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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 7438/2015

AMBIENCE EDUCATION SOCIETY ..... Petitioner

Through Ms. Maninder Acharya, Sr. Adv with Ms Urmila Kar Purkayastha, Adv.

versus

SOUTH DELHI MUNICIPAL CORPORATION ..... Respondent

Through Mr.Sanjay Poddar, Sr. Adv. Ms. Mansi Gupta, Adv.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

<u>O R D E R</u>

% **26.09.2016**

By way of this petition, the petitioner is seeking a prayer qua respondent No.1/South Delhi Municipal Corporation to refund the additional FAR charges (Rs.3,65,54,800/-) along with interest at 12% from the date of the Notification i.e. Notification dated 17.07.2012.

Record shows that the petitioner (Ambience Education Society) is a society registered under the Societies Registration Act. It was allotted land on 14.03.1997 at Block-A, Safdarjung Residential Scheme, Safdarjung Enclave, Near Kamal Cinema, New Delhi. On 30.08.2010, the Delhi Government vide its letter of even date had granted additional FAR as per Control Norms of MPD-2021 in respect of land allotted to the petitioner for construction of a primary school. This was in terms of the notification dated 23.12.2008. These charges were accordingly paid on 05.07.2011 as it was a pre-condition to the grant of the additional FAR. This notification was subsequently modified by a subsequent Notification dated 17.07.2012. The subsequent modified Notification while modifying the earlier Notification (23.12.2008) set aside the extra FAR charges on educational societies, health care and social welfare societies having income tax exemption. Admittedly the petitioner falls in that category.

The present writ petition was filed on 30.07.2015. Contention is that this modified Notification (dated 17.07.2012) was the subject matter of a writ petition which was taken up in LPA No.107/2014 (pronounced on 30.04.2014) in the matter of *Delhi Development Authority and Anr Vs. Jagan Nath Memorial Educational Society*. The Court had held that the Notification dated 17.07.2012 has a retrospective effect and as such the persons in that LPA were entitled to the benefit of the modified Notification; the respondent Corporation had been directed to refund the extra FAR charges which had been deposited by them.

The present writ petition has been filed claiming parity on the same count.

In the course of the arguments, learned senior counsel for the respondent submits that the aforenoted judgment in *Jagan Nath Memorial Educational Society* (supra) would not be applicable to the facts of the instant case. Submission is that in this case the petitioner had without any demur and protest deposited the additional FAR charges, in terms of the letter of demand dated 30.08.2010. This writ petition having been preferred in 2015 i.e. after a gap of five years cannot take advantage of this judgment. The petitioner qualifies as a fence sitter; he not having availed of the remedy which was available to him in the year 2010 cannot, after such a long period, seek a refund of the amount. Learned senior counsel has placed reliance upon 2016 (231) DLT 641 *Prakash Singh Vs. Union of India and* Anr and the discussion made by the Division Bench therein relating to the decision in AIR 1959 SC 135 *STO Vs. Kanhaiya Lal Mukundlal Saraf* wherein the question arose as to whether a manufacturer can invoke Section 72 of the Contract Act and claim refund relying upon Section 17 (1)(c) of the Limitation Act within three years from the date of discovery of a mistake of law. He submits that the Division Bench had noted that the law laid down by the Apex Court in *Kanhaiya Lal Mukundlal Saraf* (supra) had clearly held that a mistake of law cannot be invoked by an assessee after a period of limitation and just because an order has enured in favour of another assessee and a similar point had been decided in favour of that person, it could not be applied to the assessee in the prevailing case. Reliance has also been placed upon W.P. (C) No.3821/2014 decided on 12.08.2014 *Rosa Power Supply Co. Ltd. Vs. Union of India & Others* to support the same submission; submission being that the claim of the petitioner is clearly time barred. The period of limitation has to commence from 30.08.2010 ie. the date when the money had been deposited by the petitioner and the same having been deposited without any protest, the writ petition filed five years later would not entitle the petitioner to claim a refund; submission being that in this judgment of *Rosa Power Supply Co. Ltd.*, the Court had noted that where the period of claiming refund of money in a suit had expired; applying the same analogy to a writ petition, the writ petition should also be treated as time barred.

Per contra, these arguments have been countered by the learned senior counsel for the petitioner. Submission is that neither the judgment in *Prakash Singh* and nor *Rosa Power Supply Co. Ltd.* would be applicable to the facts of the instant case. Additional submission being that the Court in the case of *Prakash Singh* was dealing with seniority of certain promotee officers. The judgment of *Kanhaiya Lal Mukundlal Saraf* related to a fiscal statute, facts of the instant case are distinct, here there is a policy of the Government which was admittedly modified; the Notification dated 23.12.2008 was modified on 17.07.2012 whereby the additional FAR charges were not applicable to educational societies and healthcare societies. The petitioner admittedly being an educational society was entitled to refund of its money. The judgment of Division Bench in LPA No.107/2014 on the same issue would be applicable to the facts of instant case.

