider, but the Income Tax Department in publishing the notice of auction as referred to above, failed to adhere to the said clause No. 7 as they did not take prior permission of the lessor for the intending auction sale. The plaintiff-respondent No. 1 in the said suit also filed an application for injunction restraining the Income Tax authorities from carrying on with the notice of auction sale and the learned Judge, XIII Bench, City Civil Court, Calcutta, after hearing the submissions of both the parties, granted an injunction as prayed for by his order No. 16, dated February 20, 1990, which is the subject-matter of challenge

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in the present appeal.

6. It was submitted by Mr. Pal, learned senior counsel appearing on behalf of the defendant-appellants that the absence of prior permission granted by the lessor in favour of the Union of India would not affect the right of the Income Tax authorities to transfer the property by the auction sale, as in view of the provisions of Section 269UE(1) of the Income Tax Act, as it stood on the date of publication of the notification for such auction sale in the daily newspaper on August 19, 1989, the property in respect of which an order was made u/s 269UE(1) of the Act, had vested with the Government "free from all encumbrances".

7. The effect of an order made by the authority u/s 269UE(1) of the Income Tax Act is contained in Section 269UE(1) of the Act.

8. According to the provisions of the said Section 269UE(1) of the Income Tax Act, as it stood on the date of the disputed notification of auction sale of the property in question, in case an order of compulsory purchase was made, the property in respect of which such order was made, vested in the Central Government free from all encumbrances. The said Section 269UE(1) of the Act is reproduced below :

"269UE. (1) Where an order under Sub-section (1) of Section 269UD is made by the appropriate authority in respect of an immovable property referred to in Sub-clause (i) of Clause (d) of Section 269UA, such property shall on the date of such order, vest in the Central Government free from all encumbrances" (emphasis* added).

9. The said Section 269UE(1) along with several other sections of the Income Tax Act came up for consideration before the Supreme Court of India and the apex court in its decision in the case of C.B. Gautam Vs. Union of India and Others, , declared the said expression "free from all encumbrances" as stated in the said Section 269UE(1) ultra vires Article 14 of the Constitution of India, holding, inter alia, as follows (page 556) :

"If there is a lessee in occupation of the property concerned, his leasehold rights would be destroyed and he would have to hand over possession of the property to the appropriate authority or any other person nominated by the appropriate authority. Similarly, if an encumbrance holder like a usufructuary mortgagee were in occupation, he would lose his valuable right to remain in possession and enjoy the usufruct. This clearly shows that an order for compulsory purchase results in the rights of holders of encumbrances and leasehold rights being destroyed or significantly diminished. In a given case, it might happen that property is intended to be sold under an agreement to sell subject to encumbrances and leasehold rights, and very often agreements to sell immovable property do not provide that the property sold would be free from encumbrances or leasehold rights. In such a case, the apparent consideration, even if it is equivalent to the fair market value, would be indicative of the market

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value of the property subject to such encumbrances. If, in such a case, an order for compulsory purchase is made, the result would be that the property would be compulsorily purchased and the amount to be paid for the purchase would be only equal to the apparent consideration and this apparent consideration would not take into account the value of the encumbrances on the property like mortgages and so on or the leasehold rights. It is well known that a property may be heavily encumbered and its value can be considerably depressed if it were sold subject to encumbrances. It is equally well known that a property in respect of which there is a subsisting lease for a substantial period of time would fetch a comparatively low price because the purchase thereof would not carry with it the right to possession or occupation during the subsistence of the leasehold interests. In such cases, the amount of apparent consideration could be even less than the value of the encumbrances or the leasehold interests. An order for compulsory purchase in such cases would necessarily result in gross injustice to the encumbrance holder or the lessees and in their being deprived of their rights without their being in any way involved in the attempt at tax evasion. It, therefore, appears to us difficult to uphold the last part of Sub-section (1) of Section 269UE in so far as it provides that the property in respect of which an order under subsection (1) of Section 269UE is made shall vest in the Central Government free of all encumbrances. In our opinion, the expression ''free of all encumbrances'' is liable to be struck down as arbitrary, without any rational nexus with the object of the legislation in question and violative of Article 14 of the Constitution. . ."

