(2000) 11 DEL CK 0092

Delhi High Court

Case No: Civil Writ Petition No. 2814 of 1986

Bhatia Apartments (Pvt.) Ltd.		APPELLANT
	Vs	
Union of India and Others		RESPONDENT

Date of Decision: Nov. 23, 2000

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10
- Income Tax Act, 1961 - Section 2(47), 269(1), 269(2), 269A, 269AB
- Income Tax Rules, 1962 - Rule 48L, 48L(2)
- Transfer of Property Act, 1882 - Section 53A

Citation: (2002) 172 CTR 277 : (2001) 252 ITR 244 : (2003) 128 TAXMAN 585

Hon'ble Judges: Arun Kumar, J; A.K. Sikri, J

Bench: Division Bench

Advocate: Anoop Sharma and R.K. Raghavan, for the Appellant; G.S. Sistani, R.D. Jolly and Ajay Jha, for the Respondent

Judgement

A.K. Sikri, J.

The facts of this case revolve in a narrow compass and are not disputed. These facts may be stated first, before coming to the controversy involved in this writ petition.

2. An agreement dated September 30, 1986, was entered into between the petitioner, on the one hand, and respondents Nos. 4 to 6, on the other hand. By the said agreement, respondents Nos. 4 to 6 agreed to sell the property bearing No. B-23A, Friends Colony (West), New Delhi, measuring about 350 sq. yds. The total sale consideration was fixed at Rs. 16,50,000. Out of this, a sum of Rs. 1,50,000 was paid by three pay orders all dated September 25, 1986. The balance amount of Rs. 15,00,000 was to be paid by the petitioner to respondents Nos. 4 to 6 at the time of registration of the sale deed. Physical possession of the property in question was

also to be handed over by respondents Nos. 4 to 6 to the petitioner at the time of execution and registration of the sale deed.

3. As on September 30, 1986, Chapter XX-A of the Income Tax Act, 1961 (hereinafter referred to as "the Act", for short) held the field. This Chapter titled "Acquisition of immovable properties in certain cases of transfer to counteract evasion of tax" lays down various provisions as per which "certain transactions" relating to immovable property are to be registered with the competent authority and where the competent authority has reason to believe that any immovable property of the fair market value exceeding Rs. 1 lakh has been transferred by any person to another person for an apparent consideration which is less than the fair market value of the property and that the consideration for such transfer as agreed between the parties has not been duly stated in the instrument of transfer with the object of facilitating the reduction or evasion of the liability of the transferor to pay tax, etc., the competent authority may initiate acquisition of such property and the manner in which the property can be acquired is enumerated in different provisions of Chapter XX-A.

4. Significantly, Chapter XX-C was inserted by the Finance Act, 1986, with effect from October 1, 1986, vide Notification No. S.O. 480(E), dated August 7, 1986 (see Commissioner of Income Tax Vs. Amar Transport Services, . This Chapter deals with "Purchase by Central Government of immovable properties in certain cases of transfer". Section 269U which is the first section of this Chapter clearly lays down that the provisions of this Chapter shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different areas. By notification dated August 7, 1986, the appointed date was fixed as October 1, 1986. Section 269UC under this Chapter lays down certain restrictions on transfer of immovable property and specifically stipulates that no transfer of any immovable property of value exceeding Rs. 5 lakhs or as may be prescribed, shall be effected except after an agreement for transfer is entered into between the person who intends to transfer immovable property (vendor) and the person to whom it is proposed to be transferred (vendee) in accordance with the provisions of Sub-section (2) at least within three months from the intended date of transfer. It further prescribes that the agreement by which the immovable property, the market value of which exceeds Rs. 5 lakhs is intended to be transferred shall be reduced in writing in the prescribed form (i.e., Form No. 37-I) and the same shall be furnished to "appropriate authority" in such manner and within such time as may be prescribed. Rule 48L of the Income Tax Rules prescribes the manner in which and the time within which the statement has to be furnished. Form No. 37-I has been prescribed for this purpose.

