

(2019) 12 CAL CK 0014

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 23192 (W) Of 2015

Enkon Private Ltd

APPELLANT

Vs

Kolkata Municipal Corporation & Ors

RESPONDENT

Date of Decision : 03-12-2019

Acts Referred:

Kolkata Municipal Corporation Act, 1980 — Section 131, 131(3), 170, 170(1)(c), 170(2), 202, 202(1), 202(2), 202(4), 203, 203(3), 204, 307, 343, 343(1), 344, 344(1)
Hoogly River Bridge Act, 1969 — Section 9, 23
Uttar Pradesh Municipalities Act, 1916 — Section 116(g)
Constitution Of India, 1950 — Article 243ZB, 243X, 265

Citation : (2019) 12 CAL CK 0014

Hon'ble Judges : Shampa Sarkar, J

Bench : Single Bench

Advocate : Dipanjan Sinha Roy, A. Guha, Alok Kumar Ghosh, Piyali Sengupta, Manisha Nath

Final Decision : Allowed

Judgement

Shampa Sarkar, J

1. The petitioner is a private limited company. In this writ petition, the petitioner has impugned the demand for an amount of Rs.5,21,42,064/-as Land Utilisation Charges (in short LUC) vide Bill Nos. 2013-2014L00853, 2014-2015L02739, 2015-2016L00646, 2015-2016L00647, 2015-2016L00648, 2015-2016L00649 all dated July 29, 2015 and 2013-2014L00852, 2014-2015L02738, 2015-2016L00642, 2015-2016L00643, 2015-2016L00644, 2015-2016L00645, 2013-2014L00851, 2014-2015L02737, 2015-2016L00638, 2015-2016L00639, 2015-2016L00640, 2015-2016L00641, 2013-2014L00847, 2014-2015L02733, 2015-2016L00622, 2015-2016L00623, 2015-2016L00624, 2015-2016L00625 all dated July 28, 2015 and Bill Nos.2013-2014L00854, 2014-2015L02740, 2015-2016L00650, 2015-2016L00651, 2015-2016L00652, 2015-2016L00653, 2013-2014L00855, 2014-2015L02741, 2015-2016L00654, 2015-2016L00655, 2015-2016L00565, 2015-2016L00657 all dated July 29, 2015 and

2013-2014L00845, 2014-2015L02731, 2015-2016L00614, 2015-2016L00615, 2015-2016L00616, 2015-2016L00617, 2013-2014L00846, 2014-2015L02732, 2015-2016L00618, 2015-2016L00619, 2015-2016L00620, 2015-2016L00621 all dated July 27, 2015 and 2013-2014L00850, 2014-2015L02736, 2015-2016L00634, 2015-2016L00635, 2015-2016L00636, 2015-2016L00637, 2013-2014L00849, 2014-2015L02735, 2015-2016L00630, 2015-2016L00631, 2015-2016L00632, 2015-2016L00633, 2013-2014L00848, 2014-2015L02734, 2015-2016L00626, 2015-2016L00627, 2015-2016L00628, 2015-2016L00629 all dated July 28, 2015 and 2013-2014L00856, 2014-2015L02742, 2015-2016L00658, 2015-2016L00659, 2015-2016L00660, 2015-2016L00661 all dated July 29, 2015 issued by the Kolkata Municipal Corporation.

2. The respondent No.2, namely, Hooghly River Bridge Commissioners (in short HRBC) through the office of the respondent No.3, that is, the Director (Pr. & Co.) issued notices inviting tenders. Agencies, individual firms and individual advertisers having adequate capacity to fabricate, erect and illuminate different types of display boards, hoardings, kiosks on different structures on bridges, flyovers, piers etc. under the control and management of HRBC were called upon to participate in the tender process.

3. The petitioner participated in the tender process and the HRBC upon issuance of letters of acceptance No. HRBC/10T-95/2013/Pr & Co/4911 dated July 22, 2013 and HRBC/10T-95/2013PR & Co/4951 dated August 2, 2013, accepted the petitioner as the successful bidder for the jobs described in the different tender notices. Agreements to that effect were also executed between the petitioner and the HRBC. HRBC permitted the petitioner to erect hoardings, kiosks, gantries etc., at the allotted sites out of the various sites at Vidyasagar Setu, Gariahat Flyover, A.J.C Bose Road Flyover, Beck Bagan Ramp, Park Street Flyover, Nager Bazar Flyover (Dum Dum), Kidderpur Flyover, and Bridge all under the Hooghly River Bridge Commissioners. Later some of these sites were declared as no advertisement zone. The petitioner was also required to erect their installation and structures in order to display the advertisements on the basis of the terms and conditions of the tender process. The petitioner in lieu of such selection, had to pay to HRBC the accepted value of each of the contracts as mentioned in the bid document. The contractor was also required to pay the amount as contained in the Terms and Conditions of Contract and Instructions to Bidders. Some of the clauses being relevant in this context are set out below:-

"7. A security deposit @ 10% of the value of the accepted contract should be submitted by the successful bidder along with his bid money, which should be valid for 3 ½ years i.e upto 6 months beyond the stipulated period of contract (the contract period is 36 months i.e 3 Years in this case). After expiry of contract and subsequent removal of hoarding structure within stipulated time the security deposit will be refunded without interest.

8. On issue of LOI (Letter of Intent) after completion of the structure the entire sum covering the chargers for 3 years (36 months) commencing from 61st day

from the date of issue of LOA or date of erection of display board (whichever is earlier) as has been stipulated in the foregoing paragraphs No.3, has to be deposited.

