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

WRIT PETITION NO.588 OF 1993

1. Hiten Rashmikant Mehta of Bombay, Indian Inhabitant presently residing at Belle View Building, Flat No.21, Bhulabhai Desai Road, Bombay - 400 036.

2. Swati Hiten Mehta of Bombay, Indian Inhabitant presently residing at Belle View Building, Flat No.21, Bhulabhai Desai Road, Bombay - 400 036. ..Petitioners.

V/s.

1. Union of India

2. S.K. Laul

3. S.C. Tiwari

4. C.M. Betgeri

Members of the Appropriate Authority constituted under the provisions of Sec.269UB of the Income-tax Act, 1961 and having their office at Mittal Court, 3rd floor, A-Wing, Nariman Point, Bombay - 400 021.

5. Smt.Aruna Mathur presently residing at Navrang Building, 1st floor, Peddar Road, Bombay ..Respondents.

Mr.S.E. Dastoor, senior counsel with Mr.B.V. Jhaveri for the petitioners.

Mr.R. Asokan for the respondents.

CORAM : F.I. REBELLO &
J.P. DEVADHAR, JJ.

RESERVED ON : 10TH OCTOBER, 2007.

PRONOUNCED ON : 24TH OCTOBER, 2007.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. This petition is filed to challenge the order dated 15th February, 1993 passed by the Appropriate Authority under Section 269UD(1) of the Income Tax Act, 1961 ('Act' for short), as well as constitutional validity of Rule 48L of the Income Tax Rules, 1962 ('1962 Rules' for short).

2. The challenge to the impugned order dated 15th February, 1993 is two-fold. Firstly, the transaction relating to transfer of Flat No.21 in Belle View Co-operative Housing Society situated at 85, Bhulabhai Desai Road, Bombay - 16 ('flat in question' for short) in favour of the petitioners as per agreement dated 30th August, 1986 is governed by Chapter XX-A of the Act and not Chapter XX-C and, therefore, the impugned order passed under Chapter XX-C is without jurisdiction. Secondly, even on merits the impugned order passed under Section 269UD(1) of the Act suffers from serious infirmities and hence the said order is liable to quashed and set aside. According to the revenue, actual transfer of the flat in question took place after the provisions of Chapter XX-C came into force and, therefore, the impugned order is validly passed under Chapter XX-C of the Act.

3. The facts relevant for the present Writ Petition are that, sometime in August, 1986 the petitioners approached the Belle View Co-op. Housing Society seeking no-objection certificate (NOC) for transfer of the flat in question in favour of the petitioners. On 24th August, 1986, the Society accorded its approval for transfer of the flat in question in favour of the petitioners.

4. Thereupon on 30th August, 1986, the petitioners entered into an agreement for purchase of the flat in question from the member for a consideration of Rs.15,30,000/-. In the agreement it is recorded that out of the total consideration, the petitioners have paid Rs.6,00,000/- to the member on or before the execution of the said agreement and that the balance consideration of Rs.9,30,000/- would be paid by the petitioners on the date on which possession of the flat in question is handed over to the petitioners. It is further recorded in the agreement that the five shares bearing distinctive Nos.31 to 35 (both inclusive) of Rs.50/- each which entitles the holder of the said shares the right to use and occupy the flat in question has been handed over to the petitioners and that an irrevocable power of attorney has been

executed by the member in favour of the petitioners, so as to enable the petitioners to get the said five shares as well as the flat in question duly transferred to the name of the petitioners.

5. On 26th September, 1986, the petitioners filed a statement in Form No.37EE for registration of the above transaction with the competent authority as contemplated under Section 269AB(2) contained in Chapter XX-A of the Act.

6. Before the competent authority could consider the statement in form 37EE filed by the petitioners, the Act was amended by Finance Act, 1986 w.e.f. 1st October, 1986. By the said amendment, Section 269RR was inserted in the Act to the effect that Chapter XX-A shall not apply to or in relation to the transfer of immovable property made after 30th September, 1986. Simultaneously, by the said Finance Act, 1986, Chapter XX-C was inserted in to the Act w.e.f. 1st October, 1986 empowering the Central Government to purchase immovable properties in certain cases of transfer.

