

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

Decided on: 18.01.2018

+ **W.P.(C) 4226/2017, C.M. APPL.39213/2017**

BAR COUNCIL OF INDIA

..... Petitioner

Through : Sh. B.B. Jain, Sh. Abhay Jain and Sh.
Amitabh Marwaha, Advocates.

versus

SOUTH DELHI MUNICIPAL CORPORATION & ORS

..... Respondents

Through : Ms. Madhu Tewatia, Advocate.
Sh. Gautam Narayan, ASC with Sh. R.A. Iyer,
Advocate, for Respondent No.2.
Ms. Abha Malhotra, Advocate, for Respondent
No.3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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Facts

1. The Petitioner, (hereafter "BCI") challenges the assessment order dated 01.03.2016 made by the first respondent i.e. South Delhi Municipal Corporation ("SDMC"), calculation sheet dated 02.03.2016 and notice u/s 154(1) of the Delhi Municipal Corporation Act, 1957 ("the Act") dated 26.05.2016 pertaining to the property of the petitioner used as its offices. BCI also challenges SDMC's communication dated 04.03.2017 addressed to it assessing its property at Use factor 4 (meant only for properties used

for commercial activity) and demanding that the entire amount assessed, i.e. ₹ 94,21,784/- be paid to SDMC on the ground that the petitioner was covered by Bye-law 9 (b) of the Delhi Municipal Corporation (Property Taxes) Bye-laws, 2004 (hereinafter referred to as the Bye-laws) as it is an office building. BCI further challenges the constitutionality of Section 170(b) of the Act and of Bye-law 9 (b) of the Bye-laws and the actions of SDMC in assessing the property tax.

2. BCI is a regulatory body, created for enrolling Advocates, prescribing the educational qualifications for enrolment, approving establishment of law colleges, etc; it is the apex body supervising the functions of State bar councils and is set up under the Advocates Act, 1961. It was allotted a plot of land by virtue of a Perpetual Lease Deed dated 20.04.2001 in the Siri Fort Institutional Area (No:2/6, Siri Institutional Area, Siri Fort Road, Khelgaon, New Delhi-49) upon which it constructed a six storied building including ground floor and basement, covering a total built up area 1243.51sqm. The building plans and the subsequent amendments for the said institutional building were sanctioned by the Delhi Development Authority (DDA). Although the building was inaugurated on 22.09.2003 by the then Chief Justice of India, it was allegedly not completed. It is only when BCI applied to the Chief Fire Officer for a No Objection Certificate, which was granted on 05.04.2006, that the construction is said to have been completed. Electricity connection was, only installed on 12.09.2007 by BSES Rajdhani Power Ltd. on a domestic basis and occupation occurred w.e.f. 12.09.2007.

3. SDMC on 01.03.2016 issued a *suo moto* assessment order under section 123D of the Act adopting Use Factor 4 w.e.f. 01.09.2007. Consequently SDMC also issued an impugned communication/ calculation sheet dated 02.03.2016 raising a demand upon the petitioner of ₹89,42,232/- on the basis of the assessment order. Later, SDMC issued a demand notice under Section 154(1) of the Act demanding an amount of ₹94,21,784/-. By application (dated 10.11.2016) BCI applied for a certified copy of the assessment order dated 01.03.2016, and later for a calculation, which was not given. BCI applied under the Amnesty Scheme 2016-17 on 10.01.2017 to the Joint Assessor & Collector (HQ) for re-opening and rectification of the assessment order. Since the said letter remained unattended, on 25.02.2017, BCI filed a voluntary return paying a sum of ₹10,67,003/-. As there was a calculation mistake, it filed a Revised Return dated 18.03.2017, and paid an additional sum of ₹1,63,135/- more.

