

Laboni Developers Vs. Appropriate Authority and ors.

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Court : Gujarat

Decided On : Oct-19-1995

Reported in : (1996)130CTR(Guj)512; [1996]219ITR284(Guj)

Judge : M.S. Shah and; Rajesh Balia, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 269UD, 269UD(1), 269UD(1A) and 269UL(1)

Appeal No. : Special Civil Appln. No. 7081 of 1995

Appellant : Laboni Developers

Respondent : Appropriate Authority and ors.

Judgement :

M.S. Shah, J.

1. This petition under Art. 226 of the Constitution challenges the order passed by the Appropriate Authority under s. 269UD - Chapter XX-C of the IT Act, 1961 (hereinafter referred to as the 'Act' for brevity) and prays for an order directing the Appropriate Authority to issue a certificate in terms of s. 269UL(1) of the Act.

2. On 5th April, 1995, the petitioner and respondent No. 3 entered into an agreement for purchase of the property in question for a consideration of Rs. 45,00,000 (Rupees Forty five Lacs only); the total area of land is 2,605.32 sq. mts.

On the said land, there were three structures being a (i) bungalow; (ii) servant quarters; and (iii) a separate structure for residence of gardener and servants. On 17th April, 1995, the petitioner (intending purchaser) and respondent No. 3 (intending seller) filed Form No. 37-I in the office of the Appropriate Authority. On 11th July, 1995, show cause notice was issued by the Appropriate Authority under s. 269UD(1A) of the Act to the petitioner as well as respondent No. 3. After the petitioner submitted its reply dt. 20th July, 1995, the Appropriate Authority passed the order dt. 31st July, 1995 under s. 269UD(1) of the Act for purchasing the property for the Central Government. On 31st July, 1995 itself the Appropriate Authority also passed another order requiring respondent No. 3 to hand over the possession of the property in question. The aforesaid orders dt. 31st July, 1995 have been challenged in this petition by the petitioner-intending purchaser of the said property.

3. The learned counsel for the petitioner contended that -

(1) the Appropriate Authority had failed to determine the fair market value of the property in question. The learned counsel further contended that the finding of the Appropriate Authority that the Property Under Consideration (PUC) was comparable to the Sale Instance Properties (SIPs) was perverse;

(2) the order was also otherwise bad, because the Appropriate Authority had not given any finding that the alleged undervaluation was done with a view to evade tax.

The learned counsel for the petitioner contended that SIPs relied upon by the Appropriate Authority were not at all comparable with the PUC. The learned counsel submitted that SIP-1 is only 50 metres away from Bombay-Pune Highway which is a very major advantage apart from this being on 60 feet wide Bhau Patil Road and that it is also near a junction of major link roads to enter Pune City from Bombay-Pune Highway which links Pune city to Khadki, Pimpri and Bopodi via Aundh; SIP-1, overlooks Mula river and all plots in Pune abutting the Mula river command a better price, even though, there may be slums nearby some plots. The SIP-1 is situate approximately 3 Kms. away from PUC. It was further submitted that SIP-2 is also on Bhau Patil Road and surrounded by all residential buildings

and societies and is on the main road.

The learned counsel for the petitioner further submitted that on the other hand, PUC is situated in a small lane 40 ft. wide with a dead end which ends on the main gate of the Army Vehicle Depot; the PUC is near Khadki Army Vehicles, Railway Transport Depot and movement of heavy army vehicles opposite the PUC disturbs peace and tranquility of the area and has none of the location advantages possessed by SIP-2 and also by SIP-1. On the contrary, the PUC is facing 32 public toilets used by 700 members of 150 families residing in police constable tenements and those toilets emit a foul smell which aggravates in rainy season and wind blow in the direction of the PUC. It is also submitted that SIPs are the smaller plots compared to the PUC.

4. It was further submitted by the learned counsel for the petitioner that the petitioner had, in its reply before the Authority, pointed out that the PUC was comparable with the very adjoining property. The transferee has relied upon the Transferee's Sale Instance (hereinafter referred to the 'TSI') wherein the land at the rate of Rs. 1,102 per sq. mtr. was sold for a price of Rs. 14,00,000 and the Appropriate Authority had issued no objection certificate for that property on 30th July, 1993. It was contended that if the Authority could refer to sale instances SIP-1 and SIP-2 which had taken place in the last about 14 months, there was no reason why the Authority should not consider that TSI which had taken place about 20 months ago, especially when the TSI is abutting the PUC. It was contended that if the authority could purport to compare the SIP-1 and PUC by referring to alleged increase in the property rates to the extent of 25% to 30% in Pune, by applying the same yardstick to the increase in the cost of the TSI, the price of TSI-1 works out to Rs. 1,432 per sq. mt. On the other hand, the rate for the PUC works out to Rs. 2,138 per sq. mt.

