REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 430 OF 2007

UNITECH LTD. & ANR. .. APPELLANT(S)

VERSUS

UNION OF INDIA & ANR. ..RESPONDENT(S)

JUDGMENT

S. A. BOBDE, J.

1. This appeal is preferred by the appellants, who suffered an order of compulsory pre-emptive purchase under Chapter XXC of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') passed by the Appropriate Authority under Section 269UD of the Act.

2. Vidarbha Engineering Industries - Appellant No. 2 (hereinafter referred to as 'Vidarbha Engineering') holds on lease, three plots of land admeasuring 2595.152 sq mtrs i.e. 27934 sq ft at Dahipura and Untkhana, Nagpur (hereinafter referred to as the 'subject land'). This land is comprised of three plots of land i.e. Plot Nos. 34, 35 and 36 obtained by Vidarbha Engineering from the Nagpur Improvement

Trust. Vidarbha Engineering decided to develop the subject land and entered into an agreement for the purpose with Unitech Ltd. (herein after referred to as 'Unitech'). The Memorandum of Understanding between them was formalized into a collaboration agreement dated 17.03.1994. Under this agreement the land holder agreed to allow Unitech to develop and construct a commercial project on the subject land admeasuring 2595.152 sq mtrs at the technical and financial cost of the latter. The parties to the agreement agreed, upon construction of the multi storied shopping cum commercial complex, that Unitech will retain 78% of the total constructed area and transfer 22% to the share of Vidarbha Engineering. Unitech agreed to create an interest free security deposit of Rs. 10 lakhs. 50% of the deposit was made refundable on completion of the RCC structure and the other 50% on completion of the project. The parties were entitled to dispose of the saleable area of their share. It was specifically agreed that this agreement was not to be construed as a partnership between the parties. In particular, this agreement was not to be construed as a demise or assignment or conveyance of the subject land. It is significant to note that the agreement does not contain any clause by which Unitech, the developer, is to pay any consideration in terms of money to Vidarbha Engineering, the land holder. The only consideration apparently provided is the entitlement of Vidarbha

Engineering to 22% of the constructed area in the proposed multi storied building.

3. The appellant submitted a statement in Form 37-I under Section 269UC of the Act annexing the agreement dated 17.3.1994. According to Shri V.A. Mohta, the learned senior counsel, this form contains only the nomenclatures of transferor and transferee and contemplates only the transaction of a transfer and not an arrangement of collaboration. Therefore, the appellants were constrained to describe themselves as transferor and a transferee. Accordingly, they mentioned that the consideration for the transfer of the subject property was Rs.100.40 lakhs towards the cost of share of 22% of Vidarbha Engineering, which was to be constructed by Unitech – builder at its own cost. This submission was made as a preface to the contention that in fact and in law, Vidarbha Engineering has not transferred the property held by it to Unitech, but that it has only allowed Unitech to make a construction on the land. Indeed, we have considered this submission notwithstanding the self description of the parties as transferor and transferee since it involves the true construction of a document which is always a substantial question of law. We find much substance in the contention. In the first place, Vidarbha Engineering itself is a lessee holding the land on lease of 30 years from Nagpur Improvement Trust. It has no authority to transfer

the land. Secondly, no clause in the agreement purports to transfer the subject land to Unitech. On the other hand, clause 4.6 specifically provides that nothing in the agreement shall be construed to be a demise, assignment or a conveyance. The agreement thus creates a licence in favour of Unitech under which the latter may enter upon the land and at its own cost build on it and thereupon handover 22% of the built up area to the share of Vidarbha Engineering as consideration and retain 78% of the built up area. By the statement in Form 37-I the consideration has been valued by the parties at Rs. 1,00,40,000/-.