On completion of the period of 3 years (36 months) the successful bidder will have to remove all his structures and displays at his own cost within 15 days commencing from the date of completion of 3 years. Failure to remove the structures/displays after the expiry of the contract period plus 15 days as mentioned above, shall be at the risk and cost of the successful bidder. The bidder will have no right on the display board or materials left on the structures or at the ground the HRBC shall have full authority to remove those and dispose as will be considered appropriate by HRBC Authorities. The security deposit will be forfeited.

It is to be clearly understood by the tenderers that during the currency of their contract, access to the structures of flyover has to be made available to HRBC by temporary removal of the structures for carrying out maintenance work, at no cost to HRBC and there will be no rebate for such interruption except where the period exceeds 15 days. For interruption of 16 days or more, prorata refund or prorata extension of the terminal date of contract as will be decided by HRBC shall be admissible. The decision of HRBC will be final and binding in this regard and shall be treated as an excepted matter.

12. For installations of electric meters space may be allowed to be used which is available free of any HRBC's installation and is under control of HRBC and all expenditure for installation and removal of installation of electrical equipments has to be borne by the successful bidder. They have also to pay all levies taxes, viewer taxes, viewer taxes of Calcutta/Howrah Municipal Corporation, licensing free or any other statutory fees and taxes directly to those authorities and submit attested copies of those for record of HRBC takes no responsibility for waiver of any of the taxes. The selected agencies shall obtain necessary permission from the Municipal Commissioner after paying tax, fees and charges before display of advertisement within the jurisdiction of the Corporation by any means upon HRBC properties. This is a statutory provision. The extract of the Kolkata Municipal Corporation Act 1980 Chapter XIV is enclosed in the Tender document for ready reference. (The tenderer should obtain latest copy for full TEXT and reference of KMC/HMC as the case may be which is currently applicable)."

4. It is pertinent to mention, that the bidders like the petitioner were required to quote their amount per square metre for the spaces/sites in the tender document. The total contract price was required to be paid in three instalments. The relevant clauses with regard to the payment and the period of the contract are quoted below:-

"4. Successful bidder will have to deposit through demand draft the entire amount covering the full period of 3 years (36 months) years of the contract. The

time of contract shall be counted from the date of commencement of work which will be not exceeding 60 days from the date of issue of LOA (Letter of Acceptance). If any part of the installation is completed earlier, the fees will be charged from the date of such commissioning.

The tenderers are required to submit rates for each individual bridge/flyover and for each type of display items as given in BOQ (Bill of Quantities). Any offer on jump sum basis is likely to be summarily rejected without making any further reference to the tenderer. Conditional rates shall also be summarily reject. The B.O.Q. (Bill of Quantities) item wise quoted rate shall only be considered.

5.1 HRBC shall intimate through a "Letter of intent" to the successful bidders the locations any types of displays for which his offer has been found to be acceptable at rates quoted by him against those BOQ (Bill of Quantities) items. An amount that will be worked out on the basis of the assessed area of advertisement as mentioned in the BOQ (Bill of Quantities) at the quoted a rate for a period covering 36 months (3 years) on the basis of calendar months. The successful bidders will have to deposit the sum mentioned in the Letter of Intent through a Demand Draft in favour of the HOOGHLY RIVER BRIDER COMMISSIONERS payable at Calcutta within 10(ten) working days from the date of issue of Letter of Intent. Failure to pay the same as mentioned in the LOI (Letter of Intent) will be considered as the tenderers resiling from the offer and his earnest money shall be forfeited without making any further reference to him. In their own interest, the tenderer should furnish their FAX Nos. through which a copy of LOI (Letter of Intent) shall be transmitted in addition to despatch of the letter through Speed Post/Register Post with A/D.

5.2 Immediately on deposit of the quantified sum, the Letter of Acceptance (LOA) shall be issued to the successful bidders for the locations and types of display for which LOI (Letter of Intent) was issued. The successful bidders shall thereafter within 60 days from the issue of LOA (Letter of Acceptance) arrange to install the displays. The sum that is calculated covering the period of 36 months (3 years) of contract shall become the final payable amount.

5.3 As already specified the successful tenderer shall have to complete all formalities for obtaining permission and erection of structures as per approved design within 60 days from the date of issue of Letter of Acceptance. If the tenderer is unable to fix the structures within 60 days even then the commencement date of contract will be from 61st day from the date of LOA (Letter of Acceptance) and shall expire after 36 calendar months from the date of commencement.

6. Under no circumstances any part payment shall be accepted. The time to deposit the entire sum as mentioned in LOI (Letter of Intent) shall not be extended under any circumstances and the bidders earnest money shall be forfeited and HRBC will be free to award the work to any other agency as HRBC will consider appropriate."

5. Clause 16 provided that money should be deposited by the successful bidder by way of a demand draft. A sum of Rs.5 lakh was deposited along with the tender documents at the time of the bid.

6. Accordingly, the petitioner having been selected as the successful bidder for award of the above-mentioned contract deposited the payments in terms of the clauses referred to hereinabove. By two letters both dated December 16, 2014, HRBC called upon the petitioner to clear up all the dues of Kolkata Municipal Corporation (hereinafter referred to as KMC) including the LUC in respect of the hoarding sites which were the subject matter of the contract in the aforementioned tender process.

