

Vimal Agarwal Vs. Appropriate Authority and Others

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Court : Mumbai

Decided On : Jul-27-1994

Reported in : 1995(2)BomCR626; (1994)121CTR(Bom)99; [1994]210ITR16(Bom)

Judge : B.P. Saraf and;M.L. Dudhat, JJ.

Appeal No. : Writ Petition No. 614 of 1993

Appellant : Vimal Agarwal

Respondent : Appropriate Authority and Others

Advocate for Def. : M.I. Sethna, Adv.

Advocate for Pet/Ap. : Dr. D.Y. Chandrachud, Adv.

Judgement :

Dr. B.P. Saraf, J.

1. By this writ petition the petitioner has challenged the order of the appropriate authority dated February 26, 1993, under sub-section (1) of section 269UD of the Income-tax Act, 1961 ('the Act'), directing the purchase of the property in question by the Central Government. The facts of the case briefly stated are as follows :

The petitioner is the owner of a flat being flat No. 403, Parishram, situated at 320, Pali Hill, Bandra, Bombay. The petitioner entered into an agreement dated

February 5, 1990, for the sale of the above flat with Shri Amarnath, Smt. Kamala Amarnath and Shri Rakesh Kapoor ('the purchasers'). By the said agreement of sale, the petitioner agreed to sell and the purchasers agreed to purchase the said flat along with five shares of Rs. 50 each held by the petitioner in the co-operative housing society for a consideration of Rs. 29.50 lakhs. Of the said consideration, an amount of Rs. 1 lakh was payable as earnest money on the execution of the agreement while the balance amount of Rs. 28.50 lakhs was to be paid on the completion of the sale. Clause 8 of the said agreement provided that the sale would be completed on the payment of the balance consideration of Rs. 28.50 lakhs by the purchasers to the petitioners within seven days of the receipt of the approval of the appropriate authority under section 269UD of the Act. The petitioner filed a statement in Form No. 37-I together with a copy of the agreement of sale in the office of the appropriate authority on December 19, 1990. The appropriate authority, on the basis of the said statement passed an order under section 269UD(1) of the Act on February 26, 1991, for purchase of the aforesaid property by the Central Government. Aggrieved by the above order, the petitioner filed a writ petition in this court which was numbered as Writ Petition No. 912 of 1991. The said writ petition was disposed of by a Division Bench of this court by order dated December 16, 1992, following the decision of the Supreme Court in C. B. Gautam v. Union of India : [1993]199ITR530(SC) and the matter was remanded to the appropriate authority to be decided afresh in the light of the directions contained in the said judgment. Thereafter, a show-cause notice dated January 4, 1993, was issued to the petitioner and the intending purchasers by the Deputy Commissioner of Income-tax attached to respondent No. 1, the appropriate authority, Bombay, calling upon them to attend or to make written submissions before the members of the appropriate authority on January 20, 1993, to show cause as to why an order should not be made in their case in accordance with the provisions of section 269UD(1) of the Act. Along with the said notice, the reasons recorded in writing before making the order of purchase earlier on February 26, 1991, were conveyed to the petitioner and the intending purchasers. In the reasons annexed to the show-cause notice it was stated that the said reasons were the reasons recorded in the file at the time of making the earlier order under section 269UD(1) for making the said order. The same were treated as the

reasons recorded for initiating proceedings and to issue the show-cause notice in question. In the above reasons, it was stated, inter alia, that the flat in question had been inspected by the Valuation Officer on January 15, 1991, and by the members of the appropriate authority on February 22, 1991, and in the facts and circumstances of the case including the report of the Valuation Officer dated January 23, 1991, and note dated January 29 1991, of the Deputy Commissioner of Income-tax, appropriate Authority, Bombay, and the report dated January 21, 1991, of the Inspector of the Appropriate Authority had been carefully considered. It was pointed that : 'The building is situated in the important locality of Pali Hill, Bandra. The space planning is modern. Accommodation consists of two specious bed rooms, a spacious hall, two attached toilets, a kitchen, servant space, three balconies and a terrace. Flat is well-maintained.'

