(2014) 09 CAL CK 0143

Calcutta High Court

Case No: W.P. Nos. 133 and 134 of 2014

Jayanta Chatterji	APPELLANT
Vs	
Kolkata Municipal Corporation	RESPONDENT

Date of Decision: Sept. 26, 2014

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 174, 188, 189, 189(5), 189(6)
- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 9
- Constitution of India, 1950 - Article 226
- Limitation Act, 1963 - Section 29(2), 5

Citation: (2015) 1 CHN 215

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: Kishore Dutta, Senior Advocate, Sabyasachi Sen and S. Sen, Advocate for the Appellant; Aloke Kumar Ghosh and G.C. Das, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Soumitra Pal, J.

Since issues involved in the writ petitions, being W.P. 133 of 2014 and W.P. 134 of 2014, are identical, with the consent of the learned advocates for the parties the matters were heard analogously. However, for the sake of clarity and better understanding the facts in W.P. 134 of 2014 are dealt with in this judgment.

2. In the writ petition, being W.P. 134 of 2014, affirmed on 10th February, 2014, the petitioner No. 1 a private limited company and owner of a space on the first floor of the premises No. 43 Ashutosh Chowdhury Avenue, Kolkata - 700019 and the petitioner No. 2, the Director and Principal shareholder of the petitioner No. 1, have challenged the Rate Card issued by the Kolkata Municipal Corporation ("KMC" for short) pertaining to revision of the annual valuation with effect from first quarter 2010-2011 in respect of the said space and all supplementary bills raised in

connection therewith.

3. The facts as evident from the writ petition are that earlier the space on the premises concerned was occupied by a tenant who had vacated it on 31st March, 2009. Consequently the petitioner No. 1 submitted an Application Form No. 75-1 for reduction of annual value and for reduction of rates and taxes which were allegedly not done by the KMC. Thereafter, pursuant to an agreement dated 15th January, 2011, the petitioner No. 1 had let out the said space to one Talwalkars Better Value Fitness Limited at a monthly rent of Rs. 1,00,000/-. The petitioners thereafter received hearing notice dated 3rd February, 2012 for the proposed revision of annual valuation with effect from 1/2010-11 to Rs. 28,08,000/-. A written objection was furnished questioning the revision. Hearing was granted. Though no copy of the order revising the annual valuation was allegedly made available, they received a rate card intimating that the annual valuation for the said space had been fixed at Rs. 28,08,000/-. Aggrieved, an appeal was filed on 27th September, 2013 before the Municipal Assessment Tribunal, however without pre-depositing the amount required to be deposited u/s 189(6) of the Kolkata Municipal Corporation Act, 1993 ("1993 Act" for short).

4. At the very outset Mr. Aloke Kumar Ghosh, learned advocate for the KMC submitted that having preferred statutory appeal before the Tribunal without making statutory pre-deposit u/s 189(6) of the 1993 Act, the writ petition challenging the fixation of annual valuation is not maintainable. Submission was as the petitioner had responded to the notice for hearing for fixing the annual valuation, had submitted written objection and having understood the notice, cannot now turn back and contend that it was in violation of the provisions of the 1980 Act and is vague and uncertain. It was submitted that after having preferred appeal, the petitioner cannot question the notice and cannot take the plea of abandoning the appeal.

5. Mr. Kishore Datta, learned senior advocate appearing for the petitioners relying on the statements in the writ petition and challenging the notices proposing enhancement of annual valuation submitted that non disclosure of grounds in the notice makes it vague and uncertain. As no pre-deposit has been made, the appeal filed is non est in the eye of law. Since appeal cannot be entertained without pre-deposit and such deposit is onerous, and thus alternative remedy is not efficacious, the writ petition is maintainable.

6. Learned advocates for the parties had cited judgments in support of their respective submissions which shall be dealt with appropriately.

7. The issues which require to be considered are i) having preferred appeal from the order passed by the Hearing Officer without making pre-deposit u/s 189(6) of the 1980 Act, whether the writ petition is maintainable and ii) Whether the appeal filed by the writ petitioner before the Municipal Assessment Tribunal is non est in the eye

of law for not making pre-deposit.