It was further submitted that the purchaser was also required under the agreement to pay for alternative accommodation or compensation for getting part of premises vacated by servants and other persons who were accommodated there for more than 20 years, having their ration cards and having their names in the voters list also at the same address. Moreover, the purchaser was liable under the

agreement for stamp duty for registration charges which would bring the net price at Rs. 2,096 per sq. mt. which was comparable with Rs. 2,120 for SIP-1 and Rs. 2,175 for SIP-2. The learned counsel for the petitioner, therefore, submitted that notwithstanding the alleged drawbacks of the SIP-1 such as irregular size and small frontage, etc., SIPs were having much better location and the PUC was not having any such advantage and that, therefore, the price of SIPs could never be considered by any reasonable person to be fair market value of the PUC.

5. The learned counsel also relied on the judgment of the Bombay High Court reported in the case of Vimal Agarwal vs . Appropriate Authority : [1994]210ITR16(Bom) laying down that in order to draw inference of undervaluation, it is necessary to determine first the fair market value of the property in question in 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 fair market value by 15% or more. It has also been laid down in the said judgment that the instances relied upon by the aggrieved parties, more so, in cases where applications in form No. 37-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.

6. The learned counsel for the petitioner submitted that when the sale instance cited by the petitioner was the very adjoining property for which the Appropriate Authority has issued the no objection certificate, the Appropriate Authority could not have brushed the same aside merely on the ground that the transaction was entered into about two years back, when the Authority had relied upon an instance which was 14 months old, and even inflationary yardstick followed by the Appropriate Authority could have been applied to the TSI also, as already mentioned hereinabove.

The learned counsel for the petitioner then contended that since the power of pre-emptive purchase is to be exercised only in a case where there is under valuation of appropriate consideration, by 15% or more than the fair market value of the property with a view to evade tax, as held by the Hon'ble Supreme Court in the

case of C. B. Gautam vs . Union of India & Ors. : [1993]199ITR530(SC) but the impugned order, in the instant case, very much falls short of the said requirement inasmuch as the order nowhere records a finding that alleged undervaluation is done with a view to evade tax.

7. On the other hand, Mr. Thakore, learned standing counsel for the Revenue, relied on the affidavit in reply filed on behalf of the Appropriate Authority and submitted that all the comparable sale instances were properly considered by the Appropriate Authority and that this Court would not sit as a Court of appeal for reviewing the order of the Appropriate Authority. The learned standing counsel further submitted that the Appropriate Authority had applied its mind to all the relevant factors and, therefore, the order is not required to be interfered with. As regards the petitioner's contention that the Authority had not given any finding regarding the intention to evade tax, the learned standing counsel contended that a fair and reasonable reading of the order would go to show that there was a finding regarding the intention of the parties to evade tax.

8. Having carefully considered the rival contentions and the material on record, in our opinion, it is not necessary to examine merits of first contention on behalf of the petitioner that the impugned order passed by the Appropriate Authority was perverse in holding that two SIPs were comparable with PUC. This is so in view of our finding that the petition deserves to be allowed by accepting the second contention of the petitioner that the impugned order is vitiated as there is no finding that the apparent consideration is not the real consideration or that it was with a view to evade tax that the apparent consideration is understated in the agreement.

9. In the case of C. B. Gautam vs. Union of India & Ors. (supra), their Lordships of the Hon'ble Supreme Court held that the very historical setting in which the provisions of this Chapter XX-C were enacted, suggests 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 agreed to be sold. It was further held that 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% or more, it may draw a presumption that this undervaluation has been done with a view to evade tax. Of course, such a presumption is rebuttable and the intending seller or purchaser can lead evidence to rebut such a presumption. Moreover, an order for compulsory purchase of immovable property under the provisions of s. 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 IT Act, namely, to counter attempts to evade tax.

10. The aforesaid decision was followed by this Court in the case of Anagram Finance Ltd. vs. Appropriate Authority and also in the decisions of this Court rendered in Special Civil Appln. No. 3853 of 1995 decided on 19th Sept., 1995 [since reported as Krishnakumar Agarwal & Anr. vs. Appropriate Authority & Anr. and in Special Appln. No. 5328 of 1995 decided on 19th Sept., 1995. This Court held in Special Civil Appln. No. 3853 of 1995 as under :

