

APPROPRIATE AUTHORITY AND COMMISSIONER, INCOME TAX

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v.

SMT. VARSHABEN BHARATBHAI SHAH AND ORS.

MARCH 13, 2001

[S.P. BHARUCHA, N. SANTOSH HEGDE AND Y.K. SABHARWAL, JJ.]

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Income Tax :

Income Tax Rules, 1962 : Rule 48-K.

Immovable property—Sale of—Apparent consideration for—Pre-emptive purchase of—Co-owners entered into agreement for sale of immovable property for a certain apparent consideration, which exceeded the prescribed limit for the relevant area under R. 48-K—Under the agreement co-owners sought to transfer their equal half shares in the said property—High Court held that Chapter XX-C of Income Tax Act not applicable since each co-owner would get less than the prescribed limit—Correctness of—Held : If the apparent consideration for transfer of immovable property is more than the prescribed limit for the relevant area and is less than the market value thereof by 15% or more, notice for pre-emptive purchase can be issued—It is of no consequence that the apparent consideration with respect to each transferor is less than the prescribed limit—Immovable property is the subject of transfer and not the one half shares of the co-owners—Hence, Chapter XX-C is clearly applicable—Income Tax Act, 1961, Ss. 269-UC, 269-UD and Chapter XX-C.

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The second and third respondents entered into an agreement to sell to the first respondent immovable property for an apparent consideration, which was more than the prescribed limit for the relevant area under Rule 48-K of the Income Tax Rules, 1962. The appropriate authority of the Revenue came to the conclusion that the apparent consideration was less than the market value in respect of the said property by 15% or more. Accordingly, an order of pre-emptive purchase of the said property was made under Section 269-UD of the Chapter XX-C of the Income Tax Act, 1961.

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The respondents challenged the aforesaid order in a writ petition before the High Court contending that under the agreement respondents Nos. 2 and 3 sought to transfer their equal half shares in the said property.

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- A The High Court held that each co-owner would get less than the prescribed limit under Rule 48-K of the Rules and, therefore, the provisions of Chapter XX-C of the Act would not apply. Hence this appeal.

Allowing the appeal, the Court

- B HELD : 1. What has to be seen for the purposes of attracting Chapter XX-C of the Income Tax Act, 1961 is what is the property which is the subject-matter of transfer and what is the apparent consideration for such transfer. This has to be seen in a real light with due regard to the object of the chapter and not in an artificial or technical manner. If the apparent consideration for the transfer is more than the limit prescribed for the relevant area under Rule 48-K of the Income Tax Rules, 1962 what has then to be seen is whether the apparent consideration for the property is less than the market value thereof by 15% or more. If so, notice for pre-emptive purchase can be issued and it is then for the parties to the transaction to satisfy the appropriate authority that the apparent consideration is the real consideration. [356-H; 357-A]

2. In the present case, the agreement is for the sale of immovable property. That the equal shares of the second and third respondents are to be transferred to the first respondent is a necessary incident of such sale. The parties to the transaction, filed Form No. 37-I with the appropriate authority and, correctly, stated that what was being sold was the said immovable property and not the one half shares of the second and third respondents. It also stated, correctly, the total apparent consideration for the transfer of the said immovable property. There is not doubt at all that what was to be transferred was the said immovable property and that the consideration for such transfer was more than the prescribed limit for the relevant area under Rule 48-K of the Rules. It is of no consequence that the second and third respondents owned the said immovable property as tenants-in-common or that this is how they had shown their ownership in their income tax returns. The High Court was in error in concluding that what had been sold by the second and third respondents to the first respondent was their equal share in the said immovable property, that the apparent consideration was, therefore, less than the prescribed limit under Rule 48-K and that, therefore, the provisions of Chapter XX-C would not apply. [357-C-E]

- H 3. Even if the agreement of transfer had been so drawn as to show

the transfer of the equal shares of the second and third respondents in the said immovable property, the conclusion would have been the same, for, looked at realistically, it was the said immovable property which was the subject of the transfer. [357-F]

Jodhram Daulatram Arora v. M.B. Kodnani, 221 ITR 368 (Bom.), approved.