4. It was contended by Shri Mohta, the learned senior advocate, that since the agreement does not purport to transfer any land by Vidarbha Engineering to Unitech, Chapter XXC of the Act itself has no application and no pre-emptive purchase could have been ordered by the competent authority. Shri Mohta points out that the provisions of Chapter XXC providing for pre-emptive purchase by the Central Government only deal with transfer by way of sale, exchange or lease or admitting as a member by transfer of shares in a cooperative society or by way of an agreement or arrangement which has the effect of transferring or enabling the enjoyment of the said property and that none of this can cover a collaboration agreement of the kind

entered into by the appellants; vide sub-clause (ii) of clause (f) of sub section (2) of Section 269UA of the Act[1].

5. It may appear at first blush that the collaboration agreement involves an exchange of property in the sense that the land holder transfers his property to the developer and the developer transfers 22% of the constructed area to the land holder but on a closer look this impression is quickly dispelled. Exchange is defined vide Section 118 of the Transfer of Property Act, 1882 as a mutual transfer of the ownership of one thing for the ownership of another[2]. But it is not possible to construe the license created by Vidarbha Engineering in favour of Unitech as a transfer or acquisition of 22% share of the constructed building as a transfer in exchange. As observed earlier

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[1] Section 269UA. Definition – In this Chapter, unless the context otherwise requires, -

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(f) "transfer",-

(i) in relation to any immoveable property referred to in sub-clause (i) of clause (d), 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 purpose 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 is to be 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 immoveable property of the nature referred to in sub-clause (ii) of clause (d), means the doing of anything (whether by way of admitting as a member of or by way of transfer of shares in a cooperative society or company or other association of persons 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.

[2] Section 118 "Exchange" defined.-When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called "exchange".

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Vidarbha Engineering is not an owner but only a lessee of the land. As such, it cannot convey a title which it does not possess itself. In fact, no clause in the agreement purports to effect a transfer. Also in consideration of the licence Unitech has agreed that the Vidarbha Engineering will have a share of 22% in the constructed area. Thus it appears that what is contemplated is that upon construction Unitech will retain 78% and the share of Vidarbha Engineering will be 22% of the built up area vide clause 4.6 of the agreement[3]. Thus the transaction cannot be construed as a sale, lease or a licence. At this juncture it would be important to construe this transaction in terms of clause (d) of sub-section (2) of Section 269UA of the Act, the provision which defines immovable property[4]. In terms of Section 269UA(2)(d) of the Act 'Immovable property' consists of :-

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[3] clause 4.6 : As a consideration for the SECOND PARTY agreeing to develop the said project land in phases and in the manner specified herein, the SECOND PARTY shall be entitled to retain 78% of the total constructed area of the multi-storeyed shopping-cum-commercial project and the FIRST PARTY's share will be 22% of the same. This constructed area shall include the area in the basement, if there will be any.

[4] Section 269UA (2)(d) "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 to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fitting 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 in or with respect to any land or any building or a 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, accruing or arising from any 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), not being a transaction by way of sale, exchange or lease of such land, building or part of a building;

(a) not only land or building vide sub-clause (i) but also

(b) any rights in or with respect to any land or building including a building which is to be constructed.

'Transfer' of such rights in or with respect to any land or building is defined in clause (f) of sub-section (2) of Section 269UA of the Act as the doing of anything which has the effect of transferring, or enabling the enjoyment of, such property. Thus the question whether the collaboration agreement constitutes transfer of property must be answered with reference to clauses (d) and (f) which defines immovable property and transfer. It is clear from the agreement that the transfer of rights of Vidarbha Engineering in its land does not amount to any sale, exchange or lease of such land, since, only possessory rights have been granted to Unitech to construct the building on the land. Nor is there any clause in the agreement expressly transferring 22% of the building to Vidarbha after it is constructed by Unitech. Clause 4.6 only mentions that as a consideration for Unitech agreeing to develop the property it shall retain 78% and the share of Vidarbha Engineering will be 22%. In fact the Parliament has defined "transfer", deliberately wide enough to include within its scope such agreements or arrangements which have the effect of transferring all the important rights in land for future considerations such as part acquisition of shares in buildings to be

