

(2012) 08 DEL CK 0293

In the Delhi High Court

Case No : Writ Petition (C) 4683 of 2008

Gagan Makkar and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 23-08-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Customs Act, 1962 — Section 129E
Delhi Municipal Corporation Act, 1957 — Section 124, 126, 169, 169(1), 170
Haryana Ceiling on Land Holdings Act, 1972 — Section 18(1), 18(7)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 17, 17(2), 34

Citation : (2012) 7 AD 451

Hon'ble Judges : Veena Birbal, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : B.B. Jain with Mr. Sushil Jaswal, for the Appellant; P.L. Gautam for the Respondents/ MCD, Ms. Sujata Kashyap for the Respondent/GNCTD and Ms. Meera Bhatia for the Respondent/UoI, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—In this writ petition, there is a challenge to the amended Section 169 of the Delhi Municipal Corporation Act, 1957 (hereinafter referred to as "the DMC Act") on two grounds. First of all, it is contended that the proviso to Section 169(1) makes the remedy of appeal to the Municipal Taxation Tribunal illusory inasmuch as it requires that the full amount of the property tax be paid "before" the filing of an appeal. Secondly, the provisions of the amended Section 169 are inconsistent with Section 170 (b). The said challenge has arisen in the context of an order dated 30.05.2008 passed by the Municipal Taxation Tribunal, Delhi, which has, refused to entertain the appeal filed by the petitioner inasmuch as the petitioner had not deposited the full amount of the property tax as was due till 31.03.2004. The latter date has been taken as the terminal point inasmuch as the demand by the respondents was raised by virtue of a Bill dated January 2008 for the period 01.04.1998 to

31.03.2004. Let us examine the facts. By an order dated 24.01.2000, the Joint Assessor and Collector, under the unamended DMC Act determined the rateable value of the property in question at Rs. 1,74,500/-with effect from 01.04.1998. An appeal was filed immediately thereafter and a sum of Rs. 55,000/-was deposited so that the appeal may be heard and decided. The appeal was decided on 18.01.2002, whereby the order dated 24.01.2000 was set aside and the matter was remanded to the Joint Assessor and Collector for re-determination. In the meanwhile, the Delhi Municipal Corporation (Amendment) Act of 2003 came into force on 01.08.2003. New Section 169 was inserted in place of the old Section 169. However, Section 170 continued as before. On 18.01.2008, the remanded case came to be decided and the rateable value was re-determined at Rs. 2,52,050/-with effect from 01.04.1998. On 18.02.2008, the petitioner sought to file an appeal for the year 1998-99 before the District Judge. But, that was not accepted and the petitioner was directed to file the same before the Municipal Taxation Tribunal. The petitioner filed the appeal on the same date, that is, on 18.02.2008 before the said Tribunal. On 25.02.2008, the petitioner deposited a further sum of Rs. 20,000/-with the MCD to make up the tax amount for the year 1998-99, which, according to the petitioner was the base year. By virtue of the impugned order dated 30.05.2008, the Tribunal directed that the entire tax, that is, the sum of Rs. 4,44,600/-for the entire period 01.04.1998 to 31.03.2004 be paid before the appeal could be entertained.

2. Being aggrieved by that order, the petitioner filed the present writ petition [WP(C) 4683/2008]. By virtue of the order dated 07.07.2008, a Division Bench of this Court granted stay of the proceedings before the said Tribunal.

3. The primary and main contention of the Learned Counsel for the petitioner is that the proviso to Section 169(1) of the DMC Act, which makes it mandatory to pay the full amount of the property tax before filing any appeal, is too harsh and onerous a condition thereby making the right of appeal illusory. Therefore, according to the Learned Counsel, the said provision is unconstitutional and is violative of Article 14 of the Constitution. The Learned Counsel submitted that the reasonable approach should be the one as laid down by the Supreme Court in *Shyam Kishore and others Vs. Municipal Corporation of Delhi* and another, while upholding the validity of Section 170(b) of the DMC Act. Secondly, it was submitted that the proviso to Section 169 (1) of the DMC Act and Section 170(b) [post-amendment of 2003] are in conflict and cannot exist together. Reliance was placed on *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others*, to submit that the proviso to Section 169(1) being the harsher and more onerous provision must give way to Section 170(b). Thirdly, it was contended that in any event, and, in the alternative, in the facts of this case, the appeal filed by the petitioner ought to be dealt with under the un-amended provisions pertaining to appeals. Reliance was placed on *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, .