7. The petitioner by a letter dated December 24, 2014, intimated HRBC that LUC could not be charged in their case, as the petitioner was not utilising any land belonging to KMC. The structures over the flyover, bridges, piers and ramps belonged to HRBC. The spaces and sites where the hoardings had been installed and displayed were rented out to the petitioner by HRBC, in lieu of which the petitioner was paying the licence fee in three (3) equal instalments in terms of the clauses of the Terms and Conditions of Contract. The petitioner further asserted that the law did not permit KMC to claim LUC. Consequent to receipt of the said letter, the respondent No.3 by a letter dated January 13, 2015, informed the Special Officer Advertisement Department that, as the bridges were constructed by HRBC and were the property of the HRBC, under its control and maintenance, the demand for LUC should be kept on hold. HRBC pointed out that there was some ambiguity on the issue and the Chairman of HRBC had already spoken to the Mayor of KMC with a request to hold the demand for LUC till the matter was resolved. However, HRBC requested KMC to raise bills as per Section 203 and 204 of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the KMC Act).

8. After some time, the respondent No.3 by a letter dated June 9, 2015 called upon the petitioner to pay the LUC along with advertisement taxes as per Bills that to be issued by KMC. However, it was also mentioned in the said letter that, if the petitioner had any grounds in favour of not paying LUC to KMC, then the petitioner should justify their stand by a reply to the respondent No.3, and HRBC would make a request to KMC for exemption of LUC. The petitioner filed its reply on June 12, 2015. The petitioner contended that the claim for LUC was illegal, unlawful and not permissible under the law. The sites over which the hoardings and advertisements had been displayed belonged to HRBC and petitioner had already paid rent/licence fee in respect of the spaces utilised by the petitioner for such advertisement to HRBC. The provisions of Sections 203 and 204 of the KMC Act did not provide for payment of LUC to KMC. According to the petitioner, the special sites being admittedly properties which had vested in HRBC, the KMC could not have any right to claim charges for the land utilised by the petitioner in terms of the contract entered into with HRBC, upon payment of the contracted amount. Thereafter, the petitioner suddenly received a number of Bills some

dated July 27, 28, and 29, 2015, as demand for taxes and fees. The demands were under four (4) heads, namely, permission fee under Section 202, licence fee for advertisement under Section 203, advertisement tax under Section 204 of the KMC Act, 1980 land utilisation charges (LUC). The total quantum of land utilisation charges claimed by way of the bills amounted to Rs. 5,21,42,064/-. The petitioner by a letter dated August 5, 2015 objected to the said demand for LUC. The contentions of the petitioner were that the KMC Act provided for Tax and Fees under Sections 203 and 204 but, the Act did not speak of LUC. The LUC was in the nature of rent or licence fee for user of KMC land. LUC was not applicable on privately owned properties such as the sites owned by the HRBC. The HRBC by letters of acceptance granted permission to the petitioner to erect hoardings, kiosks, gantries etc. at the bridges, flyovers and ramps on the basis of a tender process. Accordingly, the petitioner had installed the advertisement display structures and paid licence fees/rent as demanded by the licensor that is the HRBC. As per the terms and conditions of the contracts the petitioner was required to remit taxes and fees accruing on account of the hoardings, kiosks, gantries etc. at the bridges, flyovers and ramp named herein to the KMC, as per demand raised by such authority. The fact that the sites belonged to the HRBC could be ascertained from the letter bearing Memo No.HRBC/10T-95/2013/Pr & Co./013 dated January 13, 2015 addressed to the Special Officer, Advertisement Department, Kolkata Municipal Corporation.

9. The KMC authorities did not pay any heed to the letter dated August 5, 2015 and instead by a letter dated August 12, 2015, the respondent No.4 issued a threat to the petitioner that the KMC would pull down the advertisements at the sites allotted by the respondent No.2, in the event, the petitioner did not make any payments as per the bills raised by KMC. On August 31, 2015, the KMC authorities went to the spot and started pulling down the advertisement and flexes. Aggrieved by the aforementioned action as also the issuance of the impugned demand for LUC, this writ petition has been filed.

10. The writ petition was admitted on September 22, 2015 and an interim order was passed restraining the KMC from forcibly removing the hoardings, banners, kiosks, etc. belonging to the petitioner which were displayed and were mounted on the sites of the HRBC, provided the petitioner paid the amounts demanded under other heads.

The ordering portion is quoted below:-

"I direct this matter to appear in the supplementary list on October 5, 2015 under the same heading.

After hearing the learned advocates for the respective parties I am of the view that the petitioner has been able to make out a prima facie case for the grant of an interim order.

There shall be an unconditional interim order in terms of prayer (I) till September, 30, 2015.

In case the petitioner pays the amount payable by it under Sections 202, 203 and 204 of the Kolkata Municipal Corporation Act by September 30, 2015 the unconditional stay shall continue till October 14, 2015 or until further order, whichever is earlier.

Mr. Ghosh submitted that this amount ought to have been paid by the petitioner in advance. Since that has not been done the Corporation is entitled to get some interest.

I do not think that my order has prevented the Corporation from raising the bill to that effect.

Since the order has been passed in presence of all the parties they are directed to act on the basis of the communication to be made by the learned advocates without insisting on the production of a certified copy of the order."

11. As the petitioner deposited the amount in terms of the direction of the learned Judge, the interim order was extended from time to time and finally the interim order so passed was extended until further order.