7. On 14th October, 1986, the petitioners as a matter of abundant caution, submitted a statement in Form 37-I as contemplated under Section 269UC

contained in Chapter XX-C of the Act, specifically stating therein that form 37-I is filed under protest and without prejudice to the petitioner's contention that the provisions of Chapter XX-C or the Rules framed thereunder are not applicable in the present case because the transfer of the flat in question was completed prior to 30th September, 1986 i.e. prior to Chapter XX-C came into force.

8. On 9th November, 1986, the appropriate authority ('AA' for short) constituted under Chapter XX-C of the Act called upon the petitioners to furnish certain particulars relating to the flat in question. The petitioners furnished the requisite information. Thereafter, without giving an opportunity of hearing to the petitioners, the AA passed an order on 12th December, 1986 under Section 269UD(1) of the Act for purchase of the flat in question. Challenging the said order, the petitioners filed a Writ Petition No.30 of 1987 in this Court which was admitted on 13th February, 1987 and by way of interim relief, implementation of the purchase order dated 12th December, 1986 was stayed.

9. Thereafter, by an exparte order dated 16th December, 1992, this Court, on the basis of a statement made by the counsel for the revenue set

aside the purchase order dated 12th December, 1986 and remanded the matter back to the AA for deciding the matter afresh in the light of the decision of the Apex Court in the case of C.B. Gautam V/s. Union of India reported in 199 I.T.R. 530. This Court further ordered that in the facts of the case, the statement in Form 37I submitted by the petitioners on 14th October, 1986 shall be treated as if it was filed on that date i.e. 16th December, 1992.

10. In the meantime, the competent authority constituted under Chapter XX-A of the Act had issued a notice on 2nd July, 1987 under Section 269D(1) for acquisition of the flat in question. By their reply dated 7th October, 1987, the petitioners submitted that the sale instances set out in the said notice are not comparable and by relying on the approved valuers report submitted that there was no undervaluation and hence acquisition of the flat in question under Chapter XX-A of the Act was not called for.

11. By an order dated 26th August, 1988 passed under Section 269F(7) of the Act, the competent authority after taking into account all the relevant facts and circumstances held that the flat in

question shall not be acquired under Chapter XX-A of the Act.

12. As regards the proceedings under Chapter XX-C is concerned, the AA in the light of the remand order passed by this Court on 18th December, 1992 in Writ Petition No.30 of 1987, issued a show cause notice on 30th December, 1992 inter alia calling upon the petitioners to show cause as to why the flat in question should not be purchased under Section 269UD(1) of the Act in the light of the sale instances set out therein.

13. By their reply dated 8th January, 1993, the petitioners submitted that the transfer of the flat in question took place prior to 30th September, 1986 and, therefore, Chapter XX-A and not Chapter XX-C of the Act was applicable in the present case. It was submitted that form No.37I was filed as a matter of abundant caution, expressly stating that Chapter XX-C is not attracted in the present case. It was further submitted that once the competent authority has held that the flat in question shall not be acquired under Chapter XX-A, the flat in question could not be purchased under Chapter XX-C. By the said letter, the petitioners sought particulars of the sale instances set out in the show cause notice.

As the particulars were not furnished, several letters were addressed by the petitioners in that behalf. In one of the letters, the petitioners referred to sale of a flat on the 7th floor of the Belle View Co-operative Housing Society on 7th July, 1986, in which the flat in question is situated. It was submitted that sale of the said flat which is comparable with the flat in question, has been approved by the appropriate authority under Chapter XX-C of the Act and, therefore, it is not proper to initiate proceedings for purchase of the flat in question.

14. Rejecting the contention of the petitioners, the AA by the impugned order dated 15th February, 1993 decided to purchase the flat in question under Section 269UD(1) of the Act. Challenging the said order, as also the constitutional validity of Rule 48L of the 1962 Rules, the present petition is filed.