2. It was also stated that the appropriate authority relied upon the following transactions :

Sl.	Case	Dated	Description of the	Consideration	Rate	sq. ft.	Remarks
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No.	No.	agreement	property	BUA			
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(1)	(2)	(3)	(4)	(5)	(6)	(7)	
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Rs. Rs.

1.	4262	30-3-1989	Flat No. 2	23,79,000	2,537	second floor obstructed	
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			sea view, (Transaction				
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			1 year 9 months old)				
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2.	4443	10-5-189	Flat No. 10,	5th	40,23,529	2,504	5th floor distant sea
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Floor, Reshma view (Transaction 1

Apartments, Pali years 7 months old)

Hill, Bandra.

3. 6250 3-8-1990 Flat No. 41A, 28,98,537 2,505 4th floor, no sea-view

Land Breeze, Pali

Hill, Bandra.

3. It was observed that the apparent rate of Rs. 2,189 per sq. feet of B. U. A. for the flat in question was obviously low compared to sale instances Nos. 1,2 and 3 and that the transfer was ostensibly proposed to take place at a substantially low rate and that in the circumstances, the appropriate authority was satisfied that it was a fit case for exercise of the pre-emptive right of purchase by the Central Government.

4. The petitioner filed detailed written submissions before the appropriate authority. Briefly stated, the case of the petitioner before the appropriate authority was that there was extensive litigation between the co-operative housing society wherein the flat in question is situated and the petitioner. The litigation had commenced as a result of an extension made by the petitioner to the parapet wall of the terrace annexed to the said flat. The society raised an objection to the said construction and, ultimately, at the behest of the society, the petitioner was served with a notice by the Bombay Municipal Corporation being notice dated February 21, 1990, under section 354A of the Bombay Municipal Corporation Act, to forthwith stop execution of the said construction work. A civil suit was also filed in the City Civil Court at Bombay and an interim order was granted by the said court restraining the Corporation from taking action in pursuance of the said notice. There was also a dispute between the petitioner and the society, as a result of which his membership came to be terminated on July 27, 1990. As a result of this litigation and the attitude of the society, the petitioner was unable to find a

purchaser for the said flat from any one of the existing flat owners at a consideration of Rs. 29.50 lakhs at which the petitioner has agreed to sell the same to the eventual purchasers.

5. According to the petitioner, the sale of the flat was a distress sale, as at or about the time of the said sale, the petitioner had proposed to shift his residence to New Delhi where his father was in a critical condition. A number of circumstances were pointed out which would affect the market value of the existing building as a result of which the price per sq. ft. would be much lower than the one estimated by the Income-tax Department. The following factors were mentioned in support of the above contention : The area surrounding the building was hilly as a result of which the access was narrow and steep. The said flat was entirely landlocked without any proper ventilation, sea-view or ground area. There was little open space for the members of the society and there was no possibility of two-way traffic. The construction of the building was not strong and the society was considering to make repairs to the building. The open terrace could not be used for any practical purposes as the sewerage pipes which ran along the terrace caused a severe nuisance to its user and there was no privacy as the same was surrounded all around.

6. The petitioner also relied upon a number of sale instances to show that the consideration reflected in the agreement of sale entered into between the petitioner and the intending purchasers was by no means inadequate. The petitioner also pointed out the difference between the flat of the petitioner and the intending purchasers was by no means inadequate. The petitioner also pointed out the difference between the flat of the petitioner and the flats in the sale instances mentioned in the show-cause notice and stated that the building in which the flats referred to in the sale instances were situated were most affluent and luxurious buildings. The petitioner also cited the following instances of sale of flats in the same locality wherein no objection certificates had also been granted by the appropriate authority.

Sl. No.	Building/Flat No.	Date of	Rate/Sq. ft.	Parties
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agreement

(1) (2) (3) (4) (5)

Rs.

1. Flat No. A-21, Sunset Heights, 27-9-1990 1,740 Dwarkanath and

Pali Hill, Bandra, Bombay. H. Kani

3 Bedroom hall, kitchen flat,

admeasuring 1,350 sq. ft.

2. Flat No. A-1, Crescent, Pali 10-1-1991 2,083 Mohankanam Nirvani

Hill, Bandra, Bombay.

