

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

Present:

The Hon'ble Justice Hiranmay Bhattacharyya

W.P.O. 557 of 2019

Sudip Kusarye & Anr.

Vs.

The Kolkata Municipal Corporation & Ors.

Appearance:

For the petitioners : Mr. Arindam Banerjee, Adv.
Mr. Chayan Gupta, Adv.
Mr. Hare Krishna Halder, Adv.
Mr. Koushik Bhattacharyya, Adv.

For the respondents : Mr. Biswajit Mukherjee, Adv.
Ms. Tanushree Dasgupta, Adv.
Mr. Debangshu Mondal, Adv.

Judgment reserved on : 23.09.2022.

Judgment Delivered on : 14.12.2022.

Hiranmay Bhattacharyya, J.:

1. The writ petitioners/assesseees have prayed for a writ of Mandamus to command the respondents to set aside and cancel the assessment orders of the Hearing Officer –XIII KMC dated April 25, 2019 by virtue of which assessments of premises No. 144A Rashbehari Avenue, Kolkata-700029 were made for 4 periods starting from 3rd Quarter 2001 till the period starting from 2nd Quarter, 2013.

2. The writ petitioners claim to be the co-owners of the premises no. 144A Rashbehari Avenue, Kolkata-700029 (for short” the said premises”) which is a three-storeyed building. The petitioners further claim that the said property is partly occupied by the tenants and the remaining portion is occupied by the petitioners for their residential purpose. Petitioners received the hearing notices containing the proposals for enhancement of annual valuation of the said premises in respect of four assessment periods. Petitioners filed Written Objection against the proposed annual valuations and attended the hearing through a learned advocate. The Hearing Officer passed the orders dated April 25, 2019 thereby confirming the proposed annual valuations.
3. Mr. Banerjee, learned advocate for the petitioners contended that the authorities of the Kolkata Municipal Corporation (for short “KMC”) sought to revise the Annual Valuations for the periods starting from 3rd Quarter, 2001 till the beginning of 2nd Quarter, 2013 by issuance of notices all dated January 21, 2019 when the same has become time barred in view of the decision of the Hon’ble Division Bench of this Court in the case of **Sahujain Charitable Society and Others vs. The Kolkata Municipal Corporation and Ors. reported at 2018 (3) CHN (Cal) 328**. He also contended that the principles of natural justice has been grossly violated as the writ petitioners did not get an effective opportunity to file written objections to the

proposed Annual Valuations. By referring to the provisions of Section 174 of the Kolkata Corporation Act, 1980 (for short “the Act”), Mr. Banerjee contended that the annual value is to be determined on the basis of the gross annual rent at which such premises might be reasonably expected to let from year to year. By placing reliance upon the decision of the Hon’ble Supreme Court in the case of ***India Automobiles (1960) Ltd. vs. Calcutta Municipal Corporation and another reported at (2002) 3 SCC 388***, Mr. Banerjee contended that actual rent received cannot be the sole criteria for determination of the annual valuation. He also relied upon the unreported decision of the Hon’ble Division Bench in the case of ***Commissioner, Kolkata Municipal Corporation & Ors. vs. Hastings Property & Ors in APO No. 213 of 2004; WP NO. 1050 of 1996*** delivered on 11th February, 2011 with regard to the interpretation of the word “reasonably expected rental” appearing in Section 174. Mr. Banerjee submitted that the decision making process was vitiated as the Hearing Officer did not take into consideration the aforesaid well-settled legal position. Mr. Banerjee further contended that the Hearing Officer erroneously clutched on to the jurisdiction by not appreciating that the revision of assessment for the periods in question cannot be made as it had become time barred. He placed reliance upon the decision of the Hon’ble Supreme Court of India in the case of ***Raza Textiles Ltd. vs. Income Tax Office, Ranpur***

reported at (1973) 1 SCC 633 in support of his contention that the petitioners are entitled to a writ of certiorari as the Hearing Officer had clutched onto the jurisdiction by deciding the jurisdictional fact erroneously. Mr. Banerjee concluded by submitting that the case on hand falls within the exceptions carved out by the Hon'ble Supreme Court of India in the case of **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai reported at (1998) 8 SCC page 1** and the existence of alternative statutory remedy cannot be a bar in invoking the jurisdiction of the High Court under Article 226 of the Constitution of India. He also contended that the precondition for deposit of the property tax as laid down under Section 189 (6) is also onerous.