8. In order to answer the questions it is appropriate to refer to sub-sections (5) and (6) of section 189 of the 1980 Act which are as under:-

189. Appeal before the Municipal Assessment Tribunal.-

(5) Any owner or person liable to payment of [property tax] may, if dissatisfied with the determination of objection u/s 188 appeal to the Tribunal:

Provided that such appeal shall be presented to the Tribunal within forty-five days from the date of service or [a copy of the order] u/s 188 and shall be accompanied by a copy of the said order.

(6) No appeal under this section shall be entertained unless the property tax, including penalty, together with interest on such property tax, if any, in respect of any land or building for the period ending on the date of presentation of the appeal on the valuation determined u/s 174 or section 188 has been deposited in the office of the Corporation and the appeal shall abate unless such property tax, together with interest on such property tax, if any, is continued to be deposited regularly till the appeal is finally disposed of:

Provided that, if the provision of this section is not complied with, due to misrepresentation or, otherwise, any proceedings in the Municipal Assessment Tribunal will stand ipso facto void."

(Emphasis supplied)

9. It is to be noted that the validity of the provisions contained in Part IV Chapter XII under the heading "Power of Taxation and Property Taxes" of the 1980 Act, which contains section 189, was challenged in a writ proceeding and ultimately the Hon''ble Supreme Court of Calcutta Gujrati Education Society and Another Vs. Calcutta Municipal Corporation and Others, while upholding the validity of the statute in paragraph 34, had held as under:-

"In the aforesaid circumstances, on examination of the provisions of the Act and as reasonably construing Section 189(6) of the Act, we find that the "right of appeal" as an effective remedy has to be given to a tenant, sub-tenant or occupant who is a "person liable" with "person primarily liable" for payment of "consolidated rate" and it would be available only on payment of the "consolidated rate'' as apportioned as his liability and held payable by him. Any other interpretation would frustrate the very object of providing the right of appeal to "person liable" with the "person primarily liable". This is how the provision has to be reasonably interpreted and read down."

10. Therefore, in view of the judgment in Calcutta Gujarati Education Society (supra), the contention of the petitioners that deposit of taxes determined at the time of filing appeal is onerous, cannot be accepted. The judgment of the Division Bench in

Manoshi Mohalanobish Vs. K.M.C. and Others, relied on behalf of the writ petitioners, is no longer good law in view of the order passed therefrom in appeal on 8th September, 2008 in Civil Appeal No. 5574 of 2008 (Arising out of SLP (C) No. 23632/2007) Kolkata Municipal Corpn. & Ors. versus Manoshi Moholanobish, by the Supreme Court, which is set out hereinbelow:-

"ORDER

Leave granted.

In this matter, we are directing the respondent-assessee to file an appeal against the order of assessment. That appeal shall be filed before the Tribunal u/s 189 of the KMC Act, within four weeks from today. Before the Tribunal, the respondent shall deposit the taxes, as a pre-deposit, on the basis of the annual value of Rs. 54,000/-. On such deposit of taxes, the Tribunal shall hear and dispose of the appeal within six months. All contentions on both sides are expressly kept open.

Before concluding, we may mention that in all, there were three show cause notices given by the AO. In one notice, the annual value was of Rs. 54,000/-. As regards the other two notices are concerned, we make it clear that the AO has already reduced the amount substantially, therefore, in respect of the said two notices, the High Court''s judgment setting aside the show cause notices is reversed.

Civil Appeal is disposed of accordingly."

