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

WRIT PETITION NO.439 OF 2009

M/s. Zeal Real Estate Limited)
(Formerly known as Insat Leasing & Holding)
Limited) incorporated under Companies Act,)
1956, 204, Maker Bhavan No.3, New Marine)
Lines, Mumbai – 400 020) ….Petitioner

V/s.

1. Union of India)

2. Appropriate Authority,)
Income Tax Department, Mittal Court, A Wing,)
3rd Floor, Nariman Point, Mumbai – 400 021)

3. Smt. Sakarkhanu Rajabali Tejani,)
503, Mount Mary Apartments, Dr. Peterdies)
Road, Bandra (W), Mumbai – 400 050)

4. Ms. Niloufer Rajabali Tejani,)
503, Mount Mary Apartments, Dr. Peterdies)
Road, Bandra (W), Mumbai – 400 050) ….Respondents

Mr. Rafique Dada, Senior Advocate a/w. Mr. Sashi Tulsiyan and Mr. P.C. Tripathi i/b. Mr. Jaikumar N. Shiradhonkar for petitioner.
Mr. Akhileshwar Sharma a/w. Mr. P.A. Narayanan for respondent no.2.

CORAM: K.R. SHRIRAM & N.R. BORKAR, JJ.
RESERVED ON: 22nd APRIL 2022
PRONOUNCED ON: 4th MAY 2022

JUDGMENT (PER K.R. SHRIRAM, J.):

1 Petitioner is a company registered under the Companies Act, 1956. Petitioner, by an agreement dated 18th February 1991, agreed to purchase from respondent nos.3 and 4 an apartment being Flat No.72 along with two covered car parking situated at a building called Summer Ville,

Bhulabhai Desai Road, Mumbai – 400 026 admeasuring about 1758 sq. ft. along with 5 shares of Rs.50/- each bearing distinctive nos.66 to 70 under Certificate No.14 issued by New Summer Ville Premises Co-op. Housing Society Limited (the said property). The total consideration agreed was Rs.63,00,000/-, i.e., at the rate of about Rs.3,399/- per sq. ft.

2 Petitioner and respondent nos.3 and 4 filed a statement in Form 37-I alongwith copies of the agreement dated 18th February 1991 (the said agreement) for transfer of the said property. In the said form, the consideration for the said property was shown as Rs.63,00,000/-.

3 By an order dated 29th April 1991 passed under Section 269UD(1) of the Income Tax Act, 1961 (the Act), the Appropriate Authority decided to acquire the said property. The said order dated 29th April 1991 (1st Order) was challenged by petitioner in this Court by filing a petition being Writ Petition No.1768 of 1991 (first petition). An interim order dated 12th September 1991 was passed by which direction was given to handover the possession of the said property to respondent nos.1 to 4 therein with certain other directions. The Court also stated, *inter alia*, that upon petitioner succeeding in the petition, petitioner shall be entitled to the said property upon payment of consideration amount of Rs.60,19,911/- to respondent nos.1 to 4.

4 The first petition came to be disposed by an order dated 16th December 1992, whereby the matter was remanded to the Appropriate Authority for *denovo* consideration in the light of directions contained in the judgment passed by the Apex Court in ***C.B. Gautam V/s. Union of India***[1].

5 As directed by the Court, the matter was heard afresh by respondent no.2, i.e., the Appropriate Authority, which passed an order dated 24th February 1993 (the second order) holding that the said property is fit for purchase by the Central Government. Therefore, in exercise of the powers vested in respondent no.2 under Section 269UD (1) of the Act, respondent no.2 ordered the purchase of the said property by the Central Government. Aggrieved by the said second order dated 24th February 1993, petitioner filed a Writ Petition being Writ Petition No.614 of 1993 (second petition) in this Court. This petition was disposed by an order dated 21st October 2008 with the Court observing that the impugned order having been passed without determining the fair market value of the property was contrary to the judgment of this Court in ***Vimal Agarwal V/s. Appropriate Authority and Ors.***[2]. This Court set aside the second order dated 24th February 1993 also, with a direction to respondents to pass orders afresh within twelve weeks.

