(2010) 09 CAL CK 0011

Calcutta High Court

Case No: G.A. No. 847 of 2010, A.P.O.T. No. 149 of 2010 and W.P. No. 1147 of 2005

The Salvation Army and Another		APPELLANT
	Vs	
Calcutta Municipal Corporation and Others		RESPONDENT

Date of Decision: Sept. 6, 2010

Acts Referred:

- Transfer of Property Act, 1882 - Section 108

Citation: (2011) 1 CHN 782

Hon'ble Judges: Pratap Kumar Ray, J; Harish Tandon, J

Bench: Division Bench

Advocate: Jaydip kar, Mr. Moinak Bose and Mr. S. Basu, for the Appellant; Sandip De, for the Respondent

Judgement

Pratap Kumar Ray, J.
Heard the learned Advocates appearing for the parties.

2. Assailing the order dated 26th February, 2010 passed by the learned Trial Judge in W.P. No. 1147 of 2005, this appeal has been preferred. The impugned order reads such:

"The Court : The subject matter of challenge in this writ petition is a valuation made by the KMC at Rs.5 lakh for the quarter commencing from 4th quarter of the financial year 2001-02. The KMC by its notice dated 13th December, 2002 proposed the annual valuation of Rs. 6,78,830/- on the following amongst other grounds:

"i) Revision in area and/or rise to market value of land.

ii) Increase in estimated annual rent (less statutory allowance for repairs) on account of (a) redevelopment, addition, alteration or improvement, (b) rise of rent since last valuation, (c) change of the nature of use."

The writ petitioner filed an objection dated 11th January, 2003. In the objection not a word dealing with the grounds of revision was spent. The KMC in its affidavit-in-opposition in paragraph 5 sought to justify the valuation made at Rs.5 lakh on the grounds as follows :

"In the enquiry I was found a portion of the premises is being used as Nursing Home etc., by the tenant. However, the portion of the premises is being used for non-residential or commercial purpose being a Nursing Home and as such, the same is a factor for letting out value of the premises for the purpose of determination of Annual Valuation. Considering these aspects including the objection an fresh inquiry report, the Annual Valuation was fixed at Rs.5 lac and now the petitioner, if aggrieved by the such fixation, is required to approach the Tribunal for challenging the same."

In the affidavit-in-reply the aforesaid allegations to be found in the affidavit-in-opposition were not dealt with. Therefore, prima facie the grounds assigned by the KMC for upward revision of the valuation appear to have some justification.

Learned Advocate appearing for the petitioner, however, drew my attention to sub paragraph (e) of paragraph 3 of the affidavit-in-reply affirmed by one Mr. Masih on 11th September, 2007 wherein the following statements were made:

"(e) The petitioner through their authorized representative, M/s.Talbot & Company filed a similar objection as was filed against the fixation of annual valuation with effect from 1989-90. It was also specifically noted that there has been no change either in the nature of use of the subject premises or in its occupation since the earlier general revaluation. There has also not been any enhancement of rent or in the additional and alternation in the subject premises. As such as per the provisions of the said Act the Municipal Authorities was intended to enhance the annual valuation of the subject premises by 20% upto the existing annual valuation".

Learned Advocate appearing for the petitioner submitted that since an identical objection was taken to the proposed assessment in the past which found favour with the KMC there was no reason why the same reasoning should not have been adopted this time. This submission of the learned Advocate is not acceptable. It is well-settled that in the matter of taxation previous assessment cannot create any estoppel nor is the principle of res judicata applicable. If any authority is needed, reference may be made to the judgment in the case of Maharana Mills (Private) Ltd. Vs. Income Tax Officer, Porbandar, . Therefore, this submission of the learned Advocate for the petitioner is rejected.

Considering that the petitioner did have the right to prefer an appeal against the valuation this petition is disposed of by granting the petitioner leave to prefer an appeal within three weeks from date. In the event such appeal is preferred within the aforesaid period, the same shall be treated to have been filed in time.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities."