5. The petitioner submitted the statement in Form No. 37-I before the Income Tax authority/appropriate authority, on October 13, 1986. Thereafter, it received impugned order dated December 15, 1986, passed by the "appropriate authority"

ordering the purchase of the property in question by the Central Government at an amount equal to the apparent consideration of the transfer of the said property, i.e., Rs. 16.5 lakhs. The petitioner has challenged this order in this writ petition.

6. The main premise on which the present petition is filed is that since the agreement in question is dated September 30, 1986, the provisions of Chapter XX-C which contain Sections 269UC and 269UD, would not be applicable inasmuch as the provisions of this Chapter came into force only with effect from October 1, 1986, and would not govern the transaction in question which is dated September 30, 1986. The contention raised in the writ petition is that as on September 30, 1986, Chapter XX-A was applicable to transactions regarding the immovable property and Therefore the impugned order passed applying the provisions contained in Chapter XX-C is without jurisdiction and a nullity.

7. Learned counsel for the petitioner, during the course of arguments submitted that even the agreement of sale dated August 30, 1986, was a "transfer" of an immovable property as per Clause (b) of Sub-section (1) of Section 269AB which falls in Chapter XX-A. In support of this proposition, reliance was placed on the following judgments :

(i) Sanjeev Sethi Vs. Union of India and Others,

(ii) Multi Rise Towers (P.) Ltd. Vs. Appropriate Authority and Others, and

(iii) Sunshine Travels and Tours P. Ltd. and another Vs. Union of India and others,

8. The respondent/income tax authorities filed their counter affidavit in which it is stressed that the provisions of Chapter XX-C would be applicable to the transaction in question. It is not denied that Chapter XX-C of the Act is effective from October 1, 1986, and would be applicable to the transactions taking place after September 30, 1986. However, what is sought to be contended is that the agreement to sell dated September 30, 1986, was not a transaction relating to "transfer" of property as defined in Section 269A(h) of the Act and, Therefore, the agreement dated September 30, 1986, was of no consequence. During the arguments, Mr. R. D. Jolly, learned counsel appearing on behalf of the Revenue/income tax authorities sought to justify this stand by making the following submissions :

A. The agreement to sell was for a total consideration of Rs. 16.5 lakhs out of which only a sum of Rs. 1.50 lakhs was paid at the time of entering into the agreement to sell dated September 30, 1986. Since the balance consideration was to be paid at the time of registration of the sale deed and possession was also to be handed over at that time, transfer of property did not take place on September 30, 1986, but after October 1, 1986. A reference was made to the definition of transfer as per Section 269UA(f). Learned counsel also submitted that the expression "transfer" is defined in Section 2(47) as well as Section 269A(h) and it was submitted that it is clear from these definitions that unless the agreement was coupled with possession, it cannot

be said that any "transfer" of property had taken place vide instrument dated September 30, 1986. By placing reliance on the language of rule 48L of the Income Tax Rules, 1962, it was submitted that even such type of agreements which were entered into before October 1, 1986, but where no possession had been given, were governed by Chapter XX-C since the statement as per rule 48L was to be furnished in the prescribed form in respect of these agreements also.

B. It was also contended that in fact the petitioner accepted the position that the provisions of Chapter XX-C were applicable to the transaction in question and that is why the petitioner itself submitted Form No. 37-I to the Income Tax authorities on October 13, 1986. By referring to the judgment of this court in Tanvi Trading and Credits P. Ltd. and Others Vs. Appropriate Authority and Others, it was contended that once such application was submitted then only two options were left before the "appropriate authority" namely, either to pass an order u/s 269UD of the Act for purchase of the property or to issue no objection certificate under Chapter XX-C and the "appropriate authority" had no other option and could not even go into the validity of the agreement. Learned counsel also relied upon the recent judgment of the apex court in the case of DLF Universal Ltd. Vs. Appropriate Authority and Another, for the proposition that since the agreement for transfer has to be reduced in writing in Form No. 37-I the date of agreement had to be treated when this form is submitted and Therefore the date of agreement for transfer had to be treated as October 13, 1986, when the form was in fact submitted and the provisions of Chapter XX-C thus clearly became applicable in the instant case.

