IN THE HIGH COURT OF JUDICATURE AT BOMBAY, ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1666 OF 2012
IN
SUIT No. 2120 of 2008

Plaza Diamond Properties Private Limited,
a Private Limited Company incorporated
under the Companies Act, 1956 and having
its registered office at Diamond Plaza, 391
Dr. D. Bhadkamkar Marg, Mumbai – 400 004 ...Applicant
(Plaintiff)

VERSUS

1. The Chief Commissioner of Income Tax-II,
Mumbai, having his office at Room N. 321,
Aayakar Bhavan, M.K. Road, Mumbai 400 020

2. Appropriate Authority,
Income Tax Department,
Mittal Court, A-Wing, 3rd floor,
Nariman Point, Mumbai – 400 021

3. Union of India,
through the Ministry of Finance,
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020 ...Defendants

Mr. Chirag Balsara a/w Hude Diamondwala i/b Diamondwala and Co. for applicant/plaintiff
Mr. A.C. Singh, Addl. Solicitor General of India a/w. Mr. Aditya Thakkar and Mr. Shyam V. Walve for defendants

CORAM : N.J. JAMADAR, J.

Reserved on : **22nd January 2021**

Judgment pronounced on : **6th April 2021**

ORAL JUDGMENT :

(Through V.C. at Aurangabad)

Notice of Motion under No. 1666 of 2012 in Suit No. 2120 of 2012 is taken out by the plaintiff seeking, *inter-alia*, the following reliefs:

> *"(a) That pending the hearing and final disposal of the suit the Defendants be ordered and directed to make the entire payment of outstanding dues of Municipal dues to MCGM Rs. 1,67,20,038/- up to 31.3.2012 and further municipal taxes.*
>
> *(b) That pending the hearing and final disposal of the suit, the Defendants be ordered and directed to pay to the Municipal Corporation an amount of Rs. 5,68,798/- (Rupees five lakhs sixty eight thousand seven hundred ninety eight only) every six months towards the Municipal taxes subject to any change in amount.*
>
> *(c) That pending the hearing and final disposal of the suit the Defendants be ordered and directed to deposit in this court an amount of Rs. 148.63 crores towards compensation/ damages and interest on unpaid amount upto 30/11/2011.*
>
> *(d) That pending the hearing and final disposal of the suit the Defendants be ordered*

and directed to hand over the vacant and peaceful possession of the suit property to the Plaintiff immediately. "

2. The notice of motion arises in the backdrop of the following facts:

The plaintiff has acquired ownership over the premises admeasuring 821.74 square meters bearing C.S. No. 1266 (part) comprising a cinema hall, situated at 391 Dr. Dadasaheb Bhadkamkar Road, Girgaon (hereinafter referred to as "the suit premises") in terms of the consent decree passed by this Court in Suit No. 810 of 1983 dated 3rd of August 1983. Under the said consent decree, all rights, title and interest of the reversioner, the third defendant therein, namely, Kishore Kanugo, under the indenture of lease dated 24th of March 1945 and the leasehold rights of defendant No.2 therein, Sharma Properties Private Limited, subject to the indenture of sub-lease dated 30th April 1982 made between said defendant No.2 Sharma Properties Private Limited and Swastik India Private Limited came to be assigned and transferred to the plaintiff.

3. Under the said indenture of sub-lease dated 30th April 1982, Sharma Properties Private Limited had given the suit premises

on sub-lease to Swastik India Private Limited, initially for a period of ten years commencing from 30th April 1982 , with nine options to the lessees to renew the lease for a further period of ten years each, by giving prior written notice to the lessor before the expiry of each of the terms of the lease or the renewal at the same rent and on the terms and conditions, as provided thereunder.

4. It is the case of the plaintiff that after they acquired the ownership over the suit premises including the reversionary interest therein and the leasehold rights of Sharma Properties, by virtue of the consent decree dated 3rd August 1983, the terms of the lease were modified by indenture of modification dated 19th of February 1986. The fundamental modification was that Swastik India Private Limited, the sub-lessee, agreed to hold the demised premises for the term of ten years commencing from 30th April 1982 with an option to the lessee to renew the lease for a further period of ten years. Thus, the right of renewal was restricted to one term of ten years only.

