(1992) 09 BOM CK 0043

In the Bombay High Court

Case No : First Appeal No''s. 871, 872, 873, 874 and 875 of 1984

Municipal Commissioner for Greater Bombay and Another — APPELLANT

Vs

Sangam Cinema — RESPONDENT

Date of Decision : 04-09-1992

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 217, 218
Civil Procedure Code, 1908 (CPC) — Order 11 Rule 12, Order 11 Rule 14, Order 11 Rule 15, Order 11 Rule 16

Citation : (1992) 3 BomCR 482 : (1992) 94 BOMLR 948 : (1992) MhLj 1403

Hon'ble Judges : S.M. Daud, J;M.G. Chaudhari, J

Bench : Division Bench

Advocate : Narendra V. Walawalkar, for the Appellant; U.J. Makhija, for the Respondent

Final Decision : Dismissed

Judgement

S.M. Daud, J.—These are appeals u/s 218-D of the Bombay Municipal Corporation Act, being Bombay Act No. III of 1888.

2. The assessee-respondent before us-is the owner-conductor of the Sangam Theatre which screens feature and other films, the theatre being situated at 127, Kurla Andheri Road, Andheri (East), Bombay 400 059. One of the taxes which the appellants-hereinafter to be referred to as the "BMC"-are entitled to impose is the property tax on a building or land. The preliminary step towards the fixing of the property tax is the fixing of a rateable value on the building or land assessable to such property tax. Section 154(1) of the Act says that in order to fix the rateable value of any building or land...there shall be deducted from the amount of the annual rent for which such land or building might reasonably be expected to let.. Some difficulty has been encountered, and not only in India, in respect of fixing the rateable value for theatres being conducted by the owners of the structures in which the films are screened. To get over this difficulty, the method evolved is that known as the apportionment of a certain percentage of

the gross takings. The validity of this method has been accepted by this High Court in The Globe Theatres Ltd. v. The Chief Judge of Small Causes Court, 48 BLR 691. The BMC fixed the rateable value of the Sangam Theatre at 71/2 per cent of the gross takings. On the sum representing the said 71/2 per cent, property tax was assessed and being aggrieved by the assessment made, the respondent preferred appeals u/s 217 of the Act. The stand taken before the learned Chief Judge of the Small Causes Court by the respondent was that in respect of the other cinema theatres in the area, the BMC had fixed only 5 per cent of the gross takings for determination of the rateable value. There was no reason to discriminate against the respondent by fixing the rateable value at 21/2 per cent more as compared to that percentage accepted in the case of other theatres. The BMC''s reply to this was that the Sangam Theatre was in a far more advantageous situation vis-a-vis other cinema theatres in the area. Its construction was superior and of more recent origin. It had a central air-conditioning system as also an escalator. These amenities were decisive in the matter of getting the respondent a better and more lucrative attendance as compared to the cinema-goers frequenting the other theatres in the area. In support of their rival contentions, parties examined some witnesses. Having considered the evidence and having heard Counsel for the parties, the learned Chief Judge sustained the contention advanced by the respondent. The rateable value was slashed from 71/2 per cent to 5 per cent annum of the gross takings. A consequential reduction in the property tax was made and all the five appeals having been allowed, it is the BMC which is now the aggrieved party before us.

3. Mr. Walawalkar representing the BMC submits that the learned Chief Judge of the Small Causes Court proceeded on an erroneous basis. True, the gross-takings criterion was applicable in the matter of fixing the rateable value vis-a-vis cinema theatres, but this was only as a measure for fixing the hypothetical rent which a willing tenant might offer for the occupancy and use of the property assessable to property tax. Here, the potential of Sangam Theatre could not be overlooked irrespective of what reasons there may have been for the central air-conditioning system not being used and the escalator not being repaired. The Sangam Theatre was a more recent construction vis-a-vis the other theatres in the locality and in an arms-length bargain, a tenant would offer much more of a rent for the Sangam Theatre as compared to the other theatres which did not have the advantages of the former. Mr. Makhija for the respondent answers this submission by pointing to the testimony recorded in the appeals. One of the partners of the respondent B.K. Tandon has testified that the Sangam Theatre falls in the IInd or IIIrd Class - the classification being based upon various considerations like location, class of patrons frequenting the cinema, nature of films screened etc. Tandon has testified that the central air-conditioning unit is not functioning because of the financial difficulties being faced by him and his partners-the respondent being a partnership concern. At a later stage Tandon changed the reason for the non-functioning of the central air-conditioning unit, to an alleged power cut. The later reason given out by Tandon does not appear to