9. It is clear from the aforesaid narration of facts and the submissions made by both the parties that the question to be determined is as to whether the provisions of Chapter XX-C are applicable to the transaction in question and this transaction would be governed by Chapter XX-A of the Act.

10. As noticed above, there is no dispute that the agreement to sell is dated September 30, 1986, and as on that date the provisions of Chapter XX-C had not come into existence. Therefore, if the transaction in question, as evidenced by agreement dated September 30, 1986, is covered by the provisions of Chapter XX-A of the Act, then naturally the provisions of this Chapter would apply and by necessary implications applicability of the provisions of Chapter XX-C shall stand excluded. In order to determine this aspect it needs to be examined whether the transaction in question was required to be registered under the provisions of Section 269AB of the Act. Section 269AB of the Act which falls under Chapter XX-A reads as under :

"269AB. Registration of certain transactions.--(1) The following transactions, that is to say,--

(a) every transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature

referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882), and

(b) every transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement of whatever nature) whereby a person acquires any rights in or with respect to any building or part of a building (whether or not including any machinery, plant, furniture, fittings or other things therein) which has been constructed or which is to be constructed (not being a transaction by way of sale, exchange or lease of such building or part of a building which is required to be registered under the Registration Act, 1908 (16 of 1908)),

shall be reduced to writing in the form of a statement 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.

(2) Every statement in respect of a transaction referred to in Sub-Section (1) shall-

(a) be in the prescribed form ;

(b) set forth such particulars as may be prescribed ; and

(c) be verified in the prescribed manner,

and registered with the competent 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."

11. We may, at this stage, also notice the definition of "transfer" as contained in Section 269A(h) (under Chapter XX-A) which reads as under : " ''transfer'',-

(i) in relation to any immovable property referred to in Sub-clause (i) of Clause (e), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882).

Explanation.--For the purposes of this Sub-clause, a lease which provides for the extension of the term thereof by a further term or terms shall be deemed to be a lease for a term of not less than twelve years if the aggregate of the term for which such lease has been granted and the further term or terms for which it can be so extended is not less than twelve years ;

(ii) in relation to any immovable property of the nature referred to in Sub-clause (ii) of Clause (e), means the doing of anything (whether by way of transfer of shares in a co-operative society or company or by way of any agreement or arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, such property."

12. Sub-clause (i) deals with transfer in relation to any immovable property by way of sale or exchange or lease for a term of not less than 12 years and includes allowing the possession of such property to be taken or retained in part performance of the contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882). In this case, admittedly the agreement to sell cannot be treated as either sale or exchange or lease for a term of not less than 12 years. There is no part performance as contemplated in Section 53A of the Transfer of Property Act, 1882, also as possession of the property was not taken over on September 30, 1986. Relevant for our purpose would be Clause (ii) which defines "transfer" in relation to immovable property as the doing of anything which has the effect of transferring or enabling the enjoyment of such property. Section 269AB which deals with registration of certain transactions as mentioned in Sub-section (1) also has two parts, namely, Clause (a) and Clause (b). Clause (a) deals with transactions involving the allowing of possession of any immovable property to be taken or retained in part performance of the contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882. However, Clause (b) is of much wider import and within its sweep includes all other transactions whereby a person acquires any rights in or with respect to any building or part of a building which has been constructed or which is to be constructed not being a transaction by way of sale, exchange or lease of such building or part of a building. Therefore, under Clause (b) even those transactions which are not by way of sale, exchange or lease or even relating to part performance as per Section 53A of the Transfer of Property Act, 1882, would be covered whereby a person acquires any right in or with respect to any building or part of the building. Such a right as mentioned in Section 269A(h)(ii) is the one which enables the enjoyment of property. The provisions of Section 269AB came up for interpretation before this court in the case of Sanjeev Sethi Vs. Union of India and Others, , in which one of us (Arun Kumar J.), was a party to the Bench. That was a case where the owner of the property entered into an agreement in the year, 1979, under which the developer had to put up a multi-storeyed residential area. A series of events, involving litigations took place subsequently. An order also came to be passed u/s 269UD(1) under Chapter XX-C ordering the purchase of a flat by the Central Government : this was challenged before this court. This court held that, the sale of the flat leading to the impugned order u/s 269UD was in effect, giving effect to the agreements of the year 1979 and, Therefore, Chapter XX-C was not applicable to the transaction. All the subsequent events which happened after the year 1979, were traced to the agreement of the year 1979, though another builder had stepped into the shoes of the original builder, but the right to the allotment of the flats under the earlier agreement continued to exist. Further it was held that since Chapter XX-C was not attracted, rule 48L also was not applicable and that the said rule had no retrospective operation and would not govern an agreement entered into prior to October 1, 1986 (the date when Chapter XX-C came into force), "specially to such cases where the provisions of Chapter XX-A were applicable like the present case".