Arguments have been heard. Record has been perused.

This Court is of the view that the judgment in LPA No.107/2014 would squarely cover the case of the petitioner. The judgment passed in LPA No.107/2014 on 30.04.2014 had for the first time held that the subsequent Notification dated 17.07.2012 would have a retrospective effect; it had noted that the first Notification dated 23.12.2008 (under which the petitioner had paid the extra FAR charges) was categorical to the effect that additional FAR charges would be applicable to all institutional plots including hospitals. It was when this Notification was prevailing that the petitioner as a pre-condition for the grant of his sanctioned plan had deposited the extra FAR charges which was on 05.07.2011 and not on 30.08.2010. The second Notification dated 17.07.2012 had modified this earlier Notification dated 23.12.2008 and while modifying it had noted that no additional FAR charges could be recovered from educational societies and healthcare societies. The fact that the petitioner is one such society is an admitted fact. At the cost of repetition, it was only on 30.04.2014 that the Division Bench of this Court had held that this Notification dated 17.07.2012 would have a retrospective effect. The Court had also noted that the petitioners before that Court are entitled to a parity. It had also noted its earlier judgment delivered on 20.07.2012 (qua the same Notification dated 17.07.2012) which had also granted relief to the petitioners there. Relevant extract of the judgment passed in LPA No.107/2014 reads herein as under:-

"We have already reasoned above that the decision of the Division Bench of this Court dated July 20, 2012, though not so expressly stating, meaningfully read, has treated the notification dated July 17, 2002 as retrospective and thus the respondent in LPA No.107/2014 and the writ petitioners in the three captioned writ petitions would be entitled to succeed on three distinct and independent reasons. Firstly, parity with the writ petitioners of the various writ petitions which were allowed on July 22, 2012, which decision was affirmed by the Supreme Court. Secondly, on the doctrine of fairness adopted by the Supreme Court in Indian Tobacco Associations case (supra) and Vijay"s case (supra). Thirdly that the notification dated July 17, 2012 has to be given a retrospective operation."

This Court is of the view that the present petitioner is also entitled to a parity. The doctrine of fairness as has been adopted by the Apex Court in its various judgments would be fully applicable to the case of the present petitioner. Most relevant fact which this Court notes is that in the aforenoted judgment (quoted supra) for the first time, the Court had given a retrospective operation to the Notification dated 17.7.2012. It had recorded that the earlier judgment passed on 20.07.2012 (dealing with the Notification dated 17.07.2012) had not expressly treated the Notification dated 17.07.2012 as having a retrospective effect although it may have impliedly held so.

This Court is in agreement with the submission of the learned senior counsel for the petitioner. The Notification dated 17.07.2012 having been given a retrospective effect vide judgment dated 30.04.2014, the limitation would commence from that period. The present writ petition has been filed on 30.07.2015.

In the alternate even if this argument of the learned counsel for the petitioner is rejected, the limitation at best would commence from the date when the modified Notification was promulgated which was admittedly on 17.07.2012. The writ petition filed just 10 days after the period of three years (counting from 17.07.2012) would again be within limitation as the strict period counted under the Limitation Act only serves as guideline for a writ Court to adhere to the law of limitation. Where the Court is satisfied that the litigant before it has been diligent in espousing his case and has not slept over it, the Court will not defeat his claim on the ground of delay. Even while noticing this principle as laid down in *Rosa Power Supply Co. Ltd.,* this Court is of the view that this writ petition filed (30.08.2015) just three years after 17.07.2012 (the date of Notification) cannot be thrown out on laches.

The judgment of *Kanhaiya Lal Mukundlal Saraf* would not apply to the instant case as admittedly this judgment related to refund of money which has been paid by an assessee under a fiscal statute. It was based on the proposition that where a duty has been collected under a particular order which has become final that refund of duty cannot be claimed as long as that order stands; a refund order passed in favour of one assesssee cannot be taken advantage of in its favour by another assesses.

In the instant case, what has been challenged is a Policy and thereafter a modified Policy. The benefit of the modified Policy and its retrospective application has already been given to all those litigants in terms of the judgment dated 20.07.2012 as also in LPA No.107/2014 decided on 30.04.2014. There is no reason as to why the present petitioner should stand on different footing. The petitioner has approached this Court forthwith. There appears to be no delay on his part.

The judgment dated 30.04.2014 passed in LPA No.107/2014 had for the first time held that this Notification dated 17.07.2012 would have a retrospective application. The present writ petition filed within one year and 4 months (from 30.04.2014) can in no manner be barred by delay. This is definitely not a case where the petitioner has not been cautious or slumbered over his right.

Petition is allowed. The petitioner is entitled to the refund of

Rs.3,65,54,800/- along with interest calculated at 12% per annum which be paid within eight weeks from today failing which the same shall be refunded back with further interest of 12% per annum from the said date.

INDERMEET KAUR, J

SEPTEMBER 26, 2016
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