

SUPREME COURT OF INDIA

Asgar S. Patel

Vs.

Union of India

C.A.No.6329 of 1998

(S. Rajendra Babu and R. C. Lahoti, JJ.)

25.04.2000

JUDGEMENT

R.C. LAHOTI, J.:-

1. Flat No. 201, 2nd Floor, New Jaldarshan, Dorry Cross Road, Bandra (West), Bombay was owned by one Hemant Chawla (hereinafter the 'Transferor', for short). On 1-5-1994 the transferor entered into an agreement to sell the said flat for a consideration of Rs. 45,50,000/- in favour of the six appellants herein (hereinafter referred to as the 'Transferees', for short). An amount of Rs. 4,55,000/- was paid by the transferees to the transferor on 1-5-1994 i.e. the date of the execution of the agreement. The balance consideration of Rs. 41 lakhs was to be paid on completion of sale within 30 days from the receipt of 'no objection certificate' from the Appropriate Authority. On 6-5-1994 the transferor and the transferees jointly filed a statement in Form 37-I under S. 269-UC of the Income-tax Act, 1961 (hereinafter the 'Act', for short). A copy of the agreement was annexed with Form 37-A as statutorily required and as per the pro forma the names of the six transferees were mentioned in column No. 4 of Form 37-I.

2. On 12-8-1994 the Appropriate Authority issued notice under Section 269-UD (IA) of the Act to the transferor and the transferees in view of its having formed an opinion that there was significant under-valuation of the property and calling upon the transferor and the transferees to show cause why an order of compulsory purchase by Central Government be not made. Vide Para 6 of the notice the Appropriate Authority noted that out of the amount of consideration agreed upon between the parties to the agreement dated 1-5-1994, an amount of Rupees 4,55,000/- was paid by way of earnest money on the execution of the agreement and the balance amount was payable within 30 days from the receipt of NOC from the Appropriate Authority. The transferor and the transferees filed responses to the show cause notice disputing the grounds for compulsory purchase by the Central Government.

3. On 30-8-1994 the Appropriate Authority passed an order directing compulsory purchase in favour of the Central Government for a discounted value of Rupees 44,25,680/-. Vide paras 8 and 9 of its order, the Appropriate Authority directed that out of the consideration payable by the Central Government, the encumbrance as mentioned in Clause 3 of the agreement, should be satisfied by the transferor and in the meantime the amount shall be deposited in the account of the appropriate authority. Vide Clause 9 of the agreement, the vendor was to bear 50% transfer fee payable to the Society which liability amounted to Rs. 22,000/-. The order directed this amount also to be retained by the Appropriate Authority towards the vendor's liability for payment of transfer fee. Clause (3) of the agreement referred to the flat forming subject-matter of sale having been offered as security to Indian Overseas Bank in connection with a loan of Rs. 36,50,878/- taken by the transferor. There was also an order of attachment before judgment-cum-garnishing order dated 13-9-1994 secured by one Chandrakant and Co., a partnership firm, creating an encumbrance to the tune of Rs. 6,00,800/- on the flat.

4. On 26-9-1994 the transferees made a representation to the Appropriate Authority inviting the attention of the latter to the fact that they had paid a sum of Rs. 4,55,000/- (as mentioned in the agreement) and another sum of Rs. 50,000/- after signing of the said agreement to which they were entitled to be reimbursed under Clause 5(e) of the agreement. They prayed that their lien on the flat be honoured and the amount of Rupees 5,05,000/- be released to them out of the consideration proposed to be paid by the Central Government to the transferor. Ultimately the amount of consideration payable by the Central Government was distributed as follows. An amount of Rs. 6,00,800/- was deposited in the Court on 30-9-1994 to honour the order of attachment made in summary suit No. 2012 of 1994 filed by M/s. A. Chandrakant and Co. against the transferor Hemant Chawla. An amount of Rs. 36,50,878/- was paid to Indian Overseas Bank, Bandra Branch on 27-12-1994 to satisfy the encumbrance of mortgage existing in favour of the Bank. Retaining an amount of Rs. 22,000/- towards transfer fee payable to the Society, the balance amount of Rs. 1,52,002/- was paid to transferor on 23rd December, 1994. It is clear from these facts that in so far as the claim of the transferees, appellants before us, is concerned it was neither taken note of nor honoured by the Appropriate Authority. On 25-1-1995 the transferees/appellants served a notice demanding payment of Rs. 5,05,000/- from the Appropriate Authority. On 16-3-1995 they filed a writ petition in the High Court of Bombay seeking the same relief. A learned single Judge dismissed the writ petition summarily forming an opinion that the remedy of the appellants was to sue the transferor for return of the earnest money and remedy of civil writ petition was misconceived. The appellants preferred a writ appeal which also has been dismissed by the Division Bench. The aggrieved appellants have