13. This High Court had occasion to deal with the same question in the case of Sunshine Travels and Tours P. Ltd. and another Vs. Union of India and others, . The court interpreted the definition of "transfer" as occurring in Section 269A(h) of Chapter XX-A and Section 269UA(f) of Chapter XX-C. The contention of the Revenue was the same as advanced in this case which was noted in the following words "the Revenue, however, contends that the transfer should be a real transfer and a mere agreement to sell is not a transfer and if the agreement has not fructified into the execution of a sale deed before October 1, 1986, Section 269UC will be attracted". This contention of the Department after detailed discussion relating to the concept of "immovable property" as well as the concept of "transfer" as contained in the aforesaid provisions of Act, was rejected. The relevant portion of the said judgment, dealing with this discussion, is reproduced below (page 756) :

"The right with respect to a building to be constructed created under a transaction, as is referred to in Section 269AB(1)(b) being an immovable property is dealt with in Section 269A(h)(ii); in relation to such a right (i.e., to say, in relation to such an immovable property), transfer means, inter alia, the doing of anything which has the effect of enabling the enjoyment of such property. In other words, if under an agreement, a right is created with respect to a building to be constructed enabling the enjoyment of the said building, the agreement is considered a ''transfer''. The very doing of anything which has the effect of enabling the enjoyment of a building to be constructed, under a transaction, has been brought into the control of Chapter XX-A. The liability created by Chapter XX-A gets attached to such a transaction. The very transaction of that nature incurs the liability, which any other transfer incurs under Chapter XX-A.

Thus, the transaction which involves transfer of a right enabling the transferee to enjoy the building to be constructed becomes a statutory transfer for purposes of Chapter XX-A and such a ''transfer'' is exposed to the statutory steps contemplated by Section 269C. If there has been an under valuation of the apparent consideration, the competent authority may initiate proceedings for the acquisition of the property under Chapter XX-A. Section 269D provides for issuance of a preliminary notice, within nine months of the registration of the instrument of transfer under the Registration Act or u/s 269AB. After this period of nine months, power to initiate proceedings under Chapter XX-A ceases. Other provisions provide for the filing of objections to the notice and hearing of objections, making an order of acquisition, filing of an appeal and further appeal against the order, vesting of property in the Central Government, etc. Chapter XX-A is a self-contained code governing these ''transfers'' as defined in Section 269A(e).

The difficulty of understanding the concept of ''transfer'' as defined in Section 269A(h), is the difficulty due to the abstract rights covered by the statutory definitions. If the scope of Chapter XX-A becomes dear and a transaction falls within its net, no argument is needed to conclude that Chapter XX-C would not govern such

a transaction, provided the transaction is prior to the date of the coming into force of Chapter XX-C.

The width of the relevant terms referred to in these two Chapters, is almost the same. The term ''immovable properties'' is defined in Section 269UA(d) ; Sub-clause (ii) is on par with Section 269A(e) ; similarly, the concept of ''transfer'' defined as per Section 269UA(f) in Chapter XX-C is broadly similar to the language employed by Section 269A(h) in Chapter XX-A. The law became more stringent under Chapter XX-C, as compared to the provisions of Chapter XX-A.

