

(2006) 11 CAL CK 0064

In the Calcutta High Court

Case No : A.P.O. No. 107 of 2003 and W.P. No. 163 of 1999

Calcutta Municipal Corporation and Others

APPELLANT

Vs

Damodar Ropeways and Construction Company Private Ltd.
and Others

RESPONDENT

Date of Decision : 23-11-2006

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 174, 174(1)

Citation : (2007) 1 CALLT 634 : 111 CWN 139

Hon'ble Judges : Tapan Mukherjee, J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Ashok Kumar Das Adhikari and F. Haque, for the Appellant;Anindya Kumar Mitra, Samit Talukdar and Arindam Banejee, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Banerjee, J.—Respondents were the owners of 8th floor of premises No. 11, Dr. U.N. Brambhachary Street, Calcutta measuring about 14100 sq.ft. The appellant, Corporation proposed the annual valuation at Rs. 35,31,600/- and informed the respondents accordingly. The respondents filed objection. The Hearing Officer of the Municipal Corporation after hearing the parties fixed the annual valuation at Rs. 35.31 lacs. The order of the Hearing Officer is appearing at page 57 of the Paper Book.

2. Respondents preferred an appeal before the Municipal Building Tribunal. The Municipal Building Tribunal re-fixed the annual valuation at Rs. 29,03,100/-.

3. Being aggrieved by the order of the Municipal Building Tribunal respondents filed the above writ petition. The learned single Judge allowed the writ petition by Judgment and order dated April 29, 2002 appearing at pages 10-53 of the supplementary paper book.

4. Before the Municipal Building Tribunal the respondents contended that there could not be any tax and as such service charges paid by the tenants which were

inclusive of occupier share of the tax, commercial surcharge and user of the common lift should not be taken into account while determining the gross rent for the purpose of fixing annual valuation u/s 174 of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the "said Act of 1980"). The Municipal Building Tribunal gave the benefit to the respondents to the extent of lift and commercial surcharge, however, refused to give benefit for the occupier share which promoted the respondents to prefer the writ petition. The learned Judge, however, allowed the writ petition by observing that although the challenge to the vires of the provisions of Section 174 could not be sustained benefit should be given to the respondents to the extent that the appellant would be bound to deduct the occupier share paid by the tenants from the service charges before including the same within the gross rent while determining annual value.

5. Being aggrieved by and dissatisfied with the Judgment and order of the learned single Judge the appellant filed the present appeal.

6. Mr. Ashok Kumar Das Adhikari, learned Counsel appearing for the appellant, contended before us that Section 174 empowered the Corporation to take into account the gross rent received from the premises before determining the annual valuation. According to Mr. Das Adhikari the gross rent included service charge. The learned Judge accepted his submission and rejected the submission made on behalf of the respondents that such attempt would amount to tax on tax. After rejecting such contention of the respondents and after upholding the vires of the statute the learned Judge could not have allowed the writ petition by granting them relief to the extent as prayed for.

In support of his contention Mr. Das Adhikari cited the following decisions:

(i) 2000 (1) C HC N 494 Calcutta Metropolitan Development Authority v. Ajit Kumar Majumdar and Ors.

(ii) Union of India (UOI) Vs. Justice (Retd.) S.N. Saxena and Others,

7. Citing the aforesaid decisions Mr. Das Adhikari contended that once the respondents/writ petitioners were unsuccessful on the issue of challenge to the vires of the relevant provision being Section 174(1) of the said Act of 1980 the learned Judge erred in granting them relief to the extent as prayed for by them.

8. Mr. Anindya Kumar Mitra, learned Counsel appearing for the respondents, contended as follows:

(i) The definition of "gross rent" as stipulated in Section 174(1) of the said Act of 1980 could not and did not include service charge to the extent of the property tax paid by the tenants in respect of the premises in question for the purpose of determining the annual valuation as it would amount to tax on tax.

(ii) Under the said Act of 1980 the landlord was permitted to collect half of the property tax so paid by him from the tenant who was enjoying the property at

the relevant time. Hence, such reimbursement could not be termed as rent which could be taken into account while determining the annual valuation.

(iii) The Municipal Building Tribunal after giving benefit to the respondent on the issue of commercial surcharge, could not have refused extending benefit on the issue of property tax and the learned Judge was right in intervening on that score.

9. In support of his contention Mr. Mitra relied on the following decisions:

(i) 1990 (2) CLJ 310 Pushpa Devi Gourisaria v. Sudera Enterprises Pvt. Ltd.

(ii) Canara Bank and Anr. v. Municipal Corporation of Ahmedabad, (1996) 7 SCC 298.

(iii) Surat Textile Market Cooperative Shops and Warehouses Society Ltd., Surat Vs. Municipal Corporation of the City of Surat,

(iv) 1998 (2) CLJ 480 Bengal Properties Pvt. Ltd. and Anr. v. Calcutta Municipal Corporation and Ors.

(v) 2000(2) CHC 349 Motilal Naresh Kumar v. Calcutta Municipal Corporation and Ors.