5. In the meanwhile, Swastik India Private Limited through its Director, professed to transfer the leasehold interest in the suit premises in favour of one Ashok K. Kothari. Form No. 37-I under

the Income Tax Act, 1961 was duly filed, in accordance with the then governing provisions. The appropriate authority passed an order on 27th of June 1997 for pre-emptive purchase for a sum of Rs. four crores, which was the apparent consideration and, thus, the Government exercised an option to purchase the suit premises for Rs. four crores under Section 269 UD(1) of the Income Tax Act, 1961. The possession of the suit premises was taken by the appropriate authority by passing a receipt dated 7th July 1997.

6. Dispute arose over the said acquisition by invoking the provisions contained in Section 269 UD(1) of the Income Tax Act, 1961. A series of proceedings followed. Mr. Atmaram Alwani and others instituted a writ petition, being Writ Petition No. 1887 of 1997, against the respondents seeking mandamus to forthwith pay the amount of Rs. four crores. Initially, by an order dated 12th December 1997 a Division Bench of this Court directed the Appropriate Authority to deposit Rs. four crores. The respondents were also restrained from taking steps in the matter. Nonetheless on 24th December 1997 the appropriate authority passed an order under Section 269-UJ withdrawing from acquisition on the premise that the lease was not renewed beyond 30th April 1992 and, thus, there was suppression of facts.

7. As the said order was passed while the stay was in operation, the appropriate authority subsequently vacated the said order of withdrawal from acquisition. Eventually, by order dated 30th of October 2002, the petition came to be allowed and the amount deposited by the Appropriate Authority was directed to be released in favour of the petitioners therein.

8. The plaintiff filed petition, being Writ Petition No. 3154 of 2005, seeking a direction to the defendants herein to vacate the suit premises as the term of lease had expired. A Division Bench of this Court, by order dated 21st March 2006, dismissed the petition in *limine* holding that no case for invocation of extra-ordinary jurisdiction was made out.

9. The observations of the Division Bench in paragraphs No. 3 & 4 of the said order are material for the purpose of determining the controversy at hand. They read as under:

> "*3. It would be, thus, seen that in the light of the order dated 23rd October, 2002 passed by this Court, the rights of M/s. Swastik India Private Limited and/or for that matter Atmaram W. Alwani & Ors. stand acquired by the respondents under Chapter XX-C of the Income Tax Act, 1961.*
>
> *4. Assuming that the lease that stood in*

> *favour of M/s. Swastik India Private Limited or for that matter Atmaram W. Alwani & Ors. (now in their shoes the respondents have stepped in) had expired, by itself that cannot be ground for eviction decree in extraordinary jurisdiction as is being sought by the petitioners. Even after expiry of the lease, the lessee can be said to be holding over the property under Section 116 of the Transfer of Property Act. Be that as it may, if at all the petitioners have acquired right to dispossess the respondents because of the expiry of the lease that stood in favour of Swastik India Private Limited, the course available to the petitioners is to pursue the appropriate civil remedy*."

10. The respondents-defendants issued an auction notice dated 3rd of September 2007 to sell the suit premises. The plaintiff challenged the said action by filing Writ Petition No. 2324 of 2007. A Division Bench of this Court, by judgment and order dated 6th of February 2008, was persuaded to allow the petition holding that the defendants had not acquired ownership over the suit premises. The defendants entered into the shoes of Swastik India Private Limited, the respondent No.4 in the said petition.

11. The observations of this Court in paragraph No.3 of the

said judgment bear upon the controversy at hand as well. They read as under:

> "*3. On perusing the record and in the aforesaid circumstances, we find that the petitioners have clearly acquired right of ownership in respect of the suit premises. When this right was acquired, Swastik India (P) Ltd. Who is respondent no.4 in this petition, was the sub-lessee. The rights of Swastik India (P) Ltd., were modified by the indenture of modification dated 19.2.1986. The order under Section 269 UD related to the acquisition of the shareholding of Swastik India (P) Ltd. and thus the Union of India stands in the shoes of "Swastik India (P) Ltd. i.e. respondent no.4. The impugned notice however, seeks to sell the suit premises which are of the ownership of the petitioners. In our view, this cannot be permitted as respondent nos. 1, 2, & 3 were never the owners of the suit premises*."