12. Mr. Saptangshu Basu, learned Senior Advocate appearing on behalf of the petitioner contended, that land utilisation charges denote charges to be paid in lieu of utilisation of land of another person. According to Mr. Basu, as the advertisements were displayed on the structures installed on the property which had vested in HRBC, against payment of rent as per the terms and conditions of the contract, KMC did not have any right to demand LUC. The sites were not the property of KMC and such charges did not fall within the purview of Article 265 of the Constitution of India. He next contended that KMC was empowered to claim the tax, fees etc. under Sections 202, 203 and 204 of the KMC Act, as per the demand in the impugned bills, but not LUC. According to Mr. Basu, a statutory authority could not go beyond what was prescribed in the statute. Mr. Basu referred to the provisions of Section 9 and 23 of the Hooghly River Bridge Act, 1969 (hereinafter referred to as the said Act of 1969), in order to emphasise that the lands over which the projects had been constructed along with its foundation, bridges, slopes, and structures thereon had vested in the Commissioner, HRBC. He also urged that Section 23 of the said Act of 1969 provided for situations when the said lands which vested in HRBC would either be exempted or not exempted from rates leviable under the various municipal acts with reference to whether they were utilised for deriving income by letting out to tenants or not. Mr. Basu contended, that as per the said provision in the Act of 1969, HRBC could utilise the said land which had vested in it, for deriving income by award of contracts, as in the instant case. According to Mr. Basu, once the petitioner had already paid the rent/licence fee to HRBC in terms of the contract for putting up hoardings and advertisements on the space/sites allotted by way of a tendering process, no further charge was payable for utilization of the same land.

13. Mr. Sumit Kumar Panja, learned advocate appearing on behalf of the HRBC, submitted that HRBC was a statutory body formed under the Hooghly River

Bridge Act, 1969 for the purpose of construction, maintenance and control of bridges across the river Hooghly within the port of Kolkata, and at such place or places together with such approaches, as HRBC may consider suitable, subject to the approval of the State Government. Accordingly, HRBC was entrusted by the Transport Department, Government of West Bengal to construct, maintain and control the flyovers and/or bridges at different places like A.J.C. Bose Road, Gariahat Junction, Park Street, Chowringhee Road, across Railway line on Lock Gate, at Kidderpore, Vidyasagar Setu etc. The maintenance of the flyovers were also done by the HRBC from their own resources.

14. According to Mr. Panja, under the said Act of 1969 Act, lands required for the construction of any bridge, together with its foundations, approaches and slopes including structures on such lands formed part of such flyover/bridge and they vested with HRBC. Mr. Panja submitted that HRBC was entitled to utilise the structures of the flyovers and bridges at different sites for deriving income by allotting spaces and sites for hoarding and kiosks for display of advertisements. In such fact scenario, Mr. Panja submitted that HRBC entered into a contract with the petitioner for display of advertisement by mounting/installing hoardings, boards and kiosks on or above the structures of the flyovers. The income from such allotment of site was accounted for in the budget estimates of HRBC and such income/budgets were required to be approved by the State Government. The State Government had always approved such budgets in which the income from allotments of sites by way of tenders had been disclosed. Mr. Panja, however, submitted that taxes and fees under the KMC Act, were payable by the petitioner to KMC and the same was made known to the petitioners by HRBC. Such requirement was incorporated in Clause 12 of the Terms and Conditions of the Contract. Accordingly, the petitioner and similarly situated successful bidders who were allotted space on these sites for installations of hoardings and display of advertisements, were required to take permission and licence from the KMC, upon payment of licence fees, for display of advertisement for public viewing and such levies, taxes and licence fees under the KMC Act were required to be paid by the petitioner. However, Mr. Panja categorically denied the liability of the petitioner to pay LUC, in view of the fact that the LUC could not be equated with taxes, levies or other statutory fees under the KMC Act. Mr. Panja submitted that on repeated demands and pressure created by the KMC, HRBC had requested the petitioner to pay up LUC but, on the objections raised by the petitioner, the Director HRBC took up the issue with the Special Officer, Advertising Department of the KMC and specifically contended that the petitioners were not required to pay LUC on the lands which had vested in HRBC in terms of the Act of 1969.

15. Attention of the Court had been drawn to the letters dated January 13, 2015 and June 9, 2015 in this regard. According to Mr. Panja, KMC did not have any right to claim LUC as the land utilised by the petitioner was not owned by the KMC, but those bridges flyovers and piers together with their support, pillars etc. had vested in HRBC. Moreover, neither the Constitution of India nor the KMC Act empowered KMC to impose LUC.

16. Mr. Panja relied on the following judgments, namely, New Delhi Municipal Council vs. State of Punjab and Others reported in (1997) 7 SCC 339, Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. & Ors., reported in (2003) 2 SCC 111, Cricket Association of Bengal vs. Calcutta Municipal Corporation, reported in 2016 (3) CHN (CAL) 248 and Kunwar Pal Singh (Dead) by Lrs. vs. State of U.P. & Ors., reported in (2007) 5 SCC 85 in support of his above submissions.

17. Mr. Alok Kumar Ghosh, learned advocate appearing for KMC, submitted that, although HRBC constructed, controlled and maintained the flyovers and bridges, it had no right to allot sites for advertisements on them. The sites over which the flyovers and bridges has been constructed belonged to the KMC as per Section 343 of the KMC Act. According to Mr. Ghosh, Section 344 of the KMC Act, provided that all public streets, squares etc. vested in the Corporation and would be under the control of the Municipal Commissioner. Mr. Ghosh developed his argument by relying on Sections 202, 203 and 204 of the KMC Act. According to him, these sections provided that no person could be allowed to use any site or any land, building, wall or erect any hoarding, frame, post, kiosk, structure, neon sign or sky sign for the purpose of display of any advertisement without a licence and permission from the KMC, upon payment of appropriate fees as prescribed. Relying on clause 12 of the Terms and Conditions of the Contract between petitioner and HRBC, Mr. Ghosh urged that the said clause made it compulsory for the petitioner as the successful bidder, to pay all levies, taxes, licenses fee and other statutory fees directly to the KMC. Thus, according to Mr. Ghosh, the petitioners were using KMC land for the purpose of erection of structures to put up hoardings and display of advertisement for public viewing. As per Section 204 read with Sections 343 and 344, of the KMC Act the petitioners were liable to pay LUC to KMC. Mr. Ghosh also submitted that initially the petitioner did not comply with clause 12 of the tender document. The petitioner neither took permission from KMC, nor did it pay the licence fee and the advertisement tax. The said amounts were paid pursuant to the interim order passed by this Court.

