G.J. Malik Vs. Appropriate Authority, Income-tax Deptt., New Delhi

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Court : Delhi

Decided On : Nov-27-1998

Reported in : 1998VIIAD(Delhi)534; 78(1999)DLT31; [1999]238ITR496(Delhi)

Judge : R.C. Lahoti and; C.K. Mahajan, JJ.

Acts : Income-tax Act 1961 - Sections 269 UD(1) and 269UA(1); Transfer of Property Act, 1882 - Sections 53-A

Appeal No. : CW No. 4452 of 1996

Appellant : G.J. Malik

Respondent : Appropriate Authority, Income-tax Deptt., New Delhi

Advocate for Def. : Mr. R.D. Jolly and ; Ms. Premlata Bansal, Advs.

Advocate for Pet/Ap. : Mr. M.S. Syali, Adv

Judgement :
ORDER

R.C. Lahoti, J.

1. The petitioner is aggrieved by an order dated 31.10.96 (Annexure R-6) passed by the Appropriate Authority, Income-tax Department, New Delhi whereby the statement in Form-37 I filed on 31.7.96 in respect of proposed transfer of

immovable property has been held to be not maintainable and deemed never to have been filed.

2. The immovable property forming subject matter of the proceedings is A-21 Nizamuddin (West) New Delhi. On 3rd January, 1996 the petitioner entered into an agreement to sell the said property in favor of M/s.Seraveall Resorts and Hotels (Pvt.) Ltd. for a consideration of Rs.2.60 crores. The building is a two-and-a-half storeyed house. The relevant recitals of the agreement are briefly enumerated in the succeeding paragraphs.

2.1 On September 12, 1995 the intending Vendor had taken a loan of Rs.65 lacs from the intending Vendee and had agreed to pay back the same without interest by December 31, 1995 which the Vendor failed to repay. It was agreed that the loan amount of Rs.65 lacs shall be treated as earnest money so as to form part of the sale consideration.

2.2 Over and above the said amount of Rs.65 lakhs the intending Vendee had given a further sum of Rs.1 crore by way of three cheques of Rs.25 lacs, Rs.50 lacs and Rs.25 lakhs respectively dated 3rd January, 1996. If any of the cheques was dishonoured, the amount of earnest money was to stand forfeited to the intending Vendor and the agreement was to stand cancelled.

2.3 The first floor and the barsati floor of the said property were occupied by the tenants. The tenant on the first floor was Mr.Peter Godwin working with United Nations Development Fund. Barsati floor was occupied with Mr.S.S.Soin as tenant. The possession of the ground floor was with the intending Vendor. The Vendor undertook to deliver vacant peaceful possession of the property in his possession simultaneously with the payment of balance sale consideration of Rs.95 lakhs at the time of registration of the sale deed or upon receiving the vacant peaceful possession from the tenants, whichever be earlier.

3. As required by Section 269 UC of the Income-tax Act, 1961, the statement of agreement for transfer of immovable property in Form 37-I was filed duly signed by the petitioner and the respondent No.2 on 24.1.96. The form was rejected twice on the ground of having been furnished with inaccurate particulars. It was refiled for

the third time on 31.7.96 accompanied by the agreement dated 3.1.96. This time, the appropriate authority formed an opinion that the apparent consideration was substantially low in as much as the fair market value of the property was higher by 29.68%. A show cause notice was issued to the intending transferor and transferee on 20.9.86. Replies were filed. It was brought to the notice of the appropriate authority that the tenant Shri Peter Godwin was no longer employed with the United Nations Development Funds. He was in arrears of rent for the last six months. Application for eviction was filed against Shri Godwin.

4. After hearing the parties to the agreement, the appropriate authority arrived at the following findings, inter alias :-

'At the time of hearing, the transferor was questioned on the loan a sum of Rs.65,00,000/- taken by the intending Vendor on 10.12.1995* for his personal needs as to whether the said loan was repaid by the intending vendor by 31st December, 1995 as mentioned in Agreement to sell dated 3.1.1996. The vendor however informed that the loan has not been returned and also that there was no security or any other documents entered into for the said loan between the intending vendor and the vendee namely M/s.Seraveall Resorts & Hotels Pvt.Ltd. the intending vendee had duly authorised its Director to execute the present Agreement vide resolution of the Board of Directors dated 11.9.1995. This clearly shows that the loan given to the intending vendor by the intending Vendee, as also the creation of the alleged tenancy rights in favor of the intending vendee and the further fact that the sum of Rs.65,00,000/- paid as early as 12.9.1995, has not been returned by the intending vendor, establishes that the alleged Agreement has already been partly executed before the submission of Form No.37-I to the Appropriate Authority. In view of the decision of the Rajasthan High Court in the case of Rajasthan Patrika reported at , such an action on the part of intending vendor and the vendee violates the provisions of the Income-tax Act, 1961 itself and thereforee the Appropriate Authority would be justified in not acting upon the statement filed in Form No.37-I, which has already been acted upon.

Since the property stands already transferred, though partly, to the intending vendee and part consideration has already been passed on to the intending vendor. The nomenclature given to the consideration and part possession is not very material. The fact remains that prior to the filing of Form No.37-I, Rs.65,00,000/- was given to the intending vendor by the intending vendee and part possession was also handed over to the intending vendee. In view of these facts and placing reliance on the Rajasthan High Court's decision, the Appropriate Authority holds that part performance of the Agreement dated 3.1.1996 was made by the parties concerned much before the submission of Form No.37-I, hence, it is treated as void ab-initio. As a result of this, the Form No.37-I filed on 31.7.1996 becomes not maintainable and is deemed never to have been filed.'

