
(2010) 10 DEL CK 0124

In the Delhi High Court

Case No : Writ Petition (C) No. 1828 of 1994

South Delhi Maternity and Nursing Home (P) Ltd.

APPELLANT

Vs

MCD and Others

RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:

Delhi Municipal Corporation Act, 1957 — Section 126, 129, 341, 346(2)

Citation : (2011) 176 DLT 192 : (2011) 1 ILR Delhi 309

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : B.B. Jain and Abhay Jain, for the Appellant; Amita Gupta and Parveen Kumar for R 1 and 2 MCD and Y.R. Sharma, for R 3 and 4, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The writ petition impugns the order dated 2nd February, 1994 of the Joint Assessor & Collector of the Respondent MCD fixing the rateable value of Property No. 14, Community Centre, Zamrudpur, New Delhi at Rs. 5,19,080/- w.e.f. 20th September, 1990. It was the contention of the Petitioner in the writ petition itself that the writ petition involving similar questions of law as raised in the present writ petition had been admitted by this Court. Notice of the writ petition was issued and the counsel for the Respondent MCD on 14th July, 1994 agreed not to enforce the demand pursuant to the assessment aforesaid. After completion of the pleadings, Rule D.B. was issued on 13th February, 1995 and the operation of the impugned order stayed. On 25th March, 2010 the counsel for the Petitioner stated that in the present writ petition there was no challenge to any provision of law but only to the order of assessment dated 2nd February, 1994 aforesaid and hence the matter was ordered to be listed before the Single Bench as per roster.

2. Though in the writ petition the rateable value assessed has also been challenged but the counsel for the Petitioner has confined the argument to,

whether the property is liable to be assessed at all for the purposes of the property tax or not.

3. The facts in this regard and which are not in dispute are:

(i) the Petitioner was granted a perpetual lease of a plot of land aforesaid i.e. plot No. 14, Community Centre, Zamrudpur, New Delhi admeasuring 218.50 sq. mtrs on 3rd February, 1984, though possession thereof had been delivered pursuant to allotment on 20th May, 1981;

(ii) upon the Petitioner applying for sanction of building plan for construction of superstructure on the said plot, sanction was accorded on 1st February, 1984;

(iii) the Petitioner on 20th September, 1990 gave notice to the Respondent MCD of completion of construction and applied for grant of Occupancy Certificate;

(iv) the application of the Petitioner for Occupancy Certificate was rejected on 20th September, 1991;

(v) that the Respondent MCD issued notice dated 7th /11th March, 1991 to the Petitioner u/s 126 of the Delhi Municipal Corporation Act, 1957 for enhancing the rateable value from the then existing (i.e. as of a plot) of Rs. 9,740/- to Rs. 14,69,000/- w.e.f. 1st April, 1988 for the reason of "assessment of land and/or building previously not included";

(vi) the Petitioner filed objections to the said notice inter alia contending that the Completion Certificate having not been issued till then and the building being incapable of occupation, the notice was bad.

4. The Joint Assessor & Collector of the Respondent MCD in the impugned order has held that property tax is leviable from the date the building is occupied or complete; that the Petitioner having applied for the Completion Certificate on 20th September, 1990 means that the property was completed in all respect and fit for occupation on that date; that rejection of the Occupancy Certificate was mainly on the ground of the same having not been applied by all the Directors of the Petitioner Company and due to non submission of other relevant documents. It is recorded in the impugned order that it was submitted before the MCD that there was a dispute among the partners/Directors of the Petitioner company. The Joint Assessor & Collector of Respondent MCD held that the levy of property tax in respect of a building completed in all respects as declared by the Petitioner himself could not be withheld only for the reasons of non-issuance of Occupancy Certificate and which also was attributable owing to internal disputes as to the management of the Petitioner Company. The enhancement in property tax was made effective from 20th September, 1990 i.e. the date when the Petitioner had given notice of completion.

5. The counsel for the Petitioner has relied upon Sections 129 & 346(2) of the DMC Act to contend that without issuance of Occupancy Certificate and till when the property cannot be occupied, no property tax as of a completed building

could have been levied. Reliance in this regard is placed on paragraphs 21 & 22 of *Express Newspapers Ltd. Vs. Municipal Corporation of Delhi*, holding that if a building has been erected, and in respect of which notice u/s 129 has been issued but permission to occupy is refused and the building is actually not occupied, there can be no annual rent because the building cannot be let from year to year.