15. Before dealing with the rival contentions, we may quote relevant provisions in Chapter XX-A of the Act.

"CHAPTER XX-A

ACQUISITION OF IMMOVABLE PROPERTIES IN CERTAIN CASES OF TRANSFER TO COUNTERACT EVASION OF TAX

Definitions.

269A. In this Chapter, unless the context otherwise requires, -

(a) to (d) -----------

(e) "immovable property" means, -

(i) any land or any building or part of a building, and includes, where any land or any building or part of a building is transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also.

Explanation. - For the purposes of this sub-clause, land, building, part of a building, machinery, plant, furniture, fittings and other things include any rights therein;

(ii) any rights of the nature referred to in clause (b) of sub-section (1) of section 269AB;"

(f) to (g) ----------

(h) "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.

Registration of certain transactions.

269AB. (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, 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,

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.

Chapter not to apply where transfer of immovable property made after a certain date.

269RR. The provisions of this Chapter shall not apply to or in relation to the transfer of any immovable property made after the 30th day of September, 1986.

16. Rule 48DD and Rule 48L of the 1962 Rules provide for filing of a statement in form 37EE and 37I in respect of transfer of immovable property covered under Chapter XX-A and XX-C of the Act respectively.

. Rule 48L of the 1962 Rules prior to the Income Tax (Seventh Amendment) Rules, 1987 read as under :

"Statement to be furnished under section 269UC(3).

48L. (1) The statement required to be furnished to the appropriate authority under sub-section (3) of section 269UC shall be in Form No.37-I and shall be signed and verified in the manner indicated therein by each of the parties to the transfer referred to in sub-section (1) of that section or by any of the parties to such transfer acting on behalf of himself and on behalf of the other parties.

(2) The statement in Form No.37-I shall be furnished, in duplicate to the appropriate authority -

(a) before the 16th day of October, 1986, in a case where the agreement for transfer is entered into before the 1st day of October, 1986; and

(b) before the expiry of 15 days from the day on which the agreement for transfer is entered into, in cases not covered by clause (a)."

17. From the aforesaid provisions as well as other provisions of the Act, it is clear that Chapter XX-A applies to transactions involving transfer of immovable properties upto 30th September, 1986 and Chapter XX-C applies to transactions involving transfer of immovable properties made or effected from 1st October, 1986. Rule 48DD of the 1962 Rules prescribes the time limit for filing statement in Form No.37EE in respect of transactions covered under Chapter XX-A and Rule 48L prescribes the time limit for filing statement in Form No.37I in respect of transactions covered under Chapter XX-C.

18. Mr.Dastoor, learned senor counsel appearing on behalf of the petitioners submitted that Rule 48L(2) of the 1962 Rules insofar as it applies to the agreement for transfer entered into before 1st October, 1986 is unconstitutional. The argument is that when Chapter XX-C applies to the transfer of immovable property made from 1st October, 1986, Rule 48L which is a machinery provision for implementing the provisions of Chapter XX-C cannot provide that Chapter XX-C would apply to transfers made before 1st October, 1986. We do not find any merit in this contention because, in our opinion, Rule 48L(2)(a)

applies to those agreement for transfer which are entered into before 1st October, 1986 to which Chapter XX-A is not applicable.

19. It is pertinent to note that as per Section 269A(h)(ii) of the Act, the term ‘transfer’ in Chapter XX-A includes transactions such as, a) becoming a member or acquiring shares in a co-operative Society, company or other association of persons, or b) entering into any agreement or any arrangement which has the effect of transferring or enabling the enjoyment in respect of a building or part of a building. In other words, Chapter XX-A inter alia applies to transactions, where a person, pursuant to an agreement for transfer of shares acquires any right in respect of a flat in a co-operative Society. Obviously, the transactions entered in to by and between the parties upto 30th September, 1986 which do not have the effect of transferring or enabling the enjoyment of the immovable property, would not be covered under Chapter XX-A. Since Chapter XX-C came into force with effect from 1st October, 1986, Rule 48L(2)(a) provides that in respect of agreement to transfer entered in to before 1st October, 1986 to which Chapter XX-A is not applicable, statement in form no. 37-I be filed within the time stipulated

therein. Thus, in our opinion, Rule 48L is in conformity and consistent with the provisions of the Act. Consequently, the challenge to the constitutional validity of 48L of the 1962 Rule must fail.

