

CASE NO.:
Appeal (civil) 2121 of 2001

PETITIONER:
Hans Raj Agarwal & Anr.

RESPONDENT:
Chief Commnr. of Income Tax & Ors.

DATE OF JUDGMENT: 20/12/2002

BENCH:
Ruma Pal & B.N.Srikrishna.

JUDGMENT:

J U D G M E N T

RUMA PAL, J.

The appellants' challenge under Article 226 to the order passed by the Appropriate Authorities under Section 239 UD (1) of the Income Tax Act, 1961 (referred to hereafter as 'the Act') was turned down by the Andhra Pradesh High Court. They have therefore assailed the decision of the High Court before us.

The property which was the subject matter of the order under Section 269 UD (1) was part of premises situated at Road No. 3, Banjara Hills, Hyderabad. The entire premises covered an area of about 7100 sq. mts and was jointly owned by one Leila D. Lean and her two sisters. On 13th March 1988, the three owners agreed to sell the entire premises to the appellants. Before the conveyance could be executed, Leila Lean died. The executor named in her will, through a general Power of Attorney Holder, one Sri Armugham, entered into a fresh agreement with the appellants on 27th April 1989 agreeing to sell Leila Lean's 1/3 undivided share in the property. The two other sisters appointed the appellants as their power of attorney holders. In their capacity as the power of attorney holders the appellants sold demarcated portions of the property to nominees of the appellants by eight separate agreements executed and registered between 28th April 1989 and 31st May 1989.

On 1st June 1989, Chapter XX-C of the Act which statutorily provides for the compulsory purchase by the Central Government of immovable properties in certain cases of transfer came into force in the State of Andhra Pradesh. The Chapter was introduced in an effort to curb tax evasion by under valuation of the property sold. The substance of the provisions of Chapter XX-C which are relevant for the determination of the issues raised in this appeal are briefly considered.

Section 269 UC places conditions on the transfer of immovable property valued at over Rs.5 lakhs. The conditions include (a) that an agreement for transfer must be entered into between the intended transferor and the intended transferee at least four months prior to the intended date of transfer, (b) the reduction in writing of the agreement in the form of a statement by each of the parties or by any of them acting for the other, (c) the statement being furnished to the Appropriate Authority within a prescribed period and in the prescribed form.

After the receipt of the statement under Section 269 UC

then notwithstanding anything contained in any other law or instrument or agreement, the Central Government or the Appropriate Authority can make an order under Section 269 UD for the purchase by the Central Government of such immovable property at an amount equal to the amount of apparent consideration. Under the proviso to Section 269 UD(1), no order of purchase, " shall be made in respect of any immovable property after the expiration of a period of two months from the end of the month in which the statement referred to in section 269-UC in respect of such property is received by the Appropriate Authority'.'

Where an order for the purchase of any immovable property is made under sub-section (1) of section 269-UD the property vests in the Central Government and under Section 269-UF, the Central Government "shall pay, by way of consideration for such purchase, an amount equal to the amount of the apparent consideration'. The amount of consideration payable under Section 269-UF is required to be tendered to the person or persons entitled thereto within a period of one month. If there is any dispute as to who is entitled to the amount of consideration or if the person entitled to receive the amount of consideration does not consent to receive it, the Central Government is required to deposit the amount of consideration with the Appropriate Authority within the same period. (Section 269-UG) If the Central Government fails to either tender or deposit the amount then under Section 269-UH the order under Section 269-UD would stand abrogated and the immovable property shall stand re-vested in the transferor after the expiry of the aforesaid period. If the 'Appropriate Authority' decides not to make an order under sub-section (1) of Section 269-UD or if the order stands abrogated under Section 269-UH, "the Appropriate Authority shall issue a certificate of no objection referred to in sub-section (1) or, as the case may be, sub-section (2) and deliver copies thereof to the transferor and the transferee". [Section 269UL(3)]

On 15th June 1989 the appellants and Sri Armugham, representing the estate of Leila Lean, filed a joint statement under Section 269-UC in Form 37-I which is the prescribed form under the Act in respect of Leila Lean's share in the premises. The consideration for the sale was stated to be Rs.15,33,333/33. The date of agreement of transfer was given as 13th March 1988.

