(2000) 11 CAL CK 0001

Calcutta High Court

Case No: Writ Petn No. 1833 of 1993 15 November 2000

Lytton Hotel (P) Ltd.		APPELLANT
	Vs	
Appropriate Authority and Others		RESPONDENT

Date of Decision: Nov. 15, 2000

Acts Referred:

- Income Tax Act, 1961 - Section 269UD(2), 269UL(3)

Citation: (2001) 166 CTR 437

Hon'ble Judges: Sengupta, J; Court Sengupta, J

Bench: Division Bench

Judgement

Sengupta, J.

The petitioner in this writ application has challenged an order dated 29-7-1993, passed by the Appropriate Authority of Income Tax Department, Calcutta (respondent No. 1 herein), u/s 269UD(1) of the Income Tax Act, 1961 (hereinafter referred to as the said Act).

By the said impugned order it has been held by the respondents that there has been understatement of apparent consideration in the property in question being premises No. 14. 1, Sudder Street, Calcutta, and it was fit case to exercise pre-emptive purchase as laid down in chapter XX-C of the said Act.

2. The short fact of the case is that the respondent no. 5 being the present owner by and under an agreement in writing dated 21-5-1993, agreed to sell and the writ petitioner herein agreed to purchase the said property at consideration of Rs. 75,05 lakhs subject to existing tenancy and other terms and conditions as contained in the agreement. The said property is encumbered with the monthly tenancy created by the respondent No. 5 in favour of the proforma respondent nos. 6 and 7 who were once sought to be evicted unsuccessfully. The property in question is Wakf property. So the Joint Charity Commissioner, Vadodara Division, Gujarat, with whom the Wakf

is registered had to and indeed permitted to sell the said property by an order dated 17-8-1992, read with order dated 4-6-1993. The said order was passed at the instance of the respondent no. 5 permitting to sell the same at Rs. 75.05 lakhs to the petitioner. Before the said order was passed, it had been advertised in two newspapers inviting offers. Pursuant to the said advertisement the petitioner applied to the said Commissioner.

On or about 26-7-1993, a show-cause notice dated 21-7-1993, was issued by the respondent no. 1. The writ petitioner filed an objection to the said notice dated 21-7-1993. After having considered reply to the said show cause the aforesaid impugned order was passed.

3. Mr. Goutam Chakraborty, Senior Advocate, contends for petitioner that in the instant case show-cause notice pursuant to which the proceedings were initiated and the said impugned order passed contains no particulars or materials or reasons as to why the said property was proposed to be purchased by the respondent no. 1. There is not even mentioned therein that the property was being sought to be purchased for the reasons that are the requirement under the provisions of the said Act for such pre-emptive purchase as held by the Supreme Court in C.B. Gautam Vs. Union of India and Others,

The entire proceedings including the said impugned order are violative of the principles of natural justice and thus illegal, invalid and bad. In this connection he has relied on the following decisions :

Vysya Bank Ltd. Vs. Appropriate Authority of Income Tax and Others, read with Appropriate Authority of Income Tax and Others Vs. Vysya Bank Ltd. and Another, , Shreyas Builders and Another and Laxman Ganesh Tulshibaughwala and Others Vs. M.D. Kodnani and Others, , Jagdish Electronics (India) Pvt. Ltd. and Another Vs. Appropriate Authority, Income Tax and Others, , Lily Shavak Doctor v. Union of India 1995 Tax LR 22 (Guj). He further contends condition precedent for initiation of any proceedings for purchase of immovable property u/s 269UD(1) of the said Act is that the appropriate authority has to be satisfied that there is a significant undervaluation by 15 per cent of more of the market value of the property and that such undervaluation has been with a view to evade tax. The show-cause notice issued in the instant case would ex facie demonstrate that this condition precedent had not been satisfied in the instant case. There is no observation nor allegation that there was any undervaluation of the property by 15 per cent or more of the market value. Moreover, there was also no allegation therein that there was any alleged undervaluation of the property and that too with a view to evade tax. In the premises the respondent no. 1 had no right, authority or jurisdiction to initiate the purported proceedings and pass the said impugned order. As a matter of fact even in the impugned order there is no finding whatsoever that the alleged understatement of the apparent consideration was made by the concerned parties in agreement with an intent or view to evade tax. So, the impugned order is

unsustainable as the condition precedent therefore was not satisfied. In this connection he has placed reliance on following decisions :