12. The plaintiff thereafter instituted the suit in the Court of Small Causes at Bombay for recovery of possession of the suit premises alongwith compensation for unlawful occupation and mesne profits. The defendants resisted the suit on the count that the Court of Small Causes had no jurisdiction to try and decide the said suit. A preliminary issue was, thus, framed by the said Court.

By order dated 15th of November 2011, the learned Judge of the Court of Small Causes answered the said issue in the affirmative holding that there was no direct relationship of landlord and tenant between plaintiff and defendants No.1 to 3 as envisaged under Section 33 of the Maharashtra Rent Control Act, 1999 and, thus, the said Court had no jurisdiction to adjudicate the dispute. The plaint was returned to the plaintiff for presentation to the proper Civil Court, under Order VII Rule 10 of the Civil Procedure Code, 1908 (Code). It would be contextually relevant to note that the said suit came to be renumbered as Suit No. L-164/2014 on its transfer from the Court of Small Causes to this Court.

13. In the intervening period, the plaintiff instituted the instant suit seeking the following relies:

> " *(a) that the Defendants jointly and severally be ordered and decreed to pay to the Plaintiff a sum of Rs. 78,08,00,000/- as on 30th June, 2008 together with further interest at the rate of 15% per annum from the date of 1st July, 2008 till payment and/or realization as per the particulars of claim annexed and marked Exhibit "Q" hereto.*
>
> *(b) that the Defendants jointly and severally be ordered and decreed to pay to the Plaintiff the accruing damages of Rs. 45,00,000/- per month*

*with further interest at the rate of 15% per annum from 1st July, 2008 till the Defendants put the Plaintiffs in quiet, vacant and peaceful possession of the suit premises and as more particularly setout in Particulars of claim being Exhibit "R" hereto.***"**

14. The aforesaid reliefs are sought, on the premise that the defendants were holding on to the suit premises without there being any legitimate right to continue to occupy the suit premises and the said alleged unlawful occupation of the defendants resulted in serious infringement of the possessory and proprietary rights of the plaintiff and, thus, the suit for damages.

15. In the instant suit, the plaintiff has taken out this Notice of Motion. It is premised on the facts that under the terms of the indenture of lease executed by predecessor-in-interest of the defendants, namely, Swastik India Private Limited, it was the liability of the lessee to pay all Municipal taxes and charges. The defendants are, thus, liable to pay the Municipal taxes and charges which had accumulated to Rs. 1,67,20,038/- up to 31st March 2012, and the taxes and charges as they become due. The relief of compensation was also sought on the ground that the defendants have no

subsisting right to continue to occupy the suit premises.

16. Initially, an affidavit-in-reply was filed on behalf of the defendants-respondents. The assertions in the Notice of Motion were contested. The substance of the resistance put-forth by the defendants/respondents was that the reliefs sought in the Notice of Motion were unworthy of being entertained as the reliefs sought were covered in the suit instituted by the plaintiff being Suit No. 486 of 2014. The principal question that arose for consideration was, whether the defendants were trespassers, as alleged, on the suit premises, and the reliefs of compensation and mesne profits were consequential reliefs. Since the suit instituted by the plaintiff before the Court of Small Causes was then sub-judice, it was necessary to stay the proceedings in the instant suit. The defendants/respondents also contended that the defendants were exempt from payment of Municipal taxes and cess under the provisions of Article 285 of the Constitution of India.

