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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on :08.09.2016

Judgment delivered on :22.09.2016

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W.P.(C) 3897/2006

SANCHAR VIHAR COOPERATIVE GROUP HOUSING SOCIETY

..... Petitioner

Through Mr.Bharat Bhushan Jain, Adv

versus

M.C.D

..... Respondent

Through Ms.Amita Gupta, Advocate for MCD.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The petitioner before this Court has impugned the assessment order dated 05.12.2003; submission is that this assessment order was predicated on a notice dated 01.04.2002 issued under Section 126 of the Delhi Municipal Corporation Act, 1975 (hereinafter referred to as the 'said Act'); this notice was never received by the petitioner; the subsequent assessment order passed ex-parte without notice to the petitioner on 05.12.2003 assessing his property i.e. (plot No. 5, Sector-4, Dwarka, New Delhi) is bad and thus liable to be set aside.

2 The averments in the writ petition disclose that the petitioner (Sanchar

Vihar Cooperative Group Housing Society Ltd., plot No.5, Sector-4, Dwarka) is a cooperative society registered under the Delhi Cooperative Societies Act. Property tax can be levied by the respondent Corporation (Municipal Corporation of Delhi) on land and building as the case may be. The fixation of the rateable value of the property has to be done in terms of Section 116 of the said Act. As per Section 120 of the said act, property tax is leviable either upon the lessor or superior lessor or the person to whom the right to let the property vests. Submission is that the perusal of this section shows that the lessor of the land i.e. the President of India is liable for payment of property tax. Attention has been drawn to a lease deed executed between the petitioner and the President of India dated 05.10.2001. It is pointed out that this is admittedly a registered document executed by the President of India for a period of 99 years in favour of the petitioner and in terms of the various clauses in this lease deed which includes the covenant that the lessee (petitioner) will not be entitled to transfer directly or indirectly, assign or otherwise part with his right in respect of the plot or building meaning thereby that the petitioner never had any right or authority to transfer this land to any other person; the ownership rights vested completely in the superior lessor (President of India) and as such the liability

to pay the property tax was only qua the superior lessor and not the lessee i.e. the petitioner. Additional submission being that in the instant case the building plan of the aforementioned land was sanctioned by the DDA on 04.09.2002; construction had commenced on 06.09.2002 but occupancy certificate was applied for only on 02.09.2005; the same had not been granted till the filing of the writ petition. Thus it was only a 'vacant land' and therefore the property had to be assessed as a vacant land which assessment should have been done by the DDA and not by the Corporation. Learned counsel for the petitioner has placed reliance upon a judgment of the Bench of this Court reported as 176 (2011) DLT 192 South Delhi Maternity & Nursing Home (P) Ltd. Vs. MCD. This is to support his submission that where the Occupancy Certificate has not been granted and even if the delay in obtaining the Occupancy Certificate is on the owner, as long as the owner has not occupied the property; the property cannot be made liable for property tax. Learned counsel for the petitioner additionally points out that the judgment of a Full Bench of this Court reported as 100 (2002) Delhi Law Times 66 (FB) Municipal Corporation of Delhi Vs. Shashank Steel Industries (P) Ltd. is fully applicable to this case and for this proposition, he has placed reliance upon various paragraphs of the aforementioned judgment.

Moreover, notice under Section 126 of the said Act was also not received by the petitioner. The attachment order is bad for all the aforementioned reasons. Written submissions filed by the petitioner are also bordered on these averments.

3 A counter affidavit has been filed by the respondent. It is pointed out that the assessment order dated 05.12.2003 has attained a finality; the writ petition has been filed on 10.03.2006 which is much beyond the period of limitation; it cannot be challenged. The petitioner had an alternate remedy of filing of statutory appeal; a writ is not maintainable. On this ground alone, the petition is liable to be dismissed. The second submission which is also borne out from the stand in the counter affidavit is that the provisions of Section 120 of the said Act are inapplicable. Attention has been drawn to the lease deed executed between the parties. It is pointed out that in terms of clause 9 of the said lease deed the liability to pay rates and tax was upon the petitioner. It is stated that the assessment has been made in terms of the provisions of the Act; notice was duly served upon the petitioner; the petitioner is not entitled to any relief. Learned counsel for the respondent further submits that the aforementioned judgment of Shashank Steel Industries (supra) is not applicable; that was a case where there was an inter-se dispute

between the lessee and the sub-lessee; the question which had arisen before that Bench was as to whether lessee or the sub-lessee would be liable to pay the tax; the facts of the said case are distinct from the present case.