4. Per contra, Mr. Mukherjee, learned advocate for the KMC submitted that the Hearing Officer passed the orders after considering the objections filed by the petitioners and the various rental agreements entered into between the petitioners/assesseees with their tenants. He further contended that since the assessee did not submit the return in terms of Section 182 of the Act, KMC proceeded to determine the Annual Valuation after procuring the tenancy agreements. Mr. Mukherjee placed reliance upon a decision of the coordinate bench in the case of **Kanak Projects Limited and Another vs. Kolkata Municipal Corporation & Ors. reported at 2020 SCC Online Cal 1710** in support of his contention that the decision in the case of

Sahujain (supra) cannot be applied to the facts of this case. Mr. Mukherjee contended that the statutory appellate remedy provided under the Act should not be bypassed on the ground that the mandatory pre-deposit in terms of Section 189 (6) is onerous. In support of such contention he placed reliance upon the decision of the Hon'ble Supreme Court of India in the case of ***Calcutta Gujrati Education Society & Anr. vs. Calcutta Municipal Corporation and Others reported at (2003) 10 SCC 533.***

5. Heard the learned advocates for the parties and considered the material placed.
6. Record reveals that notices under Section 184 (3) / 184(4) / 184 (4) read with Section 185 of the Act were issued on January, 2019 proposing the Annual Value under Annual Ratable Value (for short "ARV") system for the following periods.

Date of Notice	Period For Annual Valuation
21-01-2019	w.e.f. 3 rd Quarter, 2001
21-01-2019	w.e.f. 2 nd Quarter, 2007
21-01-2019	w.e.f. 4 th Quarter, 2008
21-01-2019	w.e.f. 2 nd Quarter, 2013

The Hearing Officer passed orders dated April 25, 2019 thereby assessing the Annual Value in respect of the aforesaid periods.

7. The contention of the petitioners is that the Annual Value of the said premises had already attained finality in respect of the aforesaid periods and the same cannot be revised by issuing notices dated January, 2019 as the same was already time barred.
8. The writ petitioners being the owners of the said premises and the persons liable to pay property tax thereon is under a statutory obligation under Section 182 of the Act to furnish to the Municipal Commissioner a return in the prescribed form within the stipulated time limit to enable the Municipal Commissioner to revise the Annual Value.
9. It has been specifically contended by the KMC that the petitioners have not complied with such statutory requirement. It is also not the case of the petitioners that they have filed such return under Section 182. It is the further case of the KMC that upon discovering the rent of the said premises from the rental agreements, KMC proceeded to revise the annual value for the aforesaid periods.
10. The learned advocate for the KMC would contend that non-filing of statutory return under Section 182 of the Act amounts to suppression of information which may be relevant for the purpose of revision of assessment.
11. The Hon'ble Supreme Court of India in the case of ***Joint Collector Ranga Reddy District & Anr. vs. D. Narsing Rao & Ors. reported at (2015) 3 SCC 695*** while dealing with the delayed exercise of

revisional jurisdiction, in paragraph 31 of the said reports, held that in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud.

- 12.** Therefore, this Court is of the considered view that a factual enquiry is necessary in order to ascertain whether non-filing of return under Section 182 of the Act amounts to fraudulent act and, if so, when such fraud was detected. It is also to be ascertained as to whether the authority exercised its power to revise the annual valuation within the reasonable period of the discovery of fraud or the same had become time barred when the power of revision was exercised.
- 13.** The sheet anchor of the case of the petitioners is the decision in *Sahujain (supra)* wherein the vires of second proviso to Section 179 (2) (d) of the Act as well as the assessment made by the authority was challenged. The Hon'ble Division Bench after noticing the provision laid down under Section 573 observed that under second proviso to Section 179(2), the proviso to Section 573 would be rendered otiose by giving the Commissioner the power to collect unlimited tax by unrestricted revision of the annual valuation of the premises for an unlimited period of time. The Hon'ble Division Bench, accordingly read down the proviso to the effect that the period for which valuation of a property can be revised must not be more than 3 years before the date of revising order.

- 14.** The effect of breach of obligation under Section 182 by the assessee vis-à-vis the power of the authority to revise the Annual Valuation does not appear to be in issue in Sahu Jain (supra). Therefore, Sahu Jain (supra) cannot be said to be an authority for the proposition that even in case of breach of statutory obligation under Section 182 of the Act by the assessee, the authority would be denuded of its power to revise Annual Valuation within a reasonable period of time after discovering the materials and/or information relevant for revision of Annual Valuation. However, in case of fraud, the date of discovery of fraud may be a relevant consideration for deciding the issue of limitation in view of the decision of the Hon'ble Supreme Court in D. Narsing Rao (supra).
- 15.** A coordinate bench in the case of Kanak Projects (supra), after noticing the decision of Sahu Jain (supra), observed that several factual aspects are to be considered before arriving at a finding on the jurisdictional issue. The coordinate bench further observed that in case the writ petitioners therein were found to have acted in breach of the statutory obligations under Section 182, then its impact on the annual valuation is also to be assessed.
- 16.** Upon reading the impugned orders, it does not appear to this Court that the aforesaid jurisdictional issue was raised before the Hearing Officer. In view of the observations made hereinbefore, this Court holds that the issue of limitation in the case on hand, is a mixed

question of law and fact which cannot be decided by this Court in this writ petition. It does not appear to this Court at this stage that the Hearing Officer clutched on to the jurisdiction by proceeding to revise the annual valuation for the periods in question by deciding the issue of limitation erroneously, as contended by the petitioners. Therefore, the decision in the case of Raza Testiles (supra) is of no assistance to the petitioners.