come up to this Court seeking special leave to appeal which leave has been granted to them.

5. The controversy arising for decision centers around the interpretation on Section 269-UG of the Act. According to the learned counsel for the appellants it was statutory obligation of the Central Government to have tendered to them the amount claimed by them. Their claim having been brought to the notice of the Central Government, the Appropriate Authority was not justified in releasing the amount to the transferor. The transferees were the persons entitled/claiming to be entitled to the amount of consideration to the extent of Rs. 5,05,000/- and in as much as their entitlement was not disputed by the transferor or anyone else for that matter, there was no dispute as to the apportionment of the amount to the extent of the entitlement of the transferees. In any case the amount should have been kept in deposit by the Appropriate Authority and should not have been released to the transferor. The Central Government must bear the consequences flowing from its default by non-compliance with the obligation statutorily cast on it by the Act.

6. Sections 269 UF and 269 UG of the Act read as under:-

Consideration for purchase of immovable property by Central Government.

269-UF. (1) Where an order for the purchase of any immovable property by the Central Government is made under sub-section (1) of Section 269-UD the Central Government shall pay, by way of consideration for such purchase, an amount equal to the amount of the apparent consideration.

(2) Notwithstanding anything contained in sub-section (1) where, after the agreement for the transfer of the immovable property referred to in that sub-section has been made but before the property vests in the Central Government under Section 269-UE the property has been damaged (otherwise than as a result of normal wear and tear), the amount of the consideration payable under that sub-section shall be reduced by such sum as the appropriate authority, for reasons to be recorded in writing, may by order determine.

Payment or deposit of consideration.

269-UG. (1) The amount of consideration payable in accordance with the provisions of Section 269-UF shall be tendered to the person or persons entitled thereto, within a period of one month from the end of the month in which the immovable property concerned becomes vested in the Central Government under sub-section (1) or, as the case may be, sub-section (6) of Section 269-UE :

Provided that if any liability for any tax or any other sum remaining payable under this Act, the Wealth-tax Act, 1957 (27 of 1957), the Gift-tax Act, 1958 (18 of 1958), the Estate Duty Act, 1953 (34 of 1953), or the Companies (Profits) Surtax Act, 1964 (7 of 1964), by any person entitled to the consideration payable under Section 269-UF the appropriate authority may, in lieu of the payment of the amount of consideration, set off the amount of consideration or any part thereof against such liability or sum, after giving an intimation in this behalf to the person entitled to the consideration.

(2) Notwithstanding anything contained in sub-section (1) if any dispute arises as to the apportionment of the amount of consideration amongst persons claiming to be entitled thereto, the Central Government shall deposit with the appropriate authority the amount of consideration required to be tendered under sub-section (1) within the period specified therein.

(3) Notwithstanding anything contained in sub-section (1) if the person entitled to the amount of consideration does not consent to receive it, or if there is any dispute as to the title to receive the amount of consideration, the Central Government shall deposit with the appropriate authority the amount of consideration required to be tendered under sub-section (1) within the period specified therein;

Provided that nothing herein contained shall affect the liability of any person who may receive the whole or any part of the amount of consideration for any immovable property vested in the Central Government under this Chapter to pay the same to the person lawfully entitled thereto.