Very well-maintained Flat of

2,200 sq. ft.

3. 7th Floor, B-Wing, Girnar, January, 2,134 Not known.

Pali Hill, Bombay. 1991

Very well-maintained flat

admeasuring 1,605 sq. ft. flat

area with terrace of 350 sq.

ft. having full sea-view.

4. Nibhana Annexe January, 2,205 JM Chatterjee and

7. The appropriate authority rejected all the above contentions of the petitioner including the plea of distress sale as well as the minus factors of the building in question pointed out by the petitioner. It was pointed out that on inspection of the flat in question it was found that both the location as well as the condition of the building was very good. It was further observed that it was located in one of the best areas of Bombay and the surroundings were clean and green. The flat was located on the fourth floor of the building with open terrace and the specifications were quite rich. In regard to the sale instances given by the petitioner, the appropriate authority mentioned that B. U. A. (built up area) rate in the fourth sale instance as per their Case No. 6678 was Rs. 2,367 and not Rs. 2,205 as mentioned by the petitioner. No other factor was pointed out to distinguish the flats mentioned in the sale instances furnished by the petitioner from the flat of the petitioner. No other factor was pointed out to distinguish the flats mentioned in the sale instances furnished by the petitioner from the flat of the petitioner. It appears that there was no application of mind in regard to the sale instances furnished by the petitioner which is evident from the cavalier manner in which the said sale instances were brushed aside with the following general observations :

'Furthermore, we have seen the various flats in Bandra area and the building under consideration, viz., Parishram Premises Co-operative Society, is superior to any of these buildings. Besides, merely because the orders of purchase were not made in the above cases, it cannot be assumed that the declared rate therein represents the fair market value. The orders of purchase under section 269UD(1) are made only in such cases where the appropriate authority is fully convinced that after allowing some margin for error, the fair market value is definitely more by 15 per cent. than the apparent consideration.'

8. The appropriate authority even failed to take note of the fact that the agreement of sale in the instant case had been entered into on December 5, 1990, and the first instance given by the petitioner was of an agreement of sale dated September 27, 1990, and the other instances of agreements of sale were all of January, 1991,

which were nearest in time to the agreement entered into by the petitioner for the flat in question, whereas the sale instances referred to by the appropriate authority in its show-cause notice were much older in time. The dates of agreements of sale in the three instances given by the appropriate authority in its show-cause notice were much older in time. The dates of agreements of sale in the three instances given by the appropriate authority are March 30, 1989, May 10, 1989, and August 3, 1990, respectively. The matter was not examined from this angle. The appropriate authority reiterated the sale instances set out in the reasons recorded by it where in the case of Novroz building the agreement was signed on March 30, 1989, and the rate worked out to Rs. 2,537 per sq. ft. In the case of Reshma apartment, the agreement was entered into on May 10, 1989, and the rate worked out to Rs. 2,504 per sq. ft., whereas in the case of Land breeze, the agreement was dated August 3, 1990, and the rate was Rs. 2,505 per sq. ft. It was observed that considering the time factor also the rate of Rs. 2,189 per sq. ft. was obviously very low and there was no material on record to indicate that there were reasonable grounds for such a low price. On the basis of the above observations, the appropriate authority formed an opinion that it is a fit case to exercise the right of pre-emptive purchase by the Central Government under section 269UD(1) of Chapter XX-C of the Act and ordered accordingly.

9. The above order of the appropriate authority has been challenged by the petitioner in the present writ petition. The petitioner contends that it is not tenable in law, as the appropriate authority has failed to determine the fair market value even on the basis of the material referred to by the petitioner and/or by the appropriate authority. The appropriate authority failed to arrive at a figure of fair market value of the property in question without which it is impossible to hold that the apparent consideration is lower by more than 15 per cent. of the 'fair market value'. According to the petitioner, the conclusion has been arrived at in a most cavalier manner without having regard to the directions given by the Supreme Court in C. B. Gautam's case : [1993]199ITR530(SC) . It was further pointed out that even taking the rate per square foot built up area (B. U. A) of the flats referred to by the appropriate authority as sale instances relied upon by it, the apparent consideration in the instant case is not less than 15 per cent. thereof. It was pointed out on behalf of the petitioner that rate of flat of the petitioner, which is the