Any law which operates as a restriction on the rights of persons has to be confined to operate strictly within the area sought to be covered by the language of the said law. If, by the time Chapter XX-C came into force, there has been already a transaction resulting in the ''transfer'' as defined, the court cannot read Chapter XX-C so as to make it retrospective to operate on the said transaction or ''transfer''. The term ''transfer'' has to be considered in the light of the provisions operating at the time of the ''transfer''.

If a ''transfer'' falling under Chapter XX-A has not been subjected to any acquisition proceedings under the said Chapter, the immunity accrued to such a transfer under the statute cannot be easily defeated by enlarging the scope of subsequently enacted Chapter XX-C, when the wording of Chapter XX-C clearly and unambiguously does not purport to operate on the earlier transactions, Rights and liabilities created or incurred under a prior law are always considered as continuing to exist, unless the subsequent law has manifestly expressed a contrary intention. Learned counsel for the petitioners advanced a broader proposition to the effect that Chapter XX-C is not made retrospective so as to operate on all pre-existing agreements. We do not think it is necessary for us to consider this proposition, in view of our understanding of the statutory term ''transfer'', as defined in the two Chapters XX-A and XX-C. If the transactions reflected by the two agreements before us are ''transfers'' as defined in Chapter XX-A, then the provisions of the said Chapter would have already operated on the two agreements, leaving nothing for the application of the provisions of Chapter XX-C. The main contention of the Revenue is that, there were no ''transfers'' earlier to the bringing into force of Chapter XX-C and the provisions of Chapter XX-C would govern all ''transfers'' that take place after the said Chapter came into force ; on this there should not and cannot be any doubt, because Section 269UC says that no ''transfer'' shall be effected except, as stated in the said provision. But, if the ''transfer'' has already been effected, this provision cannot operate on it. As already found by us, the term ''transfer'' and referred to here, is not a transfer as ordinarily understood and this term is not confined to the ''transfers'' referred to in the Transfer of Property Act. The term has a wider connotation-both u/s 269UA(f) and Section 269A(h), read with the relevant definitions."

14. To the same effect is the judgment of the Calcutta High Court in the case of Multi Rise Towers (P.) Ltd. Vs. Appropriate Authority and Others,) . This judgment relies upon the case of Capt. Sanjeev Sethi [1952] 195 ITR 338 decided by this court.

15. In view of the mandate laid down in the aforesaid judgments it is clear that the transaction in question evidenced by an agreement dated September 30, 1986, is the one which is covered by the provisions of Section 269AB of the Act which falls under Chapter XX-A and, Therefore, the provisions of Chapter XX-A would be attracted in this case. In view of this conclusion, the argument of the Revenue that the transaction falls within the provisions of Chapter XX-C has no merit.

16. Once we arrive at the conclusion that the provisions of Chapter XX-A of the Act would be applicable to the transaction in question, the act of submitting the application in Form No. 37-I of the Act would be inconsequential. If the provisions of Chapter XX-C are not applicable what the petitioner did was not required under the law and any bona fide mistake of law cannot bind the appellant and the Department cannot take advantage of such wrong inasmuch as neither there is any estoppel against law nor by agreement jurisdiction can be conferred upon the authority which, otherwise, lacks inherent jurisdiction.

17. It may be pointed out at this stage that reference was also made to Clause (b) of Sub-rule (2) of rule 48L as per which the statement in the prescribed Form No. 37-I has to be filed with the "appropriate authority" before the expiry of fifteen days from the date on which the provisions of Chapter XX-C come into force in the areas other than the areas specified in Clause (a) of Sub-rule (2) and on that basis it was sought to be argued that the intention was to apply rule 48L even in those cases where an agreement was entered into before October 1, 1986. We are nipping this argument in the bud inasmuch as no such intention is discernible from reading of Sub-rule (2) of rule 48L. Moreover, the provisions of the rule cannot be contrary to the mandate of the section in the enactment.