be true. Be that as it may, and, to go ahead with the analysis of Tandon''s testimony, he has said that the Sangam Theatre is classified as falling into IInd or IIIrd Class because of it being at a considerable distance from the railway station and because of it being in a labour populated area. No exception has been taken to this statement of Tandon. At a later stage Tandon has testified that the other theatres in the are Usha, Akash and Bharat. The building in which Usha functions was constructed sometime in 1950. It is not air-conditioned. The appearance of Usha Theatre is inferior as compared to The Sangam Theatre. Sangam scores over all other theatres in Bombay in that it is the only one having an escalator. Akash is no better than the Usha Theatre. Bharat is a renovated theatre and Tandon finds no difficulty is asserting that the renovated Bharat Theatre is superior to Sangam Theatre in the matter of status and decoration. Be that as it may, the point made by Tandon is that Usha, Akash and Bharat have all been assessed to property taxes on the basis of 5 per cent of the box-office collections. Some attempts was made by learned Counsel representing the BMC to contend that the respondent has suppressed vital information in that documents which their Accountant Shinde had promised to produce, were later on not produced on the flimsy pretext of the documents not being traced or having been eliminated. The practice of calling upon witnesses while under cross-examination to produce this or that document is at variance with the procedure laid down in law. The CPC speaks of steps to be taken for production of documents in the possession or custody of one''s opponent. Normally, the first step in this process is an application to the Court for a direction to the opponent to discover the documents in its custody or control. After the discovery is made, the opponent is given notice to produce such documents as the applicant desires to inspect. If the opponent is unwilling to produce the required documents for inspection, an application is made to the Court to obtain a direction against the opponent for the production of the relevant documents. But the practice followed in this case was which is something in the nature of practice generally prevalent in the city of Bombay to call upon witness Shinde to produce this or that document said to be in the custody of his masters. At the stage at which the answers were given by Shinde, he had assumed that the documents were in existence. At a later stage - so says Shinde - he found that the documents were untraceable or had been eliminated. There is no reason to disbelieve the explanation given by Shinde. In fact, the fault lies with the appellants in having following the wrong procedure by flooding Shinde with questions and obtaining answers based on assumptions made by Shinde. These answers were given by Shinde without first having taken a search of the records available with his masters. No case for the alleged suppression of documents is thus made out.

4. We now come to the appellants'' witness M.Y. Govandi. In his examination-in-chief Govandi describes the procedure for fixation of the rateable value in respect of cinema theatres. These are divided into three categories A, B and C. The total box-office collections of one year ascertained on the basis of the average of the preceding three years is taken into account minus the permissible deductions on

account of expenses. The balance represents the sum on which rateable value is to be calculated. Govandi admits that Bharat, Akash and Kalpana are all in the ''L'' Ward. Sangam Theatre is in ''K'' Ward which is adjacently situated. So far as Bharat and Akash are concerned, the rateable value has been fixed at 5 per cent of the gross takings. Neither theatre is air-conditioned. In fact, Govandi describes them as "old". In cross-examination witness has admitted that the rateable value of owner-conducted cinema theatre is fixed at 5 per cent because of this being in consonance with a practice followed since long and having become something in the nature of an established one. The other evidence is not of much relevance. Therefore, the conclusion emerging on facts is thus:

(i) Bharat, Akash and Usha are in comparatively older structures - the comparison being made with Sangam Theatre.

(ii) All the four theatres i.e. Bharat, Akash, Usha and Sangam are situated in adjacent wards.

(iii) Bharat, Usha and Akash do not have a central air-conditioning system nor an escalator. However these facilities though available to Sangam are not being put into operation by the respondent, and this, for their own reasons.

(iv) Bharat, Akash and Usha have been assessed to rateable value at 5 per cent of the gross takings, whereas rateable value of Sangam Theatre has been fixed at 71/2 per cent of the gross takings.

5. We now turn to an exposition of the legal position to be found in The Globe Theatres Ltd. (supra), the decision of a learned Single Judge in Appeal No. 858 of 1971 decided on 17th June, 1978 and certain excerpts from the Theory and Practice of Valuation authored by Roshan Namavati. Mr. Walawalkar in support of his contention that the gross-takings method is not something rigid or inflexible, has referred us to the following passage from the Globe Theatres Ltd. case (supra) :

"In Kingston Union v. Metropolitan Water Board the question of rating a water undertaking extending over several parishes came for consideration. The Court considered that the actual profits made by the occupants for the time being was a useful and relevant factor to determine what a tenant would be willing or likely to pay for hiring the premises. In the same way in Cartwright v. Sculcoates Union, (1899)1 Q.B. 677, where the question of rateable value of a public house came to be considered, the Court of Appeal held that the amount of weekly takings, the largeness of the business actually done, etc. were relevant facts on which evidence could be led. These factors are relevant for considering what expectation a hypothetical tenant would have in carrying on business at that particular place and what he would be willing to pay for running the same. This view of the Court of Appeal was confirmed by the House of Lords in Cartwright v. The Guardian of The Poor of the Sculcoates Union in Kingston upon-Hill, (1900) A.C. 150. If the profits are higher, that will induce the tenant to pay a higher rent and therefore that factor is important to be taken into account."