4. In response, it was submitted on behalf of the respondents that the writ

petition is liable to be dismissed inasmuch as, according to them, the Supreme Court decision in Shyam Kishore (supra) has no application to the present case as the DMC Act has been amended and Shyam Kishore (supra) was rendered in the context of the old provisions. Because of the fact that a huge amount of arrears of property tax was locked in litigation, the DMC Act has been amended by introducing, inter alia, the proviso to Section 169(1) which requires a pre-deposit of the tax prior to the filing of an appeal. According to the respondents, similar provisions have been repeatedly upheld by the Supreme Court. It was also contended that Section 169(1) and Section 170 operated in different fields and, therefore, there was no conflict. As regards the plea that the earlier provisions of appeal ought to apply in this case, it was submitted that the provision of payment of tax prior to filing any appeal was part of procedure and would, therefore, apply in the present case also.

5. Before we examine the rival contentions, it would be appropriate if the relevant provisions are set out. Section 169, as it stood prior to the amendment of 2003, to the extent relevant, reads as under:-

169. Appeal against assessment, etc.- (1) An appeal against the levy or assessment of any tax under this Act shall lie to the court of the district judge of Delhi.

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The amended Section 169 (1) reads as under:-

169. Appeal against assessment, etc.- (1) An appeal against the levy or assessment or revision of assessment of any tax under this Act shall lie to the Municipal Taxation Tribunal constituted under this section:

Provided that the full amount of the property tax shall be paid before filing any appeal:

Provided further that the Municipal Taxation Tribunal may, with the approval of the District Judge of Delhi, also take up any case for which any appeal may be pending before the court of such District Judge:

Provided also that any appeal pending before the court of such District Judge shall be transferred to the Municipal Taxation Tribunal for disposal, if requested by the applicant for the settlement thereof on the basis of annual value.

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(Underlining added)

6. Initially, there was no change introduced by the Amendment Act of 2003 insofar as Section 170 was concerned. That remained the same. Section 170, at the time of introduction of the amendments of 2003 and immediately thereafter, read as under:-

170. Conditions of right to appeal. - No appeal shall be heard or determined u/s

169 unless -

(a) the appeal is, in the case of a property tax, brought within thirty days next after the date of authentication of the assessment list u/s 124 (exclusive of the time requisite for obtaining a copy of the relevant entries therein) or, as the case may be, within thirty days of the date on which an amendment is finally made u/s 126, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days after the date of the presentation of the first bill or, as the case may be, the first notice of demand in respect thereof:

Provided that an appeal may be admitted after the expiration of the period prescribed therefore by this section if the appellant satisfies the court that he had sufficient cause for not preferring the appeal within that period;

(b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the Corporation.

7. We may point out that an amendment was carried out in Section 170 (b) by substituting the words "the Corporation" with "a Corporation". This amendment took effect from 01.03.2012 and was subsequent upon the trifurcation of the MCD with which we are not concerned.

8. From the above, it can be easily seen that the unamended Section 169 did not make any provision for depositing the property tax. The provision with regard to deposit of the disputed amount was only prescribed in Section 170 which stipulated the conditions of right to appeal. Section 170 (b) imposed a condition that no appeal filed u/s 169 shall be heard or determined unless the amount in dispute in the appeal has been deposited by the appellant in the office of the MCD. This provision was interpreted by the Supreme Court in *Shyam Kishore* (supra) to mean that while an appeal could be admitted and entertained by the District Judge, without the pre-deposit of the disputed property tax, it could only be heard or disposed of after the condition stipulated in Section 170 (b) of depositing the disputed amount in the appeal was satisfied. It is subsequent to the decision of the Supreme Court in the case of *Shyam Kishore* (supra) that the amendment in Section 169 has been brought about by introducing the proviso to Section 169(1) requiring that the full amount of the property tax be paid before the filing of any appeal. However, what has complicated the issue is the fact that Section 170 (b) remains on the statute book. Thus, on the one hand, we now have Section 169(1), which clearly stipulates that before an appeal is filed, the full amount of the property tax has to be paid. On the other hand, we continue to have Section 170 (b) which stipulates that no appeal shall be heard or determined u/s 169 unless, inter alia, the amount, if any, if disputed in the appeal has been deposited by the appellant in the office of the corporation. So, the amended Section 169 shuts out even the presentation of an appeal unless the full amount of the property tax is paid.