K.V. Kishore v. Appropriate Authority, 189 ITR 264 (Mad.); *N.C. Rangesh v. Inspector General of Registration*, 189 ITR 270 (Mad.); *Appropriate Authority v. J.S.A. Raghava Reddy*, 199 ITR 508 (Kar.); *Surinder Gupta v. Chief Commissioner of Income Tax*, 221 ITR 375 (Cal.) and *Webster Industries Ltd. v. Union of India*, 225 ITR 924 (Del.), overruled.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5426 of 1997.

From the Judgment and Order dated 5 and 6.2.96 of the Gujarat High Court in SCA No. 10405/95.

S. Ganesh, Kamendra Misra, B.V. Balaram Das and Ms. Sushma Suri for the Appellants.

R.F. Nariman, Kavin Gulati, Jatin Zaveri and Harish J. Jhaveri for the Respondents.

The Judgment of the Court was delivered by

BHARUCHA, J. The Revenue is in appeal by special leave against the judgment and order of a Division Bench of the High Court of Gujarat. The judgment and order was passed on a writ petition filed by the first respondent in the following circumstances.

On 12th August, 1995, the second and third respondents entered into an agreement to sell to the first respondent immovable property situated in Ahmedabad for the sum of Rs.47 lakhs. The appropriate authority of the Revenue came to the conclusion that the apparent consideration in respect of the said immovable property under the said agreement was less than the market value thereof by 15% or more. Accordingly, a notice dated 6th November, 1995 was issued to the respondents to show cause why the said immovable property should not be subjected to pre-emptive purchase under Chapter XX-C of the Income Tax Act, 1961. The respondents showed cause, but the order of pre-emptive purchase was made by the appropriate authority.

A This order was challenged in the writ petition.

Before the High Court, it was contended that what had been transferred by the second and third respondents to the first respondent were their equal half shares in the said immovable property and that they owned such equal half shares as indicated in their income tax returns and in the said agreement, which stated that the earnest money had been paid by two separate cheques to the second and third respondents. The High Court said, "There may be one agreement for transfer of property where the transferors may be co-owners or joint owners. It may be that the share of the transferor is not specified. It may happen that there may be one transferee or more than one.

C The question to be examined is whether the provisions of Chapter XX-C of the Act would be attracted or not in a case where co-owners have agreed to transfer their property rights and each co-owner is to be paid an amount of consideration which is less than the amount specified, i.e., each co-owner-transferor will get less than Rs.25 lakhs as per the agreement." The High Court followed the judgment of the Madras High Court in *K.V. Kishore & Anr. v. Appropriate Authority & Ors.*, (189 I.T.R. 264). It held that it was in the case before it clear that what was agreed to be transferred was the individual undivided share in the said immovable property and the value of each such share was less than Rs.25 lakhs. The transferors were co-owners and each co-owner was getting an apparent consideration that was less than the limit prescribed, that is, less than Rs.25 lakhs. The provisions of Chapter XX-C were not attracted even though the amount that all the co-owners received exceeded Rs.25 lakhs. Before the High Court, it was not disputed on behalf of the Revenue that all the reports obtained by it in regard to the valuation of the said immovable property had not been supplied to the respondents. For that reason, the High Court came to the conclusion that the principles of natural justice had not been followed. The High Court characterized as perverse a finding of the appropriate authority in regard to the case of the first respondent that no unaccounted money had figured in the sale transaction. For all these reasons, the High Court quashed the order of pre-emptive purchase.