(4) Where any amount of consideration has been deposited with the appropriate authority under this section, the appropriate authority may, either of its own motion or on an application made by or on behalf of any person interested or claiming to be interested in such amount, order the same to be invested in such Government or other securities as it may think proper, and may direct the interest or other proceeds, of any such investment to be accumulated and paid in such manner as will, in its opinion the parties interested therein the same benefits therefrom as they might have had from the immovable property in respect whereof of such amount has been deposited or as near thereto as may be.(Emphasis supplied)

7. We will shortly revert back to the above-said provisions. Immediately let us examine what is the nature of the right of the transferees/appellants under the law and their status under Chapter XX-C Insofar as the controversy arising for decision before us is concerned. The scheme as to purchase by Central Government of immovable properties in certain cases of transfer as is envisaged by Chapter XX-C of the Income-tax Act, 1971 (1961) came to be introduced by the Finance Act, 1986. In place of earlier Chapter XX-A and applies to transactions effected after 1st October, 1986. Once the Appropriate Authority has, after the receipt of the statement under sub-section (3) of Section 269-UC in respect of any immovable property, made up its mind to make an order for the purchase by the Central Government of such an immovable property at an amount equal to the amount of apparent consideration as defined in Clause (b) of S. 269-UA such property shall on the date of such order vest in the Central Government in terms of the agreement for transfer referred to in sub-

section (1) of Section 269-UC. Section 269-UF as it originally stood prior to its amendment by the Finance Act, 1993 with effect from 17-11-1992 provided for the vesting in the Central Government of such immovable property "free from all encumbrances." In C.B. Gautam v. Union of India, (1993) 1 SCC 78, a Constitution Bench of this Court held the employment of expression "free from all encumbrances" in sub-section (1) to be violative of Article 14 of the Constitution and therefore directed the said expression to be quashed and struck down from the language of Section 269-UE (1) Vide para 36 this Court has held:-

"36.....In the result the expression "free from all encumbrances" in sub-section (1) of Section 269-UE is struck down and sub-section (1) of Section 269-UE must be read without the expression "free from all encumbrances" with the result the property in question would vest in the Central Government subject to such encumbrances and leasehold interests as are subsisting thereon except for such of them as are agreed to be discharged by the vendor before the sale is completed.....The provisions of sub-section (6) of that section do not present any difficulty because the vesting in the Central Government would be subject to such encumbrances and leasehold rights as stated earlier."

8. A purchase under the provisions of Chapter XX-C may be called a compulsory purchase or a pre-emptive purchase. Sub-section (1) of Section 269-UF obliges the Central Government to pay an amount equal to the apparent consideration by way of consideration for such purchase. Sub-section (1) of Section 269-UG provides for the person or persons to whom the amount of apparent consideration is to be tendered by the Central Government. Without cataloguing or categorising the person or persons to whom the amount shall be tendered the Parliament has chosen to employ the expression - "the person or persons entitled thereto." The expression is not defined in Chapter XX-C or elsewhere in the Act. We have to go by the ordinary meaning of the expression and the context in which it has been used. The word 'entitle' means "to give a claim, right, or title to; to give a right to demand or receive, to furnish with grounds for claiming" (The Law Lexicon, P. Ramanatha Ayar, 2nd Edition, Page 642).

9. Chapter XX-C is not an encroachment or inroad on the right of a citizen to hold property. It merely modifies the contractual relationship between the parties to the extent superseded by the provisions of Chapter XX-C. The rights and obligations of the parties to the contract are governed by the ordinary law of the land including the provisions of the Contract Act and the Transfer of Property Act. Section 55 of the Transfer of Property Act, 1882 provides:-

"55. In the absence of a contract to the contrary the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

XXXXXX XXX

(6) The buyer is entitled-

XXXXXX XXX

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him,***, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

XXXXXX XXX

XXXXXX XXX

10. Just as the seller has a charge on the property for unpaid price under Section 55(4) (b) of T.P. Act, the buyer has a charge for price pre-paid. Thus the amount of any purchase money properly paid by the buyer in anticipation of the delivery and also the earnest where the buyer had justification for declining to accept the delivery constitutes a charge on the property forming subject-matter of sale to the extent of the seller's in the property and thus would be an encumbrance of the property. Section 269-UE(1) as amended by the Finance Act, 1993 (w.e.f. 17-11-1992) reads as under:-

Vesting of property in Central Government.