11. It is to be noted that though in Manoshi Moholanobish (supra) challenge was also with regard to vagueness of notice, as evident from the facts as reported in Manoshi Mohalanobish Vs. K.M.C. and Others, and thus the issue was identical, yet the Supreme Court, inter alia, had directed the respondent-assessee to file appeal before the Tribunal and to make pre-deposit on the basis of annual value of Rs. 54,000/- and thereby had impliedly nullified the judgment of the Division Bench. In this regard it is also appropriate to refer to the judgment in John Jeffery Madan Vs. The Commissioner, Calcutta Municipal Corporation and Others, wherein the Division Bench, while dealing with section 189, held that "The law in this regard is well settled. The provision of appeal is a creature of statute. Therefore, nobody can claim the right to prefer an appeal against an order passed by a judicial or quasi judicial authority unless a provision therefor is made in the statute itself. As a statute provides for an appeal, the same can also be hedged with condition" (paragraph 7). Therefore, the settled principles of law is, any owner or person liable to pay property tax, if dissatisfied with the determination of objection u/s 188, preferring appeal before the Tribunal, has to deposit property tax and shall continue to deposit such tax regularly till appeal is finally disposed of.

12. That apart assuming no appeal is pending before the Tribunal in the eye of law for non deposit of taxes and the writ petition deserves consideration on merit, as contended on behalf of the petitioners, however in view of the law laid down in

paragraph 11 of the judgment in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, wherein it was held "If a petitioner has disabled himself from availing himself of the statutory remedy by his own fault in not doing so within the prescribed time, he cannot certainly be permitted to urge that as a ground for the Court dealing with his petition under Art. 226 to exercise its discretion in his favour.", the petitioner should have filed the writ petition within the statutory period of preferring appeal. In this regard it is appropriate to refer to the judgment in Cal. Cal. Electric Supply Corporation Ltd. and Another Vs. Kalavanti Doshi Trust and Others, wherein it has been held "As pointed out by the Supreme Court in the case of Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Others, in this type of cases, there is even no scope of application of section 5 of the Limitation Act by taking aid of section 29(2) of the Limitation Act and as such, it is apparent that on the date of presentation of the writ-application, the remedy of the writ petitioners was totally barred. It is now settled law that a Writ Court should not by invoking jurisdiction under Article 226 of the Constitution of India revive a barred remedy" (paragraph 13). The principles of law in paragraph 22 of the judgment in Seth Nand Lal and Another Vs. State of Haryana and Others, and in paragraph 3 in J.M. Baxi and Co. Vs. Commissioner of Customs and Another, relied on behalf of the petitioners, cannot be applied in view of the specific provisions in the 1980 Act, particularly section 189.

13. It is to be also noted that as Rule 53 of the Rules of the High Court at Calcutta relating to applications under Article 226 of the Constitution provides "Save and except as provided by these Rules and subject thereto, the provisions of the CPC (Act V of 1908) in regard to suits shall be followed, as far as it can be made applicable, in all proceedings under Article 226 and nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.", and as under Order 22 Rule 9 of the Code if a suit abates no fresh suit can be brought under the same cause of action and thus parallel proceedings cannot be maintained, the writ petition is not maintainable on this ground too.

14. So far as the second question is concerned section 189 of the 1980 Act confers legal right upon any owner or person liable to pay property tax, if dissatisfied with the determination of objection u/s 188, to present an appeal before the Municipal Assessment Tribunal. Section 189(6) postulates that no appeal shall be "entertained" unless property tax, including penalty together with interest on such property tax is deposited and appeal shall abate unless such property tax is continued to be deposited regularly till the appeal is finally disposed of. The question is whether the appeal can be treated to be as non est for non-deposit of property tax. It is clear section 189 makes a distinction between presentation of an appeal and entertaining an appeal. u/s 189(5) a person aggrieved can present or file an appeal which the registry of the Tribunal shall accept. However, under sub-section (6) of section 189 the Tribunal shall not entertain or hear the appeal unless property tax is deposited.

In the absence of deposit of property tax, the appeal, which continues to remain on record, shall "abate" which can be revived on payment of property tax. Hence, the contention of the petitioner that appeal is non est in the eye of law cannot be accepted.

15. Therefore, the writ petitions, being W.P. No. 133 of 2014 and W.P. No. 134 of 2014, are dismissed.

16. Urgent photostat certified copy of this judgment, if applied for, be furnished to the appearing parties on priority basis.