20. The question then to be considered is, whether the agreement dated 30th August, 1986 has the effect of transferring the flat in question in favour of the petitioners so as to attract the provisions of Chapter XX-A ?

21. It is contended by Mr.Dastoor, that in the present case, before entering into the agreement, the petitioners have obtained N.O.C. from the Society for transfer of the flat in question in favour of the petitioners. In the agreement dated 30th August, 1986, the consideration for transfer of the shares relating to the flat in question is determined, the agreement records that part payment of the consideration amounting to Rs.6,00,000/- has been paid by the petitioners on or before execution of the agreement, the agreements records that the transferor has in fact handed over the five shares to the petitioners along with the duly signed transfer form and further, the agreement records that irrevocable power of attorney has been executed

by the transferor / member in favour of the petitioners so as to enable the petitioners to take all necessary steps for transfer of the flat in question. These facts, according to Mr.Dastoor, constitute effectively transferring the shares and the flat in question within the meaning of Section 269A(h) in Chapter XX-A of the Act and, therefore, the provisions of Chapter XX-A alone are applicable In support of the above contention, Mr.Dastoor relied upon a decision of the Calcutta High Court in the case of Multi-Rise Towers (P) Ltd., V/s. Appropriate Authority (211 I.T.R. 102) and various decisions of the Delhi High Court including the decision in the case of Bhatia Apartments (P) Ltd., V/s. Union of India & others reported in 252 I.T.R. 244.

22. Mr.Asokan, learned counsel for the revenue, on the other hand, submitted that in the present case, the possession of the flat in question is received by the petitioners on payment of the balance consideration after 1st October, 1986, the Society has transferred the flat in favour of the petitioners after 1st October, 1986 and, therefore, transfer of the flat in question took place after 1st October, 1986 and hence Chapter XX-C is applicable in the present case. In support of the

above contention, Mr.Asokan placed reliance on a decision of the Gujarat High Court in the case of Shantivan Corporation V/s. Sub-Registrar reported in 189 I.T.R. 583 and a decision of the Madras High Court in the case of K.K. Anandam Ammal V/s. Union of India reported in 212 I.T.R. 9.

23. On careful consideration of the rival submissions, we find it difficult to accept the argument of the revenue, because as stated earlier, Chapter XX-A applies not only to the transactions relating to transfer of immovable properties but also to transactions, where a person acquires any right in or with respect to any building or part of a building by becoming a member or acquiring shares in a co-operative Society, company or other association of persons, or by entering in to any agreement or arrangement in that behalf. In other words, Chapter XX-A applies not only to the transactions where a person has become a member of a society, but also to the transactions where a person acquires right to a flat in a society, on account of his acquiring shares relating to a flat in the society by entering into an agreement or arrangement. In the present case, the Society has already approved transfer of the flat in question by the member in favour of the petitioners, the

petitioners on payment of part of the sale consideration have been put in possession of the five shares relating to the flat in question along with the duly filled in transfer form, and the vendor has executed an irrevocable power of attorney in favour of the petitioners for completing the transaction. In these circumstances, in our opinion, the transaction in question would be squarely covered by the provisions of Chapter XX-A.

