

(2010) 03 MAD CK 0212

Madras High Court

Case No: Criminal O.P. No. 27473 of 2009 and M.P. No. 1 of 2009

Banumathi and Others

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision: March 26, 2010

Acts Referred:

- Income Tax Act, 1961 - Section 269, 269UC, 269UL(2), 276AB
- Income Tax Rules, 1962 - Rule 48K, 48L

Hon'ble Judges: C.T. Selvam, J

Bench: Single Bench

Advocate: R. Srinivos, for the Appellant; Ramasamy K., Sr. Special Public Prosecutor for Income Tax cases, for the Respondent

Final Decision: Allowed

Judgement

C.T. Selvam, J.

The Petitioners who are accused second and four in case pending in EOCC No. 177 of 2005 on the file of the learned Additional Chief Metropolitan Magistrate (Economic Offences-I) Egmore, Chennai have come forward with this petition to quash proceedings in such case as against them.

2. In such case, four persons are accused of offences under Sections 269UC and 269UL(2) of the Income Tax Act, 1961 (hereinafter referred as "the Act") punishable u/s 276AB of such Act. The accused first and second in the case are husband and wife. Being persons separately assessed to tax, they held individual properties comprising flats and independently have sold their respective holdings to the third accused, viz., M/s. Sangeetha Associates represented by P. Rajagopal and the fourth accused P. Rajagopal in his individual capacity.

3. Heard the learned Counsel for the Petitioners and Mr. K. Ramasamy, learned Special Public Prosecutor (income tax cases).

4. The prosecution as against the first accused in the case has been quashed by order of this Court in dated 3-12-2009 R. Baba Shankar v. ITO (2010) 321 ITR 113 (Mad) Crl. O. P. No. 16623 of 2006. I have had the benefit of perusing such order and I find that the contentions now raised by either counsel excepting for one additional submission by the learned Special Public Prosecutor (income tax cases) are the same. When the facts and the law applicable are correctly stated in the order, I can do no better than reproducing what is stated in the said order. The said order reads as follows (page 114):

The Petitioner, who is the accused in EOGC No. 177 of 2005 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences), Egmore, Chennai, wherein he is facing trial for the alleged offences under Sections 276AB read with Sections 269UC and 269UL(2) of the Income Tax Act, 1961 (hereinafter called the Act), has filed the above criminal original petition seeking to quash all further proceedings therein.

2. A perusal of the complaint filed by the Respondent against the Petitioner and others reveals the following allegations:

(a) That in pursuance of Section 269UC of Chapter XX-C of the Income Tax Act, 1961, no transfer of any immovable property of such value exceeding Rs. 25 lakhs shall be effected except after an agreement for transfer is entered into between the transferor and the transferee in accordance with the provisions of Sub-section (2) at least four months before the intended date of transfer. Both the transferor and the transferee have got a legal obligation to file with the Appropriate Authority, income tax Department the particulars of such agreement in Form No. 37-1 prescribed under Rule 48L of the income tax Rules, 1962, within the statutory time limit prescribed thereunder.

(b) Accused Nos. 1 and 2 are the owners of the landed property comprised in TS No. 23, Block No. 30 of Kottur village bearing Corporation Door No. 7, 1st Main Road, Gandhi Nagar, Adyar, Chennai measuring an extent of 13,642 sq. ft. the value of which exceeds Rs. 25 lakhs. Therefore, the above property falls within the jurisdiction of the Appropriate Authority, income tax Department, 121, Nungambakkam High Road, Chennai-34, for the purpose of Chapter XX-C of the Income Tax Act, 1961.

(c) Accused Nos. 1 and 2 by two separate sale deeds, dated 28-3-2002, have sold the above mentioned property in favour of accused No. 3 represented by accused No. 4 herein for a total consideration of Rs. 30 lakhs. Accused No. 1 by the registered sale deed of Rs. 30 lakhs registered sale deed No. 773 of 2002, dated 28-3-2002 has conveyed his undivided right, title and interest having a proportionate shares 500/22,000 of 13,642 sq. ft. of the entire landed property. The market value of the undivided above share was mentioned in the sale deed as Rs. 15 lakhs. The total extent of the landed property as a whole was mentioned under Schedule A of the

sale deed as 13,642 sq. ft. and undivided share of the 933 sq. ft. was mentioned under schedule B of the sale deed.