subject-matter of this petition, is Rs. 2,189 per sq. ft., whereas the rate per square foot after making a deduction of 15 per cent. from the fair market value in the three cases referred to by the appropriate authority comes to Rs. 2,156.45, Rs. 2,128.40 and Rs. 2,129.25. Evidently, the apparent consideration of the flat in question is not less than 15 per cent. of the sale price of the flats referred to as the instances of prevailing market price of comparable flats by the appropriate authority itself. The following calculation was furnished by the petitioner.

'The instances relied upon and referred to by the Department are as under :

Sl. No.	Rate per sq. ft.	Less 15 per cent.	Net amount	Rs.	Rs.
1.	2,537	380.55	2,156.45(Non-discounted)	3.	2,504
					375.60
				4.	2,505
					375.75
					2,129.25

-----The amount per sq. ft. of item No. 1 is without discounting.

The discounted rate of subject flat of petitioner is Rs. 2,189 per sq. ft.'

10. On the basis of the above calculation, it is stated that even if the sale instances relied upon by the appropriate authority are taken into consideration, there is no under valuation in excess of 15 per cent. of fair market value which is a condition precedent for exercise of jurisdiction under Chapter XX-C of the Income-tax Act. It was further stated by counsel for the petitioner that the sale instances given by the petitioner which were nearest in point of time, where no-objection certificates had been issued by the respondents, were not even considered by the respondents. It was further contended that the appropriate authority failed to take into consideration the various disadvantages attached to the property in question as pointed out by the petitioner, especially the disadvantage that there was a longstanding dispute between the society and the petitioner in consequence of which the membership of the petitioner had been cancelled by the society. The petitioner further contended that the report of the Valuation Officer dated January 23, 1991, the note of the Deputy Commissioner of Income-tax dated January 29, 1991, and the report of the Inspector of the appropriate authority dated January 21, 1991, were never supplied to the petitioner to enable him to explain the same. According to the petitioner, the opportunity of hearing given to the petitioner was

no opportunity in the real sense.

11. In reply to these various contentions of the petitioner, it was stated by learned counsel for the respondents that the instances given in the show-cause notice were more than 21 months old which is an indicator that the price on the date of the agreement of the flat in question should have been much higher than the price of the sale instances in question. No reply is, however, available regarding the contention of the petitioner that the sale instances given by him being nearest in time to the case of the petitioner the appropriate authority was obliged to give due weightage to the same and set out the reasons for not accepting the same as instances of fair market value at the relevant time. In the affidavit-in-reply filed by L. D. Bharti, Deputy Commissioner of Income-tax in the officer of the appropriate authority on July 18, 1994, in reply to the contentions based on the sale instances relied upon by the petitioner, it is stated as follows :

'It is incorrect for the petitioner to state that the particulars furnished by him were complete in all respects as alleged by him in paragraph 2 (a) of the rejoinder. In fact, in the absence of the particulars regarding the appropriate authority's case number even at this stage it is difficult to locate these files though attempts are continuing to do so. However, I may point out that the very fact that the impugned order itself records in paragraph 7 regarding the fourth sale instance referred to and relied upon by the petitioner that the rate per sq. ft. was Rs. 2,367 and not Rs. 2,205 as alleged, which shows that there could be a need to check regarding the correctness and/or applicability of the other three instances. However, even if someone has got an unintended benefit or even an undeserved benefit in some instances, it is my respectful submission that this is no ground for the petitioner to claim an advantage based thereon unless mala fides or arbitrariness or deliberate discrimination in favour of these parties were to be alleged.'