G In *K.V. Kishore & Anr. v. Appropriate Authority & Ors.* (189 I.T.R. 264) a learned Single Judge of the Madras High Court held, more or less on similar facts, thus :

H "After giving deep consideration to these rival submissions, the following facts would clinchingly establish the case in favour of the

petitioners. It is not denied or it is not disputed that the original allottee, A. Srinivasan, died in the year 1962. He being a Hindu, governed by the Hindu Succession Act, on his death, his wife and children acquired a vested right to the definite quantified shares in the property left behind by him. As owners of their respective shares, they were competent to enter into a family arrangement which they did on April 8, 1987, under the terms of which, each one of respondents Nos.4 to 8 were allotted a definite share in the property. After April 8, 1987, they were individual owners of definite shares in the property. Each one could deal with only his respective share and he cannot deal with the share of another. The property which so fell to the share of each individual will come definitely within the definition of the words "property". Such a sharer was entitled to transfer his property to a third person. Merely because a plurality of such individual owners joined together to enter into one single agreement to transfer their respective shares in favour of one or more persons, that would not make any difference to the main issue that what each transferred is his definite share in the property. Viewed from that perspective, the agreement entered into between the petitioners and respondents Nos.4 to 8 is to be understood only as an agreement to convey the respective undivided shares of respondents Nos.4 to 8. It is not in dispute that the value of each such share is less than Rs.10,00,000. The recitals in the agreement in more than one place refer to the fact that what is sold, is the individual undivided share in the property. Consequently, the impugned order made under Chapter XX-C of the Act taking the total consideration, the collective shares, cannot be sustained

The aforesaid judgment of the Madras High Court was followed by that High Court in *N.C. Rangesh & Ors. v. Inspector General of Registration & Ors.*, (189 I.T.R. 270) and by the Karnataka, Calcutta and Delhi High Courts in the cases of *Appropriate Authority & Ors. v. J.S.A. Raghava Reddy & Ors.*, (199 I.T.R. 508), *Surinder Gupta v. Chief Commissioner of Income-Tax & Ors.*, (221 I.T.R. 375) and *Webster Industries Ltd. v. Union of India & Ors.*, (225 I.T.R. 924) respectively.

The Bombay High Court has taken the contrary view in *Jodhram Daulatram Arora & Ors. v. M.B. Kodnani & Ors.*, (221 I.T.R. 368). In this case the vendor was one and there were three purchasers. It was contended that under the agreement in question the vendor had agreed to sell to each

A of the purchasers an undivided 1/3rd interest in the flat and each of the purchasers individually had agreed to buy an undivided 1/3rd share in the flat from the vendor for the total consideration of Rs.14,06,000; that consideration for the purchase of each such interest in the flat should be valued at Rs.4,68,667 which was less than the limit of Rs.10 lakhs; and that, in the

B circumstances, the appropriate authority had no jurisdiction to proceed under Chapter XX-C. The judgments of the Madras High Court in the cases of *K.V. Kishore* and *N.C. Rangesh* were cited. The Bombay High Court did not accept the contention and it distinguished these judgments. The agreement in question before it, it said, was a composite agreement in respect of the flat. There was nothing in the agreement which indicated that the purchasers had agreed

C to buy individually an undivided 1/3rd share of the flat from the vendor. All the concerned parties had filed Form No.37-I and, therefore, it was not open to them now to contend that Section 269- UD had no application and the appropriate authority had no jurisdiction.

D Section 269-UA defines certain terms for the purposes of Chapter XX-C, which deals with the purchase by the Central Government of properties in certain cases of transfer. An 'agreement for transfer' is defined by clause (a) thereof to mean an agreement for the transfer of any property. 'Property' is defined by clause (d) to mean any land or any building or part of a building and any rights in or with respect to any land or any building or a part of

E a building. 'Transfer' in relation to any property means, by reason of clause (f), the transfer of such property by way of sale or exchange or lease for a term of not less than twelve years. "Apparent consideration" is defined by clause (b) to mean, if the immovable property is to be transferred by way of sale, the consideration for such transfer as specified in the agreement of

F transfer. Section 269- UC places restrictions on the transfer of immovable property. What are relevant for our purpose are sub-sections (1), (2) and (3) of Section 269-UC and they read thus :

G "269-UC(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 property in such area and 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 property (hereinafter referred to as the transferor) and the person to whom it is proposed to be

H 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. A

(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. B

(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 C

(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." D

Section 269 UD, so far as it is relevant, reads thus:

"269UD.(1) [Subject to the provisions of sub-section (1A) and (1B), the appropriate authority], after the receipt of the statement under sub-section (3) of Section 269UC in respect of any 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 property at an amount equal to the amount of apparent consideration : E

[(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 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. F G

(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 property to be served on the H

A transferor, the person in occupation of the 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.”