(d) Accused No. 2 on the same date on 28-3-2002, by the registered sale deed No. 774 of 2002 has transferred her undivided right, title and interest having a proportionate share 500/22,000 of 13,642 sq. ft. of the entire landed property. The market value of the undivided above share was mentioned in the sale deed as Rs. 15. lakhs. The total extent of the landed property as a whole was mentioned under schedule A of the sale deed as 13,642 sq. ft. and undivided share of the 933 sq. ft. was mentioned under schedule B of the sale deed.

(e) Though two separate sale deeds have been executed by accused Nos. 1 and 2 in favour of accused No. 3 the property conveyed was a single unit measuring a total area of 13,642 sq. ft. as mentioned in schedule A of each sale deed. Therefore, the market value of the property as a single unit which was transferred by accused Nos. 1 and 2 to accused No. 3 was Rs. 30 lakhs.

(f) That in pursuance of Section 269UC of the Income Tax Act, 1961, both the transferors, accused Nos. 1 and 2 and the transferee, accused No. 3 represented by accused No. 4 herein, have legal obligation to file Form No. 37-1 prescribed under Rule 48L of the income tax Rules, 1962, within the statutory time limit prescribed thereunder, since the value of the property situated at Door No. 7, First Main Road, Gandhi Nagar, Adyar, Chennai-20 exceeds Rs. 25 lakhs.

(g) It is further alleged in the complaint that the above legal obligation of filing Form No. 37-1 as required u/s 269UC of the Income Tax Act, both the transferors and the transferee have wilfully and deliberately split up the sale transaction into two registered two sale deeds valued at Rs. 15 lakhs each though the property conveyed was a single unit measuring 13,642 sq. ft. valued at Rs. 30 lakhs. Thus, accused Nos. 1 to 4 contravened the provisions of Section 269UC of the Income Tax Act, 1961 which constitutes an offence u/s 276AB of the Income Tax Act, 1961.

(h) It is further alleged in the complaint that u/s 269UL(2) no person has got any right to transfer any immovable property the value of which exceeds Rs. 25 lakhs without obtaining a no objection certificate from the Appropriate Authority, income tax Department. Accused Nos. 1 and 2 by transferring the said property by two registered sale deeds without obtaining no-objection certificate as required u/s 269UL(2) of the Act to accused No. 3 and thereby contravened Section 269UL(2) of the Act, which is punishable u/s 276AB of the Act.

(i) Accused No. 4 representing accused No. 3 and signing sale deeds on behalf of accused No. 3 is a person interested in the above transaction and therefore, he is liable for the commission of the offences along with accused Nos. 1 to 3.

3. A complaint was filed after sending a show-cause notice and considering the reply received from the accused and the same was taken on file for the aforesaid offences

against the accused.

4. Being aggrieved by that, accused No. 1/Petitioner herein has come before this Court.

5. Heard both.

6. The learned Counsel for the Petitioner made the following submissions:

(a) Section 269UC of the Income Tax Act specifically states that no transfer of any immovable property in such area and of value exceeding Rs. 25 lakhs shall be effected except after an agreement for transfer is entered into between the transferor and the transferee. The Petitioner herein even according to the prosecution has sold his property through a separate registered sale deed for Rs. 15 lakhs only. Thus, there is absolutely no violation of Section 269UC of the Income Tax Act.

(b) Further, Section 269UC(2) also is not attracted as it states that no one should transfer the property unless he gets a no-objection certificate from the Appropriate Authority on the submission of a statement as contemplated u/s 269UC(3) of the Income Tax Act. The above provision is also not attracted since it applies only when Section 269 of the Income Tax Act can be invoked. Since the transaction of the Petitioner is less than Rs. 25 lakhs none of these provisions are attracted.