10. The said judgment of the Supreme Court was delivered in November, 1992. The Finance Act, 1993, thereafter amended the said provisions of Section 269UE(1) with retrospective effect from November 17, 1992, by deleting the expression "free from all encumbrances" as existing therein and substituting the expression "in terms of the agreement for transfer referred to in Sub-section (1) of Section 269UC". The said amended Section 269UE(1), however, is reproduced below :

"269UE. (1) Where an order under Sub-section (1) of Section 269UD is made by the appropriate authority in respect of an immovable property referred to in Sub-clause (i) of Clause (d) of Section 269UA, such property shall, on the date of such order, vest in the Central Government in terms of the agreement for transfer referred to in Sub-section (1) of Section 269UC."

11. No doubt, on the date of issuance of the notification for auction sale of the disputed property by the Union of India, the expression "free from all encumbrances" was there in Section 269UE(1) of the Income Tax Act, but as the auction sale could not take place pursuant to such notification due to the injunction granted by the civil court in the year 1990, and as the Supreme Court in the case of C.B. Gautam Vs. Union of India and Others, declared the said expression "free from all encumbrances" as ultra vires Article 14 of the Constitution of India which led to the amendment of Section 269UE(1) of the

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Income Tax Act by the Finance Act, 1993, with effect from November 17, 1992, deleting the said expression "free from all encumbrances", the Union of India cannot take advantage of the provisions of Section 269UE(1) of the Act as it stood on the date of publication of the notification for auction sale of the disputed property and the Union Government has to act in terms of the amended provisions of Section 269UE(1) of the Act as referred to above so far as the disputed property is concerned.

12. The Central Government by compulsory purchase of all the interests of the lessee, u/s 269UE(1) of the Income Tax Act has stepped into the shoes of the lessee, i.e., Lipton India Limited, and as such, all the terms and conditions contained in the indentures of lease dated March 21, 1925, and December 29, 1973, are binding on the Central Government concisely, the Income Tax authority. Therefore, if the said authority intends to transfer the disputed property, i.e., the leasehold interest it must take prior consent of the lessor, i.e., the plaintiff-respondent No. 1.

13. An argument is made in the alternative by the learned advocate-for the defendant-appellants that mere publication of a notice of auction sale in the daily newspaper does not amount to actual transfer and as such, if prior permission is necessary to be taken from the lessor, it should be taken before the finalisation of the transaction of the transfer/sale. After a careful consideration of the submissions made above, we also cannot disagree with the alternative submission to this extent that mere publication of a notice of auction sale does not mean the actual sale.

14. Sale is a form of contract and every contract consists of two parts-one is the offer and the other is the acceptance. The publication of the notice of auction sale in the daily newspaper giving out the description of the properties as well as the expected price is a process calling for offers of price for the property-in-question from the intending buyers. So, such a stage is really premature for obtaining permission to sell, because it is uncertain who all would be the intending buyers and whose bid would be the highest and as such may be accepted. If the successful bidder in the public auction is a Government company or a public undertaking 100 per cent. of the shares of which are being held by the President of India, in that event, in terms of clauses Nos. 6 and 7 of the indenture of lease, no such prior permission would be necessary.

15. In the above circumstances, the matter could be disposed of by allowing the defendant-appellants to proceed with the auction. But there is a possibility of some complications in future unless the intending bidders are made aware not only of the description of the property and its expected price, but also, the condition of prior consent of the lessor before the proposed sale can reach finality ; otherwise, the successful bidder may be taken by surprise by the condition of prior consent of the lessor and as it is mentioned above, such element of surprise may invite legal complications in future and may lead to multiplicity of suits which is not desirable.

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16. Therefore, considering all the aspects, we think it just, proper and reasonable, that the defendant-appellants, if they like to sell the property in auction, shall issue a fresh notice of auction sale incorporating the condition that the contract of sale with the successful/highest bidder shall be concluded and finalised subject to the condition of obtaining prior permission of the lessor, i.e., the plaintiff-respondent No. 1, and not on the basis of the earlier notice dated August 19, 1989. We are not inclined to allow the stay petition in the above circumstances. The stay petition stands rejected.

17. In view of the discussions made above, there remains nothing more to be considered regarding the impugned order of temporary injunction.

18. The stay order is hereby modified to the extent as mentioned hereinbefore and the F. M. A. as such be also disposed of accordingly as it has outlived its purpose.

19. There would be no order as to costs.

N.K. Mitra, J.

20. I agree.

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