IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 19-7-1995

SPECIAL CIVIL APPLICATION NO.4475 OF 1995

For Approval and Signature

THE HON'BLE MR. JUSTICE C.K. THAKKAR
AND
THE HON'BLE MR. JUSTICE RAJESH BALlA

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lords..

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4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

Mr.J.P.Shah, Advocate for the petitioner
Mr.B.J.Shelat, Advocate for M/s R.P.Bhatt & Co. for the respondent

Coram: (C.K.THAKKER & RAJESH BALIA JJ)
(Date: 19th July 1995)

ORAL JUDGMENT:- (Per Thakker,J.)

Mr.J.P.Shah, learned advocate for the petitioner requests to delete respondent no.2 and the relief as prayed thereto. Request is granted as prayed for.

Rule. Mr.B.J. Shelat, Advocate for M/s R.P.Bhatt & Co. waqives the service of Rule on behalf of the respondents. On the facts and in the circumstances of the case, matter is taken up for final hearing to day with the consent. On deletion of respondent no.2, respondent no.1 will now be the sole respondent here.

This petition is filed by the petitioner for quashing and setting aside the impugned orders at Annexures G and H passed by the appropriate authority. On April 28, 1995, by the impugned orders in purported exercise of the powers conferred under Sec.269(G) of the Income Tax Act, 1961 (hereinafter referred to as the Act), the respondent has exercised his power to purchase the immovable property consisting of land with superstructure situated at Bootee Street, Pune GLR Survey No.390/5A, admeasuring 0.34 acres or 14810.4 sq.ft. or 1375.92 sq.mtrs (hereinafter referred to as the PUC).

It is the case of the petitioner that in view of the Memorandum of Understanding entered on December 29, 1994 the petitioner agreed to purchase the land from one Mr.Shahrokh Rustom Mazda on old grant tenure with three tenants therein. The Memorandum also mentioned that the land was owned by the Central Government and held by the aforesaid seller on old grant tenure. It was also mentioned that the land was occupied by three sitting tenants and it was the responsibility of the purchaser to get them evicted, if he wishes to do so. The consideration which was agreed between the parties was Rs.51 Lakhs and an amount of Rs. 5 Lakhs was paid at the time of execution of Memorandum of Understanding to sell was entered into on December 29, 1994 and the remaining amount was to be paid as mentioned in the Memorandum of Understanding. In accordance with the provisions of Sec. 269UC, Form No.37-A came to be filled in by the parties in the office of the respondent on January 6, 1995. It was mentioned in the Memorandum of Understanding as well as in the Form that three persons other then the owner were in occupation of the property and they were occupying the property as the tenants or they were having the leasehold right. The appropriate authority issued notice under Sec.269UC (1-A) of the Act on April 10, 1995, inter alia, stating therein that the PUC situated in Bootee Street in cantonment area. The SIP--1 is situated in General Thimmaya Road. SIP-2 is situated

about 150 metres from General Thimmaya Road. In view of the above, the apparent consideration and the discounted consideration of the PUC appears to be understated by more than 15%. In the said notice, the Appropriate Authority has also stated that the calculated the discounted consideration per square metre of PUC at Rs.3317/- per sq.mtrs. against Rs.9984/- for SIP-1 and Rs.13,588/- for SIP-2.

The appropriate authority, therefore, called upon the transferor and transferee by giving an opportunity to show cause as to why order under Sec.269UD should not be passed in their case and the property should not be acquired under the provisions of Chapter XX-C of the Act. The petitioner submitted his reply to the aforesaid show cause notice on April 18, 1995, inter alia, contending that SIPs were situated on located area of General Thimmaya Road in Pune Camp, while the PUC was situated to Bootee Street. General Thimmaya road is one of the prime most location in Pune cantonment and is an exclusive commercial centre area whereas though Bootee Street is nearby there is vast contrast between the locational status with respect to General Thimmaya road. Another major factor according to the petitioner was that PUC was under old grant rights and for getting it converted into freehold in additional expenditure of conversion charges at the rate of about Rs.260/- per sq.ft., which comes to Rs.2600/- per sq.mt. It was also mentioned that the property was occupied by three sitting tenants namely Mr.Behram Surty, 2) Mr. F.G.Hirani and 3) Mr.Behram Shahbadi. PUC was surrounded by Motor Garage which would reduce the esthetical value of the property. The plot was also faced by a burial ground and it was also having very small frontage. In the light of all the circumstances, a reliance was placed by the appropriate authority on SIP1 & 2 and stated that it cannot be said to be comparable with PUC and notice was required to be withdrawn. After considering the reply, the appropriate authority passed the order under Sec.269UD (1) of the Act, holding that it was satisfied that the property was understated for preemptive purchase. In para 4 reasons were recorded by the appropriate authority for coming to that conclusion. Para 4 reads as under:-

