
(1991) 04 BOM CK 0076

In the Bombay High Court

Case No : Appeal 446 of 1987 in Miscellaneous Petition No. 1177 of 1977

State of Maharashtra and another

APPELLANT

Vs

Suleman Haji Qasam and others

RESPONDENT

Date of Decision : 20-04-1991

Acts Referred:

Bombay Buildings Repairs and Reconstruction Board Act, 1969 — Section 28(1)(h)
Bombay Municipal Corporation Act, 1888 — Section 156, 160

Citation : (1991) MhLj 1099

Hon'ble Judges : Sujata Manohar, J;I. G. Shah, J

Bench : Division Bench

Advocate : C. U. Bora, for the Appellant; Y. T. John N. U. Matai, for the Respondent

Final Decision : Allowed

Judgement

Mrs. Sujata Manohar, J.—The original petitioners are the owners of the property situated at 6, Club Road bearing New Survey No. Part of 3527 Cadestral Survey No. 1620 West of Agripada Estate, Byculla, Bombay-400 008. The petitioners had constructed on this plot a building consisting of ground and first floor prior to 1940. The ground floor of the building was and continues to be in the use and occupation of the petitioners exclusively as the owners of the said property. In the year 1972 after obtaining permission from the Bombay Municipal Corporation (original respondent No. 2), the first floor of the original building was demolished. As a result, upto 1st June 1972 the building consisted only of the ground floor which was exclusively in the occupation of the owners. After 1st June 1972 the petitioners constructed four additional floors on the said building by strengthening the building. This was done by putting up cement concrete pillars to support the additional construction which was put up.

2. The question which is posed before us relates to the levy of repair cess on this building under the provisions of the Bombay Building Repairs and Reconstruction Board Act, 1969 for the period 1st April 1972 to 31st March 1975. The

respondents, i.e. the State of Maharashtra and the Bombay Municipal Corporation, have, from time to time, submitted their bills for payment of the repair cess. The respondents have treated the building as exempt from repair cess upto 1st June 1972 on the basis that the building was entirely occupied by the owner upto 1st June 1972. However 1st June 1972 upto 31st March 1975, the respondents have classified the ground floor of the building which was constructed prior to 1940 as falling under Category "A" for the purposes of repair cess and have classified the four additional floors under Category "C" for the purposes of repair cess. Accordingly, the bills for repair cess have been served on the petitioners as per particulars set out in the statement of repair cess outstanding at page 21 of the Petition. The total amount payable by the petitioners to the respondents is Rs. 10,623.31 p. The petitioners have challenged the levy of repair cess under the Bombay Building Repairs and Reconstruction Board Act, 1969. The petitioners submit that no repair cess is leviable in respect of their building as the building is exempt from repair cess under the provisions of section 28(1)(h) as also section 28(1)(1) of the said Act.

3. The Petition came up for hearing before a learned Single Judge of this Court on 11th February 1986. It was pointed out to the learned Judge that the decision of S. K. Desai, J. dated 23rd November 1978 in Misc. Petition No. 747 of 1972 was directly applicable to this Petition. This position was accepted by the learned advocate appearing for the respondents. Relying upon this judgment of S. K. Desai, J. the learned Single Judge made the Petition absolute in terms of prayers (a) and (b).

4. On the date when the present Writ Petition was decided, an appeal from the judgment of S. K. Desai, J. was pending before the Appeal Court.

The respondents have filed the present appeal against the judgment of the learned Single Judge, which was admitted by the Appeal Court on 1st April 1987. Subsequently, however, on 9th June 1987 the appeal which had been filed against the judgment of S. K. Desai, J. was dismissed for default.

5. It is contended by the original petitioners that since the appeal against the judgment of S. K. Desai, J. is dismissed, the present appeal must also be dismissed. We cannot accept this submission because the appeal against the judgment of S. K. Desai, J. has not been dismissed on merits but only on account of default. The present appeal was admitted, presumably because an appeal against the judgment of S. K. Desai, J. had also been admitted. Therefore, dismissal of one appeal for default cannot automatically result in the dismissal of the other appeal. We are, therefore, proceeding to consider the present appeal on merit.