1. (1993) 199 ITR 530 (SC)
2. 2010 ITR 16 (Bom.)

6 Respondent no.2 issued a fresh notice dated 19th December 2008 alongwith copy of the notes of the Departmental Valuation Officer made in 1991 and fixed a hearing on 6th January 2009. Personal hearing was granted on 6th January 2009 on which date petitioner also submitted written submissions. On 7th January 2009 a further or additional or addendum show cause notice was issued to petitioner fixing hearing on 9th January 2009 by which petitioner was called upon to show cause as to why the fair market value of the said property should not be taken as Rs.75,94,560/- and why an order should not be made in accordance with the provisions of Section 269UD (1) of the Act. Petitioner replied to the show cause notice by its Advocate's letter dated 9th January 2009 and tendered the same during the personal hearing on 9th January 2009. At the same time, respondent no.2 passed the impugned order dated 9th January 2009 (the third order) for acquisition of the said property. This order is impugned in this petition. Therefore, this is the third round of litigation in this Court.

7 Mr. Dada submitted as under:

(a) respondent no.2 failed to comply with the Court's directions issued vide its order dated 21st October 2008 in the second petition, being Writ Petition No.614 of 1993, by not indicating the fair market value in the Show Cause Notice dated 19th December 2008 and tried to correct the non-

compliance by issuing a supplementary notice dated 7th January 2009;

(b) notice dated 19th December 2008 issued by respondent no.2 does not indicate as to why the sale rate in the said agreement dated 18th February 1991 is found to be lower;

(c) in the notice dated 19th December 2008, non-comparable sale instances of two properties have been cited by respondent no.2 by ignoring the comparable which were correctly considered by the Valuation Officer;

(d) for arriving at a fair market value, it is necessary to consider the most comparable instances out of the genuine instances based on the proximity of time, situation, terms;

(e) in the impugned order, there is no reference to the three properties compared by the Valuation Officer in 1991;

(f) the decision to acquire the said property was taken in 1991. Therefore, the valuation as on that date and what prompted the Appropriate Authority to take decision to acquire in 1991 is what is required to be considered;

(g) in the notice dated 7th January 2009, the annexure to non-comparable sale instances has been relied upon and the Appropriate Authority has resorted to addition and subtraction of various advantages and disadvantages and arrived at the conclusion that the undervaluation is

more than 15%. Such addition and subtraction were never resorted to when the original notice was issued in 1991. This has been resorted only to arrive at a conclusion that the undervaluation is more than 15%. This is because even in the non-comparable second instance of Navroze Apartment, the price difference is only about 9%, which is less than 15% held to be minimum required in *C.B. Gautam* (Supra);

(h) when the valuation of sale instance property and property under consideration are not comparable, it is not open to the Appropriate Authority to resort to mathematical calculations and by adding and subtracting the advantages and disadvantages arrived at a conclusion that there is undervaluation;

(i) if this addition and subtraction of various advantages and disadvantages has been resorted to the two non-comparable sale instances, respondent no.2 has not added or subtracted advantages and disadvantages for the said property. This is deliberate to show that there is undervaluation of more than 15%;

(j) the Valuation Officer and the Deputy Commissioner of Income Tax in the office of Appropriate Authority have both opined that the declared value was reasonable and the declared rate is not grossly understated. The Appropriate Authority has not given any reason as to why they have not accepted the opinion of the Valuation Officer or the Deputy

Commissioner of Income Tax;

(k) in the impugned order, there is no finding, which is mandatory, that the alleged undervaluation was with a view to evade tax. As held by this Court in ***Mrs. Amarjit Thapar V/s. S.K. Laul***[3], failure to specify that undervaluation was intended to evade tax and refusal to consider the comparable sale instances submitted by the affected party, the stand of respondents is vitiated;