10. On perusal of the Judgment and order under appeal we find that the vires of Section 174(1) of the said Act of 1980 was very much under challenge. In support of such challenge it was contended on behalf of the respondents that it would amount to tax on tax in case the occupier share so included in service charges was taken into account while determining the gross rent for the purpose of fixing the annual valuation. Such challenge was negated by His Lordship and there was no challenge to such finding of the learned Judge by the respondents. The respondents once accepted the reasoning given by His Lordship while rejecting their contention on the vires. His Lordship, however, after rejecting their contention on the question of vires accepted their contention in other way by granting them the ultimate relief. Paragraphs 7.4, 7.5 and 8.6 of the Judgment of His Lordship are quoted below:

7.4 All these decisions as referred to above, dealt with cases where the imposition was in respect of something other than land and building. Relying on these decisions, Mr. Ghosh sought to contend that the service charge, if includes, a component which does not relate to charges on land and building but are for reimbursement of electricity or other services or amenities, then it would be definitely outside the scope of Entry 49 and thus legislatively incompetent for the State of impose it. But, there is a fallacy in the submission having regard to the provision contained in Section 174(1) The intent and purpose of including rent and service charge is not to impose any tax on anything other than land and building. On the other hand, it is a mode, manner and method of arriving at the hypothetical annual letting out value of the land and building. It is not an impost either on rent or on the service charges. It is a guideline through which annual

letting out value of the land and building is to be arrived at.

7.5 Challenge has been thrown on the ground that it exceeds the limit provided in Entry 49 of List II. The answer is simple. Section 174(1) is a concept of method or mode for assessing the annual letting out value. It is not an imposition of tax either on rent or on service charge etc. It is a guideline for computation for assessing the annual letting out value of the land and building. The mode and method of computation is not an impost. The tax that is imposed, having been computed or assessed in the manner provided in 174(1) is within the limits of Entry 49. It does not travel beyond the parameters of Entry 49. There is a distinction between the impost and the mode and method for arriving at or determining the quantum of the impost. If such an interpretation, as Mr. Ghosh is seeking to put forth, is accepted, in that event, when cost of construction method is adopted, then it might be argued that it is an impost on the materials and labour used for construction of the building. On the same analogy, if the guideline includes service charges, it would not be an imposition on the service charges. The expression used in Section 174(1) is that the annual value of any land or building shall be deemed to be the gross annual rent including service charges, if any, at which such land or building might at the time of assessment be reasonably expected to let from year to year. Therefore, foundation or basis of the rent and service charges is in effect is the guidelines is in effect is the guideline for determining the rent at which the premises is reasonably expected to let from year to year. It is not an imposition on rent or service charges. It is an imposition on the land and building, the annual value whereof is to be determined in the manner provided in Section 174(1) of the 1980 Act. In effect, it is a national rent at which the thrust is led. It is not the actual rent. Therefore, this question is answered against Mr. Ghosh.

8.6 The vires on the question other than legislature incompetence was gone into in *Roma Sur* (supra) and it was held to be intra vires. Though, much attempt was made by Mr. Ghosh to attack the question of vires from different angles besides legislative incompetence and wanted that Section 174 of 1980 Act should be interpreted on the principle of reading down, rely on *Borosil Glass Works Limited Employees Union v. D.D. Bamode and Ors.* JT 2000 (suppl. 3) SC 278. But, it is a settled principle of law that once the question of vires is gone into, the same cannot be reopened or attacked on a different ground, which might not have been considered in the earlier decision. Therefore, all these grounds are not available to Mr. Ghosh, in any event, I do not find any reason to hold the same provisions, as ultra vires since a particular mode for arriving value has been provided for, which is in effect a guiding standard for determining the national value, which has since been recognized and emphasized in various decisions as discussed above. Majority of the decisions proceeds on the basis of assessment to be made on national value. Inasmuch as the expression used is "at a rent at, which reasonably expected to be let". The contractual rent has also been accepted. Therefore, there is nothing, which can affect the vires on account of legislative incompetence or otherwise as has already been discussed. I have held

that is was within the legislative competence of the State legislature and cannot be questioned.

11. His Lordship dealt with the challenge to the vires in detail. We need not go into that question. His Lordship, however, in the later part of the Judgment held a different view as would appear from paragraph 2 and 9.4 which are quoted below:

9.2 Now we may examine which of the components of the service charges could be taken into account for assessing the annual letting out value. The expression "service charge" used in Section 174(1) as a guiding factor, is to be interpreted in its simple and ordinary meaning. It would mean the charges realized for the services provided. Such services must have co-relation with the land and building. The service charges are meant for providing the amenities, which are necessary for the enjoyment of the land and building in occupation of the person to whom these are provided. In fact, these amenities are provided for the use and occupation of the land and building. It must be part of the amenities attachable to the land and building. In other words, it would be those amenities, which are provided for better enjoyment of the building or to facilitate the use and occupation thereof. Therefore, it may include electricity charges, water charges, conservancy charges or various other facilities and amenities, which are provided for the better enjoyment of the building itself. But it cannot include such components, which are not necessary for the purpose of enjoyment of the building. The charges realized from the tenant on account of certain services provided, which are co-related to the enjoyment of the property, are definitely service charges, which can be taken into account having regard to the principle of determining fair rent and various other decisions as discussed above, including the question of forming integral part of a particular premises or common services. It may be a case where common service is charged at a proportionate rate, which may though be common, but to that proportion, it may be an integral part of that particular tenancy. But these are dependent on the facts and circumstances of each case viz. how it being charged.