6. In order to consider whether the building of the petitioners for the period 1st April 1972 to 31st March 1975 was exempt from the levy of repair cess under the provisions of The Bombay Building Repairs and Reconstruction Board Act, 1969, it is necessary to consider a few provisions of the said Act which were applicable

at the relevant time. u/s 2(c) of the said Act, a "building" is extensively defined as follows:

"2(c). "Building" includes a tenement let or intended to be let or occupied separately and a house, outhouse, stable, shed, hut and every other such structure, but does not include any such building or structure which as a whole, is unauthorised or any building which is a temporary building as defined in clause (sb) of section 3 of the Bombay Municipal Corporation Act."

Under section 27(1) of the said Act, it is provided as follows:

"27(1). For the purposes of this Act, but subject to the provisions of the next succeeding section, there shall be levied and paid to the State Government, from such date as may be appointed by the State Government by notification in the Official Gazette, a tax on buildings and lands, called the Bombay Building Repairs and Reconstruction Cess, at the rate of so many per centum of the rateable value of the concerned property or part thereof as is prescribed therefor under First Schedule to this Act."

The levy of repair cess is, therefore, as prescribed in section 27. Section 27, however, states that the levy of repair cess is subject to the provisions of section 28. Section 28 grants exemption to certain buildings and lands from payment of repair cess. We are here concerned with section 28(1)(h) and section 28(1)(1) as well as the explanation thereto. The material parts of section 28 are as follows:

""28(1). The following buildings and lands shall be exempt from payment of the cess, that is to say,-

(a).....

(b).....

(c).....

(d).....

(e).....

(f).....

(g).....

(h) buildings exclusively in occupation of the owner;

(i).....

(j).....

(k).....

(1) buildings which may be erected after the date on which this Act comes into force in the area in which they are erected;

Explanation - In this section "building" means building as a whole, and not any part thereof or premises therein "taken separately,

Under section 29 of the" said Act, for the purpose of assessing the amount of cess leviable under this Act, the Municipal Commissioner is required to make certain entries in the assessment book maintained by the Bombay Municipal Corporation under the Bombay Municipal Corporation Act. 1888. Section 29(1) reads as under:-

"29(1). For the purpose of assessing the amount of cess leviable under this Act, the Commissioner shall, in a Schedule appended to the assessment book maintained by him u/s 156 of the Bombay Municipal Corporation Act (which shall be deemed to be a part of such assessment book) cause additional entries to be made showing the Category to which every property on which the cess is leviable belongs and such other particulars as he deems necessary. Where the building comprised in any property was erected between the period from the 1st day of September 1940. the property shall be classified as belonging to Category A. Where the building comprised in any property was erected between the period from the 1st day of September 1940 to the 31st day of December 1950 (both inclusive), the property shall be classified as belonging to Category B. where the building comprised in any property was erected between the period from the 1st day of January 1951 to the day immediately preceding the date on which the provisions of this Act are brought into force in the area in which the building is situated, the property shall be classified as belonging to Category C. Where a floor or any part of a building is constructed consequently, the date of construction, area and other description of such floor or part shall be shown separately."

7. The assessment book is required to be maintained under sections 156 to 160 of the Bombay Municipal Corporation Act. These sections set out what is required to be entered in the assessment book. It has to contain, inter alia, a list of all buildings and lands in Greater Bombay distinguishing each either by name or number and the rateable value of each such building and land determined in accordance with section 154 of the Bombay Municipal Corporation Act. u/s 29(1) of the Bombay Building Repairs and Reconstruction Board Act, 1969, where any floor or any part of the building is constructed at a subsequent date, the date of construction, area and other description of such floor or part is required to be shown separately in the assessment book and these additional entries have to be made by following the procedure as laid down in section 29(2). Sub-section (3) of section 29 further provides that for the purposes of following the procedure under sub-section (2) of section 29. for the words "the Commissioner", the words "the Commissioner in consultation with an Engineer of the Corporation and an Engineer of the Board established under the Bombay Building Repairs and Reconstruction Board Act, 1969" shall be deemed to be substituted. Clearly, therefore, the provisions in section 29(1) for showing any subsequent construction separately is for the purpose of assessing the amount of cess

leviable on it under this Act.