18. Heard the parties. The moot point to be decided here is whether the petitioner was liable to pay LUC to KMC as claimed in the impugned bills.

19. Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. The State Legislature has enacted the Kolkata Municipal Corporation Act, 1980. The authority of law as envisaged by Article 265 of the Constitution of India in this case would mean the Kolkata Municipal Corporation Act, 1980. Section 131 of the KMC Act provides for the annual budget of the Corporation. The said Section is quoted below:

"131. Annual Budget of the Corporation. - (1) The Corporation shall, on or before the 22nd day of March in each year, adopt for the ensuing year a budget estimate which shall be the estimate of the receipts and the expenditure of the Corporation to be received and incurred on account of the municipal government of Kolkata.

(2) The budget estimate shall separately state the income and the expenditure of the Corporation to be received and incurred in terms of the following accounts.-

(a) the Water-supply, Sewerage and Drainage Account,

(b) the Road Development and Maintenance Account,

(c) the Bustee Service Account,

(d) the Commercial Projects Account, and

(e) the General Account.

(3) The budget estimate shall state the rates at which various taxes, surcharges, cesses and fees shall be levied by the Corporation in the year next following.

(4) The budget estimate shall state the amount of money to be raised as loan during the year next following.

(5) The Mayor shall present the budget estimate to the Corporation on the 15th day of February in each year or as soon thereafter as possible.

(6) The budget estimate shall be prepared, presented and adopted in such form and in such manner, and shall provide for such matters, as may be prescribed."

20. In the budget, KMC was required to separately state the income and expenditure of the Corporation to be received and incurred in terms of five account heads as stated above. Part IV, Chapter XII of the KMC Act empowers KMC to levy taxes. Section 170 is quoted below:

"170. Taxes to be levied by the Corporation. - (1) The Corporation shall, for the purpose of this Act, have the power to levy the following taxes-

(a) a [property tax] on lands and buildings,

(b) [****]

(c) a tax on advertisements other than the advertisements published in newspapers [* * * *]

(d) a [toll,]

(e) a tax on cart, and

(f) a tax on carriage.]

(2) The levy, assessment and collection of taxes mentioned in sub-section (1) shall be in accordance with the provisions of this Act and the rules and the regulations made thereunder."

21. Section 170 (1) (c) provides that the Corporation shall have the power to levy tax on advertisements other than advertisements in news papers. Section 170 (2) provides that the levy, assessment and collection of taxes mentioned in Sub-section (1) shall be in accordance with the provisions of the KMC Act and the

rules and regulations made thereunder. Thus the legislature in its wisdom has empowered the KMC to collect such tax as mentioned in Section 170.

22. Chapter XIV of the KMC Act deals with tax on advertisements other than advertisements in news papers. Section 202 (1) provides that no person shall erect, exhibit, fix or retain upon or over any land, building, wall, hoarding, frame, post, kiosk or structure any advertisement, or display any advertisement to public viewing without the written permission of the Municipal Commissioner. The said section is quoted below:

"202. Prohibition of advertisements without written permission of the Municipal Commissioner.- (1) No person shall erect, exhibit, fix or retain upon or over any land, building, wall, hoarding, frame, post, kiosk or structure any advertisement, or display any advertisement to public view in any manner whatsoever, visible from a public street or public place (including any advertisement exhibited by means of cinematograph), in any place within Kolkata without the written permission of the Municipal Commissioner."

23. Section 203 (1) provides that except under and in conformity with the terms and conditions of a licence, no person being the owner, lessee, sub-lessee or an advertising agency shall use or allow to be used any site in any land, building, wall or erect or allow to erect on any site any hoarding, frame, post, kiosk, structure, neon sign for the purpose of any advertisement.

24. The first proviso to Section 202 (1) clarifies that no such permission for advertisement would be accorded without the written consent of the owner or the authority of land, building, wall, hoarding, frame, post or kiosks or structure. That the application for permission should be accompanied by a security deposit. Sub-section 2 of Section 202 provides that the Municipal Commissioner shall not grant permission unless a licence for the use of the particular site for the purpose of advertisement had been taken from KMC.

25. Section 203 (3) provides that the Municipal Commissioner shall after making inspection and within 30 days of the receipt of the application, grant a licence on payment of such fees as may be determined by the Corporation by regulations or, as the budget estimate shall state under sub-section (3) of Section 131 provide.

26. Sub-section (4) empowers the Municipal Commissioner to refuse a licence, if in the opinion of the Commissioner the proposed site for advertisement was unsuitable from the point of consideration of public safety, traffic hazards, etc.

27. Section 204 provides that every person who erects, exhibits, fixes or retains upon any land, building, wall, hoarding, frame, post, kiosk or structure for advertisement or displays any advertisement to public view, shall pay for every advertisement which is erected, exhibited, fixed or retained or displayed, a tax calculated at such rate as the Corporation may determine by regulations or as the budget estimate shall state under sub-section (3) of Section 131. Section

203 and 204 are quoted below:-

"203. Licence for use of site for purpose of advertisement. - (1) Except under and in conformity with the terms and conditions of a licence, no person being the owner, lessee, sub- lessee, occupier or an advertising agent shall use or allow to be used any site in any land, building, wall or erect or allow to be erected on any site, any hoarding, frame, post, kiosk, structure, neon-sign or sky-sign for the purpose of display of any advertisement.

