

Nizar A. Vs Municipal Council

Court: High Court Of Kerala

Date of Decision: Aug. 22, 2014

Acts Referred: Constitution of India, 1950 " Article 265
Kerala Municipalities Act, 1994 " Section 509(11), 538, 538A

Hon'ble Judges: C.T. Ravi Kumar, J

Bench: Single Bench

Advocate: D. Ajithkumar, Advocate for the Appellant; Ayyappan Sankar, SC, Advocate for the Respondent

Judgement

C.T. Ravi Kumar, J.

The petitioner executed Ext. P1 agreement with the second respondent Municipality in the matter of collection of fees

from the buses, for television advertisements and mike announcements in the Municipality bus stand premises. Alleging that the petitioner failed to

remit the amount in tune with the terms of Ext. P1 contract Ext. P9 notice dated 13.8.2014 has been issued by the second respondent. As per the

same, the petitioner was directed to pay an amount of Rs. 7,74,543 (Rupees Seven lakhs seventy four thousand five hundred and forty three only)

within 48 hours. In case of his failure to remit the said amount within the above stipulated time he was cautioned that Ext. P1 contract would be

cancelled. There is dispute regarding the amount remaining in arrears to be paid to the second respondent Municipality in terms of the contract.

Prior to the issuance of Ext. P9, Ext. P6 notice was served on the petitioner. As per Ext. P6, an amount of Rs. 5,72,700 (Rupees Five lakhs

seventy two thousand seven hundred only) was demanded. Even prior to that the petitioner was served with Ext. P3 notice. Under Ext. P3 the

petitioner was required to pay an amount of Rs. 3,24,210 (Rupees Three lakhs twenty four thousand two hundred and ten only). After the receipt

of Exts. P3 and P6 notices the petitioner preferred Ext. P7 appeal. Along with Ext. P7 appeal the petitioner filed Ext. P8 petition seeking stay of all

further proceedings pursuant to Exts. P3 and P6. It is during the pendency of Ext. P7 appeal that Ext. P9 notice was issued. As per Ext. P9 it was

revealed to the petitioner that his appeal would be entertained only on remittance of the amount demanded under Ext. P9. It is in the said

circumstances that this writ petition has been filed seeking quashment of Ext. P9 and issuance of a writ of mandamus commanding the first

respondent to consider and pass orders on Exts. P7 and P8.

2. The learned standing counsel appearing for the respondents submitted that in terms of Section 538 read with Section 509(11) of the Kerala

Municipality Act, 1994, Ext. P7 appeal preferred by the petitioner could be entertained only if the petitioner pays the entire amount demanded as

per Ext. P9. The learned counsel for the petitioner stoutly resisted the said contention and submitted that such a strained interpretation of the

aforesaid provisions would virtually deprive the right of the aggrieved party to impeach the correctness of the order and ultimately would make it

nugatory. In view of the rival submissions it is only appropriate to refer to the said relevant provisions and they read thus:-

538. Recovery of sums due as taxes.-

(1) All costs, damages, penalties, compensation, charges, fees (other than school fees), expenses, rents, contributions and other sums which under

this Act or any other law or rules or bye-laws made thereunder or under any contract made in accordance with the provisions of this Act, the rules

or bye-laws thereunder are due by any person to the Municipality may, in the absence of any specific provisions in this Act for their recovery, be

demanded by bill as provided in the rules and be recovered in the manner provided therein.

(2) Notwithstanding anything contained in this Act, any sum found legally due by any person to the Municipality under the provisions of this Act,

the rules or bye-laws made thereunder, if not paid on the due date shall be recovered together with penalty at the rate of one per cent per mensem

from the date from which it was due.

Provided that any sum due and payable in a half-year is paid in the same half-year no interest shall be realised.

509. (11) No appeal or revision shall be filed against the levy of tax, if the tax shown in the demand notice has not been paid.

(emphasis added)

A perusal of Section 509(11) would reveal that payment of the tax shown in the demand notice is a condition precedent to file an appeal or

revision against the levy of tax. Of course, Section 538 enables the concerned Municipality to recover any sum due under any of the items falling

thereunder, due to it, as taxes. Section 538A provides the manner of recovery of such sums. But, the question is how could a demand for any such

sum be treated as levy of tax. A bare perusal of Section 509(11) would reveal that the statutory prescription thereunder is only with respect to

appeal or revision filed against levy of tax. True that, an appeal or revision filed against levy of tax could be entertained only if the demand made is

paid by virtue of Section 509(11) of the Act. Merely because any amount payable to a concerned Municipality is recoverable as sum due as tax

by virtue of the provisions under Sections 538 and 538A that cannot be a reason for insisting payment of the amount demanded as a condition

precedent to consider an appeal filed against an order absolutely unconnected with levy of tax relying on the provisions under Section 509(11) of

the Act. Existence of an enabling provision to recover the amount due to a Municipality as sums due as taxes by virtue of the provisions under

Section 538 of the Act by itself cannot be a reason for treating the amount thus recoverable as an amount levied as tax. Levy of tax and making a

demand for a particular sum under a contract are entirely different in nature though in terms of the provisions under Section 538 of the Act

recovery of the sum due to the Municipality could be effected as tax. Every taxation should have a statutory backing lest it could not be levied or

collected in view of the mandate in Article 265 of the Constitution of India and therefore, it is liable to be levied or collected compulsorily. In the

case of a claim under a contract the liability as also amount recoverable are susceptible to challenge on various grounds. As long as the amount due

to the concerned Municipality is not one which is levied as tax the provisions under Section 509(11) of the Act would not be attracted. There is no

case for the respondents that the amount demanded as per Ext. P9 is one levied as tax. If the said amount covered by Exts. P3, P6 and P9 are not

levied as tax certainly, the provisions under Section 509(11) would not be applicable. When the admitted position is that the amount mentioned in

Ext. P9 is not levied as tax merely because of the existence of the provisions under Section 538 the respondents cannot insist that the appeal

preferred against Exts. P3 and P6 would be considered only if the amount demanded in Ext. P9 is remitted. I am of the view that any such

insistence would result in shutting out of an opportunity to an aggrieved party to impeach the correctness of an order against which he is having

grievances. Whenever such remittance is to be made as a condition precedent to prefer an appeal or revision against an order it is specifically

provided in the statute. If the statutory remedy of appeal is provided in a matter the aggrieved party shall not be called upon to remit the entire

amount demanded to entertain such an appeal against an order passed under the provisions of the Act or Rules or bye-laws thereunder in the

absence of any specific provision in the statute. In the said circumstances, this writ petition is disposed of with a direction to the 1st respondent to

consider Ext. P7 appeal preferred by the petitioner in accordance with law, without insisting payment of the amount covered by Ext. P9. In case of

likelihood of any delay in the matter of consideration of Ext. P7 appeal the Chairperson of the second respondent shall consider Ext. P8

application and pass appropriate orders thereon within a week from the date of production of a copy of this judgment.