4. BCI argues that it only performs the functions prescribed for it under Section 6 of the Advocates Act, 1961, which makes it *ex-facie* clear that they are not related to commercial activity, as there is complete absence of a profit motive. It is argued that, Bye-law no. 9(b) of the Bye-laws empowers SDMC to mindlessly and arbitrarily classify all buildings as 'business buildings' if the activity of maintenance of accounts/ records is being carried out without making the distinction as to profit motive. It further urged that due to this Bye-Law, all organisations/ institutes who are maintaining records/ accounts in their respective buildings, would be deemed to be assessed as a commercial building attracting the highest rate of Use Factor 4 irrespective of whether any statutory/ charitable/

non-profit work is being carried out by the organisation/ institution. Consequently, classification of all buildings as business buildings where there is a simple keeping of accounts / records without profit motive is wholly arbitrary and liable to be set aside. BCI urges that as a statutory regulatory body constituted under the Advocates Act, 1961, it performs statutory functions. There is no justification to treat it at the same pedestal as a commercial organisation for the purposes of property tax. BCI challenges the constitutional validity of Bye-law No. 9(b) of the Bye-laws on the ground that it does not make a requisite distinction between office buildings being used for commercial activity and those being used for non profit activities including discharge of functions as stipulated by the statute and therefore is violative of Article 14 of the Constitution.

5. BCI argued that it is exempt from payment of income tax and is considered a charitable organisation by placing reliance on a judgment of the Supreme Court in the case titled *CIT Bombay v. Bar Council of Maharashtra (respondent), Bar Council of India (intervener)* 1981 (130) ITR 28 upholding the High Court's view that under the facts and circumstance of the case the Bar Council of India could be taken to be a body intended to advance an object of general public utility falling within Section 2(15) for the purposes of Section 11 of the Income Tax Act, 1961, and accordingly dismissed the appeal.

6. The constitutional validity of Section 170(b) of the Act is also challenged. It prescribes that an aggrieved assessee/property tax return maker preferring an appeal before the tribunal should deposit the entire demanded tax before the appeal can be heard. The remedy of appeal therefore in the facts and circumstances of the present case is urged to be

an illusory remedy and violative of Article 14 of the Constitution. It casts an unreasonable onerous burden upon the petitioner, herein being a non-profit entity performing a statutory function. If the petitioner is constrained to deposit the entire demanded tax it would be wholly unjustified, against the principles of natural justice and cause irreparable loss and injury to the petitioner. In such circumstances, the requirement of pre-deposit of the entire demanded tax before the appeal must be held to be unconstitutional.

7. BCI argues that SDMC has wrongly assessed the property for property tax w.e.f. 2004 whereas the property could not have been assessed for property tax prior to September, 2007 when it actually occupied the property. It relies on the Supreme Court's ruling on Section 120(2) in *Municipal Corporation of Delhi v Shashank Steel Industries (P) Ltd.* 2009(2) SCC 349 which held that for any land constructed upon in tenanted premises, where the tenancy is in excess of one year, the property tax of the land and the building is to be payable by the tenant. It was further argued that in the matter of *South Delhi Maternity & Nursing Home (P) Ltd.* reported as 176 (2011) DLT 192, this Court has held that tax cannot be levied upon the assessee in relation to a building without the assessee either obtaining a completion certificate or physically occupying the premises. On the basis of these judgments, BCI contends that as the building in question was occupied only in September, 2007 it became liable to pay property tax in accordance with the provisions of the Act only w.e.f. September, 2007 in the absence of Completion Certificate and not 2003 as demanded by the SDMC.

8. The SDMC questions the maintainability of the writ petition in light of the existence of an alternative remedy of appeal as provided under Section 169 of the DMC Act, 1957. It was claimed that BCI, having failed to invoke the said remedy against the impugned assessment order, is disentitled to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