3. Assailing the annual valuation for the quarter commencing from 4th quarter of the financial year 2001-02, the writ application was moved alleging inter alia the breach of principle of natural justice on the foundational fact that in the notice as served asking to file any objection with reference to such annual valuation as was fixed as Rs. 6,78,830/- ground for annual valuation only was taken as increase in estimated annual rent on account of redevelopment, addition alteration or improvement which was mentioned in the reverse page of the notice under ground for revision in the annual value assessed, but annual valuation was fixed taking note of change of nature of use by considering the use of one portion of the premises as nursing home by the tenant. It is the contention of the writ petitioner/appellant that the nursing home was already existing at the stage when annual valuation was made prior to the present annual valuation and this issue of change in use was considered at that time. However from the writ application, opposition and reply and from the records of the Hearing Officer, it appears that in the notice there was no ground mentioned about the reason for such proposed annual valuation namely on ground of "change of nature of use", but in the objection as filed by the petitioner/appellant before us, a categorical contention made about the unauthorised occupation of south-eastern block by one Mr. N.K. Chatterjee and at the time of hearing the writ petitioner/appellant submitted the documents of eviction suit which was in the appeal stage at the material time. The documents relating to title appeal No.61 of 1992 was filed. Copy of Memorandum of title appeal has been produced before us. From the grounds as taken in the said title appeal being ground No. II, IV, XII, XX, XXX, XXXIV and XL, it appears that facts of illegal construction by the tenant as well as the use of premises, as nursing home were taken categorically in the grounds for eviction of the concerned tenant. Those grounds are set out hereinbelow:

"II. For that the learned Judge ought to have held that the Defendant committed diverse breaches of the terms of the tenancy because, inter alia, he wrongfully and illegally constructed a gate in the main boundary wall causing material deterioration and damage to the demised premises and thus he committed acts contrary to the provisions and clauses (m), (o) and (p) of section 108 of the Transfer of Property Act;

IV. For that the Defendant has caused nuisance and annoyance to the plaintiff and, though his tenancy covers and extends only to the ground floor room measuring 96'' x 40'' and first floor room measuring 166.4 x 40'', he has been mala fide and illegally using the second floor of the said premises to which he has no right;

XII. For that the Defendant opened a Nursing Home on the first floor of the suit premises without the plaintiff''s permission and, in making the Nursing Home, the Defendant caused many changes and alterations against the terms of the tenancy causing damage and injury to the suit premises;

XX. For that in converting the entire first floor building into a Nursing Home the Defendant made substantial additional structures and constructed a kitchen, urinal, bath and privy and partitioned the first floor by partitions fixed permanently in the walls and floors;

XXX. For that the learned Judge ought to have held that the Defendant wrongfully and illegally constructed several rooms including kitchen, bath privy and also made other substantial additions or alterations to the suit premises and thereby became liable for eviction;

XXXIV. For that the learned Judge erred in not holding that the Defendant after forcibly occupying the second floor further started and began a Nursing Home in the name and style of Sree Sree Mahananda Brahmachari Seva Pratisthan which is contrary to the terms of the agreement of tenancy;

XL. For that the learned Judge should have held that in running a business under the name and style of Sree Sree Mahananda Brahmachari Seva Pratisthan the Defendant was acting in violation of the terms of tenancy."

4. On considering the materials as placed before the Hearing Officer, annual valuation ultimately was determined. Hence we are of the view that even if in the notice there was no mentioning of change of nature of use of the premises but at the time of hearing the writ petitioner/appellant got sufficient opportunity to place his case on that point and in fact the writ petitioner/appellant placed all materials facts ad documents relating to that point including the documents relating to the title appeal as already discussed above, before the Hearing Officer. Hence even if in the notice that ground was not stipulated but in our considered view it has not caused breach of natural justice to that extent as would entail relief by quashing the impugned order in the writ application namely, the annual valuation, having regard to the concept of prejudice theory as has been added in the principle of natural justice. It is a settled legal proposition of law now that breach of natural justice simpliciter will not be the cause of action to quash any order until and unless it is satisfied that the person concerned has been prejudiced due to such breach of natural justice. Reliance is placed to the judgment passed in the case of Union of India (UOI) and Others Vs. Alok Kumar, , paragraphs 85 to 89 which read such:

"85. The doctrine of de facto prejudice has been applied both in English as well as in Indian law. To frustrate departmental enquiries on a hypertechnical approach has not found favour with the courts in the recent times. In S.L. Kapoor v. Jagmohan a three Judge Bench of this Court while following the principle in Ridge v. Baldwin stated that if upon admitted or indisputable facts only one conclusion was possible, then in such a case that principle of natural justice was in itself prejudice would not apply. Thus, every case would have to be examined on its own merits and keeping in view the statutory rules applying to such departmental proceedings. The Court in S.L. Kapoor held as under:

"In Ridge v. Baldwin (AC 40 68 : All ER 73), one of the arguments was that even if the appellant had been heard by the watch committee nothing that he could have said could have made any difference. The House of Lords observed at (p. 68):

''It may be convenient at this point to deal with an argument that, even if as a general rule a watch committee must hear a constable in his own defence before dismissing him, this case was so clear that nothing that the appellant could have said could have made any difference. It is at least very doubtful whether that could be accepted as an excuse. But, even if it could, the watch committee would, in my view, fail on the facts. It may well be that no reasonable body of men could have reinstated the appellant. But as between the other two courses open to the watch committee the case is not so clear. Certainly on the facts, as we know them, the watch committee could reasonably have decided to forfeit the appellant''s pension rights, but I could not hold that they would have acted wrongly or wholly unreasonably if they had in the exercise of their discretion decided to take a more lenient course.''

86. Expanding this principle further, this Court in K.L. Tripathi v. SBI held as under:

"31..... it is not possible to lay down rigid rules as to when the principles of natural justice are to apply : nor as to their scope and extent... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth."

87. In ECL v. B. Karunakar this Court noticed the existing law and said that the theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are neither incantations to be invoked nor rites to be performed on all and sundry occasions. Whether, in fact, prejudice has been caused to the employee or not on account of denial of report to him, has to be considered on the facts and circumstances of each case. The Court has clarified even the stage to which the departmental proceedings ought to be reverted in the event the order of punishment is set aside for these reasons.

88. It will be useful to refer to the judgment of this Court in Haryana Financial Corpn. v. Kailash Chandra Ahuja at pp. 38-39 where the Court held as under:

"21. From the ratio laid down in B. Karunakar it is explicitly clear that the doctrine of natural justice requires supply of a copy of the enquiry officer''s report to the delinquent if such enquiry officer is other than the disciplinary authority. It is also clear that non supply of report of the enquiry officer is in breach of natural justice. But it is equally clear that failure to supply a report of the enquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the

delinquent employee to plead and prove that non supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside.

89. The well-established canons controlling the field of bias in service jurisprudence can reasonably be extended to the element of prejudice as well in such matters. Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default which relates to statutory violations. It will not be permissible to set aside the departmental enquiries in any of these classes merely on the basis of apprehended prejudice."

5. In the case of Haryana Financial Corporation and Another Vs. Kailash Chandra Ahuja, , said principle of prejudice theory was dealt with in paragraph 21 which reads such:

"21. From the ratio laid down in B. Karunakar it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer''s report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the Court on that point, the order of punishment cannot automatically be set aside."

6. Reliance is also placed in the cases Kumaon Mandal Vikas Nigarn Ltd. v. Girja Shankar Pant & Ors. reported in AIR 2001 SC 24, S.L. Kapoor Vs. Jagmohan and Others, a judgment passed by the Bench comprising of three Hon''ble Judges of Apex Court, Ridge v. Baldwin & Ors. reported in (1963) 2 All ELR 66 (House of Lords) and Aligarh Muslim University and Others Vs. Mansoor Ali Khan, .

