IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :- Hon'ble Justice Amrita Sinha

<u>WPO 3374 of 2022</u>

Abas Nibas Private Limited
Vs.
The Kolkata Municipal Corporation & Ors.

For the Writ Petitioner	:-	Mr. Raghunath Chakraborty, Adv. Ms. Tanushree Das, Adv.
For the KMC	:-	Mr. Ashok Kumar Banerjee, Sr. Adv. Ms. Manisha Nath, Adv.
Hearing concluded on	:-	23.03.2023
Judgment on	:-	30.03.2023

<u>Amrita Sinha, J.:-</u>

The order dated 2nd September, 2022 passed by the Chief Manager (Revenue-North), Kolkata Municipal Corporation is impugned in the present writ petition. By the said order the respondent authority rejected the prayer of the petitioner for refund of the excess amount paid on account of property tax and directed that the sum of Rs. 91,39,846/- that is lying in the suspense account, after necessary adjustment, shall be allowed to be set off against future demand of the Corporation under Section 197 of the Kolkata Municipal Corporation Act, 1980 ('the Act' for short).

The annual valuation of the premises being no. 1, Rustomjee Parsee Road, Ward No. 6 was initially assessed by the Hearing Officer at Rs. 8,82,600/- with effect from 2/1997-98 and Rs. 10,59,120/- with effect from 2/2003-04. Challenging the assessment of annual valuation, appeal was preferred before the Municipal Assessment Tribunal.

The Tribunal reduced the annual valuation to Rs. 1,04,530/- with effect from 2/1997-98 and Rs. 1,21,110/- with effect from 2/2003-04. On account of the reduction in the annual valuation, the petitioner seeks refund of the excess amount which was deposited on account of property tax. After adjustment of the fresh bills a sum of Rs. 91,39,846/- was found to be lying in the suspense account maintained by the Corporation.

The petitioner prays for refund of the said amount. By the impugned order the excess amount was allowed to be set off against future demand under Section 197 of the Act. The petitioner is aggrieved by the same.

The petitioner submits that the Corporation cannot be permitted to retain the aforesaid amount as the same will amount to unjust enrichment at the end of the Corporation. It has been submitted that the amount held in suspense is a hefty one and it will take years together for the said amount to be adjusted against future bills to be raised by the Corporation.

It has been contended that instead of holding back the aforesaid amount, the Corporation ought to have refunded the same, and the petitioner will clear the property tax dues as and when bill is raised.

In support of the submission that the Corporation does not have the right to hold back such huge amount and should refund the same to the assessee, the petitioner relies upon the judgment delivered by this Court in the matter of ***Larsen and Toubro Limited & Anr. vs. The Kolkata Municipal Corporation & Ors.*** on 9th December, 2011 in ***APO No. 479 of 2006 with WP No. 1557 of 2005***, ***Chatter Singh Baid & Ors. vs. Corporation of Calcutta*** reported in ***AIR 1984 Cal 283, Abhishek Karnani vs. Kolkata Municipal Corporation & Ors.*** reported in ***2023 SCC Online Cal 99.***

The learned senior advocate representing the Kolkata Municipal Corporation opposes the prayer of the petitioner. It has been submitted that according to Section 197 of the Act, the Corporation is entitled to either set off or refund the excess amount against future bills. As the law permits the Corporation to set off excess amount, accordingly, the petitioner is not entitled to seek issuance of writ of mandamus praying for refund of the said amount. It has been contended that it is the choice of the authority whether to refund or to set off the excess amount.

As long as the provision to set off excess amount remains in the rule book, the Corporation has every right to hold back the money and adjust the same against future bills. The legislature has consciously given this option to the authority to exercise discretion whether to refund or to retain the money paid in excess.

The word ‘or’ in between the words ‘refunded’ and ‘allowed to be set off’ is disjunctive and no mandate can be issued by the Court to direct the authority to act in a particular manner, as the authority has an independent right to take a decision as to how the excess amount is to be adjusted.

In support of the aforesaid contention the respondents rely upon the judgment delivered in the matter of ***Sri Amal Kumar Roychowdhury & Anr. vs. The Calcutta Municipal Corporation & Ors.*** reported in ***(2002) 3 CAL LT 452 (HC)*** and ***Abhishek Karnani vs. Kolkata Municipal Corporation & Ors.*** reported in ***(2017) 1 CAL LT 585 (HC).***

Prayer has been made for dismissal of the writ petition.

I have heard and considered the rival submissions made on behalf of both the parties. Section 197 of the Act has been relied upon to reject the claim of the petitioner.

The relevant provision under Section 197 reads as follows:

If after the disposal of any appeal under Section 189, the valuation decided under Section 174 or Section 188 is altered, then-

(a) Any sum paid or deposited under Section 189 in excess shall be refunded or allowed to be set off against any present or future demand of the Corporation under this Act.

Admittedly, a sum of Rs. 91,39,846/- is lying in excess in the suspense account of KMC. The authority submits that it is their choice whether to refund the money or to retain the same, to be set off from the future property tax bills. It has been contended that the authority has a discretion whether to hold on to the excess amount or to refund the same.