269-UE. (1) Where an order under sub-section (1) of Section 269-UD is made by the appropriate authority in respect of an immovable property referred to in sub-clause (I) of Clause (d) of Section 269-UA such property shall, on the date of such order, vest in the Central Government (in terms of the agreement for transfer referred to in sub-section (1) of Section 269-UC);

Provided that where the appropriate authority, after giving an opportunity of being heard to the transferor, the transferee or other persons interested in the said property, under sub-section (1-A) of Section 269-UD is of the opinion that any encumbrance on the property or leasehold interest specified in the aforesaid agreement for transfer is so specified with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or leasehold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrance or leasehold interest.)"

11. In view of C.B. Gautam's case (1993) (1) SCC 78) (supra) the vesting of the property in the Central Government cannot be free from encumbrance unless the Appropriate Authority has exercised the power conferred by proviso to sub-section (1) of Section 269-UE and annulled the encumbrance after recording a finding and following the procedure as contemplated by the proviso whereupon only the property shall vest in the Central Government free from such encumbrance else the encumbrance shall run with the property.

12. The language of Section 269-UE(1) gives an indication that on the passing of an order under Section 269-UD(1) the immovable property vests in the Central Government in terms of the agreement for transfer referred to in sub-section (1) of S. 269-UC. The scheme of the provisions suggests that on the passing of the order of compulsory purchase the Central Government stands substituted in place of the buyer and the apparent consideration stands substituted in place of the agreed consideration. Further in view of the property having vested in the Central Government, the agreement need not be performed by the transferor. Ordinarily, in the event of the private agreement between the parties falling to the ground (i.e. not because of intervention of Chapter XX-C proceedings) the transferor would have been liable to refund the amount of purchase money to the transferees and so long as the amount was not returned the transferees would have held a lien on the property to the extent of the seller's interest. Recently in Delhi Development Authority v. Skipper Construction Co. (P) Ltd., 2000 AIR SCW 113 : (AIR 2000 SC 573) this Court has held that the buyer's charge under Section 55(6)(b) of the T.P. Act is a statutory charge and differs from a contractual charge which the buyer may be entitled to claim under a separate contract. The charge is enforceable not only against the seller but against all persons claiming under him.

13. A charge under Section 55(6)(b) of T.P. Act is created soon on payment of purchase money. It can be lost on wrongful refusal to accept delivery or property. As held in Saidun Nessa Hoque v. Calcutta Vyapar Pratishan Ltd., AIR 1978 Cal 285 with which we find ourselves in agreement a charge under Section 55(6)(b) may not be created if the parties expressly stipulate that the purchase money will not form the charge on the property or it will be released from the charge on certain circumstances or that earnest would be forfeited under certain circumstances. In the present case, the property having been compulsorily purchased by the Central Government there was no occasion for the buyer to have improperly declined to accept delivery of the property. The amount of purchase money was properly paid by the buyer and was in anticipation of the fulfilment of the contract which would include delivery of the property. In view of the order of compulsory purchase having intervened the transferees were excluded from accepting delivery of the property. The applicability of Section 55(6)(b) of T.P. Act fully attracted.

14. During the course of the proceedings under Chapter XX-C the Appropriate Authority may, subject to the principles of natural justice, record a finding that the purchase money which purports to have been paid by the transferees to the transferor is being claimed to have been paid only with a view to defeat the provisions of this Chapter. Then the Appropriate Authority may make a declaration avoiding the charge claimed to have been created for the purchase money paid. Else, the charge shall continue to exist and follow the property in the hands of the Central Government.