The Appropriate Authority did not accept the statement. By its order dated 23rd August 1989 it refused to act on its basis stating that the statement was premature and invalid because the property belonged to a non-resident and the approval of the Reserve Bank of India was required for alienating the same. According to the Appropriate Authority, no such approval having been taken the transferor was not empowered to dispose of the property. It was said in the order: "Therefore we are unable to issue either a purchase order u/s 269 UD(1) or issue a No Objection Certificate U/s 269 UL(1). The statement furnished in Form 37-I is filed. The transferor/transferees are however free to come up before the Appropriate Authority after the above defect is cured, if they are so advised."

This order dated 23rd August 1989 (hereafter referred to as the 'filing order') was accepted both by the transferor and transferees. On 8th September 1989, the appellants and the said Armugham representing the estate of Leila Lean submitted a second statement in Form 37-I with the Appropriate Authority after getting the permission of the Reserve Bank of India. This

statement was accepted by the Appropriate Authority and on 28th November 1989, an order was passed by the Appropriate Authority under Section 269-UD(1) for the purchase of property. (hereinafter referred to as the 'first purchase order') Within a month i.e. on 22nd December 1989, the Central Government deposited an amount equivalent to the apparent consideration with the Appropriate Authority. The purchase was, therefore complete and the said Arumugham handed over possession of the property to the Central Government.

On 18th December 1989 an affidavit was filed by the said Armugham representing the estate of Leila Lean before the Appropriate Authority giving the exact description of the demarcated portion of the share of Leila Lean in the property. On 28th December 1989 the Appropriate Authority sought to amend the first purchase order in purported exercise of power for rectification of mistakes granted under Section 269-UJ, by including the description of Leila Lean's property.

A writ petition (referred to as the first writ petition) was thereafter filed by the appellants before the High Court at Andhra Pradesh (W.P. No.1731/89) impugning the constitutional validity of Chapter XX-C and seeking the setting aside of the order passed under Section 269-UD(1) basically on the ground that it was passed in violation of natural justice and was otherwise unconstitutional.

While the appellants' first writ petition was pending, this Court in C.B. Gautam V. Union of India and Others 1993 (1) SCC 78 held that even though Section 269-UD did not provide for an opportunity of hearing being afforded to the intending purchaser and the seller of the property, a reasonable opportunity of showing cause against an order for compulsory purchase was to be given under Section 269 UD(1) to the interested parties. Reasons were also to be recorded by the Appropriate Authority to support its order. Otherwise the order issued under Section 269 UD(1) was bad in law. However, taking into consideration the laudable object with which Chapter XX-C had been introduced in the Act, this Court inter alia directed that in all cases where the orders under Section 269 UD were invalid consequent upon this Court's decision, and were the subject matter of challenge in writ proceedings, the statement in Form 37-I submitted would be treated as if it were submitted on the date of the disposal of those proceedings and the Appropriate Authority could if it so thought fit issue a show cause notice within a period of two months calculating the commencement of the period under the proviso to Section 269-D(1) from that date. It was also made clear that as far as completed transactions were concerned i.e. where after the order of compulsory purchase under Section 269-UD(1), possession had been taken and compensation paid and accepted by the owner without protest, nothing said in the judgment would invalidate such purchases.

The appellants' first writ petition was disposed of by the High Court on 16th February 1994. In view of this Court's decision in C.B. Gautam's case the first purchase order under section 269 UD(1) dated 31st August 1989 was quashed. The Appropriate Authority was directed to give an opportunity to the appellants of being heard before passing any order "in the light of the observations made by the Supreme Court in Gautam's case and in accordance with law". It was said:

"That having regard to the directions given by the Supreme Court in the case referred above Forms 37-I filed by the petitioners in these cases would be deemed to have been filed as on today and this is without prejudice to the contentions that filing of the Form for the

second or the third time as the case may be, was only pursuant to the directions of the Appropriate Authority and that no valid order of preemptive purchase under chapter XX-C can be made by the Appropriate Authority beyond the statutory period from the date of filing of the first Form 37-I in each case.