We have carefully gone through the submission made by the transferor and transferee and the same are discussed hereinunder:-

As regards the first contention that the SIP-I and SIP-II are on General Thimmaya Road which is an upper

class residential and commercial area while the PUC is on Bootee Street, there is no doubt that the locations of the SIP-1 AND SIP- 2 ARE SUPERIOR TO THE LOCATION OF THE PUC but we want to add that no two properties would be identical in all respects and yet comparisons can be made to arrive at a fair and reasonable conclusion about the market rate of a particular property. In para 2 above, it has been noted that the land rate of PUC is Rs.3,819 of SIP 1 is Rs.10 886 and of SIP II is Rs.13,660 per sq.mts. as per apparent consideration. The difference is wide and any one can realise the implication.

The contention regarding tenancy and the cost of eviction etc., it would not change the situation to such an extent that the rate of PUC would be brought near the rates of SIP I & SIP II even after making reasonable adjustments for the locational advantages of the SIP I & SIP II.

Another contention raised is regarding the calculation of discount u/s. 269UA (b) r.w. Rule 48-I and it is argued that discounting is not correct. We have examined the matter with reference to the relevant clause of the agreement and have found that the contention is totally misplaced and misconceived. Clause 9(a) to 9(d) are clear and there is no ambiguity. Clause 9(c) contemplates payment of Rs.5 lakhs per month as per one month from th3e date of 37-A Clearance or 31-4-95, whichever is earlier. Hence we are unable to agree with the contention raised in this regard.

The last contention raised is that the PUC plot is under 'old grant' and conversion charges have to be paid. This is a statement of fact but this would not affect the value of the PUC. Even in the case of SIP I as well as SIP-II, such conversion charges had to be paid.

Having considered the above and keeping in view the location of the PUC , in our considered opinion, the market rate of the PUC would not be less than Rs.7500 per sq.mts. and thus the understatement is more than 15%.

Mr.J.P.Shah, learned counsel for the petitioner raised number of contentions. He submitted that the notice issued by the appropriate authority is vague and no material particulars have been supplied to the petitioner as to show SIP I and SIP 2 can be said to be comparable for PUC. He also submitted that in the order, when finding is recorded that location os SIP I and SIP II

were superior to that of PUC, no order can be passed, on the basis of the directions of SIP I and SIP II and on that ground also, the impugned orders require to be quashed. Mr.Shah further contended that though PUC was occupied by three tenants and some fact is mentioned in the agreement to sell as well as in reply and is also believed by the appropriate authority. Due regard had not been paid to the said circumstances and the orders become vulnerable. Mr. Shah also submitted that the authority is not right in observing that conversion charges are required to be paid by the petitioner for conversion of old grant tenure and in case of SIPs also, such conversion charges had to be paid. Finally, Mr.Shah contended that on the same day and almost in similar circumstances, in case of SIPs, an order was passed by the same authority by upholding the contention which were raised in that case and were similar to one raised by the petitioner. Inspite of similar circumstances, in the instant case, the order was passed on preemptive purchase which is illegal and contrary to law. In view of the above circumstances, according to Mr.Shah, there is an error apparent on the face of the record, committed by the respondent authority in passing the impugned orders. He has also committed an error in not applying relevant principles and ignoring relevant material and there is non-application of mind, and the orders require to be interfered with in exercise of powers under Articles 226 and 227 of the Constitution of India.

Mr.B.J.Shelat, learned counsel appearing for the respondent authority on the other hand supported the order passed by the respondent authority. He also submitted that the petitioner ought to have invoked writ jurisdiction of the High Court of Bombay, when the litigation pertains to immovable property situated in Pune within the territorial jurisdiction of the High Court of Bombay and when transferor as well as transferee both are residing at Bombay.