4 Arguments have been heard. Record has been perused.

5 Admittedly the assessment order dated 05.12.2003 has attained a finality. It had not been challenged as per law before the Appellate Body under the provisions of the said Act in which an appeal has to be filed within a statutory period of 30 days. This is an admitted position. However this Court notes that this writ petition is pending before this Court since the year 2006 and at this stage relegating the parties back to the appellate forum may not be in the interest of the either party. This Court thus intends to dispose off this petition on its merits.

6 The facts of the instant case as emanated from the writ petition disclose that this lease for the aforementioned property had been entered into between the petitioner and the President of India on 05.10.2001. Para 9 of the lease deed is relevant. It reads herein as under:-

“The Lessee shall from time to time and at all times pay and discharge all rates, taxes, charges and assessments of every description which are now or may at any time hereafter during the continuance of this lease be assessed, charged or imposed upon the plot hereby demised or on any

buildings to be erected thereupon or on the landlord or tenant in respect thereof.”

7 This Clause in the lease deed clearly and unambiguously states that the lessee shall from time to time and at all times pay all taxes, charges and assessments of every description which are made in the present or in the future till the continuation of this lease be assessed, charged or imposed upon the plot or any building to be erected thereupon. The language of this Clause stipulates that the liability to pay tax will be upon the lessee which in this case is the petitioner.

8 Section 120 of the said Act reads herein as under:-

“Incidence of property taxes-(1) The property taxes shall be primarily leviable as follows:—

- (a) if the land or building is let, upon the lessor;*
- (b) if the land or building is sub-let, upon the superior lessor;*
- (c) if the land or building is unlet, upon the person in whom the right to let the same vests:*

Provided that the property taxes in respect of land or building, being property of the Union, possession of which has been delivered in pursuance of section 20 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (44 of 1954), shall be primarily leviable upon the transferee.

(2) If any land has been let for a term exceeding one year to a tenant and such tenant has built upon the land, the property taxes assessed in respect of that land and the building erected thereon shall be primarily

leviable upon the said tenant, whether the land and building are in the occupation of such tenant or a sub-tenant of such tenant. Explanation.—The term "tenant" includes any person deriving title to the land or the building erected upon such land from the tenant whether by operation of law or by transfer inter vivos.

(3) The liability of the several owners of any building which is, or purports to be, severally owned in parts or flats or rooms, for payment of property taxes or any instalment thereof payable during the period of such ownership shall be joint and several.”

9 Section 120 (1) (c) presupposes that property tax on a land or building is leviable upon the person in whom the right to let the same vests. Sub Clause (2) stipulates that where the term of the lease exceeds one year and the tenant has built upon on this land, the property tax assessed shall primarily be leviable upon the tenant; whether the land or building is in occupation of the tenant or the sub-tenant.

10 Section 120 (2) thus makes it abundantly clear that where the lease exceeds one year and tenant has built upon the land the liability will be that of the lessee. The lease in the instant case is admittedly for 99 years. The building plan for this property was sanctioned on 06.09.2002. Construction was almost complete. This has been averred in the writ petition itself. The petitioner however for reasons best known to them moved a formal application for issuance of the Occupancy Certificate only on 01.09.2005.

The building was not occupied is the vehement submission of the petitioner.

11 The application seeking issuance of an Occupancy Certificate filed by the petitioner in September, 2005 was only a formality. The petitioner deliberately waited for more than three years to get the Occupancy Certificate issued. This is clear from the fact averred by the petitioner himself wherein he has stated that after the building plan was sanctioned on 06.09.2002 the building was almost completed at that point of time; that was in the year 2002 itself. Fault on the part of the petitioner in not applying for the Occupancy Certificate for the next three years cannot accrue to his benefit; his submission that this land continued to remain vacant land in this intervening period is a submission noted to be rejected; admittedly even as per the case of the petitioners the construction of the entire building had been completed in the year 2002 itself. The building having been almost completed in the year 2002 the obvious presumption would be otherwise; meaning thereby that the property was in occupation of the owner / allottee; having remained constructed three years prior to the application seeking issuance of the occupancy certificate. Petitioner has not been able to dispel this presumption.

12 The judgment of **South Delhi Maternity & Nursing Home (P) Ltd Vs.**

MCD & Others would not apply to the facts of the instant case. In that case there was a clear finding returned that the building remained unoccupied and as such the liability to pay the property tax did not arise. This has been considered by the Single Judge in para 7 of the said judgment wherein a specific query had been put on the status of the property and it was informed that the property was unoccupied. The corporation had acceded to this stand. Not so in the instant case. In this case the categorical stand of the Department / Corporation is that the property was occupied and thus liable to tax.

