

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10229 OF 2013

Fleet Fastners Private Limited & anr. .. Petitioners
VS.
Municipal Corporation of Greater Mumbai .. Respondents

Mr. Ashish Kamat a/w. Mr. Vishal Kanade i/b Kanga & Co. for the
Petitioners.

Mr. S.S. Pakale a/w. Ms Pallavi Thakar for Respondent -BMC.

CORAM : M. S. SONAK, J.
DATE : 13 FEBRUARY , 2015

ORAL JUDGMENT :-

1] The challenge in this petition is to the following two orders:

(a) The order dated 13 July 2011 made by the Corporation fixing rateable value at Rs.11,94,935 NPA with effect from 1 April 2008 in respect of the petitioners' property;

(b) The order dated 11 May 2012 made by the Small Causes Court at Bombay (Appellate Authority) imposing the condition upon the petitioners to pay the entire amount of property taxes, for the purposes of lifting the attachment of petitioners property. This order has been made in the appeal instituted by the petitioners impugning the order dated 13 July 2011 made by the Corporation.

2] There is no dispute that the petitioners have instituted an appeal under Section 217 of the Mumbai Municipal Corporation Act,

1888 (said Act) against the order dated 13 July 2011 made by the Corporation determining the rateable value and demanding taxes based thereupon. Section 217 of the said Act, *inter alia*, provides that no appeal shall be entertained by the Appellate Authority unless the amount of disputed tax claimed the appellant, or the amount of tax chargeable on the basis of the disputable rateable value upto the date of filing of the appeal, has been deposited by the appellant with the Commissioner and such appeal is accompanied by a receipt of the full amount of tax to which the appeal relates. Sub-section (2A) of the Section 217 of the said Act provides that whereas the appeal is not filed in accordance with the provisions of clauses (a) to (d) of sub-section (2), it shall be liable to be summarily dismissed. It is sub-clause (d) of sub-section (2) which provides for pre-deposit as to entertainment of appeal under Section 217 of the said Act.

3] In the present case, although the appeal was instituted by the petitioners some time in August 2011, till date, the petitioners have not deposited the tax or tax chargeable on the basis of disputable rateable value. It is the case of the petitioners that such pre-deposit would apply only at the stage of entertainment of the appeal and therefore in the meanwhile, the petitioners are entitled

to agitate issues of interim reliefs with regard to the lifting of attachment, even without making a pre-deposit which is mandated by the provisions of section 217(2) of the said Act. Perhaps on basis of such contentions, which have been assiduously pursued, the petitioners have managed to stall the recovery of tax chargeable till date.

4] Ultimately, the Corporation issued orders of attachment of the petitioners' property, for the purposes of recovery of arrears of taxes. At that stage, the petitioners applied to the Appellate Authority in the appeal which is even yet to be numbered for grant of interim reliefs. By the order dated 11 May 2012, the Appellate Authority has in fact granted interim relief, subject however to the condition that the petitioners' deposit the entire arrears of tax with the Corporation.

5] It is at this stage, that the present petition has been instituted. The submission in the present petition is that the very order dated 13 July 2011 determining the rateable value and which is the basis for demand of tax, is without jurisdiction and in such a situation there is no bar to this Court entertaining a writ petition, despite the fact that the petitioners have already instituted an appeal to

question the order dated 13 July 2011. Reliance was placed upon the decision of this Court in case of *Rialto Cooperative Housing Society Ltd. Vs. Municipal Corporation of Greater Bombay & ors.*¹ to submit that the petition was entertained despite appeal having been instituted, particularly as this Court found that the assessment and demand of taxes was totally contrary to the principles laid down by the Supreme Court in case of *The Municipal Corporation of Greater Bombay vs. M/s. Polychem Ltd.*² It was also contended that the rateable value, in the present case has been fixed by reference to Ready Reckoner under the Stamp Act, which is again contrary to the number of decisions of the Apex Court in such matters. Reference was also made to the decision of the Apex Court in case of *Government of Andhra Pradesh & ors. Vs. P. Laxmidevi (Smt.)*³, to submit that in a situation where the demand for tax or duty is exorbitant and excessive, a party can always approach the High Court to set aside the same, without having to exhaust normal channels of appeal, which invariably require a pre-deposit of duty or taxes demanded. For all these reasons, it was submitted that the present petition be entertained and the impugned orders be interfered with.