9.4 Having regard to the above discussion, it appears that in no event the service charges could include the occupier's share of taxes, if by reason of a contract included in the rent. Similarly, it cannot commercial surcharge, if by reason of a contract, the same is also included in the rent. Therefore, while calculating rent including service charges, the assessing authority has to examine and find out that what are the components of the service charges, which are to be included or excluded. The service charge never intended to include the realization of occupier's share of taxes or commercial surcharges. The word "service charges" is to be interpreted according to its common meaning in an ordinary sense as a common man will understand. It may be charged for some services and amenities. Occupier's share of tax or commercial surcharge is not charges for any service or amenities. Therefore, occupier's share of tax or commercial surcharge cannot form a component of a service charge, even if it is included in

the rent or the service charge as the case may be.

12. The challenge to the vires of Section 174(1) was based upon the argument advanced by the respondent that it would amount to tax on tax. Such contention was specifically negated by His Lordship in the first part of the Judgment. His Lordship, however, in paragraph 11.1 observed, " it would attract the vires of imposing tax on tax ". His Lordship further observed in paragraph 11.3 that " these quantum cannot form the rent component for the purpose of assessment ". The tribunal excluded the commercial surcharge under the provisions of the said Act of 1980. The commercial charge is a liability on the person who commercially exploits the said premises. If the tenant is carrying on business from a premises he has to pay the commercial surcharge and probably on that analogy the tribunal allowed such benefit. We are, however, not interested to dilate on this score as the parties did not join issue there. In our view, once the learned Judge held that inclusion of the tax in the service charge could not be termed as "tax on tax" extension of substantial benefit could not be made.

13. On a close reading of Section 174(1) it would appear that the Corporation was empowered to fix the annual valuation of a premises for the purpose of determining the tax to be paid in respect of the said premises. One of such mode of determining the annual valuation was to take into account the gross rent. It would not for the purpose of payment of tax directly. It only gives an impression upon the Assessing Officer that what could be the fair valuation of the said property. While doing so he was empowered to take into account "gross rent". Gross rent means not only the rent which the landlord could get in lieu of his enjoyment of the property assigned to the tenant but also all other charges incidental thereto. Hence, in our view, taking into account the service charge within the gross rent component the tribunal or the Hearing Officer did not cause any mistake and no interference was called for in the writ petition.

14. In case of Calcutta Gujarat Society (supra) the Apex Court in paragraph 45 of the Judgment observed "rent is a compendious expression which may include lease money with service charges for water, electricity and other taxes leviable on the tenanted premises".

15. In the case of Gujarat Society (supra) the Apex Court considered the issue as to whether the tenants and/or sub-tenants and/or occupants could have any say in the matter of fixation of annual valuation. Mr. Mitra contended that the observation quoted (supra) was made as and by way of passing remark as the point in issue in Gujarat Society was a different one. We are, however, unable to accept such contention of Mr. Mitra. The Apex Court while deciding the issue was of the view that the tenant and/or occupant did have a say in the matter of fixation and/or revision of the annual valuation as they were to discharge their liability towards the same by way of reimbursing the landlord to the extent of their liability. Such liability towards the landlord by a tenant is nothing but rent which is paid in lieu of enjoyment of the property in question. When a tenant enjoys a property which he is otherwise not entitled to not being the owner of

the same he would have to discharge all liability, not only the rent so to be paid to his landlord in lieu of landlord's permission to occupy the said premises but also for the civic amenities attached to the said premises in question as well as for residing within the city and thereby enjoying all civic amenities. Hence, he was to pay for the same and once such payment was being made primarily by the landlord he was to reimburse him to the extent as provided in the statute. Such reimbursement was nothing but a payment in lieu of enjoyment of the property and it must be included in the service charge so to be paid to the landlord. In other words, it is a liability accrued due to enjoyment of such property and such liability must be taken into account while determining the annual valuation of the said premises. As we have observed earlier that taking into account the service charge within the gross rent component is nothing but a method and/or a mode to have an impression as to what could be the fair value of the property. It is only for that purpose such component was allowed to be taken into account u/s 174(1)..Once such statutory provision was held as valid the consequential relief on the basis of reasoning for challenge could not be extended.

The appeal succeeds.

The Judgment and order under impugned herein is set aside.

The writ petition is dismissed.

There would be, however, no order as to costs.

Urgent xerox certified copy would be given to the parties, if applied for.

Tapan Mukherjee, J.

16. I agree.