9. Apart from this apparent conflict between the first proviso to Section 169(1) of

the amended Act and Section 170 (b), the petitioner has primarily raised the question that the remedy of appeal, in view of the proviso to Section 169(1) has become illusory inasmuch as 100% of the property tax is required to be deposited even prior to the assessee filing an appeal. It is that question which needs to be examined first. But, before we do that, it would be necessary for us to point out that the Learned Counsel for the petitioner took an alternative plea also. He submitted that, as laid down in *Garikapatti Veeraya* (supra), the right of appeal is a vested right and such a right to enter the superior court (or forum) accrues to the litigant and exists as on and from the date the lis commences although it may be actually exercised when the adverse judgment is pronounced; such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. Thus, it was contended that as the initial action took place prior to the amendment of 2003, the provisions of appeal as prevalent then would apply to the petitioner's case and that the amended provisions would not at all apply. This is, of course, the alternative argument and we will need to examine this only in case the petitioner fails in his primary contention with regard to the validity of the proviso to Section 169 (1) of the DMC Act.

10. Let us now examine the question of validity of the proviso to Section 169(1) of the DMC Act. We begin with the Supreme Court decision in *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, wherein the validity of Section 406(2)(e) of the Bombay Provincial Municipal Corporation Act, 1949, as amended by the Gujarat Acts 8 of 1968 and 5 of 1970 was in issue. The provision, inter alia, entailed that "no appeal shall be entertained" against a tax etc., unless the amount claimed from the appellant had been deposited by him with the commissioner. There was also a proviso that the District Judge hearing the appeal could dispense with the requirement of depositing the tax in case of undue hardship. In this context, the Supreme Court observed as under:-

40. After hearing the Learned Counsel for the parties, we are unable to subscribe to the view taken by the High Court. Section 406(2)(e) as amended states that no appeal against a rateable value or tax fixed or charged under the Act shall be entertained by the Judge in the case of an appeal against a tax or in the case of an appeal made against a rateable value after a bill for any property tax assessed upon such value has been presented to the appellant unless the amount claimed from the appellant has been deposited by him with the Commissioner. According to the proviso to the above clause, where in any particular case the Judge is of opinion that the deposit of the amount by the appellant will cause undue hardship to him, the Judge may in his discretion dispense with such deposit or part thereof, either unconditionally or subject to such conditions as he may deem fit. The object of the above provision apparently is to ensure the deposit of the amount claimed from an appellant in case he seeks to file an appeal against a tax or against a rateable value after a bill for any property tax assessed upon such value has been presented to him. Power at

the same time is given to the appellate judge to relieve the appellant from the rigour of the above provision in case the judge is of the opinion that it would cause undue hardship to the appellant. The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate judge to dispense with the compliance of the above requirement. All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand "of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly centers a right of appeal and at the same time prevents the delay in the payment of the tax, We find ourselves unable to accede to the argument that the impugned provision has the effect of creating a discrimination as is offensive to the principle of equality enshrined in article 14 of the Constitution. It is Significant that the right of appeal is conferred upon all persons who are aggrieved against the determination of tax or rateable value. The bar created by Section 406(2)(e) to the entertainment of the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate judge that the deposit of the amount would cause him undue hardship arises out of his own omission and default. The above provision, in our opinion, has not the effect of making invidious distinction or creating two classes with the object of meting out differential treatment to them; it only spells out the consequences flowing from the omission and default of a person who despite the fact that the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or Constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian income tax Act, 1922. The proviso to that section provided that "...no appeal shall lie against an order under Sub-section (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the

exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of article 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission.

(Underlining added)

It is relevant to note that the Supreme Court did not find the condition of pre-deposit to be such as to nullify the right to appeal "especially" in view of the fact that discretion was vested in the appellate judge to dispense with the pre-deposit.

