**(2007) 03 BOM CK 0106**

**In the Bombay High Court**

**Case No :** Writ Petition No. 455 of 2005

MARS Enterprises — APPELLANT

Vs

Mumbai Municipal Corporation — RESPONDENT

**Date of Decision :** 28-03-2007

**Acts Referred:**

Constitution of India, 1950 — Article 226
Mumbai Municipal Corporation Act, 1888 — Section 128, 132, 140, 140(1), 141
Water Charges and Sewerage and Waste Removal Rules, 1976 — Rule 3, 5.1.2, 5.2.1, 5.2.2

**Citation :** (2007) 4 BomCR 752

**Hon'ble Judges :** Kanade V.M., J

**Bench :** Single Bench

**Advocate :** Rajiv Narula, instructed by Jhangiani Narula and Assoc, for the Appellant; A.Y. Sakhare and N.A. Shaikh, for the Respondent

## Judgement

Kanade V.M., J.—Heard the learned Counsel for petitioners and the learned Counsel for respondents.

2. Petitioners, by this petition, are seeking the following reliefs:

a) That this Hon''ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India, to call for the records of the petitioners'' case and to go into the legality and propriety thereof and to quash and or set aside the said bill dated 6.2 of 2004 being Exhibit-N to the petition.

b) That this Hon''ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India, to call for the records of the petitioners'' case and to go into the legality and propriety thereof and to quash and or set aside the order of the Investigating Officer dated 5.2.2004 being Exhibit O.

c) That this Hon''ble High Court be pleased to issue a writ of mandamus or a Writ in the nature of mandamus to direct the respondents;

i) To cancel and or withdraw the impugned bill dated 6.2.04 being Exhibit N to the petition;

ii) To desist from recovery of the amount of water tax and sewerage tax;

iii) To forthwith supply to the petitioners metered water connection to the property of the petitioners

iv) To direct the Chief Justice Small Causes Court to number hear and dispose off the Municipal Appeal Stamp No. 321 of 2004 without insisting on the petitioners to deposit the water tax and sewerage tax.

d) That this Hon''ble Court be pleased to issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction under Article 226 of the Constitution of India, to prohibit the respondents from recovering any amount as water tax and sewerage tax.

3. The learned Counsel appearing on behalf of petitioners, however, has made a statement on instructions that so far as property tax and sewerage tax are concerned, he shall not agitate the said issue in this Writ Petition as petitioners have also filed an appeal in the Small Causes Court u/s 217 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as "the said Act"). He also undertakes, on instructions from his clients, not to press the case in the Small Causes Court so far as the water tax is concerned. The statement is accepted.

4. Brief facts which are mentioned for the purpose of deciding this Writ petition are as under:

5. Petitioners are a partnership Firm. Petitioners are lessees and are in possession of the property situated at 5, Battery Street, Gordon House, behind Regal Theatre, Mumbai. It is the contention of petitioners that, initially, the property belonged to one Mr. Manu Narang who expired on 21-4-2001 and his property devolved upon his heirs by Will, which business is being carried on by them in the name of Mars Enterprises. It is the case of petitioners that, on the said property, there is a building consisting of ground plus four upper storeys alongwith outhouse and servant quarters on the rear side and the assessment which has been made is partly residential and partly nonresidential. It is the case of petitioners that since the building had become old and dilapidated, the necessary permission to reconstruct the building was obtained by the tenants. However, the repairs could not be completed and, therefore, petitioners submitted fresh amended plans and completed repairs/reconstruction of the building. It is the case of petitioners that in view of dispute between the original tenants, Occupation Certificate has not been granted by the Corporation.

6. It is the case of petitioners that before redevelopment of the property was taken up, water connection was provided by the Corporation. However,

 

petitioners were informed by letter dated 9-6-1995 that since the Concern was found closed, the water connection was disconnected to avoid further complication of the water charge bills. There was some correspondence between petitioners and the Corporation and the Corporation sent a letter to petitioners dated 4-11-1997 informing them that the water connection was being disconnected as the premises were closed for renovation.

