(2014) 12 CAL CK 0028

In the Calcutta High Court

Case No : Writ Petition No. 30632 (W) of 2014

Fabworth Promoters Pvt. Ltd. APPELLANT

Vs

Kolkata Municipal Corporation RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:
Calcutta Improvement Act, 1911 — Section 54, 55 — Calcutta Municipal Corporation Act, 1980 - Section 119, 119(2)(a), 171, 174, 176

Citation : (2015) 1 CHN 534 : (2015) 3 WBLR 673

Hon'ble Judges : Debasish Kar Gupta, J.

Bench : Single Bench

Advocate : Ram Jethmalani, Bikash Ranjan Bhattacharya, Surojit Nath Mitra, Arindam Banerjee, Menakshi Chatterjee, Shounak Mitra and Dipen Chatterjee, for the Appellant; Biswajit Mukherjee and Swapan Kumar Debnath, for the Respondent

Final Decision : Disposed off

Judgement

Debasish Kar Gupta, J.?Let affidavit-of-service be kept on record. This writ application is filed by the petitioners assailing an order dated August 13, 2014 passed by a committee consisting of the following persons:

1. The Controller of Municipal Finance & Accounts;

2. The Chief Municipal Law Officer;

3. The Chief Manager (Revenue);

4. The Assessor-Collector (South);

5. The Assessor-Collector (North;

6. The Assessor-Collector (Tollygunge Tax Department).

2. The impugned order was communicated to the petitioners by the respondent No. 3 by a communication dated August 13, 2014.

3. With the consent of the parties present before this Court, this matter is taken up for final disposal on the basis of the materials available on record as also considering the submissions of the respective parties.

4. Appearing on behalf of the petitioners, it is submitted by Mr. Ram Jethmalani, learned Senior Advocate, that the impugned order was passed in compliance of the order dated July 25, 2013 passed in the matter of Fabworth Promoters Private Ltd. & Anr. vs. The Kolkata Municipal Corporation & Ors. (In Re: W.P. No. 9372 (W) of 2012 with CAN 880 of 2013). According to Mr. Jethmalani, there was a direction upon the Kolkata Municipal Corporation to assess the property taxes in respect of the premises lying and situated at 4A, JBS Halden Avenue, Kolkata-700105 in accordance with law.

5. According to Mr. Jethmalani, law did not prescribe formation of a committee to assess the property taxes of the property under reference.

6. According to him, the petitioners were lessees under Kolkata Metropolitan Development Authority. Therefore, in accordance with the provisions of Clause (a) of sub-section (1) section 193 of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the said Act, 1980), the respondent No. 11 was under obligation to pay the property taxes of the above premises subject to realisation of that payment either fully or in part, as the case may be, from the lessee, i.e. the petitioners herein under the provisions of section 230 of the said Act, 1980. And there was no scope of realisation of above property taxes from the petitioners invoking the provisions of second proviso to sub-section (3) of section 193 or sub-section (3A) of section 193 of the said Act, 1980, on the basis of the facts and circumstances of this case, the assessment register of Kolkata Municipal Corporation contained the name of the respondent No. 11 (Annexure "P-3" at page 1030 of this writ application).

7. According to the Mr. Jethmalani, the Kolkata Municipal Corporation was under obligation to take into consideration the provisions of Clause (a)(ii) of sub-section (8) of section 171 read with the provisions of section 176 of the said Act, 1980 to assess the annual valuation and to assess the property tax on the basis of such valuation. According to him, those provisions were not taken into consideration at the time of passing of the impugned order though the written objection which had been filed by the petitioners before the aforesaid committee contained above objection for consideration of the above point of law.

8. It is submitted by Mr. Biswajit Mukherjee, learned Advocate appearing on behalf of the respondent Nos. 1 to 9, that there Was no bar and/or impediment to pass the impugned order by a committee formed by the Kolkata Municipal Corporation in the light of the final order dated July 25, 2013 in W.P. No. 9372(W) of 2012.

9. It is submitted by Mr. Mukherjee that in view of the terms and conditions of the deed of lease executed by and between the petitioners and respondent No. 11, there was no obligation of the above committee to consider the case of

liability of the lessor. The attention of this Court is drawn towards condition 2(b) of the deed of lease dated September 28, 2007 executed by and between the petitioners and the respondent No. 11. According to Mr. Mukherjee, the petitioners were responsible to pay the property taxes of the property under reference in accordance with the provisions of section 174 of the said Act, 1980.

10. It is also submitted by Mr. Mukherjee, there was no error in the decision making process of the respondent-Corporation in passing the impugned order relying upon the annual valuation made by the Hearing Officer earlier.

11. Mr. P.S. Basu, learned Advocate appearing on behalf of the respondent No. 11, submits that there was no challenge thrown to the action of the respondent No. 11. According to him, all the allegations were made against the Kolkata Municipal Corporation. Therefore, he does not make any submission in this regard.