6. The counsel for the Respondent MCD has argued that the MCD cannot be deprived of property tax when a building has been erected and notice of completion thereof been issued, merely because the owner fails to pursue and obtain the Occupancy Certificate. It is contended that u/s 129, the liability for property tax accrues from the date when notice of completion or occupation whichever is earlier is given and irrespective of the grant of Occupancy Certificate. It is urged that the grant of Occupancy Certificate and the prohibition against the occupation is the concern of the Building Department of the MCD and with which the House Tax Department is not concerned. The judgment in *Express Newspapers Ltd. (supra)* is sought to be distinguished by contending that it was in the context of illegal construction and will not apply when the construction is as per the sanction plan but the owner fails to take the Occupancy Certificate, as is the case here.

7. I have at the outset enquired as to what is the status of the property as of today. The counsel for the Petitioner informs that the position is the same as then i.e. the Occupancy Certificate has not been granted and the building remains unoccupied. The counsel for the Respondent MCD states that she has no instructions. I have also enquired as to whether any subsequent steps for assessment of property tax for any subsequent years have been taken by the MCD. The counsel for the Petitioner again informs that no steps have been taken by the MCD. The counsel for the Respondent MCD states that she has no instructions.

8. The aforesaid is relevant inasmuch as in the absence of any fresh notice, the impact of the order in this writ petition would be on the claim of tax since 20th September, 1990 i.e. for the last over 20 years.

9. Before dealing with the controversy aforesaid, a preliminary objection of the counsel for the Respondent MCD as to the maintainability of the writ petition on the ground of availability of the alternative remedy of appeal may be dealt with. The rule of refusing to entertain a writ petition where alternative efficacious remedy is available, is a rule of discretion and not a rule of law. In the present case, the writ petition has remained pending before this Court for the last 16 years. Though the Respondent MCD in its counter affidavit has also taken this plea but the order sheet does not reflect that the admission of the writ petition was opposed on this ground. I find it highly iniquitous now after 16 years instead of deciding the legal questions raised in the writ petition, dismiss the writ petition on the ground of availability of alternative remedy. The Supreme Court in *Durga Enterprises (P) Ltd. V. Principal Secretary, Government of UP* (2004) 13 SCC 665

deprecated the practice of summarily dismissing the writ petition on ground of existence of alternative remedy, after having entertained the writ petition and kept it pending for thirteen years in that case. To the same effect are Smt. Claude-Lila Parulekar Vs. Sakal Papers Pvt. Ltd. and Others, and Dr Bal Krishna Agarwal Vs. State of U.P. and Others, . Even otherwise the writ petition raises a pure question of law and in which circumstance this Court has entertained writ petitions notwithstanding the alternative remedy of appeal. The said contention of the Respondent MCD is thus not accepted.

10. Section 129 of the DMC Act is as under:

129. Notice of erection of building, etc. - When any new building is erected or when any building is rebuild or enlarged or when any building which has been vacant is reoccupied, the person primarily liable for the property taxes assessed on the building shall give notice thereof in writing to the Commissioner within fifteen days from the date of its completion or occupation whichever first occurs, or as the case may be, from the date of its enlargement or re-occupation; and property taxes shall be assessable on the building from the said date.

The contention of MCD is that the Petitioner itself having given notice dated 20th September, 1990 of completion, cannot be heard to contend that the property is not assessable from the date of notice.

11. However the notice dated 20th September, 1990 given by the Petitioner to the Respondent MCD was not u/s 129 of the DMC Act. The said notice was a notice under Bye-Law 7.5.2 of the Delhi Building Bye-Laws, 1983 which is as under:

7.5.2 Notice of Completion - Every owner shall have to submit a notice of completion of the building to the Authority regarding completion of the work described in the building permit. The notice of completion shall be submitted by the owner through the licensed Architect/ Engineer/ Supervisor/Group as the case may be who has supervised the construction, in the proforma given in Appendix "G" accompanied by three copies of completion plan and the following documents and along with a fee of Rs. 20.