On merits, Mr.Shelat submitted that after taking into account the relevant facts and circumstances and after affording reasonable opportunity of being heard to the parties, the authority has come to the conclusion that there was understatement of apparent consideration to the extent of more than 15% and hence the order cannot be said to be contrary to law. There is no error apparent on the face of the record which requires to be judicially reviewed in exercise of extraordinary jurisdiction of this court and the petition is liable to be dismissed.

Having given conscious consideration to the facts and circumstances of the case, we are of the view that the petitions require to be allowed. So far as the preliminary contention of Mr.Shelat is concerned, we do not find any substance in the said contention. It is no doubt true that the litigation pertains to immovable property which is situated in Pune. It is also true that both the parties i.e. transferor and transferee are resident of Pune. Prima facie, however, looking to the record, it clearly transpires that the notice under Sec.269UD (1A) of the Act required to be issued by the respondent from Ahmedabad. The petitioner submitted his reply to the above show cause notice, and after considering the show cause notice as well as the reply, the appropriate authority passed the order at Ahmedabad which is impugned in the present petitions. It is, therefore, very clear that almost part of the cause of action has arisen within the jurisdiction of this court. In our opinion, therefore, this court has jurisdiction under Art.226(2) of the Constitution of India. Art.226(2) of the Constitution of India reads as under:-

> The power conferred by clause (1) to issue directions, orders or writs to any Government authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

The preliminary contention, therefore, fails and the same is accordingly rejected.

On merits also, we are of the opinion that the contentions raised by Mr.Shah are well-founded and must be upheld. Looking to the contents of show cause notice, we see considerable force in the arguments of learned counsel of the petitioner that notice does not disclose a relevant facts as to the location of PUC as well as SIP I and SIP II have been mentioned. In para 3, it was stated as under:-

> The PUC is situated in Bootee Street in cantonment area. The SIP-1 is situated on General Thimmaya Road in cantonment area. SIP-2 is situated about 150 Metres from General

> Thimmaya Road. In view of the above, the apparent consideration and the discounted consideration of the PUC appears to be understated by more than 15%. The members of the Appropriate Authority are, therefore, satisfied that this is a fit case for the issue of show cause notice u/s269UD (1A) of the I.T.ACT, 1961.

Mr. Shah is right in contending that from the show cause notice, it is not at all clear as to how PUC can be compared with SIP I and SIP 2. From the portion of Para 3 as extracted above, it appears that PUC is situated in Bootee Street in cantonment area while the SIP I is situated on General Thimmaya Road in cantonment area and SIP 2 is situated about 150 Metres from General Thimmaya Road. It is also not made clear as to what is the distance between PUC on one hand and SIP I and SIP 2 on the other hand. It is also not clear as to where SIP 2 is situated considering the location and keeping in mind, the location of PUC. On this consideration, the notice can be said to be vague and on that ground alone, the orders which are passed in pursuance to the show cause notice, are liable to be quashed.

We are, however, not disposing of the matters only on that ground since in our opinion, even otherwise also, the orders are liable to quashed. Now looking to the reasons recorded by the respondent authority, it is clear that the appropriate authority is satisfied that the location of SIP I and SIP 2 are superior to the location of PUC. Now the respondent authority has observed that two properties would not be identical in all respect and hence on the basis of fair and reasonable comparison, some conclusion must be based accordingly. It is held that the rate quoted for PUC was very low. The difference was very wide and hence the order was passed. In our opinion, the approach as well as reasonings of the appropriate authority cannot be said to be legal, valid and proper and in accordance with law. If the location of SIP 1 & SIP 2 are superior to the location of PUC, then this instance upon which a reliance is placed by the appropriate authority cannot be said to be comparable one. If it is not comparable, then there was no question of further proceeding with the inquiry. On the one hand, the appropriate authority states that the locations of SIP 1 and SIP 2 were superior and yet it proceeds to recite as to the insufficiency of the amount for which the agreement to sell/Memorandum of Consideration was entered into, cannot stand together. If these instances are not comparable, no further inquiry was needed and the order cannot be said to be legal and

in accordance with law.