(* See - 129.9.1995)

5. The appropriate authority has, in forming the view which it has taken, placed reliance on the decision of Rajasthan High Court in Rajasthan Patrika Ltd. v. UOI 223 ITR 443.

6. In the counter filed on behalf of the respondents, the principal plea taken is that the property had already stood transferred by the petitioner to the respondent No.2 in violation of the provisions of Chapter XX-C of the Act and hence the only thing that had remained to be done was to initiate prosecution for violation of the law. Form 37-I could not have been accepted by the appropriate authority.

7. The learned counsel for the petitioner has submitted that the appropriate authority has failed to exercise a jurisdiction vested in it by law wholly on irrelevant considerations. The order is founded on such premises as do not exist. The order is, thereforee, liable to be struck down and the authority directed to issue no objection certificate to the petitioner in as much as the authority has failed to direct compulsory purchase of the property by the Central Government within a period of two months as contemplated by Section 269UD-1. It is also submitted that the decision in Rajasthan Patrika Ltd. (supra) is not attracted to the facts of the case and the appropriate authority has erred in relying on the same.

8. For the purpose of Chapter XX-C the term transfer has been assigned a special meaning by Clause(f) of Section 269-UA. Amongst others it is provided that allowing the possession of the property to be taken or retained in part performance

of a contract of the nature referred to in Section 53-A of the Transfer Property Act, 1882 amounts to transfer. In the case of Rajasthan Patrika Ltd. (supra) it had stood conclusively established by the petitioner's own case that possession had been taken over by him and according to the agreement in question the petitioner had acquired the right to use, occupy, hold and enjoy the part of the immovable property. On the facts found, Rajasthan High Court had arrived at a finding that the parties had effected the transfer before filing the statement in Form No.37-I which amounted to violation of the relevant provisions of the Act. It was, thereforee, within the rights of the appropriate authority to inform the petitioner that Form No.37-I could not be acted upon.

9. For the two reasons, we are of the opinion that the impugned order cannot be held to be in accordance with law and cannot thereforee be sustained.

9.1 Firstly, the decisions of Delhi High Court in Tanvi Trading & Credit Pvt.Ltd. Vs . Appropriate Authority : [1991]188ITR623(Delhi) Magsons Exports Vs . Union of India & Ors. : [1992]194ITR225(Delhi) were cited before the Rajasthan High Court but were not followed.

9.2 In the cases of Tanvi Trading & Credits Pvt.Ltd. (supra) and Magsons Exports (supra), the view taken by Delhi High Court upon analysis of the relevant provisions of law is that on Form No.37-I having been filed the appropriate authority has only two options : (i)either to direct purchase of the property by the Central Government, or (ii) to issue no objection to the intending sale. The authority cannot direct filing of the application on the ground that the agreement which had been entered into by the owner with the proposed transferee had resulted in the creation of certain rights in favor of the intended vendee in accordance with the provisions of Section 53-A of the Transfer Property Act and possession of the property had been handed over in part performance. It is pertinent to note that Delhi High Court decision in Tanvi Trading & Credits Pvt.Ltd. has been upheld by the Supreme Court in Appropriate Authority Vs . Tanvi Trading & Credits Pvt.Ltd. : [1991]191ITR307(SC) .

9.3 Secondly, we find it difficult to agree with the view taken by the appropriate authority that a transfer as defined in Section 269UA(f) had already taken place between the parties. The recitals of the agreement have been quoted hereinabove. The property is two-and-a-half storeyed. The ground floor was in possession of the intending Vendor; First Floor in the possession of Mr.Peter Godwin; and the Barsati Floor in possession of Mr.S.S.Soin - both as tenants. The tenants were to be evicted. The possession on being assumed by the intending Vendor, was to be handed over to the intending Vendee. The possession over the ground floor which was with the Vendor was also to be transferred subsequently. It appears that the appropriate authority entertained some doubt about the genuineness of the tenancies. However, the appropriate authority has nowhere recorded a specific finding that the possession under the agreement had stood transferred to the intending purchaser. Under Section 53-A of the Transfer Property Act, in order to amount to part performance it has to be found that the trans-feree has in part performance of the contract taken possession of the property or any part thereof or the transferee being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract. It is only on the facts being found and a finding recorded based thereon in the terms of Section 53-A of the Transfer Property Act that the appropriate authority could have arrived at a finding that a transfer within the meaning of Clause (f) of Section 269-UA had already taken place and thereforee the provisions of the law were defeated. In the absence of such a finding, the result arrived at by the appropriate authority cannot be sustained.

10. It is true that the amount of loan having been treated to have been converted as earnest money, part consideration had stood passed to the intending Vendor. However, there is no material to support a finding nor a specific finding recorded that possession under the contract was taken or continued by the transferee.

11. For the foregoing reasons, the petition is allowed. The impugned order dated 31.10.96 (Annexure P-6) is hereby quashed and set aside. The requisite no objection shall be issued by the appropriate authority to the petitioner within a period of four weeks from the date of the order. No order as to the costs.