constructed, vide sub-clause (ii) of clause (f) of sub-section (2) of Section 269UA. There is no doubt that the collaboration agreement can be construed as an agreement and in any case an arrangement which has the effect of transferring and in any case enabling the enjoyment, of such property. Undoubtedly, the collaboration agreement enables Unitech to enjoy the property of Vidarbha Engineering for the purpose of construction. There is also no doubt that an agreement is an arrangement. It must therefore be held that the collaboration agreement effectuates a transfer of the subject land from Vidarbha Engineering to Unitech within the meaning of the term in Section 269UA of the Act. It appears to be the intention of the Parliament to cover all such transactions by which valuable rights in property are in fact transferred by one party to another for consideration, under the word "transfer", for fulfilling the purpose of pre-emptive purchase i.e. prevention of tax evasion. A Judgment of the Patna High Court in *Ashis Mukerji* v. *Union of India and Ors*[5] cited before us takes the view that a development agreement is covered by the definition of transfer in Section 269UA. We note the same with approval.

SHOW CAUSE NOTICE

[5] [1996] 222 ITR 168

6. Upon the submission of the statement under Section 269UA of the Act, the Appropriate Authority issued a show cause notice dated 8.7.1994 stating that the consideration for the transaction appears to be too low and appears to be understated by more than 15%, having regard to the sale instance of a land in Hanuman Nagar, an adjoining locality. The show cause notice contains the following table:

		P.U.C.	Sale instance property
1.	File No.	214	210
2.	Dt. of agreement	17.3.1994	1.3.1994
3.	Description of property	Land bearing Plot No. 34, 35, 36, Ind. Area Scheme NIT. Dahipura and Untkhana, Rambag Rd. Nagpur	Land at Sur. No. 19 Sheet No. 32, Ward No. 10, Hanuman Nagar, Nagpur.
4.	Consideration: Apparent	1,00,40,000/-	19,50,000/-
5.	Land Area	2024.22 sq. ft.	736 sq. mtrs.
6.	F.S.I. available	56473 sq. ft.	6877 sq ft.
7.	Rates per sq. ft. of FSI apparent	Rs. 184/-	Rs. 283/-

7. It is obvious from the table that the authority took the price the consideration for the land to be Rs. 1,00,40,000/- (rupees one crore forty thousand) which is the consideration stated by the appellant in

the statement as a consideration for the transfer of subject property i.e. plot nos. 34, 35 and 36 admeasuring 2595.152 sq. mtrs. = 27,934 sq ft. It is however, difficult to imagine how or why the authority has considered the consideration to be for 56,473 sq ft (of available FSI). This has obviously resulted in showing a lower price of Rs.184/- per sq ft of FSI and enabling the authority to draw a prima facie conclusion that the consideration is understated by more than 15% in comparison to the sale instance for which the price appears to be Rs. 283/- per sq ft of FSI. If the authority had to take into account the consideration of Rs. 1,00,40,000/- for 27,934 sq ft to a piece of land as stated by the appellants the rate would have been Rs. 359.41 per sq ft. and the rate of the sale instance would have been Rs. 246.14 per sq ft. The authorities thus committed a serious error in taking the consideration quoted by the appellants for the entire subject land i.e. 27,934 sq ft as consideration for the transfer of the available FSI i.e. 56,473 sq ft. thus showing an unwarranted undervaluation.

8. Moreover, as rightly contended by Shri Mohta the authorities have treated the consideration for subject land, which is an industrial plot, as understated by more than 15% on the basis of a sale instance of a land which is in a residential locality. More importantly, it is obvious that the area of the sale instance is of a much smaller plot i.e.

736 sq mtrs whereas the subject land which is said to have been undervalued is 2,024 sq mtrs. It is well known that the price of a small residential plot would be more than a large industrial plot. The show cause notice which has subsequently been confirmed is vitiated by a gross non-application of mind.