11. Following *Anant Mills Ltd (supra)*, the Supreme Court in the case of *Seth Nand Lal and Another v. State of Haryana and Others*: 1980 (Supp) SCC 574, observed that it was well-settled by several decisions of the Supreme Court that the right of appeal was a creature of statute and there was no reason as to why the legislature, while granting the right, could not impose conditions for the exercise of such right "so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory". The Supreme Court, in that case, was considering the validity of Section 18(7) of the Haryana Ceiling on and Holdings Act, 1972. The Supreme Court observed as under:-

The next provision challenged as unconstitutional is the one contained in Section 18(7) imposing a condition of making a deposit of a sum equal to 30 times the land holdings tax payable in respect of the disputed area before any appeal or revision is entertained by the appellate or revisional authority—a provision inserted in the Act by Amending Act 40 of 1976. Section 18(1) and (2) provide for an appeal, review and revision of the orders of the prescribed authority and the position was that prior to 1976 there was no fetter placed on the appellate / revisional remedy by the statute. However, by the amendments made by Haryana Act No. 40 of 1976, Sub-sections (7) and (8) were added and the newly inserted Sub-section (7) for the first time imposed a condition that all appeals under Sub-section (1) or Sub-section (2) and revisions under Sub-section (4) would be entertained only on the appellant or the petitioner depositing with the appellate or the revisional authority a sum equal to 30 times the land holdings tax payable in respect of the disputed surplus area. Under Sub-section (8) it was provided that if the appellant or the petitioner coming against the order declaring the land surplus failed in his appeal or revision, he shall be liable to pay for the period he has at any time been in possession of the land declared surplus to which he was not entitled under the law, a licence fee equal to 30 times the land holdings tax recoverable in respect of this area. On 6th June, 1978, the Act was further amended by Amending Act 18 of 1978 whereby the rigour of the condition imposed under Sub-section (7) was reduced by permitting the appellant or the petitioner to furnish a bank guarantee for the requisite amount as an alternative to making cash deposit and while retaining Sub-section (8) in

its original form, a new Sub-section (9) inserted under which it has been provided that if the appeal or revision succeeds, the amount deposited or the bank guarantee furnished shall be refunded or released, as the case may be but if the appeal or revision fails the deposit or the guarantee shall be adjusted against the licence fee recoverable under Sub-section (8). In the High Court, two contentions were urged: first, that Section 18(1) and (2), as originally enacted in 1972, gave an unrestricted and unconditional right of appeal and revision against the orders of the prescribed authority or the appellate authority but by inserting Sub-sections (7) and (8) by Act 40 of 1976, a fetter was put on this unrestricted right which was unconstitutional; secondly, even the mellowing down of the condition by Act 18 of 1978 did not have the effect of removing the vice of unconstitutionality, inasmuch as even the conditions imposed under the amended Sub-section (7) were so onerous in nature that they either virtually took away the vested right of appeal or in any event rendered it illusory. Both these contentions were rejected by the High Court and in our view rightly.

(Underlining added)

12. The Supreme Court repelled the argument raised on behalf of the appellants therein that the conditions imposed should be regarded as unreasonably onerous, especially when no discretion has been left with the appellant or revisional authority to relax or waive the condition or grant exemption in respect thereof in fit and proper cases and, therefore, the fetter imposed must be regarded as unconstitutional and struck down. The Supreme Court observed that the object of imposing the condition was obviously to prevent frivolous appeals and revisions that impede the implementation of the ceiling policy; and secondly, having regard to sub-sections (8) and (9), it was clear that the cash deposited or the bank guarantee was not by way of any exaction but in the nature of securing mesne profits from the person who is ultimately found to be in unlawful possession of the land. The Supreme Court also took note of the fact that the deposit or the guarantee was correlated to the landholdings tax (30 times the tax) which, as per the information of the Supreme Court, varied in the State of Haryana around Rs. 8 per acre annually. It is having regard to these aspects and, particularly to the meagre rate of the annual land-tax payable, that the fetter imposed on the right of appeal / revision, even in the absence of a provision conferring discretion on the appellate / revisional authority to relax or waive the condition, was held not to be onerous or unreasonable so as to violate the provisions of Article 14 of the Constitution.