- (1). Copy of lease deed.
- (2). Copy of sewer connection permission.
- (3). Clearance from Chief Fire Officer, Delhi.
- (4). Clearance from Chief Controller of Explosives, Nagpur as required.
- (5). Clearance from DESU regarding provision of Transformers/Sub-Station/ ancillary power supply system etc. as required.
- (6). Structural stability certificate duly signed by the licensed Architect/Engineer.
- (7). Certificate from the Lift Manufacturer, as required.

(8). Certificate from Air Conditioning Engineer, Manufacturers, as required.

(9). A certificate by the owner and architect/supervisor/engineer for covering up the underground drain, sanitary and water supply work, under their supervision and in accordance with Building Bye Laws and sanctioned building plans stipulated in the Appendix B-3 as applicable.

(10). In case of large campus/complex, completion of individual block/building will be issued by the local body in accordance with the construction work completed phase-wise in the Proforma Appendix B-3.

(11). The Extension of Time up to the date of applying for completion certificate. In case, if the completion certificate is refused due to deviation, which cannot be compounded, the completion will be rejected and extension of time will be required accordingly.

(12). NOC for regular water supply and electricity may be issued only after the completion certificate is obtained.

It is only on receipt of such a notice under Building Bye-Law 7.5.2 that the procedure for grant of Occupancy Certificate under Building Bye-Law 7.6 is commenced. The necessity of such a notice under Building Bye-Law 7.5.2 arises because u/s 341 of the Act, when sanctioning the erection of building or execution of a work, a reasonable period within which the said work is to be completed is to be specified and if the work is not completed within the said period, there is a prohibition against continuing thereafter without obtaining fresh sanction or without obtaining an extension of the period.

12. The question which arises is whether a notice of completion under Building Bye-Law 7.5.2 can be treated as a notice of completion u/s 129. In my opinion, the two cannot be equated and the notice under Building Bye-Law 7.5.2 cannot be a notice u/s 129. The reasons for providing for the two notices are entirely different. While the notice under Building Bye-Law 7.5.2 is in the nature of intimation of completion of works within the time prescribed in the building permit u/s 341 and is also in the nature of an application for Occupancy Certificate and is required to be submitted through a licensed Architect/Engineer who has supervised the construction, the notice u/s 129 is intended to inform that the building is ready for occupation or has been occupied and has become liable for payment of property tax. Though "ready for occupation" can only mean "legally ready for occupation" but the Legislature in Section 129 has provided for levy of property tax even from the date of factual occupation even if not legally ready for occupation. However such illegal occupation without the building being legally ready for occupation makes the property liable for property tax only if the same is before the property being legally ready for occupation, as is evident from the expression "whichever first occurs" in Section 129. It however cannot be said that because Section 129 permits levy of house tax on "actual occupation" even if without Occupancy Certificate, that the property tax becomes leviable on mere completion of construction and before the issue of Occupancy Certificate, even

when there is no actual occupation.

13. While the provision under the Building Bye-Law 7.5.2 is of "completion of works" under the Building Permit, the notice u/s 129 is of "completion of the building". The question which arises is, when can a building be said to have been "completed". Can a building be said to have been completed merely when the work of construction is complete even though Occupancy Certificate and in the absence whereof the building cannot be occupied legally, has not been granted. In my opinion, No. As held in *Express Newspapers Ltd.*, completion for the purposes of property tax is when the building is capable of having an annual rent and which cannot be without occupation. Thus the issuance of a notice of completion coupled with an application for Occupancy Certificate made under Bye Law 7.5.2 is not the notice of completion u/s 129 so as to make the property liable for property tax.

14. I am unable to accept the contention of the counsel for the Respondent MCD that the judgment in *Express Newspapers Ltd.* is distinguishable. Even though that may have been a case of illegal construction but the ratio of the judgment is in the favour of the Petitioner herein and it is the ratio which constitutes a precedent.