- 17.** The next issue raised by the learned advocate for the petitioners is that the “reasonable expected rent” and not the “actual rent” shall have to be taken into consideration for determining the annual value.

In India Automobiles (supra) the issue that fell for consideration before the Hon’ble Supreme Court was whether the total amount paid by the subtenants to the tenant should also be taken into consideration in assessing the annual valuation. While answering such issue, the Hon’ble Supreme Court in paragraph 23 and 24 of the said reports held thus :-

23. “...The 1980 Act, therefore, requires application of mind by the municipal authorities to determine the rents on the basis of reasonableness by keeping into account all relevant circumstances including the actual rent received by the owner, hypothetical standard rent, the rent being received by the tenant from his sub-tenant and other relevant consideration, such as prevalent rate of rent of lands and building in the vicinity of the property being

assessed. Only because the owner of the building is not getting the same rent which the sub-tenant is paying to his lessor, cannot be made a basis to deprive the corporations from determining the annual valuation and taxing the land or building on that basis. If such a plea is accepted, it would be against the provisions of the statute which has been enacted to provide civic services in the form of water, drainage, sewerage, collection, removal and disposal of solid waste, fire prevention and fire safety maintenance of street and public places etc., in the municipal area where such land or building is situate.

24. “.... In appropriate cases the owner of the property may be in a position to satisfy the authorities that the gross annual rent of the building of which the annual valuation was being determined cannot be more than the actual rent received by such owner from his tenant. The municipal authorities shall keep in mind the various pronouncements of this Court, the statutory provisions made in the specified Municipal Acts, keeping in mind the applicability or non-applicability of the Rent Act and the peculiar circumstances of each case, to find out the gross annual rent of the building including service charges, if any, at which such land or building might, at the time of assessment, be reasonably expected to let from year to year in terms of Section 174 of the 1980 Act.”

- 18.** The Hon'ble Supreme Court also observed that all the circumstances including the rent actually received by the owner of the building and the rent paid by the subtenant to his tenant are also to be taken into consideration and in appropriate cases the owner may be in a position to satisfy that the gross annual rent cannot be more than the actual rent received.
- 19.** India Automobiles (supra) is not an authority for the proposition that the actual rent received /receivable from the tenant cannot be said to be the reasonable expected rent under any circumstances. The action of the Hearing Officer cannot be said to be arbitrary in the case on hand as the petitioners failed to discharge their onus of establishing that the reasonable expected rent in respect of the premises is different from the actual rent received.
- 20.** In Hastings Property (supra), the Hon'ble Division bench refused to interfere with the findings of the learned Single Judge in entertaining the writ petition as, on facts, it was found therein that the decision making process was vitiated. The Hon'ble Division Bench decided not to interfere with the discretion exercised by the Writ Court in entertaining the writ petition.
- 21.** There is, however, no quarrel to the proposition of law laid down in Whirlpool Corporation (supra) that existence of statutory alternative remedy could not operate as a bar where the writ petition has been filed for enforcement of any of the fundamental rights or where there

has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is under challenge. It was further held therein that existence of statutory alternative remedy is not a constitutional bar to the jurisdiction of the High Court, but a self-imposed restriction.

- 22.** The petitioner has challenged the jurisdiction of the Hearing Officer to revise the assessments for the aforesaid periods in question. This Court has already observed that for deciding such issue an adjudication on facts is required. In view thereof, this Court is not inclined to exercise discretion in favour of the petitioner. This Court, therefore, refrains from returning any finding on the contention of the petitioner on the principles of violation of natural justice as well as other issues as the same might prejudice the parties before the appropriate forum.
- 23.** The orders passed by the Hearing Officer on April 25, 2019 are appealable under Section 189 of the Act. However such appeal can be entertained only if the requirement of mandatory predeposit of the property tax is complied with. It appears to this Court that the writ petitioners filed this writ petition only for the purpose of avoiding the mandatory predeposit to be made for preferring an appeal as the petitioners claim that such precondition is onerous.
- 24.** The petitioners cannot be allowed to bypass the statutory alternative remedy merely for such ground. The provision laid down under

Section 189 (6) was held to be intra vires in the challenge thrown to the vires of the said provision. The Hon'ble Supreme Court in Calcutta Gujrati Education Society (supra) observed that even the tenants, subtenants and occupiers held liable for payment of a portion of tax have a right of appeal on predeposit of a portion of tax levied and made recoverable from them.

- 25.** For all the reasons as aforesaid, this Court is not inclined to interfere in this writ petition and the petitioners are left free to approach the appropriate forum strictly in accordance with law. It is, however, made clear that the observations made hereinbefore are only for the purpose of disposal of this writ petition. The appropriate forum shall be free to decide all points raised by the parties in accordance with law if such forum is approached.

The writ petition being WP 557 of 2019 stands disposed of accordingly.

There shall be, however, no order as to costs.

Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)