12. We fail to appreciate the above contentions of the respondents. When the fair market price is to be determined on the basis of comparable sale instances, every sale instances, every sale instance relied upon by the appropriate authority or by the aggrieved party has to be considered on its own merits. The appropriate authority cannot act relying upon the sale instances given by it, ignoring the

instances given by the aggrieved parties. In the instant case, the sale instances furnished by the aggrieved party were disregarded without even locating the same and/or making enquiries in regard to the nature and condition thereof and the advantages or disadvantages attached thereto compared to the property under consideration. It is evident from the affidavit of Shri Bharti, the Deputy Commissioner of Income-tax, that the authorities concerned did not even examine the other three sale instances relied upon by the petitioner. The admitted position is that they were not able even to locate their files relating to the same and are not in a position even today to locate the same. We fail to understand how in such a situation, the sale instances relied upon by the aggrieved person can be brushed aside as not applicable or not comparable, more so where they are nearest in time to the agreement of sale of the property under consideration.

13. We have carefully considered the contention of the petitioner as well as the respondents. It was pointed out to us by learned counsel for the respondents that in view of the limited time-frame, the enquiry has to be a summary one and detailed investigations and/or scrutiny of the sale instances made in the enquiry in such cases in the ordinary course is not possible in such time-bound enquiries.

14. Reliance is placed by learned counsel for both the parties on the decision of the Supreme Court in *C. B. Gautam v. Union of India* : [1993]199ITR530(SC) , where the Supreme Court has read down the provisions of section 269UD and explained the nature, scope and ambit of powers of the appropriate authority under that section. Before we refer to the said judgment, it will be expedient to set out the provisions of sections 269UC and 269UD of the Act. Section 269UC provides that no transfer of any immovable property of a value exceeding Rs. 5 lakhs or such other amount as may be prescribed shall be effected except after an agreement for transfer is entered into between the person who intends transferring the immovable property and the person to whom it is proposed to be transferred at least three months before the intended date of transfer. Sub-section (2) of this section provides that such an agreement as aforesaid must be reduced in writing in the form of a statement and sub-section (3) provides that this statement must be in a prescribed form. Section 269UC is in the following terms :

'269UC. (1) Notwithstanding anything contained in the Transfer of Property Act, 1882 (4 of 1882), or in any other law for the time being in force, no transfer of any immovable property of such value exceeding five lakh rupees as may be prescribed, shall be effected except after an agreement for transfer is entered into between the person who intends transferring the immovable property (hereinafter referred to as 'the transferor') and the person to whom it is proposed to be transferred (hereinafter referred to as 'the transferee') in accordance with the provisions of sub-section (2) at least four months before the intended date of transfer.

(2) The agreement referred to in sub-section (1) shall be reduced to writing in the form of a statement by each of the parties to such transfer or by any of the parties to such transfer acting on behalf of himself and on behalf of the other parties.

(3) Every statement referred to in sub-section (2) shall, -

(i) be in the prescribed form;

(ii) set forth such particulars as may be prescribed; and

(iii) be verified in the prescribed manner,

and shall be furnished to the appropriate authority in such manner and within such time as may be prescribed, by each of the parties to such transaction or by any of the parties to such transaction acting on behalf of himself and on behalf of the other parties.'

15. Rule 48L of the Income-tax Rules, 1962, deals with the statement to be furnished under section 269UC(3) and sub-rule (2) of the rule 48L provides that such statement in Form No. 37-I shall be furnished, in duplicate, to the appropriate authority. Sub-rule (2) of rule 48L also deals with the time-limits within which the statement under section 269UC(3) must be furnished. Section 269UD deals with the powers of the appropriate authority to make an order for the purchase by the Central Government of such immovable property at an amount equal to the amount of apparent consideration. Section 269UD reads as follows :

'269UD. (1) Subject to the provisions of sub-sections (1A) and (1B), the appropriate authority, after the receipt of the statement under sub-section (3) of section 269UC in respect of any immovable property, may, notwithstanding anything contained in any other law or any instrument or any agreement for the time being in force, make an order for the purchase by the Central Government of such immovable property at an amount equal to the amount of apparent consideration :

Provided that no such order shall be made in respect of any immovable property after the expiration of a period of two months from the end of the month in which the statement referred to in section 269UC in respect of such property is received by the appropriate authority :

Provided further that where the statement referred to in section 269UC in respect of any immovable property is received by the appropriate authority on or after the 1st day of June, 1993, the provisions of the first proviso shall have effect as if for the words 'two months', the words 'three months' had been substituted :