7. Petitioners informed the Corporation to keep the water connection of petitioners in safe custody and to restore the same after renovation work was over and, in the meantime, petitioners agreed to use tanker water for the purpose of construction. It is the case of petitioners that after the building was reconstructed and completed, petitioners applied for water connection and they were asked to pay an amount of Rs. 1,03,115/- for water connection. It is the case of petitioners that though this amount was paid, the water connection was not given. An additional amount of Rs. 17,900/ was also paid towards security deposit and for other expenses which were to be incurred by the Corporation after giving them meter connection.

8. On 6-2-2004, petitioners received a Bill from the Corporation and were asked to pay total property tax of Rs. 21,62,245/-. Petitioners filed an appeal in the Small Causes Court challenging the said property tax. However, thereafter, they filed the present Writ Petition. Petitioners'' Counsel Shri Narula has made a statement that he will press this petition only on the question of levy of water tax which is shown in Column Nos. 2 and 3 of the Bill dated 6-2-2004.

9. The learned Counsel appearing on behalf of petitioners submitted that the water supply had been disconnected by the Corporation and though no water was supplied, the said water tax was levied. He submitted that, therefore, levy of water tax in Column Nos. 2 and 3 of the said Bill was illegal. He submitted that such levy could not be imposed in view of provisions of Sections 140 and 141 read with Sections 169 and 279 of the said Act and Rules which were framed under the provisions of Section 169. In support of the said submission, he relied upon the judgment of Division Bench of this Court (Coram : Dr. S. Radhakrishnan and Smt. V.K. Tahilramani, JJ.) in the case of Harish Lamba v. Municipal Corporation of Greater Mumbai and Ors. delivered on 21-11-2006 in Writ Petition No. 1206 of 1999. He submitted that the Division Bench of this Court after relying on the judgment of this Court in the case of Nagpal Printing Mills and Another etc. Vs. Municipal Corporation of Greater Bombay and Another etc., and the judgment of the Supreme Court in the case of Municipal Corporation of Greater Bombay v. Nagpal Printing Mills and Anr. reported in 1988 (2) Bom. C.R. 325, held that the Municipal Corporation was not entitled to levy water tax unless water was actually consumed by the consumer. He submitted that in view of the said decisions of this Court and of the Supreme Court and the decision of the Division Bench of this Court dated 21-11-2006 in Writ Petition No. 1206 of 1999, and also in view of the subsequent judgment of the Supreme Court in the case of Municipal Corporation of Greater Bombay v. Bombay Tyres International Ltd. and

 

Ors. reported in 1998 (3) Bom. C.R. 436, the amount which was raised in respect of water tax mentioned in Column Nos. 2 and 3 of the Bill was clearly and wholly illegal as it was an admitted position that the water supply of the building was disconnected by the Corporation which is evident from the correspondence and more particularly letters which were written by the Assistant Commissioner of the Corporation. He further submitted that the Small Causes Court did not have jurisdiction to consider the question of water tax and in support of the said submission he relied on the judgment of the learned Single Judge of this Court in Bombay Municipal Corporation for Greater Bombay and Another Vs. Ramesh G. Patel and Others, . He further submitted that, initially, the learned Single Judge of this Court had dismissed the petition which was filed by petitioners on the ground that petitioners had an alternative remedy of filing an appeal before the Small Causes Court. He submitted that, however, Division Bench of this Court in appeal had remanded the matter back and directed that the matter should be decided on merits. He submitted that, therefore, this Court has jurisdiction to decide the question whether the water tax was correctly levied or not and also to decide the question whether it has jurisdiction to consider whether the water charges should be levied or not or pass an order granting restoration of water connection.

10. The learned Senior Counsel appearing on behalf of respondents-Corporation, on the other hand, submitted that the petition was not maintainable since petitioners had an alternative remedy of filing an appeal and which, in fact, had been filed by petitioners and that the appeal was pending in Small Causes Court.