9. SDMC contends that the DMC [Property Taxes] Bye Laws 2014 have been upheld and declared valid by judgment dated 23.08.2012 passed in W.P.(C) No. 8030 of 2003 titled *Vinod Krishan Kaul vs L.G. of NCT Delhi & Others* by a Division Bench of this Court. As argued by the petitioner, under Bye Law 9(B)(i) of the Delhi Municipal Corporation (Property Taxes) Bye Laws 2004, a business building *inter alia* means any building used for keeping accounts and records and similar purposes and such buildings shall include professional establishments and office buildings solely or principally [dominantly] used as an office or for office purposes. It is argued that there is nothing unreasonable or arbitrary in the definition and does not violate any of the substantive provisions of the Act. In this case the transactions/ activities being carried on *inter alia* involves keeping of books and records besides being solely and principally being used as office and for office purposes. Moreover, the activity was not carried out free of cost and could not be classified as a residential activity. Therefore, the activity falls within the scope of the Bye-law, which has been correctly applied to the property in question.

10. SDMC disputes BCI's claim that Section 170 (b) of the Act, is unconstitutional and invalid, stating that the issue is no longer *res integra* and has already been decided by the Court. The Supreme Court in *Shyam*

Kishore vs MCD AIR 1992 SC 2279 upheld the validity of Section 170(b) which envisages a pre deposit tax before an appeal can be heard under Section 169. Thereafter, the case of *Gaggan Makker vs UOI & Others* (W.P. (C) 4683/2008 decided on 23.08.2013) declared that the proviso to Section 169 DMC Act introduced by Delhi Municipal Corporation (Amendment) Act, 2003 is unconstitutional *inter-alia* in the light of Section 170(b) of the DMC Act. The Court observed:

"28. On account of the fact that the proviso to Section 169(1) of the DMC Act has been declared by us to be unconstitutional and invalid, we need not examine the submission with regard to the inconsistency between Section 169(1) f inclusive of the proviso} and Section j 70(b) of the DMC Act. The latter provision, as interpreted by the Supreme Court in Shyam Kishore (supra), would continue to govern the manner in which appeals are to be entertained and heard. We also do not need to consider the alternative plea of the petitioner based on the Supreme Court decision in Garikapatti (supra).

29. Consequently, while holding the proviso to Section 169(1) to be unconstitutional and invalid, the impugned order dated 30.05.2008 passed by the Tribunal is set aside and it is directed to consider the appeal filed by the petitioner in the manner indicated in Shyam Kishore."

It is argued by SDMC that these judgments are binding in law and continue to govern and uphold the constitutionality of Section 170 (b) of the Act.

Analysis & Conclusions

11. The first question that must be addressed is that of the standing of the writ petitioner, in light of the existence of an alternative remedy of

appeal. BCI had an alternative remedy of appeal as provided under the provisions of Section 169 of the Act; yet it invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution. SDMC has continually questioned the standing of the petition on the ground of availability of alternative remedy. It is however necessary, to reiterate that existence of an alternative remedy would not act as a bar on the application of Article 226 where the writ petition has been *inter alia* filed for the enforcement of either Fundamental Rights or where there has been a violation of the principle of natural justice or the constitutionality of an Act is challenged. The Supreme Court in *Whirlpool Corporation vs Registrar of Trade Marks, Mumbai* (1998) (8) SCC 1 considered the said aspect and observed as follows:

“Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.”

12. Here, BCI claims violation of Article 14 of the Constitution by Bye-law no. 9(b) of the said Bye-laws for not making a distinction of profit motive while classifying building with respect to the evaluation of property tax. It is also contended that the remedy of appeal under Section

170 (b) of the Act is violative of Article 14 and against the principles of natural justice as it is merely an illusory remedy that casts an onerous burden on the petitioner. Therefore, the existing alternate remedy of appeal does not bar the writ as the present case concerns, *inter-alia*, questions of enforcement of fundamental rights and violations of principles of natural justice.

13. The contention of SDMC that the definition of ‘business building’ under Bye law 9(b) of the Bye Laws is not ambiguous or arbitrary in our opinion, cannot stand. It is necessary to reproduce the provision in question:

“Bye-law 9

Definition of use-wise categories of buildings - For the purposes of clause (f) of sub-section (1) of section 116 A, the use-wise:

(a).....