Provided also that in a case where the statement referred to in section 269UC in respect of the immovable property concerned is given to an appropriate authority, other than the appropriate authority having jurisdiction in accordance with the provisions of section 269UB to make the order referred to in this sub-section in relation to the immovable property concerned, the period of limitation referred to in the first and second provisos shall be reckoned with reference to the date of receipt of the statement by the appropriate authority having jurisdiction to make the order under this sub-section :

Provided also that the period of limitation referred to in the second proviso shall be reckoned, where any stay had been granted by any court against the passing of an order for the purchase of the immovable property under this Chapter, with reference to the date of vacation of the said stay.

(1A) Before making an order under sub-section (1), the appropriate authority shall give a reasonable opportunity of being heard to the transferor, the person in occupation of the immovable property if the transferor is not in occupation of the

property, the transferee and to every other person whom the appropriate authority knows to be interested in the property.

(1B) Every order made by the appropriate authority under sub-section (1) shall specify the grounds on which it is made.

(2) The appropriate authority shall cause a copy of its order under sub-section (1) in respect of any immovable property to be served on the transferor, the person in occupation of the immovable property if the transferor is not in occupation thereof, the transferee, and on every other person whom the appropriate authority knows to be interested in the property'.

16. The validity of these sections was challenged before the Supreme Court in C. B. Gautam v. Union of India : [1993]199ITR530(SC) . The Supreme Court upheld the validity but read down the provisions of the sections in the manner set out therein. It was pointed out by the Supreme Court that the very historical setting in which the provisions of Chapter XX-C were enacted suggest that it was intended to be resorted to only in cases where there is an attempt at tax evasion by significant undervaluation of immovable property agree to be sold. Considering the stand of the Union of India and the Central Board of Direct Taxes, it was observed by the Supreme Court that the powers of compulsory purchase conferred under section 269UD of the Act were being used and intended to be used only in case where in an agreement to sell an immovable property in an urban area to which the provisions of the said Chapter apply, there is a significant undervaluation of the property concerned, namely, 15 per cent. or more. It was held (at page 548) :

'If the appropriate authority concerned is satisfied that, in an agreement to sell immovable property in such areas as set out earlier, the apparent consideration shown in the agreement for sale is less than the fair market value by 15 per cent. or more, it may draw a presumption that this under valuation has been done with a view to evade tax. Of course, such a presumption is rebuttable and the intended seller or purchaser can lead evidence to rebut such a presumption. Moreover, an order for compulsory purchase of immovable property under the provisions of section 269UD requires to be supported by reasons in writing and such reasons must be germane to the object for which Chapter XX-C was introduced in the

Income-tax Act, namely, to counter attempts to evade tax.'

17. Dealing with the requirement of giving a reasonable opportunity of being heard or to show cause being given to the parties adversely affected by an order of purchase under section 269UD(1), vis-a-vis, the context of the time-frame within which the order of compulsory purchase has to be made, it was observed by the Supreme Court (at 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 the show cause being given to the parties likely to be adversely affected by an order of purchase under section 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.'

18. In the light of the above observations, the Supreme Court concluded as follows (at page 553) :

'..... 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 under section 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 undervaluation 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 to 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 is not 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 undervaluation in the agreement for sale was not with a view to evade tax.'

19. The provisions of Chapter XX-C of the Act were accordingly read down by the Supreme Court to include the requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by the appropriate authority.

20. The above decision of the Supreme Court, in our opinion, is a complete answer to the controversy in the instant case. The following propositions emerge from the above judgment :

(i) The provisions of Chapter XX-C are to be resorted to only when there is significant undervaluation in the agreement of sale with a view to evade tax.

(ii) An order of compulsory purchase of immovable property can be made only if the appropriate authority is satisfied that in the agreement to sell immovable property, the apparent consideration as shown in the agreement is less than the fair market value by 15 per cent. or more. In such a case the appropriate authority may draw a presumption that this undervaluation has been done with a view to evade tax.

(iii) Though a presumption of attempt to evade tax could be raised by the appropriate authority concerned in case the aforesaid circumstances are 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.