9. In reply to the show cause notice the appellants raised several objections to the alleged undervaluation including the existence of encumbrances and the aspects mentioned hereinabove. In particular, the appellants pointed out a sale instance of a comparable case approved by the authorities where the FSI cost on the basis of apparent consideration comes to Rs. 90/- per sq ft. This was in respect of a property in the very same locality in which the subject land is located.

ORDER UNDER SECTION 269UD OF THE INCOME TAX ACT

10. The appropriate authority considered the objections filed by the appellants and rejected them by an order dated 29.07.1994 passed under section 269UD of the Income Tax Act. The authority rejected all the objections taken by the appellants. The authority validated the sale instance relied on in the show cause notice without giving any finding on the specific objections raised. It rejected the sale instance relied on by the appellants of a property in the same locality on the

ground that that property does not have road on the three sides like the property under consideration; there is a nallah carrying waste water near that property and it has a frontage of only 12.5 mtrs. It took into account the consideration of Rs. 1,00,40,000/- and deducted from it an amount of Rs. 24,09,600/- being discount calculated at the rate of 8% per annum since the consideration had been deferred for a period of three years. It therefore determined the consideration for purchase of the subject property at Rs. 76,30,400/-.

11. The authority fell into a gross and an obvious error while conducting this entire exercise of holding that the consideration for the subject property was understated in holding that Vidarbha Engineering has transferred property to the extent of 78% to Unitech. There is no warrant for this finding since Vidarbha Engineering was never to be the owner of the entire built up area. It only had a share of 22% in it. Unitech, which had built from its own funds, was to retain 78% share in the built up area. And in any case the appellants had never stated that the consideration for Rs. 1,00,40,000/- was in respect of the built up area but on the other hand had clearly stated that it was for transfer of the subject land. Thus, there was no evidence on record nor is any referred to in the order for coming to the conclusion that Vidarbha Engineering had transferred 78% of the built up area to Unitech and retained 22%. The order of appropriate authority thus suffers from a gross perversity.

IMPUGNED JUDGMENT OF THE HIGH COURT

12. By the writ petition before the High Court, the appellants raised several contentions. They maintained that the impugned order did not contain any finding that the consideration for the transaction was undervalued by the parties in order to evade taxes, which is the mischief sought to be prevented. Shri Mohta, the learned senior advocate, maintained that it was necessary for the authority to come to the conclusion that there is an attempt to or in fact an evasion of taxes before directing compulsory purchase. The learned senior counsel referred to a decision of the Bombay High Court in *Amarjit Thapar* v*. S.K. Laul & Ors.* [2008] 298 ITR 336. The Bombay High Court observed as follows:

> "The order of the Appropriate Authority is invalid and void ab initio as there is no positive finding that there was an attempt to evade tax. The Apex Court in the case of C.B.Gautam v. Union of India (1993) 1 SCC 78, held that the very historical setting in which the provisions of this Chapter were enacted indicates that it was intended to be resorted to only in cases where there is an attempt to evade tax by significant undervaluation of immovable property agreed to be sold. In the case of Nirmal Laxminarayan Grover (supra), this Court held that recourse to compulsory purchase of the immovable property; under Chapter

XX-C of the Act should be taken only in clear cases of gross undervaluation from which the interference must clearly flow that it is done for evasion of taxes.

In view of the judgment of the Supreme Court in C.B.Gautam (supra), unless the difference in the apparent effective consideration and the market value is more than 15%, the Appropriate Authority cannot assume jurisdiction under section 269-UD of the Act. The same does not mean that the mere fact that such difference is more than 15% will, automatically, lead to the conclusion that there has been undervaluation of property with the motive of evading tax. In Vimal Agarwal case (supra), this Court has reiterated that right of pre-emptive purchase under section 269UD is not a right of pre-emption simpliciter but is a right which can be exercised only in the cases where there is significant undervaluation in agreement of sale with a view to evade tax. The onus of establishing that undervaluation is with a view to evade tax is on the Revenue. No such finding is to be found in the impugned order".