B Rule 48-K of the Income Tax Rules states that the value of any property for the purposes of sub-section (1) of Section 269-UC shall be, where the agreement for transfer prescribed under the said sub-section is entered into after 31st July, 1995, Rs.25 lakhs for the city of Ahmedabad.

C In *C.B. Gautam v. Union of India & Ors.*, [1993] 1 SCC 78 a Constitution Bench of this Court dealt with the constitutionality of the Chapter XX-C. Paragraph 21 of the judgment reads thus :

D “21. The legislative history of Chapter XX-C, the stand taken by the Union of India and the Central Board of Direct Taxes as shown in the main counter-affidavit and the affidavit of H.K. Sarangi, which has been filed after obtaining instructions from the Income Tax Department and the Central Board of Direct Taxes make it clear that the powers of compulsory purchase conferred under the provisions of Chapter XX- C of the Income Tax Act are being used and intended to be used only in cases 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 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 undervaluation 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 property under the provisions of Section 269- UD required 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.”

H What, in our opinion, therefore, has to be seen for the purposes of attracting Chapter XX-C is: what is the property which is the subject matter of transfer and what is the apparent consideration for such transfer. This has to be seen in a real light with due regard to the object of the chapter and not in an artificial or technical manner. If the apparent consideration for the

transfer is more than the limit prescribed for the relevant area under Rule 48-K, what has then to be seen is whether the apparent consideration for the property is less than the market value thereof by 15% or more. If so, the notice for pre-emptive purchase can be issued and it is then for the parties to the transaction to satisfy the appropriate authority that the apparent consideration is the real consideration for the transfer.

Now, in the present case, the said agreement is for the sale of the said immovable property. That the equal shares of the second and third respondents therein are to be transferred to the first respondent is a necessary incident of such sale. The parties to the transaction filed Form No.37-I with the appropriate authority and, correctly, stated that what was being sold was the said immovable property and not the one half shares of the second and third respondents therein. It also stated, correctly, that the total apparent consideration for the transfer of the said immovable property was Rs.47 lakhs. This leaves us in no doubt at all that what was to be transferred was the said immovable property and that the consideration for such transfer was the sum of Rs.47 lakhs. It is of no consequence that the second and third respondents owned the said immovable property as tenants in common or that this is how they had shown their ownership in their income tax returns. We are, therefore, of the opinion that the High Court was in error in concluding that what had been sold by the second and third respondents to the first respondent was their equal share in the said immovable property, that the apparent consideration was, therefore, less than Rs.25 lakhs and that, therefore, the provisions of Chapter XX-C would not apply.

We should add that even if the agreement of transfer had been so drawn as to show the transfer of the equal shares of the second and third respondents in the said immovable property, our conclusion would have been the same for, looked at realistically, it was the said immovable property which was the subject of the transfer.

We are of the opinion that the judgments of the Madras, Karnataka, Delhi and Calcutta High Courts referred to above are based on a wrong approach and are erroneous. We approve of the view taken by the Bombay High Court in *Jodhram Daulatram Arora's* case.

As we have pointed out, it was conceded before the High Court on behalf of the Revenue that all the relevant reports pertaining to the valuation of the said immovable property had not been disclosed to the respondents.

A We think, in these circumstances, that the matter should go back to the appropriate authority for hearing the matter afresh. It is not, therefore, necessary to deal with the finding of the High Court about perversity.

B The appeal is allowed. The judgment and order under appeal is set aside. The matter is remanded to the appropriate authority. The Revenue shall make available to the respondents all the material, including reports, that it relied upon in regard to the valuation of the said immovable property. The appropriate authority shall then hear the parties afresh and pass an appropriate order. It shall do so without taking into account any observation of the High Court in the impugned judgment. In respect of the proceedings upon remand, no objection in regard to limitation may be raised.

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No order as to costs.

V.S.S.

Appeal allowed.