Matter can yet to be looked into from difference angle. As mentioned by the petitioner in the petition, there were three sitting tenants in PUC. The said fact is also mentioned in the agreement to sell as well as in the reply to show cause notice. It is not the case of the appropriate authority that the fact was not correct. On the contrary, looking to the order, it clearly appears that the authority had believed that fact. It was observed in the order that the contention of tenancy would not change situation to such an extent that the consideration quoted by the parties can be said to be reasonable. In affidavit in reply also, it was observed by the authority that monthly tenancy has not claimed in transaction of such nature. They cannot object to the transfer of the land or giving adverse rights. Here also in our opinion, approach of the appellate authority cannot be said to be in accordance with law. The question was not whether the tenants have right in such proceedings. The question was about the consideration to be paid by the purchaser to the seller, if there were sitting tenants in the property in question.. It cannot be compared with the property in which there were no tenants with the property in which there were no tenants and peaceful and vacant possession can be handed over immediately of the property in its entirety. It is not the case of the appropriate authority also that when it placed reliance on SIP 1 and SIP 2, there were sitting tenants. Hence on that count also, placing of reliance on SIP 1 and SIP 2 and on that basis, recording of finding that there was understatement of consideration of PUC is contrary to law, and cannot be upheld. Mr.Shah in that connection rightly placed reliance on the orders passed by the appropriate authority itself on the same day in respect of SIP 2 which is at Ex.X/1 passed on the same day. In that, the same authority placed reliance on the fact of sitting tenants and in para 6(ii) on Page 70, it is observed as under:-

> This property was covered under the "Old Grant" Scheme and can be converted into freehold tenure after payment of premium to the Cantonment Authorities and the responsibilities of conversion was with the transferee. Moreover, the structure on this property was under the occupation of 3 tenants and 2 occupiers in addition to the transferor. The rent payable was meagre and the tenants were occupying the

structure for last 25 years. Moreover, the transaction is very old (20.9.93).

Considering all these aspects, this property is also not comparable to the P.U.C.

Mr. Shah is right, therefore, in contending that in case of SIP 2, the property was in occupation of tenants which is weighed with by the authority and had observed that such tenanted property cannot be said to be comparable with the property in which there is no tenant but the said fact did not weigh with by the same authority in the facts and circumstances of the case, even though there were three sitting tenants. The said reason, therefore, in our opinion, cannot be said to be proper and legal.

Finally, on other ground also, Mr.Shah is right in contending that the statement which was made by the appropriate authority in facts and circumstances of the instant case in the impugned order, cannot be said to be factually correct. On page 55, the appropriate authority observed that if in case of SIP 1 and SIP 2, such conversion charges had to be paid. Mr.Shah relying upon the order passed by the same authority in case of SIP 2 submitted that in fact, factually, there was no such position in case of SIP 2 which was in the case of PUC which is at Annexure K/1, such conversion charges had already been paid. The said finding is recorded in that order reads as under:-

Secondly, the SIP was subject to the payment of conversion charges of Rs.200/- to Rs.300/- per sq.ft. to Pune Cantonment Board thereby increasing the cost of development of the SIP by Rs.2,153 to 3,229 per sq.mtr. Such conversion charges in the case of PUC have already been paid.

Therefore, the finding on that ground is not correct and the order becomes vulnerable for that reason.

Mr.Shelat also contended that the transferee had a limited right of challenge and transferee has no locus standi in such proceedings to challenge the order passed under Sec. 269UD and even if it is held that he had such right, then also, the right is very limited one. For the said purpose, reliance is placed on the decisions reported in INCOME TAX REPORTS 210 1994 and INCOME TAX REPORTS 208 1994 and in case of M/s. Lok Housing and