7. The learned Counsel further submitted that the Petitioner is an independent income tax Assessee and similarly the second accused, who is the wife of the first accused, is also an independent income tax Assessee and both of them have honestly shown the purchase and sale of the property concerned promptly in their respective income tax returns for the corresponding year. The learned Counsel further submitted that the Petitioner sold a separate and distinct immovable property valued at Rs. 15 lakhs and therefore, no offence is committed.

8. The learned Counsel submitted that the complaint proceeds on misconception that accused Nos. 1 and 2 are the owners of the entire property measuring 13,642 sq. ft. which is shown as "A" schedule in their respective sale deeds which has resulted in a miscarriage of justice.

9. On the aforesaid submissions the learned special public prosecutor for the income tax cases was heard.

10. The learned special public prosecutor submitted that since the undivided share of 500/22,000 of 13,642 sq. ft. each has been sold by the first and second accused, the provisions contained in Section 269UC is attracted. In support of the said contention, the learned special public prosecutor based reliance on the decision of the Apex Court reported in Appropriate Authority and Commissioner Income Tax Vs. Smt. Varshaben Bharatbhai Shah and Others, . In the said decision, the Apex Court has laid down as under (page 348):

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 48K, what has then to be seen is whether the apparent consideration for the property is less than the market value thereof by 15 per cent, 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. 37-1 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.

11. I have considered the said submissions made on either side and perused the materials available on record and the decisions relied upon by the learned Counsel for the Respondent.

12. In the complaint in paragraph 5, the complainant/Respondent has stated as follows:

13. Again, in paragraph 6, it is stated that accused Nos. 1 and 2 by two separate sale deeds, dated 28-3-2002, have sold the above mentioned property in favour of the accused No. 3 represented by the accused No. 4 herein for a total consideration of

Rs. 30 lakhs.

14. Again, in, in paragraph 9 of the complaint, it is stated that though two separate sale deeds have been executed by accused Nos. 1 and 2 in favour of accused No. 3 the property conveyed was a single unit measuring a total area of 13,642 sq. ft. as mentioned in schedule A or each sale deed. Therefore, the market value of the property as a single unit which was transferred by the accused Nos. 1 and 2 to the accused No. 3 was Rs. 30 lakhs.

15. In paragraph 11 also similar averments have been made. Thus, it could be seen that the complaint proceeds on the footing that accused Nos. 1 and 2 are the owners of the entire landed property measuring an extent of 13,642 sq. ft. comprised in T. S. No. 23, Block No 30 of Kottur Village bearing Corporation Door No. 7, 1st Main Road, Gandhi Nagar Adyar, Chennai-20. But at the same time, in the other paragraphs of the complaint, the complainant has stated that accused No. 1 by the registered sale deed No. 773 of 2002 dated 28-3-2002 has conveyed his undivided right, title and interest having a proportionate share 500/22,000 of 13,642 sq. ft. of the entire landed property. Similarly, it is stated that accused No. 2 on the same date, on 28-3-2002 by registered sale deed No. 774 of 2002 has transferred her undivided right, title and interest having a proportionate share 500/22,000 of 13,642 sq. ft. of the entire landed property.

16. Thus, it could be seen that there is some confusion in the mind of the complainant as to whether accused Nos. 1 and 2 are the owners of the entire extent of 13,642 sq. ft. or they are the owners of 500/22,000 of 13,642 sq. ft. each. It could be seen from the sale deed that accused No. 1 and accused No. 2 have purchased their respective share of 500/22,000 of 13,642 sq. ft. from their respective vendors. But in the sale deed the entire property of 13,642 sq. ft has been described in Schedule A and Schedule B, is the property conveyed under the registered sale deed No. 773 of 2002, dated 28-3-2002, standing in the name of accused Nos. 1 and 2 and it contains the description of the property, viz., 500/22,000 share of 13,642 sq.ft. purchased individually by the accused Nos. 1 and 2 and the same have been sold by them under the two independent sale deeds bearing Document No. 773 of 2002, dated 28-3-2002 and Document No. 774 of 2002, dated 28-3-2002.