15. The only defence raised in the counter filed on behalf of the Appropriate Authority before the Court is that the appellants did not file a consent letter from the transferor agreeing to payment of Rs. 5,05,000/- to the transferees/appellants and therefore the balance amount was released for payment in favour of the transferor. According to the Appropriate Authority it is always the transferor/vendor alone who is entitled to receive the consideration payable under an order of compulsory purchase unless otherwise agreed mutually and expressly between the parties and consent terms filed with the Appropriate Authority. It is difficult to agree with the abovesaid plea raised on behalf of the Appropriate Authority. If there be no dispute between the buyer and the seller or a third person as to the amount of purchase money having been paid or as to the apportionment of the amount forming part of the purchase money then the amount must be tendered by the Central Government to the person or persons entitled thereto. If there be any dispute raised as to the apportionment of the amount by more than one person staking claims seeking payment of the amount resulting into a dispute as to the apportionment of the amount of consideration, in that case the Central Government shall deposit so much part of the apparent consideration as is the subject matter of dispute with the appropriate authority as provided by sub-section (2) of Section 269-UG. In either case the compliance must be made within a period of one month from the end of the month in which the immovable property concerned becomes vested in the Central Government. Failure to make such tender shall result in the pre-emptory purchase being abrogated and the immovable property shall stand re-vested in the transferor as provided by sub-section (1) of Section 269-UH.

16. An absence of consent or express willingness to apportionment of the amount does not necessarily amount to a dispute raised. The action of the Appropriate Authority as evidenced by the proceedings in the case at hand itself exposes the worth of the plea so raised. Netiher A. Chandrakant and Co. nor Indian Overseas Bank had filed a consent letter from the transferor. Still their encumbrances were discharged. How the appellants could have been treated differently? Form 37-I filed jointly by the transferees and the transferor stated purchase money to the extent of Rs. 4,55,000/- having been paid by the appellants and received by the transferor. Nobody had questioned the genuineness of this payment. The transferor never disputed having received the said amount. The factum of payment of Rs. 4,55,000/- finding place in the agreement which was the basis of commencement of the proceedings and formed part of Form 37-I could not have been treated as a disputed payment. In any case, if the Appropriate Authority entertained any doubt about the genuineness or otherwise of such payment then the Appropriate Authority should have said so in its order and then left the amount in deposit with the Appropriate Authority. That having not been done the vesting of the property in the Central Government under the order of compulsory purchase cannot defeat the transferees lien under Section 55(6)(b) of the T.P. Act.

17. Though a further amount of Rs. 50,000/- is claimed to have been paid by the transferees to the transferor on 4th June, 1994 and this payment was also brought to the notice of the Appropriate Authority of 15th June, 1994 by the transferees, however, the factum of such payment does not find mention in any statement or document jointly signed before the Appropriate Authority or jointly submitted by the transferees and the transferor to the Appropriate Authority. An intimation as to such claim does not also appear to have been given to the transferor in the proceedings before the Appropriate Authority. There was no occasion for the transferor to have admitted or disputed the claim as to payment of Rs. 50,000/- to him. No fault can therefore be found with the Appropriate Authority having not tendered this amount of Rs. 50,000/- to the transferee-appellants.

18. During the course of hearing on a specific query raised by the Court, the learned senior counsel for the appellants stated that for non-tendering the amount of Rupees 5,05,000/- or Rs. 4,55,000/- the appellants were not seeking re-vesting of the property in the transferor; they were only seeking enforcement of the statutory charge in their favour for the amount of purchase money paid by them. In view of that statement made at the Bar the question of testing whether for failure of the Central Government to tender the amount consistently with the provisions of sub-section (1) of Section 269-UG the order of compulsory purchase in favour of the Central Government shall stand abrogated and the property shall stand re-vested in the transferor does not arise. Besides, the property compulsorily purchased by the Central Government has been put to auction once again and sold away with the result that the interests of a third party have intervened.

19. The question which now remains to be examined is whether in view of the law laid down hereinabove whether a writ of mandamus can issue in favour of transferees/appellants commanding the Central Government to pay the amount of purchase money to the appellants to the extent undisputedly paid by them.

20. Here it will be relevant to extract and reproduce Clause 5 of the agreement dated 1st May, 1994 entered into between the parties. It reads as under:-

"5. Since 1st October, 1986, the provisions of Chapter XX C of the Income-tax Act, 1961 have come into force and in view thereof the parties hereto agree as under:-

a) This agreement shall be treated as the Memorandum of Understanding between the parties hereto for the purpose of S. 269-UC of the Income-tax Act, 1961.

b) Within 15 days from the execution hereof, the Vendor and the Purchasers shall file the copy of

this agreement along with a statement in form 37-I with the Appropriate Authority as required by Section 269-UC Sub-section (3) of the Income-tax Act, 1961.

c) In the event the appropriate Authority makes an order for purchase by the Central Government of the said property under Section 269-UD of the Income-tax Act, 1961 then in such an event.