(2) For the purpose of advertisement, every person-

(a) using any site before the commencement of this Act, within ninety days from the date of such commencement, or

(b) intending to use any site, or'

(c) whose licence for use of any site is about to expire, shall apply for a licence or renewal of a licence, as the case may be, to the Municipal Commissioner in such form as may be specified by the Corporation.

(3) The Municipal Commissioner shall, after making such inspection as may be necessary and within thirty days of the receipt of the application, grant, refuse, renew or cancel a licence, as the case may be, on payment of such fees as may be determined by the Corporation by regulations [or as the budget estimate shall state under sub-section (3) of section 131]

(4) The Municipal Commissioner may, if in his opinion the proposed site for any advertisement is unsuitable from the considerations of public safety, traffic hazards [aesthetic design, or obstruction of the view of, or harmony with, any heritage building.] refuse a licence or refuse to renew any existing licence.

(5) Every licence shall be for a period of one year except in case of sites used for temporary fairs, exhibitions, sports events or cultural or social programmes.

[****]

(7) The Municipal Commissioner shall cause to be maintained register wherein the licences issued under this section shall be separately recorded in respect of advertisement sites-

(a) on telephone, telegraph, tram, electric or other posts or poles erected on or along public or private streets or public places,

(b) in lands or buildings,

(c) in cinema halls, theatres or other places of public resort.

204. Tax on advertisements. - (1) Every person, who erects, exhibits, fixes or retains upon or over any land, building, wall, hoarding, frame, post, kiosk or structure any advertisement or, displays any advertisement to public view in any manner whatsoever, visible from a public street or public place (including any

advertisement exhibited by means of cinematograph) shall pay for every advertisement which is so erected, exhibited, fixed or retained or so displayed to public view, a tax calculated at such rate as the Corporation may determine by regulations [or as the budget estimate shall state under sub-section (3) of section 131]

3[****]

4[Provided that] a surcharge not exceeding fifty per cent of the applicable rate may be imposed on any advertisement on display in temporary fairs, exhibitions, sports events or cultural or social programmes.

(2) Notwithstanding the provision of sub-section (1), no tax shall be levied under this section on any advertisement which-

5[(a) relates to 'non-Commercial advertisement' or 'advertisement related to public interest' as defined in the Explanation to sub-section (4) of section 202; or]

(b) is exhibited within the window of any building if the advertisement relates to the trade, profession or business carried on in that building; or

(c) related to the trade, profession or business carried on within the land or building upon or over which such advertisement is exhibited or to any sale or letting of such land or building or any effects therein or to any sale, entertainment or meeting to be held on or upon or in the same, or

(d) relates to the name of the land or building upon or over which the advertisement is exhibited or to the name of the owner or occupier of such land or building, or

(e) relates to the business of a railway administration and is exhibited within any railway station or upon any wall or other property of a railway administration; or

(f) relates to any activity of the Government or the Corporation.

(3) The tax on any advertisement leviable under this section shall be payable in advance in such number of instalments and in such manner as the Corporation may by regulations determine [or as the budget estimate shall state under sub-section (3) of section 131]:

Provided that the Corporation may under the terms and conditions of the licence under section 203 require the licensee to collect and pay to the Corporation, subject to a deduction of five per cent to be kept by him as collection charges, the amount of tax in respect of such advertisements as are displayed on any site for which he is the licensee."

28. On a conjoint reading of the aforesaid sections, the following points emerge. KMC cannot impose any tax unless permitted by law. All income from taxes, cesses, fees, surcharges etc. should be provided for in the budget of the Corporation. KMC is empowered to levy tax on advertisement only in terms of the provisions of the Act and Rules and Regulations prescribed thereunder.

Section 202 prohibits advertisement without permission of the Municipal Commissioner. Section 203 empowers the Municipal Commissioner to grant licence for advertisement and display of hoardings and such advertisements should be in conformity with the terms and conditions of the licence. Advertisement tax should be paid in terms of Section 204. It is also mandated by the statute that the licence fee, the advertisement tax etc. should be at a rate framed by regulations or as reflected in the budget estimate under sub-section (3) of Section 131. Thus, the law mandates that taxes, cesses, fees, surcharges etc. charged by the KMC under the KMC Act, should be reflected in the budget and should be claimed in terms of the Act and rules and regulations prescribed thereunder. The scheme of the KMC Act does not empower the Corporation to claim land utilisation charges under Chapter XII and XIV of the KMC Act. There are no rules or regulations on the basis of which KMC would be authorized to claim LUC. On the contrary Section 23 of the said Act of 1969, permits HRBC to rent out the lands required for construction of any bridge, including foundations, approaches, slopes together with all structures which vest in HRBC to be let out. Section 23 is set out below:-

"23. Lands required for the construction of any bridge under this Act including its foundations, approaches and slopes or for any improvement thereof together with all structures on such lands forming part of such bridge which vest in the Commissioners.-

(i) shall be exempt, or

(ii) shall not be exempt, from the rate or rates leviable under the Calcutta Municipal Act, 1951, the Calcutta Municipal Act, 1923, as extended to the Municipality of Howrah, the Howrah Municipal Act, 1965, the Bengal Municipal Act, 1932 or the Chandernagore Municipal Act, 1955, as the case may be, according as-

(i) they are not, or

(ii) they are,

let out to tenants or otherwise utilized for deriving income.

Explanation.- In this section, the expression "income" does not include income from levy of tolls."