(iv) A reasonable opportunity of being heard and to show cause should be given to the concerned parties, particularly the intending purchaser and the intending seller.

(v) There might be several bona fide considerations which may induce the seller to sell his immovable property at less than the fair market value such as : (a) 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; (b) there might be some dispute as to the title to the immovable property, as a result of which it might have to be sold at a price lower than the fair market value; or (c) there might be a subsisting lease in favour of the intending purchaser. The examples are merely illustrative and not exhaustive. 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.

21. The appropriate authority must consider all the relevant factors carefully and record its reasons for passing the order. The opportunity of showing cause or reasonable opportunity of hearing mentioned by the Supreme Court should be a real opportunity, not a mere pretext or an empty formality. The reasons given with the show-cause notice and/or the sale instances specified therein should be carefully scrutinised by the appropriate authority in the light of the submissions

made by the aggrieved parties and/or the sale instances furnish by them. The sale instances referred to by aggrieved persons assume more importance if they have already undergone scrutiny in the hands of the appropriate authority and a no-objection certificate has been issued in regard thereto. The instances furnished by the aggrieved parties cannot be brushed aside. No order can be passed without carefully considering the same and stating the reasons for not treating the same as comparable cases. If that is allowed to be done, the hearing given to the aggrieved parties will turn out to be a mere formality. In the instant case, it is clear from the affidavit of the Deputy Commissioner of Income-tax in the office of the appropriate authority that the sale instances referred to by the petitioner were not even considered as the records in that connection could not be located. The grievance of the respondents appears to be that the case numbers of the acquisition proceedings in these cases were not furnished by the petitioner. We fail to understand how an aggrieved party can furnish the case numbers of the acquisition proceedings to the appropriate authority the records of which are with the appropriate authority itself. All the relevant particulars on the basis of which the appropriate authority could have located the properties in question had been furnished by the petitioner. An order passed merely on the basis of the sale instances given by the appropriate authority without considering the sale instances referred to by the aggrieved parties and setting out cogent reasons for not acting upon them, cannot be a proper and valid order. Moreover, in the instant case it is evident from the chart furnished by the petitioner which has been set out earlier, that the apparent consideration shown in the agreement for sale is not less than the fair market value of any of the properties mentioned by the appropriate authority in its show-cause notice by 15 per cent. or more, which might give rise to the presumption of undervaluation with a view to evade tax.

22. Besides, in the instant case, no fair market value of the property in question has been determined by the appropriate authority. Merely three instances of sales have been set out in the order, where also the rate per square foot built-up area is Rs. 2, 504, Rs. 2,505 and Rs. 2,507, respectively. It is well-settled that though certain properties may be similar, each property is unique and two properties can hardly be totally a like. The absolute possession, the physical condition of the property which also depend on the amount of attention given to maintenance and

repairs are also relevant factors in determining the fair market value. Therefore, various allowances have to be made for difference in qualities between two properties or flats. The level of allowance would, of course, depend on the facts of each case.

23. Moreover, in order to draw inference of undervaluation, it is necessary to determine first the fair market value of the property in question in the light of all the attending circumstances. Without doing so, it is not only difficult but impossible to say that the apparent consideration is lower than the fair market value by 15 per cent. or more. The determination of the fair market value must be based on evidence on record. It cannot be a guess work. The figure of fair market value cannot be left to conjectures and surmises. To justify an order under section 269UD(1), the appropriate authority must come to a definite conclusion that the undervaluation is more than 15 per cent. of the fair market value. Though the determination of the fair market value, at the first instance, necessarily has to be an ex parte affair and a show-cause notice can be issued on the basis of such determination if the apparent consideration reflected in the agreement of sale is found to be lower by 15 per cent. or more than the fair market value so determined, once notice is given and cause is shown by the aggrieved parties, the explanation of the parties has to be considered carefully and judiciously. Various advantages/disadvantages of the property which are the subject-matter of the sale instances referred to by the appropriate authority and/or the advantages/disadvantages of the property under consideration and/or the advantages / disadvantages of the properties of which sale instances are given by the aggrieved parties should be considered carefully before arriving at the final conclusion in regard to the fair market value and consequent undervaluation of the property under consideration, if any. The instances relied upon by the aggrieved parties, more so, in cases where applications in Form No. 7-I have been filed and no-objection certificates issued, should be meticulously scrutinised as the burden of proving that the said instances are not comparable with the property under consideration is on the appropriate authority. The assessment of the appropriate authority in this regard should be objective and based on careful analysis of comparable cases and on sound reasons. This is a delicate task, more so because of the fact that ordinarily no two properties are alike. In applying the