It appears that, the time period by which the excess amount that is lying in the suspense account can be set off, will be more than decades. In such a case, will it be proper to hold back the money for such an inordinate long period of time? Will it not amount to depriving the petitioner the right to enjoy the money as per its own will and desire? Will it not amount to infringing the petitioner's fundamental right to property?

Had it been a case where the amount held in excess is not a hefty one and the same can be adjusted against the future bills within a couple of years, then KMC may exercise discretion to retain the money; but when it appears that substantial amount is being held in excess and it is likely to take years together to liquidate the same, then instead of retaining the money for decades, the authority ought to refund the same.

Legislature in its wisdom afforded opportunity to the authority to exercise discretion whether to retain or to refund the excess amount. The said discretion ought to be exercised upon proper application of mind and upon consideration of proper facts and figures. The decision to retain the money ought not to be a mechanical exercise; rather the said decision ought to be a reasonable one. The authority should exercise a balance to take a decision with regard to the money held in excess. If upon calculation it is found that it will take considerable period of time for setting off the excess amount against future bills, then the authority should refund the money.

Submission of the respondent that it is the choice of the authority either to refund or to retain and, accordingly, the Court ought not to interfere if the authority chooses to retain the money for future set off does not appear to be a very logical one. An authority which falls within the definition 'State', is liable to act on proper reasoning. The authority did not disclose the reason as to why the decision was taken to retain the money and not refund the same. It has been submitted in Court that since the amount can be easily set off against future bills, accordingly, KMC exercised option to retain the same.

It has been argued that several assessees do not pay the tax on proper time and it becomes difficult for the authority to provide the necessary service to the citizens. The money which is held back by the KMC will be used for the service of the general public. The said submission appears to be made in desperation to hold back the money paid in excess.

It is the duty and obligation of an assessee to pay property tax in due time. It is certainly improper to keep property tax dues pending for years together. The same however cannot be a reason not to refund the excess amount paid by a citizen. If an assessee fails to deposit property tax on time, it is for the authority to take necessary steps to recover the dues; but it is not permissible for the authority to hold on to someone else's excess money, allegedly, for providing service to the citizens.

It is not the case that KMC never refunds the excess amount. There are instances galore where KMC did refund the amount paid in excess. There is no parameter laid down in law as to when this amount can be refunded and when can the same be retained for future set off. Submission is that KMC exercises discretion/choice.

There should always be a rational explanation to hold on to the amount paid in excess by an assessee. It is not that the petitioner paid the excess amount voluntary. The petitioner was compelled to pay the excess amount on account of incorrect assessment of the annual valuation of the property. The petitioner was forced to invoke jurisdiction of the Municipal Assessment Tribunal for proper assessment of annual valuation for which the petitioner had to pay the enhanced amount of property tax. Had the petitioner not paid the enhanced amount, there would not have been any scope to prefer appeal. Only after the Tribunal decided the issue of assessment of annual valuation and reduced the said valuation, that the right of the petitioner to seek refund of the excess amount paid, arose. The petitioner already had to deposit a considerable sum to approach the Tribunal for the relief.

Logically thinking, the petitioner can always use the excess money held by KMC in the manner it deems fit and proper. The money can be invested and interest obtained on the same. The petitioner will suffer financial loss if the money is held back by the Corporation over such a long period of time. The act of the authority ought not to cause any financial loss to an assessee even after the assessee has paid the amount of tax as assessed.

When discretion or choice is exercised by an authority, the same has to be a judicious one. Discretion or choice cannot be fanciful, irrational or unreasonable. There must be solid reasoning as to why out of the two options, one is chosen and the other refused. In the absence of proper reasoning, it has to be taken that the decision taken is an unreasoned one.

The Court in Amal Roychowdhury (supra) noted that KMC refunded the excess amount but was of the view that the petitioner was not entitled to maintain the application for recovery of excess amount and, as such, no question of payment of interest arises. In the present case, the petitioner has not yet prayed interest in respect of the amount held in excess; but has sought leave to pray for interest before the authority.

The learned single Judge in Abhishek Karnani (supra) followed the decision in Amal Roychowdhury.

All the above decisions were taken into consideration and the entire issue has been set at rest by the judgment of the Hon'ble division bench in the matter of

Abhishek Karnani (supra) where the Court was of the opinion that an assessee was entitled to refund of the excess amount along with interest.

Just as an assessee does not have any right to default in making payment of property tax on time, similarly, the authority does not have any right to indefinitely hold on to any money that has been paid by an assessee in excess. It will be highly iniquitous and improper not to refund the excess amount of rupees ninety-one lakh and odd to an assessee, more so because, it will take years together for the excess amount to be liquidated by set off. It has already been held that the Corporation is not a profit-making organisation and should act only for the benefit of the citizens.

In view of the discussions made herein above, the instant writ petition is disposed of by directing KMC to refund the excess amount to the petitioner at the earliest but positively within a period of four months after adjustment of any tax that is due and payable by the petitioner.

As the petitioner has not prayed for any interest on refund of the excess amount, accordingly, the Court refrains from passing any order with regard to interest. The petitioner has prayed leave to file appropriate application before the Corporation seeking interest. It will be open for the petitioner to apply for grant of interest on account of delayed refund of the amount held in excess.

Writ petition stands disposed of.

No costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)