(l) unless the difference in the apparent effective consideration and the market value is more than 15%, the Appropriate Authority cannot assume jurisdiction under Section 269UD of the Act. The same does not also 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;

(m) the right of pre-emptive purchase under Section 269UD of the Act 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 and the onus of establishing that undervaluation is with a view to evade tax is on the Revenue;

(n) even though in *C.B. Gautam* (Supra), it is stated that the pre-emptive purchase has to be resorted to only if the fair market value of the property concerned is found to be at least 15% more than the apparent

3. (2007) 298 ITR 336 (Bom.)

consideration, that limit cannot be applied mechanically but a reasonable margin for probable error must be factored.

8 Mr. Sharma submitted as under:

(a) petitioner has no locus because petitioner is a transferee and not a transferor.

We would reject this submission because this Court has in ***Kirloskar Power Equipments Ltd. V/s. R.R. Bajoria and Ors.***[4] held that the transferee also had a right to have the hearing before a competent Authority and then to file a Writ Petition. This Court in *Kirloskar Power Equipments Ltd.* (Supra) has followed *C.B. Gautam* (Supra). This Court in ***S. Krishnan V/s. U.V. Shahadadpuri & Ors.***[5] has held that even if the transferor does not challenge the order of compulsory purchase, the transferee certainly can. The transferors are respondent nos.3 and 4 to the petition.

(b) it is not possible for the Appropriate Authority to ascertain and determine the fair price without giving an opportunity to the parties and the Appropriate Authority cannot be expected to determine the fair price at the time of issuance of Show Cause Notice. Mr. Sharma relied on ***Shrichand Raheja and Anr. V/s. S.C. Prasad (Appropriate Authority) and Ors.***[6]

4. (2007) 291 ITR 150 (Bom)
5. 1999 (240) ITR 274
6. 1995 (213) ITR 33

Though the Court had made such an observation, these observations will not be applicable to the present case because this Court had set aside the second order stating that the Department has not determined the fair market value of the said property before passing the order and this Court had specifically directed the Appropriate Authority to determine the fair market value.

(c) the Appropriate Authority with the Executive Engineers exercising administrative functions does not function as statutory valuation authority like the district valuation officer under the Act or the Wealth Tax Act and, therefore, the administrative noting made by the said officer has no statutory consequences. Mr. Sharma also stated that this contention of petitioner that the noting made by the Valuation Officer has been raised for the first time and was not raised on the earlier occasions.

9 First of all, it would not help Mr. Sharma because the Court has to consider all documents. Secondly, this document was disclosed and relied upon by department for the first time by enclosing with the notice issued during the last personal hearing. In fact, this Court had, by its order dated 8th April 2022, called upon respondents to produce its file and also produce the reasons which have been separately recorded as noted in its order dated 29th April 1991 which was never provided earlier. Those reasons were provided to this Court based on our directions. We will deal with those

reasons separately. We have also to note that during the hearing, Mr. Sharma stated that the noting was made by the Executive Engineer who is from the Central Public Work Department on deputation to the Income Tax Department. He assists and values the property of the Appropriate Authority. Therefore, to say that he has no authority is not logical and if he had no authority, we fail to understand why he was asked to inspect the property and permitted to make notes for the official records. In the noting, it is written "VO's recommendation" and VO is, we were informed, Valuation Officer. He has recommended on 22nd April 1991 that the declared value is reasonable. The file thereafter was put up by him to his superior officer, who Mr. Sharma states was the Deputy Commissioner of Income Tax (A.A.). He has also recorded a note on 24th April 1991 that the declared rate is not grossly understated and it may be only marginally low. The said file has been put up to the Appropriate Authority thereafter but there are no notings by the Appropriate Authority that the valuation made by the Executive Engineer or his superior (Deputy Commissioner of Income Tax) was defective or perverse or not valid for any reason.