That the first respondent shall consider these and other contentions that might be raised by the petitioners in reply to the show cause notice and pass reasoned orders in accordance with law in the light of the observations of the Supreme Court in the above case".

Within a period of two months from the date of the order of the High Court, namely on 20th May 1994, the Appropriate Authority passed a fresh order (referred to as the second purchase order) under Section 269-UD(1) after issuing notice to the parties and considering their replies. Elaborate reasons were given by the Appropriate Authority for directing the compulsory purchase of Leila Lean's property by the Central Government.

The appellants' challenged the second purchase order under Section 269-UD by way of an application under Article 226. The petition was rejected by the High Court on 27th April 2000. The appellants' filed a special leave petition challenging the High Court's decision. An interim order was passed by this Court on 19th June 2000 allowing the auction sale of Leila Lean's property to be held subject to the result of the special leave petition. On 22nd June 2000, the Central Government advertised the property for sale. The sale was duly held and M/s Vansh Builders of Hyderabad was declared the highest bidder of Leila Lean's property at a sum of Rs. Four crores and five lakhs. M/s Vansh Builders made an application for intervention before this Court which was allowed on 28th September 2000.

The appellants' have challenged the first order of purchase on the ground that although the issue of limitation had been left open by the earlier order of this Court disposing of the first writ petition, the Appropriate Authority had failed to consider the issue. According to the appellants, it was settled by this Court in Appropriate Authority vs. Tanvi Trading & Credit (P) Ltd: (1991) 191 ITR 307 that the Appropriate Authority was bound to either pass an order for purchase under Section 269-UD or issue a No Objection Certificate under Section 269-UL. It could not question the title of the vendor. Since it was not in dispute that the Appropriate Authority had done neither within the prescribed period, it is contended by the appellants that the Appropriate Authority could not extend the period of limitation for issuing a compulsory purchase order on such basis. It is contended that merely because a second statement in Form 37-I has been filed by the parties beyond that period, it would not operate as a waiver either in law or in the facts. It was emphasized that the first statement in Form 37-I was a valid statement and had been filed on 15th June 1989. The period for exercising the power under Section 269 UD(1) had expired on 31st August 1989. Since no decision was taken to purchase the property then, the Appropriate Authority was bound to issue a 'No objection' certificate under S.269 UL(3). The first purchase order had been made on 28th November 1989 beyond the prescribed time and was,

therefore, invalid.

The second submission of the appellants was that the power to purchase the property under Section 269-UD was limited to the purchase of the property which was the subject matter of the agreement for transfer dated 27th April 1989 and the statement in Form 37-I. The property in both the agreement and statement had been described as the undivided share of Leila Lean. In the second purchase order, the Appropriate Authority had wrongly purported to purchase a demarcated share in the premises which was neither the subject matter of the agreement nor the statement filed under Section 269 UC. The second purchase order was incompetent and could not be given effect to. The appellants also contended that the Appropriate Authority's determination that the stated consideration did not reflect the true market value of the property when the agreement for sale was entered into was based on immaterial and irrelevant considerations. The next submission of the appellants was that they had taken possession of the entire premises pursuant to the agreement of sale dated 13th March 1988. There was, therefore, a complete transfer of the property to the appellant for the purposes of the Income Tax Act as Section 2(47) defines transfer, in relation to a capital asset as including, "any 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". According to the appellants' the transfer having taken place before Chapter XX-C came into operation in the State of Andhra Pradesh, it was not open to the Appropriate Authority to initiate any proceeding under that Chapter in respect of Leila Lean's property. It was finally submitted that the Central Government had not deposited the consideration money nor paid it to the transferor as required under the provisions of Section 269-UG and, therefore, in terms of Section 269-UH the premises stood re-vested in the transferor. In the light of all these circumstances, it is submitted by the appellants, that the Appropriate Authority should now be directed to issue a 'No Objection' under Section 269UL(3). The respondents have submitted that it was not open to the appellants to impugn the second purchase order on the ground that the first purchase order had been issued beyond the period of limitation. The respondents say that in their writ petition in challenge to the first order, the appellants had never raised this issue. The issue was raised for the first time in answer to the show cause notice issued prior to the second purchase order. It was also submitted that the Appropriate Authority had considered the issue and had negatived it. According to the respondents, the appellants had accepted the order of the Appropriate Authority which had "filed" the first statement in Form 37-I holding that it was premature and invalid. They had acted on that order and submitted the second statement without protest. The respondents contend that even if the order refusing to either pass an order under Section 269-UD or release under Section 269UL(3) were held to be void, since the appellants had not challenged it till today, they could not do so collaterally. According to the respondents the order was at the most wrongly passed but it could not be said that it was void. According to the respondents, in any event the decision of this Court in C.B. Gautam (supra) had effectively wiped out the earlier order passed under Section 269-UD. In terms of the Supreme Court directions, the date of the disposal of the appellants' first writ petition was to be taken as the date of the filing of the statement under Section 37-I and the Appropriate Authority had issued the second purchase order