(i) Vysya Bank v. Appropriate Authority of IT Department (supra);

(ii) Hotel Mardias Pvt. Ltd. Vs. Union of India and Others, and

(iii) Ashok Kumar Sood Vs. Deputy Commissioner of Income Tax and Others,

4. His next contention is that there cannot be any undervaluation of the apparent consideration in the instant case as such respondent no. 1 had no right, authority and jurisdiction to pass impugned order. In this case the owners of the said property the respondent No. 5, is a Wakf which has been registered with the Joint Charity Commissioner, Vadodara Division, in the State of Gujarat. The permission was granted by the Commissioner on the application of the charitable trust to sell the property to the petitioner before the order was passed. The intended sale was advertised in the two newspapers inviting offers from the public to have the best market price. Thereafter the order was passed u/s 36 of the Bombay Public Trust Act, 1992, at the apparent consideration of Rs. 75,05 lakhs "as it is basis". Therefore, there cannot be any presumption that there was any attempt to evade tax as the order has been passed by the statutory authority after having accepted the aforesaid price. Hence, in this type of cases the power to purchase the property u/s 269UD of the said Act cannot be exercised. He placed reliance in this context on the following decisions :

(i) Om Shri Jigar Association v. Union of India (1995) 209 ITR 608 ; and

(ii) Madhukar Sunderlal Sheth and others Vs. S.K. Laul and others,

However, the appropriate authority did not consider at all the aforesaid position of the law.

5. The impugned order has been passed solely relying upon a purported valuation report dated 21-7-1993, of the Superintending Engineer. This valuation report is fabricated and/or tailor-made to make out a case of undervaluation of the said property. The writ petitioner requested for furnishing copy of the valuation report but the same was not supplied. He contends that the valuation report cannot be relied on otherwise as the authority concerned has ignored while valuing the property, well-settled principle relating to valuation of immovable property situated in a city where rent control restrictions are in force, and was based on assumption and presumption. The property in question is fully tenanted. In this context Mr. Chakraborty has placed reliance on the following decisions :

(i) C Commissioner of Income Tax Vs. Smt. Ashima Sinha,

(ii) Commissioner of Income Tax Vs. Panchanan Das, and

(iii) SUBHKARAN CHOWDHURY AND OTHERS Vs. INSPECTING ASSISTANT COMMISSIONER OF Income Tax, ACQUISITION RANGE I, AND OTHERS.,

He contends that if rental or yield method is adopted while valuing the said property then the apparent consideration would have been far in excess of the fair market value of the said premises on date. Moreover, the impugned order of pre-emptive purchase has been passed on extraneous materials.

Since the order is illegal, invalid, null and void for the reasons as stated above it is incumbent upon the appropriate authority respondent no. 1 to issue "No objection certificate" within such period that this Hon''ble court deems fit and proper. There is no question of the matter being remanded to the respondent No. 1 in the facts and circumstances of the instant case for any reason whatsoever. In this connection he has placed reliance on the above decision rendered Vysya Banks case (supra).

Regarding locus standi of the writ petition Mr. Chakraborty has also drawn my attention to various authorities on this point. However, this point is not seriously placed by the respondents.

6. Learned lawyer for the respondent argues that the valuation determined by the Charity Commissioner at Rs. 75.05 lakhs is minimum and/or reserve price, so far market value of the said property should be more than reserve price. Under the provision of the said Act there is no guideline and/or basis for arriving at valuation. So the authority concerned after having taken assistance of the qualified engineers has determined the aforesaid valuation. Therefore, there is no inconsistency in the revision of fair market value by the Superintending Engineer. The basis of rental method while valuing the property is not maintainable under the law. The Superintending Engineer has considered the factor that the property is tenanted one and in his valuation report it has been reported by him that the fair market value of the unencumbered property is Rs. 226.45 lakhs, whereas the fair market value of the encumbered property has been held to Rs. 111.11 lakhs. Under those circumstances the writ petition should be dismissed.