17. In the wake of these pleadings, when the Notice of Motion was listed before the Court on 6th of February 2019, this Court called upon the defendants to make their stand clear by filing affidavit on the issues formulated by the Court. It was directed,

inter-alia, as under:

> "*2. ....*
> *The limited question on which Mr Rajguru must have instructions, and these must be complete, is under what lawful or juridical authority the Income Tax Department claims to be entitled to continue in possession of the suit property. Whether it is required to make ongoing payments towards municipal taxes or is required to make payment of arrears, or alternatively is required to put the Plaintiffs in funds to make these payments are all questions that I will consider on the next occasion. I note that prayer clause (d) of the Motion seeks immediate and peaceful possession of the entire property. This might the subject matter of a companion suit No. 486 of 2014, and therefore the question will be whether this property ought to be protected in some fashion and whether the Income Tax Department should be put to some terms until the final disposal of this suit and the companion suit. The final relief in the present suit is only for monetary compensation or damages. Possession itself is sought in the companion suit.*
>
> *3. The fact that there are these two suits does not, however, mean that the plaintiffs accept that the Income Tax Department is entitled to continue in occupation and possession of any part*

of the suit property after the cancellation of the acquisition proceedings. It is on this that Mr Rajguru must take complete instructions."

18. Pursuant to the aforesaid order, Mr. C.P. Verma, Income Tax Officer has filed an affidavit-in-reply. It was asserted that in view of the withdrawal of the amount by Alwanis pursuant to the order passed by the Division Bench in Writ Petition No. 1887 of 1997 dated 23rd October 2002, the defendants have stepped into the shoes of Alwanis and that the defendants are in possession of the suit premises in that capacity. Paragraph No.4 of the said affidavit reads as under:

> "*4. I, therefore, submit that because of withdrawal of the said amount by Alwanis from the office of this Honourable Court the defendants have stepped into the shoes of Alwanis and hence defendants are in possession of the property. I say that, as per my understanding, similar observations were made by this Hon'ble Court in Writ Petition No. 3154 of 2005 in its order dated 21.03.2006 filed by the plaintiffs herein. Hereto annexed and marked as* ***EXHIBIT 1*** *is a copy of the order dated 21.03.2006 in Writ Petition No. 3154 of 2005."*

19. The aforesaid background facts and history of the litigation have been noted elaborately, on purpose. The question as to whether the plaintiff is entitled to the reliefs in the Notice of Motion, especially as regards a direction to the defendants to pay the Municipal taxes and charges, for which a demand notice has been served on the plaintiff on 6th of January 2021 computing the due amount at Rs.2,22,43,863/- up to 31st March 2020, hinges upon the jural relationship between the parties.

20. In the light of aforesaid question, I have heard Mr. Balsara, the learned Counsel for the plaintiff-applicant and Mr. Anil Singh, the learned Additional Solicitor General for the defendants/respondents. Taking the Court through the various orders passed by the Courts, referred to above, Mr. Balsara strenuously urged that the approach of the defendants is simply inexplicable. The defendants are holding on to the property despite being fully aware that the lease term has expired. From the material on record, especially the assertions in the affidavit of Mr. Awadesh Kumar in Writ Petition No. 1887 of 1997, it becomes evident that the defendants had committed a blunder in acquiring the leasehold right in the suit premises under Section 269-UD(1) of the Act though the authorities were fully aware that the leasehold rights were for a limited duration. On the one hand, the defendants are resisting the

attempts of the plaintiff to regain possession of the suit premises. On the other hand, the defendants are not discharging the contractual liability to pay the Municipal taxes and cess. The plaintiffs are the ultimate sufferers as the Municipal Corporation is initiating coercive steps to recover the Municipal dues and there is an imminent danger of the property itself being put on the block for recovery of Municipal dues. Amplifying the submission, Mr. Balsara would urge that if the defendants intend to take the benefit of the provisions contained in Article 285 of the Constitution of India, it is for the defendants to satisfy the local authority that the suit premises is exempt from payment of taxes. Else, the defendants must discharge the liability to pay the Municipal taxes and charges. The defendants cannot be permitted to occupy the suit premises and, at the same time, absolve themselves from paying taxes and charges therefor, urged Mr. Balsara.