Now this passage does not entirely support the proposition canvassed by Mr. Walawalkar. What should not be overlooked is the use of the words "business actually done". This would indicate that mere potential is not determinative of the question whether the weekly takings can be connected with the "business actually done". Now here the fact that Sangam Theatre is situated in a predominantly labour locality will naturally affect the type of feature films being screened, the class of cinema goers frequenting the said theatre and the rates of admission which the theatre owners can expect from the audience. Tandon in his deposition has said that the theatre has only two categories of seats viz. Balcony and Stall. The Sangam Theatre runs four shows per day and the occupancy is 50-60 per cent of the seating capacity. The locality where the theatre is situated being what it is, no premier shows are held in the theatre. The distributors from whom the films have to be hired are in a position to dictate terms to the Sangam Theatre, 50 per cent of the collections per show goes to the distributors. All this would show that the amenities notwithstanding, Sangam Theatre is in just about the same league as Bharat, Usha and Akash. In fact these theatres have an advantage in that they do not have dead and unproductive assets like central air-conditioning unit and an escalator. Having regard to the probabilities, these assets are not being made operational for the simple reason that they would increase the overhead recurring expenses of the respondent without any corresponding return in the collections at the box-office. This is the only explanation for the respondent refraining from making the air-conditioning and escalator operational. Tandon has explained that the central air-conditioning system was installed because of this being a mandatory requirement at the time the theatre was constructed. The same may not be the case with the escalator and it may have been put in as a novelty to attract a better class of customers. But the exception did not become a reality and therefore the same has become unused. Were it productive of any benefit, the respondent would certainly put it into action and reap the advantages it can. Now a willing tenant would take all these factors into consideration were the contemplating taking the Sangam Theatre on rent. The non-operational escalator and air-conditioning system would be considered as dead assets by the potential tenant, for making the assets operational would be to subject himself to an unproductive expenditure without any corresponding benefit in the increase in the box-office collections. There could not be any increase in the box-office collections for the patrons of the theatre would mostly be from the poorer sections who dominate the area and its vicinity. If additional amenities were made available to the patrons, the potential tenant would only be increasing his liability, and, at the best, eroding his profits. The decision in Appeal No. 858 of 1971 relates to the Shree Cinema in Mahim, Bombay 400 016. The assessee had come in appeal to the High Court against the dismissal of her appeal u/s 218 of the Act. The BMC had fixed the rateable value on the basis of 7% of the gross takings. It was contended before the Additional Chief Judge of the Small Causes Court that the condition of the theatre being what it was, not more than 6 per cent of the box office returns should have been taken for determining the rateable value. Vaidya, J., negativing the contention of the assessee dismissed the appeal holding that the rateable value fixed could not be deemed to be excessive or unreasonable. The learned Judge held the basis to be consistent with rating valuation practice followed in regard to cinema theatres. So far as Namavati''s commentary is concerned, the learned author at page 416 gives an idea as to how the percentage of gross takings is worked. This is a modification of the profit basis evolved for fixing the rateable value and it is administratively more convenient as with the introduction of the entertainment duty, a fairly accurate idea can be had of the gross takings on the basis of which the rateable value can be worked out.

6. To sum up, the gross-takings method employed in ascertaining the rateable value of the Sangam Theatre is not erroneous. That is conceded even by the BMC. What is objected to is a reduction of the percentage by a 21/2 per cent. The objection is based on the theoretical supposition that the additional amenities available to the Sangam Theatre place it in a class, distinct and different from the other theatres in the ''K'' and ''L'' Wards of the city. The mare fact that the building is more recent in date of construction vis-a-vis Bharat, Usha and Akash will not make any difference to the gross takings. This is because the class of persons frequenting all the four theatres would come from the same social strata. The escalator and central air-conditioning unit not being used is because of the obvious dis-advantages in doing otherwise. Therefore, all the four theatres are in parity and should have been treated alike. In fact that would have been in conformity with the practice spoken of by Govandi as a practice of long-standing and followed to such an extend, that it is now described as an established practice. This being the position, there was no justification for discriminating against the respondent in the matter of percentage to be fixed for determining the rateable value. The learned Judge of the Court below was right in allowing the appeal to the extent he did and affirming his conclusion, we dismiss the present appeals with costs.