1 1998(1) Bom.C.R.397

2 AIR 1974 SC 1779

3 (2008) 4 SCC 720

6] Mr. Pakale, learned counsel for the respondent-Corporation, submitted that a similar circumstance was considered by the Division Bench of this Court in case *Naman Developers Pvt. Ltd. and anr. vs. Municipal Corporation of Greater Bombay & ors.*⁴, and the parties therein were relegated to the alternate remedy by way of appeal. Mr. Pakale, further pointed out that there is no error going to the root of the jurisdiction insofar as the impugned order dated 13 July 2011 is concerned. In such circumstances, Mr. Pakhale urged that this Court ought not to interfere with the impugned orders.

7] Having heard the learned counsel for the parties and perused the record, in my judgment, this petition is nothing but an abuse of the process of Court and therefore, the same deserves to be dismissed.

8] In case of *Rialto Cooperative Housing Society (supra)*, the Corporation was insisting upon determining rateable value on the basis that the land in-question was under construction. This Court found that such approach on the part of the Corporation, in the facts and circumstances of the said case was totally contrary to the principles laid down by the Supreme Court in *Polychem Ltd.*

4 2002(6) Bom.C.R.561

(*supra*). This Court noted that in the said case, the issue whether the land under construction can be treated as vacant or not, was not even a disputed question of fact. It is under these circumstances, that the petition was entertained notwithstanding the pendency of appeal.

9] In the subsequent decision of the Division Bench in the case of *Naman Developers (supra)*, the decision in case of *Rialto Cooperative Housing Society (supra)* was explained and clarified. In case of *Naman Developers (supra)*, the Corporation had specifically determined the rateable value on the basis that it was vacant land. The dispute really was whether the valuation was correct and consequently the rateable value was appropriately determined. In such circumstances, the Division Bench explained that the parties could not directly approach this Court, but rather could avail of alternate remedy by way of institution of appeal under Section 217 of the said Act. The relevant observations are contained in paragraphs 8 and 9, which reads thus:

8.We endeavoured to find out whether the orders passed by the Assessor and Collector impugned herein are without jurisdiction as was sought to be contended by relying on the judgement of the Apex Court in *Polychem* which must be corrected in writ jurisdiction. We hold that contention of the petitioners cannot be accepted as the land which is being built upon has been assessed as vacant land though at much higher

rate than the land which is not being improved upon. Legality, correctness or otherwise justification of the high rateable value fixed for land under construction as vacant land than the remaining land simpliciter has to be questioned by the aggrieved party in a statutory appeal provided under Section 217 of MMC Act, 1888 which is in the nature of original proceedings. Since, according to us, the petitioners have adequate and efficient statutory remedy in challenging the fixation of rateable value of land under construction, we need not go into the matter further and the petitioners, if so advised, may challenge fixation of rateable value in the statutory appeal.

9. *Before we close, we may deal with Rialto decided by one of us (R.M. Lodha,J.). In Rialto, the question was whether it was open to the Assessor to assess land under construction as not vacant plot of land. The stand of Assessing Officer was that land under construction cannot be treated as vacant plot of land. The stand of Assessor being contrary to the judgment of the Apex Court in Polychem, the writ petition was entertained and allowed though appeal against the impugned assessment was pending. Once the Apex Court had ruled that land under construction has to be treated as vacant land, obviously, the Assessing Officer had no jurisdiction to hold otherwise and treat land under construction not as vacant plot of land. The action of Assessing Officer in Rialto was ex facie without jurisdiction and, therefore, this Court was satisfied to invoke extraordinary jurisdiction under Article 226 of the Constitution of India. In this group of petitions before us, the Assessing Officer has valued land under construction for the purposes of rating, as vacant land only which is in conformity with the law laid down by Apex Court in Polychem, though at a much higher rate which may or may not have been justified at that rate but the order of the Assessing Officer cannot be said to be without jurisdiction.*

(emphasis supplied)

10] In the present case, if the impugned order dated 13 July 2011 is perused, then the petitioners' property had been assessed as vacant land and not as the land under construction. Therefore, at

least *prima facie* it cannot be said that there is any breach of the principle laid down by the Apex Court in case of *Polychem (supra)*. In such circumstances, it cannot be held that the impugned order dated 13 July 2011 is one without jurisdiction and therefore a petition against the same under Articles 226 and 227 of the Constitution of India should be entertained, notwithstanding institution of appeal by the petitioners, against the same.

11] The order dated 11 May 2012, perhaps without going into the question as to whether the appeal instituted by the petitioners in the year 2012 without compliance of requirement of pre-deposit is maintainable or not, has in fact, granted interim reliefs in favour of the petitioners, subject ofcourse to the deposit of entire amount of arrears. Obviously, such order cannot be said to be without jurisdiction, at least by the petitioners to this petition. Such order is neither unreasonable nor perverse. In fact, to a certain extent, the Appellate Authority had indulged the petitioners.