Construction Versus The Appropriate Authority and others, in Writ Petition No. 548 of 1995 decided by the Division Bench of the High Court of Bombay on 26th April 1995. In the said case, after considering the relevant provisions of the Act, the High Court of Bombay came to the conclusion that after decision of C.G.Gautam Versus Union of India and others reported in 1993(1) SC 78, show cause notice is required to be given to both- transferor and transferee before acquiring the property under Chapter XX-C of the Income Tax Act. but in exercise of writ jurisdiction, there cannot be any appraisal or reappreciation of facts and materials. Interference in exercise of writ jurisdiction is justified only, if the order made by the appropriate authority is either perverse or is passed on no evidence or is passed on some extraneous consideration and materials. Mr.Shelat contended that this court is not exercising the appellate powers, however, the orders passed by the appropriate powers, however the orders passed by the appropriate authority and the extent of judicial review is limited to a considerable extent. There is no doubt so far as proposition of law is concerned. It is true that we cannot substitute our opinion on the opinion of the appropriate authority by reappreciating the facts but in the instant case, as stated by us hereinabove that SIP 1 and SIP 2, which are not comparable instances, have been made comparable by the respondent and on that basis, the finding has been arrived at by the appropriate authority that there was understatement of consideration of PUC of more than 15%. The said action is not permissible in law. On the contrary, such instances would never have been relied upon by the appropriate authority. Similarly, the respondent authority has committed an error of law in not properly considering the fact that the property was tenanted one and on that count also, no comparison could have been made with SIP 1 and SIP 2. Moreover, the said authority in case of SIP 2 had considered the fact as relevant for not treating that property as comparable to other property on which a reliance is placed by the Department. Finally, the fact of payment of conversion charges also weighed with by the authority which was not there and the statement was factually incorrect. Hence in our opinion, Mr.Shelat is not right in contending that this is a case of reappreciation of facts. In fact, in our opinion, the consideration and reasons which could not have been considered, have been taken into account which has vitiated the order passed by the respondent authority. We may also say that in view of insertion of sub sec.(1A) of Sec. 269 UD of the Act with effect from 17/11/1992, the notice is required to be issued to both- transferor

as well as transferee. That point is also concluded in C.B.Gautam's case (supra). If such notice is required to be given, then the aggrieved party can always challenge that decision and in such position, he can take all the contentions available to him. In our opinion, therefore, the contention that the transferee has only limited right to challenge cannot be said to be well-founded and that contention must be rejected.

Apart from the above grounds, in our opinion, Mr.Shah, is right in submitting that the satisfaction as contemplated by Section 269 UD must be based on objective facts. There must be evidence ande material to arrive at conclusion and satisfaction. Rejection of the sale instances and/or grounds and/or reasons put forth by the party is one thing. At the most, it can be said to be a negative finding for not accepting the case of the transferor/transferee. But the law requires something more. In our opinion, it is incumbent upon the appropriate authority to come to a positive and definite conclusion that the property was under valued. A similar question arose before us in Special Civil Application No. 869 of 1995 decided by us on January 30, 1995. Considering the relevant provisions of the Act as also the decision of the Hon'ble Supreme Court in Barium Chemicals Ltd. & Anr. Vs. Company Law Board & Ors. AIR 1967 SC 295, we observed as under :-

"The combined reading of Sec.269UD (1A) and 1B) of the Act leaves no room of doubt that it is a question of objectively decision-making lprocess by taking into consideration all relevant materials which have come before hearing authority and considering the rival aspects of the matter. Moreover, requirement of law is to splecify the grounds on which the order of pre-emptive purchase is made. That obligation does not stop by merely rejecting the submissions made before it. Rejection of submissions made by the vendors or transferee or person intersted in the property, does not lead to consequence that grounds for making pre-emptive purchase exists. Since qua-non is that the reasons must exist on the material placed before it, for supporting the action taken for pre-emptive purchase under Sec. 269 UD of the Act. The order clearly falls short of this requirement:-

In our opinion, the point is concluded by the above decision also. Since no satisfaction has been arrived at by the respondent on the basis of objective

facts and no reason have been recorded for coming to a positive conclusion as to why there was difference of more than 15%, the order cannot be said to be in accordance with law and must be quashed and set aside.

For the foregoing reasons, the petition requires to be allowed and is accordingly allowed. The impugned orders dt.11th January 1995 passed by the respondent Appropriate Authority at Annelxure G and H are hereby quashed and set aside. Respondent is directed to complete necessary formalities within a period of six weeks from the date of receipt of the order of the court including issuance of clearance certificate. Rule made absolute. No order as to costs.

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