**Form No. J(2)**

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
**The Hon'ble Justice Saugata Bhattacharyya**

**W.P.A. 37378 of 2013**

**Medinet Services Private Limited & Anr.**
**-vs-**
**The State of West Bengal & Ors.**

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| For the Petitioners | : Mr. Jaydeep Kar,<br>Mr. Arindam Banerjee,<br>Mr. Arindam Banerjee,<br>Mr. Anirban Guin |
| For the KMC | : Mr. Biswajit Mukherjee,<br>Mr. Swaan Kumar Debnath |
| For the KMDA | : Mr. Satyajit Talukdar |

Hearing concluded on : 13.06.2023

Judgment on: 13.06.2023

**Saugata Bhattacharyya, J.:**

The writ petition has been instituted, *inter alia*, challenging a communication of the Assistant Assessor Collector, Kolkata Municipal Corporation dated 13th September, 2013 whereby it was intimated to the petitioners on reference to the application made by the petitioners for mutation without "no outstanding certificate" and it was also decided that petitioners were liable to pay tax from 19th May, 2010 based on assessment made by Kolkata Municipal Corporation (for short "KMC"). In addition thereto in the writ petition prayer has been made to dispose of the application for mutation made by the petitioners on the basis of registered lease deed dated 29th April, 2013.

The learned advocate representing the petitioners has drawn attention of this Court to the notice dated 5th May, 2011 whereby petitioners were intimated that annual valuation of the land in question was assessed at Rs.16,17,700/- with effect from 2nd quarter of 2010-2011.

Admittedly such assessment of annual valuation of the land in question has been made pursuant to Section 174(2) of the Kolkata Municipal Corporation Act, 1980. Petitioners contend that the annual valuation of the land in question needs to be assessed in terms of Section 176 read with Section 171 (8)(a)(ii).

In support of such contention reliance has been placed on the judgement of Hon'ble Division Bench, reported in **2016 (3) CHN (Cal) 590 (Kolkata Municipal Corporation –vs- Fabworth Promoters Pvt. Ltd.),** paragraphs 31 to 34.

While considering the points urged on behalf of the petitioners claiming assessment of the land in question for the purpose of fixation of annual valuation in terms of law laid down by the Hon'ble Division Bench delivered in **Fabworth (supra)** it has been brought to the notice of this Court that the judgment of the Hon'ble Division Bench has been questioned by the Kolkata Municipal Corporation by filing Special Leave Petition before the Hon'ble Supreme Court and it has also been submitted that leave has been granted by the Hon'ble Supreme Court and the appeal is pending for consideration. However, in the same breath it has also been apprised that no order has been passed in appeal pending before the Hon'ble Supreme Court modifying, reversing or affirming the order under appeal.

In view of such scenario it has been submitted that there is no impediment so far this Court is concerned to rely upon the law laid down in **Fabworth (supra)** while giving direction upon the concerned authority of KMC to assess the land in question for fixation of annual valuation and property tax. Since question has been cropped up whether during pendency of the appeal before the Hon'ble Supreme Court at the instance of the KMC during post admission stage whether it would be proper so far this Court is concerned to rely upon **Fabworth (supra)** while deciding the issue involved in this writ petition.

In answer to the aforesaid query the learned advocate representing the petitioners has relied upon the judgment, reported in **2000 (6) SCC 359 (Kunhayammed & Ors. –vs- State of Kerala & Anr.)** delivered by the three Judge Bench of the Hon'ble Supreme Court. Placing reliance upon paragraph 44 of **Kunhayammed (supra**) it has been submitted that doctrine of merger only applies in the event after invocation of appellate jurisdiction by the Hon'ble Supreme Court order is passed in appeal reversing, modifying or merely affirming the order under appeal.

It has been submitted on behalf of the parties that in the present case there is no such order passed by the Hon'ble Supreme Court in the pending appeal filed by the Kolkata Municipal Corporation. At best, it has been submitted on behalf of the petitioners, that the order passed by the Hon'ble Division Bench in **Fabworth (supra)** is in jeopardy in view of pendency of the appeal before the Hon'ble Supreme Court.

Another limb of submission made by the petitioners is the effect of the order which is under appeal in absence of order of stay granted by the appellate Court.

In this regard reliance has been placed on the judgement of the Hon'ble Division Bench dated 17th May, 2007 passed in **Niranjan Chatterjee & Ors. –vs- State of West Bengal & Ors., reported in 2007 (3) CHN 683,** paragraphs 17 to 20. Based on the law laid down in **Niranjan Chatterjee (supra)** it has been argued that any interim order passed in the appeal by the appellate Court is binding upon the parties to the proceedings but the law is equally settled that by mere passing an interim order staying the operation of a judgment with certain further conditions, the existence of the judgment under appeal is not wiped out and at the same time for such interim order *inter parties*, the authority of a decision as a precedent is never undermined.