21. In opposition to this, Mr. Anil Singh, the learned Additional Solicitor General, urged with a degree of vehemence that the suit itself is not tenable. Taking the Court through the pleadings in Suit No. L-164 of 2014 (transferred from the Court of Small Causes) which has been instituted by the plaintiff for recovery of possession of the suit premises and for compensation and mesne

profits also, Mr. Singh submitted that the instant suit is clearly barred by the provisions contained in Order II Rule 2 and Order II Rule 3 of the Code. The plaintiff could have very well sought the relief of damages in the said suit. Cause of action for both the suits is one and the same. Therefore, as the instant suit is barred by the provisions of Order II Rule 2 and Rule 3, no interim relief can be granted as it is trite that interim relief is to be granted in aid of final relief, canvassed Mr. Singh. It was further submitted that the plaintiff cannot take advantage of the observations made by this Court in various proceedings. It is for the plaintiff to come to the Court with a positive case. In the case at hand, the plaintiff does not acknowledge the status of the defendants as lessees of the suit premises and, yet, insists upon payment of municipal taxes and cess by the defendants. In view of the contradictory stands as regards status of the defendants, the plaintiff is not entitled to any of the reliefs, urged Mr. Singh. Lastly, it was submitted that in any event, the defendants cannot be saddled with the liability to pay Municipal taxes and cess in view of the provisions contained in Article 285 of the Constitution of India.

22. At the outset, it is imperative to note the nature of interest which the defendants have acquired U/S. 269-UD(1) of the

Act, 1961. Though an endeavor was initially made by the defendants to claim proprietary title over the suit premises yet, in view of the orders passed by this Court especially, the order passed in Writ Petition No. 2324 of 2007 dated 6th February 2008, it becomes abundantly clear that the claim of absolute ownership over the suit premises cannot be sustained. If the orders passed by this Court in Writ Petition No. 3154 of 2005 and Writ Petition No. 2324 of 2007, extracted above, are considered in conjunction, an inference becomes inescapable that the defendants had acquired the leasehold rights of the original sub-lessee, Swastik India Pvt. Ltd. Thus, the Court has in terms observed that the defendants have entered into the shoes of M/s. Swastik India Pvt. Ltd. It is true that in Writ Petition No. 3154 of 2005 this Court refused to entertain the prayer of the petitioner-plaintiff to evict the defendants from the suit premises by observing that mere expiry of term of lease does not vest a right in the landlord to evict the lessee and the remedy lay in a suit for eviction. However, that does not imply that the juridical status of the defendants is catapulted to the owner of the suit premises. In fact, in the affidavit in reply filed by Mr. C.P. Verma, pursuant to the order by this Court in a Notice of Motion on 6th February 2019, the defendants have conceded that they have stepped into the shoes of Alwanis.

23. With the aforesaid clarity, it would be advantageous to note the term of the indenture of sub-lease dated 30th April 1982 between Sharma Properties Pvt. Ltd. and Swastik India Pvt. Ltd.- predecessor in interest of the defendants. As indicated above, under the said indenture of sub-lease, the term of lease was for ten years with nine options of renewal, each for a period of ten years. In the context of the controversy, clause 2(c) of the said indenture of sub-lease assumes significance. It reads as under:

> " *2. The Lessees hereby do covenant with the Lessor as follows:-*
>
> *(a). …………………………*
>
> *(b) ………………………*
>
> *(c) To pay any existing and future rates, cess, assessments, dues, duties, charges and outgoing whatsoever imposed by any public authority whether Government or Municipal Corporation of Greater Bombay including water charges allocable and payable in respect of the demised premises at present Municipal rates and taxes comes to Rs.34,849/- per year and in the event of any rates taxes assessment or imposition being made or levied jointly upon the*

Demised Premises or any part thereof and the other premises of the Lessor or any part thereof. They, the Lessees shall pay to the Lessor their one proportion thereof as may be determined by the Lessor as allocable and payable in respect of the demised Premises.”