12] The petitioners, on the basis of institution of the appeal in August 2011, have, till date managed to stall the recovery of arrears of taxes and other dues. The *modus operandi* appears to be that once such appeal is instituted without complying with the conditions

of pre-deposit, the same is kept pending, until the Corporation actually moves to recover the arrears of taxes. Once coercive proceedings are taken for demand of arrears, the application is made for interim reliefs. Thereafter, the application for interim relief is perused, on some basis that the requirement of pre-deposit is to be complied with only at the stage of entertainment of the appeal and not at the stage of consideration of motion for interim relief. Pending the consideration of motion for interim relief, either some ad-interim relief is obtained or some statement is wriggled out to the effect that no coercive proceedings would be proceeded with. Once motion for interim relief is declined or granted conditional upon deposit, the matter is carried to this Court challenging not merely the order on interim reliefs, but also the original order which is subject matter of appeal, *inter alia* on the ground that the same is without jurisdiction. Considerable time is taken before this Court in pursuing the petition. All this while, there is neither any offer to or deposit of the arrears of taxes, notwithstanding, the provisions contained in Section 217 of said Act. Such *modus operandi* is clearly intended to frustrate the provisions of Section 217 of said Act to stall the recovery of arrears of taxes or at least protract the same without any just cause. The petitioners, in adopting such a *modus operandi* in the present case, have abused the process of Court. If

the petitioners were indeed serious about their contention that the Corporation's order dated 13 July 2011 was without jurisdiction or in the teeth of the decision of the Apex Court in case of *Polychem (supra)*, then nothing prevented the petitioners from approaching this Court at earliest instance. As against, the order dated 13 July 2011, the petitioners instituted an appeal in August 2011 and the present petition came to be filed some time in August 2012. As noted earlier, at least *prima-facie* , the contentions based upon the decision of the Apex Court in case of *Polychem (supra)*, is misconceived. The impugned order dated 13 July 2011 itself states that the petitioners property had been assessed as vacant land and not as land under construction. Further, notwithstanding the decision of the Division Bench of this Court in case of *Naman Developers (supra)*, clarifying and explaining the decision of learned Single Judge in case of *Rialto Cooperative Housing Society (supra)*, reliance was placed upon *Rialto Cooperative Housing Society (supra)* without adverting to the decision in case of *Naman Developers (supra)*.

13] In the context of imposition of condition of deposit of disputed tax for entertaining and hearing the appeal under Section 217 of the said Act, this Court in case of *Dena Bank Vs. Municipal*

*Corporation of Greater Bombay*⁵ has observed that such a provision is neither onerous, excessive nor arbitrary, rather the same is in public interest. It is held that the appeal is a right created by Statute and the Statute can be regulate and control the exercise of that right. Payment of the amount of tax till the date of institution and filing of the appeal and the taxes which are due and payable during the pendency of the appeal have to be secured or else, the Corporation stands to lose by way of property tax, merely because legal proceedings are pending challenging the valuation and the assessment of the same. This would not be in public interest and that is the reason why such provisions have been made in Section 217 of the said Act. In the present case, however, the petitioners have successfully stalled the recovery of such arrears and the institution of this petition is yet another attempt in the same direction.

14] The petitioners are undoubtedly entitled to have their case entertained and heard by the Appellate Authority. However, the same has to be in accordance with the conditions imposed under Section 217 of the said Act. In the present case, the petitioners have not been able to establish that the impugned orders dated 13 July 2011 is without jurisdiction and that the circumstances warrant

5 2011(5) Mh.L.J.823

the entertainment of this petition directly. The authorities relied upon by the learned counsel for the petitioner only suggest that the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India is not ousted, merely because there may be an alternate or efficacious remedy available. That by itself is not sufficient. It is for the petitioners to make out the case that notwithstanding such alternate remedy, this Court ought to exercise its jurisdiction under Articles 226 and 227 of the Constitution of India even during pendency of statutory appeal. At least in this case, the petitioners have miserably failed to make out a case of such nature. It is apparent that the very institution of this petition was for the purpose of stalling the recovery of arrears pending the appeal before the Appellate Authority. It is for this reason that the present proceedings can be construed as an abuse of the process of this Court. Accordingly, the present petition is dismissed. The petitioners shall pay costs, which are assessed at Rs.50,000/- (Rs.Fifty Thousand) to the respondent-Corporation within a period of four weeks from today.

(M. S. SONAK, J.)