13 In a judgment of a Bench of this Court in W.P. (C) No.633/1980 *M/s Nehru Place Hotels Ltd. And Anr. Vs. M.C. D. and Anr.* it was held that once the lessee has taken possession of the property and he has entered into a lease deed with the covenant to bear the burden of tax, he cannot deny the liability to pay the taxes which was in accordance with the covenant of the lease. The liability of the person to pay the tax is clear.

14 Petitioner thus cannot shy away from its liability and deprive the Municipal Corporation of its legal dues. Section 120 (2) is attracted. The petitioner being a lessee of more than one year and having a built-up structure, the liability would be that of the petitioner who is the “tenant”

within the meaning of the afore noted provision.

15 The judgment of the Full Bench in Shashank Steel Industries (supra) is inapplicable to the facts of the instant case. As rightly pointed out by the learned counsel for the respondent this was a case where the question was as to whether the original lessee or the sub-lessee was entitled to pay the tax. The Court after noting the contentions and counter contentions of the respective parties had arrived at a conclusion that the liability would be upon the original lessee. In that case, the building plans had also not been sanctioned.

16 The judgment of a Bench of this Court in 1987 RLR 144 Municipal Corporation Vs. Peerless Gen. Fin. Cop. is also relevant and an extract of the same reads herein as under:-

“9. It is not as if the respondent would at no point of time become liable to pay the tax on the said land. The term of lease in favour of the respondent is for a period in excess of one year. As and when the conditions contained in Section 120(2) of the Act are satisfied, then the liability to pay the property tax would be that of the respondent not of the Government. Section 120(2) of the Act, inter alia, provides for the payment of property tax in respect of the land where the tenant has built a building. A reasonable

construction of the said provision would be that when the building plans are passed and the lessor of the tenant starts construction thereon, then the liability to pay the tax would arise on that date. It is to be noted that the Municipal fees and taxes are levied primarily in order to augment the resources of the Corporation and other local bodies who are required to provide Municipal services. Therefore, it is in consonance with that policy that, as and when the construction of a building on land commences, the liability to pay the property tax shifts to the tenant who would thereafter be enjoying the Municipal services which are offered by the Corporation”.

17. The submission of the petitioner that notice under section 126 of the DMC Act was not served upon the petitioner is also negated. This is clear from the fact that the notice was admittedly addressed to the petitioner at its correct address. The assessment order dated 05.12.2003 also records this address (i.e. Plot No. 15, Sector-4, Dwarka, New Delhi). The petitioner had received the attachment order dated 17.02.2006 at the same address.

18. The assessment order dated 05.12.2003 further records that apart from the notice under section 126 of the DMC Act (dated 26.03.2001), call letters were also sent to the assessee for a personal hearing on 10.03.2003 and 28.10.2003 but the petitioner chose not to appear. Petitioner conveniently

denied the receipt of all these communications but chose to state that the attachment order dated 17.02.2006 was served upon him. The address in all these communications was the same. Further averments in the writ petition disclose that the call letter dated 04.07.2003 alleged to have been served upon the petitioner on 07.07.2003 bore a signature but the signature appeared to be illegible. Petitioner has also admitted this call letter dated 04.07.2003 had been served upon a person at the site but that signature is illegible. The notice under section 126 of the DMC Act was also pasted at the site. This has been clearly stated in the counter affidavit. No rejoinder has also been filed on this score. The counter affidavit further states that second call letter dated 13.10.2003 has also been served upon the petitioner through postal certificate. The second call letter has been sent by UPC. Presumption under section 114(f) of the Indian Evidence Act is also attracted; presumption being that this call letter was received by the petitioner. It was pursuant to this communication that the assessment order dated 05.12.2003 had been passed. This order was never challenged. It is also surprising that the earlier communications not having been received at the same address yet the attachment order dated 17.02.2006 was received. This was again at the same address. It is also not the case of the petitioner that his address has changed.

19. This convenient approach adopted by the petitioner of accepting one communication and not accepting the other cannot accrue to benefit him.

20. The petitioner has failed to dislodge the presumption that these call letters dated 04.07.2003 and 13.10.2003 or the notice under section 126 of the DMC Act dated 26.03.2003 were not received by them. The call letters dated 04.07.2003 and 13.10.2003 had been sent by two modes of service i.e. by hand and also under postal certificate. This has been clearly averred in the writ petition. At the cost of repetition there is no rejoinder on this score. The notice was also pasted at the site. The assessment order has also not been challenged. It is obvious that the attachment order being a coercive process was immediately reacted to and not the other communications.

21. This Court is of the view that in this background the petitioner does not deserve any relief. Petition is without any merit. Dismissed.

INDERMEET KAUR, J

SEPTEMBER 22nd, 2016/A