24. Under the indenture of modification dated 19th of February 1986, the term of lease, as originally agreed under indenture of sub-lease dated 30th April 1982, came to be modified to the effect that the lessee would hold lease for a period of ten years with only one option of renewal for a further period of ten years. Clause 2(c) of the sub-lease, extracted above, came to be substituted by the following:

> **“** *To pay all expenses and future rates, cess assessments, dues, duties, charges and outgoings whatsoever imposed by public authority whether Government or Municipal Corporation of Greater Bombay allocable and payable in respect of the demised premises including water charges, allocable in respect of the demised premises*.**”**

25. From the aforesaid covenants in the indenture of sub-lease and indenture of modification, it becomes evident that the lessee had undertaken to pay the municipal taxes and cess under the sub-lease as well as the modified lease deed. The indenture of

sub-lease and indenture of modification cast the liability on the lessee-defendants to pay the municipal charges, taxes, cess in clear and explicit terms. The question which thus crops up for consideration is, whether the defendants can be called upon to discharge the liability, as covenanted under the aforesaid instruments ?

26. The submission on behalf of the defendants that the plaintiff cannot insist upon the payment of taxes and charges by the defendants unless the plaintiff unequivocally acknowledges the defendants as the lessee of the suit premises, does not merit acceptance. The basic premise of the plaintiff's case is that the term of lease, as modified by the indenture of modification, has expired. In the plaint, the plaintiff has made categorical assertion that the defendant No.2, the appropriate authority, is an illegal occupant and in unauthorised possession of the suit premises. It is not the requirement of law that unless the plaintiff acknowledges the continuation of status of lessee, the later cannot be called upon to discharge the liability under the instruments/contract, in terms of which it has entered into the demised premises.

27. This takes me to the legal challenge premised on the

provisions contained in Order II Rule 2 of the Code. Order II Rule 2 is based on the principle that a plaintiff must bring whole claim in respect of a cause of action. Its purpose is to avoid multiplicity of litigation and also prevent a party from being vexed again and again in respect of the same cause of action. Thus, a plaintiff, who omits to sue in respect of, or intentionally relinquishes, any portion of a claim, is precluded from instituting a suit in respect of the portion so omitted or relinquished.

28. The correct test to ascertain whether the bar under Order II Rule 2 applies is, whether the claim in the new suit is, in fact, founded upon a cause of action distinct from that which was the foundation for the former suit. In other words, to invoke the bar enunciated under Order II Rule 2, it has to be shown that cause of action on which subsequent claim is founded, had arisen to the plaintiff when enforcement of the first claim was sought. Resultantly, an examination of the pleadings in the previous suit and the suit in which the objection is raised and ascertainment of the cause of action for the suits becomes necessary.

29. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of ***Alka Gupta Vs.***

Narender Kumar Gupta, 2010(10) Supreme Court Cases 141, wherein the object behind the bar incorporated in Order II Rule 2 and the pre-requisites for sustaining the objection on the said count were postulated as under:

> " *12...*...
>
> *The object of Order 2 Rule 2 of the Code is two-fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.*
>
> *13. This Court in* ***Gurbux Singh v. Bhoora Lal*** *held : (AIR P. 1812, para 6)*
>
> *"6. In order that a plea of a bar under O. 2, R. 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out ; (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to*

> *more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar."*
>
> *Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court can not examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action.*"

30. On the aforesaid touchstone, reverting to the facts of the case, the question of bar under Order II Rule 2 to the tenability of the instant suit would warrant adjudication after providing an opportunity of hearing to the parties. Undoubtedly, the expiry of term of lease, as alleged by the plaintiff, constitutes the substratum

of the plaintiff's case. The question as to whether the claim for damages, as prayed for in the instant suit, is based on cause of action distinct from the cause of action on the basis of which the suit for recovery of possession of the suit premises has been instituted would, thus, arise for consideration. However, for the purpose of determination of the prayer in the instant Notice of motion, especially, the prayer for direction to pay accumulated Municipal dues and the Municipal Taxes and charges, as they fall due, the challenge on the count of the bar under Order II Rule 2, may not apply with equal force. The basis of the alleged liability is the instruments under which the predecessor-in-interest of the defendants had entered upon the suit premises.

31. At this stage, Court may not be justified in dealing with the prayer in clause (c), of payment compensation, and clause (d), of immediate delivery of possession of the suit premises, as the entitlement of the plaintiff to damages is a matter for trial in the instant suit and the entitlement to possession of the suit premises is to be adjudicated upon in Suit No. L-164/2014.

