IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.623 OF 1993

M/s.Mehta Mody & Company
392m "Anjali",
French Bridge, Opera House,
Bombay -400 021. .. Petitioner

Vs.

1.Appropriate Authority
constituted of the following members:

(i) S.K.Laul
(ii) S.C.Tiwari and
(iii) C.M.Batgeri

All members of the Appropriate
Authority constituted under Chapter
XXC of the Income Tax Act, 1961,
having their office at "Mittal Court"
"A" Wing, 3rd Floor, Mariman Point,
Bombay - 400 021.

2.Union of India

3.M/s.R.Kantilal & Company
a Partnership Firm, presently
situated at Parekh Market
Room No.414, 4th Floor,
39, Kennedy Bridge,
Opera House, Bombay - 400 004. .. Respondents

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Mrs.V.B.Patel for the Petitioner.
Mr.Mr.R.Asokan with P.S.Sahadevan for the Respondents.

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CORAM :- DR.S.RADHAKRISHNAN &
J.P.DEVADHAR, JJ.

DATE : 2nd April, 2008

ORAL JUDGMENT: (PER DR.S.RADHAKRISHNAN,J.)

1. By this Petition, the Petitioners are challenging an order dated 25.02.1993 passed by the Appropriate Authority being the Respondent No.1 herein

under Section 269 UD (1) of the Income Tax Act, hereinafter referred to as "the Act".

2. The brief facts are that the Petitioners had entered into an agreement on 11.04.1989 to purchase the flat viz.Flat No.302, 3rd Floor, at the Anjali Co-operative Housing Soceity Limited, situated at French Bridge, Opera House, Mumbai, for a total consideration of Rs.17,85,000/- and the Petitioners had also made payment of Rs.10 lakhs on the same day. On 28.04.1989, the balance amount was paid by the Petitioners and the possession of the said flat was taken from 3rd Respondent on the very same date. Thereafter the Petitioners had filed a statement in Form No.37-I under Chapter XXC of the Act on 09.05.1989. The Appropriate Authority had called upon the Petitioners to file certain particulars, and the Department's Approved Valuer had inspected the premises and thereafter the Petitioners were asked to file certain particulars which were furnished by the Petitioners.

3. It appears that again the re-inspection of the said flat was conducated by the officer of the 1st Respondent on 18.07.1989. On 20.07.1989 i.e.on the very next date the petitioners' representative informed the Respondents that in the very same building a flat was sold at the rate of Rs.2750/- per sq.ft.and even certain other comparable instances in the neighbouring building were

also brought to the notice of the 1st Respondent. It appears that without affording any opportunity of hearing, an order was passed by the 1st Respondent on 26.07.1989 under Section 269 UD (1) of the Act. The Petitioners had challenged the same by filing a Writ Petition No.223 of 1989, and this Court by an order dated 16.12.1992 had set aside the said order and directed the authority to issue an appropriate notice before passing an order under Section 269 UD (1) of the Act, relying upon the Hon'ble Supreme Court's decison in **C.B.Gautam V/s. Union of India - 199 ITR 530**.

4. Pursuant to the said order, on 01.01.1993 the Respondent No.1 issued a show cause notice to the Petitioners. It is pertinent to note that the Respondents in the aforesaid show cause notice, annexed as "reasons" the very same order dated 26.7.1989, which was set aside by this Court. Thereafter the Petitioners had made various representations and has also requested the authority to furnish a copy of the valuer's report dated 22.05.1989 which was relied upon by the Respondents as referred in the notice. However, the same was never furnished by the Respondent No.1 to the Petitioner. Again on 22.02.1993, the officer of the Respondent No.1 informed the Petitioner that they would conduct inspection of the said premises on 23.02.1993 between 04.00 p.m. to 06.30 pm., however till 07.15 p.m. nobody turned up for inspecting the flat, which

fact was recorded by the petitioners by their letter dated 24.02.1993. On the very next date on 25.02.1993 the impugned order came to be passed by the Respondent No.1 under Section 269 UD (1) of the Act and the same was received by the Petitioners on 27.02.1993 and thereafter the present petition has been filed challenging the same.

5. Mrs.Patel the learned Counsel for the Petitioners has firstly submitted that the impugned order passed under Section 269 UD (1) is in gross violation of the principles of natural justice inasmuch as the Respondent No.1 had not furnished the copy of the valuation report dated 22.05.1989 which has been strongly relied upon by the Respondent No.1, inspite of the several requests made in that behalf. Mrs.Patel, the learned Counsel for the Petitioners has secondly contended that no fair opportunity of being heard was afforded to the Petitioners before passing an order under Section 269 UD (1) of the Act, and in support of this contention she has referred to and relied upon the judgment in the case of **C.B.Gautam V/s.Union of India - 199 ITR 530.**