11. The learned Senior Counsel appearing on behalf of the Corporation submitted that the water tax was part of the property tax which is evident from the provisions of Section 140 of the Mumbai Municipal Corporation Act, 1888 and, as such, water tax could be levied irrespective of whether water was actually consumed by the consumer or not. He relied on the same provisions which were relied upon by the learned Counsel for petitioners in support of his said submission. He further relied on a Division Bench judgment of this Court (Coram : R.M. Lodha & D.B. Bhosale, JJ.) in the case of Wallace Flour Mills Co. Ltd and Anr. v. Municipal Corporation of Greater Mumbai and Ors. in Writ Petition No. 514 of 2002 delivered on 19-12-2002. He submitted that the Division Bench of this Court relied on the judgment of the learned Single Judge of this Court in the case of The Municipal Commissioner of Bombay v. Akberali Jaferali Hirji reported in 1934 36 B.L.R. 990. Relying on the said judgment, he submitted that the Division Bench had held that the water tax could be levied irrespective of the fact whether there was water supply or not. He also relied on the judgment of the learned Single Judge of this Court (Coram : Dr. D.Y. Chandrachud, J.) in the case of Mangaldas N. Verma Charitable Trust v. Municipal Corporation of Greater Bombay and Ors. Writ Petition No. 1390 of 2006 delivered on 8-3-2007 reported in 2006 (3) Bom. C.R. 551. The learned Single Judge of this Court, relying on the Division Bench judgment of this Court in the case of The Wallace Flour Mills Co. Ltd. has held that the water tax could be levied irrespective of the fact whether

 

the water was supplied or not. He also relied on the judgment of the Supreme Court in Indore Municipal Corporation Vs. Gujarat Co-operative Housing Society Ltd. and another, . He submitted that the Supreme Court also, relying on the relevant provisions of the M.P. Municipal Corporation Act, particularly Section 132 of the said Act, has held that the water tax could be levied in respect of the premises not only where the premises are connected by means of municipal pipes or Government water pots but also where the premises were situated in the portion of the city in which the Commissioner had given public notice that the Corporation had arranged to supply water.

12. After having heard both the Counsel at length, I am of the view that there is a direct conflict in respect of the judgments which are given by the two Division Benches of this Court and, therefore, in my view, this matter will have to be referred to a larger Bench. In order to lay down the point of reference, it will be essential to formulate the controversy which is arising in view of these two judgments of this Court. Unfortunately, the Division Bench judgment in the case of The Wallace Flour Mills Co. Ltd. and Anr. was not cited before the Division Bench which decided the case of Harish Lamba and similarly, two Supreme Court decisions on which reliance was placed by petitioners were not cited before the Division Bench which decided the case of The Wallace Flour Mills Co. Ltd. and Anr.

13. In the present case, it is the case of petitioners that the Corporation had disconnected their water supply since they were carrying out the work of repairs and reconstruction. It is the case of petitioners that, under such circumstances, it was not open for the Corporation to levy water tax for the period during which repairs and reconstruction work was going on during the period when, admittedly, water supply was disconnected, It is the case of petitioners that, in these circumstances, the provisions of Section 279 of the said Act cannot be made applicable. It is the further case of petitioners that water tax could be levied on the actual supply of water and reliance has been placed by the Counsel appearing on behalf of petitioners on the provisions of Section 140(a)(i) which reads as under:

140. Property taxes of what to consist and at what rate leviable. - (1) The following taxes shall be levied on buildings and lands in [Brihan Mumbai] and shall be called "property taxes", namely:

(a)(i) the water tax of so many per centum of their rateable value, as the [Standing Committee] may consider necessary for providing water supply;

The learned Counsel appearing on behalf of petitioners also relied upon Section 169 which section empowers the Corporation to frame the Rules in respect of the subject which is mentioned in the said provision. The learned Counsel appearing on behalf of petitioners relied upon the provisions of Section 169(1)(i) & (ii) and again relied on the words "providing water supply". It would be relevant to refer to the provisions of Section 169 which reads as under:

169. Rules for water taxes and charges. - (1) Notwithstanding anything

 

contained in Section 128, the [Standing Committee] shall, from time to time, make such rules as shall be necessary for supply water and for charging for the supply of water and for any fittings, fixtures of services rendered by the Corporation under Chapter X and shall by such rules determine-

(i) the charges for the supply of water by a water tax and a water benefit tax levied u/s 140 of a percentage of the rateable value of any property provided with a supply of water; or

(ii) a water charge in lieu of water tax, based on a measurement of estimated measurement of the quantity of water supplied; or

(iii) combined charges under Causes (i) and

(ii); or

(iv) a compounded charge in lieu of charges under Clauses (i) and (ii).

(2) A person who is charged for supply of water under Clause (ii) or (iv) of Sub-section (1) shall not be liable for payment of the water tax, but any sum payable by him and not paid when it becomes due shall be recoverable by the Commissioner as if it were an arrear of property tax due.

(3) Notwithstanding anything contained in Section 146, the water taxes and charges shall be primarily recoverable from person or persons actually occupying the premises.

The Corporation has framed Rules in respect of water tax and Rules 5.1.2, 5.2.1 & 5.2.2 of the Water Charges Rules are the relevant Rules which read as under:

5.1.2 Water tax at 130% of the rateable value of the premises within Greater Mumbai shall be levied on all premises other than residential use, if such premises are not charged water charges by meter measurement.

5.2.1 A water benefit tax at 12.50% of the rateable value of the premises shall be levied in addition to water tax or water charges on all residential premises situated in Greater Mumbai.

5.2.2 A water benefit tax at 25% of the rateable value of the premises shall be levied in addition to water tax or water charges on all premises other than residential, situated in Greater Mumbai.

14. It is submitted by the learned Counsel appearing on behalf of petitioners after relying upon the judgment of the Supreme Court in the Nagpal''s case (supra) and in the case of Bombay Tyres International Ltd. (supra) that the Municipal Corporation, as held by the Supreme Court in the said cases, was not entitled to levy the water tax if there was no water supply. The said decisions, therefore, clearly lay down the law on the said point and, therefore, in view of the judgment of the Supreme Court in Nagpal''s case (supra) which has been relied upon by the Division Bench of this Court in the case of Harish Lamba and the judgment of the Supreme Court in the case of Bombay Tyres International

 

Ltd (supra), the water tax could not have been imposed.

15. The learned Senior Counsel appearing on behalf of the respondents, on the other hand, submits that the term "providing water supply" was required to be interpreted to mean water being made available to the consumer and not actual consumption of water by the consumer. He tried to distinguish the judgment of the other Division Bench of this Court in the case of Harish Lamba and submitted that the Division Bench judgment in the case of The Wallace Flour Mills Co. Ltd and Anr. was not referred to by the said Division Bench. He submitted that the Supreme Court judgment in Nagpal''s case (supra) could be distinguished on facts and he submitted that the said judgment was based on Rule III(d) which was in existence at the relevant time and which rule had been struck down by this Court and which order was confirmed by the Supreme Court.

16. In view of these submissions and in view of the fact that there are two judgments of two Division Benches of this Court which are clearly in conflict with each other, in my view, it is essential to refer this matter before the larger Bench to consider the following issues:

(i) Whether the Corporation has a power to levy tax u/s 140(a)(i) of the said Act on the actual supply of water?

(ii) Whether the water benefit tax, as envisaged u/s 140(a)(ii) of the said Act, could be levied irrespective of the actual consumption of water since it pertains to maintenance of the system?

(iii) Whether the Corporation is entitled to levy fixed tax apart from water charge which is levied for actual consumption of water?

17. In my view, it would be appropriate if a larger Bench decides these questions and also the question whether there is a conflict in two Division Bench judgments or not after taking into consideration the provisions of the Mumbai Municipal Corporation Act, 1888.

18. Office to place the matter before Hon''ble the Chief Justice for appropriate orders.