within the statutory period thereafter. It is contended that the challenge to the first purchase order did not in the circumstances, survive.

On the submission of the appellants that the second purchase order was not in terms of the agreement for sale nor the statement in form 37-I, the respondents submitted that the appellants themselves had on divers dates admitted that the property had been orally partitioned between the three owners. The eight sale deeds of the other two owners which had been executed by the appellants representing the owners had expressly stated that there was an oral partition. It is pointed out that there is no claim by the appellants that what had been sold pursuant to the second purchase order was larger than the share of Leila Lean's share. It is pointed out that an oral partition between members of a non-coparcenary family was also legally permissible as has been held by this Court in *Nanni Bai and Others V. Gita Bai* 1959 SCR 479 and *Shankarrao v. Vithalrao* AIR 1988 SC 879.

According to the respondents, the appellants' submission that the Central Government had defaulted in tendering or depositing the purchase money was factually wrong. The deposit had been made with the Appropriate Authority and had been subsequently withdrawn by the transferor against a bank guarantee executed by the appellants. It is contended that this was not an issue which had been raised by the appellants in their writ petition before the High Court.

It is further submitted by the respondents that the appellants had expressly given up the argument that the property had been "transferred" to them within the meaning of Section 2 (47) of the Income Tax Act prior to coming into force of Chapter XX-C. This had been recorded by the High Court. Documents on record as well as the finding of the Appropriate Authority were referred to to show that the appellants' had not in fact taken possession of Leila Lean's share pursuant to the agreement of sale dated 13th March 1988. They had entered into the possession of demarcated portions of Leila Lean's sisters' property after the eight sale deeds had been executed by the appellants on behalf the sisters and had never taken possession of Leila Lean's share.

Finally on the question of valuation, it is stated that the Appropriate Authority had considered the material on record which clearly showed that the consideration which the appellants had agreed to pay to Leila Lean or her representative did not represent the true market value of the property either in 1988 or in 1989 when the fresh agreement for sale was entered into between the executor of Leila Lean's estate and the appellants.

We are of the opinion that the respondents' submissions are entirely acceptable and the High Court had correctly rejected the appellants' writ application. It is really unnecessary, in this case, to consider whether the 'filing order' dated 23rd August 1989 was void or merely irregular. We will assume for the purpose of argument that the 'filing order' of the Appropriate Authority refusing to exercise its power under Section 269UD(1) or 269UL(3) was illegal being in contravention of the law as laid down in *Tanvi's case* (supra). The appellants could have challenged such refusal. They chose not to do so till today. Instead they voluntarily filed a fresh statement in Form 37-I. The necessary implication was according to the parties, to the first statement, that it was not a proper one. The fact remains that a second statement in form 37-I had been filed by parties and they requested the Appropriate authority to act on the second statement. The transferor who was a party to the second statement has never contended that the second statement was not valid nor have