29. According to Mr. Ghosh all public streets, squares, parks and gardens in Kolkata in Section 343 of the KMC Act, have vested in the Corporation including the soil, sub-soil, side-drain, footpaths, pavements, stones and other materials, and all erections, materials, implements etc. there on have also vested in the Corporation. Thus, Mr. Ghosh urged that the bridges, flyovers etc. constructed, maintained and controlled by HRBC have also vested in the Corporation and thus, KMC was entitled to claim LUC in respect of those hoardings, advertisements etc. displayed by the petitioner on the bridges and flyovers. Mr. Ghosh referred to Section 344 and submitted that the public streets, squares, parks and gardens

etc. vested in the Corporation were under the control of the Municipal Commissioner although, HRBC may have constructed, maintained and controlled the said bridges and flyovers.

30. For convenience, Sections 343(1) and Section 344(1) are quoted below:-

"343. Vesting of public streets, squares, parks and gardens in the Corporation.- (1) All public streets, squares, parks and gardens in Calcutta including the soil, sub-soil, side-drain, footpaths, pavements, stones and other materials, and all erections, materials, implements, trees and other things provided therein shall vest in the Corporation:

Provided that no public street, square, park or garden which immediately before the commencement of this Act vested in the Government, the Board of Trustees for the Port of Calcutta, or the Board of Trustees for the Improvement of Calcutta shall, unless so directed by the authority competent to take a decision in this behalf, vest in the Corporation by virtue of this sub-section.

344. functions of all Municipal Commissioner in respect of public streets, etc.- (1) All public streets, squares, parks and gardens vested in the Corporation shall be under the control of the Municipal Commissioner and he shall cause the same to be maintained, controlled and regulated in accordance with the provisions of this Act and the rules and the regulations made thereunder."

31. In this connection, the contention of Mr. Ghosh cannot be accepted, inasmuch as, vesting of public streets under the above sections cannot be interpreted to mean that the Corporation had become owners thereof. Here, vesting has to be interpreted for the limited purpose for which such public streets, squares, parks, gardens including the bridges and flyovers had vested in the Corporation, that is, for maintenance, development, preservation and protection of such public streets, squares, parks, gardens, erections etc.

32. I do not accept the contention of Mr. Ghosh that the said flyovers, bridges over which structures have been installed for putting up hoardings and advertisements by the petitioner in terms of the contract entered into between the petitioner and the HRBC, had vested in the Corporation under the aforesaid Sections. Reference is made to the decision of The Fruit & Vegetable Merchants Union vs. The Delhi Improvement Trust reported in AIR 1957 S.C. 344. The relevant portion is quoted below:-

"That the word "vest" is a word of variable import is shown by provisions of Indian statutes also. For example, S.56 of the Provincial Insolvency Act (5 of 1920) empowers the court at the time of the making of the order of adjudication or thereafter to appoint a receiver for the property of the insolvent and further provides that "such property shall thereupon vest in the receiver." The property vests in the receiver for the purpose of administering the estate of the insolvent for the payment of his debts after realising his assets. The property of the insolvent vests in the receiver not for all purposes but only for the purpose of the

Insolvency Act and the receiver has no interest of his own in the property. On the other hand, Ss. 16 and 17 of the Land Acquisition Act. (Act 1 of 1894), provide that the property so acquired, upon the happening of certain events, shall "vest absolutely in the Government free from all encumbrances". In the cases contemplated by Ss. 16 and 17 the property acquired becomes the property of Government without any conditions or limitations either as to title or possession. The legislature has made it clear that the vesting of the property is not for any limited purpose or limited duration. It would thus appear that the word "vest" has not got a fixed connotation, meaning in all cases that the property is owned by the person or the authority in whom it vests. It may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation. The provisions of the Improvement Act, particularly Ss. 45 to 49 and 54 and 54-A when they speak of a certain building or street or square or other land vesting in a municipality or other local body or in a trust, do not necessarily mean that ownership has passed to any of them."

33. Reliance is also placed on the decision of Municipal Board, Manglaur vs. Mahadeoji Maharaj, reported in AIR 1965 SC 1147 and the relevant portion of the above decision is quoted below:-

"15. That a public street vests in a Municipality admits of no doubt Under section 116 (g) of the U.P. Municipalities Act, 1916 (U.P. Act II of 1916), "all public streets and the pavements, stones and other materials thereof, and also all trees, erections, materials implements and things existing on or appertaining to such streets" vest in and belong to the Municipal Board. A Division Bench the Madras High Court in S. Sundaram Ayyar v. The Municipal Council of Madura and The Secretary of State for India in Council [1902] I.L.R. 25 Mad. 635. dealt with the scope of such vesting under the Madras District Municipalities Act, 1884. The head-note therein brings out the gist of the decision, and it reads:

"When a street is vested in a Municipal Council, such vesting does not transfer to the Municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth usque ad coelum, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street. It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers."

34. Thus, as per Article 265 unless and until the Corporation was empowered by any law to claim such taxes, fees or surcharges, the Corporation could not impose the LUC.

35. Land utilization charge means such charge which has to be paid to an owner of any land for utilization of his land. In this case, for the purpose of advertisement, display of hoardings etc. the petitioner was let out the site by

HRBC by a tendering process. The tender amount was paid by the petitioner in three instalments to HRBC during the subsistence of the contract as rents or charges payable for utilization of the site. Once the petitioner has already paid such amount to HRBC they are not liable to pay any further charges for utilization of the sites to KMC. Moreover, Section 23 of 1969 Act would necessarily imply that the HRBC could utilize these sites for earning income apart from the toll that was leviable on the bridges and flyovers.

36. The HRBC is also required to account for such income in their annual budget. The annual budget is required to be approved by the State Government. The sites are let out to different advertising agencies for the purpose of display of advertisement for public viewing on the bridges and flyovers. Income of the HRBC is subject to approval of the State Government. The HRBC is thus, within its power to rent out these sites by a tendering process for the purpose of display of hoardings, advertisement etc.