The sum and substance of the argument advanced on behalf of the petitioners is that pendency of appeal before the Hon'ble Supreme Court even after grant of leave to appeal in absence of any order of affirmation, modification or reversal by the Hon'ble Supreme Court does not attract doctrine of merger and this Court is free to rely upon the law laid down in **Fabworth (supra**) by the Hon'ble Division Bench subject to the decision to be taken by the Hon'ble Supreme Court in the pending appeal preferred by KMC.

The land in question in respect of which assessment has been made by the Corporation for fixing annual valuation and property tax which has been questioned by the petitioners in the present writ petition was first allotted in favour of the petitioners by the Kolkata Metropolitan Development Authority (KMDA) by executing an unregistered indenture on 23rd July, 2010. Subsequently, the said land was transferred in favour of KMDA by executing an indenture dated 29th May, 2012 which is at page 56 onwards of the writ petition.

KMDA in its turn leased out the said land in favour of the petitioners by executing registered lease deed on 29th April, 2013. After the land in question was demised in favour of the petitioners on execution of the aforesaid lease deed the concerned authority of KMC intimated the petitioners that mutation could not be possible since there was nonsubmssion of "no outstanding certificate" and it was also intimated that the petitioners were required to pay all outstanding taxes and then can apply for mutation with proper documents.

The learned advocate representing the KMC while defending the stand taken by the Kolkata Municipal Corporation has urged that in view of withdrawal of the writ petition being WPA 961 of 2012 on 9th April, 2013 the present writ petition is not maintainable since doctrine of constructive *res judicata* bars the same. In support of such submission reliance has been placed on the judgement of the Hon'ble Supreme Court, reported in (**2014) 11 SCC 744, (Shiv Chander More & Ors. –vs- Lieutenant Governor & Ors.)** paragraphs 19 & 20.

The second contention as raised on behalf of the KMC is Section 171 and Section 176 has been amended upon incorporation of proviso to Section 171(8)(a)(ii) and also upon incorporation of Explanation II in Section 176 with effect from 7th August, 2019. It has been contended that by incorporation of Explanation II in Section 176 the land in question needs to be assessed under Section 174 and therefore the law laid down in **Fabworth (supra)** is not attracted. In this regard reliance has been placed on the judgement of the Hon'ble Supreme Court, reported in **AIR 1985 (SC) 111 (Lakshmi Narayan Guin & Ors. –vs- Niranjan Modak).**

The third contention made on behalf of the KMC is the subject matter of challenge in the present writ petition (second one) is confined to mutation of the land in question and the issue relating to assessment has been raised subsequently by filing supplementary affidavit in the present writ petition. Therefore in the present writ petition this Court ought not enter into the question of assessment of the land as argued by the petitioners.

In consideration of the submissions made on behalf of the respective parties, it appears that there is substance in the contentions made on behalf of the petitioners that in absence of any order of reversal, modification or affirmation passed by the Hon'ble Supreme Court upon invocation of appellate jurisdiction there is no fetter in relying upon the law laid down in **Fabworth (supra)** while deciding the issue involved in this writ petition as to whether the assessment to be made in terms of Section 174(2) or Section 176 read with Section 171(8).

In this regard this Court finds it apt to quote paragraph 44 (vi) of **Kunhayammed (supra):**

> *"(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation."*

It has also been decided by the Hon'ble Division Bench in **Niranjan Chatterjee (supra)** that even an interim order of stay passed by the Appellate Court during pendency of the appeal the existence of judgment the Court below is not wiped out and authority of decision under appeal is never undermined.

However, in the present case the Hon'ble Supreme Court has not passed any order of stay on the judgment delivered by the Hon'ble Division Bench in **Fabworth (supra)**.

The Hon'ble Division Bench in Fabworth (supra) has made the methodology very clear in the matter of assessment of a land which has been leased out to the lessee by the KMDA, in consideration of section 176 read with section 171(8) of the Kolkata Municipal Corporation Act, 1980. Paragraph 33 of **Fabworth (supra)** runs infra:

> *"33. If we are to accept the interpretation of the phrases as suggested by the learned Advocate General, we will be doing violence to the language of the Section. Merely because the lessee occupies the land and constructs buildings thereon which are to be used for 5/7 Star Hotel, it would not mean that the lessee becomes the owner of the land. The ownership of the land remains with the KMDA. It may be that for all practical purposes the Fabworth will enjoy the land as its own for 99 years under the Lease Deed. However, several restrictions have been placed on its enjoyment of the land under the Lease Deed. In our opinion by no stretch of imagination can Fabworth be the "owner" of the land, nor can the land be said to "belong to" Fabworth. The use of the phrase "belonging to" in section 171(8) is obviously with reference to the land being acquired for the statutory authorities mentioned in section 171(8). On acquisition the land belongs to them though it was earlier owned by someone else. Lands which were owned initially by these statutory authorities are to be taxed in the same manner. The phrase "belonging to" does not refer to the possession of the land demised to the lessee. As mentioned earlier the ownership right in a land can never be transferred when the land is leased."*

In the present case the land in question was leased out to the petitioners on 29th April, 2013 by executing registered lease deed wherein KMDA is the lessor. Therefore considering the facts of the case the methodology as contained in the judgment of **Fabworth (supra)** relating to assessment of the land in question for the purpose of fixing annual valuation and property tax squarely applies in the present case.