10 Having said this, in our opinion, as the decision to acquire the property was taken in 1991, this Court has to refer to the documents relevant to that period. Petitioner had received the first order on 29th April 1991. On 18th April 1991, the property was inspected by the Valuation

Officer who has given his report by comparing it with three sale instances. The same, for ease of reference, is reproduced hereinbelow:

SALE INSTANCES OF FLATS/BUILDINGS

Case no.6957
Flat no. 71, 7th floor
Summer Ville
Bhulabai Desai Road, Bombay

Sr. No.	*Case No.*	*Date of Agreement*	*Details of property & year of construction*	*Transferor ---------- Transferee*	*Consideration*	*B.U.A. in sq. ft.*	*Rate per sq. ft.*	*Remarks*
1		Sold in public auction on 23/11/90 (Purchased by A.A. in Sept. 90)	Flat No.12, Gulistan, 34, Bhulabhai Desai Road, Bombay - 26	Govt. of India	Rs.49,50,000/- D.O. Rs.49,27,555/-	1349 sq. ft.	Rs.3653/-	Y.O.C. 1962 1st Floor, G+9 Sea View
2	6137	26/7/90 (Purchased by A.A.)	Flat No.51 Shivtirth No.1, Bhulabhai Desai Road, Bombay - 26	Mrs. Leela Nanda ---------- Shri Paresh Natwarlal Parikh F2	Rs.51,51,000/- D.O. Rs.50,62,398/-	1672 sq. ft.	Rs.3027/-	Y.O.C. 1 to 7th in 1959 8th Floor, G+8 Panoroma Sea View
3	5901	21/5/90	Flat No.3, A Wing, Heera Panna, Bhulabhai Desai Road, Bombay - 26	Mrs. Halimunna Shaikh ---------- Mr. Taheer Shaikh F1	Rs.37,00,000/- D.O. Rs.36,36,397/-	1336 sq. ft.	Rs.2721/-	Y.O.C. - 1975 1st Floor, G+20 No Sea View

11 In the order dated 29th April 1991, respondent no.2 has noted "*in view of the reasons which have been separately recorded in writing, it is decided that the said property is fit for purchase by Central Government*". Since those reasons had not been provided ever, as stated earlier, we called

upon respondents to produce the reasons so recorded (said reasons). In the said reasons, respondent no.2 has recorded that it has carefully considered the report of Valuation Officer dated 22nd April 1991 and note dated 24th April 1991 of Deputy Commissioner of Income Tax (A.A.). As noted earlier, both these persons have recorded that the declared value was not understated. The said reasons, however, does not mention why the opinion of these two persons have not been accepted. In the said reasons, the Appropriate Authority relies upon two other transactions of sale which from the documents filed are not close to the said property are not comparable. Petitioner has filed in the petition google search location printouts. In fact, the three comparable given by the Valuation Officer are closer and comparable to the said property. We should mention here that in the said reasons recorded, there are no addition and subtraction of various advantages and disadvantages to the two properties which respondent no.2 has used as comparable. The second property, i.e., Navroze Apartment, the rate is shown as Rs.3,741/- per sq. ft. whereas, the rate for the said property was Rs.3,399/- per sq. ft. In our view, since the difference was only about 9%, respondent no.2 for reasons which are obvious, has in its supplementary show cause notice dated 7th January 2009 read with statement of valuation annexed thereto, resorted to mathematical calculations and by adding and subtracting advantages and disadvantages

arrived at a conclusion that there is undervaluation in excess of 15%. This is most improper on the part of respondent no.2. Respondent no.2 has, conveniently, also not resorted to addition or subtraction of various advantages and disadvantages with regard to the said property and only if it had done, perhaps the undervaluation would have been 9% or lesser.