37. However, as HRBC is not empowered under the law to allow advertisement but only to rent out the sites for such purposes. HRBC by inserting clause 12 in the Terms and Conditions of the contract ensured that a successful bidder would take necessary permission, and licence from KMC and also pay the advertisement taxes to KMC as per the KMC Act.

38. Reference is made to the decisions of a Division Bench of this Court in the matter of Asian Leather Limited & Anr. vs. Kolkata Municipal Corporation & Ors., reported in 2007 (3) CHN 476. The relevant paragraphs are quoted below:-

"18. A conjoint reading of Sections 307 and 131 of the Act makes it abundantly clear that if provision is made in the budget estimate showing the amount of money to be received and spent towards drainage account, an amount of annual fees may be levied upon the land and building owners at the rates fixed therein for realisation of the same. In our view, those provisions permit the Corporation to impose annual fees at the rate indicated therein upon the building owners or the landowner or the person liable to pay property-tax on the basis of budget estimate reflecting the receipt and expenditure on that account but those provisions do not authorise the Corporation to levy Drainage Development Fees for the purpose of realising "a one-time money" as condition precedent for sanction of the building-plan of a proposed building for drainage development of the surrounding area by imposing such fees only on those persons who will apply for permission to erect building leaving other landowner or the owner of the building or the persons liable to pay property-tax,

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23. We have already indicated that unless specifically authorised by the statute, a Corporation cannot realise any amount from the citizen and so far, the delegated legislation is concerned, nothing can be implied for the justification of realisation of any amount either as tax or as fees, which is not specifically authorised."

39. Reliance is further placed in the decision of *New Delhi Municipal Council vs. State of Punjab & Ors.*, reported in (1997) 7 SCC 339 and the relevant portion of the above decision is quoted below:-

"97. We have great difficulty in accepting this assertion. Article 265 of the Constitution emphatically mandates that "no tax shall be levied or collected except by authority of law". Under the framework of the Constitution there are two principal bodies which have been vested with plenary powers to make laws, these being the Union Legislature, which is described by Article 79 as "Parliament for the Union" and the State Legislatures, which are described by Article 168 in the singular as "Legislature of a State". While certain other bodies have been vested with legislative power, including the power of levying taxes, by the Constitution for specific purposes, as in the case of District Committees and Regional Councils constituted under the aegis of the Sixth Schedule to the Constitution, the plenary power to legislate, especially in matters relating to revenue, still vests with the Union and the State Legislatures. Even if the submission that Municipalities now possess, under Part IX -A of the Constitution, a higher juridical status is correct, the extension of that logic to the proposition that they have plenary powers to levy taxes is not, as is clear from a perusal of the relevant part of Article 243-X of the Constitution which reads as under:

"243-X. Power to impose taxes by, and Funds of, the Municipalities.-The Legislature of a State may, by law,-

(a) authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits;

(b)-(d) * * *

as may be specified in the law."

98. Article 243-ZB provides that this provision will be applicable to Union Territories and the reference to the legislature of a State would apply, in relation to a Union Territory having a Legislative Assembly, to that Legislative Assembly.

99. It is, therefore, clear that even under the new scheme, Municipalities do not have an independent power to levy taxes. Although they can now be granted more substantial powers than ever before, they continue to be dependent upon their parent legislatures for the bestowal of such privileges. In the case of Municipalities within States, they have to be specifically delegated the power to tax by the State Legislature concerned. In Union Territories which do not have

Legislative Assemblies of their own, such a power would have to be delegated by Parliament. Of the rest, those which have Legislative Assemblies of their own would have to specifically empower Municipalities within them with the power to levy taxes."

40. From the Schedule of Taxes, Fees and Charges for the year 2015-2016, which have been downloaded from the official website of KMC and produced in Court, LUC has not been included under a separate head. However, a foot note has been added at the bottom of the schedule which states as follows:-

"VIII. Land utilization charges will be collected @ Rs.1870/- per sq.ft/per year or part thereof for permanent Indicator Board/Glow Sign Board of footpath, Portico, Pillars & other permanent structure bearing advertisement fixed on KMC property. If permitted by KMC. (In case of Indicator/Glow Sign Board fixed on private premises no L.U.C. is to be charged subject to the permission of landlord.) In case of permanent display, rates and fees will be charged proportionately on the basis of sanctioned date.

These charges are to be paid in advance at the time of obtaining permission or renewal of licence for the year or part thereof as the case may be.

All demand will be raised financial year wise."

41. This would mean that LUC could be claimed only for use of those pillars, portico, footpath, etc. for the purposes of advertisement, which were exclusive on the property of KMC.

42. For the reasons mentioned hereinabove the impugned bills are set aside and quashed only with regard to the demand for LUC by KMC.

43. The KMC does not have the authority to impose land utilization charges for display of advertisements, hoarding glow signs etc. on structures erected on flyovers and bridges on sites which had vested in HRBC and were under the control and management of HRBC. KMC being the creature of a statute must act within the four corners of the statute.

An overall analysis of the provisions of Section 130, 202, 203 and 204 (as applicable at the relevant point of time) of the KMC Act, makes it abundantly clear that KMC is not authorized to claim LUC from the petitioner.

44. This decision is being rendered on the provision of Section 204 of the KMC Act and consequent power of the KMC to claim tax on advertisement for periods prior to the omission of Entry 55 from the VIIth Schedule of the Constitution of India by the 101st amendment. The claim for advertisement tax and payment thereof herein will not be affected by the amendment.

45. The writ petition is thus allowed.

46. There will be, however, no order as to costs.

Urgent photostat Certified Copy of this judgment, if applied for, be given to the

parties, on priority basis.