Though a feeble attempt has been made on the part of the KMC to raise the technical point that the present writ petition is barred by constructive *res-judicata*. But such argument does not hold much water in view of the fact that the previous writ petition was filed in the backdrop of license deed which was executed on 23rd July, 2010 and vide memo dated 13th June, 2011 the KMC rejected the application of the petitioners on the ground that there was requirement of executing registered deed for transferring the land in question in favour of the petitioners.

Challenging the same the first writ petition being WPA 961 of 2012 was filed by the petitioners and the situation was changed since decision was taken by the KMDA to execute lease deed in favour of the petitioners which prompted the petitioners to have the first writ petition withdrawn. Subsequently, the present writ petition was filed praying for mutation after completing assessment of the land in question for fixing the annual valuation and also challenge has been thrown to the memo dated 13th September, 2013 whereby petitioners were insisted upon to pay tax as per assessment made by the KMC. Therefore, at the time of instituting first writ petition being WPA 961 of 2012 the letter dated 13th September,2013 cannot be one of the issues which is subject matter of challenge in the subsequent writ petition. Therefore the contention of the KMC that it is a case where principle of constructive *res-judicata* applies, is negated.

The question of application of amendments made in section 171(8) as well as section 176 as discussed above pales into insignificance in view of the fact that such amendments were brought in with effect from 7th August, 2019 and in the present writ petition Court is considering the assessment of the land in question with effect from 2nd quarter of 2010-2011 and the validity of the letter dated 13th September, 2013.

It is trite law that retroactive operation of an amended provision is permissible when it has been expressly provided or by necessary implication. In the present case in spite of posing query to the learned advocate representing KMC no satisfactory answer is obtained whether as per relevant provisions of law retroactive operation of the said amended provisions is permissible or not. However, nothing has been found in the relevant provisions which empowers the respondent authorities to apply the said amended provisions retrospectively.

Though reliance has been placed on the judgment of the Apex Court reported in **AIR 1985 (SC) 111** but on perusal of paragraph 8 it appears that the law has been defined by the Apex Court in the context of divesting jurisdiction of the court which possessed the jurisdiction when the suit was instituted. Therefore, the judgment delivered in **Lakshmi Narayan (supra)** does not come in aid of the KMC. In this regard reliance is placed on paragraph 13 of the judgment of the Hon'ble Supreme Court, reported in **(2004) 8 SCC page-1, (Zile Sing –vs- State of Haryana & Ors.)**; paragraph 13 is quoted below:-

> *"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only- "nova constitutio futuris formam imponere debet non praeteritis"- a new law ought to regulate what is to follow, not the past. ( See Principles of Statutory Interpretation by Justice G.P.Singh, 9th*

> *Edn., 2004 at p. 438.) It is not necessary that an express provisions be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p.440)".*

However, this Court in consideration of pendency of the appeal preferred against the judgment delivered in **Fabworth (supra**) by the Hon'ble Division Bench of this Court at the instance of the KMC passed an order on 3rd January, 2023 directing the petitioners to submit an undertaking in the form of an affidavit that in the event mutation is made on payment of property tax as per section 176 read with section 171(8) and ultimately the appeal is decided in favour of KMC then petitioners would have to deposit additional tax in terms of the decision of the Hon'ble Supreme Court to be taken in the said pending appeal. Pursuant thereto the petitioners by affirming an affidavit has furnished an undertaking and the said affidavit was affirmed on 3rd February, 2023 which is on record.

Accordingly, the concerned authority of KMC is directed to assess the land in question in terms of section 176 read with section 171(8) of the KMC Act, 1980 and fix the annual valuation of the said land with effect from 2nd quarter of 2010-2011 on applying the principles as laid down by the Hon'ble Division Bench in **Fabworth(supra).**

Upon such assessment to be made by the KMC the decision to be intimated to the petitioners within six weeks from the date of communication of this order.

After intimating the assessment made by the KMC as directed above to the petitioners, petitioners shall be at liberty to make payment accordingly and petitioners shall also be at liberty to renew its prayer for mutation of the land in question.

Consequently the previous assessment made by the concerned authority of KMC with effect from 2$^{nd}$ quarter 2010-2011 stands set aside.

However, it is made clear in view of furnishing undertaking on behalf of the petitioners as alluded above the petitioners shall be liable to pay additional tax based on the assessment, if required to be made by the KMC in terms of the order to be passed in the appeal pending before the Hon'ble Supreme Court against the judgment of **Fabworth(supra).**

The concerned authority of KMC shall, if required, as per the order to be passed by the Hon'ble Supreme Court intimate the petitioners additional taxes required to be paid within six weeks from the date of passing order by the Hon'ble Supreme Court and in receipt of the same the petitioners shall pay the amount within three weeks thereafter.

With the aforesaid directions and observations the writ petition stands disposed of.

However, there shall be no order as to costs.

Urgent photostat certified copy of the order, if applied for, be given to the parties, upon usual undertakings.

**(Saugata Bhattacharyya, J.)**

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