7. The show-cause notices were duly issued to the transferors, tenant and the transferee concerned and as such they were given opportunity of being heard. All the interested parties including the writ petitioner filed their written submissions. After having considered their submissions and the report the appropriate authority has come to a fact finding. It is not open for the writ court to upset the fact finding of the appropriate authority as to understatement of the valuation of the property. It would appear the difference between the valuation arrived at by the engineers and that of mentioned in the agreement for sale is 58 per cent. So the same is beyond statutory limit of percentage. This apparent consideration has been worked out correctly as per provision of section 269UA(b) of the Income Tax Act, 1961, as well as rule 48-I of the Income Tax Rules, 1962. In support of his submission learned lawyer for the respondents relies on the decision of the Supreme Court in In the

Matter of the Appropriate Authority and Another Vs. Smt. Sudha Patil and Another, Under such circumstances this writ petition is liable to be dismissed.

8. Having heard the learned counsel for the parties in this case I am to examine validity and legality of two things broadly viz., the show cause issued for preemptive purchase u/s 269UD and the final order for pre-emptive purchase on their legality.

9. In the language of section 269UD there is no provision for mentioning the basis and/or tentative finding for concluding that apparent consideration in the agreement is understated by 15 per cent or more of the market price and such understatement is designed to evade taxes. A number of judicial pronouncements of various High Courts and the Supreme Court cited by Mr. Chakraborty have decided that the show-cause notice itself would speak tentative findings and/or basis that the apparent consideration in the agreement for sale is understated by 15 per cent or more of the market value and the material and/or basis on which the tentative conclusion is arrived at, should also be supplied. The summation of the ratio decided by all the cases appears to be that the aforesaid compliance is necessary to conform to principle of natural justice so that the person interested including the intending purchaser can rebut producing their materials.

10. In the case of Vysya Bank Ltd. v. Appropriate Authority of Income Tax & Ors. (supra) it was held amongst others that show-cause notice must spell out the basis for such presumption or such tentative findings and also the materials on which such tentative findings had been arrived at.

11. I have examined the show-cause notice and I agree with Mr. Chakrabortys argument that in the impugned show-cause notice did not mention any tentative findings and/or basis. However, I feel because of the omission as above the initiation of the proceedings is not . vitiated inasmuch as the petitioner had produced all materials to rebut the presumption of undervaluation in anticipation before the appropriate authority. Therefore, complaint as regard violation of natural justice at earlier stage is not entertained by me at this stage. It is settled position of law that compliance of natural justice is called for when person aggrieved, is affected by non-compliance. In this case in my view the petitioner is not affected by omission of recording tentative findings or non-mentioning of basis of materials.

12. Now I am to examine the final order of pre-emptive purchase u/s 269UD. The leading case on this subject is C.B. Gautams case (supra) which has laid down the broad principle which are to be followed in the proceedings under this provision. It has been held amongst others in the said case by the Hon''ble Supreme Court that there must be a satisfaction of the authority concerned that there is an understatement in the apparent consideration by 15 per cent or more of market price and further the same has been done in order to evade tax.

13. From careful perusal of the impugned order it appears to me that no satisfaction has been recorded as to the undervaluation and also evasion of taxes. Upon analysis

of all the judgments cited at the Bar it appears to me in this case on this point two things are to be examined(i) if there is any basis to come to conclusion that the apparent consideration is less than the market value by 15 per cent or above, and (ii) such undervaluation has been made in order to evade taxes or not.

14. To decide the first question it appears to me that the appropriate authority has relied on a valuation report prepared by the departmental engineer. The method of the market valuation arrived at by the departmental engineer is comparable sale instances though the property is tenanted one.

Though Mr. Chakraborty questioned the report as not being genuine and tailer-made. However, having considered explanation in affidavit-in-opposition I hold there was irregularity in signing the report by the competent official. Such irregularity is avoidable and ignorable which is hereby done.

15. The Bench decision of this court in CIT v. Panchanan Das (supra) has held inter alia, that where the property is tenanted and/or encumbered it is correct to apply rental method to value a particular property for exercise of pre-emptive purchase. This Bench decision followed previous Bench decision in CIT v. Smt Ashima Sinha (supra). This decision also approved of yield or rental method for the valuation in case of tenanted property. Late Justice Sabyasachi Mukherjee (as His Lordship then was) in his judgment in Subhkaran Chowdhurys case (supra) it has been held amongst other that the valuation of the property according to prevalent law has to be not on the basis of the value of the land but on the rental method.