(i) The vendor shall be entitled to receive from the Central Government entire consideration and the Purchasers hereby consents for the same.

(ii) The Purchasers shall be entitled to claim from the Appropriate Authority the refund of Rs. 4,55,000/- (Rupees Four lakhs fifty five thousand only) being the earnest money paid by the Purchasers to the Vendor. In the event the Appropriate Authority does not pay the said sum of Rs. 4,55,000/- (Rupees Four lakhs fifty five thousand only) to the Purchasers then the Purchasers shall be entitled to recover the said earnest money from the vendor.

d) In the event the Appropriate Authority does not make any (sic-order?) for purchase by Central Government of the said property for a period of three months from the date of submitting the statement in form 37-I or grants its 'No Objection' for the sale of the said property by the Vendor to the Purchaser herein, the Vendor shall be bound to complete the sale."

21. It is clear from the abovesaid Clause of the agreement that the parties were well aware of the provisions of Chapter XX-C of the Act having come into force on 1st October, 1986. In this background they had entered into a specific agreement between themselves whereby they had agreed in the event of the Appropriate Authority making an order for purchase by the Central Government of the property forming subject matter of the agreement, firstly, the vendor is the person who shall be entitled to receive the entire amount of consideration and the purchasers were consenting for it. The next sub-clause says that though the amount of Rs. 4,55,000/- shall be available to be claimed by the transferees from the Appropriate Authority but the parties were also clear in their mind, and accordingly they had stipulated, that in the event of the Appropriate Authority not paying the amount of Rs. 4,55,000/- to the transferees, the transferees shall be entitled to recover the amount from the vendor. There is no reason why the rights and obligations of the parties should not be worked out by reference to the recitals of the agreement governing their relationship. In the event of the Appropriate Authority/the Central Government failing in discharging its statutory obligation the only right reserved to the transferees under the agreement is to recover the amount from the transferor. When the parties enter into a clear, unambiguous and express contract creating mutual rights and obligations, the parties are bound by it and the extraordinary jurisdiction of the High Court under Article 226 of the Constitution which is of a discretionary nature cannot be allowed to be utilized for enforcing an obligation in departure from the terms of the agreement.

22. There is yet another reason why the discretion cannot be exercised in favour of the transferee-appellants. Even if the High Court were to exercise its discretionary writ jurisdiction in favour of the transferee-petitioners by directing payment of purchase money from the Central Government to the petitioners, the direction should be one binding on the transferor as well so that the Central Government, in its turn, could have recovered the amount from the transferor. Strangely enough the transferee-petitioners have not impleaded the transferor as party to the writ petition. As the amount left available with the Central Government was less than the amount of purchase money paid by the transferees to the transferor, if full amount of Rs. 4,55,000/- was directed to be paid by the Central Government to the transferee-petitioners then a corresponding reduction was required to be made from the amount paid to the Indian Overseas Bank and/or the amount deposited in the Court honouring the garnishing order/order of attachment in favour of M/s. A. Chandrakant and Co. Indian Overseas Bank and M/s. A. Chandrakant and Co. were also not joined as parties to the petition. The only persons impleaded as respondents before the High Court were the Union of India, the Appropriate Authority and the Commissioner of Income-tax. The special leave petition before this Court was also filed with the said three parties only impleaded as respondents. During the pendency of petition before this Court, on 25-1-1996 the transferor, the Bank and M/s. A. Chandrakant and Co. were permitted to be impleaded as respondents. This was at too late a stage. They were noticed. But they have chosen not to appear.

23. For the foregoing reasons, we hold the transferee-petitioners not entitled to any relief in these proceedings. Needless to say that are still at liberty to have their remedy against the transferor and seek return of the money paid by them to the transferor under the agreement. The appeal is dismissed though without any order as to the costs in the facts and circumstances of the case.

Appeal dismissed.