It is not possible to agree with this view in its entirety. Undoubtedly one of the objects of the provision is to prevent evasion of taxes by showing an undervaluation which is more than 15% of the true value of the property and which in turn carries an implication that some portion of the value is not shown in the agreement or the deed but passes by way of unaccounted money. But it is not possible to say

that it must be alleged in the show cause notice or a finding must be rendered in the order that there is evasion of taxes as a *sine qua non* for its validity. Nor is it possible to hold that the onus of establishing undervaluation with a view to evade tax is on the revenue. The true position seems to be that a significant undervaluation, greater than 15% below the fair market value raises a rebuttable presumption that there is an attempt to evade taxes. In C.B. Gautam's case[6] this Court observed that an allegation of such undervaluation of more than 15% raises a rebuttable presumption of evasion of taxes which renders an opportunity to show cause necessary. Therefore, such an opportunity must be read into the provisions of Chapter XXC. This Court observed in C.B. Gautam's case (supra), as follows:

> "As we have already pointed out the provisions of Chapter XX-C can be resorted to only where there is a significant undervaluation of property to the extent of 15 per cent or more in the agreement of sale, as evidenced by the apparent consideration being the lower than the fair market value by 15 per cent or more. We have further pointed out that although a presumption of an attempt to evade tax may be raised by the appropriate authority concerned in case of the aforesaid circumstances being established, but such a presumption is rebuttable and this would necessarily imply that the parties concerned must

[6] (1993) 1 SCC 78

have an opportunity to show cause as to why such a presumption should not be drawn. Moreover, in a given transaction of an agreement to sell there might be several bona fide considerations which might induce a seller to sell his immovable property at less than what might be considered to be the fair market value. For example: he might be in immediate need of money and unable to wait till a buyer is found who is willing to pay the fair market value for the property. There might be some dispute as to the title of the immovable property as a result of which it might have to be sold at a price lower than the fair market value or a subsisting lease in favour of the intending purchaser. There might similarly be other genuine reasons which might have led the seller to agree to sell the property to a particular purchaser at less than the market value even in cases where the purchaser might not be his relative. Unless an intending purchaser or intending seller is given an opportunity to show cause against the proposed order for compulsory purchase, he would not be in a position to rebut the presumption of tax evasion and to give an interpretation to the provisions which would lead to such a result would be utterly unwarranted. The very fact that an imputation of tax evasion arises where an order for compulsory purchase is made and such an imputation casts a slur on the parties to the agreement to sell lead to the conclusion that before such an imputation can be

made against the parties concerned, they must be given an opportunity to show cause that the undervaluation in the agreement for sale was not with a view to evade tax. Although Chapter XX-C does not contain any express provision for the affected parties being given an opportunity to be heard before an order for purchase is made under Section 269-UD, not to read the requirement of such an opportunity would be to give too literal and strict an interpretation to the provisions of Chapter XX-C and in the words of Judge Learned Hand of the United States of America "to make a fortress out of the dictionary". Again, there is no express provision in Chapter XX-C barring the giving of a show-cause notice or reasonable opportunity to show cause nor is there anything in the language of Chapter XX-C which could lead to such an implication. The observance of principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, the requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by an appropriate authority under Section 269-UD must be read into the provisions of Chapter XX-C".

13. The High Court has failed to render a finding on the relevance of comparable sale instances, particularly, why a sale instance in an adjoining locality has been considered to be valid instead of a sale instance in the same locality. The other aspects of the impugned order

of the appropriate authority in the earlier part of judgment seems to have been missed.

14. In the result, we find that the appeal deserves to be allowed and is hereby allowed. The impugned order dated 20.02.2004 passed by the High Court of Bombay at Nagpur is set aside. Consequently, order dated 29.07.1994 passed by the appropriate authority under Section 269UD (1) of the Act is also set aside. There will be no order as to costs.

.....J.
[MADAN B. LOKUR]

.....J.
[S.A. BOBDE]

NEW DELHI,
NOVEMBER 4, 2015