15. I however find that another Single Judge of this Court in *MCD Vs. Nehru Place Hotel Ltd.*, without noticing the earlier judgment in *Express Newspapers Ltd.* did hold that rateable value is to be assessed with effect from fifteen days after the notice of completion is given and the argument that Section 346(2) is a bar to using the building without Occupancy Certificate was held to be not available qua property tax since the said provision deals with different aspect of the matter and was held to be not relevant for the purposes of property tax. Else, the consistent view of this Court appears to be in consonance with *Express Newspaper Ltd.* Mention in this regard can be made to:

(a) *Kailash Nath and Associates and Others Vs. New Delhi Municipal Committee and Another*, , though in respect of NDMC area and under the provisions of the then Punjab Municipal Act, 1911 but negating the contention that assessment can be made even if the building is not completed. It was held that the guiding factor has to be a building which is fit for being occupied, both factually and in law before it can attract the incidence of tax. The issue of Completion Certificate or an Occupancy Certificate was held to be certainly a guiding factor. It was however held that it is not a general rule that only after the issue of Occupation Certificate or Completion Certificate that the incidence of tax is attracted. It was held that where a building is occupied even without taking a Completion Certificate, it will certainly attract the incidence of tax because the very fact of occupation would establish that the building is fit for occupation; if however the building cannot be occupied unless the Completion Certificate or an Occupation Certificate is given, then it will not attract the incidence of tax. It was further clarified that if electricity connection, water connection or arrangement for sewage disposal is not available, making it not possible for the building to be

occupied, then also the incidence of taxation will not arise. Reliance was placed on the judgment of Supreme Court in *The Municipal Corporation of Greater Bombay Vs. Polychem Ltd.*, where while construing the provisions of Bombay Municipal Corporation Act, 1888 it was held that so long as a building is not completed or construction to such an extent that at least a partial completion notice can be given so that the completed portion can be occupied and let, the land can, for the purpose of rating, be equated with or treated as vacant land. It was held that it is only when the building which is being put up is in such a state that it is actually and legally capable of occupation that the letting value of the building can enter into the computation.

(b) *Municipal Corporation of Delhi Vs. Mr. P. Chandrasekharan*, ; in this case though possession of a DDA flat was delivered but the area where the flat was situated was not electrified. Relying on *Express Newspapers Ltd.* it was held that till electrification, the flat was incapable of having any annual rent and thus liability for property tax was held from the date of electrification.

(c) *Municipal Corporation of Delhi Vs. Senaro Construction India Ltd.*, where, it was held that in the absence of any averment that the Assessee was at fault for delay in obtaining Occupancy Certificate or that the building had unauthorized construction which was required to be rectified, MCD cannot take advantage of its own delay in issuance of Completion Certificate resulting in non-occupation of the building and cannot claim property tax from the date of notice of completion and can claim property tax only from the date of Occupancy Certificate.

(d) *MCD Vs. Jain Brothers and Another*, also holding that if delay is on the part of the MCD in issuing the Completion Certificate, the date of issuance of the Completion Certificate is to be the date u/s 129 of the Act.

16. Though some of the judgments of this Court have on their facts observed the property tax leviable with effect from the date of the Completion Certificate for the reason of delay in issue/grant of Occupancy Certificate being not attributable to the owner but in my opinion, the question whether delay in grant of occupancy certificate is attributable to the owner or to the MCD is really irrelevant. If the property tax is not leviable till either the Occupancy Certificate is granted or till the property is actually occupied, even if the delay in obtaining Occupancy Certificate is of the owner, as long as the owner does not actually occupy the property, the property cannot be made liable for property tax. The tax is on the property and as long as there is no property which can be legally occupied or which has been actually occupied, the incidence of tax is not attracted. Just like the MCD cannot levy property tax as on a built-up property, on a plot of land even if the owner delays construction thereon, so also the MCD cannot levy such tax if the owner though builds but does not occupy or obtains Occupancy Certificate. The remedy of MCD in a case where the owner delays obtaining Occupancy Certificate is by either revoking the sanction earlier granted and/or of demolishing the construction as unauthorized. However it cannot hold the property liable for property tax on that ground.

17. I have perused the impugned order and the counter affidavit of the Respondent MCD carefully. It is not the case of MCD that the building even though without Occupancy Certificate has been occupied.

18. That being the position, there is no option but to strike down the order impugned in the present writ petition and to hold that the property is not liable for property tax till Occupancy Certificate with respect thereto is issued or till it is factually occupied.

19. The writ petition is therefore allowed. The Rule is made absolute. However no order as to costs.