16. It appears that the departmental engineers while valuing the property have compared this premises with other premises in the same area and localities. Such a method is not accepted by the judicial pronouncement of this court as quoted above. Almost similar view has been taken in the Gujarat High Court judgment rendered in case of Ketki Land Holdings Pvt. Ltd. Vs. Appropriate Authority and Another, that comparable price is not the basis where the property is encumbered. Another Calcutta decision rendered in case of CONTROLLER OF ESTATE DUTY, WEST BENGAL Vs. RADHA DEVI JALAN., has held amongst others that if a property burdened with tenants and the income of the property controlled by statute, such control was bound to react on the value of the property and the application of land and building method could not be proper method to apply.

17. So, relying on the aforesaid decisions and accepting the argument of Mr. Chakraborty I hold that the basis of the valuation is not legally acceptable of course the learned lawyer for the respondent has tried to impress upon me that the valuation done by the departmental authority is the correct valuation and that is the fair market value. Such argument is not acceptable in view of the aforesaid judicial pronouncements. Therefore, I set aside this valuation. It the very basis or material for having presumption is legally unsustainable, entire exercise and/or proceedings for pre-emptive purchase is bound to fall through.

18. Even the said valuation apart from being unacceptable under law. is wholly unwarranted on the facts and circumstances of this case there is no scope for any undervaluation logically, therefore, there cannot be any scope for evasion of tax. The property was not sold upon the bargaining of private individuals viz ., vendor and vendee. This property belonged to the trust and this property could not be sold easily like other properties.

Therefore, it cannot be held that the price fixed by the Joint Charity Commissioner to be undervalued or aiming at to evade tax. In my view the respondent-authority while doubting in the bona fide of agreed apparent consideration between parties should not approach hypothetically or pedantically, but realistically. To put it specifically the respondent authority should note factual aspect which is above board and importantly amenable to public scrutiny because of public notification. Apparent undervaluation per se always is not factor to presume the transaction being designed to evade tax which is sine qua non to exercise power u/s 269UD of Income Tax Act. There are instances of sale where vendor sometimes is forced to sell a property under distress and pressing need or at even a throwaway price much lesser than prevalent market price. Here all the facts and materials were produced before the respondents. Sadly enough the respondents did not consider it the same at all. On the contrary they casually passed order exercising pre-emptive right to purchase. The respondents palpably failed to meet fundamental requirement under law which is akin to breach of principle of natural justice, by not recording reasons and satisfaction in the impugned order the understatement as to valuation is aimed at to evade tax.

19. My abovementioned views are based on the following several judicial pronouncements as cited by Mr. Chakraborty.

In C.B. Gautams case (supra) it is observed by the Supreme Court amongst other than order u/s 269UD(2) must be accompanied by the reasons recorded in writings.

In the following decisions it has consistently been held that this order is unsustainable if the above satisfaction which. is condition precedent is not recorded :

(i) Vysya Bank v. Appropriate Authority (supra) ;

(ii) Hotel Mardias (P) Ltd. v. Union of India (supra); and

(iii) Ashok Kumar Sood v. Dy. CIT (supra).

On that score also the impugned order is not sustainable. Therefore, the impugned order exercising pre-emptive purchase is set aside. Since there is no basis and/or substance for exercising the right of pre-emptive purchase as already observed by me I direct the respondent authority should issue No Objection Certificate in terms of section 269UL(3) of the said Act. Following are the authorities which ruled such course of action is permissible.

(i) Hari Krishna Kanoi and Another Vs. Appropriate Authority and Others,

(ii) Ketki Land Holding (P) Ltd. v. Appropriate Authority (supra);

(iii) Manik Chand Sethia Vs. Union of India (UOI) and Others, and

(iv) Appropriate Authority and others Vs. Mass Traders Pvt. Ltd. and others,

20. The rule issued is made absolute. The respondent no. 5 shall issue this certificate within four weeks from the date of communication of this order. The petitioner is entitled to costs of this application assessed at 100 gms. to be paid by the respondents.

Stay of the operation of the order is prayed for and the same is granted for a period of fortnight.