13. In *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, , Section 129E of the Customs Act, 1962, which provided for a conditional right of appeal requiring a pre-deposit of the duty or penalty, came into question before the Supreme Court. We may point out that Section 129E, which was considered by the Supreme Court stipulated that the person desirous of appealing against, inter alia, an order relating to any duty demanded in respect of the goods, which are not under the control of the customs authority or

any penalty levied under the Act, was required to deposit with the proper officer the duty demanded or the penalty levied during the pendency of the appeal. There was, however, a proviso to Section 129E which enabled the appellate authority to dispense with such deposit in cases where the deposit would cause undue hardship. The dispensation of such deposit could be conditional or unconditional. In this backdrop, the Supreme Court observed as under:-

9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.

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13. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right-constitutional or statutory, without any right of appeal, as such. If the statute gives a right to appeal upon certain conditions, it is upon fulfilment of those conditions that the right becomes vested and exercisable to the appellant. The proviso to Section 129E of the Act gives a discretion to the Tribunal in cases of undue hardships to condone the obligation to deposit or to reduce. It is a discretion vested in an obligation to act judicially and properly.

14. The facts and circumstances of the case and all the relevant factors, namely, the probability of the prima facie case of the appellants, the conduct of the parties, have been taken into consideration by the Tribunal. The purpose of the Section is to act in terrore to make the people comply with the provisions of law.

(Underlining added)

14. In *Shyam Kishore* (supra), as pointed out above, the Supreme Court was considering the question of the constitutional validity of Section 170 (b) of the said Act of 1957. It had been argued on behalf of the assessee that if Section 170 (b) is interpreted as mandating that an appeal cannot be entertained but will have to be dismissed in limine if the tax in dispute is not paid alongwith the memorandum of appeal, that would place a very onerous condition on the right of appeal particularly in cases where there is a substantial amount involved in the appeal and the points raised in the appeal are really contentious and debatable. The Supreme Court noticed that there were decisions in the cases of *Anant Mills* (supra) and *Vijay Prakash Mehta* (supra) where the vires of a milder provisions, which permitted the appellate authority to waive or relax the condition of the deposit, were upheld. The Supreme Court noted that in *Seth Nand Lal* (supra), it was observed that these cases settled the principle that the right of appeal is a creature of the statute and there is no reason why the legislature, while granting the right, cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory.

15. In *Shyam Kishore* (supra), the Supreme Court noted that in the earlier decisions of *Anant Mills* (supra) and *Vijay Prakash Mehta* (supra), the Supreme Court did not have the occasion to consider what the position would be if the conditions placed on the right of appeal were unduly onerous or such as to render the right of appeal totally illusory.

16. The Supreme Court in *Shyam Kishore* (supra) observed that the validity of a condition, which makes a right of appeal illusory, may need careful consideration in an appropriate case, but in the case before it, it was not required to examine that question because of the construction it placed on Section 170 (b). The Supreme Court interpreted the expression "no appeal shall be heard or determined u/s 169 unless" appearing in Section 170 in the following manner:-

44. It seems to us the words of Section 170(b) are capable of a broader interpretation. A perusal of Section 170 shows that the section uses three different expressions "heard or determined", "brought" and "admitted" in relation to an appeal and some significance is to be attached to the use of the expression "heard or determined". In like situations, other statutes such as the one considered by this Court in *Income Tax Officer Vs. M.K. Mohammed Kunhi*, and those contained in certain other enactments like the Bombay and Calcutta Municipal Acts specifically prohibit the very entertainment of the appeal if the tax is not paid. When the D.M.C. Act has carefully avoided the use of that word, we must give full effect to the differential wording. Also, the absence of a language in clause (b) of the proviso similar to that in clause (a) - which indicates that an appeal filed beyond the period of limitation will not stand admitted unless the delay is condoned - also warrants an inference that the payment of disputed tax is not a condition precedent to the entertainment or admission of the appeal. In the present statutory context, it sounds plausible to say that such an appeal can be admitted or entertained but only cannot be heard or disposed of without pre-deposit of the disputed tax. Such an interpretation will provide some much-needed relief from the harshness of the provision. These are not days in which the calculation of the property tax is simple and uncomplicated; the determination of the annual value of the property, except when based on the actual rent received from the property, involves various subjective factors and, not unoften, there is a wide gulf between the tax admitted to be due and the tax demanded. Sometimes, to compel the assessee to pay up the demanded tax for several years in succession might very well cripple him altogether. This apart, an assessee may not be able to deposit the tax while filing the appeal but may be able to pay it up within a short time, or at any rate, before the appeal comes on for hearing in the normal course. There is no reason to construe the provision so rigidly as to disable him from doing this. Again, when an appeal comes on for hearing, the appellate judge, in appropriate cases, where he feels there is some great hardship or injustice involved, may be inclined to adjourn the appeal for some time to enable the assessee to pay up the tax. Though it will not be expedient or proper to encourage adjournment of an appeal, where it is ripe for hearing otherwise, only on this ground and as a matter of course, an

