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

WRIT PETITION NO. 4370 OF 2022

Vivek Jaisingh Asher ....Petitioner

V/s.

Income Tax Officer, Ward 19(3)(1)
and Ors. ...Respondents

Mr. J.D. Mistri, Senior Advocate a/w Mr. B.V. Jhaveri and Ms. Bhargavi Raval for Petitioner.
Mr. Akhileshwar Sharma for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 16th APRIL 2024

P.C. :

1. Since the pleadings in the petition are completed, we have decided to dispose the petition at the admission stage itself.

2. Rule. Rule made returnable forthwith.

3. Petitioner, an individual filed return of income for Assessment Year (A.Y.) 2020-21 on 29th December 2020 declaring total income of Rs.3,11,410/-. The case was selected for scrutiny under CASS to examine "Capital Gains Deduction Claimed". Therefore, Show Cause Notice dated 23rd August 2022 was issued calling upon petitioner to show cause as to why certain variations prejudicial to petitioner's interest should not be made.

4. In reply assessee explained that on 11th August 2014 development agreement was executed by and between the owner of the building known as Vallabha Niwas and M/s. Arkade Paradigm (the Developer). The owners of the building agreed to grant development rights in respect of the building and agreed to permit the developer to develop the property on terms and conditions mentioned therein. Under the development agreement, the developer was required to provide permanent alternate accommodation to the tenants/occupants and as mandated by Maharashtra Housing and Area Development Authority (MHADA), the developer entered into permanent alternate accommodation agreement with the tenants/occupants and registered the same with the Sub-Registrar of Assurances.

5. An intimation of disapproval was issued by the Bombay Municipal Corporation on 9th December 2015 and the amended plans for the new building were approved on 29th November 2017.

6. Petitioner along with his brother were tenant since 1st April 2013 of a flat on the first floor of the building admeasuring 2270.24 sq. ft. carpet area and a garage of 259.50 sq. ft. in the said building. Petitioner and his brother were paying rent of Rs.5,000/- per month to the owners since 1st April 2013. The tenancy agreement was executed on 5th August 2014 in respect of flat on the first floor of the building. Petitioner and his

brother got permanent alternate accommodation and possession letter dated 19th February 2020 in respect of flat on 15th Floor in the new building called Arkade Rise was issued. The stamp duty of the said flat was Rs.11,68,99,000/-. Petitioner thereafter received various notices under Section 142(1) of the Income Tax Act, 1961 (the Act) which were all replied to. Finally petitioner received Show Cause Notice dated 23rd August 2022 calling upon petitioner to show cause as to why the stamp duty value of the said flat being Rs.11,68,99,000/- should not be treated as deemed income of petitioner under Section 56(2)(x) of the Act and deduction under Section 54F of the Act be denied. Petitioner replied vide his Chartered Accountant's letter dated 1st September 2022 explaining that the tenancy in the hands of petitioner was at Nil cost and on surrender of this tenancy rights was allotted a flat in the new building which was valued by the Stamp Duty Authority at Rs.11,68,99,000/-. Petitioner fetched the consideration of Rs.11,68,99,000/- on surrender of its tenancy rights which has been invested in the flat on 15th Floor of the new building and hence entitle to deduction under Section 54F of the Act. Petitioner also filed copies of rent receipt, application to Brihanmumbai Electric Supply and Undertaking (BEST) for fresh electric connection, electricity bills etc.

7. Respondent No.3 thereafter passed the impugned assessment order dated 29th September 2022. Before that petitioner had also filed additional reply dated 12th September 2022 giving details of certain general

precedents in support of petitioner's case. The impugned order dated 29th September 2022 was passed in which Respondent No.3 proposed to treat the entire stamp duty value of the said flat as unexplained investment under Section 69 of the Act and charged to tax under Section 115BBE of the Act.

8. Admittedly, no notice has been issued to assessee/petitioner calling upon assessee to show cause whether the entire stamp duty value be treated as unexplained investment under Section 69 of the Act. In the affidavit in reply, the answer given to this allegation of petitioner that no notice was given to show cause under Section 69 of the Act is that the assessment was getting barred by limitation on 30th September 2022 and there was no time for further show cause notice and hence the Faceless Assessing Officer (FAO) has passed the assessment order after considering all the submissions and possible aspect of the case and agreement value of the new purchased property at Rs.11,68,99,000/- is treated as unexplained investment under Section 69 of the Act and added to the total income of assessee. In the assessment order though there is reference to Section 56(2)(x) of the Act and the reply/objections filed by petitioner in response to the show cause notice, in the operative part there is no reference to Section 56(2)(x) of the Act.

9. The courts have time and again held that issuance of show cause notice is not an empty formality. Its purpose is to give reasonable

opportunity to the affected persons to effectively deal with the allegations in the show cause notice. In our view, even the show cause notice dated 23rd August 2022 is defective in as much as even though it had reference to Section 56(2)(x) of the Act, it did not mention whether the Assessing Officer proposed to treat the stamp duty value as deemed income of assessee under clause (a) or clause (b) of Section 56(2)(x) of the Act. This is because both are separate provisions and under either of these two clauses the stamp duty value could be treated as deemed income. By not specifying whether Section 56(2)(x)(a) or Section 56(2)(x)(b) of the Act was applicable, the A.O. first of all has not given reasonable opportunity of showing cause to the assessee. Assessee would be totally unaware of the grounds which had prompted the A.O. to arrive at a prima facie conclusion and issue show cause notice. The power that the A.O. had was required to be executed properly. Moreover in the assessment order dated 29th September 2022 that is impugned in the petition, the A.O. has chosen to give Section 56(2)(x), a go by and treat the stamp duty value of the flat at Rs.11,68,99,000/- as from unexplained source under Section 69 of the Act. There is no reference to Section 56(2)(x) of the Act in the operative part of the order dated 29th September 2022.

10. In the circumstances, the impugned order dated 29th September 2022 cannot be sustained. The allegations in the affidavit in reply that assessee has claimed tenancy rights as colourable device in order to get an

exemption under the provisions of the Act and evade the tax liability also cannot be accepted because if the A.O. had evidence to that effect the same should have been stated in the show cause notice dated 23rd August 2022.

11. In the circumstances, Rule made absolute in terms of prayer clause – (a) which reads as under :

> *(a) that this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the passing of the assessment order u/s. 143(3) read with Section 144B of the Act dated 29th September, 2022 (Ex. 'N') and after going through the same and examining the question of legality thereof to quash, cancel and set aside the impugned assessment order passed u/s. 143(3) read with Section 144B of the Act dated 29th September, 2022 (Ex. 'N').*

12. Mr. Sharma states that respondent would issue supplementary show cause notice. We express no opinion because if the Revenue can, in accordance with law, issue such notice, assessee may exercise his rights and raise contentions as advised in accordance with law.

13. Petition disposed.

(DR. NEELA GOKHALE, J.) **(K.R. SHRIRAM, J.)**