8. Section 27 of the said Act provides that the rate of cess is as prescribed under the First Schedule to the said Act. Under the First Schedule separate rates of repair cess are provided, inter alia, for buildings belonging to Category A, Category B and Category C. The amount of repair cess which is prescribed is on the basis of a percentage of the rateable value of the property as determined under the Bombay Municipal Corporation Act.

9. It is pointed out by learned Counsel appearing for the Bombay Municipal Corporation that in respect of subsequent construction which is separately recorded in the assessment book as per section 29, separate rateable value is shown in the assessment book.

10. In the present case, a repair cess u/s 27 is leviable on the building for the said period unless the building can be considered as exempt from payment of repair cess u/s 28. u/s 28(1)(h), a building exclusively in the occupation of the owner is exempt from repair cess. For applying section 28, the explanation to section 28 has to be taken into account. It gives a special definition of "building" for the purpose of granting exemption u/s 28. The explanation says that for the purpose of section 28, "building" means building as a whole and not any part of it or any premises in it taken separately. In other words, while the general definition of "building" u/s 2(c) includes a tenement let or intended to be let separately, this wider definition u/s 2(c) is not to be applied to section 28. Section 28(1)(h) would, therefore, apply to a case where the entire building, including tenements therein, is exclusively in the occupation of the owner. In the present case, from 1st April 1972 upto 1st June 1972, the building consisted only of the ground floor which was exclusively in the occupation of the owner. Upto 1st June 1972, therefore, the building was eligible for exemption u/s 28(1)(h); and in fact this exemption has been granted to the building as then in existence by the respondents. From 1st June 1972, however, this building had other tenements which were not exclusively in the occupation of the owner. The new floors, which have been constructed, have been let out to third parties. The exemption u/s 28(1)(h), therefore, ceased to apply to the building from 1st June 1972.

11. It is contended by learned counsel appearing on behalf of the petitioners that the ground floor continued to be occupied exclusively by the owner and hence the ground floor must be treated as exempt from repair cess in view of section 28(1)(h). This submission ignores the explanation to section 28 which clearly provides that for being eligible for exemption u/s 28(1)(h), we have to take the building as a whole and not only one tenement in that building. Since the ground floor ceased to constitute the entire building from 1st June 1972, the exemption u/s 28(1)(h) was not available after 1st June 1972.

12. u/s 28(1)(1) buildings which are erected after the date on which the said Act comes into force are also exempt. The Act came into force on 1st October 1969.

The petitioners, therefore, contend that the four floors which have been constructed after 1st October 1969 are exempt from the payment of cess u/s 28(I)(1). Once again this submission ignores the explanation to section 28, For claiming exemption u/s 28(1)(1) the building as a whole must be erected after 1st October 1969 and not any part of the building or tenements in the building. Since the building in the present case is not erected after 1st October 1969, this exemption is also not available to the present building. The general definition of a building u/s 2(c) is not available for claiming exemption u/s 28.

13. As a result, a repair cess is leviable in respect of this building u/s 27 read with section 29 of the said Act.

14. The next question we have to consider is regarding the rate at which the repair cess can be levied. As we have set out earlier, in the assessment book maintained u/s 29(1) read with the relevant provisions of the Bombay Municipal Corporation Act, a separate entry is made in respect of any part of the building constructed subsequently. The 2nd respondents have stated that in their assessment book they show separately the rateable value in respect of such separate entry. In the case of this building, therefore, a separate rateable value is shown in the assessment book in respect of the ground floor which was constructed prior to 1940 and in respect of four floors which were constructed after 1st October 1969. These floors have been constructed sometime between 1 st June 1972 and 21 st January 1973. On the basis of the rateable value, repair cess has to be calculated as per section 29(1) read with First Schedule to the said Act. In respect of the ground floor which is in existence prior to 1940, section 29(1) provides that it being property erected before 1 st September 1940, it shall be classified as belonging to Category A. Under First Schedule to the said Act, for a building belonging to Category A, the repair cess is levied at the rate of 34% of the rateable value of the property. Hence repair cess at this rate is leviable in respect of the ground floor of the said building.