the appellants either before the High Court or before us contended otherwise. There is no question of the Appropriate Authority having extended the time under the first proviso to Section 269-UD nor did it do so. Whatever the reason for their doing so, it was the appellants and transferor's act of filing a fresh statement under Section 269-UC which gave rise to a fresh period of limitation. Under the first proviso to Section 269UD(1) time is to be computed from the receipt of "the statement" under form 37-I. In this case, "the statement" was the second one. It was open to the Appropriate Authority, in such circumstances, to act on the second statement and pass the compulsory purchase order within a period of two months from the receipt of that statement. The first compulsory purchase order could not, in the circumstances, be said to be invalid on this ground.

Besides, the appellants' challenge to first purchase order dated 28th November 1989 does not really survive after the disposal of the first writ petition. When the first writ application was disposed of on 16th February 1994, the High Court had quashed the first order issued under Section 269-UD(1) on the basis of the Supreme Court's decision in C.B. Gautam (supra). The language is unequivocal and unqualified. It said:

"The impugned order in F.N.AA/Hyd/9/68/11/89-90 dated 23.8.1989 on the filing of the 1st respondent herein be and hereby quashed".

There is no appeal from this order. If the first purchase order has been set aside without protest, the appellants present grievance that the first purchase order is otherwise invalid is ill founded. C.B. Gautam's directive that the statements in form 37-I were to be deemed to have been filed on the date of the disposal of pending writ petitions did not make a distinction between the orders under Section 269UD(1) which were invalid because of non-compliance with natural justice alone and those which were also otherwise assailable.

Having quashed the purchase order, the High Court had also directed, as has been quoted above, that the form 37-I filed by the appellants would be deemed to have been filed as on that date. No doubt, the High Court records that the deeming fiction as to the date of the filing of the statement was without prejudice to the appellant's contention that the first purchase order was passed beyond the period of limitation. However, in preserving the appellants' right, the High Court directed the Appropriate Authority to determine the contention in keeping with the decision in C.B. Gautam's case. And as we have already held that in the light of the decision in C.B. Gautam's case, the appellants' challenge to the first purchase order was misconceived.

The appellants challenge to the second purchase order on the ground that it directed the purchase of something which was not the subject matter of the agreement for sale or the Form 37-I statement is also unacceptable. The appellants cannot dispute that the shares of the three owners of the premises had been demarcated prior to the second purchase order in November 1989, if not even prior to the filing of the first statement under Section 269UC. In that statement in describing the property of Leila Lean, under the heading 'Persons in occupation of the property sought to be transferred and details thereof', it was said 'Vacant'. Under the heading 'Persons interest in the property and in consideration specifying their shares and basis thereof', it was said 'Self-full'. The 'nature of interest or right proposed to be transferred' was described as 'Absolute' and 'Ownership' property. There was

no reference to the undivided interest of the sisters therein. Secondly, in the several sale deeds executed by the appellants themselves, as the general power of attorney holders of the two sisters of Leila Lean between April and May 1989 they had said in the recital portion in each of the sale deeds:

"And whereas, the said land and building have fallen to the share of Mrs. Kripa Devi in oral partition effected amongst the three sisters."

Apart from the repeated references to an oral partition in the recital portion of the each deed, the deeds also recite that the property sold under each deed consisted of a specified area "as detailed in the schedule and the plan annexed". The boundaries were given and demarcated on the plan in respect of each of the sisters' share which was indicated on the plans forming part of the sale deeds. Apart from this, the vendor represented by the general power of attorney holder, namely the said Armugham, had filed an affidavit affirming the fact of the oral partition giving in detail the demarcated portion of the premises which was owned by Leila Lean. The Appropriate Authority had also inspected the premises prior to issuing the purchase order and had found that the property was in fact demarcated as recorded in the order under Section 269UD(1). The reason why the share of Leila Lean has been mentioned as undivided in the agreement of sale dated 13th March 1988 has been explained by the appellants themselves in the eight sale deeds executed by them between April and May 1989 as:

"Though the property had already been divided equally among the three sisters through an oral partition and share of each sister was delineated in the plan, as the agreement holders wanted to buy the entire said property for redevelopment, all the three sisters executed a single agreement of sale."