6. Mrs.Patel, the learned Counsel for the Petitioners has also thirdly contended that ex-facie the impugned order is bad in law inasmuch as the same bas been passed without determining the "fair market value" of the property. The learned Counsel for the Petitioner,

fourthly also pointed out that the Respondent No.1 has totally ignored various instances and factual circumstances pointed out by the petitioners in support of the valuation adopted by the Petitioners to be fair market value. In the light of the above, Mrs.Patel, the learned Counsel for the Petitioners has pointed out that the Respondent No.1 has to first determine the market value of the flat as envisaged under Section 269 UD of the Act, without which the provisions of Chapter XXC cannot be invoked. Over and above, the learned Counsel Mrs.Patel has also emphasised that the Respondent has not made out any case that the Petitioners had attempted any tax evasion and that the onus of establishing that the undervaluation is with a view to evade tax was squarely on the Respondents. In that context, the learned Counsel for the Petitioners has referred to and relied upon two judgments of the Division Bench of this Court viz. the judgment dated 29.10.2007 passed in Writ Petition No.527 of 1993 in the case of **Manubhai Sakarchand Shah & Another V/s.S.K.Lal & Others,** and the other Judgment dated 24th October, 2007 passed in Writ Petition No.588 of 1993 in the case of **Hiten Rashmikant Mehta & Another V/s. Union of India & Ors.**

7. Referring to and relying upon the aforesaid decisions, the learned Counsel for the Petitioners has submitted that there is gross violation of the principles of natural justice by Respondent No.1 by not

furnishing the copy of the valuation report relied upon by the Respondent No.1 dated 22.05.1989 inspite of the several requests made by the Petitioner. Mrs.Patel contended that no fair hearing was given to the Petitioner. On that behalf Mrs.Patel has referred to and relied upon the judgment in the case of **C.B.Gautam V/s.Union of India - 199 ITR 536** and the above mentioned judgment of our Court in **Manubhai Shah's** case. Mrs.Patel, the learned Counsel for the Petitioner has brought to our notice that the action of Respondent Nos.1 & 2 is arbitrary and illegal since the Respondent No.1 in respect of other premises in the neighbouring area as referred in paragraph No.61 of the Petition as well as premises in the very same building referred to in page Nos.77 & 85 of the Petition, the Authorities had accepted the lower rate than the purchase price paid by the Petitioners, though they were all during the same period. Mrs Patel, the learned Counsel for the Petitioners has also pointed out that the Petitioners had brought to the notice of the Respondent No.1 by their letters dated 02.02.1993 and 08.02.1993 various comparable instances as well as the Petitioner's approved valuer's report, however the same were not considered by the Respondent No.1 properly, and merely brushed aside the same stating that they were not comparable. Under the aforesaid facts and citcumstances, Mrs.Patel, the learned Counsel for the Petitioners has submitted that the order passed by the

Respondent No.1 is unsustainable in law, hence should be quashed and set aside.

8. Mr.Sahadevan, the learned Counsel appering on behalf of the Respondent Nos.1 & 2 has sought to justify the impugned order. However, he was unable to controvert the submission made on behalf of the Petitioners that the valuation report dated 25.05.1989 (on which the Respondent Department had relied upon) was never furnished to the Petitioners. Mr.Sahadevan also could not dispute that no fair market value was fixed by the Respondent No.1 in the above.

9. Having regard to the aforesaid facts and circumstances aof the case and after considering all the above submissions it is clear that in this matter the Respondent No.1 had not fixed any "fair market value" at all. It is vital to note as has been held by this Court in the case of **Vimal Agarwal V/s.Appropriate Authority and Others - 210 ITR 16,** that it is very essential that the Respondent should first determine the "fair market value" of the property in question in the light of the attending circumstances and without determining the fair market value it is not only difficult but impossible to state that the apparent consideration is lower than the market value by 15% or more.

10. Perusal of the impugned order in the present case

clearly shows that the "fair market value" of the flat in question had not been determined at all, and therefore, the purchase of the flat in question on the footing that there is undervaluation to the extent of 15% of the market value cannot be sustained at all, as the same is without any basis. The Respondent No.1 had relied on the valuation report prepared by their valuer. Respondent No.1 ought to have furnished the copy of the valuation report dated 22.05.1989 to the Petitioners which was also admittedly not done in this case. Hence the impugned order is clearly violative of principles of natural justice.

11. Similarly, in cases of other flats in the same building and the neighbouring area, the valuation has been adopted, which is in fact slightly higher than the apparent consideration paid in the case of flat purchased by the petitioners. Even the Respondent No.1 has not given any credence to the valuation report submitted by the Petitioners as well as the comparable sale instances referred to by the Petitioners, without justifiable reasons. Non consideration of the aforesaid relevant factors also vitiates the impugned order. Even the purported show-cause notice dated 1.1.1993 which relies on the earlier order dated 26.7.1989 which was already set aside by this Court, shows a "pre-determined mind" to purchase.

12. Under the aforesaid facts and circumstances of the case, Rule is made absolute in terms of prayer clauses (a) and (b) with costs.

(J.P.DEVADHAR, J.) **(DR.S.RADHAKRISHNAN,J.)**