12 Respondent no.2 has not even explained anywhere why they chose the two properties of "Sea Face Park" and "Navroze Apartment" as comparable and from where they got details of those two properties. Respondent no.2 ought to have disclosed everything in transparent manner to enable petitioner to effectively respond. As held by this Court in ***Jugal Kishore Jajodia V/s. S.C. Prasad, Chief Engineer and Ors.***[7], it is settled law that issuance of a show cause notice is not an empty formality. Its purpose is to give a reasonable opportunity to the affected persons to contend that the apparent consideration as per the agreement to sell is the market price or that there is no undervaluation because of peculiar facts. It will be apposite to quote paragraph 8 of the said judgment, which reads as under:

> *8. It is settled law that issuance of a show-cause notice is not an empty formality. Its purpose is to give a reasonable opportunity to the affected persons to contend that the apparent consideration as per the agreement to sell is the market price or that there is no undervaluation because of peculiar facts. The appropriate authority should give to the person likely to be affected by the order proposed to be made a notice of the action intended to be taken, inform him about the materials on the basis of which the appropriate authority proposes to take action for pre-emptive purchase*

7. Writ Petition No.1018 of 1993 dated 23.09.2021

> *and give a fair and reasonable opportunity to such person to represent his case and to correct or controvert the material sought to be relied upon against him. Hence, in the show-cause notice under Section 269UD of the Act, provisional conclusions are required to be briefly specified. These provisional conclusions are required to be briefly specified so that the affected persons could correct or controvert the same effectively. If a vague show- cause notice is given without specifying anything as has been done in this case or without specifying the grounds for holding that the property is required to be purchased under Section 269UD of the Act, then it can be held that reasonable opportunity of showing cause has not been given. The transferor and transferee would be totally unaware of the grounds which had prompted the appropriate authority to arrive at prime facie conclusion that the power under Section 269UD(1) of the Act was required to be exercised and the property should be compulsorily purchased. xxxxxxxxxxxxxxxxxxxxxxx*

13 We have to also note that as held by the Apex Court in *C.B. Gautam* (Supra), even the limit of 15% prescribed cannot be mechanically applied and the reasonable margin for probable error has to be considered. This Court in *Mrs. Amarjit Thapar* (Supra) has held that the order of the Appropriate Authority was invalid and *void ab initio* as there is no positive finding that there was an attempt to evade tax. It will be useful to reproduce the following portions from *Mrs. Amarjit Thapar* (Supra), which read as under:

> *33. Where the Appropriate Authority has failed to clearly determine the fair market value and to specify that undervaluation was intended to evade tax and refused to consider the comparable sale instances submitted by the affected party, its action stands vitiated on the face of it see Himmatlal Vadalia v. Union of India.*
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> *34. 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 (supra) 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.*
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> *35. 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 per cent, the Appropriate Authority cannot assume jurisdiction under Section 269UD of the Act. The same does not mean that the mere fact that such difference is more than 15 per cent will, automatically, lead to the conclusion that there has been undervaluation of property with the motive of evading tax. In Vimal Agaiwal 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.*
>
> *36. In the circumstances, the impugned order passed by the Appropriate Authority is liable to be quashed and set aside holding it to be in breach of principles of natural justice and bad in law. The view taken by the Appropriate Authority is palpably erroneous and cannot stand to the scrutiny of law even on merits.*

14 In the case at hand, there is no finding that the undervaluation was intended to evade tax, let alone discharge the onus of establishing that undervaluation was with a view to evade tax. In the impugned order, it is only stated that the transaction under consideration was proposed to take place at a rate lower than the fair market value by more than 15% considering the fair market value determined by the Appropriate Authority.

On this ground alone, the impugned order is liable to be quashed and set aside. In our view, the view taken by the Appropriate Authority is palpably erroneous and cannot stand to the scrutiny of law even on merits.