17. Since individual undivided shares purchased by accused Nos. 1 and 2 have been dealt with by them under the aforesaid two sale deeds, it cannot be said that a single unit has been dealt with by them under two different sale deeds by splitting the single unit. Simply because, accused Nos. 1 and 2 happened to be the husband and wife, the prosecution seems to have been launched by clubbing two properties sold under two different sale deeds as a single unit, which, in the considered view of this Court, cannot be done. For example, if two 500/22,000 shares of 13,842 sq. ft. of the entire landed property had been sold by two individuals, who are not related to each other, whether the complaint could be filed and, in, considered view of this Court, such a complaint cannot be filed. When accused Nos. 1 and 2 are income tax

Assessee and they are two different legal entities in the eye of law, the purchases made by them under two sale deeds can be dealt with by them individually and as such the sales effected by them cannot be clubbed together and that it cannot be alleged that the single unit has been transferred under two sale deeds to get over the provisions of the Income Tax Act.

18. In the decision reported in [Appropriate Authority and Commissioner Income Tax Vs. Smt. Varshaben Bharatbhai Shah and Others](#), the Apex Court was dealing with a case, where co-owners had agreed to transfer their property rights and each co-owner was 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 and the facts of which are as follows:

19. On 12-8-1995 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 per cent, or more. Accordingly, a notice dated 6-11-1995, 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. This order was challenged at the writ-petition.

20. 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 was 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 of Gujarat upheld the said contention. The revenue preferred an appeal to the Apex Court. In the above factual background, the Apex Court has considered the issue and observed that what 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.

21. The Apex Court has pointed out that in that 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. 37-1 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. From that, the

Apex Court came to the conclusion that the consideration for such transfer was the sum of Rs. 47 lakhs. The Apex Court has pointed out that it is of no consequence that the second and third Respondents owned the immovable property as tenants-in-common that this is how they had shown their ownership in their income tax returns. On the aforesaid reasonings, the Apex Court reversed the judgment of the High Court holding 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, more than Rs. 25 lakhs and that, therefore, the provisions of Chapter XX-C would apply. The Apex Court further observed 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, their conclusion would have been the same for, looked at realistically, it was the said immovable property which was the subject of the transfer.

22. In the considered view of this Court the facts of that case are totally different from the facts of the case on hand. If in the light of the law laid down by the Apex Court, the facts of the case on hand are considered it could be seen that the immovable property dealt with by accused Nos. 1 and 2 have been purchased by them under two different sale deeds and the same has been shown in their respective income tax returns. Here, individual agreements have been entered into by accused Nos. 1 and 2 with accused No. 3 in respect of their individual shares. Therefore, the property that has been dealt with under the sale deed executed by accused Nos. 1 and 2 is not a single unit but two different undivided shares. Therefore, the legal principle laid down in Appropriate Authority and Commissioner Income Tax Vs. Smt. Varshaben Bharatbhai Shah and Others, is not applicable to the facts of this case.

For the aforesaid reasons, the criminal original petition is to be allowed. Accordingly, the criminal original petition is allowed quashing the complaint in EOCC No. 117 of 2005 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences), Egmore, Chennai-8. Connected criminal miscellaneous petition is closed.

5. The additional contention raised by the learned Special Public Prosecutor (income tax cases) is that the accused Nos. 3 and 4 in effect being one and the same entity and being the purchaser of the property, his purchase thereof in a sum above Rs. 25,00,000 would attract the application of Sections 269UC and 269UL(2) of the Act and hence, on his non-compliance with the requisites thereof, prosecution u/s 276AB will stand.

6. I am unable to accept such contention. When the purchase is of two independent units and two distinct persons holding the same in their individual capacity have effected sale, then, it would not be proper to club such two independent purchases and read the same as one transaction.

7. For the above said reasons, this criminal original petition shall stand allowed. The proceedings in EOCC No. 177 of 2005 on the file of the learned Additional Chief Metropolitan Magistrate (Economic Offences-I) Egmore, Chennai shall stand quashed. Consequently, the connected miscellaneous petition is closed.