(b) *"Business building" shall mean any building or part thereof used for transaction of business or for keeping of accounts and records or for similar other purposes, and such buildings shall include -*

(i) *offices (other than offices of Central Government, State Government and local bodies), banks, professional establishments, court houses, and libraries for the principal function of transaction of public business and keeping of books and records;*

(ii) *office buildings (premises) solely or principally used as office or for office purpose; and*

(iii) *one and two star hotels, restaurants, lodges and guest houses”;*

There is no patent arbitrariness or illegality *per se* in the provision; yet there is facial arbitrariness in its application to a building wherein

statutory functions are performed or a non-profit activity is conducted. The SDMC attributes a Use Factor to a building depending on its purpose. The Use Factor varies from 1 (for Residential and Public Purpose) to 10 for Star Hotels (3 star & above), Hoardings and Towers). The Use Factor for Industry, Entertainment, Recreation & Clubs has been specified as 3 and that of Utilities and Business as 2 and 4, respectively. In the broad classification of a 'business building' as keeping of accounts and records or for similar other purposes, *inter alia*, buildings wherein a non-profit activity is conducted, including discharge of functions stipulated by a statute are prescribed the same factor as one wherein commercial activity is taking place, is applied, thereby attracting the highest Use Factor rate of 4. Non-profit entities and statutory bodies are given certain financial benefits for the functions they perform due to the lack of revenue generated in performing these social activities. Therefore the property tax attributable to a building belonging to such entities cannot be the same as that of commercial entities in light of the disparity in the financial power and financial ability to pay the property tax. Instead, a non-profit entity, including one discharging a statutory function, must be assessed as a public utility, attracting a Use Factor of 1, i.e. the lowest Use Factor. This ensures a fair assessment for property tax of buildings which are used for such purposes and are performing necessary social functions and also provides the requisite financial benefits enjoyed by such entities.

14. In the present case BCI is a statutory professional body constituted under the Advocates Act, 1961. Its functions are set out under Section 6 of the Act, a perusal of which makes it evident that there is no scope for it

to be considered a commercial organisation or related to a commercial activity. SDMC has erred in classifying the office building of BCI as a 'business building', subsequently attributing a Use Factor of 4, the same rate as a commercial entity. However, the discharge of BCI's statutory duty is not comparable to a commercial activity; it is rather a social statutory activity performed for the furtherance of the legal profession. It would be unfair to subject the performance of such a duty to the same Use Factor as compared to a commercial enterprise using their building for the furtherance of their commercial and financial goals. An assessment of property tax on the highest degree of Use Factor substantially hinders and handicaps BCI's ability to perform its statutory duties. As the function performed is for societal good, all necessary steps must be taken to facilitate its ability to discharge its duties. Therefore, for the purposes of conducting a fair assessment of property tax, the petitioner must be assessed on a Use Factor of 1 as is attributable to a public utility.

15. As far as property tax liability imposed upon BCI prior to its valid incidence goes, the issue is a pure question of law. This court proposes, in the light of the conclusions recorded above, to remit the matter for fresh determination, by the competent authority/ assessing officer, who shall consider this aspect. So far as the question of constitutionality of Section 170 is concerned, the court is of opinion that in view of the order proposed, it would not be appropriate to examine the issue.

16. For the above reasons, the writ petition is allowed. It is hereby declared that BCI's premises are liable to property tax assessment under Use Factor 1 as a "public purpose" building. As far as the issue of

charging vacant land tax and as to the time from which the liability arose in the present case, BCI is at liberty to urge these issues in the fresh assessment proceedings.

17. In the light of the above conclusions, the impugned assessment order is quashed. The respondent SDMC is directed to conduct fresh assessment proceedings and pass a final order after granting opportunity to the BCI, which is at liberty to urge all contentions with respect to the time when the levy can be imposed, i.e. the date of occupation or the date of completion certificate, as the case may be, and on the issue of vacant land tax. The writ petition is allowed in these terms; there shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JANUARY 18, 2018