18. The judgment of the Supreme Court in the case of DLF Universal Ltd. Vs. Appropriate Authority and Another,) as cited by the Revenue is also of no avail. That was a case where the court was interpreting the meaning of "agreement for transfer" as occurring under Chapter XX-C and it was held that the agreement for transfer means statement in Form No. 37-I. It was a case where the provisions of Chapter XX-C were applicable and were being interpreted. The question posed before the court did not relate to the very applicability of Chapter XX-C. By this time it is abundantly clear that in the instant case, the question posed is entirely different, namely, whether provisions of Chapter XX-A or those of Chapter XX-C are applicable. Such a question never fell for determination in the aforesaid judgment. Therefore, this case would not advance the submission of the respondents.

19. Before we conclude, there is yet another aspect which we need to decide in this petition. The petitioner had filed this petition challenging the action of the Income

Tax authorities who were arrayed as respondents Nos. 1 to 3. However, during the pendency of the writ petition, respondents Nos. 4 to 6 who were the vendors of the property in question got themselves imp leaded as respondents Nos. 4 to 6 by moving an application under Order I, rule 10 of the Code of Civil Procedure. Their grievance is that in view of the litigation between the petitioner and respondents Nos. 1 to 3, they were deprived of the balance sale consideration of Rs. 15 lakhs and Therefore, they may be granted interest at the commercial rate either by the petitioner or by the "appropriate authority". It may be stated at this stage that by order dated December 23, 1986, impugned decision dated December 15, 1986, was stayed. Thereafter, on January 27, 1987, further order was passed to maintain status quo in respect of the property as amongst the parties. Respondents Nos. 4 to 6 had moved C. M. No. 1951 of 1999 praying for modification of order dated January 27, 1987, and seeking direction to the petitioners to pay the sum of Rs. 15 lakhs as condition of stay. The order dated March 19, 1991, was passed directing the petitioner to deposit the amount of Rs. 15 lakhs out of which a sum of Rs. 13.50 lakhs was paid to respondents Nos. 4 to 6. This amount was received by respondents Nos. 4 to 6 on November 1, 1991. Therefore, in these circumstances, respondents Nos. 4 to 6 have prayed for payment of interest at 24 per cent, per annum from October, 1986, till November, 1991, on the amount of Rs. 15 lakhs and from December, 1991, till date on the amount of Rs. 1,50,000. Learned counsel for the respondents Nos. 4 to 6 referred to the order dated January 27, 1987, wherein the court had stated that the question of payment of interest would be taken into consideration and the issue decided appropriately at the time of disposal of the writ petition. It was also submitted that since the value of the property had increased tremendously during the intervening period and the payment of interest would be justified on this ground as well. After giving our due consideration to this submission we are not inclined to award any interest to respondents Nos. 4 to 6. It was not the fault of the petitioner because of which the petitioner delayed the payment of balance sale consideration of Rs. 15 lakhs to respondents Nos. 4 to 6, in fact, the circumstances were created because of the impugned order passed by the Income Tax authorities. As far as the petitioner is concerned the amount was paid after order dated March 19, 1991, was passed to this effect. Earlier there was a status quo order dated January 27, 1987. Therefore, the petitioner cannot be blamed for delayed payment to respondents Nos. 4 to 6. On the other hand, as far as the Income Tax authorities are concerned they were acting under the bona fide belief that the provisions of Chapter XX-C are applicable and thus the impugned order was passed. In view of the above, we reject the request of respondents Nos. 4 to 6 for award of the interest.

20. The conclusion which follows from the aforesaid discussion is that the impugned order dated December 15, 1986, which is passed u/s 269UD of the Act, falling under Chapter XX-C is bad in law inasmuch as the provisions of this Chapter do not apply to the transactions in question. Rule is made absolute. Impugned order dated

December 15, 1986, is set aside. In the facts of the case there will be no order as to costs.