12. I have heard the learned Counsels appearing for the respective parties and I have given my thoughtful consideration to the facts and circumstances of this matter.

13. It is not in dispute that there was a direction upon the Kolkata Municipal Corporation in order dated July 25, 2013 passed in W.P. No. 9372 (W) of 2012 to assess the property taxes of the premises under reference in accordance with law. The operative part of the above order is quoted below:

"I am of the opinion that KMC is the best body to make the assessment in accordance with law. I direct Kolkata Municipal Corporation to make the above determination, by considering all the documents that may be produced by the writ petitioner-company, including those annexed to the two writ applications and those annexed to the connected application and by passing a reasoned order within three months from the date of communication of this order, after giving an opportunity of hearing to all interested parties. Therefore, the writ application WP 9372 (W) of 2012 with CAN 880 of 2013) are disposed of by this order."

14. After considering the provisions of section 187 of the said Act, 1980, I am of the opinion that the property tax of the premises under reference could be assessed on the basis of the determination of annual valuation of the above property by an officer appointed by the Kolkata Municipal Corporation with approval of the State Government. None of the provisions of the said Act, 1980, empowered the Kolkata Municipal Corporation to form a committee of the above property and to assess property tax of the same on the basis of that annual valuation.

15. Necessary to point out that the annual valuation of the property under reference on the basis of the order dated December 30, 2008 lost its force in view of the final order passed in W.P. No. 9372 (W) of 2012. Therefore, the impugned order was passed by the committee without jurisdiction.

16. For the purpose of ascertaining the liability of the petitioners to pay property

taxes of the premises under reference as a lessee of the above premises, the provisions of the sub-section (a) of section 193 and sub-section (3A) of section 193 and section 230 of the said Act, 1980 are quoted below:--

"193. Incidence of property tax on lands and buildings.--(1) the property tax on lands and buildings shall be primarily leviable.--

(a) if the land or building is let, upon the lessor;"

"(3A) In the case of any land or building or portion thereof which is not self-occupied and where the owner is refrained, by any law, Order of the Government or Order of Court, from recovering the property tax due from the occupier or occupiers, such tax shall be recovered from the occupier or occupiers, as the case may be:

Provided that the owners shall continue to pay such amount of property tax as he was liable to pay before coming into force of the Kolkata Municipal Corporation (Amendment) Act, 2006, and only the balance amount of the property tax, when determined after coming into force of the Kolkata Municipal Corporation (Amendment) Act, 2006, if any, shall be recovered from the occupier."

"230. Apportionment of property tax by the person primarily liable to pay.--Save as otherwise provided in this Act, the person primarily liable to pay the property tax in respect of any land or building may recover--

(a) if there be but one occupier of the land or building, from such occupier half of the rate so paid, any may, if there be more than one occupier, recover from each occupier half of such sum as bears to the entire amount of rate so paid by the owner the same proportion as the value of the portion of the land or building in the occupation of such occupier bears to the entire value of such land or building:

Provided that if there be more than one occupier, such half of the amount may be apportioned and recovered from each occupier in such proportion as the annual value of the portion occupied by him bears to the total annual value of such land or building:

(b) the entire amount of the surcharge on the property tax on any land or building from the occupier of such land or building who uses it for commercial or non-residential purposes:

Provided that if there is more than one such occupier, the amount of surcharge on the property tax may be apportioned and recovered from each such occupier in such proportion as the annual value of the portion occupied by him bears to the total annual value of such land or building."

17. In the assessment registrar of the Kolkata Municipal Corporation the name of the respondent No. 11 had been recorded as "lessor" of the above premises (Annexure P-3 at page 103 of this writ application.)

18. It is the settled principles of law that where a power is given to do certain thing in a certain way, the thing must done in that way or not at all. Other methods of performance are necessarily forbidden. Reference may be made to the celebrated judgment of Taylor vs. Taylor, reported in (1876) 1 Ch 426 . The above proposition of law was repeated and reiterated in the matter of Nazir Ahmed vs. King Emperor, reported in AIR 1936 PC 253. The above proposition of law has been adopted by the Hon''ble Supreme Court. Reference may be made to the decision of Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, and the relevant portions of the above decision are quoted below:-

"27. Then it is to be seen that the Act requires the Board to exercise the power under section 119 in a particular manner i.e. by way of issuance of orders, instructions and directions. These orders, instructions and directions are meant to be issued to other income tax authorities for proper administration of the Act. The Commission while exercising its quasi-judicial power of arriving at a settlement under section 245-D cannot have the administrative power of issuing directions to other income tax authorities. It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. If that be so, since the Commission cannot exercise the power of relaxation found in section 119(2)(a) in the manner provided therein it cannot invoke that power under section 119(2)(a) to exercise the same in its judicial proceedings by following a procedure contrary to that provided in sub-section (2) of section 119."