interpretation which leaves some room for the exercise of a judicial discretion in this regard, where the equities of the case deserve it, may not be inappropriate. The appellate judge's incidental and ancillary powers should not be curtailed except to the extent specifically precluded by the statute. We see nothing wrong in interpreting the provision as permitting the appellate authority to adjourn the hearing of the appeal thus giving time to the assessee to pay the tax or even specifically granting time or instalments to enable the assessee to deposit the disputed tax where the case merits it, so long as it does not unduly interfere with the appellate court's calendar of hearings. His powers, however, should stop short of staying the recovery of the tax till the disposal of the appeal. We say this because it is one thing for the judge to adjourn the hearing leaving it to the assessee to pay up the tax before the adjourned date or permitting the assessee to pay up the tax, if he can, in accordance with his directions before the appeal is heard. In doing so, he does not and cannot injunct the department from recovering the tax, if they wish to do so. He is only giving a chance to the assessee to pay up the tax if he wants the appeal to be heard. It is, however, a totally different thing for the judge to stay the recovery till the disposal of the appeal; that would result in modifying the language of the proviso to read: "no appeal shall be disposed of until the tax is paid". Short of this, however, there is no reason to restrict the powers unduly; all he has to do is to ensure that the entire tax in dispute is paid up by the time the appeal is actually heard on its merits. We would, therefore, read clause (b) of Section 170 only as a bar to the hearing of the appeal and its disposal on merits and not as a bar to the entertainment of the appeal itself.

45. If the provision is interpreted in the manner above suggested, one can steer clear of all problems of constitutional validity. The contention on behalf of the Corporation to read the provision rigidly and seek to soften the rigour by reference to the availability of recourse to the High Courts by way of a petition under Articles 226 and 227 in certain situations and the departmental instructions referred to earlier does not appear to be a satisfactory solution. The departmental instructions may not always be followed and the resort to Articles 226 and 227 should be discouraged when there is an alternative remedy. A more satisfactory solution is available on the terms of the statute itself. The construction of the section approved by us above vests in the appellate authority a power to deal with the appeal otherwise than by way of final disposal even if the disputed tax is not paid. It enables the authority to exercise a judicial discretion to allow the payment of the disputed tax even after the appeal is filed but, no doubt, before the appeal is taken up for actual hearing. The interpretation will greatly ameliorate the genuine grievances of, and hardships faced by, the assessee in the payment of the tax as determined. Though an assessee may not be able to acquire an absolute stay of the recovery of the tax until the dispute is resolved, he will certainly be able to get breathing time to pay up the same where his case deserves it. If this interpretation is placed on the provision, no question of unconstitutionality can at all arise.

(Underlining added)

17. Therefore, it is clear that the Supreme Court, in view of the construction it placed on Section 170 (b) was not required to answer the question of whether the requirement of paying tax prior to the filing of an appeal would be constitutional or not. However, the Supreme Court expressed a desire that suitable amendment should be made in the said Act in the following words:-

46. We only wish that the statute itself is soon amended to make this position clear. After all, under the D.M.C. Act, the appellate authority is a high judicial officer, being the District Judge, and there is no reason why the Legislature should not trust such a high judicial officer to exercise his discretion in such a way as to safeguard the interests of both the Revenue and the assesseees. We think that, until this is done, the provision requires a liberal interpretation so as to preserve such interests and should not be so rigidly construed as to warrant the throwing out of an appeal in limine merely because the tax is not paid before the appeal is filed.

(Underlining added)

18. Unfortunately, the amendment that has been brought about by the introduction of the new Section 169 and, particularly, the first proviso to Section 169(1) has obfuscated the situation rather than bringing in clarity.