In other words, the oral partition had taken place before the agreement of sale. For the Appropriate Authority to have issued the purchase order in respect of the undivided share, in these circumstances, would mean not only the disruption of the established state of fact but also a reopening of the appellants' title to the divided portions of the premises which had been purchased by them or by their nominees. In any event, it does not lie in the appellants' mouths to contend in the face of these facts that Leila Lean's share was at any material time in fact undivided.

The further submission of the appellants that an oral partition was impermissible in law is erroneous. As far back as in 1958 in Nanni Bai and Others V. Gita Bai (1959 SCR 479), it was held:

"Partition in the Mitakshara sense may be only a severance of the joint status of the members of the coparcenary, that is to say, what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-sharers who may not be members of a Hindu coparcenary
... ..

For partition in the latter sense of allotting specific properties or parcels to individuals coparceners, agreement

amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition and is, thus, within the mischief of s. 17(1)(b).."

This view has been affirmed in Roshan Singh and Others V. Zile Singh and Others AIE 1988 SC 881 at p. 885: "A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it."

Apart from all this, the second purchase order directed the purchase of, '1/3 share/interest in the property known as Lilazar bearing No. 8-2-349, Road No. 3, Banjara Hills, Hyderabad'. Although the purchase order goes on to describe the 1/3 share/interest with reference to its boundaries, this would not serve to invalidate the first portion of the order. The appellants' submission that they were transferees within the meaning of S.2(47) of the Income Tax Act is equally unsustainable. Whether there was a transfer or not would depend on whether the appellants had, in part performance of the agreement for sale dated 13th March 1988, taken possession of Leila Lean's property. In each of the eight such sale deeds executed by the appellants of the share of the two sisters of Leila Lean in April/May, 1989, it is recorded that the vendor was 'full and absolute owner and possessor of the property conveyed' and that the 'vendor has handed over vacant possession to the vendee'. In other words, the appellants or their nominees who were the purchasers of the property conveyed took possession of demarcated portions of the premises pursuant to the eight deeds of sale and not prior thereto. There is no such document which would show that the appellants had ever taken possession of Leila Lean's share. Besides the question is essentially one of fact and the High Court expressly records that:

"Although a contention has been raised in the writ petition that the agreement was given effect to and transferees, were put in possession even before the date Chapter XX-C was made applicable to the State of Andhra Pradesh, the same has not been pursued before us."

Having given up the case before the High Court, the appellants cannot be permitted to reopen the issue at this stage.

On the question of valuation, the Appropriate Authority has in great detail considered the several instances of the sale which had taken place on or about the time that the agreement of sale was executed on 31st March 1988. Apart from the sale instances, the location of the property, its frontage and accessibility were considered by the Appropriate Authority which after physical inspection came to the conclusion that the consideration for which Leila Lean's property had been sold

was under-stated. The High Court has affirmed this valuation. We see no reason to disturb the finding of fact on the basis of material before us. We cannot also be oblivious to the fact that the property which the appellants had agreed to purchase at Rs.15,33,333/- in 1988 was agreed to be purchased by the intervenor in 2000 at Rs. four crores and five lakhs. The final submission of the appellants that the Central Government had not deposited or tendered the amount within the time required under Section 269-UF read with S.269-UG(1) is an issue of fact which has been raised for the first time by the appellants before this Court and is liable to be rejected on this ground alone. Nevertheless, we may note that the deposit had been made by the Central Government on 22nd December 1989 within one month from the first purchase order and in any case prior to the second purchase order. Admittedly the payment has been received by the transferor without any protest whatsoever.

We, therefore, dismiss the appeal with costs.