comparative sale method of valuation, the appropriate authority should compare the apparent consideration with the market value reflected in the most comparable instance, whether furnished by the authority or the aggrieved parties, which provides the index of market value. The proximity from the time angle and proximity from the situation angle are also relevant considerations for ascertaining the most comparable instance. Having identified the instances which provide the index of market value, the price reflected therein may be taken as the norm and the market value of the property under consideration may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis property under consideration by placing the two in juxtaposition. The balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do. The fair market value of the property which is the subject-matter of proceedings under section 269UD has thereafter to be deduced by loading the price reflected in the instances taken as the norm for plus factors and unloading it for minus factors. The evaluation of these factors of course will depend upon the facts of each case. In the event of failure of the appropriate authority to do so an adverse inference may be drawn against it depending upon the facts and circumstances of each case.

24. It is thus clear that in all cases where an order is proposed to be passed for purchase of the property by the Central government under section 269UD(1) of the Act, the appropriate authority has to determine the figure of the fair market value of such property with reference to which it can be ascertained whether the apparent consideration was lower by 15 per cent. or more. That has not been done in the instant case. Here, even if the rates at which the properties referred to in the instances relied upon by the appropriate authority were sold are taken to be the fair market value on the relevant date, then also even from the highest of the three figures, the apparent consideration of the property under consideration is not lower by 15 per cent. than the fair market value. If the instances relied upon by the petitioner are taken into account, the margin will be much lesser than 15 per cent. In some of the cases the apparent consideration will be even higher than the sale price shown therein. In such a situation, no presumption of undervaluation with a view to evade tax can be drawn. It may also be expedient to observe at this stage

that it was never the stand of the Revenue before the Supreme Court that pre-emptive purchase can be resorted to automatically once the difference between the fair market value and the apparent consideration is 15 per cent. or more. On the other hand, the Revenue itself had emphatically stated before the Supreme Court that the limit of 15 per cent. is not to be applied mechanically but a reasonable margin for probable error has to be taken into account. That is because section 269UD does not confer an unfettered discretion on the appropriate authority to order purchaser of any and every property. In other words, the right of pre-emptive purchase under section 269UD is not a right of pre-emption simpliciter. It is a right which can be exercised only in cases where there is significant undervaluation in the agreement of sale 'with a view to evade tax'. The emphasis is on 'attempt at tax evasion'. The onus of establishing that the undervaluation is with a view to evade tax is on the Revenue. An imputation of tax evasion arises in a case where an order of compulsory purchase is made which casts a slur on the parties to the agreement. Such a imputation cannot be made mechanically without due regard to the explanation of the affected parties. The presumption of undervaluation in case of undervaluation of 15 per cent. or more being a rebuttable one, the evidence led by the intending seller or purchaser assumes great importance. The observations of the Supreme Court in C. B. Gautam's case : [1993]199ITR530(SC) to the effect that having regard to the limited time frame enquiry pursuant to the explanation of the seller or the purchaser might be a somewhat limited one or a summary one cannot be construed to confer power on the appropriate authority to pass an order without carefully considering the facts and circumstances set out by the intending seller or purchaser and analysing the comparable cases cited by such persons. However, in the instance case, even that question would not arise as evidently the apparent consideration is not lower than 15 per cent. of the fair market value.

25. In that view of the matter, we are of the clear opinion that the impugned order of the appropriate authority under section 269UD (1) is arbitrary and illegal and the same is liable to be set aside, which we hereby do.

26. In the result, this writ petition is allowed. Rule made absolute in the above terms. There shall be no order as to costs.

27. Shri Sethna, learned counsel for the respondents, prays for stay of this order for a period of eight weeks. Prayer allowed.

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