24. The decision of the Madras High Court in the case of K.K. Anandam Ammal (supra) relied upon by the counsel for the revenue is distinguishable on facts. In that case, the property in question, which the petitioner therein had agreed to purchase on 24th February, 1986 was purchased by the A.A. under Chapter XX-C of the Act on 9th December, 1986. After taking possession, the said property was auctioned by the Central Government and even the auction purchaser was put in possession of the said property on 14th September, 1987. Thereafter, in November, 1987 a writ petition was filed in the Madras High Court for setting aside the pre-emptive purchase order on the ground that the transaction which the petitioner therein had entered into was prior to 1st October, 1986 and, therefore, to such a transaction, Chapter XX-C was not applicable. In

that context, it was held by the Madras High Court that the petitioner having accepted the pre-emptive purchase and having delivered possession voluntarily to the A.A. could not challenge the order that too after the purchased property was auctioned and the auction purchaser was put in possession of the said property purchased by the Central Government. The facts in the present case are altogether different and hence, reliance placed on the above decision is wholly misplaced.

25. Similarly the decision of the Gujarat High Court in the case of Shantivan Corporation (Supra) is also distinguishable on facts. In that case, Chapter XX-C was made applicable to Surat region with effect from 1st June, 1989. The petitioner therein had entered into an agreement for purchase of the property situated in the Surat region prior to 1st June, 1989. It was contended by the petitioner therein that he was put in possession of the property in question prior to 1st June, 1989 which was found to be false. In that view of the matter, the writ Petition was dismissed. Therefore, the aforesaid decision is distinguishable on facts.

26. The argument of the revenue based on the decision of the Gujarat High Court in the case of

Shantivan Corporation (Supra) that the petitioners were put in possession of the flat in question after 1st October, 1986 and, therefore, Chapter XX-C would be applicable to the case of the petitioners cannot be accepted, because, Section 269A(h) read with Section 269AB of the Act expressly provide that, where a person acquires any right in respect of a flat in a co-operative Society on account of his entering in to an agreement or arrangement in that behalf, then such transaction would be covered under Chapter XX-A. Therefore, in the facts of the present case, irrespective of the fact that the petitioners were put in possession of the flat in question after 1st October, 1986, in view of the fact that the petitioners acquired a right in respect of the flat in question on account of their entering into an agreement prior to 1st October, 1986, the transaction would be clearly covered by the provisions of Chapter XX-A of the Act.

27. Assuming that Chapter XX-C applies to the facts of the present case, in our opinion even on merits, the impugned order cannot be sustained. As held by the Supreme Court in the case of C.B. Gautam (supra), the provisions of Chapter XX-C can be resorted to only when there is a significant undervaluation to the extent of 15% of the fair

market value with a view to evade tax. As held by this Court in the case of Vimal Agarwal V/s. Appropriate Authority reported in 210 I.T.R. 16, it is necessary first to determine the fair market value of the property in question in the light of 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. In the present case, on perusal of the impugned order it is seen that the fair market value of the flat in question has not been determined at all and, therefore, purchase of the flat in question on the footing that there is undervaluation to the extent of 15% of the fair market value has to be held to be without any basis.

28. Moreover, in the present case admittedly the AA has not furnished the particulars of sale instances relied upon in the show cause notice in spite of repeated letters addressed by the petitioners in that behalf. Without furnishing the particulars of the sale instances set out in the show cause notice, the AA could not have passed the impugned order in breach of the principles of natural justice. Reliance placed on the decision of this Court in the case of Smt.Vimla Devi G.

Maheshwari V/s. S.K. Laul reported in 208 I.T.R. 734 does not support the case of the revenue, because, even in that case, it is held that the order of the AA can be interfered with if it is found to be perverse. In the present case, we find that the impugned order suffers from serious infirmities and hence the impugned order cannot be sustained. Apart from the above, in the present case, the AA has not given any reasons as to why the sale instance relied upon by the petitioners is not comparable.

29. For all the aforesaid reasons, we are of the opinion that the impugned order passed on 15th February, 1993 cannot be sustained and the same is hereby quashed and set aside.

30. Accordingly, the petition succeeds. Rule is made absolute with no order as to costs.

(J.P. DEVADHAR, J.) (F.I. REBELLO, J.)