15 Therefore, to recap, the Valuation Officer has noted on 22nd April 1991 and the Deputy Commissioner of Income Tax (A.A.) has noted on 24th April 1991 that the said property was not undervalued. The Appropriate Authority (respondent no.2) has not stated in its reasons recorded in 1991 why they did not accept these two reports. The Appropriate Authority (respondent no.2) has not stated anywhere why it was not accepting the three comparables mentioned by VO. The Appropriate Authority (respondent no.2) has not given the basis for comparing "Sea Face Park" and "Navroze Apartment" with the said property, when those two properties were farther away than the three properties used by VO to compare. In any case, the valuation of Navroze Apartment used in the first order dated 29th April 1991 by the Appropriate Authority (respondent no.2) was only about 9% more compared to the said property. The mathematical calculations by adding and subtracting advantages and disadvantages to arrive at a conclusion that there was undervaluation in excess of 15% limit can be stated to be far from being honest. This 15% limit also cannot be applied mechanically but a reasonable margin of error has to be considered. There is also no finding that the undervaluation was intended to evade tax,

which, as held in *Mrs. Amarjit Thapar* (Supra), was mandatory vitiating the stand of respondents. Even for a moment we assume there was a difference of 15%, the Appropriate Authority cannot assume jurisdiction under Section 269UD of the Act automatically. Various factors determine the price for a property like demand, supply, terms of payment, the urgency for the seller to sell or for the buyer to buy, relationship between parties, dominance of a party etc. None of these points are also considered by the Appropriate Authority while arriving at its conclusions in the impugned order. The impugned order, therefore, requires to be set aside. Respondent no. 2 could not have acquired the said property under Section 269UD.

16 Petition accordingly allowed in terms of prayer clauses – (a) and (b), which read as under :

> *(a) This Hon'ble Court in its jurisdiction under Article 226 of the Constitution of India, be pleased to issue a Writ of Certiorari and/or any other writ in the nature of certiorari and/or order and/or direction, calling upon the respondent no.2 to produce petitioner's case papers and after perusing the same as to the legality and propriety of the order impugned to set aside and quash the order dated 9th January 2009 passed by respondent no.2;*
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> *(b) This Hon'ble Court in its jurisdiction under Article 226 of the Constitution of India be pleased to issue a Writ of Mandamus and/or any other writ in the nature of mandamus and/or such other order and/or direction, calling upon respondent no.2 to handover the possession of the said property to the petitioner.*

17 We hold that petitioner shall be entitled to the said property alongwith the shares in the society upon payment to respondent nos.1 to 4 of consideration of Rs.61,77,411/-. If this amount is not paid within twelve weeks from today, interest thereon at 12% p.a. shall become payable until payment / realisation. Petitioner shall pay all society charges payable at the relevant time, i.e., 1991, together with interest, if any, for getting the shares transferred in its name.

18 The Prothonotary and Senior Master shall refund to respondent nos.1 to 4 the sum of Rs.1,75,500/- deposited during the second petition together with accumulated interest, if any. This amount shall be paid provided (a) respondent nos.1 to 4 file a declaration that they are not challenging this order or judgment or (b) the SLP or petition to be filed by respondent nos.1 to 4 is dismissed or rejected.

19 From the minutes of the order dated 13th September 1991 filed in the second petition, there is a sum of Rs.1,22,589/- that would become payable to respondent nos.5 to 7 in that petition together with interest thereon at 10% per annum from 13th September 1991 until payment. Mr. Dada states that two out of the three respondents, i.e., respondent nos.5 to 7 are respondent nos.3 and 4 in this petition. They are not before us. Therefore, petitioner to deposit an amount of Rs.1,22,589/- together with interest thereon at 10% per annum from 13th September 1991 until

payment/realisation with the Prothonotary and Senior Master who shall invest the same in a fixed deposit with a nationalised bank initially for a period of one year to be renewed year to year unless otherwise ordered. Prothonotary and Senior Master shall also forward a copy of this order to respondent nos.3 and 4 at the address given in the cause title. Mr. Dada states that this amount will be deposited within two weeks from today. Statement accepted.

20 Petition disposed. No order as to costs.

21 Mr. Sharma seeks stay of this order for a period of 120 days. Mr. Dada strongly opposes. We are inclined to grant the stay of 120 days which we hereby do.

(N.R. BORKAR, J.) (K.R. SHRIRAM, J.)