7. Having regard to the aforesaid judgments of the Apex Court it appears that the prejudice theory has settled its firm ground in the legal field to adjudicate an issue when any breach of natural justice would be canvassed. Mere breach of natural justice will not suffice for quashing any order on such breach until and unless a party who alleges breach of natural justice satisfies the point that he was prejudiced by such breach. In the instant case it appears that though in the notice no ground was taken about the change of use of the premises but such fact of change of use was dealt with and considered in details by the Hearing Officer wherein the writ petitioner/appellant got opportunity of hearing as well as placement of the facts and documents in his favour as already discussed above. Hence non-mentioning of that ground since has not caused prejudice to the petitioner, breach of principle of

natural justice on the alleged ground of non-mentioning of the same as a ground in notice of alleged violation, has not satisfied the basis for judicial review of the impugned notice for the purpose of quashing the same and the order as passed on the basis of such notice. Besides the aforesaid issue, from the records it appears that the writ petitioner/appellant submitted a false affidavit in his affidavit in reply by denying the existence of a nursing home though in the affidavit-in-opposition the Corporation took a positive ground about the existence of a nursing home and the running of such nursing home by a tenant. Relevant portion of the affidavit-in-opposition from paragraph 5 reads such:

"5. .....In the enquiry it was found a portion of the premises is being used as Nursing Home etc. by the tenant. However the portion of the premises is being used for non-residential or commercial purpose being a Nursing Home and as such the same is a factor for letting out value of the premises for the purpose of determination of Annual valuation. Considering these aspects including the objection an fresh enquiry report the Annual valuation was fixed at Rs. 5 lac and now the petitioner If aggrieved by the such fixation, is required to approach the Tribunal for challenging the same."

8. This paragraph 5 was replied in the affidavit in reply in paragraph 9, which reads such:

"9. With reference to the statements contained in paragraph 5 of the said Affidavit I repeat and reiterate the statements made in paragraphs 14 to 18 of the said petition and all allegations contrary thereto and/or inconsistent therewith are denied and disputed. It is specifically denied that a portion of the premises is used as a Nursing Home etc. as alleged or at all. I once again repeat and reiterate that the petitioner No.1 is a non-profit making organisation and is engaged in various social services in and around 108 countries over the World. The subject premises is used by the petitioner as a social service center and consist of homes for the aged, for the blind and handicapped free clinic, free feeding center etc."

9. This affidavit was affirmed by one Manuel Masih who is the writ petitioner/appellant No. 2 before us, working as a Divisional Commander under writ petitioner/appellant No.1. In view of said statement made by the said gentleman by contending inter alia that there was no nursing home at all, we are of the view that writ application ought to have been dismissed on that ground alone having regard to the factual matrix of the case as discussed above.

10. Hence on considering the judgment under appeal passed by the Learned Trial Judge, we are of the view that there is no scope to interfere with this appeal. We are confirming the judgment delivered by the learned Trial Judge by separate reasoning to this effect that no relief could be granted on the writ application on the ground of breach of principle of natural justice. Appeal accordingly stands dismissed.

11. Learned advocate for the appellant has prayed for extension of time to prefer an appeal in terms of the judgment under appeal passed by the learned Trial Judge. Such time is extended to four weeks with effect from this date on identical terms as ordered by the learned Trial Judge.

12. It is made clear that in the event such appeal is filed within the said period, the injunction order as passed by the learned Trial Judge restraining the Municipal Corporation from giving any effect of the annual valuation will continue till the disposal of the appeal. It is also made clear that we have not gone into the merits of the issue except non-application of natural justice principle. We have decided the point about the maintainability of the writ application and its consequential effect. The stay application stands disposed of on the aforesaid finding. Original Document as produced today be returned.

13. It is recorded that a copy of the order passed u/s 184 of said Act has been served today.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Harish Tandon, J.

14. I agree.