32. However, so far as the prayer for direction for payment of the arrears of Municipal dues and the Municipal taxes and cess, as

they fall due, there does not seem to be any impediment. As indicated above, the liability of the defendants to clear the municipal taxes and other Government charges emanates from the indenture of sub-lease and indenture of modification. Indisputably, the suit premises is in the possession of the defendants. In the context of contractual liability, there is no circumstance which would absolve the defendants from the liability to pay the taxes and charges.

33. At this juncture, the issue of the suit premises being exempt from the liability to pay tax arises for consideration. An endeavor was made on behalf of the defendants to draw home the point that the suit premises, being in the occupation of the Union of India, post acquisition thereunder U/S. 269 UD(1) of the Income Tax Act, 1961, is exempt from all taxes imposed by State or by any authority within a State, under Article 285 of the Constitution.

34. Article 285 of the Constitution of India reads as under:

> " *285. Exemption of property of the Union from State taxation.- (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.*
>
> *(2) Nothing in clause (1) shall, until Parliament by*

> *law otherwise provides, prevent any authority within a State from levying any tax on any property of the union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.*"

35. It would be contextually relevant to note that Section 139 of the Mumbai Municipal Corporation Act, 1888 provides that for the purpose of the said Act, taxation shall be imposed by the corporation as follows:

(1) property taxes;

(2) tax on dogs;

(3) a theatre tax.

36. Sub-section (2) of Section 139A Provides that property taxes leviable on buildings and lands in *Bruhan* Mumbai shall include water tax, water benefit tax, sewerage tax, sewerage benefit tax, general tax, education cess, street tax and betterment charges.

37. Under Article 285(1), extracted above, the property of the Union, shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State. In the case at hand, evidently a

consolidated tax demand has been made by the Municipal Corporation. Thus, the taxes and charges levied by the Mumbai Municipal Corporation on the suit premises would fall within the ambit of the taxes by a local authority, provided it is held that the suit premises is the property of Union of India.

38. From a plain reading of the aforesaid provision, it becomes evident that the term of 'property' has wide amplitude. It is not restricted to lands and buildings but may subsume within its fold all forms of property. There is no warrant for restricting it to the property in which the Union of India has absolute ownership right and to assume that it does not cover the interest short of absolute ownership.

39. In the case of ***The Corporation of Calcutta Vs. The Governors of St. Thomas' School, Calcutta*, AIR 1949 Federal Court 121,** it was held that:

> **"** *10. Section 154 raises two questions for determination when an exemption from liability to tax is claimed: (i) whether tax is claimed in respect of property; and (ii) whether such property is vested in Government : The word "property" is used in the context without any limitation and therefore should bear its normal*

meaning. Interpreted in that way it will embrace every kind of property. As observed by ***Langdale, M.R. in Jones V. Skinner, (1835) 5 L.J. Ch. 87 at page 90: (42 R.R.274)****:*

" 'Property' is the generic term for all that a person has dominion over. It is the most comprehensive of all terms which could be used, inasmuch as it is indicative and descriptive of every possible interest which the property can have."

Without attempting to define affirmatively what the generic term will cover, it is sufficient for us to hold that the buildings in question are property and as in India the ownership of a building is not necessarily related to the ownership of the land on which the building stands, the buildings in the present case were vested in the Government. ......"

40. Indubitably, the question as to whether the leasehold interest which the Union of India has acquired in the suit premises, by virtue of the provisions contained in Section 269-UD(1) of the Income Tax Act, 1961, qualifies for exemption under Article 285(1) of the Constitution of India, cannot be examined in this proceeding, especially in the absence of the Municipal Corporation, which has levied the taxes. From this stand point, Mr. Balsara is within his

rights when he submits that if the defendants claim that the suit premises is exempt from payment of taxes to the Municipal Corporation, it is for the defendants to pursue the said stand. The defendants cannot be permitted to merely assert that the suit premises is exempt from payment of taxes and, at the same time, allow the suit premises to be proceeded against for non-payment of taxes.