(Emphasis supplied)

19. In view of the above, the respondent No. 11 was under obligation to pay the property tax of the premises under reference at the first instance. No material is available on record to show that the provisions of sub-section (3A) of section 193 and/or section 230 could be invoked in this case. Therefore, the impugned order is liable to be set aside on that ground alone.

20. I do not find substance in the submissions made by Mr. Biswajit Mukherjee, learned advocate of the Kolkata Municipal Corporation, that in view of the conditions prescribed in Deed of lease executed by and between the petitioners and the respondent No. 4, the above provisions of the said Act, 1980 need not be considered. If an agreement executed by and between the parties is pitted against statutory provisions, the statutory provision would prevail.

21. For the purpose of deciding the question of applicability of the provisions of Clause (a)(ii) of sub-section (8) of section 171 and those of section 176 of the said Act, 1980 are quoted below:

"171(8). Notwithstanding anything contained in sub-section (2), the property tax on the--

(a) land owned by or belonging to--

(i) the Board of Trustees for the improvement of Calcutta, constituted under the Calcutta Improvement Act, 1911 (Ben. Act V of 1911), or

(ii) the Kolkata Metropolitan Development Authority, constituted under the Calcutta Metropolitan Development Authority Act, 1972 (West Ben. Act XI of 1972), or

(iii) the West Bengal Housing Board, constituted under the West Bengal Housing Board Act, 1972 (West Ben. Act XXXIII of 1972), or

(iv) the West Bengal Industrial Infrastructure Development Corporation, established under the West Bengal Industrial Infrastructure Development Corporation Act, 1974 (West Ben. Act XXV of 1974), or

(v) such other statutory body as may be notified by the State Government in this behalf from time to time, for the purposes of development schemes in accordance with the published or approved plans but not put to such use, shall be ten per cent of the annual value of such land as determined under this Chapter;

(b) land or building acquired, constructed, purchased or owned by the Government or any of the statutory bodies mentioned in clause (a) for any Government approved scheme for the purpose of subsidized housing for persons belonging to low income group or industrial workers and comprising of tenements let out to such persons on a monthly rent shall be ten per cent of the annual value of such land or building determined under this Chapter;

(c) land or building acquired, constructed, purchased or owned by Government or any of the statutory bodies mentioned in clause (a) for any other purpose shall be at the rate determined under sub-section (2) of this section."

176. Annual valuation of lands or buildings belonging to various statutory bodies.--The annual value of any land or building belonging to the State Government or any of the statutory bodies mentioned in clause (a) of sub-section (8) of section 171 shall be deemed to be five per cent of the cost of acquisition thereof, subject to any revision made in this behalf by the State Government on an application by any such body or by the Corporation.

Explanation.--For the purpose of this section, the cost of acquisition shall mean.--

(i) in the case of any land or building acquired under the Land Acquisition Act, 1894 (1 of 1894), as amended by the Calcutta Improvement Act, 1911 (Ben. Act V of 1911), the value of such land or building as determined under the Land Acquisition Act, 1894, as so amended or by the Tribunal constituted under the Calcutta Improvement Act, 1911 or by any appellate authority under any of the enactments as aforesaid;

(ii) in the case of any land or building acquired by private treaty, the purchase price of such land or buildings;

(iii) in the case of any land or building taken for an improvement scheme under section 54 or section 55 of the Calcutta Improvement Act, 1911, such amount as may be determined under either of those sections;

(iv) in the case of any land or building belonging to the State Government or any of the statutory bodies mentioned in clause (a) of sub-section (8) of section 171, such amount as may be determined under the provisions of the Act governing such body or of any other law in force for the time being and applicable to such body."

22. The liability of the respondent No. 11 is evident in clause (a)(ii) of sub-section (8) of section 171 of the said Act, 1980. Both the aforesaid provisions contained "Non-obstantc" clause. The objection had been raised by the petitioners in their written objection on the above ground and it was ignored.

23. In view of the discussions and observations made hereinabove, the impugned order is quashed and set aside.

24. I direct the Kolkata Municipal Corporation to pass an order afresh on the basis of the order dated July 25, 2013 passed in W.P. No. 9372 (W) of 2012 taking into consideration the discussions and observations made hereinabove within January 15, 2015 after giving opportunity of hearing to the persons concerned including the petitioners. The above competent authority is further directed to communicate the above decision to the parties concerned within a week thereafter.

25. Let it further be recorded that the payment of property taxes paid by the petitioners on the basis of the claim of the Kolkata Municipal Corporation made by a communicated dated July 22, 2013 (Annexure P-7 at page 111 of this writ application) shall be adjusted against the amount which may be due and payable on the basis of the aforesaid decision of the competent authority of the Kolkata Municipal Corporation.

26. I make it clear that I have not entered into the merits of this case with regard to correctness of annual valuation or property taxes of the above premises while examining the propriety of the decision making process and all points are kept open.

27. This writ application is, thus, disposed of.

28. There will be, however, no order as to costs. Urgent photostat certified copy of this order be supplied to the parties, if applied for, subject to compliance with all necessary formalities.