19. In *The Gujarat Agro Industries Co. Ltd. Vs. The Municipal Corporation of the City of Ahmedabad and Others Etc. Etc.*, , the Supreme Court was once again considering the provisions of Section 406 (2)(e) of the Bombay Provincial Municipal Corporation Act, 1949 as applicable to Ahmedabad. It may be recalled that this provision had been declared as constitutional and valid by the Supreme Court in *Anant Mills* (supra). This time, the matter came up because there was an amendment to the proviso which provided for waiver of pre-deposit on account of undue hardship to the appellant. By virtue of the amended proviso, the discretion of the appellate authority was limited to 25% of the tax demanded. This restriction was under challenge in *Gujarat Agro Industries* (supra). The Supreme Court observed with reference to its earlier decision in *Anant Mills* case (supra) that the right of appeal is a creature of the statute and it is for the legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be given conditionally. It further observed that the right of appeal, which is a statutory right could be conditional or qualified. It observed that it cannot be said that such a law would be violative of Article 14 of the Constitution. If the statute does not create any right of appeal, no appeal can be filed. The Supreme Court further observed that there is a clear distinction between a suit and an appeal and that while every person has an inherent right to bring a suit of a civil nature (unless the suit is barred by statute), the right to appeal, on the other hand, inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. Consequently, when the law authorizes filing of an appeal, it can impose

conditions as well.

20. We must, however, note that in *Gujarat Agro Industries (supra)*, the provisions in question permitted a complaint to be filed before the Municipal Commissioner against the imposition of any property tax and it was only after the complaint was disposed of that an appeal could be filed. The court observed that in that sense, the appeal to the court was rather like a second appeal. The Supreme Court also noticed that in the case before it, even if a person could not avail of the right of appeal u/s 406 of the concerned Act, the other remedies were available to him under the law.

21. In *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, , the constitutional validity of, inter alia, Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Securitisation Act") was in question. It was contended that the "right to appeal" granted by Section 17 of the said Act was illusory, particularly because of the provisions of sub-section (2) thereof which provided that where an appeal was preferred by a borrower, such appeal shall not be entertained by the DRT unless the borrower has deposited with the DRT 75% of the amount claimed in the notice referred to in sub-section (2) of Section 13, provided that the Debts Recovery Tribunal, may for reasons to be recorded in writing, waive or reduce the amount to be deposited under the said Section.

22. The Supreme Court noticed that, although Section 17 of the Securitisation Act was entitled as "Right to Appeal", this was a misnomer. The proceedings u/s 17 of the Securitisation Act were, according to the Supreme Court, not appellate proceedings at all but were, in fact, initial actions brought before a forum as prescribed under the Act raising grievances against the actions or measures taken by one of the parties to the contract. The Supreme Court noticed that it was akin to the stage of initial proceedings like filing a suit in a civil court. It observed that, as a matter of fact, the proceedings u/s 17 of the Securitisation Act were in lieu of a civil suit, which remedy was ordinarily available but for the bar u/s 34 of that Act. The Supreme Court then referred to its earlier decision in the case of *Smt. Ganga Bai Vs. Vijay Kumar and Others*, wherein, it had been pointed out that there is a basic distinction between the right of suit and the right of appeal. A suit for its maintainability did not require any authority of law and it was enough that no statute bars the suit but, the position with regard to appeals was different inasmuch as the right of appeal did not inhere in anyone and, therefore, an appeal for its maintainability requires the clear authority of law. Based on the propositions in *Ganga Bai (supra)*, the Supreme Court observed in *Mardia Chemicals (supra)* that the requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All the cases which require a pre-deposit were cases which related to appeals. It is in this backdrop that the Supreme Court, without going into the question of whether a provision, such as Section 17(2) would be valid or not in the context of a "regular" appeal, came to

the conclusion that the condition of pre-deposit u/s 17 was bad and rendered the remedy illusory. The Supreme Court's decision on this point was as under:-

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75% of the amount claimed by no means would be a meager amount (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone [(sic) only] onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.