41. The situation which thus emerges is that the plaintiff being the owner of the suit premises is served with the notices under the Mumbai Municipal Corporation Act to pay the outstanding municipal dues, at the pain of coercive action. The defendants, who are indisputably in possession of the suit premises, contest the liability to pay the municipal dues. In terms of the instruments under which the predecessor-in-interest of the defendants entered upon the suit premises, the lessee is bound to pay the municipal taxes, cess and charges. Alternatively, the defendants claim immunity from payment of municipal taxes.

42. In the aforesaid backdrop, in my considered view, it is necessary to modulate the relief in such a way that the defendants get an opportunity to pursue its stand that the suit premises is

exempt from payment of taxes, with the Municipal Authorities and in the event of failure to obtain a favourble order of exemption, direct the defendants to pay the Municipal taxes and charges, as have accumulated up to date, and continue to pay the same as they fall due till the disposal of the suit.

43. At this stage, the Court is confronted with the issue of Municipal Corporation proceeding with coercive action to recover its dues. As observed above, in the absence of Municipal Corporation as a party to the instant proceeding, no restraint can be ordered against the Municipal Corporation. Even otherwise, it is well recognized that a Municipal Corporation cannot be restrained from levying and collecting taxes by lightly passing interim orders.

44. The observations of the Supreme Court in the case of ***Siliguri Municipality and others Vs. Amalendu Das and others, 1984(2) Supreme Court Cases 436*** *are instructive and thus extracted below:*

> " 3. *It is needless to stress that a levy or impost does not become bad as soon as a writ petition is instituted in order to assail the validity of the levy. So also there is no warrant for presuming the levy to be bad at the very threshold of the proceedings. The only*

consideration at that juncture is to ensure that no prejudice is occasioned to the rate payers in case they ultimately succeed at the conclusion of the proceedings. This object can be attained by requiring the body or authority levying the impost to give an undertaking to refund or adjust against future dues, the levy of tax or rate or a part thereof, as the case may be, in the event of the entire levy or a part thereof being ultimately held to be invalid by the Court without obliging the tax-payers to institute a civil suit in order to claim the amount already recovered from them. On the other hand, the Court cannot be unmindful of the need to protect the authority levying the tax, for, at that stage the Court has to proceed on the hypothesis that the challenge may or may not succeed. The Court has to show awareness of the fact that in a case like the present a municipality cannot function or meet its financial obligations if its source of revenue is blocked by an interim order restraining the municipality from recovering the taxes as per the impugned provision. And that the municipality has to maintain essential civic services like water supply, street lighting and public streets etc., apart from running public institutions like schools, dispensaries, libraries etc. What is more, supplies have to be purchased and salaries have to be paid. The grant of an *interlocutory order of this nature would paralyze the administration and dislocate the entire working of the municipality. It seems that these serious ramifications of the matter were lost sight of while making the impugned order.* "

45. In the case at hand, the question of legality and justifiability of the taxes levied by the Municipal Corporation is not raised. Instead, the question is, who is liable to pay those taxes. Thus, there can be no restraint qua the Municipal Corporation. Nonetheless, I deem it in the fitness of the things to give liberty to the plaintiff to place this order before the competent officer of the Municipal Corporation, who may, having regard to the nature of the controversy, decide the question as to whether coercive action is imminently warranted.

46. For the foregoing reasons, the Notice of Motion deserves to be partly allowed in the following terms:

O R D E R

I) Defendants No.1 to 3 may pursue the claim with the Mumbai Municipal Corporation that the suit premises is exempt from payment of taxes, cess and charges, within a period of two months.

II) If the defendants do not get a declaration/order/ clarification that the suit premises is exempt from the payment of taxes, cess and charges from the Municipal Corporation, within the said period of two months, the defendants shall pay the Municipal dues accumulated till 31st March 2021 and continue to pay the Municipal taxes and charges, as they fall due henceforth.

III) In the event, any coercive action is taken by the Municipal Corporation, in the intervening period of two months, costs and consequences thereof shall also be borne by the defendants No.1 to 3.

IV) Rest of the prayers in the Notice of Motion stand rejected.

V) No costs.

(N.J. JAMADAR)
JUDGE

Madkar