IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

SECOND APPEAL (ST) NO.20384 OF 2017

Mahendrakumar Nathmal Lunkad,
Age: 74 years, Occu: Business,
R/o. Rajkamal Talkies, Jalgaon,
Taluka & District Jalgaon. ..Appellant.

V/s.

The Commissioner,
Jalgaon Municipal Corporation, Jalgaon ..Respondent.

Mr.A.B. Kale for the applicant.

CORAM: NITIN W.SAMBRE, J.

DATE : NOVEMBER 22, 2017

ORAL ORDER

Heard learned counsel for the applicant.

2. The appellant is the original-plaintiff in Regular Civil Suit No.55/2005 for declaration and permanent injunction, which was dismissed vide judgment and order dated April 26, 2013 by the IInd Joint Civil Judge, S.D., Jalgaon which was confirmed in Regular Civil Appeal No.150/2013 by the First Appellate Court by

judgment and order dated April 19, 2017. Hence this Second Appeal by the original Plaintiff.

3. The suit came to be filed for declaration and permanent injunction in the capacity of partners of a registered partnership firm who were running the theatre since last more than 60 years. The appellant claims that he has deposited property tax for the year 1998-99, 1999-2000 and 2000-2001. According to him, the demand made by the Corporation of consolidated property tax of Rs.1,61,697.25 on March 24, 2001 is illegal. According to him, the tax was not calculated as per Government circular dated September 16, 2000 and the notice sent was not replied. According to him, the tax was calculated at an exhorbitant rate.

4. The learned trial Court considered the pleadings of the respective parties and held that the Corporation has assessed the tax lawfully. The learned First Appellate Court after framing points for consideration, observed that the appellant-plaintiff has failed to prove that the assessment of the property tax was improper and wrong.

5. In the aforesaid backdrrop, Mr.Kale, the learned counsel for the appellant would urge that the issue is squarely covered by the Division Bench judgment of this Court in *Writ Petition No.5294 of 2010 [Rajkamal Talkies, Jalgaon and others V/s. The State of Maharashtra and others] decided on November 29, 2010*. According to him, in absence of compliance by the respondent-Corporation *qua* the provisions of section 149 of the Bombay Provisional Municipal Corporations Act, 1949 [for short hereinafter referred to as 'BPMC Act'], the demand against the appellant is not sustainable. According to him, an appropriate question of law needs to be framed based on the aforesaid submissions.

6. With the assistance of the learned counsel for the appellant, I have perused the judgment delivered by the learned trial Court wherein the issues were framed at Exhibit-134 which read thus :-

> "1. Whether the plaintiff proved that the defendant defendant-Corporation has made wrong/improper assessment of tax in respect of the disputed property, as alleged ?

2. Is the suit bad for non-issuance of prior notice under Section 487 of the B.P.M.C. Act ?
3. Is the suit maintainable ?
4. Whether suit is grossly & inadequately stamped ?
5. Whether this Court has jurisdiction to try this Suit ?
6. Is the plaintiff entitled for relief of declaration, as claimed ?
7. Is he entitled for reliefs of permanent injunction, as claimed ?
8. What order & decree ?

7. The learned trial judge then proceeded to evaulate the factual matrix based on the evidence of the plaintiff for demand of tax on CTS No.1852 and not CTS Nos.1853 and 1854, has proceeded to observe the appellant's case as reflected in his cross-examination that tax has to be applied as per the mode of seating arrangement. The Court below then proceeded to record a finding that the plaintiff has failed to discharge his burden by demonstrating that the tax was illegally levied.

8. Apart from above, earlier suit being Regular Civil Suit No.212/2001 for injunction came to be allowed which claim appears to have been also included in the suit in hand.

9. The right of the plaintiff as can be inferred from the provisions of the BPMC Act is, of filing an appeal under section 407 of the BPMC Act, if he was aggrieved by the demand. It is not the case of the appellant that he is not liable to pay taxes. What is claimed by him is, the calculation of tax is incorrect, which of-course, was rightly decided by both the Courts below. In my opinion, incorrect calculation of the tax by no stretch of imagination can be termed as question of law which needs to be gone into at this stage.

10. The first Appellate Court has re-appreciated the entire claim of the appellant and hence on facts observed that the plaintiff in his cross-examination has admitted the receipt of bills of property tax in the name of Bhikamchand Agarwal and Chunilal Agarwal. The plaintiff instead of carrying out appropriate mutation entry has tried to take undue advantage of his own wrong of not including their names in the record of rights and possession.

11. Apart from above, the judgment in the matter of *Rajkamal Talkies and others V/s. State of Maharashtraand others*

[Writ petition No.5294 of 2010] decided on November 29, 2010 deals with the provisions of section 149 of the BPMC Act *qua* the procedure to be followed in levying other taxes. It was never the case of the appellant before both the Courts below that the respondent-Corporation has no authority to levy taxes. What is claimed is, the tax was calculated incorrectly. The appellant rather admitted that he has already paid the taxes before filing of the suit for the year 1998-99, 1999-2000 and 2000-2001. Apart from above, the appellant has conceded the position, as observed in paragraph 24 by the learned trial Judge, that the issue raised in Writ Petition No.5294 of 2010 has no remote connection to the prayer in the present appeal.

12. That being so, this Court hardly notice any substantial question of law arises for consideration. The appeal as such fails and stands dismissed.

(NITIN W.SAMBRE, J.)

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