15. In respect, however, of the four floors which have been constructed after 1st October 1969, the provisions of section 29(1) or the First Schedule have no application. If one looks at section 29(1), it deals with only three Categories of buildings, viz. (i) buildings including tenements constructed prior to 1 st September 1940, (ii) buildings including tenements constructed between 1st September 1940 and 31st December 1950, and (iii) buildings including tenements constructed between 1st January 1951 and 1st October 1969, i.e. the date on which the said Act came into force. Similarly, the First Schedule which prescribes rates of cess, deals only with these three classes of buildings and also buildings structurally repaired. There is no provision under this Act for taxing a building or tenement constructed after 1st October 1969. At least none has been pointed out to us. Hence the four floors which have been constructed after 1st October 1969, do not fall under any of the Categories of property on which the repair cess is levied u/s 27 read with section 29 and First Schedule to the said Act. The respondents have classified these floors as belonging to Category C.

One has only to look at section 29(1) to arrive at the conclusion that such categorisation is erroneous. Buildings under Category C are only those erected between 1st January 1951 and 1st October 1969. These floors have been constructed subsequently. In respect of these four floors, therefore, it is not possible to levy any repair cess under the provisions of the said Act.

16. S. K. Desai, J. had held, in the case of a building like the present one, i.e. partly constructed after 1st October 1969, that the entire building would be exempt from repair cess. He came to this conclusion because he held that such a building would not fall under any of the Categories A, B, or C u/s 29(1). Hence the rates of cess under the First Schedule would also not be applicable. With respect to the learned Judge, he seems to have applied the special definition of "building" u/s 28 to section 29 also.

17. For this purpose, S. K. Desai, J. has, in the course of his judgment, made an extensive reference to the provisions of the Maharashtra Housing and Area Development Act, 1976 which subsequently replaced the Bombay Building Repairs and Reconstruction Board Act, 1969. He has done this for the purpose of interpreting the provisions of the Bombay Building Repairs and Reconstruction Board Act, 1969. to mean that if a building has floors or premises constructed after 1 st October 1969, the entire building is exempt from payment of repair cess. We respectfully disagree. The provisions of the Bombay Building Repairs and Reconstruction Board Act are clear. Section 28 of the said Act clearly provides a special definition of "building" which is applicable to section 28 and which clearly excludes the general definition of "building" u/s 2(c) of the said Act. We have, therefore, not considered it necessary to refer to the Maharashtra Housing and Area Development Act, 1976. There is also no ambiguity in section 29 if one bears in mind that section 29 is governed by the general definition of "building" u/s 2(c) and not the special definition of "building" which is only for the purpose of granting exemption u/s 28. Since there is no ambiguity in sections 27, 28 and 29, the question of granting the benefit of a more liberal construction in favour of the assessee-tax payer does not arise. We respectfully agree with S. K. Desai, J. that where there is ambiguity in any taxing statute, the benefit must go to the assessee. In the present case, there is no such ambiguity.

18. It is important to bear in mind that the explanation to section 28 has no application either to section 27 or to section 29. These two sections are governed by the general definition of "building" u/s 2(c). Hence it is permissible to determine rateable value of a tenement separately and put it in a separate Category u/s 29(1) because a tenement separately occupied is a "building" within the meaning of that term u/s 2(c).

19. As a result, the repair cess on the said building of the petitioners has to be calculated on the rateable value as determined in respect of the ground floor which falls under Category A. Any additional repair cess levied is without the authority of law. We make it clear that had the additional construction come into existence prior to Ist October 1969. repair cess under the said Act would have

been leviable in accordance with section 29 read with First Schedule in respect of such additional construction.

20. The appeal is, therefore, partly allowed. The respondents are directed to calculate afresh the repair cess in respect of the said building for the period 1st April 1972 to 31st March 1975 in the light of our above decision. In the circumstances, there will be no order as to costs.