'Thus necessary concomitants of exercise of powers under s. 269UD(1) are that firstly the Appropriate Authority must arrive at a decision that there is significant undervaluation of the property by 15% or more and secondly, such undervaluation is an attempt at tax evasion. It is only on the existence of second indicia and not merely in the case of undervaluation that the Authority has been empowered to have resort to the power of pre-emptive purchase, undervaluation having been done with a view to evading tax, a presumption which is rebuttable. However, such presumption is not an obligation under statutory provision. It is for the Appropriate Authority to raise presumption or not on the basis of the estimated valuation. Whether such presumption has in fact been resorted to and has not been rebutted must in our opinion be reflected in the order which is finally passed by the Appropriate Authority disclosing application of mind to all available material on record. As this exercise of power depends upon the satisfaction of the Appropriate Authority and Appropriate Authority is under an obligation to pass a speaking order by specifying the reasons for purchasing the property, its satisfaction about the facts must be reflected in the order and cannot be left to the guess work or for raising the presumption by the Court in favour of the Appropriate Authority, if the order is challenged. The order must speak for itself. The impugned order in our

opinion, does not even whisper about the satisfaction of Appropriate Authority about the undervaluation being with an intention to evade tax. It must be noticed that the presumption is rebuttable one and what evidence is required to rebut depends upon facts and circumstances of each case. The presumption may even be rebutted, without leading evidence, on the basis of material already available on record.'

Thereafter, in the decision dt. 19th Sept., 1995, rendered in Spl. C. A. No. 5328 of 1995, this Court held as under :

'It may further be noticed that if in the estimate of Appropriate Authority apparent consideration of the property situated in the agreement to sell is less by 15% or more of its fair market value, the presumption of understatement having been made with the intention to evade the tax may be raised by it. However, such presumption is not a statutory presumption which is mandatorily required to be drawn in all cases. Mere finding of understatement, without recording the conclusion of the Appropriate Authority himself about nexus between understatement of consideration and attempt to tax evasion, it is not permissible to raise presumption that Appropriate Authority has also found that such understatement was an attempt to evade the tax when such an order is challenged before Courts. It is to be seen that for element of a nexus being present with the understatement of consideration and attempt to evade tax, it is essential that apparent consideration is not the real consideration. Therefore merely on the finding that the apparent consideration is less than fair market value without there being any satisfaction that the apparent consideration is not real consideration the nexus cannot be established with an attempt to evade tax. Therefore, it is also necessary in the chain of decision making not only to arrive at conclusion of the differentiation between fair market value and apparent consideration but it is required that the fair market value of the property concerned is arrived at and a conclusion is reached that apparent consideration is not the real consideration.'

11. If we analyse the facts of the present case and the order passed by the Appropriate Authority, we find that the following finding given by the Appropriate Authority falls short of mandatory requirement as required in the judgment of the

Supreme Court in the case of C. B. Gutam (supra) and the aforesaid two decisions of this Court rendered on 19th Sept., 1995 :

'The Hon'ble Supreme Court, in the case of C. B. Gautam vs . Union of India & Ors. : [1993]199ITR530(SC) had held that when the apparent consideration declared in an agreement for sale is less than the fair market value by 15% or more, the Appropriate Authority may draw a presumption that this undervaluation has been done with a view to evade tax. In such cases, the Appropriate Authority can exercise its power of pre-emptive purchase of the property. 'For the reasons already discussed in this order above, the Members, Appropriate Authority (sic) have not been able to effectively rebut the presumption of understatement of apparent consideration of the PUC drawn in the show cause notice dt. 11th July, 1995.'

The above finding, of course, refers to presumption in the show-cause notice dt. 11th July, 1995. The relevant portion of the said show-cause notice is, therefore, quoted hereunder :

'On a careful consideration of the relevant facts and circumstances mentioned above, the Members (Appropriate Authority) have reason to believe that the apparent consideration disclosed in the transfer agreement accompanying the Form No. 37-I in respect of PUC is understated by more than 15% and is substantially less than the fair market value of the property under consideration. Therefore, acting under the powers vested in them under Chapter XX-C of the IT Act, 1961, the Members (A. A.) propose to make pre-emptive purchase of the property under consideration.'

12. In our view, the Appropriate Authority has not given any positive finding to the effect that there was an attempt to evade tax or that the apparent consideration was lower than the real consideration. The Authority could have raised a presumption about intention to evade tax in the show-cause notice. After hearing the parties, the Authority could have held that the presumption was not rebutted and given the finding that the apparent consideration mentioned in the agreement was understated with a view to evade tax. However since the mandatory requirement of giving such positive finding is not complied with, in our opinion, the

order deserves to be quashed and set aside.

13. Accordingly, this petition succeeds. The impugned orders of the Appropriate Authority at Annexures C and H are hereby quashed and set aside. The petitioners have also prayed for an order directing the Appropriate Authority to issue no objection certificate in terms of s. 269UL(1) of the IT Act. Accordingly respondents Nos. 1 and 2 are directed to issue no objection certificate under s. 269UL(1) of the Act within a period of six weeks from the date of receipt by the Appropriate Authority a certified copy of this order or the writ of this Court, whichever is earlier.

14. Respondents Nos. 1 and 2 are further directed to take all steps consequential to the impugned order Annexures C and H being set aside.

15. Rule is made absolute accordingly, with no order as to costs.

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