(Underlining added)

23. From this discussion, it is apparent that, first of all, the right of appeal is a creature of the statute; secondly, as such, the legislature can circumscribe this right of appeal by making it conditional; thirdly, however, such condition must not be so onerous as to amount to an unreasonable restriction rendering the right almost illusory; fourthly, it is permissible to enact a law stipulating that no appeal shall lie against an order relating to assessment of tax unless the tax has been paid; but, fifthly, this has been held by the Supreme Court in cases where the requirement of pre-deposit of the tax amount at the point of appeal is accompanied by a provision for waiver of the same, complete or partial, by the appellate authority on the appellant demonstrating "undue hardship".

24. In the backdrop of these legal principles - can it be said that the proviso to Section 169 (1) of the DMC Act imposes a condition so harsh or onerous as to make the right of appeal granted u/s 169(1) illusory ? We have seen that in *Anant Mills* (supra), the provision in question [section 406(2)(e) of the Bombay Provincial Municipal Corporation Act, 1949] had a proviso which permitted the appellate authority to dispense with the requirement of pre-deposit of the tax claimed from the appellant in cases of hardship. In *Seth Nand Lal* (supra), the Supreme Court upheld such a provision, inter alia, because of the "meagre" amount of pre-deposit that was required under the Act in question. Once again, in *Vijay Prakash D. Mehta* (supra), the Supreme Court upheld the validity of Section 129E of the Customs Act, 1962 which also contained a proviso enabling the appellate authority to dispense with the pre-deposit of tax or penalty. A similar provision was considered in *Gujarat Agro Industry* (supra) though in that case, the power to dispense with the pre-deposit was limited to 25% of such amount. In *Shyam Kishore* (supra), the Supreme Court interpreted Section 170(b) of the DMC Act in such a way as to avoid the issue of constitutional validity. However, it observed that the validity of a condition, which makes the right of appeal illusory, may need careful consideration in an appropriate case.

25. In its present avatar, Section 169(1) gives a conditional right of appeal. The condition being that before the filing of the appeal, the full amount of the property tax is required to be paid. There is no provision for dispensation of this condition, in full or in part, by the appellate authority on the appellant showing and establishing hardship. In this way, it is different to the cases considered in *Anant Mills (supra)*, *Vijay Prakash D. Mehta (supra)* and *Gujarat Agro Industries (supra)* all of which, to some degree, involved provisions which had a "safety valve" clause, as it were, for dispensation of the pre-deposit amount. And, in *Seth Nand Lal (supra)*, which had a peremptory provision without such a clause, the Supreme Court held the provisions to be valid because the pre-deposit amount was a "meagre" amount. The Constitution Bench after reiterating the principle that the legislature could impose conditions on the right to appeal provided the conditions were not so unreasonable or onerous to render the right illusory, found that the meagre amount of pre-deposit was neither an unreasonable nor onerous condition.

26. Here, the property tax amount may run into lakhs of rupees and, therefore, cannot be regarded as meagre. As such, we are of the opinion that the proviso to Section 169(1) of the DMC Act imposes an onerous and unreasonable condition of paying the full amount of the property tax before the filing of an appeal. Such a provision renders the right of appeal illusory. It is true that the legislature need not have given a right of appeal at all. But, the legislature, having decided, in its wisdom, to give a right of appeal cannot make it illusory by imposing such an onerous or unreasonable condition as to amount to a deprivation of that very right which it intends to give. Neither can the possible property tax amounts be considered meagre nor is there any provision for dispensation, whether full or partial, so as to ease the harshness of the proviso to Section 169(1) of the DMC Act. Therefore, we have no alternative but to hold that the said proviso is an onerous condition and to strike it down as being violative of Article 14 of the Constitution of India.

27. On account of the fact that the proviso to Section 169(1) of the DMC Act has been declared by us to be unconstitutional and invalid, we need not examine the submission with regard to the inconsistency between Section 169(1) [inclusive of the proviso] and Section 170(b) of the DMC Act. The latter provision, as interpreted by the Supreme Court in *Shyam Kishore (supra)*, would continue to govern the manner in which appeals are to be entertained and heard. We also do not need to consider the alternative plea of the petitioner based on the Supreme Court decision in *Garikapatti (supra)*. Consequently, while holding the proviso to Section 169(1) to be unconstitutional and invalid, the impugned order dated 30.05.2008 passed by the Tribunal is set aside and it is directed to consider the appeal filed by the petitioner in the manner indicated in *Shyam Kishore (supra)*. The writ petition is allowed to the aforesaid extent. The parties shall bear their own costs.